

# WHO SHOULD DEAL WITH FOREIGN TERRORISTS ON U.S. SOIL?: SOCIO-LEGAL CONSEQUENCES OF SEPTEMBER 11 AND THE ONGOING THREAT OF TERRORIST ATTACKS IN AMERICA

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## I. INTRODUCTION

When members of the Al Qaeda terrorist organization attacked the World Trade Center and the Pentagon with hijacked commercial aircraft on September 11, it was the first time since a young America fought pitched battles with British troops during the War of 1812 that aggressors from abroad had engaged targets on contiguous American soil. In short order, the coordinated attack by terrorists became a watershed event in U.S. history, as it led to substantial changes in the fabric of our nation's life. Since September 11, America has been on a war footing, with armed soldiers standing guard at our nation's airports, enhanced security at nuclear power plants and other vulnerable locations, and military jets flying combat air patrols in order to intercept and shoot down hijacked commercial aircraft. The legal climate has also been affected by the events of September 11. Congress has passed, and the President has signed, anti-terrorism legislation<sup>1</sup> that expands police surveillance powers. Additionally, the President has announced that suspected terrorists who are not U.S. citizens may be tried in special military tribunals lacking many of the

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1. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act)* of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

due process standards of American criminal courts.<sup>2</sup>

The events of September 11 have forced Americans to rethink the way we operate when it comes to dealing with violence within our borders. As our nation has moved quickly to reassess and sometimes reform the ways we have traditionally thought about and dealt with the specter of violent acts, attention has been focused on a set of incidents that government leaders have defined as the most likely or most disruptive to our way of life (such as airline hijackings and attacks on nuclear facilities).<sup>3</sup> Consideration of the current situation, however, suggests that those tasked with planning for and dealing with terrorist violence have overlooked one obvious potential threat: attacks by well-trained terrorist cells armed with military arms and ordnance on Americans who have congregated in public spaces such as schools, shopping malls, churches, and sports arenas.

Currently local police officers have the exclusive charge to respond to and handle any attacks of this sort within the rubric of state and federal statutes that forbid assault, murder, the possession of specific sorts of weapons, etc. A cursory look at law enforcement capabilities to protect innocents should a group of terrorists conduct a military-style assault, however, indicates that the police might be quickly overmatched. In this Article we first show why the police may not be capable of effectively dealing with assaults by terrorist cells on groups of American citizens. Second, we argue that our nation needs to develop contingency plans that would allow the U.S. military to take direct action against terrorists under certain conditions. Third, we identify some possible socio-legal consequences of the gap in our current capabilities to respond to military-style terrorist assaults.

The first step in this process is to briefly review the history of such attacks in the Middle East and other parts of the Islamic world and explain why we believe that military-style terrorist attacks should be considered a realistic threat in present-day America. We next discuss current police response capabilities

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2. See Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

3. See Michael Beebe & Douglas Turner, *The Lockdown Life; The War on Terrorism is Becoming Evident in a Lot of Little Ways—Security Measures That May Tax Americans' Patience and Nibble Away at Their Privacy*, BUFF. NEWS, Sept. 23, 2001, at A1.

to such attacks, explain how they have developed over the last few decades in response to specific instances of mass criminal violence committed by U.S. citizens, and identify the limitations of law enforcement's ability to respond to military-style terrorist attacks. We then explain how the military could, at least theoretically, fill the void in our nation's current anti-terrorist response capabilities, specify the conditions under which we believe U.S. military should be used, and discuss the legal and social ramifications of U.S. military action on U.S. soil. We conclude with an analysis of how the American public may respond to such threats with a return to an "unorganized militia" and a traditional interpretation of the Second Amendment.

## II. THE THREAT OF MILITARY-STYLE ATTACKS

We are concerned about the possibility of military-style assaults in the U.S. because they are a standard terrorist tactic overseas. Perhaps the most notable military-type terrorist assault occurred in 1981, when some Egyptian soldiers with ties to an Islamic fundamentalist group assassinated President Anwar Sadat with automatic weapons fire and hand grenades as he was reviewing troops during a parade celebrating Egypt's 1973 war with Israel.<sup>4</sup> Egypt was also home to another notable military-style terrorist attack in 1997, when a group of Islamic fundamentalists associated with Sheik Omar Abdul Rahman, now imprisoned in the United States for his role in the 1993 World Trade Center bombing, used automatic weapons and knives to kill fifty-eight foreign tourists and four Egyptians at the Temple of Hatshepsut in Luxor.<sup>5</sup> (Among the major effects of this attack was its devastating impact on Egypt's tourism industry and the ongoing expense of posting armed security guards to reassure tourists and prevent a reoccurrence.)<sup>6</sup>

Two more recent examples of the military assault tactic occurred immediately after the September 11 attacks. One was in October 2001, when Islamic militants armed with assault

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4. See, e.g., MOHAMED HEIKAL, *AUTUMN OF FURY: THE ASSASSINATION OF SADAT* (1983).

5. See Douglas Jehl, *At Ancient Site Along the Nile, Modern Horror*, N.Y. TIMES, Nov. 19, 1997, at A1.

6. See, e.g., Susan Sachs, *Mideast Violence Hurts Egypt's Tourism Boom*, N.Y. TIMES, Dec. 3, 2000, at E3.

rifles killed a Muslim security guard and fifteen worshipers attending Christian services at a church in Bahawalpur, Pakistan.<sup>7</sup> The other was in November 2001, when a Palestinian terrorist opened fire on an Israeli school bus,<sup>8</sup> an event that was on the leading edge of increased terrorist attacks in the Holy Land as Israel and the Palestinian Authority teetered toward full-scale war during the winter of 2001-2002.

Given the events of September 11 and the calls of Osama bin Laden and others<sup>9</sup> for jihad in the U.S., it would be foolish to believe that terrorists trained to conduct the military-style attacks that have periodically plagued other nations would not be willing to employ such tactics within our borders. An organized attack by trained terrorists at a school, sporting event, religious service, or any of the many other sorts of activities where Americans typically congregate would have a severe impact on our nation's daily life and sense of security. Sending children to school, attending athletic activities, or even going to church or synagogue services might no longer be considered safe by American citizens. The very nature of the American way of life could be changed in an instant.

The impact of a single such event is potentially far greater than the events of September 11. Securing our limited number of airports with National Guard soldiers is feasible, and most Americans can get by without flying on commercial airplanes. Securing every shopping mall and every school in America, by contrast, would be vastly more difficult than securing our airports. Moreover, if Americans quit shopping, or if they quit sending their children to school, the effect on our economy and our way of life could be more devastating and far reaching than that of the September 11 attacks.

### III. THE AMERICAN ANALOGUE: "ACTIVE SHOOTERS"

Although our nation has so far avoided attacks by foreign terrorists of the sort described above, our recent past is replete

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7. See *Massacre; Funeral Held For Christians In Pakistan*, N.Y. TIMES, Oct. 30, 2001, at B4.

8. See Phil Reeves, *Two Die in Attack on Israeli School Bus*, INDEPENDENT (London), Nov. 5, 2001, at 1.

9. See, e.g., Ronald Brownstein & Robin Wright, *Toppling of Arab Regimes Called Wider Goal of Terror; Strategy: Bin Laden's Jihad Against America is Ultimately Aimed at the Mideast*, ANALYSTS SAY, L.A. TIMES, Oct. 5, 2001, at A1.

with analogous events: cases in which Americans have executed well-planned attacks on large numbers of their fellow citizens at school, at work, and at play. The first of these events to capture the nation's attention occurred on August 1, 1966, when Charles Whitman, a former Marine who had murdered both his mother and his wife the night before, took two rifles and a shotgun to the observation deck near the top of the 300-foot Texas Tower on the campus of the University of Texas at Austin. At 11:50 A.M., Whitman began to shoot people indiscriminately on the campus plaza below. Before he was fatally struck by a police shotgun blast more than an hour later, Whitman had killed or wounded more than forty people.<sup>10</sup>

Whitman's murderous assault from the Texas Tower revealed some critical weaknesses in American law enforcement's capacity to respond to violent incidents and led to some notable changes in police practices. From the time the first phone call reporting the rampage came in to the Austin police switchboard moments after the shooting started, until Whitman was killed, all of the assets of the Austin Police Department were devoted to dealing with the incident.<sup>11</sup> Because this concentration of effort left the rest of the city essentially devoid of police service, many in law enforcement realized that they needed to develop the means to respond to sniping and similar incidents without draining the rest of the community of law enforcement coverage. The fact that Whitman was able to hold police at bay and continue his rampage for more than an hour led to a reassessment of law enforcement capabilities to resolve ongoing shooting incidents in a timely fashion.<sup>12</sup>

One consequence of the reviews that followed Whitman's rampage was that many law enforcement agencies decided that the best way to mount efficient and effective responses to such incidents was to develop specially trained and equipped units that could rapidly resolve such situations without paralyzing police capacity to respond to other needs. These units came to be generally known as SWAT (Special Weapons and Tactics)

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10. GARY M. LAVERGNE, *A SNIPER IN THE TOWER: THE TRUE STORY OF THE TEXAS TOWER MASSACRE* 27 (1997).

11. *Id.*

12. See TOMAS C. MIJARES ET AL., *THE MANAGEMENT OF POLICE SPECIALIZED TACTICAL UNITS* (2000).

teams. Since the late 1960s these units have proliferated so widely that today nearly all large law enforcement agencies in the U.S. have some sort of SWAT team.<sup>13</sup>

Over the years, SWAT teams have been called upon to deal with many sorts of special threats, including hostage crises and situations with barricaded criminals who refuse to be arrested. Significantly, the notion that SWAT teams would rush into a crisis quickly gave way to a different sort of police doctrine. As SWAT teams developed a base of experience, it was found that the most effective and safe thing SWAT teams could do in the vast majority of situations they handled was to slow things down by containing whatever problem was afoot, gain control of the location, and work to de-escalate the situation through negotiations or other non-lethal means. While SWAT team members did occasionally have to resort quickly to deadly force, they were able to resolve almost all of the critical incidents they handled through a patient response, without shooting anyone.<sup>14</sup> As experience showed that patient SWAT action was a sound way to deal with critical incidents, the notion of taking things slowly during dangerous situations became the norm in other realms of police work.<sup>15</sup> Indeed, until quite recently, it was widespread police doctrine that patrol officers who find themselves in special threat incidents should not attempt to resolve them, but rather should seek to contain the situation and call for the SWAT team to patiently resolve the situation.

The doctrine that patrol officers should handle all critical incidents by standing by and calling for SWAT, and that SWAT should move slowly toward resolution, was called into question in the 1990s as a new phenomenon emerged in our nation: mass school shootings. Although gunfire had episodically rung out on elementary, middle, and high school grounds in previous decades, the 1990s saw a wave of mass shootings in which one or two students would viciously attack their classmates in a manner designed to exact maximum

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13. *See id.*

14. *See* DARYL F. GATES & DIANE K. SHAW, CHIEF: MY LIFE IN THE LAPD 153-59 (1992).

15. *See generally* James J. Fyfe, *The Split Second Syndrome and Other Determinants of Police Violence*, in CRITICAL ISSUES IN POLICING 493 (Roger G. Dunham & Geoffrey P. Alpert eds., 2d ed. 1993).

carnage.<sup>16</sup> Prior to the spring of 1999, the shootings had all ended by the time the first police officers arrived on the scene, so little thought was given to appropriateness of the standard police response of waiting and taking things slowly in ongoing special threat situations. Then, at approximately 11:25 A.M. on April 20, 1999, two students from Columbine High School in Jefferson County, Colorado invaded their campus with a cache of guns and homemade explosives. Over the next fifteen minutes they killed twelve of their classmates, wounded even more, and shot a teacher who died later that day. About twenty-five minutes after they shot their last victim, the two killers ended their rampage by committing suicide at approximately 12:05 P.M.<sup>17</sup>

What made Columbine different from the school shootings that preceded it is that police officers were on the scene throughout the incident. Indeed, one police officer exchanged gunshots with the two students even before they made their way into the school. Within minutes, moreover, other officers had arrived at the school. Rather than immediately going into the school to halt the shooting, however, these officers followed the standard police doctrine of containing the location and calling for SWAT.<sup>18</sup>

SWAT officers from different agencies arrived in short order, formed an ad hoc team, and entered the school at about 12:15 P.M., approximately thirty-five minutes after the suspects had shot their last innocent and approximately ten minutes after they had killed themselves. Over the next few hours other SWAT officers entered Columbine, conducted deliberate clearing operations, and methodically evacuated students, staff, and faculty. At approximately 4:00 P.M. these clearing and evacuation activities were completed and SWAT officers began the process of double-checking the school for anything they might have missed.<sup>19</sup>

The officers who responded to the Columbine massacre were

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16. See DAVE GROSSMAN & GLORIA DEGAETANO, *STOP TEACHING OUR KIDS TO KILL: A CALL TO ACTION AGAINST TV, MOVIE AND VIDEO GAME VIOLENCE* 75-77 (1999).

17. SWAT Commander Bill Black, Littleton, Colorado Police Department, Presentation at the Illinois State Police Conference on Active Shooters (Nov. 12, 2001).

18. *See id.*

19. *See id.*

roundly criticized from many quarters for waiting outside the school while the killers executed students inside and for moving slowly through the building once they went in.<sup>20</sup> Among the many lessons that American law enforcement took from Columbine and the repercussions that followed was that time was not always on their side when dealing with armed intruders; waiting to negotiate with people who have no interest in doing so only increases the odds that innocents will die. This recognition has led to a change in police doctrine regarding the proper response to critical incidents. Since the Columbine incident, law enforcement officials have come to realize that the "take it slow" model is not appropriate for all special threat situations. There are times when police officers need to move quickly in order to protect innocents from murderers who are interested in killing as many people as possible, as quickly as possible.<sup>21</sup>

A new term, "active shooters," was developed to identify such individuals. Law enforcement officials realized that as long as such individuals are actively shooting and killing, they have no alternative but to respond as quickly as possible. This realization has led to enhanced law enforcement training and, in many cases, acquisition of additional equipment designed to provide officers with the tools needed to stop active shooters. As a result, in the years since Columbine, many U.S. enforcement officers have received training in what are called "rapid response" tactics. This training has included intense simulations using state-of-the-art, paintball-type training equipment, often in real schools. Police officers are trained to ignore the wounded, and move rapidly toward the "sound of the guns" in order to stop the killings as quickly as possible.<sup>22</sup> The equipment that increasingly has been provided to law enforcement officers has usually included assault rifles, often military surplus M-16's.<sup>23</sup>

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20. See, e.g., Judith Graham, *Report Faults Police for Columbine; Sheriff's Office Singled Out for Ignoring Warnings*, CHI. TRIB., May 18, 2001, at 16.

21. See Jane Prendergast, *Police Adopt Terminator Approach to School Shootings*, CINCINNATI ENQUIRER, Aug. 29, 2000, at [http://enquirer.com/editions/2000/08/29/loc\\_police\\_adopt.html](http://enquirer.com/editions/2000/08/29/loc_police_adopt.html).

22. See *id.*

23. See *id.*

## IV. THE CHINK IN THE ARMOR

Although rapid response tactics and the mindset underlying them would appear to represent a step forward in police preparedness for protecting innocents from active shooters, they offer little hope in terms of dealing with large scale, well-coordinated terrorist attacks. Rapid response tactics were designed to deal with one or two disturbed individuals armed with the sorts of weapons that are commonly available in America, not well-trained terrorist cells consisting of foreign nationals who are equipped with military ordinance and bent on killing as many American citizens as possible. Consequently, the first police officers to respond to a terrorist attack of this sort may find themselves quickly outgunned. It would then be up to SWAT to save the day. The problem is that they, too, may well be outgunned, for SWAT teams are trained and equipped to deal with conventional criminals, not foreign terrorists. They simply do not have the capabilities to match the sorts of explosives, armor, and support systems that well-equipped terrorists could bring to bear in an attack. Because the police cannot effectively deal with attacks by groups of terrorist active shooters, the nation needs to consider, and consider quickly, setting up some system whereby U.S. military assets can be employed on short notice in such situations.

This idea has already seen implementation, albeit very narrowly. On September 11, military jets were scrambled to shoot down the hijacked planes, but they were, tragically, too late. It was not that we did not have the capacity to protect New York and Washington, D.C., from aircraft turned into missiles by hijackers, it was just that no one had seriously prepared for the possibility. Now, as previously mentioned, the President and his military commanders have dispatched combat aircraft to patrol our skies and have crafted a protocol for shooting down planes that have been commandeered by terrorists.<sup>24</sup>

As a general rule, we are opposed to the use of the U.S. military in law enforcement operations and actions on U.S. soil. When terrorists from abroad take or plan violent actions within the United States, however, they do not merely violate the laws

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24. See, e.g., Seth Stern, *Shooting Airliners: Can Pilots Ever be Ready?*, CHRISTIAN SCI. MONITOR, Oct. 30, 2001, at 3.

of whatever state in which they act (and relevant federal laws); the actions of terrorists constitute acts of war. Foreign individuals or groups (and U.S. citizens aiding and abetting them) who commit acts of war on U.S. soil should not be viewed as people who need to be apprehended under the aegis of the Fourth Amendment of the Constitution, which properly requires substantial restraint on the part of law enforcement when seizing citizens, but rather as enemy soldiers who fall under the wholly different legal strictures of wartime.

Few objected when it was announced that fighter jets had been dispatched to shoot down the airliners hijacked on September 11 and that procedures were immediately established to shoot down any commercial aircraft that might be hijacked in the future. Few objected because it was apparent to all that there is no way to prevent terrorist suicide jets from completing attacks other than having military jets fire missiles into them. There is simply no other way to accomplish the task of protecting targets on the ground from sky-borne assaults. In the same way, we believe that the time has come for U.S. military personnel to be on standby to respond should foreign terrorists (or U.S. residents acting as soldiers for a foreign interest) launch a ground-based active shooter attack. Because such an attack would rapidly overwhelm police capacity to protect life, the law enforcement officials in charge should be able quickly to call for military assistance.

Indeed, we believe that law enforcement officials should be able to obtain military support in other sorts of situations in which they make an informed decision that the people with whom they are dealing are foreign terrorists (or U.S. residents acting on behalf of a foreign interest). We argue for this because there are other situations besides active shooter assaults where police capabilities would not match the level of threat posed by (apparent) terrorists. One such sort of situation would be instances when law enforcement locates terrorists at some static location. For instance, imagine a replay of the situation that led to the 1974 shoot-out between members of the Symbionese Liberation Army (SLA) and the Los Angeles Police Department (LAPD), but now the individuals going up against the LAPD are not home-grown criminals, but terrorists from Al Qaeda.

The SLA was a small group of violent American leftists bent on overthrowing the U.S. government. They executed the head

of the Oakland, California, school system, kidnapped newspaper heiress Patty Hearst, committed sundry other acts they deemed "revolutionary," and financed their operations through bank robberies.<sup>25</sup> When law enforcement located six of them in what the SLA believed was a safe house in a south-central Los Angeles neighborhood on May 17, 1974, LAPD SWAT, along with more than two hundred other police officers, surrounded the house and demanded that the occupants surrender.<sup>26</sup> The surrender demand was met by a fusillade of semi- and fully-automatic gunfire. Over the next hour, LAPD SWAT, along with other officers on the scene, fought a pitched battle with the six SLA members. Over the course of the fire-fight, police officers fired more than 5,000 rounds, while the SLA fired upwards of 3,700 rounds and threw a half-dozen or so small explosive devices at the police. The situation finally ended when the safe house burned to the ground, killing all six of the domestic terrorist occupants. Remarkably, no police officers or innocent bystanders lost their lives.<sup>27</sup>

One reason that the police prevailed with no loss of innocent life is that the SLA was a rag-tag group with little training in tactics and weapons use. An Al Qaeda cell would be substantially more formidable. They would have spent time developing expertise with the weapons in their arsenal (which would likely include ordnance far more lethal than the crude explosives the SLA had)<sup>28</sup> and preparing for confrontations with law enforcement should they be discovered before they could launch their attack plans. Thus, a replay of the events of May 17, 1974 with Al Qaeda in the role of the SLA likely would not play itself out so strongly in favor of the LAPD.

Under our proposed model, in order to prevent the loss of innocent life that almost surely would occur in a protracted shoot-out between the LAPD and Al Qaeda (or others of their

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25. See generally LES PAYNE & TIM FINDLEY, *THE LIFE AND DEATH OF THE SLA* (1976); see also VIN. MCLELLAN, *THE VOICES OF GUNS: THE DEFINITIVE AND DRAMATIC STORY OF THE TWENTY-TWO-MONTH CAREER OF THE SYMBIONESE LIBERATION ARMY, ONE OF THE MOST BIZARRE CHAPTERS IN THE HISTORY OF THE AMERICAN LEFT* (1977).

26. See Jim Newton, *Cutting-Edge SWAT Force Adapts to Changing LAPD*, L.A. TIMES, May 29, 1994, at A1.

27. See *id.*

28. The SLA used explosives consisting of C-4 stuffed into 35mm film canisters.

ilk), the chief of the LAPD, the city's mayor, or whoever in civilian authority would be designated to do so, would inform designated military authorities that the police have located a terrorist cell and request assistance. The house would be surrounded by a combination of LAPD SWAT and U.S. military forces. If the terrorists inside surrendered when the demand to do so was issued, they would be taken into custody using standard law enforcement procedures. If the terrorists did not surrender to the LAPD, the military would be there to destroy the house and all inside with whatever ordnance was proper as soon as the first shot was fired from inside. There would be no hour-long gun battle, no police officers firing small arms as they are attacked with explosives and automatic weapons, no unnecessary risk to thousands of innocent civilians living within gunfire range. Just swift, sure death to those who had invaded (albeit on a small scale) our nation.

Another true scenario to consider: in May 1995, a demented individual stole a National Guard tank and went on an extended joy ride through San Diego, destroying much in his path. The only reason he did not kill anyone is that the San Diego Police Department, in the words of one San Diego SWAT commander, "got lucky"<sup>29</sup> when the tank lost a tread as it high-centered on a freeway center divider and one of three police officers who climbed atop the tank shot the driver after another officer (with a military background) opened the hatch.<sup>30</sup> Under our proposal, if another stolen military tank starts careening through the streets of an American city, the police should not depend on luck. They should make the necessary calls to the military, and the tank should be disabled with whatever military asset is capable of doing so as quickly as possible. Although the driver in the San Diego tank incident was not a terrorist, his actions (and the fact that the police were able to stop him only because of an equipment breakdown) indicate that law enforcement simply does not possess the wherewithal to halt attacks by individuals who possess military hardware.

America has begun to grasp what has changed since September 11. But if we do not think ahead and prepare for the

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29. Interview with Sgt. Kenneth Hubbs, SWAT Team, San Diego Police Dep't (Dec. 14, 2000).

30. *Id.*

worst-case scenario, then we are sure to experience additional, potentially preventable deaths, perhaps not on the scale of September 11, but in large numbers nonetheless. A single terrorist in a mall or at a sporting event might be stopped by a police officer or an armed citizen (provided that the terrorist attacked in a State that grants concealed carry permits). A handful of terrorists might be stopped by a group of police or SWAT officers. But a large, well-armed, and disciplined terrorist cell that attacked a large school, a sports arena, or any other of the many sorts of places where thousands of Americans congregate could kill vast numbers of people before the police could stop it. Because the police have very limited capacity to deal with threats of this sort, we need to get the military working, within the framework of the Constitution, with civilian law enforcement to protect innocent U.S. citizens from the future acts of war that our adversaries have promised to visit upon us.

Military bases (National Guard, reserve, and active duty) are distributed across America. Very few locations within the U.S. are outside the immediate striking range of military assets. In many scenarios there will be time for the military to respond. Indeed, in the worst-case scenarios, those in which the local law enforcement agencies are overwhelmed, there will be too much time, and every minute the military delays will be another minute that the terrorists can kill American citizens. The real problem is having these assets on standby, coordinated and even rehearsed, ready to respond on short notice. We have been here before, depending on the U.S. Cavalry to respond to "Indian raids," and now what was old may be new again.

## V. THE LEGAL BARRIER

Our proposal to bring in the military to do battle with terrorists is in direct opposition to federal law, which generally prohibits military involvement in law enforcement activities. The legal foundation for this prohibition is the 1878 Posse Comitatus Act, which Congress passed in response to concerns about the use of military units in imposing Reconstruction on

the Southern States.<sup>31</sup> The Act, which reflected a long-standing American tradition of keeping the military and civilian realms of society distinct from one another, forbade the Army from participating in civilian law enforcement, "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress."<sup>32</sup> Although the law applies by its terms only to the Army and the Air Force, the Department of Defense has extended it by regulatory fiat to the Navy and Marine Corps.<sup>33</sup> Thus there are presently substantial legal restrictions on the capacity of any of the four branches of the military to take direct action against anyone in the U.S. who would violate state and federal laws in order to commit terrorist acts against Americans.

These restrictions, however, are not set in stone. As indicated in the portion of the legislation quoted in the preceding paragraph, the Posse Comitatus Act allows Congress to authorize the use of the military to engage in law enforcement activity in specific cases and circumstances. The largest exception to the Posse Comitatus Act that Congress has carved out to date relates to the use of the military to enforce drug laws. As the so-called "war on drugs" heated up during the 1980s, Congress authorized the military to assist the anti-drug efforts of civilian police agencies by providing them with training, equipment, and help in conducting surveillance operations.<sup>34</sup> One thing these "Drug War Exceptions" to the Posse Comitatus Act do not permit is direct military action against civilians. This speaks volumes about America's reluctance to let soldiers deal with people who engage in illegal behavior on U.S. soil.

Given the existence of the Posse Comitatus Act and the deep-seated American preference that the military stay out of law

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31. See Army Appropriations Act, ch. 263, § 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385 (1994)).

32. 18 U.S.C. § 1385 (1994).

33. See DoD Cooperation with Civilian Law Enforcement Officials, Department of Defense Directive No. 5525.5, at 21 (Jan. 15, 1986).

34. The Department of Defense Authorization Act of 1982, Pub. L. No. 97-86, § 905, 95 Stat. 1099, 1114-16 (1981) (codified as amended at 10 U.S.C. §§ 371-380 (1994)), was the first law to authorize military involvement in the drug war. By 1989, Congress had designated the Department of Defense the lead federal agency to interdict drugs via the National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1202, 103 Stat. 1352, 1563 (1989) (codified as amended at 10 U.S.C. § 124(a) (1994)).

enforcement, our proposal that military units engage terrorists in combat must overcome both legal and cultural barriers. The legal barrier is, in theory, rather simple to clear. Congress can pass, and the President can sign, legislation that allows members of the military to directly engage, on American soil, people who break the law. As a practical matter, on the other hand, it may not be so simple to get the American public to stand behind legislation that runs counter to our nation's long-standing aversion to military action against lawbreakers. America quickly acceded to armed troops standing guard in airports and other locations around the country in the wake of September 11, but these GIs are simply providing security. We believe that the American people will not readily sign off on giving the military wide-ranging powers to take offensive action against individuals here in the U.S. (nor do we believe that they should do so).

It seems to us that the cultural barrier can be overcome through the legislative process necessary to overcome the legal barrier. If those who would write the law carving out a terrorist exception to the Posse Comitatus Act were to focus only on those sorts of terrorist threats that law enforcement clearly is not designed to handle, they could craft a narrow law that would allow the military to respond when needed, while at the same time placing strict limits on military powers. Such legislation would limit the use of the military to those situations in which there is probable cause to believe that those plotting or engaging in terrorist activity are foreign nationals or American citizens working on behalf of a foreign power. Under this legal regime, if the probable cause bar is met, civilian authorities can call in the military; if not, the police handle the situation.

This probable cause standard would set a bright line test that civilian authorities could look to when, in the midst of a situation that could involve foreign, or foreign-sponsored, terrorism, they contemplate the possibility of calling for military assistance. The standard would also provide the same bright line for military commanders, who would have to agree to sign off on the deployment of military forces when their civilian counterparts requested assistance. If military assets were to be committed in a situation in which the probable cause threshold were not met, then the civilian authorities and

military commanders in charge would be subject to the penalty provisions of the Posse Comitatus Act (i.e., unspecified fines and up to two years of imprisonment). This threat should be sufficient to preclude reckless or arbitrary deployment of military assets in regular police matters.

On the other hand, the probable cause standard would allow for good faith mistakes that might arise during the quickly evolving situations facing authorities and commanders when violence strikes. Take, for example, a replay of the previously mentioned tank attack in San Diego. We would argue that in the current climate, it would be eminently reasonable to believe that a tank rolling through an American city was somehow connected to foreign-based terrorism and that it would therefore be appropriate to use military assets to stop its rampage. If it turned out that the situation was utterly unrelated to foreign terrorism (as in the San Diego incident), no criminal liability should apply to those who called for and authorized the military strike that halted the tank in its tracks, because the decisions to employ the military would have been based on probable cause to believe that there was a foreign terrorist link.

Indeed, one way that a terrorist exception to the Posse Comitatus Act could help clarify the circumstances under which it authorizes military action would be to set out some specific conditions that would constitute the necessary probable cause. The law could, for example, state that the use of military hardware such as tanks and armored personnel carriers in attacks presumptively constitutes the probable cause necessary to call out the military. The list of specific circumstances would be a short one, but it would be helpful in providing the guidance that civilian authorities and military commanders would need to make the hard decisions that must be made when violent incidents erupt.

Crafting a sound terrorism exception to the Posse Comitatus Act will require substantial thought and careful consideration of many factors by our legislators. We believe that Congress should go through the deliberative process necessary to write and enact a statute that will allow the military to deal directly with foreign-born terrorism. If it does not, Americans will continue to stand naked against the threat of violence that law enforcement is simply not equipped to deal with. As one

commentator has noted, "Whatever the nature of the next attack, if another 'big one' comes and the government is woefully unprepared or incompetent, public confidence could collapse at home and the war effort would be badly crippled."<sup>35</sup>

## VI. TERRORIST ATTACKS AND GUN LAWS

The preceding material frames an argument for one step we believe our society should take to enhance its ability to protect itself in the wake of September 11 within the confines of American legal and civic traditions. In asserting that the military should be permitted to respond to terrorist "active shooting" situations, we are advocating a proposal that we believe will reduce the loss of life should foreign terrorists launch a military-style assault. The remainder of this article is devoted to commentary about a different safety-related issue that has been sharpened by the events of September 11 and that will almost certainly be sharpened further should the sort of attack we fear indeed come to pass: gun laws.

A look around the globe discloses that western nations have adopted one of two basic responses to terrorism in drafting gun laws.<sup>36</sup> One is the British model of restrictive gun laws and extensive public surveillance.<sup>37</sup> The other model is the Israeli<sup>38</sup> or Swiss<sup>39</sup> model, in which large numbers of citizens are trained and armed. In essence, then, there are two competing models that our nation can adopt in response to growing terrorist threats: reduce civil liberties and restrict individuals' access to firearms, or maintain civil liberties and perhaps even expand individuals' access to firearms. Although the terrorism of September 11 has had a substantial impact in many realms of

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35. David Gergen, *Tending the Home Front*, U.S. NEWS & WORLD REP., Nov. 5, 2001, at 84.

36. See DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* (1992).

37. See generally Joseph E. Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 *HAMLIN L. REV.* 399 (1999).

38. See generally Abraham Tennenbaum, *Israel Has a Successful Gun Control Policy*, in *GUN CONTROL: CURRENT CONTROVERSIES* 248 (Charles P. Cozic ed. 1992).

39. For a discussion of gun availability and carrying under Swiss law, see KOPEL, *THE SAMURAI*, *supra* note 36, at 278-302. See also David B. Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 *ST. LOUIS U. PUB. L. REV.* 285, 299 (1993).

American life, the issue of access to guns received scant attention, perhaps because the attackers used knives rather than firearms. A military-style active shooter assault, in contrast, would by definition involve guns, and thus would likely focus considerable attention on the gun law issue.

The response of the Air Line Pilots' Association to the September 11 hijackings is instructive as to whether our nation might favor the British or the Israeli-Swiss anti-terrorist model. Prior to September 11 the Association was adamantly opposed to guns in the cockpit.<sup>40</sup> Since then, the Association has reversed itself and has just as adamantly requested that the flight crew be allowed to carry guns when they fly.<sup>41</sup> Congress subsequently approved this right in the Aviation and Transportation Security Act (subject to approval by the new Undersecretary of Transportation for Security and proper training).<sup>42</sup> Similarly, if Americans see mass murders in their malls, schools, stadiums, or places of worship, they are probably likely, in most states, to follow the airline pilots and call for a response based on the Israeli-Swiss model.

It can be argued that the original application of the Second Amendment, as it was interpreted for well over a century, was that "the people" referred to the general population, and "a well regulated Militia" also referred to the general American public and its ability to protect itself from Indian raids and foreign invasions.<sup>43</sup> This original intent can be observed in the militia enactments, passed by the U.S. Congress in 1792, which required that "every able-bodied male citizen between the ages of 18 and 45 be enrolled . . . [in the militia] and equip himself with appropriate weaponry."<sup>44</sup> In 1903, new legislation "divided the class of able-bodied male citizens between 18 and 45 years of age into an 'organized militia' to be known as the National Guard . . . and the remainder of which was then described as the 'reserve militia,' and which later statutes have

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40. See Marshall Wilson, *Plan to Put Guns on Planes Brings Dubious Reaction*, S.F. CHRON., Sept. 26, 2001, at A3.

41. See Susan Dodge, *Keeping Cockpits Secure: Durbin, Airline Workers Meet at Midway*, CHI. SUN-TIMES, Oct. 1, 2001, at 7.

42. See Pub. L. No. 107-71, § 128, 115 Stat. 597, 633 (2001)..

43. U.S. CONST. amend. II.

44. *Perpich v. U.S. Dep't of Def.*, 496 U.S. 334, 341 (1990).

termed the 'unorganized militia.'"<sup>45</sup> Today, faced with a new threat from abroad, this meaning is likely to reassert itself.

This traditional interpretation was recently reaffirmed by the Fifth Circuit Court of Appeals in *United States v. Emerson*, where the court stated:

All of the evidence indicates that the Second Amendment, like other parts of the Bill of Rights, applies to and protects individual Americans. We find that the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training.<sup>46</sup>

It is difficult, if not impossible, to conceive of a scenario in which civilians carrying weapons could prevent an airline hijacking because such weapons cannot be carried on aircraft. Yet civilian weapon possession could conceivably reduce the degree of damage done in at least some active shooter attacks (obviously, not including those that would necessitate a military response). In a recent school bus shooting in Israel that involved a single gunman, for example, gunfire from an armed citizen was instrumental<sup>47</sup> in stopping the killer before he could do any further damage.<sup>47</sup> If Americans are responding to airline hijackings by arming themselves (an action of dubious value), then in response to terrorist active shooter attacks (in which armed citizens could have some utility), the demand for concealed carry permits would probably be quite dramatic, even if pistols would have been of limited or zero value in the case that prompted the demand.

Such a demand would represent a move toward the Israeli-Swiss anti-terrorism model and could have a substantial effect on the American political landscape. States with restrictive gun laws might well see a powerful backlash against "anti-gun" politicians as citizens clamor for access to the weapons that they believe (perhaps incorrectly) they need to protect themselves and their communities from terrorists who might attack them. In such a climate, politicians who attempt to "disarm" American citizens might well be committing political

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45. *Id.* at 342.

46. *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001).

47. *See Reeves, supra* note 8, at 1.

suicide, and laws restricting concealed carry would likely see dramatic and sweeping change. In sum, given our nation's long-standing affinity for the right to keep and bear arms, and given recent court decisions regarding the interpretation of the Second Amendment, it is likely that a mass shooting by foreign terrorists would have substantial repercussions as Americans scrambled to restore their sense of safety.

## VII. CONCLUSION

The possibility of a terrorist attack using the active shooter model is very high both because it is consistent with the Middle Eastern terrorist's modus operandi and because it is an effective and simple means of creating mass casualties and terror. We cannot expect local authorities to prevent every single attack of this sort, so we must think hard about how best to reduce the loss of innocent life once such an attack commences. Because the military has the assets to accomplish this goal by stopping such attacks in short order, we need immediately to reconsider the role of the military in domestic terrorist situations and lay the groundwork for it to respond to support law enforcement in active terrorist attacks.

Finally, in the face of the threat posed by terrorists from abroad, we foresee the likelihood of a significant reassessment of gun laws and the interpretation of the Second Amendment. Politicians who have traditionally been "anti-gun" may need to recognize that new political imperatives may come into play very rapidly. There is no shame in modifying political stances in recognition of new realities. If we had been told a year ago that young soldiers with loaded M-16 rifles would be in every airport in America, it is unlikely that anyone would have believed it. Similarly, new realities emerging from future active shooter terrorist attacks may result in changes that few could contemplate today. Among those changes may be a more traditional application of the Second Amendment.

We sincerely hope that we are wrong in our belief that military-style attacks by foreign terrorists loom on the horizon. We also hope that if our fears are realized, our nation will have taken steps that can minimize the damage while, at the same time, honoring the legal and social traditions that make our nation worth defending in the first place.