

## **20. Militarization of the Home Front**

### ***Congress should***

- refuse to enact further exceptions to, or otherwise weaken, the Posse Comitatus Act;
- closely monitor the executive branch to ensure that the military remains a last resort, not a first responder, for addressing the problem of terrorist attacks on the home front; and
- repeal the “drug war exceptions” to the Posse Comitatus Act.

Americans hold the U.S. military in high regard for very good reasons. Despite the current difficulties in Iraq, America’s armed forces have overthrown two tyrannical regimes in the space of two years—and they have done so quickly and overwhelmingly. In fact, the military has been so impressive abroad that some federal officials have come to see it as a panacea for domestic security problems posed by the terrorist threat. But on the home front there are many tasks for which the military is ill suited and for which its deployment would be dangerous.

Americans have long been wary of the use of standing armies to keep the peace at home. Despite that reluctance, top figures in Congress and the Bush administration have proposed weakening the Posse Comitatus Act, the 126-year-old statute that restricts the government’s ability to use the U.S. military as a police force. Calls abound for bringing military resources to bear in areas ranging from border control to domestic surveillance. Sen. John Warner (R-VA), head of the Armed Services Committee, has said that the doctrine of Posse Comitatus may have had its day. And Gen. Ralph E. Eberhardt, the head of the new Northern Command, which directs all military forces within North America, said, “We should always be reviewing things like Posse Comitatus . . . if we think it ties our hands in protecting the American people.”

## ***The Posse Comitatus Act***

What is the Posse Comitatus Act (PCA), and does it “tie the hands” of the government in protecting the American people? Passed in 1878, the PCA forbids law enforcement officials from employing the U.S. military to “execute the laws.” The rationale behind the act, as one federal court has explained, is that “military personnel must be trained to operate under circumstances where the protection of constitutional freedoms cannot receive the consideration needed in order to assure their preservation. The Posse Comitatus statute is intended to meet that danger.”

But the PCA is not a total prohibition on domestic use of the military, and it hardly ties the government’s hands with regard to any *legitimate* use of the military on the home front. First, the act applies only to troops that are acting under federal command. It does not forbid state governors from using the National Guard to perform policing duties. The troops stationed in the nation’s airports after September 11, 2001, were operating under the command of the state governors, and therefore the Posse Comitatus Act didn’t apply.

Second, the courts have generally held that only hands-on policing violates the act. That means that arresting people, searching them, interrogating them, restricting their movement, and other coercive activities are proscribed. But if the Army provides training or equipment to domestic authorities, it’s not violating the act.

Third, Congress can pass exceptions to the law, and it has done so repeatedly. For example, there are statutes on the books that allow the military to act in an emergency situation involving weapons of mass destruction.

Finally, the courts recognize a “military purpose exception” to the PCA even when there is no specific statute in place allowing the use of the military. So if a latter-day Pancho Villa invades California, we don’t have to send in state and local police; instead, the Army can respond. The same analysis applies to the fighter jets patrolling American skies for hijacked jetliners after 9/11. They were there to defend our cities against a military-style attack, and no one has suggested that was a violation of the Posse Comitatus Act.

Clearly then, the Posse Comitatus Act doesn’t tie the government’s hands. What the law does is reaffirm the principle that a free country relies on civilian peace officers to keep the peace. We call the troops in only as a last resort in extraordinary circumstances. And that is entirely appropriate.

## **Past Abuses**

Unfortunately, we've deviated from that principle in the past. And those mistakes show how important it is to resist militarization of the home front. For example:

- In the late 19th and early 20th century, the military was used repeatedly to suppress labor unrest and crush unions, putting whole areas of the country under martial law. Particularly egregious was the Army's suppression of the 1899 miners' strike in Coeur d'Alene, Idaho. Army regulars engaged in house-to-house searches and assisted in more than a thousand arrests. Troops arrested every adult male in the area and jailed the men without charging them for weeks.
- During World War I, Army intelligence agents had arrest powers and free rein throughout the country. They used that power to harass labor leaders, opponents of the war, and politically active minorities. They carried out some six million investigations during the war and caught a grand total of one German spy.
- In the 1960s, the military got back into the spy business. Senate hearings in 1971 revealed that military intelligence agents kept thousands of files on suspected radicals, including such dangerous characters as Adlai Stevenson, the ACLU, and Americans for Democratic Action.

More recently, the Army played a key role in the Waco disaster in 1993. It provided the equipment and advice that helped lead to the deaths of more than 80 people, including 27 children. The drug war exceptions to the Posse Comitatus Act allowed federal agents to get M1 Abrams tanks. And it was U.S. Army Delta Force operatives on the scene who advised federal agents to launch a tank and CS gas assault on buildings full of women and children.

A few years later, in 1997, a Marine Corps anti-drug patrol shot and killed an 18-year-old American high school student named Esequiel Hernandez. Hernandez was herding goats and carrying a .22 caliber rifle near his family's farm in Redford, Texas, when he ran into the Marines, who were heavily camouflaged and hidden in the brush. Shots were exchanged. Instead of identifying themselves, or trying to defuse the situation, the Marines hunted Hernandez for 20 minutes. When Hernandez raised his rifle again, a Marine shot him, and Hernandez bled to death without receiving first aid. An internal Pentagon investigation of the incident said that the soldiers were ill prepared for contact with civilians, as the Marines'

military training had instilled “an aggressive spirit while teaching basic combat skills.”

That’s the kind of training soldiers should have. But that training can lead to tragic collateral damage when we try to turn soldiers into peace officers.

### ***A Blunt Instrument***

Policymakers who would give the military a greater role in internal security should keep those abuses in mind. And they should also consider how ineffective and wasteful domestic use of the military is likely to be.

We simply cannot surround every high-value target in America with troops, even if we want to. The first responders to any terror attack are almost always going to be civilians and local law enforcement. Moreover, in most cases, a military response is ill suited to the domestic fight against Al Qaeda. The army is a blunt instrument—fantastic for destroying columns of enemy tanks or toppling rogue regimes. But at home we’re fighting an asymmetric war against a clandestine enemy. That is the kind of fight that calls for investigative skills and smart policing—not overwhelming firepower.

Public officials have forgotten that and called for domestic uses of the military that are ill-conceived and wasteful. For example, over Thanksgiving weekend in 2001, Florida authorities stationed a tank outside Miami International Airport. However impressive and ominous that looked, it was rather unlikely that Al Qaeda was about to roll up in an armored column. And a tank would be utterly useless against knives or explosives smuggled aboard an airplane—a far more likely form of attack.

Worse still, after September 11, Transportation Secretary Norman Mineta called for putting Delta Force operatives on domestic flights to guard against hijackers. It’s hard to think of a more unproductive use of military resources than having highly trained commandos warming seats on flights to Los Angeles. Delta Force soldiers ought to be hunting Al Qaeda operatives overseas, not collecting frequent flier miles.

Moreover, having troops sitting around airports and border stations undermines military preparedness. That’s what the General Accounting Office concluded when it studied DoD home-front operations in the wake of September 11. In a July 2003 report, the GAO noted:

While on domestic military missions, combat units are unable to maintain proficiency because these missions provide less opportunity to practice the varied skills required for combat and consequently offer little training value.

In addition, . . . the present force structure may not be sufficient to address

the increase in domestic and overseas military missions. As a result, U.S. forces could experience an unsustainable pace that could significantly erode their readiness to perform combat missions and impact future personnel retention.

### ***Mission Creep***

Nonetheless, pressure is building to give the Army a greater domestic role. Despite the lessons we should have learned with the tragic death of Esequiel Hernandez, there are growing calls to militarize our borders with Canada and Mexico and turn armed soldiers into border patrol agents. In fact, in 2002 the Pentagon undertook a limited militarization of our borders with Canada and Mexico—deploying some 1,600 federalized National Guardsmen to the borders for six months. Though the deployment was temporary, it was carried out in violation of the Posse Comitatus Act—a disturbing indication of the government’s willingness to violate the law.

There are also troubling signs that the military is getting back into the domestic surveillance business. First, there was Total Information Awareness, the Pentagon’s research on data-mining technology that could be used to generate a dossier on every American citizen. In the fall of 2003 Congress cut off funding for TIA. But military analyst and former Army intelligence officer William M. Arkin reports that research continues on domestic data mining, and military intelligence agents have been assigned to FBI field offices.

Then there’s the Pentagon’s response to the sniper incident in the D.C. area in 2002, which suggests that the restraints on domestic use of the military are eroding. In the hunt for the sniper, the Pentagon provided surveillance planes, despite the fact that there was no evidence that the incident involved international terrorism. In the future, we may see pressure to get the military involved in every high-profile crime that might conceivably be linked to terrorism. If we weaken the Posse Comitatus Act, as Senator Warner and others have suggested, that involvement will not be limited to a support role—it could involve hands-on policing, with all the threats to life and civil liberty that entails.

True, Defense Secretary Donald Rumsfeld has said that he sees no need to amend the Posse Comitatus Act. But that’s hardly reassuring, given that other administration officials appear ready to interpret the act out of existence. Peter Verga, the Pentagon’s number-two man on homeland security, told the September 11 commission in January 2004 that when Congress voted to authorize war with Al Qaeda and Afghanistan seven

days after the September 11 attacks, that authorization “was not limited to overseas use of the military forces.” If so, then there are no legal restraints on what the military can do domestically to fight the war on terror. If the president so chooses, armed soldiers on the home front can search, interrogate, arrest, and possibly shoot to kill. But the debate over the September 2001 use-of-force resolution does not contain any reference to the Posse Comitatus Act, and there’s no indication that anyone who voted for it thought he was authorizing militarization of the home front.

Verga’s boss, Paul McHale, assistant secretary of defense for homeland security, gave a similarly narrow account of the restrictions Posse Comitatus imposes on military involvement in the domestic war on terror. In a March 2004 hearing before the Senate Armed Services Committee, McHale told Senator Warner that the PCA does not restrict the use of U.S. armed forces when they’re employed for anti-terror purposes. Such deployments, he argued are not “for law-enforcement purposes. They’re deploying to defeat Al Qaeda. That activity is not covered by posse comitatus.”

It’s true that the so-called military purpose exception allows some uses of U.S. armed forces domestically; as mentioned above, it allows the Air Force to guard American skies against a repeat of 9/11. However, McHale appears to want to make the military purpose doctrine the exception that swallows the rule. It is not a fair interpretation of the doctrine to say that because a particular domestic use of the military is ultimately aimed at catching a terrorist, anything goes. Terrorists forge IDs and they sometimes engage in the drug trade or smuggle cigarettes. Are those military matters now? To slide down that slope is essentially to say that the act does not apply during wartime so long as there may be clandestine foreign enemies on American soil. That is not a proviso that Congress ever chose to write into the law, and it is quite a dangerous view. Given the Bush administration’s broad view of its powers to use the military on the home front, Congress should closely monitor the Pentagon’s homeland security activities to guard against abuses.

### ***Demilitarize the War on Drugs***

Congress should also move to end military involvement in the drug war. In a series of statutory revisions passed in the 1980s, Congress made the war on drugs a bona fide war, with the Pentagon a central player in the struggle. Though those statutory provisions are commonly referred to as the “drug war exceptions” to the Posse Comitatus Act, they do not

grant soldiers arrest authority. However, the provisions do encourage the Pentagon's involvement in surveillance and drug interdiction near the national borders. In some cases, the loopholes also promote direct involvement by soldiers in law enforcement.

In 1990 Congress authorized the secretary of defense to fund National Guard involvement in state-level drug war operations. That funding has encouraged the use of uniformed National Guardsmen in state drug interdiction operations, which range from leveling crack houses to lecturing high school students about the dangers of drug abuse. One state-level anti-drug program, California's Campaign against Marijuana Planting, has long been a source of friction between rural residents and law enforcement. Under CAMP, National Guard helicopters buzz California farms and Guardsmen and police officers invade private property looking for marijuana plants during growing season. As one irate Californian said of CAMP: "It's like a Boy Scout outing for law enforcement. It is a kick. . . . They get up here, and everyone in the countryside is a criminal."

Rumsfeld has referred to military efforts to stop drug trafficking as "nonsense." In his confirmation hearing in January 2001, he noted that "the drug problem in the United States is overwhelmingly a demand problem and to the extent that demand is there and it is powerful, it is going to find ways to get drugs in this country." Former defense secretary Caspar Weinberger has been equally blunt, arguing that military involvement in the war on drugs has been "detrimental to military readiness and an inappropriate use of the democratic system."

Weinberger is right. The militarization of the drug war has led to abuses of power at home and abroad. Abroad, U.S. Army involvement in the fight against drugs has destabilized Latin American governments and cost scores of innocent lives, including those of Americans. In April 2001 in Peru, for example, a U.S. surveillance plane identified a small Cessna airplane as a possible drug-trafficking vehicle. The Peruvian air force sent up an A-37B Dragonfly attack plane, which fired on the Cessna, killing an innocent American missionary, Roni Bowers, and her infant daughter.

The loopholes for military participation in the drug war have done damage enough. By putting heavily armed and inappropriately trained Marines on the U.S.-Mexican border, the "drug war" exceptions to the Posse Comitatus Act led inexorably to the death of Esequiel Hernandez. And by encouraging the transfer of military ordnance to civilian peace officers, the drug war exceptions have encouraged a dangerous culture of paramilitarism in police departments. It is time to demilitarize the war on drugs.

## ***Eternal Vigilance***

In the past, when America has departed from its tradition of civilian law enforcement, the results have been tragic. We should be loath to make those mistakes again. Proud as we are of our armed forces, we Americans have fought to keep our Republic free from domestic militarization. As James Madison put it in *Federalist* no. 41: “The liberties of Rome proved the final victim to her military triumphs. . . . A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution.” In other words, remain vigilant. Take care that the institution that helps defend our liberties can never become a threat to our liberties. That warning has never been more important.

### ***Suggested Readings***

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—Prepared by Gene Healy