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A Call to Arms: The Posse Comitatus Act and the Use of the Military in the Struggle against International Terrorism

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A CALL TO ARMS: THE *POSSE COMITATUS ACT* AND THE USE OF THE MILITARY IN THE STRUGGLE AGAINST INTERNATIONAL TERRORISM

Tom A. Gizzo, Esq.* and Tama S. Monoson*

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I. INTRODUCTION

The tragic events of September 11, 2001, marked the beginning of a new age in the war against international terrorism in the United States. As President George W. Bush stated in his address to the nation:

[W]e are a country awakened to danger and called to defend freedom. Our grief has turned to anger and anger to resolution. Whether we bring our enemies to justice or bring justice to our enemies, justice will be done We will not tire; we will not falter; we will not fail.¹

International terrorism "covers a number of different issues in the contemporary world, from state-sponsored terrorism against foreign countries to co-operation between various terrorist groups."² Terrorists have indicated through recent attacks³ that there are few actions that they will not take in an attempt to spread their angry message. The chances of further attack on the United States and the use of weapons of mass destruction are great.⁴ Currently, terrorism is defined as a law enforcement issue rather than a national security issue, which limits the ability of the Department of Defense to counter terrorism when actions occur on American soil.⁵

¹ Address to a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1347-50 (Sept. 20, 2001).

² WALTER LAQUEUR, *THE AGE OF TERRORISM* 266 (1987).

³ In the past ten years, terrorists have attacked Tokyo's subway system by releasing sarin gas, sent anthrax through the United States mail, and buried radiological weapons in a Moscow park. See Chris Quillen, *Posse Comitatus and Nuclear Terrorism*, 32 PARAMETERS 60 (2002), <http://carlisle-www.army.mil/usawc/parameters/02spring/quillen.htm>.

⁴ See *id.*

⁵ See *id.*

In order to defeat terrorism or minimize its impact, one must first understand that — terrorism is, in reality, “propaganda by deed.”⁶ The success of a terrorist campaign depends upon the degree of publicity each event receives.⁷ Therefore, success for the terrorist is measured not only by the actual accomplishment of the mission but also by creating the public perception that ordinary citizens are vulnerable to attack while terrorists themselves remain shadows — difficult to find and harder still to prosecute.

This article will address whether current federal and state law enforcement measures are adequate to safeguard the citizens and the national interests of the United States from terrorist attack or whether a more comprehensive antiterrorism plan requiring military intervention is needed. This article will explain what the United States must do to effectively respond to recent acts of international terrorism committed on domestic soil. Specifically, it will focus on the historical significance and development of the Posse Comitatus Act (Act or PCA)⁸ and examine the Act’s potential application in matters relating to the deployment of military personnel to assist federal or state law enforcement agencies responding to terrorist incidents. The issues raised include whether current federal and state law enforcement measures are adequate to safeguard the citizens of the United States and national interests from terrorist attack or if a more comprehensive antiterrorism plan requiring military intervention is needed.

Part II provides the historical context within which the Act was created. In addition, Part II examines how federal courts have interpreted the Act’s express prohibition against using the Army or the Air Force as a posse comitatus and whether such prohibition has been applied to all branches of the military appropriately.

Part III looks at territorialism and how the commingling of law enforcement and military personnel creates the potential for statutory, logistical and philosophical differences regarding how best to approach international terrorism issues. As part of this discussion, Part III contrasts the military’s use of force doc-

⁶ LAQUEUR, *supra* note 2, at 121.

⁷ See *id.*

⁸ See 18 U.S.C.S. § 1385 (Law. Co-op. 1996).

trine with the more traditional law enforcement approach, which relies on international conventions and economic sanctions to achieve results. Also, Part III examines a concern shared by the state and federal judiciaries that an overzealous military could lead to authoritarian rule in violation of the letter and the spirit of the Act.

Part IV discusses the legal standards applied by the federal courts to determine whether the Act bars all military action and/or intervention. Part IV, subsection A, surveys contemporary interpretations of the Act and its application to military forces. Meanwhile, Part IV, subsection B, examines *United States v. Yunis*,⁹ a case that presents the most definitive judicial analysis to date of military intervention in support of federal law enforcement agents, and Part IV, subsection C, examines how contemporary federal counterterrorism legislation defines the role of a proactive military in matters of international terrorism.

Part V analyzes whether, consistently with counterterrorism legislation, United States military forces may become more deeply involved in matters concerning acts of international terrorism. Lastly, Part VI suggests that the use of military personnel and equipment to assist domestic law enforcement agencies does not violate the Act and that the military's support of law enforcement agencies in matters involving international terrorism violates neither the letter nor the spirit of contemporary counterterrorism legislation.

II. THE POSSE COMITATUS ACT

A. *Background and Related History*

The post-Civil War era spawned much legislation aimed at curbing hostilities and soothing a wounded nation. The Posse Comitatus Act was first adopted in 1878¹⁰ as a rider to an Army appropriations bill.¹¹ The PCA criminalized and prohibited the

⁹ 681 F. Supp. 891 (D.D.C. 1988).

¹⁰ See Army Appropriations Act, ch. 263, § 15, 20 Stat. 145, 152 (1878) (codified as, and amended at 18 U.S.C. § 1385 (1994)).

¹¹ See Bonnie Baker, *The Origins of the Posse Comitatus*, AIR AND SPACE POWER J. (Nov. 1, 1999), at <http://www.airpower.maxwell.af.mil/airchronicles/cc/baker1.html>. The original act stated "[f]rom and after the passage of this act it shall not be lawful to employ any part of the Army of the United States as a posse

use of the Army as a posse comitatus;¹² however, the Act is more of a policy statement than a criminal law.¹³ The Act arose due to two factors: the end of the Civil War Reconstruction period and the conditions of the western frontier of the United States.¹⁴ More specifically, the close presidential election of 1876 was the direct cause of the development of the Act.

Prior to the enactment of the Posse Comitatus Act, federal troops were stationed at voting booths to prevent “inebriates,” women, blacks, and others who were not authorized to vote from voting.¹⁵ After the Civil War, federal troops were used to ensure “universal manhood suffrage” and prevent former Confederate officers from voting.¹⁶ The involvement of federal troops in everyday functions became unnecessary when the Reconstruction period ended.¹⁷

During the Reconstruction period, America was also expanding into the western frontier, which presented its own problems regarding law enforcement. Much of the frontier had not been admitted to statehood, and therefore fort commanders assumed the responsibility of exercising civilian law enforcement.¹⁸ The fort commanders exercised their responsibilities in an arbitrary manner seeking those they believed were criminals

comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment said force may be expressly authorized by the Constitution or by an act of Congress . . .” Army Appropriations Act, ch. 263, § 15, 20 Stat. 145, 152 (1878). See also *People v. Burden*, 288 N.W.2d 392, 392-94 (Mich. Ct. App. 1979) (providing a detailed explanation and discussion of the Congressional reasoning for the enactment of the Posse Comitatus Act).

¹² A “posse comitatus” is defined as “[t]he power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases, as to aid him in keeping the peace, in pursuing and arresting felons, etc.” BLACK’S LAW DICTIONARY 806 (6th ed. 1991). The second part of the definition is part of the English common law doctrine. See Jeffrey Addicott, *Drafting the Military: The Posse Comitatus Act and the Hunt for the D.C. Sniper*, JURIST (Oct. 17, 2002), at <http://jurist.law.pitt.edu/forum/forumnew62.php>.

¹³ See Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L. Q. 953, 955 (1997).

¹⁴ See Baker, *supra* note 11.

¹⁵ See *id.*

¹⁶ See *id.* All former Confederate officers were unable to vote or hold state office after the Civil War. See *id.*

¹⁷ See *id.*

¹⁸ See *id.*

or Indians and were a threat to settlers.¹⁹ As a result of the unstructured law enforcement, violations of the United States Constitution occurred and conditions arose that were “untenable to elected civil officials.”²⁰ The concern was that federal troops would be used to control the Western frontier rather than allowing the area to develop its own law enforcement measures.

The original Posse Comitatus Act was vetoed by President Rutherford B. Hayes when it was sent to him as the rider to the Army Appropriations Act of 1880.²¹ President Hayes explained that he vetoed the entire bill because the rider “involve[d] questions of the gravest character.”²² Additionally, President Hayes vetoed the bill due to the changes it made as to how elections were controlled and the role of the military in the enforcement of the laws, which had no relation to the financing of the Army,²³ and his belief that the United States has the right “to use force . . . to protect these elections from violence and fraud.”²⁴ The Act was amended in 1981 under Public Law 97-86 and reads as follows:

[w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.²⁵

The language of the Act was intended to reiterate the Founding Fathers’ dislike of federal troops overbearing presence, including investigating Americans at home.²⁶ The Act’s purpose, in

¹⁹ *See id.*

²⁰ Baker, *supra* note 11.

²¹ *See id.*

²² *Id.* (quoting President Hayes veto statement of the Army Appropriation Act for 1880, April 29, 1879).

²³ *See* C.T. Rossi, *The Posse Comitatus Act: Can We Maintain American Freedom Without it?*, ENTER STAGE RIGHT (July 29, 2002), at <http://www.enterstageright.com/archive/articles/0802/0802posse.htm> (where the author suggests that President Hayes vetoed the bill because he wanted the “power to intimidate” with federal troops as his predecessors had used).

²⁴ *Id.*

²⁵ 18 U.S.C.S. § 1385 (Law. Co-op. 1996).

²⁶ *See* Kelley Beaucar Vlahos, *Lawmakers Debate Sending in the Troops - at Home*, FOXNEWS.COM (Nov. 9, 2001), <http://www.sweetliberty.org/issues/war/safety/mil.htm>.

short, was to deter the use of military personnel to augment or replace civil law enforcement authorities in circumstances involving domestic disturbances or uprisings.²⁷

B. *To Which Branches of the Military Does the Act Apply?*

The Posse Comitatus Act is currently used to prevent generalized military involvement in domestic law enforcement, but the prohibitions have eroded due to challenges, such as excessive drug trafficking, to modern law enforcement.²⁸ The circumstances that precipitated the adoption of the Act no longer exist, and the federal courts have not been inclined to place greater limitations on the military than are exacted by the Act. The Act originally only forbade use of the Army in civilian law enforcement with the prohibitions against Air Force involvement arising from Congress' codification of Title 10 of the United States Code in 1956.²⁹ Today, when federal courts are asked to decide whether the military has exercised authority in matters traditionally reserved for domestic law enforcement agencies, they must first decide which branch of the military was involved and whether or not the Act applies at all. Thus, the relevant inquiry when determining whether to apply the Act in such matters is by necessity fact specific, and requires examination on a case-by-case basis.³⁰

²⁷ "[T]he feared use which is prohibited by the posse comitatus statute is that which is regulatory, proscriptive or compulsory in nature, and causes the citizens to be presently or prospectively subject to regulations, proscriptions, or compulsions imposed by military authority." *United States v. McArthur*, 419 F. Supp. 186, 194 (D.N.D. 1975), *aff'd sub nom.* *See also United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977). The purpose of the Act was "to put an end to the use of federal troops to police state elections in the ex-Confederate states where the civil power had been reestablished." *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948). Elections were held through the use of federal troops ostensibly called upon to preserve peace and maintain order. *See United States v. Red Feather*, 392 F. Supp. 916, 922 (D.S.D. 1975). When state elections were disputed, it was alleged that federal troops were shown to have supported Reconstruction candidates. *See id.*

²⁸ *See Baker*, *supra* note 11.

²⁹ The Act now applies to the Army and the Air Force. *See Hammond*, *supra* note 13, at 963 n.66.

³⁰ *See generally United States v. Chon*, 210 F.3d 990 (9th Cir. 2000) (holding that although the Act, prohibiting Army and Air Force military personnel from participating in civilian law enforcement activities, does not directly reference the Navy or Marine Corps, this omission does not constitute Congressional approval for Navy involvement in enforcing civilian laws); *Gilbert v. United States*, 165 F.3d

Federal courts have steadfastly recognized the principle that the amended Act of 1956, “[b]y its express terms . . . prohibits only the use of the Army and the Air Force in civilian law enforcement.”³¹ The Act makes no mention of either the Navy or other military subdivisions, including the Marine Corps, Coast Guard, and the National Guard. At the time of the passage of the original Act, the Army was the only type of military used in the United States. The Air Force, Marines, Coast Guard and National Guard all existed at the time of the amendment of the Act in 1965, but specific prohibitions of their use in domestic law enforcement were not included. As a matter of policy, however, the Navy, in 1988 adopted the restrictions of the PCA, but authorized exceptions to this policy when specifically approved by the proper authority.³² The Coast Guard functions as a branch of the armed forces, but during peacetime, under Title 14 of the United States Code, it is under the authority of the Department of Transportation,³³ making it non-military, and therefore the Act does not apply to it.³⁴ Similarly, the National Guard is not limited by the PCA during its normal function of state service since the Act only applies to forces in federal service.³⁵ Additionally, the Army has the ability to assist civilian law enforcement during times of great national disaster under the Robert T. Stafford Disaster Relief Act

470 (6th Cir. 1999) (finding that members of the Kentucky National Guard who were part of a marijuana strike force team did not violate the Act when they were in “state” rather than “federal” service at the time of defendant’s arrest and when they were acting in response to directives issued by the governor); *United States v. Hutchings*, 127 F.3d 1255 (10th Cir. 1997) (explaining that a Utah National Guardsman who assisted federal officials in the search and arrest of defendant from a marijuana growing operation was not then any part of the Army or Air Force, and therefore his participation did not violate the Act when there was no showing that he had been ordered into federal service); *United States v. Allred*, 867 F.2d 856 (5th Cir. 1989) (holding that a member of the Judge Advocate Corps acting as a special assistant prosecutor in the investigation, grand jury presentation, and prosecution of defendant did not violate the Act).

³¹ *United States v. Roberts*, 779 F.2d 565, 567 (9th Cir. 1986). See generally *United States v. Acosta-Cartagena*, 128 F. Supp. 2d 69 (D.P.R. 2000) (holding that the statute generally bars the use of the Army and Air Force but not the Navy as *posse comitatus* and prohibits the Army or Air Force from enforcing civilian law).

³² See *Hammond*, *supra* note 13, at 963 n.68.

³³ See 14 U.S.C. § 1 (2001).

³⁴ See *Hammond*, *supra* note 13, at 963 n.68.

³⁵ See *id.*

of 1984(Stafford Act),³⁶ which was amended in 1988. The Army's³⁷ assistance is requested by the governor of a given state from the President of the United States, when a state of emergency occurs, which results from a national disaster. The result of this request is that active duty soldiers are deployed under the supervision of the Federal Emergency Management Agency (FEMA)³⁸. The courts have affirmed the above distinctions by narrowly defining "army" as used in the Act.³⁹

Another significant area of exception to the Act focuses on the President's power to delegate the military's services. The Act expressly exempts activities authorized by the Constitution as well as specific activities enumerated in the actual Act itself. The President is provided under 10 U.S.C.S. 332, the ability to call "the militia of any state and use . . . the armed forces to suppress . . . rebellion"⁴⁰ during times in which he determines "unlawful obstructions, combinations, or assemblages, or rebellion against the United States"⁴¹ result in an inability to enforce national or state laws using ordinary methods. This exception to the Act provides the President with broad discretion in supplying states with active duty soldiers to assist.⁴² The courts have found that the President has a plenary authority to use federal troops under this exception and these decisions are not subject to judicial review.⁴³ This exception is probably the most

³⁶ 42 U.S.C.S. § 5121 (Law. Co-op. 1988). *See also* Thomas R. Lujan, *Legal Aspects of Domestic Employment of the Army*, 27 *PARAMETERS* 82 (1997), available at <http://carlisle-www.army.mil/usawc/Parameters/97autumn/lujan.htm> (stating the Stafford Act authorizes the President to create a program to provide assistance during times of national disaster).

³⁷ The Department of Defense has delegated the Army as the executive agent for disaster relief. *See* Lujan, *supra* note 36, at n.1.

³⁸ *See id.* This exception is invoked regularly, such as during the September 11, 2001 World Trade Center attack and Hurricane Andrew in 1992.

³⁹ *See United States v. Jaramillo*, 380 F. Supp. 1375, 1382 (D. Neb. 1974) (where the court excluded the special operations group of the United States Marshall Service from the Act's definition of an army).

⁴⁰ 10 U.S.C.S. § 332 (Law. Co-op. 1998).

⁴¹ *Id.*

⁴² *See* Lujan, *supra* note 36. In 1992, after the Rodney King trial verdict was publicized, violent riots erupted in Los Angeles, which the Los Angeles Police Department and National Guard could not contain. *See id.* Therefore, at the California governor's request the President provided armed forces, army soldiers, and marines to enforce the law and restore order. *See id.*

⁴³ *See Monarch Ins. Co. v. District of Columbia*, 353 F. Supp 1249 (D.D.C. 1973), *aff'd* 497 F.2d 683 (D.C. Cir. 1974), *cert. denied* 419 U.S. 1021 (1974).

important one when analyzing whether the United States can respond to domestic terrorist attacks using the federal armed forces.

C. *Jurisdictional Challenges*

The Act has been in effect for over 120 years and has not resulted in any criminal prosecutions. This has limited the courts' ability to directly interpret the Act.⁴⁴ Federal courts have steadfastly maintained that challenges to the Act based on inappropriate personal jurisdiction will not prevail. In *United States v. Cotten*,⁴⁵ the Ninth Circuit rejected a challenge to the Act based upon an alleged lack of personal jurisdiction, as applied to persons abducted overseas. In *Cotten*, two American servicemen were forcibly returned to the United States from Vietnam using military personnel and equipment. The defendants claimed that such actions violated the Act and their due process rights under the Fifth and Fourteenth Amendments of the United States Constitution.⁴⁶ Despite acknowledging that the defendants were poorly treated when they were physically subdued, struck in the head, handcuffed, and placed in leg irons and cargo chains, the court nevertheless held that there was no violation of the Act and denied the defendant's jurisdictional challenge.⁴⁷ Additionally, in *Chandler v. United States*,⁴⁸ the First Circuit held that the Act was not violated when military forces arrested a defendant overseas in a territory where no civil regime existed.⁴⁹

⁴⁴ See Hammond, *supra* note 13, at 961. See also *People v. Burden*, 288 N.W.2d 392, 395 (Mich. App. 1979) (where the court stated that an investigation showed no cases in which violators of the Posse Comitatus Act were prosecuted).

⁴⁵ 471 F.2d 744 (9th Cir. 1973).

⁴⁶ See *Cotton*, 471 F.2d at 746.

⁴⁷ See *Cotton*, at 746 n.4.

⁴⁸ 171 F.2d 921 (1st Cir. 1948).

⁴⁹ See *Chandler*, 171 F.2d at 936. See also *Gillars v. United States*, 182 F.2d 962, 972-73 (D.C. Cir. 1950) (where the court stated that the trial court had personal jurisdiction to try the defendant for treason even if she was brought from Japan to the United States illegally; however, the Posse Comitatus Act was not applicable since its purpose was to end the use of federal troops in state elections in a posse comitatus and the American troops in Germany after World War II were not considered a posse comitatus as they were the law enforcement in Germany at the time of the defendant's arrest).

However, perhaps the most famous challenge to the jurisdictional basis of the Act concerns the circumstances surrounding the extradition of the infamous "Tokyo Rose," who was taken from Japan to San Francisco on charges of treason.⁵⁰ The defendant's argument that the federal court lacked jurisdiction and that the Act had been violated was rejected in a curt reference to the holdings in *Chandler* and *Gillars*.⁵¹

The federal courts have also been resistant to applying the exclusionary rule in matters alleging PCA violations.⁵² The federal courts' main determination when addressing the issue of whether the Act is applicable to a situation focuses on the behavior of the military while supporting civilian law enforcement. Specifically, the courts have applied a test, which was

⁵⁰ See *D'Aquino v. United States*, 192 F.2d 338, 351 (9th Cir. 1951). Iva Ikuko Toguri D'Aquino was a radio speaker, announcer, scriptwriter, and broadcaster for the Japanese government and the Broadcasting Corporation of Japan who was charged with treason for giving aid and comfort to the enemies of the United States through her work between November 1, 1943, and August 13, 1945. See *id.* at 348. She was specifically convicted of speaking "into the microphone" in October 1944 regarding the loss of ships with the intent to destroy the confidence of soldiers in the armed forces of the United States. See *id.* D'Aquino appealed her conviction on many errors by the trial court, including a lack of jurisdiction because she was transported from Japan to San Francisco by military authorities, which violated the Posse Comitatus Act. See *id.* The court, nevertheless, rejected this argument, as discussed in the accompanying text. See *id.* at 351.

⁵¹ See *D'Aquino*, 192 F.2d at 351.

⁵² See *Hayes v. Hawes*, 921 F.2d 100, 103 (7th Cir. 1990). See also *Hall v. State of Indiana*, 557 N.E.2d 3, 4-5 (Ind. App. 1 Dist. 1990) (where the court stated that the acts of two air force personnel in an undercover drug investigation did not rise to the Act's standard of "regulatory, proscriptive or compulsory" and therefore their testimony would not be suppressed under the exclusionary rule); *People v. Blend*, 175 Cal. Rptr. 263, 270 (Ct. App. 1981) (where the court stated that the involvement of a Navy WAVE in an undercover narcotics bust was not a violation of the Act, and therefore her testimony was properly admitted as evidence of the narcotic sale. The court declined to reach the issue of whether the imposition of an exclusionary rule is ever an appropriate remedy in a case regarding the violation of the Act.); *Hammond*, *supra* note 13, at 962. See generally *United States v. Brown*, 9 M.J. 666 (N.C.M.R. 1980) (where the Act was found not to proscribe joint investigatory techniques, and where the primary military purpose was motivation behind the use of armed forces personnel, no violation occurs from incidental enforcement of civilian law); *Taylor v. State*, 645 P.2d 522 (Okla. Crim. App. 1982) (where the court applied the exclusionary rule to a violation of the Act because a military police officer was found to be actively involved in a search and arrest. However, the court found that the violation of the Act was not the reason to invoke the exclusionary rule.).

laid out in *State v. Nelson*.⁵³ The purpose of this test is to determine whether military personnel are acting in a "passive" or "active" role.⁵⁴ Involvement of military personnel in actions such as arrests and searches and seizures are considered "active" and the courts have found these actions to be in violation of the Act.⁵⁵ In comparison, the courts have determined that "passive" support includes actions such as providing equipment, planning, logistics support, and training.⁵⁶ The courts have based these decisions on the fact that the imparting of superior knowledge by the military does not violate the Act because of the limitations on civilian law enforcement and the unique equipment and technological advances of the military. The line between the territory of civilian law enforcement and the military seems clearly based on the *Nelson* court's test. However, often a determination is being made as to whether a commingling of forces should occur.

III. TERRITORIALISM - THE COMMINGLING OF POLICE AND MILITARY SUPERSTRUCTURES

Circumstances that demand action in response to terrorist attacks invoke a desire to use all available force, without often taking into consideration the more practical aspects of balancing philosophical and logistical boundaries, with the pride that often comes with defending one's own turf. The use of military personnel and equipment is one means available in responding to terrorist incidents, while another couples standard police response practices together with political and economic sanctions against the terrorist's host country.⁵⁷ It has been proposed that the federal government has two means of responding to terrorism in the United States and abroad.⁵⁸ Specifically, a nation may respond to terrorist attacks as a law enforcement problem

⁵³ 260 S.E.2d 629, 639 (N.C. 1979), *cert. denied sub nom.* See generally *Jolly v. North Carolina*, 446 U.S. 929 (1980).

⁵⁴ See *Nelson*, 260 S.E.2d at 639. See generally Craig T. Treiblock, *The Myth of the Posse Comitatus*, J. HOMELAND SECURITY (Oct. 2000), at <http://www.homelanddefense.org/journal/Articles/Treiblock.htm>.

⁵⁵ See Treiblock, *supra* note 54.

⁵⁶ See *id.*

⁵⁷ See NORMAN ANTOKOL & MAYER NUDELL, *NO ONE A NEUTRAL: POLITICAL HOSTAGE-TAKING IN THE MODERN WORLD* 174 (1990).

⁵⁸ See RICHARD J. ERICKSON, *LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM* 57 (1989).

or it may respond in a more traditional military fashion by invoking “the law of armed conflict.”⁵⁹ The military is prohibited from executing the law of the United States under the Act. Generally, civilian law enforcement functions include execution of national, state, and local laws on a daily basis. Specifically, these functions include arrest and detention of suspected criminals, search and seizure, restriction of civilian mobility in designated areas, evidence gathering for adjudication, and employment of undercover agents in civilian drug enforcement.⁶⁰ Force is the ability to influence, affect, or control,⁶¹ and generally a demonstration of military strength and resolve often involves the use of force.⁶² Democratic governments have consistently viewed the overt use of military force “as the option of last resort.”⁶³ An effective use of force requires development and implementation of specialized units that are capable of neutralizing terrorist threats when they occur.⁶⁴

The inherent problem with an increased or expanded military presence in areas traditionally reserved for law enforcement agencies is that military intervention necessarily requires a dramatic shift in the relationship between federal and state law enforcement. This change necessitates a comprehensive understanding of the political sensibilities and realities of mitigating “turf wars” between traditional law enforcement agencies on the one hand, and the military superstructure on the other. This topic was of recent discussion when Defense Secretary Donald Rumsfeld permitted the use of military surveillance planes in tracking the “D.C. sniper” who was eluding local law enforcement.⁶⁵ When confronted with concerns regarding military involvement in the sniper search, the Pentagon responded that the military pilots would be flying with federal agents and would be merely operating the planes with no involvement in analysis or follow up, which is allowed under the

⁵⁹ *Id.*

⁶⁰ See Treiblock, *supra* note 54.

⁶¹ See AN TOKOL & NUDELL, *supra* note 57, at 174.

⁶² See *id.*

⁶³ *Id.*

⁶⁴ See *id.*

⁶⁵ See Addicott, *supra* note 12 (where the author argues that the Posse Comitatus Act was not violated by Defense Secretary Rumsfeld’s agreement to provide military surveillance planes to track the DC sniper, since the Act “does not prevent the President from using the military in cases of civil disorders or emergencies.”).

PCA.⁶⁶ The intermingling of law enforcement and military superstructures evokes a fear of loss of power and role by both military and law enforcement personnel, which was a basis for the creation of the Act.

Courts have provided several factors that weigh against using military forces for law enforcement purposes. First, it is understood that the deployment of military personnel in areas traditionally reserved for law enforcement agents would expose civilian governments to autonomous military rule and the possible abeyance of constitutional liberties.⁶⁷ Second, the use of the military to enforce civil laws requires the entrustment of the protection of Fourth and Fifth Amendment rights to persons not trained to uphold these rights.⁶⁸ In addition, it is conceivable that through military deployment we might limit the exercise of fundamental rights and in the process create an atmosphere dominated by the same fear and hostility that exists in countries occupied by enemy forces.⁶⁹ Finally, it is also possible that the military's hierarchy could feel uneasy and uncertain in performing a role that is essentially a law enforcement function.⁷⁰ In the past, the military's reaction to terrorist actions was more closely related to the response of a peacetime crisis and not that of an armed conflict⁷¹ since the United States was not deemed to be "at war" in a traditional sense.

Since September 11, 2001, however, that view has changed and there is overwhelming support for the current notion that terrorism and terrorist acts are essentially a new form of warfare. This is evidenced by the creation of a Counterterrorism Bureau and the Intelligence Division in the New York City Police Department.⁷² In creating this department, the New York City Police Department has effectively avoided bringing the military into the local law enforcement but has advanced its

⁶⁶ See generally Steve Vogel, *Military Aircraft with Detection Gear to Augment Police*, WASH. POST, Oct. 16, 2002.

⁶⁷ See *Bissonette v. Haig*, 776 F.2d 1384, 1387 (8th Cir. 1985).

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See ERICKSON, *supra* note 58, at 57.

⁷¹ See *id.* at 59.

⁷² See William K. Rashbaum, *Terror Makes All the World Beat for New York Police*, N.Y. TIMES, July 15, 2002, <http://www.nytimes.com/2002/07/15/nyregion/15TERR.html>.

skills through training of senior police commanders by the Naval War College in Rhode Island.⁷³ The relationship that the New York City Police Department has developed with the military seems to be the ideal situation for civilian law enforcement and the military. Services of both departments are employed appropriately and assistance, information, and possibly equipment are shared without a loss of integrity of either the civilian law enforcement or the military. The attack on New York on September 11, 2001, has a clear long term affect on the struggle regarding whether the military should be involved in domestic issues and when law enforcement should be relied upon by civilian law enforcement agencies.

In order to determine what is indeed the best way to approach the international terrorist threat, a government must look to a variety of factors, including "foreign policy and other political considerations, the nature of the threat, and the advantages and disadvantages of each approach."⁷⁴ In the United States, the Justice Department, through the auspices of the Federal Bureau of Investigation (FBI), is responsible for representing law enforcement interests in circumstances surrounding domestic terrorist incidents.⁷⁵ The dramatic increase in foreign terrorism in recent years has caused our domestic federal and state agencies to review, modify, and upgrade their existing anti-terrorist capabilities.⁷⁶ Police forces have found it increasingly difficult to address terrorist activities using traditional law enforcement security measures.⁷⁷ Unlike many democratic countries, the United States does not suffer from a lack of civilian law enforcement personnel available or capable of dealing with an adversary, but there is a need to ensure that these forces are aware of the most effective and technologically advanced methods of law enforcement.⁷⁸ Specifically, the equipment necessary to track international terrorists, elucidate their plans, and ensure the safety of Americans has been compromised by outdated equipment, limited training, and the mo-

⁷³ See generally *id.*

⁷⁴ ERICKSON, *supra* note 58 at 58.

⁷⁵ See ROBERT H. KUPPERMAN & DARRELL M. TRENT, TERRORISM: THREAT, REALITY, RESPONSE 167 (1979).

⁷⁶ See JOHN B. WOLF, ANTITERRORIST INITIATIVES 58 (1989).

⁷⁷ See LAQUEUR, *supra* note 2, at 133.

⁷⁸ See *id.*

bility of the terrorists. The assistance and guidance of the military through training, advice, and borrowed equipment is necessary to adequately respond to the many instances addressed by civilian law enforcement and to ensure readiness for future domestic terrorist attacks. Balancing the need for safety and the desire to maintain a non-militarized country has become more important to prevent territorialism between the military and the local law enforcement, while also adequately protecting the United States' interest domestically and abroad.

IV. THE *Posse Comitatus* Act: To Bar or Not to Bar – That is the Issue

The federal courts have attempted to strike a balance between statutory limitations of post-Civil War legislation, and the practical realities of interpreting those limitations in a contemporary society. The decisions indicate a clear willingness to grant military use exemptions under circumstances not expressly prohibited by the Act.⁷⁹ It has been reasoned that the pooling of such critical resources would serve the common welfare by promoting cooperation and understanding between various law enforcement and military branches.⁸⁰ This cooperation would be beneficial in protecting the United States from further terrorist attack.⁸¹ The symbiotic relationship of the military and law enforcement will provide an expanded base for the ex-

⁷⁹ See generally *United States v. Yunis*, 681 F. Supp. 891 (D.D.C. 1988); *State v. Marrero*, 818 So.2d 211 (La. App. 4 Cir. 2002) (holding that the Act was not violated in a circumstance in which the Navy personnel provided Navy uniforms to civilian vice squad detectives who were involved in an undercover drug bust in an area frequented by Navy personnel); *State v. Hayes*, 404 S.E.2d 12 (N.C. App. 1991) (finding that the military personnel's involvement in the investigation of a soldier dealing drugs did not violate the Act since civilian law enforcement was in charge of the investigation and the citizens were not subject to military power); *Burkhart v. State*, 727 P.2d 971 (Okla. Crim. App. 1986) (finding that an Army Criminal Investigation Department investigator's role was "passive", in that he only purchased the drugs from the defendant and was not involved in the arrest or asserting military authority over the defendant).

⁸⁰ See generally *United States v. Yunis*, 681 F. Supp. 891 (D.D.C. 1988).

⁸¹ See David Isenberg, *Terrorism Project, Posse Comitatus: Caution is Necessary*, Center for Defense Information (Aug. 6, 2002), at <http://www.cdi.org/terrorism/pcomitatus.cfm>. The new head of the Northern Command (NORTHCOM), Gen. Ralph E. Eberhardt has stated that he supports changes existing law to provide more domestic powers to the military to allow protection of the country from terrorist attacks. See *id.*

change and dissemination of information, thereby enhancing the possibility that international terrorists will be apprehended prior to further attacks on the United States.

A. *Contemporary Interpretation and Application to Military Forces*

The courts have interpreted the Act as not expressly prohibiting the use of military personnel or equipment in certain support functions involving federal or state law enforcement agencies.⁸² Specifically, the National Guard and the Coast Guard have been excluded from the prohibitions of the Act.⁸³ Moreover, there is additional support for the notion that Congress, by adopting the Act, did not intend to suggest that the Act “prohibit[ed] the use of military material, supplies or equipment in the aid of executing the laws.”⁸⁴ For example, Congress itself established procedures that allowed any government department, including military departments, to provide materials, work, and services to other bureaus and agencies within the government.⁸⁵ In order to be of practical application in matters relating to law enforcement, the violations of the Act and the Act itself must be analyzed based on the facts surrounding the violation.⁸⁶ Some courts have supported Congress’ decision stating that it is better to allow sharing of sources and training when necessary than allowing civilian law enforcement to maintain their own similar level of materials and limitations of the services.⁸⁷

Much of the recent case law on the subject of the Act addresses issues related to the military’s support of law enforce-

⁸² See *infra* note 134 and accompanying text.

⁸³ See Hammond, *supra* note 13, at 963. See generally United States v. Chaparro-Almeida, 679 F.2d 423 (5th Cir. 1982) (finding that the Act was not violated when the defendant was seized at sea by Coast Guard personnel because the Act does not apply to the Coast Guard), *cert. denied*, 459 U.S. 1156; Gilbert v. United States, 165 F.3d 470 (6th Cir. 1999) (finding that there was no violation of the Act when the National Guard was acting under state services as a marijuana strike force, rather than federal service).

⁸⁴ Yunis, 681 F. Supp. at 895.

⁸⁵ See 31 U.S.C. § 1535 (2003).

⁸⁶ See United States v. McArthur, 419 F. Supp. 186, 194-95 (D.N.D. 1975), *aff’d sub nom.* See generally United States v. Casper, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977).

⁸⁷ See McArthur, 419 F. Supp. at 194.

ment activities in domestic rather than international or foreign law enforcement matters.⁸⁸ The courts have provided extensive analysis concerning use of military personnel by civilian law enforcement and the Act.⁸⁹ In *United States v. McArthur*,⁹⁰ three

⁸⁸ See generally *United States v. Gerena*, 649 F. Supp. 1179 (D.Conn. 1986) (which involved transportation from a military base in Puerto Rico to a courthouse in the same territory); *Hall v. State*, 557 N.E.2d 3 (Ind. Ct. App. 1990) (where the court stated the PCA was not violated when the OSI involved Air Force personnel as undercover agents to assist the local law enforcement with drug investigations). The use of the military in transporting individuals found to be violating laws enforced by the United States overseas may again become an importance discussion since the United States has commenced war against Iraq and Al-Queda.

⁸⁹ See generally *Gerena*, 649 F. Supp. 1179 (where transporting the defendant in the custody of United States Marshals from a courthouse to a base in Puerto Rico and later to an Army airfield in New York did not violate the Act as the military role was "passive"). See also generally *United States v. Yunis*, 681 F. Supp. 891 (D.D.C. 1988) (where the court stated military personnel acted passively in defendant's arrest since they merely housed, transported and cared for defendant while he was in FBI custody); *State v. Marrero*, 818 So.2d 211 (La. Ct. App. 4 Cir. 2002) (where the court found the Act was not violated in a circumstance in which the Navy personnel provided Navy uniforms to civilian vice squad detectives who were involved in an undercover drug bust in an area frequented by Navy personnel); *State v. Hayes*, 404 S.E.2d 12 (N.C. Ct. App. 1991) (where the court found the military personnel's involvement in the investigation of a soldier dealing drugs did not violate the Act since the civilian law enforcement was in charge of the investigation and the citizens were not subject to military power); *Burkhart v. State*, 727 P.2d 971 (Okla. Crim. App. 1986) (where the court found an Army Criminal Investigation Department investigator's role was "passive," in that he only purchased the drugs from the defendant and was not involved in the arrest or asserting military authority over the defendant); *Commonwealth v. Shadron*, 370 A.2d 697 (Pa. 1977) (where the court found that the Act was violated when state police investigating armed forces members were assisted by military personnel who provided a place to question the defendant and assisted in the search of his living quarters on the base); *Burns v. State*, 473 S.W.2d 19 (Tex. Crim. App. 1971) (where court found no violation of the Act when investigators of the Criminal Investigation Department accompanied civilian law enforcement who arrested military personnel for selling drugs); *State v. Gunter*, 902 S.W.2d 172 (Tex. App. 1995) (where the court stated the Act was not violated when the CID investigators who were undercover and purchased cocaine from defendant relinquished the drugs to civilian law enforcement after the "buy" and were not involved in the defendant's arrest and did not overtake the civilian law enforcement's superior role in the investigation); *Lovelace v. State*, 411 S.E.2d 770 (Ga. Ct. App. 1991) (similar to *Gunter* in that undercover personnel were in a "passive" role and the Act was not violated); *United States v. Mendoza-Cecelia*, 963 F.2d 1467 (11th Cir. 1992), *cert. denied sub nom* (where the court found no violation of the Act where the Navy provided a ship to the Coast Guard personnel pursuing the defendant's vessel in search of a large quantity of marijuana); *Marin-Hernandez v. United States*, 506 U.S. 964 (1992); *United States v. Kahn*, 35 F.3d 426 (9th Cir. 1994) (where the court stated that the Navy's assistance to the Coast Guard, including providing a vessel, communicating aerial reconnaissance to the Coast Guard, and intercepting the defendant's vessel

legal standards, which federal courts may apply in determining whether or not certain military actions constitute a violation of the Act, were enunciated.⁹¹ The first standard asks whether military personnel were actively and directly used by civilian law enforcement in executing laws.⁹² The second standard asks whether the use of the Army or Air Force, or any division thereof, has taken charge of the activities of the law enforcement official's activities.⁹³ The third standard addresses whether Army or Air Force personnel have used the law enforcement officers so that the individuals were under military power, which was regulatory, proscriptive, or compulsory in nature, either presently or prospectively.⁹⁴ When the courts are faced with an accusation by a defendant that the military was improperly involved in a domestic arrest, the application of these standards would clarify whether a violation has occurred, or in fact whether an exception applies to the situation in question.

Congress responded to the judiciary's clear desire to allow some commingling of law enforcement and the military by providing the Secretary of Defense discretion in assisting civilian

did not violate the Act); *United States v. Hitchcock*, 286 F.3d 1064 (9th Cir. 2002) (where the court held that the Act was not violated when military personnel and the DEA were involved in the investigation of the defendant for selling LSD to a marine, who later sold it to another military personnel on the base).

⁹⁰ 419 F. Supp. 186, 194-95 (D.N.D. 1975), *aff'd sub nom.* See generally *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977).

⁹¹ See *McArthur*, 419 F. Supp. at 193. In general the courts have found violations of the Act when military personnel are involved in arresting, searching personal property of an accused, seizing property of an accused, interviewing witnesses, and directing off base investigations. See generally *State v. Pattioay*, 896 P.2d 911 (Haw. 1994) (where the court found a violation of the Act when Army Criminal Investigation Department Personnel had initiated an off-case investigation of defendant based on a military dependent and civilian's information, even though civilian law enforcement executed the search warrant and made the arrest).

⁹² See *McArthur*, 419 F. Supp. at 194. See generally *United States v. Hitchcock*, 103 F. Supp. 2d 1226 (D.Haw. 1999) (where military involvement in investigation and arrest of drug defendant was indirect, and therefore did not violate the Act), *opinion withdrawn by* 273 F.3d 903 (9th Cir. 2001); *United States v. Bacon*, 851 F.2d 1312 (11th Cir. 1988) (where the court affirmed the defendant's conviction based upon military investigator testimony because the investigator merely aided civilian personnel in the ordinary course of his duties).

⁹³ See *McArthur*, 419 F. Supp. at 194.

⁹⁴ See *id.*

law enforcement using military personnel and equipment. Specifically, general military law states, "the Secretary of Defense may, in accordance with other applicable law, make available any equipment . . . base facility, or research facility of the Department of Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes."⁹⁵ The law allows the Secretary of Defense to assign personnel as long as there is appropriate regulation and all laws are complied with. A restriction does exist, which requires that military personnel assignment is done in accordance with regulations and compliance with applicable law.⁹⁶ Over the years, Congress has limited the Act to allow for protection and safety of the American citizens in the possibility of an attack in the United States.⁹⁷ For example, in 1997 Congress provided the Pentagon with authority to work with the Justice Department in the event of a biological or chemical attack.⁹⁸ Most recently, the defense department has expanded the role of the United States Joint Forces Command providing more authority in coordinating and deploying military personnel in the fight against terrorism on domestic soil and allowing use of equipment, research facilities, and bases to civilian law enforcement officials for law enforcement reasons.⁹⁹ Over the years, there has been more use of military personnel in civilian situations without violating the PCA,

⁹⁵ 10 U.S.C.S. § 372 (Law. Co-op. 1996).

⁹⁶ *See id.*

⁹⁷ *See Isenberg, supra* note 81 (stating in response to a concern regarding the safety of Americans and other Olympic contenders, about 5,000 federal troops assisted civilian law enforcement at the 2002 Winter Olympics in Salt Lake City).

⁹⁸ *See id.* (providing several laws, including one in which the President has authority in an emergency to use the armed forces to perform work "essential for the preservation of life and property").

⁹⁹ *See* 10 U.S.C.S § 372 (Law. Co-op. 1996). *See also* 32. C.F.R. § 215.5 (2003), which states:

[t]he employment of DoD military resources for assistance to civil authorities in controlling civil disturbances will normally be predicated upon the issuance of a Presidential Executive order or Presidential directive . . . Exceptions to this condition will be limited to:

(1) Cases of sudden and unexpected emergencies as described in § 215.4(c)(1)(i), which require that immediate military action be taken.

(2) Providing military resources to civil authorities as prescribed in § 215.9 of this part . . . (f) DoD civilian employees generally should not be used to assist civil authorities in connection with civil disturbances, except as provided for in § 215.9(b)(3). *Id.*

See Isenberg, supra note 81.

but the involvement is not at the level that would be necessary or effective to ensure safety from further terrorist attacks on American soil.¹⁰⁰

The courts have recognized that not every military involvement rises to the level of a constitutional violation.¹⁰¹ There have been numerous court decisions that have held that the PCA is not violated in a situation in which the military is providing assistance to the civilian law enforcement, but the investigation is not characterized as military.¹⁰² Additionally, it has been found that military involvement with civilian law enforcement provides the benefit of military technology, knowledge, personnel, and equipment, which is a legitimate governmental interest.¹⁰³ Clearly, it is beneficial for the civilian law enforcement to be of the highest quality, training, and expertise to ensure adequate domestic safety and this can be achieved through appropriate commingling of military resources and civilian law enforcement. Courts have also favored the view that the Act will not bar military support and assistance when the nature of the action and conditions warrant it, or when individuals act as private citizens.¹⁰⁴ The courts have demonstrated a willingness to interpret the Act according to its express terms, which does

¹⁰⁰ See *United States v. Yunis*, 681 F. Supp. 891, 894 (D.D.C. 1988).

¹⁰¹ See *United States v. Gerena*, 649 F. Supp. 1179, 1182 (D. Conn. 1986) (where the court reiterated the importance of maintaining a separate military and civilian law enforcement, but indicated that minimal involvement of the military with civilian activities is unlikely to cause the limitations on freedoms that the writers of the Posse Comitatus Act feared).

¹⁰² See *id.* See also *United States v. DelPrado-Montero*, 740 F.2d 113, 116 (1st Cir. 1984), *cert. denied*, 469 U.S. 1021 (1984). "The furnishing of materials, work, and services, standing alone, is not a violation of the Posse Comitatus Act." *Yunis*, 681 F. Supp at 901. See also *United States v. Hartley*, 796 F.2d 112, 114 (5th Cir. 1986); *Bissonette v. Haig*, 776 F.2d 1384, 1390 (8th Cir. 1985); *United States v. McArthur*, 419 F. Supp. 186, 194 (D.N.D. 1975), *aff'd sub nom*; *United States v. Hartley*, 486 F. Supp. 1348, 1356-57 (M.D. Fla. 1980); *United States v. Red Feather*, 392 F. Supp. 916, 923 (D.S.D. 1975); *United States v. Jaramillo*, 380 F. Supp. 1375, 1379 (D. Neb. 1974). See generally *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977).

¹⁰³ See *Gerena*, 649 F. Supp. at 1182.

¹⁰⁴ See generally *People v. Blend*, 175 Cal. Rptr. 263 (Ct. App. 1981) (where the court affirmed defendant's conviction when an off-duty sailor assisted police voluntarily in their investigation). See also *People v. Talifero*, 520 N.E.2d 1047 (Ill. App. Ct. 1988) (when the court upheld defendant's conviction upon testimony derived from an airman who participated in a controlled drug purchase in exactly the same manner as any other private citizen would have participated in); *People v. Burden*, 303 N.W.2d 444 (Mich. 1981) (where the court reversed trial court's order to sup-

not provide a blanket prohibition on military involvement in civilian law enforcement.

B. *United States v. Yunis*: The Turning Point

*United States v. Yunis*¹⁰⁵ represents perhaps the most significant case to date concerning United States military intervention in a matter involving acts or participants engaged in international terrorism. In *Yunis*, the FBI was successful in luring Fawaz Yunis, the suspected hijacker of a Jordanian airplane in the Middle East, into international waters and arresting him.¹⁰⁶ The Navy assisted law enforcement which included advising the FBI on the hijacker's location in international waters, transporting the defendant from the FBI's command post aboard a yacht to the U.S.S. Saratoga, providing supplies and medical attention to defendant while on board Navy vessels, and operating the plane which carried Mr. Yunis and his FBI escort from the U.S.S. Saratoga to the United States.¹⁰⁷

The *Yunis* court found that Navy personnel had not violated the Act by assisting the FBI in the apprehension and arrest of the defendant in international waters.¹⁰⁸ In short, the Navy's support was not the type of activity prohibited by the Act, nor was it the kind of activity prohibited by the Department of Defense military and law enforcement cooperation laws.¹⁰⁹ The court found it significant that the entire episode had been directed by and had originated from within the FBI.¹¹⁰ In fact, the FBI was responsible for the mission at all times.¹¹¹ Thus, the court held that there was no violation of the Act when the Navy's participation in the apprehension of this defendant did not involve the arrest or interrogation of the defendant but merely provided necessary services for the FBI custodians on board its vessels.¹¹²

press evidence and allowed testimony because airman informant's assistance was unrelated to his status as a member of the military).

¹⁰⁵ 681 F. Supp. 891 (D.D.C. 1988).

¹⁰⁶ See *ANTOKOL & NUDELL*, *supra* note 57, at 175.

¹⁰⁷ See *Yunis*, 681 F. Supp. at 895.

¹⁰⁸ See *Yunis*, 681 F.Supp. at 891.

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See *id.*

The court reasoned that the Navy's limited actions were not enough to constitute "direct active involvement in the execution of the laws, nor did the use of military personnel pervade the activities of the civilian authorities."¹¹³ Moreover, the court determined that by its very nature, the success of the operation required the assistance of military personnel deployed in a particular location.¹¹⁴ These Naval forces, acting under the direction of the FBI through this mission, only gave law enforcement agents requisite support in terms of "equipment, supplies, and services."¹¹⁵ In the end, the court held that the mere "furnishing of materials, work, and services, standing alone,"¹¹⁶ did not violate the Act.

C. *International Counterterrorism Legislation: The United States and the International Community Respond to Terrorist Threat*

1. *European Convention on the Suppression of Terrorism*

The European Convention on the Suppression of Terrorism¹¹⁷ was adopted by the Council of Europe and is currently in force among many leading European nations.¹¹⁸ The member States of the Council adopted this multi-national agreement because of their growing concern over the increase in acts of terrorism.¹¹⁹ The group wished to take effective measures to ensure that the violators of such acts did not escape prosecution and/or punishment.¹²⁰ The convention provides that contracting states would afford one another protection and assistance in the extradition of terrorists for specific offenses such as those "involving an attack against the life, physical integrity or liberty of internationally protected persons . . . offen[s]e[s] involving kidnapping, [or] the taking of a hostage . . . [or] an of-

¹¹³ *Id.*

¹¹⁴ See Yunis, 681 F. Supp. at 895.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See European Convention on the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. 90, reprinted in 15 I.L.M. 1272 (1976).

¹¹⁸ See Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880, 888 (1989).

¹¹⁹ See European Convention on the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. 90, reprinted in 15 I.L.M. 1272, 1272 (1976).

¹²⁰ See *id.*

fence involving the use of a bomb . . .”¹²¹ among others. This pact is one of the earliest attempts made by governments in order to proactively deal with the terrorist threat.

2. *The United Nations General Assembly Resolution on Measures to Prevent International Terrorism*

The United Nations has also long since recognized the principle that acts of terrorism should not be tolerated, nor should they be ignored by members of the world community. Its General Assembly Resolution on Measures to Prevent International Terrorism¹²² and companion resolutions,¹²³ “[u]nequivocally condemn[], as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security; . . . [and] [d]eeply deplores the loss of innocent human lives which results from such acts of terrorism.”¹²⁴ These resolutions urge cooperation among nations “especially through the exchange of relevant information concerning the prevention and combating of terrorism . . . [and the] apprehension and prosecution or extradition of the perpetrators of such acts”¹²⁵

3. *United States Counterterrorism Legislation*

Early federal legislation enacted in response to the international terrorist threat focused on specific terrorist attacks, rather than broad based policy declarations aimed at terrorism in general. The Anti-Terrorism Act of 1987¹²⁶ was enacted to make it unlawful for the Palestine Liberation Organization to establish and maintain an office in the United States and other related purposes.¹²⁷ This legislation was a direct response to a series of terrorist attacks that began with the Black September massacre of Olympic athletes in 1972, and culminated in the

¹²¹ European Convention on the Suppression of Terrorism, Jan. 27, 1977, art. 1, Europ. T.S. 90, *reprinted in* 151 I.L.M. 1272, 1272 (1976).

¹²² See G.A. Res. 145, U.N. GAOR, 34th Sess., Supp. No. 46, at 244-45, U.N. Doc. A/Res/34/145 (1980).

¹²³ See G.A. Res. 61, U.N. GAOR, 40th Sess., Supp. No. 53, at 301-02, U.N. Doc. A/Res/40/61 (1986).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See 22 U.S.C. §§ 5201-5203 (1988).

¹²⁷ See 133 CONG. REC. S6447 (1987).

death of an American tourist aboard the Achille Lauro ocean liner in 1987.¹²⁸ The adoption of the Anti-Terrorism Act was an attempt by Congress to alert government leaders about the serious threat Americans considered terrorism, and especially Middle Eastern terrorists. The legislative history indicates that the senators believed that the main issue needing to be addressed at that time was terrorism and the right of the United States to defend itself against terrorism.¹²⁹ While the Palestine Liberation Organization continues to be a threat to the United States, the focus of terrorism legislation has widened since 1987 to concentrate less on terrorist organizations directly and more on terrorist actions in general and the manner of response by the United States.

In 1981, Congress added a chapter on Military Support for Civilian Law Enforcement Agencies (MSCLEA)¹³⁰ to Article Title 10 of the United States Code Service to address the circumstances under which the military could be asked to assist domestic law enforcement without violating the PCA. The MSCLEA is a comprehensive and extensive chapter that determines which military actions are authorized and prohibited under federal law. The statute states that the Secretary of Defense can provide equipment and a base or research facility operated by the Department of Defense to federal, state, or local civilian law enforcement agencies to be used for law enforcement purposes.¹³¹ The courts have followed the requirements of the statute and have not found violations of the Act when the military is assisting law enforcement agencies as prescribed under 10 U.S.C.S. § 372.¹³² The MSCLEA contains many provi-

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See* 10 U.S.C.S. §§ 371-382 (Law. Co-op. 1996).

¹³¹ *See* 10 U.S.C.S. § 372 (Law. Co-op. 2002).

¹³² *See generally* United States v. Gerena, 649 F. Supp. 1179 (D.Conn. 1986) (where the defendants were transported from a courthouse in Puerto Rico to Muniz Air Base at the San Juan International Airport and then to Stewart Army Air Field in New York and they later claimed a violation of the Posse Comitatus Act. The court found that the Act was not violated as the civilian law enforcement agency's use of the military equipment, facilities and personnel was "neither regulatory, prescriptive, nor regulatory" as the defendants were in the custody of marshals and not under the control of the military.). *See also* United States v. Garcia, 909 F. Supp 334 (D. Md. 1996), *aff'd without op.*, 103 F.3d 121, reported in full (MD 1996) (where the court found based on 10 U.S.C.S. § 372 that the DEA and the

sions whose sole purpose is to allow an exchange of information and services between the military and civilian law enforcement when such exchange is vital to the protection of citizens of the United States or national interests.

The MSCLEA also contains other sections that were created with the goal of widening the legislation regarding military involvement in domestic law enforcement, but not allowing the public to conceive that the operation is directed by the military. Department of Defense personnel are permitted to train federal, state, and local civilian law enforcement on the maintenance and operation of equipment and, specifically, equipment also provided under the statute.¹³³ This level of involvement is important to ensure that local law enforcement is working with the latest and most sophisticated technology in their new role of homeland defense. Allowing military personnel to train civilian law enforcement allows the United States to maintain highly trained civilian law enforcement, while continuing to keep the military focused on protecting the interests of the United States outside of its borders.

The MSCLEA assists in bridging the gap between law enforcement agencies and the military when interaction is vital to an operation's success. This is an issue that was raised post September 11, 2001, when it was determined that civilian law enforcement, such as the FBI, were unaware of certain information obtained by the Central Intelligence Agency. MSCLEA allows the Secretary of Defense to provide federal, state, and local law enforcement agencies with information collected during "the normal course of military training or operations"¹³⁴ with the caveat that the information must be relevant to a violation of any federal or state law within those officials' jurisdiction.¹³⁵ This section is the type of directive in the MSCLEA that draws together the federal government through the Secretary of Defense and local and state law enforcement in a unified action. Additionally, the MSCLEA seeks to encourage free exchange of information by providing that "[t]he Secretary of Defense shall

state police did not violate the Posse Comitatus Act when they used a trained Air Force canine to find heroin in a bus passenger's bag).

¹³³ See 10 U.S.C.S. § 373 (Law. Co-op. 2002).

¹³⁴ 10 U.S.C.S. § 371(a) (Law. Co-op. 2002).

¹³⁵ See 10 U.S.C.S. § 371 (Law. Co-op. 2002).

ensure, to the extent consistent with national security, that intelligence information held by the Department of Defense and relevant to . . . civilian law enforcement matters is provided promptly to appropriate civilian law enforcement officials.”¹³⁶ In light of recent events of domestic terrorist attacks, it is likely that this section of the statute will be cited more frequently as the reasoning for providing information between the military and civilian law enforcement.

The MSCLEAA also requires that the military “provide such law enforcement officials with expert advice relevant to the purposes of this chapter [10 U.S.C.S. §§ 371-378].”¹³⁷ The ability to call upon expert advice, equipment and personnel is essential to the success of any joint military and law enforcement operation. Collaborative efforts such as those indicated in MSCLEA along with recent legislation create a unified approach to fighting terrorism. Throughout the sections of the MSCLEA and based on the change in the title in 1988 from “Military Cooperation with Civilian Law Enforcement Officials” to “Military Support for Civilian Law Enforcement Agencies” it is clear that interagency support is a direct goal.

Until Congress passed the Patriot Act and the Homeland Security Act of 2002, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹³⁸ represented the United States’ most extensive legislative effort to respond to international terrorist threats. The AEDPA was enacted by both the Senate and the House of Representatives and expressed its concern that terrorism is a “serious and deadly problem”¹³⁹ that threatens the United States, and that the country must make provisions for response and prevention.¹⁴⁰ Congress made several findings, including those stated below, which were the impetus to creating the section on international terrorism prohibitions:

- (1) international terrorism is a serious and deadly problem that threatens the vital interests of the United States;

¹³⁶ 10 U.S.C.S. § 371(c) (Law. Co-op. 2002).

¹³⁷ 10 U.S.C.S. § 373(2) (Law. Co-op. 1996).

¹³⁸ See Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, 110 Stat. 1214.

¹³⁹ See *id.* § 301(a)(1).

¹⁴⁰ See *id.*

- (2) the Constitution confers upon Congress the power to punish crimes against the law of nations and to carry out the treaty obligations of the United States, and therefore Congress may by law impose penalties relating to the provision of material support to foreign organizations engaged in terrorist activity¹⁴¹

The Congress also listed the following findings as the basis for the section addressing the provision of material support to terrorists:

- (1) international terrorism is among the most serious transnational threats faced by the United States and its allies, far eclipsing the dangers posed by population growth or pollution;
- (2) the President should continue to make efforts to counter international terrorism a national security priority;
- (3) because the United Nations has been an inadequate forum for the discussion of cooperative, multilateral responses to the threat of international terrorism, the President should undertake immediate efforts to develop effective multilateral responses to international terrorism as a complement to national counter terrorist efforts;
- (4) the President should used all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists.¹⁴²

It is obvious that from these two groups of findings by the AEDPA that Congress identified terrorism as a continuous threat and provided Congress with extensive power to create laws, which penalized the provision of material support to terrorist organizations. Congress has defined "terrorist activity" as "any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any other state)"¹⁴³ The definition also identifies the following specific actions, when committed by either an individual or as a group would constitute terrorist activity:

¹⁴¹ *Id.* § 301(a)(1-2).

¹⁴² *Id.* § 324(1-4).

¹⁴³ 8 U.S.C.S. § 1182(a)(3)(B)(iii) (Law. Co-op. 2000).

- (I) The hijacking or sabotage of any conveyance (including an aircraft . . .).
- (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
- (III) A violent attack upon an internationally protected person . . . or upon the liberty of such a person.¹⁴⁴

Congress has defined terrorist activity not only by the area where it is committed but also by delineating specific actions that are considered “terrorist.” This broad definition allows an application of the law to actions committed both internationally with Americans as the target and on American soil. Terrorists and terrorism have a clear impact on both domestic and foreign policy and as of recent have become the focus of every disaster, tragedy, and policy decision made by the government.¹⁴⁵ As a result, “foreign policy and economic interests are profoundly affected by terrorist acts overseas directed against foreign governments and their people.”¹⁴⁶

The AEDPA includes in its scope the desire for the federal government to assist civilian law enforcement in creating counterterrorism programs and provides allotted funding for the purchase of updated equipment necessary to counter terrorist tactics. For example, the legislation allows extensive latitude for counterterrorism measures, by providing that the Attorney General has the responsibility to create a FBI counterterrorism and counter-intelligence fund for the costs of

¹⁴⁴ 8 U.S.C.S. § 1182(a)(3)(B)(iii)(I-III) (Law. Co-op. 2000).

¹⁴⁵ After the tragic explosion of the space shuttle Columbia on February 1, 2003, there were immediate concerns that terrorist activity was the cause because the first Israeli astronaut was on the mission. This theory was discounted by officials who stated that a surface to air missile could not have reached the height the shuttle was flying at the time of the explosion. See generally *Bush: ‘Columbia is Lost’*, CBSNEWS.COM (Feb. 1, 2003), at <http://www.cbsnews.com/stories/2003/02/01/tech/main538865.shtml>. However, the fact that terrorist activity was discussed indicates how pervasive of an issue it has become since the attack on the World Trade Center on September 11, 2001. See *id.* See also *Officials: No Evidence of Terrorism*, CNN.COM (Feb. 2, 2003), at <http://www.cnn.com/2003/US/02/01/security.shuttle/index.html>.

¹⁴⁶ Antiterrorism and Effective Death Penalty Act of 1996, § 401, Pub. L. No. 104-132, § 301(a)(1), 110 Stat. 1214.

investigation and fighting cases.¹⁴⁷ The Act further eliminates all doubt as to appropriate federal court jurisdiction by providing that “[t]he courts of the United States have jurisdiction over [an] offense . . . if (A) a national of the United States was aboard the aircraft; (B) an offender is a national of the United States; or (C) an offender is afterwards found in the United States.”¹⁴⁸

V. THE *Posse Comitatus Act* and the U.S. Military - Friend or Foe?

There is little doubt that acts of international terrorism pose a clear and present danger to national security.¹⁴⁹ The response of the United States to international terrorism, and how the PCA impacts the military in that decision making process, requires a three part analysis. First, the federal courts must examine the facts and circumstances of a given incident in order to determine whether or not the Act is applicable. Second, judges must look to the MSCLEA in order to determine whether military actions made in conjunction with law enforcement agencies advance the purpose of the MSCLEA by promoting greater inter-agency cooperation and providing a base for the gathering of information and dissemination of intelligence. Finally, the courts should examine the AEDPA and decide whether these military actions fall within the expressed purpose that the United States “*use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists . . .*”¹⁵⁰

For its part, Congress addressed the need for greater inter-agency support between the military and civilian law enforcement agencies by enacting both the MSCLEA and AEDPA. The MSCLEA provides a statutory basis for interaction between the military and federal, state, and local law enforcement officials, while the AEDPA has widened the focus of terrorist legislation from the original focus of the Palestine Liberation Organization

¹⁴⁷ See *id.* § 811(a)(1)(B).

¹⁴⁸ *Id.* § 721(a)(2)(A-C).

¹⁴⁹ See ERICKSON *supra* note 58, at 63. See also 142 CONG. REC. H2268 (1995) (section 401(k)(5) defines the term “national security” as the national defense and foreign relations of the United States).

¹⁵⁰ Antiterrorism and Effective Death Penalty Act of 1996, § 324, Pub. L. No. 104-132, 110 Stat. 1214 (emphasis added).

to address specific acts of terrorism and their location while also empowering the President to take swift and immediate action in order to meet the terrorist threat against United States citizens or interests.

There is a growing awareness that traditional methods of law enforcement involving only federal and state law enforcement agencies to combat terrorism, in and of itself, is not the answer. Since September 11, 2001, the President and Congress have created a Homeland Defense cabinet level post, and each has called upon the military and law enforcement communities to increase their abilities to share intelligence information. Further, the possibility exists that vital transportation hubs will now have federalized security forces to monitor public travel. Finally, as a result of the recent World Trade Center disaster, President Bush signed into law a \$40 billion emergency spending bill to implement national recovery initiatives and authorize the use of military forces in the fight against terrorists. The bill, passed by Congress, provides for an immediate \$10 billion to be used to respond to the World Trade Center attacks and to counter domestic and international terrorism in the United States and abroad. The resolution also authorized President Bush "to use all necessary and appropriate forces against those responsible for the terrorist attacks"¹⁵¹ of September 11, 2001.¹⁵²

VI. CONCLUSION

This article focused on the federal judiciary's interpretation of the Act and its potential application in the deployment of military personnel, supplies, and equipment in matters involving international terrorism. As a nation, our collective frustration in coping with the contemporary realities of international terrorism have caused government and political leaders to examine the issue as to whether current federal and state law enforcement measures are indeed adequate enough to protect the health, safety, and welfare of our citizens in such circumstances. The PCA can be harmoniously integrated with the

¹⁵¹ *Bush Signs Emergency Spending Bill, Resolution Authorizing Use of Force*, PEOPLE'S DAILY ONLINE (Sept. 19, 2001), at http://fpeng.peopledaily.com.cn/200109/19/eng20010919_80576.html.

¹⁵² *See id.*

spirit and intent of contemporary domestic and international legislation enacted to respond to acts of terrorism. In conclusion, this article has advanced the proposition that the Posse Comitatus Act does not bar the military from rendering assistance to law enforcement agencies engaged in the struggle to combat international terrorism when such assistance does not create a military directly involved with daily investigation and adjudication of laws.

We are not seeking to undermine anyone's rights — neither the rights of any Americans, nor the rights of anyone anywhere else in the world; but we are trying to protect the right of the citizens of this country to be free from the threat of terrorism So the Constitution is not the issue Terrorism is the issue.¹⁵³

¹⁵³ 133 CONG. REC. S6447 (daily ed. May 14, 1987) (statement of Senator Robert Dole).