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“If there is no military purpose, the activity cannot take place with the use of military personnel. In that case, there is no Posse Comitatus issue. There must be a military purpose involved.” Quote from [redacted]

The purpose of the briefing was to acquaint the staff with a general background of Posse Comitatus (PC) issues.

Briefing

The PC Act prohibits the use of the Army and Air Force in civilian law enforcement unless a there is a constitutional or statutory exception. The Act has been construed by courts and the Department of Defense as prohibiting the use of military personnel in the front line of law enforcement activities. This included the arrest, search and seizure, and pursuing and serving as informants. The Act does not address the services of the Navy or Marine Corps, however, these services were later restricted by PC when the Department of Defense (DoD) adopted DoD Directive 5525.5. According to this Directive, the Secretary of Defense (SECDEF) can waive the limitations cited in the directive, allowing for the Navy and Marines Corps to engage in activities that would otherwise be precluded under the PC Act.

As a result of the PC Act and in an effort to maintain the distinction between those activities the military can and cannot do regarding law enforcement, DoD has traditionally been reluctant in engaging in missions that are not within its overall mission, such a civil law enforcement. However, exceptions do occur. In the early 1980's, there was a push in the U.S. for DoD to become involved in the war against drugs. In that case, the USG and Congress believed the DoD should become more involved in activities that were crossing the line into law enforcement activities.

In 1981, Congress passed Chapter 18, Title 10. The intent of the statue was not to make exceptions to the PC Act but to identify situations whereby DoD could provide civil law enforcement type assistance. Chapter 18, Title 10 has been amended since 1981 and today covers many areas where the military can provide law enforcement type assistance, such as responding to chemical and biological incidents in the United States.

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The statute did not turn DoD into a civilian police force. Even with the exceptions within this statute, military personnel cannot engage in search, seizure, arrest and similar activities.

There is also case law on the PC Act and through this case law, there has developed a standard that the military applies when the PC Act is at issue. The standard used is that DoD will not violate the PC Act unless the DoD is engaged in activities that is "regulatory, prescriptive or compulsory" in nature. This standard is now in DoD Directive 5525.5 noted above.

The National Guard

The National Guard normally serves under Title 32, which places them under the authority of the Governor of the state in which units are located. The PC does not apply to the National Guard when they are acting under the authority of the Governor since the National Guard has not been federalized in those cases. However, National Guard troops can be federalized and in doing so, the PC Act may come into play. Logically, there is no advantage to federalizing NG units unless it is absolutely necessary.

Insurrection Statute: 10 USC 331-334

10 USC 331-334 has been a useful tool for engaging the military in law enforcement type activities while avoiding the problems encountered with the PC Act. It is essentially a waiver of the PC Act. The premise of the statute is to allow the use of the military in domestic activities and it has been relied upon to employ the military in a number of riot situations in the United States. The statute also allows the military to be used in the case of a quarantine.

The Military Mission

When DoD is asked to undergo a mission that is not strictly military in nature, the first issue to address is exactly what are the troops going to do during the mission? believes that there is little DoD can be asked to do that is not strictly military in nature and that cannot be done through application of a statute or through the inherent authorities of the President. For example, if the President responds, "this is a military mission," then that mission can be undertaken by the military. The President will then instruct the Secretary of Defense (Sec Def) to take action.

Recent Examples of the Assistance of the Military in Domestic Law Enforcement Activities

I. September 11, 2001 PC Issues

There were two issues that arose immediately after the September 11 attacks that involved the issue of the PC Act. They were the following:

- A. Airport security; and
- B. The use of the military along the border (north and south borders).

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A. Airport Security

After the attacks on 9/11, National Guard (NG) units were called upon to provide airport security. However, the use of the NG was possible because the President directed that the NG be paid with federal funds. The mission was the responsibility of the states and the relevant Governors directed the mission through their Article 32 authorities. The NG was used in this role under the authority of Title 32, Section 502F. Normally, a mission taken on by military personnel should have a direct nexus to a mission essential to the task for which the personnel are trained. However, that was clearly not true in this situation. As a result, this was not an ideal use of the military.

B. The Use of the Military Along the Border

Immediately after 9-11, the Immigration and Naturalization Service (INS), Customs and Border Control requested the use of 2000 military personnel to assist with security on the northern and southern borders of the United States. It was not clear what was the specific military related mission for this task since it was not a mission that was directly related to DoD's unique capabilities. However, since the request involved military personnel and therefore, the PC Act automatically became an issue. The PC issue was resolved through the application of an old opinion written by Justice Rhenquist when he was working at DOJ. The opinion states that if military personnel are detailed to a federal agency and the military relinquishes command and control of its forces when those forces are working with that agency, the PC Act does not apply.

The DoD decided that it would sign Memoranda of Understandings with INS, Customs and the Border Patrol providing for their use of DoD personnel for the specific purpose of border security and that the day-to-day command and control of the personnel would be under these agencies. However, DoD retained control of the military personnel for all other purposes. Additionally, the personnel could not engage in offensive operations. The use of military personnel for this purpose lasted from 9-12 months.

There were other options that could have been used to allow the military to take on the tasks requested by the three agencies, however, these other options were not chosen. There was no desire at the time to force a resolution of the issue to higher levels within the USG.

II. Support of the Military During the 2002 Washington DC Sniper Incidents

During the sniper incidents that occurred in the fall 2002 in the Washington DC Metropolitan Area, the military provided an air platform to local authorities that wanted to obtain video recordings of various locations in the area as part of the effort to apprehend those responsible for the shootings. Military personnel were authorized to fly the aircraft and provide technical expertise for downloading the information. The military personnel took their instructions from the FBI when the video equipment was turned on until the equipment was turned off. Otherwise, the military personnel remained under the authority of the DoD. In addition to the above, there was also a request made for B2 air support. DoD decided that this support was authorized under Chapter 18, Title 10.

Recent Issues

Overall, the PC Act does not limit the ability of the military to provide support to domestic agencies for law enforcement related activities. In 2003, DoD did a study on this issue and it was decided that there would be no problem of such support when directed by the President. There are also numerous legal options for allowing the military to engage in law enforcement related activities without the need to rely on the President's use of his inherent authorities. However, it should not be forgotten that there are solid policy concerns about the use of the military in law enforcement activities that underlie the serious attention paid to PC issues when they arise.

NORTHCOM

There were no significant legal impediments to the establishment of a NORTHCOM prior to 9-11. However, there were PC Act concerns that had to be addressed. The command prepares forces for domestic homeland defense missions. It cannot take part in immediate response to an attack unless authority to do so is communicated through normal command channels in the Department.

Other Relevant Statutes

1. The Economy Act – addresses the reimbursement by agencies to DoD for the use of DoD's resources.
2. 18 USC 831 – the Attorney General (AG) can request assistance from DoD to respond to nuclear incidents.
3. 10 USC 382 – the AG can request assistance from DoD to respond to chemical or biological incidents.
4. The Official Guest Act.