

# THE POSSE COMITATUS ACT: A PRINCIPLE IN NEED OF RENEWAL

## I. INTRODUCTION

In response to the military presence in the Southern States during the Reconstruction Era, Congress passed the Posse Comitatus Act<sup>1</sup> ("PCA" or the "Act") to prohibit the use of the Army in civilian law enforcement. The Act embodies the traditional American principle of separating civilian and military authority and currently forbids the use of the Army and Air Force to enforce civilian laws.<sup>2</sup> In the last fifteen years, Congress has deliberately eroded this principle by involving the military in drug interdiction at our borders.<sup>3</sup> This erosion will continue unless Congress renews the PCA's principle to preserve the necessary and traditional separation of civilian and military authority.

The need for reaffirmation of the PCA's principle is increasing because in recent years, Congress and the public have seen the military as a panacea for domestic problems.<sup>4</sup> Within one week of the bombing of the federal building in Oklahoma City,<sup>5</sup> President Clinton proposed an exception to the PCA to allow the military to aid civilian authorities in investigations involving "weapons of mass destruction."<sup>6</sup> In addition to this proposal Congress also

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

2. See 18 U.S.C. § 1385 (1994).

3. See generally Jim McGee, *Military Seeks Balance in Delicate Mission: The Drug War*, WASH. POST, Nov. 29, 1996, at A1. The military has become "embedded" in the drug war and performing domestic police missions traditionally belonging to civilian law enforcement. *Id.*

4. Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 342 (1994); see also McGee, *supra* note 3; Editorial, *A Hasty Response to Terrorism*, N.Y. TIMES, June 9, 1995, at A28.

5. On April 19, 1995, a fertilizer bomb in a parked truck destroyed the federal office building in Oklahoma City, Oklahoma. David Johnston, *Terror in Oklahoma City: The Investigation, at Least 31 Are Dead, Scores Are Missing After Car Bomb Attack in Oklahoma City Wrecks 9-Story Federal Office Building*, N.Y. TIMES, Apr. 20, 1995, at A1, B8. At least 165 people were killed. See *Terror in Oklahoma: The Victims; 165 People Who Were Killed in the Oklahoma City Explosion*, N.Y. TIMES, May 7, 1995, at 36 (list of those killed).

6. Todd S. Purdum, *Terror in Oklahoma: The Overview, Clinton Seeks More Anti-Terrorism Measures*, N.Y. TIMES, Apr. 27, 1995, at A1, A21. "Weapons of mass destruction . . . are generally considered to be nuclear or massive chemical or biological weapons." *Id.* The exception to the PCA would have been enacted in the Counterterrorism Act of 1995, S. 735, 104th Cong., 1st Sess. § 908 (June 5, 1995) (version 4) (the House version was H.R. 1710).

The House of Representatives later deleted this provision from their version of the bill to gain

considered legislation to directly involve federal troops in enforcing customs and immigration laws at the border.<sup>7</sup> In the 1996 presidential campaign, candidate Bob Dole pledged to increase the role of the military in the drug war, and candidate Lamar Alexander even proposed replacing the Immigration and Naturalization Service and the Border Patrol with a new branch of the armed forces.<sup>8</sup>

The growing haste and ease with which the military is considered a panacea for domestic problems will quickly undermine the PCA if it remains unchecked. Minor exceptions to the PCA can quickly expand to become major exceptions. For example in 1981, Congress created an exception to the PCA to allow military involvement in drug interdiction at our borders.<sup>9</sup> Then in 1989, Congress designated the Department of Defense as the "single lead agency" in drug interdiction efforts.<sup>10</sup>

The PCA criminalizes, effectively prohibiting, the use of the Army or the Air Force as a *posse comitatus*<sup>11</sup> to execute the laws of the United States. It

support from conservative Republicans and salvage the legislation. *Terrorism Bill Plan May Break Deadlock*, N.Y. TIMES, Dec. 2, 1995, at 8. An exception for nuclear materials is already law. See 18 U.S.C. § 831 (1994) (authorizing the Attorney General to request assistance from the Department of Defense in enforcing prohibitions against transactions involving nuclear materials).

7. See Border Integrity Act of 1995, H.R. 1224, 104th Cong., 1st Sess.

8. See Otto Kreisher, *Alexander's Ideas Hard to Pin Down; Military, Welfare Experts Call Plans Lousy, Unworkable*, SAN DIEGO UNION-TRIB., Mar. 1, 1996, at A6, available in 1996 WL 2145186.

9. See Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, § 905, 95 Stat. 1099, 1114-16 (1981) (codified as amended at 10 U.S.C. § 371-380 (1994)).

10. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 100-189, § 1202, 103 Stat. 1353, 1563 (1989) (codified as amended at 10 U.S.C. § 124(a) (1994)). The statute states as follows:

**Lead Agency.—**

(1) The Department of Defense shall serve as the single lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States.

(2) The responsibility conferred by paragraph (1) shall be carried out in support of the counter-drug activities of Federal, State, local, and foreign law enforcement agencies.

10 U.S.C. § 124(a) (1994); see also McGee, *supra* note 3, at A1 (since 1989, the military has spent over seven billion dollars on counter-drug efforts).

11. *Posse comitatus* is defined as follows: "The power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases, as to aid him in keeping the peace, in pursuing and arresting felons, etc." BLACK'S LAW DICTIONARY 1162 (6th ed. 1990). The definition is your basic movie western posse. In 1854, the Attorney General interpreted *posse comitatus* to include the military. See *infra* notes 44-45 and accompanying text.

In Norman England, the *posse comitatus* also had a military character and could be called out to defend the kingdom against insurrection and invasion. Walter E. Lorence, *The Constitutionality of the*

reads:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or 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.<sup>12</sup>

Though a criminal law, the PCA has a more important role as a statement of policy that embodies “the traditional Anglo-American principle of separation of military and civilian spheres of authority, one of the fundamental precepts of our form of government.”<sup>13</sup>

Major and minor exceptions to the PCA, which allow the use of the military in law enforcement roles, blur the line between military and civilian roles, undermine civilian control of the military, damage military readiness, and inefficiently solve the problems that they supposedly address.<sup>14</sup> Additionally, increasing the role of the military would strengthen the federal law enforcement apparatus that is currently under close scrutiny for overreaching its authority.<sup>15</sup> Although it seems benign, such an increase in military authority revives fears of past overreaching during the late 1960s.<sup>16</sup>

This Note argues that the principle embodied by the PCA should be renewed by rejecting exceptions to the Act and reaffirming the policy behind its inception. This renewal is necessary to preserve the historic division between civilian and military roles, to maintain civilian superiority over the military, to enhance military readiness, and to efficiently attack domestic

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*Posse Comitatus Act*, 8 U. KAN. CITY L. REV. 164, 166-67 (1939-40).

12. 18 U.S.C. § 1385 (1994). Currently, the fine for individuals is up to \$250,000. See 18 U.S.C. § 3571(b) (1994).

13. *Posse Comitatus Act: Hearing Before the Subcomm. on Crime of the Comm. on the Judiciary on H.R. 3519*, 97th Cong., 1st Sess. 10-11 (1981) [hereinafter *PCA Hearing*] (statement of Edward S.G. Dennis, Jr., Chief, Narcotics and Dangerous Drug Sec., Crim. Div., U.S. Dep't of Justice).

14. See *infra* Part IV.

15. See, e.g., Stephen Labaton, *Bill on Terrorism, Once a Certainty, Derails in House*, N.Y. TIMES, Oct. 3, 1995, at A1; *The F.B.I. Overreaches*, N.Y. TIMES, May 10, 1995, at A22; see also James Bennett, *Two States, Two Gatherings and a Lot of Anti-Government Sentiment*, N.Y. TIMES, Oct. 3, 1995, at A1.

16. See *Laird v. Tatum*, 408 U.S. 1, 3-8 (1972) (discussing the Army's domestic surveillance system in the late 1960s). The plaintiffs sued to stop the Army from compiling files on civilians as part of its support of federal law enforcement. *Id.* at 2. The Supreme Court dismissed the lawsuit for lack of standing. *Id.* at 12-15; see also Letter from former Senator Sam J. Ervin, Jr. to Rep. William J. Hughes, Chairman, Subcomm. on Crime, Comm. on the Judiciary, House of Representatives (June 2, 1981) [hereinafter *Ervin Letter*] (Sen. Ervin chaired the committee that investigated the military's spying on civilians in 1967 and 1968), in *PCA Hearing*, *supra* note 13, at 86.

problems. Part II reviews the historical traditional American fear of a standing army and the circumstances leading to the PCA's passage. Part III discusses the current scope of the PCA and the permissible roles of the military. Part IV explains how exceptions to the PCA endanger its underlying principle. The explanation covers the spectrum of possible exceptions to the PCA: drug interdiction, border duty, and biological and chemical weapons investigations.<sup>17</sup> Part V proposes legislative action to reaffirm the policy of the PCA and to limit to any further exceptions to it.

## II. PASSAGE OF THE PCA: REAFFIRMATION OF A LONG-STANDING AMERICAN TRADITION

The hotly contested presidential election of 1876 directly led to the passage of the PCA,<sup>18</sup> but the principle behind the Act—excluding the military from the civilian sphere—is as old as the United States.<sup>19</sup> Since the writing of the Declaration of Independence, Americans have mistrusted standing armies and have seen them as instruments of oppression and tyranny.<sup>20</sup> Over time, the military has increased its esteem among the

17. Border duty is a direct use of the military to execute civilian laws. Use of the military for investigative support is on the opposite end of the spectrum—a passive, indirect execution of civilian laws with only minor involvement foreseen. Drug interdiction falls between the two: it is passive, but the involvement is extensive. In 1993, the Department of Defense had \$1.4 billion in its annual budget to finance drug interdiction. Charles J. Dunlap, Jr., *The Last American Warrior: Non-Traditional Missions and the Decline of the U.S. Armed Forces*, FLETCHER F. WORLD AFF., Winter/Spring 1994, at 65, 69. For a description of current activities of the military in counter-drug activities, see McGee, *supra* note 3.

18. See *infra* note 49-51 and accompanying text.

19. See *supra* note 13 and *infra* notes 20-43 and accompanying text. “[M]emories of the arrogance of the British Army” fueled the early controversy over the military. M.E. Bowman, *The Military Role in Meeting the Threat of Domestic Terrorism*, 39 NAVAL L. REV. 209, 211 (1990).

20. The Declaration of Independence eloquently expressed this mistrust:

He has erected a multitude of New Offices, and sent hither swarms of Officers, to harass our People, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our Legislature.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

....

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

populace, but it has always been held separate from civilian government and limited to its focussed goal of military preparedness and national security.<sup>21</sup>

This antimilitarism bent of the United States is evident in our foundation documents.<sup>22</sup> The Declaration of Independence decries King George III's use of armies "to compleat works of death, desolation and tyranny . . . totally unworthy . . . of a civilized nation."<sup>23</sup> Specifically, the Signers of the Declaration of Independence attacked the keeping of a standing army in time of peace,<sup>24</sup> the military's independence from the civil control,<sup>25</sup> and the quartering of troops among the population of the colonies.<sup>26</sup>

In response to these concerns, the Articles of Confederation limited the role of the military.<sup>27</sup> Specifically, they restricted the raising of armies and the maintaining of naval vessels.<sup>28</sup> They also reserved the appointment of

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

THE DECLARATION OF INDEPENDENCE paras. 12-19 (U.S. 1776).

21. See *PCA Hearing*, *supra* note 13, at 15 (statement of William Howard Taft IV, Gen. Counsel, U.S. Dep't of Defense); ANDREW J. GOODPASTER & SAMUEL P. HUNTINGTON, CIVIL-MILITARY RELATIONS 9-11 (1977); *cf.* Letter from Larry L. Simms, Deputy Asst. Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Rep. L.A. "Skip" Befalis 4-5 (Aug. 6, 1979) (noting that because "the primary mission of the Navy is to be the instrument of seapower in the national defense," it should not become involved in interdiction efforts despite the lack of a PCA bar to such involvement), *reprinted in PCA Hearing*, *supra* note 13, at 523, 526-27.

22. See generally U.S. CONST.; ARTICLES OF CONFEDERATION, 1 Stat. 4 (U.S. 1778) (superseded by U.S. CONST.); THE DECLARATION OF INDEPENDENCE (U.S. 1776).

23. THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

24. *Id.* para. 13 ("He has kept among us, in times of peace, Standing Armies without the Consent of our Legislature.").

25. *Id.* para. 14 ("He has affected to render the Military independent of and superior to the Civil Power.").

26. *Id.* para. 15 ("For quartering large bodies of armed troops among us: For protecting them, by mock Trial, from Punishment for any Murders which they sould commit . . .").

27. ARTICLES OF CONFEDERATION arts. 6, §§ 4,5, 1 Stat. 4, 4-5 (U.S. 1778); *id.* art. 7, 1 Stat. at 5.

28. *Id.* art. 6, §§ 4-5, 1 Stat. at 4-5.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents,

officers, other than the rank of general, to the states, thus lessening the central government's control over the military.<sup>29</sup> In addition to establishing a weak central government, the Articles of Confederation's reliance upon militia for military power was inadequate to meet the needs of the nation.<sup>30</sup>

In the Constitution, the Founding Fathers mandated civilian control of the military through the government structure.<sup>31</sup> While allowing for a standing army and the maintenance of a navy,<sup>32</sup> the Constitution restricts military appropriations to two years;<sup>33</sup> designates the President as the Commander-in-Chief, thereby subordinating the military to civilian authority;<sup>34</sup> and empowers Congress to regulate the armed forces.<sup>35</sup> Additionally, the Bill of Rights proscribes the peacetime quartering of soldiers in private homes<sup>36</sup> and

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and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies . . . : nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, . . . unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

*Id.*

29. *Id.* art. 7, 1 Stat. at 5.

When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

*Id.*

30. John A. Hardaway, *Colonial and Revolutionary War Origins of American Military Policy*, MIL. REV., Mar. 1976, at 77, 81.

31. J. Bryan Echols, *Open Houses Revisited: An Alternative Approach*, 129 MIL. L. REV. 185, 200 (1990).

32. U.S. CONST. art. 1, § 8, cls. 12-13.

33. *Id.* art. 1, § 8, cl. 12 ("The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . ."). However, appropriations for the Navy are not similarly limited. *See id.* cl. 13 ("To provide and maintain a Navy . . ."). The failure to limit navy appropriations follows from the failure to mention the navy as an evil in the Declaration of Independence. *See supra* note 20. Indeed, navies were seen as instruments of the great powers and were not thought to be a threat to civil supremacy.

34. U.S. CONST. art. 2, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .").

35. *Id.* art. 1, § 8, cl. 14 ("To make Rules for the Government and Regulation of the land and naval forces."). The Constitution preserves the right of states to appoint officers for their militias, but limits the states' authority by requiring militia training to conform with Congress's requirements. *Id.* cl. 16; *cf.* THE ARTICLES OF CONFEDERATION art. 7 (U.S. 1778) (as discussed *supra* notes 27-30 and accompanying text).

36. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."). For a

provides for the states to have a well-regulated militia as a counterbalance to a national army.<sup>37</sup>

Fear of a standing army helped to motivate the enactment of the Bill of Rights beyond the specific amendments relating to the military.<sup>38</sup> By guaranteeing individual rights in the First Amendment<sup>39</sup> and freedom from unreasonable search and seizure in the Fourth Amendment,<sup>40</sup> it was that the abuses of the British army could be prevented in the new republic.<sup>41</sup> The Founding Fathers recognized that the military's authoritarian nature, while effective in defending democracy, remains antithetical to the basic tenets of democracy.<sup>42</sup> According to this reasoning, "[s]kepticism and criticism" of the military are "absolute requisites of freedom" that are missing from every unfree nation.<sup>43</sup>

Fear of the military seemed to have been forgotten until the mid-1800s, when the events leading up to enactment of the PCA began prior to the Civil War. The Fugitive Slave Act of 1850 allowed federal marshals to call on the

discussion of the history and purpose of the Third Amendment, see William Sutton Fields, *The Third Amendment: Constitutional Protection from the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195 (1989).

37. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.")

38. See Peter M. Sanchez, *The "Drug War": The U.S. Military and National Security*, 34 A.F. L. REV. 109, 117 (1991) ("Despite [Alexander] Hamilton's assurances [in response to public fears regarding a national army], the Constitution was only ratified after Federalists agreed to incorporate the Bill of Rights." (quoting W. PETERS, A MORE PERFECT UNION 231-37 (1987))).

39. U.S. CONST. amend. I.

40. *Id.* amend. IV.

41. See Sanchez, *supra* note 38, at 118 (mentioning the belief that the Bill of Rights "would effectively preclude the new government from usurping the rights of citizens, whether by military or other means").

42. See THE FEDERALIST NO. 41, at 258-60 (James Madison) (Clinton Rossiter ed., 1961); see also Dunlap, *supra* note 4, at 388 ("[T]he military is the antithesis of democracy." (footnote omitted)); Hardaway, *supra* note 30, at 80 (Colonial feeling was that a standing army "was simply incompatible with a democratic system of government."). "The ideals of liberty, democracy, equality, and peace have contrasted with the military's concern with authority, hierarchy, obedience, force, and war." GOODPASTER & HUNTINGTON, *supra* note 21, at 7. "It ill behooves a democracy to become over-fond of its soldiery," said one Founding Father. DeWitt C. Smith, Jr., *From Yesterday's Fears to Today's Realities*, PARAMETERS, Fall 1977, at 90, 90.

The Founding Fathers' fear of a standing army is also evident in the constitutions of the thirteen original states, which note that standing armies are "dangerous." See, e.g., N.H. CONST. pt. 1, art. 25 ("Standing armies are dangerous to liberty, and ought not to be raised, or kept up, without consent of the legislature."); VA. CONST. art. 1, § 13 ("[S]tanding armies, in time of peace, should be avoided as dangerous to liberty; and . . . in all cases the military should be under strict subordination to, and governed by, the civil power."); see also H.W.C. Furman, *Restrictions upon Use of the Army Imposed by the Posse Comitatus Act*, 27 MIL. L. REV. 85, 92 n.41 (1960).

43. See Smith, *supra* note 42, at 90.

*posse comitatus* to aid in returning a slave to his owner.<sup>44</sup> In the context of the Fugitive Slave Act, Attorney General Caleb Cushing issued an opinion defining the *posse comitatus* to include the military even if entire units had to be called upon while remaining under the direction of their own officers.<sup>45</sup> This use of the military by federal marshals became common; in Kansas, for example, federal troops were used to quell disorder between pro- and anti-slavery factions.<sup>46</sup>

The post-Civil War military presence in the South continued to foment a distaste for military involvement in the civilian sphere.<sup>47</sup> The military presence was necessary to support the Reconstruction governments installed in the South,<sup>48</sup> but the situation came to a head during the 1876 presidential election, which was determined by only one electoral vote.<sup>49</sup> In the election, Rutherford B. Hayes won with the disputed electoral votes of South Carolina, Louisiana, and Florida.<sup>50</sup> In those states, President Ulysses S. Grant had sent troops as a *posse comitatus* for federal marshals to use at the polls, if

44. See Act of Sept. 18, 1850, ch. 60, 9 Stat. 462, 462-63. See *supra* note 11 for the definition of *posse comitatus*.

45. Extradition of Fugitives from Service, 6 Op. Att’y Gen. 466, 473 (1854).

46. Furman, *supra* note 42, at 93.

47. See Lorence, *supra* note 11, at 169.

48. See *id.* The military support of these governments was described as a “rotten-borough or carpet-bag system.” G. NORMAN LIEBER, U.S. WAR DEP’T, OFFICE OF THE JUDGE ADVOCATE GEN., DOC. NO. 64, THE USE OF THE ARMY IN AID OF THE CIVIL POWER 10 (1898) (quoting Rep. J.D.C. Atkins).

In the Reconstruction South a monumental task faced the military:

Unplanned and aimed not at eradicating states but at hurrying their return to the Union . . . , [the Military Reconstruction Laws] one way or another imposed on the Army the duties of initiating and implementing state-making on the basis of biracial citizen participation. Protecting the personnel of the federal courts and Freedman’s Bureau, shielding blacks and whites who collaborated in the new order of equality under state law from retaliations by indignant vigilante neighbors, and monitoring the quality of daily marketplace justice in ten thousand villages—these were tasks that West Point had not prepared Army officers to perform.

Harold M. Hyman, *Ulysses Grant I, Emperor of America?: Some Civil-Military Continuities and Strains of the Civil War and Reconstruction*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989, at 175, 186 (Richard H. Kohn ed., 1991) [hereinafter U.S. MILITARY UNDER THE CONSTITUTION].

The size of the standing army increased in post Civil War America. Emory Upton, The Military Policy of the United States (1881) (unpublished manuscript) (see tables and charts), reprinted in S. DOC. NO. 379, 1st Sess. (1916). With its increased size and permanence, the army began transforming itself into a professional army. See *id.* With a standing army of significant size, the PCA became even more important as a limit on the role of the military in society and as a shield from improper requests by civilian authorities. See *PCA Hearing*, *supra* note 13, at 38-39 (statement of Christopher H. Pyle, Professor, Mount Holyoke College).

49. Furman, *supra* note 42, at 94; Lorence, *supra* note 11, at 173-74.

50. See Lorence, *supra* note 11, at 172-74.



necessary.<sup>51</sup> This misuse of the military in an election—the most central event to a democracy—led Congress to enact the PCA in 1878.<sup>52</sup>

### III. THE SCOPE OF THE PCA

In the nearly 120 years that the PCA has been in effect, there have been no criminal prosecutions under the Act, although it is a criminal statute.<sup>53</sup> This lack of criminal prosecutions has deprived courts of the opportunity to interpret the PCA directly.<sup>54</sup> Courts have had a few opportunities to interpret the statute indirectly, however.<sup>55</sup> Defendants have unsuccessfully raised the PCA as a shield, contending that a violation of the Act divests the trial court

51. Furman, *supra* note 42, at 94-95, 94 & nn.56-57; Lorence, *supra* note 11, at 172.

52. Furman, *supra* note 42, at 94-96; *see also* LIEBER, *supra* note 48, at 10-12; Lorence, *supra* note 11, at 174-79; *cf.* Federal Document Clearing House, *Buyer Offers Amendment to Anti-terrorism Legislation; Limits and Clarifies Role of Military*, Gov't Press Release, June 14, 1995, available in 1995 WL 14249788 (suggesting that the PCA was also passed to prevent the use of troops to quell labor disputes).

Grant's improper actions finally pushed the PCA through after several prior defeats. The original text of the PCA read as follows:

From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person wilfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment.

Army Appropriations Act, ch. 263, § 15, 20 Stat. 145, 152 (1878). Congress adopted the modern text of the PCA, *see supra* note 12, in 1956. *See* An Act to Codify Title 10 and Title 32, ch. 1041, § 18(a), 70A Stat. 1, 626 (1956) (codified as amended at 18 U.S.C. § 1385 (1994)). The modern text was meant "to restate, without substantive change, the law replaced." *Id.* § 49(a), 70A Stat. at 640.

In 1866, prior to the passage of the PCA, the Supreme Court cast doubt on the use of the military to enforce the laws in place of civilian authorities, even in a time of stress. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

53. CHARLES DOYLE, CONG. RES. SERV., NO. 88-583A, USE OF THE MILITARY TO ENFORCE CIVILIAN LAW: POSSE COMITATUS ACT AND OTHER CONSIDERATIONS 2 (1988); Furman, *supra* note 42, at 86; Interview with Brig. Gen. Walter B. Huffman, Asst. Judge Advocate Gen. for Military Law and Operations, U.S. Army, in Burke, Va. (Dec. 31, 1995) [hereinafter Huffman Interview]. In 1879, two Army officers were indicted in Texas for violating the PCA after providing a U.S. marshal with troops to enforce the revenue laws. LIEBER, *supra* note 48, at 28 n.1. Other than this one mention, there is no record that the officers were ever prosecuted.

54. *See PCA Hearing*, *supra* note 13, at 10 (statement of Edward S.G. Dennis, Jr., Chief, Narcotics and Dangerous Drug Sec., Crim. Div., U.S. Dep't of Justice); Sanchez, *supra* note 38, at 120. The lack of opportunity for judicial interpretation will continue because military enforcement of the PCA is seldom challenged in the courts. *Id.*

55. *See infra* Part III.B.

of jurisdiction<sup>56</sup> and that evidence gathered through a violation of the PCA should be suppressed.<sup>57</sup> The PCA has been successfully used where (1) the involvement of the military drew into question whether federal law enforcement officers were lawfully performing their duty<sup>58</sup> and (2) a PCA violation enabled the federal government to avoid liability under the Federal Tort Claims Act<sup>59</sup> because the tortious act in question “could not have been authorized on behalf of the United States by any action short of a Congressional enactment.”<sup>60</sup>

This dearth of judicial interpretation has left “the parameters of the [PCA] . . . substantially untested.”<sup>61</sup> Due to the resulting lack of clarity, the PCA does not actually prohibit all so-called “exceptions” to its application, and such exceptions-in-name have been enacted to clarify—or, depending upon your view, alter—its boundaries<sup>62</sup> and to provide guidance to military commanders.<sup>63</sup> The greatest uncertainties regarding the PCA concern what

56. See, e.g., *Chandler v. United States*, 171 F.2d 921, 935-36 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949) (finding jurisdiction where the Army arrested the defendant in Germany and returned him to the United States); *Ex parte Mason*, 256 F. 384, 385-87 (C.C.S.D.N.Y. 1882) (finding jurisdiction for military court in a court martial proceeding against a soldier for an attempted murder while on guard duty at a civilian jail despite finding a PCA violation).

57. See *United States v. McArthur*, 419 F. Supp. 186 (D.N.D. 1975), *aff'd sub. nom.*, *United States v. Red Feather*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied sub nom.*, *Casper v. United States*, 430 U.S. 970 (1977); *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975), *aff'd*, 541 F.2d 1275 (8th Cir. 1976); *United States v. Jaramillo*, 380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975). *But see* *People v. Burden*, 288 N.W.2d 392 (Mich. Ct. App. 1979) (applying exclusionary rule to drug investigation in which a member of the U.S. Air Force participated with the approval of his commander), *rev'd*, 303 N.W.2d 444 (Mich. 1981); *Taylor v. State*, 645 P.2d 522 (Okla. Crim. App. 1982) (applying the exclusionary rule for a PCA violation as a result of a military police officer's active participation in a search and arrest).

58. See *Jaramillo*, 380 F. Supp. 1375 (D. Neb. 1974) (directed verdict on charge of obstruction of law enforcement officers for defendants because the military's involvement in response to civil disorder raised reasonable doubt whether the officers were in lawful performance of their duty), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

59. Ch. 646, 62 Stat. 983 (1948) (codified as amended at 28 U.S.C. § 2674 (1994)).

60. *Wrynn v. United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961) (finding a PCA violation where Air Force helicopter and pilots were used to search for civilian prison escapees and plaintiff was injured when the helicopter landed).

61. *PCA Hearing*, *supra* note 13, at 10 (statement of Edward S.G. Dennis, Jr., Chief, Narcotics and Dangerous Drug Sec., Crim. Div., U.S. Dep't of Justice) (citing REPORT OF THE TASK FORCE ON EVALUATION OF AUDIT, INSPECTION AND INVESTIGATIVE COMPONENTS OF THE DEP'T OF DEFENSE 197 (1980)).

62. See *infra* notes 117-20 and accompanying text.

63. See *PCA Hearing*, *supra* note 13, at 12; H. REP. NO. 97-71, pt. 2, at 3 (1981); see also INTERNATIONAL & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, DOC. NO. JA422, OPERATIONAL LAW HANDBOOK 22-2 (1995) [hereinafter ARMY LAW HANDBOOK].

constitutes “any part of the Army or Air Force”<sup>64</sup> and what actions “execute the laws.”<sup>65</sup>

#### *A. Elements of the Armed Forces Covered by the PCA*

The PCA expressly applies only to the Army and Air Force.<sup>66</sup> Congress did not mention the Navy, Marine Corps, Coast Guard, or National Guard in the PCA; accordingly, the PCA does not limit them.<sup>67</sup> However, the Department of Defense has extended by regulation the PCA’s prohibitions to the Navy and Marine Corps.<sup>68</sup> Although, the Coast Guard is part of the armed forces, in peacetime it falls under the authority of the Department of

64. 18 U.S.C. § 1385 (1994).

65. *Id.*; see DOYLE, *supra* note 53, at 12 (stating that “case law does not definitively answer the question of what constitutes use to ‘execute the laws’”).

66. 18 U.S.C. § 1385. The Air Force was expressly included under the PCA when Congress codified Title 10 of the U.S. Code in 1956. *United States v. Walden*, 490 F.2d 372, 375 n.5 (4th Cir. 1974); see also *supra* note 52. The inclusion was natural because the Air Force was originally part of the Army as the Army Air Corps. *Walden*, 490 F.2d at 374-75, 375 n.5. Even prior to 1956, Congress included the Air Force under the PCA. See National Security Act of 1947, ch. 343, §§ 207(a), 208(a), 305(a), 61 Stat. 495, 502-04, 508.

67. See *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) (failing to extend PCA prohibitions to the Navy where defendant was transported to the U.S. on a Navy vessel); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987) (same), *cert. denied*, 503 U.S. 951 (1992). But see *Walden*, 490 F.2d at 375 (noting that failure to include the Navy in the text of the PCA does not evince congressional approval of the Navy’s use to enforce civilian laws), *cert. denied*, 416 U.S. 983 (1979); *People v. Caviano*, 560 N.Y.S.2d 932, 936 & n.1 (N.Y. Sup. Ct. 1990) (finding the PCA applicable to the Navy); *People v. Blend*, 175 Cal. Rptr. 263, 267 (Cal. Ct. App. 1981) (stating that the PCA “applies to all branches of the federal military”). The first version of the Act would have included “any part of the land or naval forces.” 7 CONG. REC. 3586 (1878). The Navy was possibly dropped to avoid a challenge under House rules for germaneness because the law was in an army appropriations bill. *Walden*, 490 F.2d at 374; DOYLE, *supra* note 53, at 15; see 7 CONG. REC. 3845 (1878) (chronicling a the debate under the House rule for germaneness). Although it is unlikely, another suggestion is that the failure to include the Navy was a drafting error. *PCA Hearing, supra* note 13, at 22 (comments of Rep. William J. Hughes).

68. U.S. DEP’T OF DEFENSE, DIRECTIVE NO. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS encl. 4, at 4-6 (Jan. 15, 1986) (extending the PCA’s application to the Navy and Marine Corps “as a matter of DoD policy”) [hereinafter DOD DIR. 5525.5], available at <<http://www.dtic.mil/adm/>> (visited Jan. 1, 1996); SECRETARY OF THE NAVY, DEP’T OF THE NAVY, INSTRUCTION NO. 5820.7B, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, OFFICE OF THE SECRETARY 4 (Mar. 28, 1988) (same) [hereinafter SECNAVINST 5820.7B]. Interestingly, the Code of Federal Regulations included a section applying the PCA to the Navy and Marines which substantially followed the DoD Directive, compare DoD Cooperation with Civilian Law Enforcement Officials, 32 C.F.R. pt. 213 (1992) with DOD DIR. 5525.5, *supra*, but the Defense Department repealed the section in 1993 because it had “served the purpose for which [it was] intended and [is] no longer valid.” 58 Fed. Reg. 25,776 (Apr. 28, 1993) (repealing 32 C.F.R. pt. 213).

Transportation<sup>69</sup> and has an express law enforcement function.<sup>70</sup> Additionally, the PCA only applies to forces in federal service, and therefore, the National Guard is not limited by the PCA in its normal status of state service.<sup>71</sup> Because the National Guard is the modern militia, this distinction actually follows the intent of the PCA, which was not meant to limit militias.<sup>72</sup> The courts have also implicitly limited *army* to the official military establishment rather than its broader plain meaning.<sup>73</sup>

The breadth of the PCA in its application to “any part of the Army or Air Force” is uncertain and can be a factual question.<sup>74</sup> The PCA applies to on-duty service members, but not to off-duty service members acting in a private capacity.<sup>75</sup> Conversely, when an off-duty service member acts under the direction of military authorities, the PCA applies.<sup>76</sup> Whether the PCA applies to civilian employees of the armed forces remains undecided. On the basis of general agency principles, the PCA should arguably apply to civilian

69. 14 U.S.C. § 1 (1994); DOYLE, *supra* note 53, at 16.

70. 14 U.S.C. § 2 (1994). As part of the drug interdiction effort, Coast Guard personnel are detailed to Navy ships to perform their law enforcement function because the Navy cannot exercise the powers of arrest or search and seizure. *See* 10 U.S.C. § 379 (1994). The Department of Justice has taken the position that members from the other military branches are also not limited by the PCA when detailed to the Department of Transportation, because they are not subject to military command or charged to the military force structure. *See* Memorandum from William H. Rehnquist, Asst. Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Benjamin Forman, Asst. Gen. Counsel (Int’l Affairs), U.S. Dep’t of Defense 3 (Sept. 30, 1970) (*Legality of Deputizing Military Personnel Assigned to the Department of Transportation*), in *PCA Hearing*, *supra* note 13, at 562, 564.

71. Furman, *supra* note 42, at 101; Sanchez, *supra* note 38, at 119. However, the National Guard is still limited by applicable state law when in state service. *Id.*

72. DOYLE, *supra* note 53, at 17.

73. *United States v. Jaramillo*, 380 F. Supp. 1375, 1382 (1974) (excluding the Special Operations Group of the United States Marshall Service from the definition of *army* under the PCA), *appeal dismissed* 510 F.2d 808 (8th Cir. 1975). For a full discussion of the PCA and its application to all the different elements of the military, see Furman, *supra* note 42, at 98-103 & 99 fig.

74. *See, e.g.*, cases cited *supra* note 67. The “any part” language applies the PCA to any unit of troops, regardless of “its size or designation.” *Jaramillo*, 380 F. Supp. at 1379.

75. Congress acknowledged this fact during the debates regarding the enactment of the PCA, admitting that the Act was not meant to limit a soldier as a citizen. *See* 7 CONG. REC. 4245 (1878) (comments of Sen. Merrimon in response to a question of whether a soldier could come to the defense of a fellow citizen being assaulted). Senator Merrimon stated in Congress:

If a soldier sees a man assaulting me with a view to take my life, he is not going to stand by and see him to do it; he comes to my relief not as a soldier, but as a human being, a man with a soul in his body, and as a citizen.

*Id.*

76. *See* DOD DIR. 5525.5, *supra* note 68, encl. 4, at 4-6; SECNAVINST 5820.7B, *supra* note 68, §9.b(4), at 7. The test has also been described as based upon the service member’s conduct and upon whether civilians were subjected to military power. *See* DOYLE, *supra* note 53, at 19.

employees during the performance of their duties,<sup>77</sup> but Department of Defense regulations do not apply PCA restrictions to them.<sup>78</sup> Furthermore, according to the Judge Advocate General, civilian employees of the Army are technically not part of the military.<sup>79</sup>

### *B. What Action Constitutes a Violation of the PCA*

The PCA proscribes the use of the military<sup>80</sup> “as a posse comitatus or otherwise to execute the laws.”<sup>81</sup> Courts have used three formulations of an active versus passive test to determine a PCA violation. All three formulations result from litigation that ensued following the 1973 standoff between federal authorities and the American Indian Movement at Wounded Knee, South Dakota.<sup>82</sup> The formulations allow passive assistance in support of law enforcement without causing a PCA violation.<sup>83</sup>

In *United States v. Red Feather*,<sup>84</sup> the court defined a PCA violation as “direct active use of Army or Air Force personnel,”<sup>85</sup> thus creating the passive versus active dichotomy. The court found that a provision of military equipment and supplies was not an active use of the military.<sup>86</sup> The court

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77. See Clarence I. Meeks III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 100 (1975). It would not suffice to allow the principal to achieve a goal through an agent that the principal is proscribed from achieving herself. See *id.*

78. DoD DIR. 5525.5, *supra* note 68, encl. 4, at 406; SECNAVINST 5820.7B, *supra* note 68, § 9.b(3), at 7.

79. Furman, *supra* note 42, at 102-03 & n.109 (citing a 1956 opinion of the Judge Advocate General of the U.S. Army). But see SECNAVINST 5820.78, *supra* note 68, at § 9.c(2) (extending the PCA prohibitions to the Navy’s civilian employees).

80. Because the PCA has been extended to the Navy and Marine Corps by regulation, see *supra* note 68 and accompanying text, the term “military” is used in this Note to refer to the Army, Navy, Air Force, and Marines Corps.

81. 18 U.S.C. § 1385 (1994); *supra* note 12 (text of the Act). The PCA also is limited to “willful” use, see text accompanying *supra* note 12, but courts have not used the term to limit the PCA’s scope. DOYLE, *supra* note 53, at 11 n.18.

82. See *infra* notes 84-103 and accompanying text.

83. See DOYLE, *supra* 53, at 11-13. Courts and commentators have read the legislative history of the PCA to allow “incidental” benefits to civilian law enforcement. *Id.* at 13.

84. 392 F. Supp. 916 (D.S.D. 1975) (granting a motion in limine to exclude evidence of activities of military personnel in a criminal prosecution for interfering with law enforcement officers at Wounded Knee).

85. *Id.* at 921-23.

86. *Id.* at 923. The defendant was charged with interfering with law enforcement officers in lawful execution of their duties. *Id.* at 918-19. The government filed a motion in limine to bar evidence of the loan of military equipment, of the military’s presence, and of any other military involvement at Wounded Knee. *Id.* at 918. The judge found that evidence of a PCA violation would be admissible because it would relate to whether the federal officers acted in lawful execution of their duties, but

found support for this position in Congress's passage of the Economy Act of 1932,<sup>87</sup> which provides for the transfer of resources between executive departments.<sup>88</sup>

In *United States v. Jaramillo*,<sup>89</sup> the court focussed on whether use of the military "pervaded the activities" of the civilian law enforcement agencies to determine a PCA violation.<sup>90</sup> The court found that the provision of supplies and equipment alone did not constitute a violation,<sup>91</sup> and it concerned itself with whether the military observers involved had too much influence over civilian law enforcement decisions regarding negotiations, use of equipment, and the policy on the use of force.<sup>92</sup> Although the court did not necessarily find a violation of the PCA, the evidence cast doubt on whether the federal authorities were "lawfully engaged in the lawful performance of their official duties."<sup>93</sup> Therefore, the court dismissed the indictment for obstructing law enforcement officers.<sup>94</sup>

*United States v. McArthur*,<sup>95</sup> approved by the Eighth Circuit in *United States v. Casper*,<sup>96</sup> promulgated the third formulation of the active versus passive test and focussed on the individual subjected to the PCA violation.<sup>97</sup> The *McArthur* formulation asked whether "military personnel subjected . . . citizens to the exercise of military power which was regulatory, proscriptive,

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granted the motion to bar evidence of passive involvement. *Id.* at 925.

87. Ch. 314, § 601, 47 Stat. 382, 417-18 (1932) (codified as amended at 31 U.S.C. § 1535 (1994)).

88. *Red Feather*, 392 F. Supp. at 923.

89. 380 F. Supp. 1375, 1381 (D. Neb. 1974) (directing verdict for defendant charged with obstructing law enforcement officers at Wounded Knee because a possible violation of the PCA raised a reasonable doubt as to whether the officers acted in lawful performance of their duty), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

90. *Id.* at 1379.

91. *Id.* The list of material provided by the military included star parachute flares, M-16 ammunition, protective vests, sniper rifles, and unarmed armored personnel carriers. *Id.*

92. *See id.* at 1380-81. Military observers counseled the federal authorities to substitute a shoot-to-wound policy for their shoot-to-kill policy, encouraged negotiations, and approved the request for armored personnel carriers with strict conditions on their use. *Id.* at 1379-80.

93. *Id.* at 1381.

94. *Id.*

95. 419 F. Supp. 186 (D.N.D. 1975) (finding that the approach of the court in *Jaramillo*, *see supra* notes 89-94 and accompanying text, would not establish a PCA violation on the part of federal authorities), *aff'd sub nom.*, *United States v. Red Feather*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied sub nom.*, *Casper v. United States*, 430 U.S. 970 (1977).

96. 541 F.2d 1275, 1278 (8th Cir. 1976) (referring with approval to the *McArthur* test formulated in the district court), *cert. denied sub nom.*, *Casper v. United States*, 430 U.S. 970 (1977).

97. *See McArthur*, 419 F. Supp. at 194.

or compulsory in nature.”<sup>98</sup> On basically the same facts as *Jaramillo*, the *McArthur* court found no PCA implications.<sup>99</sup> *United States v. Yunis*<sup>100</sup> further clarified the elements of the *McArthur* formulation: regulatory power “controls or directs”;<sup>101</sup> proscriptive power “prohibits or condemns”;<sup>102</sup> and compulsory power “exerts some coercive force.”<sup>103</sup>

It should be noted that the PCA’s effect is limited to the United States and does not bar the military’s support of law enforcement agencies abroad. In *Chandler v. United States*,<sup>104</sup> the court held that the PCA has no extraterritorial effect.<sup>105</sup> However, some restrictions do exist on the military’s activities outside the United States. These restrictions arise out of military regulations<sup>106</sup> and congressional acts that have limited military support to foreign civilian law enforcement authorities.<sup>107</sup>

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98. *Id.*

99. *See id.* at 194-95.

100. 681 F. Supp. 891 (D.D.C. 1988) (denying motion to dismiss indictment of airplane hijacker who was transported to the United States on Naval vessels).

101. *Id.* at 895. A prisoner under the exclusive control and authority of civilian law enforcement while being transported by the military is not subjected to military regulatory power. *See id.*

102. *Id.* at 896. A prisoner aboard a military vessel and confined by military personnel, but in the custody of civilian law enforcement at all times, is not subjected to military proscriptive power. *See id.*

103. *Id.* Involvement of the military which is “indifferent, passive, and subservient” to civilian law enforcement is not a PCA violation. *See id.*

104. 171 F.2d 921 (1st Cir. 1948).

105. *Id.* at 936. The Army arrested the defendant in Germany after World War II and then transported him to the United States to face charges of treason. *Id.* at 927. The defendant, a U.S. citizen, was convicted of treason for his propaganda radio broadcasts on behalf of the German government during World War II. *Id.* at 928-29. The Ninth Circuit followed *Chandler* in dealing with the arrest of Tokyo Rose and her return to the United States by military authorities. *See Iva Ikuko Toguri D’Aquino v. United States*, 192 F.2d 338, 351 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952). The *Yunis* court could have also found no PCA violation by following *Chandler* and *D’Aquino*. *See Yunis*, 681 F. Supp. 891 (D.D.C. 1988) (finding no violation of the PCA under the *McArthur* test, *see supra* notes 95-98 and accompanying text, where the allegedly unlawful military involvement occurred outside the United States).

106. Huffinan Interview, *supra* note 53.

107. *See* Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 30(a), 88 Stat. 1795, 1803 (codified as amended at 22 U.S.C. § 2420(a) (1994)). Under the Foreign Assistance Act, Congress prohibited military foreign assistance monies from being spent to “provide training or advice . . . for police, prisons, or other law enforcement forces for any foreign government or any program of internal intelligence or surveillance on behalf of any foreign government within the United States or abroad.” *Id.*; *see also* International Security Assistance Act of 1978, Pub. L. No. 95-384, § 3, 92 Stat. 730, 730 (codified as amended at 22 U.S.C. § 2291(c) (1994)) (barring officers and employees of the United States from making arrests in foreign countries as part of drug control efforts); DOYLE, *supra* note 53, at 25.

### C. Exceptions to the PCA

The PCA explicitly recognizes constitutional and legislative exceptions to its application.<sup>108</sup> The existence of any constitutional exceptions was contested at the time of the PCA's enactment.<sup>109</sup> Some proponents of the PCA saw the exceptions as inherent in the executive powers of the President and in his position as Commander-in-Chief of the armed forces,<sup>110</sup> thus making them beyond the reach of Congress to limit.<sup>111</sup> Others who supported the PCA's passage recognized no such exceptions.<sup>112</sup> The existence of constitutional exceptions to the PCA may only actually lie in the "twilight zone" where the President may act where Congress has not, as described by Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>113</sup>

Another "constitutional" exception to the PCA is described by the Department of Defense regulations based upon the "inherent right of the U.S. Government . . . to ensure the preservation of public order and to carry out governmental operations . . . by force, if necessary."<sup>114</sup> The Office of Legal Counsel of the Department of Justice has promulgated a similar view in recognition of the U.S. government's power to protect federal functions.<sup>115</sup> The power to protect federal functions has been so broadly interpreted, however, that if accepted it would become the exception that swallows the rule. Now-Chief Justice William Rehnquist interpreted this power to extend to any "uniquely federal responsibility" while he was an attorney in the Office of Legal Counsel.<sup>116</sup> However, this exception has yet to be tested in the courts

108. 18 U.S.C. § 1385 (1994) ("except in cases and under circumstances expressly authorized by the Constitution or Act of Congress").

109. The statutory language recognizing constitutional exceptions in the PCA was a compromise.

110. 7 Cong. Rec. 4686 (1878); see U.S. CONST. art. 2, §§ 2, 3.

111. Furman, *supra* note 42, at 91-92; Lorence, *supra* note 11, at 185-91.

112. DOYLE, *supra* note 53, at 20.

113. See 343 U.S. 579, 644-45 (1952) (Jackson, J., concurring); *PCA Hearing*, *supra* note 13, at 41 n.39 (statement of Christopher H. Pyle, Professor, Mount Holyoke College).

114. DOD DIR. 5525.5, *supra* note 68, encl. 4, § A(2)(c), at 4-2. The exception permits military action to protect federal property and functions, to prevent loss of life, and to restore public order when local authorities cannot control a situation. *Id.* These exceptions have yet to be tested. DOYLE, *supra* note 53, at 21 n.29. The Office of Legal Counsel at the Department of Justice bases the exception explicitly on the President's duty to faithfully execute the laws. Memorandum from William H. Rehnquist, Asst. Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Robert E. Jordan III, Gen. Counsel, U.S. Dep't of the Army 1-2 (May 11, 1970) (Authority to Use Troops to Protect Federal Functions, Including the Safeguarding of Foreign Embassies in the United States) [hereinafter *Federal Functions Memorandum*], in *PCA Hearing*, *supra* note 13, at 558, 559.

115. *Federal Functions Memorandum*, *supra* note 114, at 1-2.

116. *Id.*



and would likely be interpreted as narrowly as the other exceptions to the PCA.

Congress itself has recognized several exceptions to the PCA,<sup>117</sup> which this Note categorizes as exceptions-in-fact and exceptions-in-name.<sup>118</sup> The exceptions-in-fact are true exceptions that exempt otherwise criminal actions under the PCA and alter its boundaries. Exceptions-in-name include exceptions that are described or perceived as exceptions to the PCA, but which authorize allowable acts under any of the court-created tests.<sup>119</sup> Exceptions-in-name do not alter the accepted boundaries of the PCA and do not make previously criminal acts legal. They are sometimes simply termed "clarifications."<sup>120</sup>

Exceptions-in-name allow the military to provide equipment and supplies,<sup>121</sup> technical assistance,<sup>122</sup> information,<sup>123</sup> and training to law enforcement agencies.<sup>124</sup> Such provisions constitute passive assistance to civilian law enforcement, which does not subject any civilian to the regulatory, proscriptive, or coercive power of the military.<sup>125</sup>

Exceptions-in-fact include protection of the rights of a discoverer of a guano island,<sup>126</sup> removal of persons illegally occupying Indian lands,<sup>127</sup>

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117. See ARMY LAW HANDBOOK, *supra* note 63, at 22-2.

118. Others have implicitly recognized this distinction. See *PCA Hearing*, *supra* note 13, at 35-37 (comments by Christopher H. Pyle, Professor, Mount Holyoke College); Paul Jackson Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. L. REV. 109 (1984). This Note makes the distinction explicit here to illustrate that both types of exceptions have deleterious effects and should be avoided.

119. See *PCA Hearing*, *supra* note 13, at 35-37 (comments of Christopher H. Pyle, Professor, Mount Holyoke College).

120. See, e.g., *PCA Hearing*, *supra* note 13, at 11 (statement of Edward S.G. Dennis, Chief, Narcotics and Dangerous Drug Sec., Crim. Div., U.S. Dep't of Justice). Congress intended to clarify the boundaries of the PCA. ARMY LAW HANDBOOK, *supra* note 63, at 22-2.

121. 10 U.S.C. §§ 372, 381 (1994).

122. *Id.* § 373(2).

123. *Id.* § 371.

124. *Id.* § 373(1).

125. See *supra* notes 95-103 and accompanying text.

126. See 48 U.S.C. § 1418 (1994). This exception existed before the passage of the PCA. Act of Aug. 18, 1856, ch. 164, § 5 11 Stat. 119, 120. Guano islands are islands rich in guano deposits. See 48 U.S.C. § 1411 (1994). Guano is "a substance that is found on some coasts or islands frequented by sea fowl, is composed chiefly of their partially decomposed excrement, is rich in phosphates, nitrogenous matter, and other material for plant growth, and has been used extensively as a fertilizer." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1007 (1986).

A great rush of claims made on guano islands occurred from 1856 to 1903: 94 claims were made during that period, and 66 islands were recognized by the State Department. JIMMY M. SKAGGS, *THE GREAT GUANO RUSH: ENTREPRENEURS AND AMERICAN OVERSEAS EXPANSION* 200 (1994). The law continues to have relevance because the United States still maintains possession of nine of the

protection of national parks,<sup>128</sup> investigation of crimes against the President or others in the line of succession,<sup>129</sup> and protection of civil rights where local authorities do not or cannot protect them.<sup>130</sup> Exceptions-in-fact also include the quelling of civil disturbances and labor strife that rises to the level of civil disorder. For example, Troops were used to put down the Whiskey Rebellion<sup>131</sup> long before the PCA was passed and to maintain order during school desegregation in the South after the Act's passage. Troops have also been used to quell riots in Detroit and other cities.<sup>132</sup> More recently, they were deployed on the streets of Los Angeles in 1992 after the Rodney King verdict.<sup>133</sup>

The courts have recognized another type of exception through the military purpose doctrine, which is not explicitly mentioned in the PCA.<sup>134</sup> The

recognized islands. *Id.* For an in-depth discussion of the rush to claim guano-rich islands, see generally SKAGGS, *supra*.

127. See 25 U.S.C. § 180 (1994). This exception may have also provided authority for the military presence at Wounded Knee.

128. See 16 U.S.C. §§ 23 (detail of troops for protection of park), 78 (detail of troops to Sequoia and Yosemite Parks), 593 (protection of timber in Florida) (1994).

129. See 18 U.S.C. § 1751(i) (1994).

130. See 10 U.S.C. §§ 331-333 (1994).

Other exceptions to the PCA, as listed in DOD DIR. 5525.5, *supra* note 68, encl. 4, § A.2(e), at 4-2 to 4-3, include:

(i) 16 U.S.C. § 1861(a) (1994) (enforcement of the Fishery Conservation and Management Act of 1976);

(ii) 18 U.S.C. §§ 112, 1116 (1994) (assistance to law enforcement officers in crimes against foreign officials, official guests of the United States, and other internationally protected persons);

(iii) 18 U.S.C. § 351 (1994) (assistance to law enforcement officers in crimes against members of Congress);

(iv) 22 U.S.C. §§ 408, 461-462 (1994) (actions in support of the neutrality laws);

(v) 18 U.S.C. § 831 (1994) (assistance to law enforcement officers in crimes involving nuclear materials);

(vi) 42 U.S.C. § 97 (1994) (execution of quarantine and certain health laws);

(vii) 43 U.S.C. § 1065 (1994) (removal of unlawful inclosures from public lands);

(viii) 48 U.S.C. §§ 1422, 1591 (1994) (support for territorial governors if civil disorder occurs);

(ix) 50 U.S.C. § 220 (1994) (actions in support of certain customs laws); and

(x) 42 U.S.C. § 1989 (1994) (execution of certain warrants relating to enforcement of specified civil rights laws).

131. Sanchez, *supra* note 38, 120 & n.13.

132. See Jerry M. Cooper, *Federal Military Intervention in Domestic Disorders*, in U.S. MILITARY UNDER THE CONSTITUTION, *supra* note 48, at 120.

133. See generally Kurt Andrew Schlichter, Comment, *Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations*, 26 LOY. L.A. L. REV. 1291 (1993) (the author served as an Army National Guardsman deployed to Los Angeles during the riots); Eric Schmitt, *Elite U.S. Forces Sent in to Perform a Rare Role*, N.Y. TIMES, May 2, 1992, § 1, at 8. For a discussion of the military's use in relation to civil disorder, see Cooper, *supra* note 132.

134. See DOYLE, *supra* note 53, at 13-14.

doctrine allows the military to enforce civilian laws on military installations, to police themselves, and to perform their military functions even if there is an incidental benefit to civilian law enforcement.<sup>135</sup> However, the doctrine is interpreted by the *McArthur* formulation—whether a person is subjected to military power that is regulatory, proscriptive, or coercive<sup>136</sup>—when the activities occur off-base.<sup>137</sup>

#### *D. Allowable Domestic Uses of the Military*

There are many other uses of the military which seem to implicate the PCA, but are not within its scope because law is not being enforced. Since the passage of the PCA, the military has been used several times for domestic purposes that do not conform to its traditional role. The PCA proscribes use of the army in civilian law enforcement, but it has not prevented military assistance in what have been deemed national emergencies, such as strike replacements and disaster relief. However, these emergencies differ in character from other exceptions to the PCA by their very nature as emergencies and by the duration of the military involvement.

Presidents Richard Nixon and Ronald Reagan both used the military to replace striking federal employees. In 1970, President Nixon sent 30,000 federal troops to replace striking postal workers in New York,<sup>138</sup> and in 1981, President Reagan replaced striking air traffic controllers.<sup>139</sup> The military has also been used to replace striking coal miners.<sup>140</sup>

Disaster relief, another common use of the military, does not seem to violate the PCA because it is not a mission executing the laws. In the 1906 San Francisco earthquake, the Army led the effort to put out fires and restore order. More recently, Hurricane Hugo in Florida resulted in a large military presence during the relief effort.<sup>141</sup> However, the military also found itself

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135. *Id.*

136. *See supra* notes 95-103 and accompanying text.

137. DOYLE, *supra* note 53, at 14.

138. JAMES B. JACOBS, *SOCIO-LEGAL FOUNDATIONS OF CIVIL-MILITARY RELATIONS* 54 (1986).

139. *Id.* at 55.

140. For a thorough discussion of the use of the military in labor disputes, see JOAN M. JENSEN, *ARMY SURVEILLANCE IN AMERICA, 1775-1980*, at 44-45, 139-40 (1991) and Jacobs, *supra* note 138, at 51-76.

141. *See, e.g.*, Edmund L. Andrews, *Army Has Trouble Building Beachhead in Disaster Zone*, N.Y. TIMES, Aug. 31, 1992, at A10; Edmund L. Andrews, *Urgency Is Growing: 4 Days After Hurricane, Thousands Still Need Food and Shelter*, N.Y. TIMES, Aug. 28, 1992, at A1; *see also* Stephanie Nano, *Flood Area Hails Tardy Old Friend: The Sun*, S.F. EXAMINER, July 19, 1993, at A1

providing election facilities in Florida—a situation too similar to that which precipitated the passage of the PCA in 1876.<sup>142</sup>

#### IV. EXCEPTIONS TO THE PCA ENDANGER THE MILITARY AND THE UNITED STATES

The PCA's exceptions-in-name and exceptions-in-fact endanger the military and the United States by blurring the traditional line between military and civilian roles, undermining civilian control of the military, damaging military readiness, and providing the wrong tool for the job.<sup>143</sup> Besides the current drug interdiction exceptions, the 104th Congress considered two bills to create new exceptions to the PCA.<sup>144</sup> The Border Integrity Act<sup>145</sup> would have created an exception to allow direct military enforcement of immigration and customs laws in border areas.<sup>146</sup> The Comprehensive Antiterrorism Act<sup>147</sup> would have allowed military involvement in investigations of chemical and biological weapons.<sup>148</sup> This Note will discuss these two proposed exceptions together with the exception mandating military involvement in counter-drug operations to illustrate the negative effects of creating exceptions to the PCA. Increasing direct military involvement in law enforcement through border policing—an exception-in-fact<sup>149</sup>—is an easy case against which to argue. Investigative support—an exception-in-name<sup>150</sup>—is passive, indirect enforcement. Drug interdiction—an exception-in-name for the most part—falls between border policing and investigative support because of the extensive military involvement.

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(mentioning President Clinton's offer of federal troops to help with cleanup after floods in the Midwest); Jeffrey Schmalz, *Troops Find Looting and Devastation on St. Croix*, N.Y. TIMES, Sept. 22, 1989, at A22 (reporting the use of federal troops on St. Croix after Hurricane Hugo).

142. Huffinan Interview, *supra* note 53.

143. This Note does not project immediate doom nor suggest that the armed forces or its members would consider a military coup or improperly influence the civilian government. Indeed, within the U.S. Army officer corps there exists "an implicit—one could almost say instinctive—acceptance of the civil power's superiority to the military in government." Edward M. Coffman, *The Army Officer and the Constitution*, PARAMETERS, Sept. 1987, at 2, 2. This Note argues that there are good reasons for the policies behind the PCA, policies that should not be discarded by the exigencies of the moment. *Id.*

144. See *supra* notes 5-7 and accompanying text.

145. H.R. 1224, 104th Cong., 1st Sess. (1995).

146. See *supra* note 7 and accompanying text.

147. S. 735, 104th Cong., 1st Sess. (1995).

148. See *supra* note 6 and accompanying text.

149. See *supra* notes 117-20, 126-33 and accompanying text.

150. See *supra* notes 117-25 and accompanying text.

### A. *Blurring the Lines*

The differences in the role of civil law enforcement and the role of the military are blurred by the PCA's exceptions. Civilian law enforcement is traditionally local in character, responding to needs at the city, county, or state level. Civilian law enforcement trains for the law enforcement mission, which differs from the military mission.<sup>151</sup> Civilian law enforcement requires the cognizance of individual rights and seeks to protect those rights, even if the person being protected is a bad actor. Prior to the use of force, police officers attempt to de-escalate a situation. Police officers are trained to use lesser forms of force when possible to draw their weapons only when they are prepared to fire.

On the other hand, soldiers are trained when to use or not to use deadly force.<sup>152</sup> Escalation is the rule. The military exists to carry out the external mission of defending the nation. Thus, in an encounter with a person identified with the enemy, soldiers need not be cognizant of individual rights, and the use of deadly force is authorized without any aggressive or bad act by that person.<sup>153</sup> This difference between soldiers and police has been tragically illustrated in the recent shooting of a young man by marines patrolling near the Mexican border.<sup>154</sup>

The exceptions of border duty, investigative support, and drug interdiction blur the traditional line between civilian law enforcement and the role of the

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151. See *PCA Hearing*, *supra* note 13, at 29-30 (comments by Rep. William J. Hughes).

152. Soldiers do receive training in intermediate levels of force for peacekeeping missions, but the main focus is on how and when to use deadly force as part of the wartime rules of engagement. Huffman Interview, *supra* note 513 (LANE Training provides soldiers with examples of hostile acts which can be responded to without waiting to be fired upon which consist of simulation exercises in a field setting); see also Anthony DePalma, *Canada Assesses Army: Warriors or Watchdogs?*, N.Y. TIMES, Apr. 13, 1997, § 1, at 4 (noting increase of U.S. training for peacekeeping); Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 27 (1994). This focus flows directly from the military's responsibility "to fight or be ready to fight wars should the occasion arise." *Toth v. Quarles*, 350 U.S. 11, 17 (1955), *cited in* Dunlap, *supra* note 4, at 357 n.119. To fulfill that responsibility, the Army has challenged itself to "[i]mprove[] lethality and readiness" in the 21st century. Dennis J. Reimer, *Soldiers Are Our Credentials*, MIL. REV., Sept.-Oct. 1995, at 4, 13 fig.5 (at the time of this writing the author was U.S. Army Chief of Staff).

153. See generally Martins, *supra* note 152. It is interesting that we want the military to take on some police functions, yet we will not let that same military train foreign police or even give them advice. See Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 30(a), 88 Stat. 1795, 1803 (codified as amended at 22 U.S.C. § 2420(a) (1994)); see also *supra* note 107 and accompanying text.

154. Jesse Katz, *A Good Shepherd's Death*, L.A. TIMES, June 21, 1997, at A1 (chronicling the debate about troops use near the border as the danger is illustrated by this killing); *Border Killing Brings Criticism of Military Role*, CHICAGO TRIB., May 23, 1997, at 15.

military. Border duty by soldiers under the Border Integrity Act has traditionally been the responsibility of civilian law enforcement. Drug interdiction has traditionally been a task for civilian law enforcement, and long-term military involvement comes close to subjecting civilians to all three types of military power—a fear of the Founding Fathers.<sup>155</sup> Investigative support by the military is very reminiscent of the military surveillance conducted in the 1960s, which was condemned by Congress and members of the Supreme Court as an improper use of the military.<sup>156</sup>

### *B. Undermining Civilian Control of the Military*

Civilian control of the military is undermined whenever military activities invade areas that “endanger liberties or the democratic process, even when that expansion is sanctioned by the civilian leadership.”<sup>157</sup> The military should not gain “unwarranted influence” in civilian affairs.<sup>158</sup> The purpose of civilian control is “to ensure that defense policy and the agencies of defense policy are subordinated to other national traditions, values, customs, governmental policies, and economic and social institutions.”<sup>159</sup> The civilian government must therefore consider the institutional characteristics of the military, including personnel, doctrine, training, equipment, and morale, when making policy decisions about the domestic use of the military.<sup>160</sup> A military with many nonmilitary functions is more “autonomous” and thus under less civilian control.<sup>161</sup>

In the case of counter-drug activities, the government has disregarded all these considerations. The counter-drug mission is not a good fit for the military: the chronic nature of the drug problem requires the military’s deep

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155. See *supra* notes 22-43 and accompanying text.

156. See *Laird v. Tatum*, 408 U.S. 1 (1972).

157. Dunlap, *supra* note 4, at 344 (emphasis removed).

158. *Id.* at 343 (emphasis removed) (paraphrasing President Eisenhower’s Farewell Address).

159. *Id.* at 344 (quoting ALLAN R. MILLET, *THE AMERICAN POLITICAL SYSTEM AND CIVILIAN CONTROL OF THE MILITARY 2* (1979)).

160. *Id.* at 344 n.13 (quoting MILLET, *supra* note 159, at 2).

161. GOODPASTER & HUNTINGTON, *supra* note 21, at 22 (citing David R. Segal et al., *Convergence, Isomorphism, and Interdependence at the Civil-Military Interface*, *J. POL. & MIL. SOC.*, Fall 1974, at 157ff).

A military establishment . . . that encompasses many nonmilitary functions and that operates in a civilianized manner is likely to be more autonomous—freer from civilian contacts and, potentially, civilian control—than a military establishment that is purely military and that, precisely because of its specialization, is dependent upon civilian society for support.

*Id.* (quoting Segal, *supra*) (footnote omitted).

involvement over time without any true success<sup>162</sup> because the high profitability of drug trafficking makes its complete deterrence impossible.<sup>163</sup> This involvement without success hurts morale,<sup>164</sup> and the long-term nature of the involvement cannot help but increase the “unwarranted influence” of the military in civilian affairs.<sup>165</sup>

Both border duty and investigative support, if enacted, would create the same concerns as the counter-drug mission. Increasing the involvement of the military in civilian law enforcement will make it difficult to maintain the military’s subordinate role over the long-term. Additionally, use of the military in civilian law enforcement damages its professionalism, which the PCA’s enactment helped to develop. Many of these same concerns underlay the government’s reluctance to send the military abroad without clear criteria and timelines for withdrawal,<sup>166</sup> yet those concerns have been ignored in

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162. See McGee, *supra* note 3, at A30. “[The military’s involvement] should [have been] a temporary stopgap, but it’s been institutionalized.” *Id.* (quoting Lawrence J. Korb, Asst. Sec’y of Defense under President Reagan) (second set of brackets in original).

163. See 134 CONG. REC. 11,643, at 11,644 (1988) (comments of Sen. Daniel P. Moynihan) (stating that “100 of the [illegal aliens crossing the Mexican border into the U.S.] could bring across a year’s supply and more of Mexican heroin for the American market”); see also PETER REUTER ET AL., RAND CORP., SEALING THE BORDERS: THE EFFECTS OF INCREASED MILITARY PARTICIPATION IN DRUG INTERDICTION 123 (1988) (stating that “a single cargo plane, fully loaded, could supply the nation’s current demand [for cocaine] for a year”); Michael H. Abbott, *The Army and the Drug War: Politics or National Security?*, PARAMETERS, Dec. 1986, at 95, 96 (noting that drugs are second to petroleum, in monetary value, as the largest U.S. import); Christopher S. Wren, *Why Seizing Drugs Barely Dents Supply*, N.Y. TIMES, Dec. 15, 1996, § 4, at 4 (reporting that increased seizures of illegal drugs do not increase costs to the drug user).

164. Cf. Thomas E. Ricks, *The Military: The Great Society in Camouflage*, ATLANTIC MONTHLY, Dec. 1996, at 24, 38 (stating that “murky new missions . . . may be chipping away at the Army’s sense of itself”); DePalma, *supra* note 152.

165. See McGee, *supra* note 3, at A30 (“[T]he open-ended nature of the military’s commitment is the greatest potential hazard.” (interview with Lawrence J. Korb, Assistant Sec’y of Defense under President Reagan)). At least one critic sees the expansion of the Junior Reserve Officer’s Training Program, the large number of retired military personnel working as teachers, and the appointment of a retired general as the “drug czar” and another as head of the D.C. school system as steps towards militarization and a decline in civilian control of the military. Courtland Milloy, *Overruling Civilian Rule*, WASH. POST, Nov. 13, 1996, at B1 (describing the views of Sam Smith, editor of the *Progressive Review*).

166. See, e.g., Clifford Krauss, *The Somalia Mission: Congress; Clinton Gathers Congress Support*, N.Y. TIMES, Oct. 8, 1993, at A14 (noting Congress’s approval of President Clinton’s plan to limit the goals of U.S. forces in Somalia and commit to an end date for troop deployment); Elaine Sciolino, *Loosening the Timetable for Bringing G.I.’s Home*, N.Y. TIMES, Nov. 17, 1996, § 4, at 3 (discussing military doctrine of no overseas deployment without a specific timetable for withdrawal); Elaine Sciolino, *U.S. Narrows Terms for Its Peacekeepers*, N.Y. TIMES, Sept. 23, 1993, at A8 (noting anxiety within Clinton administration over “open-ended peacekeeping missions in Somalia and Bosnia”); *Senatorial Passion: U.S. Interest or Deadly Quagmire?*, N.Y. TIMES, Dec. 14, 1995, at A15 (quoting from Senate debate about sending troops to Bosnia and the fear of an open-ended mission).

domestic military use.

### C. *Damaging Military Readiness*

The military's primary mission is national security, and the wisdom of all military decisions is ultimately weighed against whether national security is enhanced or damaged. Military readiness is a key to modern warfare and to the maintenance of national security.<sup>167</sup> In recognition of this fact, the military can refuse a request for aid in drug interdiction and in the investigation of chemical and biological weapons if military readiness might be compromised.<sup>168</sup> However, this power of refusal does not prevent injury to military readiness,<sup>169</sup> because while the military still takes on these missions, their mere consideration injures readiness through the redirection of resources in the decisionmaking process by adding a nonmilitary factor to the decision.<sup>170</sup>

The border duty, investigative support, and drug interdiction exceptions are double-edged swords with respect to military readiness. The military has embraced new missions like drug interdiction as a way to preserve force structure and budget levels and to improve public relations.<sup>171</sup> In this respect, these new missions may aid readiness by preserving support for military strength and funding, but this benefit is outweighed by the shift of focus slightly away *from the mission* to fight a war.<sup>172</sup> This change of focus lessens

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*But see* Sciolino, *Loosening the Timetable for Bringing G.I.'s Home*, *supra*, at 3 (reporting criticism of establishing a clear exit strategy for troops deployed overseas).

167. Reimer, *supra* note 152, at 9 (stating that "readiness and training . . . [are] the reason the Army exists").

168. See Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, § 905(a)(1), 95 Stat. 1099, 1116 (1981) (codified as amended at 10 U.S.C. § 376 (1994)); *PCA Hearing*, *supra* note 13, at 16 (statement of William H. Taft IV, Gen. Counsel, U.S. Dep't of Defense).

169. To be effective the military would have to be able to say "no," but it is actually marketing itself with a 55-page pamphlet to local law enforcement. See McGee, *supra* note 3, at A30.

170. "[R]eadiness is a tough, *continuous* job." Smith, *supra* note 42, at 91 (emphasis added). The most "productive"—and full-time—purpose of the military during peacetime is the deterrence of war. *Id.* As Elihu Root said, the goal of the military is "[n]ot to promote war, but to preserve peace through intelligent and adequate preparation." *Id.*

171. See Ricks, *supra* note 164, at 38 (noting the need for the Army to justify its existence "[a]rguably for the first time in its existence"); William Rosenau, *NonTraditional Missions and the Future of the U.S. Military*, FLETCHER F. WORLD AFF., Winter/Spring 1994, at 31, 32 (suggesting that non-military missions could protect the infrastructure of the Army by giving it "a new organizational vision").

172. These new missions occur at a time when the Army has increased its overseas operational deployments by 300%, but has been forced to accommodate for diminishing resources. See Reimer, *supra* note 153, at 5, 7; see also Ronald B. Flynn, *The National Guard Drug Interdiction Mission: A*



the fighting edge of the military<sup>173</sup> and dampens the “warrior spirit.”<sup>174</sup> Additionally, these missions require equipment modifications and the reallocation of resources.<sup>175</sup> For example, F-15 pilots do not hone their dogfighting skills by tracking a single-engine Cessna flying north from Mexico; in the Gulf War, there were stories of inadequately trained National Guard units that had participated more frequently in nontraditional missions, yet were incapable of fulfilling their military mission.<sup>176</sup>

The three exceptions to the PCA affect military readiness in a variety of ways. Drug interdiction has injured military readiness as a result of expensive equipment modifications and the redirection of resources. The 1993 Department of Defense budget included more than \$1.4 billion for drug interdiction missions.<sup>177</sup> This budget allocation has resulted in a “drug command” of sorts which is entirely focussed on the domestic mission of drug interdiction.<sup>178</sup> Border duty requires a different mindset and a different

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Circumvention of Posse Comitatus? 21 (Apr. 2, 1990) (unpublished U.S. Army War College Military Studies Program Paper, available through Defense Technical Information Center) (contending that the military’s involvement in the counter-drug effort detracts from training readiness as it relates to war-fighting). *But see* Dale E. Brown, *Drugs on the Border: The Role of the Military*, PARAMETERS, Winter 1991-92, at 50, 50 (describing military involvement in counter-drug efforts as “valuable, real-world training for the participating units”).

173. Mike O’Connor, *Does Keeping the Peace Spoil G.I.’s for War?*, N.Y. TIMES, Dec. 13, 1996, at A3 (discussing the need for approximately 18 months of rest and retraining to reestablish the basic military readiness of the Army troops who were deployed in Bosnia); *see also* DePalma, *supra* note 152. The work of U.S. soldiers in Bosnia “runs counter to their traditional training” and their skills are perishable. *Id.* One sergeant, a tanker, spends each day checking identification at a checkpoint. *Id.* As a result of mostly working in small groups, the soldiers’ ability to work in large coordinated groups suffers. *Id.*

174. Dunlap, *supra* note 17; *see* Ricks, *supra* note 164, at 38.

175. In fiscal year 1990, forty-eight percent of all AWACS, radar surveillance planes, flying hours worldwide were devoted to counter-drug efforts. Brown, *supra* note 172, at 53. In the case of the National Guard, 532,899 man-days and 5155 missions were devoted to the counter-drug effort. *Id.*

176. *See* Alex Prud’Homme, *Phantom Army: For the Most Part the National Guard Fought Well in the Gulf but Some Outfits, Plagued by No-Shows and Poor Training, Never Got to the Front*, TIME, June 10, 1991, at 18; *see also* DARPA Seeks to Upgrade National Guard Training, DEF. & AEROSPACE ELECS., Feb. 22, 1993 (noting the National Training Center did not believe that National Guard troops called up for the Persian Gulf War were not combat ready), available in 1993 WL 289339; *National Guard: Peacetime Training Did not Adequately Prepare Combat Brigades for Gulf War*, GEN. ACCT. OFF. REP. & TESTIMONY, Dec. 1, 1991 (referencing GAO report on lack of readiness of National Guard troops), available in 1991 WL 2659334. This turns on the use of the National Guard in nontraditional missions, when their active service time should be spent honing their fighting capabilities so that they can back up the regular army in time of war.

177. Dunlap, *supra* note 17, at 69.

178. *See* McGee, *supra* note 3, at A30 (discussing the military’s counter-drug headquarters). This “drug command” is referred to as Joint Task Force Six (“JTF-6”). JTF-6 circulates a 55-page pamphlet to local law enforcement, which in effect markets Green Berets, Navy SEAL teams, and other services.

level of restraint than warfare,<sup>179</sup> thus disrupting the optimum culture and mindset needed to maintain national security. Investigatory support by the military is also a mission differing from that which currently exists in the military.<sup>180</sup> To redirect resources or to consider performing such nonmilitary missions involves considerations that lessen the importance of strictly improving military readiness, even when the only question is where to train.

#### *D. Wrong Tool for the Job*

Illegal immigration, drug interdiction, and investigative support relating to terrorism are all long-term problems requiring long-term solutions. These problems are not easily resolved, however, and no foreseeable end to the military's involvement appears forthcoming.<sup>181</sup> Because of the significance of the problems and their continuing and chronic nature, using the military to combat these problems is like using a sledge hammer to open a locked trunk when all one needs is the key. It is better to fashion a key than to destroy the trunk.

All three exceptions to the PCA require using the wrong tool for the job. For example, border duty forces the military to alter its mindset and training. The border patrol and other law enforcement agencies already have the proper mindset and qualifications and are better able to do the job. Using an F-15 to track drug smugglers' slow planes is both excessive and expensive. A basic military soldier costs the government \$82,000 a year in training and upkeep. A soldier's involvement in drug interdiction is much more expensive than a civilian counterpart's participation. Investigatory support for weapons of mass destruction to counter terrorism is more than a minor exception because terrorism is a continuing problem without end. We would best be

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*Id.*

179. Border duty consists of patrolling the U.S. border to stop illegal entry and enforcing customs laws at border entry points.

180. To fulfill this mission, it is entirely reasonable for the military to begin civilian surveillance again under the same rationale used in the 1960s. *See supra* note 16 and accompanying text.

181. *See Wren, supra* note 163, at 4 (noting that drug trafficking does not seem to follow basic economic principles). Increased seizures have not increased the cost to users of illegal drugs. *Id.* Increased interdiction results in increased seizures, but those seizures only increase transportation expenses; the drug dealers are hassled, but the drug flow continues. *Id.*

The 1996 price of cocaine is only one-fifth of the 1981 price, and heroin is less than half of its 1980 price. William March, *Drugs Ignore Politicians*, TAMPA TRIB., Sept. 28, 1996, at 1. In 1981, Congress began involving the military in the drug war. *See supra* note 9-10 and accompanying text. Obviously, military involvement and increased seizures have not helped to turn the tide in the drug war; it is being lost.

served by developing these resources in civilian law enforcement.<sup>182</sup>

#### V. RENEWAL OF THE POLICY EMBODIED BY THE PCA

The fundamental precept of maintaining the separation between the military and civilian spheres of action<sup>183</sup> must be renewed, not eroded by exceptions. Both exceptions-in-name and exceptions-in-fact should be avoided because they injure that separation.<sup>184</sup> To maintain the principle that animates the PCA, the PCA should be reaffirmed and strengthened. Below are three possible approaches.

One approach is to do nothing, but to do nothing would only leave the situation in its current unacceptable state. The military is seen as a panacea to many domestic problems that do not properly fall within the military sphere. Congress may resolve to leave the PCA alone, but it should be remembered that in 1878 the PCA was enacted precisely because the government had to be reminded of the fundamental principle of separating the military from the civilian sphere.<sup>185</sup> The need to remind, or re-remind, government of that fundamental principle exists today.

Another approach is to amend the Constitution, but this is less appealing than the first approach. A constitutional amendment by its very nature would strengthen the principle of excluding the military from the execution of civilian laws, but it is inflexible. In this case, a constitutional amendment would limit the powers of the President by limiting his authority as Commander-in-Chief and executor of the laws.<sup>186</sup> If these powers are qualified by Congress, as some commentators suggest,<sup>187</sup> then the amendment would only add inflexibility to the Constitution, thereby weakening one of its greatest assets.<sup>188</sup> Normally, the "twilight zone"<sup>189</sup> of Presidential power

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182. See Editorial, *False Choices on Terrorism*, N.Y. TIMES, Apr. 30, 1995, § 4, at 14 (suggesting that the F.B.I. should receive more funding and use it to improve the training of agents); Editorial, *Washington's Undeclared War on Drugs*, ST. LOUIS POST-DISPATCH, Dec. 8, 1996, at 2B (suggesting that the drug war is best handled by agencies other than the military). These resources need to be developed when civilian law enforcement is not able to take full advantage of information provided by the military. See Ted Waronicki, Letter to the Editor, *War on Drugs Must Begin in the Home*, TAMPA TRIB., Oct. 20, 1996, at 3 (noting that civilian law enforcement agencies attempted to apprehend only a small percentage of suspicious aircraft identified by the military).

183. See *supra* Part II.

184. See *supra* Part IV.

185. See *supra* notes 47-52 and accompanying text.

186. See *supra* notes 110-13 and accompanying text.

187. See *supra* note 111 and accompanying text.

188. See Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of*

provides enough flexibility to allow the United States to best meet the uncertainties of the future. A constitutional amendment would remove the “twilight zone” with respect to military use. It might be possible to amend the Constitution to allow nonmilitary use of the military through the exercise of emergency powers, but the resulting amendment would still create a fixed standard that might not foresee some future event, making it unacceptable.<sup>190</sup> Additionally, a constitutional amendment should not be enacted unless absolutely necessary for the functioning of our government or society.<sup>191</sup>

The third and best approach, is a legislative reaffirmation of the fundamental principle behind the PCA with added guidelines to help focus considerations of PCA exceptions. Legislative action refocusses the debate on the use of the military from the pressing problems into which they may possibly be drawn and retains the flexibility that a constitutional amendment would remove. Additionally, the legislative solution maintains flexibility yet Congress and the President remain constrained by public opinion in their use of the military.<sup>192</sup> This Note proposes that Congress repeal the PCA in Title 18 and enact the following statute in Title 10:

- (a) Any part of the armed forces,<sup>193</sup> excluding the Coast Guard, is prohibited from acting as a *posse comitatus* or otherwise to execute the laws, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.<sup>194</sup>
- (b) Exceptions to paragraph (a) allowing use of the armed forces must

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*Amendment Fever*, 17 CARDOZO L. REV. 691, 700 (1996). “It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.” *Id.* (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (Marshall, C.J.)).

189. See *supra* note 113 and accompanying text.

190. See Sullivan, *supra* note 188, at 700-01.

191. See generally Sullivan, *supra* note 188 (discussing arguments against constitutional amendments in general); cf. Ronald L. Goldfarb, *The 11,000th Amendment: There's a Rush to Amend the Constitution, and It Shows No Signs of Letting Up*, WASH. POST (Nat'l Weekly Ed.), Nov. 25-Dec. 1, 1996, at 22, 22-23 (noting that over 11,000 amendments have been proposed in Congress since 1789—more than one a week). As Professor Kathleen Sullivan has said, “[T]here are strong structural reasons for amending the Constitution only reluctantly and as a last resort. This strong presumption . . . has been bedrock in our constitutional history, and there is no good reason for overturning it now.” Sullivan, *supra* note 188, at 694.

192. See GOODPASTER & HUNTINGTON, *supra* note 21, at 26.

193. Title 10 defines the term “armed forces” to “mean the Army, Navy, Air Force, Marine Corps, and Coast Guard.” 10 U.S.C. § 101(a)(4) (1994).

194. See *supra* text accompanying note 12 for the current text of the PCA and note the use of the same phrasing.

meet the following criteria:

(1) the use must be triggered by an emergency, which is defined as any occasion or instance for which Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe<sup>195</sup>—generally a sudden, unexpected event,<sup>196</sup>

(2) the use must be beyond the capabilities of civilian authorities; and

(3) the use must be one limited in duration and not one which addresses a chronic, continuing issue or problem.

(c) Clarifications to prohibitions in subsection (a) are to be made by regulations to be published in the Federal Register and printed in the Code of Federal Regulations.

(d) This section is an affirmation of the fundamental precept of the United States of separating the military and civilian spheres of authority.

(e) Nothing in this section shall be construed to affect the law enforcement functions of the United States Coast Guard.

First, a repeal of the PCA in Title 18, Crimes and Criminal Procedure, and recodification into Title 10, Armed Forces, would bring the law into line with its current function and force. The PCA is a law of policy, both in application and political discourse. The total lack of prosecutions under the PCA<sup>197</sup> causes the law to lack force and credibility, because the crime is going unpunished. Recodification recognizes the law as a limitation on the use of the military without losing credibility due to the lack of enforcement. Additionally, other criminal statutes would cover misappropriation of military services,<sup>198</sup> or Congress could modify them to cover activity prohibited by the PCA. The 94th Congress considered such a recodification.<sup>199</sup>

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195. This definition is taken nearly verbatim from 42 U.S.C. § 5122(1) (1994) (regarding disaster relief).

196. This language is derived from 15 U.S.C. § 2655(c) (1994).

197. See *supra* note 53 and accompanying text.

198. The statutes that currently cover embezzlement or misappropriation of federal services, funds, or equipment would fill the void left by repeal of the PCA from Title 18.

199. See S. 1, 94th Cong. 1st Sess., tit. II, pt. G. The text of the bill proposed the following text as a re-enactment of the PCA in 10 U.S.C. § 127:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, knowingly uses any part of the Army, Navy, or Air Force as a posse comitatus or

The general language in subsection (a) of the proposed law would be substantially similar to the current wording of the PCA.<sup>200</sup> This language leaves some of the ambiguity and vagueness in the law, which in turn leaves intact the flexibility of the current law and clearly marks it as a continuation of the PCA. Past interpretations of the PCA would therefore apply equally to the proposed law as they do to the current law.

However, one significant change in the language extends the principle of the PCA to the Navy and Marine Corps by reference to “the armed forces.” This extension broadens the language of the PCA<sup>201</sup> and makes the current policy—as it is evinced by Department of Defense regulations—law, thereby erasing a meaningless distinction.<sup>202</sup> By codifying the DoD regulations, any change would require congressional approval.<sup>203</sup> The Coast Guard is explicitly excluded from the proposal in both subsections (a) and (d) to leave their current law enforcement responsibilities intact.

The criteria for exceptions creates a structure for considering what exceptions to the PCA are proper. In subsection (b), the proposed basic criteria for exceptions is an emergency of limited duration and a nonchronic nature that is beyond the capabilities of civilian authorities.<sup>204</sup> The purpose of such criteria is to keep the military from getting drawn into a substantial, long-term, and distracting role, such as involvement in drug interdiction activities. The emergency requirement recognizes the importance of the separation of military and civilian spheres by stating that anything less will

otherwise to execute the laws is guilty of a Class A misdemeanor. Nothing in this section shall be construed to affect the law enforcement functions of the United States Coast Guard.

*Id.*, cited in James P. O’Shaughnessy, Note, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 AM. CRIM. L. REV. 703, 711 n.43 (1976).

200. See text accompanying *supra* note 12.

201. See *supra* notes 66-67 and accompanying text. The 94th Congress also considered similarly broadening the coverage of the PCA. See *supra* note 201.

202. See *supra* note 68 and accompanying text.

203. A regulation that is not codified does not require congressional approval to be changed. *Cf. supra* note 68 (noting the withdrawal of a section similar to the DoD Regulations from the Code of Federal Regulations presumably to make the regulations easier to change).

204. A similar proposal was made by Professor Christopher Pyle. See *PCA Hearing, supra* note 13, at 42.

What is at stake is nothing less than a consistent theory of the proper role of armed forces in a democratic republic.

That theory . . . envisions the military as a back-up force, operating under its own command, prepared to deal with large scale emergencies, *beyond the capabilities of civilian authorities*, not for the purpose of executing civilian laws, or even assisting in their execution, but for restoring order, saving lives, and protecting property from natural or man-made disasters.

*Id.* (emphasis added) (statement Christopher H. Pyle, Professor, Mount Holyoke College).

not involve the military. An emergency also suggests something more than an ordinary occurrence, which further ties in the notion of a nonchronic problem requiring a limited time commitment. The military should be used as a stop-gap, not as a permanent or regular solution to a problem.<sup>205</sup> Requiring the problem to be beyond the capabilities of civilian authorities forces the military to stay out of matters that can otherwise be handled by the proper authorities<sup>206</sup> and will encourage the development of those authorities' capabilities to deal with chronic, nonemergency problems.

The framework of this proposal would allow exceptions for civil disturbances, insurrection, strike replacement, and disaster relief, because all are limited in scope, require resources usually beyond local authorities, and would by nature be emergencies. The use of troops for border duty would fail under all three requirements because no emergency is occurring, involvement is not of limited duration, and customs and immigration problems are not beyond the capabilities of immigration authorities. The counter-drug exception also fails under all three criteria, particularly because it involves no emergency and is not of limited duration. The investigative support exception for weapons of mass destruction fails under the limited-duration and capabilities-of-civilian authorities criteria, but like the PCA, the proposal does not prohibit investigatory support.

The requirement of regulations to clarify the law lessens the need for exceptions-in-name while providing military commanders with guidance. One of the reasons Congress passed the counter-drug exception was that the military commanders lacked guidance. The inclusion of clarifying regulations in the Code of Federal Regulations delineates the acceptable uses of the military and promotes public discourse about the appropriateness of these uses.

## VI. CONCLUSION

The Departments of Justice and Defense got it right as recently as 1979:

The [PCA] expresses one of the clearest political traditions in Anglo-American history: that using military power to enforce the civilian law is harmful to both civilian and military interests. The authors of the

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205. See McGee, *supra* note 3, at A30.

206. See *PCA Hearing*, *supra* note 13, at 16 (testimony of William H. Taft, Gen. Counsel, U.S. Dep't of Defense) (quoting an Aug. 6, 1979 report on the PCA by the Departments of Justice and Defense).

[PCA] drew upon a melancholy history of military rule for evidence that even the best intentioned use of the Armed Forces to govern the civil population may lead to unfortunate consequences. They knew, moreover, that military involvement in civilian affairs consumed resources needed for national defense and drew the Armed Forces into political and legal quarrels that could only harm their ability to defend the country. Accordingly, they intended that the Armed Forces be used in law enforcement only in those serious cases to which the ordinary processes of civilian law were incapable of responding.<sup>207</sup>

The need to fight “the war” on drugs, to combat terrorism, and to deter illegal immigration are long-term problems that are currently high on the public agenda and will not go away without long-term solutions. Tight budgets and the desire for a quick-fix do not create an emergency justifying the conversion of martial rhetoric to reality. Relegating these problems to a military solution poses dangers to our individual rights and to the history and underlying structure of the United States that should not be ignored.

Resources must be made available to create viable civilian law enforcement responses to these problems. If these resources must be redirected from the military, then Congress should do so. Declare “war,” but let it be fought by civilian law enforcement with the right weapons for the job. The military should be the last resort, not the first solution. In the long run, the “war” will be more effectively fought with dedicated “soldiers” with an undivided focus.<sup>208</sup>

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207. *Id.*

208. This Note does not suggest that the armed forces are any less dedicated, but these domestic problems are not, and should not be, their primary mission. When the need arises, the armed forces must be able to direct their resources towards their primary mission; thus, they cannot give these domestic problems the full attention that they need.