ALTERING THE POSSE COMITATUS ACT: LETTING THE MILITARY ADDRESS TERRORIST ATTACKS ON U.S. SOIL

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I. INTRODUCTION

In the aftermath of the September 11, 2001 terrorist attacks, one of the authors of this Article, David A. Klinger, along with Lieutenant Colonel Dave Grossman, United States Army (Retired), wrote an article describing why Congress should create an exception to the Posse Comitatus Act ("PCA"), a Reconstruction-era law generally forbidding the military from enforcing civil law on American soil.¹ Asserting that America’s police agencies lack the capacity to respond effectively to certain types of conventional terrorist activity (e.g., attacks involving military style assaults in public places) that could lead to many deaths, they argued that the PCA should be amended to permit the use of military assets and personnel to deal with terrorism of this sort.² Because they focused their attention on why the military should be allowed to take action against terrorists within our borders, Klinger and Grossman offered less detail about two other matters relevant to the issue they broached: when and how the military should be called into service. This follow-up article takes up where Klinger and Grossman left off, putting meat on the bones of their proposal by offer-

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¹. David A. Klinger & Lt. Col. Dave Grossman, Who Should Deal with Foreign Terrorists on U.S. Soil?: Socio-Legal Consequences of September 11 and the Ongoing Threat Of Terrorist Attacks in America, 25 HARV. J.L. & PUB. POL’Y 815 (2002); 18 U.S.C. § 1385 ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both."). Some retired military officials and members of Congress have discussed the possibility of carving an exception to the PCA as well. Sean J. Kealy, Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement, 21 YALE L. & POL’Y REV. 383, 426-27 (2003); Michael P. O’Connor & Celia M. Rumann, Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland, 24 CARDOZO L. REV. 1657, 1726-27 (2003).
ing a detailed discussion of the circumstances under which the military could be used to deal with terrorist activity and how such mobilizations might occur.

The remainder of this Article proceeds as follows: First, in order to bring readers who have not read Klinger and Grossman’s article up to speed, Part II reviews the highlights of their argument about why the military should be involved in certain anti-terror activities in the United States. Here we specify the sorts of terrorist activity Klinger and Grossman had in mind, identify the limitations inherent in American law enforcement when it comes to directly confronting terrorists in such circumstances, and explain why the military is the appropriate institution to overcome these limitations.

Part III discusses the legal standards that govern the use of the military in domestic anti-terror activity and how the history behind these standards might be expected to influence the decisions that leaders would have to make during a terrorist attack. Here we detail our belief that while the Constitution and applicable federal statutes authorize the military to act against some sorts of terrorist attacks, the law also contains a sizable gray area where the use of the military goes. We also discuss some practical problems that could well foreclose an effective military response in the face of a terrorist strike on American soil, whatever form it might take.

Part IV lays out our proposal for dealing with the present roadblocks to effective anti-terror responses. Here, we put forth a clear, narrow exception to the PCA that would alleviate the uncertainties that presently exist by providing military and law enforcement personnel with clear guidelines for when and how the military may assist the police when dealing with terrorists. In so doing, we explain how our exception would allow the military to address terrorists on American soil while preserving the American citizenry’s civil liberties and historical skepticism about using military power here in the homeland.

Finally, we conclude in Part V with some comments on how military and law enforcement personnel might prepare for their respective and collaborative roles should the sort of foreign terrorist attack we envision come to pass.

II. WHY THE MILITARY MAY BE NEEDED TO ASSIST CIVILIAN LAW ENFORCEMENT

The crux of Klinger and Grossman’s argument about why the military should be permitted to deal with certain sorts of terrorism on American soil is that American law enforcement does not have the ca-
pacity to effectively counter certain sorts of attacks. More specifically, they were concerned about the prospect that al Qaeda or other Islamic terrorist organizations would launch in the United States the sort of military-style assaults on people gathered in public spaces that terrorists repeatedly carried out in the Middle East and southwest Asia, and recently Spain and England. Arguing that attacks with assault rifles, explosives, and other military ordinance are part of the operational doctrine of Islamic terrorist organizations, they asserted it was logical to suspect the terrorists who declared war on our nation might undertake similar attacks here in the United States.

After laying out this predicate, Klinger and Grossman explained why they believed American law enforcement is not equipped to deal with military-style assaults by terrorists. They rooted their argument in an overview of how our nation's police are postured to deal with episodes of mass violence, pointing out the police have neither the operational philosophy nor the tools to effectively handle military-style terrorist attacks. For decades, American police have operated on the premise that the best way to handle a crisis involving criminal violence is to contain the problem, control the problem location, and then seek to de-escalate the situation through negotiations or some other non-lethal means. Special Weapons and Tactics (SWAT) teams play a critical role in this approach by providing containment of crisis locations, having the capacity to put pressure on criminal adversaries, and, if need be and as a last resort, judiciously applying deadly force to resolve the situation. In recent years many American law enforcement agencies developed an exception to this general approach, adopting what have been dubbed "rapid response" policies that encourage their officers to take aggressive action against armed criminals who are actively attacking (dubbed "active shooters") in order to stop the assault at the earliest possible moment.

5. For the train bombings in Spain, see Bombs were Spanish-made explosives, CNN.COM, at http://www.cnn.com/2004/WORLD/europe/03/12/spain.blasts/ (Mar. 12, 2004). For the London attacks, see Russell Jenkins, Dominic Kennedy, David Lister & Carol Midgley, The London bombers, TIMES ONLINE, at www.timesonline.co.uk/article/0,,22989-1693739,00.html (July 15, 2005).
7. Id. at 823-27.
While this doctrinal shift towards taking the fight to active shooters might at first appear to mean the police are ready to deal with any sort of armed assault, Klinger and Grossman assert the following:

[Rapid response tactics . . . offer little hope in terms of dealing with large scale, well coordinated terrorist attacks. [They] were designed to deal with one or two disturbed individuals armed with the sorts of weapons that are commonly available in America, not well-trained terrorist cells consisting of foreign nationals who are equipped with military ordnance bent on killing as many American citizens as possible. Consequently, the first police officers to respond to a terrorist attack of this sort may find themselves quickly outgunned. It would then be up to SWAT to save the day. The problem is that they, too, may well be outgunned, for SWAT teams are trained and equipped to deal with conventional criminals, not foreign terrorists. They simply do not have the capabilities to match the sorts of explosives, armor, and support systems that well-equipped terrorists could bring to bear in an attack.10

American law enforcement has struggled to stop a number of incidents in which small groups or rogue individuals attempted to cause destruction on American soil. Klinger and Grossman recap the LAPD's violent standoff with the domestic terrorist group SLA in 1974 when 8700 rounds of ammunition were used, and the SLA threw six small explosives at police.11 In 1995, a demented individual stole a National Guard tank and went on a joy ride in San Diego, destroying much in his path before police got lucky when the tank lost a tread, and police were able to shoot the driver after opening the tank hatch.12 Similarly, in June 2004, a gunman drove an armed bulldozer through a Colorado town, wreaking destruction.13 SWAT teams could do little to stop the bulldozer, only after it got stuck in a building it plowed into were SWAT officers able to enter the bulldozer and discover the driver killed himself.14 Colorado Governor Bill Owens alerted the National Guard and was prepared to send troops if they were so requested.15

Klinger and Grossman go on to argue that because our police are not designed to take on well-armed foreign terrorists, this leaves our

10. Id. at 824-25.
11. Id. at 825.
12. Id. at 826.
14. Id.
nation essentially unprotected against a looming threat, and we need
to greatly increase our capacity to protect ourselves. They assert one
logical approach to this would be to authorize our military to respond
to foreign terrorist activities on American soil for the simple reason
the military has both the weapons and the mindset to deal with the
threat posed by terrorists.16

They further argue the military is the proper institution to deal
with incipient and realized attacks by foreign terrorists because such
attacks are not mere crimes, but also acts of war.17 They assert that
"[w]hen terrorists from abroad take or plan violent actions within the
United States . . . they do not merely violate the laws of whatever
state in which they act (and relevant federal laws); the actions of the
terrorists constitute acts of war."18 Terrorists who enter from outside
society for the purpose of destroying it do not fit within the criminal
model.19 Crime is deviation from the domestic legal order, not an at-
tack upon the very basis of that order.20 Large-scale terrorist hostili-
ties against the United States therefore constitute acts of war,21
especially since the response to such attacks is not to arrest terrorists
and prosecute them in the criminal justice system, but to kill or cap-
ture them in military conflicts.22

In sum, Klinger and Grossman argued the PCA should be
amended to permit the military to respond to terrorist activity on
American soil because the military has the means to respond and be-
cause the military is the proper institution to deal with acts of war.

III. CURRENT LAW ALLOWING MILITARY ACTION (AND ITS
LIMITATIONS)

As a first step in discussing the law governing military action on
American soil we wish to point out our belief that some of the terrorist
attacks our nation might face in the future clearly go beyond the pur-
view of civil law and constitute acts of war.23 These type of attacks,
like those carried out on September 11, 2001, which used hijacked passenger airlines as impromptu missiles that struck America's leading political and financial centers, killing nearly 3000 people, are important to classify as national emergencies because they go beyond regular law enforcement. As such, the use of the military to address these actions does not constitute law enforcement. This determination is crucial as the PCA only prevents using the military in civil law enforcement; it does not prevent using the military to defend against acts of war or national emergencies. Ultimately, the PCA stops the military from pursuing domestic criminals and fighting crime, but it does not bar the military from assisting law enforcement agencies engaged in the struggle to combat international terrorism when such assistance involves repelling acts of warfare.

After September 11, Congress passed a statute entitled, "Sense of Congress reaffirming the continued importance and applicability of the Posse Comitatus act." Congress noted the PCA "has served the Nation well" and the PCA "is not a complete barrier to the use of the Armed Forces for a range of domestic purposes."

While we believe the Constitution and applicable federal law authorize the military to act against foreign terrorist attacks in certain instances, the line between crime and acts of war may not always be clear. Some members of the armed forces, for example, have expressed concerns about whether a military response in the form of shooting down the hijacked jets during the September 11th attacks would have been permissible under the PCA. And given what a mil-

27. Gizzo & Monoson, 15 PACE INT'L L. REV. at 180.
29. Id.
30. See generally Gary Felicetti & John Luce, The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done, 175 MIL. L. REV. 86, 179 (2003) (explaining the PCA's prohibitions create confusion in the military, poor command structure, and decreased response time). An enabling statute directs the Secretary of State to enact regulations to prevent military personnel from participating in law enforcement and investigation activities. See 10 U.S.C. § 375.
itary-style assault of the sort described above would look like as it unfolded in real time, it might not be at all clear that the incident was in fact a foreign interest waging war.

The fact that there is no bright line between criminal acts and acts of war presents a pair of problems when it comes to mobilizing the military to defeat terrorist attacks. First, the relevant constitutional provision and all but one of the applicable federal statutes that govern the use of the military have not been squarely applied or interpreted with respect to the military's ability to address a foreign terrorist attack. There is, therefore, very limited definitive statutory and case law driven authority for the military to address foreign terrorist attacks on American soil. Since most of the applicable statutes and the Constitution do not provide clear, explicit guidelines for when the military may act, the military may continue to hedge before acting to address a foreign terrorist attack, and military personnel who do act would have to hope that any subsequent investigation does not lead to their prosecution under the PCA. Second, the applicable statutes require a rather bulky bureaucratic process before the military can act; one that would in all likelihood hobble a timely military response in the event of a terrorist attack. Both of these problems are explicated in the following discussion of the current state of the law that governs the use of the United States military.

The first point to be made is the Constitution authorizes the President, and in certain instances lower-level military commanders, to defend the country in a national emergency. Acts of war against the United States compel the President, or a lower-level military commander, to protect the country in an emergency situation through the use of the military. Specifically, Article Four, Section Four of the Constitution provides the following:

The United States shall guarantee to every state in this Union a Republican Form of Government, and shall protect each of them against invasion.32

Under the Constitution, the President is considered "the Commander-in-Chief of the Army and Navy"33 and he is to execute the laws.34 The Constitution, however, does not provide the President with war-making power. The Congress is vested with the power to declare war.35

33. U.S. CONST. art. II, § 2. A reasonable interpretation of this constitutional provision, as well as common sense, leads to an obvious conclusion that the President is also the Commander-in-Chief of the Air Force and Marines. Christopher J. Schmidt, Could a CIA or FBI Agent Be Quartered in Your House During a War on Terrorism, Iraq or North Korea?, 48 ST. LOUIS U. L.J. 587, 645-46 n.405 (2004).
34. U.S. CONST. art. II, § 3.
35. U.S. CONST. art. I, § 8 ("Congress shall have Power... To declare War."). Congress is vested with essentially all other powers related to war-making or war-authori-
While the President is generally only vested with the power to employ the military after Congress authorizes the use of it, Article Four, Section Four provides text-based support for the President to unilaterally execute the military to protect the United States in emergency situations. Thus, the President may respond to sudden attacks without congressional authorization. In other words, President-made war is justified in defending the United States from attack. Under Article Four, Section Four, therefore, the President can use troops or the militia to quench a civil disorder. As former United States Supreme Court Justice Tom C. Clark stated, "the Constitution does grant to the President extensive authority in times of grave and imperative national emergency... As [President] Lincoln aptly said, 'is it possible to lose the nation and yet preserve the Constitution?'"
Similarly, if the country is under attack in a national emergency and the military must immediately respond, without having the opportunity to contact and receive authority from the President to act, defensive military action without a presidential order would be permissible under Article Four, Section Four. For Article Four, Section Four’s text requires the “United States,” not specifically the “President,” to protect the states from invasion.\textsuperscript{41} As we believe the Constitution should be construed reasonably to contain all that it fairly means,\textsuperscript{42} a reasonable construction of Article Four, Section Four would allow a military commander beneath the President to act to defend the country, without presidential authority, from a clear-cut terrorist attack. (One could not reasonably argue, for example, that the military stationed at Pearl Harbor on December 7, 1941 would have had to wait to act until it received presidential authority before it could respond to what was clearly an attack by a foreign adversary.) This constitutional authority for the United States to act in such a scenario should obviate any concern that the use of the military in such a situation violates the PCA as the United States would be responding to an act of war and the military would not be used as a posse comitatus enforcing civilian law.\textsuperscript{43}

In our opinion, Article Four, Section Four might well apply to the sorts of military-style terrorist attacks described above. But Article Four, Section Four acts in a practical sense only as a potential defense after the military is used, as opposed to specifically granting the military the power to operate on American soil against foreign terrorists. Since Article Four, Section Four is a somewhat little-known and little-referenced constitutional provision, with much of the interpretation concerning its meaning derived from academic articles such as this one, it does not carry much authoritative weight. This is particularly true concerning military and law enforcement personnel, who probably are not deeply engaged in the academic discourse on this issue and simply want a clear “yes or no” answer concerning when they can and cannot act in concert. In other words, if one were to rely solely on Article Four, Section Four for the authority of the military to take action against foreign terrorist attacks on American soil, they would

\textsuperscript{41} U.S. Const. art. IV, § 4.


\textsuperscript{43} See Feldman, 25 Harv. J.L. & Pub. Pol’y at 482 (noting that defending the United States against incursions by foreign troops is an act of national defense, not an instance of executing the laws). It is regularly argued, without reference to Article Four, Section Four, that the President has inherent authority to defend the nation as the Commander-in-Chief. The Commander-in-Chief Clause says who the President is; Article Four, Section Four states what the United States shall do to protect itself.
have to hope that those investigating, litigating, and judging how the military was used after the fact would adopt our arguments.

Another legal basis for using the military to defend America against terrorist attacks lies in federal law that dictates how the President may commit military troops to battle. Federal law describes that the military's purpose is to preserve peace and security and provide for the defense of the United States. The first federal statute that provides support for the notion that the President can utilize the military to address foreign terrorists on American soil appears to have been enacted pursuant to Article Four, Section Four of the Constitution. Specifically, Title 10, Section 331 provides the following:

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

For an insurrection to exist there must be an intent to overthrow a lawfully constituted regime. An insurrection is a rising against civil or political authority, the open and active opposition of a number of persons to the execution of law in city or state. The September 11, 2001 terrorist attacks, for example, could constitute an insurrection as nineteen terrorists used passenger airlines in an attempt to cripple the United States' lawful governmental and financial centers in Washington, D.C. and New York City. The terrorists constituted a number of persons whose actions certainly were in open and active

44. Felicetti & Luce, 175 MIL. L. REV. at 173 (citing 10 U.S.C. §§ 3062, 8062).
45. See Laird v. Tatum, 408 U.S. 1, 3-5 (1972).
46. 10 U.S.C. § 331. A few related federal statutes allow the President to order the Armed Forces or militia to enforce civil law when the citizenry essentially prevents its enforcement. See 10 U.S.C. §§ 332, 333, 334. Generally, these statutes have been used to enforce school desegregation orders that Southern states resisted. See Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957); Exec. Order No. 11,053, 27 Fed. Reg. 9693 (Sept. 30, 1962); Exec. Order No. 11,111, 28 Fed. Reg. 5709 (June 11, 1963); Proclamation No. 3204, 72 Stat. C8 (Sept. 23, 1957); Proclamation No. 3497, 76 Stat. 1506 (Sept. 30, 1962); Proclamation No. 3542, 77 Stat. 1011-1012 (June 11, 1963); Proclamation No. 3554, 77 Stat. 1024 (Sept. 10, 1963). Under Title 10, Section 332, the President has broad discretion in supplying states with active duty soldiers to assist law enforcement. Gizzo & Monoson, 15 PACE INT'L L. REV. at 157. Courts have found the President has plenary authority to use federal troops under Section 332, and these decisions are not subject to judicial review. Id. (citing Monarch Ins. Co. of Ohio, 353 F. Supp. 1249 (D.D.C. 1973)).
opposition to the execution of law in the United States as turmoil and chaos existed during and in the immediate aftermath of the attacks.

A future large scale terrorist attack could almost certainly be viewed as another attempt to overthrow the United States in an open and active aggression against civil and government authority. Consequently, under this statute the President would have the discretion to call into service the militia and federal military to defend against such an attack. In fact, under the statute the decision about whether to use the military or militia in quelling such a civil disorder is exclusively within the province of the President. The use of the military in these instances would not trigger posse comitatus concerns as long as the military that is called into the field to ensure the law is duly executed only does so in defensive operations, thus, ensuring that the military power remain in strict subordination to civil authority.

As we discussed above, however, some types of terrorist attacks on American soil could take place so quickly that defensive action would be necessary before the President could learn of the attack and authorize the use of the military to address it. While we believe applicable provisions, like Article Four, Section Four of the Constitution, should be construed reasonably to contain all they fairly mean, we cannot get around the clear textual mandate that only the "President" can introduce the armed forces into certain situations. Under these circumstances, Title 10, Section 331, leaves little, if any, authorization and legal protection for military personnel who might choose to take action before securing presidential authorization in the case of a suspected terrorist attack on American soil.

Beyond the fact that Title 10, Section 331 would not provide any legal cover for members of the military who took action prior to presidential authorization, the law makes securing the requisite presidential authority a difficult task. As former Attorney General Ramsey Clark notes, three basic prerequisites are required before federal troops can be used under the statute. First, a situation of serious domestic violence must exist within a state. Second, such violence cannot be brought under control by law enforcement resources availa-

51. Monarch Ins. Co. of Ohio, 353 F. Supp. at 1254-55. See Felicetti & Luce, 175 MIL. L. REV. at 173 (noting the President has broad authority under 10 U.S.C. §§ 331-35 to use the military to enforce federal authority). For a review of related areas in which the military has domestic authority, see Felicetti & Luce, 175 MIL. L. REV. at 173-74 and accompanying footnotes.
52. 9 Op. Att'y Gen. 517 (1890).
53. SCALIA, supra note 42, at 23.
55. Laird, 408 U.S. at 4 n.2.
56. Id. at 4 n.2.
ble to a Governor, including local and state police forces and the National Guard.\textsuperscript{57} Third, the applicable state legislature or Governor requests the President to employ the armed forces to bring the violence under control.\textsuperscript{58} The element of a Governor's request is essential if the legislature cannot be convened.\textsuperscript{59}

In a rapidly unfolding terrorist attack, the process this statute requires would take too long before the military could be used: as a terrorist attack would occur, the state legislature would have to learn of the attack, convene legislative session, and determine that local and state resources could not address the attack. Then, the legislature would have to request the President send the military, and the President would have to oblige. Or, in the alternative, the Governor of a state could unilaterally request the President send the military. Even under this expedited scenario, the Governor would have to learn of the attack, then the Governor would have to determine that state and local resources could not address it, then the Governor requests the President send troops, then the President would have to oblige. Unfortunately, in the matter of time it takes for either of those processes to occur, a foreign terrorist attack could be crippling state and local law enforcement and causing tremendous death, destruction, and chaos.

A second law granting the President power to commit military forces to deal with a terrorist strike here in the homeland is the War Powers Resolution, which provides the following:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.\textsuperscript{60}

Concerning a future terrorist attack, a declaration of war and statutory authorization for the use of the military could almost certainly not be passed quickly enough to allow the military to address a rapidly unfolding and potentially extremely deadly foreign terrorist attack on American soil. It would be nearly impossible for both Houses of Congress to authorize military action while a terrorist attack occurred unless they were in joint session at the time of the attack, they learned of

\textsuperscript{57} Id.

\textsuperscript{58} Id.

\textsuperscript{59} Id.

\textsuperscript{60} 50 U.S.C. § 1541(c).
the attack, and they were able to pass a law that skipped or expedited their normal deliberative process before enacting legislation.

The President, however, under the War Power Resolution, could unilaterally introduce the military to address an ongoing terrorist attack or even situations in which no attack has occurred, but when circumstances clearly indicate that imminent involvement in hostilities with terrorists could occur. Section (c)(3) grants the President plenary authority to respond to an emergency created by an attack against the United States. A reasonable interpretation of Section (c)(3) is that the President can unilaterally order the military to respond to attacks against the United States. This valid presidential statutory authorization for the military to act would likely eliminate any potential violation of the PCA. Military forces acting upon the President's order would be following the order of their ultimate superior, the Commander-in-Chief of the Armed Forces, pursuant to a valid, binding federal law, the War Powers Resolution.

While the War Powers Resolution appears to permit military action against terrorists when the troops are under the direct command of the President, two practical problems still remain when unexpected military-style terrorist attacks are concerned. The first stems from the fact that—like Title 10, Section 331—the Resolution provides no legal cover for any member of the military who might respond to such attack before the President authorized such action. Absent clear legal authority to do so, many (perhaps most) military commanders would not be willing to commit their troops. The second problem is that while securing presidential authorization under the War Powers Resolution is not nearly so cumbersome as the multi-step process that would obtain under Title 10, Section 331, doing so would almost certainly take considerable time—time that the terrorists could use to destroy more property, secure more ground, and kill more Americans.

A final legal basis for using the military against terrorists on American soil rests in legislation that permits members of the armed forces to assist civilian law enforcement in response to acts of terrorism (and threats thereof) that involve specific weapons of mass destruction. A "threat of an act of terrorism" includes "any circumstance providing a basis for reasonably anticipating an act of terrorism.

61. Id.
terrorism, as determined by the Secretary of Defense in consultation with the Attorney General and the Secretary of the Treasury. The term "weapon of mass destruction" means the following:

[A]ny weapon or device that is intended, or has the capacity, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of –

(A) toxic or poisonous chemicals or their precursors;
(B) a disease organism; or
(C) radiation or radioactivity.

Under the statute, the Secretary of Defense, upon the Attorney General's request, may provide assistance to civilian authorities if the Secretary determines "special capabilities and expertise of the Department of Defense are necessary and critical to respond to the act of terrorism or the threat of an act of terrorism; and . . . the provision of such assistance will not adversely affect the military preparedness of the Armed Forces."

The statute allows the Department of Defense to provide personnel and resources to the extent that and for such period as the Secretary of Defense determines is "necessary to prepare for, prevent, or respond to an act or threat of an act of terrorism described in . . . subsection[(a)]." Members of the Army, Navy, Air Force, or Marine Corps may not, unless otherwise authorized by law, "directly participate in a search, seizure, arrest, or other similar activity; or . . . collect intelligence for law enforcement purposes." The Secretary of Defense and the Attorney General each may not delegate their authority under this statute. The statute provides that the term "emergency situation involving a biological or chemical weapon of mass destruction" means the following:

[A] circumstance involving a biological or chemical weapon of mass destruction . . . that poses a serious threat to the interests of the United States; and . . . in which . . . civilian exper-

tise and capabilities are not readily available to provide the required assistance to counter the threat immediately posed by the weapon involved[,] special capabilities and expertise of the Department of Defense are necessary and critical to counter the threat posed by the weapon involved[,] and . . . enforcement of section 175 or 2332c of title 18 would be seriously impaired if Department of Defense assistance were not provided.71

The "WMD" exception to the PCA is not relevant to the military-style assaults we fear because such assaults would not involve the sorts of weapons detailed in the statute. And even if there were some evidence that a group of terrorists involved in a conventional military-style assault included some WMDs in their arsenal, the rules for committing troops under the law are so cumbersome that the quick response needed to defeat the terrorists would not be possible.

More specifically, the statute presents a deliberative multi-step process, involving two individuals, before military action can occur. First, the Attorney General must learn of the act or threat of terrorism.72 Second, the Attorney General must request the Secretary of Defense provide assistance.73 Third, the Secretary of Defense must determine the military's special capabilities are critical to respond to the act or threat and such military response will not unduly affect military preparedness.74 In a rapidly unfolding terrorist attack, it would be unlikely the Attorney General could quickly be informed of the attack, then request the Secretary of Defense provide assistance, and then have the Secretary of Defense determine military assistance is needed and military preparedness would not be burdened by acting. The statute's deliberative process is too lengthy and will likely allow a foreign terrorist attack to go unanswered by the military or, at least, unnecessarily delay military response to such an attack.

Similarly, the statute's non-delegation doctrine, wherein the Attorney General and Secretary of Defense cannot delegate their authority, further inhibits military action. As we indicated above, we do not

71. 10 U.S.C. § 382(b). Title 18, Section 175(a) provides criminal penalties for anyone who "knowingly develops, produces, stockpiles, transfers, acquires, retains, or possesses any biological agent, toxin, or delivery system for use as a weapon, or knowingly assists a foreign state or any organization to do so, or attempts, threatens, or conspires to do so the same." 18 U.S.C. § 175(a). Exceptions to criminal penalties exist if material is not produced for use as a weapon. 18 U.S.C. § 175(b). Title 18, Section 2332c was repealed. Pub. L. No. 105-277, Div. I, Title II, § 2d(c)(1), 112 Stat. 2681-871.
72. 10 U.S.C. § 382(a)(1)-(2).
73. Id.
believe in an overly strict statutory interpretation, but we cannot get beyond the fact that only the “Attorney General” and “Secretary of Defense” can act under this statute. Suppose a potential terrorist attack is aimed at one of those officials, thereby preventing communication with the other in order to act under this statute. Or suppose the officials cannot get in touch with each other, thereby preventing military action. Or, at the least, what if it takes substantial time for both officials to get in touch with each other. Much like the federal statutes we discussed above, this statute — aimed at only the most extreme forms of terrorism mind you — simply provides much too lengthy a process before the military can act against foreign terrorists while also tightly restricting which officials can authorize the use of the military in these instances.

To summarize this point, while there currently exists substantial legal authority for military forces to respond to some forms of terrorist attacks here in the homeland, the current state of relevant law leaves us quite vulnerable. Current law simply does not provide military authorities with the legal protection that is needed to ensure that they would promptly commit resources and troops to take on a rapidly evolving terrorist attack on United States soil. A clear, specific statutory exception to the PCA, however, would alleviate this uncertainty and provide military personnel with clear guidelines so that they can quickly and effectively act against a foreign terrorist attack. Attention now turns to our proposal for such a law.

IV. A PLAN TO ADDRESS FOREIGN TERRORIST ATTACKS ON AMERICAN SOIL

We begin specification of our proposed modification of the PCA with a discussion of its intellectual pedigree, for our proposal is hardly original and is largely based on principles announced over twenty years ago. In 1981, one commentator offered the following ideas about how the military should assist law enforcement within the constitutional and statutory scheme:

What is at stake is nothing less than a consistent theory of the proper role of armed forces in a democratic republic. That theory . . . envisions the military as a back-up force, operating under its own command, prepared to deal with large scale emergencies, beyond the capabilities of civilian authorities, not for the purpose of executing civilian laws, or even assisting in their execution, but for restoring order, saving

75. Scalia, supra note 42, at 23, 38.
lives, and protecting property from natural or man-made disasters.\textsuperscript{76}

These ideas provide the theoretical foundation for the statutory proposal we proffer below, and we indicate that underlying our thinking is the notion that rather than expanding the military's powers to execute civilian laws, we wish to limit military action to situations only the military can deal with: emergencies that lie beyond the capabilities of law enforcement wherein military action is needed to restore order and save lives and property.\textsuperscript{77} We reiterate that what we propose below is intended only to permit the military to respond to dire situations that unravel quickly and chaotically (and which may appear at first to be matters for law enforcement). Our proposal attempts to alleviate the uncertainty about what would be currently permitted under the PCA\textsuperscript{78} by providing clear statutory guidelines for when the military may act without violating the law.

As was the case of the intellectual pedigree of our proposal, much of the actual language for our proposed statute is hardly original. In fact, our proposal is based on another commentator's own statutory proposal, which provides the following:

(a) Any part of the armed forces, excluding the Coast Guard, is prohibited from acting as a posse comitatus or otherwise to execute the laws, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.

(b) Exceptions to paragraph (a) allowing the use of the armed forces must meet the following criteria:

(1) the use must be triggered by an emergency, which is defined as any occasion or instance for which Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of catastrophe—generally a sudden, unexpected event;

(2) the use must be beyond the capabilities of civilian authorities; and

(3) the use must be one limited in duration and not one which addresses a chronic, continuing issue or problem.


\textsuperscript{77} Hammond, 75 WASH. U. L.Q. at 982 n.204.

\textsuperscript{78} Gary Felicetti & John Luce, The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done, 175 MIL. L. REV. 86, 179 (2003).
(c) Clarifications to prohibitions in subsection (a) are to be made by regulations to be published in the Federal Register and printed in the Code of Federal Regulations.

(d) This section is an affirmation of the fundamental precept of the United States of separating the military and civilian spheres of authority.

(e) Nothing in this section shall be construed to affect the law enforcement functions of the United States Coast Guard.79

We believe that this proposal has many desirable components vis-à-vis the question of using the military against terrorists. First, the proposal closes the current loophole in the PCA by generally preventing any part of the armed forces from enforcing civil law. Currently, the PCA prevents only the Army and Air Force from enforcing civil law,80 even though Department of Defense policy prevents the entire Armed Forces, excluding the Coast Guard, from enforcing civil law, and Congress recently stated the PCA “prohibits the use of the Armed Forces as a posse comitatus . . . .”81 Second, the proposal limits the use of the military to situations it is adept at addressing—sudden emergencies threatening lives and property that civilian authorities cannot address and that are short in duration.82 Under this proposal, therefore, the military could be used to address sudden, violent foreign terrorist attacks or apparent terrorist attacks that are beyond local and state law enforcement’s capabilities. The proposal limits the use of the military to extraordinary emergencies—wherein military capabilities would be utilized as a short-term stop-gap to restore order—not substantial, long-term problems such as the “war on drugs.”83

We do, however, have some quibbles with this proposal. First, the commentator proposes the PCA be repealed entirely and the proposed statute take its place in Title Ten of the United States Code, which contains Armed Forces provisions, thereby eliminating any criminal penalties for violating the PCA.84 Because there have been no prosecutions under the PCA,85 the argument goes, the law lacks force and credibility.86 The commentator thus believes a recodification of the

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82. Hammond, 75 WASH. U. L.Q. 982 at 982 n.204.
83. Id. at 983.
84. Id. at 980.
PCA would bring it in line with its current function and force because it is more of a law of policy.\textsuperscript{87} This position, however, overlooks the deterrent effect the PCA has on law enforcement and the military, which we believe must remain in place, especially under an exception to the PCA that provides clear guidelines for when the military may assist civilian law enforcement.

Second, the proposal's language that the military's use "must be one limited in duration" is too broad and vague. This vagueness may hinder military efforts to address an emergency because military personnel may feel compelled to cease assistance if their personal definition of "limited in duration" is on the shorter end of the scale. On the other hand, a real possibility of abuse of military power exists if "limited in duration" is defined as weeks, months, or even longer.\textsuperscript{88} That would essentially eliminate the entire thrust and ideal behind the proposal.

In order to address our concerns while following the overall theme of our predecessor's work, we propose the following statutory exception to the PCA:

(a) Any part of the United States armed forces, excluding the Coast Guard, is prohibited from acting as a posse comitatus or otherwise to execute the laws, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.

(b) Exceptions to paragraph (a) allowing the use of the armed forces as a posse comitatus or otherwise to execute the laws must meet all of the following criteria:

(1) the use must be triggered by an emergency, which is defined as any occasion or instance for which Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of catastrophe—generally a sudden, unexpected event; and

(2) the use must be beyond the capabilities of civilian authorities; and

(3) the use must not be one which addresses a chronic, continuing domestic law enforcement issue or problem; and

(4) the use must be one limited to a forty-eight hour time period, beginning the moment when the armed forces are ordered to take action or take action, whichever is ear-

\textsuperscript{87} Id. at 981.

\textsuperscript{88} See Bruce Ackerman, \textit{The Emergency Constitution}, 113 \textit{Yale L.J.} 1029, 1040 (noting the President should not have authority, as Commander-in-Chief, to do whatever he wants, for as long as he wants).
After the forty-eight hour time period expires, the armed forces may act as a posse comitatus for a successive forty-eight hour period or otherwise execute the laws if Congress and the President are unable to execute their duties and all of the criteria set forth in Section (b)(1)-(3) are once again met.

(c) This section is an affirmation of the fundamental precept that the United States military is subordinate to civilian spheres of authority.

(d) Nothing in this section shall be construed to affect the law enforcement functions of the United States Coast Guard.

(e) Any use of the armed forces in violation of this statute shall be subject to penalties prescribed under 18 U.S.C. § 1385 unless such use of the armed forces is pursuant to another law of Congress or provision of the Constitution.

The notable changes are, as indicated above, keeping the criminal penalties in the PCA and specifically defining how long the military may act under our exception. In order to keep the criminal penalties available under the PCA, we added a sentence indicating such penalties exist for violating our proposal unless some other law or constitutional provision authorizes the military to enforce civil law. Regarding the duration the military can operate under our proposal, we set forth a forty-eight hour time period within which the military can act and be exempt from the PCA. That period starts when a military commander orders the military to begin action or when the military begins action, whichever is earlier. For example, suppose on September 11th our proposal was in place. If a military airplane shot down a hijacked airliner without approval from a military commander then the forty-eight hour clock would start once the military airliner fired its weapons. On the other hand, suppose a military commander ordered the pilot to shoot down a hijacked airliner, then the forty-eight hour clock would begin once that order occurred.

We feel a forty-eight hour period is generally sufficient to allow the military to address a rapidly unfolding attack. History shows even in the most treacherous attacks against American soil – Pearl Harbor and September 11th - that the emergency situation is quelled in hours, with relative stability in place shortly after the attacks. Forty-eight hours for the military to act with exemption from PCA sanctions, therefore, is a rather lengthy period. On the other hand, as events such as the recent assault by Chechryan terrorists on a school in Beslan, Russia indicate, some terrorist attacks could easily turn into

89. See Hammond, 75 WASH. U. L.Q. at 981.
comparatively protracted episodes.\textsuperscript{90} In the Beslan incident, of course, the terrorists opted to hold most of their victims hostage as opposed to killing them outright, so the incident stretched out over several days.\textsuperscript{91} In a case such as this, our forty-eight hour provision would permit the military to deploy and take action while military commanders consult with civilian authorities about the precise nature of the incident. Once the parties determine to their satisfaction that the incident indeed involves foreign terrorism, the appropriate requests could be made to the President for authorization to continue operations under the rubric of either Article Four, Section Four or one of the relevant statutes. If it were determined that the War Powers Resolution should be invoked, Congress could then be notified and the rest of the military involvement would proceed as put forth in that piece of legislation.

We expect, particularly with advanced planning and readiness since September 11th, that Congress and the President could assume their war powers duties within twenty-four hours of a terrorist attack. The forty-eight hour period in our proposal, therefore, is more of a safeguard than a full sanction of military power. The President may call off military action taken under our proposal within hours of its use, particularly if the military use was effective, which is the ultimate goal and ideal behind our proposal.

For a further safeguard, we do provide a successive forty-eight hour use of the military if Congress and the President can still not perform their duties. If after ninety-six hours of military action Congress and the President cannot fulfill their duties, we believe the continuity of the United States itself and the security of its people would be paramount issues thereby curtailing any concerns that military action at that time would violate a federal law.

We believe the limitations in our proposal on the use of the military to enforce civilian law preserve our nation’s historical tradition and desire for civilian supremacy and subordination of military power.\textsuperscript{92} This tradition dates back to the founding of the United States. The Declaration of Independence provided the King “has affected to render the Military independent of and superior to the Civil power.”\textsuperscript{93} Our nation’s historical distrust of the military’s power over its own people arises because the people fear the military’s power may trample upon their liberty.

\textsuperscript{90} \textsc{John Giduck}, \textsc{Terror at Beslan: A Russian Tragedy with Lessons for America’s Schools} (Archangel Group 2005).

\textsuperscript{91} Id.

\textsuperscript{92} Laird v. Tatum, 408 U.S. 1, 19 (1972) (Douglas, J., dissenting).

\textsuperscript{93} \textsc{The Declaration of Independence} para. 14 (U.S. 1776).
A fear of keeping standing armies plagued the Founding Fathers. Anti-Federalists believed granting a newly formed federal legislature power to raise and support armies in peacetime and wartime could destroy the people's liberty. Consequently, there "was a significant citizen sentiment against the mere presence of standing armies, particularly in peacetime." Specifically, the Declaration of Independence stated, "[the King] has kept among us, in times of peace, Standing Armies without the consent of our legislatures." In fact, the people of six of the original states expressed serious concern over the army's danger to liberty in peacetime in their respective state constitutions. The North Carolina and Pennsylvania constitutions stated, "as standing armies in time of peace are dangerous to liberty, they ought not to be kept up." Delaware, Maryland, Massachusetts, and New Hampshire's constitutions provided, "standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the legislature." Currently, the Third Amendment's prohibition against compelled quartering of soldiers during peacetime stands as a monument to the fear of standing armies.

While there was a clear skepticism of keeping a standing army in peacetime, the use of a posse comitatus was not expressly disavowed in the founding era. Alexander Hamilton, responding to Anti-Federalist arguments that the proposed Constitution would prohibit the use of the posse comitatus, contended that a posse comitatus was lawful under the Constitution. Hamilton described the Anti-Federalist argument as "short of the truth" as the right of Congress to pass all laws necessary and proper to execute its declared powers would include the assistance of citizens to the officers entrusted with the exe-

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95. THE ANTI-FEDERALIST PAPERS, "Brutus,” Essay I.
97. THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).
98. THE FEDERALIST No. 24 (Alexander Hamilton).
99. Id.
101. Felicetti & Luce, 175 MIL. L. REV. at 95.
102. THE FEDERALIST No. 29 (Alexander Hamilton).
103. Id.
Hamilton appeared to be arguing, however, that a citizen militia could assist with the execution of laws – he may not have similarly argued for a large, professional standing army to act as a posse comitatus. This would align with early American thought as the citizen militia was generally more trusted than a standing army for the reason discussed above – the citizenry feared the power of a standing army. A law passed a few years after the Constitution was ratified authorized the President to use the citizen militia as a domestic military force, but only in limited circumstances when law enforcement officers could not suppress a violent internal disorder. Consequently, citizen soldiers as a militia could quell an emergency, but Congress excluded the regular army from law enforcement matters. A strong American tradition against the domestic use of the military therefore stretches back to the founding era.

Some of the early colonial citizenry’s angst concerning the military’s power is diminished, to a degree, by the current conflicts in which the United States is engaged. As many of the colonial concerns over the military focused on the military’s power during peacetime, those concerns do not directly apply to today’s climate. Regardless of whether the United States is technically in a wartime or peacetime state now, it is definitely engaged in two major theatres of conflict: Afghanistan and Iraq. Consequently, concerns over expanded use of the military are diminished to a degree because the expanded use is not occurring during a time of general peace and stability, but instead, is occurring in response to a large attack on the domestic United States on September 11th, 2001, the ongoing threat of terrorist attacks against the domestic United States, and major conflicts overseas. Accordingly, the colonial concern over the military’s power in peacetime does not directly parallel the climate today. We do not mean to discard the colonial sentiment in this regard, in fact, we discuss it in order to embrace it. In embracing it, however, we recognize that the citizen concern over standing armies, at least to a degree, existed because of such armies’ presence in peacetime. As the United States is currently involved in conflicts, the colonial sentiment in this

104. Id. See U.S. Const. art. I, § 8 (“To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . “).
105. Schmidt, 48 St. Louis U. L.J. at 651.
107. Id.
108. Id. at 384.
109. See Schmidt, 48 St. Louis U. L.J. at 642-44 (concluding the United States legal status is peacetime because Congress did not declare war against terrorism or Iraq).
regard must be applied in today's context, thus, resulting in a slight curtailment of its persuasive authority today.

Through our statutory proposal we attempt to parallel the historical balance between preserving national security through the military and preserving the liberty of the people by curtailing the military's power over civilians. James Madison, expressing a federalist perspective, described this high-wire act:

A standing force . . . is . . . dangerous . . . at the same time that it may be a necessary . . . provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.\(^{110}\)

A modern day commentator reiterated those sentiments:

The military establishment is, of course, a necessary organ of government; but the reach of its power must be carefully limited lest the delicate balance between freedom and order be upset. The maintenance of the balance is made more difficult by the fact that while the military serves the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in a free society . . . .\(^{111}\)

Based upon the people's historical desire for civilian power to exceed military power, the Constitution provides a framework wherein civilian power not only trumps military power, but civilians control the military power.

The Constitution reflects the traditional and strong resistance of Americans to any military intrusion into civilian affairs.\(^{112}\) The people, through their elected representatives in the House and Senate, control most aspects of the military under our Constitution. Congress has the power to declare war, "raise and support Armies," "provide and maintain a Navy," "make Rules for the Government and Regulation of the land and naval Forces," issue "Letters of Marque and Repri-sal," make "rules concerning Capture on Land and Water," and appropriate funds for the military. The President, the elected head of

\(^{110}\) The Federalist No. 41 (James Madison).


\(^{112}\) Laird, 408 U.S. at 15.
the executive branch, is the Commander-in-Chief of the armed forces.113

Even with this constitutional structure allotting elected civilian control over the military, "the safeguards in the main body of the Constitution did not satisfy the people on their fear and concern of military dominance."114 One commentator indicated the following:

[The people] . . . were reluctant to ratify the Constitution without further assurances, and thus we find in the Bill of Rights Amendments 2 and 3, specifically authorizing a decentralized militia, guaranteeing the right of the people to keep and bear arms, and prohibiting the quartering of troops in any house in time of peace without the consent of the owner . . . Although there is undoubtedly room for argument based on the frequently conflicting sources of history, it is not unreasonable to believe that our Founders' determination to guarantee the preeminence of civil over military power was an important element that prompted adoption of the Constitutional Amendments we call the Bill of Rights.115

Accordingly, preventing the military from fighting crime is consistent with the republican impulse to maintain a separation between the military and domestic political involvement.116 Allowing the military to execute the laws, even if in limited situations, undercuts the republican value of distancing the military from involvement with civilian affairs.117 The armed forces, though extremely important, are subservient and restricted purely to military missions.118

To comply with the historical and constitutional desire for a military to provide security while not trampling on citizens' freedom, our statutory proposal attempts to balance these competing interests. We do so through a number of provisions. First, we must reiterate that our proposal is only an exception to the PCA; we wish to keep the PCA in full force and effect. Consequently, we do not desire a large-scale shift in law concerning the use of military in civilian spheres. Thus, our statutory proposal is consistent with the balance of national security and civil liberties that has characterized our nation since its founding. Second, our narrow exception maximizes military use in areas in which the people have always wanted and needed the military to act—emergency situations that are beyond the capabilities of state and lo-

114. Laird, 408 U.S. at 22 (Douglas, J., dissenting).
115. Id. at 15.
117. Id. at 485.
118. See Laird, 408 U.S. at 23 (Douglas, J., dissenting).
Our provisions that the military respond only to emergencies that civilian authorities cannot handle and only for a maximum of forty-eight hours – unless the situation requires continued civilian-authorized involvement – limit military action to quick and forceful response to attacks, the restoration of order, and then a swift departure from the picture. This approach adheres to the following belief:

[I]t is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires.120

The flip side to our statutory proposal, therefore, is a confirmation of the citizen distrust of the military's might. We believe that our limitations on when and for how long the military may act provide more than adequate safeguards that the military will not become overbearing and exalt excessive force on its own citizens that would trample the freedoms its initial use is intended to preserve.121 Specifically, we provide an affirmative statement in our proposal that the military is subordinate to the civilian authority. By placing this in our proposal's text, we seek to ensure that it will be followed. Leaving that statement as an explanatory reference, comment, or evidence of legislative intent would leave it as only persuasive evidence of our position, not authoritative evidence of it. Finally, by leaving in place the criminal sanctions for violations of the PCA, our proposal keeps and maintains the deterrent effect the PCA serves. With our exception providing clear parameters for military use, we expect any military use under it to comply with its terms or else be subject to indictment, prosecution, and eventual conviction and punishment.

V. CONCLUSION

The forgoing specification of our proposal for modifying the Posse Comitatus Act and our explanations for specific provisions of the proposed law set the stage for the legal changes that we believe are necessary to enhance our nation's capabilities to respond to the threat of foreign terrorism. The changes we propose would clarify when and how the United States armed forces can take action on American soil and thus reduce our vulnerability to military-style assaults that have

119. Kealy, 21 YALE L. & POL'y REV. at 430-31 (noting the military's role is to deter war, protect national security, and only used in extremely limited circumstances to enforce the law).
120. Laird, 408 U.S. at 20 (Douglas, J., dissenting).
121. See Philip B. Heymann, Civil Liberties and Human Rights in the Aftermath of September 11, 25 HARv. J.L. & PUB. POL'y 441, 451 (2002) (stating extraordinary powers are only available in extraordinary instances and those extraordinary circumstances are determined to exist by bodies not empowering themselves by this determination).
been a mainstay of Islamic terrorism in the Middle East and South Asia and more recently terrorism in Russia, Spain, and England. Changing federal law regarding the use of military assets here in the homeland, however, would be but the first step in increasing our preparedness for such attacks. In order to realize the promise that military action holds to quickly deal with foreign terrorist incidents here at home, political, military, and law enforcement leaders will need to establish policies and procedures for matters such as notification processes for mobilizing the military, lines of authority during crises, and the division of martial labor in instances when both military and law enforcement assets are present.

Klinger and Grossman touched briefly on such matters in their initial foray into this territory when they imagined a system in which designated civilian authorities could request military assistance and senior military leaders could authorize the same and in which the military would play a back-up role to civilian police who sought the arrest of foreign terrorists on our soil. But their ruminations scratch only the surface of the sorts of communication, logistical, and other issues that must be addressed before meaningful military response to acts (and planned acts) of conventional terrorism could occur. Given the gravity of the threat posed by military-style terrorist attacks, we believe military and civilian planners should devote substantial time and energy to considering the practical matters of military involvement. That way, should our elected officials modify the Posse Comitatus Act along the lines suggested herein, we will be well along the way towards improving our nation's capabilities to respond to foreign terrorism here on American soil.