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# Legal Aspects of Domestic Employment of the Army

THOMAS R. LUJAN

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With the end of the Cold War, America's Army has been tested across the entire continuum of military operations. Since 1990 we have seen numerous and varied major international deployments that range from the high end of the spectrum of warfare in Operation Desert Storm to successful humanitarian relief operations in Northern Iraq, Rwanda, and Haiti, and less clear outcomes in Somalia and Bosnia. Closer to home, and with much less fanfare and public attention, the US Army has participated in an arguably unprecedented number and type of domestic employments. These include disaster relief operations, military support to law enforcement in the war against drugs, and discrete cases of military support to federal law enforcement agencies.

It is the premise of this article that the coming years will see a continuation, if not an increase, in the employment of the Army within the United States. Further, because of the potentially adverse effect of such deployments on the relationship between the Army and the American people, the critical element of success is strict conformance with the legal framework established by the Constitution and federal law. Consequently, it is incumbent on our national strategic leaders and their staffs to understand and appreciate the legal underpinnings of these operations. This article seeks to aid that understanding by presenting and analyzing the legal lessons learned from selected domestic employments in the 1990s. In that same context, military lessons learned will be drawn from the employment of the Federal Bureau of Investigation (FBI) Hostage Rescue Team (HRT) at Ruby Ridge, Idaho. Topics to be addressed are the Army's role in disaster relief operations, its support to civilian law enforcement in the fight against drugs, and the full range of domestic deployments available under the presidential authority to quell insurrection and maintain public order.

## Disaster Relief Operations

The US Army had a remarkable experience in responding to the devastating onslaught of Hurricane Andrew in south Florida in August 1992; Hurricane Iniki on the island of Kauai in Hawaii one month later evoked a similar response. Both instances provide ample evidence that there is a reliable mechanism to facilitate the employment of active-duty Army units in times of great national disaster. The Robert T. Stafford Disaster Relief Act of 1984, as amended in 1988 (42 US Code Section 5121 *et seq.*), commonly referred to as the Stafford Act after its legislative author, is the authority under which such assistance is provided. The Stafford Act is applicable only within the United States and its territories, and comes into play when a state, usually through its governor, requests a presidential declaration of a state of emergency following a natural disaster. Once a state of emergency is declared, active-duty soldiers can be employed to respond to the crisis under the direction of the Federal Emergency Management Agency (FEMA).[1] These situations present unique legal issues.

In response to the almost total devastation wrought by Hurricane Andrew in Dade County, Florida, brigade-sized contingents of the 82d Airborne Division and 10th Mountain Division, both XVIII Airborne Corps assets, were deployed as Joint Task Force (JTF) Andrew under the provisions of the Stafford Act. Once deployed, they encountered a wide variety of contentious legal issues. First, these warfighters were confronted by the preeminent statutory proscription which controls US soldiers deployed within the United States. The Posse Comitatus Act prohibits the Army and Air Force from enforcing civil criminal law within the United States.[2] This historic law, passed in 1878 to preclude the presence of soldiers from deterring voters during Reconstruction, is generally considered a great bulwark in our democratic society. Its proponents cite Posse Comitatus as the clear demonstrable indicator of the properly circumscribed limits of a civilian-controlled army in a representative democracy.[3] The nuances of Posse Comitatus at the conceptual level, and the effect of its various exceptions, will be addressed later in this article. In the present context, suffice it to say that on the ground, deployed soldiers were told they could not and would not enforce the law,

i.e. detain, arrest, or serve warrants or any other kind of process on civilians.[4] Of course, it could be argued that by our soldiers' very presence, as the only tangible evidence of governmental authority, they were de facto enforcing the civilian law.[5] Three examples demonstrate the difficulties inherent in following this theoretically clear prohibition.

In South Florida, the legal question arose as to what soldiers should do if they encountered illegal immigrants attempting to avail themselves of the humanitarian services provided by the soldiers. It could be argued that illegal immigrants are status offenders whose very presence in the United States constitutes a continuing offense under the law, and who could be arrested by soldiers in the capacity of a "citizen arrest" of a perpetrator violating the law.[6] Because of the sensitivity of this situation, however, soldiers were directed to just ignore inquiring into the legal status of the citizens they encountered, and to treat everyone equally.[7] Similarly, the guidance as to how soldiers would provide security at relief centers was carefully drawn. Normally, DOD personnel may maintain the security of DOD installations. However, the DOD Life Support Centers established in Florida were inhabited almost entirely by civilians seeking relief. In light of Posse Comitatus, National Guard and local law enforcement personnel, not active-duty soldiers, were tasked to guard these sites.[8] These anomalous examples reflect the impractical, yet necessary, application of Posse Comitatus.

The second major legal issue confronted a group of American soldiers who were quartered contiguous to a polling place for a Florida State primary election. Their positioning ran directly contrary to the provisions of 18 US Code Section 592, which flatly prohibits the presence of American soldiers at just such a place.[9] The solution to this situation was fairly straightforward. Military authorities sought an advisory opinion from the Department of Justice. This opinion thoughtfully considered the clear application of the law, but counterpoised that clarity with the exceptional circumstances present in South Florida. The result favored expediency and pragmatism. The presence of soldiers next to a polling place was deemed legal as long as the integrity of the polling site itself was maintained.[10] A similar result occurred during Hurricane Iniki in Hawaii, where active-duty soldiers were tasked to erect tents to serve as polling sites so that an election could be held. Aware of the issue from Florida, the legalistic solution was to have the National Guard construct the sites, and to move active-duty soldiers away from them during the hours of voting.[11] Clearly, when it comes to the enforcement of archaic laws relative to voting, practical solutions override legal theory.

A third significant issue confronted during domestic disaster relief operations is the proper handling of private contributions to the relief effort. In Florida, donated goods and volunteer services came from all parts of the country and from across the world. They came in three forms: donations to Hurricane victims, gifts to soldiers in the JTF, and civilian volunteers who came to help. The issue of gifts to hurricane victims was resolved easily. JTF Andrew was deemed a mere conduit for the gifts, and supply centers were established and operated. To avoid problems, the supply centers never commingled government supplies and donated items.[12] Gratuities offered to the military were more problematic. Each proffered item had to be reviewed to insure its acceptability under the standards of conduct of the Office of Government Ethics.[13] Generally, strict accountability was maintained and proper documentation had to accompany each gift to reflect it as an unconditional gratuity. Volunteer workers presented a problem because of the prohibition against the government accepting voluntary services and because of perceived liability issues. The solution was to prohibit volunteers from working directly for military forces, redirecting them to the nongovernmental relief agency efforts. This tack eliminated the voluntary services issue and reduced the liability concern to a manageable level.[14]

The unprecedented destruction of the Alfred P. Murrah Federal Office Building in Oklahoma City, Oklahoma, on 19 April 1995, raised another important legal issue affecting disaster relief operations. As one might imagine, all the resources of local, state, and federal government agencies were mobilized to deal with this shocking act of domestic terrorism. FEMA served as the primary focal point of relief operations, and Army assets were provided under the terms of the Stafford Act. FEMA officials were on the scene within hours of the explosion, and specialized rescue teams followed closely. The entire reaction has been categorized as a masterful melding of state and federal resources. However, the internal FEMA report[15] underscores a natural tension between the rescue effort and the FBI which may be increasingly important in the future. The FBI, as part of the Department of Justice, determined that the entire area was a crime scene for the purposes of apprehending and successfully prosecuting the perpetrators of the bombing. The rescue effort's only goal was recovering survivors or their remains. This natural conflict must be resolved in order to facilitate the nation's response to the increasing threat of similar incidents.

Strategic leaders can take solace in the lessons learned from military participation in domestic disaster relief, for the record indicates that legal niceties or strict construction of prohibited conduct will be a minor concern. The exigencies of the situation seem to overcome legal proscriptions arguably applicable to our soldiers' conduct. Pragmatism appears to prevail when American soldiers help their fellow citizens.

## **Civilian Law Enforcement**

Military support to law enforcement agencies seemingly will present more problems for senior leaders than those encountered in disaster relief. At first blush, this entire area appears to be outside the scope of military operations. As previously mentioned, the Posse Comitatus Act provides a broad proscription against soldiers enforcing the law. However, subsequent congressional acts granting exceptions to the original prohibition of Posse Comitatus have significantly altered the manner in which the armed forces may assist law enforcement.[16] Congress began to carve out these exceptions in response to the perceived increase in importation and use of destructive illegal drugs. Under more recent legislation, the Army can provide equipment, training, and expert military advice to civilian law enforcement agencies as part of the total effort in the "war on drugs." [17] In addition, troops of the active Army are authorized to provide a wide range of support along the borders with the caveat that a "nexus" be established between illegal drugs and the support given. The principle example of the contentious nature of such support can be found in a review and analysis of the support provided to the Bureau of Alcohol, Tobacco, and Firearms (BATF) by the Army under the operational control of Joint Task Force 6 (JTF 6), during the siege and assault of David Koresh's Branch Davidian compound outside of Waco, Texas.[18]

Joint Task Force 6 is a long-standing operational unit; in 1993, it was under the operational control of US Army Forces Command (FORSCOM) and the United States Atlantic Command (USACOM). For several years this standing task force, located just outside Fort Bliss, Texas, was a key part of Operation Alliance, a joint local, state, and federal entity that provided an intelligence fusion center and rapid response for surveillance needs along the Southwest border. Essentially, requests for military support of law enforcement agencies would flow into JTF 6, be vetted by its staff as having the appropriate drug nexus, and be approved with deployment orders transmitted by the JCS.[19] Major projects included area, as opposed to pinpoint, surveillance and reporting, and the use of aviation assets to ferry law enforcement officers. Soldiers detailed to JTF 6 were attached to that organization from their parent unit for specified periods of time; thus a Special Forces Operational Detachment with supporting aviation was part of a Rapid Reaction Support Unit assigned to JTF 6 in early 1993 for a six-month period. During this same period a request came into Operation Alliance for military assets to support a BATF operation against a methamphetamine laboratory located on the outskirts of Waco.[20] The request detailed the needs of the BATF: military training in the specific areas of medical treatment, communications procedures, operational plan development, review, and approval, and "room clearing discriminate fire operations," termed "close-quarter combat" by the military.[21] More important, the BATF requested that Army medics and communicators actually accompany them to the forward staging base if not on the actual mission. Clearly, the request was more expansive than those normally received.[22]

The original request was initially approved by the JTF 6 staff. However, questions by the Commander of the Special Forces detachment relayed to his home-unit legal advisor resulted in a review of the extent of Army involvement. Consequently, in the actual operation the Army provided only a training site at Fort Hood, safety inspection of the training lanes set up by the BATF, and medical and communications training and equipment. All members of the Special Forces detachment departed the training site at Fort Hood before the operation at the Branch Davidian compound took place.[23]

The results of the attempt by the BATF to forcibly serve a warrant at the Branch Davidian compound were disastrous. In the initial assault, four BATF agents were killed and 20 were wounded, the greatest loss of life in the bureau's history. Six Branch Davidian members were killed and four were wounded. The resulting siege captured the attention of the nation, and its tragic, fiery conclusion two months later resulted in the deaths of 74 Branch Davidians, including 21 children under the age of 14.[24]

While some lessons for America's military leaders from this incident remain obscure, there are at least three that can be derived from it. First, military decisionmakers cannot rely on the assertions of other federal agencies. The BATF knew of the requirement to establish a drug nexus in order to obtain needed military support from JTF 6. Authoritative

evidence conclusively demonstrates that any precursor chemical or methamphetamine connection at the Waco compound had occurred in 1987, fully six years before the raid. It is probable that David Koresh was in fact responsible for expelling the member involved in the fledgling illegal drug activity, going so far as to report the offender to police.[25] The six-year lapse in these events clearly attenuates the underlying rationale for illegal drug activity; the BATF request nevertheless boldly asserted the needed nexus.

It became clear from the after-action reports and investigations that BATF's primary interest in this case stemmed from their conclusion that the Branch Davidians were stockpiling weapons in their compound.[26] That conclusion perhaps could have been foreshadowed by a series of anomalies related to the BATF request for Special Forces support. They were the peripheral nature of BATF in drug operations (usually spearheaded by the Drug Enforcement Agency at the federal level), the lack of involvement of the specialized drug laboratory reaction force, and the extensive nature of military support requested. All provided strong indications that further command inquiry was advisable. And although the commanding general of the JTF testified before Congress that he saw no reason to pierce the veil of the BATF request,[27] the implications of this sequence of events should be understood by commanders and senior staff officers engaged in such operations in the future.

The specter of members of the Army's special operations forces accompanying BATF agents storming a religious compound, however misguided its leader, could have seriously compromised public support of the US Army. Had the initial request been approved (it was) and acted upon (it wasn't), this could easily have been the single most debilitating event to occur within the Army since the tragedy at My Lai. In fact, this occurrence could have been even more egregious because it would have taken place on American soil, would have been a clear violation of the Posse Comitatus Act, and would have raised the issue of military involvement in a case of alleged religious freedom.

The second important lesson for both leaders and followers is to recognize that the military's fervor to complete the mission, so essential in desperate battles to take the high ground, needs to be curtailed while supporting other federal agencies in suppressing drugs. The military mentality that breeds conformance and dedication to team effort must give way to healthy skepticism and critical analysis. Missions such as those described above are on the periphery of the role of the US Army. Any actual or perceived departure from applicable legal restrictions can lead to an unacceptable loss of confidence in the Army. In testimony before Congress, the officer who questioned the legality of the proposed mission at Waco related that his JTF 6 counterpart, a higher-ranking officer, had indicated that the witness was being an unwarranted obstacle to mission success.[28] In fact, the officer who objected to the mission was asking probing questions for all the right reasons, thus precluding a significant role for the Army in the debacle at Waco.

Finally, leaders can take heart from the fact that the training and experience of today's soldiers allow them to make the right decisions in situations fraught with career and personal implications. Granted, in this instance the soldiers were mature commissioned and noncommissioned officers with substantial operational experience. However, at considerable personal risk they had the integrity and wisdom to question the propriety of the proposed mission within their operational chain of command. When the answer did not comport with their training and experience, they had the moral courage to go outside official channels to receive an independent legal opinion from their parent unit's legal advisor.[29] Had they simply gone along with the attitude that an order is an order, they would have involved the Army in a violation of Posse Comitatus, contributed to a great scandal, potentially subjected themselves to personal liability, and unnecessarily complicated the criminal prosecutions.

Although current Army doctrine envisions a lawyer at every brigade-sized unit, lawyers cannot be everywhere. We must continue to rely on the training and moral fortitude of our soldiers, which in this case was well-placed. As a footnote to the above incident, the parent command of the Special Forces soldiers detailed to JTF 6 has promulgated a list of prohibited training events related to counter-drug support. This policy letter proscribes close-quarter combat training and accompanying law enforcement agencies, in addition to restricting intelligence-gathering, and it is signed by the commander, not the lawyer.[30]

## **Presidential Authority**

The next area of consideration focuses on those discrete instances when the President of the United States relies on his constitutional and statutory authority to maintain public order and domestic tranquillity. Those who consider the Posse

Comitatus Act a giant bulwark preventing the Army from enforcing the law will be surprised to learn that the relevant enabling mechanism is fairly straightforward. The language of the act itself specifies that activities expressly authorized by the Constitution or by statute are exempt from the act's restrictions. One such exception is the statutory authority of the President to use federal troops to quell domestic violence.[31] Upon receipt of a proper request for assistance from a state governor, the President issues a proclamation identifying that a breakdown in public order has occurred, and orders the intransigent individuals to disperse. Once it is clear that the order to disperse is not being followed, the President then orders the Secretary of Defense, in consultation with the Attorney General, to quell the insurrection and restore public order. This presidential authority to use federal troops is plenary and not subject to judicial review.[32] There are lessons for strategic leaders in the most recent example of the execution of this procedure, the Los Angeles riots that occurred in April 1992 in response to the verdict in the trial of Rodney King. A second series of lessons applicable to future employments can be derived from the FBI's experience at Ruby Ridge, Idaho, in August 1992, and its aftermath.

The Rodney King trial verdict on 29 April 1992 unleashed violence across the city and county of Los Angeles. In the opinion of local and state officials, it was beyond the capabilities of the Los Angeles Police Department (LAPD) and the California National Guard to restore order. Consequently, the Governor of California informed the President of the situation. On 1 May 1992, the President issued both the initial proclamation to disperse and the Executive Order authorizing the Secretary of Defense to employ members of the armed forces to restore law and order. This order, which federalized the California National Guard, also set in motion procedures to establish a 3500-member JTF composed primarily of soldiers of the 7th Infantry Division stationed at Fort Ord and Marines from Camp Pendleton. This force convoyed into Los Angeles on 3 May 1992 to restore order.[33] Two important lessons flow from this operation.

First, it is clear that the coordination and planning essential to operations of this sort had not occurred. Soldiers and Marines underwent hastily conceived and executed civil disturbance training at Fort Ord in the short time between receipt of a warning order on 1 May and actual deployment on 3 May.[34] The prospect of folding federalized National Guard soldiers under the operational control of an active-duty JTF had not been adequately addressed or properly planned. For example, the Rules of Engagement (ROE) were not initially uniform throughout the JTF. Ironically, active-duty forces were operating under far more restrictive guidance than the federalized National Guard.[35] This difference in the restrictions governing the use of force stemmed from the initial employment of the National Guard in their state status working directly with the LAPD. Upon federalization, the discrepancies were ultimately resolved by the actions of the JTF commander. It is also clear that the administrative and logistic underpinnings of such an operation had not been adequately planned. In one notable example, the LAPD made a simple request to borrow a number of available and critically needed night vision goggles.[36] The request was bureaucratically strangled by a legal issue related to the definition of fair market value and the requirement for the LAPD to post a surety bond for the equipment in the amount of \$90,000. Such administrative gaps could be easily filled by adequate planning.

The second lesson is even more fundamental. It is now clear that there was a widespread misunderstanding of the role of the active-duty military and federalized National Guard in this kind of operation. This misunderstanding permeated the National Guard and active-duty forces, and it extended to the commander of the JTF.[37] At their very first meeting, it was clear that neither the military commander nor the Los Angeles police chief nor the county sheriff had a clear perception of the proper role of military forces in the emergency. On a tactical level, the police chief favored a military partitioning of the city. The county sheriff believed that military forces were to be allocated to police units and follow their orders in a "rent a soldier" fashion. But the key discrepancy went to just what role the military could play.

The JTF commander apparently believed that he and his troops were constrained by the Posse Comitatus Act, and therefore could not legally participate in law enforcement activities. He was mistaken. In this particular situation, pursuant to the presidential power to quell domestic violence, federal troops are expressly exempted from the prohibitions of Posse Comitatus. This exemption applies equally to active-duty military and federalized National Guard troops. The JTF commander may have had political, policy, or tactical reasons for refusing law-enforcement missions, but his asserted reliance on the proscription of Posse Comitatus was misplaced.[38] This misunderstanding seriously degraded the effectiveness of military support of local law enforcement in Los Angeles.

Prior to federalization, the National Guard in their Title 32 status responded to every request for assistance. After transformation to Title 10 status, the response rate dropped to approximately 20 percent owing to the perceived effect of Posse Comitatus. As one example, the LAPD asked federalized National Guard troops to transport prisoners arrested during a civil disorder. The military decision matrix made a distinction between "military functions" and "law enforcement functions" and placed this mission in the latter category. These requests in general, and this one in particular, were uniformly denied as violations of Posse Comitatus when in fact no such prohibition was imposed when the National Guard was federalized. This misunderstanding permeated all military activities; it led to underutilization of a potent force and to morale problems within the National Guard.[39]

The lesson is clear. By the stroke of a pen, within a single day, the underlying framework for the authorized use of military force within the United States can be completely changed.[40] Pursuant to presidential order, a JTF commander can find units of all services enforcing the law under the direct supervision of the Department of Justice. Given this possibility, several pragmatic steps should be taken. Contingency planning should continue and be expanded, and standing operational plans should be reviewed and rehearsed periodically. Administrative and logistical coordination should be planned in detail. Joint training with National Guard troops in this environment should make its way into the already overcrowded training plan of designated active component units. At the strategic level, senior leaders will have to reorient their thinking. Given the scarcity of resources, our nation can ill afford to have the effectiveness of its military assets artificially constrained by a misunderstanding of the law.

## **Counterterrorism**

The second series of lessons related to the military helping civil law enforcement agencies to maintain public order and domestic tranquillity is derived from the FBI experience at Ruby Ridge, Idaho. It should be noted that the incident at Ruby Ridge was classified as a generic hostage-barricade situation and not a terrorist incident. What distinguishes it from other hostage operations is the development and application of rules of engagement (ROE) for operations in support of civil authorities, and the relevance of such ROE to possible employment of selected military units in a counterterrorist operation within our borders. This final section of the article addresses the growing threat of terrorism within the United States, the facts of what happened at Ruby Ridge, and factors to consider if military forces are used in domestic counterterrorism operations.

Despite some evidence to the contrary, the use of indiscriminate force for political ends continues to increase throughout the world. In a 1994 book, *The Terrorist Trap*,[41] Jeffrey D. Simon argues that terrorism is endless in nature. Using examples ranging from the Barbary Pirates in the early 1800s, through anarchists in the early 1900s, to the Weathermen in the 1960s and the World Trade Center bombing of 1993, he demonstrates that terrorism is inherent in the American experience. He also postulates that the explosion of technology and the willingness of outlaws of various kinds to use it indiscriminately against ordinary citizens makes the threat of modern terrorism much more direct than at any time in our history.[42] The proliferation of weapons of mass destruction, chemical and biological agents, and threats based on microencapsulation and nanotechnology suggest a grim future.[43] Simon's revelation that Army experiments in the 1960s in the New York subway system resulted in an estimate of several hundred thousand casualties is a sobering testimonial to the magnitude of the threat.[44]

If Simon is correct that the first publicized incident using biological agents would break down the last remaining obstacles to their use and spawn repetition, then the Aum Shinrikyo Tokyo subway incident in 1995 becomes all the more chilling.[45] It suggests that we will need to marshal all the resources of the federal government to combat the growing threat. The United States has for many years fielded military units specifically equipped and trained to deal with terrorist threats throughout the world. With the growing prospect of terrorism in our own country, the probability of domestic employment of the US military to counter terrorism has grown substantially. The FBI experience at Ruby Ridge provides lessons for such employment.

The incident at Ruby Ridge, Idaho, began with a 1991 investigation of weapons charges against Randy Weaver, an alleged former Green Beret and a survivalist living in a remote cabin in northern Idaho. The attempt by the US Marshall Service to serve a warrant on Weaver, which resulted in the death of a Deputy US Marshall and a member of the Weaver family, led the FBI to deploy its Hostage Rescue Team (HRT) to the scene. The incident culminated on 22 August 1992 when, after a week-long standoff, an HRT sniper shot and killed Randy Weaver's wife, Vicki. The FBI

actions were subsequently investigated exhaustively by the Department of Justice and by Congress. Five senior members of the FBI were suspended and finally disciplined, and the government settled a wrongful death suit brought by Vicki Weaver's survivors for over \$3 million. Randy Weaver was acquitted in a criminal trial of the original firearms charges and absolved of criminal liability for the death of the federal marshal.[46]

A principal item of interest for military leaders is the rules of engagement (ROE) in force at Ruby Ridge, the development and promulgation of which are illustrated by the official Justice Department investigation into the incident.[47] Generally, the FBI adheres to standard law enforcement guidelines for the use of deadly force: agents are authorized to use deadly force in self-defense or in defense of other agents who are in imminent danger of death or grievous bodily harm. This stricture is essentially defensive in nature, and has passed constitutional muster.[48]

At the time the HRT was deployed, federal agents were convinced that they were going into the most dangerous situation faced by the unit in its dozen years of existence.[49] The record reflects that the commander of the HRT, in consultation with Special Agent Larry Potts (later promoted and then removed as Deputy Director of the FBI), concluded that this situation required an additional set of ROE. Consequently, the ROE promulgated at the initial briefing stated that HRT snipers could engage "any adult with a weapon . . . in the vicinity . . . of the cabin" and that anyone so engaged "*could and should* be the subject of deadly force" (emphasis added).[50] This language was considered by those involved as the least restrictive ROE ever used by the bureau.

The FBI requires that any operational plan involving deliberate assault resolutions of a hostage rescue situation be submitted for approval to Headquarters, FBI. Proposed ROE for the operation must also be approved at the same level. An operational plan for the Ruby Ridge situation was indeed submitted; the reviewing official stopped the review when he noted that the plan did not include the required negotiation plan annex and rejected it on that basis. A negotiation plan annex was subsequently drafted by the lead negotiator on site, submitted, and eventually approved. But the ROE section (which sequentially followed the negotiation plan section in the FBI OPLAN format) and the complete plan itself were never formally approved in writing by Headquarters, FBI. At the local level, agents on the scene never coordinated the proposed rules of engagement with the FBI legal counsel, nor did they consult the US Attorney who had geographical responsibility for the crisis site.[51] Incredible as it may seem to those accustomed to more structured management of ROE, the rules of engagement in effect at Ruby Ridge were never formally approved.

The events in the tragedy unfolded as follows. The FBI sniper on the scene saw a man armed with a rifle come out of the cabin. The sniper saw that individual aim the weapon into the sky in the general direction of an FBI helicopter that could be heard but was not directly observable, due to a low, dense cloud cover. The sniper decided to engage this target; as the man headed behind a small building away from the main cabin, the sniper shot him in the back. (The sniper testified that in accordance with the ROE, he had also determined that if he reacquired that target he would fire again.) Others came from the cabin to assist the wounded man, and as they made their way back to the cabin the sniper thought he once again saw his initial target. The sniper again aimed at that target and led him as he ran for the open back door of the main cabin. He fired, and the round passed through the wooden door, killing Vicki Weaver--standing with her youngest child in her arms--as she held the door open.[52]

The Justice Department investigation concluded that the ROE used were suspect in each of three aspects: they were imprecise, they created an unduly offensive atmosphere, and they were an unconstitutional departure from the reliance placed on an individual agent to determine the threat of death or imminent grievous bodily harm before using deadly force.[53] Consequently, those on the scene had departed from the norm of law enforcement rules of engagement; rather than subjecting agents on the scene to the constraints inherent in "self-defense or in defense of other agents in imminent danger of death or grievous bodily harm," the ROE used at Ruby Ridge served to categorize armed adults at the site as hostile combatants. The ROE thus had the effect of allowing any armed adults to be decisively engaged by deadly force. Such a standard is analogous to that authorized to soldiers on the battlefield, who engage enemy forces not necessarily because they present a threat, but because they are the enemy.[54] At Ruby Ridge that day--as if it were a battlefield--status, not threat, dictated who would be engaged by fire.

Several of the lessons from Ruby Ridge for military leaders are tangential but nonetheless important. Consider that any terrorist activity in the United States so significant as to require the use of military forces to counter it could involve among the perpetrators US citizens, resident aliens, illegal immigrants, and members of foreign terrorist organizations



in the country illegally. Two circumstances will shape the effectiveness of US response to such incidents.

. There is a growing awareness that many US law enforcement agencies are ill equipped to deal with heavily armed terrorist organizations. The spectacle of police rushing to a local gun store to borrow high-performance weapons in March 1997 during a shoot-out in California defines the nature of the threat and a possible response to it by the average local police department. We can expect a degree of asymmetry between terrorists and law enforcement personnel that will almost inevitably trigger an intervention by the military. Our police are neither constituted, nor trained, nor equipped to deal with paramilitary assaults on our citizens. Simply stated, the scope of a terrorist action may be beyond the capability and resources of the FBI's Hostage Rescue Team (HRT), the preeminent civilian law enforcement entity trained and equipped for this role.

. The introduction of military units into such situations adds to the difficulty of applying law enforcement standards of self-defense or defense of other agents in imminent danger of death or grievous bodily harm before using deadly force. If the military is deployed to eliminate terrorists and restore a situation, they must be employed as they have been trained. That training is intended to succeed with minimum friendly casualties using military rules of engagement. Hence any member of a group participating in such an incident on this specific form of battlefield could by definition be considered a threat and subject to attack.

A major terrorist incident that requires the active participation of the armed forces on a domestic battlefield under the conditions described above will become the target of scrutiny unparalleled in the American experience. The level of media interest will be commensurate with that accorded Waco, Ruby Ridge, or the Oklahoma City bombing. Additionally, our governmental investigative agencies will be galvanized, with the FBI, as the lead federal agency, defining the site as a crime scene (under current rules) and trying to conduct a complete forensic workup on all weapons and individuals involved. The Department of Justice probably will review the procedures of the FBI. These reviews will occur even in the context of a perfect operation. If it is found not to be perfect, one can rest assured that a DOD blue-ribbon panel will be appointed to get to the bottom of the story. And notwithstanding all that scrutiny, it is highly likely that Congress will see fit to hold protracted hearings on the matter. Finally, in our society, the prospect of criminal and civil litigation must also be expected.

It is wishful thinking that military forces committed in such a situation would remain outside the reach of that attention. Commanders of any unit likely to be committed in aid of domestic law enforcement agencies confronting terrorists will want to ensure that our soldiers are the most capable, best equipped, and best trained they can possibly be. The operational plan will have to be developed, coordinated, and approved at the highest level of government. The final requirement will be for the government to stand behind its decisions and acknowledge errors without attempting to make scapegoats of those at the tactical level. This course of action will allow the United States to apply its military resources successfully in support of civilian law enforcement to meet a very real and growing terrorist threat.

The direct lesson for civilian leaders is startling in its clarity. Any military forces authorized by the President to restore domestic tranquility in terrorist incidents must be prepared to operate under military ROE. Our specially trained and equipped forces are not law enforcement elements, whose activities should be subjected to the same legal boundaries applicable to the FBI.[55] Instead, they possess specialized military operational standards. When civilian leaders decide to employ military forces in response to a domestic terrorist threat, they will have to recognize that military units may be required to use traditional military rules of engagement, defining combatants and using deadly force without the analytical assessment of threat. Before decision-makers bring our military forces to bear, the situation must be so potentially harmful (seized nuclear weapon, biological or chemical weapon of mass destruction) that the United States must react to it as if it is an act of war--not just a crime. In domestic terrorism requiring a military response, the armed forces are not "adjunct police," they are military forces operating under military rules of engagement. Their actions are, of course, subject to applicable law of war proscriptions. The ROE used must be approved and supported at the highest level of the Executive Branch.

## **Conclusion**

Civilian and military leaders need to expect an increase in domestic deployments of US military forces. They need to

recognize that each instance of use is accompanied by new and possibly unprecedented challenges. America's leaders should recognize that the relationship between America's Army and the American people is strong but may be compromised. Public confidence in the military can best be maintained by strict adherence to the legal underpinnings governing domestic operations of the armed forces. Applying the lessons learned from the early 1990s will maintain the excellent relationship between the people and the military well into the next century.

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## NOTES

1. The Stafford Act authorizes the President to establish a program for disaster preparedness and response. The Federal Emergency Management Agency (FEMA) is so established by Executive Order 12673, 23 March 1989. DOD Directive 3025.1 governs the Department of Defense response. The controlling Army Regulation is AR 500-60. The Secretary of the Army is designated as the Executive Agent for disaster relief in the Department of Defense.
2. The Posse Comitatus Act, 18 US Code Section 1385, states: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both." The Air Force was added to the original language in 1956. Black's Law Dictionary defines the term "posse comitatus" as "the power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases as to aid him in keeping the peace, in pursuing and arresting felons, etc." The Navy and Marine Corps are not included in the act, but are made subject to it by DOD Regulation (32 C.F.R. Section 213.2, 1992). The Coast Guard is exempt during peacetime, as are National Guard forces operating under the state authority of Title 32.
3. Congress, House of Representatives, Panel B, *Inquiry into Federal Law Enforcement Actions at Waco, Texas*, 20 July 1995, testimony of Brigadier General Walter P. Huffman, Assistant Judge Advocate General for Military Law and Operations, p. 14.
4. Department of the Army, *Domestic Disaster Assistance, A Primer for Attorneys*, The Judge Advocate General's School, Center for Law and Military Operations, p. 15. Hereinafter referred to as *Primer*.
5. The overarching proscriptive nature of Posse Comitatus results in the drawing of narrow distinctions. For example, conventional wisdom dictates that soldiers can manage traffic pursuant to convoy operations during a deployment. To a civilian driver stopped at an intersection by a Military Policeman (MP) this is a distinction without a difference. The civilian driver is subject to law enforcement by the MP notwithstanding what kind of traffic passes in front of him.
6. The concept of "citizen arrest" in common law generally allows for the detention of another by ordinary citizens if the detained party is caught during the actual commission of a crime. The concept provides for timely referral to appropriate law enforcement entities.
7. *Primer*, p. 17. All serious incidents involving illegal aliens were to be transferred to the Immigration and Naturalization Service.
8. *Ibid.*, p. 18. Unless otherwise indicated, the term "soldier" as used in this article refers to active-duty personnel. Members of the Army National Guard, who are also soldiers, are identified as members of the Guard.
9. 18 US Code Section 592 provides, "An officer of the Army or Navy who has control of troops and brings them to a place where a general or special election is being held shall be fined \$5,000 or imprisoned for five years or both, and be disqualified from holding any office of honor, profit or trust under the United States." By any account, a Draconian punishment.
10. The opinion, authored by the Principal Deputy Attorney General, distinguished on the facts the prohibitions of the law when passed just after the Civil War and the emergency situation that existed in Florida in 1992. The opinion divined that 50 feet constituted the distance needed to not have troops "at" a polling place. It further counseled federal troops to not be involved in any demonstrable show of federal military presence. *Primer*, Appendix F.

11. Ibid., p. 19.

12. Ibid., p. 22.

13. The Office of Government Ethics (OGE) standards, 5 C.F.R. Part 2635, are difficult to enforce in disaster relief operations. Many of the proffered gifts were not accepted for public relations reasons (steaks at a local restaurant, for example, for fear of the perception that soldiers were eating better than citizens) or operational constraints (rest and recreation at a nearby, but unaffected, Florida resort). Some ingenious attorneys managed to accept pizzas on behalf of the command. See *Primer*.

14. 31 US Code Section 1342 prohibits federal agencies from accepting voluntary services except in an "emergency involving the safety of human life or the protection of property." It was left to FEMA to make this determination. Liability could accrue under the Federal Tort Claims Act, 42 US Code 2679 *et seq.*, if volunteers were harmed by negligent acts of DOD personnel, or more broadly, if DOD was "directing" their activities. Volunteers referred to the American Red Cross and other similar agencies would not be deemed to be "directed" by DOD. *Primer*, p. 17.

15. Report of the Federal Emergency Management Agency, EM 3115, DR-1048, *Review of the Bombing of the Alfred P. Murrah Building, April 19, 1995.*, dated 12-13 June 1995, Log of Events at p. 18.

16. See 10 US Code Sections 371-378, codifying judicially created exceptions to the PCA.

17. House of Representatives Report No. 71, Part 2, 97th Cong., 1st sess. (1981). Reprinted in 1981, US Code Congressional and Administrative News, at p. 1785, Section 1004 of 1991 National Defense Appropriations Act.

18. See generally, Testimony of Major General John M. Pickler, former Commander, JTF 6, *Hearings*, p. 14 *et seq.*

19. Ibid., p. 14. JTF6 had Secretary of Defense delegated authority (through CINC-USACOM and USAFORSCOM) to approve missions within these parameters.

20. Ibid., p. 20.

21. Ibid.

22. The author was serving as the Staff Judge Advocate of the US Army Special Operations Command at the time of the initial request for support. The basic facts in this paragraph are taken from an article in the May 1995 issue of *Soldier of Fortune* magazine. Although that publication may not necessarily be a credible source, the information contained in the article comports with my recollection of the original request. The breadth of the request was also substantiated at the congressional hearings on Waco, see Testimony of Lieutenant Colonel Phillip P. Lindley, p. 27.

23. Ibid.

24. Eugene V. Gallagher and James D. Tabor, *Why Waco? Cults and the Battle for Religious Freedom in America* (Berkeley: Univ. of California, Berkeley, Press, 1995), p. 3.

25. Dick J. Reavis, *The Ashes of Waco* (New York: Simon and Schuster, 1995), p. 125.

26. Ibid., p. 124. The initial BATF request for helicopter support from the Texas National Guard was completely justified by the existence of illegal weapons.

27. Major General Pickler, in response to a question indicating that no reasonable evidence of a drug lab existed, replied, "I had absolutely no reason to doubt it at the time. We do not routinely question the veracity of credentialed officials of law enforcement agencies." *Hearings*, pp. 10, 30.

28. Lieutenant Colonel Phillip Lindley, interview with author, contemporaneous with the event, Fort Bragg, North Carolina. The actual conversation, as related, had the senior officer refer to Lieutenant Colonel (then Major) Lindley as

a "toad in the road." Major Lindley replied that he tended to take comments such as that personally. The senior officer replied that he (Major Lindley) could take it personally, and promptly hung up the phone.

29. *Hearings*, p. 17. Lieutenant Colonel Lindley and the Representatives present lauded the soldiers for their action in this regard. Care should be taken to curtail "forum shopping" in issues of great importance such as this.

30. Department of the Army, Memorandum, Headquarters United States Army Special Operations Command, Subject: USASOC Policy on Training Domestic Law Enforcement Agencies (DLEA), 12 January 1996, signed J. T. Scott, Lieutenant General, US Army, Commanding. The Secretary of Defense also issued written policy requiring his personal approval for support to civilian law enforcement agencies in situations of confrontation or use of lethal force.

31. 10 US Code Sections 331 through 334. Section 332 states: "Whenever the President considers the unlawful obstructions, combinations, or assemblages, or rebellion against the United States, makes it impracticable to enforce the laws of the United States in any state or territory by the ordinary course of judicial proceedings, he may call into federal service such of the militia of any state, and use such of the armed forces to suppress the rebellion." On its face this is a very low threshold, only elevated by political considerations.

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

33. A Report by the Special Advisor to the Board of Police Commissioners on the Civil Disorder in Los Angeles, *A City in Crisis*, 21 October 1992, p. 152, hereinafter Special Advisor Report.

34. *Ibid.*

35. Department of the Navy, After Action Report, Joint Task Force Los Angeles-Garden Plot-Staff Judge Advocate, Section II c (4). The Staff Judge Advocate of the JTF indicated that inconsistent levels of arming were reported throughout the JTF. Specifically he notes that active-duty troops were uniformly at the correct level "one," while federalized National Guard units were noted at levels "one" through "six," apparently at the direction of first-line leaders (p. 3).

36. *Ibid.* Section II Problem Areas-Lessons Learned, d.(2) reflects this administrative disconnect.

37. Special Advisor Report, p. 153.

38. *Ibid.*, p. 154.

39. *Ibid.* See also Christopher M. Schnaubelt, "Lessons in Command and Control from the Los Angeles Riots," *Parameters*, 27 (Summer 1997), 88-109.

40. The presidential proclamation to disperse and the order authorizing the Secretary of Defense to employ federal troops were signed and dated that same day, 1 May 1992.

41. Jeffrey D. Simon, *The Terrorist Trap, America's Experience With Terrorism* (Bloomington: Indiana Univ. Press, 1994).

42. *Ibid.*, p. 38.

43. *Ibid.*, p. 362.

44. *Ibid.*, p. 357.

45. *Ibid.*, p. 364.

46. Summarized report, *The New York Times*, 16 August 1995.

47. Department of Justice Report Regarding Internal Investigation of Shootings at Ruby Ridge, Idaho, During Arrest of Randy Weaver, undated. Hereinafter, DOJ Report.

48. DOJ Report, Section IV, F.3 a.(3) explains compliance of FBI ROE with the Supreme Court's decisions in *Tennessee v. Garner*, 471 US 1 (1985) and *Graham v. Connor*, 490 US 386 (1989).

49. Testimony of SA Larry Potts, at the time Assistant Director of the Criminal Investigative Division, HQ, FBI, at DOJ Report, Section IV F.3.b.

50. Although there was considerable conflict about the exact wording of the ROE, this appears to be the essential wording of the initial brief to the snipers who formed the perimeter around the cabin. The ROE were enlarged to negate the possibility of harming children and to allow the shooting of the camp's dogs if they interfered or gave warning of law enforcement activities. DOJ Report, Section IV, F.3.b.(3).

51. DOJ Report, Section IV F.2.b., details the process of formulating and processing the ROE in effect on 22 August 1992. The initial "could and should" language was formulated by the HRT Commander and SA Potts en route to the scene. They both testified that this additional guidance was never meant to impinge on the discretion of the individual FBI agent on the scene. Both the DOJ report and the Director of the FBI later disagreed with that proposition.

52. Summation of facts as derived from DOJ Report, Statement of Facts.

53. Conclusion of DOJ Report, Section IV, F.4.

54. Customary International Law of Armed Conflict allows soldiers to engage enemy combatants without regard to an assessment of present threat. All that must be considered is lack of protected status (medical personnel, sick and wounded, prisoners of war) and generally considered rules of proportionality.

55. The 22d Special Air Service Regiment in the United Kingdom has long operated under the rules applicable to the police forces of that nation. Author's interview with attorneys of the United Kingdom Land Forces, providing legal support to the 22 SAS, Salisbury, UK, 10 January 1993.

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