

CRS Report for Congress

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Terrorism: Some Legal Restrictions on Military Assistance to Domestic Authorities Following a Terrorist Attack

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Summary

The Constitution empowers to the President to act as Commander in Chief of the armed forces and to see to the execution of federal law; it gives Congress the authority to make federal law including laws for the regulation of the armed forces. The Posse Comitatus Act prohibits use of the armed forces to perform civilian governmental tasks unless explicitly authorized to do so. There are statutory exceptions to ensure continued enforcement of state and federal law, to provide disaster assistance, and to provide technical support for law enforcement. There are constitutional impediments to the use of the military to nationalize an industry, to try civilians, and to compel state officials to perform federally-imposed duties. Unlawful use of the armed forces might result in criminal or civil liability and frustrate prosecution of terrorists. For a more complete discussion, see CRS Report 95-964, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*.

The President is Commander in Chief of the armed forces of the United States and is constitutionally charged to take care that the laws of the United States are faithfully executed, *U.S.Const.* Art.II, §§2, 3. Congress is the repository of federal legislative authority and is charged with the responsibility to make rules and regulations for the governance of the armed forces of the United States, *U.S.Const.* Art.I, §8, cl.14. Authority not constitutionally vested in the national government, here or elsewhere, is reserved to the states and the people, *U.S.Const.* Amends. X, IX.

Congress, through the Posse Comitatus Act (PCA) has forbidden use of the armed forces to perform the tasks of civilian government in this country except where expressly permitted by statute or the Constitution, 18 U.S.C. 1385. The President has explicit statutory authority to:

- use military personnel to suppress insurrection or to overcome obstructions to or interference with the enforcement of federal or state law, 10 U.S.C. 331 to 333

- grant the request of a state governor to use military resources to perform emergency work for 10 days following a major disaster (with 75% of the cost to be borne by the federal government), 42 U.S.C. 5170b.

The Secretary of Defense has explicit statutory authority to permit assistance to state and local law enforcement (on a reimbursable basis, 10 U.S.C. 377, without adversely affecting military preparedness, 10 U.S.C. 376, and without using personnel to conduct searches or arrests, 10 U.S.C. 375) in the form of:

- sharing intelligence gathered in military operations, 10 U.S.C. 371
- supplying military equipment and facilities, 10 U.S.C. 372
- providing training and advising on the use and maintenance of equipment, 10 U.S.C. 373
- maintaining and operating equipment, 10 U.S.C. 374.

The questions of the President's authority to act in the absence of an explicit statutory exception remain unresolved. The PCA aside, it appears that the President may not use the military to:

- seize an industry critical to national security even in a national emergency when Congress has declined to empower him to do so, *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952)
- subject civilians to military tribunals for criminal prosecution while civilian courts remain available, *Reid v. Covert*, 354 U.S. 1 (1957); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)
- compel state officials to execute federal authority, *Printz v. United States*, 521 U.S. 898 (1997).

Restrictions on use of the National Guard (until federalized) are a matter of state law which varies from jurisdiction to jurisdiction.

Performance in excess of authority might result in criminal and/or civil liability for responsible officials, 18 U.S.C. 1385, *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), *U.S. Const. Art. II, §4*; suppression of evidence, *cf.*, *United States v. Walden*, 490 F.2d 372 (4th Cir. 1974); dismissed criminal charges and/or reversed convictions, *United States v. Banks*, 383 F.Supp. 368 (D.S.D. 1974); *United States v. Jaramillo*, 380 F.Supp. 1375 (D.Neb. 1974).