

Book Review

Soldiers on the Home Front¹

Reviewed by *Fred L. Borch III**

This book is a useful survey of the role played by the American armed forces on U.S. soil. Its focus, however, is not on operations or personalities in history. Rather, *Soldiers on the Home Front* examines whether Americans in uniform on the “home front” have complied with the rule of law in saving lives, suppressing civil disturbances, and maintaining law and order from the colonial era to the present day. This legal history perspective makes sense, as authors William C. Banks and Stephen Dycus are law professors at Syracuse University and Vermont Law School, respectively.

Soldiers on the Home Front examines the following issues and themes: Responding to Civil Disturbances and Assisting Law Enforcement;² “Military Imprisonment of Civilians;” “Military Trials of Civilians;” “Military Intelligence Collection in the United States;” and “The Domestic Role of the Military After September 11 [2001].”² In discussing these topics, the book takes a chronological approach. It begins with the role of the militia in colonial America, its transformation into a Continental Army under the command of George Washington, and explains the Founding Father’s reluctant acceptance of a standing Army when drafting the U.S. Constitution. As the authors explain, the current structure of the armed forces—active duty, Reserve and Guard—is rooted in the idea that a permanent Federal force was necessary to protect the new Republic from external enemies, while state militias consisting of citizen-soldiers would be chiefly responsible for maintaining internal security.³ Initially, the idea was that this permanent force would be relatively small, but by the early 1950s, the threat posed by the Soviet Union and China, combined with America’s emergence as a major player on the world stage, resulted in an Army, Navy, Air Force and Marine Corps consisting of more than a million men and women.

A chapter titled “Soldiers as Peacekeepers, Soldiers as Cops,” traces the use of military troops to maintain law and order when civilian police authorities were either unable or unwilling to prevent civilian disorder.⁴ Historical events detailed in this chapter include the use of Union troops to quell riots in Boston, New York City, and other locations that were sparked by the implementation of a draft during the Civil War;⁵ and the use of soldiers to quell civil disturbances in the aftermath of the assassination of Dr. Martin Luther King in 1968.⁶

While *Soldiers on the Home Front* generally gets its history right in this chapter, it is inaccurate when discussing legal advice given by Army lawyers during the Los Angeles riots of 1992. The authors claim that “the general in charge refused to allow [active duty] troops to assist local police in law enforcement, mistakenly believing that the Posse Comitatus Act barred such use. He apparently failed to consult or to heed his staff judge advocate”⁷ This is wrong. In fact, Army judge advocate Major Scott C. Black⁸ advised Major General Mervin L. Covault, the Task Force Los Angeles commander that, because Soldiers were being used to quell a civil disturbance, the Posse Comitatus Act did not restrict the use of active duty personnel in any way. As a result, despite the authors’ claims to the contrary, active duty troops were patrolling the streets of Los Angeles in direct support of the local police. Their mission was “to suppress violence and restore law and order in the City and County of Los Angeles.”⁹

Other chapters in *Soldiers on the Home Front* discuss the use of the military troops in “jailing” Americans (the internments of more than 100,000 Japanese Americans in World War II)¹⁰ and Soldiers as “investigators” on U.S. soil (the collection of personal information about anti-war protesters during the Vietnam War).¹¹ There is also a lengthy

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¹ WILLIAM C. BANKS & STEPHEN DYCUS, *SOLDIERS ON THE HOME FRONT* (2016).

² *Id.* at 7–10.

³ *Id.* at 32–40.

⁴ *Id.* at 47–112.

⁵ *Id.* at 67–68.

⁶ *Id.* at 90–91.

⁷ *Id.* at 92.

⁸ Scott C. Black served as The Judge Advocate General from 2005 to 2009. He retired as a lieutenant general.

⁹ Lieutenant Commander Rolph, *Civil Disturbance Rules of Engagement: Joint Task Force Los Angeles*, ARMY LAW., Sept. 1992, at 32.

¹⁰ BANKS, *Supra* note 1, at 120–30.

¹¹ *Id.* at 175–78.

chapter titled “Soldiers as Judges,” which takes an in-depth look at the use of military commissions during the Mexican-American War, Civil War and World War II.

The book finishes—not surprisingly—with a lengthy chapter on “Soldiers at Home in the Age of Terrorism.” In an excellent discussion the major legal events that have occurred since September 11, 2001, the authors correctly conclude, in this reviewer’s opinion, that the terrorist attacks on the World Trade Center and the Pentagon have forever changed the role of the American armed forces “on home ground.”¹² According to *Soldiers on the Home Front*, “the growth in the military’s domestic role since 9/11 demonstrates . . . that in times of crisis we have looked to the armed forces to keep us safe at home.” However, it is not all clear that the law has kept pace with this changed landscape. Consequently, they argue that “our celebrated system of civilian control of the military needs fundamental reform.”¹³ Significantly, *Soldiers on the Home Front* does not argue that military forces themselves require additional restraints; the authors believe that military respect for civilian authority is firmly entrenched. Rather, the need is for “better controls” for “the military’s civilian controllers.”¹⁴

What they suggest is not particularly persuasive, especially since Professors Banks and Dycus believe that “better controls” will be achieved through the reconfiguration or realignment of military forces.¹⁵ The authors propose a merger of the Army National Guard and Army Reserve. As they see it, Reserve personnel would be integrated into the guard of the reservists’ residence states. However, the history of the Army National Guard and the Army Reserve indicate that this proposal would never make it through the U.S. Congress.

Even less practical is the proposal to create a Navy National Guard. This new military force would “focus on state maritime security . . . leaving the Coast Guard to focus on federal needs.”¹⁶ Nothing could be less practical. How would the new naval force be resourced? The active Army historically passes on resources to the Guard. How would the active Navy pass on items to the Navy National Guard? And what would it pass on? Why do we need a Navy National Guard if we have a Coast Guard? National defense is very much a zero-sum game these days. Consequently, if America were to resource a Navy National Guard, it would have to give up something else. Finally, one of the overarching themes of *Soldiers on the Home Front* is that American society must be on guard against the military undermining democratic civilian society. But since creating a new Navy National Guard would expand the military’s domestic footprint, would this not add yet another potential threat to America’s civilian government?

These criticisms aside, Professors Banks and Dycus rightly identify so-called “black swans”—“outlier events beyond the realm of regular planning”—as the major threat to American society.¹⁷ They also accept that “military forces will have to lend a hand”¹⁸ in an attack on America using a bioengineered virus or electromagnetic pulse (EMP) or similar unanticipated event. But the book falls short in proposing a way forward that is either politically unworkable or likely to succeed in practice.

Soldiers on the Home Front is well-written and the authors raise some interesting questions about the future of the U.S. armed forces in American life. Judge Advocates interested in the domestic role of the military in American history will find this a useful introduction to the topic.

¹² *Id.* at 227.

¹³ *Id.* at 267.

¹⁴ *Id.* at 269.

¹⁵ *Id.* at 267.

¹⁶ *Id.* at 271.

¹⁷ *Id.* at 266.

¹⁸ *Id.* at 267.