

## THE POSSE COMITATUS ACT: AN ACT IN NEED OF A REGULATORY UPDATE

BY

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USAWC STRATEGY RESEARCH PROJECT

**THE POSSE COMITATUS ACT: AN ACT IN NEED OF A REGULATORY UPDATE**

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## **ABSTRACT**

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The Posse Comitatus Act (PCA), primarily through misinterpretation, has acted as a needless hurdle to full and proper employment of the Armed Forces in a domestic capacity. By design, the PCA limits who can employ the U.S. Armed Forces to enforce the laws within the U.S. In the recent past, even when the President has properly and clearly authorized employment of the Armed Forces, military members have misapplied the PCA to unnecessarily limit the use of Armed Forces to respond to a domestic crisis.

The main concern is not the PCA itself. Before and after the PCA was enacted, Presidents have successfully used the Armed Forces, primarily the Army, in response to domestic issues. The PCA acknowledges the President and Congress can use the military in a domestic capacity. The chief issue that arises is subordinate officers, to include legal advisers, perceiving PCA barriers when none exist. In response, DoD needs to update DoD Directive (DoDD) 5525.5. It was much too broad when released in 1986 and much has changed since then both in laws and the world. This DoDD needs to discuss the GWOT.



## THE POSSE COMITATUS ACT: AN ACT IN NEED OF A REGULATORY UPDATE

The world changed on September 11, 2001. We learned that a threat that gathers on the other side of the earth can strike our own cities and kill our own citizens. It's an important lesson; one we can never forget. Oceans no longer protect America from the dangers of this world. We're protected by daily vigilance at home. And we will be protected by resolute and decisive action against threats abroad.

—President George W. Bush, Sept. 17, 2002

On September 11, 2001, Americans realized they were no longer safe from terrorism while at home. As a nation, the United States has been blessed by great geographic location. Having the Atlantic and Pacific Oceans as borders shielded the Continental United States from significant foreign attack and invasion for almost 200 years. These barriers and the mightiest military on the planet failed to stop terrorists from attacking the U.S. on 9/11.

The President of the United States, Congress, the Department of Defense (DoD), and the Army, would be derelict in their duty to defend the American people if they failed to employ available assets to prevent another terrorist attack against America. As evidenced by 9/11, DoD also must play a domestic role in defending the homeland. As stated in the National Strategy for Homeland Security, the President acknowledged the U.S. will avail itself of all assets:

... the United States will use all instruments of national power and influence – diplomatic, information, military, economic, financial, intelligence, and law enforcement – to achieve our goals to prevent and disrupt terrorist attacks; protect the American people, critical infrastructure, and key resources; and respond to and recover from incidents that do occur.<sup>1</sup>

The U.S. Armed Forces, out of necessity, must be used in the GWOT, at home and abroad. They are essential, since “they bring to bear the largest and most diverse

workforce and capabilities in government to protect the United States from direct attacks and conduct missions to deter, prevent, and defeat threats against our Nation.”<sup>2</sup> These forces also play key roles in response to terrorist attacks and natural disasters.

The Posse Comitatus Act (PCA), primarily through misinterpretation, has acted as a needless hurdle to full and proper employment of the Armed Forces in response to a domestic crisis. By design, the PCA limits who can employ the U.S. Armed Forces to enforce the laws within the U.S. In the recent past, even when the President has properly and clearly authorized employment of the Armed Forces, high ranking military members have misapplied the PCA to unnecessarily limit the use of Armed Forces to respond to a domestic calamity.

The main concern is not the PCA itself. Before and after the PCA was enacted, Presidents have successfully used the Armed Forces, primarily the Army, in response to domestic issues. The PCA acknowledges the President and Congress can use the military in a domestic capacity. The chief issue that arises is subordinate officers, to include legal advisers, perceiving PCA barriers when none exist.

To the extent an aura surrounds the PCA, shrouding it in Constitutional protections and precepts held by the Founding Fathers, this cloud needs to be dispelled. One former esteemed member of the Army’s Judge Advocate General’s Corps described the PCA as the “clear demonstrable indicator of the properly circumscribed limits of a civilian-controlled army in a representative democracy.”<sup>3</sup> The Navy Department Library web page currently features a Congressional Research Service Report that describes the PCA as “perhaps the most tangible expression of an American tradition, born in England and developed in the early years of our nation, that rebels against military

involvement in civilian affairs.”<sup>4</sup> Ironically, the Navy was never intended to be covered by PCA, but has been included in the penumbra of PCA limitations by DoD administrative fiat.

This article will examine the history of the PCA, where it came from and what it does and does not restrict. This article will further identify Department of Defense Directive (DoDD) 5525.5<sup>5</sup> as a Directive that needs to be amended. This DoDD was originally released in 1986, amended in 1989, and not touched again. To the extent this DoDD reflects a desire to minimize domestic support while focusing on forward threats, it is a relic of the Cold War. To the extent it fails to reflect lessons learned from the Los Angeles Riots of 1992, the attacks of September 11, 2001, the Global War on Terrorism (GWOT), and the re-focusing of DoD’s mission on domestic issues, it is a major vulnerability in DoD’s arsenal.

### Putting Posse Comitatus in its Correct Historical Context

While definitions for the venerable phrase “posse comitatus” vary<sup>6</sup>, it commonly means a group of citizens who help a sheriff enforce the law. As practiced in the United States, using a posse comitatus meant the President or U.S. Marshal, not a local or state officer, employing federal troops to enforce domestic law. The Constitution placed no restriction on using the U.S. Army as part of a posse comitatus. Some checks and balances were, however, placed on the Army as a whole.

Pursuant to the Constitution, Congress controls funding of the Army, mandating that appropriations be used within two years. James Madison, in *The Federalist Number 41*, wrote “the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support.”<sup>7</sup> In

addition, the Constitution mandates the President would be the Commander in Chief of the Army.<sup>8</sup> By Constitutional design, granting both the Congress and the President oversight responsibilities reflects a desire to minimize a standing army.

In *The Federalist Number 8*, Alexander Hamilton noted that since the Constitution did not preclude standing armies, they were allowed to exist in the United States. While permissible, however, Hamilton found standing armies “problematic and uncertain.” Hamilton’s greatest fear was that if a standing army played too prominent a role in civil society, the American people would elevate the status of the army from protector to superior. Hamilton further noted that since America enjoyed a great defensive position, it should not of necessity need a large standing army and therefore would avoid the pitfall of having one.<sup>9</sup>

The Third Amendment to the Constitution placed additional restrictions on the Army, prohibiting the quartering of Soldiers in any house without the express consent of the owner.<sup>10</sup> Interestingly, Congressional two year spending restraints were not placed on the Navy, the Constitution merely stating that Congress shall “provide and maintain a Navy.” In addition, the quartering of sailors was not mentioned in the Third Amendment.

These restrictions on a standing army were in response to the British use of a standing army to impose its will on the American Colonies. The American Constitution reflects a desire to subordinate the army to a civilian government. America was not forced to maintain a significant standing army since it was not threatened by a rival nation. In addition, a large standing army would have been quite expensive for a newly formed nation. Fewer restrictions were placed on the navy, since the sea was the only

means to gain access to America and there was a desire to offer protection to its merchant fleet.

Using the Army as a posse comitatus does not represent a Constitutional violation. To the contrary, in the Constitution, Congress was granted the ability to federalize the Militia in order to “execute the Laws of the Union, suppress insurrections and repel Invasions.”<sup>11</sup> Congress went further in 1789 when it passed the Judiciary Act, granting U.S. Marshals the “power to command all necessary assistance in the execution of his duty.”<sup>12</sup> In 1792, by passing the “Calling Forth Act”, Congress gave the President the ability to use the militia to enforce the law, suppress insurrections and defeat invasions when Congress was out of session and with judicial approval. This Act was further interpreted as giving federal marshals the ability to use the militia as part of a posse comitatus.<sup>13</sup>

This power is implicitly granted to the President in Article II, section 3 of the Constitution, since the President “shall take care that the laws be faithfully executed....”<sup>14</sup> While arguably not necessary, the Calling Forth Act, with some caveats, clearly authorized the President to use the force necessary to enforce the law without having to wait for Congress to be in session. To the extent the federal marshals would be given similar authority in the 1850s by the U.S. Attorney General, this interpretation of this Act was too broad. It gave too much power to U.S. Marshals. It was this error that the PCA was meant to fix.

Beginning in 1794, Presidents began to use the militia to enforce the law and defeat insurrections. In response to a request by Pennsylvania Governor Mifflin and with the approval of Supreme Court Justice Wilson, President Washington federalized

multiple state militias to quell rioting in Western Pennsylvania over liquor taxes. This incident, known as the Whiskey Rebellion, was quashed without a shot being fired.

In 1795, Congress eliminated the requirements of judicial approval or Congressional absence before the President could use the militia to uphold the law or put down insurrections.<sup>15</sup> This amendment reflected the need to give the President the flexibility to respond quickly and decisively to domestic crises. In 1799, President John Adams, without Congressional objection, extended Presidential authority by using both Regular Army troops and militia forces to put down a tax rebellion in eastern Pennsylvania.<sup>16</sup>

In 1806, President Jefferson wanted to use Regular Army forces in response to what he considered a domestic rebellion led by Aaron Burr. In response to a request from Jefferson, James Madison stated regular troops could not be used “against insurrections, but only against expeditions having foreign countries as the object.”<sup>17</sup> Frustrated by this apparent limitation, Jefferson requested Congress give him the ability to use the Regular Army in response to domestic insurrections. In March of 1807, Congress approved this request through legislation and Jefferson signed it into law.<sup>18</sup>

Washington, Adams, and Jefferson are three of the United State’s distinguished founding fathers. All found it fitting and appropriate to use federalized militia or regular army troops to enforce civil law and quell domestic disturbances. Faced with domestic challenges, their use of the military was necessary. In response to the current environment, the President needs to also have this ability.

As stated above, the Judiciary Act gave Federal Marshals the ability to use all necessary assistance in the execution of their duties. U.S. Attorney General Caleb

Cushing authored a definitive opinion on whether federal troops could be included in a posse comitatus organized by a federal marshal:

The posse comitatus comprises every person in the district or county above the age of fifteen years, whatever may be their occupation,... and including the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of the sheriff or marshal. The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still posse comitatus.<sup>19</sup>

U.S. Attorney General Charles Devens authored a similar opinion in 1878, finding the Judiciary Act authorized the practice of Federal Marshals using militia and regular army soldiers as part of a posse comitatus.<sup>20</sup> While these two opinions might be technically correct, the ability of Federal Marshals to supplant a Soldier's chain of command in order to enforce domestic law is highly questionable. The ability of a federal marshal to sua sponte trump a Soldier's commanding officer would strike any modern day Soldier as not only violating the concept of the chain of command, but impractical and implausible. It is likely that Soldiers and officers in the 1850s and 1860s likewise resisted federal marshal interference.

The concept of using federal troops as a posse comitatus to enforce civil law was put on hold while the North and South fought the Civil War. When the Civil War ended, the concept was to become an important one during Reconstruction. Since many white Southerners were opposed to recognizing the rights of blacks, federal troops were used throughout the South to execute the laws

Many Southern States enacted "Black Codes" to limit the rights of blacks.<sup>21</sup> In response, Congress passed the Civil Rights Act in 1866, greatly expanding the rights of blacks. Pursuant to the Reconstruction Act of 1867, since Congress declared sitting

Southern governments provisional, Army commanders were empowered to enforce laws. This helped ensure black males were allowed to vote.<sup>22</sup>

In response to the Federal government's efforts to guarantee rights and protection to blacks, the Ku Klux Klan and other Southern extremist organizations began to terrorize blacks.<sup>23</sup> In an effort to protect blacks, Congress passed the Ku Klux Klan Act in 1871 and President Grant enforced it with federal troops.<sup>24</sup> Federal presence in the South soon began to wane, however, and this resulted in Southern States enacting segregation laws aimed at limiting black rights.<sup>25</sup>

By 1876, the only remaining Republican governments were in Louisiana, Florida, and South Carolina. President Grant ordered federal troops to polling places in those states during the 1876 Presidential Election. While Democrats and Republicans attributed different motives to President Grant's actions,<sup>26</sup> the presence of federal troops ensured black male voters could vote in those states. The wrangling over the results of the Presidential election of 1876 led to the Republican candidate, Hayes, promising to remove federal troops from the South in return for the Democratic candidate conceding the election to Hayes.

It is under these circumstances that the Posse Comitatus Act (PCA) was born. Attached as part of an Army appropriations bill, the Act became law on 18 June 1878:

It shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases as may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section. And any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor ....<sup>27</sup>

Based on the circumstances under which the PCA was enacted and its plain language, it was pretty clear U.S. Marshals could no longer order Federal troops to

enforce the law. While the specific act of using federal troops to ensure black voters could vote was noble, the ability of Federal Marshals to unilaterally employ federal troops was objectionable. By enacting the PCA, Congress ended this practice.

In addition, early draft versions of the PCA had precluded using the Navy as part of a posse comitatus. This language was dropped and a common understanding was that the PCA did not apply to the Navy.<sup>28</sup>

After 1878, the Army was used in domestic affairs 125 times from 1877 to 1945. The common element to these uses was the President authorized or ratified the action, a warning proclamation was usually released before federal troops were employed and the Army stayed out of the South.<sup>29</sup> Many of these interventions involved labor issues. One of these events resulted in a Congressional review. Republicans found the use of troops proper, while Democrats generally condemned the action.<sup>30</sup> No one was criminally tried for any alleged violation of PCA as a result of this incident. In fact, no one has ever been tried or convicted of committing a PCA violation.

In 1956, the Act was moved to Title 18 of the U.S. Code and extended the PCA to preclude using the Air Force as a posse comitatus. Since 1956, the PCA has been only slightly amended and currently reads as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>31</sup>

A further amendment to add the Navy to the PCA was defeated in 1975.<sup>32</sup>

On its face, the PCA is subject to both Constitutional and Statutory exceptions. As previously discussed, the President is charged with the responsibility to ensure the laws are faithfully executed by Article II of the Constitution. The President is therefore

imbued with the ability to employ the military in a domestic law enforcement capacity when he believes it is appropriate. In addition, Congress can and has explicitly given the President the ability to employ armed forces in a domestic law enforcement capacity. Some examples are discussed below.

In the 1970s, the PCA gained notoriety as a tactic used by criminal defense attorneys. In a string of cases arising from an armed incident at Wounded Knee, defense counsel argued their clients should not be convicted of armed robbery, kidnapping, or providing aid to the principles involved in these crimes because Army personnel provided assistance to civilian law enforcement personnel in violation of the PCA. While this defense was mostly rejected, some judges awarded defendants with acquittals based on finding the military had violated the PCA.<sup>33</sup>

Based on the history of the PCA, this result clearly exceeded the affect Congress intended in enacting the PCA. Most courts, thankfully, have not applied an exclusionary rule. These courts have based this decision on one or more of these factors: the PCA is a criminal statute, which has a sufficient deterrent affect; the PCA was designed to protect all civilians, not just the defendant; and PCA violations are not numerous enough to justify exclusionary treatment.<sup>34</sup> Although the results of the Wounded Knee cases varied, a common concept that developed out of this string of cases whose application continues to present times is direct versus indirect participation.<sup>35</sup>

If Army participation was deemed direct, this would run afoul of the PCA prohibition against “executing” the law. If Army participation, however, was deemed indirect, the PCA was not violated since the Army was deemed to be merely supporting

civilian law enforcement instead of directly executing the law. The determinative standard applied by the last court in the series posited whether:

... Army or Air Force personnel [were] used by civilian law enforcement officers ... in such a manner that the military personnel subjected the citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature, either presently or prospectively?<sup>36</sup>

The impact of finding direct participation in contravention of PCA could be either a criminal prosecution of the offending party, exclusion of evidence in a criminal prosecution, or the potential civil liability of an offending individual. This latter concept is derived from the idea that a federal employee acting within the scope of their employment will not be subject to personal legal liability. As an agent of the government, it is the U.S., not the individual, who is liable for any tortious conduct. If an individual is operating outside the scope of their duties, however, he would not be acting as an agent for the U.S. and would not be afforded protection by the federal government. In *Wrynn v. U.S.*, the court used this analysis in finding that an Air Force pilot who acted in violation of the PCA was not acting “within the scope of their employment” and was therefore subject to personal liability.<sup>37</sup>

In 1974, despite a Navy Instruction that extended the PCA to cover the Navy, the 4<sup>th</sup> Circuit declined to extend PCA coverage to the Navy.<sup>38</sup> Other courts have also refused to extend the PCA to cover the Navy and Marine Corps.<sup>39</sup> The trend of the Navy and DoD to put self-imposed limits on their Navy and Marine Corps participation in domestic matters, however, would continue in the 1980s.

In response to the mounting introduction of illegal drugs from South America, Congress amended Title 10 of the U.S. Code to generally encourage the expansion of DoD in the area of law enforcement support in the soon to be called “War on Drugs.”

Congress saw this expansion as necessary based on the adverse affects illegal drugs were causing in the U.S.<sup>40</sup> In general, Congress encouraged DoD to share relevant information collected during military operations; equipment and facilities; training and advice; and maintenance and operation of equipment with civilian law enforcement.

In directing DoD to develop implementing regulations, Congress, in 10 U.S.C. §375, restricted members of the Army, Navy, Air Force, and Marine Corps from directly participating in a “search, seizure, arrest, or other similar activity.”<sup>41</sup> Congress also precluded DoD’s support to civilian law enforcement if it adversely impacted military readiness.<sup>42</sup> Congress included a reimbursement clause, requiring civilian agencies to pay for federal assistance, but allowed this reimbursement to be waived in most circumstances.<sup>43</sup> No mention was made of the PCA in any of these statutes.

In response, DoD published DoDD 5525.5 to implement these new laws. The scope of this DoDD was much broader in restricting DoD interaction with civilian authorities than required by the new laws.<sup>44</sup> Instead of merely precluding the Armed Forces from direct participation in search and seizures, DoD precluded: “apprehensions” and “stop and frisks”; “large scale or elaborate training” (without defining those terms); and use of DoD personnel to operate or maintain equipment when it would be “unfeasible or impractical” to train non-DoD personnel.<sup>45</sup> Contrary to Congress’ intent, the cumulative effect was to minimize support to civilian authorities.<sup>46</sup>

In addition, DoD, sua sponte, extended PCA restrictions to the Navy and Marine Corps as a matter of “DoD policy.”<sup>47</sup> In this same paragraph, DoD designated the Secretary of Navy and/or the Secretary of Defense as arbiter of whether a request for Navy or Marine Corps support would be granted. The requirements placed on such

requests would obviously make the process time consuming and discourage requests. The ultimate affect was a broadening of the PCA, thereby using PCA as a shield to limit DoD involvement with Homeland issues.<sup>48</sup>

DoD needs to update DoD Directive 5525.5. It was much too broad when released in 1986 and much has changed since then both in laws and the world. This DoDD needs to discuss the GWOT. Although Congress amended 10 U.S.C. 371-378, to expand military assistance to civilian law authorities in the war on drugs and terrorists, DoD has failed to change DoD Directive 5525.5. This DoDD also needs to recognize the existence and role of U.S. Northern Command (NORTHCOM) as it applies to its domestic use of Armed Forces.

On October 1, 2002, in response to the attacks on 9/11, NORTHCOM was established. NORTHCOM's mission is "to provide command and control of DoD homeland defense efforts and to coordinate defense support of civil authorities."<sup>49</sup> Specifically, NORTHCOM "anticipates and conducts Homeland Defense and Civil Support operations within the assigned area of responsibility to defend, protect, and secure the United States and its interests."<sup>50</sup>

When updating the Directive, DoD should take the opportunity to make it clear the PCA is not the result of the Founding Father's fear of a standing army, but rather is a Congressional limitation on use of the military in domestic law enforcement. When necessary and appropriate, such as today in the GWOT, presidents have tapped into valuable national assets to defend the homeland from domestic and foreign enemies.

The DoD Directive should also remove the Navy from being covered by the PCA. Congress has never extended coverage of the PCA to limit the Navy. The limitations

found in 10 U.S.C. §375 need to be included, but those include searches, seizures and arrests, not the PCA. Appropriate DoD personnel, to include NORTHCOM, Navy, Department of Homeland Security, and Coast Guard personnel should review current interdiction procedures, to include those covered in 10 U.S.C. §379 concerning GWOT missions, and ensure the revised DoD Directive reflects best practices.

In addition, this DoD Directive was written with an aim to minimizing DoD's role in the war against drugs. The President has made it clear DoD is playing a prominent role in GWOT. DoD and the Services no longer have the luxury of using PCA as a crutch to refuse requests for assistance or missions falling squarely within GWOT. This review would therefore eliminate limiting language such as "large scale or elaborate" or "infeasible."

The new DoD Directive should also clarify who may exercise the "Emergency Authority" found in Enclosure 4. As stated in the DoDD, this emergency authority is derived from the President's Constitutional Authority to execute the laws. As stated in the DoDD, this authority authorizes:

... prompt and vigorous Federal action, including use of military forces, to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, disaster, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situation.<sup>51</sup>

Who can order this emergency action and under what circumstances? DoDD 5525.5 limits this emergency authority for "unusual circumstances, and will be used only under DoD Directive 3025.12."<sup>52</sup> DoD Directive 3025.12, which was last updated in 1994, gives this emergency authority to "responsible DoD officials and commanders" who "will use all available means to seek Presidential authorization through the chain of

command while applying their emergency authority under this Directive.”<sup>53</sup> Arguably, a company commander could use military forces if in his estimation the situation warranted it.

Instead of merely referencing 3025.12, DoD should amend 5525.5 to make it clear who has emergency authority. Unless DoD’s intent is for company commander’s to have the authority to make the call on the use of emergency authority, they should amend both sections to clarify who has actual authority. I recommend the following language be added to DoDD 5525.5 to specifically identify who has emergency authority:

This authority is reserved to officers exercising general court-martial convening authority. These officers will notify their higher headquarters of the use of this emergency authority. The higher headquarters may disapprove the use of military forces on their own authority; suspend use pending higher HQ approval; or approve the use and seek Presidential authorization through their chain of command while the authorizing official deals with the crisis.

This concept limits the ability of who may use military force to, in most instances, general officers. Below the general officer level, it is unlikely a subordinate commander would use military force to intervene in civilian law enforcement anyway. This amendment also puts the onus on higher headquarters to deal with formal authorization while the responding commander deals with the crisis. It also recognizes the ability of the higher HQ to give an order to cease and desist.

Language having a similar affect should be added to the section of Enclosure 4 (E4.3), that discusses requests for Navy PCA exceptions. Requests that are deemed emergencies may be approved by a Ship Captain in the grade of O6, with the request forwarded through higher headquarters as captured above.

By the mid-1980s, some people began to question DoD's reluctance to look at homeland defense. As one pundit observed in 1986:

The day can easily be foreseen when one of our cities is held hostage by a terrorist group or a terrorist state; the stuff of novels can quickly become reality. At that point, we would be asking: how did they get the bomb into our country? Whose job was it to stop the incoming weapon at our border? Why have we spent trillions on defense when any maniac can fly a bomb that can destroy a city?<sup>54</sup>

As we move forward in the GWOT and, out of necessity use U.S. armed forces to defend the homeland, it is important to review recent examples of the misinterpretation of PCA and how those missteps adversely affected the use of the military.

#### PCA – Misunderstood and misapplied

Building on a series of laws dating back to the Constitution and the Calling Forth Act, Congress, in 1956, recognized and approved the President's ability to employ troops in a domestic capacity in 10 U.S.C. §§ 331-334.<sup>55</sup> Section 331 recorded the President's ability, when requested by a state legislator or its governor, to use either the militia or regular army to suppress insurrection. Section 332 captured the President's ability of using either the militia or regular army to suppress rebellion and enforce federal authority. Section 333 enumerated the President using either the militia or regular army to guarantee individual civil rights. Section 334 contained the Presidential requirement to issue a proclamation to disperse – the same one Washington issued before sending in troops to put down the Whiskey Rebellion. These laws are clearly devised as exceptions to the PCA.

The 1992 Los Angeles riots provide a case study in misapplying the PCA. In response to wanton rioting and chaos, California Governor Wilson mobilized the

California Army National Guard (CANG) to help quell the violence. The on-scene CANG commanders decided that LA Law Enforcement commanders should lead while National Guard personnel would provide support. The use of National Guard troops for law enforcement purposes was necessary and entirely within the proscriptions of PCA. Although this tactic was restoring calm, Governor Wilson decided to request federal military assistance.<sup>56</sup> As required by 10 U.S.C. §334, President Bush issued a proclamation to disperse. When this proclamation failed to yield results, 4,000 Soldiers and Marines were ordered into LA. In addition, the CANG was federalized and put under Federal control.

As part of his executive order, President Bush cited 10 U.S.C. §§331-333 as authority.<sup>57</sup> Although the statute under which President Bush authorized this force trumped the PCA, and his executive order made it clear federal troops were being used to “suppress violence” and “restore law and order”, multiple commanders and Judge Advocates (JAs) mistakenly believed the PCA limited the use of troops.

After the fact, the CANG Commander stated he “frankly did not know until several months after the riots that posse comitatus did not apply.”<sup>58</sup> A Commission that investigated the causes and handling of the riots found the Active Duty Army Commander “took the position that the Defense Department’s internal plan for handling domestic civil disturbance coupled with the posse comitatus statute prohibited the military from engaging in any law enforcement functions.”<sup>59</sup> Instead of providing supported commanders with accurate and enabling guidance, both CANG and Active Duty JAs provided inaccurate and conflicting guidance, further muddying the process.<sup>60</sup>

The end result was that once the Regular Army troops arrived on the scene and the National Guard was federalized and placed under the Regular Army commander, all troops were prohibited from directly supporting law enforcement personnel. Only 20% of missions being performed by the CANG were allowed to continue.<sup>61</sup> Instead of helping the situation, federal troops and the process of federalizing the national guard, through misinterpretation of the PCA, hurt the situation.

The underlying problem was not the PCA or acts prohibited by the PCA. President Bush was clearly in his authority to send federal troops to LA to suppress violence and restore law and order. The problem was caused by commanders and their legal advisers misapplying PCA. The lessons learned from mistakes made during the LA Riots should appear in the revised DoDD 5525.5

Has DoD taken subsequent steps to clear the fog concerning PCA? Has the interpretation of PCA become more understandable to those reviewing and applying it? Based on recent scholarly discussions and events concerning the PCA, much confusion still exists.

In his article on the PCA, Lieutenant Colonel Donald J. Currier stated that while it was permissible for Soldiers to train police officers in the effective use of an armored vehicle or the maintenance of that vehicle, the PCA prohibited a Soldier from driving “the vehicle to the scene of a bank robbery to extract police officers under fire....”<sup>62</sup> I agree that most Soldiers using their own authority could not perform this mission. But there are two arguments to be made that would authorize the military to use an armored vehicle in this situation.

First, LTC Currier used this scenario as an example of the military directly participating in law enforcement. I disagree that using the vehicle in this rescue capacity would qualify as direct assistance. Neither 10 U.S.C. §375 nor DoDD 5525.5 would categorize this use as direct assistance in law enforcement since the vehicle is not being used as part of a search or seizure, arrest, apprehension, stop and frisk, or similar activity. Since there was no direct involvement of military assets in civilian law enforcement, I do not believe the PCA would be used to either criminally prosecute someone for an alleged PCA violation or be used by a judge to exclude evidence against the bank robbers.

Second, this use, with some additional facts, would appear to fall clearly under the Emergency Authority described in DoDD 5525.5 and 3025.12. Specifically, the armored vehicle was being used to prevent loss of life, namely police officers under fire. Assuming a local civilian authority, to include the Mayor or Chief of Police, had requested the assistance, this would imply the local authorities were unable to control the situation. This is the exact scenario the Emergency Authority was meant to address. If one further assumes that a “responsible commander” approved the request while seeking Presidential authorization through his chain of command, the use of the armored vehicle to rescue police officers under fire becomes a success story, not a PCA induced tragedy.

The importance of this example is not whether I am right or LTC Currier is right concerning the use of the armored vehicle in this example. The significance is that commanders in the field get it right. To the extent I believe my analysis is correct, this

example should be incorporated into DoDD 5525.5 as an example of the permissible use of military support in response to a domestic crisis.

It is imperative that a misunderstanding concerning the PCA not lead to the military failing to use assets to combat terrorism on a domestic front. Prior to 9/11, it is clear the armed forces were not looking internally at the United States for possible threats. As part of his testimony in front of the 9/11 Commission, GEN Myers, the Chief of the Joint Chiefs of Staff stated, "... our military posture on 9/11, by law, by policy and in practice, was focused on responding to external threats, threats originating outside of our borders."<sup>63</sup>

In response, Ms. Jamie Gorelick asked GEN Myers the following question:

... where was our military when it should have been defending us.... And the response of NORAD ... is that NORAD was not postured to defend us domestically unless someone was coming at us from abroad....And so I want to explore very briefly this question with you, because for years the [DoD] did, in fact, resist having a domestic mission.<sup>64</sup>

As part of his response, GEN Myers denied DoD had resisted a domestic mission and invoked the PCA as a partial defense to why DoD was not looking at internal threats to national security:

... I don't know that the military has ever resisted [having a domestic mission], I mean, those are your words. What we try to do is follow the law, and the law is pretty clear on Posse Comitatus and that is whether or not the military should be involved in domestic law enforcement. As you know, the president can waive that, and the state's National Guard can be used by the governor under Title 32 to participate in that ....<sup>65</sup>

Ms. Gorelick responded by clarifying the PCA for GEN Myers,

... when I was general counsel of the Defense Department, I repeatedly advised ... the Posse Comitatus says, you can't arrest people. It doesn't mean that the military has no authority, obligation, or ability to defend the United States from attacks that happen ... in the domestic United States. And we will help you with that, if there's any lack of clarity on that today.<sup>66</sup>

GEN Myers responded by first blaming the lawyers for any confusion, but then admitting that the armed forces did need to focus on domestic terrorism:

We'll leave that to the lawyers, because my view is, I don't know if there's lack of clarity, but there's probably a plethora of opinions on it [PCA].... But, certainly our job today in the military, ..., is to look at the current threat assessment, and now that we have ... Northern Command to do the same, to look at how we can better defend this Country against threats that are not traditional. Again, at the time [of 9/11] terrorism was viewed as a criminal act. And we have changed that, I think, in our government, and view it a little more broadly now....<sup>67</sup>

### Conclusions and Recommendations

Whether in response to a domestic crisis, such as the LA Riots, a prospective terrorist attack, from land, sea, or air, or an emergency call for help from a local mayor, military forces need clear guidance on how they can act. They need guidance on what they can and cannot do. Revising and updating DoDD 5525.5 would provide that guidance. It would help dispel PCA myths while providing authoritative instructions.

The relevance of PCA is evidenced by the reference to it in the Homeland Security Act:

The Posse Comitatus Act has served the Nation well in limiting the use of the Armed Forces to enforce the law. Nevertheless, by its express term, the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President's obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency.<sup>68</sup>

When implementing these changes, it is important to inform the American people as to why DoD is changing the Directive. An example of how not to implement a new program is how the federal government handled the Patriot Act.<sup>69</sup> The Patriot Act's

overall intent was to enhance the federal government's ability to secure the U.S. against terrorism. Specifically, the intent of the Patriot Act was to make it easier to intercept telephone and electronic mail communications, cut off financial support to terrorists, protect the border, and eliminate some restrictions on gathering foreign intelligence in the United States. These were areas deemed vulnerable and exploitable by terrorists.<sup>70</sup>

The Patriot Act produced significant protests from Americans. Many state and local governments have drafted Resolutions that protest provisions in the Patriot Act.<sup>71</sup> The American Bar Association has opposed multiple provisions.<sup>72</sup> One group that has been particularly aggressive in opposing the Patriot Act is the American Library Association (ALA).<sup>73</sup>

While not advocating changes to the PCA itself, changes to a DoD Directive that implements the PCA is bound to bring allegations of martial law, constitutional infringement, or suspension of habeas corpus. When published, the revised DoD Directive, needs to be accompanied with a press release that captures the history of PCA, and what the DoD Directive amendment is meant to accomplish.

The will of the American people is vital to the on-going GWOT. To borrow a term from Carl von Clausewitz, the U.S. center of gravity is the will of the American people. The backlash caused by the Patriot Act should serve as a reminder of how jealously Americans guard their civil liberties.

The U.S. needs to keep this concept in mind as it continues to fight the GWOT. In his most recent National Security Strategy, President Bush equated GWOT to the Cold War, stating the current struggle will take generations.<sup>74</sup> To be successful in this long war, the federal government needs to ensure it does not jeopardize its own center of

gravity, the will of the American people, by not clearly communicating changes to DoDD 5525.5. These changes will help the services provide appropriate and necessary support to the American people and will not lead to violations of the PCA or the Constitution.

Using the Armed Forces in a domestic capacity is a tradition dating back to Washington, Adams, and Jefferson. The military possesses valuable assets that should be used when necessary. These resources should not be left unused due to misinterpretation of PCA or any other law or policy. The intent is to ultimately protect the U.S. from all enemies, foreign and domestic. This is a concept the American people can and will appreciate.

## Endnotes

<sup>1</sup> George W. Bush, *National Strategy for Homeland Security*, (Washington, DC: The White House, October 5, 2007) p. 13.

<sup>2</sup> *Ibid.*, 50.

<sup>3</sup> Congress, House of Representatives, Panel B, "Inquiry into Federal Law Enforcement Actions at Waco, Texas," 20 July 1995, testimony of BG Walter P. Huffman, Assistant Judge Advocate General for Military Law and Operations, p. 14 as cited in "Legal Aspects of Domestic Employment of the Army," Thomas R. Lujan, *Parameters*, U.S. Army War College Quarterly, Autumn 1997, pp. 82-97.

<sup>4</sup> Jennifer Elsea, "The Posse Comitatus Act and Related Matters: A Sketch," *CRS Report for Congress* (June 6, 2005): available from <http://www.history.navy.mil/library/online/posse%20comit.htm>; Internet; accessed 26 January 2008.

<sup>5</sup> Department of Defense, *Department of Defense Cooperation with Civilian Law Enforcement*, DoD Directive 5525.5, Washington, DC: U.S. Department of Defense, 1986, Change 1, 1989.

<sup>6</sup> In English Common Law, posse comitatus, latin for "force of the county" and shorthand for local militia, referred to the ability of a county sheriff to conscript any able-bodies male over the age of fifteen to assist in keeping the peace or capturing a felon, as cited in John R. Brinkerhoff, "The Posse Comitatus Act and Homeland Security," February 2002; available from [www.homelandsecurity.org/journal/Articles/brinkerhoffpossecomitatus.htm](http://www.homelandsecurity.org/journal/Articles/brinkerhoffpossecomitatus.htm); Internet; accessed 5 January 2008; Black's Law Dictionary defines posse comitatus as a "group of citizens who are called together to assist the sheriff in keeping the peace." Bryan A. Garner, ed., Black's Law

Dictionary, 7<sup>th</sup> ed. as cited in Matt Mathews, "The Posse Comitatus Act and the United States Army: A Historical Perspective," *Combat Studies Institute Press*, Fort Leavenworth, KS, 2006, footnote 2, p. 18.

<sup>7</sup> Alexander Hamilton, James Madison, and John Jay, "The Federalist and Other Constitutional Papers," ed. E.H. Scott (Chicago: Scott, Foresman & Co., 1898), 227, as cited in Mathews, 6.

<sup>8</sup> *U.S. Constitution*, art. I, sec. 8 and art. II, sec. 2.

<sup>9</sup> Alexander Hamilton, "Federalist No. 8," November 20, 1787, available from [http://thomas.loc.gov/home/histdox/fed\\_08.html](http://thomas.loc.gov/home/histdox/fed_08.html); Internet; accessed 9 February 2008.

<sup>10</sup> *U.S. Constitution*, Amendment III.

<sup>11</sup> *U.S. Constitution*, art. I, sec 8.

<sup>12</sup> Act of 24 September 1789, chapter 20, 1 Stat. 73, sec. 27 as cited in Mathews, 7.

<sup>13</sup> Act of 2 May 1792, chapter 28, Stat. I, sec. 2. *The Library of Congress, American Memory: A Century of Lawmaking For a New Nation, U.S. Congressional Documents and Debates, 1774-1875*, available from <http://memory.loc.gov/cgi-bin/ampage?collId=11s1&filename=001/11s1001.db&recNum=387>; Internet; accessed on 24 August 2005 as cited in Mathews, 7; 6 Op. Att'y Gen. 466, 473 (1854) as cited in Charles Doyle, "The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law", *CRS Report for Congress*, (June 1, 2000), 8; 16 Op. Att'y Gen. 162, 163 (1878) as cited in Gary Felicetti and John Luce, "The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done", *Military Law Review*, 175 (March 2003), 98.

<sup>14</sup> *US Constitution*, art. II, sec 3.

<sup>15</sup> Act of 28 February 1795, Stat. II, chapter 36, sec. 1, 2. See *The Library of Congress, American Memory: A Century of Lawmaking For a New Nation*, as cited in Mathews, 13.

<sup>16</sup> Mathews, 13.

<sup>17</sup> Dumas Malone, *Jefferson the President: Second Term, 1805-1809* (Boston: Little, Brown and Company, 1974) 252-253, as cited in Mathews, 13.

<sup>18</sup> Public Acts of Congress, *An Act authorizing the employment of the land and naval forces of the United States, in cases of insurrections*, See *The Library of Congress, American Memory: A Century of Lawmaking For a New Nation, U.S. Congressional documents and Debates, 1774-1875*. *Annals of Congress*, 9<sup>th</sup> Congress, 2d Session, 1285, available from <http://memory.loc.gov/cgi-bin/ampage>; Internet; accessed on 7 September 2005, as cited in Mathews, 13.

<sup>19</sup> 6 Op. Att'y Gen. 466, 473 (1854), as cited in Doyle, 8.

<sup>20</sup> 16 Op. Att’y Gen. 162, 163 (1878), as cited in Felicetti and Luce, “Setting the Record Straight,” 98.

<sup>21</sup> Eric Foner, “Reconstruction: America’s Unfinished Revolution 1863-1877,” at 4, 8-10 (1998) as cited in Felicetti and Luce, “Setting the Record Straight,” 103.

<sup>22</sup> Mathews, 26.

<sup>23</sup> Ibid.

<sup>24</sup> Mathews, 29.

<sup>25</sup> Felicetti and Luce, “Setting the Record Straight,” 108.

<sup>26</sup> Compare Doyle’s footnote 18 on 9 with Mathews, 31 and Felicetti and Luce, “Setting the Record Straight,” 107-108.

<sup>27</sup> Posse Comitatus Act of 1878, 20 Stat. 145, 152, as cited in Felicetti and Luce, “Setting the Record Straight,” 113.

<sup>28</sup> Gary Felicetti and John Luce “The Posse Comitatus Act: Liberation from the Lawyers,” *Parameters*, U.S. Army War College Quarterly (Autumn 2004), 100.

<sup>29</sup> Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* (Washington: US Army Center of Military History, 1977), 421 as cited in Felicetti and Luce, “Liberation from the Lawyers,” 100.

<sup>30</sup> Felicetti and Luce, “Setting the Record Straight,” 125.

<sup>31</sup> Posse Comitatus Act, 18 U.S.C. §1385. It was amended in 1959, deleting “This section does not apply in Alaska”, and amended in 1994, substituting “under this title” for “not more than \$10,000.”

<sup>32</sup> Felicetti and Luce, “Liberation from the Lawyers,” 101.

<sup>33</sup> *U.S. v. Jaramillo*, 380 F. Supp. 1375 (D.C. Nev. 1974); *U.S. v. Banks* 539 F.2d 14 (C.A. Wash. 1976).

<sup>34</sup> *State v. Pattioay*, 896 P.2d 911 (Hawaii 1995); *U.S. v. Walden*, 490 F.2d 372 (4<sup>th</sup> Cir. 1974), cert. denied 416 U.S. 983 (1974); *U.S. v. Roberts*, 779 F.2d 565 (9<sup>th</sup> Cir. 1986), cert. denied 479 U.S. 839 (1986).

<sup>35</sup> Felicetti and Luce, “Setting the Record Straight,” 145.

<sup>36</sup> *U.S. v. McArthur*, 419 F. Supp. 186, 194-95, (N.D. 1975).

<sup>37</sup> *Wrynn v. U.S.*, 200 F. Supp. 457 (E.D.N.Y. 1961).

<sup>38</sup> *U.S. v. Walden*, 490 F.2d 372 (1974).

<sup>39</sup> *U.S. v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *U.S. v. Roberts*, 779 F.2d 565 (9<sup>th</sup> Cir. 1986), cert. denied, 479 U.S. 839 (1986). .

<sup>40</sup> 10 U.S.C. §§371- 378 (1981).

<sup>41</sup> 10 U.S.C. §375 (1981).

<sup>42</sup> 10 U.S.C. §376 (1981).

<sup>43</sup> 10 U.S.C. §377 (1981).

<sup>44</sup> 47 Fed. Reg. 14,899 (Apr. 7, 1982) (adding a new pt. 213 to ch I, 32 C.F.R). DoD Directive 5525.5, 15 January 1986, provided internal guidance consistent with published regulations. On 28 April 1993, DoD cancelled the published regulations and indicated DoD Directive 5525.5 replaced 32 C.F.R 213 as cited in Felicetti and Luce, "Setting the Record Straight," 153.

<sup>45</sup> DoD Directive 5525.5, 1 and Enclosure 4.

<sup>46</sup> Donald J. Currier, "The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?," *Strategic Studies Institute*, Carlisle Barracks, PA, Sept. 2003, 13.

<sup>47</sup> DoD Directive 5525,5, Encl 4.

<sup>48</sup> Currier, 13.

<sup>49</sup> "About USNORTHCOM," available from <http://www.northcom.mil/About/index.html>; Internet: accessed 1 March 2008.

<sup>50</sup> Ibid.

<sup>51</sup> DoD Directive, 5525.5, Encl 4.

<sup>52</sup> Ibid.

<sup>53</sup> Department of Defense, *Military Assistance for Civil Disturbances (MACDIS)*, DoD Directive 3025.12, Washington, DC: U.S. Department of Defense, (4 Feb 94), para. 4.2.2.

<sup>54</sup> William Safire, *Thataway, Posse Comitatus*, N.Y. Times, Feb. 28, 1986 at A31, quoted in 132 CONG. REC. E1331 as cited in Felicetti and Luce, "Setting the Record Straight," 160.

<sup>55</sup> 10 U.S.C. §§331-334.

<sup>56</sup> Currier,12; Mathews, 49.

<sup>57</sup> Executive Order 12804, *Providing for the restoration of law and order in the city and county of Los Angeles, and other districts of California* (May 1, 1992).

<sup>58</sup> Mathews, 47.

<sup>59</sup> Los Angeles, Calif. Board of Police Commissioners and William H. Webster, *The City in Crisis: A Report*, Los Angeles, CA: Special Advisor Study, Inc. 1992, 12 as cited in Currier at 12.

<sup>60</sup> Mathews, 58-59.

<sup>61</sup> Currier, 12.

<sup>62</sup> *Ibid.*, 8.

<sup>63</sup> National Commission on Terrorist Attacks Upon the United States (9-11 Commission), Transcript of Testimony by General Richard Myers, June 17, 2004, p. 36; available from <http://govinfo.library.unt.edu/911/archive/hearing12/index.htm>; Internet: accessed 27 January 2008.

<sup>64</sup> *Ibid.*, 50.

<sup>65</sup> *Ibid.*, 51.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, 51-52.

<sup>68</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

<sup>69</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, 115 Stat. 295, Public Law 107-56, (Oct 26, 2001).

<sup>70</sup> *Ibid.*

<sup>71</sup> Bill of Rights Defense Committee, "Resolutions Passed and Efforts Underway, By State," available at <http://www.bordc.org/list.php?sortAlpha=1>; accessed on 7 December 2007.

<sup>72</sup> Michael S. Greco, President, American Bar Association, Letter to Conferee, "RE: Conference on H.R. 3199," November 9, 2005.

<sup>73</sup> American Library Association, Website, available at <http://www.ala.org/ala/oif/ifissues/usapatriotact.htm>; accessed on 9 February 2008.

<sup>74</sup> George W. Bush, *The National Security Strategy of the United States of America*, Washington, DC: The White House, March 2006, 1.

