Eroding Protections Against Domestic Military Intervention: History, the Constitution and the Establishment of the Northern Command

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Abstract

Together with other comparable countries, including Canada, Britain, Australia, Germany and Japan, the United States is witnessing an expansion of the government’s powers to call out troops to deal with civil unrest, accompanied by plans and preparations for such deployments. In the US, these changes most notably include the erosion of the Posse Comitatus Act, which forbids the use of federal troops for domestic law enforcement, and the establishment of the Northern Command, a specific Pentagon command for North America. These developments point to a troubling trend that raises significant historical, Constitutional and legal issues which have thus far received inadequate attention.

Introduction

In overthrowing British colonial rule, the American people inherited and defended a deeply-felt hostility to the use of the armed forces to suppress domestic discontent. A Congressional Research Service report on the Posse Comitatus Act remarked:

Americans have a tradition, born in England and developed in the early years of our nation, that rebels against military involvement in civilian affairs. It finds its most tangible expression in the nineteenth century Posse Comitatus Act (Doyle 2000, 1).

As late as 1985, a legal scholar could still write with some justification that

To the conscience of the nation that fancies itself as the world’s greatest democracy, the idea of military intrusion into the affairs of civil government is profoundly repugnant (Engdahl 1985, 1).

However, new foundations were laid for military intervention within the United States during the Nixon administration of 1969-1974, when regulations were introduced to authorise the use of troops against civil disturbances. Despite concerns being expressed in academic and civil liberties circles, those foundations have been revived and extended since the terrorist attacks of September 2001.

Since the 1970s, the Posse Comitatus Act, which forbids the use of federal troops for domestic law enforcement, has been eroded to the point that one US Army Reserve lawyer has described its effect in impeding the use of the military for ‘homeland defense’ as a ‘myth’ (Treblilcock 2000). Moreover, in 2002, the Pentagon established the Northern Command (NorthCom), giving the armed forces an unprecedented focus
on domestic operations across the North American continent, and developed plans for military deployments during political crises. In 2008, for the first time, an active duty regular Army combat unit was assigned to full-time use inside the US (Cavallaro 2008).

The military has also played a visible role in domestic political events. NorthCom forces were on high alert during President Barack Obama’s 2009 inauguration, increasing air defences and deploying chemical attack experts and medical units. About 11,500 military personnel took part. About 4,000 National Guard members provided support to local law enforcement, boosting security on the National Mall and around Washington. There were 7,500 troops under federal control, including emergency medical teams and experts in chemical attacks (Barnes 2008).

These developments, most notably the erosion of the Posse Comitatus Act and the establishment of the Northern Command, point to a troubling trend that raises significant historical, Constitutional and legal issues which have thus far received inadequate attention. Together with other comparable countries, including Canada, Britain, Australia, Germany and Japan, the United States is witnessing an expansion of the government’s powers to call out troops to deal with civil unrest, accompanied by plans and preparations for such deployments (Head 2009).

**Historical experiences**

The American experience with domestic military deployment began with the repeated use of British troops to suppress disorders in the colonies, including the Boston massacre of 1770, when the army fired upon anti-colonial demonstrators, killing five (Engdahl 1971, Doyle 2000, 4). Engdahl, who examined this record in some detail, commented:

> The American colonists of the mid-eighteenth century were British subjects who considered themselves heirs to the liberties that had been won through the struggles of what was then relatively recent English history. Increasingly, however, they came to perceive the King of their time as hostile to the liberties thus claimed (Engdahl 1985, 3).

The 1776 Declaration of Independence spelled out the anti-militarist stance of the United States in unequivocal terms. It condemned the King’s use of armies to cause ‘death, desolation and tyranny … totally unworthy … of a civilized nation’ and specifically attacked the keeping of a standing army in peacetime (Hammond 1997). The Declaration denounced the King for ‘protecting [British troops] by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states (clause 17) and for affecting to ’render the military independent of and superior to the civil power (clause 14).

When the US Constitution was proposed in 1787, it met opposition on several grounds, but the most controversial proposition was the provision for a standing army. In order to enforce the principle of civilian control, the Constitution restricted military appropriations to two years, designated the President as the Commander-in-Chief and empowered the Congress to regulate the armed forces (Article 1, section 8, clauses 12 and 14; Article 2, section 2). At the same time, the Constitution forbade the States to
maintain regular armed forces and its ‘Guaranty Clause’ provided only that the United States should protect the States against invasion and – upon the application of a State legislature or executive (when the legislature could not be convened) – ‘domestic violence’ (Article IV, section 4).

Despite these protections, there was considerable agitation against the spectre of military law enforcement. As a result, the First Amendment guaranteed individual rights, the Fourth Amendment enshrined freedom from unreasonable search and seizure and the Fifth Amendment insisted that ‘No person shall … be deprived of life, liberty, or property without due process of law’ (Engdahl 1985, 4-5). These provisions were viewed as specific bulwarks against military power. The founding fathers regarded the military’s authoritarian nature as antithetical to democracy and potential threat to any democratic system of government (Hammond 1997, fn 42).

Following the experiences of the Civil War and the Reconstruction period, in which military methods, including martial law, were applied in the South, the Congress repudiated law enforcement by military means by adopting the Posse Comitatus Act of 1878, which declared:

> From 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 comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress.

Thus, the Act not only ended the practice of using troops as a posse; it prohibited military involvement in domestic law enforcement, except with express Constitutional or Congressional authority. No room was left for calling out the troops via presidential or executive orders or regulations, unless they had explicit Constitutional or Congressional approval.

In two decisions in the 1970s, the US Supreme Court recalled these principles. In 1972, Chief Justice Burger invoked the ‘traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history… (Laird v Tatum, 408 U.S. 1, 15). Two years later, speaking on behalf of the court, Burger CJ observed that ‘the decision to invoke military power has traditionally been viewed with suspicion and skepticism since it often involves the temporary suspension of some of our most cherished rights…(Scheuer v Rhodes, 416 U.S. 232, 246).

Nevertheless, US history displays a recurring tendency for governments, during periods of social or industrial unrest, to resort to military intervention, whether by the national armed forces or the National Guard. (The National Guard is not covered by the Posse Comitatus Act, because it is a state-based militia – see Hammond 1997). By one estimate, federal troops were used for domestic operations, including riots and civil disorders, more than 200 times in the two centuries from 1795 to 1995 (Brinkerhoff 2002).

Military forces, usually state militia, were frequently called upon between 1875 and 1925, and again in the early 1970s, to break strikes, sometimes with deadly
consequences. During the 1877 railroad strike, 45,000 militiamen were mobilised in 11 states, and more than 100 strikers were killed and several hundred were wounded. In another instance, President Cleveland sent federal troops to ‘preserve order’ in Pullman, Illinois, in 1894 (Jacobs 1985, 130-131). In 1970, President Nixon declared a postal strike to be a national emergency, and dispatched 30,000 troops to replace strikers in New York, claiming that the strike threatened ‘survival of a government based on law’ (Hammond 1997, Jacobs 1985, 137). In 1981, President Reagan used troops to replace striking air traffic controllers, effectively crushing the PATCO union, and the military has also been utilised to break strikes by coal miners (Hammond 1997).

Political and social movements have been also targeted. At the height of the urban riots of the 1960s, troops were sent into Detroit and other cities (Hammond 1997). During the anti-Vietnam War movement, four students were shot dead at Kent State University in 1970. Ohio Governor James A. Rhodes sent National Guard troops to the campus at the request of the local mayor (Bills 1998, Caputo 2005). President Nixon's Commission on Campus Unrest, known as the Scranton Commission, concluded that the Ohio National Guard shootings were unjustified (President’s Commission 1970). The report said: ‘The Kent State tragedy must mark the last time that, as a matter of course, loaded rifles are issued to guardsmen confronting student demonstrators.’

Nevertheless, in 1972, the Nixon administration promulgated a new set of regulations, ‘Employment of Military Resources in the Event of Civil Disturbances’, asserting legal authority for substantial military intrusions into domestic affairs, and reducing prior safeguards against misuse (Engdahl 1985, 2-3). The regulations purportedly derived their legality from federal statutes dealing with insurrections, unlawful obstructions and domestic violence (Title 10 U.S.C. ss 331, 332, 333) (whose current form and revived use are discussed below). Further, the regulations asserted three additional sources of legal power. The first was a sweeping concept of an inherent executive emergency power to ‘preserve public order’; the second was a purported executive power to protect federal property and functions; the third related to the Secret Service (Engdahl 1985, 19-31).

In 1973, at the Wounded Knee Indian village in South Dakota, the Nixon administration employed the military in a situation not even contemplated by those regulations. After several score supporters of the American Indian Movement, some armed, moved into the village, federal officials cut off access, beginning a 71-day siege. No uniformed military personnel were visible, but the Directorate of Military Support was involved from the first day, a brigade of the 82nd Airborne was placed on alert, air force reconnaissance flights were conducted and, at one point, hundreds of troops were placed on six-hour alert, although ultimately not deployed (Engdahl 1985, 35-36). Courts rejected arguments that the operation breached the Posse Comitatus Act, on the basis that there had been no direct ‘active’ use of the army, only the ‘passive’ provision of military equipment and supplies (Hammond 1997). Some of the Indians, who were charged with interfering with federal officers, ultimately succeeded in having the charges dismissed because the Posse Comitatus Act had been violated by giving the military observers too much influence over civilian law enforcement decisions regarding negotiations, use of equipment and the policy on the use of force (Hammond 1997, Jacobs 1985, 222).
Also during the 1970s, evidence came to light of another aspect of military intervention into domestic politics – military intelligence surveillance of civilians, notably political activists. Lawsuits failed to provide a judicial remedy. In *Laird v Tatum* (408 U.S. 1 (1972)), the case cited above, the US Supreme Court, while invoking a principle against ‘military intrusion into civilian affairs’, ruled that the plaintiffs, who suspected they had been placed under surveillance, lacked standing. The court found that they had not shown any direct injury and that mere knowledge of military investigative activity fell short of a ‘chilling’ of their First Amendment free speech rights. In what amounted to a ‘Catch-22’ situation, the judges refused to order the military to stop collecting information about civilians unless they could prove that they had been harmed by what the military was doing (Jacobs 1985, 223-226, Doyle, 13).

In 1992, the first President Bush invoked the statutes dealing with insurrections, unlawful obstructions and domestic violence to send about 4,000 soldiers and Marines to Los Angeles at the request of California Governor Pete Wilson after the outbreak of riots sparked by the acquittal of four police officers who assaulted Rodney King. These troops were in addition to 10,465 national guardsmen and 1,717 federal law enforcement officers. A study of the deployment concluded that the heavily-armed soldiers operated largely outside civilian control and that, although the troops killed no one, a ‘bloodbath’ could have easily resulted (Rasmussen 1999).

Federal troops have been mobilised many times for disaster relief, a practice that authorities argue does not violate the *Posse Comitatus Act*, because no civilian law enforcement is involved. However, such operations have the potential to spill over into law enforcement and also create a climate for military intervention into civilian areas. Previous operations have included soldiers patrolling urban areas, confronting looters and even providing election facilities, as happened after Hurricane Hugo in Florida in 1992 – a quintessentially civilian political role (Hammond 1997).

Over the past three decades, the domestic use of troops against civilians has continued through the deployment of the military for the ‘wars’ on drugs and terrorism, and for immigration border patrols. The consequences of sending soldiers, trained to kill, to guard the Mexican border were tragically illustrated in 1997 when Marines killed an innocent 16-year-old boy, a local shepherd, near the border (Hammond 1997, Trebilcock 2000).

**The establishment of the Northern Command**

As part of a global reorganisation of the Pentagon, the creation of the Northern Command in 2002 set a new focus for the US military. Alongside the invasions of Afghanistan and later Iraq, for the first time a specific Pentagon command was established for domestic military intervention. NorthCom’s stated mission was to defend the US ‘homeland’ and assist federal, state and local authorities.

Another step was taken in 2008, when for the first time a regular Army combat unit was deployed for full-time use inside the US. The 4,000-strong First Brigade Combat Team of the Third Division was placed under the command of US Army North, the Army’s component of NorthCom. The 1st BCT had spent nearly three out of the
previous five years in Iraq, leading the assault on Baghdad in 2003 and carrying out house-to-house combat in the city of Ramadi. It was the first brigade combat team to be sent to Iraq three times (Cavallaro 2008).

While active-duty units previously had been used in temporary assignments, such as the combat-equipped troops deployed to Los Angeles in 1992 and to New Orleans in the wake of the 2005 Hurricane Katrina, it was the first time that an Army combat unit had been given a dedicated assignment on US soil. The Pentagon’s announcements stressed the role of specialised units in a potential response to terrorist attacks, but the mission exceeds terrorism. Army Times, a specialist military publication, reported that ‘they may be called upon to help with civil unrest and crowd control’. The article noted the connection and continuity between the unit’s operations in Iraq and its domestic task: ‘The 3rd Infantry Division’s 1st Brigade Combat Team has spent 35 of the last 60 months in Iraq patrolling in full battle rattle, helping restore essential services and escorting supply convoys. Now they’re training for the same mission — with a twist — at home’ (Cavallaro 2008).

According to military officials quoted by Army Times, the deployment that began with the First Brigade Combat Team was to become permanent, with different units rotated into the assignment on an annual basis. Army Times reported that the 1st BCT would be kitted out with ‘the first ever nonlethal package that the Army has fielded.’ The publication reported, ‘the package includes equipment to stand up a hasty road block; spike strips for slowing, stopping or controlling traffic; shields and batons; and, beanbag bullets’. Without explanation, the newspaper later retracted that portion of their report, stating that NorthCom said the weapons package was intended only for use in Iraq.

Army doctrine and rules of engagement for civil disturbance and ‘riot control’ planning have long recommended equipping troops with ‘non-lethal weapons’ for ‘operations other than war’. The Center for Army Lessons Learned, located at Fort Leavenworth, Kansas, issued a primer on the subject, entitled Civil Disturbances: Incorporating Non-Lethal Technology, Tactics, Techniques and Procedures, in 2000 (Burghardt 2002).

In October 2008, the American Civil Liberties Union filed a Freedom of Information request for information from the government about the Army Times report. The ACLU said: ‘This deployment jeopardizes the longstanding separation between civilian and military government, and the public has a right to know where and why the unit has been deployed’ (ACLU 2008). ACLU requested the Departments of Justice, Homeland Security and Defense to immediately make public all legal opinions, executive orders, presidential directives, memos, policy guidance, and other documents that authorize the deployment of military troops for domestic purposes.

In December 2008, the Washington Post reported that the Pentagon had begun to implement plans to make 20,000 troops available to NorthCom on a full-time basis by 2011. The additional soldiers were to be assigned as they completed assignments in Iraq or Afghanistan. Bert B. Tussing, director of homeland defense and security issues at the US Army War College’s Center for Strategic Leadership, commented that the plan ‘breaks the mold’ by assigning an active-duty combat brigade to the Northern
Command for the first time. Previously, the military required the command to rely on troops requested from other sources (Washington Post 2008).

According to the *Post*, Deputy Defense Secretary Gordon England signed a directive in late 2007 providing $556 million over five years to fund the program. Paul McHale, assistant defense secretary for homeland defense, said the use of 20,000 troops in a domestic deployment ‘would have been extraordinary to the point of unbelievable’ before the terrorist attacks of September 11, 2001, according to the text of a speech given to the Center for Strategic and International Studies, a Washington think tank, quoted by the *Post*. He described the new policy as ‘a fundamental change in military culture’.

**Domestic intervention plans and exercises**

Since the formation of the Northern Command, plans have been drafted and exercises conducted for internal troop deployments, usually under the banner of counter-terrorism preparedness. According to a report published by the *Washington Post* in 2005, the Pentagon has developed plans for operations within the continental United States, in which terrorist attacks would be used as the justification for imposing virtual martial law on cities, regions or the entire country (Graham 2005). The article cited sources working at the NorthCom headquarters, located in Colorado Springs, Colorado.

While the plans are classified, they outlined 15 potential crisis scenarios, ranging from ‘low-end,’ which the article described as ‘relatively modest crowd-control missions,’ to ‘high-end,’ after as many as three simultaneous catastrophic mass-casualty events, such as a nuclear, biological or chemical weapons attack. In each case, the military would deploy a quick-reaction force of as many as 3,000 troops per attack. More troops could be made available as needed.

The plans were due to sent to the Defense Secretary for approval. Military lawyers had studied their legal implications, and canvassed the use of the National Guard, which is exempt from the *Posse Comitatus Act*, to detain people. The plans also involved the military’s intelligence agencies. The article described NorthCom’s ‘Combined Intelligence and Fusion Center, which joins military analysts with law enforcement and counterintelligence specialists from such civilian agencies as the FBI, the CIA and the Secret Service.’

Exercises have been conducted to test out domestic military capacities. One example is Exercise Vigilant Shield 2008, which was officially described as ‘a Chairman of the Joint Chiefs of Staff-designated, North American Aerospace Defense Command (NORAD) and U.S. Northern Command (USNORTHCOM)-sponsored, and U.S. Joint Forces Command-supported Department of Defense exercise for homeland defense and defense support of civil authorities missions’.

At various locations across the US and the Territory of Guam, NORAD and NorthCom, along with the Pacific Command, the Department of Homeland Security and local, state and other federal responders exercised their ‘response abilities against a variety of potential threats’. The purpose was said to be to ‘provide local, state, tribal, interagency, Department of Defense, and non-governmental organizations and
agencies involved in homeland security and homeland defense the opportunity to participate in a full range of exercise scenarios that will better prepare participants to prevent and respond to national crises’ (NorthCom News 2007).

On occasions, residents of US cities have been confronted by armed troops conducting exercises in urban areas. In February 2008, a company of Marines arrived in Toledo, Ohio, carrying M16 rifles and wearing camouflage uniforms to carry out foot patrols, drive military vehicles through city streets, and engage in mock gunfights and ambushes with blank ammunition. However, the mayor ordered the Marines to leave because the sight of armed soldiers patrolling city streets would ‘frighten people’ (Toledo Blade 2008).

During the 2008 Vibrant Response exercise at Fort Stewart, Georgia, three units of NorthCom’s Consequence Management Response Force (CCMRF, pronounced ‘se-smurfs’), including two combat units from the 1st Brigade Combat Team, 3rd Army Division and the elite 82nd Combat Aviation Brigade, participated in mock drills designed to ‘coordinate with local governments and interagency organizations such as the Federal Bureau of Investigation and the Federal Emergency Management Agency,’ according to a report on *U.S. Northern Command News* (NorthCom News 2008b).

A report published by the US Army War College’s Strategic Studies Institute in November 2008 indicated that Pentagon planners were preparing for a serious domestic crisis that could require the use of armed force to quell social struggles at home. Entitled, *Known Unknowns: Unconventional ‘Strategic Shocks’ in Defense Strategy Development*, the monograph stated that one of the key contingencies for which the US military must prepare is a ‘violent, strategic dislocation inside the United States,’ which could be provoked by ‘unforeseen economic collapse’, ‘loss of functioning political and legal order’ or ‘purposeful domestic resistance or insurgency’. (Freier 2008, 31-32). The report stated:

> Widespread civil violence inside the United States would force the defense establishment to reorient priorities in extremis to defend basic domestic order... An American government and defense establishment lulled into complacency by a long-secure domestic order would be forced to rapidly divest some or most external security commitments in order to address rapidly expanding human insecurity at home (Freier 2008, 32).

In other words, domestic unrest could erupt on such a scale that it threatened the established order and forced the Pentagon to call back its forces from overseas expeditions, such as those in Iraq and Afghanistan, for use against dissidents, protesters and other perceived enemies. The document continued:

> Under the most extreme circumstances, this might include use of military force against hostile groups inside the United States. Further, DoD [the Department of Defense] would be, by necessity, an essential enabling hub for the continuity of political authority in a multi-state or nationwide civil conflict or disturbance (Freier 2008, 33).
The phrase, ‘an essential enabling hub for continuity of authority’, suggests a government resting directly on the armed forces, at least temporarily.

**Undermining the Constitution?**

As mentioned earlier, both the Declaration of Independence and the Constitution embody a principle, based on the ‘Anglo-American tradition’, opposing domestic military mobilisation against the citizenry. The Constitution restricts military appropriations to two years, designates the President as the civilian Commander in Chief and empowers the Congress to regulate the armed forces (Article 1, section 8, clauses 12 and 14; Article 2, section 2). Its ‘Guaranty Clause’ provides that the military may only be used to protect a State against ‘domestic violence’ if requested by a State legislature or executive, when the legislature cannot be convened (Article IV, section 4).

It is also possible to see in the First, Second, Third, Fourth and Fifth Amendments, with their promises of individual rights, a civilian militia, freedom from the quartering of troops, freedom from unreasonable search and seizure and no deprivation of life, liberty, or property without due process, an underlying constitutional principle barring the use of a standing army to interfere in civilian affairs (Doyle 2000, 12).

There is some judicial support for this proposition. Members of the Supreme Court seemed to acknowledge a larger constitutional principle in both *Youngstown Sheet and Tube Co. v Sawyer*, 343 U.S. 579 (1952) and *Laird v Tatum*, 408 U.S. 1 (1972). In *Youngstown*, Douglas J, after noting the President’s role as Commander in Chief, added: ‘But our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs’ ((324 U.S. at 632). The court struck down an attempt, via a Presidential order, to use the armed forces to seize and operate the country’s steel mills, which were threatened by a nationwide strike. The court held that the President’s constitutional and statutory powers as President and Commander in Chief were not sufficient to support such an executive order, when Congress had specifically refused to grant such authority by statute. That decision still leaves open considerable scope for military intervention where Congress has not expressly taken an opposing stand (Doyle 2000, 15).

In *Laird v Tatum*, the Court commented that the ‘philosophical underpinnings’ of the Constitution explained ‘our traditional insistence on limitations on military operations in peacetime’ (408 U.S. at 15-16). Nevertheless, the court refused to order the military to stop collecting information about civilians. It held that a claim that First Amendment rights were chilled was non-justiciable unless citizens could show evidence of specific harm or the realistic threat of specific harm.

Likewise, in February 2008 the Supreme Court refused to hear an appeal brought by the American Civil Liberties Union and other groups challenging the Bush administration’s warrantless domestic wiretapping program, conducted by the NSA, a military agency. The wiretapping program began in 2001 but was first revealed to the public through a media leak in 2005. The program, the full details of which are still not known, included domestic spying in breach of the Foreign Intelligence Surveillance Act (FISA). In 2006, a US District Court judge ruled that the program violated the First and Fourth Amendments, the separation of powers and FISA.
When that ruling in *ACLU v NSA* was overturned on appeal, the government refused to identify the individuals targeted by the NSA program, on the grounds that this information was secret. However, the appellate court upheld the government’s argument that only those who could prove they had been specifically targeted by the program could have standing to sue. The Supreme Court rejected a further appeal without comment (*ACLU* 2008b).

The courts have long been reluctant to recognise the authority of military tribunals over civilians (Doyle 2000, 12). This view was upheld, albeit in a limited manner, in the Guantanamo Bay habeas corpus cases that challenged the constitutionality of the military commissions established to try ‘enemy combatants’. In 2004, the Supreme Court, by a 6-3 majority, ruled that Guantanamo Bay detainees could seek writs of habeas corpus in US courts. The majority judgment, delivered by Stevens J, suggested that at stake were democratic conceptions dating back nearly 800 years to the Magna Carta of 1215 (*Rasul v Bush; Al Odah v United States*, 542 U.S. 466 (2004)).

Four years later, in *Boumediene v Bush*, 553 U.S. __ (2008), the Supreme Court ruled 5-4 that Guantánamo detainees could immediately file habeas corpus petitions in US district courts challenging the legality of their confinement. Most had been held at the US naval base, some enduring solitary confinement, water-boarding and other coercive techniques or torture, for more than six years, without having the merits of their cases reviewed by a court of law. However, the ruling did not question the executive branch’s ability to declare someone an ‘enemy combatant’, a power the Supreme Court upheld four years earlier in *Hamdi v Rumsfeld*, 542 U.S. 507 (2004).

Later in 2008, a 5-to-4 decision by the US Court of Appeals for the 4th Circuit backed the Bush administration’s contention that the President has such power. In *Al-Marri v. Pucciarelli* (4th Cir.July 15, 2008), the court effectively overturned a decision reached by a three-judge panel of the same court in 2007, which compared the assumption of such sweeping powers to military rule and the oppression of the American colonies by King George III. The appellate ruling denied habeas corpus to Al-Marri, a legal resident of the US before the White House declared him an enemy combatant in 2003 and ordered the military to detain him in a Navy brig in South Carolina. The government claimed that the Authorization to Use Military Force (AUMF) resolution passed by Congress in 2002 gave the president the power to carry out such detentions. Alternately, it asserted that the Commander in Chief has unchallengeable authority to imprison anyone without charges for the duration of a global war on terror. In 2009, the Supreme Court vacated the 4th Circuit ruling but declined to hear the case further after Al-Marri was charged with a terrorism offence and transferred to civilian custody (*ACLU* 2009).

Overall, the courts have failed to enunciate a wider constitutional principle against military intervention, even in the context of the *Posse Comitatus Act*, where the judges have generally avoided any examination of its possible constitutional underpinnings (Doyle 2000, 13-14). Thus, in *United States v Walden*, 490 F.2d 372 at 376, the court said ‘we do not find it necessary to interpret relatively unexplored sections of the Constitution in order to determine whether there might be constitutional objection to the use of the military to enforce civilian laws’.
It therefore seems that military action must violate one of the explicit constitutional prohibitions or guarantees, such as habeas corpus, the right to jury trial, freedom of expression and freedom from unreasonable searches and seizures, before courts will object. This means that a President has substantial leeway, both as chief executive, charged with seeing that laws are faithfully executed, and as Commander in Chief, to mobilise the armed forces.

The Supreme Court has made it clear that the President does not require express Congressional or statutory authorisation to exercise such powers. If an emergency threatens the freedom of interstate commerce, transportations of the mails or some other federal government responsibility, he may call upon ‘the army of the Nation, and all its militia … to brush away the obstructions’ (In re Debs, 158 U.S. 364 at 381).

Such rulings have left the way open for assertions of presidential, executive and prerogative powers to use military personnel and resources against civilians, arguably flying in the face of the intent of the Constitution. In effect, the role of Commander in Chief has been transformed from a guarantor of civilian supremacy over the military, to an instrument for potentially utilising the armed forces in civilian settings.

Constitutional presidential authority has been asserted to provide a broad basis for the mobilisation of military forces under the banner of homeland security. Particularly since 2001, the White House has asserted that the executive powers of the President and his position as Commander in Chief support wide-ranging exceptions to the Posse Comitatus Act. Defense Department regulations assert another ‘constitutional’ exception to the Act, founded on the ‘inherent right of the U.S. Government … to ensure the preservation of public order and to carry out governmental operations … by force, if necessary’.

Stated so sweepingly, this ‘federal functions exception’ has the capacity to swallow the rule (Hammond 1997). Expanding federal authority over areas formerly reserved to the states, such as transportation, commerce, education and civil rights, has widened the scope of federal functions. During the 1960s, presidential authority provided the basis for sending troops to the South to enforce school de-segregation (Trebilcock 2000).

The Guaranty Clause and ‘domestic violence’

The Constitution provides one explicit avenue for authorising domestic military intervention. Its language presents potential obstacles to presidential power to deploy the armed forces. The guaranty clause provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

By distinguishing between invasion and domestic violence, the clause is clearly intended as a limitation on the President’s executive power to send in federal troops. There must be a request by the state. Four obvious questions arise. First, what is
domestic violence? It is not defined by the Constitution, nor has it been defined by legislation or judicial interpretation. Second, when can a state governor request military aid without waiting for the state legislature? Third, is the federal government obliged to accede to an application? Fourth, can a president send in federal troops without a state request?

‘Domestic violence’ is a vague term. Presidents have interpreted it to justify military interventions against ‘an assemblage of rioters’, ‘mobs’ and widespread violence (Bassiouni 1971, 372-373). Clearly these interpretations are broad enough to cover political protests and other forms of dissent that fall far short of armed violence. Only in one instance, in 1903, was a governor’s request for troops denied because the disturbance did not amount to an ‘insurrection’. In 1967, Attorney General Ramsey Clarke sent letters to all governors indicating that ‘serious domestic violence’ was needed, but the addition of the word ‘serious’ hardly clarified anything (Bassiouni 1971, 373).

The requirement for an application from the state legislature has been read as preventing a governor requesting troops while the legislature is in session. If the legislature is not sitting, however, presidents have not insisted on waiting for the legislators to gather to make a request. On their face, the words of the guaranty clause seem to limit unilateral action by a governor to where it is impossible to convene the legislature. In practice, most presidents have only required there to be difficulty in convening the legislature. On a few occasions, presidents have rejected requests because the language of the application was not unequivocally asking for intervention, as distinct from recommending it (Bassiouni 1971, 368-369).

Despite the Constitution’s imperative phraseology – ‘shall protect’ – the clause has generally been treated as leaving the president discretion to withhold aid. Pleas for troops have been rejected because a president thought the danger exaggerated or the state forces adequate to deal with the situation. The precedents indicate that a state must fully utilise all its forces, including its National Guard, before federal troops will be dispatched (Bassiouni 1971, 374-375).

Even though the guaranty clause specifically sets a state application as a precondition for deploying troops, it seems to have been accepted that this proviso only applies if there is no independent or concurrent federal interest in maintaining order. At least, legal opinion appears to allow for presidential executive or Commander in Chief powers to protect substantial federal interests, regardless of any state request (Bassiuoni 1971, 375-376).

Eroding the Posse Comitatus Act

On its face, the Posse Comitatus Act (PCA) stands as a strict prohibition against using the military for civilian law enforcement, complete with criminal penalties for violation. Its entire text, in its current form, states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined
Congress has left the PCA substantially unchanged since 1878, and buttressed it with an additional proscription against the use of the armed forces to make arrests or conduct searches and seizures. Section 375 of 10 U.S.C. forbids the Secretary of Defense making regulations that permit direct participation by military personnel in ‘a search, seizure, arrest, or other similar activity’.

It appears that no prosecution has ever been conducted for breach of the PCA, however. Moreover, the dearth of judicial interpretation has left its parameters ‘substantially untested’ (Hammond 1997). In addition, growing numbers of major and minor exceptions have been created, some by Congress and some by the courts. The cumulative result has been to blur the line between police, para-military and military intervention, undermine civilian control of the military and expose the population to the dangers of deadly force and de facto dictatorship. The following outline seeks to trace the erosion of the PCA to the point where ‘reality bears little resemblance to the myth’ and the PCA ‘is more of a procedural formality than an actual impediment’ to the domestic mobilisation of the armed forces (Trebilcock 2000).

In the first place, while the Act applies today to Army, Air Force, Navy and Marines, and their Reserve components, it does not cover the Coast Guard and the National Guard, at least as long as the National Guard is operating exclusively under the control of a state (Doyle, 42-43). Only when federalised by presidential authority does the Guard become subject to the PCA. This exception gives the authorities access to ‘huge military manpower resources’ (Trebilcock 2000). The courts have also said that the PCA has no extra-territorial effect. It therefore does not prevent the military from conducting operations with law enforcement agencies abroad or mounting its own operations against civilians, including US citizens and residents, overseas (Hammond 1997).

Secondly, the courts have interpreted the PCA as only barring ‘active’, rather than ‘passive’ engagement in law enforcement. ‘Execution of the laws’ includes the arrest and detention of criminal suspects, search and seizure activities, restriction on civilian movement through the use of blockades or checkpoints, gathering evidence for use in court and the use of undercover personnel in civilian law enforcement. From the cases arising from the 1973 Wounded Knee confrontation, the courts have developed three tests:

1. whether military personnel have been in ‘direct active use’ in civilian law enforcement
2. whether the use of the military ‘pervaded the activities’ of the civilian officials
3. whether the military subjected ‘citizens to the exercise of military power which was regulatory, prescriptive or compulsory in nature (Doyle 2000, 37)

Thus ‘direct active’ participation in making arrests has been deemed a violation of the PCA, but not taking a supporting role. Military personnel may be involved in planning law enforcement operations, as long as actual arrests of suspects and seizures of evidence are carried out by civilian personnel. Courts have held that providing supplies, equipment, training, facilities and certain types of intelligence
information, including aerial photography and visual search and surveillance, does not contravene the PCA (Trebilcock 2000, Hammond 1997). The ‘passive-active’ distinction ignores the reality that troops engaged in supposedly passive support roles can and will be called upon to use force against civilians if operations encounter resistance or other difficulties that threaten to exceed the capacities of the police or civilian authorities.

Thirdly, aspects of the language of the PCA can serve to narrow its scope. It is restricted to ‘willful’ misuse of the military. Although the few judicial interpretations of that requirement are somewhat conflicting, it seems that a court would not convict for anything less than deliberate disregard of the PCA, with the authorities acting with the knowledge that their conduct was unlawful (Doyle 2000, 35). This approach permits government or military figures to argue that they acted innocently, thinking that their activities were within the boundaries set by the PCA. Courts have treated the phrase ‘execute the laws’ as confined to civilian laws, and allowed military personnel to perform military duties in a manner that assists civilian law enforcement -- as long as the primary purpose of an activity is a military one. For example, a court permitted naval military police investigators to act as undercover informants in a civilian police drug operation near a naval base, for the purpose of minimising the flow of drugs into the base (Doyle 2000, 33).

Fourthly, because the Act is a statutory creation, not a constitutional prohibition, it can and has been circumvented by subsequent legislation. This has happened particularly since 1980, when the Reagan administration directed the Department of Defense to utilise naval and air assets for the ‘war on drugs’. Congress subsequently approved this tasking, and extended it to immigration control, customs and tariff enforcement (Treblilcock 2000). By 1989, the military was designated the ‘single lead agency’ in the drugs war, a classic instance of mission creep. The Pentagon embraced new missions like drug interdiction as a means of boosting budget levels and improving public relations. In 1993, the Department of Defense budget included more than $1.4 billion for the drug-related missions (Hammond 1997).

In 1995, within one week of the bombing of a federal building in Oklahoma City, President Clinton proposed an exception to the PCA to allow military involvement in investigations related to ‘weapons of mass destruction’ (Hammond 1997). The other most prominent Congressional exceptions to the PCA relate to: insurrections, espionage, terrorism and civil disturbances, natural disasters, nuclear materials, protection of national parks, investigation of crimes against the President or others in the line of succession, civil rights, fishery conservation, internationally protected persons and quarantine (Hammond 1997, fn 130, Doyle, 20-23).

Another exception is the Uniform Code of Military Justice. The code gives the military the inherent right to maintain good order and discipline over its personnel through law enforcement, prosecution and punishment. As such, the code gives jurisdiction to the military to enforce both military and civilian laws against its own personnel (Trebilcock 2000, fn 5). These provisions may permit the military to protect its personnel from prosecution in civilian courts for alleged abuses of power committed during domestic operations.
After surveying the whittling away of the PCA, military reserve lawyer Trebilcock concluded:

> The erosion of the *Posse Comitatus Act* through Congressional legislation and executive policy has left a hollow shell in place of a law that formerly was a real limitation on the military’s role in civilian law enforcement and security issues (Trebilcock 2000).

The most direct threat to civilian politics comes from the Civil Disturbance Statutes (10 U.S.C., sections 331-335), which allow the president to call up the armed forces and the National Guard (State militia) to suppress challenges to the political order, ranging from insurrections to ‘domestic violence’. Section 331, covering insurrections against States, says:

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection

Section 332 deals with various threats to federal authority, from unlawful combinations to rebellions:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

Section 333 goes further to cover ‘interference with State and Federal law’:

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

In 2006, the Bush administration secured Congressional support for amendments that extended these powers. One amendment effectively widened the scope of section 333
from ‘insurrection, domestic violence, unlawful combination, or conspiracy’ to ‘natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition’ if the authorities of the State ‘are incapable of maintaining public order’. In part, the Bush administration justified the change as a response to the monumental failings of the Hurricane Katrina relief operation in 2005. Expert commentators described the amendments as an unhelpful diversion from the government’s political embarrassment over the Katrina debacle, in which the military actually played a substantial part (Banks 2005).

In 2007, the amendments were reversed. Democrat Senator Patrick Leahy opposed them, partly to defend States’ rights and strengthen the role of the National Guard. He said the amendments ‘make it easier for Presidents to declare martial law’ and ‘make it unnecessarily easy to assert federal authority over national guard elements without the consent of governors’. President Bush initially vetoed the reversal into law, in exchange for measures expanding the military budget, giving the National Guard higher status at the Pentagon, and a closer relationship with the Northern Command, and directing the Pentagon to work with the Guard in homeland defense planning (Leahy 2008). Thus, in the name of civil liberties, the Congress overturned the PCA changes, but bolstered the National Guard’s substantial part in domestic military deployments. Moreover, the reversion still left the PCA in a severely eroded condition. In addition, President Bush attached a signing statement that he did not feel bound by the repeal (Goodman 2008).

The Bush administration’s moves dovetailed with the National Security Presidential and Homeland Directive (NSPD 51, HSPD 20), promulgated in 2007. In the event of a ‘catastrophic emergency’, which the President can declare without congressional approval, NSPD 51 would institute virtual martial law under the authority of the White House and the Department of Homeland Security. It would suspend constitutional government under the provisions of Continuity in Government, leaving extraordinary powers in the hands of the President and Vice-President. ‘Catastrophic emergency’ is loosely defined as ‘any incident, regardless of location, that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the U.S. population, infrastructure, environment, economy, or government functions’. ‘Continuity of Government’ is defined as ‘a coordinated effort within the Federal Government’s executive branch to ensure that National Essential Functions continue to be performed during a Catastrophic Emergency’.

The Department of Defense Directive 3025.12, ‘Military Assistance for Civil Disturbances (MACDIS)’ provides for far-ranging use of the military against civil unrest:

Ensure continuous planning by the DoD Components, both in the Department of Defense and in cooperation with civil government agencies for MACDIS operations that may be required during any time or condition of peace, war, or transition to war, including any national security emergency. …

The President is authorized by the Constitution and laws of the United States to employ the Armed Forces of the United States to suppress insurrections, rebellions, and domestic violence under various conditions and circumstances. Planning and preparedness by the Federal Government and the Department of
Defense for civil disturbances are important due to the potential severity of the consequences of such events for the Nation and the population... The President has additional powers and responsibilities under the Constitution of the United States to ensure that law and order are maintained. (‘Military Assistance for Civil Disturbances [MACDIS],’ Department of Defense Directive, No. 3025.12, February 4, 1994, pp. 1, 3).

DoD 3025.12 also states: ‘Under reference (r), the terms “major disaster” and “emergency” are defined substantially by action of the President in declaring that extant circumstances and risks justify Presidential implementation of the legal powers in those statutes.’ Thus the ‘circumstances’ in which troops can be deployed are ‘defined substantially’ by the President.

**Use of deadly force**

If troops are called out, civilians appear to have few protections against the use of force, including lethal force. None of the statutory exceptions to the PCA define or limit the powers of military personnel. Instead, these critical issues are left in the hands of the Pentagon. DoD 3025.12 directed the Army Secretary to ‘promulgate orders, rules, and regulations, as appropriate, to govern all MACDIS operations in which the use of force or deadly force is or can be authorized’. The secretary was also tasked with ensuring that all task force commanders ‘promulgate supplemental rules of engagement and rules for the use of force’.

The Rules of Engagement for the 1992 Los Angeles riots deployment set three preconditions for the use of deadly force: (a) all other means have been exhausted; (b) there is no significantly increased risk of death or serious bodily harm to innocent persons; and (c) one or more of the following purposes exists: self-defense, prevention of a crime, defense of others, detention or prevention of escape of persons (Rasmussen 1999). These provisions left the way open for wide use of lethal force. A study of the operation noted that ‘all other means have been exhausted’ implied that non-lethal weapons were available to soldiers, but that was not the case. Few non-lethal riot and crowd control resources were distributed, nor did the soldiers, with the exception of some National Guard units) have any training in the use of non-lethal equipment. In one instance, on receiving a request to ‘cover me’, marines fired more than 200 bullets into a house with young children inside (Rasmussen 1999).

The study pointed out that decisions on the Rules of Engagement ‘were left to all intents and purposes in the hands of the military’ and the enforcement of those rules was ‘at best haphazard’. Task force commanders devised the rules and Arming Orders, based on existing Department of Defense operational plans and regulations. There was no evidence that the relevant civilian authorities, the mayor and state governor, provided any input into the rules or how they were enforced. There was also substantial evidence that different units operated at different arming levels, and that this was widely known at the time (Rasmussen 1999).

**Growing political use of armed forces**

When President Obama’s 2009 inauguration featured a visible military presence, it built upon a growing trend. In effect, the PCA has been further eroded by the common
use of military forces as security for essentially civilian events. ‘National Security Events’ covered by NorthCom have included sports events, State of the Union addresses, G-8 summits, Presidential inaugurations and funerals, and political conventions (Ehling 2008). During the 1996 Atlanta Olympics, more than 10,000 US troops were deployed, partially on the pretext of deterring terrorism. No questions were raised about infringement of the PCA, even though these troops would have been central to a massive law enforcement emergency if a terrorist attack had occurred (Trebilcock 2000).

It has become customary for the military to be involved in the security for the national conventions of both the Republican and Democratic parties. For the 2004 Republican National Convention, 307 federalised National Guard troops were fielded, in addition to 1,247 state-level soldiers, and provided military aircraft to enforce no-fly zones (Ehling 2008).

In 2008, the Department of Homeland Security declared the conventions of both the Democratic and Republican parties ‘National Special Security Events’. This designation placed the department and the Secret Service in charge of overall security and brought in an array of national police, military and intelligence agencies.

For the Democratic convention, in addition to 1,500 heavily-armed police officers, more than 1,000 National Guard troops were activated. Elements of the US Coast Guard were placed in charge of intelligence operations in designated areas, while the North American Aerospace Defense Command and the Northern Command also participated, in part to provide ‘air cover’.

**Erosion of civilian control of the military**

Beneath these developments is a tendency toward a reversal of the relationship between the military and civilian rule. In his 1961 farewell speech, President Dwight D. Eisenhower urged the American people to beware the undue political influence of the ‘military-industrial complex’. He warned:

> This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence – economic, political, even spiritual – is felt in every city, every Statehouse, every office of the Federal government (Eisenhower 1968).

Half a century on, that complex is far larger and more powerful than it was in Eisenhower’s time. By 2007, the Pentagon commanded an annual budget of more than three quarters of a trillion dollars, which exceeded the military budgets of every other country combined, and operated more than 1,000 bases in 132 countries. It is a military that has engaged in repeated military interventions over the past three decades, including in Grenada, Nicaragua, Haiti, Somalia, Libya, the former Yugoslavia, Afghanistan and Iraq, often to overturn foreign governments. Its senior commanders have wielded de facto political power over entire populations in Afghanistan and Iraq (Van Auken 2007).

Likewise, the corporate side of the military-industrial complex has mushroomed, benefiting directly from military contracts and indirectly from the global assertion of
American strategic and commercial interests. Led by Lockheed-Martin and Halliburton and the giant weapons and aerospace contractors, the ‘complex’ also includes the oil and energy conglomerates, the big construction, engineering and public utility companies, and the biotechnology corporations. Other prominent firms are Boeing, Carlyle Group, General Atomics, General Electric and Northrop Grumman Corporation (Singer 2003, Chalmers 2004).

Those who have studied the American military establishment have issued warnings about its transformed role over the past period. One review by a military historian, Richard H. Kohn, concluded that ‘in recent years civilian control of the military has weakened in the United States and is threatened today’:

The issue is not the nightmare of a coup d'etat but rather the evidence that the American military has grown in influence to the point of being able to impose its own perspective on many policies and decisions. What I have detected is no conspiracy but repeated efforts on the part of the armed forces to frustrate or evade civilian authority when that opposition seems likely to preclude outcomes the military dislikes (Kohn 2002).

Examples cited by Kohn included the public Joint Chiefs of Staff opposition to the Clinton administration’s proposal to abolish the ban on open homosexual service, in which the chiefs floated rumors of their own and dozens of other resignations, encouraged their retired brethren to arouse congressional and public opposition, and then more or less openly negotiated a compromise with President Clinton, their commander in chief.

Also among the ‘continuous stream of incidents and controversies’ were the undermining and driving from office of Secretary of Defense Les Aspin in 1993, followed by the humiliating withdrawal of his nominated replacement; controversies over the retirements of at least six four-star flag officers; and bitter arguments over readiness, over budgets, over whether and how to intervene with American forces abroad, from Somalia to Haiti to Bosnia to Kosovo, and over national strategy generally. In other cases, senior officers spoke out publicly on whether the United States should sign a treaty banning the use of land mines; on whether American forces should be sent into the Balkans in the 1990s; and on whether the US should support the establishment of the International Criminal Court (Kohn 2002).

During the presidential election crisis of 2000, the chief legal officers of two of the largest commands in the Army and Air Force issued warnings that resentment over Gore campaign challenges to military absentee ballots in Florida could boil over into open contempt. Democratic Party presidential candidate Al Gore dropped his challenges, saying he would not wish to take office in conflict with the military (Kohn 2002, Grey 2001). This back down cleared the way for George W Bush to become President, a result that was sanctioned by the Supreme Court in its five-to-four vote in *Bush v Gore* (531 U.S. 98 (2000)) to halt the counting of votes in Florida.

Kohn has argued that these developments were unprecedented in American history. Five decades of warfare had created
something entirely new in American history--a separate military community, led by the regular forces but including also the National Guard and reserves, veterans organizations, and the communities, labor sectors, industries, and pressure groups active in military affairs. More diverse than the ‘military-industrial complex’ of President Eisenhower's farewell address forty years ago, this ‘military’ has become a recognizable interest group. Also, it is larger, more bureaucratically active, more political, more partisan, more purposeful, and more influential than anything similar in American history (Kohn 2002, see also Bacevich 2002, Bacevich 2006).

Conclusion

The ‘war on terror’ declared in September 2001 has accelerated processes leading toward a greater mobilisation of the US military, both at home and abroad. Actions such as the interventions in Afghanistan and Iraq, not only gave the military direct experience against civilian populations but were accompanied by intensive preparations for domestic use of the armed forces, also in the name of combatting terrorism. For the first time in US history, an entire command, the Northern Command, has been established for internal use.

In the process, basic constitutional principles have been transgressed and the only specific legislative protection against military intervention, the Posse Comitatus Act, has been further eroded, both in law and practice. Pentagon plans indicate that a resurgence of social and class tensions, as witnessed in Los Angeles in 1992, could see troops called out against civilians on a large scale, with possible deadly consequences and far-reaching political implications.

References


