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FROM: John C. Yoo   
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RE: *Authority for Use of Military Force To Combat Terrorist Activities  
Within the United States*

You have asked for our Office's views on the authority for the use of military force to prevent or deter terrorist activity inside the United States. Specifically, you have asked whether the Posse Comitatus Act, 18 U.S.C. § 1385 (1994), limits the ability of the President to engage the military domestically, and what constitutional standards apply to its use. We conclude that the President has ample constitutional and statutory authority to deploy the military against international or foreign terrorists operating within the United States. We further believe that the use of such military force generally is consistent with constitutional standards, and that it need not follow the exact procedures that govern law enforcement operations.

Our analysis falls into five parts. First, we review the President's constitutional powers to respond to terrorist threats in the wake of the September 11, 2001 attacks on the World Trade Center and the Pentagon. We consider the constitutional text, structure and history, and interpretation by the executive branch, the courts and Congress. These authorities demonstrate that the President has ample authority to deploy military force against terrorist threats within the United States.

Second, we assess the legal consequences of S.J. Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (2001), which authorized the President to use force to respond to the incidents of September 11. Enactment of this legislation recognizes that the President may deploy military force domestically and to prevent and deter similar terrorist attacks.

Third, we examine the Posse Comitatus Act, 18 U.S.C. § 1385, and show that it only applies to the domestic use of the Armed Forces for *law enforcement* purposes, rather than for

the performance of military functions. The Posse Comitatus Act itself contains an exception that allows the use of the military when constitutionally or statutorily authorized, which has occurred in the present circumstances.

Fourth, we turn to the question whether the Fourth Amendment would apply to the use of the military domestically against foreign terrorists. Although the situation is novel (at least in the nation's recent experience), we think that the better view is that the Fourth Amendment would *not* apply in these circumstances. Thus, for example, we do not think that a military commander carrying out a raid on a terrorist cell would be required to demonstrate probable cause or to obtain a warrant.

Fifth, we examine the consequences of assuming that the Fourth Amendment applies to domestic military operations against terrorists. Even if such were the case, we believe that the courts would not generally require a warrant, at least when the action was authorized by the President or other high executive branch official. The Government's compelling interest in protecting the nation from attack and in prosecuting the war effort would outweigh the relevant privacy interests, making the search or seizure reasonable.

## I.

The situation in which these issues arise is unprecedented in recent American history. Four coordinated terrorist attacks took place in rapid succession on the morning of September 11, 2001, aimed at critical Government buildings in the nation's capital and landmark buildings in its financial center. The attacks caused more than five thousand deaths, and thousands more were injured. Air traffic and telecommunications within the United States have been disrupted; national stock exchanges were shut for several days; damage from the attack has been estimated to run into the tens of billions of dollars. Hundreds of suspects and possible witnesses have been taken into custody, and more are being sought for questioning. In his Address to a Joint Session of Congress and to the American People on September 20, 2001, President Bush said that "[o]n September the 11th, enemies of freedom committed an act of war against our country." President's Address to a Joint Session of Congress (Sept. 20, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>.

It is vital to grasp that attacks on this scale and with these consequences are "more akin to war than terrorism."<sup>1</sup> These events reach a different scale of destructiveness than earlier terrorist episodes, such as the destruction of the Murrah Building in Oklahoma City, Oklahoma in 1994. Further, it appears that the September 11 attacks are part of a violent terrorist campaign against the United States by groups affiliated with Al-Qaeda, an organization created in 1988 by Usama bin Laden. Al-Qaeda and its affiliates are believed to be responsible for a series of attacks upon the United States and its citizens that include a suicide bombing attack in Yemen on the *U.S.S. Cole* in 2000; the bombings of the United States Embassies in Kenya and in Tanzania in 1998; a truck bomb attack on a U.S. military housing complex in Saudi Arabia in 1996; an unsuccessful attempt to destroy the World Trade Center in 1993; and the ambush of U.S. servicemen in

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<sup>1</sup> Lewis Libby, *Legal Authority for a Domestic Military Role in Homeland Defense*, in Sidney D. Drell, Abraham D. Sofaer, & George D. Wilson (eds.), *The New Terror: Facing the Threat of Biological and Chemical Weapons* 305, 305 (1999).

Somalia in 1993 by militia believed to have been trained by Al-Qaeda.<sup>2</sup> A pattern of terrorist activity of this scale, duration, extent, and intensity, directed primarily against the United States Government, its military and diplomatic personnel and its citizens, can readily be described as a “war.”<sup>3</sup>

On the other hand, there are at least two important ways in which these attacks differ from past “wars” in which the United States has been involved. First, this conflict may take place, in part, on the soil of the United States. Except for the Revolutionary War, the War of 1812, and the Civil War, the United States has been fortunate that the theatres of military operations have been located primarily abroad. This allowed for a clear distinction between the war front, where the actions of military commanders were bound only by the laws of war and martial law, and the home front, where civil law and the normal application of constitutional law applied. September 11’s attacks demonstrate, however, that in this current conflict the war front and the home front cannot be so clearly distinguished – the terrorist attacks were launched from within the United States against civilian targets within the United States.

Second, the belligerent parties in a war are traditionally nation-states, see *The Prize Cases*, 67 U.S. (2 Black) 635, 666 (1862), or at least groups or organizations claiming independent nationhood and exercising effective sovereignty over a territory, *id.*; see also *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878).<sup>4</sup> Here, Al-Qaeda is not a nation (although they have been harbored by foreign governments and may have received support and training from them). Like terrorists generally, Al-Qaeda’s forces bear no distinctive uniform, do not carry arms openly, and do not represent the regular or even irregular military personnel of any nation. Rather, it is their apparent aim to intermingle with the ordinary civilian population in a manner that conceals their purposes and makes their activities hard to detect. Rules of engagement designed for the protection of non-combatant civilian populations, therefore, come under extreme pressure when an attempt is made to apply them in a conflict with terrorism.

This, then, is armed conflict between a nation-state and an elusive, clandestine group or network of groups striking unpredictably at civilian and military targets both inside and outside

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<sup>2</sup> See generally Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 Am. J. Int’l L. 161 (1999); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 Yale J. Int’l L. 559 (1999).

<sup>3</sup> On September 12, 2001, the North Atlantic Council of the North Atlantic Treaty Organization (“NATO”) agreed that the September 11 attack was directed from abroad against the United States, and decided that it would be regarded as an action covered by article 5 of the 1949 NATO Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all. Press Release, NATO, Statement by the North Atlantic Council, available at <http://www.nato.int/docu/update/2001/1001/e1002a.htm>. Article 5 of the NATO Treaty provides that if an armed attack against a NATO member occurs, each of them will assist the Party attacked “by taking forthwith, individually or in concert with the other Parties, such action as it deems necessary, including the use of armed force.” North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.

<sup>4</sup> It is true, however, that a condition of “war” has been found to exist for various legal purposes in armed conflicts between the United States and entities that lacked essential attributes of statehood, such as Indian bands, see *Montoya v. United States*, 180 U.S. 261, 265, 267 (1901) and insurrections threatening Western legations, see *Hamilton v. McClaghry*, 136 F. 445, 449 (C.C.D. Kan. 1905) (Boxer Rebellion).

the United States. Because the scale of the violence involved in this conflict removes it from the sphere of operations designed to enforce the criminal laws, legal and constitutional rules regulating law enforcement activity are not applicable, or at least not mechanically so. As a result, the uses of force contemplated in this conflict are unlike those that have occurred in America's other recent wars. Such uses might include, for example, targeting and destroying a hijacked civil aircraft in circumstances indicating that hijackers intended to crash the aircraft into a populated area; deploying troops and military equipment to monitor and control the flow of traffic into a city; attacking civilian targets, such as apartment buildings, offices, or ships where suspected terrorists were thought to be; and employing electronic surveillance methods more powerful and sophisticated than those available to law enforcement agencies. These military operations, taken as they may be on United States soil, and involving as they might American citizens, raise novel and difficult questions of constitutional law.

## II.

We believe that Article II of the Constitution, which vests the President with the power to respond to emergency threats to the national security, directly authorizes use of the Armed Forces in domestic operations against terrorists. Although the exercise of such authority usually has concerned the use of force abroad, there have been cases, from the 1794 Whiskey Rebellion on,<sup>5</sup> in which the President has deployed military force within the United States against armed forces operating domestically. During the Civil War and the War of 1812, federal troops fought enemy armies operating within the continental United States. On other occasions, the President has used military force within the United States against Indian tribes and bands. In yet other circumstances, the Armed Forces have been used to counter resistance to federal court orders, to protect the officials, agents, property or instrumentalities of the federal Government, or to ensure that federal governmental functions can be safely performed.<sup>6</sup> We believe that the text, structure, and history of the Constitution, in light of its executive, legislative, and judicial interpretation, clearly supports deployment of the military domestically, as well as abroad, to respond to attacks on the United States.

*The Text, Structure and History of the Constitution.* The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of compelling, unforeseen, and possibly recurring, threats to the nation's security.

Drawing on their experiences during the Revolutionary War and the Articles of Confederation, the Framers designed a Constitution that would vest the federal Government with

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<sup>5</sup> We note that Washington's use of the militia to suppress the "Whiskey Rebellion" in western Pennsylvania was authorized by statute. See Edward S. Corwin, *The President: Office and Powers* 166 (1940).

<sup>6</sup> See generally Henry P. Monaghan, *The Protective Power of the Presidency*, 93 Colum. L. Rev. 1, 66 (1993). Among the Presidents who have used troops domestically to protect federal functions or to enforce federal law are President Hayes in the railroad strike of 1877; President Cleveland in the Pullman strike of 1895; President Hoover in response to the "Bonus Army" in 1932; and President Eisenhower against Governor Faubus' resistance to school desegregation in 1957. President Theodore Roosevelt intended to use federal troops to take over mines and work them in the coal strike of 1902, had he not been able to settle the strike by other means. Theodore Roosevelt, *Theodore Roosevelt: An Autobiography* 489 (1985 reprint) (1913).

sufficient authority to respond to any national emergency. In particular, the Framers were aware of the possibility of invasions or insurrections, and they understood that in some cases such emergencies could be met only by the use of federal military force. By definition, responding to these events would involve the use of force by the military within the continental United States. One of the signal defects of the Articles of Confederation was its failure to establish a federal Government that could respond to attacks from without or within. As James Madison observed before the start of the Federal Convention, the chief difficulty with the Articles was the “want of Guaranty to the States of their Constitutions & laws against internal violence.” *Vices of the Political System of the United States* (Apr. 1787), in 9 *The Papers of James Madison* 345, 350 (Robert A. Rutland et al. eds., 1975). Similarly, Edmund Randolph argued before the Philadelphia Convention on May 29, 1787, that “the confederation produced no security agai[nst] foreign invasion; congress not being permitted to prevent a war nor to support it by th[eir] own authority.” 1 Max Farrand, *The Records of the Federal Convention of 1787*, at 19 (1911) (alterations in original).<sup>7</sup>

As they understood it, the Constitution amply provided the federal Government with the authority to respond to such exigencies. “There are certain emergencies of nations in which expedients that in the ordinary state of things ought to be forborne become essential to the public weal. And the government, from the possibility of such emergencies, ought ever to have the option of making use of them.” *The Federalist* No. 36, at 191 (Alexander Hamilton). Because “the circumstances which may affect the public safety are [not] reducible within certain determinate limits, . . . it must be admitted, as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy.” *Id.* No. 23, at 122 (Alexander Hamilton). As the nature and frequency of these emergencies could not be predicted, so too the Framers did not try to enumerate all of the powers necessary in response. Rather, they assumed that the national government would possess a broad authority to take action to meet any emergency. The federal Government is to possess “an indefinite power of providing for emergencies as they might arise.” *Id.* No. 34, at 175 (Alexander Hamilton). Events leading up to the Federal Convention, such as Shay’s Rebellion, clearly demonstrated the need for a central government that could use military force domestically.<sup>8</sup>

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<sup>7</sup> The breakdown of public order in Massachusetts during Shay’s Rebellion of 1786-1787 – which Alexander Hamilton described as a “civil war” in that State, *The Federalist* No. 6, at 24 (Alexander Hamilton) (Clinton Rossiter ed., 1999) – and the obvious ineffectiveness of the Continental Congress in mustering troops to meet the crisis, were among the immediate causes leading to the call for the Constitution. See *The Federalist* No. 25, at 134-35 (Alexander Hamilton) (illustrating need for new Constitution by discussing Shay’s Rebellion); see also Andrew C. McLaughlin, *The Confederation and the Constitution 1783-1789*, at 114-17 (1971 reprint) (1962). Clearly, responding to events such as Shay’s Rebellion would involve the use of military force domestically.

<sup>8</sup> See also *The Federalist* No. 41, at 224 (James Madison) (“Security against foreign danger is one of the primitive objects of civil society. . . . The powers requisite for attaining it must be effectually confided to the federal councils.”). Supreme Court opinions echo Hamilton’s argument that the Constitution presupposes the indefinite and unpredictable nature of the “the circumstances which may affect the public safety,” and that the federal government’s powers are correspondingly broad. *Id.* No. 23, at 122. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981) (noting that the President “exercis[es] the executive authority in a world that presents each day some new challenge with which he must deal”).

This power includes the authority to use force to protect the nation, whether at home or abroad. It “cannot be denied,” Hamilton argued, that “there may happen cases in which the national government may be necessitated to resort to force.” *Id.* No. 28, at 146 (Alexander Hamilton). “Our own experience has corroborated the lessons taught by the examples of other nations; that emergencies of this sort will sometimes exist in all societies, however constituted; that seditions and insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body.” *Id.* In this event, Hamilton observed, the federal Government must have power to use the military. “Should such emergencies at any time happen under the national government, there could be no remedy but force.” *Id.*

To address these concerns, Article II vests in the President the Chief Executive and Commander in Chief Powers. The Framers’ understanding of the meaning of “executive” power confirms that by vesting that power in the President, they granted him the broad powers necessary to the proper functioning of the government and to the security of the nation. Article II, Section 1 provides that “[t]he executive Power shall be vested in a President of the United States.” By contrast, Article I’s Vesting Clause gives Congress only the powers “herein granted.” *Id.* art. I, § 1. This textual difference indicates that Congress’s legislative powers are limited to the list enumerated in Article I, Section 8, while the President’s powers include *all* federal executive powers unenumerated in the Constitution. To be sure, Article II specifically lists powers, such as the treaty and appointments powers, and some have argued that this limits the “executive Power” granted in the Vesting Clause to the powers on that list. These powers, however, are explicitly listed rather than subsumed within the Vesting Clause because parts of these once plenary executive powers have been either divided between Articles I and II (such as the war power), or have been altered by inclusion of the Senate (as with treaties and appointments). Article II’s enumeration of the Treaty and Appointments Clauses, for example, only dilutes the unitary nature of the executive branch in regard to the exercise of those powers, rather than transforms them into quasi-legislative functions.

Thus, an executive power, such as the power to use force in response to attacks upon the nation, not specifically detailed in Article II, Section 2, must remain with the President. This has been the general approach in regard to other powers not mentioned in the Constitution. *See, e.g., Bowsher v. Synar*, 478 U.S. 714 (1986) (removal power). In defending President Washington’s authority to issue the Neutrality Proclamation, Alexander Hamilton came to the same interpretation of the President’s powers. According to Hamilton, Article II “ought . . . to be considered as intended by way of greater caution to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power.” Alexander Hamilton, *Pacificus No. 1* (1793), in 15 *The Papers of Alexander Hamilton*, 33, 39 (Harold C. Syrett et al. eds., 1969). Hamilton further observed that “[t]he general doctrine then of our constitution is, that the *Executive Power* of the Nation is vested in the President; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument.” *Id.*

These “exceptions” and “qualifications” are limited to those powers, in which the Framers unbundled certain plenary powers that had traditionally been regarded as “executive.” Some elements of those powers were assigned to Congress in Article I, while other elements were expressly retained as executive powers in the enumerations in Article II. So, for example,

the King's traditional powers with respect to war and peace were disaggregated: the royal power to declare war was given to Congress under Article I, while the Commander in Chief authority was expressly reserved to the President in Article II.<sup>9</sup> Further, the Framers altered other plenary powers of the King, such as treaties and appointments, by including the Senate in their exercise.<sup>10</sup> Any other, unenumerated executive powers, however, were conveyed to the President by the Vesting Clause.

Such unenumerated power includes the authority to use military force, whether at home or abroad, in response to a direct attack upon the United States. There can be little doubt that the decision to deploy military force is "executive" in nature, and was traditionally so regarded. At the time of the Framing, the commander in chief and executive powers were commonly understood to include the executive's sole authority to use the military to respond to attacks, invasions, or threats to a nation's security.<sup>11</sup> Using the military to defend the nation requires action and energy in execution, rather than the deliberate formulation of rules to govern private conduct. "The direction of war implies the direction of the common strength," wrote Alexander Hamilton, "and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority." *The Federalist* No. 74, at 415 (Alexander Hamilton). As a result, to the extent that the constitutional text does not explicitly allocate to a particular branch the power to respond to critical threats to the nation's security and civil order, the Vesting Clause provides that it remains among the President's unenumerated executive powers.

The records of the Philadelphia Convention further demonstrate that the Framers intended to secure the President's authority to meet foreign attacks on or within the United States. On August 17, 1787, the Convention debated the proposal to grant Congress the power "To make war." James Madison and Elbridge Gerry "moved to insert '*declare*,' striking out '*make*' war; leaving to the Executive the power to repel sudden attacks." 2 Farrand, *supra* at 318 (final emphasis added). Although he opposed the Madison-Gerry motion, Richard Sherman nonetheless agreed that "[t]he Executive shd. be able to repel . . . war." *Id.* The Madison-Gerry motion was initially adopted by the votes of 7 states to 2. *Id.* at 319. At the very least, therefore, the Framers understood the executive and commander in chief powers to give the President the full constitutional authority to respond to an attack. It was clearly understood that this authority included the power to use force domestically as well as abroad.

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<sup>9</sup> See 1 William Blackstone, *Commentaries* \*257, \*258 (1765) (attributing to the King "the sole prerogative of making war and peace," including the authority to "publicly declare[] and duly proclaim[]" war and to "begin[], conduct[], or conclud[e]" it); *The Federalist* No. 69, at 386 (Alexander Hamilton) (noting that "while [the power] of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies," those authorities "by the Constitution under consideration, would appertain to the legislature").

<sup>10</sup> Article II's enumeration of the Treaty and Appointments Clauses only dilutes the unitary nature of the executive branch in regard to the exercise of those powers, rather than transforming them into quasi-legislative functions. See *Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on Conservation of North Pacific Fur Seals*, 10 Op. O.L.C. 12, 17 (1986) ("Nothing in the text of the Constitution or the deliberations of the Framers suggests that the Senate's advice and consent role in the treaty-making process was intended to alter the fundamental constitutional balance between legislative authority and executive authority.").

<sup>11</sup> See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167, 196-241 (1996).

Early Constitutional Practice. Early judicial, congressional and executive practice also support our interpretation of the President's emergency powers. As Justice William Peterson, himself a prominent delegate to the Philadelphia Convention, wrote in *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342), even absent statutory authorization, it would be "the duty . . . of the executive magistrate . . . to repel an invading foe." *Id.* at 1230. "[I]t would," Justice Paterson remarked, "be not only lawful for the president to resist such invasion, but also to carry hostilities into the enemy's own country." *Id.* The First Congress – in which many of the Framers sat – also recognized this emergency Presidential authority. In response to President George Washington's request to regularize the status of the (then some 672) troops in the service of the United States, Congress ratified the previous military establishment in nearly all respects. Act of September 29, 1789, 1 Stat. 95. Washington had explained that he was seeking regular federal military forces in part so that he might defend the frontier from hostile Indians, but the statute remained silent on the purposes for which the troops might be deployed. James Madison seems to have understood this statutory silence to signify that once Congress had made troops available to the President, he could deploy them for defensive purposes as he judged best. "By the constitution, the President has the power of employing these troops for the protection of those parts [of the frontier] which he thinks require[] them most." 1 *Annals of Cong.* 724 (Joseph Gales ed., 1789) (statement of Rep. James Madison). The next year, Congress took further steps to put the federal army on a permanent basis. Act of April 30, 1790, 1 Stat. 119. Although this statute gave the President no express authority to protect the frontiers, it "plainly assumed that the President already had that power. . . . [T]he inference is strong that Congress thought the requisite authority inherent in the office of Commander in Chief." David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, at 83 (1997). The President's constitutional authority to deploy troops to protect the frontier was not thought to be confined to *defensive* operations: "[B]oth Secretary [of War] Knox and [President] Washington himself seemed to think this [Commander in Chief] authority extended to offensive operations undertaken in retaliation for Indian atrocities." *Id.* at 84. Thus, these early actions show that the Framers understood the Constitution to permit the President to deploy the military domestically to respond to threats to the national security.

Once Congress has provided the President with armed forces, he has the discretion to deploy them both defensively and offensively to protect the nation's security. The Constitution empowers Congress to raise an army and to provide a navy even in time of peace. U.S. Const. art. I, § 8, cls. 12-13. The Philadelphia Convention's proposal to grant this power was highly contentious. Pre-constitutional American political thought and practice had disfavored standing armies in time of peace.<sup>12</sup> The Declaration of Independence objected that the King "kept among us, in Times of Peace, Standing Armies, without the consent of our Legislatures." *Id.* para 13 (U.S. 1776). The Articles of Confederation restricted the powers of the States to maintain

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<sup>12</sup> Benjamin Franklin had asserted in 1770 that maintaining a standing army without the consent of the colonial legislatures was "not agreeable to the Constitution." *Quoted in* Richard B. Morris, *The Forging of the Union 1781-1789* at 32 (1987). "Samuel Adams warned that 'the Sins of America may be punished by a standing Army,' and Richard Henry Lee agreed with James Monroe that it led to 'the destruction of liberty.' . . . One of the principal causes of the rejection of the famous Albany Plan in 1754 was that the Grand Council would have the right to raise troops and levy taxes as well as other critical powers." Jackson Turner Main, *The Anti-Federalists: Critics of the Constitution 1781-1788*, at 14-15 (1961).



"vessels of war" and "any body of forces" in time of peace. Articles of Confederation, art. VI, cl. 4, reprinted in 4 *Encyclopedia of the American Constitution* app. 2, at 2093 (Leonard W. Levy ed., 1986). At the Philadelphia Convention, Elbridge Gerry argued that the proposed Constitution was defective because "there was <no> check here agst. standing armies in time of peace. The existing Cong. is so constructed that it cannot of itself maintain an army. This wd. not be the case under the new system. The people were jealous on this head, and great opposition to the plan would spring from such an omission."<sup>13</sup> Anti-Federalists vigorously opposed authorizing Congress to establish such forces not only because "the rulers may employ them for the purpose of promoting their own ambitious views," but also because "perhaps greater danger, is to be apprehended from their overturning the constitutional powers of the government, and assuming the power to dictate any form they please."<sup>14</sup>

Nonetheless, these misgivings yielded to the necessity of enabling Congress to raise and maintain a federal military force, which was to be placed under the President's sole command. In *The Federalist*, Hamilton laid bare the strategic vulnerabilities of the United States, emphasizing its exposure along both coast and frontier to potentially hostile European empires or Indian tribes. "On one side of us, and stretching far into our rear, are growing settlements subject to the dominion of Britain. On the other side, and extending to meet the British settlements, are colonies and establishments subject to the dominion of Spain. . . . The savage tribes on our Western frontier ought to be regarded as our natural enemies, their natural allies." *The Federalist* No. 24, at 128-29 (Alexander Hamilton); see also *id.* No. 25, at 131 (Alexander Hamilton). It had already been found imperative in those circumstances to maintain a standing federal army that could respond to sudden invasions and attacks. Since its independence, the United States had found it "a constant necessity" to maintain garrisons on its western frontier, and "[n]o person can doubt that these will continue to be indispensable, if it should only be against the ravages and deprivations of the Indians." *Id.* No. 24, at 129. Without such a permanent federal force, the United States would be "a nation incapacitated by its Constitution to prepare for defense before it was actually invaded. . . . We must receive the blow before we could even prepare to return it." *Id.* No. 25, at 133. According to Hamilton, experience had demonstrated in Britain that "a certain number of troops for guards and garrisons were indispensable; that no precise bounds could be set to the national exigencies; that a power equal to every possible contingency must exist somewhere in the government." *Id.* No. 26, at 138. Madison also argued in *The Federalist* that standing military forces would be indispensable if the United States were to be prepared to meet sudden attacks, such as a permanent navy that could guard the coasts. *Id.* No. 41, at 229. Such concerns clearly focused on the ability of the federal Government to maintain a military that could respond to threats both domestically as well as abroad.

If a standing army and navy are required to repel or deter sudden attacks, then by creating such forces and placing them under the President's command, Congress is necessarily authorizing him to deploy those forces. As the argument of *The Federalist* shows, a fundamental purpose of a standing army and a permanent navy was that they be used in such emergencies. Moreover, Congress could not possibly anticipate every contingency in which those forces might

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<sup>13</sup> 2 Farrand, *supra* at 329 (alteration in original).

<sup>14</sup> Brutus X (Jan. 24, 1788), in 15 *Documentary History of the Ratification of the Constitution* 463 (John P. Kaminski et al. eds., 1984).

be used. As Commander in Chief, the President necessarily possesses ample discretion to decide how to deploy the forces committed to him. Thus, he could decide it was safer to pre-empt an imminent attack rather than to wait for a hostile power to strike first. In sum, the clauses of Article I relating to a standing army and a navy flow together with Article II's Commander in Chief and Executive Power Clauses to empower the President to use the armed forces to protect the nation from attack, whether domestically or abroad. All three of the first Presidents assumed that they possessed such authority.<sup>15</sup>

*Later Views of the Executive Branch.* President Lincoln's actions at the start of the Civil War more fully bear out the executive branch's plenary authority to respond swiftly with military force to an armed attack, even if the operations were to occur domestically. Fort Sumter was attacked on April 12, 1861. Lincoln called Congress into a special session beginning on July 4. In the intervening ten weeks, he aggressively pursued military measures that ensured that the Civil War would be won or lost on the battlefield. On April 15, he called out 75,000 of the state militia. On April 19, he imposed a blockade on Southern ports, an action which until that time had been thought to require a declaration of war. On April 20, President Lincoln authorized the Secretary of the Treasury to spend public money on defense without congressional appropriation. On April 27, he authorized the suspension of habeas corpus by the commanding general of the army. On May 3, he issued a call for volunteers and unilaterally increased the size of the army and navy. According to Lincoln, the South's attack on Fort Sumter "presents to the whole family of man, the question, whether a constitutional republic, or a democracy – a government of the people, by the same people – can, or cannot, maintain its territorial integrity, against its own domestic foes." Message to Congress in Special Session (July 4, 1861), in *Abraham Lincoln: Speeches and Writings 1859-1865*, at 250 (Don E. Fehrenbacher ed., 1989). "So viewing the issue, no choice was left but to call out the war power of the Government," Lincoln answered, "and so to resist force, employed for its destruction, by force, for its preservation." *Id.* Congress retroactively ratified his actions, which, of course, involved almost exclusively the deployment of the military domestically.

Attorney General Edward Bates later defended President Lincoln's inherent authority to deploy federal troops to subdue the domestic enemies of the United States:

It is the plain duty of the President (and his peculiar duty, above and beyond all other departments of the Government) to preserve the Constitution and execute the laws over all the nation; and it is plainly impossible for him to perform this duty without putting down rebellion, insurrection, and all unlawful combinations to resist the General Government. . . . In such a state of things, the President must, of necessity, be the sole judge, both of the exigency which requires him to

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<sup>15</sup> Washington assumed this interpretation of presidential power, and Madison defended it. Washington used force against the Wabash Indians pursuant to a statute that provided forces and authorized the call-up of militia to protect frontier inhabitants from hostile incursions of Indians. See Abraham D. Sofaer, *The Power Over War*, 50 U. Miami L. Rev. 33, 41 (1995). Furthermore, during President John Adams' administration, the United States and France were engaged in armed conflict, and Congress provided the President with frigates without any restriction on their use. Again, the bare statutory provision for a navy was thought sufficient by many congressmen to authorize the President to order such deployments. Finally, when President Thomas Jefferson deployed a naval squadron against the Barbary pirates, he relied on no specific delegation of authority to use force. *Id.* at 43.

act, and of the manner in which it is most prudent for him to deploy the powers entrusted to him, to enable him to discharge his constitutional and legal duty – that is, to suppress the insurrection and execute the laws.

*Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att’y Gen. 74, 82, 84 (1861).

More recent statements of the executive branch’s views have been similar. Thus, Attorney General (later Justice) Frank Murphy stated that:

The Executive has powers not enumerated in the statutes – powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance. These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. . . . The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.

*Request of the Senate for an Opinion as to the Powers of the President “In Emergency or State of War,”* 39 Op. Att’y Gen. 343, 347-48 (1939).

*The Views of the Judicial Branch.* Judicial decisions support the view that the President possesses an inherent power to use force in response to threats to national security. As the Supreme Court has noted, Article II’s Vesting Clause “establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law . . . [and] the conduct of foreign affairs.” *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). These powers must include deployment of troops to prevent and deter attacks on the United States and its people by enemies operating secretly within this country.

Judicial decisions since the beginning of the Republic confirm the President’s constitutional power and duty to repel violent attacks against the United States through the use of force, and to take measures to deter the recurrence of such attacks. As Justice Joseph Story said long ago, “[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws.” *The Apollon*, 22 U.S. (9 Wheat.) 362, 366-67 (1824). The Constitution entrusts the “power [to] the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety.” *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946) (Stone, C.J., concurring). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat with whatever means are necessary, including the use of military force abroad. As the Court declared during the Civil War: “If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority.” *See, e.g.,*

*The Prize Cases*, 67 U.S. at 668.<sup>16</sup> In the Civil War context, the President used this authority to respond militarily to a threat from within the United States itself.

The courts have also consistently recognized that the executive power extends to the domestic deployment of military force when necessary to safeguard civil order or to protect the public from violent attacks. Although the courts have had little occasion to review the domestic deployment of military force by the President, they have frequently been confronted with its use by Governors, who are similarly imbued with the executive power and the duty to faithfully execute the laws. Analogizing the powers of the Governor of Indiana to the powers of the President, for example, the Indiana Supreme Court ruled in *State ex rel. Branigin v. Morgan Superior Court*, 231 N.E.2d 516 (Ind. 1967), that as “[t]he power, the duty, and the discretion to manage the military forces of the state are given to the Governor by the Constitution,” *id.* at 519, “[i]f the Governor determines that an exigency requires the use of the military forces, then, in his discretion, he has authority to call out such forces.” *Id.* at 521. Similarly, the New Mexico Supreme Court has observed that “[t]he nature of the [executive] power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order.” *State ex rel. Roberts v. Swope*, 28 P.2d 4, 6 (N.M. 1933) (sanctioning the Governor’s use of military force domestically in the face of a threat to civil order).<sup>17</sup> In sum, the principle that the Chief Executive is inherently vested with broad discretion to employ military force both domestically and abroad when necessary to safeguard the public welfare is firmly ingrained in the judicial branch’s treatment of the subject since the founding of the Republic.

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<sup>16</sup> *Kahanamoku*, 327 U.S. at 336 (Stone, C.J., concurring) (“Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity” for emergency measures.); *Hirota v. MacArthur*, 338 U.S. 197, 208 (1949) (Douglas, J., concurring) (The President has “full power to repel and defeat the enemy.”); *Mitchell v. Laird*, 488 F.2d 611, 613 (D.C. Cir. 1973) (“there are some types of war which without Congressional approval, the President may begin to wage: for example, he may respond immediately without such approval to a belligerent attack”). The court further observed that “in a grave emergency [the President] may, without Congressional approval, take the initiative to wage war. . . . In such unusual situations necessity confers the requisite authority upon the President. Any other construction of the Constitution would make it self-destructive.” *Id.* at 613-14; *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir.) (Silberman, J., concurring) (“[T]he President has independent authority to repel aggressive acts by third parties even without specific statutory authorization.”), *cert. denied*, 531 U.S. 815 (2000); 203 F.3d at 40 (Tatel, J., concurring) (“[T]he President, as commander in chief, possesses emergency authority to use military force to defend the Nation from attack without obtaining prior congressional approval.”); *Cox v. McNutt*, 12 F. Supp. 355, 358-59 (S.D. Ind. 1935) (three-judge court) (“It cannot be controverted that the [Executive] has wide discretion in determining whether or not an exigency requires the use of military forces. . . . If the [Executive] determines that an exigency requires the use of the military forces, then, in his discretion, he has authority to call out such forces, and the courts will not interfere therewith. . . . The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for, without such liberty to make immediate decisions, the power itself would be useless.”).

<sup>17</sup> See also *Powers Mercantile Co. v. Olson*, 7 F.Supp. 865, 867-68 (“[T]he Governor, as the chief executive officer of the state... is authorized... when in his judgment the exigencies of the situation require, to use the military forces of the state... [and] the means which are employed to restore law and order must necessarily be left largely to the discretion of the Governor and the commanding officer of the troops.”); *Hatfield v. Graham*, 81 S.E. 533, 535 (W.Va. 1914) (upholding the Governor’s seizure of a newspaper during the course of a domestic military campaign and noting that the Governor “is vested with the discretion to determine whether the conditions existing are such as to make it necessary to put into operation and effect the military power of the state and, having once exercised his judgment in the premises, in good faith, the courts have no power to review it and to declare his official act void”).

*The Views of Congress.* Congress has explicitly recognized the President's constitutional authority to deploy military force to counter a national emergency caused by an attack upon the United States. Section 2(c) of the War Powers Resolution ("WPR") declares:

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

50 U.S.C. § 1541(c) (1994) (emphasis added). Although the executive branch "has taken the position from the very beginning that § 2(c) of the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces," *Overview of the War Powers Resolution*, 8 Op. O.L.C. 271, 274 (1984),<sup>18</sup> section 2(c)(3) expresses Congress's recognition of one, if by no means the only, unilateral Presidential authority to deploy military forces. As applied to the present circumstances, the statute signifies Congress' recognition that the President's *constitutional* authority alone enables him to take military measures to combat the organizations or groups responsible for the September 11 incidents, together with any governments that may have harbored or supported them, if such actions are, in his judgment, a necessary and appropriate response to the national emergency created by those incidents. It is also important to recognize that section 2(c)(3) is not limited, either expressly or by implication, to military actions overseas, but instead recognizes the power to use force without regard to location.

Finally, Congress's support suggests no limits on the President's judgment whether to use military force in response to the current national emergency. Section 2(c)(3) leaves undisturbed the President's constitutional authority to determine both when a "national emergency" arising out of an "attack against the United States" exists, and what types and levels of force are necessary or appropriate to respond to that emergency. Because the statute itself supplies no definition of these terms, their interpretation must depend on longstanding constitutional practices and understandings. As we have shown in this and other memoranda, the constitutional text and structure vest the President with the plenary power to use military force, especially in the case of a direct attack on the United States. Section 2(c)(3) recognizes the President's broad authority and discretion to deploy the military, either domestically or abroad, to respond to an attack.

Indeed, we do not believe that the Constitution articulates specific factors that the President must follow in determining whether an attack has occurred, and what response to take. This decision lies wholly within the President's constitutional discretion, and would almost certainly present a political question that would not be reviewed by the courts. *See, e.g., Clinton,*

<sup>18</sup> *See also* Memorandum for John M. Quinn, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Deployment of United States Armed Forces in Bosnia and Herzegovina*, at 9 (Nov. 30, 1995); *Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173, 176 (1994).

203 F.3d at 23; *id.* at 24-28 (Silberman, J., concurring). Nonetheless, some factors that the President, in his discretion, might consider include the nature of the attack, its magnitude, the number of casualties, the effect on the nation, and whether the attacks are part of a broader conflict with an enemy. Thus, some limited incursions into United States territory – such as the British pursuit of terrorists who had launched an attack on Canada from the United States – generally might not qualify as an armed attack on the nation, while others – such as the surprise Japanese attack on Pearl Harbor, obviously do.

Here, the facts of the September 11 attacks easily would support the conclusion that an armed attack had occurred, sufficient to trigger the President's constitutional authorities. Terrorist groups hijacked planes, effectively transformed them into guided missiles, and launched them into the World Trade Center and the Pentagon, the nation's military headquarters. At least 5,000 civilians and government officials have died, greater than the nation's losses in the Pearl Harbor attack. The attacks led to a temporary shutdown of the nation's air transportation network and the closure of the financial markets. They were the culmination of years of attacks on American facilities and personnel by the Al Qaeda organization over the last eight years. Based on these facts, the President would be justified in using military force, either domestically or abroad, to respond to, and prevent, terrorist attacks upon the United States.

Conclusion. The text and history of the Constitution, supported by the interpretations of past administrations, the courts, and Congress, show that the President has the independent, non-statutory power to take military actions, domestic as well as foreign, if he determines such actions to be necessary to respond to the terrorist attacks upon the United States on September 11, 2001 and before.

### III.

The WPR does not stand alone as an acknowledgment by Congress of the President's emergency powers. In the wake of the September 11 incidents, Congress enacted S.J. Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (2001). Congress found that "on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens," that "such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad," and that "such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States." *Id.* Section 2 authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

Section 2 authorizes the use of "all necessary and appropriate force" against the designated nations, organizations or persons. Further, Congress declares that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." 115 Stat. at 224. This broad statement reinforces the War Powers Resolution's acknowledgment of the President's constitutional powers in a state of national emergency. Like the War Powers Resolution, Pub. L. No. 107-40 does not limit its authorization

and recognition of executive power to the use of force abroad. Indeed, Pub. L. No. 107-40 contemplates that the domestic use of force may well be necessary and appropriate. For example, Pub. L. No. 107-40's findings state that the September 11 attacks "render it both necessary and appropriate that the United States . . . protect United States citizens *both at home and abroad.*" *Id.* (emphasis added). Protection of United States citizens at home could require the use of military force domestically. Moreover, some of the designated persons or groups who aided, abetted, or harbored the terrorists may remain within the United States, and Congress was doubtless aware of that when enacting the legislation.

Therefore, even if one were to disagree with our analysis of the President's inherent authority, Pub. L. No. 107-40 supplies the congressional authorization for the domestic use of military force. In authorizing the President to wage war against the terrorist organizations that attacked the United States on September 11, Pub. L. No. 107-40 approves any necessary and appropriate action to successfully conduct that war. As the Supreme Court has said,

The power to wage war is the power to wage war successfully. . . . [T]he power has been expressly given to Congress to prosecute war, and to pass all laws which shall be necessary and proper for carrying that power into execution. That power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the constitution or by any one of the amendments. These may all be construed so as to avoid making the constitution self-destructive, so as to preserve the rights of the citizen from unwarrantable attack, while assuring beyond all hazard the common defence and the perpetuity of our liberties." . . . The war powers of Congress and the President are only those which are to be derived from the Constitution but, in the light of the language just quoted, the primary implication of a war power is that it shall be an effective power to wage the war successfully.

*Lichter v. United States*, 334 U.S. 742, 780-82 (1948) (quoting Charles E. Hughes, *War Powers Under The Constitution*, 42 A.B.A. Rep. 232 (1917)).<sup>19</sup> In the present circumstances, the "power to wage war successfully" must include the power to use military force within the territory of the United States, if need be, in order to combat and defeat terrorists who have been operating domestically as well as abroad.

#### IV.

We next address the question whether the Posse Comitatus Act, 18 U.S.C. § 1385 (the "PCA"), would restrict the President's authority, in present circumstances, to deploy the Armed

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<sup>19</sup> See also *Hamilton v. Regents*, 293 U.S. 245, 264 (1934) (federal government's war powers are "well-nigh limitless" in extent); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506 (1870) ("The measures to be taken in carrying on war . . . are not defined [in the Constitution]. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870) ("The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.").

Forces domestically. We conclude that the PCA does not apply to, and does not prohibit, a Presidential decision to deploy the Armed Forces domestically *for military purposes*.<sup>20</sup> We believe that domestic deployment of the Armed Forces to prevent and deter terrorism is fundamentally military, rather than law enforcement, in character. Yet, even if the PCA were thought to apply, the statute would still permit domestic deployment due to the PCA's exceptions for actions specifically authorized by the Constitution or statute.

A.

The PCA 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 under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385.<sup>21</sup>

The PCA “was originally a section inserted into an Army Appropriation Act as a backwash of the Reconstruction period following the Civil War. Its legislative history . . . indicates that the immediate objective of the legislation was to put an end to the use of federal troops to police state elections in the ex-Confederate states where the civil power had been reestablished.” *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948) (Magruder, J.), *cert. denied*, 336 U.S. 918 (1949); *see generally* Charles Doyle, *Congressional Research Service Report for Congress: The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law* 9-11 (June 1, 2000). Before the PCA was enacted, Attorney General Cushing had opined that under the Judiciary Act of 1789, a federal marshal, like a sheriff, had the authority to raise a posse comitatus “to aid [him] in the execution of his duty.” *Extradition of Fugitives from Service*, 6 Op. Att’y Gen. 466, 472-73 (1854). A posse comitatus, which included everyone in a district more than fifteen years old, could include “the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a sheriff or marshal. The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character.” *Id.* at 473. *See also Employment of the Military as a Posse*, 16 Op. Att’y Gen. 162, 163 (1878) (“It has been the practice of the Government since its organization . . . to permit the military forces of the United States to be used in subordination to the marshal of the United States when it was deemed necessary that he should have their aid in order to the enforcement of his process.”). The PCA rejected these opinions and practices and barred the use of the military domestically “as a posse comitatus or otherwise *to execute the laws*,” 18 U.S.C. § 1385 (emphasis added).<sup>22</sup>

<sup>20</sup> The analysis and conclusion with respect to 10 U.S.C. § 375 (2000) would not materially differ.

<sup>21</sup> The PCA originated as the Act of June 18, 1878, ch. 263, § 15, 20 Stat. 145, 152. It was amended in 1956 to cover the Air Force. Act of Aug. 10, 1956, § 18(a), 70A Stat. 626; *see United States v. Walden*, 490 F.2d 372, 375 n.5 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974). The contemporary version of the PCA differs only slightly from the original.

<sup>22</sup> The PCA originated in the House of Representatives of the 45th Congress. The House was then controlled by a Democratic majority sympathetic to the wishes of political majorities in the former Confederate States, and in



Both the express language of the PCA and its history show clearly that it was intended to prevent the use of the military for domestic *law enforcement* purposes. It does not address the deployment of troops for domestic *military* operations against potential attacks on the United States. Both the Justice Department and the Defense Department have accordingly interpreted the PCA *not* to bar military deployments that pursue a military or foreign policy function. In *Application of the Posse Comitatus Act to Assistance to the United States National Central Bureau*, 13 Op. O.L.C. 195 (1989), our Office cited and agreed with a Department of Defense regulation that interpreted the PCA not to bar military actions undertaken primarily for a military purpose. We said (*id.* at 197):

[T]he regulations provide that actions taken for the primary purpose of furthering a military or foreign affairs function of the United States are permitted. 32 C.F.R. § 213.10(a)(2)(i). We agree that the Posse Comitatus Act does not prohibit military involvement in actions that are primarily military or foreign affairs related, even if they have an incidental effect on law enforcement, provided that such actions are not undertaken for the purpose of executing the laws.<sup>23</sup>

Because using military force to combat terrorist attacks would be for the purpose of protecting the nation's security, rather than executing the laws, domestic deployment in the current situation would not violate the PCA.

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vigorous opposition to a Republican-controlled Senate and a narrowly-elected Republican President, Rutherford B. Hayes. The House supporters of the measure intended it to "apply[] to everyone, from the Commander in Chief to the lowest officer, who presumed to take upon himself to decide when he would use the military force in violation of the law of the land." *Wrynn v. United States*, 200 F. Supp. 457, 464 (E.D.N.Y. 1961). However, the statute was amended by the Senate "by adding the reference to express Constitutional authorization and by deleting so much of the House Bill's language as referred to use of the military 'under the pretext' of executing the laws (7 Cong. Rec. 4240)." *Id.*; see also James P. O'Shaughnessy, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 Am. Crim. L. Rev. 703, 704-13 (1976); Note, *Honored in the Breach: Presidential Authority to Execute the Laws With Military Force*, 83 Yale L.J. 130, 141-44 (1973).

<sup>23</sup> *Accord United States v. Thompson*, 30 M.J. 570, 573 (A.F.C.M.R.) ("[T]he prohibitions contained in the Posse Comitatus Act . . . do not now, nor were they ever intended to, limit military activities whose *primary purpose* is the furtherance of a military (or foreign affairs) function, regardless of benefits which may incidentally accrue to civilian law enforcement), *aff'd*, 32 M.J. 5 (C.M.A. 1990), *cert. denied*, 502 U.S. 1074 (1992).

Department of Defense ("DoD") regulations promulgated pursuant to a congressional directive in 10 U.S.C. § 375 also recognize that the PCA does not apply to or restrict "[a]ctions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities." DoD Directive 5525.5, Enclosure 4, E4.1.2.1 (Jan. 15, 1986) (as amended Dec. 20, 1989). See generally *United States v. Hitchcock*, No. 00-10251 (D. Haw. 2001) at \*4-\*5 (reviewing and applying DoD Directive 5525.5). Several courts (including the court of appeals in *Hitchcock*) have accepted and applied the DoD Directive in a variety of circumstances to find that the use of the military was *not* in violation of the PCA or 10 U.S.C. § 375. See, e.g., *United States v. Chon*, 210 F.3d 990, 993 (9th Cir.) (activities of Navy Criminal Investigative Service "were permissible because there was an independent military purpose for their investigation – the protection of military equipment"), *cert. denied*, 531 U.S. 910 (2000); *Applewhite v. United States Air Force*, 995 F.2d 997, 1001 (10th Cir. 1993) (military may investigate illegal drug transactions by active duty military personnel), *cert. denied*, 510 U.S. 1190 (1994).

Central to our conclusion that the PCA does not apply is the distinction between “military” and “law enforcement” purpose. To be sure, distinguishing between the two functions is no easy matter. This is not only for the general reason that “the President has discretionary responsibilities in a broad variety of areas, many of them sensitive. In many cases it would be difficult to determine which of the President’s innumerable ‘functions’ encompassed a particular action.” *Nixon v. Fitzgerald*, 457 U.S. at 756. It is also because, in the conflict against terrorism, national security and law enforcement activities, objectives and interests may inevitably overlap.

For example, the September 11 attacks were both acts of war and crimes under United States law. Future terrorist incidents could continue to have both aspects. If the President were to deploy the Armed Forces within the United States in order to engage in counter-terrorism operations, their actions could resemble, overlap with, and assist ordinary law enforcement activity. Military action might encompass making arrests, seizing documents or other property, searching persons or places or keeping them under surveillance, intercepting electronic or wireless communications, setting up roadblocks, interviewing witnesses, and searching for suspects. Moreover, the information gathered in such efforts could be of considerable use to federal prosecutors if the Government were to prosecute against captured terrorists.

In attempting to explain a distinction between these two executive functions, we would normally rely on judicial decisions and administrative precedents. In the present circumstances, however, few if any precedents exist. There have been rare occasions in recent decades in which Presidents have deployed the military within the United States, pursuant to constitutional or statutory authority or both, in order to address grave threats to civil order. Thus, in Alabama in 1963, in Mississippi in 1962, and in Arkansas in 1957, Presidents deployed troops within the United States to meet threats of mass, violent resistance to efforts to end racial segregation. See *President’s Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders – Little Rock, Arkansas*, 41 Op. Att’y Gen. 313, 326-29 (1957) (advising the President that he had both constitutional authority and authority under 10 U.S.C. §§ 332 & 333 to deploy troops in Little Rock, Arkansas). Again, in 1967, the President, pursuant to 10 U.S.C. § 331, “ordered federal troops to assist local authorities at the time of the civil disorders in Detroit, Michigan, in the summer of 1967 and during the disturbances that followed the assassination of Dr. Martin Luther King.” *Laird v. Tatum*, 408 U.S. 1, 4-5 (1972); see also *id.* at 3 n.2 (quoting Attorney General’s letter to State Governors outlining prerequisites for Presidential invocation of § 331). But these episodes did not produce judicial decisions of significant help here. See, e.g., *Alabama v. United States*, 373 U.S. 545 (1963) (per curiam). Factually as well as legally, moreover, those deployments were markedly different from those envisaged here.

Yet we are not wholly without useful precedents. We have recently reviewed proposed amendments to the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-11 (1994 & West Supp. 2000) (the “FISA”). See Memorandum for David S. Kris, Associate Deputy Attorney General, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the “Purpose” Standard for Searches* (Sept. 25, 2001). As we explained, FISA arose out of a background in which the Supreme Court had declined to rule on the President’s constitutional authority to order warrantless electronic surveillance of foreign powers and their agents within

the United States. See *United States v. United States District Court*, 407 U.S. 297, 308 (1972); *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967). Lower courts, however, have held that due to the President's constitutional superiority in foreign affairs, and the unsuitability of foreign affairs questions for judicial resolution, he could engage in warrantless searches of foreign powers or their agents for national security purposes. See, e.g., *United States v. Truong Dinh Hung*, 629 F.2d 908, 913, 915 (4th Cir. 1980) *United States v. Butenko*, 494 F.2d 593 (en banc), cert. denied, 419 U.S. 881(1974); *United States v. Brown*, 484 F.2d 418 (1973), cert. denied, 415 U.S. 960 (1974).

Enacted in 1978, FISA created a special procedure by which the Government may obtain warrants for foreign intelligence work on the basis of judicial review of an application for such a warrant that had been approved by the Attorney General. In support of such an application, the Government is required to certify, among other things, that "the purpose" of the proposed search or surveillance is "to obtain foreign intelligence information," 50 U.S.C. § 1804(a)(7)(B). In reviewing the application, therefore, the FISA courts have been required to consider whether "the government is primarily attempting to form the basis for a criminal prosecution," *Truong Dinh Hung*, 629 F.2d at 915, or is indeed acting for the purpose of obtaining foreign intelligence. Distinguishing between "law enforcement" and "foreign intelligence" seems, if anything, more difficult than distinguishing between "law enforcement" and "military" functions. Yet the FISA courts seem to have found little difficulty in applying the statute's "purpose" test.<sup>24</sup> This, we believe, reflects the care and circumspection with which the executive branch itself reviews and prepares FISA applications, and the courts' justified confidence in the executive branch's self-monitoring. Likewise here, we believe that the courts will defer to the executive branch's representations that the deployment of the Armed Forces furthers military purposes, if the executive institutes and follows careful controls.

We believe that the Department of Defense could take steps to make clear that a deployment of troops is for a military, rather than a law enforcement, purpose. The object of such steps would be to emphasize that a specific military operation is intended to counter a terrorist attack, thus furthering a national security purpose, rather than to apprehend suspects or to secure evidence for a criminal prosecution. Any criteria or procedures for distinguishing domestic counter-terrorist military operations from operations involving the Armed Forces that have primarily a law enforcement character would, of course, have to be framed, interpreted and applied in a manner that would not inhibit military effectiveness. Furthermore, domestic uses of the Armed Forces for military purposes in counter-terrorist actions may also promote the goals of the anti-terrorism portions of the U.S. criminal code. It also bears emphasizing again that it rests within the President's discretion to determine when certain circumstances – such as the probability that a terrorist attack will succeed, the number of lives at risk, the available window of opportunity to stop the terrorists, and the other exigencies of the moment – justify using the military to intervene. In this memorandum, we shall not recommend particular tests or procedures for consideration by the Secretary of Defense. We will be pleased to work with the Department of Defense and with other interested departments and agencies in devising an

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<sup>24</sup> See, e.g., *United States v. Kavanaugh*, 807 F.2d 787, 790-91 (9<sup>th</sup> Cir. 1987) (Kennedy, J.); *United States v. Johnson*, 952 F.2d 565, 572 (1<sup>st</sup> Cir. 1991), cert. denied, 506 U.S. 816 (1992); *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984).

appropriate list of factors to be considered in establishing whether there is a military purpose for a domestic use of the Armed Forces in a counter-terrorist action.

## B.

Even if the PCA were generally held to apply to the use of the military domestically in an anti-terrorism role, the statute still would not bar such a deployment. The PCA includes both a constitutional and a statutory exception: it excludes military actions taken “in cases and under circumstances expressly authorized by the Constitution or Act of Congress.” Both of these exceptions apply to the use of the Armed Forces in response to the September 11 attacks.

In light of Part II’s review of the President’s inherent powers, it should be clear that the PCA’s constitutional exception has been triggered. According to one interpretation of the PCA’s legislative history, “the debates . . . reveal that the exception for the Constitution represented a compromise designed to enable the bill to pass, rather than a Congressional recognition of specific Presidential authority under the Constitution.” O’Shaughnessy, *supra* n.22, at 712. Whether Congress in 1878 recognized the President’s constitutional authority is, however, not critical. By its own terms, the PCA excludes from its coverage any use of the military for constitutional purposes. As Attorney General Brownell noted in reviewing the PCA’s legislative history, “[t]here are in any event grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate.” *President’s Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders – Little Rock, Arkansas*, 41 Op. Att’y Gen. 313, 331 (1957). Thus, the dispositive question is whether the President is deploying troops pursuant to a plenary constitutional authority. Here, as we have shown earlier, that is clearly the case. The President would be deploying the military pursuant to his powers as Chief Executive and Commander in Chief in response to a direct attack on the United States. Thus, the PCA by its own terms does not apply to the domestic use of the military in a counter-terrorism role.

Even if the PCA’s constitutional exception were not triggered, two statutes, Pub. L. No. 107-40 and 10 U.S.C. § 333 (2000) would allow the President to avoid application of the PCA.<sup>25</sup> First, as we have discussed, Pub. L. No. 107-40 authorizes “the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.” This authorization does not distinguish between deployment of the military either at home or abroad, nor does it make any distinction between use of the Armed Force for law enforcement or for military purposes. Rather, it simply authorizes the use of force against terrorists linked to the September 11 attacks. Thus, Pub. L. No. 107-40 provides the statutory authorization envisioned by the PCA’s drafters to allow the use of the military domestically, whether for law enforcement purposes or not.

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<sup>25</sup> For a review of some of the main statutory exceptions to the PCA, including several fairly recent enactments, see Doyle, *supra*, at 20-29; Major Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. Rev. 67, 80-82 (2000); see also Commander Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, 1997-JUL Army Law. 3, 13-14.

Second, 10 U.S.C. § 333 provides another statutory exception to the PCA. That provision reads:

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it –

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.<sup>26</sup>

Attorneys General have consistently read this statute as authorizing the domestic use of the military. Interpreting a companion statute, now codified as 10 U.S.C. § 332 (2000), Attorney General Brewster opined that it “*expressly authorized* [the President] to employ the military forces of the United States to aid in enforcing the laws” upon the determination that such enforcement was being obstructed and resisted by “powerful combinations of outlaws and criminals.” *Suppression of Lawlessness in Arizona*, 17 Op. Att’y Gen. 333, 334-35 (1882). Accordingly, he concluded, the exception in the PCA for statutorily authorized uses of the military was triggered. *Id.* at 335; *see also Suppression of Unlawful Organizations in Arizona*, 17 Op. Att’y Gen. 242 (1881). During the emergency caused by threats of mass violence in response to the desegregation of the public schools of Little Rock, Arkansas, Attorney General Brownell advised the President that he had the authority, both under the Constitution and under statutes including § 333, “to call the National Guard into service and to use those forces, together with such of the Armed Forces as you considered necessary, to suppress the domestic violence, obstruction and resistance of law then and there existing.” *President’s Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders – Little Rock, Arkansas*, 41 Op. Att’y Gen. at 326. If invoked,<sup>27</sup> the Attorney General advised, this statute would obviate the application of the PCA. More recently, the Office of Legal Counsel advised that President George H.W. Bush could deploy federal troops in Los Angeles in 1992 to suppress mass violence and to restore law and order there under his authority under chapter 15 of Title 10.

We think it plain that the President could find that the present circumstances justify the invocation of § 333. Here, an unlawful terrorist group has hijacked civilian airliners and used them to kill thousands of civilians by crashing them into the World Trade Center and the Pentagon. These terrorists have engaged in “domestic violence” within the states of New York and Virginia and have violated numerous federal laws. *See, e.g.*, 49 U.S.C. § 46502 (1994 & Supp. V 1999) (Aircraft Piracy); 18 U.S.C. § 32 (1994 & Supp. V 1999) (Aircraft Sabotage); 18 U.S.C. § 1111 (1994) (Murder Within the Special Territorial Jurisdiction of the United States); 18 U.S.C. § 1114 (Supp. V 1999) (Murder of Federal Employees); 18 U.S.C. § 844(i) (Supp. V 1999) (Malicious Damage or Destruction by Means of Fire or Explosive of Any Building Used in Interstate or Foreign Commerce); 18 U.S.C. § 844(f) (Supp. V 1999) (Malicious Damage or Destruction By Means of Fire or Explosive to Any Building Owned or Possessed by the United

<sup>26</sup> Section 333 originated as § 3 of the Ku Klux Klan Act of April 20, 1871, Ch. 22, § 3, 17 Stat. 13, 14.

<sup>27</sup> The Attorney General noted that in order to invoke his authority under § 333, “it is required that the President first issue a proclamation, as set forth in section 334 of title 10.” The proclamation requirement remains in the law. *See* 10 U.S.C. § 334.

States); 18 U.S.C. § 2332b (Supp. V 1999) (Terrorist Acts Transcending National Boundaries); 18 U.S.C. § 1962 (1994) (RICO). The Al Qaeda group apparently has also threatened to attack airports and public gatherings, and has studied the use of biological or chemical warfare against the United States. Section 333 provides the President with the statutory authority to use the military to respond to such coordinated, violent terrorist attacks within the continental United States. Thus, even if military deployment here were to be considered to have a law enforcement, rather than military, character, it would still be authorized by federal law. As a result, action under that statutory authority would also obviate application of the PCA.

*Summary.* We conclude that the PCA would not apply to the use of the Armed Forces by the President domestically to deter and prevent terrorist acts within the United States. Use of the Armed Forces would promote a military, rather than a law enforcement, purpose. In any event, the proposed Presidential deployments are exempt from the PCA, because the President has both constitutional and statutory authorization to use military forces in the present context.

## V.

Having concluded that the President has the legal and constitutional authority to use military force within the United States to respond to and combat future acts of terrorism, and that the Posse Comitatus Act does not bar deployment, we turn to the Fourth Amendment. The Fourth Amendment states that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV.

## A.

The Fourth Amendment requires that police searches and seizures not be “unreasonable.” If such an intrusion qualifies as a full “search” or “seizure” (rather than, say, an investigative police “stop”), the Supreme Court has held that it must ordinarily be based upon “probable cause.” See, e.g., *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (affirming “the general principle that Fourth Amendment seizures must be supported by the ‘long-prevailing standards’ of probable cause”). In addition to requiring probable cause in order to demonstrate reasonableness, the Court has concluded that in the normal law enforcement context the Government generally must obtain a warrant before conducting a search.<sup>28</sup> Nonetheless, the Court has recognized several areas in which warrantless searches will be considered reasonable under the Fourth Amendment. See, e.g., *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam) (certain automobile searches); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (drug testing of high school athletes); *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990)

<sup>28</sup> See, e.g., *Kyllo v. United States*, 121 S. Ct. 2038, 2042 (2001); *Illinois v. McArthur*, 121 S. Ct. 946, 949 (2001); *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). “The requirement that a warrant be obtained is a requirement that the inferences to support the search ‘be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.’” *Schmerber v. California*, 384 U.S. 757, 770 (1966) (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)).

(drunk driver checkpoints); *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602 (1989) (drug testing of railroad personnel); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (random drug testing of federal customs officers); *United States v. Place*, 462 U.S. 696 (1983) (temporary seizure of baggage); *Michigan v. Summers*, 452 U.S. 692 (1981) (detention to prevent flight and to protect law enforcement officers); *Terry v. Ohio*, 392 U.S. 1 (1968) (temporary stop and limited search for weapons).

In the normal domestic law enforcement context, the use of deadly force is considered a "seizure" under the Fourth Amendment. The Supreme Court has examined the constitutionality of the use of deadly force under an objective "reasonableness" standard. See *Tennessee v. Garner*, 471 U.S. 1, 7, 11 (1985). The question whether a particular use of deadly force is "reasonable" requires an assessment of "the totality of the circumstances" that balances "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* at 8-9 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). Because "[t]he intrusiveness of a seizure by means of deadly force is unmatched," *id.* at 9, the governmental interests in using such force must be powerful. Deadly force, however, may be justified if the danger to the officer's or an innocent third party's life or safety is sufficiently great. See Memorandum to Files, from Robert Delahunty, Special Counsel, Office of Legal Counsel, *Re: Use of Deadly Force Against Civil Aircraft Threatening to Attack 1996 Summer Olympic Games* (Aug. 19, 1996).

As a matter of the original understanding, the Fourth Amendment was aimed primarily at curbing law enforcement abuses. Americans of the founding period associated such abuse with "writs of assistance" issued to revenue officers empowering them to search suspected places for smuggled goods, and "general warrants" issued by the British Secretary of State for searching private houses for the discovery of books and papers that might be used to convict the owner of libel.<sup>29</sup> Although the Fourth Amendment has been interpreted to apply to governmental actions other than criminal law enforcement, the central concerns of the Amendment -- and especially of the Warrant Clause -- are focused on police activity. "The standard of probable cause is peculiarly related to criminal investigations. . . ." *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976); see also *United States v. Butenko*, 494 F.2d 593, 606 (3rd Cir.) (probable cause requirement "most often" relates to police officer's belief that criminal activity has or will take place, and may be modified "when the governmental interest compels an intrusion based on something other than a reasonable belief of criminal activity," such as need to acquire foreign intelligence information), *cert. denied*, 419 U.S. 881 (1974). Recognizing that the Fourth Amendment may apply differently outside the core context of criminal investigations, the Court has said that "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable," the Fourth Amendment will not be held to impose that requirement. *Vernonia School Dist. 47J*, 515 U.S. at 653 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)); see also *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (declining to "suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes," but stating that "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock [at a law enforcement checkpoint] set up to thwart an imminent terrorist attack").

<sup>29</sup> See *Boyd v. United States*, 116 U.S. 616, 630 (1886); Akhil Reed Amar, *The Constitution and Criminal Procedure* ch. 1 (1997); Telford Taylor, *Two Studies in Constitutional Interpretation* 35-44 (1969).

In our view, however well suited the warrant and probable cause requirements may be as applied to criminal investigations or to other law enforcement activities, they are unsuited to the demands of wartime and the military necessity to successfully prosecute a war against an enemy. In the circumstances created by the September 11 attacks, the Constitution provides the Government with expanded powers to prosecute the war effort. The Supreme Court has held that when hostilities prevail, the Government “may summarily requisition property immediately needed for the prosecution of the war. . . . As a measure of public protection the property of alien enemies may be seized, and property believed to be owned by enemies taken without prior determination of its true ownership. . . . Even the personal liberty of the citizen may be temporarily restrained as a measure of public safety.” *Yakus v. United States*, 321 U.S. 414, 443 (1944) (citations omitted). “[I]n times of war or insurrection, when society’s interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous.” *United States v. Salerno*, 481 U.S. 739, 748 (1987); see also *id.* at 768 (Stevens, J., dissenting) (“[I]t is indeed difficult to accept the proposition that the Government is without power to detain a person when it is a virtual certainty that he or she would otherwise kill a group of innocent people in the immediate future.”). Thus, in *Moyer v. Peabody*, 212 U.S. 78 (1909), the Court rejected a due process claim by an individual jailed for two and a half months without probable cause by the State Governor in time of insurrection. As Justice Holmes wrote, “[w]hen it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment.” *Id.* at 85. Thus, the Supreme Court has recognized that the Government’s compelling interests in wartime justify restrictions on the scope of individual liberty.

First Amendment speech and press rights may also be subordinated to the overriding need to wage war successfully. “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.’ . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.” *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (citation omitted); cf. *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (recognizing that “[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service”). Accordingly, our analysis must be informed by the principle that “while the constitutional structure and controls of our Government are our guides equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind.” *Lichter*, 334 U.S. at 782; see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) (“[W]e must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad.”); *McCall v. McDowell*, 15 F. Cas. 1235, 1243 (C.C.D. Cal. 1867) (No. 8,673) (The Constitution is “a practical scheme of government, having all necessary power to maintain its existence and authority during peace and war, rebellion or invasion”).

The current campaign against terrorism may require even broader exercises of federal power domestically. Terrorists operate within the continental United States itself, and escape



detection by concealing themselves within the domestic society and economy. While, no doubt, these terrorists pose a direct military threat to the national security, their methods of infiltration and their surprise attacks on civilian and governmental facilities make it difficult to identify any front line. Unfortunately, the terrorist attacks of September 11 have created a situation in which the battlefield has occurred, and may occur, at dispersed locations and intervals within the American homeland itself. As a result, efforts to fight terrorism may require not only the usual wartime regulations of domestic affairs, but also military actions that have normally occurred abroad.

## B.

In light of the well-settled understanding that constitutional constraints must give way in some respects to the exigencies of war, we think that the better view is that the Fourth Amendment does *not* apply to domestic military operations designed to deter and prevent further terrorist attacks. First, it is clear that the Fourth Amendment has never been applied to military operations overseas. In *Verdugo-Urquidez*, the Supreme Court reversed the court of appeals' holding that the Fourth Amendment applied extraterritorially to a law enforcement operation. The Court pointed out the untenable consequences of such a holding for our Government's *military* operations abroad:

The rule adopted by the Court of Appeals would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in "searches or seizures." The United States frequently employs Armed Forces outside this country – over 200 times in our history – for the protection of American citizens or national security. . . . Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters. . . . [T]he Court of Appeals' global view of [the Fourth Amendment's] applicability would plunge [the political branches] into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad.

494 U.S. at 273-74 (citations omitted). Here, the Court demonstrated its practical concern that the Fourth Amendment not be interpreted and applied to military and foreign policy operations abroad. If things were otherwise, both political leaders and military commanders would be severely constrained if they were required to assess the "reasonableness" of any military operation beforehand, and the effectiveness of our forces would be drastically impaired. To apply the Fourth Amendment to overseas military operations would represent an extreme over-judicialization of warfare that would interfere with military effectiveness and the President's constitutional duty to prosecute a war successfully.

It also seems clear that the Fourth Amendment would not restrict military operations within the United States against an invasion or rebellion.<sup>30</sup> Were the mainland of the United States invaded by foreign military forces, for example, our armed forces must repel them. Allowing the Fourth Amendment, in general, to constrain their efforts would interfere with the Government's higher constitutional duty of preserving the nation and defending its citizens. Our forces must be free to "seize" enemy personnel or "search" enemy quarters, papers and messages without having to show "probable cause" before a neutral magistrate, and even without having to demonstrate that their actions were constitutionally "reasonable." They must be free to use any means necessary to defeat the enemy's forces, even if their efforts might cause collateral damage to United States persons. Although their conduct might be governed by the laws of war, including laws for the protection of noncombatants, the Fourth Amendment would no more apply than if those operations occurred in a foreign theater of war. Indeed, we have been unable to find any case from the War of 1812 – the last major conflict fought out on American soil against a foreign enemy – in which plaintiffs brought a successful wrongful death action due to federal military operations within the continental United States.<sup>31</sup>

<sup>30</sup> In time of insurrection, territory belonging to the United States has been held to be "hostile," and ordinary civil law was inapplicable to military actions there. See 24 Op. Att'y Gen. 570, 574 (1903) (armies of the United States were "in hostile territory" or "enemy's country" in Philippine Islands during insurrection, although United States was sovereign over territory).

<sup>31</sup> Soon after the War of 1812, the scope of the President's authority to arrest and detain enemy aliens was litigated before Justice Bushrod Washington in *Lockington v. Smith*, 15 F. Cas. 758 (Case No. 8,448) (Cir. Ct. D. Pa. 1817) (Washington, Circuit Justice). The Act of July 6, 1798 had authorized the President to detain enemy aliens with a view of removing them from the United States. The plaintiff, a British alien, had been arrested and confined by a federal marshal in 1813 pursuant to a general order of President Madison. The plaintiff argued, in part, that the 1798 statute authorized the President to detain enemy aliens only for the purpose of removal, and that he had not been confined for that purpose. Justice Washington disagreed, holding that the legislation "appears to me to be as unlimited as the legislature could make it. . . . There is not, I think, the slightest ground for the argument, that every restraint or confinement of an alien enemy is unauthorized by this law, unless it be made with a view to his removal from the United States. If this be the true construction of the act, it would follow that, however dangerous it might be, under any supposed circumstances, for alien enemies to quit the United States, possessed of information useful to the enemy, and detrimental to this Nation, they must nevertheless be either sent away, or be suffered to go at large, protected spies in the service of the enemy, and possibly in the vicinity of their armies and navy. . . . It seems perfectly clear, that the power to remove was vested in the president, because, under certain circumstances, he might deem that measure most effectual to guard the public safety. But he might also cause the alien to be restrained or confined, if in his opinion the public good should forbid his removal." *Id.* at 760. Justice Washington also rejected the plaintiff's argument that the executive was required to resort to the courts to enforce the applicable regulations, once the President had issued them. The "great object" of the legislation, he said, "was to provide for the public safety, by imposing such restraints upon alien enemies, as the chief executive magistrate of the United States might think necessary, and of which his particular situation enabled him best to judge." *Id.* at 761. Hence no judicial hearing was necessary before the alien could be seized. Nor could the Constitution be invoked to imply a right to a pre-seizure hearing: "I do not feel myself authorized to impose limits to the authority of the executive magistrate which congress, in the exercise of its constitutional powers, has not seen fit to impose." *Id.* In short, Justice Washington read the statute to vest broad emergency powers in the President to restrict the liberties of enemy aliens in time of war, and found it unproblematic that the President should summarily arrest and detain such persons in the interest of national security and without prior authorization by a magistrate.

The other War of 1812 precedents that might be read the other way appear only to stand for the proposition that military cannot use courts-martial or military commissions to try citizens who did not take part in military operations. In *Smith v. Shaw*, 12 Johns. 257 (N.Y. Sup. Ct. 1815), 1815 WL 1065, the court sustained an action in trespass and false arrest brought by a naturalized citizen who had been arrested by two U.S. military officers on charges of spying, breach of parole, exciting mutiny, and illicit trading with the enemy and who had thereafter been detained in military custody. The court held that none of the offenses charged against the plaintiff was cognizable

Nor is it necessary that the military forces on our soil be *foreign*. Suppose that an armed and violent group of United States citizens seized control of a part of the country or of one of the territories, and declared itself independent, as occurred during the Civil War. Federal Armed Forces must be free to use force to put down this insurrection without being constrained by the Fourth Amendment, even though force would be intentionally directed against persons known to be citizens. This appears to have been the understanding that prevailed during the Civil War. We have been unable to find any Civil War examples in which plaintiffs successfully brought wrongful death actions arising from federal military operations.<sup>32</sup> Although the terrorists who staged the September 11 incidents operate clandestinely and have not occupied part of our territory, they bear a strong resemblance to foreign invaders or domestic rebels. They have come from abroad to launch coordinated attacks of great destructive force, within the territorial United States, that are designed to change the policies of the Federal Government. If the President

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by court-martial, except that relating to the charge of spying; and by statute, see Act of April 10, 1806, citizens could not be "spies." The defendant had no right to detain the plaintiff to stand trial before a court-martial, because such a court would lack subject-matter jurisdiction. 1815 WL 1065 at \* 6.

Somewhat more instructive is *M'Connell v. Hampton*, 12 Johns. 234 (N.Y. Sup. Ct. 1815), 1815 WL 1058, a case from the same period and before the same court. There the court set aside a jury verdict against the defendant as excessive and ordered a new trial. The defendant, a U.S. army commander, had confined the plaintiff and had brought him to trial before a court-martial on a charge of treason. There was some evidence that the defendant was "wantonly exercising his military power, for the purpose of gratifying a[] private resentment." 1815 WL 1058, at 11 (opinion of Thompson, C.J.). On the other hand, the evidence also showed that the defendant "had strong grounds for believing the plaintiff to be a suspicious character," *id.* at \*12 (opinion of Spencer, J.), because of his dealings with the enemy. The majority of the judges held that the jury had been prejudiced and had awarded excessive damages. Judge Spencer stated that "[t]he defendant, as Commander in Chief of a division of the army, being near the enemy's territory [in Canada], and at no great distance from their forces, was bound, by every consideration of duty as a soldier . . . to avoid surprise, and to guard himself against machinations of any kind. . . . It seems to me that the jury have wholly overlooked the critical and delicate situation of the defendant, as a commander of an army upon the frontiers, as also the very suspicious light in which he must have viewed the plaintiff." *Id.* Again, the case only involved the question whether a citizen could be subject to the jurisdiction of a military court.

<sup>32</sup> Although the post-Civil War Supreme Court did allow tort actions to go forward against Union military officers who had arrested and imprisoned citizens at places remote from the scene of battle, it did not preclude the availability of the defense that such actions were authorized by Presidential order. See *Beckwith v. Bean*, 98 U.S. 266, 282-83 (1878) (leaving question undecided). It is true that several lower courts rejected such a defense. For example, in *Griffin v. Wilcox*, 21 Ind. 370 (1863), 1863 WL 2075, the court refused on constitutional grounds to give effect to an Act of Congress that established the defense of compliance with Presidential orders in suits in false arrest and imprisonment. The court said that the President may not authorize "a military officer to seize and execute a private citizen of the United States, who was quietly pursuing his lawful business, in a State not in rebellion." 1863 WL 2075 at \*9. But it seems to have been essential to these decisions that the challenged arrests and detentions took place far from the front. See *id.* at \*10 ("the rebellion . . . is not general, but local. It is confined to the Southern States. It is a sectional rebellion. The theatre of force. Where the civil tribunals are closed, is sectional, bounded by geographical lines."); see also *Milligan v. Hovey*, 17 F. Cas. 380, 381 (C.C.D. Ind. 1871) (Case No. 9,605); *Johnson v. Jones*, 44 Ill. 142 (1867), 1867 WL 5117 at \*7. Moreover, one lower court decision in a post-Civil War false arrest case accepted that the defense based on congressional ratification of the executive's acts was available, but found that the defendants had failed to show that any order or authorization of the President's underlay their imprisonment of the plaintiff. *McCall v. McDowell*, 15 F. Cas. at 1245. Thus, the scope of the President's power to order the military to arrest and detain citizens in places where armed conflict was occurring or was likely to occur was not decided in these cases.

concludes that it is necessary to use military force domestically to counter them, the Fourth Amendment should be no more relevant than it would be in cases of invasion or insurrection.<sup>33</sup>

Practice under the early Republic supports this conclusion. In 1798, Congress authorized President Adams to “instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas.” An Act Further to Protect the Commerce of the United States, § 1, 1 Stat. 578 (1798). Under this and a companion statute, “scores of seizures of foreign vessels [took place] under congressional authority.” *Verdugo-Urquidez*, 494 U.S. at 267. Although some of the seizures were litigated, “it was never suggested that the Fourth Amendment restrained the authority of Congress or of the United States agents to conduct operations such as this.” *Id.* at 268. The 1798 Act authorized the U.S. Navy to seize vessels of a hostile State – albeit a State against which we had not declared war – if they were found “within the jurisdictional limits of the United States,” as well as in international waters. Thus, within the first decade of the Constitution’s ratification, the Fourth Amendment was not understood to restrict military operations against the nation’s enemies purely because those operations were conducted within the United States. On the contrary, seizures *within* the territorial sea of the United States were no more subject to the Fourth Amendment than seizures in international waters. The fact that the military operations in contemplation here may take place on American soil rather than abroad, therefore, does not compel a distinction of constitutional dimensions.

The view that the Fourth Amendment does not apply to domestic military operations against terrorists makes eminent sense. Consider, for example, a case in which a military commander, authorized to use force domestically, received information that, although credible, did not amount to probable cause, that a terrorist group had concealed a weapon of mass destruction in an apartment building. In order to prevent a disaster in which hundreds or thousands of lives would be lost, the commander should be able to immediately seize and secure the entire building, evacuate and search the premises, and detain, search, and interrogate everyone found inside. If done by the police for ordinary law enforcement purposes, such actions most likely would be held to violate the Fourth Amendment. See *Ybarra v. Illinois*, 444 U.S. 85 (1979) (Fourth Amendment violated by evidence search of all persons who are found on compact premises subject to search warrant, even when police have a reasonable belief that such

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<sup>33</sup> The claim that the Fourth Amendment does not apply to military actions inside the United States whose object is to combat an enemy operating here is not altogether novel: it was made, with respect to the Bill of Rights as a whole, during the Civil War. The legal adviser to the War Department during the War observed, however, that those rights “were intended as declarations of the rights of peaceful and loyal citizens, and safeguards in the administration of justice by the civil tribunals; but it was necessary, in order to give the government the means of defending itself against domestic or foreign enemies, to maintain its authority and dignity, and to enforce obedience to its laws, that it should have unlimited war powers; and it must not be forgotten that the same authority which provides those safeguards, and guarantees those rights, also imposes upon the President and Congress the duty of so carrying on war as of necessity to supersede and hold in temporary suspense such civil rights as may prove inconsistent with the complete and effectual exercise of such war powers, and of the belligerent rights resulting from them. The rights of war and the rights of peace cannot coexist. One must yield to the other. Martial law and civil law cannot operate at the same time and place upon the same subject matter. Hence the constitution is framed with full recognition of that fact; it protects the citizen in peace and in war; but his rights enjoyed under the constitution, in time of peace are different from those to which he is entitled in time of war.” William Whiting, *War Powers under the Constitution of the United States* 50-51 (1864).

persons are connected with drug trafficking and may be concealing contraband). To subject the military to the warrant and probable cause requirement that the courts impose on the police would make essential military operations such as this utterly impossible. If the military are to protect public interests of the highest order, the officer on the scene must be able to "exercise unquestioned command of the situation." *Michigan v. Summers*, 452 U.S. 692, 703 (1981).<sup>34</sup>

Further support for our position comes from *Scheuer v. Rhodes*, 416 U.S. 232 (1974). In that case, the Court clearly recognized that the "probable cause" requirement could not be imposed on high ranking executive officials ordering military actions to be taken in situations of civil disorder. *Scheuer* was an action under 42 U.S.C. § 1983 against the Governor of Ohio and other State officials, alleging that they had recklessly deployed the Ohio National Guard onto the campus of a State university and had ordered the Guard to perform illegal acts resulting in the deaths of several students. Although it denied that the Governor's executive immunity was absolute, the Court did emphasize the difference, for the Fourth Amendment and official immunity analysis, between decisions taken at that level of executive authority and at the police level:

When a court evaluates police conduct relating to an arrest its guideline is "good faith and probable cause." In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices . . . is virtually infinite. In common with police officers, however, officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office. . . . Decisions in such situations are more likely than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events and when, by the very existence of some degree of civil disorder, there is often no consensus as to the appropriate remedy. In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad.

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<sup>34</sup> In a case decided not long after the end of the Civil War, the Supreme Court of Illinois reached similar conclusions. See *Johnson v. Jones*, 44 Ill. 142 (1867), 1867 WL 5117. This was an action in trespass brought by an alleged Confederate sympathizer in Illinois who had been arrested and imprisoned in a military fortress, purportedly on the authority of President Lincoln's orders. The court rejected the defense that the plaintiff had been arrested as a belligerent and held as a prisoner of war. It did, however, state that had the plaintiff been a belligerent, "the order of the President was wholly unnecessary to authorize the arrest. Any soldier has the right, in time of war, to arrest a belligerent engaged in acts of hostility toward the government, and lodge him in the nearest military prison, and to use such force as may be necessary for that purpose - even unto death." 1867 WL at \*5. Further, although the court also rejected the defense that the arrest was justified as an exercise of martial law, it also stated that "[i]f a commanding officer finds within his lines a person, whether citizen or alien, giving aid or information to the enemy, he can arrest and detain him so long as may be necessary for the security or success of his army. He can do this under the same necessity which will justify him, when an emergency requires it, in seizing or destroying the private property of a citizen." *Id.* at \*7. In terrorist wars, unlike conventional warfare, there are of course no battle lines, and the theater of operations may well be in heavily populated urban settings. We think, however, that the same principle applies, and that a military commander operating in such a theater has the same emergency powers of arrest and detention.

*Id.* at 245-47 (citation omitted); cf. *Katz v. United States*, 389 U.S. 347, 364 (1967) (White, J., concurring) (“We should not require the warrant procedure and the magistrate’s judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.”).

State and federal court decisions reviewing the deployment of military force domestically by State Governors to quell civil disorder and to protect the public from violent attack have repeatedly noted that the constitutional protections of the Bill of Rights do not apply to military operations in the same way that they apply to peacetime law enforcement activities. Thus, the courts have explained that “[w]ar has exigencies that cannot readily be enumerated or described, which may render it necessary for a commanding officer to subject loyal citizens, or persons who though believed to be disloyal have not acted overtly against the government, to deprivations that would under ordinary circumstances be illegal.” *Commonwealth ex rel. Wadsworth v. Shortall*, 55 A. 952, 955 (Pa. 1903) (holding that in time of domestic disorder the shooting by a sentry of an approaching man who would not halt was not illegal). “[W]hatever force is requisite for the defense of the community or of individuals is also lawful. The principle runs through civil life, and has a twofold application in war – externally against the enemy, and internally as a justification for acts that are necessary for the common defense, however subversive they may be of rights which in the ordinary course of events are inviolable.” *Hatfield*, 81 S.E. at 537 (internal quotations omitted) (upholding the Governor’s seizure of a newspaper printing press during a time of domestic insurrection).<sup>35</sup>

### C.

Our view that the Fourth Amendment does not apply to domestic military operations receives support from federal court cases involving the destruction of property. In a line of cases arising from several wars, the federal courts have upheld the authority of the Government, acting under the imperative military necessity, to destroy property even when it belongs to United States citizens and even when the action occurs on American soil. Such destruction of property might constitute a seizure under the Fourth Amendment. Moreover, the courts have held, even if such seizures might otherwise constitute “takings” under the Fifth Amendment, the exigent circumstances in which they occurred absolve the Government from liability. The cases articulate a general rule that “the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field.” *United States v. Pacific*

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<sup>35</sup> See also *Powers Mercantile Co.*, 7 F. Supp. at 868 (upholding the seizure of a factory to prevent a violent attack by a mob and noting that “[u]nder military rule, constitutional rights of individuals must give way to the necessities of the situation; and the deprivation of such rights, made necessary in order to restore the community to order under the law, cannot be made the basis for injunction or redress”); *Swope*, 28 P.2d at 7 (upholding the seizure and detention of a suspected fomenter of domestic insurrection by the “military arm of the government,” noting that “there is no limit [to the executive’s power to safeguard public order] but the necessities and exigency of the situation” and that “in this respect there is no difference between a public war and domestic insurrection”) (emphasis added) (quotations and citation omitted); *In re Moyer*, 85 P. 190, 193 (Colo. 1904) (“The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting other to commit such acts, violates none of his constitutional rights.”); *In re Boyle*, 57 P. 706, 707 (Idaho 1899) (upholding the seizure and detention of a suspected rebel during time of domestic disorder).

*R.R. Co.*, 120 U.S. 227, 239 (1887).<sup>36</sup> Although these decisions arise under the Fifth Amendment rather than the Fourth, we think that they illuminate the Government's ability to "search" and "seize" even innocent United States persons and their property for reasons of overriding military necessity. For if wartime necessity justifies the Government's decision to destroy property, it certainly must also permit the Government to temporarily search and seize it.

In *United States v. Caltex, Inc. (Philippines)*, 344 U.S. 149 (1952), plaintiffs had owned oil facilities in the Philippine Islands (then a United States territory) at the time of the Japanese attack on Pearl Harbor. In the face of a rapidly deteriorating military situation in the western Pacific, United States military authorities ordered the destruction of those facilities. On December 31, 1941, while Japanese troops were entering Manila, Army personnel demolished the facilities. "All unused petroleum products were destroyed, and the facilities rendered useless to the enemy. The enemy was deprived of a valuable logistic weapon." *Id.* at 151. Although the Government voluntarily paid compensation for certain losses after the war, it refused to pay for the destruction of the terminal facilities. Quoting its earlier decision in *Pacific R.R. Co.*, 120 U.S. at 234, the Court denied compensation under the Fifth Amendment:

The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone, as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss.

*Caltex*, 344 U.S. at 153-54. The Court further observed that the "principles expressed" in *Pacific R.R. Co.* were

neither novel nor startling, for the common law had long recognized that in times of imminent peril – such as when fire threatened a whole community – the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.

*Id.* at 154. The Court summed up its conclusion:

The short of the matter is that this property, due to the fortunes of war, had become a potential weapon of great significance to the invader. It was destroyed, not appropriated for subsequent use. It was destroyed that the United States might better and sooner destroy the enemy.

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<sup>36</sup> See also *Heflebower v. United States*, 21 Ct. Cl. 228, 237-38 (1886) ("[T]here is a distinction to be drawn between property used for Government purposes and property destroyed for the public safety. . . . [I]f the taking, using, or occupying was in the nature of destruction for the general welfare or incident to the inevitable ravages of war, such as the march of troops, the conflict of armies, the destruction of supplies, and whether brought about by casualty or authority, and whether on hostile or national territory, the loss, in the absence of positive legislation, must be borne by him on whom it falls, and no obligation to pay can be imputed to the Government.").

The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign.

*Id.* at 155-56.<sup>37</sup> Likewise, in *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909), the court held that the United States owed no compensation to a United States corporation for the destruction of its property in a province of Cuba during the Spanish-American War. In that case, United States troops were endangered by the prevalence of yellow fever, and the military commander found it necessary to destroy all facilities, including the plaintiff's, which might contain fever germs.<sup>38</sup> Further, even after a Cuban city had capitulated and was under the control of United States forces during the Spanish-American War, the area was still considered "enemy's country," and property belonging to its residents, even if they were United States nationals, was held liable to uncompensated seizure, confiscation or destruction for military needs. See *Herrera v. United States*, 222 U.S. 558, 569 (1912).

In the aftermath of the Civil War, the Supreme Court upheld legislation enacted by Congress and enforced by the President that confiscated the property of "rebels," designated as such. *Miller v. United States*, 78 U.S. 268 (1870). The plaintiff had argued that the relevant provisions of the legislation were "municipal regulations only," *i.e.*, "merely statutes against crimes," *id.* at 304, and therefore that the Fifth and Sixth Amendments should have applied. The Court rejected that contention, holding that the provisions "were not enacted under the municipal power of Congress to legislate for the punishment of crimes . . . [but were] an exercise of the war

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<sup>37</sup> The defense of military necessity to a claim for compensation for the destruction of property has been held to apply in the circumstances of insurrection (and not only those of war) in the Philippines during the period in which those islands were territory of the United States. In an international arbitration case arising out of injuries to a British-owned plant during the insurrection in the Philippines after the Spanish-American War, the tribunal rejected the claimant's demand for arbitration, stating that the damage had been an incident of United States military operations against the insurgents, and that foreign residents whose property happened to be in the field of operations had no right to recover. See *Luzon Sugar Refining Co., Ltd. (Great Britain v. United States)*, Nielsen's Report (1926) 586, discussed in 6 Green Haywood Hackworth, *Digest of International Law* 178-79 (1943).

<sup>38</sup> Even in a case involving the destruction of a Confederate citizen's property by Confederate Army officers, the Supreme Court held military necessity to be a defense. In *Ford v. Surget*, 97 U.S. 594 (1878), the Court declared:

[T]he destruction of the [plaintiff's] cotton, under the orders of the Confederate military authorities, for the purpose of preventing it from falling into the hands of the Federal army, was . . . an act of war upon the part of the military forces of the rebellion, for which the person executing such orders was relieved of civil responsibility . . . . [The Confederate commanders] had the right, as an act of war, to destroy private property within the lines of the insurrection, belonging to those who were co-operating, directly or indirectly, in the insurrection against the government of the United States, if such destruction seemed to be required by impending necessity for the purpose of retarding the advance or crippling the military operations of the Federal forces.

*Id.* at 605-06. Moreover, the Court has also upheld, and construed liberally, statutes exempting persons from liability for acts of destroying or impressing property during wartime on the basis of the military authority vested in them. See, *e.g.*, *Beard v. Burtis*, 95 U.S. 434 (1877).



powers of the government.” *Id.* at 304-05. “Because “the power to declare war involves the power to prosecute it by all means and in any manner in which war may legitimately be prosecuted, . . . [i]t therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor.” *Id.* at 305. Further, the Court upheld the confiscations despite the United States citizenship of the property owners. “[T]hose must be considered [enemies] who, though subjects or citizens of the lawful government, are residents of the territory under the power or control of the party resisting that government. . . . Have they not voluntarily subjected themselves to that party? And is it not as important to take from them the sinews of war, their property, as it is to confiscate the property of rebel enemies resident within the rebel territory?” *Id.* at 311-12. Indeed, the Court even suggested that the property of disloyal residents within the Union could also have been confiscated in the same manner. Referring to the experience of the Framing generation during the Revolution, the Court found that the practice of the period showed “the general understanding that aiders and abettors of the public enemy were themselves enemies, and hence that their property might lawfully be confiscated.” *Id.* at 312; *see also id.* at 311 (those who, though “subjects of a state in amity with the United States, are in the service of a state at war with them” are “public enemies”). *Miller* establishes that certain basic constitutional rights do not apply to the enemy, and that even United States citizenship may not negate the possibility that one may have the legal status of an enemy. *Accord Ex parte Quirin*, 317 U.S. 1 (1942). Other Supreme Court decisions from the Civil War are consistent with this outcome.<sup>39</sup>

The doctrine that a commander, acting in circumstances of compelling military necessity, may destroy a citizen’s private property without causing the United States to incur an obligation of compensation has deep roots in the law. “In 1776 during the Revolution when private property was destroyed at Charleston in furthering military operations, during the War of 1812 when a plantation near New Orleans was damaged by inundation caused by the cutting of a levee to impede the advance of Packenham, during the Civil War, when a house was destroyed at Paducah, Ky., because its location on the outskirts of town made it a favorable point for an enemy sharpshooter, – in all these cases the government refused to indemnify the owners. . . . [D]uring the Civil War property vested in cotton was not protected and persons within the limits of the insurrection, whoever they might be, were unable to secure satisfaction because cotton was considered a military article, ‘potentially an auxiliary of the enemy’ by which he would be able to secure warlike material abroad.” Elbridge Colby, *War Crimes*, 23 Mich. L. Rev. 606, 622-23 (1925) (footnote omitted).

These cases show the Court’s consistent recognition that the protections of the Bill of Rights are tempered by the circumstances of war. The lessons of the Court’s approach to the wartime application of the Fifth Amendment should apply to the Fourth Amendment, which also involves constitutional rights with respect to property. If the Court has found that wartime destruction of property does not involve a “taking” under the Fifth Amendment, it seems safe to

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<sup>39</sup> Thus, in *Mrs. Alexander’s Cotton*, 69 U.S. 404 (1864), the Court upheld the Union navy’s seizure of privately owned cotton from a Louisiana plantation as the capture and confiscation of enemy property, even though the area was for a brief time under occupation by the Union forces and even though the plaintiff claimed loyalty to the United States. *See also Haycraft v. United States*, 89 U.S. 81, 94 (1874); *Beard v. Burts*, 95 U.S. at 438; *cf. Price v. Poynter*, 64 Ky. 387 (1867), 1867 WL 3918; *Bell v. Louisville & Nashville R.R. Co.*, 64 Ky. 404 (1867), 1867 WL 3920.

conclude that the Court would not apply the Fourth Amendment to domestic military operations against foreign terrorists. The former involves a great intrusion into an individual's rights – the complete destruction of property – than does a temporary search and seizure of property. In any event, both rights would give way before the Government's compelling interest in responding to a direct, devastating attack on the United States, and in prosecuting a war successfully against international terrorists – whether they are operating abroad or within the United States.

This is not, of course, to say that war suspends constitutional civil liberties. *See, e.g., Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 124 (1866). But the Court has also found it “‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” *Haig*, 453 U.S. at 307 (citation omitted), and has interpreted and applied constitutional protections to accommodate that overriding need. Here, we believe that the Constitution, properly interpreted, allows the President as Commander in Chief, and the forces under his control to use military force against foreign enemies who operate on American soil, free from the constraints of the Fourth Amendment.

We emphasize that nothing in this advice *precludes* the use of information obtained by military actions for criminal investigations or prosecutions, if obtaining it for such use is not a significant purpose of the action. As a general matter, the Fourth Amendment law does not require that a search or seizure have only a single purpose so long as it is otherwise legitimate. Thus, the police may engage in (objectively justified) traffic stops even if their underlying motive may be to investigate other violations as to which no probable cause or even articulable suspicion exists. *See Whren v. United States*, 517 U.S. 806 (1996); *see also United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983) (otherwise valid warrantless boarding of vessel by customs officials not invalidated by facts that State police officer accompanied customs officials and officers were following tip that vessel might be carrying marijuana). In the FISA context, the courts have said that an “otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used, as allowed by [50 U.S.C.] § 1806(b), as evidence in a criminal trial.” *Duggan*, 743 F.2d at 78. Thus, while the Government's military and law enforcement purposes may overlap, the Government should not be denied the benefits to its law enforcement functions so long as securing such benefits is not the predominant purpose of its military actions.

## VI.

We have argued that the Fourth Amendment would not apply to military operations the President ordered within the United States to deter and prevent acts of terrorism. We recognize, however, that courts could decide otherwise, although we believe this would be at odds with the best reading of the constitutional text and history, practice, and the case law. Nonetheless, we analyze the standards that would govern if courts were to subject domestic military operations to the Fourth Amendment.

The Fourth Amendment's “‘central requirement’ is one of reasonableness.” *Illinois v. McArthur*, 121 S. Ct. 946, 949 (2001) (quoting *Texas v. Brown*, 460 U.S. 730, 739 (1983)); *see also Vernonia School Dist. 47J*, 515 U.S. at 652 (“As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is

'reasonableness.'"). Even in the context of ordinary law enforcement by the police, the Court has "made it clear that there are exceptions to the warrant requirement. When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *McArthur*, 121 S. Ct. at 949. "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it was conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). In light of the extraordinary emergency created by the September 11, and taking account also of the compelling need military commanders would no doubt have to act swiftly in particular exigent circumstances, we think that the courts – if they applied the Fourth Amendment at all – would find that the challenged military conduct was "reasonable."

It is, of course, not possible to preview the reasonableness analysis for all possible uses of force within the United States. Our Office has, however, previously examined a somewhat similar situation, and the advice we gave at that time is relevant here. In 1996, we were asked whether law enforcement or the armed forces could use deadly force to defend against an aerial attack on the Summer Olympics in Atlanta, Georgia, consistent with the Fourth Amendment. Memorandum to File from Robert Delahunty, Special Counsel, *Re: Use of Deadly Force Against Civil Aircraft Threatening to Attack 1996 Summer Olympic Games* at 1 (Aug. 19, 1996). We began by noting the destruction of an aircraft would be a "seizure" within the meaning of the Fourth Amendment, and we assumed that the use of deadly force by the law enforcement or military personnel to prevent or repel an imminent aerial attack on the Olympic Games would be subject to the Fourth Amendment. See *Garner*, 471 U.S. at 7, 11; *Graham v. Connor*, 490 U.S. 386, 394-95 & n.10 (1989); *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993). Our Office assumed that the Fourth Amendment applied both because we were asked to as part of the hypothetical question, and because the possible use of the aircraft was not considered to be part of a larger military attack upon the United States.

In judging the constitutionality of the use of deadly force, we applied the Supreme Court's balancing test for determining "reasonableness" for Fourth Amendment purposes. Because "[t]he intrusiveness of a seizure by means of deadly force is unmatched," *Garner*, 471 U.S. at 9, the governmental interests in using such force must be powerful. We concluded that deadly force would be justified if the danger to an officer's life, or to the life or safety of an innocent third party were sufficiently great. Further, we noted:

The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies . . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation. *Graham*, 490 U.S. at 396-97.

We think those conclusions are still valid, and would support a broader use of military force – consistent with the Fourth Amendment, to combat terrorism within the continental United States. The law has traditionally recognized that force (including deadly force) may be legitimately used in self-defense. “[S]elf defense is . . . embodied in our jurisprudence as a consideration totally eliminating any criminal taint . . . . It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether . . . .” *Griffin v. Martin*, 785 F.2d 1172, 1186-87 & n.37 (4th Cir. 1986), *aff’d by an equally divided court*, 795 F.2d 22 (4th Cir. 1986) (en banc), *cert. denied*, 480 U.S. 919 (1987). “More than two centuries ago, Blackstone, best known of the expositors of the English common law, taught that ‘all homicide is malicious, and of course, amounts to murder, unless . . . excused on the account of accident or self-preservation . . . .’ Self-defense, as a doctrine legally exonerating the taking of human life, is as viable now as it was in Blackstone’s time . . . .” *United States v. Peterson*, 483 F.2d 1222, 1228-29 (D.C. Cir.) (footnote omitted), *cert. denied*, 414 U.S. 1007 (1973). *See also United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994) (application of criminal statute prohibiting destruction of civil aircraft to acts of United States military personnel in a state of hostilities could “readily lead to absurdities” because they “would not be able to engage in reasonable self-defense without subjecting themselves to the risk of criminal prosecution”).

Moreover, the court in *Romero v. Board of County Comm’rs, County of Lake, Colo.*, 60 F.3d 702, 704 (10th Cir. 1995), *cert. denied*, 516 U.S. 1073 (1996), held that a law enforcement officer’s “use of deadly force in self-defense is not constitutionally unreasonable. *See Garner*, 471 U.S. at 11 (deadly force may be used if ‘officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or to others’) . . . . [See also] *O’Neal v. DeKalb County*, 850 F.2d 653, 655, 657-58 (11th Cir. 1988) (holding officers did not act unreasonably in shooting suspect who charged toward one of them with a knife).” Furthermore, deadly force may legitimately be used by governmental actors, not only in their own defense, but in defense of innocent third parties. *See Cummingham v. Neagle*, 135 U.S. 1, 58-59, 63-64 (1890); *Garner*, 471 U.S. at 11; *Cole v. Bone*, 993 F.2d at 1333; *Ford v. Childers*, 855 F.2d 1271, 1275 (7th Cir. 1988); *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. at 164 (“[A] USG officer or employee may use deadly force against civil aircraft without violating [a criminal statute] if he or she reasonably believes that the aircraft poses a threat of serious physical harm . . . to another person.”).

These precedents show that the use of force in the current circumstances would be reasonable, within the terms of the Fourth Amendment. Here, military force would be used against terrorists to prevent them from carrying out further attacks upon American citizens and facilities. This would amount to the exercise of the right of self-defense on a larger, but no less compelling, scale. A justification of self-defense therefore would justify the use of force, even deadly force, in counter-terrorism operations domestically. We stress that any calculus of reasonableness must also take into account that the September 11 attacks and the threat of further attacks pose a far graver threat to national security than the risk of terrorist attack in 1996. As we were aware at that time, any attack would have been discrete and localized. Here, however, attacks have fallen within an unfolding pattern of terrorism directed at the United States by a coordinated international network of terrorists. Nor would an attack on the Atlanta Games have

had the same sweeping consequences for our nation's defense capabilities and financial stability as the attacks on the Pentagon and on the World Trade Center. Thus, in any judicial examination of the reasonableness of a particular military operation or class of operations, we think that the Government's interests must be given extraordinary weight.<sup>40</sup>

#### Conclusion

We conclude that the President has both constitutional and statutory authority to use the armed forces in military operations, against terrorists, within the United States. We believe that these operations generally would not be subject to the constraints of the Fourth Amendment, so long as the armed forces are undertaking a military function. Even if the Fourth Amendment were to apply, however, we believe that most military operations would satisfy the Constitution's reasonableness requirement and continue to be lawful.

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<sup>40</sup> Cf. *Best v. United States*, 184 F.2d 131, 139-41 (1st 1950) (Magruder, J.), cert. denied, 340 U.S. 939 (1951) (taking account of unsettled conditions in occupied Austria in immediate aftermath of Second World War in holding that warrantless search of Vienna apartment of U.S. national charged with treason pursuant to military orders was reasonable under Fourth Amendment).