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## Avoiding the Fog of Crisis: A Protocol for the Proper Domestic Use of the Military

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# Avoiding the Fog of Crisis: A Protocol for the Proper Domestic Use of the Military

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Senior Honors Thesis  
Professor G. Calvin Mackenzie, Advisor, First Reader  
Professor L. Sandy Maisel, Second Reader  
April 17, 2009

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<sup>1</sup> AP Photos, "People watched as National Guard troops moved about the area outside the Louisiana Superdome in New Orleans on Friday," Hurricane Katrina - Military Presence, *boston.com*, [http://www.boston.com/news/weather/gallery/katrina\\_military](http://www.boston.com/news/weather/gallery/katrina_military) (accessed April 16, 2009).

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## Introduction

At approximately 4:15 PM on April 29, 1992, in what became known as the Rodney King Riots, rioting broke out in the city of Los Angeles, primarily in the South Central portion of the city. For many reasons, the Los Angeles Police Department was overwhelmed. Governor Pete Wilson and Mayor Tom Bradley ignored the Mutual Aid system which would have brought responses from neighboring law enforcement agencies and instead called in the California National Guard. On the third day of rioting, President George H.W. Bush federalized the California National Guard and also deployed members of the US Army and Marine Corps. Though the guardsman, soldiers, and marines often showed great restraint and bravery, their appearance in Los Angeles demonstrated the potential problems of using military personnel to police an American city.

In one particular incident, Marines responding with police to a domestic dispute were told by one of the officers to "cover me" (i.e. in police terms, be ready to fire if necessary). The Marines opened fire, discharging over 200 rounds into the house. To a Marine, that is what is meant by "cover me," i.e., lay down a suppressing round of fire. Luckily, no one including the children inside the house was hurt or killed. As Maria J. Rasmussen of the Center for Civil-Military Relations at the Naval Postgraduate Institute pointed out in regard to this

incident, “This points to the most important difference between military troops and police officers. Police officers are trained to respond to crime and violence with the minimum force necessary to accomplish the task. This principle of minimum force is alien to a soldier.”<sup>2</sup>

On the morning of September 11, 2001, Americans were awakened to the realities of international terrorism when 19 foreign terrorists associated with the Al Qaeda network hijacked 4 commercial airliners. Two were crashed into the twin towers of the World Trade Center in Manhattan and a third into the Pentagon, while the fourth plane apparently bound for either the Capitol or the White House crashed into a field in Pennsylvania as it was forced down by the passengers who knew America was under attack. The Federal Aviation Administration (FAA) and the North American Aerospace Defense Command (NORAD) attempted to mount a defense against an attack for which there were no suitable existing protocols. In the end, authorization to shoot down any hostile plane was not given to NORAD until 28 minutes after the last plane had crashed. The order was never communicated to the fighter pilots that had been scrambled in response to the attack.<sup>3</sup>

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<sup>2</sup> Maria J. M. Rasmussen, “The Military Role in Internal Defense and Security: Some Problems,” (Occasional paper, The Center for Civil-Military Relations, Naval Postgraduate School, Monterey, CA, October 1999), 6-13.

<sup>3</sup> National Commission on Terrorist Attacks Upon the United States, *Final Report of National Commission on Terrorist Attacks Upon the United States-Executive Summary*, 2004 (Washington, DC: GPO 2004), 1-2, 7.

On August 29, 2005, Hurricane Katrina wreaked destruction on large portions of the Gulf Coast, most notably the state of Louisiana and the city of New Orleans. Though the response by civilian agencies and military was characterized by the RAND Corporation as “historically unprecedented,” it is also considered to have been “tragically inadequate” as civilian organizations were quickly overwhelmed and the military response was too slow and plagued by problems of duplicate systems of command and control between the National Guard and active duty forces. The end result was evacuations as well as search and rescue missions were delayed.<sup>4</sup>

The incidents described here represent the three major areas in which domestic crises may occur: collective violence that overwhelms local police forces, international terrorism, and natural disasters. In these cases and many others, we have had recent examples of the difficulties of conducting coordinated and coherent responses to high-profile domestic crises. Currently, the United States is faced with many potential domestic crises that could pose a threat to the lives and property of Americans, the functioning of the economy and to national security.

The Department of Homeland Security recently identified examples of the “gravest dangers facing the United States.” These include a bombing using an improvised explosive device, detonation of an improvised nuclear device, an attack using a radiation dispersal device, biological attacks (using aerosolized

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<sup>4</sup> Lynn E. Davis, et al., “Hurricane Katrina: Lessons for Army Planning and Operations,” *Report for RAND Arroyo Center, for the US Army* (2007): xi.

anthrax, plague, food contamination, or a foreign animal disease), chemical attacks (using blister agents, industrial chemicals, nerve agents, or a chlorine tank explosion), a major earthquake, a major hurricane, a cyber attack, and an outbreak of pandemic influenza.<sup>5</sup>

In addition, it is quite possible that we will not have the luxury of dealing with one isolated crisis at a time. Experts recognize the possibility of a hurricane with a Katrina-like impact striking the US at the same time as a complex national wildland fire.<sup>6</sup> The RAND Corporation has noted in its study of the Army's response to Hurricane Katrina, for example, the possibility of terrorist attacks occurring simultaneously in different parts of the United States each involving the use of weapons of mass destruction that could inflict death and destruction like Hurricane Katrina.<sup>7</sup>

But therein lies the problem. The evidence indicates that despite flawed responses to high profile domestic incidents in the past, the US is still woefully unprepared for many possible domestic crises. A major cause for this is the lack of a clear framework, codified in law, regarding the role of the military. This inhibits the ability of response organizations to plan for crises and may, in fact, hamper the execution of an effective response.

The lack of such a legal framework means that officials at all government levels are too often forced to improvise in their use of the military. Decisions which

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<sup>5</sup> US Department of Homeland Security, *National Response Framework*, (Washington, DC: GPO 2008), 73-75.

<sup>6</sup> Robert Maynes, "FDNY IMTs-Some Background," *With New York Firefighters*, no. 1 (2008): 14-15.

<sup>7</sup> Davis, et al., "Hurricane Katrina" xi.

could have important implications in several areas (e.g., for national security, the continuity of government, the execution of government functions, as well as the lives, property and civil liberties of the American people) will be made in what will be referred to here as the “fog of crisis” instead of in prior planning when there is more information and time available to calmly think through the consequences of various responses.

Failure to contemplate and define an appropriate role for the armed forces of the national government in domestic crises of this sort is a serious problem. It is all the more serious now as these potential crises seem to multiply in character and scope. This thesis will explore the history of this problem and its recent implications. It will argue the need for a comprehensive, operational framework, codified in law, which defines the various alternative uses of all emergency services, both civilian and military, and is applicable to “all hazards.” I will attempt to provide a blue-print for what such a framework should look like. More specifically, I will, in subsequent chapters:

- 1) Examine the current plans, capabilities and experience of the use of the military domestically;
- 2) Review relevant historical cases of domestic usage of the military in the US;
- 3) Recount some examples of the experiences of other nations regarding the use of the military domestically; and
- 4) Analyze some current proposals regarding the role of the military domestically.

I will suggest here that the existing plans and capabilities for the domestic use of the military are incapable of making America safe and secure while at the same time preserving individual liberty and civilian supremacy. I will seek to show that, in the United States, both the historical uses of the military and recent uses have been inconsistent in their approaches as well as results, often being used as a “band-aid” on long term problems. I will also try to indicate the ways in which some responses to crises have been negatively affected by the lack of a clearly defined domestic role for the military.

An often valuable way to shed light on one country’s problems and to aid in finding solutions is to look to the experiences of other countries. I will also undertake that kind of comparative analysis here, while trying to avoid any oversimplified suggestions that foreign templates for action can be easily superimposed on the United States.

There have been some significant proposals for redefining the domestic role of American military forces. I will seek to show that those are fraught with biases and misconceptions. Finally, I will offer a framework for reform, a new approach, and suggest the kinds of changes that must accompany this new approach in order to make America safe and secure while preserving individual liberty and civilian supremacy.

# Chapter 1

## Deficiencies of the Status Quo

It is extremely important that one understand the current status of American domestic preparedness, if one is to define an improved role for the military in dealing with domestic crises. This chapter will examine both the existing national response plans and the current response capabilities of American governments. I will also analyze some recent domestic military missions for examples of the difficulties they illustrate. Finally, I will draw some conclusions about the status of our ability to keep America safe and secure while preserving individual liberty and civilian supremacy.

### Confusion in the Legal and Organizational Structures of Existing Response Plans

The US government has attempted to establish a framework which will coordinate the response to a crisis of all relevant organizations, civilian and military, private and public.<sup>8</sup> Nonetheless, the military's role, particularly in regard to law enforcement, is unclear, and the area of command and control is fraught with problems.

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<sup>8</sup> US Department of Homeland Security, *National Response Framework*, i.

The US Department of Homeland Security (DHS) has developed the National Response Framework as “a guide to how the Nation conducts all-hazards response.” It “describes specific authorities and best practices for managing incidents that range from the serious but purely local, to large-scale terrorist attacks or catastrophic natural disasters.” President George W. Bush approved this plan. The general principle behind the Framework is that incidents are managed at the lowest level feasible i.e. first, at the local level by local public officials. Their efforts are then supplemented by the state (or appropriate territorial or tribal authorities) which have their own response resources, such as state military forces, which the Governor commands.

“If a State anticipates that its resources may be exceeded, the Governor can request assistance from the Federal Government and/or from other States through mutual aid and assistance agreements such as the Emergency Management Assistance Compact (EMAC).” However, “Prior to and during catastrophic incidents, especially those that occur with little or no notice, the State and Federal governments may take proactive measures to mobilize and deploy assets in anticipation of a formal request from the State for Federal assistance... to ensure that resources reach the scene in a timely manner to assist in restoring any disruption of normal function of State or local governments.” This will be done in coordination with other involved entities when possible.<sup>9</sup>

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<sup>9</sup> US Department of Homeland Security, *National Response Framework*, 1-6, 42.

If the incident requires a federal response, the Framework spells out the roles and responsibilities of various federal agencies and how the federal response will be coordinated. While federal responses may be handled without coordination by the Secretary of Homeland Security (according to plans such as the National Search and Rescue Plan and the National Maritime Security Plan), the Framework states, “When the overall coordination of Federal response activities is required, it is implemented through the Secretary of Homeland Security consistent with Homeland Security Presidential Directive (HSPD) 5. Other Federal departments and agencies carry out their response authorities and responsibilities within this overarching construct.” The Federal Emergency Management Agency (FEMA) Administrator is the “principal advisor on all matters relating to emergency management,” and assists the Secretary.

The Attorney General, as the country’s chief law enforcement officer, is responsible for the investigation of terrorist attacks and coordination of law enforcement to prevent terrorist attacks. In addition, he is responsible for approving “requests submitted by State Governors pursuant to the Emergency Federal Law Enforcement Assistance Act for personnel and other Federal law enforcement support during incidents,” as well as enforcing civil rights laws.

Since the Department of Defense (DOD)’s “primary mission” is national defense “resources are committed after approval by the Secretary of Defense or at the direction of the President” except for those elements already authorized to support civil authorities. DOD assets remain under the command of the Secretary

of Defense but they, and state military forces under the Governor, are supposed to “coordinate closely with response organizations at all levels.”<sup>10</sup> FEMA may call upon federal agencies to coordinate “Emergency Support Functions,” while coordinating an incident, the only function designated to be coordinated by DOD is Public Works and Engineering, where the Army Corps of Engineers would be used.<sup>11</sup>

The Department of Defense created the US Northern Command (US NORTHCOM) in 2002 “to provide command and control of Department of Defense (DoD) homeland defense efforts and to coordinate defense support of civil authorities.” (Its area of responsibility does not include Hawaii, Puerto Rico or the US Virgin Islands, which fall under the Pacific and Southern Commands, respectively). US NORTHCOM has few permanently assigned forces so, when necessary, the President or Secretary of Defense assign forces to it.<sup>12</sup> However on December 1, 2008 the Pentagon announced it planned to have 20,000 troops inside the US dedicated to domestic response by 2011. A 4,700-person unit has been available for this purpose available since October 2008. Interestingly, that unit would still be scheduled for deployment overseas in 2010 pointing to the increasing burdens being placed on our nation’s military.<sup>13</sup>

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<sup>10</sup> US Department of Homeland Security, *National Response Framework*, 24-26.

<sup>11</sup> *Ibid*, 57-59.

<sup>12</sup> US Northern Command, “About US Northern Command,” *US Northern Command: Defending Our Homeland*, US Northern Command, <http://www.northcom.mil/About/index.html> (accessed October 8, 2008).

<sup>13</sup> Spencer S. Hsu and Ann Scott Tyson, “Pentagon to Detail Troops to Bolster Domestic Security,” *Washington Post*, December 1, 2008.

This command's civil support missions include responding to natural disasters, terrorist attacks, and counter-drug operations.<sup>14</sup> On February 14, 2008, NORTHCOM also signed the "Canada-US Civil Assistance Plan" or CAP with Canada Command (its Canadian equivalent) which allows the two countries militaries to support in each other "during a civil emergency."<sup>15</sup>

According to NORTHCOM's website, "An emergency must exceed the capabilities of local, state, and federal agencies before USNORTHCOM becomes involved. In most cases, support will be limited, localized and specific." Once the incident can be managed by civil authorities, NORTHCOM will withdraw.

NORTHCOM's website also notes that, "per the *Posse Comitatus Act* (PCA), military forces can provide civil support, but cannot become directly involved in law enforcement."<sup>16</sup> Although this has been a subject of great legal debate, according to Coast Guard attorneys Captain Gary Felicetti and Lieutenant Commander John Luce, "majority opinion including that of the Department of Defense" currently is that the Act does preclude direct DOD involvement in law enforcement.<sup>17</sup> There have been, however, many conflicting opinions from different branches of government at different times in our history and even today.

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<sup>14</sup> US Northern Command, "About US Northern Command," *US Northern Command: Defending Our Homeland*, US Northern Command, <http://www.northcom.mil/About/index.html> (accessed October 8, 2008).

<sup>15</sup> US Northern Command, "U.S. Northern Command, Canada Command establish new bilateral Civil Assistance Plan," *US Northern Command: Defending Our Homeland*, <http://www.northcom.mil/News/2008/021408.html> (accessed October 8, 2008).

<sup>16</sup> US Northern Command, "About US Northern Command."

<sup>17</sup> Gary Felicetti and John Luce, "The Posse Comitatus Act: Liberation from the Lawyers," *Parameters*, (2004): 94-107.

The Posse Comitatus Act was passed in 1878 by southern Democrats angered by the actions taken by federal troops during Reconstruction and northern Democrats angry over the use of federal troops against striking railroad workers in Pittsburgh in 1877.<sup>18</sup> It is a fairly short statement and has only been amended once in 1956 to include the Air Force. It now reads,

“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 under this title or imprisoned not more than two years, or both.”<sup>19</sup>

As background, in 1854 Attorney General Cushing had formally defined “posse comitatus” in the “Cushing Doctrine,”

“The posse comitatus comprises every person in the district or county above the age of fifteen years whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines. All of whom are alike bound to obey the commands of a sheriff or marshal.”<sup>20</sup>

According to Felicetti and Luce the meaning of the act was debated at the time of enactment<sup>21</sup> and since then there have been plenty of conflicting statements on the Act’s meaning.

Shortly after the Act was passed, President Rutherford B. Hayes sent federal troops to the territory of New Mexico to quell violence there claiming while the Act did apply to marshals; the act did not apply to the President. His

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<sup>18</sup> Reid K Beveridge, “The Bulwark of Civilian Supremacy,” *Armed Forces Journal* 140 (2002): 23.

<sup>19</sup> Felicetti and Luce, “Liberation from the Lawyers,” 94.

<sup>20</sup> *Ibid*, 96.

<sup>21</sup> *Ibid*, 99.

successor Chester A. Arthur, faced with a similar issue in the territory of Arizona did not believe Hayes' interpretation was the meaning of the law and asked the Congress to amend the law. According to Felicetti and Luce, the Senate Judiciary Committee responded with a report that "confirmed that the primary evil addressed by the Posse Comitatus Act was a marshal's power to call out and control the Army. The President could, essentially, use troops in Arizona as he saw fit, provided that military officers maintained command over those forces."<sup>22</sup>

The Act was resurrected in the 1970s by criminal defense attorneys defending clients who in many of these cases were arrested by law enforcement officers who had received help from DOD personnel. According to Felicetti and Luce, "To violate the Act, someone must: (1) willfully (2) use the Army or Air Force (3) as a posse comitatus or otherwise (4) to execute the laws (5) in a way that is not authorized by the Constitution or an act of Congress."<sup>23</sup> In these cases the courts found the Act could not be used to acquit defendants in these cases because the "to enforce the laws" qualification was not met but did not pronounce rulings on the other qualifications necessary to prove a violation of the Act. In another case, a court ruled the Act did not apply to the Navy but Felicetti and Luce point out, "In doing so, however, this court articulated a broader "spirit" of the Act, opining that the legislative history showed congressional intent to apply the Act's

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<sup>22</sup> Ibid, 100.

<sup>23</sup> Ibid, 102

policy to all armed services.”<sup>24</sup> However, the two Coast Guard lawyers claim the court came to this conclusion through poorly researched history of the legislative process behind the act.

Following legislation giving the DOD a role in countering drug smuggling in the 1982 Defense Authorization Act, the DOD issued regulations defining what a violation of the PCA was. These regulations were based on the 1970s court decisions definition of to “execute the laws” and none of the other qualifications, thus extending the restrictions to the Navy and Marine Corps forces and to DOD forces outside the US. When legal challenges by drug traffickers arrested by Coast Guard Law Enforcement Detachments (who are not viewed as bound by the PCA) on Navy ships appeared in courts, though the courts ruled in favor of the government; the courts used the DOD regulations and according to Felicetti and Luce sometimes did not adequately differentiate the regulations from the PCA itself. In 1988, when Congress gave the DOD even further counter-drug responsibilities in the Defense Authorization Act for 1989, DOD kept the restrictions on those it construed as being covered by the PCA in place and made a change in language that could be construed as having tightened those restrictions.<sup>25</sup>

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid, 102-104.

In 2001, the *FBI Law Enforcement Bulletin* outlined how the PCA affects the use of military personnel for domestic law enforcement duties. According to their interpretation, functionally the PCA applies to active duty military personnel (with the exception of the Coast Guard), reservists performing active duty or training, National Guardsmen in *federal* service, and civilian employees of DOD under the command of a military officer. It does not apply to National Guard in state service. The personnel to which it applies are forbidden under the PCA and DOD policy from performing interdictions, arrests, apprehensions, stop and frisks, pursuits, surveillances, as well as serving in undercover, investigatory and interrogation roles. One exception, however, applies if those roles fall under the “Military Purpose Doctrine,” (i.e. they primarily serve a military or foreign affairs purpose).

“National Guard personnel still are precluded,” the *Bulletin* continues, “except in exigent circumstances, from direct participation in arresting suspects, conducting searches, or becoming involved in the chain of custody of evidence...It must be emphasized that National Guard personnel serve in a support role to the law enforcement agency.”<sup>26</sup> Whether Guardsmen will carry weapons is a question for the Adjutant General of the state (the state National Guard commander). During a disaster relief operation, “active duty military forces rely upon federal, local, and state law enforcement or the National Guard for force protection. Local

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<sup>26</sup> David G., Bolgiano, “Military Support of Domestic Law Enforcement Operations,” *FBI Law Enforcement Bulletin* 70 (2001).

and state law enforcement has primary responsibility for maintaining law and order.”<sup>27</sup>

Statements by other agencies of the government, however, seem to confuse the real role of the military in domestic crises. It does not appear that all the elements of the federal government are reading from the same page. On March 2, 2009, the *New York Times* reported that in a memo in October, 2001 Deputy Attorney General John Yoo and Special Counsel Robert J. Delahunty, then both of the Justice Department’s Office of Legal Counsel, responded to questions from White House Counsel Alberto Gonzales about whether President Bush could use the military against terrorism in the US. In that memo, they claimed that military forces could go as far as conducting raids on terrorist cells, conducting warrantless searches, and seizing property. Although other legal memos released at the same time were later repudiated by officials in the executive branch, there is no indication that the Bush or Obama administrations have repudiated this legal interpretation.<sup>28</sup>

Furthermore, the Commission on the National Guard and Reserves, in its final report, noted several problems with planned military responses to domestic incidents. The report noted that the disaster response roles of the DOD, and particularly the National Guard and Reserve elements, have not been written into law. The Commission was also concerned that the DHS and the DOD, “had not

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<sup>27</sup> Bolgiano, “Military Support of Domestic Law Enforcement.”

<sup>28</sup> Neil A. Lewis, “Memos Reveal Scope of Power Bush Sought in Fighting Terror,” *New York Times*, March 2, 2009.

have not yet acted adequately to integrate DOD and National Guard leadership into national preparedness and response planning activities.” In addition, they mentioned that since the DOD did not accept its earlier recommendation to allow a Governor, “to direct within his or her state the unified efforts of all military forces that are responding to domestic contingencies,” there was a lack of a unified command.<sup>29</sup>

### Current Response Capabilities

The failed response to Hurricane Katrina raised serious concerns about US capabilities for handling a catastrophic incident. There are many indications that neither civilian nor military authorities are capable of dealing with a catastrophic incident in a satisfactory fashion. There are many reasons for this including a lack of involvement from ordinary citizens, insufficient funding, shortage of equipment and training, and the commitment of military resources overseas. One should add that efforts to increase preparedness are made more difficult by a lack of a known, clear plan for what the military will do. In addition, as I will attempt to show, certain trends in the military bring into question whether use of the military is appropriate for the tasks of law enforcement or force protection in a domestic operation.

If people are prepared to take care of themselves, it would obviously help to lessen the burden on response authorities. FEMA recommends that each

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<sup>29</sup> Commission on the National Guard and Reserves: Transforming the National Guard and Reserves into a 21<sup>st</sup>-Century Operational Force, *Executive Summary of the Final Report*, (Washington, DC: 2008), 18-21.

household have at its disposal at least 3 days worth of drinking water and non-perishable food. In addition, FEMA states that citizens should be prepared to go without other basic services such as utilities for a week or longer. All of these supplies should be stored in one or two containers that are easily portable. Furthermore, FEMA recommends having an emergency plan and practicing it.<sup>30</sup>

Many Americans, however, have not heeded these recommendations at all and, among those who have made attempts, a significant portion has failed to follow them fully. A study by the American Red Cross in Greater New York and New York University's Center for Catastrophe Preparedness and Response published in 2006 indicated that while residents of New York City have increased their personal preparedness, half of New Yorkers do not have emergency supply kits, and among those who do many of these kits are incomplete. Furthermore, the study indicated that some of these kits are not portable, most New Yorkers have not practiced their plans, a majority would attempt to use cars to evacuate (not advisable in New York City), and a minority would not heed recommendations by the City to shelter in place or evacuate.<sup>31</sup>

The people who would be best positioned to respond to a crisis where help might be slow in coming would be ordinary members of the community, their ability to respond immediately could be critical in terms of protecting lives and property especially in situations where help might be slow in coming. This was

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<sup>30</sup> FEMA, *Are You Ready?*, FEMA, [http://www.fema.gov/areyouready/basic\\_preparedness.shtm](http://www.fema.gov/areyouready/basic_preparedness.shtm) and [http://www.fema.gov/areyouready/assemble\\_disaster\\_supplies\\_kit.shtm](http://www.fema.gov/areyouready/assemble_disaster_supplies_kit.shtm) (accessed, April 16, 2009)

<sup>31</sup> Center for Catastrophe Preparedness & Response and the American Red Cross in Greater New York, *How Prepared Are We, New York?-Executive Summary*, 2006 (New York: CCPR, 2006), 1-5.

shown by the self-initiated response of ordinary citizens in the Mexico City earthquake who are credited with saving 800 lives. Unfortunately, being untrained led to the death of 100 of these spontaneous volunteers.

The Community Emergency Response Team (CERT) concept was created in 1985 by the Los Angeles City Fire Department. Since then CERT training has been adopted and expanded by the Emergency Management Institute and the National Fire Academy (both part of FEMA). Members are trained in preparing for a disaster, disaster medical operations (triage, first aid, etc.), light search and rescue, disaster psychology and team organization. At the end of the course, they are put through a disaster simulation. FEMA made the materials available in 1993,<sup>32</sup> but the information provided by Citizen Corps an umbrella organization of citizen preparedness groups under which CERT is found indicates there are many localities that are possibly still without CERTs.<sup>33</sup> Jeremy Damren, CERT coordinator for the Maine Emergency Management Agency (MEMA) given that CERT teams volunteer their time and labor, and that there are large potential benefits from CERT involvement, that CERTs should be expanded. He notes in Maine where there are relatively few disasters that it is necessary to involve

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<sup>32</sup> Citizen Corps, *CERT: Community Emergency Response Team: About CERT*, Citizen Corps, <http://www.citizencorps.gov/cert/about.shtm> (accessed April 16, 2009).

<sup>33</sup> Citizen Corps, *CERT: Community Emergency Response Team: Directory of Community Emergency Response Team Programs by State*, Citizen Corps, <https://www.citizencorps.gov/cc/CertIndex.do?submitByState> (accessed April 16, 2009). It should be noted that the information here is inexact because the programs listed there have chosen to be listed.

CERTs in exercises. Finally, he points out that “we do not have a whole lot of funding for CERTs, so they need to be self sufficient.”<sup>34</sup>

The first governmental authorities to respond to an incident would be local and then state authorities. While these authorities routinely respond to emergencies on a daily basis, and have developed response capabilities for large-scale incidents, recently it has begun to appear their ability to respond may be under stress.

Some local law enforcement agencies have attempted to prepare for civil unrest since the 1980s with the “Field Force Concept” “pioneered by the Metro-Dade, Florida Police Department. That approach involves specially training and equipping select patrol officers who could be mobilized to deal with such unrest. The Suffolk County, New York Police Department (SCPD) created its own Mobile Field Force in 1993 but wound up using them not for riots but for other large incidents like aircraft crashes and mutual aid to New York City on September 11th. After the 9/11 attacks, the SCPD revitalized and revamped the unit with new equipment, new training and a new name: the Crisis Action Team (CAT).

The CAT is intended to provide both civil unrest and Weapons of Mass Destruction (WMD) response capabilities, as one incident could involve both of those problems. This Field Force format has also been used to form the Suffolk Coordinated Law Enforcement Response Group (SCLERG) involving 29 local,

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<sup>34</sup> Jeremy Damren, email message to the author, March 30, 2009.

state, and federal agencies in the county, which can respond to incidents both in and outside the county.<sup>35</sup>

Currently, however, many local police forces are under fiscal strain. A 2003 survey indicated that 1 in 4 could be forced to cut positions—this may be a conservative estimate in light of the current financial crisis if insufficient aid is delivered to local governments. To add to the problem, police forces are now being given homeland security responsibilities, which are making it “harder to meet normal public safety duties in 1 in 4 cities of all sizes and in more than half of cities of 100,000 plus in population.” Mobilization of National Guard and Reserve units has also reduced police ranks, as many police personnel also serve in those units. In addition, the movement of FBI agents from jobs working with local law enforcement to counter-terrorism has also added to the demands on local forces.<sup>36</sup>

At the same time, federal grant programs to local enforcement have suffered. From the inception of Local Law Enforcement Assistance Block Grants (LLEABG) in 1996 until the program was replaced by the Justice Assistance Grant Program in 2004, the amount awarded under LLEABG decreased from \$424 million to \$115 million.<sup>37</sup> By 2007 the JAG allocations were \$304 million (higher

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<sup>35</sup> Stuart K. Cameron, “Suffolk County’s Crisis Action Team: A Mobile Field Force for the Twenty First Century,” *FBI Law Enforcement Bulletin* (2006): 1-7.

<sup>36</sup> Donald J. Borut, “Call It a Crisis When the Heroes of 9-11 Are Being Laid Off,” *Nation’s Cities Weekly* 26 (2003): 2.

<sup>37</sup> US Department of Justice, Bureau of Justice Statistics, *Technical Report: Local Law Enforcement Block Grant Program, 1996-2004*, by Lynda Bauer, 2004, (Washington, DC: GPO, 2004), 1.

than LLEABG allocation in 2004 but still lower than in 1996) but in 2008 allocations were cut by 65% to \$107 million, an amount lower than 2004.<sup>38</sup>

It has also been noted that despite the proliferation of law enforcement units specially armed and trained to deal with heavily armed criminal suspects, law enforcement may not have the capability to deal with certain types of incidents. For example, recent cases involving armored vehicles in Colorado, where a gunman drove an armored bulldozer through a town, and San Diego where an individual stole a National Guard tank, overwhelmed local response capabilities. In both cases, the police were unable to stop the armored vehicles and were unable to take action against the suspects until the vehicles became disabled on their own.<sup>39</sup>

Research by the RAND Corporation has indicated that state and local agencies increased terrorism preparedness after 9/11; however, there are concerns that this may have stretched agencies “too thin.” The research also indicated that these agencies were not working with the private sector and there were disconnects between different types of agencies which hamper integrated responses. State and local agencies also had differing expectations about the role of the military and National Guard, which raises questions as to whether they also might be planning under different assumptions. Agencies cited limited budgets

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<sup>38</sup> US Department of Justice, Bureau of Justice Assistance, *FYs 2007/2008 JAG State Allocation Comparisons*, US Department of Justice, <http://www.ojp.usdoj.gov/BJA/grant/08JAGstateallocations.pdf> (accessed April 16, 2009)

<sup>39</sup> Christopher J. Schmidt and David A. Klinger, “Altering the Posse Comitatus Act,” *Creighton Law Review* 39 (2006): 669-670.

and other competing priorities as reasons they have not increased terrorism preparedness. These agencies were also looking to DHS for more funding and assistance in other areas.<sup>40</sup>

If these local agencies are overwhelmed, the governor can request assistance from many federal civilian agencies that are also capable of responding to incidents. But it appears there may be overlap and duplication in the procedures for this as well as possible problems with funding and transparency. In addition to “headquarters-level” and “regional support structures,” the National Response Framework highlights a number of federal assets that can be utilized in field support, coordinated by a Joint Field Office. Incident Management Assistance Teams (IMATs) can help with the coordination of a response and provide situational awareness. Mobile Emergency Response Support (MERS) can provide telecommunications and power generation to help coordinate the response. Hurricane Liaison Teams (HLTs) facilitate “information exchange between the National Hurricane Center in Miami and other National Oceanic and Atmospheric Administration components, as well as Federal, State, tribal, and local government officials.”

There are also 28 Urban Search and Rescue (US&R) teams made up of “local emergency services personnel [structured] into integrated response task forces...Complete with the necessary tools, equipment, skills, and techniques, [which] can be deployed by FEMA to assist State, tribal, and local governments in

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<sup>40</sup> Lois M. Davis, et al, “Combating Terrorism: How Prepared Are State and Local Response Organizations?,” *Research Brief for RAND National Security Research Division* (2006): 1-2.

rescuing victims of structural collapse incidents or to assist in other search and rescue missions.”<sup>41</sup> In addition, there is the National Disaster Medical System (NDMS) to provide medical assistance to affected populations. However, commanders of the civilian Disaster Medical Teams (DMATs), which are part of the NDMS, have made accusations that the Department of Health and Human Services (HHS) has been “systematically weakening” the DMATs as it strengthens the new uniformed US Public Health Service (PHS) Commissioned Corps Health and Medical Response (HAMR) teams. Some suspect that this change results from the belief that the HAMR teams will be less likely to speak out about problems—an accusation that HHS officials deny.<sup>42</sup>

On the military side, a response can come from units of the state military forces such as the National Guard, as well as reserve or active duty federal military forces. Questions have been raised, however, about the ability of these units to mount an effective and suitable response. The National Guard figures prominently here as state governors can deploy their National Guard forces even if they are not requesting federal civilian assistance. In addition, as mentioned earlier, while in state service, they are less bound by the various interpretations of Posse Comitatus Act than federal military forces.

The National Guard has developed a number of units for homeland security missions. The Joint Force Headquarters-State and Joint Task Force State help provide command and control. The Civil Support Teams can assist civilian

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<sup>41</sup> US Department of Homeland Security, *National Response Framework*, 54-62.

<sup>42</sup> Mannie Garza, “DMATs in Danger,” *The Journal of Emergency Medical Services* 33 (2008): 26-27.

responders by providing consultation and assessment as well as helping coordinate responses at suspected Weapons of Mass Destruction (WMD) incidents. CBRNE Enhanced Response Force Package (CERFP) responds and offers operational capabilities at Chemical, Biological, Radiological, Nuclear, or high yield Explosive (CBRNE) incidents. National Guard Reaction Force (NGRF)'s mission is to "provide force protection and security for WMD Civil Support Teams and... (CERFP) Teams." Expeditionary Medical Support (EMEDS) can provide rapid medical response for humanitarian relief, wartime contingencies and disaster response. The Modular Airborne Fire Fighting System (MAFFS) assists the Forest Service with wildland fires.<sup>43</sup>

Critics note that US military involvement overseas has drawn away resources that might otherwise be available for use at home (such as National Guard units) making it difficult to mount an effective response to a domestic incident. "Remote areas of several states had air medical service only because of the Military Assistance to Safety and Traffic (MAST) service," but these units are increasingly being deployed to Iraq and Afghanistan. Alaska found out its "last MAST unit would be deployed July 1 [2008]." <sup>44</sup> In February of 2008, The Commission on the National Guard and Reserves released a report claiming, "The United States military is not prepared for a catastrophic attack on the country, and National Guard forces do not have the equipment or training they need for the

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<sup>43</sup> National Guard Bureau, "The National Guard's Role in Homeland Defense," The National Guard, <http://www.ngb.army.mil/features/homelanddefense/index.html> (accessed October 8, 2008).

<sup>44</sup> *The Journal of Emergency Medical Services*, "Last MAST Unit Deploys," 33 (2008): 27.

job.” The Commission also acknowledged that, given the wars in Iraq and Afghanistan, there is no choice but to use reserve elements overseas.<sup>45</sup>

This has led some to call for study of using the little-known State Defense Forces (SDF) or State Guard Units possessed by “approximately 22 states and Puerto Rico,” which cannot be federalized and sent overseas. However, advocates of this approach note that currently “SDF units operate with little fanfare on shoe string budgets.”<sup>46</sup>

The suitability of the US military for domestic missions, particularly those involving law enforcement, is also brought into question by potentially disturbing social and ideological trends in the US military. Taken individually these trends may not be consequential, but taken together they indicate a serious need to evaluate what role the military should play domestically. While the officer corps of the US military has traditionally been politically non-partisan in public, survey data indicate the portion of officers openly identifying themselves as Republicans has approximately doubled to two-thirds of the officer corps, a trend not seen in civilian opinion leaders. In addition, Paul Gronke and Peter Fever noted while over two-thirds of the officers surveyed in 1998 said the military would “rarely or never” avoid following civilian orders it disagreed with, “Nearly one fifth of elite military officers expect the military to try to avoid orders from civilians some of

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<sup>45</sup> Associated Press, “Military Called Unprepared for Attack,” *The New York Times*, February 1, 2008.

<sup>46</sup> Brent C. Bankus, “Homeland Defense: The Pennsylvania State Guard: 1941-1953,” *Military Review* 84, no. 3 (2004): 56-58.

the time, and not an insignificant 5 percent think the military will do so most or all of the time.”<sup>47</sup>

In addition, evidence suggests that with the end of conscription, members of the armed forces tend to feel that military culture is increasingly different from civilian culture. They also believe that military culture is superior to civilian culture and the military could help instill proper values in Americans. This alienation is strengthened by the fact that many officers live in military base communities that resemble “small town America” and that military officers are more religious (and more likely to believe the Bible is the literal word of God) than the rest of the society.

Finally, there are some in the armed forces, mainly in the Marines and special operations units, who are advocates of a theory known as “Fourth Generation Warfare.” This theory posits that future warfare will be asymmetric warfare not between nations but between civilizations. These believers feel that the US must be prepared to defend Western civilization by creating small elite units with a “warrior culture” to fight the enemy which, according to Fourth Generation theorists like William Lind, may very well include operations inside the US against civilian groups. Their justification is the “abandonment of Judeo-Christian, Western culture and values here at home” which they believe will cause internal disorder in the US.

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<sup>47</sup> Ian Roxborough, “America Confronts the New World Disorder,” in *Irregular Armed Forces and Their Role in Politics and State Formation*, ed. Diane E. Davis and Anthony W. Pereira, 360-361 (New York: Cambridge University Press, (2003).

While this is still considered to be a minority viewpoint, the importance placed on the threat of Islamic fundamentalist terrorist groups to American homeland may very well increase support for the Fourth Generation theory<sup>48</sup>

### Recent Domestic Military Missions

Military units have been and are currently involved in many missions in support of domestic civil authorities, many of which were to deal with long term security problems or natural disasters. At the end of July 2008, the 6,000 National Guardsman sent to the Mexican Border in 2006 to combat illegal immigration were withdrawn despite requests from border states that they stay.<sup>49</sup> In 2007, according to the *New York Times*, about 300 uniformed and armed New York State National Guardsmen were still patrolling airports and railroad stations in the New York City area (after 9/11 there were approximately 2,000 soldiers on such duty).<sup>50</sup> In August 2008, almost three years after Katrina, the *New York Times* reported that there were still 300 Louisiana National Guardsmen assisting the New Orleans Police Department in patrolling the city. They were initially sent in 2006 after New Orleans' mayor requested them to help quell violent crime there.<sup>51</sup> In 2008 alone, the US Northern Command assisted with the responses to the Midwestern floods, the California wildfires, and Hurricanes Ike, Gustav, and Hanna.<sup>52</sup>

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<sup>48</sup> Ibid, 365, 374-376.

<sup>49</sup> Editorial Staff, "False Victory at the Border," *The New York Times*, July 5, 2008.

<sup>50</sup> Michael Pollack, "Security Patrols," *The New York Times*, November 25, 2007.

<sup>51</sup> Dan Barry, "Three Years After the Hurricane the Backup is a Fixture," *New York Times*, August 24, 2008.

<sup>52</sup> US Northern Command, "US NORTHCOM News," *US Northern Command: Defending Our Homeland*, US Northern Command, <http://www.northcom.mil/News/index.html> (accessed October 8, 2008).

## Conclusion

This examination suggests that current plans and existing capabilities cannot be counted on to keep America safe and secure in a domestic crisis while preserving civil liberties and civilian supremacy. Existing response plans, particularly those related to law enforcement, lack consistency because of confusion in their legal and organizational structures and this confusion raises many issues that call into question the country's ability to respond to domestic crisis. In addition, the domestic missions tasked to our military are highly varied and fit no appropriate model of what military involvement should be.

When major domestic crises occur, the consequences of these failures may quickly become apparent. The lack of a clearly defined role for the military is both part of the problem and, at the same time, an impediment to improving preparedness.

## Chapter 2

### Historical Uses of the Military

One can better understand the current debate about the use of military forces in a domestic crisis with the help of some background on the roles they have played in the past and the variety of impacts they have had. Federal military forces have been used to deal with a wide array of situations since 1794, when Washington first led state militia units he had called into federal service during the Whiskey Rebellion. In that first instance, the governor of Pennsylvania had refused to call up his own militia to suppress a rebellion in the western part of the state over the imposition of a federal excise tax on whiskey.

Federal troops have been used to help stop Aaron Burr's vague plot to take over portions of US territory, to curtail slave rebellions, to prevent incursions on Cherokee land and, when that failed, to help remove the Cherokee to lands west of the Mississippi. When the Patriot movement (1837-8) and later the Fenian Brotherhood (1866) attempted invasions of Canada, federal troops were used to secure the areas around the Canadian border.<sup>53</sup> On and around the Mexican border, they have been used against attempted rebellions, incursions by Mexican irregular forces and to prevent the entry into this country of illegal immigrants,

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<sup>53</sup> Frederick T. Wilson, *Mass Violence in America: Federal Aid in Domestic Disturbances*, e.d. Robert M. Fogelson and Richard E. Rubenstein (New York: Arno Press & The New York Times, 1969) 33-64 & 111.

drugs<sup>54</sup> and terrorists.<sup>55</sup> Federal troops have also been used to end a conflict over the constitution of the State of Rhode Island (Dorr's Rebellion), reassert federal authority over the Mormons in Utah, preserve order during the Bloody Kansas period, and to stop John Brown's raid at Harpers Ferry. After the Civil War, the military was tasked with overseeing the Reconstruction of the South. It would also play a role in preventing lawlessness and allowing the administration of justice in the Old West.<sup>56</sup> In a more negative fashion, soldiers were involved in the suppression of labor unions, anti-war groups and minority groups, such as the internment of Japanese-Americans in World War II. They have also been sent to restore order during urban riots,<sup>57</sup> to stem the flow of illegal drugs into the country,<sup>58</sup> and to provide relief after disasters.<sup>59</sup>

Some of these incidents, particularly some of those from the 18<sup>th</sup> and 19<sup>th</sup> centuries have little direct bearing on the current debate, except to show the wide array of contingencies that have occurred in a large and diverse federal republic like the United States and been addressed, at least in part, by federal military forces. As such, they will not be discussed here as that discussion could fill volumes. Instead, this chapter will concentrate on those cases that usefully inform the current debate on the domestic role of the military.

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<sup>54</sup> Graham H. Turbiville, Jr., "US-Mexican Border Security," *Military Review* 79, no. 4 (1999): 29-40.

<sup>55</sup> Tim Weiner, "A Nation at War: The Mexican Border; U.S. and Mexico Coordinate Military Efforts for Mutual Protection Against Terror;" *New York Times*, March 23, 2003.

<sup>56</sup> Wilson, *Mass Violence in America*, 65, 79-85, 93-97, 100-101, 107-189, 206-225.

<sup>57</sup> Robert J. Goldstein, *Political Repression in Modern America: From 1870 to the Present*, (Cambridge, MA: Schenkman Publishing Company, 1978) 14-190, 268, 439, 498.

<sup>58</sup> Richard J. Newman, "Unwinnable War," *U.S. News & World Report*, November 4, 1996.

<sup>59</sup> Lynn E. Davis, et al., "Hurricane Katrina: Lessons for Army Planning and Operations," *Research Brief for the RAND Arroyo Center* (2007): 1-2.

Much of the current debate refers to the Posse Comitatus Act (PCA) which, as the previous chapter explains, is now, despite legal opinions that muddy the picture, accepted by many as restricting the use of the military in domestic law enforcement. In analyzing that debate, this chapter will:

- Review the uses of the military, during Reconstruction and the 1877 Pittsburgh Railroad Riots, which led to the passage of the act in 1878.
- Analyze uses of the military in the suppression of organized labor, anti-war groups and racial minorities, arguably the most troubling precedents relevant to the current debate.
- Review use of federal troops to enforce racial integration during the civil rights era.
- Address some of the operational difficulties found with the use of the military to keep order during urban riots and to provide disaster relief, which, I will argue, are due in part to the lack of a clear role for the military.
- Address the use of the military during operations that have no foreseeable end, e.g., their use in the “War on Drugs” and the effort to curb the flow of illegal immigrants and potential terrorists across the Mexican border.

## Uses of the Military During Reconstruction

In 1867, the military was given responsibility for overseeing the Reconstruction of the former Confederate States (with the exception of Tennessee which had been “reconstructed” earlier but would still see Federal military involvement). Until these states were fully “reconstructed” (Georgia was the last in 1870) the military was in full control, and afterwards the military remained a presence until 1877. During this time, the military monitored elections to ensure blacks could vote,<sup>60</sup> set up state governments that had blacks as members<sup>61</sup>, and broke up violent conflicts between blacks and whites. They arrested “upward of 600” “known or suspected” members of the Ku Klux Klan in South Carolina under the Ku Klux Klan Act which allowed military authorities to take action to suppress the Klan, and at times suspended civil governments during disturbances, instituting military rule.<sup>62</sup> In essence, the military attempted to protect the rights of a relatively powerless group, African-Americans, but at the expense of federalism, civilian supremacy and the civil liberties of southern whites.

Anger among southern Democrats about these actions contributed to the passage of the Posse Comitatus Act (PCA) in 1878 while anger among Northern Democrats about the use of the Army against the unions involved in the 1877

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<sup>60</sup> Wilson, *Mass Violence in America*, 107-189.

<sup>61</sup> Beveridge, “The Bulwark of Civilian Supremacy,” 23.

<sup>62</sup> Wilson, *Mass Violence in America*, 107-189.

Pittsburgh Railway Riots contributed to their support of the bill.<sup>63</sup> At the time it was passed the PCA stated,

“Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army 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.”<sup>64</sup>

### Suppression of Organized Labor, Anti-War Groups, and Racial Minorities

A quite disturbing chapter of American history involves the use of the military against organized labor, anti-war groups and racial minorities. Despite the passage of the PCA, federal troops were still used to break strikes with only one party line objection from Congress and that objection did not cite the PCA. In suppressing labor, they acted along with law enforcement, state militia/National Guard, and “company police” (who were hired by the companies to protect their interests and often granted police powers). Political scientist Robert J. Goldstein notes, intervention may have been necessary at times, “and in many cases such forces limited themselves to the protection of men who wished to continue working. However, in all too many cases police [,] militia and federal troops acted so brutally and one-sidedly that they clearly acted as handservants of the companies involved.”<sup>65</sup>

In cases as late as 1922, there was no reasonable justification for troops to be sent during peaceful strikes, except possibly to intimidate strikers. According to

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<sup>63</sup> Beveridge, “The Bulwark of Civilian Supremacy,” 23.

<sup>64</sup> Felicetti and Luce, “Liberation from the Lawyers,” 96, 101.

<sup>65</sup> Goldstein, *Political Repression in Modern America*, 14-16.

Goldstein, in Goldfield, Nevada troops were kept in place “although federal investigators reported the troops were not needed and had been secured so mineowners could break the union” using illegal methods. In fact, in some cases like the 1903 strike in Morenci, Arizona, the strikers were merely asking for labor laws to be enforced and troops were sent against them.<sup>66</sup>

Not only were federal troops used illegitimately but the methods they used were often illegitimate, brutal and/or contemptuous of state and local authorities including local law enforcement. Furthermore, at times they exceeded their granted authority. Indiscriminate arrests were a favored practice. During an 1899 strike by the Western Federation of Miners in Coeur d’Alene, Idaho those arrested included “a large number of Populist party leaders, including a local deputy sheriff. The Populist county sheriff and three Populist county commissioners was [were] removed from office.”<sup>67</sup> This case was investigated by the House Military Affairs Committee and the report was split on party lines with only the Democratic minority objecting to the actions taken after the initial deployment of troops (which they regarded as legal) as, “reprehensible, violative of the liberty of the citizen, and totally unwarranted by the laws and Constitution of the United States.” They never cited the PCA at all.<sup>68</sup>

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<sup>66</sup> Ibid, 14-16.

<sup>67</sup> Ibid, 71.

<sup>68</sup> Felicetti and Luce, “Liberation from the Lawyers,” 100-101

During the American Railway Union Strike of 1894, troops were sent to several states without the request of the respective governors, "Populist Gov. David White of Colorado, protested that the federal government was 'waging an active war in Colorado without any declaration thereof by the United States, or notice or knowledge thereof by state authorities, and utterly in violation of the law.'" In Hammond, Indiana where troops "indiscriminately opened fire on citizens, the Mayor protested, 'I would like to know by what authority U.S. troops come here and shoot our citizens without the slightest warning.'"<sup>69</sup> In the early 1920s there was a conflict between mine operators (who in this case dominated the state and local authorities) and the United Mine Workers (UMW). This conflict ended with the defeat of the UMW at the Battle of Blair Mountain during which the US Army Air Service *attempted to drop pipe bombs on the unionists.*<sup>70</sup>

According to Goldstein, in 1917, in the buildup to World War I, the Army "was authorized to sternly suppress acts committed with seditious intent,"<sup>71</sup> and according to Felicetti and Luce, "the Secretary of War unilaterally instituted a 'Direct Access Policy,'" that essentially reinstated the Cushing Doctrine for over 4 years" allowing local officials to use the military to oppress workers.<sup>72</sup> According to Goldstein, military intelligence spied on "the IWW [the Industrial Workers of the World], the SPA [Socialist Party of America], the pacifist Fellowship of Reconciliation, and the National Civil Liberties Bureau." Although they were

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<sup>69</sup> Goldstein, *Political Repression in Modern America*, 53-56.

<sup>70</sup> Robert Shogan, "A Powder Keg Ready to Blow," *American History* 42 (2007).

<sup>71</sup> Goldstein, *Political Repression in Modern America*, 150-152.

<sup>72</sup> Felicetti and Luce, "Liberation from the Lawyers," 101

“instructed to confine their activities to preserving ‘law and order’ and to protecting ‘life and property’” the military investigated a governor, wound up breaking the IWW in the West by “raids on IWW headquarters, breaking up meetings, arresting and detaining hundreds of strikers under military authority, without any declaration of military law and instituting a general reign of terror against the IWW.” They continued to do this in some areas until 1921 (the war ended in 1918).<sup>73</sup>

After the war, the Red Scare was used as an excuse for the same type of tactics used for decades before and during the war. During the steel strike of 1919, which was associated with the American Federation of Labor, “Federal troops and military intelligence agents...placed Gary [Indiana] under ‘modified martial law’ barring public assemblies, and regularly raided homes of alleged ‘Reds’ in the middle of the night.”<sup>74</sup> According to Felicetti and Luce, “few in power appeared to care.”<sup>75</sup>

In another related case, General MacArthur secretly trained his troops in riot control and despite orders to the contrary from the Secretary of War, led his troops against the Bonus Marchers.<sup>76</sup>

Federal military forces were also used against racial minorities. In military intelligence’s study of the 1919 urban race riots, they spied on moderate groups such as the Urban League. In the same year, when black sharecroppers attempted

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<sup>73</sup> Goldstein, *Political Repression in Modern America*, 101, 110, 115.

<sup>74</sup> *Ibid.*, 150-152.

<sup>75</sup> Felicetti and Luce, “Liberation from the Lawyers,” 101

<sup>76</sup> Paul Dickinson and Thomas B. Allen, “Marching on History,” *Smithsonian* 33 (2003): 84-95.

to organize in Arkansas violence broke out between the blacks and sheriff's deputies after which a white mob attacked the blacks. Federal troops were sent and "arrested several hundred blacks."<sup>77</sup> During World War II, Japanese Americans on the West Coast including those who were US citizens were interred in military camps run by the military acting under an Executive Order.<sup>78</sup>

This wide range of federal involvements demonstrates the possibility of using federal troops in the support of specific interests, not necessarily the interests of the nation as a whole, and at the expense of the rights of other groups, normally those with less power such as workers, racial minorities and those whose political opinions run counter to those in power.

### Forcible Integration

During the civil rights era, many state governments in the South opposed the Supreme Court decision in *Brown vs. Board of Education* requiring the integration of schools. In response, federal troops were used by Presidents Eisenhower and Kennedy to help forcibly integrate the schools.

When nine black students tried to enter Central High School in Little Rock in 1957, despite Mayor Woodrow W. Mann's claim that his police could control the angry mob of whites outside the school, Gov. Orval Faubus sent in the Arkansas National Guard which proceeded to prevent the nine students from entering. Mayor Mann then requested that Eisenhower send federal troops.

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<sup>77</sup> Goldstein, *Political Repression in Modern America*, 150-152.

<sup>78</sup> *Ibid*, 268.

Eisenhower heeded the request<sup>79</sup> and sent the 1,000 riot-trained troops from the 101<sup>st</sup> Airborne who took control of the school and escorted the students to class.<sup>80</sup>

When James Meredith tried to enter the University of Mississippi in 1962 under escort of US Marshals, Meredith and the marshals were stopped by state troopers under orders from Governor Ross Barnett. So President Kennedy responded by sending more Deputy US Marshals along with deputized Border Patrol agents (bringing the number of federal law enforcement officers to 538). When the officers came under attack with bricks, buckshot and Molotov cocktails by an angry mob, President Kennedy federalized members of the Mississippi National Guard and then later a company of Military Police. The federal forces never fired on the mob although the mob was finally dispersed by the sound of the Military Police locking and loading their carbines.<sup>81</sup> The decision to use federal troops in these situations indicates the complex interplay of the competing demands of enforcing federal court decisions regarding the right to equal education, federalism/states rights, and civil supremacy. Decisions in such complex areas are arguably not best made when the crisis is already at hand.

### Riots and Disaster Relief

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<sup>79</sup> Douglas Martin, "Woodrow Mann Dies at 85; Sought Troops in Little Rock," *New York Times*, August 9, 2002.

<sup>80</sup> Shelby Steele, "The Legacy of Little Rock," *Wall Street Journal*, September 25, 2007.

<sup>81</sup> US Marshals Service, "The U.S. Marshals and the Integration of the University of Mississippi," *James Meredith*, US Marshals Service, <http://www.usmarshals.gov/history/miss/02.htm> (accessed April 16, 2009).

Federal military forces have also been used to restore order during riots and to provide disaster relief and there has been a history of operational problems when they have served in those roles. In the 1943 Detroit Riot, “Municipal and state authorities claim that the accessibility of these troops had been misrepresented to them or, at the very least, that they had not been correctly informed about the procedures necessary to obtain federal aid in the suppression of civil disturbance.”<sup>82</sup> In the wake of the 1967 Detroit riot, President Johnson was accused by Governor George Romney of “playing politics with the situation” in regard to a request for the deployment of federal troops.<sup>83</sup> In the 1992 Los Angeles riots, state-controlled National Guard units were taking requests/orders from the Los Angeles Sheriff’s Department (LASD) but once they were federalized they fell under the authority of an active duty military general who, uncomfortable with law enforcement missions, subsequently denied 90% of requests from the Sheriff’s Department.<sup>84</sup>

Response to natural disasters has traditionally been a responsibility of the National Guard in state service. However, the active duty federal military has in the past tried taking command of the situation, which has led to conflict with the National Guard. After Hurricane Andrew in 1992, for example, the Army chief of staff sent a Lieutenant General to Florida who then proceeded to claim that he was

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<sup>82</sup> Allen D. Grimshaw, “Actions of Police and the Military in American Race Riots,” *Phylon* 24, no. 3 (1963): 283.

<sup>83</sup> *New York Times*, “News Summary and Index,” July 30, 1967.

<sup>84</sup> *The Military’s Role in Disasters: What’s the Right Answer*. Video of Heritage Foundation Panel Discussion, (10/03/05), <http://www.heritage.org/Press/Events/ev100305c.cfm>

in command, something that the commander of the Florida National Guard rebuffed.<sup>85</sup> Research of the active-duty military's relief efforts in the 1800s indicates that the military responses varied from situation to situation and were often hampered by "localism" and a lack of financial support from Congress.<sup>86</sup> In these cases, operational problems could have been avoided by a clear and defined role for the military.

### Missions with No Foreseeable End

There has also been a recent trend in the assignment of the military to missions that have no foreseeable end; e.g., drug interdiction and patrolling the border for illegal immigrants and terrorists. The Reagan Administration ordered the use of the military for drug interdiction which was subsequently approved by Congress in legislation that also allowed the military to be used for tariff and immigration enforcement, otherwise normally civilian functions.<sup>87</sup>

In 1996, over 3,000 National Guardsmen along with active duty Department of Defense elements such as the US Navy were involved in counter-drug operations, mostly centered on high tech surveillance leading to interdiction by civilian law enforcement and the Coast Guard. When this approach did not produce the results Senator Bob Dole wanted, he was considering "giving the US military the lead responsibility for stopping the flow of illegal drugs." This was

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<sup>85</sup> Beveridge, "The Bulwark of Civilian Supremacy," 22.

<sup>86</sup> William B. Skelton, review of *The Demands of Humanity: Army Medical Disaster Relief*, by Gaines M. Foster, *American Historical Review* 90, no. 1 (1985): 230-231.

<sup>87</sup> Craig T. Trebilcock, "The Myth of Posse Comitatus."

despite the fact that interdiction seemed to have no effect on either consumption or the supply of drugs available. Even military officers in charge of these high tech operations said that money could be better spent on law enforcement agents and, as Richard J. Newman of *US News and World Report* pointed out; the most effective way to reduce the importation of illegal drugs would be to get Americans to stop using them.<sup>88</sup>

Military activity has been common on the Mexican Border where there have been deployments to stop the flow of drugs, illegal immigrants and potential terrorists across the border. In 1997, it was reported that the Department of Defense had suspended the use of federal military forces on the Mexican Border after the controversial shooting of a local teenager by a US Marine patrol.<sup>89</sup> In 2003, *The New York Times* reported that US Special Forces, Army Rangers, Marines and unmanned aerial drones had been deployed to the Mexican border to combat drug trafficking and terrorism.<sup>90</sup> At the end of July 2008, the 6,000 National Guardsman sent to Mexican Border in 2006 to combat illegal immigration were withdrawn despite requests from border states that they stay. This move was criticized by *The New York Times* as a case of President Bush claiming a “false victory” because the border was not secure.<sup>91</sup>

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<sup>88</sup> Richard J. Newman, “Unwinnable War,” *U.S. News & World Report*, November 4, 1996.

<sup>89</sup> Sam Howe Verhovek, “Pentagon Halts Drug Patrols After a Killing at the Border,” *New York Times*, July 31, 1997.

<sup>90</sup> Weiner, “A Nation at War.”

<sup>91</sup> Editorial Staff, “False Victory at the Border,” *The New York Times*, July 5, 2008, <http://nytimes.com> (accessed October 8, 2008).

In a related case, in 1989, President George H. W. Bush proposed using federalized National Guard or regular military personnel in the District of Columbia if local police did not reduce the District's growing murder rate.<sup>92</sup> These cases show a proclivity of American politicians when faced with a long-term, complex domestic problem to "send in the troops" to take care of it, and as a result militarize a situation not normally included among the kinds of operations for which the armed forces are suited or trained.

### Conclusions

These cases paint a picture of the domestic use of federal military forces in a wide range of circumstances and with a wide variety of effects. Use of the military has been at times a force for good to protect constitutional rights, ensure the administration of justice and assist the threatened and the powerless. At other times, however, it has been a force to reassert the role of the powerful at the expense of the less powerful. Sometimes it has been a resource to back up the limited capabilities of the states; at other times, the military has posed a threat to federalism by muddying or corroding the relationship between federal, state and local authorities. In addition, the domestic deployment of federal military forces has often proved operationally difficult due to a lack of clearly defined role for the military and indicates a proclivity by some politicians to give the military ill-defined missions without any foreseeable end, using the military as a figurative

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<sup>92</sup> Bernard Weinraub, "Bush Considers Calling in Guard To Fight Drug Violence in Capital," *New York Times*, March 21, 1989.

“band-aid,” instead of getting to the roots of the problems. Furthermore, these events call into question the effectiveness of the Posse Comitatus Act as a control on military domestic operations, as the Act seems to have been completely ignored in some instances and yet no one has ever been prosecuted under the Posse Comitatus Act.<sup>93</sup>

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<sup>93</sup> Kealy

## Chapter 3

### Lessons from Abroad

While the previous chapter showed the wide variety of ways that the United States has used its military domestically, examining the experiences of other countries provides a broader context for that history, as other countries have shown a greater range of roles for the military and a wider variety of subsequent effects.

The domestic role of the military as part of the greater subject of civil-military relations has been an issue in societies for millennia, as evidenced by the quote from 1<sup>st</sup> and 2<sup>nd</sup> century Roman satirist Juvenal “Quis custodiet ipsos custodes?” (Who will guard the guards themselves?). There is a large body of literature on civil-military relations in specific countries or regions, particularly about Latin America, where the creation of military/constabulary forces by the US in some countries from 1898-1934, combined with the conquistador military tradition, “spawned military dictatorships.”<sup>94</sup>

While it would be interesting and no doubt useful to do case studies of specific domestic activities of foreign militaries, the sheer number of variables involved would make it difficult, in a work of this size, to draw any strong conclusions relevant to the current situation in United States. At different times,

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<sup>94</sup> Richard L. Millett, “Creating Security Forces in Latin America,” *Joint Forces Quarterly*, no. 42 (2006): 14.

and places, there have been a wide variety of economic, political and social conditions. In fact, until recently, democracy was a “rare political format.”<sup>95</sup>

There have also been variations in the degree of civilian control of the military (if any). As technology has changed, so have the relative capabilities of the police, military and other groups (including private citizens) to exercise coercive force. Finally, there have been many variations in how the security forces of a country are organized and utilized. Many countries have national police forces while others do not; other countries have paramilitary forces charged with policing such as gendarmerie along with civilian police, while others employ their military in police roles. It has been recognized that the primarily state-controlled National Guard units of the US are a “uniquely American organization.”<sup>96</sup>

Thus, this chapter will mainly draw from the work of political scientists and others who have done extensive comparative studies of the subject and have promoted general theories on the domestic role of the military backed up with specific relevant cases when practical. Specifically, it will address the following issues:

- The characteristics of military forces as compared with police agencies.
- How different countries utilize their security forces.

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<sup>95</sup> Thomas C. Bruneau, “Introduction,” in *Who Guards the Guardians and How: Democratic Civil-Military Relations*, ed. Thomas C. Bruneau, 1-17 (Austin, TX: University of Texas Press, (2006).

<sup>96</sup> Maria J. M. Rasmussen, “The Military Role in Internal Defense and Security: Some Problems,” (Occasional paper, The Center for Civil-Military Relations, Naval Postgraduate School, Monterey, CA, October 1999), 9.

- The effects of different utilization patterns.
- The effects of the changing security environment on that utilization.
- The implications of international experience for the domestic use of the military in this country.

### Military Forces Compared with Police Agencies.

Scholarly works usually differentiate between the roles of the police and the military. What are the characteristics of each type of organization that lead to this differentiation?

Police are generally assigned the duty of preserving public order domestically. Police often act in a service capacity, responding to car accidents and other emergencies, providing first aid to civilians, dealing with the mentally ill, assisting the elderly and children in crossing streets etc. Police, including paramilitary units such as gendarmerie, are usually not heavily armed, instead rely on close connections to the community to perform their duties, and thus are often drawn from and live in the area.<sup>97</sup> Importantly, despite their ability to influence political figures, the police usually do not; often they simply carry out the commands of those figures.<sup>98</sup> Operationally, police are taught to perform their duties while exerting the least amount of force necessary.<sup>99</sup> This “law enforcement mentality” is considered, by some authors, to be necessary for

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<sup>97</sup> Claude E. Welch and Arthur K. Smith, *Military Role and Rule: Perspectives on Civil Military Relations*, (North Scituate, MA: Duxbury Press, 1974) 5,10.

<sup>98</sup> Ibid.

<sup>99</sup> Rasmussen, “The Military Role,” 13.

military forces in operations dealing with civilians in potentially hostile environments where they do not have the option of relying on a large advantage in firepower.<sup>100</sup>

On the other hand, the military is traditionally concerned with foreign threats. By virtue of where they are stationed, they are usually detached from civilians. Personnel are recruited nationwide and have their billets consistently shifted to avoid them making close connections to civilians<sup>101</sup> Political scientist Paul Shemella has pointed out that their traditional missions “are high-profile, large-unit affairs, conducted by heavily armed combatants in an environment where everyone is a target...[which involve] little civil-military interaction.”<sup>102</sup> Maria Rasmussen of the Naval Postgraduate School notes that the “principle of minimum force is alien to a soldier.”<sup>103</sup> As an example of the difference between a “law enforcement mentality” and a purely military “warrior mentality” where levels of force are not an issue, one only needs to think back to the example from the Los Angeles Riots in the introduction to this thesis where the military use of the phrase “cover me” could easily have resulted in a tragedy.

### How Different Countries Utilize Their Security Forces

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<sup>100</sup> Paul Shemella, “The Spectrum of Roles and Missions of the Armed Forces,” in *Who Guards the Guardians* (see note 2), 137.

<sup>101</sup> Welch, *Military Role and Rule*, 10.

<sup>102</sup> Shemella, “The Spectrum of Roles and Missions,” 137.

<sup>103</sup> Rasmussen, “The Military Role,” 13.

How then do countries employ these significantly different organizations, each of which has the ability to use force? As mentioned earlier, there are many variations, however Paul Shemella has developed five “Macro Roles” which can be used to categorize the ways in which different countries utilize their military forces. These are outlined in the following table.

**Table 1. "Macro Roles for the Armed Forces" <sup>104</sup>**

<i>War Fighter</i>	<i>Defender</i>	<i>Peacekeeper</i>	<i>Firefighter</i>	<i>Police Officer</i>
United States	Japan	Canada	Peru	Indonesia
Russia	Taiwan	Sweden	Botswana	Honduras
Britain	Jordan	Argentina	Mexico	Albania
China	South Korea	Bangladesh	Georgia	Togo
France	Kuwait	Mongolia	Brazil	Bolivia

Source: Shemella, “The Spectrum of Roles and Missions,” 126.

Both “War Fighters” and “Defenders” may use their forces for other roles, but their main focus is on maintaining the option of offensive force and defending themselves from attacks by neighbors respectively. “Peacekeepers” focus their militaries on peace operations abroad. <sup>105</sup>

For our purposes, “Fire Fighters” and “Police Officer” countries are the most important. Shemella claims, “Fire Fighters” have no real external threats and thus involve their militaries in a variety of domestic missions such as “developing infrastructure and crisis management...Like real fire fighters, the military forces of these countries are used in missions for which no other organizations are available.”<sup>106</sup> They may carry out counter drug enforcement, fight insurgencies and civil wars but do not carry out “regular law enforcement.” They tend to

<sup>104</sup> Shemella, “The Spectrum of Roles and Missions,” 126.

<sup>105</sup> Ibid 126-7.

<sup>106</sup> Ibid, 126-127.

cooperate with civilian law enforcement when the two types of organizations interact. Though almost all governments require their militaries to engage in “Military Support to Civil Authorities” (MSCA), Shemella notes that “the extent to which military forces are used in this role and the duration of that usage are what distinguishes military and police forces from each other, and the fire fighter countries from all the others.”<sup>107</sup> “Police Officer” countries like the name suggests make domestic law enforcement the primary focus of their militaries and the regular police are usually supplanted by the military.<sup>108</sup>

Shemella further shows, in the table that follows, what kind of “micro roles” the armed forces, coast guard, and police are assigned in each of these types of countries:

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<sup>107</sup> Ibid, 130-1

<sup>108</sup> Ibid.

**Table 2. Modified Version of “Micro Roles of Armed Forces and Law Enforcement”<sup>109 110</sup>**

<i>Macro Role</i>	<i>Army</i>	<i>Navy</i>	<i>Air Force</i>	<i>Coast Guard</i>	<i>Police Force</i>
War Fighter	Ground component in joint warfare	Maritime component in joint warfare	Air component in joint warfare	Augments Navy for combat operations & conducts maritime law enforcement	Enforces the law at home
Defender	Ground component in joint warfare	Maritime component in joint warfare	Air component in joint warfare	Augments Navy for combat operations & conducts maritime law enforcement	Enforces the law at home
Peacekeeper	Conducts peace support operations (PSOs) ashore	Conducts PSOs in coastal and riverine areas	Provides logistic support to ground troops	Conducts maritime law enforcement at home	Enforces the law at home & trains indigenous police during PSOs
Firefighter	Conducts military support to civil authorities (MSCA)	Conducts MSCA in coastal and riverine areas	Provides air service to remote areas	Conducts maritime law enforcement	Enforces the law at home
Police Officer	Enforce the law in rural areas and cities	Enforces the law in coastal and riverine areas	Provides logistic support to ground troops	Conducts maritime law enforcement	Augments the Army in domestic law enforcement

Source: Shemella, “The Spectrum of Roles and Missions,” 129.

### Effects of Different Utilization Patterns

Political scientists also have determined several effects associated with these different utilization patterns. If multiple security forces are employed in the same capacity or if the roles keep changing, it can increase the cost of maintaining those security forces. In addition, domestic uses of the military can negatively

<sup>109</sup> Ibid, 129.

<sup>110</sup> The table is modified version of Shemella’s table in order to incorporate key information from his text into his simplified version of this table.

affect the strength of both the police and the military. Domestic deployments can also negatively influence civil-military relations and increase the possibility of military intervention in politics.

If security forces are given duplicative roles, or their roles are not stable, the cost to society can be increased. If duplicate services are provided by different organizations, funds may be wasted on a perpetual basis because roles tend to become permanent. However, if the military's roles are consistently shifted the cost to society increases due to the inefficiencies of consistently changing direction.<sup>111</sup>

Countries which use the military primarily for domestic law enforcement (the "Police Officers" in the parlance above), risk weakening the actual domestic police permanently. Shemella states,

"Regular police officers in these countries are weak, and the use of the military in their place only makes them weaker. When armed forces are used in this way, it is very difficult for them to do anything else. Police officers are among the most unstable countries in the world; their governments tend to remain convinced that a shift of military forces away from law enforcement would create even more instability."<sup>112</sup>

Use of the military in "non-traditional" roles or, in US military parlance, "operations other than war," (e.g. low intensity conflicts, law enforcement, humanitarian operations, and combating terrorism) may weaken the military's ability in its "traditional" role of fighting wars. In these operations, military personnel interact with civilians regularly which ideally would require the "law

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<sup>111</sup> Ibid, 130, 133.

<sup>112</sup> Ibid, 127.

enforcement mentality” mentioned earlier as opposed to a “warrior mentality” useful in fighting true military opponents. It would seem to be a no-win situation: military used for domestic policing pose a risk to the populace if they exhibit the warrior mentality and yet if they shift to the law enforcement mentality they may lose effectiveness as soldiers. As Shemella noted, “Military personnel who must perform both traditional and nontraditional missions risk becoming less capable at both.”<sup>113</sup>

Domestic roles for the military may also be problematic for civil-military relations. It is necessary for good civil-military relations that the public have confidence in the military as well as believe in the legitimacy of the military. Militaries whose main focus is abroad tend to receive public support. In contrast, the “Fire Fighters” and “Police Officers” tend to have poor public support, as when the police and military act in the same roles both groups tend to become weak as they cannot concentrate on specific tasks, and this leads to poor military performance which may undermine public confidence.<sup>114</sup>

When they utilize the military domestically, whether on an ongoing basis or just in times of crisis, countries also increase the chances of military intervention in domestic politics. Domestic operations unavoidably involve the military in political disputes. It has also been suggested that:

“1) The likelihood of military intervention rises should the armed forces become heavily involved in primarily domestic, police type or counterinsurgency activities.

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<sup>113</sup> Ibid, 136.

<sup>114</sup> Ibid, 138-9.

2) The likelihood of military intervention rises should the armed forces be ordered, contrary to the advice of the officer corps, to use coercion against domestic opponents of the government.”<sup>115</sup>

In fact, almost two thirds of successful military coups in Latin America from 1907-1966 were correlated with times of public unrest.<sup>116</sup>

### Effects of the Changing Security Environment

The “traditional” division of roles among security forces is being challenged by changes in what is referred to as the “security” or “threat environment.” These changes have endangered civilian control of the military and military personnel themselves. With the end of the Cold War, there has been more domestic than interstate political violence.<sup>117</sup> Combating these “new” security problems, such as drug trafficking and terrorism, has resulted in many nations, even those with strong police forces, using military forces to assist in these efforts or combining the military forces’ abilities with civilian security efforts. Either route can diminish the demarcation between civil and military matters.<sup>118</sup> This shift has been more prominent in less developed countries, but the emergence of terrorism as major security issue for developed countries is forcing this shift in those countries as well.<sup>119</sup>

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<sup>115</sup> Welch, *Military Role and Rule*, 10.

<sup>116</sup> Ibid.

<sup>117</sup> Michael C. Dresch, *Civilian Control of the Military: The Changing Security Environment*, (Baltimore, The Johns Hopkins University Press, 1999), 5.

<sup>118</sup> Shemella, “The Spectrum of Roles and Missions,” 135.

<sup>119</sup> Ibid.

While terrorism suddenly became America's prime security focus after 9/11, many other Western industrialized and "democratic" nations have faced the threat of terrorists operating within their borders for much longer. There may be lessons in examining their reactions to these internal threats. One of those appears to be that military involvement is not necessarily the only option and that there are severe risks in using the military in a domestic counter-terrorist campaign both for democracy and the chances of neutralizing the threat.

Counter-terrorist activities based solely on military repression have very little chance of success. In fact, the only successful campaigns of military repression against terrorist groups occurred in the "dirty wars" in Argentina and Peru in which there were large scale human rights violations. As Rasmussen points out, "Through studies on the life histories of former terrorists we have learnt that repression will only strengthen the individual terrorist's resolve, increase the group's cohesiveness, and even encourage the terrorist organization to stage further acts of violence."<sup>120</sup>

In the 1970s, Italy was faced with terrorist attacks first by right-wing neo-fascist and then left wing terrorist groups (e. g., the Red Brigades) that resulted in civilian casualties. Though the initial Italian anti-terrorist efforts were weak and inefficient, the use of special police investigative units emerged as the most effective strategy. In addition, the Italian Army is not mentioned in these efforts. Interestingly, by the time the Red Brigades were basically defeated laws were

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<sup>120</sup> Rasmussen, "The Military Role," 30.

passed to demilitarize and unionize the state police (though not the paramilitary Carabinieri) due to disturbing patterns of police behavior regarding increasingly violent protests.<sup>121</sup> The Italian case demonstrates that a state does not have to militarize the fight against internal disorder, but in fact can demilitarize it and that police tactics can be the most effective method against terrorists.

West Germany, too, was faced with domestic terrorism in the 1970s from left wing groups such as the Rote Armee Faktion (Red Army Faction) and Bewegung 2. Juni (Movement 2<sup>nd</sup> June). By 1974 terrorism was considered a significant threat to the state. It was the German police that were leading the fight against terrorism mainly through undercover investigations, technological data gathering, and enlisting public support.<sup>122</sup>

In addition, the attack on the Olympic Village at the 1972 Games in Munich by the Palestinian terrorist group Black September and the failed hostage rescue led to the creation of a new elite counter-terrorist unit, GSG-9,<sup>123</sup> which professor of political science Scott Sigmund Gartner (University of California-Davis) states “was deliberately formed from the German Border Guard in September 1973, instead of from the armed forces, so that it could act domestically and internationally within the perceived legal constraints of the Constitution.”<sup>124</sup>

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<sup>121</sup> Herbert Reiter and Klaus Weinbauer, “Police and Political Violence in the 1960s and 1970s: Germany and Italy in a Comparative Perspective,” *European Review of History* 14 (2007): 384-387.

<sup>122</sup> *Ibid.*, 378-380.

<sup>123</sup> Terry Martin, “Munich Massacre Remembered,” *Europe* 410 (2001): 43.

<sup>124</sup> Scott Sigmund Gartner, “Today’s Germans Atone for the Holocaust; Sending Troops Abroad,” *New York Times*, July 23, 1994.

Instead of violating their own laws by militarizing the situation the Germans chose to use the police to combat terrorism.

In contrast, in 1969, to put an end to public disorder surrounding Catholic civil rights protests in Northern Ireland, mainly in order to protect the Catholics from the Protestants and the Protestant dominated police, the Royal Ulster Constabulary (RUC), the British government deployed the British Army to Northern Ireland without a clear mission. Though the troops were initially welcomed into Catholic neighborhoods, the Army soon initiated a 3 day curfew in a Catholic neighborhood in order to search for arms, introduced "internment without charges" that initially was applied only to Catholics, and shot unarmed Catholic protestors on "Bloody Sunday" an incident which was never adequately investigated. These repressive actions combined to drive moderate Catholics from demanding civil rights to demanding independence and supporting the Irish Republican Army (IRA). Furthermore, the increased violence caused the British to dismantle the Ulster Parliament and assume governance of the region which was something the British hoped to avoid.

The British Army wound up assuming responsibility for the counter-terrorist campaign, which was mainly directed at the IRA (the Protestant paramilitaries were considered less of a threat) and maintaining public order. By the 1980s the police (RUC) were given responsibility for more tasks, but the military remained as a major player and troop levels remained constant irrespective of the level of violence.

Despite a reputation as one of the world's most skilled counter-terrorist organizations, the British Army failed to control the violence. Instead many adverse effects on the Army, the police and democracy are seen as stemming from military primacy. The RUC resented the Army's superior position and cooperation between the two organizations suffered. It was observed that when the RUC began assuming more responsibility they had become more militarized and correspondingly secretive. The engagement also diverted the Army's attention from NATO's defense of Europe. The British government also became more secretive; in fact it refused to release the rules of engagement laid down for British soldiers and would not release information on the numbers of deaths from the conflict. When journalists gained such information elsewhere, they were threatened with prosecution. Additionally, the government instituted new rules to try to prevent the prosecution of soldiers for killing civilians which has resulted in what Maria Rasmussen, characterized as *de facto* legal immunity.<sup>125</sup>

In Israel's low intensity conflict with Palestinian militants, the difficulty making detailed policies to deal with the conflict has resulted, according to Kobi Michael, in the Israeli public and politicians in essence surrendering decision making authority to the military.<sup>126</sup> Not surprisingly, political scientist Michael C. Dresch has noted that "domestic violence has been one of the primary precipitants

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<sup>125</sup> Rasmussen, "The Military Role," 18-33.

<sup>126</sup> Kobi Michael, "Military Knowledge and Weak Civilian Control in the Reality of Low Intensity Conflict—The Israeli Case," *Israel Studies* 12, no. 1 (2007): 28.

of the complete breakdown of civilian control of the military in various countries.”<sup>127</sup>

In addition, operationally, “this transformation places fighters at great risk, requiring them to conduct missions in dangerous places without overwhelming force to protect themselves.”<sup>128</sup>

### Implications of the International Experience

By taking a broad view of the domestic use of the military around the world, one can deduce a number of implications for the domestic use of the military in this country. It becomes apparent that there are many different ways the military and the police can be utilized. Given the different characteristics of these two types of organizations, the use of the military to perform traditional police functions can potentially endanger civilians, increase the costs to society of maintaining the security forces, weaken both the police and the military, worsen civil-military relations, and increase the likelihood of military intervention in domestic politics. Finally, worldwide changes in the “security environment” have challenged the traditional distinction between the roles of the police and the military, which ultimately endangers both civilian control of the military as well as the lives of military personnel. While no one country’s experience can be viewed as directly applicable to the experience of the United States, the analysis of

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<sup>127</sup> Dresch, *Civilian Control*, 5-6.

<sup>128</sup> Shemella, “The Spectrum of Roles and Missions,” 135.

the experience of other countries suggests some of the risks of domestic use of the military.

## Chapter 4

# Reform Proposals

Current discussions of the role of the military in a domestic crisis have been pushed to the fore by the events of September 11<sup>th</sup> and Hurricane Katrina, as well as the threat of a global flu pandemic. Proposals for reform range widely in terms of how much they would change the current system. Of course, in politics each proposal carried with it the motivations, biases, misrepresentations and misconceptions of their promoters. In this chapter, I will evaluate proposals broadly grouped as follows:

- The use of private military companies to provide security services during crises.
- Broadening the military's authority in a crisis, including changes to the Posse Comitatus Act (PCA).
- Leaving the PCA as is and making changes within the existing response framework.
- Crafting a new law which strictly forbids the military, including the National Guard, from taking on most domestic law enforcement duties.

## Use of Private Military Companies

Recently, on the international security scene, there has been proliferation of Private Military Companies (PMCs). These are mercenaries who, in return for compensation, offer their security services to a host of entities including private corporations and the US government. It has been widely reported that they have been used in places such as Iraq and Afghanistan. In the aftermath of Hurricane Katrina, however, companies such as Blackwater USA, DynCorp, Wackenhut, Kroll and the Israeli company Instinctive Shooting International deployed hundreds of armed men to the disaster area. At least in the case of Blackwater, portions of these private forces got there before most federal agencies and wound up protecting both private and government property under contract. Blackwater has sought to contract its services in other disasters, applying for permits and even meeting with California Governor Arnold Schwarzenegger on the subject. Blackwater emphasizes its flexibility and ability to provide “turnkey” homeland security services as well as its desire to “serve the country” making claims that it was not there during Katrina to make a profit.<sup>129</sup>

Blackwater’s claims, however, must be taken with a grain of salt because in the end, Blackwater is a private company that needs to market its services and make a profit to survive. In addition, it should be noted that the owner of Blackwater, Erik Prince, is a devoted and politically active member of the Christian Right. Altruistic motivations or not, Blackwater in fact was receiving

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<sup>129</sup> Jeremy Scahill, *Blackwater: The Rise of the World’s Most Powerful Mercenary Army* (New York: Nation Books, 2007) xiii-xxvii, 321-337.

\$283,000 a day in government contracts. Some of the company's claims, such as arriving in the French Quarter of New Orleans before the Louisiana National Guard, as well as rescuing 128 people with its own helicopter for free, have been called into question by military officers. In addition, while Blackwater boasts that its employees take loyalty oaths to the US Constitution, a private military company's personnel are not bound, for example, by the constitutional restrictions on search and seizure. With that in mind, some commentators have noted that they could be used as an "extrajudicial enforcement mechanism" much like the Nazi Brownshirts.<sup>130</sup>

#### Broadening Military Authority and Changing the Posse Comitatus Act (PCA)

After September 11<sup>th</sup>, several prominent public leaders (most notably President George W. Bush, Senate Armed Services Committee Chair John Warner (R-VA),<sup>131</sup> and former Senator Gary Hart,<sup>132</sup>) argued that the PCA, which limits the role of the military in domestic law enforcement, should be reviewed. Warner mentioned the idea in 2001 and the Bush administration called for it in 2002, although by 2003 Bush had backed away from the idea while Warner was still calling for hearings.<sup>133</sup> After the disastrous response to Hurricane Katrina in 2005, there were again calls by Warner and Bush to review the PCA.<sup>134</sup> After Hurricane

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<sup>130</sup> Ibid.

<sup>131</sup> David Morris, "Warner My Revisit Ban on Domestic Police Power," *Congress Daily*, April 21, 2003.

<sup>132</sup> Elisabeth Frater, "Whoa! Keep the Reins Tight on that Posse," *National Journal* 33, no. 42 (2001).

<sup>133</sup> Morris, "Warner My Revisit Ban."

<sup>134</sup> Dave Moniz and Matt Kelly, "Military's Role in Disasters Reconsidered: Senator wants to review law that limits troops use," *USA Today*, September 19, 2005.

Rita, later in 2005, President Bush went beyond calls for the military to be granted law enforcement power, suggesting that the military also “determine and mobilize the national assets needed to respond to disaster.”<sup>135</sup> Again in 2005, with the threat of pandemic influenza, Bush suggested that while Homeland Security would be in overall control of the response, the military should be involved in “enforcing security around quarantined areas,”<sup>136</sup> a law enforcement function.

Many of the writings advocating changes in the PCA to expand the military’s domestic law enforcement powers neglect or misrepresent important facts that would otherwise undermine their arguments. For example, some include a conclusion that military personnel are superior to their civilian counterparts that is counter-factual. In 2006, Christopher J. Schmidt and David A. Klinger made the argument that there needed to be an exemption in the PCA for the military to act in circumstances beyond the capabilities of civilian law enforcement, especially for military-style assaults by terrorists which, they claim, police SWAT units cannot handle. As evidence they present the attacks by Islamic terrorists in Madrid and London in 2005.<sup>137</sup> One cannot, however, construe the placement of bombs in mass transit systems (which at least one of their own sources indicate was the modus operandi of the attack)<sup>138</sup> to be a military style

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<sup>135</sup> Bryan D. Watson, “A Look Down the Slippery Slope: Domestic Operations Outsourcing and the Erosion of Military Culture,” *Air & Space Power Journal* (Spring 2008): 95.

<sup>136</sup> John M. Doyle, “Be Prepared,” *Aviation Week & Space Technology* 163, no. 15 (2005).

<sup>137</sup> Schmidt and Klinger, “Altering Posse Comitatus,” 668-9, 685.

<sup>138</sup> *CNN.com*, “Bombs were Spanish-made explosives,” March 13, 2004, <http://www.cnn.com/2004/WORLD/europe/03/12/spain.blasts/> (accessed November 20, 2008) and *The Times*, “Britain 'defiant' as bombers kill 52 in attack on the heart of London,” July, 8 2005. <http://www.timesonline.co.uk/tol/news/uk/article541666.ece> (accessed November 20, 2008).

assault that a SWAT team cannot handle but the military could. The prevention of such incidents could require a large number of resources acting concertedly over an extended period of time not a brief use of heavy arms. In addition, the response to such a terrorist attack after the fact would seldom require a large amount of firepower.

While Schmidt and Klinger do present evidence of law enforcement being unable to stop individuals with armored vehicles, they do not present any convincing evidence that it was something inherent about civilian law enforcement that made them incapable of stopping those individuals. Rather it seems that they did not possess specific weapons to disable such vehicles,<sup>139</sup> a problem that could be fixed rather easily. One could also argue that the time frame for response, once such a vehicle was being actively used, would probably not allow for bringing in federal military specialists. Thus the capability to disable such vehicles should be in the hands of the first responders, i.e., local law enforcement.

Schmidt and Klinger also present the events of 9/11 and possible future terrorist attacks as attempts to overthrow the US government.<sup>140</sup> Neither the actions of 19 hijackers who planned to crash planes into buildings or any operation by Islamic terrorists in the near future can be thought of as attempts to overthrow the US government, as they did not and will not (at least in the foreseeable future) have the capabilities to do so.

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<sup>139</sup> Schmidt and Klinger, "Altering Posse Comitatus," 669-670.

<sup>140</sup> Ibid, 670-671.

James Pinkerton, in a 2005 opinion piece for *USA Today* is probably the best example of the outright bias against civilian responders as compared to the military. He starts by saying, “When you absolutely, positively, have to get something done right away -- you call in the military...They are trained to complete their mission, or die trying. And as Hurricane Katrina made clear, the rest of the government doesn't hold to such a high standard.”<sup>141</sup> This characterization of the military as more dedicated than civilian responders flies in the face of the facts, as thousands of civilian responders have made the ultimate sacrifice in the line of duty. In the 20<sup>th</sup> century at least 14,140 law enforcement officers died in the line of duty and another 824 are known to have died in the previous century.<sup>142</sup> From 1977 to 2007, 3,933 firefighters died in the line of duty in the US<sup>143</sup> while 423 fallen EMS providers have been honored by the National EMS Memorial Service since 1993.<sup>144</sup>

James F. Kelly Jr., a former naval officer, in a 2002 article also misrepresents the facts surrounding the issue. He wrongly claims that the objections that military personnel are not trained in domestic law enforcement are not important because police agencies in many ways model themselves after the military and many police officers are veterans. Neither of these statements has any bearing on

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<sup>141</sup> James Pinkerton, “Send in the Troops,” *USA Today*, October 10, 2005.

<sup>142</sup> Craig W. Floyd, “A Record of Law Enforcement’s Sacrifice during the 20<sup>th</sup> Century,” *National Law Enforcement Officers Memorial Fund*, National Law Enforcement Officers Memorial Fund <http://www.lneomf.com/TheMemorial/Facts/CenturySacrifice.htm>.

<sup>143</sup> US Fire Administration, *USFA Firefighter Fatalities Historical Overview*, US Fire Administration, <http://www.usfa.dhs.gov/fireservice/fatalities/statistics/history.shtm> (accessed April 16, 2009).

<sup>144</sup> National EMS Memorial Service, *National EMS Memorial Service: Press and Media Info*, National EMS Memorial Service, <http://nemsms.org/press.htm> (accessed April 16, 2009).

whether *current* military personnel have domestic law enforcement training. While Kelly rightly points out that many military personnel have had training in military law enforcement roles,<sup>145</sup> he does not mention there are important differences between military and civilian law enforcement.

John F. Awtrey, Director of the US DOD's Office of Law Enforcement Policy and Support, and Jeffery Porter, of the US Army's Office of the Provost Marshal General have compared military law enforcement groups to their civilian equivalents. While they have found many similarities in such as the work performed, they also found differences in the culture, operations and authority of the officers most importantly, that these military law enforcement officers may also be "warriors" with a "national defense mission."

Another important difference regarding culture is that military law enforcement officers also enforce a different a special set of laws, the Uniform Code of Military Justice (UCMJ), a complete criminal code plus special laws to preserve military functionality.<sup>146</sup> In a law review article specifically concerned with the UCMJ's influence on the Supreme Court's interpretation of "evolving standards of decency" and the 8<sup>th</sup> amendment, law professor Corey R. Yung does note,

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<sup>145</sup> James F. Kelly Jr., "Broaden Armed Forces' Roles At Home and Abroad," *US Naval Institute Proceedings* 128, no. 10 (2002): 2.

<sup>146</sup> John F. Awtrey and Jeffery Porter, "Civilian and Military Law Enforcement Cooperation," *The Police Chief* 71, no. 2 (2004).

Part of the military's special role is that those subject to military law enjoy differing levels of constitutional protection than do nonmilitary persons. Members of the military have greater limitations on their constitutional rights under the First, Fourth, Fifth, Sixth, and Seventh Amendments.<sup>147</sup>

This suggests that for whatever similarities exists between civilian and military law enforcement forces, that military police are used to working in circumstances where protection of individual rights is less of a concern.

In addition, while Bush and other advocates of allowing the military to carry out domestic law enforcement have tried to make their proposal sound like it is a Katrina-related reform; there is no evidence that suggests that the Posse Comitatus Act in any way hampered the disastrous response to Katrina.<sup>148</sup> In fact the RAND Corporation report on the Army's response to Katrina does not mention the Posse Comitatus Act as causing a problem.<sup>149</sup>

### Making Changes within the Existing Response Framework

Many commentators do not believe that improving the response to a domestic crisis requires a change in who is ultimately in charge or in the Posse Comitatus Act. While many have proposed increasing FEMA's capabilities which is extremely important, one must remember FEMA only has 2,600 full time employees and 4,000 employees on standby for disasters.<sup>150</sup> It does not have the large amounts of manpower and equipment for operations, which is one of the

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<sup>147</sup> Corey R. Yung, "Is Military Law Relevant to the "Evolving Standards of Decency Emodied in the Eighth Amendment?" *Northwestern University Law Review Colloquy* 103, (2008): 145.

<sup>148</sup> Spencer Ackerman, "Coup de Grace," *New Republic* 223, no. 18 (2005): 11-12.

<sup>149</sup> Davis, et al., "Hurricane Katrina": 1-2.

<sup>150</sup> FEMA, *About FEMA*, FEMA, <http://www.fema.gov/about/index.shtm> (accessed April 15, 2009)

military's strengths, nor does it provide law enforcement/force protection services. In addition, other proposals of making changes within the existing framework are not without their own biases which tend towards military solutions.

The recommendation by the RAND Corporation, which studied the Army's response to Katrina, was to give National Guard units the "federal mission to conduct homeland security activities." This broad, new role would include preparation for Guard units to deploy outside their states and to fill in for units deployed overseas, the use of air transport, the creation of "10 regional task forces to work closely with FEMA and other civilian agencies," and the creation of a pool of units with extra homeland security training ready to respond to incidents the number of which "would be defined in light of currently available civilian responders." In addition, it also recommended creating a set of predetermined possible command and control centers one of which would be chosen based on the incident (during Katrina the response was complicated due to the existence of multiple centers).<sup>151</sup>

The earlier RAND Corporation study "Army Forces for Homeland Security," similarly called for an emphasis on the National Guard conducting homeland security activities (though it made an unclear statement about statutory changes to allow the Army Reserve to undertake any homeland security mission).

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<sup>151</sup> Davis, et al., "Hurricane Katrina": 1-2.

<sup>152</sup> The Commission on the National Guard and the Reserves also emphasized the role of National Guard and Reserve forces and made recommendations as to how they could be better utilized.<sup>153</sup> It must be remembered, however, that the RAND Corporation was hired by the US Army to do research on what the US Army could do better, and the Commission was tasked with studying the Guard and the Reserves which may have led their researchers to focus on the problem from those organizations' points of view, as opposed to providing a solution that was best for the nation as a whole.

Many other commentators-e.g., military officials, scholars from the conservative Heritage Foundation as well as the ACLU-have advocated solutions centering on the National Guard and restructuring of the military but not a repeal/modification of the Posse Comitatus Act. Most also emphasize that there is no problem with the military undertaking non-law enforcement humanitarian and logistical tasks in a crisis.<sup>154</sup> William Lind who advises the Marines on "Fourth Generation Warfare" also claims the National Guard should have responsibility for domestic events but also that the "United States needs to rebuild its tradition of local self-reliance and look to local police forces and civilian preparedness."<sup>155</sup>

However there is some indication that this side of the debate is also somewhat biased in favor of the military as many of these commentators have

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<sup>152</sup> Lynn E. Davis, et al., "An Army Strategy for Homeland Security," *Research Brief for the RAND Arroyo Center* (2004): 1-3.

<sup>153</sup> Commission on the National Guard and Reserves: Transforming the National Guard and Reserves into a 21<sup>st</sup>-Century Operational Force, *Executive Summary of the Final Report*, (Washington, DC: 2008), 9.

<sup>154</sup> Ackerman, "Coup de Grace," 11-12.

<sup>155</sup> Joseph A. D'Agostino, "Bush Will Review Law on Domestic Use of Military," *Human Events* 58, no. 28 (2002).

some sort of connection to the military, whereas we hear very little from those connected with civilian responders. For example, the Heritage Foundation held a panel discussion in 2005 in which participants stressed the role of the National Guard, three of the participants were former members of the Army but there was no one with a connection to civilian law enforcement, other public safety organizations, emergency management or public health.<sup>156</sup>

### Drafting A New Law Limiting Military Law Enforcement

In sharp contrast to much of the current debate about modifying the Posse Comitatus Act, there are some who claim that the Act needs to be replaced with a new law limiting the use of the military in domestic law enforcement. However, the proposal by Sean Kealy, which will be discussed below, ignores some of the operational realities of the current situation and assumes that certain organizations will be able to handle every situation and thus due to its inflexibility risks being deemed irrelevant in a crisis.

Gary Felicetti and John Luce, argue that the Posse Comitatus Act itself does not significantly limit military participation in law enforcement activities. They, in fact, deride the complexity of the related Department of Defense regulations which they claim have little basis in the actual law and endanger national security because among other things they “create bizarre situations where the US Navy perceives itself to have less authority to conduct some national defense missions as

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<sup>156</sup> Heritage Foundation Event, “The Military’s Role in Disasters: What’s the Right Answer,” Heritage Foundation, <http://www.heritage.org/Press/Events/ev100305c.cfm>.

threats get closer to America.”<sup>157</sup> They also claim the current interpretation of the Act “is dangerous to American civil liberties and erodes respect for the rule of law. It holds up the Posse Comitatus Act as a strict legal and quasi-constitutional limit that is easy to discard or ignore when practical necessity appears to require it.”<sup>158</sup> They instead call for an end to competing legal interpretations of the current Act and a new debate on how best to protect both America and civil liberties.<sup>159</sup>

In 2003, Sean J. Kealy, cited the historical principle of separation of the military and law enforcement and claimed that the “principle” of the Posse Comitatus Act has been eroded and is under assault with the “War on Terror.” Kealy also called for a new law regarding the military’s role in domestic law enforcement. However, he goes further than Felicetti and Luce by outlining what that statute should include.

According to Kealy the new statute should be based on several principles. “First, the statute should clearly state...that, barring an emergency, or in extremely limited circumstances, the military will not be used to enforce the law and subject the civilian population to military authority.”<sup>160</sup> He also claims that the law should clearly state when the military can engage in a law enforcement mission, which he claims should be based on whether it is a “mission for which it has been trained and equipped - to deter war and to protect the nation's security

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<sup>157</sup> Felicetti and Luce, “Liberation from the Lawyers,” 94, 106.

<sup>158</sup> *Ibid*, 106.

<sup>159</sup> *Ibid*.

<sup>160</sup> Sean J. Kealy, “Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement,” *Yale Law & Policy Review* (Spring 2003): 17.

interests.”<sup>161</sup> In addition, the mission should not harm the military’s preparedness and the mission should not be taken on unless it cannot be carried out by civilian law enforcement. He also claims the law should minimize interactions between military personnel and civilians since that is not what military personnel are trained for.

Thus, for a multitude of reasons, he suggests that the military’s law enforcement authority be limited to securing the nation’s maritime and aviation borders. He also claims that the military should share information it has about criminal activity with law enforcement but not engage in surveillance of civilians. Finally, he claims that evidence gained in violation of the new statute should be excluded from trial, as that limitation would provide a needed deterrent to violations.<sup>162</sup>

Interestingly, again in contrast to much of the debate, Kealy makes the claim that the National Guard be considered to be the same as the rest of the military, which ignores some important aspects of the Guard. He notes that Guard members are primarily trained as soldiers and not in discretion nor in criminal procedure, and thus may inadvertently violate constitutional rights. Thus, he suggests a possible division of the Guard into one section trained like police and dedicated to public safety duties, with another section oriented to military service overseas.<sup>163</sup>

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<sup>161</sup> Ibid.

<sup>162</sup> Ibid 17-18.

<sup>163</sup> Ibid.

While Kealy's proposal may provide some benefits in terms of specialization and should be considered, he neglects that the nature of the National Guard makes it different than the active duty military. Being part-time soldiers, Guard members and reservists for that matter spend most of their time in the civilian world which gives them a better understanding of and connection with the civilian population. This combined with the fact that local National Guard and Reserve forces will return to the area afterwards to live among that population, may help prevent abuses of civilians. Thus the Guard and Reserve should be placed in a category distinct from the regular military branches when it comes to domestic deployment.

Furthermore, Kealy seems to believe that those local organizations authorized to engage in law enforcement under his law will be able to handle all situations and never need military assistance, thus his proposed law has a dangerous lack of flexibility that may lead to the law being ignored by officials in circumstances where circumstances threaten their ability to preserve law and order. It must be remembered that in future crises certain resources may have their capacity reduced (e.g., staff have been called up for overseas military duty, difficulties with communication and transport, etc.) or be outright incapacitated. In addition, there might be simultaneous crises in different areas of the country.

Thus, it is possible that civilian law enforcement and the public safety oriented National Guard units may be incapable of maintaining law and order. In those circumstances, with Kealy's law, officials may be tempted to say the law

does not apply and start handing out law enforcement missions to military forces ad hoc. If they proceeded that way, they would in essence be making decisions with important and complex implications for the country in a time of crisis when by definition they would have less of the time and information necessary to make truly informed decisions. They would be making these important decisions in what I have referred to as the “fog of crisis” a variation on the traditional “the fog of war.”

### Conclusions on the Current Debate

After both September 11<sup>th</sup> and Hurricane Katrina, the debate on the proper role of the military in a domestic crisis has been pushed to the fore. This debate is influenced by the current flaws in the country’s response capabilities, and the historical experiences of the US as well as other societies. There are many different proposals competing, which can broadly grouped as the use of private military companies, broadening the military’s authority in a crisis, including changes to the Posse Comitatus Act (PCA), leaving the PCA undisturbed and making changes within the existing framework, and crafting a new law limiting the military’s role in domestic law enforcement. Upon examination of these proposals it becomes clear that the current debate, while raising some important questions, includes many biases, misrepresentations and misconceptions. Most notably, there seems to be a widespread bias in the debate in favor of military solutions.

In the final chapter, I will seek to draw from the important questions raised above and describe my recommendations for an approach that would focus on using civilian resources whenever possible, allowing for the military to assist with non-law enforcement missions when necessary and establishing a progressive protocol for determining what forces will join the law enforcement efforts if local resources become insufficient.

## Chapter 5

### Improving Emergency Response Capabilities

In beginning this thesis, I suggested that America faces a multitude of threats to its safety and security and that current trends indicate that the severity of those threats is growing. I have also sought to demonstrate with multiple examples that our current plans and existing capabilities cannot be counted on to keep America safe and secure in a domestic crisis while preserving civil liberties and civilian supremacy. I noted that our existing response capabilities were weak in many areas and thus questioned our ability to coordinate an effective, unified response to domestic crisis. I suggested that the domestic missions tasked to our military are highly varied and that the lack of a clearly defined role for the military is part of the problem.

In Chapter Two, I reviewed the history of the domestic use of federal military forces, revealing both the wide range of circumstances in which they were employed and the wide range of effects of that usage. I suggested that their use has been at times a force for good to protect constitutional rights, ensure the administration of justice and assist the threatened and the powerless and yet, at other times, a force to reassert the role of the powerful at the expense of the less powerful. They have been used as a resource to back up the limited capabilities of the states and at other times posed a threat to federalism by overriding state and

local authority. I also showed that the domestic deployment of federal military forces has often proved operationally difficult due to a lack of clearly defined role for the military and the proclivity by some politicians to give the military ill-defined missions without any foreseeable end, using the military as a figurative “band-aid,” instead of getting to the roots of the problems.

In Chapter Three, looking at international examples of the domestic use of the military, I introduced the distinction between law enforcement which is oriented at service to a local population and the minimal use of force and the military which is traditionally tasked with the fighting of wars which at least traditionally did not include much interaction with civilians. I also suggested that the use of the military domestically, in the “traditional” realm of the police, can potentially risk the lives of civilian and military personnel, increase the costs to society of maintaining the security forces, weaken both the police and the military, and worsen civil-military relations, increasing the chance of military intervention in domestic politics.

In Chapter Four, I reviewed recent proposals for changes to the way the military is used domestically, sparked for the most part by the failures of effective response to Hurricane Katrina and international terrorism such as September 11<sup>th</sup>. I suggested that seemingly disparate proposals such as the use of private military companies to provide security services during crises, or broadening the military’s authority in a crisis, or including changes to the Posse Comitatus Act or leaving the PCA as is but making changes within the existing response framework, all

included misrepresentations and misconceptions and most seemed to share a bias in favor of solutions involving the military as opposed to local resources.

Here I will attempt to propose a better emergency response framework that avoids many of the difficulties mentioned above and build on some of the positive suggestions noted at the end of Chapter Four. This new law and framework of response should be crafted with the following goals:

- Ensure national security by maintaining the military's ability to fight wars and ensure continuity of government.
- Maintain civilian supremacy and prevent the intrusion of the military into domestic politics.
- Ensure domestic security i.e. protecting life and property, maintaining law and order, and ensuring the continuity and restoration of government functions.
- Protect individual civil liberties.
- Maintain the ability to respond to, in homeland security parlance, "all hazards."

This last point is important because if the new law does not give officials the means to respond to extreme situations, when one of those situations occurs the likely response of government officials would be to claim the law does not apply to that situation. They would then make difficult decisions about the appropriate role of the military in "the fog of crisis" (a phrase inspired by the notion of the

“fog of war”) instead of in the calmer and information-rich atmosphere of normal policymaking where time is not of the essence.

In order to accomplish these goals, the primary considerations should be, as Kealy says, to: (1) use the military for domestic missions that are similar to their traditional primary missions, and (2) to avoid the use of the military for other missions.

The best way to deal with the complexity in differentiating between those two considerations would be to act in the following areas:

- Increase the response capabilities of civilian agencies particularly civilian law enforcement.
- Restrict the military to a support role in domestic crises and only in situations where civilian agencies are overwhelmed.
- Split the National Guard into public safety and combat components.<sup>164</sup>
- Maintain the ability to respond to all hazards by establishing a hierarchy of responsibility for force protection and law enforcement.

#### Using the Military for Missions Aligned with Its Primary Purpose

As mentioned in Chapter 3, the US military’s traditional primary role is that of fighting large scale conventional wars (although for the Coast Guard it also includes maritime safety and security). In fact it has been noted that the “defining moment” for the US military was the conventional warfare of War World II and

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<sup>164</sup> Kealy.

the preparations for war with the USSR. While Vietnam did not fit that model of warfare, “The great lesson of Vietnam for the US military was a refusal to ever again fight a limited war against irregular forces.”<sup>165</sup> However, the long term impact of the “War on Terror” and Iraq where it seems the military has been given militarily ill-defined missions without any foreseeable end has yet to be seen.

While large scale combat is not likely to occur in the United States in the near future, Kealy points out that some of the functions the military carried out in pursuit of its primary missions may be useful domestically while comporting with the military’s existing mission, not hindering military preparedness, meeting needs that cannot be easily met by civilian law enforcement, and have limited contact with civilians. Obviously the Coast Guard’s maritime safety and security mission falls into that category. The Navy’s mission includes the prevention of maritime-based threats attacking the United States, and thus it should be allowed to assist the Coast Guard in intercepting those threats should the need arise.<sup>166</sup> However, the use of Coast Guard detachments on board Navy ships for boarding other ships in a law enforcement operation should continue as Coast Guardsmen are specialists in maritime law enforcement.

The Air Force’s mission to defend America from airborne threats should allow it and other military aircraft to take action against, for example, planes attempting to smuggle contraband into the US<sup>167</sup> or a hijacked airliner still in the

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<sup>165</sup> Roxborough, “The Ghost of Vietnam,” 346.

<sup>166</sup> Kealy.

<sup>167</sup> Ibid.

air to prevent it from being used as a missile. In addition, as Tim Edgar, the counsel for national security at the American Civil Liberties Union points out, there are many tasks performed by the military in war (and in the Coast Guard's maritime safety and security mission) that do not require the use of force but may be useful in a response to a domestic crisis.<sup>168</sup> These include but may not be necessarily limited to, logistics, medical support, search and rescue, response to Weapons of Mass Destruction (e.g. decontamination), and engineering. In fact, military personnel performing these roles may in fact increase military preparedness for a war as, for example, air crews that have the real life experience performing search and rescue after a natural disaster should be better prepared to rescue downed pilots in a war.

#### Avoiding the Use of the Military for Other Functions

All efforts should be made to avoid using the military for non-military missions, most prominently those that involve interactions with civilians that could require search and seizure or the use of force, namely law enforcement or force protection. As Kealy points out, this will serve to maintain military readiness, bolster domestic security, and protect military and civilian lives as well as individual civil liberties. Military forces performing missions that involve the minimal use of force may detract from their ability to fight wars. In addition, most military personnel are not trained in rules of evidence and proper police

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<sup>168</sup> Ackerman, "Coup de Grace," 11-12.

procedure concerning search and seizure, plus, as mentioned earlier, even military law enforcement may not have as much experience with civilian laws which evoke a greater concern for individual rights. They may make mistakes while conducting actions resulting in the evidence they gained being inadmissible at trial, leading to dangerous offenders being released back into society. In fact, former federal prosecutor, Bruce Fein claimed, "the military "would probably botch an effective prosecution [of a crime]."<sup>169</sup> At the same time, limiting the military's role helps preserve civil liberties by reducing potential violations of civilians' constitutional rights to not be arrested or searched without probable cause.<sup>170</sup> In addition, since private military companies are not bound by the Constitution at all,<sup>171</sup> their use must be strictly prohibited.

Perhaps most importantly, preventing the military from performing these missions protects the lives of civilians and military personnel alike. Civilian police are trained to maintain law and order as well as preserve their own lives and the lives of others with the minimum use of force, but as Rasmussen mentioned that is a "foreign concept" to soldiers. Having military personnel perform missions that require the minimal use of force raises the likelihood of tragedy in that personnel may revert back to their training and unnecessarily take the life of a civilian, which could have easily happened in the situation involving the phrase "cover me" described in the introduction.

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<sup>169</sup> Kealy.

<sup>170</sup> Ibid.

<sup>171</sup> Scahill, Blackwater, xiii-xxvii.

Conversely, trying to avoid overuse of force in what will necessarily be situations unique to soldiers may lead them to hesitate at the wrong moment resulting in the death of themselves or others. In a similar vein, Major General Marvin L. Covault, commander of all military forces in Los Angeles during the 1992 riots was criticized for giving military personnel very restrictive rules of engagement which, critics claim, put soldiers at risk. This is not to say these tragedies do not happen when police officers perform their duties but they are specially trained to minimize the chances of a tragedy.

#### Increasing Civilian Capabilities

It is also necessary to increase the capabilities of individual civilians and the civilian agencies that deal with domestic security, most notably civilian law enforcement. If private citizens can become more educated and trained in matters relating to domestic security, they can help to reduce the burden on response agencies by following orders regarding evacuation, assisting with the evacuations of their neighbors who may have special needs and being properly prepared with their own emergency supplies. Also, if through expanding the existing Community Emergency Response Teams (CERT), more citizens can be trained in providing first aid and light search and rescue within their communities, more lives could be saved in cases where help might be slow in coming and the burden on professional responders will be lessened.

If the capabilities of civilian response agencies in general are increased, not only will America be better prepared to respond (even if large portions of the military are deployed overseas) but it will reduce the number of situations in which military assistance to civil authorities will be necessary. This will have benefits in reducing the burden on the military and letting it concentrate more on its primary missions and reducing the chances of military being drawn into political disputes.

Finally, enhancing the response capabilities of civilian law enforcement will reduce the chances that officials will feel the need to use the military in the situations better handled by civilian law enforcement mentioned above. Given the incidents in San Diego and Colorado mentioned previously, civilian law enforcement should be given the resources necessary to effectively counter armored vehicles. Not only should already over-stretched local police departments receive additional funding and support but the ability to move local and state law enforcement officers to other jurisdictions where they are needed in a crisis must be developed. While the Attorney General can deploy federal law enforcement officers upon request from state governors (see Chapter One), the US would also benefit from the development of special teams of state and local law enforcement officers trained to respond to WMD or other major incidents and civil disturbances.

A good example is Suffolk County, New York's Crisis Action Team which is capable of responding to large-scale incidents, such as plane crashes, civil

disturbances and Weapons of Mass Destruction incidents.<sup>172</sup> Its members could be temporarily deputized as US Marshals when deployed by the Attorney General. (Hereafter, when referring to these hypothetical teams, I will use the term Crisis Action Teams). Currently, a similar capacity exists in the area of search and rescue with the FEMA Urban Search and Rescue teams described earlier, composed of local emergency service personnel who respond to structural collapses and other major incidents nationwide.<sup>173</sup>

Creation of such teams would not only provide more law enforcement resources in a crisis but would also provide a subsidy to participating local and state law enforcement agencies by providing their members extra training thereby enhancing the area's local resources. This in turn could further enhance local police capabilities as Cameron pointed out the Suffolk County team not only improved officers involved at their normal patrol duties, but these officers helped spread knowledge to other officers in their precincts.<sup>174</sup>

### Restricting the Military Role

It is also important to ensure the current publicized policy of using the military in *support* of civilian authorities, only when civilian agencies request assistance because they are overwhelmed, and with immediate withdrawal of military forces once civilian authorities are capable of handling a situation on their

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<sup>172</sup> Stuart K. Cameron, "Suffolk County's Crisis Action Team: A Mobile Field Force for the Twenty First Century," *FBI Law Enforcement Bulletin* (2006): 1-7.

<sup>173</sup> US Department of Homeland Security, *National Response Framework*, 54-62.

<sup>174</sup> Cameron, 7.

own, continues. This will not only help reduce the burden on the military by limiting the number of domestic missions it is asked to perform, but also reduce the danger of military forces being drawn into political disputes and interfering in domestic politics, which Welch showed to have occurred in Latin America where the military often takes on domestic missions.<sup>175</sup>

### Splitting the National Guard

There would also be benefits to splitting the National Guard into two components, one purely for domestic service that cannot be sent overseas and would be oriented towards public safety, the other eligible for overseas service oriented towards warfare. In fact, approximately 22 states and Puerto Rico have State Defense Forces or State Guard units that cannot be federalized which, Lieutenant Colonel Brent C. Bankus of the US Army War College points out, could be used as the basis for a domestic component in those states,<sup>176</sup> (from here onward I will refer to these domestic units as State Guard units). This would be beneficial in allowing units to specialize in the different skills of policing or fighting wars and it would ensure that units necessary for domestic security are not deployed overseas when needed at home a concern raised by many including political scientist Brett Morris of the University of Alabama.<sup>177</sup>

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<sup>175</sup> Welch, *Military Role and Rule*, 10.

<sup>176</sup> Bankus, 58.

<sup>177</sup> Brett Morris, "National Guard Dedication to Homeland Defense: A Needed Emphasis in a Storm of Conflict" (paper presented at annual meeting of the Midwestern Political Science Association, Chicago, IL, 2004).

Furthermore, splitting the Guard functions would be more advantageous than creating a new reserve force to carry out homeland security missions, as the National Guard/State Guards have already built up an expertise in dealing with domestic incidents. Many of the Guardsmen called up for the Rodney King riots in LA 1992 had been deployed in LA for the Watts riots in 1965, as well as assisting civilian law enforcement during natural disasters.<sup>178</sup> The institutional experience of the Guard in these areas is invaluable and all efforts should be made to keep from losing it, thus the Guard should continue to play a role in these types of situations. Furthermore, there is no need to reinvent the wheel; the National Guard has already built up units specifically for homeland security,<sup>179</sup> so why dismantle them? Finally, given that they will be able to specialize the State Guards will hopefully move farther towards police mentality, training etc.

#### Maintaining the Ability to Respond to All Hazards

Though the aim of this new approach is to avoid the use of the military when it is not needed and in particular to avoid the use of the military in domestic law enforcement (with the exception of the Coast Guard's unique mission), we cannot foresee all possible future crises and what resources may be weakened, destroyed or otherwise rendered unavailable by a crisis. In some of these cases, the situation may exceed the capabilities of civilian law enforcement. In these

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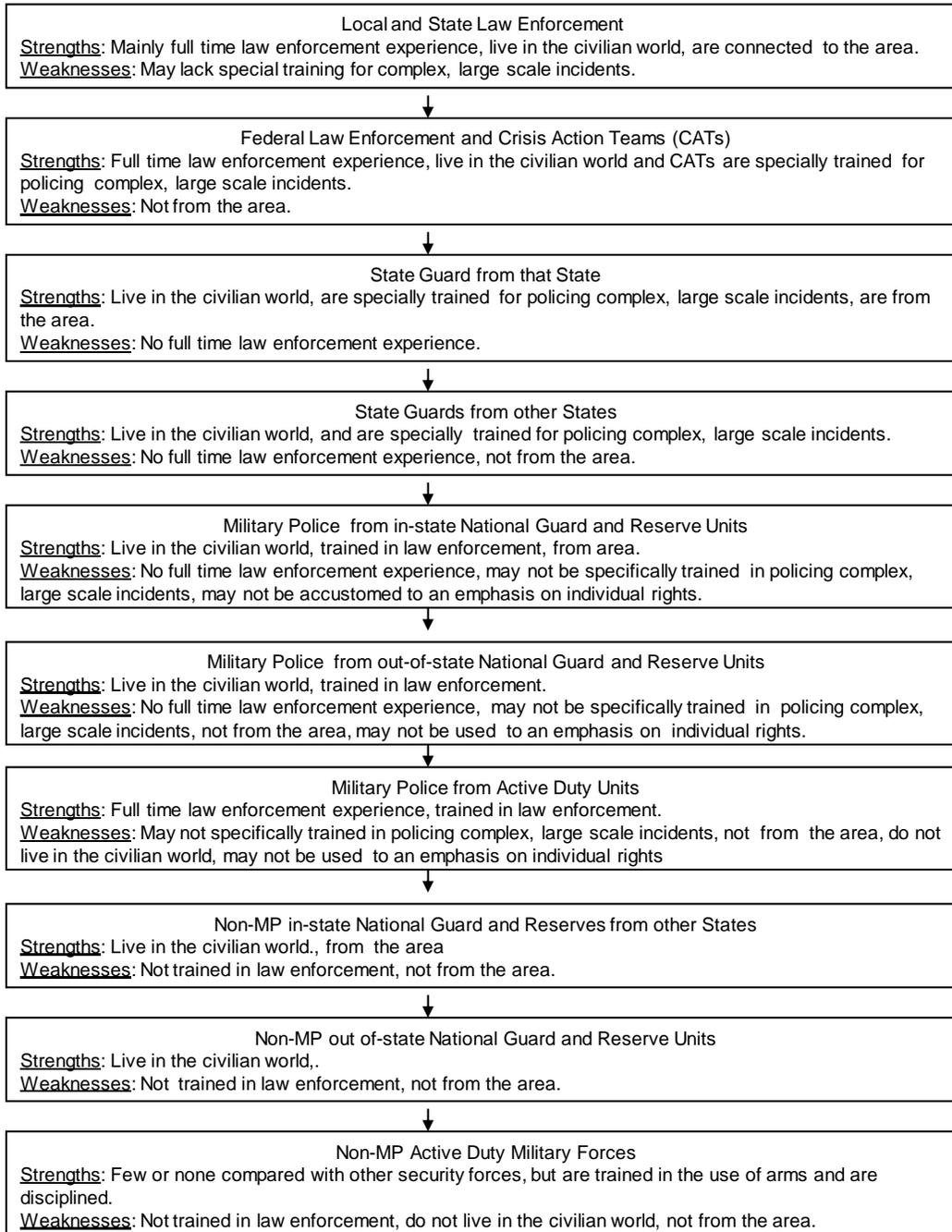
<sup>178</sup> Rasmussen, "The Military Role," 9-10.

<sup>179</sup> National Guard Bureau, "The National Guard's Role in Homeland Defense," The National Guard, <http://www.ngb.army.mil/features/homelanddefense/index.html> (accessed October 8, 2008).

cases it is vital to have a plan regarding what forces to rely on next, rather than have government officials decide that the law does not apply to a particular situation. As I noted previously, leaders with no set protocol may then make decisions about the appropriate role for the military that will potentially lead into the problems seen in the past (e.g., adverse affects on continuity of government, civil liberties, American lives etc.). The reason being that they will necessarily make those decisions in “the fog of crisis,” when they do not have the time or abilities to collect and examine the evidence nor think through the potential consequences.

This new approach should spell out a pre-determined progression of forces depending upon how much law enforcement/force protection is needed and the qualities each separate force possesses. Put simply, if the first level of law enforcement/force protection proves or promises to be insufficient in the eyes of the responsible civilian official they will be supplemented by the next level and so on until the situation is contained. Below, in Table 3, is a graphic presentation of my recommended progression of forces with the strengths and weaknesses of each of the ten levels of response listed with it to explain its position in the progression.

**Table 3: Recommended Progression of Forces**



If during the incident a more appropriate unit becomes available, reasonable effort should be made to attempt to replace the less appropriate unit with one better suited to the tasks. Similarly, as the situation improves the first units removed should be the less appropriate units lower in the chain.

### Conclusion

Recently, America has had difficulty in responding adequately to high-profile domestic crises. Given the gravity of potential domestic crises facing the US, it is only natural to question whether the country is adequately prepared to handle a large-scale incident. Unfortunately, the evidence suggests despite the efforts of many, that the US will be woefully unprepared to keep America safe and secure while still maintaining civilian supremacy and individual civil liberties when a crisis erupts.

As argued, one reason for this is the lack of a clear, legally defined role for the domestic use of the military which complicates response efforts, hampers the ability of authorities to plan for emergencies and heightens the possibility of the abuse of the less powerful. The experiences of other countries are highly informative on the problems of defining the military's domestic role and limiting heavily involvement in domestic affairs, but will not provide a cookie-cutter solution for the US. Furthermore, many of the current proposals are beset by biases and misconceptions.

Thus I have proposed several reforms, including a new framework of response that could be incorporated into law to remedy this situation. The key elements of this proposal are that the military should be used for missions similar to its primary traditional mission of fighting wars and that their use for other purposes should be avoided. Limiting military involvement to its traditional mission can be achieved by increasing civilian capabilities, restricting the military to supporting civilian authorities only when civilian authorities are overwhelmed and request help, and splitting the National Guard into domestic and overseas functions. The response framework suggested above allows officials to maintain appropriate law enforcement and force protection in all types of hazardous situations by giving them a pre-established progression of forces upon which to rely. Having the progression established in advance will help increase coordination and communication in preparation and response. Too often in the past, important decisions have been made in the “fog of crisis.” My proposal seeks to put robust plans in place before a crisis occurs, and to organize those plans in a simple logical progression that maximizes the probability of their successful use.

As crises multiply and dangers grow, America deserves and requires no less.

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