

Deployed in the U.S.A. The Creeping Militarization of the Home Front

by Gene Healy

Executive Summary

As its overwhelming victories in Afghanistan and Iraq have demonstrated, the U.S. military is the most effective fighting force in human history. It is so effective, in fact, that many government officials are now anxious for the military to assume a more active policing role here at home.

Deploying troops on the home front is very different from waging war abroad. Soldiers are trained to kill, whereas civilian peace officers are trained to respect constitutional rights and to use force only as a last resort. That fundamental distinction explains why Americans have long resisted the use of standing armies to keep the domestic peace.

Unfortunately, plans are afoot to change that time-honored policy. There have already been

temporary troop deployments in the airports and on the Canadian and Mexican borders and calls to make border militarization permanent. The Pentagon has also shown a disturbing interest in high-tech surveillance of American citizens. And key figures in the Bush administration and Congress have considered weakening the Posse Comitatus Act, the federal statute that limits the government's ability to use the military for domestic police work.

The historical record of military involvement in domestic affairs cautions against a more active military presence in the American homeland. If Congress weakens the legal barriers to using soldiers as cops, substantial collateral damage to civilian life and liberty will likely ensue.

On the home front, there are many tasks for which the military is ill suited and situations in which its deployment would be hazardous to both civilian life and civil liberties.

Introduction

As its overwhelming victories in Afghanistan and Iraq have demonstrated, the U.S. military is the most powerful fighting force in human history. In fact, the military has been so brilliantly effective abroad that it is not altogether surprising that many people think it can be equally effective fighting the war on terrorism here at home. Since the September 11, 2001, terrorist attacks, there has been a rising chorus of calls for deploying military personnel on the home front to fight terrorism. In the immediate aftermath of the attacks, troops were stationed in airports, and fighter jets patrolled the skies over New York and Washington. Later, in early 2002, the Pentagon deployed troops on the borders with Canada and Mexico. Even though that border deployment was temporary, it was a blatant violation of federal law—and a disturbing indication that the Bush administration is willing to disregard the law when it gets in the way. Meanwhile, the Department of Defense has shown an unhealthy interest in domestic surveillance, exploring technologies that could open the door to surveillance of American citizens on an unprecedented scale.

High-level officials in Congress and the Bush administration have proposed revising or rescinding the Posse Comitatus Act, the 125-year-old law that restricts the government's ability to use the U.S. military as a police force. Sen. John Warner (R-VA), chairman of the Senate Armed Services Committee, has said that the legal doctrine of *posse comitatus* (force of the county) may have had its day.¹ That view was echoed by Gen. Ralph E. Eberhart, who as head of the new Northern Command oversees all military forces within the United States. Eberhart has declared, "We should always be reviewing things like Posse Comitatus . . . if we think it ties our hands in protecting the American people."²

The notion that the military is the appropriate institution for fighting terrorism at home, as well as abroad, is ill-conceived. On the home front, there are many tasks for

which the military is ill suited and situations in which its deployment would be hazardous to both civilian life and civil liberties.

Americans have long distrusted the idea of soldiers as domestic police officers—a distrust that is reflected in both the Constitution and federal statutory law. Col. Patrick Finnegan, who heads the Department of Law for the U.S. Military Academy, has observed, "The military is designed and trained to defend our country by fighting and killing the enemy, usually faceless, with no individual rights. . . . The training, mission, and role of the military and police are so dissimilar that it is not surprising that we do not, and should not, want the military to act as a police force."³ Experience has shown that when America departs from that principle, the results can be disastrous.

It is unfortunate that the call to have soldiers assume a more active police role domestically has not generated more media and scholarly attention. Such a dramatic move away from the American tradition must be carefully studied. As this paper argues, Americans have good reason to distrust proposals to militarize the home front. First, the paper briefly reviews America's history of civil-military separation—and a series of tragic departures from that tradition. It then turns to America's experience in the aftermath of September 11 and evaluates proposals to break down the legal barriers to domestic use of the military in areas such as border control, domestic surveillance, and criminal investigations. The paper concludes that current law does not "tie the hands" of the government in responding appropriately to the terrorist threat, and, far from being weakened or repealed, the Posse Comitatus Act should be strengthened.

Historical and Legal Background

A strong preference for civilian law enforcement is deeply rooted in the American tradition. Historian Bernard Bailyn notes that the

generation that fought the American Revolution considered the use of soldiers to maintain law and order a grave threat to freedom: “[The colonists’] fear was not simply of armies, but of *standing armies*, a phrase that had distinctive connotations . . . the colonists universally agreed that ‘unhappy nations have lost that precious jewel *liberty* . . . [because] their necessities or indiscretion have permitted a standing army to be kept amongst them.’ There was, they knew, no ‘worse state of thralldom than a military power in any government, unchecked and uncontrolled by the civil power.’”⁴

That fear was reinforced by one of the epochal events of the Revolutionary period: the Boston Massacre. In March 1770 a civilian mob started to taunt British soldiers who had been sent to Boston to reinforce the local colonial government. Under threat from the crowd, the troops opened fire, wounding eight and killing five, including Crispus Attucks, a runaway slave who had been working as a seaman and day laborer.⁵ Later, Boston was placed under military rule, and the Intolerable Acts passed in 1774 in the wake of the Boston Tea Party provided for quartering of troops in private houses.

American hostility toward militarized law enforcement, born in republican political theory and stoked by the experiences of the Revolutionary period, found expression in the Declaration of Independence’s bill of particulars against King George III: “He has kept among us, in times of peace, Standing Armies, without the consent of our legislatures. He has affected to render the Military independent of and superior to the Civil power.”

Seven years after the Revolutionary War, America adopted a Constitution that authorized Congress to raise an army.⁶ So great was the fear that a standing army might be used to oppress the people, however, that the movement for a Bill of Rights included calls for safeguarding the right to keep and bear arms so as to ensure that an armed populace would be able to resist abuses of power. The Constitution authorizes the federal govern-

ment to suppress insurrections and restore order but identifies the militia, not the regular army, as the force to be used for such tasks.⁷ In fact, there is no explicit constitutional authority for use of the Army to suppress domestic violence.⁸

Later, following the struggles of the Reconstruction period, Congress passed the Posse Comitatus Act, which made it a criminal offense to use the Army to “execute the laws.” As one federal judge has written, the act expresses “the inherited antipathy of the American to the use of troops for civil purposes.”⁹

However, along with the American tradition of hostility toward domestic militarization has come a series of bloody departures from that tradition, both before and after the passage of the Posse Comitatus Act. Throughout American history, presidents have deployed troops against civilians, often with tragic results. Here are just a few of the abuses that have occurred when presidents have disregarded the bedrock principle that the military should not intervene in civilian affairs:

- In the years leading up to the Civil War, efforts to enforce the odious Fugitive Slave Laws often met with forceful resistance in the North. In response, the federal government repeatedly used federal troops to disperse abolitionist protestors and forcibly return escaped slaves to bondage. In 1851, for example, 300 armed federal deputies and soldiers led a 17-year-old escaped slave named Thomas Sims from a Boston courthouse to the Navy yard, where 250 more Army regulars waited to put him on a ship heading South.¹⁰
- In the late 19th century, the federal government repeatedly and illegally used troops to intervene in labor disputes. Particularly egregious was the Army’s suppression of the 1899 miners’ strike in Coeur d’Alene, Idaho. Army regulars engaged in house-to-house searches and assisted in more than a thousand arrests. Troops arrested every adult male in the area and jailed the men without

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charges for weeks, imposing martial law. After two years of military occupation, the union was destroyed.¹¹

- During World War I, the War Department quashed strikes and destroyed the International Workers of the World union. Military intelligence agents harassed and arrested union leaders. The Army suppressed strikes in Gary, Indiana; Butte, Montana; and Seattle, Washington, as well as occupying the copper mining regions of Arizona and Montana for three years. Historian Jerry Cooper notes that “unrestrained federal military intervention . . . substantially slowed unionization for more than a decade.”¹²
- Concerns about German saboteurs during World War I led to unrestrained domestic spying by U.S. Army intelligence operatives. Civilian spies for the Army were given free rein to gather information on potential subversives and were often empowered to make arrests as special police officers. The War Department relied heavily on a quasi-private volunteer organization called the American Protective League. The APL was composed of self-styled “patriots” who agreed to inform on their fellow citizens. At the War Department’s request, APL volunteers harassed and arrested opponents of the draft.¹³
- During the Vietnam War, National Guardsmen shot four student protesters to death at Kent State University. After four days of protests following President Richard Nixon’s announcement that American troops were being sent to Cambodia, the governor of Ohio called in National Guard units to restore order. The troops arrived on campus and ordered the crowd to disperse, advancing on the unarmed students with fixed bayonets. Some of the protesters responded by throwing rocks at the soldiers. Without firing a warning shot, 28 Guardsmen began firing into the crowd of demonstrators—at least 61 shots in 13 seconds—killing students

Allison Krause, Jeffrey Miller, Sandra Scheuer, and William Schroeder and wounding nine others, paralyzing one.¹⁴

- Military involvement in the 1993 standoff between federal police agencies and the Branch Davidian community in Waco, Texas, contributed to the worst disaster in law enforcement history—military-style attacks that left more than 80 civilians dead, including 27 children. First, U.S. Army Special Forces helped the Bureau of Alcohol, Tobacco and Firearms to rehearse its aggressive initial raid on the Davidian residence. Federal law enforcement officials used false allegations of drug trafficking by the Branch Davidians to obtain military training and National Guard helicopters. Second, U.S. Army Delta Force commanders advised Attorney General Janet Reno to end the 51-day standoff by launching a tank and chemical gas assault against the Branch Davidians’ residence.¹⁵

As those appalling incidents demonstrate, colonial fears about military law enforcement were well-grounded. The abuses of power and risks to civilians that come with using soldiers as cops caution against legal changes that encourage further military involvement in domestic security.

Posse Comitatus and the September 11 Attacks

The phrase *posse comitatus* refers to the sheriff’s common law power to call upon the male population of a county for assistance in enforcing the laws. Enacted by Congress in 1878, the Posse Comitatus Act forbids law enforcement officials to employ the U.S. military for that purpose.¹⁶ The act consists of a single sentence:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress,

willfully uses any part of the Army as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.¹⁷

Supporters of the act believed it merely affirmed principles that were already embodied in the Constitution. During the congressional debate in 1877, for example, Rep. Richard Townsend of Illinois said that “it was the real design of those who framed our Constitution that the Federal Army should never be used for any purpose but to repel invasion and to suppress insurrection when it became too formidable for the State to suppress it.”¹⁸

In practice, however, the Posse Comitatus Act has a number of limitations and exceptions that make it far from a blanket prohibition on domestic use of the military. First, the courts have held that the phrase “executing the laws” indicates hands-on policing: searching, arresting, and coercing citizens. Thus, the act does not prohibit the military from providing equipment and training to civilian authorities—even though such civil-military cooperation often works to inculcate a dangerous warrior ethos among police officers.¹⁹ Second, the act applies only to Army regulars and federalized National Guardsmen. If Guard units remain under the command of state governors, the act does not apply. Third, the act does not bar the use of federal troops even for hands-on policing, so long as Congress has passed a statutory “exception”—and there are statutory exceptions in place that permit the military to operate domestically where a terrorist attack with nuclear, biological, or chemical weapons threatens imminent loss of human life.²⁰ Fourth, the courts have long recognized a “military purpose” exception to the act. When the Army is used domestically to achieve a military purpose, it does not violate the act even if the action incidentally aids civilian law enforcement.²¹ Thus, if a latter-day Pancho Villa were to invade the United States, the Army could stop him without vio-

lating the Posse Comitatus Act. Finally, even though the act has clearly been violated any number of times since its passage, the Department of Justice has never prosecuted anyone for violating the act.

America’s experience in the weeks following the September 11 attacks makes it abundantly clear that the Posse Comitatus Act does not “tie the hands” of the military in responding to terrorism. For good or for ill, U.S. armed forces were heavily involved in security operations on the home front. In February 2002, for example, as Black Hawk helicopters and thousands of troops patrolled Salt Lake City for the Winter Olympics, Secretary of Defense Donald Rumsfeld observed: “It’s interesting to note that the largest theatre for the United States is not Afghanistan today. It is in fact Salt Lake City and the environs. We have more people in the area around Salt Lake City for the Olympics than we do in Afghanistan.”²²

Shortly after September 11, the Air Force was given the authority to shoot down civilian airliners in the event of a hijacking.²³ No one suggested that such activity violated the Posse Comitatus Act, and rightly so. The act’s prescription against using the military to “execute the laws” does not bar the use of military forces to ward off a military-style attack. If Al Qaeda somehow procured a squadron of Soviet MIGs and attempted a kamikaze run at the White House, no one would suggest deploying police helicopters to “arrest” them. By shooting the planes down, the Air Force would not be violating federal law—it would be doing its job. The fact that Al Qaeda has decided to turn civilian airliners into missiles doesn’t change the legal analysis. An Air Force pilot ordered to down a hijacked plane would not be trying to enforce the District of Columbia’s laws against homicide or federal laws against destruction of federal property—he would be defending the capital against military attack.²⁴

The Posse Comitatus Act did not prohibit the deployment of some 7,000 National Guardsmen at the nation’s airports in the aftermath of the 9/11 attacks. Those troops were operating under the command of the

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state governors and therefore were not covered by the act.²⁵ Mindful of the possible danger to civilians, in most cases the governors opted to keep the troops unarmed (as one Pennsylvania Guard leader put it, “We don’t want any John Waynes”).²⁶

Of course, whether the use of the Guardsmen was an intelligent deployment of military personnel is another question entirely. Joseph McNamara, former police chief of Kansas City, Missouri, called the Guardsmen’s presence “a pretense of doing something.” He argued that the troops provided no real security benefit, and leaving them in place for months after the attacks only made people nervous and discouraged them from flying.²⁷

Indeed, use of the Guardsmen was emblematic of an overly simplistic approach to domestic security that sees the military as the answer to almost every conceivable terror threat. Florida authorities, for instance, deployed a tank outside Miami International Airport over the Thanksgiving holiday in 2001, as if the next terror attack would come in the form of an Al Qaeda mechanized column, rather than a shoe bomb or a smuggled boxcutter.²⁸ But what many public officials fail to understand is that the military is a blunt instrument: effective for destroying enemy troops en masse but ill suited for the fight on the home front, which requires subtler investigative and preventive skills.

In the panicked days following the terror attacks, many public officials sought military help in areas where it would have been entirely inappropriate. One of the most ludicrous ideas came from Transportation Secretary Norman Mineta, who urged that Delta Force commandos be placed aboard civilian airliners to guard against hijackers. Delta Force soldiers ought to be hunting Al Qaeda operatives overseas, not riding domestic flights. Deputy Secretary of Defense Paul Wolfowitz was the voice of reason in that case. Providing security on board civilian aircraft “is fundamentally a civil function,” noted Wolfowitz, “It doesn’t require all the exotic training that Delta Force members have. It requires law enforcement training that our people don’t have.”²⁹

Yet Wolfowitz and other administration officials have called for rethinking the Posse Comitatus Act.³⁰ In July 2002 the White House indicated its openness to a new role for the military in providing domestic security; its *National Strategy for Homeland Security* called for a “thorough review of the laws permitting the military to act within the United States.”³¹ The views expressed by Gen. Eberhart, the newly appointed commander of all U.S. armed forces within North America, are particularly troubling. In October 2002 Eberhart became head of the new Northern Command, responsible for homeland defense—the first time since America’s founding that the command of all military personnel in North America has been centralized under a single officer.³² So long as the military confines itself to its traditional role, the new homeland command is, in itself, no cause for concern. But Gen. Eberhart has repeatedly contemplated a broader role for the military. In September 2002, for example, Eberhart said, “My view has been that Posse Comitatus will constantly be under review as we mature this command.”³³ He did not elaborate on what that “maturation” process will entail.

Creeping Militarization

Gen. Eberhart’s openness to domestic military intervention may be a sign of things to come. Already, some troubling new measures that would expand the domestic role of the military are being explored and tested.

Militarizing the Borders

The Pentagon is under increasing pressure from Congress to militarize America’s borders with Canada and Mexico. That pressure led to a six-month deployment of some 1,600 federalized National Guardsmen that ended in August 2002, a deployment carried out in violation of the Posse Comitatus Act. Though most of the soldiers were unarmed, the tasks they undertook involved regulation and compulsion of citizens and thus constituted active

police work under the Posse Comitatus Act. The Immigration and Naturalization Service's own press release announcing the use of the Guardsmen stated that soldiers assigned to the border would perform "cargo inspections, traffic management, and pedestrian control."³⁴ Because the soldiers were operating under federal command and performing policing tasks, the deployment was illegal.³⁵

Although the troops were removed after six months, the pressure for militarization has not abated. Politicians like Rep. Tom Tancredo (R-CO) and Sen. Trent Lott (R-MS) and conservative pundits like Bill O'Reilly and Michelle Malkin have called for armed soldiers to enforce U.S. immigration law. In her new book, *Invasion*, Malkin writes that "at the northern border with Canada . . . every rubber orange cone and measly 'No Entry' sign should immediately be replaced with an armed National Guardsman." Malkin suggests that something in the neighborhood of 100,000 troops would be appropriate.³⁶

The problem with such proposals is that the same training that makes soldiers outstanding warriors makes them extremely dangerous as police officers. Lawrence Korb, former assistant secretary of defense in the Reagan administration, put it succinctly: the military "is trained to vaporize, not Mirandize."³⁷ No one knows that better than the military establishment, which is why the Pentagon has steadfastly resisted calls to station troops on our borders, most recently in the spring of 2002 when members of Congress pushed for border militarization. Pentagon officials raised the possibility of an "unlawful and potentially lethal use of force incident" if the troops were armed. Ultimately, some 1,600 National Guardsmen, most of them unarmed, were placed on the Mexican and Canadian borders for a six-month mission. A Pentagon official told United Press International: "We do not like to do these things. We do them as a matter of last resort. That is why we entered into this undertaking with a specific end date and a specific requirement."³⁸

Military officials are right to worry. U.S. troops have been placed on the borders in the

past, as part of the quixotic fight against drug smuggling. Even though those deployments have been limited to surveillance and support roles, they've led to tragedy in the past. In 1997, for example, a Marine anti-drug patrol shot and killed an 18-year-old high school student named Esequiel Hernandez, who was carrying a .22-caliber rifle while tending goats near his family's farm near the Mexican border. Hernandez allegedly fired two shots in the general direction of the Marines, who were hidden in the brush heavily camouflaged, with blackened faces and bodies covered with burlap and leaves. The Marines did not return fire instantly. Nor did they identify themselves, order Hernandez to put down the rifle, or try to defuse the situation. Instead, they tracked Hernandez silently for 20 minutes. When Hernandez raised his rifle again, a Marine shot him. Hernandez bled to death without receiving first aid.³⁹ An internal Pentagon investigation noted that the soldiers involved in the shooting were ill prepared for contact with civilians, as their military training instilled "an aggressive spirit while teaching basic combat skills."⁴⁰ That assessment was echoed by a senior Federal Bureau of Investigation agent involved with the case, who said: "The Marines perceived a target-practicing shot as a threat to their safety. . . . From that point, their training and instincts took over to neutralize a threat."⁴¹ The Justice Department ultimately paid \$1.9 million to the Hernandez family to settle a wrongful death lawsuit.⁴²

The new proposals to use troops for border patrol work would greatly multiply the dangers revealed by the Hernandez incident. Unlike the soldiers deployed for the drug war, the troops on border patrol duty would be given arrest authority and allowed to directly engage civilians. And the danger to civilians would not be limited to the border itself. Federal law allows the Border Patrol to set up checkpoints as far as 100 miles inland from the border or shoreline.⁴³

It is true that U.S. soldiers have successfully guarded other countries' borders for years. But patrolling the demilitarized zone

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on the Korean peninsula is a far cry from enforcing U.S. immigration laws in Texas or Maine. The American borders with Canada and Mexico, two peaceful neighbors with whom Americans trade heavily, are rife with ambiguous situations and opportunities for conflict. Having soldiers enforce the immigration laws is not wise, it is not necessary, and it is not legal. If more immigration and border enforcement personnel are needed, they should be hired. Border security can be provided without the dangerous innovation of militarized borders.

The Threat of Military Surveillance

Although the Department of Defense deserves credit for resisting calls to place troops on the borders, its research arm has shown a disturbing interest in domestic surveillance. As has been widely reported, the Pentagon's Office of Information Awareness, part of DoD's Defense Advanced Research Projects Agency, has been planning to develop a powerful data-mining system called Total Information Awareness.⁴⁴ Such a system could potentially allow the government to track the routine activities of Americans, from travel plans to credit card transactions to medical records. In response to public outcry, Congress shut down the Office of Information Awareness in September 2003.⁴⁵ But work on TIA-style technology continues below the radar screen.⁴⁶ Moreover, the JetBlue scandal, in which an airline shared private passenger data with a defense contractor in response to an "exceptional request from the Department of Defense," shows that DoD retains its interest in developing data-mining technology to sift through personal information on civilians, whatever the fate of TIA.⁴⁷ In any event, it's worth examining the TIA proposal to understand what Americans would be risking if they permitted military surveillance with 21st-century technology.

As Iran-contra figure John Poindexter, who oversaw research for TIA, envisioned it, TIA would "break down the stovepipes" that separate commercial and government databases, allowing government access to records of citi-

zens' credit card purchases, travel itineraries, telephone calling records, e-mail, medical histories, and financial information. As recently as January 2003, DARPA's website featured a TIA schematic that envisioned use of "Transactional Data" including "Financial, Education, Travel, Medical, Veterinary, Country Entry, Place/Event Entry, Transportation, Housing . . . [and] Communications" data, as well as "Authentication Biometric Data," including "Face, Finger Prints, Gait, [and] Iris" identifiers. Interestingly, that schematic, demonstrating DARPA's desire to access private databases, was removed from the DARPA website after news spread about the program and the controversial implications became widely known. In any event, the idea is to develop data-mining technology that can sift through these databases, many of which are currently in private hands, and identify patterns of terrorist activity.⁴⁸ Once developed, the system would give the government the power to generate a comprehensive data profile on any U.S. citizen. Though some DARPA officials envisioned turning the system over to civilian law enforcement, it's clear that military officials were keenly interested in the technology. In November 2002 Maj. Gen. Dale Meyerrose, chief information-technology officer for NORTHCOM, said: "I've been to [visit] Admiral Poindexter. He and I are talking about TIA."⁴⁹

DARPA officials maintained that TIA would be designed so as to respect constitutional guarantees of privacy and shield law-abiding citizens from the Pentagon's all-seeing eye. But if the history of military surveillance of civilians is any guide, accepting that assurance would amount to the triumph of hope over experience. After all, the Pentagon's TIA project would not be the first time the U.S. military has amassed private data on citizens, and judging by its past forays into domestic surveillance, that authority would almost certainly be abused.

For example, during World War I, U.S. Army intelligence operatives were given carte blanche to gather information on potential subversives and were often empowered to make arrests as special police officers. Occasionally, they carried false identification

as employees of public utilities to allow them, as the chief intelligence officer for the Western Department put it, “to enter offices or residences of suspects gracefully, and thereby obtain data.”⁵⁰ In her book, *Army Surveillance in America*, historian Joan M. Jensen notes, “What began as a system to protect the government from enemy agents became a vast surveillance system to watch civilians who violated no law but who objected to wartime policies or to the war itself.”⁵¹

The War Department relied heavily on a quasi-private volunteer organization, the American Protective League, which was composed of self-styled “patriots” who agreed to inform on their fellow citizens. America’s experience with the APL makes clear that civil libertarian concerns about Operation TIPS, the Justice Department’s plan to enlist a legion of citizen-informants in the war on terror, are, if anything, understated.⁵² APL volunteers carried identification cards and tin badges and responded to requests from the War Department for investigation of civilians. At the War Department’s request, APL volunteers harassed labor organizers; intimidated and arrested opponents of the draft; and spied on Mexican-American leaders in Los Angeles, pacifist groups, and anti-war religious sects. Through it all, the Army caught exactly one German spy.⁵³ By the end of the war, the APL had close to a quarter of a million members and had carried out some 6 million investigations.⁵⁴

The Army’s domestic surveillance activities were substantially curtailed after the end of World War I, but throughout the 20th century, in periods of domestic unrest and foreign conflict, Army surveillance ratcheted up again, most notably in the 1960s. During that tumultuous decade, President Lyndon B. Johnson repeatedly called on federal troops to quell riots and restore order. To better perform those domestic missions, Army intelligence operatives began compiling thousands of dossiers on citizens, many of whom had committed no offense beyond exercising their constitutional right to protest government policy. Reviewing the

files, the Senate Judiciary Committee noted that “comments about the financial affairs, sex lives and psychiatric histories of persons unaffiliated with the armed forces appear throughout the various records systems.”⁵⁵ In a case involving the program, Justice William O. Douglas called army surveillance “a cancer in our body politic.”⁵⁶

With TIA, DARPA sought to bring Pentagon surveillance into the 21st century, replacing the low-tech, labor-intensive system relied on in the past with high-tech data-mining techniques. DARPA’s website states that the Department of Defense is committed to executing TIA “in a manner that protects privacy and civil liberties.”⁵⁷ But given the military’s legacy of privacy abuses, such vague assurances are cold comfort. And even if the military would be barred from access to the TIA system, the potential for abuse inherent in that system counsels against its development. Once the system is developed, there will be no guarantee that privacy protections can be maintained, or that it will be limited to tracking terrorist suspects.⁵⁸ Thus far, Congress has prevented the development of this dangerous “all-seeing eye.” But given the invasive potential of the technology and the sordid history of military surveillance, this is an area where vigilance is imperative.

Gumshoes and Grunts: Blurring the Lines

In addition to the dangers posed by domestic surveillance and militarization of the borders, the war on terrorism threatens to blur the lines between civilian law enforcement and the military in two ways: first, by encouraging police paramilitarism and, second, by inviting military participation in the investigation of high-profile crimes that may not have any genuine connection to terrorism.

Increasingly, American police departments are coming to view their mission in military terms—a tendency encouraged by federal policies that allow the transfer of surplus military equipment to local cops and policies that promote training of law enforcement personnel by the military.⁵⁹ The warrior

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mentality encouraged by civil-military cooperation has repeatedly resulted in collateral damage to innocents killed in violent no-knock police raids. To take one recent example, in May 2003 a raid in New York City resulted in the death of Alberta Spruill, a 57-year-old church volunteer. She died of a massive coronary after cops in riot gear threw a flash-bang grenade into her small apartment. No drugs were ever found.⁶⁰

The drug war has been the driving force behind the growth of police paramilitarism over the last two decades. But the far more serious threat of terrorism in the post-9/11 environment threatens to accelerate this trend. New York City police commissioner Raymond Kelly has hired ex-military professionals, including a retired Marine Corps general as deputy commissioner for counterterrorism, to reshape the department's approach to fighting terrorism. Says Kelly: "We're at war, and we have to be able to defend ourselves in a variety of ways. . . . The military experience is really perfect for what we have to do."⁶¹ Kelly has created "Hercules Teams"—elite paramilitary units armed with 9-millimeter submachine guns and often accompanied by air or sea support—that mount public shows of force at potential terrorist targets like Times Square or the New York Stock Exchange.⁶² The NYPD has also considered placing .50-caliber machine guns on police helicopters.⁶³

The terrorist threat to New York City is undeniably real, and extraordinary measures that would be inappropriate elsewhere may be justified in a city that has been targeted repeatedly by Al Qaeda. But if this is so, NYPD officials must take steps to ensure that the department as a whole is not infected with a "warrior cops" mentality. After all, the paramilitary mindset that NYPD leadership has condoned among anti-crime units has contributed to tragedy in the past. The NYPD's elite Street Crimes Unit—members of which fired 41 shots at an unarmed West African immigrant named Amadou Diallo in 1999—had a distinctly militaristic cast, with officers referring to themselves as "commandos."⁶⁴

Fortunately, some police departments are resisting the trend toward militarized tactics. Chief Kenneth Holding of Trenton, Florida, gave up his department's military-issue M-16s, saying, "I don't think terrorists are likely to visit here."⁶⁵ But with the warrior élan that military hardware brings and with federally promoted deep discounts that can have M-16s going to local police departments for less than \$5, it is not realistic to expect many police officials to be as conscientious as Chief Holding.

In addition to providing further incentives for police paramilitarism, the war on terrorism may increase direct military involvement in the investigation of high-profile crimes. In the heightened threat environment of the post-September 11 world, there is a real danger that the military will be called in for any high-profile incident that has any plausible connection to terrorism. And once that precedent is established, military involvement could expand to ordinary criminal investigations. After all, terrorists have been connected to mundane criminal activity, such as cigarette smuggling.⁶⁶

During the month-long hunt for the Washington, DC, area sniper, Secretary of Defense Donald Rumsfeld approved the use of Army RC-7 surveillance aircraft to help find the killer. The low-flying planes, crammed with \$17 million worth of infrared sensors and other surveillance technologies, are typically used for tasks like monitoring troop movements around the demilitarized zone on the Korean peninsula. Federal officials argued that the RC-7 could help to pinpoint the sniper's location.⁶⁷ At the time, however, constitutional scholar and criminal justice expert Stephen Halbrook predicted that when the sniper was eventually caught, it would not be through use of high-tech military hardware but through old-fashioned police work.⁶⁸ Halbrook was right. In the end, the killers' greed, a credit card number, a fingerprint, ballistics work, and a witness identification of the car at a rest stop in Maryland led to the apprehension of John Allen Muhammad and Lee Boyd Malvo.

Is it legal and appropriate for police officials to use the military to help solve a domestic murder spree with no solid connection to international terrorism? First, it should be noted that use of the Army planes did not violate the Posse Comitatus Act. If the Army had deployed Delta Force snipers on the ground to hunt Muhammad and Malvo, that would have been a clear violation of the act. But, as noted above, the courts define “executing the laws” as arresting, shooting, searching, and coercing citizens; the courts have not held that provision of advice or equipment constitutes execution of the laws under the Posse Comitatus Act. Thus, the act is no barrier to the Army’s provision of surveillance equipment to local authorities.⁶⁹

However, that the law was not broken does not mean that Pentagon involvement in the sniper hunt is no cause for concern. The eagerness of the civilian authorities to seek military help in that case suggests that America will likely see more military involvement in high-profile investigations in the future. As then-representative Bob Barr (R-GA) noted: “If you use this as a precedent, where do you then draw the line? The next time you have a sniper, do you bring the military in after two deaths?”⁷⁰ And even where the military’s role is limited to advice, training, and provision of equipment, the erosion of the civil-military line is troubling. After all, to the best of our knowledge, Army personnel at Waco limited themselves to provision of equipment and advice. Even that limited involvement contributed to the greatest disaster in U.S. law enforcement history.

Of late, local officials have been calling in federal law enforcement agencies on high-profile local incidents—even if the incident has no plausible connection to a federal interest. For instance, half a dozen federal agencies participated in the investigation of the tragic Rhode Island nightclub fire at a Great White Concert in February 2003.⁷¹ Federal intervention is worrisome enough; calling in Army Special Forces will be even worse.

Increasingly, public officials are coming to view militarization of law enforcement, not as a last resort in situations in which civil order breaks down entirely, but as an option that can be invoked whenever public safety is threatened. In the middle of the sniper ordeal, Maryland governor Parris Glendening announced that he was considering using the National Guard to provide security at polling places on Election Day.⁷² Consider the ominous image of armed soldiers surrounding American polling places. That is an image one would normally associate with a banana republic, not a free, democratic one.

Policymakers Should Look before They Leap

Before policymakers embrace proposals that will radically restructure the role of the American military, the dangerous implications of such a move must be carefully considered. Those dangers are not limited to collateral damage to civilians from combat-trained soldiers; they include threats to our open, participatory, republican institutions.

Will There Be Accountability for Accidents, Misconduct, Brutality?

“The blue wall of silence” is the popular term for a pattern of collusion and coverup that can often be found among police officers seeking to shield lawless violence and corruption in the ranks. It denotes “an unwritten rule and custom that police will not testify against a fellow officer and that police are expected to help in any cover-up of illegal action.”⁷³ The blue wall of silence frustrates citizens and elected officials who are investigating possible abuses of power. Civilian authorities have developed institutions, such as internal affairs boards, that are designed to overcome that wall, but those institutions work only imperfectly, and cover-ups persist.⁷⁴

However much the code of silence obstructs the search for truth in cases of police abuse or negligence, the problem is likely to be far worse if policymakers expand

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and normalize the use of military policing. People trying to ascertain exactly what happened when citizens are killed or seriously injured by soldiers engaged in police actions on the home front are likely to run into a “green wall of silence” that will be even more impenetrable than the culture of secrecy in domestic police agencies. The prospect of lawless and unaccountable military units patrolling America should concern people across the political spectrum.

Consider, for example, the military’s response to the previously mentioned Esequiel Hernandez incident, in which an American high school student was killed by a Marine Corps anti-drug patrol. The Pentagon and other federal agencies repeatedly stonewalled the local civilian investigators, according to Rep. Lamar Smith (R-TX), who conducted a congressional oversight inquiry into the circumstances surrounding the slaying. Two days after the incident, the soldiers involved in the shooting were abruptly transferred from the Texas border to Camp Pendleton, California, which obviously hampered the investigation of the incident. Rep. Smith’s report notes that “the Marines were treated much differently from most potential suspects in homicide cases, and as a result they benefited from ample opportunities to coordinate and memorize their stories before being subjected to professional law enforcement interrogation.” Moreover,

During their criminal investigation, the Texas Rangers and District Attorney Valadez found it difficult to obtain necessary information, documents and testimony from the Marines, JTF-6 [Joint Task Force Six, the multiservice military command responsible for counterdrug operations within the United States] and the Border Patrol. The federal agencies failed to provide evidence in response to simple requests, so the District Attorney served subpoenas. The Defense Department responded to those subpoenas by asserting federal immunity.⁷⁵

Rep. Smith’s investigation concluded that the Defense Department, along with the Justice Department, operated so as to “obstruct and impede state criminal law enforcement in the Hernandez case.”⁷⁶

The Pentagon and federal agencies also evaded scrutiny when wrongful death lawsuits were filed in the aftermath of the Waco incident. Lawyers for the victims’ families, seeking to determine what role Delta Force soldiers played at Waco, were repeatedly rebuffed with assertions of “national security.” For example, when the lawyers sought the names of the soldiers so that they could be interviewed, the government’s reply was that only written questions could be submitted and the lawyers would eventually receive anonymous answers from military personnel involved in the incident.⁷⁷ Although three Delta operatives were eventually questioned face to face, the Pentagon refused to declassify 5,000 pages of documents the plaintiffs’ lawyers believed were instrumental to resolving whether military personnel acted illegally during the standoff. “Public interest demands the public be informed of the military activities undertaken against U.S. citizens on U.S. soil,” attorney Jim Brannon wrote to then-secretary of defense William Cohen in protest.⁷⁸

Should use of soldiers to fight the domestic war on terror be expanded, the compelling public interest in government transparency will run up against a powerful legal barrier preventing disclosure of the facts when citizens are killed or injured. That barrier is the so-called state secrets privilege, which allows federal agencies to shield information from civil or criminal courts when “compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”⁷⁹ Courts accord “utmost deference” to executive assertions of privilege on national security grounds.⁸⁰ The judge will generally not examine the documents sought, to ensure that they in fact contain military secrets, lest too much judicial inquiry into the claim of privilege “force disclosure of the thing the privilege was meant

to protect.”⁸¹ If through a narrow review, a court satisfies itself that military secrets are at issue, “even the most compelling necessity [on the part of the litigant] cannot overcome the claim of privilege.”⁸²

There is no parallel claim of “public safety privilege” or the like protecting police methods and tactics from disclosure in cases involving civilian police personnel. That helps to keep the police accountable to the people. In contrast, the more policymakers turn to, and rely on, military personnel to fight crime domestically, the harder it will be for innocent injured parties to attain redress in the courts. Judicial review of the state secrets privilege is so deferential that courts may uphold it even where it is invoked, not to protect genuine national security interests, but to shield wrongdoers from civil or criminal liability.

There is perhaps no better illustration of this than *United States v. Reynolds*, the landmark 1953 Supreme Court case that established the state secrets doctrine. That case arose out of the crash of a B-29 aircraft in Waycross, Georgia, on a flight to test electronic navigation equipment. Three widows of civilian observers killed in the crash brought a wrongful death suit against the federal government and sought the release of the Air Force’s accident report. The secretary of the Air Force asserted that the report was privileged for “national security” reasons, and the Supreme Court upheld the claim of privilege.

It now appears that the Air Force misled the Supreme Court. Five decades later, the report had been declassified, and the daughter of one of the victims ordered a copy. According to the accident report, “[T]he aircraft is not considered to have been safe for flight,” because, in violation of Air Force directives, a protective shield designed to prevent engine overheating had not been installed on the plane. No genuine military secret was involved—rather, what the Air Force sought to shield was evidence of its own negligence.⁸³ Note the double abuse: First, the plane was not properly equipped for safe flight and people were killed as a result. Second, the Air Force evaded accountability by defrauding the

civilian court and litigants with false claims about “national security.”⁸⁴

If broadscale, hands-on policing by the military is adopted and citizens are injured or killed, there is no guarantee that the state secrets privilege will not be abused again. Those who seek to bring the military into domestic law enforcement will increase the danger to civilians while at the same time making it difficult or impossible for the public to find out the truth about incidents of “collateral damage.”

Covert Operations on the Home Front?

Americans have traditionally been uneasy about greater involvement of the military in domestic affairs because military culture mixes uneasily with open, participatory, republican institutions. During the Cold War, for example, military leaders occasionally showed appalling judgment about the kinds of clandestine activities that should be carried out domestically in the name of national security. What follows are two cautionary tales from that era.

Between 1949 and 1969 the military conducted open-air tests of biological agents 80 times, often using American civilians as guinea pigs.⁸⁵ The Army used biological agents that were thought to be harmless, dispersing *Serratia* bacteria on Key West and Panama City, Florida, and other areas during the 1950s. In at least one case, however, the experiment appears not to have been harmless. In 1950 the Navy staged a mock biological attack on San Francisco, spraying *Serratia* and *Bacillus* microbes from hoses on an off-shore vessel. Soon, 11 men and women checked into Stanford hospital with a rare form of pneumonia caused by exposure to *Serratia marcescens*. One of the men, a retired pipefitter named Edward J. Nevin, died three weeks later.⁸⁶ Three decades later, when information about the experiments was revealed, Nevin’s surviving family members sued the federal government. A federal appellate court rebuffed the claimants with the following words: “[O]ur review would likely impair the effective administration of government pro-

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grams believed to be vital to the defense of the United States at the time that they are conducted.”⁸⁷

One of the witnesses at the Nevin trial was retired general William Creasy, former commander of the testing program. Creasy was unapologetic about his actions, noting that biological agents are “designed to work against people. You have to test them in the kind of place where people live and work.” And in such cases, he argued, it would be “completely impossible to conduct such a test trying to obtain informed consent. I could only conduct such a test without informing the citizens it was being conducted.”⁸⁸

In another shocking episode, top military officials developed a plan to foment a war with Cuba by staging mock terrorist attacks and shifting the blame to Fidel Castro. In 1962 Army general Lyman L. Lemnitzer, chairman of the Joint Chiefs of Staff, presented Robert McNamara, President Kennedy’s defense secretary, with a memo detailing Operation Northwoods, a plan to covertly engineer various “pretexts which would provide justification for U.S. military intervention in Cuba.”⁸⁹ Those pretexts would include “a ‘Remember the Maine’ incident”—staging the explosion and sinking of a U.S. ship in Guantanamo Bay. Though no U.S. personnel were to be killed in the incident, phony casualty lists would be supplied, which “in U.S. newspapers would cause a helpful wave of national indignation.”⁹⁰ The memo also contemplates faking a Cuban attack on “a chartered civil airliner enroute from the United States to Jamaica, Guatemala, Panama or Venezuela,” and developing a fake

Communist Cuban terror campaign in the Miami area, in other Florida cities, and even in Washington. The terror campaign could be pointed at Cuban refugees seeking haven in the United States. We could sink a boatload of Cubans enroute to Florida (real or simulated). We could foster attempts on lives of Cuban refugees in the United States even to the point of wounding

in instances to be widely publicized. Exploding a few plastic bombs in carefully chosen spots, the arrest of Cuban agents and the release of prepared documents substantiating Cuban involvement also would be helpful in projecting the idea of an irresponsible [Cuban] government.”⁹¹

The plan, which was unanimously approved by the Joint Chiefs of Staff, was apparently vetoed by Defense Secretary McNamara.⁹² Still, it is frightening that military authorities at the highest level felt comfortable proposing such a plan to the civilian leadership.

These episodes are not revived to impugn the integrity of the men and women who serve in America’s armed forces or the integrity of their leaders in general. The point is to recall that, on occasion, U.S. military leaders’ zeal for victory has inspired actions that are profoundly dangerous to free, democratic institutions. That sort of zeal is a serious danger—and never more so than when the military is engaged, as it is now, in a justified struggle against an evil foe.

Necessary Reforms

There is ample reason, then, to be cautious about proposals for further domestic military involvement. The burden ought to lie on those who seek to cast aside the time-honored principle that day-to-day protection of civilians on the home front is a civilian responsibility. Thus far, the proponents of such a move have not come close to discharging that burden. The Posse Comitatus Act does not hamstring the government in fighting the war on Al Qaeda. The act leaves ample room for any appropriate use of the military to aid civilian authorities in protecting Americans from violence. The real problem is not that the Posse Comitatus Act is too restrictive but that it is not restrictive enough. The current law allows far too much military involvement in law enforcement, in areas where it is neither neces-

sary or appropriate. Congress should close those loopholes.

Demilitarize the War on Drugs

For more than 20 years the federal government has steadily ramped up the militarization of the war on drugs. In 1986 President Reagan signed a National Security Decision Directive that declared the drug trade a “national security threat.”⁹³ Congress, in a series of statutory revisions passed in the 1980s, made the war on drugs a bona fide war, with the Pentagon a central player in the struggle.⁹⁴ Though those statutory provisions are commonly referred to as the “drug war exceptions” to the Posse Comitatus Act, they do not grant soldiers arrest authority. However, the provisions do encourage the Pentagon’s involvement in surveillance and drug interdiction near the national borders.

In some cases, the loopholes also promote direct involvement by soldiers in law enforcement. In 1990 Congress authorized the secretary of defense to fund National Guard involvement in state-level drug war operations.⁹⁵ That funding has encouraged the use of uniformed National Guardsmen in state drug interdiction operations, which range from leveling crack houses to lecturing high school students about the dangers of drug abuse.⁹⁶ One state-level anti-drug program, California’s Campaign against Marijuana Planting, has long been a source of friction between rural residents and law enforcement. Under CAMP, National Guard helicopters buzz California farms and Guardsmen and police officers invade private property looking for marijuana plants during growing season. As one irate Californian described CAMP: “It’s like a Boy Scout outing for law enforcement. It is a kick. . . . They get up here, and everyone in the countryside is a criminal.”⁹⁷

The Department of Defense spent about a billion dollars fighting the drug war during fiscal year 2002. But that may be about to change. With the shift in priorities after September 11, the Pentagon is prepared to scale back its role in drug interdiction. “The top priorities are now to defend the home-

land and to win the war on terrorism,” said Andre Hollis, head of the Pentagon’s drug war efforts.⁹⁸ That is good news. Secretary of Defense Donald Rumsfeld has referred to military efforts to stop drug trafficking as “nonsense.”⁹⁹ In his confirmation hearing in January 2001, Rumsfeld noted that “the drug problem in the United States is overwhelmingly a demand problem and to the extent that demand is there and it is powerful, it is going to find ways to get drugs in this country.”¹⁰⁰ Former defense secretary Caspar Weinberger has been equally blunt, arguing that military involvement in the war on drugs has been “detrimental to military readiness and an inappropriate use of the democratic system.”¹⁰¹

Weinberger’s assessment is accurate. The militarization of the drug war has led to abuses of power at home and abroad. Abroad, U.S. Army involvement in the fight against drugs has destabilized Latin American governments and cost scores of innocent lives, including those of Americans. In April 2001 in Peru, for example, a U.S. surveillance plane identified a small Cessna airplane as a possible drug-trafficking vehicle. The Peruvian air force sent up an A-37B Dragonfly attack plane, which fired on the Cessna, killing an innocent American missionary, Roni Bowers, and her infant daughter.¹⁰²

Incredibly, in the midst of drug war hysteria, some legislators have even considered adopting the Peruvian shoot-to-kill policy for drug interdiction inside the continental United States. In 1990 Sen. Mitch McConnell (R-KY) introduced an amendment to the FY90 Pentagon budget that would have allowed the military to shoot down planes suspected of carrying drugs. Though the amendment passed the Senate, it did not become law.¹⁰³

But the loopholes for military participation in the drug war have done damage enough. By putting heavily armed and inappropriately trained Marines on the U.S.-Mexican border, the “drug war” exceptions to the Posse Comitatus Act led inexorably to the death of Esequiel Hernandez. And by encour-

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aging the transfer of military ordnance to civilian peace officers, the drug war exceptions have encouraged a dangerous culture of paramilitarism in police departments.

Given this record, the Pentagon’s move to divert resources from drug interdiction is a step in the right direction. But that policy change is not nearly enough. Instead of a sub rosa effort to limit Pentagon involvement in the war on drugs, Congress should repeal the “drug war exceptions” to the Posse Comitatus Act. American military personnel should be focusing on Al Qaeda operatives who are plotting mass murder, not marijuana smugglers.

Weapons of Mass Destruction

Military involvement in the drug war has been a tragic mistake. But that does not mean that every use of military resources domestically ought to be reflexively opposed. There are limited areas in which military expertise, equipment, and even personnel can help to secure Americans from terrorist threats—and where such assistance does not present the kind of dangers the Posse Comitatus Act is designed to prevent.

For example, there are 32 Civil Support Teams currently operational in the United States, tasked with responding to suspected chemical, biological, or radiological attacks. The teams are not combat units; rather, they consist of full-time National Guardsmen specially trained in analyzing and responding to threats involving weapons of mass destruction (WMD). The Civil Support Teams operate under the command of their respective state governors, but they can be placed under federal command, if necessary. They bring special expertise and capabilities not normally available to civilian first responders—such as high-tech mobile laboratories that can allow the teams’ WMD experts to analyze suspected chemical or biological agents on-site to determine whether the suspected threat is genuine.¹⁰⁴ If it is, the teams advise civilian authorities on the likely consequences and preferred courses of action. Congress has authorized the creation of 23 additional teams.¹⁰⁵

The Civil Support Teams are a good example of how military resources can be deployed effectively and appropriately to improve homeland security.¹⁰⁶ Regrettably, most other proposed domestic uses of American military post-9/11 have not met that standard. Public officials, most of them outside the uniformed services, have uncritically accepted the notion that because the military has been so spectacularly effective at its appointed task of waging war, it can be equally effective providing security on the home front. That notion is as simplistic as it is dangerous.

Conclusion

The U.S. military is the most effective fighting force in human history; it is so effective, in fact, that some federal officials have come to see it as a panacea for domestic security problems posed by the terrorist threat. But on the home front, there are many tasks for which the military is ill suited, and for which its deployment would be profoundly unwise.

The soldier’s mission, as soldiers often phrase it, is “killing people and breaking things.” In contrast, police officers, ideally, are trained to operate in an environment where constitutional rights apply and to use force only as a last resort. Accordingly, Americans going back at least to the Boston Massacre of 1770 have understood the importance of keeping the military out of domestic law enforcement. That understanding is reflected in the Posse Comitatus Act of 1878, which makes it a criminal offense to use U.S. military personnel as a police force.

In the more than two years since the terror attacks of September 11, 2001, however, there has been a slowly building chorus of calls to amend or weaken the Posse Comitatus Act and give the U.S. military a hands-on role in homeland security. Prominent figures in Congress and the Bush administration have complained that legal barriers to domestic militarization tie their hands in protecting the American people. Of course, where appropri-

ate, we *want* constitutional and statutory constraints to “tie the hands” of the authorities in their pursuit of domestic security. Safety and security are not the only ends of government—liberty is our highest political end. The Posse Comitatus Act is, unfortunately, a weak and porous barrier to military involvement in domestic law enforcement, but it is designed to protect both our liberty and our safety.

Changed circumstances after September 11 provide no compelling reason to weaken the statute further. Moreover, the disturbing history of Army involvement in domestic affairs strongly cautions against giving the military a freer hand at home.

Notes

1. Hearing of the Senate Armed Services Committee, Federal News Service, October 4, 2001.
2. Quoted in Eric Schmitt, “Wider Military Role in U.S. Is Urged,” *New York Times*, July 21, 2002, p. A16.
3. Quoted in Fred Brown, “Civilians, Military Clashed on 9-11; Each Had Different Goals, Historian Says,” *Knoxville News-Sentinel*, May 3, 2003, p. B1.
4. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, Belknap, 1992), pp. 61–62, quoting from *Argument Shewing, That a Standing Army Is Inconsistent with a Free Government* by the English libertarian pamphleteer John Trenchard.
5. Details on the Boston Massacre, including contemporary accounts, can be found at www.bostonmassacre.net/index.html. The soldiers were prosecuted for murder but were eventually acquitted, thanks in part to a defense led by John Adams, the revolutionary who was later to become America’s second president.
6. Even so, the Framers would not concede that a regular army had to be a permanent feature of governance; they empowered Congress to “raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.” U.S. Constitution, Art. I, sec. 8, cl. 12.
7. See Art. I, sec. 8, cl. 15: “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” Indeed, the first use of federal authority to suppress insurrections, President Washington’s quashing of the Whiskey Rebellion in 1794, was carried out with federalized militia, and in that use of the militia “Washington was careful always to subordinate the military to civilian authority. The militia was not allowed to exercise the authority or function of civil officers, or to serve as an occupying army. The President’s orders to General Harry Lee emphasized that the military force was simply to suppress disorder and allow judges, district attorneys, marshals, and excise officers to enforce the law.” Jerry M. Cooper, “Federal Military Intervention in Domestic Disorders,” in *The United States Military under the Constitution of the United States, 1789–1989*, ed. Richard H. Kohn (New York: New York University Press, 1991), p. 123.
8. Since the modern National Guard is ultimately subservient to the president in conflicts with state governors, *Perpich v. Department of Defense*, 496 U.S. 334 (1990), it is arguably no longer the “militia” contemplated by Art. I, sec. 8, cl. 12. For that reason, some scholars have argued that any use of federalized National Guardsmen rests on dubious constitutional grounds. See Stephen P. Halbrook and David B. Kopel, “I Can’t Have My Babies Back’: Historical and Constitutional Objections to Use of the National Guard in Domestic Law Enforcement,” Hearings before the Subcommittee on Crime of the House Judiciary Committee, October 5, 1994. But note that it was at the request of President Thomas Jefferson in 1807 that Congress amended the insurrection statute to allow use of “such part of the land and naval force of the United States as shall be judged necessary” for the same purposes for which the president was allowed to use federalized militia. Cooper, p. 124.
9. *Whrynn v. United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961) (Dooling, J.).
10. See James M. McPherson, *Battle Cry of Freedom* (New York: Oxford University Press, 1988), p. 83; and Cooper, p. 123. See also Clay Conrad, *Jury Nullification* (Durham, NC: Carolina Academic Press, 1998), pp. 75–88. Defenders of domestic militarization point out that military involvement in law enforcement has done some good in the past—for instance, the 1957 desegregation of Central High School in Little Rock, Arkansas, in which President Eisenhower used federalized National Guardsmen and Army paratroopers to ensure compliance with *Brown v. Board of Education*. True enough, but the story of Thomas Sims, and others like him, serves as an important reminder that the federal policies soldiers have been used to enforce have not always been just.
11. Joan M. Jensen, *Army Surveillance in America*,

1775–1980 (New Haven, CT: Yale University Press, 1991), p. 139; and Cooper, p. 135.

12. *Ibid.*, p. 137

13. Jensen, p. 177.

14. Gary Tuchman, “Kent State Forever Linked with Vietnam War Era,” *CNN.com*, May 4, 2000, www.cnn.com/SPECIALS/views/y/2000/04/tuchman.kentstate.may4.

15. Rowan Scarborough, “Military Training of Civilian Police Steadily Expands; Congress Has Paved Way with Legislation,” *Washington Times*, September 9, 1999, p. A1; Lee Hancock, “ATF Official Defends Raid Planning,” *Dallas Morning News*, March 27, 1993; and David B. Kopel and Paul H. Blackman, *No More Wacos* (Amherst, NY: Prometheus, 1997), p. 86.

16. In an attempt to discredit the act, supporters of broader use of the military to enforce the laws have made much of the act’s Reconstruction-era origins, perhaps too much. Historian Joan M. Jensen argues that it is inaccurate to label the Posse Comitatus Act merely a “Reconstruction law”:

Democrats were still concerned about a Republican president using the army in the South, but with troops already withdrawn from the South, it is unlikely that Southern Democrats would have been able to get support for the bill had Northern members of Congress not responded to the rhetoric expressing opposition to a standing army. By resurrecting the old Republican fears of 1856, raising the specter of the army being used against laboring men, and examining the difference between suppressing domestic violence and the execution of the law, proponents were able to convince many members that the act merely declared a truth about the limits of the military in American society.

Jensen, p. 36.

17. 18 U.S.C. § 1385. The act was later amended to include the Air Force. It does not apply to the Navy, but another statute, 10 U.S.C. § 375, precludes naval involvement in hands-on law enforcement, providing, “The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized

by law.”

18. *Congressional Record*, 45th Cong., 1st sess., vol. 6, pt. 1, p. 287 (November 8, 1877).

19. For more on the active-passive distinction, see *United States v. Red Feather*, 392 F. Supp. 916 (S.D. 1975); see also *Bissonette v. Haig*, 800 F.2d 812 (8th Cir. 1986) (furnishing equipment and advice did not violate Posse Comitatus Act, but roadblocks and armed patrols do, because they are regulatory, proscriptive, and compulsory). See also Diane Cecilia Weber, “Warrior Cops: The Ominous Growth of Paramilitarism in American Police Departments,” Cato Institute Briefing Paper no. 50, August 26, 1999.

20. See 10 U.S.C.S. § 382 (“Emergency Situations Involving Chemical or Biological Weapons of Mass Destruction,” which allows the attorney general to request the Pentagon’s help in such circumstances and even grants the military arrest authority if it is necessary for “immediate protection of human life” and civilian law enforcement agencies cannot handle the situation); and 18 U.S.C.S. § 831 (allowing same authority with respect to nuclear threats).

21. See *Anchorage v. King*, 754 P.2d 283 (Ak. App. 1988).

22. Quoted in Damian Whitworth, “Utah Goes on to War Footing for Winter Games,” *Times* (London), February 8, 2002.

23. Associated Press, “Two Generals Given Authority to Shoot Down Airliners,” *Houston Chronicle*, September 27, 2001, www.chron.com/cs/CDA/story.hts/special/terror/impact/1064439.

24. It is important, however, to recognize the limits of the military purpose exception, lest it be warped into an exception that swallows the Posse Comitatus Act rule. It is true that the ultimate purpose of any post-9/11 military involvement in domestic law enforcement would be to deter and neutralize Al Qaeda operatives at war with the United States. But that does not allow the U.S. military to take over all aspects of local law enforcement simply because by so doing soldiers might catch some terrorists. To slide down that slope is essentially to say that the act does not apply during wartime so long as saboteurs may be afoot. That is not a proviso that Congress ever chose to write into the law, and it would be an unreasonable interpretation of the military purpose exception.

25. Instead of federalizing them, President Bush asked the state governors to call them up and promised to have the federal government pay the

bills. See George Cahlink, "Identity Crisis," *Government Executive*, September 1, 2002, www.govexec.com/features/0902/0902s5.htm.

26. Quoted in *ibid*.

27. Henry Towsner, "News: Hoover Expert Discusses Airport Security," *Stanford Review* 27, no. 3 (November 15, 2001), http://stanfordreview.org/Archive/Volume_XXVII/Issue_3/News/news7.shtml.

28. Oliver Poole, "Thanksgiving Gestures Focus on Servicemen," *Daily Telegraph* (London), November 24, 2001, p. 15.

29. Quoted in "Military Resists Domestic Role," *Government Executive*, November 2001, www.govexec.com/dailyfed/1001/102201kp2.htm.

30. In a hearing before the Senate Armed Services Committee, Sen. John Warner (R-VA) suggested to Deputy Secretary of Defense Paul Wolfowitz that the Posse Comitatus Act needed to be reexamined since "we saw [on September 11] from within the cities and towns and villages of this great nation came the enemy." Wolfowitz said he agreed "very strongly" that the doctrine needed to be reexamined. Warner has also stated, "The reasons for the Posse Comitatus Act have long given way to the changed lifestyle we face today here in America." Hearing of the Senate Armed Services Committee. See also Mary Leonard, "Fighting Terror Legislative Moves/Posse Comitatus Act, Officials Talk of Using Military at Home, Despite Doubts," *Boston Globe*, October 31, 2001. Later, Sen. Joseph Biden (D-DE) backed giving U.S. soldiers the authority to arrest American civilians in some cases. See Joyce Howard Price, "Biden Backs Letting Soldiers Arrest Civilians," *Washington Times*, July 22, 2002.

31. Office of Homeland Security, *National Strategy for Homeland Security*, July 2002, p. 48, www.whitehouse.gov/homeland/book/nat_strat_hls.pdf.

32. The benefits of the new Northern Command are not entirely clear. On the one hand, unifying under one commander the military personnel available for the defense of North America likely would make it possible to carry out legitimate defensive operations more efficiently. But the broad view the Pentagon takes of the executive's authority to use the military domestically (see 32 C.F.R. 215.4 for Department of Defense views regarding "Employment of Military Resources in the Event of Civil Disturbances," which includes "the inherent legal right of the U.S. Government . . . to ensure the preservation of public order and the carrying out of governmental operations within its territorial limits, by force if necessary"), coupled with Gen. Eberhart's readiness to consider weaken-

ing the Posse Comitatus Act, suggests that the new command should be closely monitored by constitutionalists and civil libertarians. For further detail, see "The Creation of the United States Northern Command: Potential Constitutional, Legal, and Policy Issues Raised by a Unified Command for the Domestic United States," *An Interim Report of the Constitution Project*, February 13, 2003, www.constitutionproject.org/ls/NorthcomInterim.DOC.

33. Quoted in Mary H. Cooper, "The New Defense Priorities," *Congressional Quarterly Weekly*, September 13, 2002.

34. "INS Signs Memorandum of Agreement with Department of Defense, National Guard Troops to Assist INS at Northern and Southern Borders," U.S. Department of Justice, Immigration and Naturalization Service, press release, February 25, 2002, www.immigration.gov/graphics/publicaffairs/newsrels/nguard.htm.

35. See *Bissonette v. Haig*, 800 F.2d 812 (8th Cir. 1986) (furnishing equipment and advice did not violate PCA, but roadblocks and armed patrols do, because they are regulatory, proscriptive, and compulsory).

36. Michelle Malkin, *Invasion: How America Still Welcomes Terrorists, Criminals, and Other Foreign Menaces to Our Shores* (Washington: Regnery, 2002), p. 233. See also Bill O'Reilly, "Porous U.S. Borders," *FoxNews.com*, February 7, 2003, www.foxnews.com/story/0,2993,77898,00.html.

37. Quoted in Douglas Holt, "DA Questions Military Account of Border Slaying; Drug Unit Spokeswoman Calls Remarks Surprising," *Dallas Morning News*, June 4, 1997, p. 1A.

38. Quoted in Pamela Hess, "Soldiers at US Border Posts to Be Armed," *United Press International*, March 26, 2002.

39. *Oversight Investigation of the Death of Esequiel Hernandez, Jr.*, report by Chairman Lamar Smith to the Subcommittee on Immigration and Claims of the House Committee on the Judiciary, 105th Cong. (Washington: Government Printing Office, November 1998), pp. 4-5.

40. Quoted in Dane Schiller, "Was Justice Denied on the Border?" *San Antonio News Express*, December 13, 1998, p. A1.

41. *Ibid*.

42. *Ibid*.

43. See 8 U.S.C.S. § 1357 and 8 C.F.R. 287.1(2): "The term reasonable distance, as used in section

287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States.” See also Tamara Audi, “Rights at Risk at Michigan Checkpoints; Under New Laws, Federal Agents Have More Power in All Border States,” *Detroit Free Press*, December 9, 2002. Note also that the Supreme Court has held that Fourth Amendment protections are substantially weaker at border checkpoints. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

44. In a May 20, 2003, report to Congress, DARPA changed the name of the proposed system to Terrorist Information Awareness, in an attempt to allay the privacy concerns of critics.

45. Associated Press, “Pentagon Spy Office to Close,” September 25, 2004, www.wired.com/news/print/0,1294,60588,00.html.

46. Noah Schachtman, “Bride of TIA Lives,” *Defense Tech.org*, September 26, 2003, www.defense-tech.org/archives/000595.htm/.

47. Ryan Singel, “Jet Blue Fesses Up Quietly,” *Wired News*, September 19, 2003, www.wired.com/news/privacy/0,1848,60540,00.html; and Ryan Singel and Noah Schachtman, “Army Admits Using JetBlue Data,” *Wired News*, September 23, 2003, www.wired.com/news/privacy/0,1848,60540,00.htm.

48. DARPA’s TIA website is www.darpa.mil/iao/TIASystems.htm. The Electronic Privacy Information Center runs a site following, and critiquing, developments in the TIA program at www.epic.org/privacy/profiling/tia/.

49. Quoted in Nathan Hodge, “DARPA Official Stumps for ‘Total Information Awareness,’” *Defense Week* 23, no. 46 (November 18, 2002).

50. Quoted in Jensen, p. 175.

51. *Ibid.*, p. 160.

52. TIPS stands for “Terrorism Information and Prevention System.” See Gene Healy, “Volunteer Voyeurs?” *Cato Daily Commentary*, July 29, 2002.

53. Jensen, pp. 176–77.

54. See generally, G. J. A. O’Toole, *Honorable Treachery: A History of U.S. Intelligence, Espionage, and Covert Action from the American Revolution to the C.I.A.* (New York: Atlantic Monthly Press, 1991), p. 278.

55. Quoted in Morton H. Halperin et al., *The Lawless State: The Crimes of the U.S. Intelligence Agencies* (New York: Penguin Books, 1976), p. 165.

56. *Laird v. Tatum*, 408 U.S. 1, 28 (1972) (Douglas,

J., concurring).

57. www.darpa.mil/body/tia/tia_report_page.htm.

58. Heritage Foundation analysts Paul Rosenzweig and Michael Scardaville argue that, with appropriate privacy protections, TIA can be a useful tool for fighting terrorism without threatening to develop a surveillance state. See Paul Rosenzweig and Michael Scardaville, “The Need to Protect Civil Liberties While Combating Terrorism: Legal Principles and the Total Information Awareness Program,” Heritage Foundation Legal Memorandum no. 6, February 5, 2003, www.heritage.org/Research/HomelandDefense/lm6.cfm. For instance, they argue that Congress should ensure that “the use of TIA to query non-government databases be limited to the exigent circumstances that made it necessary,” i.e., terrorist activity. They further urge that the government should not get wider access to private databases as part of TIA than it already has. However, even under current law, government access to private databases is both disturbingly easy and sweeping. As Sen. Ron Wyden (D-OR) put it in response to OIA’s assertion that the program would not go beyond private data that could be obtained under current law, “That loophole is so big you could drive five trucks through it.” Quoted in Audrey Hudson, “Report Stirs Fear of Privacy Violations,” *Washington Times*, June 25, 2003.

59. Starting with the drug-war-inspired Military Cooperation with Law Enforcement Officials Act in 1981, Congress has passed a series of statutes that order the Department of Defense to loan, sell, or give away military equipment to civilian police agencies for law enforcement purposes—regardless of how ill suited such equipment may be to police work in a civilian environment. See 10 U.S.C. § 2576 (“the Secretary of Defense may transfer to Federal and State agencies property of the Department of Defense . . . [that is] suitable for use by the agencies in law enforcement activities, including counter-drug and counter-terrorism activities”); and 10 U.S.C § 381 (“Procurement by State and local governments of law enforcement equipment suitable for counter-drug activities through the Department of Defense”). The Department of Defense maintains a website to facilitate such transfers via the Law Enforcement Support Office of the Defense Logistics Agency, www.dla.mil/j-3/leso/aboutleso.htm.

60. Eric Lenkowitz and Dan Mangan, “\$500M Death Suit,” *New York Post*, May 23, 2003, www.nypost.com/news/regionalnews/57963.htm.

61. Quoted in Patrice O’Shaughnessy, “NYPD’s Prepping for War; Kelly Taps Military Pros to Reshape Force vs. New Threats,” *New York Daily News*, March 3, 2002, p. 27.

62. Craig Horowitz, "The NYPD's War on Terror," *New York Metro*, February 3, 2003, www.newyorkmetro.com/nymetro/news/features/n_8286/.
63. Sean Gardiner and Rocco Parascandola, "9/11 One Year Later," *Newsday*, September 8, 2002.
64. See Timothy Lynch, "'We Own the Night': Amadou Diallo's Deadly Encounter with New York City's Street Crimes Unit," Cato Institute Briefing Paper no. 56, March 31, 2000.
65. Quoted in Chuck Murphy and Sidney P. Freedberg, "Fort Florida," *St. Petersburg Times*, March 2, 2003, p. A1.
66. See Patrick Fleenor, "Cigarette Taxes, Black Markets, and Crime: Lessons from New York's 50-Year Losing Battle," Cato Institute Policy Analysis no. 468, February 6, 2003.
67. Pamela Hess, "Pentagon Agrees to Help DC Sniper Hunt," *Washington Times*, October 16, 2002.
68. Halbrook's comments were delivered at a Cato Institute Policy Forum, "The Posse Comitatus Act: Venerable Safeguard—Or Old Hat?" October 16, 2002, www.cato.org/events/021016pf.html.
69. That is not to say that use of military resources was entirely legal in this case. Attorney and former judge advocate general Eugene Fidell argues that the Pentagon went beyond its authority under Title 10 of the U.S. Code, which limits assistance in the form of "aerial reconnaissance" to cases related to immigration, customs, drug trafficking, and terrorism. The first three were not at issue, and as for the possible link to international terrorism, Fidell argues that "speculation is not a basis for breaking the law." Quoted in Elaine M. Grossman, "Former JAG: Military Aid in D.C. Sniper Pursuit May Have Broken Law," *Inside the Pentagon*, November 14, 2002, www.fas.org/sgp/news/2002/11/itp111402.html.
70. Quoted in Adam Clymer, "Big Brother Joins the Hunt for the Sniper," *New York Times*, October 20, 2002.
71. Elizabeth Mehren, "Bracing for Wave of Litigation; Questions of Liability Abound after Nightclub Fire in Rhode Island That Killed 97 People. Some See Civil Claims Exceeding \$500 Million," *Los Angeles Times*, March 2, 2003, part 1, p. 17.
72. Vaishali Honawar, "National Guard Eyed to Lend Voter Safety," *Washington Times*, October 24, 2002.
73. David Rudovsky, "Police Abuse: Can the Violence Be Contained?" *Harvard Journal of Civil Rights and Civil Liberties* 27 (1992): 465, 481 n. 60.
74. See Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States* (New York: Human Rights Watch, June 1998).
75. *Oversight Investigation of the Death of Esequiel Hernandez, Jr.*, p. 14.
76. *Ibid.*, p. 15.
77. Lee Hancock, "Government Seeks Delay on Waco Files; White House Weighs Withholding Documents," *Dallas Morning News*, November 2, 1999, p. 15A.
78. Quoted in "Davidians Lawyer Says Defense Documents Hold Key to Gunfire Issue," Associated Press, February 18, 2000.
79. *United States v. Reynolds*, 345 U.S. 1, 10 (1952).
80. *Black v. United States*, 62 F.3d 1115, 1119 n. 5 (8th Cir. 1995).
81. *Reynolds* at 8.
82. *Ibid.* at 10.
83. L. Stuart Ditzen, "Unearthed Military Secret Brings New Life to Old Case," *Philadelphia Inquirer*, March 5, 2003.
84. Even now, 50 years later, the federal government is resisting paying compensation to the victims' families. See Timothy Lynch, "An Injustice Wrapped in a Pretense: In '48 Crash, the U.S. Hid behind National Security," *Washington Post*, June 22, 2003, p. B3.
85. Jim Carlton, "Of Microbes and Mock Attacks: Years Ago, the Military Sprayed Germs on U.S. Cities," *Wall Street Journal*, October 22, 2001. Edward A. Miller, the Army's secretary for research and development, defended the program before the Senate Subcommittee on Health. According to Miller, "Release in and near cities, in real-world circumstances was considered essential to the program, because the effect of a built-up area on a biological agent cloud was unknown." Quoted in Lawrence L. Knutson, Associated Press, March 8, 1977.
86. *Ibid.*
87. *Nevin v. United States*, 696 F.2d 1229, 1231 (9th Cir. 1983).
88. Quoted in Leonard A. Cole, "Biological Warfare Testing 'Where People Live and Work,'" Testimony before the Legislation and National Security Subcommittee of the House Committee

on Government Operations, September 28, 1994.

89. Quotations are from the "Operation Northwoods" memo, which can be found at www.gwu.edu/~nsarchiv/news/20010430/northwoods.pdf in George Washington University's National Security Archive, www.gwu.edu/~nsarchiv/: "The Archive is simultaneously a research institute on international affairs, a library and archive of declassified U.S. documents obtained through the Freedom of Information Act, a public interest law firm defending and expanding public access to government information through the FOIA, and an indexer and publisher of the documents in books, microfiche, and electronic formats."

90. "Operation Northwoods" memo, p. 8.

91. *Ibid.*, pp. 8-9.

92. William D. Hartung, "Shadow Warriors," *Washington Post Book World*, May 27, 2001. For further information on Operation Northwoods, see David Ruppe, "Friendly Fire Book: U.S. Military Drafted Plans to Terrorize U.S. Cities to Provoke War with Cuba," *ABC News.com*, November 7, 2001, http://abcnews.go.com/sections/us/DailyNews/jointchiefs_010501.html; and Michael Young, "Spy Watch behind Closed Doors at the National Security Agency," *Reason*, March 1, 2002.

93. National Security Decision Directive 221, Narcotics and National Security, April 8, 1986, www.fas.org/irp/offdocs/nsdd/nsdd-221.htm.

94. 18 U.S.C.S. 371-82.

95. 32 U.S.C.S. 112.

96. Stacie Orsagh-Aguillon and Elisa Schement, "Residents Speak Out on Project; Drug Crackdown's Success Questioned," *San Antonio Express-News*, June 13, 2001; Sgt. 1st Class Eric Wedeking, "Guard's 'War on Drugs' Gets Nod from Congress," *Army News Service*, June 27, 2000, www.dtic.mil/armylink/news/Jun2000/a20000627counterdrug.html.

97. Quoted in New York Times News Service, "Law Agencies' Tactics in Fight against Marijuana Criticized. Some Say Zealous Officers Disrupt Daily Life," *Dallas Morning News*, October 2, 1994, p. 8A.

98. Quoted in Paul Richter, "Military Is Easing Its War on Drugs," *Los Angeles Times*, October 20, 2002.

99. Quoted in *ibid.*

100. Quoted in John J. Stanton, "War on Drugs: U.S. Has No 'Exit Strategy,'" *National Defense*, May 1, 2001.

101. Quoted in *ibid.*

102. Tony Karon, "Peru Plane Tragedy Highlights a Troubled War on Drugs," *Time*, April 25, 2001, www.time.com/time/columnist/karon/article/0,9565,107559,00.html.

103. Ted Galen Carpenter, *Bad Neighbor Policy: Washington's Futile War on Drugs in Latin America* (New York: Palgrave Macmillan, 2003), p. 197.

104. William K. Rashbaum, "After Effect: Security; Sniffing New York's Air Ducts for Signs of Terror," *New York Times*, April 22, 2003, p. A1.

105. Maj. Gen. Raymond F. Rees, USA Acting Chief, National Guard Bureau, Prepared statement before the Subcommittee on Terrorism, Unconventional Threats and Capabilities of the House Armed Services Committee, Federal News Service, March 13, 2003.

106. 10 U.S.C.S. § 372 also allows the provision of "material or expertise of the Department of Defense appropriate for use in preparing for or responding to an emergency involving chemical or biological agents, including the following:

- (A) Training facilities.
- (B) Sensors.
- (C) Protective clothing.
- (D) Antidotes."

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