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THE POSSE COMITATUS ACT POST-9/11:

TIME FOR A CHANGE?

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Introduction

“We are today a Nation at risk to a new and changing threat.”¹ With these opening remarks to the National Security Strategy for Homeland Security, President George W. Bush simplified the terrorism problem facing the United States (U.S.) today - - a problem that intensified after the 11 September 2001 attacks. The demand to find solutions to this problem, and make the U.S. more secure from terrorist attacks, may result in an increased domestic security role for the U.S. military. However, the Posse Comitatus Act (PCA) limits the domestic use of the military. In light of the recently activated U.S. Department of Homeland Security and U.S. Northern Command, should the Posse Comitatus Act be repealed or amended? This paper will examine the debate concerning the PCA by explaining the founding origins of the PCA; the current PCA and its amendments focusing in particular on what the PCA specifically permits and prohibits; implementation problems for the U.S. military; the arguments for and against changing the PCA; examining the people and process involved in the debate concerning the PCA; and lastly providing a proposal for change.

Founding Origins

Black's Law Dictionary defines the term “posse comitatus” as “the power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases as to aid him in keeping the peace, in pursuing and arresting felons, etc.”² Although the word “posse” to many evokes images of the Wild West, the history of posse comitatus dates back to Britain in 871 when “it was the citizen’s duty in the shire to help the sheriff in nabbing criminals and maintaining order. The sheriff would give the “hue and

cry” and any citizen who heard it was legally bound to assist the sheriff in bringing the criminal to justice.”³

The use of the military to enforce civil law in America began during the American colonial period. One of the duties of the British Army in the colonies was to serve as a police force. Our founding fathers were apparently not offended by this practice as they incorporated into the U.S. Constitution “to provide for calling forth the Militia to execute the Laws of the Union.”⁴

Prior to the enactment of the Posse Comitatus Act in 1878, the U.S. military’s involvement in civilian law enforcement was neither illegal nor uncommon. President George Washington began the practice when “he called out the militia to put down the Whiskey Rebellion in 1794.”⁵ Later, the Judicial Act of 1798 codified this practice as it “allowed United States marshals to call on the military as a posse comitatus.”⁶ Some examples include: 1846 – Anti-Catholic riots in Philadelphia; 1850 – Bloody Kansas; 1854 – enforcement of fugitive slave laws; 1859 – capture of John Brown; and 1863 – Draft riots in New York.⁷ During the Reconstruction period following the end of the Civil War in 1865, the U.S. military was repeatedly used to enforce civil law.

The incident that sparked the passage of the PCA however was the disputed 1876 presidential election. Incumbent Republican President Ulysses S. Grant directed the Army to guard polling sites throughout the South. After Republican candidate Rutherford B. Hayes was declared the winner, “accusations were quickly made that troops sent to the southern states to act as a posse comitatus for federal marshals at the polls assisted in providing the President with the essential votes.”⁸ In 1878, Southern Democrats controlling the House of Representatives responded to the perceived interference of the U.S. Army at southern polling sites by creating the Posse Comitatus Act as a rider to the Army’s appropriation bill. The Act was designed to

prohibit the use of the Army in enforcing civil law “except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress.”⁹ The end result was the military was severely limited in taking a role in civilian law enforcement and security actions within the boundaries of the U.S.

The Posse Comitatus Act today

The current PCA is a slight variation of the original 1878 Act: “whoever, except in such cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.”¹⁰ Although the Navy and Marine Corps are not included in the Act, they were made subject to it via an additional regulation¹¹ and Department of Defense policy.¹²

Exceptions to the Posse Comitatus Act

Although the PCA explicitly applies restrictions there are five key exceptions. First, it does not apply to the Coast Guard, “whose peacetime mission specifically includes the enforcement of civilian maritime laws.”¹³ Second, National Guard troops while under the control of state governors are excluded from the act. Third, upon a presidential declaration of a disaster, and a request from a State Governor, military forces may be sent on an emergency basis for up to 10 days to preserve life and property.¹⁴ Fourth, pursuant to Presidential power to quell insurrections, “Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion . . . make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may . . . use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.”¹⁵

Lastly, as the act is a legislative action, it has been repeatedly changed via subsequent legislation to permit a variety of exceptions. A few of these circumventions will be discussed later.

What the Posse Comitatus Act permits

What assistance does the PCA permit the military to provide in enforcing civil law? The simple answer is that the PCA permits the military a passive role in supporting civil law enforcement duties. There are also some particular statutory permissions among which are: sharing information concerning violations of law; loaning equipment and/or facilities to support civilian law enforcement to include associated spare parts and supplies; certain training of civilian law enforcement to include training on the use of loaned equipment; operating and maintaining equipment in support of civilian law enforcement for detection, monitoring and communication of air and sea traffic outside of U.S. borders; aerial reconnaissance; and the interception of vessels and aircraft outside the U.S. to communicate with them and direct them to a location designated by civilian law enforcement officials.

Many of the specifically permissible actions were enacted into law post-1982 when the Department of Defense (DOD) was directed to play a more active role in the U.S. Drug War. This easement of PCA restrictions resulted in an explosion of the use of the military. “As early as 1984, DOD had honored almost 10,000 requests for assistance from civilian law enforcement agencies.”¹⁶

More recently, following the bombing of the Oklahoma City federal building, new terrorism related easements of the PCA came into effect. The 1997 National Defense Authorization Act “required the Secretary of Defense to create a program to provide civilian agencies with training and advice on reaction to a crisis involving weapons of mass destruction.”¹⁷ Additionally, the Secretary of Defense was also authorized “to provide assistance

relating to the enforcement of the statutes involving biological or chemical weapons of mass destruction in an emergency situation.”¹⁸ One final easement of note is that “Title 18, U.S. Code, Section 831 provides that if nuclear material is involved in an emergency, the Secretary of Defense may provide assistance to the Department of Justice, notwithstanding the Posse Comitatus Act.”¹⁹

What the Posse Comitatus Act prohibits

On the opposite hand, what support does the PCA prohibit the military from providing to civilian law enforcement authorities? According to Colonel Nolon Benson Jr., “The simple answer is direct involvement in enforcing civil laws.”²⁰ Specifically, the PCA “restrains the military from making arrests, directly participating in searches and seizures, or directly participating in the gathering of intelligence for [civilian] law enforcement purposes, except when needed for the immediate protection of human life.”²¹

Military Posse Comitatus Act implementation problems

Although the intent and wording of the PCA are very clear and easily understood, the previously mentioned laws amending the PCA, combined with the over 40 U.S. District Courts/Courts of Appeals decisions²² resulting from challenges to the PCA, have made implementation of the PCA by the military extremely difficult. Guidance provided by the Department of Defense (DOD) and the Joint Staff exacerbates the confusion. The overall result is that military commanders often do not have a clear understanding of the PCA and its implementation.

DOD Directive 5525.5, entitled DOD Cooperation with Civilian Law Enforcement Officials, is supposed to provide the seminal guidance to each of the Armed Services concerning the PCA. Any commander reviewing the Directive and hoping to find clear, concise instructions

regarding implementing the PCA will be disappointed. The Directive contains a verbatim transcript of the PCA itself, but then in an attempt to explain what the PCA permits and prohibits, the Directive provides an eleven page convoluted mass of legalese that continuously cross references not only within itself but also to numerous criminal statutes. As a caveat, when determining what might be permissible direct assistance, commanders are advised, “this provision must be used with caution,”²³ lest they forget the PCA’s warning of a \$10,000 fine and/or up to two years in prison.

Guidance provided by the Joint Staff is not any better. Indeed, Joint Publication 1, the document that “serves as the capstone publication for all U.S. joint doctrine”²⁴ provides erroneous information. Its limited discussion of the PCA merely states: “This act, together with related DOD regulations, prohibits the Army, Air Force, Marine Corps, and Navy from participating in civilian law enforcement activities within the United States.”²⁵ There is no mention of the fact that there are numerous actions that the PCA and its amendments currently permit. An uninformed commander looking for guidance on the PCA, yet only reading the above excerpt, would be left to believe that participating in civilian law enforcement activities is not in any way permissible.

Dropping down a further layer to the guidance concerning implementing the PCA provided by the Services revealed that the Army had provided its commanders with a relatively easily understood explanation of the PCA. Army doctrine explains:

It is DOD policy to cooperate with civilian law enforcement officials to the extent practical. However, cooperation must consistently meet the requirements of applicable law, the needs of national security and military preparedness, and the historic tradition of limiting direct military involvement in civilian law enforcement activities . . . Several exceptions to the

statute exist that allow, with proper authorization, military support to civilian law enforcement agencies.²⁶

So, how do commanders ensure they don't run afoul of the PCA? Typically, a legal review is conducted of each request for the military to support civilian law enforcement agencies. With regards to any joint counterdrug operation "The Staff Judge Advocate (SJA) must review all operations to ensure they comply with the Act."²⁷ Not limiting itself to counterdrug operations, the Army directs that "The SJA must review all operations to ensure that they comply with the act."²⁸ There is no shortage of work for these SJAs as between 1982-84, "DOD had honored almost 10,000 requests for assistance from civilian law enforcement agencies."²⁹

The culminating inhibiting impact is that because of the confusion and fear of violating any PCA restrictions, limited advanced planning of support to civilian law enforcement agencies by the military takes place. Adding to the chaos as a result of limited planning is that because many civilian law enforcement agencies infrequently encounter the PCA, they face frustration when attempting to secure military support.

Arguments for/against changing the Posse Comitatus Act

Before turning to all of the actors involved with the debate to change the PCA, a review of the arguments for and against change seems prudent. There are four main arguments calling for repealing or changing the PCA.

The most frequent argument is that the terrorist attacks of September 11th radically changed America's way of life, therefore a radical response is required. "Never again" has been the battle cry of many desiring to thwart any future attacks. America must review the old paradigm of how it deals with terrorism. To some a radical response means lifting the current restrictions placed on civilian-military law enforcement cooperation:

It now appears that to fully engage our armed forces to defeat terrorism, we must rethink posse comitatus . . . the military can support civilian authorities in a wide array of enforcement missions. . . Rethinking policy and practice regarding posse comitatus should be a priority for the new Department of Homeland Security as it creates links to the Pentagon's Northern Command in the . . . battle against terrorism, heretofore limited to the criminal justice system.³⁰

The second argument for changing the PCA is that many believe all available U.S. elements of power should be utilized to deter future terrorist attacks. As the military is one of the elements it should not be excluded. Those who utilize this argument believe that excluding the proven capabilities of the U.S. military is foolhardy.

A third argument is that many see the military as a cornucopia of domestic assistance available for both the drug and terrorism wars. Some even go as far as to claim that military personnel and equipment are underutilized and using them to fight domestic terrorism would be a good utilization of military assets. Therefore, why not use all/some of the assets the military can bring to bear on these pressing problems? "No other agency of government has the equipment, training, and experience in the use of force that the Defense Department does . . . No other agency has such a durable communications system. And no other agency, especially if the National Guard is counted among its forces, is so widely dispersed around the country in places where its services may be urgently needed."³¹

The final argument is if the military's role is to protect national security, what difference does it make if it conducts this mission domestically? Should not the military be our first line of domestic defense against all enemies? The military's purpose for existing is to fight our nation's wars. Today these wars as proclaimed by U.S. elected leaders include a War on Drugs and a

War on Terrorism; wars which cannot be won strictly overseas. To some, it does not make sense to exclude the military from fighting these wars on U.S. soil.

The arguments against changing the PCA are more numerous, based on tradition, and not currently influenced by emotion as the arguments for changing the PCA tend to be. The five key objections to change are: a traditional reluctance to have the military involved in civilian law enforcement, mixing warrior skills with civilian law enforcement is dangerous, the undermining of civilian control of the military, damages to military readiness, and the military is the wrong tool for the job.

The first argument against change revolves around a traditional reluctance to have the military involved in civilian law enforcement; a tradition as sound today as it was in the past. Many believe doing so has dangerous potential as “restrictions should not be lessened . . . lest we be willing to forego those time honored freedoms and civil liberties expected and cherished by generations of Americans.”³²

The second argument against changing the PCA is to refrain from mixing warrior skills with civilian law enforcement. In particular, civilian law enforcement emphasizes when dealing with the public, individuals’ rights and the de-escalation of violent situations. With the military on the other hand, “escalation is the rule . . . soldiers need not be cognizant of individual rights, and the use of deadly force is authorized without any aggressive or bad act by that person.”³³ Soldiers are trained, and practice in military exercises, wartime rules of engagement. When they become involved in domestic law enforcement operations they have to be retrained on “softer” rules of engagement. The unfortunate May 1997 shooting death of Esequiel Hernandez along the Texas-Mexico border is an example of what can go wrong. To use an analogy for this

argument, civilian law enforcement plays by the home game rules while the military is best suited for an away game.

The third argument concerns control of the military. Some believe that “whenever the military activities involve areas that endanger liberties . . . even when that expansion is limited by the civilian leadership,”³⁴ civilian control of the military becomes undermined. Allowing the military to enforce domestic law would permit the military undue influence in civilian affairs and “a military with many nonmilitary functions is more “autonomous” and thus less under civilian control.”³⁵

The fourth argument against change, and the one most difficult to dismiss, is that each easement of the PCA restrictions further damages military readiness. The military mission is national security via preparing for, then fighting and winning our Nation’s wars. DOD’s resources are already strained. The allocation of military resources for anything but preparing for war diminishes the warrior ethos and hinders military readiness.

The final key argument against changing the PCA is that the military is the wrong tool to use. First, you deviate the military from its primary mission. Second, using the military is more expensive than using civilian law enforcement as “a soldier costs the government \$82,000 a year in training and upkeep, while the use of a civilian law enforcement person would be cheaper.”³⁶ Lastly, terrorism and drugs are problems without an end in sight. Should the U.S. divert its military’s attention and resources to fighting these two major problems that might be better handled by domestic law enforcement agencies? Opponents of changing the PCA argue that perhaps developing the proper resources in civilian law enforcement is a more viable option.

The players, their positions and actions

Who are the players in the ongoing debate, where do they stand, and what actions do they intend to take? I'll discuss them divided by the four categories of executive branch, legislative branch, Department of Defense (DOD), and external influences. As you will see, there does not appear to be an interagency consensus on a preferred course of action.

Within the executive branch, there are two voices on the issue of amending the PCA: President Bush and his Secretary of Homeland Security, Tom Ridge. Neither has called for an outright repeal or change to the PCA but are instead approaching the issue obliquely.

President Bush has been eager to ensure his administration does not have to deal with a perceived violation of the PCA á la Waco or Ruby Ridge, while simultaneously ensuring he does not come across as tramping the civil liberties of Americans. His first real test of bumping up against the PCA came soon after September 11th when he wanted to put National Guard soldiers at the U.S. borders and within airports. Federalizing National Guard soldiers and assigning them these missions would have been a violation of the PCA. The President, instead of activating National Guard soldiers himself, however, accomplished a circumvention of the PCA by convincing Governors to call up their National Guard troops and assigning them the missions themselves. The result was 54 different ways of conducting augmented airport security, adding to the frustration and confusion faced by travelers through U.S. airports.

Tom Ridge has been giving conflicting statements of his view of the issue. For example interviewed during a Sunday morning talk show, when asked about the issue of PCA he replied, "Generally, that goes against our instincts as a country to empower the military with the ability to arrest. But it may come up as a part of a discussion."³⁷ Then in a later interview, "There's been absolutely no discussion with regard to giving military authorities the ability to arrest in

support of civilian authorities. [However] he could imagine the secretaries of defense and homeland security broaching the possibility of changing the 1878 act at some future meeting.”³⁸

Yet in another interview he stated, “We need to be talking about military assets in anticipation of a crisis event.”³⁹

The clearest perspective on the executive branch’s stand on the issue however comes from President Bush’s National Strategy for Homeland Security: “The threat of catastrophic terrorism requires a thorough review of the laws permitting the military to act within the United States in order to determine whether domestic preparedness and response efforts would benefit from greater involvement of military personnel and, if so, how.”⁴⁰ This action is listed as part of one of six major initiatives. Designating this a major issue for resolution hints at the executive branch’s position. The directed review of authority for military assistance in domestic security is ongoing by the Justice Department and, as you will see below, being stalled by the Department of Defense.

Turning to the legislative branch, the PCA appears to be an issue that periodically solicits attention from elected representatives, i.e. Ruby Ridge, Waco, the shooting death by Marines during a counter drug surveillance mission on the Mexican border, Oklahoma City bombing and the recent military assistance to the D.C. area sniper shootings. Post September 11th, elected representatives have been gently testing the public waters with limited statements about changing the PCA. The *Washington Times* suggests that the comments “may have been coordinated to measure public reaction.”⁴¹ For example, among those open to the possibility of change are Senator Nickles of Oklahoma: “There’s still people actively planning to attack U.S. citizens and our interests . . . we need to do everything within our power, maybe to the point of also giving our military some police powers for protection”;⁴² and former Senator Thompson of Tennessee

stating he, “believes military troops could be useful for tasks such as surveillance along the borders’ thousands of miles that are very difficult for law enforcement to deal with. It would be against our traditional Posse Comitatus principles. But it might be an idea whose time has come.”⁴³ And ensuring that the Democrats are not silent on the issue, Senator Levin of Michigan remarking, “the Posse Comitatus Act is a solid law that has served us well. We should not assume that we’re going to have to change it. On the other hand, I don’t fear looking at it to see whether or not our military can be more helpful than they’ve been up to now.”⁴⁴

Two Senators however have not only been vocal, but have taken action. From opposite sides of the Senate Chamber they are Senators Joseph Biden Jr., Delaware Democrat and John Warner, Virginia Republican.

In the aftermath of the bombing of the Murrah Federal Building in Oklahoma City, Senator Biden co-sponsored legislation with Senator Nunn of Georgia to amend the PCA which would have permitted the military to intervene in incidents involving weapons of mass destruction.⁴⁵ “Biden’s desire to alter the act – after a single act of terrorism in Oklahoma City – seemed a radical step and his effort failed.”⁴⁶ In interviews after September 11th, Senator Biden has on repeated occasions not been “milquetoast” in his stance saying, the PCA “should be reexamined and has to be amended.”⁴⁷ “But Biden assures that the alterations which Congress might make to the Posse Comitatus Act would not mean radical changes to civil liberties.”⁴⁸ It is very interesting however that despite being very vocal on the issue, and having once introduced legislation to amend the PCA, and believing that “some lawmakers are likely to be more receptive to repealing the 1878 act now than they were before September 11,”⁴⁹ Senator Biden has no current plans to sponsor any new legislation to amend the PCA.⁵⁰ Additionally, the Senate Judiciary Committee (of which Biden is a member), which would have committee

jurisdiction concerning any changes to the PCA, does not plan any hearings or actions concerning the PCA.⁵¹

Senator Warner, now the Chairman of the Senate Armed Services Committee (SASC) is not only speaking about the PCA, he has been taking action. Speaking of the PCA, Warner stated, “it’s served this nation these 100-plus years. But it seems to me it’s time to re-examine that doctrine . . . we have to bring together every asset of the United States of America, irrespective of where it comes from, military, civilian, and the like.”⁵² Exactly 30 days after the September 11th attacks, Senator Warner sent a letter to the Secretary of Defense inquiring about the PCA:

Since the tragic, unforeseen terrorist attacks on September 11, our nation must reexamine our military doctrine . . . The world has dramatically changed; our way of life has forever changed. Should this law now be changed to enable our military to more fully join other domestic assets in this war against terrorism? . . . In view of recent events and the unique capabilities which the armed forces can bring to emergency situations, I request the Department review this issue and make any recommendations for changes.⁵³

Not satisfied with the DOD response, which will be discussed below, Senator Warner as the SASC Chairman intends to call hearings concerning the PCA as it impacts the military.⁵⁴ This dynamic is interesting in that the SASC is not the committee with jurisdictional responsibility for the PCA.

Within the Department of Defense, there are three players regarding the PCA debate, the National Guard Bureau, the Commander of the United States Northern Command, and the Secretary of Defense.

The National Guard Bureau (NGB) is placed in a unique position in that the PCA does not apply to National Guard members when they are performing duty under state/territory auspices but does apply when federalized. The Chief, NGB published: “The National Guard is willing to take on a greater role in performing the Homeland Security mission, however it is more important than ever that it maintain its . . . mission capability.”⁵⁵ The National Guard is comfortable with the PCA when its members are under Governors’ control, but understands that DOD has concerns over the disparity when different Governors perform a military role in homeland security. The NGB does not however intend to take on the political hot potato of proposing any changes to the PCA.⁵⁶

The first Commanding General of the recently activated NORTHCOM, General Ralph Eberhardt vacillates, as he has given statements in favor of and against changing the PCA. The official position of General Eberhardt to the question, “Do you believe changes to the Posse Comitatus law are necessary to enhance NORTHCOM’s mission accomplishment? [Is:] No. USNORTHCOM’s mission of military support to civil authorities does not require any changes in the law.”⁵⁷ On the other hand he also said, “we should always be reviewing things like Posse Comitatus and other laws if we think it ties our hands in protecting the American people,”⁵⁸ and “It would be foolish to say there’s never going to be a change to Posse Comitatus, because . . . times change.”⁵⁹ It is also interesting to note that NORTHCOM recently added a fact sheet explaining the PCA to its website.⁶⁰

The official position of DOD regarding changing the PCA is not diluted. It became very clear at a press conference held recently after the Members of Congress cited previously tested the waters on the public’s reaction to changing the PCA. Secretary of Defense Rumsfeld’s comments were, “I have not seen any reason why I would propose changes in posse comitatus

and the role of the U.S. military in domestic law-enforcement type activities . . . I don't think anyone should hold their breath waiting for changes in posse comitatus . . . I have made no recommendations for changes.” Standing at Rumsfeld's side during the conference and posed a similar question, General Richard Myers, Chairman of the Joint Chiefs of Staff replied, “it's not clear to me that there's any need to change posse comitatus.”⁶¹

In response to Senator Warner's letter mentioned earlier, DOD replied that “the Department of Defense has historically been reluctant to accept law enforcement missions . . . Nevertheless, we will review the Posse Comitatus Act and existing authorities to determine if there are any changes that would enhance our domestic security.”⁶² DOD's response was disingenuous as seventeen months later DOD still has not provided a follow-up reply with any proposed changes and has no plans to.⁶³ The DOD does not want any changes that will further ease the PCA for the reasons previously cited. Perhaps Senator Warner's proposed SASC hearings on the PCA will force an end to DOD's reluctance to change?

Aside from the executive branch, Congress, and DOD, how are the external influences reacting? Those involved include the National Governors Association, civil liberties groups, the media, and the general public.

The National Governors Association is not in favor of changing the PCA, but as the phrase goes, “they want their cake and to eat it too”:

[The] Governors believe that whatever is needed for security and protecting lives must be accomplished . . . the federal government should reimburse states for this protection since it is originally its responsibility . . . Furthermore, Governors believe that when the National Guard is performing missions to secure the nation's critical infrastructure, they should be

used in Title 32 USC status rather than Title 10 status . . . Title 32 status avoids any posse comitatus issues.⁶⁴

In other words, the Governors want to keep the use of their National Guard Forces only within their states/territories, not relinquish control of their forces, and have the federal government pay for their use while realizing that National Guard troops under a Governor's control only benefit the citizens of the Governor's state.

Recoiling at the notion of U.S. armed forces enforcing civilian laws, civil liberties groups are adamantly opposed to amending the PCA. Believing that any "revisions in the act to permit more open cooperation between civilian and military authorities . . . would be a mistake."⁶⁵

These groups keep careful watch and are ready to mobilize to fight any further easement of PCA restrictions. Their stance is "In short, Posse Comitatus provides a barrier against the pell-well deployment of troops by the President against the American people. It may be one of the most common-sense-laden pieces of legislation ever to come out of Washington."⁶⁶

Civil liberties groups are united in the belief that any modifications of the PCA serve to denigrate freedom and create potential for abuse. The American Civil Liberties Union (ACLU) for example believes, "the military must not be turned against the American people . . . But time and again, Congress authorizes just that by expanding the military's role in domestic law enforcement."⁶⁷ Another group, the Free Congress Foundation, alters a recent scenario that reminds us of why the PCA was first enacted: "a modification of Posse Comitatus makes Americans practically no safer, it would open the door to old abuses. Had the Biden initiative to repeal the Posse Comitatus Act passed in 1995, Bill Clinton would have been free to deploy troops to Florida to ensure the validity of the presidential recount."⁶⁸

The media has also had a voice in the debate. Print, television and Internet sites are getting their opinions on the issue heard. Here is a sampling. An assistant editor of the *Wall Street Journal* believes that the PCA makes it harder to fight terror and asks, “Why cordon off a zone, the United States, where these fighters (terrorists) are safe from the U.S. military?”⁶⁹ A contributing editor for the *National Review* takes an opposite view stating, “Employing the U.S. military as a domestic police force is a recipe for disaster . . . we should not be blurring further the distinction between military activities and domestic law enforcement.”⁷⁰ *Talk Left*, an organization devoted to liberal coverage of crime-related political news states, “We don’t think the law should be weakened any further.”⁷¹ Even television series are getting in on the issue. The May 2002 season finale of the popular show *The West Wing*, was entitled “Posse Comitatus.” Finally, in today’s information age, a search of the Internet concerning a particular topic is a must. The number of “hits” may be an indicator of how prevalent a topic is. A recent check of the term “Posse Comitatus Act” revealed its popularity with a result of about 11,000 hits.

The unknown stand on the PCA debate however is the general public. When members of Congress floated the idea of amending the PCA the general public failed to respond. Was it apathy? Could it be the general public doesn’t even understand what the PCA is and what it restricts? Perhaps it doesn’t understand the nuances of utilizing the National Guard or deploying the U.S. military domestically? There has been no strong and organized public pressure on the government to act, no rallies, no marches, and no sensational media coverage, so the general public remains silent on the issue.

A Soldier's Proposal

Is there a way to bring the two sides together on this issue? I offer a four part conciliatory solution.

The first action would be to scrap all current PCA legislation. Start over by rescinding the current PCA and all of its circumventions. In its place create new legislation that retains the fundamental principles of the original PCA. Ensure the new PCA applies specifically to all of the Armed Forces (not just the Army and Air Force). Lastly, the new legislation should add clearly delineated guidelines on permissible acts. Doing so will eliminate confusion and ambiguities.

Second, stop any further circumventions of the PCA. There is not a need to expand the military's role in enforcing civilian laws. Those looking for solutions should stop looking to the DOD as an unending cornucopia of assistance. Although the current PCA (and a proposed rewrite) do not preclude the use of the military, we have gone far enough. There is a definite need to maintain a separation of the military and civilian spheres of control. However, adding any further exemptions exacerbates problems for the military and further alienates many U.S. citizens.

Third, the Departments of Defense and Homeland Security should work together to determine ways to limit and reduce the use of the Armed Forces in supporting civilian authorities. As the Department of Homeland Security (DHS) was recently created and still determining its roles and missions, the time is ripe to pass certain military missions in support of civilian authorities to the DHS. Routine tasks that could be handled by non-DOD federal agencies should be taken away from the DOD. The goal should be to rely on the DOD only during true National Emergencies on an as-needed basis. This may involve creating new non-

military civilian federal agencies to assume missions or in some cases expanding current roles. For instance, why not expand the Drug Enforcement Agency to assume the DOD Counter-Narcotics missions? Additionally, the Departments of Defense and Homeland Security must deconflict mission requirements to ensure they are not working against each other. For example, many members of Reserve and National Guard units are also on the front lines of defending their local communities. Does it make sense to activate a Reserve Military Police unit made up primarily of civilian first responders?

Lastly, the Department of Defense should develop easily understood guidelines for its implementation of the PCA. These guidelines should be taught to members of the Armed Forces periodically throughout their careers. Commanders with a clear understanding of what is permissible under the PCA will eliminate both misunderstandings regarding the PCA and the need to confer with a platoon of lawyers every time the military is tasked to provide support to civilian authorities.

Future of the Posse Comitatus Act?

The Posse Comitatus Act was born from controversy and remains controversial today. Born from the desire to separate the military from civilian law enforcement, it is interesting that no one has ever been convicted of violating the PCA. Whenever needed, Congress has enacted numerous statutory exceptions. The result some claim is the PCA is “a hollow shell in place of a law that formerly was a real limitation on the military’s role in civilian law enforcement and security issues . . . It is a low legal hurdle that can easily be cleared.”⁷²

The demand to find solutions to the terrorism problem, viewed through the prism of the attacks of September 11th, leads some to propose changing the PCA. Opponents are lining up on opposite sides of the issue, but even those in agreement on a particular stance are not working

together to achieve a common goal. Dissenting voices are barely being heard, but perhaps that is because those who desire to amend the PCA have not been forceful in pursuing change. Will opponents reach a compromise? Therein lies the question, in light of the recently activated Department of Homeland Security and NORTHCOM, will the Posse Comitatus Act be repealed or amended? The debate continues.

Notes

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- ² Black's Law Dictionary (Saint Paul: West, 1990), 1162.
- ³ Diane Alden, "American Crazy Quilt: Posse Comitatus," Spintech, 12 October 2000, <<http://www.spintechmag.com/0010/da1000.htm>> (24 October 2002).
- ⁴ The Constitution of the United States, Article 1, Section 8.
- ⁵ Stephen Dycus et al., National Security Law (New York: Aspen Law & Business, 2002), 764.
- ⁶ U.S. Army, Field Manual 3-07, "Stability and Support Operations", 20 February 2003, 6-7, paragraph 6-28.
- ⁷ Alden.
- ⁸ Stephen Young, "The Posse Comitatus Act: A Resource Guide," 17 February 2003, <<http://www.llrx.com/features/posse.htm>> (21 March 2003).
- ⁹ 20 Stat. L., 145, Sec.15.
- ¹⁰ The Posse Comitatus Act, 18 U.S. Code, Section 1385 (1997).
- ¹¹ 32 C.F.R. Sec 213.2, 1992.
- ¹² U.S. Department of Defense, Directive Number 5525.5, Subject: DoD Cooperation with Civilian Law Enforcement Officials, 15 January 1986, 21, paragraph E4.3.
- ¹³ Major Craig T. Trebilcock, "Posse Comitatus – Has the Posse outlived its purpose?," <<http://www.csis.org/homeland/reports/trebilcock.pdf>> (11 April 2003).
- ¹⁴ Trebilcock, 3.
- ¹⁵ Insurrections, 10 U.S. Code, Section 332.
- ¹⁶ Colonel Nolon J. Benson, Jr., "The Posse Comitatus Act: Is There A Need For Change?," U.S. Army War College Strategy Research Project, May 1998, 8.
- ¹⁷ Benson, 8.
- ¹⁸ Benson, 9.
- ¹⁹ John R. Brinkerhoff, "The Posse Comitatus Act and Homeland Security", Journal of Homeland Security, February 2002, <<http://www.homelandsecurity.org/journal/articles/displayArticle.asp?article=30>> (16 December 2002), 9.

²⁰ Benson, 4.

²¹ Major David W. Chase, “Posse Comitatus: A Nineteenth Century Law Worthy of Review For the Future?”, School of Advanced Military Studies, United States Army Command and General Staff College, May 2001, 22.

²² Benson, 37.

²³ U.S. Department of Defense, Directive Number 5525.5, Subject: DoD Cooperation with Civilian Law Enforcement Officials, 15 January 1986, paragraph E4.1.2.1.

²⁴ U.S. Department of Defense, Joint Publication 1, Joint Warfare of the Armed Forces of the United States, 14 November 2000, introduction.

²⁵ U.S. Department of Defense, Joint Publication 1, Joint Warfare of the Armed Forces of the United States, 14 November 2000, VI-3.

²⁶ U.S. Army, Field Manual 3-07, “Stability and Support Operations”, 20 February 2003, 6-19 and B-3.

²⁷ U.S. Department of Defense, Joint Publication 3-07.4, Joint Counterdrug Operations, 17 February 1998, I-4.

²⁸ U.S. Army, Field Manual 3-07, “Stability and Support Operations”, 20 February 2003, B-3.

²⁹ Benson, 8.

³⁰ Jeffrey H. Norwitz, “Combating Terrorism: With a Helmet or a Badge?”, Journal of Homeland Security, August 2002, <<http://www.homelandsecurity.org/journal/articles/displayArticle.asp?article=72>> (16 December 2002), 13.

³¹ Dycus, 778.

³² Chase, 42.

³³ “The Posse Comitatus Act: A Principle In Need of Renewal”, Washington University Law Quarterly 75 (Summer 1997), 7.

³⁴ Washington University Law Quarterly, 8.

³⁵ Washington University Law Quarterly, 8.

³⁶ Benson, 19.

³⁷ Carol Lin and Patty Davis, “Should Posse Comitatus Laws Be Changed?”, CNN Sunday, 21 July 2002, Transcript #072105CN.V36.

³⁸ Joyce Howard Price, “Biden backs letting soldiers arrest civilians; But Ridge says it’s unlikely,” The Washington Times, 22 July 2002, A01.

³⁹ Price.

⁴⁰ Bush, 48.

⁴¹ Price.

⁴² Lin and Davis.

⁴³ Price.

⁴⁴ Price.

⁴⁵ Price.

⁴⁶ C.T. Rossi, “Modifying Posse Comitatus Puts Americans in Danger”, Insight on the News, 2 September 2002, 45.

⁴⁷ Price.

⁴⁸ Rossi.

⁴⁹ Price.

⁵⁰ Brian McKeon, Chief Counsel, Senate Foreign Relations Committee, interview by Gerald Manley, 9 April 2003.

⁵¹ Bill Castle, Senate Judiciary Committee staff member, interview by Gerald Manley, 17 December 2002.

⁵² Victoria Clarke, “The Home Front”, The American Prospect, 1 July 2002, 4.

⁵³ John Warner, letter to Secretary of Defense Donald Rumsfeld, 11 October 2001.

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⁵⁵ Lieutenant General Russell C. Davis, FY 2003 National Guard Posture Statement.

⁵⁶ Lieutenant Colonel John Gereski, Deputy Staff Judge Advocate, National Guard Bureau, interview by Gerald Manley, 16 December 2002.

⁵⁷ General Ralph E. Eberhardt, Responses to Senate Armed Services Committee, information provided by U.S. Northern Command’s Legislative Liaison.

⁵⁸ Price.

⁵⁹ William B. Scott, "Northern Command Adds Teeth To Homeland Defense", Aviation Week & Space Technology, No.15, 7 October 20002, 29.

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⁶¹ Donald Rumsfeld and General Richard Myers, Department of Defense Briefing, 22 July 2002.

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⁶³ Colonel Fred Pribble, Senior Attorney, Office of the Secretary of Defense (Legislative Affairs), interview by Gerald Manley, 10 January 2003 and 11 April 2003.

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⁶⁵ Alan Bock, "Bending Posse Comitatus Brings Bad Results," Antiwar.com, 22 October 2002,
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⁶⁶ Rossi.

⁶⁷ "Congress Moves to Expand Military Involvement in Law Enforcement", American Civil Liberties Union, 14 September 1999, <<http://www.aclu.org/news/NewsPrint.cfm?ID=8683&c=24>> (13 December 2002).

⁶⁸ C. T. Rossi, "The Posse Comitatus Act: Can we maintain American freedom without it?", Free Congress Foundation, 29 July 2002, <<http://www.enterstageright.com/archive/articles/0802/0802posse.htm>> (7 January 2003).

⁶⁹ Brendan Minitzer, "The Posse Comitatus Problem", The Wall Street Journal Opinion Journal, 12 August 2002,
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⁷⁰ Mackubin Thomas Owens, "Soldiers Aren't Cops", National Review Online, 1 August 2002
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⁷¹ "Don't Change the Posse Comitatus Act", Talk Left, 22 July 2002
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