STRATEGY RESEARCH PROJECT

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FAST GUNS AND THE POSSE COMITATUS ACT

BY

COLONEL CHRISTOPHER G. GALLAVAN
United States Army Reserve

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by

COL CHRISTOPHER G. GALLAVAN

COL Joseph A. Russelburg
Project Advisor

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U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

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ABSTRACT

AUTHOR: COL CHRISTOPHER G. GALLAVAN

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Transnational threats, such as terrorism and international drug crime, and civil disturbances bode future domestic support operations in the realm of law enforcement for the U.S. military. The reserve components will play a key role in the growing homeland defense mission and will have to be integrated into the mission to provide the United States with an effective deterrent to potential domestic crises.

The Posse Comitatus Act (PCA) generally precludes the use of federal forces to perform law enforcement actions. There are numerous constitutional and statutory exceptions to the PCA which allow U.S. military forces to conduct law enforcement operations.

This paper examines national and military strategy focused on the homeland defense policy within the context of the ends-ways-means model. Countervailing civil-military relations policy concerns arising out of the PCA are identified and the history of federal forces use under the PCA discussed. Finally recommendations are made for an overarching homeland defense policy.

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FAST GUNS AND THE POSSE COMITATUS ACT

> The Army exists to protect Americans from foreigners. Harassing, attacking and killing Americans is a function of the police and FBI. American soldiers turning their guns on Americans should be unthinkable, and is intolerable.
>
> —Charles A. Zimmerman[1]

I. PRELUDE

In September 1991, 7th Squadron, 6th Cavalry Regiment (ATKHB) (7-6 CAV, FAST GUNS), Conroe, Texas reorganized from an AH-1 to an AH-64 Apache helicopter battalion under the auspices of the Reserve Component Unit Training Plan (RCUTP) administered by the Combat Aviation Training Brigade (CATB), Fort Hood, Texas. 7-6 CAV was the first United States Army Reserve (USAR) aviation unit to attempt to field the AH-64 Apache. The RCUTP involved an arduous four year training program beginning with individual Military Occupational Skill (MOS) and soldier survival skill training and culminating in a battalion level external evaluation (EXEVAL). Training was focused on acquiring skills to destroy armored forces under conventional European Major Theater War (MTW) Mission Essential Tasks (METL)—Movement to Contact, Deliberate Attack, Hasty Attack and Deep Attack. In July 1995, 7-6 CAV successfully completed its EXEVAL and was declared the first combat-ready USAR AH-64 Apache battalion.[2]

After completion of its EXEVAL, 7-6 CAV continued to hone its collective war-fighting skills by conducting battle drills, staff training exercises, gunnery and ground and air training with 1st Cavalry Division, Fort Hood, Texas. The FAST GUNS soldiers were proud of their accomplishments and were prepared to serve their country's mobilization needs in time of war.

On 8 January 1997, 7-6 CAV received an alert notice to perform a mission vital to its nation's security interest. Instead of mobilizing for MTW, the soldiers of the FAST GUNS found themselves preparing to conduct Operations Other Than War (OOTW). Specifically, 7-6 CAV was tasked to conduct aviation reconnaissance forward looking infrared (FLIR) counter-drug law enforcement assistance for Joint Task Force Six (JTF-6), in the vicinity of Del Rio, Texas. Cited statutory authority for the mission was Title 10 U.S.C. sec. 374 (B)(2)(B).[3]

Despite their lack of law enforcement OOTW training, elements of the FAST GUNS assembled, conducted pre-deployment training in military support to civil authorities and deployed to their assigned station. The critical focus of the FAST GUNS' pre-deployment training was the PCA and its restrictive impact on operational tasks and Rules of Engagement (ROE).

Why was 7-6 CAV, a combat-ready aviation attack unit prepared for war on the plains and rolling hills of Germany, tasked to conduct counter-drug support operations against

foreign and domestic citizens on the dusty, cactus strewn border of southwest Texas? The answer lies in an analysis of our complex National Security Strategy (NSS). This paper addresses the (NSS) and its enunciation of the homeland defense policy focused on military support to civil authorities in the realm of law enforcement. The interweaving of the policy throughout executive and military policy and doctrine documents is reviewed within the context of the ends-ways-means model. The countervailing civil-military relations policy imbedded in the terms of the PCA is explored. Finally, recommendations are made for an overarching homeland defense policy.

II. NATIONAL SECURITY STRATEGY

The basis for the use of U.S. military forces to support civil authorities in law enforcement activities stems from our core national values. Specifically, the Declaration of Independence deems that all men are created equal and endowed with certain unalienable rights to include life, liberty and the pursuit of happiness. Our Constitution was drafted and implemented to provide for the common defense, promote the general welfare and secure the blessings of liberty for our citizens and their posterity. Due to our cultural background, Americans feel that the values set forth in the Declaration of Independence and the Constitution extend to all humanity and

should be heeded by all humanity. The rights are perceived as fundamental values defining the dignity of mankind and are worthy of protection and promotion at home and abroad.

The NSS incorporates the aforementioned national values and sets forth three key national interests—protect the lives and the safety of Americans, maintain the sovereignty of the United States with its values, institutions and territories intact and provide for the prosperity of the nation and its people. To protect national values and interests, the NSS establishes three national policy objectives (ends)—enhance security, bolster economic prosperity and promote democracy. The fundamental concept underpinning the policy objectives is a world vision that is stable and prosperous thereby fostering security.[4] Military support to civil authorities not only satisfies moralistic and humanitarian concerns underlying our national core values but also stability issues underlying our national objectives.

In order to prioritize competing demands for U.S. action throughout the world, the NSS places national interests into three categories—vital, important and humanitarian. Vital interests are those of broad, overriding importance to the survival, safety and vitality of our nation. Physical security of U.S. territory, the safety of U.S. citizens and the

protection of critical domestic infrastructures are considered vital interests and form the core of the homeland defense policy. Under the NSS, the United States will defend vital interests unilaterally and decisively utilizing all means to include U.S. military forces. Important national interests do not affect our national survival; however, they do affect our national wellbeing and the character of our world. Under some circumstances, humanitarian and other interests compel national action because our values demand it. Examples include responding to natural and manmade disasters.[5]

Threats to our enduring national goals and internal security are diverse. Transnational threats in the form of terrorism, international crime, drug trafficking, weapons of mass destruction (WMD) and national information, power and transportation cyber-crime and strategic information attacks as well as civil disturbances and natural and man-made disasters threaten U.S. interests, citizens and the U.S. homeland itself. All forms of natural and man-made threats to the United States dictate a concomitant law enforcement function. The lines between domestic and foreign policy, intelligence and information, political and economic agendas and military and law enforcement activities will become increasingly blurred with time. Reserve forces will increasingly be involved in containing threats in the United States. Effectively organizing

and training the appropriate reserve assets to meet the homeland defense mission will not only provide the United States with a more effective deterrent, but it will provide a quicker and more comprehensive response to crises should they occur. Employment concerns raised by the Posse Comitatus Act must be addressed in any homeland defense plan utilizing reserve forces.[6] Homeland defense will require the integrated efforts of federal agencies, to include U.S. military forces, state and local governments, the industries that own and operate critical national infrastructures, non-governmental organizations and others in the private sector.[7]

To achieve its policy security objective in light of perceived external and internal threats, the NSS fashions a strategy (ways) of SHAPE the environment, RESPOND to crises and PREPARE for future threats. The means to support the SHAPE, RESPOND, PREPARE Strategy are superior military forces, a strong diplomatic corps and strong economic and foreign assistance programs.[8]

Under the NSS RESPOND strategy, the criteria for U.S. response are direct interest challenges and probability of high impact, successful engagement. United States response might be diplomatic, economic, law enforcement, military or a combination thereof. Military personnel are increasingly called upon to respond to growing transnational threats, particularly

terrorism, drug trafficking and international organized crime. In addition, military forces are charged with providing augmentation and assistance forces for WMD consequence management, civil disturbance, natural and man-made disasters and critical infrastructure protection.[9]

The NSS PREPARE strategy envisions new approaches for integrating the Active and Reserve components into a Total Force optimum for future missions. Efforts to integrate and improve the capability of federal, state, local and private sector partners to protect against and respond to transnational and other domestic threats will continue.[10]

The NSS (ways) clearly links military support to civil authorities to our national objective (ends) of enhancing security. The U.S. military (means), to include USAR forces, is specifically tasked with the conduct of military support to civil authorities to include law enforcement.

III. NATIONAL MILITARY STRATEGY

The National Military Strategy (NMS) exists to advise the Joint Chiefs on the strategic direction of the Armed Forces in implementing guidance of the NSS and Quadrennial Defense Review (QDR).[11] The national military objectives (ends) are to promote peace and stability and defeat adversaries. The U.S. military has adopted the NSS strategy (ways) of SHAPE, RESPOND, PREPARE

to achieve its objectives and support the NSS strategy.[12] The NMS recognizes that America's Armed Forces have responded to a variety of national needs other than waging wars. The NMS foresees military forces combating terrorism, WMD, illegal drug-trafficking and other threats at home depending upon applicable law, the direction of the National Command Authority (NCA) and the national interest involved. In addition, the NMS foresees the continued commitment of military resources to support civil authorities in executing missions such as civil works, disaster relief and domestic crises.[13]

The NMS RESPOND strategy requires military forces to conduct Smaller-Scale Contingency Operations (SSC) to include countering terrorism at home and providing support to domestic authorities in combating direct and indirect threats to the U.S. homeland. The utilization of military forces especially is critical when the potential for violence exceeds the capability of domestic agencies.[14] The NMS PREPARE strategy requires the integration of the National Guard and other Reserve Component elements into a Total Force organized, modernized and trained to support military strategy.[15] The means utilized to accomplish the NMS objectives are full-spectrum forces which are multi-mission capable, jointly and internationally interoperable and capable of coordinated operations with other agencies of government,

nongovernmental organizations (NGO), international organizations (IO) and private volunteer organizations (PVO).[16]

IV. U.S. ARMY DOCTRINE AND POLICY

Consistent with the NMS, Joint Vision 2010 and Army Vision 2010 envision a mission of military support to civil authorities. Specifically, the military support to civil authorities mission is sub-categorized as core security and humanitarian missions. Core security tasks involve WMD, counter-drug, illegal immigration and crime in the streets. Humanitarian tasks involve disaster relief and population evacuation.[17]

Field Manual 100-5, Operations, identifies military support to domestic civil authorities as OOTW. When appropriate governmental authority directs the Armed Forces to assist in domestic emergencies within CONUS, the Army has primary responsibility. Army units support disaster relief, humanitarian assistance and similar operations. Federal law also authorizes the domestic use of military force to suppress domestic violence or insurrection. The Constitution and federal law; however, restrict its use. Under the provisions of the Posse Comitatus Act, neither the active component nor the USAR may execute the law in the place of duly appointed law-

enforcement means without specific Presidential or Congressional approval and direction.[18]

Field Manual 100-19, Domestic Support Operations, identifies four general mission support categories: disaster assistance, environmental assistance, law enforcement support and community assistance. FM 100-19 contends that the Army, particularly the NG and USAR with their extensive combat support and combat service support (CS/CSS) structure, is ideally equipped to assist civil authorities in support operations. Three distinct missions are grouped under law enforcement support: counter-drug, civil disturbance and combating terrorism. Under certain conditions, disaster and environmental assistance could involve law enforcement functions. FM 100-19 cautions that domestic support operations are secondary to the Army's primary mission of national defense.[19]

The Army Reserve is designated a reserve component of the Armed Forces of the United States.[20] The Army Reserve includes all Reserves of the Army who are not members of the Army National Guard of the United States.[21] The purpose of the Army Reserve is to provide trained units and qualified persons available for active duty in time of war or national emergency, and at such other times as the national security may require.[22] Under our NSS, members of the USAR are subject to the

restrictions of the PCA if they are tasked to perform law enforcement functions.

Key policy provisions prescribing the USAR role in support to civil disturbances and civilian law enforcement are contained in AR 500-50 and AR 500-51 respectively.[23] The provisions are consistent with the constitutional, statutory, judicial and Department of Defense proscriptions underlying the PCA addressed in subsequent portions of this paper.

It is clear from an examination of executive and military strategy (ways) and doctrine documents that the NSS policy (ends) of enhancing domestic security through military support to civil authorities is articulated throughout the structure. Within the SSC OOTW environment, it is clear that military forces, to include the USAR, (means) are an essential component of the integrated approach to domestic law enforcement support; however, the applicability of the Posse Comitatus Act muddies the clarity, coherence, consistency and applicability of the policy. An "ends" tension exists between the interests articulated by the homeland defense policy and the PCA. To better understand the origin and nature of the tension, it is necessary to examine the PCA in detail.

V. POSSE COMITATUS ACT

A. HISTORY

Military support to civil authorities in the realm of law enforcement is proscribed by the PCA. The Posse Comitatus Act provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both[24]

Posse Comitatus is defined 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.[25]

The Posse Comitatus Act is a legislative prescription of the proper domestic spheres of the military and civilian authorities. The PCA was spawned by the abusive, widespread use of federal troops as a posse in the South during the Reconstruction Era by U.S. marshals to enforce laws and interfere in local elections and legislative machinery. The South perceived that the North was vicariously denying Southerners the fundamental rights of self-government. After extensive debate, the Posse Comitatus Act was enacted as a rider to the Army Appropriations Bill in 1879. To date, no one has been criminally charged for its violation.[26]

The philosophical underpinning to the Posse Comitatus Act is succinctly set forth in Bissonette v. Haig.[27] Bissonette was one of a multitude of cases emanating from the occupation at Wounded Knee, South Dakota during the 71 day period from February 27, 1973 to May 8, 1973. In Bissonette, residents of the Pine Ridge Indian Reservation brought a damages action against military personnel and federal officials for alleged wrongful seizure and confinement of the plaintiffs. Plaintiffs alleged that they were unreasonably seized and confined in the village of Wounded Knee by military personnel contrary to the Posse Comitatus Act and the Fourth Amendment. Defendants unsuccessfully moved to have the claim dismissed for failure to state a claim. In performing its reasonableness test of balancing the interests for and against seizure, the court arrayed the societal and governmental interest of special threats to the constitutional government inherent in military enforcement of civilian law rather than traditional individual interests of privacy, freedom of movement or life against seizure. As its rationale, the court stated:

> Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to

speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.

The interest in limiting military involvement in civilian affairs has a long tradition beginning with the Declaration of Independence and continued in the Constitution, certain acts of Congress, and decisions of the Supreme Court[28]

B. JUDICIAL CONSTRUCTION AND INTERPRETATION

Construction and interpretation of the body of the Posse Comitatus Act follows traditional constitutional, statutory and judicial analysis. On its face, the statute provides for constitutional and congressional exceptions. In regard to constitutional exceptions, the sponsor of the statute, Congressman Knott, intended that the word "whoever" include everyone who successfully ordered the Army to execute the laws. He said that the Act's restrictions reach "from the Commander-in-Chief down to the lowest officer in the Army who may presume to take upon himself to decide when he shall use the military force in violation of the law of the land".[29] The subjugation of the Commander-in-Chief to the statute coupled with the lack of specific constitutional authority for the President to employ a posse comitatus has not prevented the President from assuming power to call forth the Army. In re Neagle[30] was a seminal case holding that presidential power could arise from his duties under the Constitution.[31] In re Neagle, coupled with Article II,

Section 3[32] (he shall take care that the laws be faithfully executed) and Article IV, Section 4[33] (U.S. shall guarantee to every state upon application of the Legislature or of the Executive against domestic violence) of the Constitution, ostensibly give the President the constitutional power to employ federal troops in emergency situations involving loss of life, wanton destruction of property, loss of governmental functioning and public order and protection of federal property and functions.[34]

Statutory authority for presidential use of federal troops is much broader than the constitutional exceptions. Congress has often authorized use of the nation's armed forces to either enforce or assist in the enforcement of a wide range of federal and state laws. Significant statutory exceptions exist in the realm of insurrection,[35] Uniform Code of Military Justice,[36] appointment of military legal officers as Special Assistant United States Attorneys and Assistant United States Attorneys[37] and military support for civilian law enforcement agencies.[38] Additional statutory grants of military enforcement power include protecting and assisting the investigation of crimes against foreign diplomats and high government officials,[39] protecting Indian and public lands,[40] supporting the nation's neutrality,[41] enforcing health and quarantine laws,[42] assisting in

the enforcement of offshore fisheries laws,[43] executing warrants relating to enforcement of federal civil rights legislation,[44] protecting the rights of the discoverer of a guano island,[45] providing assistance in cases of crimes involving nuclear materials,[46] actions to support customs laws,[47] civil disorder support to territorial governors[48] and providing support in emergency situations involving chemical or biological weapons of mass destruction.[49] Individuals and agencies responsible for requesting forces under the statutory exceptions and providing lead agent management oversight are scattered throughout the federal government bureaucracy.

Judicial decisions concerning the terms of the Posse Comitatus Act combined with statutory exceptions have served to flesh out the terms of the PCA. The use of the term "willfully" connotes a scienter requirement to prove a violation of the statute.[50] The meaning of the term "willful" was raised in United States v. Walden.[51] In Walden, the court found that the use of Marine military personnel by civil authorities to secure a firearms conviction against civilian defendants violated a Navy Instruction proscribing the use of military personnel to enforce civilian laws. The defendants moved to have the evidence gained in the investigation excluded and their

convictions reversed. In denying defendants' request, the court concluded that:

> There is totally lacking any evidence that there was a conscious, deliberate or willful intent on the part of the Marines or the Treasury Department's Special Investigator to violate the Instruction or the spirit of the Posse Comitatus Act[52]

The meaning of the statutory terms "uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws" was the focus of multiple cases spawned by the Wounded Knee uprising. The operative facts indicate that on the evening of February 27, 1973, well over 100 people entered and occupied the village of Wounded Knee on the Pine Ridge reservation in South Dakota. The Federal Bureau of Investigation, United States Marshal Service and the Bureau of Indian Affairs were summoned, along with local police authorities, in an effort to put down the resulting civil disorder.[53]

Military forces were involved in myriad support activities. The U.S. Army and South Dakota National Guard provided materiel and equipment to federal civil law enforcement officers. U.S. Army personnel were ordered to Wounded Knee to observe and report to the President through the Department of Defense on the necessity of calling in federal troops and to draft contingency plans to be used by the Army in the event that federal military intervention was required. The U.S. Air Force and Nebraska

National Guard provided aerial photographic reconnaissance services. The U.S. Army personnel provided advice and counsel to Department of Justice personnel on the subjects of negotiations, logistics and rules of engagement. Members of the Nebraska National Guard provided maintenance services for military vehicles provided to federal officers.[54]

As a result of the occupation, there were numerous prosecutions on charges including obstruction of justice in violation of 18 U.S.C. sec. 231. The gravamen of this charge, as it pertained to the actions of the Wounded Knee defendants, was the statutory requirement that the law enforcement officers allegedly obstructed be lawfully engaged in performance of their duties. The defendants claimed that military involvement in the uprising violated the Posse Comitatus Act rendering the actions of the law enforcement officers unlawful and the charges subject to dismissal. Four cases were tried on the identical salient facts—United States v. Banks,[55] United States v. Jaramillo,[56] United States v. Red Feather[57] and United States v. McArthur.[58] The courts in Banks and Jaramillo found the military activities violative of the Posse Comitatus Act, thus vitiating charges under Section 231 while the courts in Red Feather and McArthur found the activities permissible.

In Jaramillo, the court concluded that the use of military supplies and equipment was not a violation of the statute. The

Court believed that the term "any part of the Army or Air Force" referred to any unit of troops, whatever its size or designation".[59] The court focused on the critical question of the degree to which there was use of military personnel at Wounded Knee. The court found that the PCA had been violated because the "use of any part of the Army or Air Force pervaded the activities" of the civilian law enforcement agents.[60]

In Red Feather, the court reviewed the term "to execute the laws" and held that Congress intended it to make unlawful "the direct active participation of federal military troops in law enforcement activities. Congress did not intend to make unlawful the involvement of federal troops in a passive role in civilian law enforcement activities".[61] The court further held:

> Activities which constitute an active role in direct law enforcement are: arrest; seizure of evidence; search of a person; search of a building; investigation of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect and other like activities[62]

The court opined that:

> Activities which constitute a passive role which might indirectly aid law enforcement are: mere presence of military personnel under orders to report on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of military personnel to deliver military materiel, equipment or supplies, to train local law enforcement officials on the proper use and care of such material or equipment, and to maintain such materiel or

> equipment; aerial photographic reconnaissance flights and other like activities[63]

In McArthur, the court focused on the meaning of the word "execute" and determined that it implied an authoritarian act.[64] The court concluded that the proper standard to determine a violation of the PCA was:

> Were Army or Air Force personnel used by the civilian law enforcement officers at Wounded Knee in such a manner that the military personnel subjected the citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature, either presently or prospectively?[65]

In United States v. Gerena,[66] the court further defined the three-part inquiry set forth in McArthur. The court concluded

> A power regulatory in nature is one which controls or directs. A power proscriptive in nature is one that prohibits or condemns. A power compulsory in nature is one that exerts some coercive force[67]

Although the PCA specifically refers to the "Army or the Air Force" on its face, it has been extended by administrative directive to the Department of the Navy and Marine Corps.[68] The Posse Comitatus Act does not apply to:

> 1. A member of the Reserve component when not on active duty, active duty for training, or inactive duty for training.
>
> 2. A member of the National Guard when not in the Federal Service.
>
> 3. A civilian employee of the Department of Defense.
>
> 4. A member of a Military Service when off duty, and in a private capacity.[69]

C. JUDICIAL PRECEDENT

In addition to challenges to indictments as set forth in the Wounded Knee cases, judicial application of the Posse Comitatus Act primarily has been limited to cases involving jurisdictional contests, attempts to exclude evidence on the ground that the government's case has been tainted by a violation of the PCA and the imposition of individual liability and damages for violation of the Act. Chandler v. United States,[70] the leading authority in the jurisdictional cases, dealt with the issue of whether or not the PCA precluded the arrest and transportation to trial of a U.S. national in Germany by US troops. The court held that it did not on grounds that the actions taken comprised the sole manner in which the defendant could have been brought within the jurisdiction of the court. Dispositive in the court's mind was the fact that the arrest occurred in occupied enemy territory under exclusive US military control.[71] Chandler and subsequent cases have been cited for the proposition that the PCA has no extra-territorial application. Current law is unsettled on the proposition.[72]

The exclusionary rule cases center on drug and felony offenses. The underlying issue in the cases is the extent to which military personnel may be used to gain civilian convictions. The courts' methodology centers on two issues—was the PCA violated, if so, is the exclusionary rule applicable?

Concerning violations of the Act, Burns v. State[73] holds that civilian aid to military authorities during a drug investigation that netted a civilian conviction is permissible under the PCA. In Hubert v. State[74] and Hildebrandt v. State,[75] military investigators investigated soldiers for drug use and discovered civilian suppliers. The agents contacted civilian law enforcement and assisted in obtaining convictions of the civilian suppliers by purchasing drugs in an undercover role. The courts relied on the fiction that the agents "assumed no greater authority than that of a private citizen" in finding no violation of the PCA.[76] Regarding the exclusionary rule, courts have been reluctant to fashion and apply the rule to evidence gained in violation of the PCA.[77]

Turning to personal liability and damages for violations of the PCA, judicial precedent exists to support the proposition that violation of the PCA coupled with a violation of the Constitution presents a justiciable claim for damages. In Laird v. Tatum,[78] a class action suit was brought against the Army to restrain its surveillance and information gathering against targeted individuals and organizations. The plaintiffs contended that the activities chilled their First Amendment rights. Although the Court did not reach the First Amendment damages issue in the case in chief, the Court in dictum stated:

> Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, Federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied[79]

In Bissonette, the court examined the interplay between the Fourth Amendment and the Posse Comitatus Act in the context of a constitutional damages claim and concluded:

> In the context of the Fourth Amendment, however, we believe plaintiffs' theory that the use of military force is in a class by itself has merit. The legal traditions which we have briefly summarized establish that the use of military force for domestic law-enforcement purposes is in a special category, and that both the courts and Congress have been alert to keep it there. In short, if the use of military personnel is both unauthorized by any statute, and contrary to a specific criminal prohibition, and if citizens are seized or searched by military means in such a case, we have no hesitation in declaring that such searches and seizures are constitutionally "unreasonable"[80]

D. POSSE COMITATUS ACT APPLICATION TO LAW ENFORCEMENT SUPPORT OPERATIONS

Domestic counter-drug operations fall under a plethora of executive agencies to include the Department of Justice, Drug Enforcement Agency (DEA), U.S. Border Patrol, Bureau of Alcohol, Tobacco and Firearms (ATF), U.S. Customs Service, Internal Revenue Service (IRS) and Department of Defense (DOD). The

hodgepodge of judicial rulings in the drug and Wounded Knee cases were amalgamated into the text of Chapter 18—Military Support For Civilian Law Enforcement Agencies, Title 10 U.S.C. sec. 371 et. seq. as statutory exceptions to the PCA within the context of the drug war. Chapter 18 specifically allows the military to provide civilian law enforcement information, military equipment and facilities, training and advising, and maintenance and operation of equipment.[81] Chapter 18 proscribes "direct participation" in law enforcement activities and implementing instructions proscribe indirect assistance that is "regulatory, proscriptive, or compulsory".[82] The Red Feather "direct active involvement in the execution of the laws", the Jaramillo "pervade the activities of civilian authorities" and the McArthur "constitute the exercise of regulatory, proscriptive, or compulsory military power" tests have been consistently applied by courts interpreting the provisions of 10 U.S.C. sec. 375 and implementing DoD Instructions.[83]

Civil disturbances may range from unruly demonstrations to widespread rioting with looting and arson. In extreme cases, civil disturbances may include criminal acts of terrorism and violence.[84] As previously mentioned, constitutional and statutory authority exists for the President to employ federal forces without the restrictions of the PCA. The Attorney General is the lead agent for federal response to civil

disturbances. Certain statutory provisions render the PCA inapplicable to particular civil disturbance scenarios; however, the restrictions of the Constitution's Bill of Rights applicable to any law enforcement officer remain in effect and are applicable to federal forces functioning as law enforcement officers unless martial law is declared.[85]

Counter-terrorism includes means taken to prevent, deter and respond to terrorism. Assistance provided in counter-terrorism is essentially a subset of civil disturbance operations. The Federal Bureau of Investigation (FBI) is the lead law enforcement agency for a terrorist incident.[86] Under presidential authority, the employment of special operations forces to support counter-terrorism operations must comply with law enforcement policies dictated by the Attorney General.[87] All training and equipment support provided by military forces is subject to the PCA imposed limitations of Chapter 18, Title 10 U.S.C.[88]

VI. CONCLUSIONS AND RECOMMENDATIONS

Civilian rule is basic to the American system of government. The Constitution, congressional statutes and judicial decisions are consistent in their acknowledgment of the primacy of civilian control. The President serves as the Commander-in-

Chief of the armed forces. Congress has the power to appropriate monies and establish rules to sustain and govern the armed services. Civilian leadership over the armed forces exists in the form of a Secretary of Defense, service secretaries and various other civilian authorities.

The concept of military involvement in civilian law enforcement is an anathema to our citizens because of the inherent threat of military rule and suspension of civil liberties. Exceptions allowing military involvement in domestic law enforcement have been narrowly drafted and construed by our executive, legislative and judicial branches of government. Military forces executing law enforcement missions must remain mindful of the constitutional rights afforded to all citizens within their operations area.

Our national interest in maintaining civilian primacy in government is pressured by the growing threat to our domestic security posed by transnational threats and civil disturbances. Our traditional approach to domestic threats has been to rely on federal, state and local law enforcement agencies to identify, locate and eliminate or contain the threats. Military support, to include reserve components, for civil law enforcement has been provided on a reactive, situational basis.

The war on drugs, weapons of mass destruction and civil riots have shown resistance to conventional law enforcement

programs. Myriad disjunctive laws, rules and regulations exist governing military support to law enforcement. Multitudes of executive agencies exist having similar and/or overlapping responsibilities for segments of vital domestic law enforcement threats. An overarching homeland defense policy incorporating a single-source lead agency and specific inter-agency responsibilities is not contained in the NSS or NMS.

In order to formulate a cohesive, overarching homeland defense policy, our national interest in civil-military relations (ends) must be balanced against our national interest in domestic security (ends). The policy must be fabricated within the context of our SHAPE, RESPOND, PREPARE NSS (ways) and must include the use of the Total Force (means). As transnational and public order threats mature and are better identified, corresponding action must be taken by our executive, legislative and judicial branches to formulate cohesive, narrowly focused laws, regulations and policies which will serve to eliminate or contain the threats without undue infringement of our constitutional rights.

The President, in conjunction with Congress, has the responsibility for formulating domestic security policy for the United States. The President must take the lead in developing an overarching homeland defense policy incorporating a judicially recognized balanced approach to domestic security and

civil-military primacy, designate a lead agency for management, assign interagency responsibilities and gather the support of US citizens through political and congressional action. The creation of an integrated, coordinated homeland defense policy will diminish the possibility of "Americans turning their guns on Americans" while insuring our laws, sovereignty, institutions and unique way of life remain intact.

VII. EPILOGUE

During the period 24 April 1997 through 6 May 1997, elements of 7-6 CAV deployed to Del Rio, Texas as an assigned CJTF-6 force and assisted the U.S. Border Patrol, Del Rio sector, by conducting military training consisting of aviation reconnaissance and FLIR operations in the vicinity of Val Verde, Kinney, Maverick and Dimmit Counties. 7-6 CAV safely flew a total of 358 mission support flying hours to include 284 night system hours. The FAST GUNS indirectly assisted in the arrest of eight suspected felons and the seizure of marijuana and cocaine valued at $1,400,000.00.[89] 7-6 CAV complied with the constitutional tenets of the PCA incorporated into Title 10 U.S.C. sec. 374 while performing essential domestic security services. 7-6 CAV completed its mission in an exemplary manner, a manner envisioned by Mr. Charles A. Zimmerman.

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ENDNOTES

[1] Charles A. Zimmerman, "Killing Americans," Army Times, 21 December 1998, p. 22.

[2] The writer commanded 7th Squadron, 6th Cavalry Regiment (ATKHB) from September 1991 through September 1995.

[3] CJTF SIX MSG (U) DTG 081720Z Jan 97 Subject: Concept for Counterdrug Mission JT494-97A (AH-64A Aviation Reconnaissance FLIR with Detection & Monitoring Authority), 4.

[4] The White House, A National Security Strategy For A New Century (Washington, D.C.: n.p., 1998), 5.

[5] Ibid., 5-6.

[6] National Defense Panel, Transforming Defense National Security in the 21st Century (Washington, D.C.: n.p., 1997), 25-28.

[7] The White House, 8.

[8] Ibid., 6-7.

[9] Ibid., 14-21.

[10] Ibid., 23.

[11] Chairman of the Joint Chiefs of Staff, National Military Strategy (Washington, D.C.: n.p., 1997),5.

[12] Ibid., 11.

[13] Ibid., 6.

[14] Ibid., 16-17.

[15] Ibid., 17,23-24.

[16] Ibid., 21-22.

[17] U.S.Army War College, Department of Command, Leadership and Management, Strategic Leadership (Carlisle Barracks: U.S. Army War College, 1998), 349-350, 368.

[18] Department of the Army, Operations, Field Manual 100-5 (Washington, D.C.: U.S. Department of the Army, 14 June 1993), 13-0, 13-5 (hereinafter FM 100-5).

[19] Department of the Army, Domestic Support Operations, Field Manual 100-19 (Washington, D.C.: U.S. Department of the Army, 1 July 1993), viii, 9-5 (hereinafter FM 100-19).

[20] 10 U.S.C. sec. 10101 (1994).

[21] 10 U.S.C. sec. 10104 (1994).

[22] 10 U.S.C. sec. 10102 (1994).

[23] Department of the Army, Civil Disturbances, Army Regulation 500-50 (Washington, D.C.: U.S. Department of the Army, 1 June 1972), 1-2 (hereinafter AR 500-50); Department of the Army, Support to Civilian Law Enforcement, Army Regulation 500-51 (Washington, D.C.: U.S. Department of the Army, 1 August 1983), i (hereinafter AR 500-51).

[24] 18 U.S.C. sec. 1385 (1994).

[25] Black's Law Dictionary 1324 (4th ed. 1968); United States v. Wolffs, 594 F.2d 77, 84 n.7 (5th Cir. 1979).

[26] James P. O'Shaughnessy, "The Posse Comitatus Act: Reconstruction Politics Reconsidered," The American Criminal Law Review Vol. 13, No. 4 (Spring 1976): 703-712.

[27] Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985).

[28] Id. at 1387.

[29] 7 Cong. Rec. 3847 (1878).

[30] In re Neagle, 135 U.S. 1 (1890).

[31] Id. at 16.

[32] U.S. Const. art. II, sec. 3.

[33] U.S. Const. art. IV, sec. 4.

[34] In re Debs, 158 U.S. 564, 578-579 (1895). Contra Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-588 (1952); AR 500-50, 2-1 through 2-3.

[35] 10 U.S.C. secs. 331-335 (1994) (President authorized to enforce laws in States after issuance of proclamation to disperse).

[36] 10 U.S.C. sec. 801 et. seq. (1994 & Supp.II 1996).

[37] 28 U.S.C. secs. 515, 543 (1994).

[38] 10 U.S.C. secs. 371-381 (1994 & Supp.II 1996) (Military support for civilian law enforcement agencies pursuant to activities under the Controlled Substance Act, 21 U.S.C. sec. 801 et. seq. (1994 & Supp.II 1996)).

[39] 18 U.S.C. secs. 112(f), 351(g) 1751(i) (1994 & Supp.II 1996).

[40] 16 U.S.C. secs. 23, 78, 593 (1994); 25 U.S.C. sec. 180 (1994); 43 U.S.C. sec. 1065 (1994).

[41] 22 U.S.C. secs. 408, 461, 462 (1994).

[42] 42 U.S.C. sec. 97 (1994).

[43] 16 U.S.C. sec. 1861 (1994).

[44] 42 U.S.C. sec. 1989 (1994).

[45] 48 U.S.C. sec. 1418 (1994).

[46] 18 U.S.C. sec. 831(d)(e) (1994).

[47] 50 U.S.C. sec. 220 (1994).

[48] 48 U.S.C. secs. 1422, 1591 (1994).

[49] 10 U.S.C. sec. 382 (Supp.II 1996).

[50] O'Shaughnessy, "The Posse Comitatus Act: Reconstruction Politics Reconsidered", 731 n. 171.

[51] United States v. Walden, 490 F.2d 372 (4th Cir. 1974).

[52] Id. at 376.

[53] O'Shaughnessy, "The Posse Comitatus Act: Reconstruction Politics Reconsidered", 724.

[54] United States v. Red Feather, 392 F.Supp. 916, 921 (D.S.D. 1975), aff'd sub nom. United States v. Casper, 541 F.2d 1275 (8th Cir. 1976).

[55] United States v. Banks, 383 F.Supp. 368 (D.S.D. 1974).

[56] United States v. Jaramillo, 380 F.Supp. 1375 (Neb. 1974), appeal dismissed, 510 F.2d 808 (8th Cir. 1975).

[57] 392 F.Supp. at 916.

[58] United States v. McArthur, 419 F.Supp. 186 (D.N.D. 1976).

[59] 380 F.Supp. at 1379.

[60] Id. at 1381.

[61] 392 F.Supp. at 924.

[62] Id. at 925.

[63] Id.

[64] 419 F.Supp. at 194.

[65] Id.

[66] United States v. Gerena, 649 F.Supp. 1179 (D.Conn. 1986).

[67] Id. at 1182.

[68] U.S. Department of Defense, DoD Cooperation with Civilian Law Enforcement Officials, DoD Directive 5525.5 (Washington, D.C.: U.S. Department of Defense, 15 January 1986), 4-6 (hereinafter DoD Directive 5525.5).

[69] Ibid.

[70] Chandler v. United States, 71 F.2d 921 (1st. Cir. 1948).

[71] Id. at 936.

[72] U.S. v. Yunis, 924 F.2d 1086, 1093 (D.C.Cir. 1991) (Posse Comitatus Act imposes no restriction on use of American armed forces abroad). Contra United States v. Kahn, 35 F.3d 426, 431 n.6 (9th Cir. 1994).

[73] Burns v. State, 473 S.W.2d 19 (Tex.Crim.App. 1971).

[74] Hubert v. State, 504 P.2d 1245 (Okla.Crim.App. 1972).

[75] Hildebrandt v. State, 507 P.2d 1323 (Okla.Crim.App. 1973).

[76] 504 P.2d at 1247; 507 P.2d at 1325. Contra People v. Burden, 288 N.W.2d 392, 394-395 (Mich.Ct.App. 1980).

[77] Walden, 490 F.2d at 377; United States v. Hartley, 486 F.Supp. 1348, 1356 (D.C.Fla. 1980); State v. Nelson, 260 S.E.2d 629, 639 (N.C. 1979); Contra 288 N.W.2d at 395.

[78] Laird v. Tatum, 408 U.S. 1 (1972).

[79] Id. at 15, 16.

[80] Bissonette, 776 F.2d at 1389.

[81] 10 U.S.C. secs. 371-384 (1994 & Supp.II 1996).

[82] 10 U.S.C. sec. 375 (1994); DoD Directive 5525.5, 4-6.

[83] 35 F.3d at 431; 924 F.2d at 1094; 649 F.Supp. at 1182.

[84] FM 100-19, 7-11.

[85] U.S. Department of Defense, Military Assistance for Civil Disturbances (MACDIS), DoD Directive 3025.12 (Washington, D.C.: U.S. Department of Defense, 4 February 1994), 2-3 (hereinafter DoD Directive 3025.12); AR 500-50, 2-1 through 2-3; Department of the Army, FORSCOM Military Assistance to Civil Authorities, Command Readiness Program Handbook (Atlanta, GA: U.S. Army Forces Command, September 1998),48.

[86] FM 100-19, 7-14.

[87] DoD Directive 3025.12, 8.

[88] 50 U.S.C. sec. 2312(f) (Supp.II 1996).

[89] Craig D. Schwab, CPT, Assistant S-3, 7th Squadron, 6th Cavalry Regiment (ATKHB), telephone interview by author, 4 February 1999.

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