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# Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement

Sean J. Kealy<sup>†</sup>

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war, the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they at length become willing to run the risk of being less free.

—Alexander Hamilton<sup>1</sup>

## INTRODUCTION

*On an early March day, several hundred protestors marched up Washington Street in Boston. The demonstration started in the Roxbury neighborhood and was to pass through Downtown Crossing, past monuments of the American Revolution like the Old South Meeting House and the Old State House, to historic Faneuil Hall. At the head of the predominately minority crowd walked the Reverend Ignatius Waters.*

*A decade and a half earlier, Reverend Waters was a key figure in establishing the highly successful community-policing program in Boston. That, however, was before weapons-grade anthrax was released in the Washington, D.C. Metro system and before car bombs simultaneously exploded at the headquarters of five major corporations in Dallas, Atlanta, Chicago, Seattle, and Boston. Those acts of terror prompted Congress to pass the "Freedom and Policing Act of 2004," which removed any legal obstacles to deploying the military domestically and mandated that a reluctant Pentagon become fully involved in law enforcement activities. At first, the public embraced these new security measures. After a few years, however, Reverend Waters saw a breakdown in relations between his community and law enforcement. Gray armored vehicles staffed by officers in black SWAT uniforms often patrolled his*

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1. THE FEDERALIST NO. 8, at 120 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

*neighborhood. People were randomly stopped and questioned, and constitutionally suspect searches were reported, as were numerous stories of physical abuse during arrest. Reverend Waters had tried in vain to address these concerns, but the Mayor claimed that the offending officers were National Guard troops, while the Governor claimed that the problem was with the regular military personnel.*

*As the demonstration crossed State Street, it passed a dozen law enforcement officers. Several of the younger demonstrators confronted the officers and some members of the crowd started to throw objects. As Reverend Waters frantically attempted to calm the crowd, the officers raised their automatic rifles. In the confusion, someone yelled "fire" and the officers discharged their weapons. Five protestors, including Reverend Waters, were declared dead at the scene.*

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The military is currently prohibited by federal statute from participating in domestic law enforcement. The Posse Comitatus Act of 1878 ("PCA")<sup>2</sup> establishes criminal penalties for people who willfully use members of the Army or the Air Force to execute the laws. Although a product of the Reconstruction Era, this law reflects a strong American tradition against the domestic use of the military that stretches back before the founding of the nation.

Over the last several decades, however, there has been a growing trend to increase the role of the military in traditional law enforcement. This trend was especially evident during the 1980s and 1990s when an influx of cocaine caused the federal government to declare a "war on drugs." To fight this war, Congress created exceptions to the PCA and encouraged greater interface between the military and law enforcement, passing the Military Cooperation with Law Enforcement Officials Act in 1981.<sup>3</sup> As Congress has encouraged the military to supply intelligence, equipment, and training to civilian police through joint task forces, the military's role in the drug war has become "steadily more active, more innovative and more flexible."<sup>4</sup>

This military-civilian cooperation has extended beyond the drug war to include the enforcement of immigration and customs laws. The Army has used its Blackhawk helicopters to support U.S. and Bahamian efforts to chase

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2. Army Appropriations Act, ch. 263, § 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385 (2000)) (providing that "[w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both").

3. Pub. L. No. 97-86, § 905, 95 Stat. 1115 (codified as amended at 10 U.S.C. §§ 371-78 (1998)).

4. PRESIDENT'S COMM'N ON ORGANIZED CRIME, AMERICA'S HABIT: DRUG ABUSE, DRUG TRAFFICKING, AND ORGANIZED CRIME 380 (1986) [hereinafter AMERICA'S HABIT].

smugglers and to transport customs officials.<sup>5</sup> At the state level as well, National Guard units routinely assist state and local law enforcement officers in myriad policing efforts, including assisting customs officers inspecting cargo at land, sea, and air ports of entry.<sup>6</sup> The Navy has been allowed to interdict vessels and aircraft, conduct searches and seizures, make arrests, and take other measures that are likely to “subject civilians to [the] use [of] military power.”<sup>7</sup>

The partnership between the military and law enforcement is even more clearly seen in the joint training programs and equipment transfers utilized during the 1990s. In addition to training thousands of civilian law enforcement officers in skills such as marksmanship, interrogation techniques, and combat emergency care, the military has provided reconnaissance flights and armed soldiers to actually patrol the Mexican border.<sup>8</sup> Among the most notorious examples of such military assistance to law enforcement was the 1993 siege on the Branch Davidian Compound near Waco, Texas, which represented the single largest use of military weaponry in a civilian law enforcement effort. After the fiery end to the Waco standoff, a congressional committee concluded that civilian law enforcement should not be using military weaponry and tactics to carry out its mission.<sup>9</sup>

Civilian law enforcement officials, however, have continued to adopt military tactics to carry out their mission, with potentially significant consequences.<sup>10</sup> Although the courts consider the impact that domestic military involvement has on individual liberty, what often goes unnoticed are the subtle changes in the methods and priorities of civilian law enforcement authorities that flow from military/law enforcement cooperation. The training and equipment shared through joint task forces, critics argue, have caused police departments to become increasingly authoritarian, centralized, and autonomous bureaucracies that are isolated from the public.<sup>11</sup> The result is the spawning of “a culture of paramilitarism in American police departments.”<sup>12</sup>

One example of this militarization of the police is the proliferation of elite SWAT teams that use militaristic tactics and armament. Developed in the late 1960s to respond to particularly dangerous situations, such as hostages, barricaded suspects, or hijackers, SWAT teams were originally much like regular police officers, but better equipped and utilized on only rare

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5. H.R. Rep. No. 101-121, at 320 (1989), reprinted in 1989 U.S.C.C.A.N. 838, 941.

6. *Id.*

7. Department of Defense Directive 5525.5 Encl. 4, para. 3.2 (1986).

8. *NewsHour: Casualties of the Drug War* (PBS television broadcast, Aug. 13, 1997) (transcript available at [http://www.pbs.org/newshour/bb/military/july-dec97/border\\_8-13.html](http://www.pbs.org/newshour/bb/military/july-dec97/border_8-13.html) (last visited Mar. 11, 2003)) [hereinafter *NewsHour 1997*].

9. See Rowan Scarborough, *Dangerous Alliances*, INSIGHT ON THE NEWS, Oct. 25, 1999, at 30.

10. See *id.*

11. Diane Cecilia Weber, *Warrior Cops: The Ominous Growth of Paramilitarism in American Police Departments*, in 50 CATO INSTITUTE BRIEFING PAPERS 5 (1999).

12. *Id.* at 2.

occasions.<sup>13</sup> By 1997, nearly ninety percent of the police departments serving cities with populations over 50,000 had SWAT teams.<sup>14</sup> Due to the Military Cooperation with Law Enforcement Officials Act, these SWAT teams are armed with greater firepower than average police officers, including M-16s, armored personnel carriers, and grenade launchers.<sup>15</sup> Through the joint task forces, the military also provides training to police departments with active duty Army Rangers and Navy SEALs, thus allowing the “warrior mentality” of Special Forces to be adopted by local police officers.<sup>16</sup>

Ominously, these militarized units do not respond exclusively to extraordinary situations, but are engaged in routine patrols. Police departments routinely send their SWAT teams out on the streets in tactical uniforms armed with military style weaponry, making them look more like soldiers than police officers. These “saturation patrols” often seek out minor violations that may lead to deterrence of more serious crimes. For example, one police department in a city of 75,000 sends out patrols dressed in tactical uniforms in an armored personnel carrier and armed with machine gun pistols to stop “suspicious vehicles and people” or “surround suspicious homes.”<sup>17</sup> One commentator argues that although a military approach is inappropriate for civilian law enforcement officers, the military is becoming the model for their behavior and outlook.<sup>18</sup>

The increased cooperation between the police and the military has blurred the line between the two traditionally distinct organizations. Whereas soldiers must attack and defeat an enemy, police officers are charged with not only protecting the community from lawbreakers, but also protecting the constitutional rights of those alleged lawbreakers that they arrest.<sup>19</sup> Whereas

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13. After the Los Angeles Police Department successfully used its SWAT team against the Black Panthers in 1969 and the Symbionese Liberation Army in 1973, similar teams were established in police departments throughout the country. SWAT teams grew rapidly starting in the mid-1970s and remained strong throughout the 1980s and 1990s.

14. Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOC. PROBS. 1, 5-6 (1997). This proliferation is not limited to cities—seventy percent of communities under a population of 50,000 also had SWAT teams. Weber, *supra* note 11, at 1.

15. For example, “[b]etween 1995 and 1997 the Department of Defense gave [various] police departments 1.2 million pieces of military hardware, including 73 grenade launchers and 112 armored personnel carriers.” This armament covered all police departments regardless of size, with 600 M-16s going to the Los Angeles Police Department and the seven-member Jasper, Florida Police Department being given fully automatic M-16s as well. Weber, *supra* note 11, at 2 (citing Timothy Egan, *Soldiers of the Drug War Remain on Duty*, N.Y. TIMES, Mar. 1, 1999, at A1; *Wilson Praises LAPD Acquisition of 600 Army Surplus Assault Rifles*, L.A. TIMES, Sept. 17, 1997, at A18; *60 Minutes: Gearing Up* (CBS television broadcast, Dec. 21, 1997)).

16. Weber, *supra* note 11, at 9.

17. *Id.* at 8 (citing Kraska & Kappeler, *supra* note 14, at 10).

18. *Id.* at 1.

19. Every facet of the military is designed to effect the rapid and efficient destruction of the “enemy” by killing enemy soldiers, destroying enemy equipment and shattering the enemy’s will to resist. See U.S. ARMY FIELD MANUAL 7-10: *The Infantry Rifle Company 1-1* (1990) (updated Oct. 2000), available at <http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/7-10/toc.htm> (last visited Mar. 11,

soldiers are trained to inflict maximum damage in many situations, police officers have a duty to use minimum force, and only when reasonably justified, in accomplishing their mission.<sup>20</sup>

Ultimately, by allowing so much training and equipment interchange between the police and military, the Military Cooperation with Law Enforcement Officials Act has created a dangerous exception to the PCA. Forcing the military into a law enforcement role makes them less like soldiers, but not quite police officers, and conversely, using police officers in a paramilitary role makes them resemble soldiers in appearance and actions.<sup>21</sup> As the line between the police and military becomes blurred, there are bound to be negative long-term effects on the military, civilian police organizations, and the population as a whole.

This process of increased military involvement in domestic law enforcement and the militarization of the police is likely to continue after the September 11th terrorist attacks on New York and Washington. Whereas the erosion of PCA protections in the past has taken place over time in the interest of economy or efficiency, the threat of terrorism may spur citizens to actively renounce liberty for safety. Some commentators have used the erosion of PCA protections during the drug war and efforts to capture illegal aliens to argue for an active domestic role for the military in countering terrorism.<sup>22</sup> Since September 11th, moreover, many policymakers have called for, and authorized, increased use of the military in domestic law enforcement. The most visible manifestation has been the thousands of National Guard troops stationed at airports, bridges, power plants, and at the borders. Congress has also allowed the military to transport suspected terrorists from foreign countries to the United States for trial.<sup>23</sup> Furthermore, the requests for a greater military role in law enforcement have spread to other, non-terrorist related, crimes. For example, during the fall of 2002, the Washington, D.C. sniper case led to the

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2003). In fact, the military requires the use of deadly force if the killing is pursuant to a lawful order. See 10 U.S.C. § 892 (2000) (U.C.M.J. art. 92, "failure to obey order or regulation").

20. See Weber, *supra* note 11, at 10; Kurt Andrew Schlichter, Note, *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, 1295-1296 (1993). In *Tennessee v. Garner*, 471 U.S. 1, 20-21 (1985), the Supreme Court required peace officers to apply a reasonableness test to determine whether shooting a fleeing victim is justifiable. The Court held that deadly force is only to be used in self-defense, to prevent harm to others, or to stop the flight of dangerous felons. *Garner*, 471 U.S. at 11-12. Unjustified uses of deadly force may be the basis of a civil rights complaint under 42 U.S.C. § 1983. See *id.* at 5. Of course, in peacetime, soldiers have no greater authority to employ deadly force than other officers. See *Manley v. State*, 137 S.W. 1137 (Tex. Crim. App. 1911) (National Guard private held criminally liable for fatally wounding a civilian passing through a restricted area).

21. See Schlichter, *supra* note 20, at 1333; *Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974) (heavily armed police officers at a college campus reacted to a sniper with massive return fire that ultimately killed two students).

22. Ann Roosevelt, *Experts Debate Possible Police Role For Military*, NAVY NEWS & UNDERSEA TECH., Feb. 4, 2002, at 3.

23. See 10 U.S.C. § 374(b)(2)(F)(iii) (2000).

enlistment of military aircraft and crews to search the Maryland and Virginia suburbs of Washington for the gunmen.<sup>24</sup>

This Article will examine the Posse Comitatus Act and assess the statute's usefulness in a post-September 11th world. Part I reviews the history that underlies and gave form to the PCA. This history demonstrates that the improper use of military power was at the forefront of the Founders' concerns. Still, as the memories of the Revolutionary Era abuses faded, and the nation struggled with Reconstruction, the military was used more frequently, often with negative results. The misuse of the military during Reconstruction led directly to the creation of the PCA, which legally restricted military activity for a century. Part II explores the significant limitation of PCA protections due to judicial interpretations during the 1970s. Rather than drawing a bright line between the military and law enforcement, the courts limited the Act's scope to those activities that subjected civilians to military action that was "regulatory, proscriptive or compulsory" in nature. Furthermore, the courts of this era started a trend to limit the applicability of the exclusionary rule to PCA violations, thereby eliminating the most effective way to enforce the Act's restrictions. Part III details the exceptions to the PCA created by Congress and the Pentagon during the 1980s and 1990s to fight the war on drugs. This Part also examines the expanded role of the National Guard in these anti-drug efforts and the joint operations between the military and law enforcement created during this period. Part IV provides a cautionary tale about police departments becoming militarized by examining "The Troubles" that have plagued Northern Ireland for decades. This social unrest is due, in part, to a poisoned relationship between the Catholic population and the state police force, the Royal Ulster Constabulary, leading to a commission report in 2000 calling for a reformed and more civilian-oriented police service. Since then, several reforms, including limits on the use of the military in law enforcement, have been put into effect with some success.

Part V reviews the debate over a more active military role in the war against terrorism since September 11th. Although some congressional leaders and commentators have argued for a wide-ranging military role, an interesting collection of libertarians, civil rights advocates, and military leaders have opposed an expansion of the military's domestic mission. Part VI will offer recommendations for a new federal statute to replace the PCA. Contrary to the current inclinations of Congress, I recommend that the new statute should affirm the founding principle of limiting the military's domestic role and reflect an understanding that the military is not always the best answer for a particular security challenge. This legislation should clearly define the limits of military authority and the circumstances under which the military would be authorized

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24. Adam Clymer, *Big Brother Joins the Hunt for the Sniper*, N.Y. TIMES, Oct. 20, 2002, § 4, at 3.



## Posse Comitatus

to assist civil law enforcement. Such a statute would protect the rights of the individual, provide guidance to military commanders and, ultimately, restore the clear distinction between the military and law enforcement. Finally, Part VII will argue that American citizens and residents have a right to civilian law enforcement when the need arises to exercise governmental authority over them. By recognizing this principle as an affirmative right, individual liberty will be protected to a greater extent than it could be by statute, and the courts will be able to enforce the restrictions on military power through the use of the exclusionary rule.

### I. A BRIEF HISTORY OF THE POSSE COMITATUS RESTRICTIONS

The term “posse comitatus” literally means the “force of the county.”<sup>25</sup> Specifically, it refers to the common law power of a county sheriff to summon a “posse”—consisting of any able-bodied person over the age of fifteen years—to assist him in keeping the peace, pursuing and arresting felons, and suppressing riots.<sup>26</sup> Today, most jurisdictions permit a police officer to command the assistance of an able-bodied person for the arrest or recapture of an escaped prisoner.<sup>27</sup> Although British common law considered military personnel eligible to assist law enforcement, the American tradition has been to limit the role the military could play on the domestic scene. This tradition reflects an American concern, formed well before the Revolution, about the dangers of using a standing army to keep civil peace.<sup>28</sup> This tradition was codified in 1878 with the Posse Comitatus Act, which forbade the use of the Army to execute the laws or to provide aid to civil authorities in the enforcement of civilian laws.<sup>29</sup>

#### A. *A Founding Principle*

To the Founders, the results of routine military involvement in civilian affairs were a fresh and painful memory. From 1768 to 1770, a force of British troops occupied the city of Boston, enforcing regulations and taxes intended to

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25. 12 OXFORD ENGLISH DICTIONARY 171 (2d ed. 1989); see also BLACK'S LAW DICTIONARY 1162 (6th ed. 1990) (defining “posse comitatus” as “power or force of the county”).

26. See OXFORD ENGLISH DICTIONARY, *supra* note 25, at 171 (“[T]he body of men above the age of fifteen in a county (exclusive of peers, clergymen, and inform persons), whom the sheriff may summon or ‘raise’ to repress a riot or for other purposes; also a body of men actually so raised and commanded by the sheriff.”). Blackstone states, “[F]or keeping the peace and pursuing felons, he [the sheriff] may command all the people of his county to attend him; which is called the *posse comitatus*, or power of the county.” 1 WILLIAM BLACKSTONE, COMMENTARIES \*332. Under common law, only a sheriff could organize a posse. See *United States v. Hart*, 545 F. Supp. 470 (N.D. 1982), *aff’d*, 701 F.2d 749 (8th Cir. 1983).

27. See, e.g., *Scott v. Vandiver*, 476 F.2d 238 (4th Cir. 1973).

28. See David E. Engdahl, *Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1 (1971).

29. See, e.g., *United States v. Hartley*, 486 F. Supp. 1348, 1356 (M.D. Fla. 1980).

demonstrate British control over the colony. Incidents of violence between the townsmen and troops were common, and the atmosphere in Boston soon became what historian David McCullough calls "incendiary."<sup>30</sup> The crisis came to a head on March 5, 1770 when a confrontation between an unruly mob and a detachment of troops on King Street resulted in the troops firing on the crowd. Five men died and the event came to be known as the "Boston Massacre," portrayed by many colonists as a prime example of British tyranny.<sup>31</sup> The troops and officer involved were tried in Boston, with John Adams leading their defense. Although Adams argued that the troops' actions were justified as a matter of self-defense, he emphasized that the mob was the inevitable result of quartering troops in a city with the intent of keeping the peace.<sup>32</sup> "[S]oldiers quartered in a populous town, will always occasion two mobs, where they prevent one.—They are wretched conservators of the peace!"<sup>33</sup> Despite this experience, British soldiers continued to quell disorder in Boston. In 1774, Parliament further encouraged this practice by making it less likely that a soldier would be tried for using excessive force when suppressing civil disorders.<sup>34</sup>

Five years after Adams denounced the use of troops among civilian populations, Jefferson's Declaration of Independence cited the improper use of troops and standing armies as examples of King George's tyranny. Specifically, Jefferson attacked the King and Parliament for keeping standing armies among the civilian population in times of peace without the consent of the local legislatures;<sup>35</sup> rendering the "Military independent of and superior to the Civil power;"<sup>36</sup> and "[f]or quartering large bodies of armed troops among us."<sup>37</sup>

30. DAVID MCCULLOUGH, JOHN ADAMS 65 (2001).

31. *Id.* at 65-66.

32. *Id.* at 67.

33. John Adams, *Argument*, in 3 LEGAL PAPERS OF JOHN ADAMS 266 (L. Kinvin Wroth & Hillier B. Zobel eds., 1965). The *Legal Papers of John Adams* presents a thorough, if not complete, record of the Boston Massacre trials, *Rex v. Preston* and *Rex v. Wemms*.

34. The Administration of Justice Act of 1774 permitted the removal of trials to other colonies or to England for those government officials, including soldiers, who were accused of using excessive force in suppressing disorders. See Engdahl, *supra* note 28, at 26; Clarence I. Meeks III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 86 (1975). Adams's sentiments were reiterated two years later by Joseph Warren:

The ruinous consequences of standing armies to free communities may be seen in the histories of Syracuse, Rome, and many other once flourishing states . . . . Soldiers are also taught to consider arms as the only arbiters by which every dispute is to be decided between contending states; they are instructed implicitly to obey their commanders without inquiring into the justice of the cause they are engaged to support; hence it is that they are ever to be dreaded as the ready engines of tyranny and oppression. And it is too observable that they are prone to introduce the same mode of decision in the disputes of individuals, and from thence have often arisen great animosities between them and the inhabitants, who whilst in a naked, defenseless state, are frequently insulted and abused by an armed soldiery.

See Joseph Warren, *Against a British Army in the Colonies*, 2 THE ANNALS OF AMERICA 211, 213-14 (Oration Delivered at Boston, Mar. 5, 1772).

35. THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).

36. *Id.* para. 14.

This revolutionary sentiment carried over into the establishment of the Republic. The Founders limited the domestic powers of the military, even in the face of grave threats to national security from several powerful European nations and various hostile Indian tribes.<sup>38</sup> The Articles of Confederation restricted the states from raising armies or maintaining naval vessels during times of peace, mandating instead a “well regulated and disciplined militia, sufficiently armed and accoutered.”<sup>39</sup> The dangers of the armed services were further discussed at the Constitutional Convention, as delegates debated whether there should be a standing army at all, or if defense of the nation should rely entirely on the state militias.<sup>40</sup> Ultimately, the Convention granted Congress the power to raise a standing army<sup>41</sup> but imposed several safeguards such as frequent review of military appropriations,<sup>42</sup> making the military subordinate to the President,<sup>43</sup> and reserving the power to declare war to Congress.<sup>44</sup> The military’s only expressly stated domestic role was to quell insurrections.<sup>45</sup>

Despite these restrictions, the issue of standing armies remained a point of contention. As Convention delegate Luther Martin of Maryland declared to the Maryland Legislature, “when a government wishes to deprive its citizens of freedom, and reduce them to *slavery*, it *generally makes use of a standing army*.”<sup>46</sup> Distrust of standing armies also appears throughout the Federalist Papers. Alexander Hamilton argued that standing armies not only push a people toward monarchy, but place the population under military subordination: “[A strong military leads to the] frequent infringements on their rights . . . and by degrees the people are brought to consider the soldiery not only as their protectors but as their superiors.”<sup>47</sup> He advocated a small force under civil authority that would be available to restore order under extreme circumstances.<sup>48</sup> Madison echoed this concern, pointing out that “the liberties

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37. *Id.* para. 16.

38. See Engdahl, *supra* note 28, at 18-27.

39. U.S. ART. OF CONFEDERATION art. 6, § 4.

40. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 209 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND].

41. U.S. CONST. art. I, § 8, cl. 12.

42. See *id.* (specifying that funds cannot be appropriated for longer than two years).

43. U.S. CONST. art. II, § 2.

44. U.S. CONST. art. I, § 8, cl. 11.

45. U.S. CONST. art. I, § 8, cl. 15. This Clause has been invoked on a handful of occasions, such as Shay’s Rebellion (1786-1787), the Whiskey Rebellion (1794), the Dorr Rebellion (1842), and the Civil War (1861-1865). See Engdahl, *supra* note 28, at 49.

46. FARRAND, *supra* note 40, at 209.

47. THE FEDERALIST NO. 8, at 122-23 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

48. Hamilton argued:

The smallness of the army renders the natural strength of the community an over-match for it; and the citizens, not habituated to look up to the military power for protection, or to submit to its oppressions, neither love nor fear the soldiery; they view them with a spirit of jealous acquiescence in a necessary evil, and stand ready to resist a power which they suppose may be

of Rome proved the final victim to her military triumphs.”<sup>49</sup> As a result of these lingering fears, the Bill of Rights included the Second Amendment, which ensures a regulated but decentralized militia and guarantees the right of the people to keep and bear arms, and the Third Amendment, which prohibits the quartering of troops in any house in time of peace without the consent of the owner.<sup>50</sup>

During the early period of the United States, federal law reflected the principle that regular troops should not be used to execute the law. The Judiciary Act of 1789 empowered federal marshals “to command all necessary assistance in the execution of his duty.”<sup>51</sup> In 1792, however, Congress specifically authorized the President to use the “militia” as a domestic military force, but only in limited circumstances where law enforcement officers, typically the marshal and his posse, could not suppress a violent internal disorder.<sup>52</sup> The 1792 statute makes a clear distinction between the citizen soldiers who may be used in emergencies and the standing army, indicating that Congress sought to exclude the regular army from law enforcement matters.<sup>53</sup>

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exerted to the prejudice of their rights.

*Id.*

49. THE FEDERALIST NO. 41, at 296 (James Madison) (Benjamin Fletcher Wright ed., 1961). Madison elaborated on his views:

A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties. The clearest marks of this prudence are stamped on the proposed Constitution. The Union itself, which it cements and secures, destroys every pretext for a military establishment which could be dangerous. America united, with a handful of troops, or without a single soldier, exhibits a more forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat.

*Id.*

50. *Laird v. Tatum*, 408 U.S. 1, 22-23 (1972).

51. Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73, 87.

52. Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264. The term “militia,” as it is used here, derives from the French word “*malice*” and is defined as “A military force, esp. the body of soldiers in the service of a sovereign or state; in later use employed in more restricted sense to denote a ‘citizen army’ as distinguished from a body of mercenaries or professional soldiers.” OXFORD ENGLISH DICTIONARY, *supra* note 25, at 768. In 1776, Adam Smith wrote, “[The state] may . . . oblige either all the citizens of the military age, or a certain number of them, to join in some measure the trade of a soldier to whatever other trade or profession they may happen to carry on. . . . [I]ts military is [then] said to consist in a militia.” 1 ADAM SMITH, WEALTH OF NATIONS 754-55 (Edwin Cannan ed., 1994). A century before Smith, Sir William Petty recognized that a “militia” could have both law enforcement and war making abilities, “There be in Ireland, as elsewhere, two Militias; one are the Justices of Peace, their Militia of High and Petty Constables; as also the Sheriffs Militia of his Servants and Baliffs, and Posse Comitatus. . . . There is also a Protestant Militia, of about 24000 Men. . . .” SIR WILLIAM PETTY, TRACTS: CHIEFLY RELATING TO IRELAND, “THE POLITICAL ANATOMY OF IRELAND” 42 (1769); *see also* BLACK’S LAW DICTIONARY *supra* note 25, at 993 (defining “militia” as “[t]he body of citizens in a state, enrolled for discipline as a military force, but not engaged in actual service except in emergencies, as distinguished from regular troops or a standing army”).

53. Presumably, the basis for this statute is the constitutional provision that allowed the use of the militia to execute the law. U.S. CONST. art I, § 8, cl. 15.

## Posse Comitatus

### B. *Erosion of the Principle*

Despite the statutory distinction made between militia and regular army personnel, as time passed, regular soldiers were routinely called upon to serve in the marshal's posse.<sup>54</sup> By the middle of the nineteenth century, not only could military personnel acting in their personal capacity participate in a posse,<sup>55</sup> but a military force could be used so long as it remained subordinate to civil authority.<sup>56</sup>

The Civil War further eroded the traditional limits to domestic military power. In 1861, Congress enacted new laws permitting the President to use the militia or military when he determined that it was impracticable to enforce the law by ordinary means.<sup>57</sup> During the Reconstruction Era, the limits on the military that had been so important to the Founders were completely cast aside and the military actually governed the defeated Confederate states.<sup>58</sup> In this capacity, the military was commonly used to both quell disorders and as law enforcement officers of the first resort.<sup>59</sup> During this period, the Army often patrolled the border between Texas and Mexico with civilian deputy sheriffs searching for cattle rustlers.<sup>60</sup> The Army was also commonly called upon to enforce the revenue laws with unruly, and sometimes violent, "moonshiners."<sup>61</sup> Even more notorious instances of military involvement came, however, when federal troops seized southern state legislative bodies and involved themselves in local political matters.<sup>62</sup>

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54. Meeks, *supra* note 34, at 88.

55. 6 Op. Att'y Gen. 466, 473 (1854). The Attorney General stated that this position reflected the traditional English rule as identified by Lord Mansfield in 1789. Mansfield stated that all persons serving as posse comitatus were doing their duty as citizens regardless of their status as a civilian or regular military personnel.

56. 9 Op. Att'y Gen. 516, 522 (1860).

57. Act of July 29, 1861, ch. 25, § 8, 12 Stat. 281.

58. The Reconstruction Act of March 2, 1867, ch. 153, 14 Stat. 428 (establishing military districts in the defeated states).

59. During the Reconstruction period, from 1866 to 1877, federal troops enforced the law and kept public order in the defeated Confederate states. Their tasks included quelling domestic disturbances, arresting members of the Ku Klux Klan, enforcing the laws against illegal whiskey production, guarding polling places, and becoming involved in labor disputes. See Meeks, *supra* note 34, at 89-90; see also James P. O'Shaughnessy, Note, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 AM. CRIM. L. REV. 703, 704-10 (1976).

60. 7 CONG. REC. 3848 (1878) (statement of Rep. Schleicher).

61. *Id.* (statement of Rep. Burchard); 7 CONG. REC. 4241 (1878) (statement of Sen. Blaine).

62. See 7 CONG. REC. 3850 (1878) (statement of Rep. Ellis) (listing several instances of Army involvement in political matters in the South). Ellis's allegations were hotly contested by the Republicans who pointed out that it was the local Democratic Party that had requested troops on election day. See, e.g., 7 CONG. REC. 3847 (1878) (statement of Rep. Hale); 7 CONG. REC. 3851 (1878) (statement of Rep. Dunnell). During the election of 1876, the United States Attorney General gave instructions to the marshals specifically advising them that they had the right to summon the posse comitatus, including the military within their jurisdiction. 7 CONG. REC. 3850 (1878) (statement of Rep. Southard) (quoting Instructions of the Attorney General, Sept. 7, 1876). To compliment this advisory, the President, the Secretary of War, and the General of the Army ensured that a detachment of troops was available in any jurisdiction that potentially required one so that it could be employed as a posse

C. *Reestablishing the Principle: The Posse Comitatus Act of 1878*

The excessive presence of the military in the South, and especially the use of partisan election marshals during the hotly disputed 1876 presidential election, helped bring Reconstruction to an end. A century and a quarter before George W. Bush and Al Gore wrangled over the presidency, Samuel J. Tilden and Rutherford B. Hayes engaged in a very similar and highly disputed election. Although Tilden won the popular vote, the electoral votes in three southern states and Oregon were disputed.<sup>63</sup> The election was thrown to the Congress,<sup>64</sup> which decided for Hayes just days before the scheduled inauguration. As part of his selection, Hayes made concessions to southern Congressmen, including the removal of federal troops from the South.<sup>65</sup>

One of the first post-Reconstruction reforms was the Posse Comitatus Act. This law prohibited any part of the Army from executing the laws unless expressly authorized by Congress.<sup>66</sup> If the Act's immediate objective was to prevent future military influence over elections,<sup>67</sup> it also embodied a limited role for the military, which had been envisioned by the Founders, in the former Confederate states.<sup>68</sup> Other commentators contend that Congress enacted the PCA because the "long-term use of the Army to enforce civilian laws posed a potential danger to the military's subordination to civilian control."<sup>69</sup>

The debate over the PCA was laced with the residual tension of the Civil War. During that year's debate on Army appropriations, Representative Ellis argued that the request for a larger Army was really a request for a "national police force."<sup>70</sup> This fear was encouraged by the many instances of military involvement in law enforcement at the request of a wide range of officials,

comitatus. *Id.*; see also 7 CONG. REC. 4240 (1878) (statement of Sen. Kernan).

63. Tilden's supporters believed that their candidate lost the electoral vote because the military preferred Hayes, taking advantage of its role in watching polling locations in the South to throw the election to Hayes. JEFFREY ROGERS HUMMEL, *EMANCIPATING SLAVES, ENSLAVING FREE MEN* 321 (1996).

64. U.S. CONST. art. II, § 3 (describing process for choosing the President when the vote of the electoral college does not provide a majority to any one candidate).

65. See HUMMEL, *supra* note 63.

66. Army Appropriations Act, ch. 263 § 15, 20 Stat. 145, 152 (1878).

67. See, e.g., *United States v. Allred*, 867 F.2d 856 (5th Cir. 1989); *United States v. Hartley*, 486 F. Supp. 1348 (M.D. Fla. 1980), *aff'd*, 678 F.2d 961 (11th Cir. 1982).

68. See, e.g., *United States v. McArthur* 419 F. Supp. 186 (D.N.D. 1975), *aff'd*, 541 F.2d 1275 (8th Cir. 1976). Part of this second purpose was to restrict the unilateral use of the military by the President. See 7 CONG. REC. 4240 (1878) (statement of Sen. Kernan).

69. Craig T. Trebilcock, *Posse Comitatus: Has the Posse Outlived Its Purpose?* 1 (Mar. 2000) (unpublished paper presented at the Center for Strategic & International Studies, on file with author).

70. 7 CONG. REC. 3718 (1878) (statement of Rep. Ellis). Rep. Eden was even more direct in an exchange with Rep. Aldrich:

Mr. Eden: I would ask my colleague if he would be willing to employ a half million of men in order to preserve the peace in their locality and dispense with sheriffs, constables and courts?

Mr. Aldrich: Certainly I would not, nor have I intimated anything of the kind.

7 CONG. REC. 3850 (1878) (statements of Reps. Ellis and Aldrich)

## Posse Comitatus

including marshals, U.S. Attorneys, governors, federal revenue agents, and local law enforcement officers.<sup>71</sup> Proponents of the Act argued that the execution of civil laws was not the proper function of the Army and that the Act was a necessary check on military power. Military enforcement of the laws was “perfectly shocking and monstrous” and suggested that the government was one of force rather than a free government.<sup>72</sup> Echoing Hamilton and Madison, Senator Hill stated, “Whenever the idea obtains that you need a military power to govern the great body of the people of this country you have given up the fundamental theory of your system of government; it is gone.”<sup>73</sup>

The Act’s proponents further argued that the use of the military in civil law enforcement not only led to ill will among the population, but also to an ever-greater reliance on the military:

The ill disposed become more and more exasperated at being coerced by a force which they think has been unconstitutionally employed against them, and the better disposed relax their efforts to punish local crimes, on the plea that this duty now devolves on the military. Hence in the case of a murder or a robbery there is a call for Federal troops to arrest and guard the criminals.<sup>74</sup>

It was perhaps for this reason that Army commanders had complained about their law enforcement role.<sup>75</sup> The Act ultimately limited use of the Army to situations where Congress had expressly mandated such support, including enforcing the neutrality laws, the collection of custom duties, and the civil rights bill.<sup>76</sup> In all other situations, the civil authorities were expected to rely on the populace of their jurisdiction, the traditional posse comitatus, to assist in the execution of the law.<sup>77</sup> The posse comitatus would not, however, include soldiers who should be commanded by their own officers rather than the civil

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71. 7 CONG. REC. 3579-82 (1878) (statement of Rep. Kimmel). Rep. Kimmel cited several Army reports concerning military involvement in civilian affairs. Examples included four companies of troops that had been used to collect revenue in New York in 1871, troops that had assisted civil authorities in Kentucky on over 400 occasions between 1871 to 1875, and seventy-one reports of military assistance to civil authorities in 1876 alone.

72. 7 CONG. REC. 4245 (1878) (statement of Sen. Merrimon); *see also* 7 CONG. REC. 4247 (1878) (statement of Sen. Hill).

73. 7 CONG. REC. 4247 (1878) (statement of Sen. Hill).

74. 7 CONG. REC. 3849 (statement of Rep. Hewitt) (quoting an 1870 report by General Halleck on the use of troops in executing judicial process and enforcing civil law).

75. 7 CONG. REC. 3579-82 (1878) (statement of Rep. Kimmel). There was also a sense that the military was not properly trained for domestic law enforcement. One senator facetiously suggested that a year of legal training be added to the curriculum at the Military Academy if soldiers were to become law enforcement officers. 7 CONG. REC. 4298 (1878) (statement of Sen. Matthews).

76. 7 CONG. REC. 3849 (1878) (statement of Rep. Knott). Senator Kernan elaborated on the meaning of “express authority”:

Unless there is some law that says that if there shall be resistance to the collection of the revenue the marshal may call in the military as a posse, I deny the right to so use it, notwithstanding the opinion of the Attorney-General. Unless there be some express authority to do it, I am opposed to leaving it so that any Attorney-General, under the general authority of the President to see that the laws are executed, may say that he can use the military against the citizen as a *posse comitatus* at all.

77. 7 CONG. REC. 4242 (1878) (statement of Sen. Kernan).

77. 7 CONG. REC. 4243 (1878) (statement of Sen. Merrimon).

authorities.<sup>78</sup> Clearly, if the populace refused to assist the authorities, the situation then would be akin to an insurrection. Under such circumstances, the state government could request that the President deploy the Army to restore order and allow the civil authorities to carry out their duties.<sup>79</sup> Otherwise, the PCA was a bar to anyone, civilian or military, from using troops to execute the law without congressional authorization.<sup>80</sup>

Whereas the Act's proponents saw the PCA as a reaffirmation of American principles supporting the separation of civil and military power, the congressional Republicans viewed it as a method for crippling the civil administration of government for crime prevention.<sup>81</sup> The Republicans argued that the bill was at best superfluous and vague,<sup>82</sup> and at worst a dangerous restriction on law enforcement.<sup>83</sup> Furthermore, the opponents of the Act argued that the enforcement of the matter through criminal penalties was not only improper, but "unmanly."<sup>84</sup>

After amending the bill to limit its application to the Army and to exclude military acts authorized by the Constitution, the Posse Comitatus Act became law.<sup>85</sup> Congress has only slightly amended the PCA since its passage. Today the statute 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 the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>86</sup>

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78. 7 CONG. REC. 4241 (1878) (statement of Sen. Sargent). The proponents further argued that the Attorney General was incorrect in his 1854 opinion, 6 Op. Att'y Gen. 466, 473 (1854), which had stated that the Army was naturally part of the posse comitatus. *See id.*

79. 7 CONG. REC. 3851 (1878) (statement of Rep. Gardner); 7 CONG. REC. 4243 (1878) (statement of Sen. Merrimon). Throughout the debate, proponents referred to the Whiskey Rebellion of 1794 and the refusal of the Boston citizenry to assist the marshal in enforcing the fugitive slave act as evidence of how rarely the situation would arise where the military would be necessary to enforce the law. 7 CONG. REC. 4243 (1878) (statements of Sen. Merrimon and Sen. Blaine).

80. One of the primary points of debate was for whom the law was intended. 7 CONG. REC. 4301 (1878) (colloquy of Sens. Christiancy and Conkling). Did Congress mean to have the local sheriff or the marshal charged with a criminal act? Was the law aimed at members of the military? If so, how far down the chain of command would the criminal liability extend? In debating this last point, some argued that the President could only be charged with a crime after being impeached, while the lowly foot soldier was expected to follow orders and, therefore, should not be charged with a crime for doing so. The Act's sponsors, however, saw the legislation as comprehensive, including everyone "from the Commander-in-Chief down to the lowest officer in the Army who may presume to take upon himself to decide when he shall use the military force in violation of the law of the land." 7 CONG. REC. 3847 (1878) (statement of Rep. Knott).

81. 7 CONG. REC. 3848 (1878) (statement of Rep. Burchard).

82. 7 CONG. REC. 4241 (1878) (statement of Sen. McMillan); 7 CONG. REC. 4297 (1878) (statement of Sen. Burnside).

83. 7 CONG. REC. 4241 (1878) (statement of Sen. Blaine).

84. 7 CONG. REC. 4242 (1878) (statement of Sen. Hoar).

85. The Act's inclusion in an Army appropriations bill explains the exclusion of the Navy. *See* 7 CONG. REC. 3845 (1878) (debating the germaneness of the Act's addition to an Army appropriations bill).

86. 18 U.S.C. § 1385 (2000). The Air Force was included in the statute in 1956, consistent with the creation of that new branch of the military. *See* *United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir.



Due to the Act's express references to the Army and the Air Force, questions have arisen as to whether the law applies to the other branches of the military. The courts have refused to extend the reach of the PCA beyond the named branches.<sup>87</sup> Military regulations, however, require that the Navy comply with the restrictions of the PCA.<sup>88</sup> Neither the PCA nor military regulations restrict the activities of the Coast Guard to execute the law.<sup>89</sup> Likewise, the PCA does not apply to the National Guard when in state service, since those units are considered to be the modern militia.<sup>90</sup> Finally, military involvement with law enforcement is permissible where it is limited to action that has an "independent military purpose" such as arresting a drug dealer or drunk driver on a military base.<sup>91</sup>

Although presidents have used troops domestically to execute the law without prior congressional authorization, the military has been used to accomplish specific objectives for short periods of time.<sup>92</sup> Congress has authorized the President to use the military during insurrections<sup>93</sup> and when domestic violence, unlawful combination, or conspiracy threatens the constitutional rights of the citizens of any state.<sup>94</sup>

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1991) (citing H.R. REP. NO. 71, at 4 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1786).

87. *Yunis*, 924 F.2d at 1093; *accord* *United States v. Roberts*, 779 F.2d 565, 567 (9th Cir. 1986); *see also* H.R. REP. NO. 71, at 4 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1786 (stating that the Navy is "not legally bound" by the PCA). Several members of Congress have suggested making the PCA applicable to all of the armed services, but these attempts have been unsuccessful. *See, e.g.*, H.R. 266, 94th Cong. (1975); H.R. 559, 94th Cong. (1975).

88. Department of Defense Directive 5525.5 Encl. 4, para. 3 (1986) (extending the PCA's application to the Navy and Marine Corps "as a matter of DoD policy"); Secretary of the Navy Instruction 5820.7B(9) (1988) (same). A similar provision in the Code of Federal Regulations, 32 C.F.R. § 213, was repealed by the Defense Department in 1993.

89. Although federal law defines the Coast Guard as part of the "armed services," 10 U.S.C. § 101(a)(4)(1998), in peacetime it is part of the Department of Transportation and is charged with law enforcement duties, 14 U.S.C. §§ 1-2 (1990). *See United States v. Chaparro-Almeida*, 679 F.2d 423 (5th Cir. 1982).

90. *See Perpich v. Dept. of Defense*, 496 U.S. 334 (1990).

91. *Hayes v. Hawes*, 921 F.2d 100, 103 (7th Cir. 1990); *Taylor v. State*, 640 So. 2d 1127, 1136 (Fla. App. D. 1994); H.W.C. Furman, *Restrictions upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 128 (1960) (arguing that acts performed primarily for the purpose of ensuring the accomplishment of the mission of the armed forces that incidentally enhance the enforcement of civilian law do not violate the PCA). The military purposes doctrine clearly includes violations of law committed on a military base. *See United States v. Banks*, 539 F.2d 14 (9th Cir. 1976); *Cafeteria & Rest. Workers Union Local 473 v. McElroy*, 367 U.S. 886 (1961) (power to maintain order, security, and discipline on a military facility is necessary for military operations).

92. *See AMERICAN MILITARY HISTORY* 600-02 (Maurice Matloff ed., 1969).

93. 10 U.S.C. §§ 331-32 (1998).

94. 10 U.S.C. § 333 (1998). For example, troops and federalized National Guardsmen were used to enforce the desegregation of schools during the late 1950s and early 1960s. 10 U.S.C. § 332 authorizes the President to use members of the armed forces or federalized National Guard troops to suppress any insurrection that makes it "impracticable to enforce the laws of the United States . . . by the ordinary course of judicial proceedings." President Eisenhower invoked this exception to the PCA in 1957 when he federalized the Arkansas National Guard to desegregate Little Rock's Central High School. Likewise, President Kennedy federalized the Mississippi National Guard in 1962 in another desegregation battle. The use of troops in Little Rock was the first time a President had exercised his power to federalize the militia to control a domestic disturbance since the Reconstruction Era. *See AMERICAN MILITARY*

Theoretically, at least, the principles of the Revolution had been reaffirmed and remained enforceable through the criminal penalties provided in the PCA. Despite the occasional unauthorized use of the military to execute the law, the PCA was rarely mentioned for a century after its passage,<sup>95</sup> and the courts so rarely had to interpret the law that one court described the PCA as “obscure and all-but-forgotten.”<sup>96</sup> The obscurity may have been a result of the Act’s effective curtailment of military involvement in law enforcement.<sup>97</sup> When the issue of military involvement in domestic matters has been examined, however, legislators and judges alike have been quick to reaffirm the traditions of civilian supremacy over military power<sup>98</sup> and the importance of preserving the “delicate balance between freedom and order.”<sup>99</sup>

Despite these normative defenses of the PCA, over the last 30 years, the protections offered by the PCA have been significantly eroded. Since the 1970s, the courts have narrowed the scope of the Act’s application, and during the 1980s, Congress specifically exempted certain military actions from the PCA, particularly in the context of the war on drugs. The next Part examines the judicial erosion of the PCA, while Part III examines the legislative exceptions enacted during the 1980s.

## II. JUDICIAL INTERPRETATIONS AND THE NEW EROSION

Despite the Posse Comitatus Act’s reaffirmation of the principle of limitations on the military’s law enforcement role, the protections offered by the PCA started to erode during the 1970s. Although federal courts consistently reaffirmed the importance of limiting the military’s domestic role, courts also narrowed the scope of the PCA by interpreting the Act to forbid only those military activities that are “regulatory, proscriptive or compulsory” in nature. This rule first appeared in *Laird v. Tatum* and was specifically applied to the

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HISTORY, *supra* note 92, at 600-01.

95. For example, the post-Reconstruction army restored order during the Colfax County and Lincoln County range wars in New Mexico between 1877 and 1880, played a role in ending the practice of open polygamy in Utah in 1885, and suppressed anti-Chinese demonstrations on the west coast from 1885-1886. The military also played an important role in major labor disputes such as the Pullman Strike of 1894. See HUMMEL, *supra* note 63, at 329. During World War II, the military tried civilians accused of purely civilian crimes until the Supreme Court ended the practice in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

96. *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948).

97. See Paul Jackson Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. L. REV. 109, 111 (1994).

98. *Laird v. Tatum*, 408 U.S. 1, 20 (1972); see, e.g., Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264; 7 CONG. REC. 4247 (1878) (statement of Sen. Hill).

99. *Raymond v. Thomas*, 91 U.S. 712, 716 (1875) (“It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires.”); see also *Laird*, 408 U.S. at 19 (Douglas, J., dissenting); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (refusing to expand the “theater of war” concept to allow executive ostensibly taken to maintain the production of materials essential to the war effort during the Korean War).

PCA in the so-called “Wounded Knee” cases. Finally, the courts during this period limited the Act’s effectiveness by refusing to apply the exclusionary rule to evidence obtained in violation of the Act. Regardless of where courts draw the line between “active” and “passive” military activity, however, the court cases of this era emphasize the impact on the individual to the exclusion of all other considerations. No consideration is given to the effect that “passive” activity has on military preparedness nor does the doctrine take into consideration what negative effects such cooperation has on the civilian police.

A. *Laird v. Tatum: Establishing a Standard*

In 1967 and 1968, the military assisted state and local law enforcement to quell civil disorders and urban riots.<sup>100</sup> As a result of these missions, and to better respond to future disturbances, the Army established a data-gathering system to collect and analyze information on civilians and groups who posed a potential security threat.<sup>101</sup> In *Laird v. Tatum*, several targeted groups objected to this surveillance of civilians, claiming such activity had a chilling effect on their right to free speech.<sup>102</sup>

The Supreme Court found no such threat because the activity was not “regulatory, proscriptive, or compulsory” on the plaintiffs.<sup>103</sup> In other words, the military activities at issue in the case did not regulate, forbid, or compel certain conduct by the civilian groups that were targeted by the military for surveillance.<sup>104</sup> Although Chief Justice Burger recognized a traditional and

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100. President Lyndon Johnson ordered federal troops to assist local authorities during the civil disorders in Detroit, Michigan in the summer of 1967 and during the disturbances that followed the assassination of Dr. Martin Luther King. President Johnson acted pursuant to 10 U.S.C. § 331, which allows the President to make use of the armed forces to quell insurrection and other domestic violence if and when the conditions described in that Section arise within one of the states. *Laird*, 408 U.S. at 3-4.

101. *Laird*, 408 U.S. at 5-6. The Army claimed that the data-gathering system was necessary to develop better planning so that it could respond to civil disturbances effectively with a minimum of force. The information collected came principally from the news media, publications in general circulation, information gathered by Army Intelligence agents who attended meetings that were open to the public, and from information provided by civilian law enforcement agencies. This information was stored in a Defense Department databank and shared with regional Army Intelligence offices and with the appropriate law enforcement agencies. The Court of Appeals observed that since the Army was unfamiliar with local situations, it had a need for greater information if it was going to function as a police force or as a back-up to a local police force. See *Tatum v. Laird*, 444 F.2d 947 (D.C. Cir. 1972).

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

103. *Id.* at 8, 11, 13-14. The Court distinguished the Army’s surveillance in *Laird* from cases where government activity had an improper chilling effect on speech. See, e.g., *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); *Baggett v. Bullitt*, 377 U.S. 360 (1964). Such instances of chilling, however, did not arise from the individual’s mere knowledge that the government was engaged in certain activities or from the individual’s fear of some future action that would be detrimental to the individual. Rather, in the above cases, the challenged governmental activity was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to that activity. *Laird*, 408 U.S. at 11.

104. A later case further defined these terms as follows: regulatory power means “controls or directs”; proscriptive power either “prohibits or condemns”; and compulsory power requires “coercive

strong resistance of Americans to any military intrusion into civilian affairs, he declined to allow the courts to conduct a broad investigation of the Army without any actual or immediate threat of injury to an aggrieved citizen.<sup>105</sup> Perhaps a bit optimistically, the Chief Justice stated that nothing in the nation's history or the Supreme Court's decisions would lead one to believe that "actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied."<sup>106</sup>

Justices Douglas and Marshall strongly dissented, arguing that the courts should protect citizens from the possibility of improper activity by the military.<sup>107</sup> After reviewing the history of separation between the military and the civilian population, Justice Douglas called the Army's surveillance of civilians in this case a "gross repudiation of our traditions" and a "usurpation dangerous to the civil liberties on which free men are dependent."<sup>108</sup> Justice Douglas rejected the majority's assertion that there was no demonstrated harm or threat of imminent harm, finding that the Army's surveillance "exercises a *present inhibiting effect* on [the plaintiff's] full expression and utilization of their First Amendment rights."<sup>109</sup>

Ultimately, Congress investigated the Army's surveillance activities before the Supreme Court considered *Laird v. Tatum*. After a Senate subcommittee's inquiry in 1970, the Army ordered a significant reduction in the scope of the intelligence-gathering program to matters of immediate concern to the Army or incidents beyond the capability of the police or the National Guard.<sup>110</sup> Still, *Laird* marked the beginning of the "regulatory, proscriptive or compulsory" standard for review of military action.

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force." *United States v. Yunis*, 681 F. Supp. 891, 895-96 (D.D.C. 1988) (denying motion to dismiss indictment for hijacking where the defendant was transported to the United States aboard an U.S. naval vessel).

105. *Laird*, 408 U.S. at 15.

106. *Id.* at 16.

107. Justices Brennan and Stewart also dissented.

108. *Laird*, 408 U.S. at 23-24.

109. *Id.* at 25. This point was demonstrated by the scale and scope of the Army's surveillance, the Army's use of undercover agents, and the fact that the information was shared with the FBI, the CIA, and state and municipal police departments. The dissenters further stated that an even more serious constitutional question would have existed if Congress had passed a law authorizing the armed services to establish surveillance over the civilian population. *Id.*

110. *Federal Data Banks, Computers and the Bill of Rights: Hearing Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong. (1971). The Army's new policies were set forth in a letter to the Subcommittee's chairman, Senator Sam J. Ervin:

[R]eports concerning civil disturbances will be limited to matters of immediate concern to the Army—that is, reports concerning outbreaks of violence or incidents with a high potential for violence beyond the capability of state and local police and the National Guard to control. [These reports] will not be placed in a computer [and will be] destroyed 60 days after publication or 60 days after the end of the disturbance.

*Laird*, 408 U.S. at 7-8.

## Posse Comitatus

### B. *Wounded Knee: Application of the Standard to the Posse Comitatus Act*

Federal courts reexamined the Posse Comitatus Act during a series of cases arising from the early 1970s military standoff in Wounded Knee, South Dakota. The Wounded Knee cases mark the beginning of a narrow interpretation of the Posse Comitatus Act based on the *Laird* standard, which is more limited than the original intent of the Act's sponsors. This interpretation ultimately contributed to increased military involvement in domestic law enforcement.

On the evening of February 27, 1973, a group of over 100 people looted the trading post in Wounded Knee, South Dakota.<sup>111</sup> The group shot out the lights around the trading post, carried the contents of the trading post to a nearby church, and took some Wounded Knee residents hostage for several days. The Bureau of Indian Affairs and Federal Bureau of Investigation responded to the scene and established roadblocks around the town. A few days later, the occupiers of Wounded Knee, behind their own roadblocks, traded shots with the federal authorities.<sup>112</sup> During the operation, Colonel Volney Warner, Chief of Staff of the 82nd Airborne Division of the United States Army, represented the military. Colonel Warner's primary role was to advise the Department of Defense whether it should commit troops and whether the Justice Department's requests for supplies and materiel should be approved. Colonel Warner also actively advised Justice Department personnel on the conduct of law enforcement during the standoff and the use of military supplies.<sup>113</sup> Although some believed that Colonel Warner had an "inflated concept of his function and duties,"<sup>114</sup> he was clearly an active participant in the government's response to the occupation. In addition to Colonel Warner's involvement, the Nebraska National Guard provided aerial reconnaissance and the South Dakota National Guard repaired and maintained Army-provided armored personnel carriers.<sup>115</sup>

The Wounded Knee occupation resulted in the arrest and prosecution of several people apprehended within the patrolled perimeter around the town of Wounded Knee.<sup>116</sup> Several of the defendants were convicted of violating the Civil Disobedience Act of 1968 for attempting to smuggle arms and ammunition into Wounded Knee, where the weapons would be used against law enforcement officials.<sup>117</sup> At trial and on appeal, the PCA was a central

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111. The history of the occupation of Wounded Knee is recounted in *United States v. Jaramillo*, 380 F. Supp. 1375, 1376-77 (D. Neb. 1974).

112. *Jaramillo*, 380 F. Supp. at 1379.

113. *Id.* at 1379-80.

114. *United States v. McArthur*, 419 F. Supp. 186, 194-95 (D.N.D. 1976) (noting Colonel Warner's claim that he had a vote in final policy decisions).

115. *Jaramillo*, 380 F. Supp. at 1380.

116. The defendants were attempting to enter Wounded Knee with several weapons including a shotgun, a .30 caliber rifle, and a large amount of ammunition. *See, e.g., United States v. Casper*, 541 F.2d 1275, 1277 (8th Cir. 1976).

117. *Id.*

issue. The defendants argued that the law enforcement officers at Wounded Knee were not “lawfully engaged in the lawful performance of [their] official duties” because the officers’ use of the armed forces constituted a violation of the PCA.<sup>118</sup>

The various federal judges presiding over the Wounded Knee prosecutions established differing standards for interpreting the PCA. In *United States v. Red Feather*, District Judge Bogue extensively reviewed the legislative history of the PCA. He looked at whether there was a “direct active use” of any unit of federal military troops of whatever size, even if it be one single soldier.<sup>119</sup> After finding no evidence of a direct, active use of the military, Judge Bogue found the evidence of military activity that did occur to be irrelevant and denied its admission at trial.<sup>120</sup> In contrast, District Judge Urbom, writing in *United States v. Jaramillo*,<sup>121</sup> acquitted the defendants based on a broad reading of the PCA. Relying on a far more detailed history of the military’s involvement at Wounded Knee than found in the *Red Feather* decision,<sup>122</sup> Judge Urbom framed the issue as whether a “use of any part of the Army or the Air Force . . . pervaded the activities of the United States marshals and the Federal Bureau of Investigation agents.”<sup>123</sup> Because of Colonel Warner’s extensive involvement at Wounded Knee, the judge felt that the crucial element—that the law enforcement officers were lawfully engaged in the performance of their duties—had not been established beyond a reasonable doubt.<sup>124</sup>

District Judge VanSickle, writing in *United States v. McArthur*, reviewed the *Red Feather* and *Jaramillo* standards, but found neither satisfactory. Although VanSickle acknowledged that Judge Urbom’s “pervading” test was a well-established approach in constitutional law, he argued that the rule would

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118. *Id.*

119. *United States v. Red Feather*, 392 F. Supp. 916, 922 (D.S.D. 1975). The judge enumerated several situations that would constitute “active” and “passive” roles for the military. Among the active roles that are prohibited by the PCA are “arrest; seizure of evidence; search of a person; search of a building; investigation of a crime; interviewing witnesses; pursuit of an escaped civilian prisoner; [and] search of an area for a suspect.” “Passive” roles which might constitute “indirect” aid to law enforcement may include mere presence of military personnel under orders to report on the necessity for military intervention, preparation for contingency plans, giving advice to civilian law enforcement on tactics or logistics, the delivery of military materiel and supplies, to train local law enforcement officials on the proper use and care of the loaned material, and aerial photographic reconnaissance flights. *Id.* at 925.

120. *Id.* at 925.

121. *United States v. Jaramillo*, 380 F. Supp. 1375 (D. Neb. 1974).

122. Compare *Jaramillo*, 380 F. Supp. at 1379-80, with *Red Feather*, 392 F. Supp. at 921. The two fact patterns are both noted in *United States v. McArthur*, 419 F. Supp., 186, 192-93 (D.N.D. 1976). The Court of Appeals later adopted and cited the *Jaramillo* fact pattern. *United States v. Casper*, 541 F.2d 1275, 1277 n.4 (8th Cir. 1976).

123. *Jaramillo*, 380 F. Supp. at 1379 (emphasis added).

124. The judge, however, was careful to point out that he had not found that the marshals or FBI agents had violated the PCA or that their actions were unlawful. Rather, the prosecution simply had not established that the actions of law enforcement were lawful. *Id.* at 1381.

require a judgment to be “made from too vague a standard.”<sup>125</sup> Judge VanSickle also dismissed Judge Bogue’s rule in *Red Feather* as “too mechanical” and likely to “crumble at the edges” when applied to borderline cases.<sup>126</sup> Arguing that the PCA was intended to prevent the danger inherent in having military personnel, who are not trained to protect constitutional freedoms, attempting to enforce the law, Judge VanSickle stated that “[h]istory tells us that Americans are suspicious of military authority as a dangerous tool of dictatorial power—dangerous, that is, to the freedom of individuals.”<sup>127</sup> Balanced against this potential danger, however, were the governmental goals of economy and efficiency that allow various agencies to share materials, supplies, equipment, or services.<sup>128</sup>

Judge VanSickle also read the PCA term “execute” as implying an “authoritarian act.”<sup>129</sup> Because the statute only applied to authoritarian acts, and resorting to the *Laird v. Tatum* standard, the judge held that the PCA only prohibits military action that is “regulatory, proscriptive or compulsory in nature, and causes the citizens to be presently or prospectively subject to regulations, proscriptions, or compulsions imposed by military authority.”<sup>130</sup> In applying the facts of the case to this standard, the court found that the military involvement was not extensive enough to overturn the presumption that “one or more” law enforcement officers were acting in performance of their duties.<sup>131</sup> Unlike the ruling in *Jaramillo*, Judge VanSickle saw the military involvement, and specifically the role of expert advisers, as analogous to the loaning of equipment between government agencies.<sup>132</sup>

The Eighth Circuit Court of Appeals reviewed the various District Court decisions and their competing legal interpretations of the PCA, and adopted the *McArthur* analysis of Judge VanSickle.<sup>133</sup> Since then, both the courts and the military have generally interpreted the PCA as allowing military involvement in law enforcement matters, so long as the assistance is “passive.”<sup>134</sup> One

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125. *United States v. McArthur*, 419 F. Supp. 186, 194 (D.N.D. 1976).

126. *Id.*

127. *Id.* at 193.

128. *Id.* at 194 (citing The Economy Act, 31 U.S.C. § 686).

129. *Id.* at 194.

130. *Id.* (citing *Laird v. Tatum*, 408 U.S. 1 (1972), as the inspiration for the court’s language).

131. *Id.* at 195.

132. *Id.*

133. *See United States v. Casper*, 541 F.2d 1275, 1277 (8th Cir. 1976).

134. *See, e.g., Bissonette v. Haig*, 800 F.2d 812 (8th Cir. 1986), *aff’d*, 485 U.S. 264 (1988), *State v. Nelson*, 260 S.E.2d 629 (N.C. 1979). In *Bissonette*, the Eighth Circuit found that the military’s use of roadblocks and armed patrols had violated the PCA. The court observed that military involvement in civilian law enforcement does not violate the Act unless it regulates, forbids, or compels certain conduct by those who seek relief. The Army, therefore, did not violate the Act by providing personnel, planes, and supplies for surveillance at Wounded Knee, or by furnishing advice to civilian authorities. Creating an armed defense perimeter, however, is regulatory, proscriptive, or compulsory within the scope of the *Laird* test.

commentator suggests that the “closer the role of the military personnel comes to that of a police officer on the beat, the greater the likelihood that the [Posse Comitatus] Act is being violated.”<sup>135</sup> For example, if the military houses, transports, or cares for a prisoner in federal custody, it is not considered a violation of the PCA.<sup>136</sup> When, however, the military participates in a search, seizure, or arrest, the Act is violated.<sup>137</sup>

There has been disagreement among commentators as to which of the Wounded Knee decisions best reflects the congressional intent of the PCA. One commentator believes that the broad reading of the PCA found in *Jaramillo* is the correct interpretation because the Act did not create an active/passive distinction.<sup>138</sup> Such a distinction, he argues, would make compliance with the Act more confusing, thus resulting in more violations.<sup>139</sup> Another commentator, however, argues that the limited reading of the Act found in *Red Feather* is the most workable of the three interpretations.<sup>140</sup>

In fact, the *McArthur* analysis of the PCA may have led to more military interventions on the domestic scene, but the federal courts have rarely declared them violations. For example, in *United States v. Al-Talib*,<sup>141</sup> the Fourth Circuit held that there was no violation of the PCA when the Air Force transported a car and drugs from one state to another on behalf of the Drug Enforcement Administration. The court held that barring a direct, personal connection between the military involvement and the defendants, such as using the military to “hunt down” or confine the defendants, there was no violation of the PCA.<sup>142</sup> This formula required an even greater degree of military involvement for a violation than the Wounded Knee interpretation, thus highlighting the further erosion of the PCA.

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135. Trebilcock, *supra* note 69, at 1-2.

136. See, e.g., *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991). In *Yunis*, the District of Columbia Circuit found no violation of the PCA when the Navy held and transported a suspected hijacker while the FBI conducted an interrogation. The Court of Appeals held that the Navy’s acts complied with the Department of Defense regulations “allowing ‘indirect assistance’ to civilian authorities that does not ‘subject civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature.’” *Id.* at 1094 (citing 32 C.F.R. § 213.10(a)(7) (1987)). The Navy’s role, therefore, did not amount to “direct active involvement in the execution of the laws,” and it did not “pervade the activities of civilian authorities.” *Yunis*, 924 F.2d at 1094.

137. See, e.g., *Taylor v. State*, 645 P.2d 522 (Okla. Crim. App. 1982) (holding that the PCA was violated where an Army Criminal Investigation Department (CID) agent participated in an undercover drug purchase, arrested the defendant, searched the defendant’s house, delivered the evidence seized during the search to the state police, and completed forms pertaining to that evidence).

138. Meeks, *supra* note 34, at 122.

139. *Id.* at 123.

140. See Rice, *supra* note 97, at 116.

141. 55 F.3d 923 (4th Cir. 1995).

142. *Id.* at 930.



C. *Enforcement of the PCA: The Exclusionary Rule Debate*

Even when military action is declared a violation, courts, prosecutors, and the military have been unwilling to take meaningful action. First, no prosecution for a violation of the PCA has ever been brought.<sup>143</sup> A PCA violation may result in the dismissal of a case where the violation has the effect of making an element of the crime impossible to prove, as in the Wounded Knee cases.<sup>144</sup> This, however, is a rare situation. A more effective remedy in many cases where evidence is obtained through a PCA violation would be the use of the exclusionary rule.<sup>145</sup> Since the Warren Court, the exclusionary rule has become the principal method to deter police from using unconstitutional methods of law enforcement and to preserve the integrity of the judicial system.<sup>146</sup> In cases where evidence has been obtained through violations of the PCA, the exclusion of such tainted evidence would serve as a more effective deterrent than the currently toothless criminal penalty established in the PCA. But shortly after the federal courts narrowed the scope of the PCA, they displayed a reluctance to impose the exclusionary rule in these cases.

In *United States v. Walden*,<sup>147</sup> the Treasury Department used three Marines as undercover agents to purchase weapons from the defendant's retail gun shop. The defendant unsuccessfully attempted to suppress the Marines' testimony, which proved instrumental to obtaining convictions under the Federal Firearms Act,<sup>148</sup> by arguing that the investigation violated the PCA and the corresponding Navy Instruction.<sup>149</sup> The court upheld the convictions despite finding that the use of Marines violated Navy regulations that had effectuated the congressional intent of the PCA. The court cautioned, however, that the exclusionary rule could be applied to similar cases in the future if such violations became "frequent and widespread" or if the military was ineffective in its enforcement of the PCA.<sup>150</sup>

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143. See, e.g., H.R. REP. NO. 97-86, at 5 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1781, 1787 (stating that there have been no PCA-related prosecutions in the statute's history).

144. See *supra* note 118 and accompanying text.

145. Typically, evidence obtained in violation of a defendant's constitutional rights may be excluded. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending the exclusionary rule for violations of the Fourth Amendment to state courts); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that the exclusionary rule for violations of Fourth Amendment is mandated in federal courts); see also *Terry v. Ohio*, 392 U.S. 1, 12 (1968) (arguing that without the exclusionary rule, the constitutional guarantee against unreasonable searches and seizures would be "a mere form of words"); CHESTER JAMES ANTIEAU, *MODERN CONSTITUTIONAL LAW* 314 (2d ed. 1997).

146. The Supreme Court tends to focus exclusively on the deterrence rationale. See, e.g., *United States v. Calandra*, 414 U.S. 338, 350-52 (1974). The second rationale is only rarely invoked. See, e.g., *Harker v. State*, 663 P.2d 932, 934 (Alaska 1983) (stating the judicial integrity rationale would only be applied in cases of gross police misconduct).

147. 490 F.2d 372 (4th Cir. 1974).

148. 18 U.S.C. §§ 921-28 (1968).

149. *United States v. Walden*, 490 F.2d 372, 373 (citing Secretary of the Navy Instruction 5400.12 (1969) (stating that the Navy will comply with the restrictions of the PCA as a matter of policy)).

150. *Walden*, 490 F.2d at 377 (refusing to apply the exclusionary rule on the grounds that the

Since *Walden*, several federal and state courts have refused to apply the exclusionary rule as a remedy for a violation of the PCA.<sup>151</sup> In part, this refusal is due to the fact that the PCA itself identifies the consequences of a violation as a criminal penalty.<sup>152</sup> Alternatively, courts hold that a PCA violation does not amount to a constitutional violation and therefore neither dismissal of the charges nor the exclusionary rule is an appropriate remedy.<sup>153</sup>

In contrast, the Hawaii Supreme Court has used the exclusionary rule as a remedy for a PCA violation to protect the integrity of judicial proceedings and to protect citizens from undue interference from the military. In *State v. Pattioay*, ongoing undercover investigations involving the Army's Criminal Investigation Department (CID) and the Honolulu Police Department (HPD) resulted in convictions of civilian drug dealers.<sup>154</sup> Armed CID investigators routinely made drug buys and tested the purchased cocaine before turning it over to the Honolulu Police Department. During the buys, a joint CID and HPD surveillance team provided protection for the undercover agent. After several months of buys, the HPD searched the defendant's house and arrested the defendants.<sup>155</sup> The court rejected the prosecution's argument that the CID conduct came under the military purposes exception to the PCA.<sup>156</sup> The court

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prohibition of Marine involvement in civil law enforcement was not widely known and because this was the first such violation brought to that court's attention).

151. See, e.g., *Gilbert v. United States*, 165 F.3d 470 (6th Cir. 1999); *United States v. Al-Talib*, 55 F.2d 923, 930 (4th Cir. 1993); *Hayes v. Hawes*, 921 F.2d 100, 103 (7th Cir.1990); *United States v. Griley*, 814 F.2d 967, 976 (4th Cir. 1987); *United States v. Hartley*, 796 F.2d 112, 115 (5th Cir. 1986); *United States v. Wolffs*, 594 F.2d 77, 85 (5th Cir. 1979); *Taylor v. State*, 640 So. 2d 1127, 1136 (Fla. Dist. Ct. App. 1994); *Lovelace v. State*, 411 S.E.2d 770, 771 (Ga. 1991).

152. See, e.g., *State v. Valdobinos*, 858 P.2d 199, 204 (Wash. 1993); J.W. Julian, *Noriega: The Capture of a State Leader and Its Implications on Domestic Law*, 34 AIR FORCE L. REV. 153, 172 (1991) (discussing *United States v. Hartley*, 796 F.2d 112 (5th Cir. 1986); and *United States v. Roberts*, 779 F.2d 565 (9th Cir. 1986)).

153. *United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991); *United States v. Cotton*, 471 F.2d 744, 749 (9th Cir. 1973) (rejecting dismissal as a remedy for an alleged violation of the PCA on *Ker-Frisbie* grounds); *Hartley*, 796 F.2d at 115 (noting court's hesitation to adopt exclusionary rule for violations of the PCA); *Roberts*, 779 F.2d at 568 (refusing to adopt exclusionary rule); *People v. Hayes*, 494 N.E.2d 1238, 1240-41 (Ill. 1986) (holding that the exclusionary rule is never an appropriate remedy regardless of how egregious the violation). In 1995, the Fourth Circuit held that as a general rule, the exclusionary rule is unavailable as a remedy for a violation of the PCA. *Al-Talib*, 55 F.3d at 930.

154. *State v. Pattioay*, 896 P.2d 911, 912-14 (Haw. 1995). This relationship between the police and the military was an ongoing one; one CID officer estimated that over fifty percent of the undercover activities performed by the Army CID during his tenure were directed against civilian targets and that he was involved with between twenty-five and fifty such cases. One member of the CID testified that he was given guidelines for "targeting" civilians in military investigations, which specified that where a soldier, military dependant, or Department of Defense civilian has stated that drugs had been purchased from civilians, a sufficient military connection exists to justify controlled "off post" drug purchases, including surveillance of alleged civilian drug suppliers. *Id.* at 913.

155. Military personnel neither prepared or executed the search warrant, and they did not participate in the arrests. *Id.* at 913.

156. The military purpose doctrine did not apply because there was no nexus between civilian drug dealing, military personnel, and the military base at which the purchasers were stationed. *Id.* at 921; see also *Moon v. State*, 785 P.2d 45, 46-47 (Alaska Ct. App. 1990), *aff'd*, *Kim v. State*, 817 P.2d 467 (Alaska 1991) (holding that military enhancement of civilian law enforcement efforts is acceptable where narcotics dealers seemed to target military personnel); *Hawes*, 921 F.2d at 103 (admitting

held that this matter was clearly the responsibility of civilian law enforcement and that the military assistance was in direct contravention of the PCA and federal regulations.<sup>157</sup> Furthermore, the court rejected the government's argument that suppression was not justified because the military did not act "precipitously" and because there was no history of PCA violations in Hawaii. Instead, the court found that the military involvement was "clearly pervasive and largely unregulated by civilian law enforcement officials"<sup>158</sup> and warranted suppression to deter the military's conduct.<sup>159</sup>

Although the court refused to find a personal right to be free from military involvement in civilian criminal investigations within the state constitution,<sup>160</sup> it suppressed the tainted evidence based on the "imperative of judicial integrity."<sup>161</sup> The court held that only the exclusion of illegal evidence "will compel respect for the federal law 'in the only effective way—by removing the incentive to disregard it.'"<sup>162</sup> The court refused to rely on the PCA's statutory remedy because it would not only obviate the court's role in supervising criminal prosecutions, but would be a "judicial sanction of federal law violations by federal military personnel."<sup>163</sup>

In addition to the courts, the military has been accused of taking a slack approach to PCA compliance. Even before the Fourth Circuit issued its rebuke in *Walden*, the Director of the Marine Corps Judge Advocate Division issued a memorandum to Marine staff judge advocates calling for strict compliance with

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evidence of off-base drug purchase by naval agent after a sailor identified a location as the source of the drugs because the activities were "like those of an undercover civilian cooperating with the police in a controlled drug transaction". But see *Kim*, 817 P.2d at 470-71 & n.10 (Alaska 1991) (Rabinowitz, J., dissenting) (arguing that the military's interest in the health and safety of its personnel does not establish a "military function" or "primary [military] purpose" under 32 C.F.R. § 213.10(a)(2)(i)).

157. *Pattioay*, 896 P.2d at 915 (citing 32 C.F.R. § 213.10(a)(3)(iv)).

158. *Id.* at 915.

159. *Id.* at 924-25.

160. Although the court specifically stated that the PCA "does not spawn personal rights," it did cite the state constitution as requiring that "[t]he military shall be held in strict subordination to the civil power." *Id.* at 922 (citing HAW. CONST. art. I, § 16). Therefore, a local commentator has observed that it is illegal to use the military forces of the United States to enforce the civil laws of the State of Hawaii. In large part, this is because of Hawaii's experience under martial law during World War II. *Pattioay*, 896 P.2d at 919 (citing Stephen K. Christensen, *Suppression of Evidence Without the Aid of the Fourth, Fifth and Sixth Amendments*, 8 HAW. B.J. 109, 112 (1972)).

161. This protection of the judicial process was necessary because the PCA is enforced through purely theoretical criminal penalties in that "no one has been charged or prosecuted under the [PCA] since its enactment." H.R. Rep. No. 97-71 at 5 (1981), reprinted in 1981 U.S.C.C.A.N. 1781, 1787; see also *United States v. Walden*, 490 F.2d 372, 376-77 (4th Cir. 1974). The U.S. Supreme Court provided guidance in *Lee v. Florida*, 392 U.S. 378 (1968), where it suppressed evidence gained in violation of another federal statute, the Federal Communications Act of 1934, that includes a never-used criminal penalty. *Pattioay*, 896 P.2d at 923-24 (citing *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that states cannot adopt rules of evidence calculated to permit the invasion of rights protected by federal law)).

162. *Pattioay*, 896 P.2d at 924 (citing *Lee v. Florida*, 392 U.S. at 387). The court also cited *State v. Santiago*, 492 P.2d 657, 663 (Haw. 1971), for the proposition that "[t]he objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system."

163. *Pattioay*, 896 P.2d at 926; (citing *Elkins v. United States*, 364 U.S. 206, 222-23 (1960)).

the PCA and pertinent regulations.<sup>164</sup> Furthermore, the Secretary of the Navy forbade naval and Marine personnel from enforcing or executing local, state, or federal civil law except when specifically approved by either the Secretary of Defense or the Secretary of the Navy.<sup>165</sup> It should be noted, however, that approval of the Secretary of the Navy or even the Secretary of Defense is not as high of a bar as the congressional approval required by the PCA.

Despite the seemingly strong reaction by the Navy after *Walden*, one commentator took issue with the Department of Defense's general attitude toward the PCA. He argued that the attitude and philosophy of the Defense Department was indicated by the "absolute lack of regulations which provide guidance to the commander" regarding requests for assistance from local law enforcement.<sup>166</sup> What little direction field commanders did have, however, seemed to be contradicted by another directive that not only recommended, but required, cooperation between commanders, government officials, and community leaders.<sup>167</sup> This directive not only ignored the PCA, but even encouraged activity that would violate the Act.<sup>168</sup> In this instance, the Department of Defense's "zeal to enhance public relations" contributed to the Department's indifference to the PCA.<sup>169</sup>

### III. THE WAR ON DRUGS: NEW LEGISLATIVE EXCEPTIONS

In 1986, the President's Commission on Organized Crime declared that, "perhaps the single most valuable development in the area of [drug] interdiction in recent years" was the increased assistance of the Department of

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164. Meeks, *supra* note 34, at 103.

165. This Instruction dates back to 1974. *Id.* (citing Secretary of the Navy Instruction 5820.7 (1974)). The policy has been reiterated in subsequent instructions. Secretary of the Navy Instruction 5820.7B (1988) ("Although use of the Navy and Marine Corps as a posse comitatus is not criminal under the Posse Comitatus Act, such use is prohibited, with exceptions as contained in this instruction, as a matter of Department of Defense policy."). This Instruction specifies that the Secretary of Defense must approve the use of fifty or more naval personnel for than thirty days, granting the Secretary of the Navy authority to approve other requests. *Id.* Maj. Meeks points out that, in the opinion of the Judge Advocate General of the Navy, the Instruction was promulgated because the Secretary of the Navy wanted to ensure that violations of the Act were punishable under Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 (1970). Meeks, *supra* note 34, at 103 (citing Op. J.A.G.N. 1974/3363 (1974)).

166. Meeks, *supra* note 34, at 108. At that time, the only guidance available to the field commander was two directives that established the procedures the Department will follow when the President acts under a recognized exception to the PCA to quell civil disturbances or to protect federal property or functions. *Id.* at 108-9. These directives deal with the use of troops pursuant to an Executive Order (Department of Defense Directive 3025.12 (1971, *reissued* 1973)), and the provision of aid to the District of Columbia for combating crime (Department of Defense Directive 5030.46 (1971)). Under the first directive, a field commander may act within his own discretion to prevent loss of life or wanton destruction of property or respond to terrorist activities after consulting with the FBI at the scene. Meeks, *supra* note 34, at 109 (citing Letter of Agreement on Assistance in Combating Terrorism from Attorney General R.G. Kleindienst to Secretary of Defense Melvin R. Laird (Nov. 10, 1972)).

167. Department of Defense Directive 5410.18 (1974).

168. Meeks, *supra* note 34, at 109-10. For example, the Directive suggests that the military may be used as a "security cordon," which Meeks argues would violate the PCA. *Id.* at 110.

169. *Id.* at 134.

## Posse Comitatus

Defense.<sup>170</sup> This assistance became possible due to the passage of statutory exceptions to the Posse Comitatus Act designed to allow the military to take a more active role in the war on drugs. In addition to the drug war, the end of the Cold War in the early 1990s contributed to a perception that the military was without a mission and should be utilized in law enforcement.<sup>171</sup> The legislative exceptions to the PCA created during this period and a change in military policy encouraged an ever-closer relationship between the military and police. Although some have called these changes modest,<sup>172</sup> these exceptions have had a dramatic impact as the line between the military and civilian law enforcement has become increasingly blurred.

### A. *The Military Cooperation with Law Enforcement Officials Act*

In 1981, Congress enacted the Military Cooperation with Law Enforcement Officials Act.<sup>173</sup> Despite resistance from the military, Congress created exceptions to the PCA allowing the military to help enforce drug, immigration, and tariff laws.<sup>174</sup> The Act clarified and “mildly” expanded the powers of the military to cooperate with law enforcement by providing equipment, research facilities, and information; by training and advising police on the use of loaned equipment; and by assisting law enforcement personnel in keeping drugs from entering the country.<sup>175</sup>

First, the Act authorizes the military to share information with law enforcement officials when the information is collected “during the normal course of military operations” and is relevant to a violation of federal or state law.<sup>176</sup> Second, the Act clarifies and regulates when military equipment can be loaned to law enforcement officials, an issue that arose in the wake of

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170. AMERICA'S HABIT, *supra* note 4, at 379.

171. The end of the Cold War effectively left the United States with a huge military and only limited interests overseas. See Schlichter, *supra* note 20, at 1293; Jeff Greenfield, *Rethinking the Formula*, L.A. TIMES, Jan. 10, 1993, at M1; Jed C. Snyder, *Must the U.S. Disengage?*, NAT'L REV., Nov. 16, 1992, at 24.

172. See, e.g., *supra* note 97.

173. Pub. L. No. 97-86, § 905, 95 Stat. 1115 (codified as amended at 10 U.S.C. §§ 371-78 (1998)).

174. Laurence Kolb, an Assistant Secretary of Defense during the Reagan Administration, stated that the exceptions were controversial, mostly because the military resisted playing a supporting role to law enforcement agencies. *NewsHour 1997*, *supra* note 8; see also William Matthews, *Critics Say Stay at Home Role Will Hamper Readiness*, ARMY TIMES, Oct. 26, 1992, at 24.

175. Rice, *supra* note 97, at 112-13. The characterization of the new exceptions as “mild” is Colonel Rice's. *Id.* at 111.

176. 10 U.S.C. § 371. Although this use of the military had never been questioned, Congress believed the clarification would spur on greater information sharing to combat the drug war. See H.R. REP. NO. 97-71, pt. 2, at 8 (1981), reprinted in 1981 U.S.C.C.A.N. 1785, 1791 (“For example, the scheduling of routine training missions can easily accommodate the need for improved intelligence information concerning drug trafficking in the Caribbean.”). In response, the Secretary of Defense directed that the military could take law enforcement needs into consideration if such information could be gathered as an “incidental aspect” of training. Department of Defense Directive 5525.5 Encl. 2, para. 1.4 (1986).

Wounded Knee.<sup>177</sup> The Act allows such loans as long as the assistance does not adversely affect military preparedness.<sup>178</sup> Similarly, the Act allows the military to train and advise civilian law enforcement on the operation and maintenance of loaned equipment,<sup>179</sup> but seemingly excludes other types of training, including crowd and riot control or authorizing use of a Green Beret training course for urban SWAT teams.<sup>180</sup> Finally, expert advice from the military is specifically authorized as long as the military advisor does not assert that authority in such a way as to place himself in charge.<sup>181</sup>

Ultimately, much of this Act and related Defense Department directives clarified and codified the Wounded Knee distinction between active and passive military participation by prohibiting "direct participation" by military forces in a search and seizure, an arrest, or other similar activity.<sup>182</sup> One section

177. Rice suggests that when the court highlighted the "large amounts of military equipment" involved at Wounded Knee as part of the "insufficient evidence of the lawfulness of the government activity at Wounded Knee" it caused unnecessary military hesitancy to comply with civilian equipment requests. Rice, *supra* note 97, at 118. For example, the military did not immediately comply with a request from the Justice Department when it asked for grenades during the Hanafi Muslim hostage situation in Washington, D.C. for use in case the gunmen started killing their hostages. *Id.* at 118 n.55.

178. The Department of Defense recognized that this determination must be made at a relatively high level, presumably so that the cumulative effect of requests from various places, and not just individual requests, could be properly evaluated. *Id.* at 119. This is based in part on Department of Defense Directive 5525.5.

179. 10 U.S.C. § 373 provides, "The Secretary of Defense may assign members of the Army, Navy, Air Force, and Marine Corps to train Federal, State, and local civilian law enforcement officials in the operation and maintenance of equipment made available under Section 372 of this title and to provide expert advice relevant to the purpose of this chapter." This was meant to be a clarification of the law, not a limitation to the training that had been taking place. See H.R. REP. NO. 97-71, pt. 2, at 10 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1785, 1792-93. One of the important factors in the *Wounded Knee* cases was the involvement of Colonel Voley Warner as an "advisor." See *supra* note 113 and accompanying text.

180. See H.R. REP. NO. 97-71, pt. 2, at 10 n.2 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1785, 1793; Rice, *supra* note 97, at 120. Rice points out that it was not unusual for law enforcement officers to attend the Military Police School at Fort McCellan, Alabama. He argues that such a relationship does not violate the PCA because it would be difficult to imagine that such a relationship could be considered "execution of the law." *Id.* at 120. Rice further argues that such training would not be precluded by § 378, which states that "[n]othing in this chapter shall be constructed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law prior to the enactment of this chapter." *Id.*

181. 10 U.S.C. §§ 373, 375 (2000).

182. See *United States v. McArthur*, 419 F. Supp. 186 (D.N.D. 1975); *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975). 10 U.S.C. § 375 stated: "The Secretary of Defense shall issue such regulations as may be necessary to ensure that the provision of any assistance (including the provision of any equipment or facility or the assignment of any personnel) to any civilian law enforcement official under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law." A 1982 Defense Department directive prohibited the "[u]se of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators or interrogators." Department of Defense Directive 5525.5 Encl. 4, para. 1.3 (1986); see also H.R. REP. NO. 86, 97th Cong., at 1, 3 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1781, 1791 n.1.

In 1988, § 375 was amended to drop the interdiction phrase and to emphasize the overt acts of executing the law such as search and seizure or arrest. See National Defense Authorization Act, Pub. L. No. 100-456, § 1104, 102 Stat. 1918, 2045 (1988). These restrictions do not apply to Coast Guard

of the 1981 Act, however, clearly expanded the military's role, allowing the Defense Department to assign military personnel and equipment upon the request of an agency charged with enforcing drug, immigration, and customs laws.<sup>183</sup> Typically, the military personnel and equipment could be limited in use to "monitoring and communicating the movement of air and sea traffic," and use of military personnel was to "be limited to situations where the training of civilian personnel would be unfeasible or impractical from a cost or time perspective."<sup>184</sup> The military, for example, could not interdict or interrupt the passage of vessels or aircraft.<sup>185</sup>

Although Congress increased the authority of the military, it resisted giving the military a broad mandate for direct involvement in searches, seizures, and arrests<sup>186</sup> because it was not "appropriate to make such a radical break with the

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personnel assigned to naval vessels who are authorized to perform searches and seizures of suspected drug smugglers and make arrests. 10 U.S.C. § 379 (2000). Nor do the restrictions apply to actions related to enforcement of the Uniform Code of Military Justice, 10 U.S.C. ch. 47, or which primarily serve a military purpose. *See* Department of Defense Directive 5525.5 Encl. 4, para. 1.2 (1986).

183. 10 U.S.C. § 374 (2000). This section states:

(a) The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available for the maintenance of equipment for Federal, State, and local civilian law enforcement officials, including equipment made available under section 372 of this title.

(b)(1) Subject to paragraph (2) and in accordance with other applicable law, the Secretary of Defense may, upon request from the head of a Federal law enforcement agency, make Department of Defense personnel available to operate equipment (including equipment made available under section 372 of this title) with respect to -

(A) a criminal violation of a provision of law specified in paragraph (4)(A);

(B) assistance that such agency is authorized to furnish to a State, local, or foreign government which is involved in the enforcement of similar laws;

(C) a foreign or domestic counter-terrorism operation; or

(D) a rendition of a suspected terrorist from a foreign country to the United States to stand trial.

....

(4) In this subsection:

(A) The term "Federal law enforcement agency" means a Federal agency with jurisdiction to enforce any of the following:

(i) The Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.).

(ii) Any of sections 274 through 278 of the Immigration and Nationality Act (8 U.S.C. 1324-1328).

(iii) A law relating to the arrival or departure of merchandise (as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401) into or out of the customs territory of the United States (as defined in general note 2 of the Harmonized Tariff Schedule of the United States) or any other territory or possession of the United States.

(iv) The Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(v) Any law, foreign or domestic, prohibiting terrorist activities.

184. Rice, *supra* note 97, at 124 (citing H.R. REP. NO. 97-311 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1860, 1861; and Department of Defense Directive 5525.5 Encl. 4, para. A.6.b).

185. Rice points out that the original House bill contained limited authority for military personnel to make arrests and conduct seizures. Still, the Conference Committee found that no federal law enforcement agency had expressed desire for that type of support. Rice, *supra* note 97, at 126 (citing H.R. REP. NO. 97-311, at 121).

186. *See* 10 U.S.C. § 375 (2000).

historic separation between military and civilian functions.”<sup>187</sup> Congress also showed some concern for military preparedness,<sup>188</sup> and expressed its fear that civilian enthusiasm for military involvement in the drug war would quickly fade if ordinary Americans were subjected to military authority.<sup>189</sup>

Within a few years of the PCA amendments, the military’s role in the drug war became “steadily more active, more innovative, and more flexible.”<sup>190</sup> By 1984, for example, the military provided \$100 million in drug interdiction assistance, consisting mainly of aerial surveillance, transport of enforcement personnel, and loans of equipment and personnel as allowed under the PCA.<sup>191</sup> In addition, some members of Congress advocated the expansion of military and civilian drug interdiction efforts, such as the National Guard’s efforts to assist Customs in the inspection of cargo at land, sea, and air ports of entry.<sup>192</sup> Because of the success of the program and the lack of adverse public reaction, some suggested that the program be extended to active duty and reserve forces.<sup>193</sup> In another program, the Army supported U.S. and Bahamian efforts in the Bahamas by using Blackhawk helicopters to chase smugglers and transport arresting officers. Again the sentiment was that this program could be expanded without direct contact between military personnel and citizens.<sup>194</sup>

In addition to these statutory changes, the military adjusted its policies to increase its ability to participate in law enforcement. For instance, under the 1981 law, some military operations were frustrated when the Navy could be used as a base of operations and to transport officials, but could not interdict a smuggling vessel.<sup>195</sup> In response, the Defense Department determined that because the Navy and Marine Corps were not included in the PCA, the prohibitions included in the new Act did not apply to those branches. Therefore, the only restrictions on those branches came from Defense Department policy.<sup>196</sup> This position was reinforced by the Act itself, which

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187. H.R. CONF. REP. NO. 100-989, at 452 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2503, 2580. Even the military has resisted the impulse to become more involved with direct participation in search and seizure efforts. For example, Secretary of Defense Carlucci testified before the Senate Armed Service Committee that

I am even more firmly opposed to any relaxation of the posse comitatus restrictions on the use of the military to search, seize, and arrest. . . . The historical tradition which separates military and civilian authority in this country has served both to protect the civil liberties of our citizens and to keep our Armed Forces militarily focused and at a high state of readiness.

1988 U.S.C.C.A.N. 2503, 2581-82.

188. See 10 U.S.C. § 376 (2000) (providing that support may not be rendered if it would interfere with military preparedness).

189. See 1988 U.S.C.C.A.N. 2503, 2581.

190. AMERICA’S HABIT, *supra* note 4, at 380.

191. *Id.*

192. H.R. REP. NO. 101-21, at 320 (1989), *reprinted in* 1989 U.S.C.C.A.N. 838, 941.

193. *Id.*

194. *Id.*

195. Rice, *supra* note 97, at 126.

196. Secretary of the Navy Instruction 5820.7B (1988); see also *United States v. Yunis*, 924 F.2d



stated that the new restrictions were not to be interpreted as limiting existing executive authority.<sup>197</sup> Accordingly, the Defense Department directed that the Navy or Marine Corps may participate, with the Secretary of Defense's approval, in "interdiction of a vessel or aircraft, a search or seizure, an arrest or other activity that is likely to subject civilians to the exercise of military power that is regulatory, proscriptive or compulsory in nature."<sup>198</sup> Such activities are often done in conjunction with the Coast Guard.<sup>199</sup>

Despite these statutory and regulatory changes, the President's Commission on Organized Crime argued for further amendments to the PCA to reflect the Commission's view of "national security" and "foreign hostile action."<sup>200</sup> The Commission recommended a consolidated statute, including a statement of purpose promoting "an accordingly expansive interpretation of the statutory language."<sup>201</sup> The Commission also recommended a thorough reexamination of DOD practices and policies, arguing that the military's own conception of its permissible role in law enforcement efforts was too limited.<sup>202</sup> The

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1086 (D.C. Cir. 1991) (holding that Navy had jurisdiction over alleged hijacker held and transported on its naval vessel).

197. 10 U.S.C. § 378 (2000).

198. Department of Defense Directive 5525.5 Encl. 4, para. 3.2. Colonel Rice points out that this language mirrors that found in *United States v. McArthur*, 419 F. Supp. 186 (D.N.D. 1976). Rice, *supra* note 97, at 122 n.76.

199. Since 1986, Coast Guard personnel, in the form of Law Enforcement Detachments (LEDETS), have been assigned to Navy vessels for the express purpose of performing the boarding and search of interdicted suspect smuggling vessels and to effectuate necessary arrests. LEDETS are typically deployed on Navy surface ships that operate in waters where drug trafficking is common. See U.S. Coast Guard web site, at <http://www.uscg.mil/hq/g-cp/comrel/factfile/factcards/possecomitatus.html> (last visited Mar. 11, 2003); <http://www.uscg.mil/hq/g-cp/comrel/factfile/factcards/ledet.html> (last visited Mar. 11, 2003). The authority for these LEDETS is found at Pub. L. No. 99-570, 100 Stat. 3207 (1986) and Pub. L. No. 100-456, 102 Stat. 1918 (1988).

200. At the time of the Commission report, the definition of "national security" employed by the Joint Chiefs of Staff as their starting point in mission determination was:

A collective term encompassing both national defense and foreign relations of the United States. Specifically, the condition provided by:

States. Specifically, the condition provided by:

- a. a military or defense advantage over any foreign national group of nations, or
- b. a favorable foreign relations position, or
- c. a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

The Commission suggested that the Joint Chiefs be instructed by "the highest levels of government" that "hostile or destructive action from within or without, overt or covert," as used in this definition shall include the airborne, amphibious, and overland invasion of this country by drug smugglers." The Commission points out that the intelligence community used such a definition pursuant to Executive Order 12333. The Department of the Defense operations concerning drug smugglers should then be conducted accordingly. *AMERICA'S HABIT*, *supra* note 4, at 473.

201. The Commission took the view that having the PCA in one title of the U.S. Code and having the exceptions in another title "led to delays and confusion in pursuing opportunities permitted by [the exceptions]." *Id.* at 380 n.92.

202. On this point, the Commission pointed out that when Secretary of Defense Caspar Weinberger wrote to the Chairman of the House Armed Services Committee in 1985, he stated that direct military participation in drug seizures outside U.S. territory would do violence to "the historic separation between military and civilian spheres of activity . . . one of the most fundamental principles of American democracy." *Id.* at 381. Secretary Weinberger was opposing a proposal to authorize members of the armed forces "to assist drug enforcement officials in drug searches, seizures or arrests outside the land

Commission stated that it was unable to find the basis for the “fundamental principle” often cited in support of restricting the military’s law enforcement role.<sup>203</sup> Rather, the PCA should be amended so that the military would no longer be hamstrung in addressing drug smuggling since that activity presented a clear threat to “national security.”<sup>204</sup> Perhaps in response to this assessment, in 1989 Congress stated that the Department of Defense would be the “single lead agency” for drug interdiction efforts.<sup>205</sup> As one example of the increased military role that resulted from this shift of authority, the Navy started deploying ships to waters where drug trafficking was common for the express purpose of supporting Coast Guard law enforcement efforts.<sup>206</sup> Congress also allowed enhanced cooperation between the military and law enforcement by requiring the Secretary of Defense and Attorney General to brief state law enforcement personnel on an annual basis regarding information, training, technical support, equipment, and facilities that the military can provide.<sup>207</sup> Finally, the Department of Defense may deploy military assets when the Secretary of Defense and the Attorney General agree that an emergency exists concerning situations involving chemical or biological weapons of mass destruction or terrorism.<sup>208</sup>

#### B. *The Use of the National Guard in Anti-Drug Efforts*

Another important aspect of the 1980s drug war was the widespread use of National Guard units to assist civilian law enforcement.<sup>209</sup> The National Guard

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area of the United States.” Paul F. Gorman, *Illegal Drugs and US Security*, in AMERICA’S HABIT, *supra* note 4, at app. G, at 25. General Gorman inferred from Secretary Weinberger’s position that he had “rejected the idea that drug smuggling is a national security problem.” *Id.*

203. AMERICA’S HABIT, *supra* note 4, at 382. The Commission, however, did note in a footnote that this view “enjoyed considerable currency” and that it had been widely accepted even by strong proponents of a greater military role in drug interdiction. *Id.* at 382 n.96.

204. *Id.* at 382-83.

205. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 100-89, § 1202, 103 Stat. 1353, 1563 (1989) (codified at 10 U.S.C. § 124(a) (1994)) (“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.”).

206. See U.S. Coast Guard web site, at <http://www.uscg.mil/hq/g-cp/comrel/factfile/factcards/possecomitatus.html> (last visited Mar. 11, 2003); <http://www.uscg.mil/hq/g-cp/comrel/factfile/factcards/ledet.html> (last visited Mar. 11, 2003).

207. Pub. L. No. 100-180, § 1243(a), 101 Stat. 1163 (codified as amended at 10 U.S.C. § 380 (1998)).

208. 10 U.S.C. § 382 (2000). The military role in cases of terrorism was added by Pub. L. No. 106-65, § 1023, 113 Stat. 747 (1999). In cases concerning chemical or biological weapons the military may “monitor, contain, disable or dispose” of the weapon. 10 U.S.C. § 382(c). In cases concerning terrorism, the Defense Department may deploy personnel and resources as the Secretary of Defense determines is necessary to prepare for, prevent, or respond to an act or threat of terror. Pub. L. No. 106-65, § 1023, 113 Stat. 747 (1999). These provisions, however, specifically disallow the use of military personnel to participate in a search, seizure, arrest, or to collect intelligence for law enforcement. 10 U.S.C. § 382 (2)(a). Such direct involvement, however, is allowed for the immediate protection of human life where civilian law enforcement officers are not capable of taking action. 10 U.S.C. § 382(2)(b).

209. The Commission pointed out that the National Guard units are “frequently well-trained,

can be deployed on law enforcement missions without legislation because, as a state entity, it is not subject to the PCA. For this reason, proponents of expanding the role of the military in law enforcement continue to argue for an even greater use of the National Guard in the drug war.<sup>210</sup>

The National Guard is generally considered the successor to the “militias” referred to in the Constitution and is specifically empowered to execute the laws.<sup>211</sup> Traditionally, a militia is comprised of civilians who undergo military drilling and exercises and are called upon to leave their usual vocations “when the public exigencies demand it.”<sup>212</sup> They are not, however, kept on service like standing armies in time of peace.<sup>213</sup> In its standard, state-controlled status, the Guard may be used by a governor for law enforcement roles in accordance with state law. At times, the federal government may call upon a state guard unit to perform certain functions, but the units remain under the control of the state governors.<sup>214</sup> Under certain circumstances, such as overseas duty or to address dire civil disturbances, the guard units may be federalized, at which time the PCA applies.<sup>215</sup> Regardless of their status, the federal government not only

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suitably equipped, and highly motivated to conduct anti-drug efforts.” *AMERICA’S HABIT*, *supra* note 4, at 385 n.104.

210. See, e.g., *AMERICA’S HABIT*, *supra* note 4, at 385.

211. See U.S. CONST. art. I, § 8, cl. 15-16; *Maryland ex rel. Levin v. United States*, 381 U.S. 41, 46 (1965), *vacated on other grounds*, 382 U.S. 159 (1965). Apart from its ability to raise an army, U.S. CONST. art. I, § 8, cl. 13, and maintain a navy, U.S. CONST. art. I, § 8, cl. 14, Congress has the power to call forth the militia to execute the laws of the union, suppress insurrections, and repel invasions, U.S. CONST. art. I, § 8, cl. 15. To those ends, Congress is also empowered to organize, arm, discipline, and, to some extent, govern the militia. See U.S. CONST. art. I, § 8, cl. 16 (authorizing “governing such Part of them as may be employed in the Service of the United States”). The militia, however, remains primarily a state entity because unless the militia is called into federal service, the state governor is the commander-in-chief and appoints the militia’s officers. U.S. CONST. art. I, § 8, cl. 16; see also *United States v. Dem.*, 74 F.2d 485, 487 (D.C. Cir. 1934) (holding that “except when in the service of the United States, officers of the National Guard continue to be officers of the state and not officers of the United States or of the Military Establishment of the United States”). Furthermore, members of the National Guard are civilians when not in a military status. As the Supreme Court stated, “In a sense, all [National Guard members] now must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time.” *Perpich v. Dep’t of Def.*, 496 U.S. 334, 348 (1990).

212. *Perpich*, 496 U.S. at 348. For most of the Guard’s history, members were expected to serve short deployments. In recent years, however, National Guard units have been used much more frequently and for longer periods of time. For a good description of the evolving nature of the National Guard, see *Perpich*, 496 U.S. at 340-346.

213. *Dunne v. People*, 94 Ill. 120, 138 (1879); *Perpich*, 496 U.S. at 348.

214. 32 U.S.C. §§ 326-33 (2000).

215. 10 U.S.C. §§ 101, 331-33 (2000). *Perpich*, 496 U.S. at 333, 348 (holding that during federal service, National Guard units lose state militia status). For an excellent discussion of the differences of status when the National Guard is in state, as opposed to federal, service, see Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of “In Federal Service,”* ARMY LAW., June 1994, at 35. The PCA, however, does restrict the use of the military reserves. Whereas during a natural disaster both Guardsmen and Reservists may provide logistical aid, 42 U.S.C. § 5121 allows the President to introduce federal troops to preserve life and property when a disaster or emergency has been declared. This statute, however, does not constitute an exception to the PCA. Only the Guard can take an active role in suppressing looting and provide general security. It should be noted, however, that the Reservist may be used in a law enforcement capacity upon a presidential proclamation pursuant to the Civil Disturbance Statutes, 10 U.S.C. §§ 331-

trains<sup>216</sup> and regulates<sup>217</sup> the state guard units, but also provides much of the funding for the state units.<sup>218</sup> Despite this federal involvement, one commentator argues that because the Guard is controlled by state governors and its counter-drug efforts must be authorized under state law, the “perceived abuses” of federal power that the PCA was designed to protect against would not actually occur.<sup>219</sup>

Although these National Guard efforts have been challenged as a violation of the PCA, the courts have rejected the argument. For instance, in *Gilbert v. United States*, the Sixth Circuit upheld convictions for conspiracy and the manufacturing of marijuana despite the active involvement of the Kentucky National Guard.<sup>220</sup> In 1990, Kentucky Guardsmen, armed with sidearms and automatic weapons, participated in an anti-drug task force operation involving the surveillance and subsequent arrest of the defendants. Although the Guardsmen looked and acted more like soldiers than law enforcement officers, the court found that there was no violation of the PCA.<sup>221</sup> More significant than how the Guardsmen looked is who commanded the Guard at the time. In this case, the Kentucky Guard was clearly under state control.<sup>222</sup> The Court also found that since federal law specifically allows full-time national guardsmen to carry out drug interdiction and counter-drug activities, the Guard officers were exempt from the PCA.<sup>223</sup>

Throughout the 1980s and 1990s, several states utilized their National Guard units to fight the drug problem.<sup>224</sup> In 1990 and 1991, Congress expanded

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216. 32 U.S.C. § 502 (2000).

217. 32 U.S.C. § 110 (2000) (giving the President authority to regulate organization and discipline of National Guard forces).

218. In Fiscal Year 2001, the Pentagon paid over \$12 billion for training and equipment, overhead, and much of the Guard's payroll. Jon Bonni, *The Changing of the Guard*, MSNBC (Apr. 18, 2002), at <http://www.msnbc.com/news/723122.asp?pne=msn.html> (last visited Mar. 11, 2003).

219. Rich, *supra* note 215, at 42.

220. *Gilbert v. United States*, 165 F.3d 470 (6th Cir. 1999).

221. *Id.* at 473.

222. *Id.* (quoting *United States v. Hutchings*, 127 F.3d 1255, 1258 (3d Cir. 1997); *see, e.g.*, *United States v. Benish*, 5 F.3d 20 (3d Cir. 1993) (holding that the National Guard did not violate the PCA when it conducted surveillance and seized contraband because the Guard was not in federal service and, therefore, the PCA did not apply)).

223. 32 U.S.C. § 112(b) (2000). National Guard regulations imposed after *Gilbert* require that state law must authorize the counter-drug activity of Guard units; generally restrict Guard units from direct participation in arrests, searches, and seizures; prohibit surveillance directed at specific individuals; and establish minimum rules of engagement concerning the use of force. DEP'T OF ARMY & AIR FORCE, ARMY NAT'L GUARD REG., 500-2/ AIR NAT'L GUARD REG. 10-801, Nat'l Guard Counterdrug Support (1994).

224. During the first nine-and-a-half months of 1985, nineteen states reported the use of National Guard units on State Active Duty or during training activities participating in 199 drug war-related missions. These joint operations resulted in the destruction of almost 200,000 marijuana plants with an estimated street value of over \$260 million. Furthermore, the Commission reported that twenty-nine states had memorandums of agreement with local law enforcement agencies regarding the use of the National Guard with another fifteen states in the process of developing similar memorandums of understanding. AMERICA'S HABIT, *supra* note 4, at app. E. In 1996, the California National Guard had

this effort by enacting the National Defense Authorization Act, which authorized funding to support drug interdiction and counter-drug activities conducted by state National Guard units.<sup>225</sup> The issue of who commands the Guard, however, has become a source of tension between state and federal authorities. This has become especially apparent in the last few decades as the military has assigned more essential support roles to the Guard and routinely called them into federal service.<sup>226</sup> As federalization becomes more common, guard units are more often subject to multiple lines of command that can create confusion and precipitate turf battles between state and federal authorities.<sup>227</sup> The question also arises as to what training the guard members will receive to perform functions as defined by state law and to perform the tasks assigned by the Pentagon.<sup>228</sup>

### C. Joint Operations and Training

In addition to the National Guard, the regular military has also become more involved in drug trade investigations. During the 1980s, military personnel routinely engaged in joint investigations and patrols with local or state law enforcement targeting the drug trade. Some cases arising from these joint efforts clearly targeted military personnel selling drugs or civilians supplying drugs to soldiers and sailors off base. This involvement of the military in enforcing the drug laws is justified under the military purposes doctrine.<sup>229</sup> In other cases, however, there is only a tenuous connection between off-base drug dealing and the ability to maintain the “order, security and discipline” required for military operations.<sup>230</sup> For example, in one case, the basis for a joint investigation of drug dealing at an off-base nightclub turned on

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450 Troops assigned full time to drug interdiction efforts and in that year alone seized over \$3 billion in narcotics. The California Guard has patrolled the Mexican border near San Diego and inspected overseas packages for drugs at the Oakland postal facility. *NewsHour* 1997, *supra* note 8.

225. Rich, *supra* note 215, at 41. “Counter-drug activities” is defined to include “National Guard personnel in drug interdiction and counter-drug law enforcement activities, including drug demand reduction activities, authorized by the law of the state and requested by the governor of the state.” 32 U.S.C. § 112(a) (2000). This statute requires that a governor request federal financial assistance and provide a plan for the counter-drug activities. The Secretary of Defense has broad discretion as to what activities can be funded. *Id.*

226. After the Vietnam War, the Pentagon began assigning essential support units like medivac, civil affairs, and aerial refueling to the Guard and Reserves so that wars like Vietnam could not be fought without widespread civilian participation. ROBERT WOODWARD, *THE COMMANDERS* 284 (1991). During the Gulf War, for example, the military used 265,000 Guard and Reserve troops, and Guard call-ups have increased 300% in the last decade. *Id.*; *NewsHour: Citizen Soldiers* (PBS television broadcast, May 17, 2000) (transcript available at [http://www.pbs.org/newshour/bb/bosnia/bosnia\\_5-17.html](http://www.pbs.org/newshour/bb/bosnia/bosnia_5-17.html) (last visited Mar. 11, 2003)).

227. Bonni, *supra* note 218. When Guard units are federalized, governors often feel “cut out of the loop.” *Id.*

228. *Id.*

229. *See supra* note 91.

230. *United States v. Banks*, 539 F.2d 14 (9th Cir. 1976); *Cafeteria & Rest. Workers Union Local 473 v. McElroy*, 367 U.S. 886 (1961).

the allegation that the club had a "reputation" for selling drugs to military personnel.<sup>231</sup> These joint operations are rarely disallowed by the courts, either because of the military purposes doctrine,<sup>232</sup> or because the activities of the military investigators did not amount to "execution" of the law.<sup>233</sup>

In addition to joint investigations, the military also engages in joint patrols with civilian law enforcement officials in towns adjacent to military bases.<sup>234</sup> Although the military at one time frowned on such patrols,<sup>235</sup> they are allowed as long as the military police are "thoroughly instructed as to the limits of their authority."<sup>236</sup> Despite this instruction, military police have, on occasion, overstepped their authority. For example, military police on a joint patrol near Fort Riley, Kansas stopped and searched a car fitting the description of a vehicle involved in a robbery.<sup>237</sup> When the military police found a pistol under the car seat, the vehicle operators were arrested. The trial judge subsequently suppressed the evidence related to the arrest due to a violation of the PCA.<sup>238</sup>

231. *State v. Gunter*, 902 S.W.2d 172 (Tex. 1995).

232. *See, e.g., State v. Hayes*, 404 S.E.2d 12 (N.C. 1991); *Anchorage v. King*, 754 P.2d 283 (Alaska App. 1988) (military police arrested suspected drunk driver on military base and delivered him to civilian authorities); *McNeil v. State*, 787 P.2d 1036 (Alaska App. 1990) (military police arrested suspected drunk driver on military base); *State v. Maxwell*, 328 S.E.2d 506 (W. Va. 1985); *People v. Hayes*, 494 N.E.2d 1238 (Ill. App. 1986); *People v. Wells*, 221 Cal. Rptr. 273 (1985), *Hubert v. State*, 504 P.2d 1245 (Okla. Crim. App. 1972).

233. *See, e.g., Lovelace v. State*, 411 S.E.2d 770 (Ga. App. 1991) (Army investigators made undercover drug buy and turned evidence over to the civil authorities but did not subject citizenry to "regulatory power"); *United States v. Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988); *Burns v. State*, 473 S.W.2d 19 (Tex. Crim. App. 1971) (police furnished marked bills for drug buy and were present at arrest, but did not execute law). *But see State v. Pattioay*, 896 P.2d 911 (Haw. 1995) (military investigators who participated in undercover drug buys with the local police to target civilians who may have been supplying drugs to military personnel were not within the military purposes doctrine and violated the PCA).

Another argument often relied on by courts is that investigations initiated by the military were allowed under the PCA because they did not act at the request of civilian law enforcement. *See, e.g., State v. Maxwell*, 328 S.E.2d 506 (W.V. 1985); *Wright v. State*, 749 S.W. 935 (Tex. App. 1988). This argument lacks merit, however, because the legislative history shows that the Act's purpose is to keep local law enforcement from pressing the local troops into service, and to keep local commanders from assuming the role of sheriff. *See supra* note 71 and accompanying text.

Another argument often relied on by courts is that investigations initiated by the military were allowed under the PCA because they did not act at the request of civilian law enforcement. This final argument lacks merit because the legislative history shows that the Act's purpose is to keep local law enforcement from pressing the local troops into service, and to keep local commanders from assuming the role of sheriff.

234. *Rice, supra* note 97, at 134. The reason for such patrols is that the military personnel going off base to seek "entertainment" may overwhelm the local civil police. *Id.*

235. In 1922, the Judge Advocate General of the Army stated that the joint patrol would result in confusion and harmful results. *Rice, supra* note 97, at 134 (citing JAG 253.5 (June 14, 1922)). In 1952, the Judge Advocate General held that the joint patrols, which allow military personnel to assist civilian police enforcing the laws, violate the PCA. *Rice, supra* note 97, at 135 (citing JAGA 1952/4810 (May 26, 1952)).

236. *Rice, supra* note 97, at 134 (citing JAGA 1956/8555 (Nov. 26, 1956)).

237. *State v. Danko*, 548 P.2d 819 (Kan. 1976).

238. *Id.* The Kansas Supreme Court subsequently overturned the decision, holding that the military acted innocently and with no knowledge of the PCA. *Danko*, 548 P.2d at 825. If the soldiers had no understanding of the Act, however, one must question how well trained they were on the limits of their

The partnership between the military and law enforcement is even more clearly seen in the joint training programs utilized during the 1990s. In 1989, President Bush created six regional joint task forces ("Joint Task Force-Six" or "JTF-6") within the Defense Department both to coordinate the anti-drug efforts of the military and police agencies and to provide military reinforcements to law enforcement agencies for anti-drug efforts.<sup>239</sup> Joint Task Force-Six provides joint training to military units and civilian police. Since its inception, JTF-6 has trained thousands of civilian law enforcement officers in skills such as marksmanship, interview and interrogation, narcotics interdiction, and field tactical operations.<sup>240</sup> The Task Force's operational guidebook at one time even emphasized the disappearing distinction between the military and the police: "Innovative approaches to providing new and more effective support to law enforcement agencies are constantly sought and legal and policy barriers to the application of military capabilities are gradually being eliminated."<sup>241</sup>

Although that language was later removed from the guidebook, the Task Force's presence has been felt in several areas. The Task Force has provided reconnaissance flights to the U.S. Border Patrol and has trained Border Patrol Agents in combat emergency care, analyzing intelligence, and conducting patrols.<sup>242</sup> In addition to training, the military has provided armed soldiers to actually patrol the Mexican border.<sup>243</sup> Such active participation has, at times, highlighted the problems of involving the military in law enforcement matters. The border patrols ended after a JTF-6 marine shot and killed an 18-year-old civilian during one patrol.<sup>244</sup> In light of border residents' anger over the continued military presence, JTF-6 suspended this type of assistance.<sup>245</sup> From the time of this incident until September 11, 2001, proposals to place soldiers at the border were rejected by congressmen, the military, and the Clinton

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authority before participating in the joint patrol.

239. Requests from law enforcement for JTF-6 assistance and training are screened by Operation Alliance, a coalition of law-enforcement agencies, and is then sent to JTF-6's commanding officer for approval. Scarborough, *supra* note 9. JTF-6 can summon thousands of active duty and reserve personnel to carry out its missions. *Id.*

240. *Id.* In 1999 alone, JTF-6 employed 3000 members of the military for the war on drugs and trained 2700 law enforcement officers. *Id.*

241. *Id.* (quoting the operational guidebook for JTF-6). This language was eliminated in 1995. *Id.*

242. *Id.*

243. The troops were armed with M-16 rifles. *NewsHour 1997*, *supra* note 8.

244. Scarborough, *supra* note 9. The incident took place during a ground based anti-drug surveillance Listening Post/Observation Post mission where soldiers use night vision devices to spot drug smugglers, and then notify law enforcement officers to intercept them. *NewsHour 1997*, *supra* note 8. The shooting was later ruled self-defense because the civilian fired his weapon in the direction of the Marines. As one commentator states, however, "[w]hen armed military personnel are placed in a position where they may need to defend themselves to carry out their 'passive' mission, it is a semantic exercise to claim they are not acting in a law enforcement capacity." Trebilcock, *supra* note 69, at 2 n.11.

245. *NewsHour 1997*, *supra* note 8. The American Friends Committee lobbied for an investigation and assistance to "border communities in their efforts to restrain abusive and discriminatory treatment by U.S. authorities, and to speak out against the militarization of the border." *Id.*

Administration.<sup>246</sup>

Another notorious example of JTF-6 assistance is the federal siege of the Branch Davidian Compound near Waco, Texas in 1993.<sup>247</sup> This siege represents “the single largest use of military weaponry in a civilian law-enforcement operation.”<sup>248</sup> In addition to the loan of Abrams and Bradley tanks, ammunition, night vision goggles, and reconnaissance flights, the military provided training on all of the equipment. The military even dispatched members of the Delta Force to both observe and train FBI agents on the use of a classified piece of surveillance equipment.<sup>249</sup> After the attack, Congress held hearings on the tactics employed by federal agents. A congressional committee’s report on the raid concluded that civilian law enforcement should not be using military tactics to carry out its mission.<sup>250</sup> Still, the transfer of military equipment to state and local police departments soon became even easier. In 1994, the Department of Justice and the Department of Defense signed a memorandum of understanding that enables the military to transfer technology to police departments and other law enforcement agencies.<sup>251</sup>

#### IV. NORTHERN IRELAND: A BRIEF CASE STUDY ON THE DANGERS OF MILITARY INVOLVEMENT IN LAW ENFORCEMENT

When questions arising under the Posse Comitatus Act are litigated, courts uniformly have approved or disapproved of the military actions according to the effects the action had on the individual—that is, whether the person was subject to the control or authority of the military. Although direct contact between civilians and the military can lead to myriad problems, including botched criminal investigations and the violation of civil rights, there are other potential problems. One problem is the effect on military preparedness caused

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246. *Id.* Rep. Sylvestore Reyes (D-Texas), a former border patrol officer, called the idea “dangerous” and said it would ultimately create more problems for law enforcement. Brian Sheridan, Deputy Assistant Secretary For Special Operations at the Defense Department, argued that such a deployment would hurt readiness. President Clinton’s “drug czar” Gen. Barry McCaffrey also stated that the drug problem “doesn’t lend itself to resolution by military combat power.” Gen. McCaffrey supported a withdrawal of the military as long as it was accompanied by an increase in manpower for law enforcement agencies. *Id.*

247. After a 51-day standoff, federal agents conducted a paramilitary attack on the heavily armed Davidians who had taken refuge in the compound. After tanks were used to ram the doors to the compound and fire tear gas, the compound caught fire. The fire, which investigators concluded was ignited by the Davidians, ultimately killed all eighty-six men women and children in the compound. Scarborough, *supra* note 9, at 30.

248. *Id.* The General Accounting Office estimated that federal agents used nearly \$1 million in military hardware during the 51-day operation. *Id.*

249. *Id.*

250. *Id.*

251. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF DEF., DEPARTMENT OF JUSTICE AND DEPARTMENT OF DEFENSE JOINT TECHNOLOGY PROGRAM: SECOND ANNIVERSARY REPORT 8-18 (1997); *see also* United States v. Garcia, 909 F. Supp. 334 (D. Md. 1995), *aff’d*, 103 F.3d 121 (4th Cir. 1996) (concluding that Congress authorized the DEA and state police to use an Air Force drug detection dog by designating the dog as “equipment” and the handlers of the dog as “operators” of equipment).



by the diversion of military resources to domestic law enforcement activities.<sup>252</sup> Another problem, one that is not always immediately apparent, is the long-term effects that military training, tactics, and equipment have on the operation of civilian law enforcement agencies.

Laws such as the Military Cooperation with Law Enforcement Officials Act have encouraged the military to supply intelligence, equipment, and training to civilian police. With the increase in joint training and loaned equipment, criminal justice experts have argued that civil law enforcement has become militarized,<sup>253</sup> with police departments becoming increasingly authoritarian, centralized, and autonomous bureaucracies that are isolated from the public.<sup>254</sup> Military training, in particular, inculcates local police officers with a “warrior mentality,” such critics argue, thus spawning “a culture of paramilitarism in American police departments.”<sup>255</sup> The proliferation of elite SWAT teams that use militaristic tactics and armament for routine patrols and everyday, rather than extraordinary, police activities is just one example of this increasing militarization of domestic law enforcement.<sup>256</sup>

The case of Northern Ireland provides a somewhat extreme, but potentially instructive, example of the dangers of excessive military influence in domestic law enforcement activities. One legacy of the Northern Ireland “Troubles”—a nearly 35-year period of sectarian violence and domestic terrorism—has been a poisoned relationship between the police and the public. The British government reacted to this nearly constant security threat both by deploying troops to keep order and by allowing the Northern Ireland police force, the Royal Ulster Constabulary (RUC), to adopt ever more militaristic approaches to accomplish their mission. Rather than solving the security problem, however, these changes helped place the police at the heart of many of Northern Ireland’s problems.<sup>257</sup>

Despite continuing violence and security threats, the British and local Northern Ireland governments have not given the military a greater role, but instead have reformed the police and limited the military’s role in law enforcement. These reforms were based on the recommendations made by the Independent Commission on Policing in Northern Ireland, known as the Patten

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252. To some extent, the military in its regulations takes into consideration the military preparedness issue. See Rice, *supra* note 97, at 119; see also The Military Cooperation with Law Enforcement Officers Act, 10 U.S.C. § 376 (2000).

253. See Scarborough, *supra* note 9, at 30.

254. Weber, *supra* note 11, at 5.

255. *Id.*

256. According to a recent academic survey, nearly ninety percent of police departments surveyed in cities with populations over 50,000 had paramilitary units, and in cities with fewer than 50,000 people, seventy percent of the police departments had paramilitary units. *Id.*

257. INDEP. COMM’N ON POLICING FOR N. IR., A NEW BEGINNING: POLICING IN NORTHERN IRELAND 2 (1999) [hereinafter PATTEN REPORT].

Commission.<sup>258</sup> During a year-long investigation, the Commission found that years of security threats had distorted the RUC's policing style. These threats caused the creation of a huge police force with a hierarchical command structure.<sup>259</sup> The RUC also had a bunker mentality, illustrated by its use of armored vehicles, firearms, and body armor, all of which were indicative of its reactive, rather than community-oriented, style of policing.<sup>260</sup> Even the "fortress like" look of RUC stations further separated the police from the community.<sup>261</sup> The close relationship between the British Army and the RUC, including joint patrols, also contributed to the militarization of the police.<sup>262</sup> Finally, the Commission found that RUC training emphasized activities such as military drills at the expense of instruction in human rights.<sup>263</sup> This militarism in training led to inattention to human rights in practice.<sup>264</sup> For example, the improper use of police powers in search and seizure practices not only led to poor relations with neighborhoods, it also sometimes led to wrongful convictions.<sup>265</sup>

The Patten Commission explored reforms that would focus the police on crime prevention rather than simply the detection and punishment of offenders, make the RUC less militaristic, and limit the police service's reliance on the British military.<sup>266</sup> The Commission recommended that more emphasis be placed during training on human rights, in both the technical and behavioral

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258. The Commission took its name from the Commission chairman, Christopher Patten.

259. In 1999, the RUC was staffed by close to 13,000 officers, with a regular full-time force of 8500, for a population of 1.675 million. A comparable geographical area with a comparable population elsewhere in the United Kingdom would have a police force of 4300 officers. PATTEN REPORT, *supra* note 257, at 75 (citing a Home Office model).

260. *Id.* at 41-42. The RUC has also made extensive use of military style armored vehicles for routine patrols. *Id.* at 47.

261. *Id.* at 46.

262. For example, the RUC would routinely patrol with Army escorts. Since 1976, when the RUC assumed primary control for security in Northern Ireland, the Army has played a subordinate role to the police, only providing aid and support. *Id.* at 48.

263. More than ten percent of the training curriculum is taken up with military style drill and "it is symbolic of the militaristic nature of the training that the head of the training establishment has had the title of 'Commandant.'" *Id.* at 91. A new training program instituted in 1998 included only two sessions out of 700 dedicated to human rights, as opposed to forty sessions of drill and sixty-three sessions of firearms training. *Id.* at 19.

264. The Commission based its conclusions on the Universal Declaration of Human Rights, which provides that "[e]veryone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 29, para. 2 (1948). Human rights can be defined in many different ways, but the Patten Commission took as its starting point the specific implications for policing within the Human Rights Act of 1998. This Act gives effect in the United Kingdom courts the rights and freedoms set out in the European Convention on Human Rights (1950). Although many of the protections within the Act are observed in the British criminal justice system, the Act changes pre-trial procedures to require earlier disclosure of evidence, limits covert policing, and imposes an obligation on the police to protect an individual's right to life. PATTEN REPORT, *supra* note 257, at 19.

265. *Id.* at 18.

266. *Id.* at 44-48.

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senses. By mastering policing skills, such as how to interview suspects, and by understanding the law, the Commission argued, the police would be less likely to resort to unethical methods in order to get results. Ultimately, the police should instinctively “perceive their jobs in terms of the protection of human rights.”<sup>267</sup> The Commission also recommended that if police intervention is required, there should be a graduated response to developing difficulties, from verbal persuasion to various forms of coercive force, and police should avoid the deployment of equipment or tactics that are disproportionate to the threat they face.<sup>268</sup>

As these assessments and recommendations indicate, even during a time of continued and serious security threats, the Patten Commission and the English government saw the benefits of clearly separating the military from the police. Extensive use of the military to control the civilian population and a militarized police force led to both human rights violations and a bitter distrust of the military and police among the population. To avoid these results in the United States, some commentators urge a restoration of the traditional American principle of civil-military separation by abolishing all military-civilian law enforcement joint task forces and by destroying or returning all military hardware loaned, given, or sold to law enforcement agencies.<sup>269</sup> The acts of terrorism on September 11, 2001, however, may have seriously damaged any effort to prevent further erosion of the PCA’s protections or to reverse the three-decade-long trend toward greater involvement of the military in domestic law enforcement.

## V. WAR ON TERROR: A NEW ERA?

The debate about whether or how the Posse Comitatus Act should be amended or revised has become even more important since the terrorist attacks of September 11th. “Homeland Security” has become a top national priority, and some officials have called for the military to play a greater role in the domestic theater. Previously, the danger of the military being deployed to assist law enforcement came in the form of undermining military preparedness and militarizing the police. Today, policymakers are rushing to make changes that assault the most basic tradition underlying the PCA—to prevent greater domestic activity by the military.

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267. *Id.* at 21.

268. *Id.* at 53. The Commission also recommended that 1) the Army’s role be reduced as quickly as the security situation would allow so that patrols could be conducted without military support, 2) the Army’s role in law enforcement be limited to search and rescue missions, bomb-disposal, and aid in exceptional emergencies such as natural disasters and those large annual public demonstrations in Northern Ireland that often involve violent confrontations, and 3) the police recruit more officers into the part-time police reserve rather than rely on the Army to meet public safety needs. *See id.* at 48, 51, 52.

269. Weber, *supra* note 11, at 11.

*A. Deploying the Military for "Homeland Defense"*

Well before September 11th, Major Craig T. Trebilcock argued that the PCA had outlived its usefulness and that the military should assume a greater role in preventing terrorism or attack by biological or chemical weapons. He argued that, although some instances of military use for law enforcement purposes may have been "misguided," they had the benefit of creating a precedent for greater use of the military in "homeland defense."<sup>270</sup> Trebilcock argued that, rather than serving as narcotics police and border agents, the most effective use of military personnel in preserving domestic security is to defend "against terrorism and weapons of mass destruction."<sup>271</sup> In 1996 and 1999, Congress gave greater latitude to the military to assist civilian authorities during emergency situations involving chemical or biological weapons of mass destruction.<sup>272</sup> Congress has also specifically allowed the military to transport suspected terrorists from foreign countries to the United States for trial.<sup>273</sup>

Even before September 11th, the Defense Department called on President Clinton to appoint a "military leader" for the continental United States in the event of a terrorist attack on American soil. What powers this commander would have, however, was never made clear.<sup>274</sup> Since the attacks on Washington and New York, the military has established a North American Command.<sup>275</sup> As of October 1, 2002, this Command has operated air patrols over American cities, engaged in searches up to 500 miles off of the nation's coastline, and prepared itself to respond to major terrorist attacks.<sup>276</sup> There seems to be an expectation, both in Washington and within the Command, that the Command will direct a large part of the federal government's response to

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270. Trebilcock states that the early drug and immigration missions were misguided because they "injected the military into missions that they are not trained to perform." Trebilcock, *supra* note 69, at 3.

271. *Id.* Trebilcock asserts in several parts of his paper that the military possesses "unique" detection and response capabilities that will be useful in the fight against terrorism. He fails, however, to enumerate the specific capabilities and equipment that could not be replicated by law enforcement personnel. *Id.* at 4.

272. Military Assistance to Civilian Law Enforcement Officials in Emergency Situations Involving Biological or Chemical Weapons, Pub. L. No. 104-201, § 1416(a), 110 Stat. 2721 (codified as amended at 10 U.S.C. § 382 (2000 & Supp. 2002)). This Section allows the Secretary of the Defense to respond to a request of the Attorney General in cases where the special capabilities and expertise of the Defense Department are necessary and critical to respond to a terrorist threat and the assistance will not adversely affect military preparedness. The duration of such a mission is determined by the Secretary of Defense.

273. 10 U.S.C. § 374(b)(2)(F)(iii) (Supp. 2002) (requiring, however, that federal law enforcement maintain custody over the suspect).

274. Even before September 11th, the Defense Department called on President Clinton to appoint a "military leader" for the continental United States in the event of a terrorist attack on American soil. What powers this commander would have, however, were never clear. Weber, *supra* note 11, at 2 (citing William J. Broad & Judith Miller, *Pentagon Seeks Command for Emergencies in the U.S.*, N.Y. TIMES, Jan. 28, 1999, at A19).

275. The Command is headquartered in Colorado Springs, Colorado and currently has a staff of 500. This staff includes advisors on loan from the FBI, CIA, and State Department. See Philip Shenon & Eric Schmitt, *At U.S. Nerve Center, Daily Talks on the Worst Fears*, N.Y. TIMES, Dec. 27, 2002, at A14.

276. See Eric Schmitt, *Wider Military Role in U.S. Is Urged*, N.Y. TIMES, July 21, 2002, § 1, at 16.

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any future terrorist attack.<sup>277</sup> In the case of a large-scale terrorist attack that includes weapons of mass destruction, the Command anticipates taking charge of the scene.<sup>278</sup>

Immediately after September 11th, the Bush Administration hoped to federalize tens of thousands of National Guard personnel to patrol the borders and airports. The PCA restrictions, however, hindered this effort. For example, federalized Guard personnel could not have been used as border patrol officers, and the PCA did not allow the Guard personnel that were flown to the Canadian border to conduct surveillance.<sup>279</sup> Instead, the federal government requested that the states use the Guard for security purposes. By mid-October 2001, more than 6300 Guard members had been used at 420 airports.<sup>280</sup> In the three months after September 11th, the Pentagon employed 45,000 National Guard personnel to active duty flying air patrols and guarding airports, bridges, and nuclear power plants.<sup>281</sup> Since December 2001, 1600 guard members have been stationed at the border.<sup>282</sup> Bowing to extreme pressure from Congress, the Pentagon allowed some of these troops to be armed while on patrol.<sup>283</sup>

The military has been far more active domestically, both for security purposes and to pursue criminals. During the fall of 2002, for example, the Northern Command coordinated the deployment of Army RC-7 reconnaissance aircraft to the Washington, D.C. area during a series of sniper attacks.<sup>284</sup> The federal government also provided heightened security to various sporting events such as the Super Bowl, the World Series, and the Olympic Games. In 2002, security around the New Orleans Superdome during the Super Bowl included fighter jets and military attack helicopters to patrol the skies, as well as patrols conducted by SWAT teams and National Guard units on the ground. Proposals to deploy soldiers equipped with portable surface-to-air Stinger missiles were also discussed.<sup>285</sup> During the 2001 World Series in New York, police snipers were visible on the roof of Yankee Stadium, and National Guard troops, who were not in uniform, patrolled the area.<sup>286</sup> The 2002 Winter Olympics presented another security role for the military, given the international nature of the games and past instances of terrorism at the

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277. Shenon & Schmitt, *supra* note 275.

278. *Id.*

279. Schmitt, *supra* note 276.

280. Elisabeth Frater, *White House: Whoa! Keep the Reigns Tight on That Posse*, NAT'L J., Oct. 20, 2001, at 3266-67.

281. *Id.*

282. *NewsHour: Changing of the Guard* (PBS television broadcast Jan. 14, 2002) (transcript available at [http://www.pbs.org/newshour/bb/fedagencies/jan-june02/guard\\_1-14.html](http://www.pbs.org/newshour/bb/fedagencies/jan-june02/guard_1-14.html) (last visited Mar. 11, 2003)) [hereinafter *NewsHour* 2002].

283. See Jim Geraghty, *US May Allow Arms for National Guard*, BOSTON GLOBE, Apr. 7, 2002, at A10; Pamela Hess, *Soldiers at US Border Posts to Be Armed*, UPI, Mar. 26, 2002.

284. Clymer, *supra* note 24.

285. Mike Freeman, *Security, and Event, Will Be Extraordinary*, N.Y. TIMES, Dec. 1, 2001, at B6.

286. *Id.*

Olympics.<sup>287</sup> In Salt Lake City, the military not only provided air patrols, but also conducted all searches of spectators and vehicles entering Olympic sites.<sup>288</sup>

Finally, the air patrols and surveillance conducted by the Northern Command also raise questions regarding who will be responsible for gathering domestic intelligence and what methods they will be allowed to use. As Senator Bob Graham recently stated,

[t]here are going to be strong pressures to expand domestic intelligence collection, which will raise a number of issues of civil liberties and privacy . . . the questions are what type of domestic intelligence should the United States have? Against whom should that domestic intelligence capability be targeted? And where within the federal government should those responsibilities be placed?<sup>289</sup>

Many of these questions echo the issues from thirty years ago in *Laird v. Tatum*.<sup>290</sup>

The war on terrorism and the increased use of the military domestically has also spurred debate on possible changes to the PCA. Randy Larsen, a retired Air Force colonel and director of the ANSER Institute for Homeland Defense, calls the PCA “out of date” and in need of revision because it fails to clarify when military forces may be used to keep civil order or to enforce the law.<sup>291</sup> Major Trebilcock argues that the numerous exceptions carved out of the PCA during the past twenty years indicate that the Act should pose no bar to the military involving itself in the fight against terrorism. He asks, “Could anyone seriously suggest that it is appropriate to use the military to interdict drugs and illegal aliens, but preclude the military from countering terrorists threats employing weapons of mass destruction?”<sup>292</sup> These sentiments seem to be shared by members of Congress. Senator John Warner recently suggested, in a letter to Secretary of Defense Donald Rumsfeld, that greater use of the military would improve both the nation’s protection and its response to terrorist acts such as September 11th.<sup>293</sup> Senator Max Cleland was more emphatic: “I’m not comfortable with the FBI leading the war against terrorism and DOD [Department of Defense] taking a second seat, DOD needs to be the lead dog here.”<sup>294</sup>

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287. Notable examples of terrorism at the Olympic Games are the explosion in an Atlanta park during the 1996 Summer Games and the killing of eleven Israeli athletes by Palestinian terrorists during the 1972 Munich Games.

288. Edward Wong, *Chief of Winter Games Discusses Security Plans*, N.Y. TIMES, Dec. 21, 2001, at S5.

289. Alison Mitchell, *The Perilous Search for Security at Home*, N.Y. TIMES, July 28, 2002, § 4, at 1.

290. 408 U.S. 1 (1972); see *supra* text accompanying note 101.

291. Roosevelt, *supra* note 22. The ANSER Institute for Homeland Defense is a not-for-profit research institute based in Arlington, Virginia.

292. *Id.*

293. *Id.* (citing Letter from Senator John Warner to Defense Secretary Donald Rumsfeld (Oct. 12, 2001)).

294. Lisa Troshinsky, *Congress Battles Over DoD*, NAVY NEWS & UNDERSEA TECH., Oct. 29, 2001, at 1.

A coalition of libertarians and liberals, however, disagree with this sentiment.<sup>295</sup> Until recently, the Department of Defense also resisted wholesale changes to either its mission or the PCA, with officials stating that the Pentagon would not ask for amendments to the PCA unless specific changes were needed.<sup>296</sup> This attitude has changed, however, with the creation of the North American Command and the Department of Homeland Defense. North American Commander General Ralph E. Eberhart, for example, recently has suggested that he would support a full review of, and changes to, the PCA as the new command matured.<sup>297</sup> General Eberhart has also stated that he is sensitive to the concerns of civil libertarians, and that his Command would only respond to a terrorist attack at the express direction of the President and the Pentagon.<sup>298</sup>

### B. *Should the Military Play a Greater or Lesser Domestic Role?*

As the passions and fears sparked by September 11th give way to reflection and reasoned action, what role should the military play in domestic law enforcement and how should the PCA be revised, if it is retained at all? To answer this question, policy makers must assess the current threats facing the United States and determine what organization will best answer those threats.

First, is the nation's security so threatened today by drugs or terrorists that the tradition of prohibiting domestic use of the military must be discarded or significantly changed? Without a doubt, these are significant public safety threats, and this Article does not intend to minimize them. Nevertheless, the Founders placed restrictions on the domestic use of the military during a time when there were immediate threats of rebellion, Indian attacks, piracy, and invasion by European nations. The Reconstruction Era Congress passed the PCA in the shadow of civil war and during a time of social unrest punctuated by the rise of the Ku Klux Klan, violent reaction to the collection of alcohol revenue taxes, and violence along the Mexican border. The nation's internal security threats may have changed, but they do not outweigh the lessons taught

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295. Gene Healy of the Cato Institute has argued that the PCA "embodies the tradition of civilian law enforcement that we want to adhere to." Harry Levins, *Loopholes in Law Give Military Ability To Play Role in U.S.*, ST. LOUIS POST-DISPATCH, Apr. 21, 2002, at B6. Michael Scardaville of the conservative Heritage Foundation also objected to a change in the military's domestic role. *Id.* Tim Edgar, Legislative Counsel for the American Civil Liberties Union, has argued that soldiers should not be used for police work because their training to use overwhelming force to compel compliance by an enemy is different from the negotiations regularly engaged in by law enforcement officers. Mark Thompson, *Soldier on the Beat: Our Domestic Safety Used To Be up to Cops, Now the Pentagon Wants To Step in*, TIME, Dec. 3, 2001, at 60. Eugene R. Fidell, president of the National Institute of Military Justice, cautions against any relaxation of the PCA given the American notion that the military constitutes a "specialized society separate from civilian society." Eugene R. Fidell, *Think Again Before Relaxing Posse Act*, BOSTON GLOBE, Aug. 3, 2002, at A15.

296. See Levins, *supra* note 295.

297. Schmitt, *supra* note 276.

298. Shenon & Schmitt, *supra* note 275.

by previous ages when lawmakers purposely restricted, rather than embraced, use of the military on the domestic scene. The Framers did not foresee the creation of the powerful standing army that exists today. However, the power and capabilities of today's army require more, rather than less, vigilance regarding the boundary between military and law enforcement functions.

Second, even if one believes that the current threats are greater than any previous menace, there is less need for military involvement in law enforcement than at any time in our nation's history. When the nation was founded, federal law enforcement consisted of a handful of marshals,<sup>299</sup> and local law enforcement was almost entirely handled by sheriffs. When the PCA was enacted, the Secret Service was a new creation,<sup>300</sup> and the largest cities were just establishing full-time professional police departments. Today, the federal government employs tens of thousands of law enforcement agents, many of whom were added in recent years.<sup>301</sup> In addition to the federal effort, every state and city, and nearly every small town, has a professional police force.<sup>302</sup> This civil law enforcement effort is so extensive that the need for a local law enforcement officer to call upon the "posse comitatus" to execute the law is today only found in western movies. Rather than retooling the military to perform law enforcement functions, we should be building upon the existing civilian law enforcement structure.<sup>303</sup> To some extent this has already started as a result of the war on terrorism.<sup>304</sup>

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299. In 1789, Congress created the Marshals Service to ride circuit with the Supreme Court and perform various law enforcement tasks at the direction of the President and the various cabinet officers. See William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, in 15 CRIME AND JUSTICE: A REVIEW OF RESEARCH 231, 241, 328 (Michael Tonry & Norval Morris eds., 1992) (citing DONALD A. TORRES, HANDBOOK OF FEDERAL POLICE AND INVESTIGATIVE AGENCIES 353, 360 (1985)).

300. Responding to a crisis of false currency during and after the Civil War, the Secret Service was created in 1865 to suppress counterfeiting. See Eric H. Monkkenon, *History of Urban Police*, in 15 CRIME AND JUSTICE: A REVIEW OF RESEARCH 547, 569 (Michael Tonry & Norval Morris eds., 1992) (citing David R. Johnson, *Crime and Power: Counterfeiters, the Secret Service and the Nation State, 1865-1900* (1991) (unpublished manuscript)).

301. Today, the Marshal Service has approximately 4000 deputy marshals and career employees; the Drug Enforcement Agency grown from 1470 special agents in 1973 to 4601 special agents in 2001; the FBI has grown from 654 special agents in 1934 to approximately 11,000 special agents and 16,000 support personnel in 2002.

302. A professional police force was not even conceived of until the organization of the London Metropolitan Police Department in 1829. Boston created a police force in 1838, and New York instituted its police force in 1844. By 1992, there were as many as 500,000 police officers in the United States. The federal government helped to augment this number during the 1990s by helping localities and states to train and fund new police officers. See TED GEST, *CRIME AND POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER* 169, 174-87 (2000).

303. This point was made recently by Bruce Fein, who argued that "[t]he whole idea [of changing Posse Comitatus] is utterly and completely preposterous . . . [a]nd I think in the United States, what's the need for the military here that the FBI and other law enforcement authorities can't provide already." Roosevelt, *supra* note 22, at 3.

304. For example, the FBI announced in May 2002 that it would primarily concentrate on counter-terrorism and counter-espionage operations both at home and abroad. This will be accomplished by the establishment of an intelligence office, the reassignment of 500 FBI agents to terrorism efforts, and the hiring of 900 agents by September 2002. The reassigned agents will mostly be drawn from anti-drug units. Bryan Bender, *FBI Responds To Re-Address the Terrorist Threat*, JANE'S INTELLIGENCE DIG.



Even if law enforcement needs supplementing, the military may not be the best organization for this mission. First, military leaders and experts have questioned whether the military is currently large enough to meet its existing overseas obligations, never mind the added burden of supporting domestic law enforcement efforts and meeting new threats to American interests abroad that may arise.<sup>305</sup> This was also a concern of Congress, as reflected in the Military Cooperation with Law Enforcement Officers Act.<sup>306</sup> In addressing the military readiness issue, Army Chief of Staff General Eric K. Shinseki argues that a prime consideration is how long it will take the military to respond to a new threat with sufficient force. He contends that each mission strips away inventory and capability, with the current inventory already “spread-eagled” on a variety of missions.<sup>307</sup> Whereas the end of the Cold War contributed to a perception that the military did not have a mission and, therefore, could take on an expanded domestic law enforcement role, that is not true today. Since September 11th, the military has had to focus on the international search for Al Qaeda, the stabilization of Afghanistan, and, at the time of writing, an invasion of Iraq and a potential conflict with North Korea. These extraordinarily important military missions should not be diluted with domestic commitments to assist law enforcement agencies.

Second, military personnel are not typically trained for police work such as investigation, arrest procedure, and the law of search and seizure.<sup>308</sup> Providing this training may detract from the standard military training needed to prepare for the military’s primary mission.<sup>309</sup> If the armed forces are training their personnel to assist law enforcement efforts and are deploying them to airports and the borders, then they will not be as well trained or as readily available for more traditional military matters.

Third, using the military may also make civil law enforcement overly reliant on military support to the point that it will be inadequate if the military is mobilized elsewhere. This may be a significant problem after a year and a half of relying on National Guard troops to staff security checkpoints at airports and at the borders. Many of these troops are now being redeployed for the

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(June 3, 2002), available at [http://www.janes.com/regional\\_news/americas/news/misc/janes020603\\_1\\_n.shtml](http://www.janes.com/regional_news/americas/news/misc/janes020603_1_n.shtml) (last visited Mar. 11, 2003).

305. See, e.g., *Frontline: The Future of War* (PBS television broadcast, Oct. 24, 2000), available at <http://www.pbs.org/wgbh/pages/frontline/shows/future/experts/2mtw.html> (last visited Mar. 11, 2003) [hereinafter *Frontline*]; see also Thompson, *supra* note 295; Matthews, *supra* note 174.

306. See 10 U.S.C. § 376 (2000).

307. *Frontline*, *supra* note 305.

308. For example, in a March 11, 2002 letter to Senator Patrick Leahy, military leaders expressed concern that having the military conduct armed patrols on the border will lead to an unlawful and “potentially lethal use of force incident” such as the killing of an innocent traveler by a soldier not trained in law enforcement. Hess, *supra* note 283.

309. See *United States v. McArthur*, 419 F. Supp. 186 (D.N.D. 1976) (arguing that it is the nature of the military’s primary mission that its personnel must be trained to operate under circumstances where the protection of constitutional rights is not always considered); Matthews, *supra* note 174.

conflict in Iraq.

Finally, one must ask whether the public will tolerate giving the military a larger and sustained domestic law enforcement role. Perhaps anticipating this question, some commentators have pointed to the military's high standing in public opinion surveys since the end of the Gulf War.<sup>310</sup> However, this admiration grew out of the military's performance in its traditional role of battlefield combat. Even military advocates admit that "[a]n unwise or overzealous employment of the military in civilian affairs could obviously cause public opinion and tolerance to swing the other way."<sup>311</sup> History demonstrates that at some point civilians will resist and resent military authority—revolutionary Boston, the post-Civil War South, World War II Hawaii, and Northern Ireland in recent years. Unfortunately, as these memories fade, governments and citizens become more willing to accept a domestic role for the military.

Despite calls for more security and the perceived efficiency of joint training or equipment transfers, Congress should resist any call for greater domestic involvement of the military. Such operations have too great a capacity to lead to civil rights violations, disproportionate uses of force, a depletion of military resources, and the militarization of the police. Instead, any action should be aimed at creating a clear distinction between the military and police rather than removing the barriers between the two.

## VI. RECOMMENDED LEGISLATION

Congress should replace the Posse Comitatus Act, but in spite of September 11th and Congress's recent inclinations, the new act should place *more* restrictions on the military. The new act should be used to affirm the founding principles of limitations on the military and to reflect an understanding that the military is not always the best answer for a particular security challenge. A new statute should clearly define the limits of military authority and under what circumstances, if any, the military will be authorized to assist civil law enforcement. Such a statute would protect the rights of the individual, provide guidance to military commanders, and, ultimately, restore the clear distinction between the military and law enforcement.

### A. *The Outline of a New Statute*

First, the statute should clearly state the principle that has been recognized since the founding of the country—that, barring an emergency, or in extremely

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310. Trebilcock, *supra* note 69, at 4.

311. *Id.* at 4 n.20. Such negative reactions to the domestic deployment of military personnel were seen after the use of National Guard troops at Kent State in 1970, the siege at Waco, Texas in 1993, and the 1997 shooting of a shepherd along the Mexican border by Joint Task Force Six military personnel.

limited circumstances, the military will not be used to enforce the law and subject the civilian population to military authority. This statement should clearly apply to all of the military forces under the control of the Department of Defense.

Second, the statute should clearly state where and when the military may be used to enforce and execute the laws. The controlling factor should not depend on the impact on the civilian who is subject to the authority of the military,<sup>312</sup> nor should the standard rely, as some have argued, on expediency<sup>313</sup> or the duration of the mission.<sup>314</sup> Rather, the military's role should be predicated on the mission for which it has been trained and equipped—to deter war and to protect the nation's security interests.<sup>315</sup> Such law enforcement missions also must not harm the military's preparedness. Any law enforcement role should be determined by need, with the military taking on only those tasks that civil law enforcement cannot perform.

Finally, the military's role should be further crafted to minimize the potential interaction between its personnel and civilians. For example, this standard would bar the type of joint drug investigations at issue in *Pattioay*<sup>316</sup> for the following reasons: 1) the military is not trained and equipped as a detective agency; 2) local drug dealing is not a primary mission of the Army and scarce training resources should not be allocated for such missions; 3) the military contribution to that investigation can just as easily be provided by the local police department; and 4) military personnel are not trained to engage in encounters with rights-bearing civilians.<sup>317</sup>

If the military is to be handed an ongoing law enforcement role and a bright line is required, perhaps it should be drawn, literally, at the borders. Some

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312. See *supra* note 130 and accompanying text (discussing the Wounded Knee cases).

313. See, e.g., Rice, *supra* note 97 at 109-111. Colonel Rice cites comments by Congressman Charles E. Bennett during a hearing of the Government Information, Justice, and Agriculture Subcommittee of the Committee on Government Operations that "in peacetime, boredom and lack of mission have been historical problems for the military, and involvement in the drug war would be extremely beneficial." *Id.* at 110.

314. See, e.g., Matthew Carlton Hammond, Note, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 981 (1997) (recommending military action only in emergencies and for a mission limited in duration).

315. The Department of Defense web site announces that "[t]he mission of the Department of Defense is to provide the military forces needed to deter war and to protect the security of our country." About Defense Link, at <http://www.defenselink.mil/admin/about.html> (last visited Mar. 11, 2003).

316. See *supra* note 154 and accompanying text.

317. This standard, however, would not be a bar to law enforcement activities that clearly had a military purpose to them. The military should be able to maintain order on its facilities and among the military and civilian personnel employed at those facilities. Unfortunately, some courts have applied such a loose standard for the military purposes doctrine that behavior much like that in *Pattioay* has been allowed. See, e.g., *State v. Gunter*, 902 S.W.2d 172, 175 (Tex. Ct. App. 1995) (allowing admission of evidence obtained through a series of off-base undercover drug buys by military investigators allowed for military purpose of identifying persons who supply drugs to soldiers); *Moon v. State*, 785 P.2d 45, 48 (Alaska Ct. App. 1990) (finding military investigation of an off-base hotel used by drug dealers who had targeted military personnel as a market valid and not in violation of the PCA).

elements of the military's training and equipment make it particularly useful in securing the borders. For example, the Air Force can interdict unknown aircraft or aircraft suspected of smuggling or entering American airspace for illegal purposes. The Navy can also play an official supporting role to the Coast Guard.<sup>318</sup> Each of these missions meet the criteria proposed above: It fits into the military's primary mission because the focus is on preventing foreign invaders; the effect on the service's preparedness would be minimal; given the nation's vast airspace and shoreline, civil law enforcement could not easily provide the ships, aircraft, and trained personnel to operate such equipment; and there is little threat of the military engaging a civilian population in such circumstances. In contrast, using the Army at the borders with Mexico and Canada would be problematic. Although the purpose of that mission may be appropriate, the potential for interaction with the civilian population—and the attendant problems—is much more likely.<sup>319</sup> Furthermore, civilian law enforcement can be more easily expanded to meet the need for increased patrols, and since these agents would be trained for law enforcement duty, they would be more appropriate than soldiers.

Given this limited active role, the military should not only be allowed, but encouraged, to share information with law enforcement when it is necessary to prevent or investigate criminal activity. For example, if the commander of a military base learns that a local off-base bar is the preferred spot for military personnel to buy drugs,<sup>320</sup> she should report that information to the local police authorities so that they can investigate and make the necessary arrests. Such information sharing, however, should not constitute a license for the military to conduct surveillance on civilians or actively gather information for law enforcement purposes.

Far more insidious than information sharing between the military and law enforcement is the long-term militarization of the civilian police forces that results from joint training exercises and the widespread sharing of equipment. Equipment, and especially weapons, designed for the military should be kept within the Department of Defense and not shared with the police. Training should also be curtailed. What started out as limited training on loaned equipment evolved into joint training missions with Special Forces during the 1990s. This "mission creep" has led to the police looking and acting more like troops.

Finally, and this is essential to its success, a new statute must contain some mechanism for ensuring that the separation between the military and civil law

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318. Allowing such a role would do away with the charade that was used during the drug war where a naval vessel was "reflagged" as a Coast Guard ship for the purpose of enforcing the law.

319. See, e.g., *supra* note 245 and accompanying text (describing problems with troops patrolling the Mexican border).

320. This is a common fact pattern for PCA cases in the 1980s. See *supra* notes 91, 229 and accompanying text.

enforcement will be honored. When Congress originally debated the PCA, opponents argued against imposing a criminal penalty because, in very Victorian terms, such actions were “unmanly.”<sup>321</sup> The criminal penalties in the current PCA have never been imposed, despite many instances of violations of the law. The statutory remedy, therefore, has no deterrent effect. In contrast, the exclusionary rule provides an efficient and effective method for controlling the behavior of military personnel or the civil authorities that seek to use them as police officers. The new statute should affirmatively state that evidence obtained in violation of this statute will not be allowed in a criminal case.

*B. Application to the National Guard*

To the extent that it may be done by federal statute, the National Guard should also be prohibited from involvement in law enforcement. Gone are the days of citizens taking a rifle down from over the fireplace and reporting to the village green for duty. The National Guardsmen look like soldiers, are trained as soldiers, and are equipped as soldiers, and, when federalized, they are in fact part of the military. To say that they are somehow different from active military personnel or the military reserves, as some commentators and courts have, is nothing more than semantics.<sup>322</sup> The training and mentality of National Guard troops is that of a soldier and not a law enforcement officer. The Guard are trained for riot control duty and for quelling insurrections, but not for law enforcement duty, which requires the wise exercise of discretion and a detailed knowledge of criminal law and procedure. Therefore, the danger of a National Guard member participating in a criminal investigation or an arrest and inadvertently violating a defendant’s constitutional rights is just as great as it is with a regular soldier. In addition, extensive use of the National Guard creates its own preparedness issues—what tasks should Guard personnel be trained for during their part-time duty?<sup>323</sup> As National Guard units become more important to the Pentagon’s plans for overseas action,<sup>324</sup> they should be viewed as being more like their active duty counterparts. If they can be mobilized at any time for long-term federal service, they should not be expected to take on, or train for, law enforcement missions at home.

Another factor that must be considered is that using National Guard troops as police officers may hurt National Guard recruitment. As Lt. General Russell Davis, the chief of the Guard Bureau, pointed out, most people do not join the

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321. 7 CONG. REC. 4242 (1878) (statement of Sen. Hoar).

322. See, e.g., *supra* notes 219-221 and accompanying text.

323. Congress has mandated that the Guard’s role in the drug war not degrade its preparation for military service. See 32 U.S.C. § 112(b)(2)(C) (2000). This provision, however, leads back to the earlier question of whether Guard personnel have time to properly train for law enforcement roles. See *supra* note 228 and accompanying text.

324. See *supra* note 227.

National Guard to carry a rifle in an airport. "If people wanted to become firemen and policemen, they'd go out and become firemen and policemen."<sup>325</sup> During the nation's infancy, the militia had both armed defense and public safety duties. Over the years, however, the emphasis has been on the military aspects of service. Perhaps the time has come for the federal government and the states to create a division of the National Guard that is trained for public safety duties, leaving the remaining members to serve as military reservists available for armed defense. Such a police reserve was suggested by the Patten Commission as a remedy for the Northern Ireland police service's reliance on the British Army.<sup>326</sup> The key to this proposal is that law enforcement would be supplemented by persons who look and act like police rather than soldiers.

Because state National Guard units are state entities, federal law cannot restrict a governor's use of the National Guard for law enforcement. However, the federal government could limit its training for the state Guard to traditional military skills and stop funding Guard units for law enforcement duties.

## VII. THE RIGHT TO CIVILIAN LAW ENFORCEMENT

New legislation, however, may not be enough. The decades-long erosion of the PCA's protections, and recent proposals to give the military an even greater role in law enforcement, demonstrate the need for clear limitations on domestic military activity. Although the Hawaii Supreme Court applied the exclusionary rule to remedy a PCA violation, it relied on its supervisory power to prevent future improper activity.<sup>327</sup> However, the Hawaii Court could have found an affirmative right to civil law enforcement under the United States Constitution. This right to civil law enforcement is grounded in a long tradition that antedates the Revolution and the ratification of the Constitution, is reflected in several of the protections guaranteed by the Constitution, and has been reaffirmed in statutes and case law.<sup>328</sup> Furthermore, such a right is necessary to protect enumerated constitutional rights and, in a changing society, to protect individual liberty from unwarranted intrusions from the government.

Although the government has a legitimate interest in investigating and suppressing crime, the government cannot degrade the individual to fight crime.<sup>329</sup> For example, the police cannot use physical force to compel a confession;<sup>330</sup> psychological torture is forbidden;<sup>331</sup> and the Supreme Court has been extremely wary of police searches of a person's body that are considered

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325. *NewsHour 2002*, *supra* note 282.

326. *See supra* note 268.

327. *State v. Pattioay*, 896 P.2d 911, 926 (Haw. 1995).

328. *See supra* notes 50-53 and accompanying text.

329. *ANTIEAU*, *supra* note 145, at 267.

330. *Brown v. Mississippi*, 297 U.S. 278 (1936).

331. *Leyra v. Denno*, 347 U.S. 556 (1954).

“intrusive.”<sup>332</sup> These prohibitions spring not only from those rights enumerated in the Constitution, but also fundamental rights that are implied by the Constitution.<sup>333</sup>

The source of these implied or “peripheral” rights is a matter of some debate. In *Griswold v. Connecticut*, for example, Justice Douglas found the peripheral right to privacy within the “penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>334</sup> In the same case, Justice Goldberg relied on the Ninth Amendment,<sup>335</sup> which he felt revealed the Framers’ belief that “there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”<sup>336</sup> For Justice Goldberg, the proper analysis was whether a principle is “deep-rooted” in the traditions of our society.<sup>337</sup> Justice Harlan offered yet another analysis by asking whether the government has infringed on the Due Process Clause of the Fourteenth Amendment by violating the basic values “implicit in the concept of ordered liberty.”<sup>338</sup> Justice Harlan sought to balance liberty and the demands of an organized society with regard to the nation’s legal traditions.<sup>339</sup> The Court

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332. For example, in 1952 the Supreme Court held that the police could not force a person to vomit in order to recover swallowed narcotics. *Rochin v. California*, 342 U.S. 165 (1952). In contrast, the Court allowed the practice of extracting blood from an unconscious person to prove the presence of alcohol when investigating a drunk-driving accident, so long as the extraction was done by a medically trained person. *Breithaupt v. Abram*, 352 U.S. 432 (1957).

333. The Court has identified “peripheral rights” that are necessary to secure the rights that are specifically enumerated in the Constitution. For example, Justice Douglas argued that the freedoms of speech and press within the First Amendment “include[ ] not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach.” *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (citations omitted).

334. *Id.* at 484.

335. The Ninth Amendment provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

336. *Griswold*, 381 U.S. at 488.

337. “In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there] . . . as to be ranked as fundamental.” *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring).

338. The Due Process Clause, in Justice Harlan’s opinion, “stands on its own bottom,” and although the inquiry may be aided by reference to one or more enumerated rights, the Clause is not dependant on the Bill of Rights or “any of their radiations.” *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319 (1937)).

339. Justice Harlan develops this point in *Poe v. Ullman*, 367 U.S. 497 (1961):

[I]t is not the particular enumeration of rights in the first eight Amendments which spells out the reach of the Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights which are . . . *fundamental*; which belong . . . to the citizens of all free governments, for the purposes [of securing] which men enter into society. . . . [T]hrough the course of this Court’s decisions, [due process] has represented the balance which our nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. . . . [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or

continues to hold that the Due Process Clause specially protects those fundamental rights and liberties that are “deeply rooted in this nation’s history and tradition.”<sup>340</sup>

The debate over constitutional construction in the area of implied rights generally divides into two camps: “originalism” and “nonoriginalism.” Originalism holds that judges deciding constitutional issues should only enforce norms that are either stated in, or clearly implied by, the Constitution, “as it was understood by those who ratified it.”<sup>341</sup> Nonoriginalism holds that judges must interpret the Constitution and make judgments that could not be foreseen by, and may be contrary to the views of, the Constitution’s ratifiers.<sup>342</sup> The recognition of these implicit rights is necessary not only to protect the Constitution’s enumerated rights, but also to give formal expression to the values that society holds fundamental. Recognizing implicit rights is especially necessary given how circumstances change and values evolve from generation to generation.<sup>343</sup> Such a nonoriginalist approach, some commentators suggest, is the principle behind several Supreme Court decisions recognizing rights not explicitly stated in the Constitution.<sup>344</sup>

#### A. *Penumbras, Emanations, and Originalism: The Right to Civil Law Enforcement*

The right to civil law enforcement is clearly implied through both an originalist argument based on textual provisions of the Constitution and nonoriginalist arguments based on the concept of “ordered liberty.” First, the right to civil law enforcement may be found in “penumbras” and “emanations” similar to those in which Justice Douglas found the right to privacy.<sup>345</sup> The Second Amendment<sup>346</sup> is generally regarded as an endorsement of a decentralized, but well regulated, security force to defend the nation. The

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limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.” *Poe*, 367 U.S. at 541-43 (internal citations and quotations omitted).

340. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997).

341. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 685 (4th ed. 2001). In construing the language of the Bill of Rights, the Supreme Court has often looked at the intent of the Founders responsible for the Amendments to discern what rights they intended to protect. ANTIEAU, *supra* note 145, at 322 (citing *West v. Cabell*, 153 U.S. 78 (1894)). The Court has also examined the common law to illuminate what the authors of the Bill of Rights considered “unreasonable” governmental intrusions into the privacy of free people. *Payton v. New York*, 445 U.S. 573 (1980).

342. STONE ET AL., *supra* note 341, at 685.

343. ANTIEAU, *supra* note 145, at 322.

344. STONE ET AL., *supra* note 341, at 685-86. For example, there is doubt as to whether a narrow construction of the “intent of the framers” or the text as originally understood would have led to “Supreme Court decisions outlawing racial segregation, recognizing a constitutional right of privacy, affording women protection against discrimination, protecting commercial, libelous, and sexual explicit speech, and applying the bill of rights to the states.” *Id.*

345. See *supra* note 334 and accompanying text.

346. 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.”).



Founders envisioned an armed populace that was capable of mustering into an ordered force when a community's or state's security was threatened. In this context, citizens have the right to keep and bear arms.<sup>347</sup> For the Founders, the militia, not the regular army, was to be the first line of defense in the event that domestic tranquility is threatened.

The Third Amendment provides more direct protection to the citizen by forbidding the quartering of troops during peacetime without the consent of the owner.<sup>348</sup> Even during a time of war, quartering can only take place when authorized by law.<sup>349</sup> The U.S. Supreme Court has held that the Third Amendment, in conjunction with other Amendments, protects individual privacy from governmental intrusion.<sup>350</sup> Similarly, the Second and Third Amendments, read together and in conjunction with those other enumerated rights, indicate that the military's role in the domestic theater should be extremely limited, if it has a role at all. The Third Amendment ensures that civilians will not be forced to house soldiers during times of peace and limits the burden on civilians even during wartime. The right to not have a soldier housed within your home is an important liberty interest—after all, a citizen should be able to determine who will stay in his or her house, as well as when and for how long. If the Founders believed this right needed to be protected so clearly in peacetime, and was worthy of some protection even during wartime, they must also have intended to protect against other more intrusive interactions with soldiers such as searches, seizures, and arrests. The right to civil law enforcement, therefore, would preserve and give greater substance to a host of fundamental rights enumerated in the First, Fourth, Fifth, and Sixth Amendments.

The longstanding traditions of our nation also illuminate the broad intentions of the Founders when they limited the power of the military in the Constitution and Bill of Rights. John Adams declared troops to be “wretched conservators of the peace,” and several of the Founders reflected on the dangers of standing armies.<sup>351</sup> In the Declaration of Independence, the Founders complained of military abuses by England.<sup>352</sup> The provisions of the Constitution and Bill of Rights, which clearly keep the military under civilian command, establish strong militias so that the regular military cannot monopolize armed force, and they expressly restrict the military's presence among the civilian population even during times of war. These principles have

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347. See, e.g., *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

348. 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.”).

349. *Id.*

350. See, e.g., *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967) (citing the combination of the First, Third, Fourth, and Fifth Amendments); *State v. Coburn*, 530 P.2d 442 (Mont. 1974).

351. See *supra* notes 34, 46, 48.

352. See *supra* notes 35-37.

been codified on several occasions.<sup>353</sup> In addition, the Supreme Court has recognized this longstanding and essential tradition by stating: “[The American experience has been marked by] a traditional and strong resistance . . . to *any* military intrusion into civilian affairs. That tradition has deep roots in our history . . . .”<sup>354</sup> Another court remarked that the PCA expresses “the inherited antipathy of the American to the use of troops for civil purposes.”<sup>355</sup> This tradition indicates that the Founders intended the Constitution’s protections, notably those in the Second and Third Amendments, to be read expansively to protect the population from the military. The military has an important role to play, but it should be separate from the civilian population. With these protections, both stated and implied, the military would remain the servant, rather than the master, of the nation.

### B. *The Protection of Liberty and Non-Originalism*

The right to civil law enforcement is increasingly necessary today to protect the ordered liberty required by the Ninth and Fourteenth Amendments. Greater military involvement in law enforcement endangers liberty in several ways, even when it is in strict subordination to civil authorities. This danger is due in large part to two specific areas—accountability and training. In light of the recent trend to use the military domestically to fight drugs or terrorism, the PCA, and perhaps any statute, will be inadequate to fully protect an individual’s liberty interests.

The threats to individual liberty interests are all too clear where the military is in control of a civilian population. Such a situation was a significant cause of the American Revolution, and it was an impetus to the PCA. Such threats to liberty and civil rights, however, are not limited to the eighteenth and nineteenth centuries. For example, during World War II, Hawaii was placed under martial law, as

[t]he Military authorities took over the government of Hawaii. They could and did, by simply promulgating orders, govern the day to day activities of civilians who lived, worked, or were merely passing through there. The military tribunals interpreted the very orders promulgated by the military authorities and proceeded to punish violators. The sentences imposed were not subject to direct appellate court review, since it had long been established that military tribunals are not part of our judicial system. . . . Military tribunals could punish violators of these orders by fine, imprisonment or death.<sup>356</sup>

This recent history led the Hawaii Supreme Court to exclude evidence due to a Posse Comitatus violation. One justice stated that Hawaii could not wait for “widespread and repeated” violations of the PCA before using the

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353. See *supra* notes 51-53.

354. *Laird v. Tatum*, 408 U.S. 1, 15 (1972) (emphasis added).

355. *Wrynn v. United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961) (citation omitted).

356. *Duncan v. Kahanamoku*, 327 U.S. 304, 309 (1946).

exclusionary rule as a deterrent to future violations.<sup>357</sup>

The threat to liberty interests and civil rights also exists when the military remains subordinate to civil authority. Inappropriate uses of military force often result from the muddled command structure of arrangements allowing the military to support civil law enforcement.<sup>358</sup> In addition to the command structure, the military poses a risk due to accountability and training considerations. An individual's liberty is always at risk when exposed to the necessarily invasive functions of law enforcement—that is, questioning, arrest, search, and seizure—when those powers are not tempered by accountability. Local and state police officials are clearly accountable in that the public has greater access to the elected or appointed officials who oversee the police. Public opinion may be much more effectively marshaled to change local police practices and policies than federal practices and policies. This accountability represents a significant and necessary restraint on the police, and it is a valuable protection to an individual's liberty. This argument was at the crux of Justice Frankfurter's opinion in *Wolf v. Colorado* that federal police must be held to a different standard when protecting a person's liberty interests.<sup>359</sup> At least the federal law enforcement agencies are civilian in nature, have been created by Congress specifically to perform law enforcement functions, and are staffed by federal agents who have been trained to carry out a law enforcement mission. By contrast, the military, with no law enforcement mandate, is only accountable to the President and various congressional oversight committees. If the accountability issue creates a higher standard for federal law enforcement, the standard should be even higher for the military.

Liberty interests are also at risk because military personnel are not properly trained to perform law enforcement functions. Government agents and local law enforcement officers are expected to know the proper and legally acceptable methods for conducting an investigation, eliciting a confession, or performing a search. An essential part of preserving liberties and rights is to fully train law enforcement officers in what those rights entail and the steps the

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357. *State v. Pattioay*, 896 P.2d 911, 929 (Haw. 1995) (Ramil, J., concurring).

358. An essential element of the military is the establishment of a clear line of command from the foot soldier to the President. Support missions have far more complex chains of command that make coherent and synchronized operations "virtually impossible." See Schlichter, *supra* note 20, at 1306 (citing WOODWARD, *supra* note 226, at 175-76). Often the military is suddenly subordinated to civilian officials and agencies that "lack a meaningful understanding of the appropriate and inappropriate uses of military forces." *Id.* This was clearly an issue that concerned Congress when the PCA was debated. See *supra* note 62 and accompanying text.

359. Frankfurter argued:

There are . . . reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the community.

*Wolf v. Colorado*, 338 U.S. 25, 32 (1949).

government must take to protect those rights. Some degree of technical knowledge has been required to protect rights in certain intrusive searches,<sup>360</sup> and arguably a thorough understanding of personal rights and the limits of the government's power to investigate should be required for all searches. While all police officers are trained to perform their missions without violating an individual's constitutionally protected rights, soldiers do not necessarily receive such training.<sup>361</sup> Bruce Fein, a former federal prosecutor, recently argued that due to the intricacies of criminal law, the military "would probably botch an effective prosecution [of a crime]."<sup>362</sup> Even more ominous than botched prosecutions is the potential for widespread violations of fundamental rights due to the prevalent use of the military in law enforcement.

Furthermore, the now common joint training between police and the military make the police more like the military, rather than training soldiers in police practices and the law of criminal procedure. Even if the local and state police remain accountable, individual liberty is at risk when the police are trained to think and act like soldiers. Again, the police officer and the soldier are not interchangeable. Differences exist in their primary mission, weapons carried, practices in the field, and the level of force to be employed in carrying out the mission. Treating the two as interchangeable may be efficient, but it also poses a grave risk to the liberty of the citizen.

Using the military in a law enforcement role inherently puts personal rights and the concept of "ordered liberty" at risk. Rather than risk the rights violations that occurred in colonial America, or Hawaii during the Second World War, the courts should put an end to the practice by declaring a right to civil law enforcement.

### C. *Enforcement of the Right to Civilian Law Enforcement*

By recognizing the right to civilian law enforcement, courts could start applying the exclusionary rule to evidence obtained through improper military activity. One commentator asks whether evidence should be lost "because the soldier has blundered."<sup>363</sup> The answer is yes. First of all, improperly obtained

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360. The practice of extracting blood as part of an investigation must be conducted by a medically trained person. See *Breithaupt v. Abram*, 352 U.S. 432 (1957).

361. When performing civilian support missions, soldiers are often taught civilian law enforcement practices, including policies on the use of deadly force, only on the verge of being deployed. Greg Seigle, *Civil Wars: Police Praise Guard's L.A. Performance*, ARMY TIMES, May 18, 1992, at 12; see also Greg Seigle, *Troops Take Crash Course in Riot Control*, ARMY TIMES, May 18, 1992, at 16 (contrasting skills taught during military training and law enforcement training). Even when military police are used, there is the potential for problems given the differences between civilian and military jurisdictions, and because certain rights enjoyed by civilians are not always afforded to military personnel due to the nature of military service. See *United States v. Jones*, 4 M.J. 589, 590 (CGCMR 1977); *State v. Cameron*, 909 S.W.2d 836 (Tenn. 1995).

362. Roosevelt, *supra* note 22.

363. Larry L. Boschee, Note, *The Posse Comitatus Act as an Exclusionary Rule: Is the Criminal To*

## Posse Comitatus

evidence becomes no less improper simply because it was obtained by military personnel under a pretense of protecting public safety, and there should be some mechanism to protect a person's rights during a criminal investigation. Second, given the lack of accountability and training, a soldier should not be given the opportunity to blunder in a criminal investigation in the first place. By threatening the criminal prosecution, the exclusionary rule provides a powerful disincentive for military involvement with criminal investigations. The exclusionary rule has been criticized over the years,<sup>364</sup> and while other remedies exist for constitutional violations,<sup>365</sup> the exclusionary rule is still a simple, easily understood device for keeping the government honest when invading personal liberty in the name of public safety. If the exclusionary rule is applied where there has been a violation of the right to civil law enforcement, individuals will have the immediate protection from the improper use of the military that the PCA has never afforded.

## CONCLUSION

Whether the military is enforcing the law in Boston in 1770, Florida in 1878, or Hawaii in 1942, the liberty interests of the people have suffered. In addition, such missions have negatively affected military preparedness and the relationship between the military and civil authorities. These results are inevitable because the military is simply the wrong tool for the job. The military is an armed force that is maintained, equipped, and trained for the purpose of making war. Law enforcement is intended to keep the peace, enforce the laws, and protect the rights of citizens. The Founders recognized the dangers of standing armies and limited the power of the military over the citizenry. The Reconstruction Era Congress recognized and reaffirmed that using the military as police force led to a host of problems and ill will among the populace. Unfortunately, the method Congress chose to limit domestic use of the military, the Posse Comitatus Act, has not been effective. Through court interpretations, congressional exceptions, and military regulation, the Act no longer provides the protection its sponsors intended. The lack of prosecutions

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*Go Free Because the Soldier Has Blundered?* 61 N.D. L. REV. 107, 129 (1985).

364. For instance, Judge Stephen J. Markman has argued that the exclusionary rule should be abolished. He claims that the exclusionary rule as applied in *Mapp v. Ohio* was the product of an aberrational period in American history that "severely eroded the ability of state and local governments to ensure the domestic tranquility." Stephen J. Markman, *Six Observations on the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 425, 426 (1997); see also OFFICE OF LEGAL POL'Y, DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REP. NO. 2, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE, TRUTH IN CRIMINAL JUSTICE SERIES, REP. NO. 2 (1988), reprinted in 22 U. MICH. J.L. REFORM 573, 620-31 (1989).

365. Judge Markman offers several alternatives to the exclusionary rule including improved training for law enforcement officers, strengthened disciplinary procedures for misbehaving officers, civil claims against the offending police department, punitive damages, injunctive relief, and "*Bivens* Actions" (based upon *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (allowing a limited private right of action against government officials)). Markman, *supra* note 364, at 427.

for violations of the law and the federal courts' refusal to apply the exclusionary rule illustrate the Act's ineffectiveness.

Congress should enact new legislation that will reverse this trend and reaffirm the American tradition of strictly limiting the military's domestic law enforcement role. Even more protection for individual rights would be offered if the courts recognized the right to civil law enforcement that is a traditional liberty interest, is implied by the Constitution, and gives meaning to rights explicitly stated in the Bill of Rights. Furthermore, this right could be effectively enforced through the exclusionary rule, thus offering far more protection than the never-used penalties within the PCA. Such a change will not only benefit the individual's liberty interests, it will also create a clear distinction between the police and the military, and free the military from taking on missions which it neither wants nor is prepared to carry out.

The need to restrict the domestic use of the military is as pressing today as it was in the aftermath of the American Revolution or during Reconstruction. In fact, in the wake of the September 11th, an effective restraint on the military is more important now than it has been in over a century. The United States possesses a powerful, well-equipped, well-trained military force composed of courageous, patriotic soldiers, sailors, and airmen. Nevertheless, the military is still a "wretched conservator of the peace." In order to protect individual liberty, preserve domestic peace and security, and ensure the readiness of the military to respond to external threats, the courts and Congress must take the appropriate steps to reestablish the clear and necessary distinction between the military and law enforcement.