

**STRATEGY
RESEARCH
PROJECT**

The views expressed in this paper are those of the author and do not necessarily reflect the views of the Department of Defense or any of its agencies. This document may not be released for open publication until it has been cleared by the appropriate military service or government agency.

**LEGAL ASPECTS OF DOMESTIC EMPLOYMENT
OF THE ARMY**

BY

**COLONEL THOMAS R. LUJAN
United States Army**

DISTRIBUTION STATEMENT A:

Approved for public release.
Distribution is unlimited

19960603 275

USAWC CLASS OF 1996



U.S. ARMY WAR COLLEGE, CARLISLE BARRACKS, PA 17013-5050

DTIC QUALITY INSPECTED 1

USAWC STRATEGY RESEARCH PROJECT

The views expressed in this paper are those of the author and do not necessarily reflect the views of the Department of Defense or any of its agencies. This document may not be released for open publication until it has been cleared by the appropriate military service or government agency.

LEGAL ASPECTS OF DOMESTIC EMPLOYMENT OF THE ARMY

by

Colonel Thomas R. Lujan
United States Army

Colonel Donald Morgan
Project Advisor

DISTRIBUTION STATEMENT A: Approved for public release. Distribution is unlimited.

U.S. Army War College
Carlisle Barracks, Pennsylvania 17013

ABSTRACT

AUTHOR : Thomas R. Lujan (COL), USA

TITLE : Legal Aspects of Domestic Employment of the Army

FORMAT : Strategy Research Project

DATE : 15 March, 1996 PAGES : 23 CLASSIFICATION : Unclassified

The 1990's have seen a significant number of domestic employments of the United States Army. This study examines and distills the legal issues arising from disaster relief operations and military support to civilian law enforcement. It further analyzes lessons learned from the 1992 Los Angeles Riots and the FBI experience at Ruby Ridge in order to apply those lessons to future military employments. The premise of this paper is that strict adherence to the law in domestic employments is the critical element in order to maintain the proper relationship between the American people and America's Army.

INTRODUCTION

With the end of the Cold War, and the advent of the New World Order, America's Army has been tested across the entire continuum of military operations. Since 1990 we have seen numerous and varied international major deployments that range from the high end of the spectrum of warfare in Operation Desert Storm, to successful humanitarian relief operations in Northern Iraq, Rwanda, and Haiti, and less clear outcomes in Somalia and the nascent effort in Bosnia. Closer to home, and with much less fanfare and public attention, the United States Army has participated in an arguably unprecedented number and type of domestic employments. These examples include disaster relief operations, military support to law enforcement in the war against drugs, and discrete incidences of military support to federal law enforcement agencies. It is the premise of this paper that the coming years will see a continuation, if not an actual increase, in the domestic employment of the Army within the United States. Further, because of the potentially adverse effect of such deployments on the relationship between the Army and the American people, the critical element of their success is strict conformance with the legal framework established by the Constitution and federal law. As such, it is incumbent on our national strategic leaders to understand and appreciate the legal underpinnings of these operations. It is the purpose of this

paper to aid that understanding by presenting and critically analyzing the legal lessons learned from domestic employments in the 1990's. In that same context, military lessons learned will be drawn from the employment of the Federal Bureau of Investigation (FBI) Hostage Rescue Team (HRT) at Ruby Ridge, Idaho. This paper will first examine the Army's role in disaster relief operations, and then consider support to law enforcement in the fight against drugs. Finally, it will analyze the full panoply of domestic deployments available under the Presidential authority to quell insurrection and maintain public order.

DISASTER RELIEF OPERATIONS

The United States Army had the unique experience of responding to the devastating onslaught of Hurricane Andrew through south Florida in August of 1992, and a similar response to Hurricane Iniki on the island of Kauai in Hawaii in September of 1992. Both instances provide ample evidence that a reliable mechanism exists to facilitate the employment of active duty Army units in times of great national disaster. The Robert T. Stafford Disaster Relief Act of 1984, as amended in 1988, (42 US Code, Sections 5121 et. seq.) commonly referred to as the Stafford Act after its legislative author, is the authority under which such assistance is provided. The Stafford Act is only applicable within the United States and its territories, and requires a state, usually through its Governor, to request a

Presidential declaration of a state of emergency following a natural disaster. Once a state of emergency is declared, active duty soldiers can be employed to respond to the crisis under the auspices of the Federal Emergency Management Agency (FEMA).¹ These situations present unique legal issues.

In response to the almost total devastation wrought by Hurricane Andrew in Dade County, Florida, brigade-sized contingents of the 82nd Airborne Division and 10th Mountain Division, both XVIII Airborne Corps assets, were deployed as Joint Task Force Andrew under the provisions of the Stafford Act. Once deployed, they encountered a myriad of contentious legal issues. First and foremost, these warfighters encountered the preeminent statutory proscription targeted at U.S. soldiers deployed within the United States. This is, of course, the *Posse Comitatus* Act which prohibits the Army and Air Force from enforcing civil criminal law within the United States.² This historic law, first passed in 1878 to preclude the presence of soldiers from deterring voters during Reconstruction, is generally considered a great bulwark in our democratic society. Its proponents cite *Posse Comitatus* as the clear demonstrable indicator of the properly circumscribed limits of a civilian controlled Army in a representative democracy.³ The nuances of *Posse Comitatus* at the conceptual level, and the effect of the various exceptions granted to it, will be addressed in detail later in this paper. Suffice it to say, that on the ground,

deployed soldiers were told that they could not and would not enforce the law, i.e. detain, arrest or serve warrants or any other kind of process on civilians.⁴ Of course, it could be argued that by their very presence, as the only tangible evidence of governmental authority, that our soldiers were defacto enforcing the civilian law.⁵ More concretely, two examples demonstrate the difficulties inherent in following this theoretically clear prohibition.

In South Florida, the legal question arose as to what soldiers should do if they encountered illegal immigrants attempting to avail themselves of the humanitarian services provided by the soldiers. It could be argued that illegal immigrants are status offenders whose very presence in the United States constitutes a continuing offense under the law, and who could be arrested by soldiers in the capacity of a "citizen arrest" of a perpetrator violating the law.⁶ Because of the sensitivity of this situation however, soldiers were directed to just ignore inquiring into the legal status of the citizens they encountered, and treat everyone equally.⁷ Similarly, the guidance as to how soldiers would provide security at relief centers was carefully drawn. Normally, DOD personnel may maintain the security of DOD installations. However, the DOD Life Support Centers established in Florida were inhabited almost entirely by civilians seeking relief. In light of *Posse Comitatus*, National Guard and local law enforcement, not

soldiers, were tasked to guard these sites.⁸ These anomalous examples reflect the impractical, yet necessary, application of *Posse Comitatus*.

The second major legal issue confronted American soldiers who were quartered contiguous to a polling place for a Florida State primary election. Their positioning ran directly contrary to the provisions of 18 U.S. Code 592, which flatly prohibits the presence of American soldiers at just such a place.⁹ The solution to this situation was fairly straightforward. Military authorities sought a Department of Justice advisory opinion. This opinion thoughtfully considered the clear application of the law, but counterpoised that clarity with the exceptional circumstances present in South Florida. The result favored expediency and pragmatism. The presence of soldiers next to a polling place was deemed legal as long as the integrity of the polling site itself was maintained.¹⁰ A similar result occurred during Hurricane Iniki in Hawaii. There the issue was even more clear. In order to actually hold an election, soldiers were tasked to build tentage to serve as polling sites. Aware of the issue from Florida, the legalistic solution was to have the National Guard construct the sites, and move active duty soldiers away from them during the hours of voting.¹¹ Clearly, when it comes the enforcement of archaic laws relative to voting, practical solutions override legal theory.

A third major issue confronting soldiers during domestic disaster relief operations deals with the proper handling of private contributions to the relief effort. In Florida, from all parts of the country and from across the world, came donated goods and volunteer services. These gifts came in three forms: donations to Hurricane victims, gifts to soldiers in the JTF, and civilian volunteers who came to help. The issue of gifts to hurricane victims was resolved easily. JTF Andrew was deemed a mere conduit for the gifts, and supply centers were established and operated. To avoid problems, the supply centers never commingled governmental supplies and donated items.¹² Gratuities offered to soldiers were more problematic. Each proffered item had to be reviewed to insure its acceptability under the Office of Government Ethics standard of conduct rules.¹³ Generally, strict accountability was maintained and proper documentation had to accompany each gift to reflect it as an unconditional gratuity. Volunteers presented a problem because of the prohibition against the government accepting voluntary services and perceived liability issues. The solution was to prohibit volunteers from working directly for military forces, and redirect them to the non-governmental relief agency effort. This tack eliminated the voluntary services issue and reduced the liability concern to a manageable level.¹⁴

Another important legal issue in disaster relief operations arose during the governmental reaction to the unprecedented

destruction of the Daniel P. Murrah Federal Office Building in Oklahoma City, Oklahoma on April 19, 1995. As one might imagine, all the resources of local, state and federal government agencies were mobilized to deal with this shocking act of domestic terrorism. FEMA served as the primary focal point of relief operations, and Army assets were provided under the terms of the Stafford Act. FEMA officials were on the scene within hours of the explosion, and specialized rescue teams followed closely. The entire reaction has been categorized as a masterful melding of state and federal resources. However, the internal FEMA report¹⁵ underscores a natural tension which will become increasingly important in the years to come. The tension which was highlighted in Oklahoma City was that between the rescue effort and the Federal Bureau of Investigation (FBI). The FBI as part of the Department of Justice (DOJ) determined that the entire area was a crime scene for the purposes of apprehending and successfully prosecuting the perpetrators of this irrational act of senseless violence. The rescue effort had as its only goal recovering survivors or their remains. This natural conflict must be resolved in order to facilitate the nation's response to the ever-increasing threat of similar incidents.

Strategic leaders can take solace in the lessons learned from military participation in domestic disaster relief. On the macro-level, the record indicates that legal niceties or strict construction of prohibited conduct will be a minor concern. The

exigencies of the situation seem to overcome legal proscriptions arguably applicable to our soldiers' conduct. Pragmatic realism appears to dominate as American soldiers help Americans.

CIVILIAN LAW ENFORCEMENT

Military support to law enforcement agencies presents more problems for strategic leaders. At first blush, this entire area appears to be outside the scope of military operations. As previously mentioned, the *Posse Comitatus* Act provides a broad proscription against soldiers enforcing the law. However, subsequent Congressional enactments¹⁶ granting exceptions to the original prohibition of *Posse Comitatus* have served to eviscerate much of its original purpose. Congress began to carve out these exceptions in response to the perceived rising tide of importation and use of destructive illegal drugs. Under more recent legislation, the Army can provide equipment, training, and expert military advice to civilian law enforcement agencies as part of the total effort in the "war on drugs".¹⁷ In addition, troops of the active Army are authorized to provide a wide range of support along the borders with the caveat that a "nexus" be established between the support given and illegal drugs. The principle example of the contentious nature of such support can be found in a review and analysis of the military support provided to the Bureau of Alcohol, Tobacco, and Firearms (BATF) by the Army under the operational control of Joint Task Force 6

(JTF 6), during the tragic assault and siege of David Koresh's Branch Davidian compound outside of Waco, Texas.¹⁸

Joint Task Force 6 is a long standing operational unit. In 1993, it was under the tactical control of Army Forces Command (FORSCOM) and the Joint Chiefs of Staff (JCS). For several years this standing task force, located just outside Fort Bliss, Texas, was a key part of Operation Alliance. Operation Alliance was a joint local, state, and federal entity that provided an intelligence fusion center and rapid response to surveillance needs along the Southwest border. Essentially, requests for military support of law enforcement agencies would flow into JTF 6, be vetted by their staff as having the appropriate drug nexus, and then be approved through FORSCOM and the JCS.¹⁹ Major projects included area, as opposed to pinpoint, surveillance and reporting, and the use of aviation assets to ferry law enforcement officers. Soldiers detailed to the JTF were attached to them from their parent unit for specified periods of time. For example, a Special Forces Operational Detachment with supporting aviation was part of a Rapid Reaction Support Unit assigned to JTF6 for a six month period in early 1993. During this same time frame a request came into Operation Alliance for military assets to support a BATF operation against a methamphetamine laboratory located on the outskirts of Waco, Texas.²⁰ The request detailed the needs of the BATF. They wanted military training in the specific areas of medical

treatment, communications procedures, operational plan development, review, and approval, and in "room clearing discriminate fire operations" termed close-quarter combat (CQB) by the military.²¹ More importantly, the BATF requested that Army medics and communicators actually accompany them to the forward staging base for this raid. Clearly, the request was more expansive than those normally received.²² The original request was initially approved by the JTF6 staff. However, questions by the Commander of the Special Forces detachment relayed to his home unit legal advisor resulted in a review of the extent of Army involvement. In the actual operation the Army provided a training site at Fort Hood, safety inspection of the training lanes set up by the BATF, and medical and communication training and equipment. All members of the Special Forces detachment departed the training site at Fort Hood prior to the conduct of the operation in Waco.²³

As we all know, the results of the attempt by the BATF to forcibly serve a warrant at the Branch Davidian compound were disastrous. The BATF suffered the greatest loss of life in its history. In the initial assault, four agents were killed and twenty were wounded. Six members of the Branch Davidians were killed and four were wounded. The resulting siege captured the attention of the nation, and its incredibly tragic fiery conclusion two months later resulted in the deaths of seventy-four Branch Davidians, including twenty-one children under the

age of fourteen.²⁴ The resultant Department of Treasury review and Congressional hearings have brought these facts to light.

The lessons for America's military leaders remain somewhat obscure. I submit that three major lessons can be derived from this catastrophe. First, military decision makers cannot rely on the assertions of other federal agencies. The BATF knew of the necessity to establish a drug nexus in order to obtain needed military support. It is clear from the after-action reports and investigations that the main thrust of BATF interest in this case stemmed from their conclusion that the Branch Davidians were compiling a weapons arsenal in their compound.²⁵ Authoritative evidence exists which conclusively demonstrates that any precursor chemical or methamphetamine connection at the Waco compound occurred in 1987, fully six years prior to the raid. In fact, it is more probable than not that David Koresh was in fact responsible for expelling the member involved in the fledgling illegal drug activity, and went so far as to report the offender to police authorities.²⁶ The six-year lapse in these events clearly attenuates the underlying rationale for illegal drug activity. Regardless, the BATF request boldly asserted the needed nexus. The Commanding General of the JTF testified before Congress that he saw no reason to pierce the veil of the BATF request.²⁷ I submit that in light of the peripheral nature of BATF in drug operations (usually spearheaded by the Drug Enforcement Agency (DEA) at the federal level), the lack of involvement of the specialized drug laboratory reaction force,

and the extensive nature of military support requested, that further inquiry was needed and required. The specter of members of the Army's elite special operations forces accompanying BATF agents storming a religious compound, however misguided its leader, would have seriously compromised public support of the United States Army. Had the initial request been approved (and it was) and acted upon (and it wasn't) this would have been the single most debilitating event to occur within the Army since the tragedy at My Lai. In fact, this occurrence could have been even more egregious because it happened on American soil, was a clear violation of the *Posse Comitatus Act*, and raised the issue of religious freedom.

The second important lesson for our military leaders is to recognize that the fervor to complete the mission, so essential in desperate battles to take the high ground, needs to be curtailed while supporting other federal agencies in suppressing drugs. The military mentality that breeds conformance and dedication to team effort, must be replaced with healthy skepticism and critical analysis. These missions are on the cutting edge of the role of the American Army. Any actual or perceived departure from the legal restrictions will lead to an unacceptable loss of confidence in the Army. In testimony before Congress, the officer who questioned the legality of the proposed mission related that his JTF6 counterpart, someone superior in rank to the witness, indicated that the witness was being an

unwarranted obstacle to mission success.²⁸ In fact, the officer in question was asking probing questions for all the right reasons, thus saving the Army from a significant role in the debacle at Waco.

Finally, strategic leaders can take heart from the fact that the training and experience of today's soldiers allow them to make the right decisions in situations fraught with career and personal implications. Granted, in this instance the soldiers were experienced and mature Noncommissioned Officers and Officers with substantial operational experience. However, at considerable personal risk they had the integrity and wisdom to question the legality of the proposed mission within their operational chain of command. When the answer did not comport with their training and experience, they had the moral courage to go outside official channels to receive an independent legal opinion from their parent unit's legal advisor.²⁹ Had they simply gone along with the attitude that an order is an order, they would have involved the Army in a clear violation of *Posse Comitatus*, contributed to a great scandal, and probably subjected themselves to personal liability. Although current Army doctrine envisions a lawyer at every Brigade-sized unit, lawyers are not everywhere. We must continue to rely on the training and moral fortitude of our soldiers. In this case it was well-placed reliance. As a footnote to the above incident, the operational command of the Special Forces soldiers detailed to JTF6 have

subsequently promulgated a list of prohibited training events in the counter-drug arena. This policy letter proscribes close quarter combat training and accompanying law enforcement agencies, in addition to restricting intelligence gathering, and it is signed by the Commander, not the lawyer.³⁰

PRESIDENTIAL AUTHORITY

The last major area of consideration focuses on those discrete incidences when the President of the United States relies on his constitutional authority to maintain public order and domestic tranquility. Those who consider the *Posse Comitatus* Act a giant bulwark preventing the Army from enforcing the law will be surprised to learn that the mechanism to allow that seemingly monumental event to happen is fairly straightforward. The language of the Act itself specifies that activities expressly authorized by the Constitution or by statute are exempt from the Act's restrictions. One such exception is the statutory authority of the President to use federal troops to quell domestic violence.³¹ Upon receipt of a proper request for assistance from a state Governor, the President issues a proclamation identifying that a breakdown in public order has occurred, and orders the intransigents to disperse. Once it is clear that the order to disperse is not being followed, the President then orders the Secretary of Defense, in consultation with the Attorney General, to quell the insurrection and restore

public order. This Presidential authority to use federal troops is plenary and not subject to judicial review.³² Great lessons for strategic leaders are to be learned from the most recent example of the execution of this procedure, the Los Angeles riots of April, 1992 that occurred in response to the verdict in the trial of Rodney King. A second series of lessons applicable to future employments can be derived from the FBI's experience at Ruby Ridge, Idaho in August, 1992, and its aftermath.

The Rodney King trial verdict of 29 April, 1992, unleashed violence across the City and County of Los Angeles. In the opinion of local and state officials, the violence was beyond the capabilities of the Los Angeles Police Department (LAPD) and the California National Guard. Consequently, the Governor of California informed the President of the situation. On May 1, 1992, the President issued both the initial proclamation to disperse and the executive order authorizing the Secretary of Defense to employ members of the Armed Forces to restore law and order. This order also federalized the California National Guard. Pursuant to this order, a 3,500 member Joint Task Force composed primarily of Marines from Camp Pendleton, and soldiers of the 7th Infantry Division stationed at Fort Ord, convoyed into Los Angeles on 3 May, 1992 to restore order.³³ Two important lessons flow from this operation.

First, it is clear that the appropriate prior coordination

and necessary planning for operations of this sort had not occurred. Troops and Marines underwent hastily conceived and executed civil disturbance training at Fort Ord in the short period between a warning order (on May 1, 1992) and actual deployment on May 3, 1992.³⁴ The prospect of folding federalized National Guard soldiers under the operational control of an active duty Joint Task Force had not been adequately addressed or properly planned. For example, the Rules of Engagement were not initially uniform throughout the JTF. Ironically, active duty forces were operating under far more restrictive covenants than the federalized National Guard.³⁵ This glitch in the critical restrictions governing the use of force stemmed from the initial employment of the National Guard in their state status working directly with the LAPD. Upon federalization, the discrepancies were ultimately resolved by the forceful actions of the JTF Commander. It is also clear that the administrative and logistic underpinnings of such an operation had not been properly contemplated. In one notable example, the LAPD made a simple request to borrow a number of available and critically needed night vision goggles.³⁶ The request was bureaucratically strangled by a legal issue centered around the definition of fair market value and the requirement for the LAPD to post a surety bond in the amount of \$90,000.00. Such administrative gaps could be easily filled by prior planning.

The second lesson is even more fundamental. It is now clear

that there was a widespread misunderstanding of the role of the active duty military and federalized National Guard in this kind of operation. This misunderstanding permeated the National Guard and active duty forces, and extended to the Commander of the JTF.³⁷ At the very first meeting of the military commander, the Los Angeles Police Chief, and the County Sheriff, it was apparent that no clear perception of the proper role of military forces existed. On a tactical level, the Police Chief favored a military partitioning of the city. The County Sheriff believed that military forces were to be partitioned to police units and follow their orders in a "rent a soldier" fashion. But the key discrepancy went to just what role the military could play. The JTF Commander apparently believed that he and his troops were constrained by the effect of the *Posse Comitatus Act*, and therefore could not legally participate in law enforcement activities. His belief was erroneous. In this particular situation, pursuant to the Presidential power to quell domestic violence, federal troops are expressly exempted from the prohibitions of *Posse Comitatus*. This exemption applies equally to active duty military and federalized National Guard troops. The JTF Commander may have had political, policy, or tactical reasons for refusing law enforcement missions, but his asserted reliance on the proscription of *Posse Comitatus* was misplaced.³⁸ This misunderstanding seriously degraded the effectiveness of operations in Los Angeles. Prior to federalization, the National Guard in their Title 37 status responded to every request for

assistance. After transformation to Title 10 status, the response rate dropped to approximately twenty percent due to the perceived effect of *Posse Comitatus*. In one concrete example, the LAPD asked federalized National Guard troops to transport prisoners arrested during a civil disorder. The military decision matrix apparently made a distinction between "military functions" and "law enforcement functions" and placed this mission in the latter category. These requests in general, and this one in particular, were uniformly denied as violative of *Posse Comitatus*. This misunderstanding permeated all military activities and led to underutilization of a potent force, and morale problems within the National Guard.³⁹

The lesson for strategic senior leaders is clear. By the stroke of a pen, within a single day, their entire framework for the authorized use of military force within the United States could be completely undercut.⁴⁰ Pursuant to Presidential order, a JTF Commander could find units of all services enforcing the law under the direct supervision of the Department of Justice. Several pragmatic steps should be taken. Contingency planning under the auspices of FEMA and in-place operational plans should continue and be expanded. Administrative and logistical coordination should be pre-planned. Joint training with National Guard troops in this environment should make its way unto an already overcrowded training plan. At the strategic level, senior leaders must reorient their thinking. Given the scarcity

of resources, this nation can ill afford to have the effectiveness of its military assets artificially constrained by a misunderstanding of the law.

COUNTERTERRORISM

The last area for consideration in this paper seeks to draw important lessons from the F.B.I experience in Ruby Ridge, Idaho and apply them to domestic employments of selected military units in a counter-terrorist operation within our borders. First, the growing threat of terrorism within the United States and the need to use military forces will be summarized. Second, the factual underpinnings of what happened at Ruby Ridge will be covered. Finally, the lessons for strategic leaders involved in the decision to use our counter-terrorist military units will be distilled and presented.

Despite some evidence to the contrary, the use of indiscriminate force for political ends continues to increase throughout the world. Jefferey D. Simon argues in a 1994 book, The Terrorist Trap,⁴¹ that terrorism is endless in nature, and as evidenced by examples from the Barbary Pirates in the early 1800's, through anarchists in the early 1900's, to the Weatherman and the World Trade Center Bombing, is an elemental part of the American experience. He further postulates that the explosion of technology makes the threat from modern terrorism that much more

direct and threatening to the American people.⁴² The proliferation of weapons of mass destruction, chemical and biological agents, and future threats attendant to microencapsulation and nanotechnology make the future appear grim.⁴³ Simon's revelation that Army experiments in the 1960's in the New York subway system resulted in an estimate of several hundred thousand casualties is a sobering testimonial to the magnitude of the threat.⁴⁴ If he is correct that the first publicized incident using biological agents will break down the last remaining obstacles and spawn repetition makes the Tokyo Aum Shinrikyo subway incident all that more chilling.⁴⁵ In the face of such a tragedy, it is absolutely critical to marshal all the resources of the federal government to combat the growing threat. Since the early 1980's the United States has fielded specialized units equipped and trained to deal with threats throughout the world. With the incidence of terrorism on our shores, and the growing magnitude of the threat, the probability of domestic employment of the U.S. military to counter terrorism has grown substantially. The F.B.I. experience at Ruby Ridge provides insightful lessons for such employment.

The incident at Ruby Ridge, Idaho began with a 1991 investigation on weapons charges against Randy Weaver, an alleged former Green Beret survivalist living in a remote cabin in northern Idaho. The attempt by the U. S. Marshall Service to serve a warrant on Mr. Weaver resulted in the death of a Deputy

United States Marshall and a member of the Weaver family. In response to the situation, the FBI deployed its Hostage Rescue Team (HRT). The incident culminated on August 22, 1992 when, after a weeklong standoff, an HRT sniper shot and killed Vicki Weaver, the wife of the object of the original warrant. The actions of the F.B.I. were the subject of an exhaustive Department of Justice (DOJ) investigation and extended Congressional hearings. Five senior members of the FBI were suspended and finally disciplined, and the government settled a wrongful death suit brought by Vicki Weaver's survivors for over three million dollars. Randy Weaver was subsequently acquitted in a criminal trial of the original firearms charges and absolved of criminal liability for the death of the federal marshall.⁴⁶

The first major item of interest for military strategic leaders centers on the Rules of Engagement (ROE) in force at Ruby Ridge. The official DOJ investigation⁴⁷ provides a unique window into the development and promulgation of ROE at Ruby Ridge. Generally, the F.B.I. adheres to standard law enforcement guidelines for the use of deadly force. Essentially, agents are authorized the use of deadly force in self-defense or defense of other agents in imminent danger of death or grievous bodily harm. This stricture is essentially defensive in nature, and has passed Constitutional muster.⁴⁸ At the time of the deployment of the HRT, federal agents were convinced that they were going into the most dangerous situation faced by the unit in its dozen years of

existence.⁴⁹ The record reflects that the Commander of the HRT in consultation with Special Agent Larry Potts (later promoted and then removed as Deputy Director of the FBI) concluded that this situation required an additional set of ROE. Consequently, the ROE promulgated at the initial briefing stated that snipers could engage "any adult with a weapon... in the vicinity...of the cabin....could and should [emphasis added] be the subject of deadly force."⁵⁰ This language was considered by those involved as the least restrictive ROE ever used by the Bureau. Incredibly, these ROE were never properly approved. The agents on the scene never coordinated them with the FBI Legal Counsel Office. Similarly, no consultation occurred with the United States Attorney having geographic responsibility over the crisis site. In accordance with FBI policy, an operational plan, which includes ROE, must be submitted for approval to Headquarters, FBI, for all deliberate assault resolutions of a hostage rescue situation. In this case an operational plan was submitted. The approving official noted that the overall plan did not include a negotiation plan annex as required, and rejected it on that basis. A negotiation plan annex was duly drafted by the lead negotiator on site and submitted and subsequently approved. Amazingly, the ROE section followed the negotiation plan annex, and the ROE and the overall plan were never formally approved in writing.⁵¹

The FBI sniper on the scene observed a male person come out

of the cabin armed with a rifle. The sniper observed that individual aim the weapon into the sky in the general direction of an FBI helicopter that could be heard but was not directly observable, due to a low dense cloud cover. The sniper made the decision to engage this target and shot him in the back as he headed behind a small building away from the main cabin. The sniper testified that under the ROE he had also determined that if he reacquired that target he would engage it again. Others came from the main cabin to assist the wounded man, and as they made their way back into the main cabin the sniper thought he once again saw his initial target. He again aimed at that target, and led him as he ran for the open backdoor of the main cabin. He fired, and the round passed through the wooden door killing Vicki Weaver as she held the door open with her youngest child in her arms.⁵²

The DOJ investigation concluded that the ROE used were suspect in each of three aspects. They concluded that they were imprecise, created an unduly offensive atmosphere, and were an unconstitutional departure from the reliance placed on an individual agent to determine the threat of death or imminent grievous bodily harm.⁵³ In effect, the FBI departed from its law enforcement mode, and militarized its ROE. In military terms, the ROE used at Ruby Ridge served to categorize armed adults at the site as hostile combatants. The ROE then had the effect of directing that this group be decisively engaged by deadly force.

Such a framework is analogous to military soldiers on the battlefield, authorized to engage the enemy not because they present a threat, but because they are the enemy.⁵⁴ Status not threat dictates who is engaged. The direct lesson for military leaders is startling in its clarity. All ROE for military forces authorized by Presidential authority to restore domestic tranquility must conform to the law enforcement model. That is the standard to which our soldiers will be held. The 22nd Special Air Service Regiment in the United Kingdom has long operated under the rules applicable to the police forces of that nation.⁵⁵ Our dedicated forces must be trained and ready to operate in that same milieu. Joint Force commanders must recognize the hypersensitivity of operations of this nature. ROE must be approved at the highest levels of the Executive Branch, and fully coordinated with the Attorney General in Washington as well as the local United States Attorney.

The other lessons for military leaders drawn from Ruby Ridge are less tangible but just as important. Any counter-terrorist incident in the United States so significant as to require the use of military forces will become the target of scrutiny unparalleled in the American experience. The level of media interest will be commensurate with that accorded Waco, the Oklahoma City bombing, or even the O.J. Simpson trial. Secondly, our own governmental investigative agencies will be galvanized. The FBI, as the lead federal agency, will determine the site to

be a crime scene and conduct a complete forensic workup on all weapons and individuals involved. The Department of Justice will probably review the procedures of the FBI. These reviews will occur even in the context of a perfect operation. If it is not perfect, one can rest assured that a Department of Defense blue ribbon panel will be appointed to get to the bottom of the story. Regardless of all that activity, it is highly predictable that Congress will also see fit to hold protracted hearings on the matter. And finally, in our litigious society, the prospect of criminal and civil litigation looms high on the horizon. Any hope that our relatively obscure commandos will remain outside of the glare of that attention is wishful thinking. What must be done is to insure that our soldiers are the most capable, best equipped and best trained counter-terrorist force in the world. The operational plan must be planned, coordinated, and executed at the highest level of government. The final requirement is that the government stand behind its decisions and acknowledge errors without attempting to "scapegoat" those lowest on the operational continuum. This course of action will allow the United States to meet the growing threat with all its resources.

CONCLUSION

In summary, strategic leaders need to look to the future increase of domestic deployments of the military forces of the United States. They need to recognize that each instance of use

is accompanied by new and different challenges. America's leaders must recognize that the relationship between America's Army and the American people is strong but may be compromised. Public confidence in the military can best be maintained by strict adherence to the legal underpinnings governing domestic operations of the armed forces. Applying the lessons learned from the early 1990's will maintain the excellent relationship between the people and the military well into the next century.

ENDNOTES

1. The Stafford Act authorizes the President to establish a program for disaster preparedness and response. The Federal Emergency Management Agency (FEMA) is so established by Executive Order 12673, March 23, 1989. DOD Directive 3025.1 governs the Department of Defense response. The controlling Army Regulation is AR 500-60. The Secretary of the Army is designated as the Executive Agent for disaster relief in the Department of Defense.

2. The Posse Comitatus Act, 18 U.S.C. Section 1385 states: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both." The Air Force was added to the original language in 1956. 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." The Navy and Marines are not included in the Act, but are made subject to it by DOD Regulation (32 C.F.R. Section 213.2, 1992). The Coast Guard is exempt during peacetime as are National Guard forces operating under the state authority of Title 32.

3. Congress, House of Representatives, Panel B, Inquiry into Federal Law Enforcement Actions at Waco, Texas, 20 July, 1995, testimony of Brigadier General Walter P. Huffman, the Assistant Judge Advocate General for Military Law and Operations, p. 14.

4. Department of the Army, Domestic Disaster Assistance, A Primer for Attorneys, The Judge Advocate General's School, Center for Law and Military Operations, 15. Hereinafter referred to as Primer.

5. The overarching proscriptive nature of *posse comitatus* results in the drawing of narrow distinctions. For example, conventional wisdom dictates the soldiers can manage traffic pursuant to convoy operations during a deployment. To a civilian driver stopped at an intersection by a Military Policeman (MP) this is a distinction without a difference. The civilian driver is subject to law enforcement by the MP notwithstanding what kind of traffic passes in front of him.

6. The concept of "citizen arrest" in common law generally allows for the detention of another by ordinary citizens if the detained party is caught during the actual commission of a crime. The concept provides for timely referral to appropriate law enforcement entities.

7. Primer, page 17. All serious incidents involving illegal aliens were to be transferred to the Immigration and Naturalization Service (INS).

8. Ibid., 18.

9. 18 United States Code 592 provides that " An officer of the Army or Navy who has control of troops and brings them to a place where a general or special election is being held shall be fined \$5,000 or imprisoned for 5 years or both, and be disqualified from holding any office of honor, profit or trust under the United States." By any account, a Draconian punishment to be sure.

10. The opinion, authored by the Principal Deputy Attorney General, distinguished on the facts the prohibitions of the law when passed just after the Civil War and the emergency situation that existed in Florida in 1992. The opinion divined that 50 feet constituted the distance needed to not have troops "at" a polling place. It further counselled federal troops to not be involved in any demonstrable show of federal military presence.Primer, Appendix F.

11. Ibid., 19.

12. Ibid., 22.

13. The OGE standards, 5 CFR Part 2635, are difficult to enforce in disaster relief operations. Many of the proffered gifts were not accepted for public relations reasons (steaks at a local restaurant for fear of the perception that soldiers were eating better than citizens) or operational constraints (rest and recreation at a nearby, but unaffected, Florida resort). Some ingenious attorneys managed to accept pizzas on behalf of the command. See Primer.

14. 31 United States Code 1342 prohibits federal agencies from accepting voluntary services except in an "emergency involving the safety of human life or the protection of property". It was left to FEMA to make this determination. Liability could accrue under the Federal Tort Claims Act, 42 United States Code 2679 et. seq. if volunteers were harmed by negligent acts of DOD personnel, or more broadly, if DOD was "directing" their activities. Volunteers referred to the American Red Cross and other similar agencies would not be deemed to be "directed" by DOD. Primer, 17.

15. Report of the Federal Emergency Management Agency, EM 3115, DR - 1048, Review of the Bombing of the Alfred P. Murrah Building, April 19, 1995., dated June 12-13, 1995, Log of Events at 18.

16. See 10 United States Code, Sections 371-378.

17. House of Representatives Report No. 71, Part 2, 97th Congress, 1st Session, (1981). Reprinted in 1981 U.S. Code Congressional and Administrative News, at 1785.

18. See generally, Testimony of Major General John M. Pickler, former Commander, Joint Task Force 6, Hearings, p. 14 et. seq.

19. Ibid., 14.

20. Ibid., 20.

21. Ibid.

22. The author was serving as the Staff Judge Advocate of the United States Army Special Operations Command at the time of the initial request for support. The basic facts in this paragraph are taken from an article in the Mar 93 issue of Soldier of Fortune magazine. Although not usually a viable source, the information contained in the article comports with my recollection of the original request. The breadth of the request was also substantiated at the Congressional Hearings on Waco, see Testimony of LTC Phillip P. Lindley. p. 27.

23. Ibid.

24. Eugene V. Gallagher and James D. Tabor, Why Waco? Cults and the Battle for Religious Freedom in America, (University of California, Berkeley Press, 1995) 3.

25. Dick J. Reavis, The Ashes of Waco, (Simon and Schuster, N.Y., N.Y., 1995) 124. The initial BATF request for helicopter support from the Texas National Guard was completely justified by the existence of illegal weapons.

26. Ibid., 125.

27. Major General Pickler in response to a question indicating that no reasonable evidence of a drug lab existed replied that "I had absolutely no reason to doubt it at the time. We do not routinely question the veracity of credentialed officials of law enforcement agencies". Hearings, page 10 and 30.

28. LTC Phil Lindley, Interview with author, contemporaneous with the event, Fort Bragg, North Carolina. The actual conversation, as related, had the senior officer refer to LTC

(then Major) Lindley as a "toad in the road". Major Lindley replied that he tended to take comments such as that personally. The senior officer replied that he (Major Lindley) could take it personally, and promptly hung up the phone.

29. Hearings, 17. LTC Lindley and the Congressmen present lauded the soldiers for their action in this regard. Care should be taken to curtail "forum shopping" to areas of great importance such as this.

30. Department of the Army, Memorandum, Headquarters United States Army Special Operations Command, Subject: USASOC Policy on Training Domestic Law Enforcement Agencies (DLEA), 12 Jan 1996, signed J.T. Scott, LTG, Commanding.

31. 10 United States Code, Section 331 through 334. Section 332 states: "Whenever the President considers the unlawful obstructions, combinations, or assemblages, or rebellion against the United States, makes it impracticable to enforce the laws of the United States in any state or territory by the ordinary course of judicial proceedings, he may call into federal service such of the militia of any state, and use such of the armed forces to suppress the rebellion." On its face this is a very low threshold, only elevated by political considerations.

32. See Monarch Ins. Co. v. District of Columbia, 353 F.Supp. 1249 (D.C.D.C. 1973), aff'd 497 F.2d 683, cert. denied 419 U.S. 1021.

33. A Report by the Special Advisor to the Board of Police Commissioners on the Civil Disorder in Los Angeles, A City in Crisis, October 21, 1992, at p. 152, hereinafter Special Advisor Report.

34. Ibid.

35. Department of the Navy, After Action Report, Joint Task Force Los Angeles-Garden Plot-Staff Judge Advocate, Section II c (4). The Staff Judge Advocate of the Joint Task Force reports that inconsistent levels of arming were reported throughout the JTF. Specifically he notes that active-duty troops were uniformly at the correct level "one", while federalized National Guard units were noted at levels "one" through "six", apparently at the direction of first line leaders. p. 3.

36. Ibid., Section II Problem Areas- Lessons Learned, d.(2) reflects this administrative disconnect.

37. Special Advisor Report, 153.

38. Ibid., 154.

39. Ibid.
40. The Presidential Proclamation to disperse and the order authorizing the Secretary of Defense to employ federal troops were signed and dated that same day, 1 May, 1992.
41. Jeffrey D. Simon, The Terrorist Trap, America's Experience With Terrorism, (Indiana University Press, Bloomington, Indiana, 1994).
42. Ibid., 38.
43. Ibid., 362.
44. Ibid., 357.
45. Ibid., 364.
46. Summarized report, The New York Times, August 16, 1995.
47. Department of Justice Report Regarding Internal Investigation of Shootings at Ruby Ridge, Idaho During Arrest of Randy Weaver, undated. Hereinafter, DOJ Report.
48. DOJ Report, Section IV, F.3 a.(3) explains compliance of FBI ROE with the Supreme Court's decisions in Tennessee v. Garner, 471 U.S. 1 (1985) and Graham v. Connor, 490 U.S. 386 (1989).
49. Testimony of SA Larry Potts, at the time Assistant Director of the Criminal Investigative Division, HQ, FBI, at DOJ Report, Section IV F.3.b.
50. Although there was considerable conflict about the exact wording of the ROE, this appears to be the essential wording of the initial brief to the snipers who formed the perimeter around the cabin. The ROE were enlarged to negate the possibility of harming children and to allow the shooting of the camp's dogs if they interfered or gave warning of law enforcement activities. DOJ Report, Section IV, F.3.b.(3).
51. DOJ Report, Section IV F.2.b. details the process of formulating and processing the ROE in effect on August 22, 1992. The initial " could and should" language was formulated by the HRT Commander and SA Potts enroute to the scene. They both testified that this additional guidance was never meant to impinge on the discretion of the individual FBI agent on the scene. Both the DOJ report and the Director of the FBI later disagreed with that proposition.
52. Summation of Facts as derived from DOJ Report, Statement of Facts.

53. Conclusion of DOJ Report, Section IV, F.4.

54. Customary International Law of Armed Conflict allows soldiers to engage enemy combatants without regard to an assessment of present threat. All that must be considered is lack of protected status (medical personnel, sick and wounded, prisoners of war) and generally considered rules of proportionality.

55. Author's Interview with Attorneys of the United Kingdom Land Forces, providing legal support to the 22 SAS, Salisbury, UK, 10 January, 1993.

BIBLIOGRAPHY

- Attorneys for the 22 Special Air Service Regiment (22 SAS),
interview by author, 10 January, 1993, Salisbury, UK.
- Federal Tort Claims Act, U.S.Code, Vol. 42, sec 2679 et.seq.
- Gallagher, Eugene V., and James D. Tabor. Why Waco? Cults and
the Battle for Religious Freedom in America. Berkeley:
University of California Berkeley Press., 1995.
- Lindley, Phillip A. Lieutenant Colonel, United States Army,
Deputy Staff Judge Advocate, U.S. Army Special Forces
Command, Fort Bragg, N.C. Inter view by author, 20 April,
1993, Fort Bragg, North Carolina.
- Office of Government Ethics Standards, contained at 5 Code of
Federal Regulations 2635 et. seq.
- Posse Comitatus Act, U.S. Code. Vol 18, secs. 1385 et. seq.
(1878).
- Reavis, Dick J. The Ashes of Waco. New York: Simon and Schuster,
1995.
- Report of the Federal Emergency Management Agency, EM 3115, DR
1048, Review of the Bombing of the Alfred P. Murrah
Building, April 19, 1995. 12 June 1995.
- Report by the Special Advisor to the Board of Police
Commissioners on the Civil Disorder in Los Angeles, A City
in Crisis, 21 October 1992.
- Simon, Jeffrey D. The Terrorist Trap, America's Experience With
Terrorism. Bloomington, Indiana: Indiana University Press,
1994.
- "Special Operations Forces at Waco." Soldier of Fortune, (August
1993).
- U.S. Congress. House. Joint Committee of the Judiciary, National
Security International Affairs and Criminal Justice
Subcommittee of the Government Reform and Oversight
Committee, Panel B. Inquiry into Federal Law Enforcement
Activities at Waco, Texas, 20 July, 1995.

- U.S. Congress, House. Report No. 71, Part 2, 97th Congress, 1st Session, (1981). Reprinted in 1981 U.S. Code Congressional and Administrative News.
- U.S. Department of the Army. Domestic Disaster Assistance, A Primer for Attorneys, The Judge Advocate General's School. Charlottesville, Virginia: 1994.
- U.S. Department of the Army, "USASOC Policy on Training Domestic Law Enforcement Agencies (DLEA)," Memorandum for subordinate units. Fort Bragg, North Carolina, 12 Jan 1996.
- U.S. Department of Justice, " Report Regarding Internal Investigation of Shootings at Ruby Ridge, Idaho During Arrest of Randy Weaver. Washington, undated. @Lexis Counsel Connect.
- U.S. Department of the Navy, "After Action Report, Joint Task Force Los Angeles-Garden Plot," Memorandum, Camp Pendleton, California, undated.