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THE MILITARY, DOMESTIC LAW ENFORCEMENT, AND POSSE COMITATUS: A TIME FOR CHANGE

by

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Preface

This research paper explores military involvement in the anti-drug effort. Its primary focus is on the restrictions on direct military involvement imposed by the 1878 Posse Comitatus Act and the need to amend the Act to further enable military forces to combat the national security threat of illegal drug trafficking. Military involvement in domestic affairs, especially in drug interdiction efforts, is here to stay. This research paper discusses the advantages and disadvantages of this involvement and recommends changes to the Act to legitimize military involvement in the anti-drug effort.

I would like to express my sincere appreciation for the efforts of the professional staff of librarians and bibliographers at the Air University Library. I would especially like to thank Melinda Mosley and Diana Simpson for their extra assistance with collecting research materials. My appreciation also extends to Mr. Michael J. Speedling, HQ AFOSI/XOK, for providing vital crime data and information on Department of Defense and Department of Justice Memorandum of Agreements. And finally, I want to thank my faculty advisor, Major Friend Walker. His thoughtful assistance, support, and understanding were instrumental in completing this research project.

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Abstract

In 1981 the U. S. military began assuming a greater role in the war on drugs, on both the domestic and international fronts. Since that time, the supporting role has dramatically increased and active military involvement along American borders is now commonplace. The Posse Comitatus Act of 1878 (PCA) has served as the primary statutory guard against the use of the U.S. military in domestic law enforcement. With this increased military participation in a number of domestic incidents, questions concerning whether these actions violate the Act or require changes to it continue to challenge policymakers. This paper addresses these questions by examining the historical background of the PCA and traces the expansion of the military role through its participation in the drug war. Military technology has frequently outpaced civilian technology development, consequently, poorly funded and equipped local, state, and federal law enforcement agencies look to the military for assistance in deploying these technological improvements in the fight against drugs. The current National Security Strategy identifies drug trafficking as a transnational threat vital to American interests and goes on to link it to other threats involving international organized crime and terrorism. The support in the drug war will also be compared to the military's role in domestic hurricane relief and civil disturbance operations. This routine and recurring support has evolved into a constant military presence in domestic law enforcement that requires an immediate examination of and changes to the PCA.

Part 1

Introduction

In 1878, Congress passed the PCA in response to the large military presence in the southern states during the Reconstruction Era.[1] The intent of the ACT was clear and remains today as the primary statutory guardian against the use of the military in domestic law enforcement. As passed it stated:

> *Title 18, US Code, Section 1385: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army of 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."*[2]

The purpose of this paper is to examine the PCA to determine if a change is warranted as a result of the tremendous influx of military assistance in federal, state, and local law enforcement operations. Poorly funded local and state law enforcement agencies have become dependent on US military support for training, equipment, and often times, personnel. The framers of the Constitution feared a large standing army due to their oppressive experiences with the British military's often ruthless law enforcement practices. Likewise, the Congress that passed the PCA recognized the abuses of the federal troops during Reconstruction and sought to prevent further intrusion into domestic issues by the military. However, since 1981, the presence of the military has incrementally grown to staggering numbers and proportions. For instance, since its inception in 1989, Joint Task Force 6 (JTF-6) has conducted more than 4,300 missions and supported more

than 300 federal, state, and local law enforcement agencies and counterdrug task forces along the United States and Mexican border.[3]

The paper will begin the discussion for changes to the PCA by examining its historical background. Building upon this brief historical review, the paper will then focus on relevant judicial interpretations and decisions regarding challenges to the Act. The background section will end with a short discussion on the relevant congressional and presidential exceptions that have slowly permitted the expansion of the military into the domestic law enforcement realm.

With the historical perspective setting the stage for the modern application of the PCA, the next section of the paper will focus on the growth of the military involvement in the drug war beginning in 1981. Specifically, the roles the Bush and Clinton Administrations played in expanding military involvement in the drug war, and how the Department of Defense implemented those changes. The discussion will highlight the incorporation of drug trafficking into the National Security Strategy and National Military Strategy and the formal role given to the military as a result of identifying it as a threat to national interests. Key to this discussion will be the wealth of technology, expertise, and leadership the military has to offer law enforcement agencies. The military drug war operation will then be compared to its role in the Hurricane Andrew Relief operation and the Los Angeles Riot operation following the Rodney King verdict. This comparison will illuminate the differences between domestic emergencies that overwhelm local and state law enforcement capabilities and the long term, ongoing prosecution of the drug war.

The next section of the paper will identify recommendations for changes to the PCA that will legitimize the military involvement in the drug war. The positive and negative implications of these recommendations will be debated and analyzed with respect to public support and opinion. And finally, the conclusion will succinctly summarize the necessity for changing the

PCA to formalize the military role in the drug war and offer some insight into further research opportunities on military training and doctrine implications of this formal mission.

Notes

[1] Thevenot, Chad. *The Militarization of the Anti-Drug Effort*,1997; on-line, Internet, available from http//www.ndsn.org/JULY/MILITARY.html,July 1997

[2] Diehl, James G. *The Cop and the Soldier: An Entangling Alliance? The Posse Comitatus Act and the National Security Strategy of Engagement and Enlargement,* (Army War College: Carlisle Barracks, PA, 1997), vi

[3] Joint Task Force Six, *History*, on line Internet, available from http://www-jtf6.bliss.army.mil/html/history/history.mil. 1.

Part 2

Background

Although the use of federal troops in the southern states during Reconstruction and their subsequent involvement in the presidential election of 1876 led to the passage of the PCA, its foundation goes back to pre-Revolutionary times.[1] Americans have long feared a large standing army and military intervention into domestic affairs. This fear was a direct result of the abuses of the British Army in colonial times. "The Declaration of Independence decries King George III's use of armies to compleat works of death, desolation, and tyranny…totally unworthy…of a civilized nation."[2] The architects of the Declaration of Independence designed the document to prevent a large standing army, maintain civilian control of the military, and allow states to establish militias to offset the military. These provisions clearly illustrate the framers' intent to prevent federal military involvement in domestic affairs. However, as history has vividly demonstrated, the intent was not always what was practiced.

Prior to the passage of the Act, "the army participated in more than 70 domestic disturbances, labor disputes, draft riots, racial disorders, and natural disasters."[3] However, the Civil War and the disruption it caused to the nation provided the final abuses that paved the way for congressional action to limit domestic military intrusion. Realistically, the Civil War can be viewed as the largest domestic disturbance in the nation's history. Federal troops were used to patrol and guard polling places during the presidential election of 1876. Charges of voter fraud, inaccurate vote tabulations, and federal military presence at polling stations threatened the

essence of democracy. The results of the election produced a victory for the Republican Candidate by one electoral vote and a Democrat controlled House of Representatives.[4] The perception of military abuses led Congress to pass the Act in 1878.

Over the years, several judicial decisions and congressional actions have slowly eroded the Act's original intention. Perhaps the hallmark incident in modern times and resulting judicial decisions began as a result of the 71-day occupation at Wounded Knee, South Dakota, from February to May 1973.[5] During this period, armed members of the American Indian Movement seized the village of Wounded Knee. Military assistance in the form of supplies, equipment, and advice were provided to the federal law enforcement officials during the ordeal. In the first of several cases, *Bissonette v. Haig*, residents of the Pine Ridge Indian Reservation sought damages against the military for unlawful search and confinement.[6] The court's opinion was contrary to the plaintiffs' allegations and the military's participation was found to be within the limits of the law. Following *Bissonette*, in *United States v. Red Feather*, the court focused on the direct involvement of the military in law enforcement activities.[7] The court distinguished between active (search and seizure) and passive (presence or logistics support) roles and opined that the military involvement was legitimate. The court opined in a similar fashion with respect to the execute portion of the Act in *United States v. McArthur*.[8] It required the standard to be that the military forces must subject citizens to compulsory military authority. *In United States v. Jarimillo,* the court upheld that the use of military supplies and equipment did not constitute a violation of the Act.[9] The cases that arose from the Wounded Knee incident helped to define the scope of the Act; however, the Act has been tested on several other occasions.

Three other prominent cases further defined the limits of the PCA. *In Chandler v. United States*, the court held that military law enforcement actions outside the United States were not subject to the Act.[10] The court based their decision on the fact that the subject had been arrested

in occupied enemy territory under military control during WWII. This was very significant because this case set the precedent that the Act was not valid outside of the United States. In *United States v. Yunis*, the court identified three tests which have routinely used to determine if military actions have violated the PCA.[11] The first of these three tests determines whether or not the military was actively used to enforce civilian laws. Active participation in search and seizure operations would be excluded under this test, while an advisory role would be permissible. The second test looks at the nature of the operation and the role the military played. Questions about the military as the lead agency and were other involved agencies' actions secondary to the military role would be answered to meet the standard of the second test. Clearly, a pervasive role of the military would exceed the limits of this test. The final test examines whether or not the military action was proscriptive or compulsory in nature. Proscriptive or compulsory military actions could involve subjugating an individual to military authority by denying his freedom of movement or restricting his actions. The court determined those actions were not protected by the Act. This case and subsequent tests were used in defense of General Manuel Noriega as result of his arrest during the military operation in Panama. However, due to the fact his arrest was outside of the United States, the possible violations of the Act were not considered. Additionally, in *United States v. Hartley*, the court held that military police inspectors could investigate independently and in conjunction with other federal investigative agencies activities designed to defraud the federal government.[12] Taken collectively, these cases highlight the significant issues contested under the Act. It should also be mentioned that although the Act is criminal in nature, there has never been a single criminal prosecution under the Act.[13] With the judicial interpretation of the Act firmly established, an examination of congressional exceptions and exemptions is now warranted.

When the Act was passed in 1878 it exempted the Navy and Coast Guard from its provisions. The Department of Defense has since rectified this oversight and made the Act applicable to the Navy. However, the Coast Guard has a codified maritime law enforcement mission that extends to United States ports and port facilities, therefore, this Department of Transportation service remains exempted from the Act. Several other key congressional exemptions are examined next.

The gradual buildup to fight the emerging drug problem in the early 1980's gave rise to the first piece of major legislation aimed at reducing PCA limitations and thereby expanding military involvement in domestic affairs. In 1982, the Defense Authorization Act ushered in several new changes to the Act. It codified these changes in Title 10, United States Code, Sections 371-382.[14] These sweeping changes can be summarized as follows. The Department of Defense could share equipment and facilities, train civilian law enforcement personnel on specialty equipment, maintain and operate surveillance, reconnaissance, and communications equipment along air, sea, and surface areas.[15] This provision also provided for the continued monitoring to 25 miles inside United States borders if the monitoring began outside. The military could share information with civilian law enforcement officials, but the prohibition still remained for active searches, seizures, and arrests by military personnel within the United States.[16] However, the military retained the right to detain civilians in order to turn them over to the appropriate civilian law enforcement agency. Another major exception to the Act was a collaborative action between the Department of Defense and Department of Justice in 1985. The Criminal Investigations Policy Memorandum Number 5, more commonly known as "Memo 5", permitted military criminal investigative organizations to investigate civilians suspected of drug crimes on military installations or involved with military members[17]. Memo 5 specifically authorized military investigators to investigate and collect evidence against civilians suspected of drug related

crimes on and off military installations as long as there was a military connection. When coupled with the authority granted military investigative organizations as a result of the decision in *United States v. Hartley,* these agencies now possessed tremendous latitude in investigating suspected civilian criminal activity on and of military installations.

Subsequent additional legislation enacted in 1988, 1996, and 1997 added provisions for providing spare parts for loaned equipment, use of federal facilities during chemical or biological emergencies, and tasked the Department of Defense to create a training program for civilian agencies for responses to incidents involving weapons of mass destruction.[18] These incremental changes can be traced to the gradual escalation of the drug war and created an opening for military involvement. The next section of the paper will explore presidential influence in the ever-expanding military role and how the National Security Strategy assures continued military presence in the war on drugs. Key to this discussion will be the Department of Defense response to presidential directives and how the active duty military, National Guard, and Reserve components have applied their vast array of technology, equipment, and personnel in an effort to stem the flow of illegal drugs into the United States.

Notes

[1] Washington Law Quarterly. *The Posse Comitatus Act: A Principle in Need of Renewal,* 1997, on-line Internet, available from http//www.wustl.edu/WULQ/75-2/752-10.html, 1.

[2] Ibid, 2.

[3] [3] Diehl, James G. *The Cop and the Soldier: An Entangling Alliance? The Posse Comitatus Act and the National Security Strategy of Engagement and Enlargement,* (Army War College: Carlisle Barracks, PA, 1997), 1-10.

[4] Washington Law Quarterly. *The Posse Comitatus Act: A Principle in Need of Renewal,* 1997, on-line Internet, available from http//www.wustl.edu/WULQ/75-2/752-10.html, 3.

[5] Gallavan, Christopher G. *Fast Guns and the Posse Comitatus Act,* (Army War College: Carlisle Barracks, PA, 1998), 13.

[6] Ibid.

[7] Ibid.19.

[8] Ibid. 20.

[9] Ibid. 18.

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[10] Ibid. 21

[11] Benson, Nolon J. *The Posse Comitatus Act: Is There a Need for a Change,* (Army War College: Carlisle Barracks, PA 1998) 11.

[12] 18 U.S.C. 1385, 1998, on-line Internet, available from http//www.law.emory.edu/11circuit/sept96/95-8873.opa.html, 3.

[13] Washington Law Quarterly. *The Posse Comitatus Act: A Principle in Need of Renewal,* 1997, on-line Internet, available from http//www.wustl.edu/WULQ/75-2/752-10.html, 3.

[14] Benson, Nolon J. *The Posse Comitatus Act: Is There a Need for a Change,* (Army War College: Carlisle Barracks, PA 1998) 6-9.

[15] Ibid 7.

[16] Ibid 8.

[17] Department of Defense, Inspector General, *Criminal Investigations Policy Memorandum Number 5 -Criminal Drug Investigative Activities,* 17 Dec 11985. 2-3.

[18] Ibid. 7

Part 3

Growth of Military Involvement

During his Administration, President Nixon recognized the emerging drug problem and understood the potential for military intervention. However, his Administration was plagued by too many distractions for him to formulate a coherent strategy to involve the military in the impending drug war. In a similar fashion, President Carter's focus was not military centered and he gave little consideration to involving the military in domestic affairs. All of this changed with the Reagan era. President Reagan ushered in the largest peacetime military buildup in the nation's history. This buildup was predicated upon many considerations, first and foremost was the Cold War. Even so, the trickle effect resulted in the gradual, but steady growth, and early on in the Reagan Administration, the military participation in the drug war began in earnest.

The most widely recognized starting point for the official entry of the military in the drug war began in 1981 with the passage of the Military and Civilian Law Enforcement Statute.[1] With the enactment of this law, the doors opened to permit military assistance in the form of equipment, training, surveillance, intelligence, and use of facilities. The Pentagon reacted cautiously and wearily approached this new mission. The Secretary of Defense, Caspar Weinberger, did not favor military involvement in domestic affairs and stated quite simply, "reliance on military forces to accomplish civilian tasks is detrimental to both military readiness and the democratic process".[2] The words Secretary Weinberger said then form the foundation of the crux of the argument to restrict military involvement in domestic issues, especially the drug

war today. However, his words had little effect as the gradual involvement had begun. By the mid 1980's, the Department of Defense had provided support and assistance to nearly 10,000 requests by civilian law enforcement agencies.[3]

The strategy in the early 1980's was similar to the strategy today. The military involvement was designed to identify potential smugglers outside of the United States' borders and relay this information to appropriate civilian law enforcement agency. Vice President Bush used this strategy when he authorized Navy and Air Force patrolling of the Caribbean, Gulf of Mexico, and associated coastlines in 1983.[4] Throughout the remainder of President Reagan's Administration, the military began in earnest efforts to interdict the flow of illegal drugs into the United States. Several key surveillance sites were established in South America with the full cooperation of the host countries. Active duty forces initially operated these sites, but by the late 1980's, Air National Guard forces were routinely working alongside their active duty counterparts.

With the election of President Bush came a renewed emphasis on military support in the national fight against drugs. Dr. William Bennett was named the new "drug czar" and President Bush " ordered a more vigorous military anti-drug involvement".[5] By 1989 Congress had more than doubled the Defense Department's anti-drug budget to $438 million.[6] Further Congressional action identified the Department of Defense as:

> *" the lead federal agency for anti-drug intelligence; integrated U.S. command, control, communications, and intelligence (C3I) systems; provided an improved interdiction role for the National Guard; directed the forces to conduct training in known drug-trafficking areas in the U.S.; and expanded military authority to assist foreign police military in anti-drug operations".*[7]

However, the most significant military involvement occurred later in 1989 with the establishment of JTF-6. Headquartered in Fort Bliss, Texas, JTF-6's mission was to coordinate joint military and civilian law enforcement anti-drug operations along the United States and

Mexico border. A JTF-6 spokesperson stated, "We are the eyes and ears of the Border Patrol".[8] Since its inception, JTF-6 has grown into a unit with approximately 700 soldiers and numerous other military forces supporting their ongoing operations in a temporary duty assignment role. For example, the unit had conducted nearly 550 law enforcement missions involving several thousand personnel by the end of 1997.[9] Additional JTF-6 activities will be discussed later in the paper.

One of the more public political maneuvers to further involve the military in the drug crisis was President Clinton's decision to hire the former Commander in Chief, Southern Command, General Barry McCaffrey as the drug czar and head of the Office of National Drug Control Policy (ONDCP).[10] The Clinton Administration also shifted the focus of the national drug effort away from the interdiction in transit role to one of strengthening our borders and providing assistance to source countries to combat the production of illegal drugs. Imbedded in this new philosophy was an increased intelligence effort aimed at uncovering production and transportation pipelines. Efforts along the United States and Mexico border rose to new levels as anti-smuggling operations increased. An interesting side effect was the increased detection of illegal immigrants attempting to enter the United States.

Identifying the growth in the Department of Defense's drug war funding since 1981 can neatly summarize the scope of the military drug intervention effort. The Department's budget increased 2850% during that period and in 1995, more than 8,000 military personnel participated in 754 domestic anti-drug missions.[11] Additionally, it has also been reported that the National Guard has more personnel on counter-narcotics missions than the Drug Enforcement Agency has special agents on duty. According to this report, the National Guard is involved in approximately 1,300 counter-drug missions annually with nearly 4,000 supporting troops.[12] To some, these figures might seem staggering, but as General McCaffrey forcefully stated to the

Senate Committee on Foreign Relation in 1997; "…if unchecked, America's drug abuse problem will kill 140,000 Americans and cost our society $700 billion over the coming decade".[13] General McCaffrey argues that the military is the best option for no other reason than the military possesses the training, equipment, advanced technology, and command and control structure that surpasses any civilian law enforcement agency. Whether it is AWACS support or the latest generation of hand-held thermal imager, the military is infinitely better equipped to provide detection, surveillance, reconnaissance, and targeting capabilities than other state or federal agencies. The military is typically on the cutting edge of emerging technologies and these technologies can often times be easily adapted to the drug war environment. Non-lethal technologies are moving into the forefront of military research and have suitable applications in the civilian law enforcement arena as well. The potential benefit of these technologies is vast. However, funding constraints will in all likelihood prevent civilian application in the near term. More often than not, civilian law enforcement requests for assistance center on equipment loans. Regardless of the type of military support provided, one might question why it appears to be commonplace today. You need only to look at the National Security Strategy and National Military Strategy to find the answer.

The December 1999 National Security Strategy identifies drug trafficking as a transnational threat that requires international cooperation to bring under control and eventually eliminate. Specifically, it identifies drug trafficking as a threat to U.S. interests, values, and its citizens.[14] In that context, it could be categorized as vital interest because the drug trafficking problem threatens the welfare of so many of our citizens. It could also be categorized as a humanitarian or other interest because drug trafficking violates the rule of law and democratic values. These are important distinctions because if a vital American interest is threatened, the U.S. reserves the right to address it unilaterally and by military force, if necessary.[15] The National Security

Strategy goes on to further identify the goal of the national drug control strategy. The stated goal is: "to cut illegal drug use and availability in the United States by 50 percent by 2007 - and reduce the health and social consequences of drug use and trafficking by 25 percent over the same period'.[16] This strategy stresses intelligence collection and interdiction efforts as key to achieving our stated goals. The 1997 National Military Strategy echoes the themes established by the National Security Strategy.

The National Military Strategy identifies international drug trafficking and the associated cartels as asymmetric challenges and transnational dangers; "challenges that transcend national borders and threaten our national interests".[17] The military support for anti-drug operations is identified under the overarching umbrella of responding to the full spectrum of crises and specifically, as responding to multiple, concurrent smaller-scale contingency operations.[18] "Unique military capabilities can also support domestic authorities in combating direct and indirect threats to the US homeland, such as the illegal drug trade, especially when the potential for violence exceeds the capability of domestic agencies".[19] The continued military presence is virtually assured by its incorporation into these two guiding national level strategies. And in all likelihood, military influence will expand even further as our national level strategy takes gradual, incremental steps to continue to capitalize on unique military capabilities. If the military presence is indeed here to stay, what if any comparisons can be made with the military's drug war role and its limited roles in other domestic crises? The next section of the paper will address this issue by examining the 1992 Hurricane Andrew response and the 1992 Los Angeles riot response by military forces.

Notes

[1] Thevenot, Chad. *The Militarization of the Anti-Drug Effort*,1997; on-line, Internet, available from http//www.ndsn.org/JULY/MILITARY.html,July 1997

Notes

[2] Ibid

[3] Benson, Nolon J. *The Posse Comitatus Act: Is There a Need for a Change,* (Army War College: Carlisle Barracks, PA 1998) 8.

[4] Ibid 1.

[5] Ibid.1.

[6] Ibid. 2.

[7] Ibid. 2.

[8] Ibid. 2.

[9] Ibid. 2.

[10] Ibid. 2.

[11] Ibid. 3.

[12] Drug War Facts. *Military Participation in the Drug War,*1997, on-line, Internet, available from http://www.csdp.org/factbook/military.htm

[13] Allen, Charles B. *Tightening America's Borders: An Increased Drug Interdiction Role for the U.S. Military,* (Army War College: Carlisle Barracks, PA 1998) 3.

[14] The White House. *A National Security Strategy for a New Century,* (Washington, D.C., 1999) 2.

[15] Ibid. 1.

[16] Ibid. 15.

[17] Chairman of the Joint Chiefs of Staff, *National Military Strategy of the United States of America,* (Washington D.C., 1997) 9.

[18] Ibid. 16.

[19] Ibid. 17.

Part 4

Responses to Domestic Crises

Hurricane Andrew devastated southern Florida in August of 1992. Its aftermath left behind a path of destruction and despair that crippled Dade County, Florida. The affected area was declared an official state of emergency and federal aid and relief began almost immediately. Under the provisions in the Robert T. Stafford Disaster Relief Act of 1984, "active-duty soldiers can be employed to respond to a crisis under the direction of the Federal Emergency Management Agency".[1] Due to the overwhelming humanitarian crisis at hand, JTF Andrew was quickly established with brigade-sized elements of the 82d Airborne Division and the 10th Mountain Division providing soldiers.[2] Initial PCA considerations took a back seat to the immediate task of restoring a sense of normalcy throughout the county. However, it was not long before questions concerning the legitimacy of the soldiers' presence arose. Taken at face value, the soldiers represented the government and therefore, they were in fact enforcing civilian law within the disaster relief area of operation. The soldiers were well versed on the limits of their authority and fully understood they did not possess power to search, seize, or arrest. These statutory powers fell within the civilian law enforcement realm. The basis for the soldiers' presence was primarily humanitarian. However, there were other legal considerations that manifested themselves during the operation.

There were three primary issues that caused concern with potential PCA implications. The first problem centered on the potential for soldiers to come in contact with illegal

immigrants seeking relief aid.[3] Could a soldier on duty make a citizen's arrest? The potential implications of this issue far outweighed the need to enforce immigration laws, therefore, anyone seeking aid was attended to by soldiers and civilian relief workers. Although force protection is not typically associated with a relief operation within the United States, security at aid stations and storage facilities had to be addressed. The decision was to use non-federalized Florida National Guard forces to provide security at these locations in lieu of active-duty forces. This decision was based upon the fact that most of the people in these facilities were civilians and federal forces were better suited for other tasks. Closely related to security at relief facilities were the locations of active duty bivouac areas, which raised the second issue.

Regardless of the reason, a group of soldiers ended up inhabiting an area next to a polling place for a Florida State primary election.[4] Although clearly in violation of federal law and similar to the original triggering event that led to the passage of the PCA, the Department of Justice opinion echoed common sense and practicality over an unmanageable legal decision. As long as the polling facility's integrity was maintained and not violated by the soldiers, the Justice Department did not require the soldiers to relocate to another location. The decision reflected the belief that the soldiers' presence would not intentionally or unintentionally influence the election process and fully acknowledged the emergent circumstances of the situation.

The final hurdle that came to light concerned the tremendous volume of privately donated relief contributions.[5] Once again practicality in decision making solved the potential problem quickly and effectively. Every effort possible was made to keep federal supplies separated from relief donations and active-duty forces were viewed as a conduit for donated gifts. Items donated directly to the military forces for their use were more problematic. These gifts were required to meet all federal gift donation guidelines, a necessary but cumbersome administrative burden.

Even though there were some challenges facing the soldiers of JTF Andrew, the intergovernmental coordinated operation was touted as an overall success.

A similar request for assistance occurred after the verdict of the Rodney King trail was announced in Los Angeles in April 1992.[6] Following the not guilty verdict, the streets of Los Angeles erupted in violence. The situation grew to such proportions that the California governor felt the Los Angeles Police Department and the California National Guard could not contain the expanding violence. Within a week the President authorized the deployment of active duty forces, nationalized the California National Guard, and formed a JTF of 3,500 soldiers and Marines. Unfortunately, this hastily formed operation suffered significantly from a lack of planning and understanding from the senior military and civilian leadership perspective. A few key distinctions must be drawn from similar requests for humanitarian support operations. First, the forces entered a crime-ridden, hostile environment. Secondly, the "bad guys" were American citizens. Third, rules of engagement had not been adequately explained and caused confusion and concern, especially with the use of deadly force. Fourth, the roles of the civilian law enforcement officers, nationalized California National Guard, and the military were unclear. Fifth, inadequate logistics planning further reduced the effectiveness of the JTF. And finally, perceived PCA restrictions hampered the California National Guard's ability to meet requests for assistance. Individually, these problems could present formidable obstacles to any operation, but collectively, they almost spelled disaster. Clearly, this type of domestic response differs greatly from humanitarian relief operations. What conclusions can be drawn from these two different domestic operations?

Similarities between the two operations would include the notional tasking and time sensitive nature of the deployment. Each operation required the military leadership to develop a tailored operation order with not only a concept of operations, but also, rules of engagement,

special instructions, and limitations of authority. Establishing a follow on logistics support capability was also necessary. Developing interagency coordination and establishing liaison elements required extensive planning, patience, and understanding. Presidential authority or applicable federal statute should establish the chain of command. Regardless of the chain of command, interagency "turf battles" should be expected. Although this short list identifies the most common and obvious similarities, the differences can truly separate these operations.

At face value, disaster relief operations are humanitarian in nature and generally speaking, victims desire outside help and military assistance. The same cannot be said for riots laced with pockets of unmitigated violence. In this instance, outside help may be viewed negatively and actually increase the level of civil disorder. The military role in these situations is often one it has not trained adequately for and may find itself unprepared. Infantry skills, close quarter combat training, and sniper fire immediate action drills are no substitute for crowd control experience and non-lethal use of force training. Potential adversaries in these disturbances are American citizens, the very people the military is sworn to protect. The potential philosophical and psychological implications of this type of encounter are mind numbing, and are not routinely addressed in military training or doctrine. Additionally, conducting civil disturbance operations in a potentially hostile environment inhabited by "noncombatants" is adverse to the law of war and the military mindset. As with the similarities, these differences pose significant challenges for the military. Now, the question to be answered is how do these operations compare with the drug war effort?

Domestic responses are typically limited scope operations with limited objectives and a fairly well defined end state. Although the anti-drug effort has established goals, the immense enormity and pervasiveness of the problem precludes short-term achievement of the desired end state. The anti-drug effort is a long-term solution to a long-term problem. Domestic operations

tend to be personnel intensive and not as reliant on technology and unique military hardware as the anti-drug effort. The use of airborne or seaborne intelligence, surveillance, and reconnaissance is not of much value during relief and recovery operations centered on providing food, drinking water, and shelter. The focus in these instances is on alleviating pain, suffering, providing comfort, and restoring order. And finally, domestic incidents are usually centered upon an individual city or small area, whereas the military anti-drug effort is not only national, but also international in scope; it knows few boundaries.

The key to understanding the differences between military responses to domestic crises and the anti-drug effort is simple. The military can successfully operate in crisis environments under the current PCA restrictions. Military personnel involved in these operations do not possess the need to search, seize, or arrest civilians to accomplish their mission. Should trouble arise, military forces can detain civilians and promptly turn them over to the appropriate civilian authority. This is not the case in the anti-drug effort. The military must become equal partners with its civilian law enforcement counterparts. Therefore, the military needs the statutory authority to search, seize, and arrest civilians while conducting counterdrug missions. The current PCA restrictions severely hamper the military's ability to successfully prosecute the war on illegal drugs by using two sets of rules, one for domestic operations and another for international missions. Additionally, without the ability to search, seize, and arrest, the military cannot operate independently of civilian law enforcement personnel. This severely restrains unique covert military capabilities. When viewed from the macro level, these similarities and differences produce some stark contrasts. The enduring common denominator is the military involvement and how it ultimately relates to the PCA. The following section will discuss the need to grant the military the authority to search, seize, and arrest in the anti-drug effort and

identify the common reasons for maintaining it in its current form and the counter-arguments calling for modifications of the Act to bring it into the 21st century.

Notes

[1] Lujan, Thomas R. *Legal Aspects of Domestic Employment of the Army, 1997* on-line, Internet, available from http://www.army.mil/usawc/parameters/97autumn/lujan.htm. 1.

[2] Ibib.2.

[3] Ibid. 2.

[4] Ibid.2.

[5] Ibid.2.

[6] Ibid. 6.

Part 5

A Time for Change

The time has come for a modification to the Act. The legislators in the late 1800's could not imagine nor predict the social chaos, economic turbulence, and widespread despair that illegal drugs would bring upon American families in the 21st century. Gallup polls over the last three years consistently rank crime, violence, and illegal drugs in the top five most pressing problems facing America.[1] The need does not exist for wholesale changes to the Act. Rather than dismantling it, legislation is needed to amend the Act to permit direct military involvement in the drug war by granting statutory authority to the military to search, seize, and arrest in conjunction with its counterdrug operations. The discussion that follows examines both sides of the debate by addressing four key points and their counter-arguments.

The first commonly cited reason for maintaining the PCA in its current form and restricting further military involvement in the drug war is that it negatively impacts military readiness.[2] The primary mission of the military is protecting national security. Anything that threatens it falls within the military realm. "Military readiness is key to modern warfare and to the maintenance of national security".[3] As the military embraced the additional demands of fighting the drug war, limited resources were diverted from operational and training budgets to meet the new demands. In a downsized military, involvement in the drug war adds additional requirements to an already overburdened force structure. It is only logical to deduce that this chain of events will negatively effect readiness. To compound matters, some military equipment has been modified to support

drug related missions and these modifications rendered the equipment useless for its original purposes.[4] The potential effect on the military mindset and culture are equally disturbing. The law enforcement mindset is significantly different from the military in that it stresses restraint and gradual escalation along the use of force continuum. De-escalation of violence is the norm in civilian law enforcement, whereas, the military environment often requires a different response. Taken collectively, these conditions can seriously degrade military readiness to the detriment of the nation.

As with any argument, there is another point of view. First and foremost, the reason identified above readily acknowledges that anything that threatens national security falls within the purview of the military. As previously stated, the National Security Strategy identifies drug trafficking as a transnational threat to American interests and clearly identifies a military response to it. Secondly, active participation in the drug interdiction effort improves basic soldiering skills, thereby increasing readiness. During peacetime, combat related individual and small unit skills such as, patrolling, reconnaissance, and urban terrain operations perish quickly without realistic training. Drug interdiction missions provide "real-world" training and experience. "Readiness in wartime can often be increased by participation in real-world counterdrug operations".[5] The soldiers and Marines of JTF-6 conduct patrolling, surveillance, and reconnaissance missions daily along the United States and Mexican border supporting a host of local, state, and federal law enforcement agencies. These operations provide an avenue to maintain these highly perishable skills while responding to threats to national security.

The second point involves the complex international environment and the decision when to use military force. Clear objectives with known end states are necessary for successful military operations. Rarely is a military response viewed as a long-term solution to any problem in democratic societies. Recent military operations stretching back to the Gulf War have been high

tempo, short duration events. The anti-drug effort cannot be described in this manner. Undeniably, it is a long-term, open-ended problem that requires a long-term solution. Although the length of a potential mission should not factor into the decision whether to accept it or not, long-term military involvement in social problems is not historically sound. Additionally, "a basic military soldier costs the government $82,000 a year in training and upkeep. A soldier's involvement in drug interdiction is much more expensive than a civilian counterpart's participation".[6] Perhaps then, the military is the wrong tool for the job.[7]

The nation has rarely faced such a pervasive and damaging threat to its citizens as the international drug trafficking industry. The traditional approach to this type of criminal threat has been to rely upon the network of local, state, and federal law enforcement agencies to work collectively to discover the sources, arrest the culprits, and prosecute them under the appropriate statutes. Generally speaking, this approach has proven successful. However, nearly two decades ago, the President, with congressional support declared the traditional approach incapable of solving the illegal drug problem and declared it a national issue that threatened the nation's security. Every President since Nixon has steadily relied upon the military in countering the illegal drug threat. The National Security Strategy not only defines the transnational drug trafficking problem as a threat to our national security, it also implies it threatens our national economic prosperity as well. The nation spends billions of dollars in combating the flow of illegal drugs into the United States and billions more on prevention and rehabilitation programs, additional medical costs, and costs associated with lost productivity. The threat is very real and cannot be underestimated.

In 1997, Representative Benjamin J. Gilman, Chairman of the House Foreign Relations Committee declared; "the most immediate and serious security threat to the United States today is international narcotics trafficking".[8] Our current National Security Strategy recognizes the

illegal drug threat and clearly identifies a military role in countering it. It states, "failure to deal with such security concerns early in their development may require a more substantial response to a more dangerous problem later".[9] International drug cartels are well-organized, efficiently operated business enterprises that apply a lethal trade. More often than not, they are better armed and equipped than the officers of the civilian law enforcement agencies designed to stop them. It is abundantly clear that the international scope of the problem exceeds conventional civilian law enforcement capabilities to combat such a national threat.

The military also offers vast pool of unique resources not readily available to civilian law enforcement agencies. These resources include equipment, command, control, and communication architectures, personnel, and investigative experience. The military possesses an impressive and robust array of tactical equipment and weaponry not widely available to civilian law enforcement officers. From laser designated range finders to camera sized thermal imagers, the military easily distances itself from potential adversaries. Specially equipped aircraft, both rotary and fixed wing, provide unsurpassed, far-reaching detection capabilities. The emerging development of new non-lethal technologies offers a possible alternative to current lethal uses of deadly force. "Non-lethal weapons are indispensable to military operations other than war".[10] The military's command, control, and communications structure is unparalleled in the world today. From secure satellite communications to a firmly established doctrine of centralized command and decentralized execution of operations, military forces are best equipped to counter the drug threat. The potential pool of personnel the military has to offer is also unmatched by civilian law enforcement agencies. As previously mentioned, the National Guard has more personnel involved in the anti-drug effort than the DEA. And finally, the military brings to the drug war an experienced investigative arm. The Air Force Office of Special Investigations (AFOSI) is charged with investigating drug crime in the Air Force. It reported that its military

investigators closed more than 2700 drug related cases between 1997 and 1999, and of these cases, 16% involved civilian subjects.[11] All branches of the services have similar investigative organizations. The combination of these examples and the tremendous capability they represent validate congressional and presidential decisions to involve the military in the anti-drug effort. The military is the right choice to counter this threat to American interests.

Thirdly, historically speaking, the distinction between civilian law enforcement authority and military responsibility has been clear and unequivocal. With military intervention in the anti-drug effort, this distinction has become increasingly fuzzy and blurred.[12] Civilian law enforcement is a local endeavor with deep-seated historical roots. The military mission is not only national, but also, international in scope. Law enforcement personnel are specifically trained for the law enforcement mission. This type of training is significantly different than military training in that it emphasizes the protection of individual rights. Military training is not based on the protection of individual rights. Mr. Raymond E. Kendall, the former Secretary General of Interpol cautions; "the military has a tremendous role to provide, but it has to be a support role…it has to be the right relationship-in support of the police and not simply taking over, as is often the case".[13] Some would argue that this is precisely the case with JTF-6 operations. Soldiers and Marines of JTF-6 in support of the United States Border Patrol have been involved in two highly publicized shootings, one of which was fatal. Esequiel Hernandez Jr., a high school sophomore was killed by Marines on a covert patrol after he allegedly fired upon the Marines with a rifle he carried to keep predators away from his goat herd.[14] Although the facts surrounding this incident remain disputed, one fact is vividly clear. Esequiel Hernandez, an American citizen is dead, killed by an American serviceman on American soil. As previously identified in the background section, the founding fathers, fearful of an oppressive standing military, mandated a clearly visible boundary for military authority. General Hugh

Shelton, Chairman of the Joint Chiefs of Staff, echoed this distinction during a recent visit to Fort Bliss, the Headquarters of JTF-6. He stated; " the law is very clear on when the military can be involved…we have very clear guidelines that we operate under".[15] Military intervention in the drug war has blurred that boundary and further intervention will cross it.

As the chief law enforcement official in the United States, every President for the past two decades determined that military intervention in the illegal drug problem was necessary. This necessity was based on the inability of civilian law enforcement agencies to curb drug related crime in the United States and its growing threat to national security. If any blurring of lines of authority has occurred, it was a result of a set of rational decisions made by a succession of Presidents. Congressional action during this period also supported military intervention. Every member of the armed forces takes and oath to support and defend the Constitution of the United States against all enemies, both foreign and domestic. The civilian leadership understands that drug trafficking threatens American interests both domestically and internationally. Using the military to combat the flow of illegal drugs into the United States is the next logical step when viewed in these terms. The military role in the drug war is designed to capitalize upon its operational experience. From flying reconnaissance and surveillance missions to patrolling borders with ground forces, the military is engaged in activities that mirror its training and operational requirements. The military also spends valuable training time on the protection of individual rights and freedoms in the form of discrimination, sexual harassment, and the Law of Armed Conflict training. Commanders at every level of command are extremely well versed on the protection of individual rights and the criminal investigation process. The military does not desire to take over the control of the anti-drug effort, it wants only to level the playing field with its civilian law enforcement counterparts. These examples do not represent a blurring of civilian

law enforcement authority and military responsibility, rather, they further refine the military role in combating a domestic threat.

The final argument for restricting further military intervention concerns the erosion of civilian authority and control over the military. "Civilian control of the military is undermined whenever military activities invade areas that endanger liberties or the democratic process, even when the expansion is sanctioned by the civilian leadership".[16] This assertion is based on the philosophical argument that individual citizens have lost a portion of their inalienable rights guaranteed by the Constitution as the military expands the scope of its anti-drug operations by investigating civilians. With the authority to investigate civilians suspected in drug or federal fraud related crimes, the military now performs a conventional law enforcement function. Clearly, this was not the role the founding fathers' intended for the military. By expanding its authority in domestic affairs, the military has gained a measure of autonomy and this autonomy can potentially lead to less civilian control.[17] General McCaffrey summed it up quite well; "the biggest limitation, seems to me, is our constitutional and political uneasiness with getting the armed forces involved in domestic law enforcement". [18]

The assertion that civilian control over the military has been eroded because of the military involvement in the anti-drug effort could not be further from the truth. This claim is speculative at best and there exists no credible evidence to support it. The military is involved in the drug war because the democratically elected civilian leadership chose to involve it. This philosophical argument does not recognize that simple fact. As far as the suggestion that civilians have lost a portion of their inalienable rights because the military may investigate them, just the opposite is true. Military investigators conduct investigations on those individuals, both military and civilian, who are suspected of criminal behavior. Specifically, those individuals involved with illegal drugs and fraudulent claims against the federal government. In essence,

military investigators are protecting the public by gathering evidence against a criminal element of society. Military investigators are not infringing on civilians' freedoms, liberties, or individual rights. Simply put, civilian control over the military is not in jeopardy.

The arguments against amending the PCA identified here are not persuasive, nor conclusive to continue to restrict active and direct military intervention in the anti-drug effort. The threat to national security coupled with the vast resources and capabilities of the military clearly dictate a military response to the international drug trafficking problem. Together, with civilian law enforcement agencies, the military can mesh its unique qualities and capabilities to build a synergistic effect and turn the tide on the flow of illegal drugs into the United States. With military support, the disjointed local, state, and federal civilian effort can focus its energy across the entire spectrum of the problem and disregard the current piecemeal approach.

With these arguments in mind, the civilian leadership made the rational decision to employ military forces to combat drug trafficking. How has the American public reacted? Military intervention in the illegal drug industry is still a contentious and hotly debated social and political issue with many far-reaching implications. With so much at stake, public opinion support is key to any anti-drug strategy and effort. Not surprisingly, public support for military intervention in the national anti-drug effort is high. Since 1989, the Gallup Organization has consistently reported that confidence in the United States military ranks equal to or greater than that of the church or Supreme Court.[19] The pollsters further identified:

> *…the majority (64%) of Americans feel that more money should be spent on stopping drugs from coming into the United States from foreign countries. There also seems to be support for the theory that reducing the supply is a more effective means than reducing the desire.*[20]

The current anti-drug interdiction effort is primarily aimed at reducing the flow of illegal drugs into the United States, mirroring public opinion. Based on public opinion and perception,

it is not difficult to take the next logical step to increase military participation in the drug war. Increasing the scope of current interdiction efforts would in all likelihood receive the same favorable public support. The war against drugs cannot be won on a single front. It will take local, state, federal, and military efforts to attack its many facets. Public opinion clearly supports this integrated effort.

Notes

[1] Allen, Charles B. *Tightening America's Borders: An Increased Drug Interdiction Role for the U.S. Military,* (Army War College: Carlisle Barracks, PA 1998) 2.

[2] Washington Law Quarterly. *The Posse Comitatus Act: A Principle in Need of Renewal,* 1997, on-line Internet, available from http//www.wustl.edu/WULQ/75-2/752-10.html, 6.

[3] Ibid. 7.

[4] Benson, Nolon J. *The Posse Comitatus Act: Is There a Need for a Change,* (Army War College: Carlisle Barracks, PA 1998) iv.

[5] Thevenot, Chad. *The Militarization of the Anti-Drug Effort,* 1997; on-line, Internet, available from http//www.ndsn.org/JULY/MILITARY.html, July 1997, 4.

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[16] Washington Law Quarterly. *The Posse Comitatus Act: A Principle in Need of Renewal,* 1997, on-line Internet, available from http//www.wustl.edu/WULQ/75-2/752-10.html, 7.

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Part 6

Conclusion

The PCA is nearly 125 years old and although that does not necessarily make it outdated or meaningless, it is more than appropriate to revisit it to determine if it is accomplishing what it was intended to do. The original intent of the Act was to prevent federal military intervention in civilian law enforcement matters stemming from the painful rebuilding of the South following the Civil War. "The Act embodied the traditional American principle of separating civilian and military authority".[1] This was especially true for the time period in which the Act was made into law. However, a lot has transpired since 1878. How could the Congress that passed the PCA predict the country would be threatened by an internationally led illegal drug trafficking industry in the early1980's? Obviously, they could not foresee the future and understand the tremendous threat posed by drug trafficking. As General McCaffrey stated in 1997; "…if unchecked, America's drug abuse problem will kill 140,000 Americans and cost our society $700 billion over the coming decade".[2] Equally so, they could not predict that the enormity of the problem would overwhelm every level of civilian law enforcement. Consequently, every President since Nixon has identified the drug problem a threat to national security and used the military to combat it.

The time has come to truly legitimize military intervention in the drug war by amending the Act to permit direct military operations in the anti-drug effort by granting the military statutory authority to search, seize, and arrest. In its current form, the Act's restrictions and limitations

hamstring civilian leadership from protecting the American public from this dreadful threat. This amendment would specifically allow a full range of military operations wherever and whenever appropriate. Direct military intervention will put some teeth into the anti-drug effort by enabling military operations independent of immediate civilian law enforcement presence. The military could conduct covert operations, capture suspects, arrest them, and turn them over to civilian authorities for prosecution. Military intervention would continue to remain under civilian authority and control. This change would only apply to the anti-drug effort. Incidents like Ruby Ridge and Waco would not fall under the national security threat status of drug trafficking. Current PCA restrictions that prevent direct military intervention in those types of incidents would not be affected by this change

The increase in military intervention since 1981 is a classic example of bureaucratic congressional incrementalism. The gradual increase in military intervention has come in the form of piecemeal legislation and has historically lacked the necessary strength and stamina to impact international drug-smuggling efforts. Furthermore, the time is right for the Congress and President to stand up and legitimize military intervention. The opportunity to restore some confidence in the federal government cannot be dismissed. The executive and legislative departments must not only acknowledge the illegal drug problem threatens national security, they must act on it with the same force and tenacity demonstrated in the Persian Gulf War, Bosnia, and Kosovo.

The military has proven its ability to successfully combat illegal drug trafficking, whether through criminal investigations or interdiction efforts. AFOSI criminal investigators identified nearly 450 civilians involved in drug related offenses over the past three years.[3] Equally impressive is the military criminal investigative organizations' ability to uncover and solve complex fraud cases. A small sampling of 13 cases from 1991-1998 revealed that more than $5

million worth of fraudulent claims against the federal government were investigated and solved by these investigative agencies.[4] Eliminating the current PCA restrictions will permit this successful trend to continue as the following three studies indicate. The United States Customs Service conducted two studies and determined that "successful interdiction of 25% of actual smugglers would result in the deterrence of 50% of potential smugglers".[5] And finally, another study conducted by the Institute for Defense Analyses concluded:

> *Well-conceived source zone operations, in cooperation with host nation forces, that significantly and unexpectedly disrupt the normal drug trafficker processes for producing and transporting coca products from the source zone, cause discernible increases in the street price of cocaine in the U.S., and through normal market relationships between price and demand, thereby reduce cocaine consumption.*[6]

The combination of the national security threat, the successful record of military investigative organizations, anti-drug interdiction efforts, and the extensive military resources produce a powerful argument to change the PCA to allow the military to continue to protect American interests by expanding the fight against illegal drugs.

The United States can ill-afford to continue its disjointed approach to solving the drug problem. The changes proposed here will undoubtedly produce a myriad of reactions. These reactions will serve as the basis for spirited discussion of new strategies to reduce the flow of illegal drugs into the United States. Further research is needed in several areas, including; should a functional drug command be formed to tackle the problem, what additional specialized training is needed for military forces, and who will develop anti-drug doctrine? The United States military is not a cure-all for the drug problem, but given the opportunity, it can reduce its impact.

Notes

[1] Washington Law Quarterly. *The Posse Comitatus Act: A Principle in Need of Renewal,* 1997, on-line Internet, available from http//www.wustl.edu/WULQ/75-2/752-10.html, 1.

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[5] Corcoran, Kimberly J., *DOD Involvement in the Counterdrug Effort—Contributions and Limitations,* Air Command and Staff College, Mar 1997, 26.

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