AN ARGUMENT FOR PUTTING THE POSSE COMITATUS ACT TO REST

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INTRODUCTION

The Posse Comitatus Act (PCA) was brewed in a post-Civil War political and racial cauldron, purportedly for the high-minded purpose of preserving American liberty.[1] The PCA

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[1] The [PCA] expresses one of the clearest political traditions in Anglo-American history: that using military power to enforce the civilian law is harmful to both civilian and military interests. The authors of the [PCA] drew upon a melancholy history of military rule for evidence that even the best intentioned use of the Armed Forces to govern the civil population may lead to unfortunate consequences. They knew, moreover, that military involvement in civilian affairs consumed resources needed for national defense and drew the Armed Forces into political and legal

makes it a felony offense for one to use the military to enforce civil law.[2] However, the government has never prosecuted anyone for violating the Act,[3] despite repeated instances of alleged violations.[4] Moreover, Congress has enacted so many

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> quarrels that could only harm their ability to defend the country. Accordingly, they intended that the Armed Forces be used in law enforcement only in those serious cases to which the ordinary processes of civilian law were incapable of responding.

Posse Comitatus Act: Hearing on H.R. 3519 Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 97th Cong. 16 (1981) [hereinafter *Hearing*] (statement of William H. Taft IV, Gen. Counsel, U.S. Dep't of Def.) (quoting an Aug. 6, 1979 report on the PCA by the Dep'ts of Justice and Def.).

[2] 18 U.S.C. § 1385 (2012). The Posse Comitatus Act provides:

> 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.

Id.

[3] *See Hearing*, *supra* note 1, at 9-14 (statement of Edward S.G. Dennis, Jr., Chief, Narcotics and Dangerous Drug Section, Criminal Div., U.S. Dep't of Justice) (noting that the Dep't of Justice official testified that no one has been prosecuted or charged under the Act); CHARLES DOYLE & JENNIFER K. ELSEA, CONG. RESEARCH SERV., R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 62-63 (2012) (noting that there have been no officially reported prosecutions under the PCA); *see also* Jackson v. State, 572 P.2d 87, 90 n.9 (Alaska 1977) (noting that no criminal charges have been filed under PCA); State v. Pattioay, 896 P.2d 911, 929 (Haw. 1995) (Ramil, J., concurring) (noting the lack of prosecution under the PCA); Christopher A. Abel, Note, *Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy, and Federal Law Enforcement at Sea*, 31 WM. & MARY L. REV. 445, 448 n.18 (1990) (stating no one has ever been charged for violating PCA). *But see* G. NORMAN LIEBER, THE USE OF THE ARMY IN AID OF THE CIVIL POWER 28 n.1 (1898) (indicating that in 1879, two Army officers were indicted in Texas for violating the PCA after providing a U.S. Marshall with troopers to enforce the revenue laws, but there is no further mention of the prosecution and this author could find no reported record that the prosecution was carried out). A search of the reported case law has failed to turn up any evidence of the prosecution under the Act.

[4] *See e.g.*, United States v. Johnson, 410 F.3d 137, 146-49 (4th Cir. 2005); Wrynn v. United States, 200 F. Supp. 457, 465 (E.D.N.Y. 1961); State v. Gonzales, 247 P.3d 1111, 1114-16 (N.M. Ct. App. 2010). In a number of other cases, the courts have assumed a violation of the Act but refused to directly address the issue, finding the litigant was not entitled to the relief sought regardless of whether it was violated. *See, e.g.*, United States v. Walker, 96 Fed.

exceptions to the PCA[5] that it no longer effectively functions—even as a policy statement.[6] Instead, the PCA has generated confusion and caused paralysis among those earnestly attempting to protect America within the confines of the law, and has served as an excuse when they have been accused of failing.[7] As a criminal law the PCA is dead, and the time has come to put it to rest.

To fully understand the PCA, its purported purpose, its political motivation, and its practical utility today, it is necessary to delve into the history of the PCA and American law enforcement. The Act's stated purposes were to maintain civilian control of the military[8] and to ensure the proper

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App'x 561, 562 (9th Cir. 2004); United States v. Wooten, 377 F.3d 1134, 1139-40 (10th Cir. 2004); United States v. Mullin, 178 F.3d 334, 342-43 (5th Cir. 1999).

[5] *See* STEPHEN YOUNG, THE POSSE COMITATUS ACT OF 1878: A DOCUMENTARY HISTORY xvi-xviii (2003) (citing CHARLES DOYLE, CONG. RESEARCH SERV., 95-964S, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 20-22, 21 n.48 (2000) [hereinafter DOYLE] (asserting Congress has enacted twenty-five exceptions to the PCA)).

[6] *See* Tom A. Gizzo & Tama S. Monoson, *A Call to Arms: The* Posse Comitatus Act *and the Use of the Military in the Struggle Against International Terrorism*, 15 PACE INT'L L. REV. 149, 153 (2003) (asserting that "the Act is more of a policy statement than a criminal law").

[7] For example, when the federal government was criticized for its response to the Hurricane Katrina disaster, public officials argued the PCA was to blame for preventing the military from responding to the emergency. *See, e.g.*, David E. Sanger, *Bush Wants to Consider Broadening of Military's Powers During Natural Disasters*, N.Y. TIMES (Sept. 27, 2005), http://www.nytimes.com/2005/09/27/us/nationalspecial/bush-wants-to-consider-broadening-of-militarys-powers-during-natural-disasters.html [http://perma.cc/5NZT-STSY] ("President Bush said . . . Congress should immediately begin discussing whether to amend federal law so the military could take responsibility right away in natural disasters like Hurricane Katrina. . . . [He was] apparently referring to the Posse Comitatus Act of 1878."); Eric Schmitt & Thom Shanker, *Military May Propose an Active-Duty Force for Relief Efforts*, N.Y. TIMES (Oct. 11, 2005), http://www.nytimes.com/2005/10/11/politics/military-may-propose-an-activeduty-force-for-relief-efforts.html?_r=0 [http://perma.cc/9Q7V-DDHP] ("Pentagon and military officials say that federal troops could not have been sent into the chaos of New Orleans without breaking the Posse Comitatus law.").

[8] The PCA embodies "the traditional Anglo-American principle of separation of military and civilian spheres of authority, one of the fundamental precepts of our form of government." *Posse Comitatus Act: Hearing on H.R. 3519 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 97th Cong. 10-11 (1981) (statement of Edward S.G. Dennis, Jr., Chief, Narcotics and Dangerous Drug Section, Criminal Div., U.S. Dep't of Justice).

allocation of power between the federal and state governments.[9] The Act's real underlying purpose was to prevent the Republican administration from using the military to impact elections.[10] The PCA, passed during the post-Civil War Reconstruction era, must be seen as the offspring of a unique time in history. It was born of a political and racial power struggle after years of military occupation of the South, at a time when there was virtually no federal law enforcement apparatus and when wars were waged by nation states.[11]

Historically, the federal government used the military before—and after—passage of the Act to aid civil law enforcement. Moreover, the federal government has become increasingly involved in law enforcement, expanding from a handful of postal agents in the late 1700s enforcing a few narrowly drawn statutes, to a wide array of federal law enforcement agencies enforcing more than 2,000 federal

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[9] *See* Sean McGrane, Note, *Katrina, Federalism, and Military Law Enforcement: A New Exception to the Posse Comitatus Act*, 108 MICH. L. REV. 1309, 1311 (2010) ("The PCA is rooted in federalism.").

[10] *See infra* notes 77-87 and accompanying text.

[11] *See* Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 88-90 (2003).

> This nineteenth century remnant from the Reconstruction period has been mischaracterized from its very beginnings, at times deliberately. One initial deception was to hide the Act's racist origins by linking the Act with the principles surrounding the founding of the United States, without accounting for the passage of the Constitution or the Civil War. To compound matters, the Act's most vocal nineteenth century supporters incorporated by reference the controversial, yet somewhat contrived, arguments against a standing U.S. [A]rmy from the revolutionary period. The Act's supporters also hid their unsavory agenda behind patriotic phrases and ideas of the Anti-Federalists that the founders themselves had not put into practice. In short, the Act was carefully disguised in two levels of deliberate misinformation.

Id. (footnotes omitted). This excellent article persuasively relates at some length and in great detail the history of the Act and the political and racist motivation leading to its passage. *Id.* at 93-113; *see also* Dan Bennett, Comment, *The Domestic Role of the Military in America: Why Modifying or Repealing the Posse Comitatus Act Would Be a Mistake*, 10 LEWIS & CLARK L. REV. 935, 936 (2006) (describing the PCA as "a flawed law" and "[i]ts origins . . . at best, less noble than many of our important early laws and founding documents").

criminal laws.[12] Finally, war has changed. No longer do armies of warring nations face each other on static battlefields. Today, non-state actors bent on achieving political aims seek to turn cities into cinders and civilians into casualties. Today, warfare is conducted unconventionally, using weapons such as commercial jets[13] and improvised explosive devices.[14] From the first attacks on the Twin Towers, to the 9/11 terrorist attacks, to the 2013 Boston marathon bombing, non-state actors have wrought violence on the American home front. The line between crime and war is now blurred.[15] The line between law enforcement and military action is fuzzy.

This Article proposes Congress should repeal the PCA. Part I of this Article explores the historic involvement of the military in American law enforcement and demonstrates how the military has assisted civilian law enforcement officers before and after the passage of the PCA.[16] Part II discusses the history of the federal government's involvement in law enforcement, and reveals it has grown exponentially from a minor presence at the time Congress enacted the PCA to a major establishment today.[17] Part III then discusses

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[12] *See infra* text accompanying notes 125-93.

[13] *September 11, 2001: A Day of Terror*, CNN.COM (Mar. 10, 2003, 3:27 PM), www.cnn.com/2003/US/03/10/sprj.80.2001.terror/ [http://perma.cc/6P3P-KEK9] (describing use of hijacked commercial airliners as weapons of mass destruction by Al-Qaeda).

[14] Susan Candiotti, *Suspect: Boston Bombing Was Payback for Hits on Muslims*, CNN.COM (May 17, 2013, 1:48 PM) www.cnn.com/2013/05/16/us/boston-bombing-investigation [http://perma.cc/4YW7-J9LD] (describing investigation of two naturalized United States citizens setting off improvised explosive devices at finish line of Boston Marathon in retaliation for killing of Muslims in foreign countries by United States in its war on terrorism).

[15] *See* Christopher J. Schmidt & David A. Klinger, *Altering the Posse Comitatus Act: Letting the Military Address Terrorist Attacks on U.S. Soil*, 39 CREIGHTON L. REV. 667, 672 (2006) ("While we believe the Constitution and applicable federal law authorize the military to act against foreign terrorist attacks in certain instances, the line between crime and acts of war may not always be clear."). For example, a man who bombs an abortion clinic because he is against abortions would be labeled a terrorist. The same man, who bombs the same abortion clinic, but this time because he wants to kill his cheating wife who works there, would be labeled a criminal.

[16] *See infra* text accompanying notes 20-124.

[17] *See infra* text accompanying notes 125-93.

deficiencies in the PCA, from its limited scope to the absence of judicial remedies for alleged violations of the Act.[18] Finally, Part IV argues the PCA is unenforceable as a criminal law, unnecessary because other constraints ensure the military has limited involvement in law enforcement, and ineffective because the Act is poorly designed to achieve its purported purposes.[19] The Article concludes that Congress needs to repeal the PCA.

I. THE HISTORY OF MILITARY INVOLVEMENT IN LAW ENFORCEMENT

America has historically been committed to local, decentralized law enforcement, having inherited from England traditions of local control over the enforcement of civil law.[20] Americans have also historically sought to limit the influence and power of the military in relation to civilian authorities.[21] "History tells us that Americans are suspicious of military authority as a dangerous tool of dictatorial power—dangerous, that is, to the freedom of individuals."[22] Thus, it has long been a tradition in America that the military does not directly participate in civilian law enforcement.[23] Yet, history also

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[18] *See infra* text accompanying notes 194-318.

[19] *See infra* text accompanying notes 319-54.

[20] DAVID R. JOHNSON, AMERICAN LAW ENFORCEMENT: A HISTORY 1-2 (1981).

[21] Roger Blake Hohnsbeen, Note, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 GEO. WASH. L. REV. 404, 404-05 (1986) (relating origins of American opposition to using troops to enforce the laws).

[22] United States v. McArthur, 419 F. Supp. 186, 193 (D.N.D. 1976), *aff'd*, 541 F.2d 1275 (8th Cir. 1976).

[23] *See* Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985), *aff'd on reh'g* 800 F.2d 812 (8th Cir. 1986), *aff'd*, 485 U.S. 264 (1988) (per curiam); *see also* William B. Skelton, *Officers and Politicians: The Origins of Army Politics in the United States Before the Civil War*, *in* THE MILITARY IN AMERICA: FROM THE COLONIAL ERA TO THE PRESENT 89, 90 (Peter Karsten ed., 1980) ("Antimilitarism became a staple of American political ideology, periodically renewed in the democratic reform movements of the nineteenth century and only temporarily submerged after World War II."). Indeed, the tradition of separating the military from civilian law enforcement is thought to predate the birth of the United States by more than five centuries. *See* David E. Engdahl, *The Legal Background and Aftermath of the Kent State Tragedy*, 22 CLEV. ST. L. REV. 3, 4 & n.3 (1973)

teaches us that civilian authorities have repeatedly used the military to aid civilian law enforcement. This has created a unique "American Dilemma"[24] between maintaining a separation between the military and civilian law enforcement while retaining the flexibility to use the military to assist civilian law enforcement. This part of the Article traces the history of military involvement in American law enforcement so that the debate about the propriety of the PCA can be informed by history.

A. Colonial Law Enforcement and Military Power

In England, local constables were responsible for keeping the peace within the community, with the help of local male inhabitants who had the duty to serve as watchmen and to respond, as a posse comitatus,[25] to the "hue and cry" of constables when emergencies arose.[26]

(finding Magna Carta of 1215 reflects belief in separating military from civilian affairs); *see also* Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 344-54 (1994) (discussing traditional anti-militarism in United States).

[24] Leroy C. Bryant, *The Posse Comitatus Act, the Military, and Drug Interdiction: Just How Far Can We Go?*, ARMY LAW., Dec. 1990, at 3, 3 n.9. The phrase "American Dilemma" was coined here to refer to "the conflict faced by the United States in its war on drugs" and the proper role of the military in that war. *Id.* This author finds the phrase to have greater application, encompassing the broader, American dilemma of maintaining a strong military but a stronger civilian government.

[25] *Posse comitatus*, BLACK'S LAW DICTIONARY (6th ed. 1990) (means "the power or force of the county"); *see also Posse comitatus,* OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("the force of the county"). Historically, the posse comitatus could be called forth either as a military force to defend the county or as a body to enforce the laws. *See* Walter E. Lorence, *The Constitutionality of the Posse Comitatus Act*, 8 U. KAN. CITY L. REV. 164, 166-67 (1940) (reviewing history of posse comitatus, including its use in Norman England as force to suppress insurrection or repel invasions).

[26] Lorence, *supra* note 25, at 166; *see also* H.W.C. Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 87 (1960) (relating history of development of posse comitatus); Lowell Adams Keig, Note, *A Proposal for Direct Use of the United States Military in Drug Enforcement Operations Abroad*, 23 TEX. INT'L L.J. 291, 293-94 (1988) (also relating history of development of posse comitatus).

American colonists brought with them this English model of local law enforcement.[27] These often unpaid[28] and generally unarmed[29] local constables and watchmen were recruited from the eligible male population and charged with the responsibility of maintaining law and order.[30]

In the mid-1700s, the American Colonists began to drift apart from England, in part because England's centralized enforcement of English laws in the Colonies became intolerable. England used soldiers to collect tax levies, suppress civil disorders, and generally enforce British laws.[31] England's use of troops to enforce compliance with its laws helped generate America's antagonism toward military involvement in civilian law enforcement.[32] England's policy of requisitioning the Colonists' homes for use as quarters for its soldiers was an additional source of America's anti-militarism.[33]

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[27] Thomas L. Avery, *The Third Amendment: The Critical Protections of a Forgotten Amendment*, 53 WASHBURN L.J. 179, 187 (2014) (stating that "British soldiers in the colonies became increasingly used for law enforcement and tax collection" leading to more "confrontations between civilians and soldiers").

[28] The Dutch were the first to pay law enforcement officers when they began to pay watchmen in New York City in 1658, with Boston following suit in 1663; but both towns soon abandoned the practice because it was too expensive. JOHNSON, *supra* note 20, at 5.

[29] *Id.* at 29.

[30] Ordinary citizens made up the ranks of constables and watchmen as such service was deemed a matter of civic duty for all adult, able-bodied males. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 28 (1993).

[31] William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 25 (1992) (describing use of British soldiers to enforce civilian laws).

[32] *See* David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 22-26 (1971); *see also* E. JAMES FERGUSON, THE AMERICAN REVOLUTION: A GENERAL HISTORY, 1763-1790, at 89 (1974) (explaining that England's stationing of troops in American population centers in order to enforce English law provoked resistance because America "had inherited a long anti-military tradition, in which professional soldiers were the veritable symbol of [R]oyal despotism").

[33] *See* Clarence I. Meeks III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 86 (1975) ("Eighteenth century colonists were distraught over the British practice of

England's use of troops inevitably led to a number of confrontations,[34] most notably the so-called Boston Massacre in which British soldiers killed five Colonists.[35] In reaction to Colonial outrage about the use of excessive force by soldiers, the English Parliament passed the "Administration of Justice Act" in 1774. Although it purported to punish the use of excessive force by troops in suppressing disorders, the Act nevertheless removed to England trials of any English official charged with a crime, effectively insulating them from prosecution.[36] In the end, England's use of the military to enforce civilian law in the American Colonies was one of the principal causes of the American Revolution.[37]

B. Independence, the Articles of Confederation, and the Constitution

When America declared its independence in 1776, it voiced its objections about military power over civilians. The Declaration of Independence protested the practice of "[q]uartering large bodies of armed troops among us" and "[f]or protecting them, by a mock [t]rial, from punishment for any [m]urders which they should commit on the [i]nhabitants of these [s]tates."[38] Indeed, the Declaration of Independence concluded the Mother Country had "affected to render the Military independent of and superior to the Civil power" in the Colonies.[39]

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requisitioning their property for use as quarters for British soldiers.") (citing 3 G. BANCROFT, HISTORY OF THE UNITED STATES 105, 481 (1916)).

[34] *See* Fields & Hardy, *supra* note 31, at 25 (noting that soldiers used to perform law enforcement duties "increasingly became the objects of colonial hostility").

[35] HILLER B. ZOBEL, THE BOSTON MASSACRE 68-77 (1970); *see also id.* at 94 (describing use of troops at Boston Massacre).

[36] Engdahl, *supra* note 32, at 26-28.

[37] *Id.* at 28 ("Here, then, is one of the paramount principles for which the Revolutionary War was fought: soldiers, needed and honored in war for the valor and strength that turns back the nation's enemies, are never to be used against their civilian countrymen, no matter how expedient their utilization might seem.").

[38] THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

[39] *Id.* para. 14.

In the midst of the struggle for independence, the colonies set out in the Articles of Confederation to place limits on the military.[40] The Articles restricted the power of the central government to raise armies or a navy.[41] The Articles also denied the central government the authority to appoint military officers other than generals, reserving that power instead to the several states.[42]

When the Constitutional Convention convened in 1787, the role of the military remained an important issue, though not directly tied to law enforcement. There was considerable debate at the Convention concerning whether state militias or a standing army would better serve American interests.[43] Some were concerned the military could be used as a tool of the federal government to suppress the liberties of the people.[44] To the extent some military power was deemed necessary, the Founding Fathers were generally content to rely upon individual states to furnish militias for the common defense.[45] Although the Constitution authorized a standing army, in arguing for its ratification proponents sought to allay the people's fears by emphasizing that the army's small size would prevent it from being used as a tool of oppression.[46] To further

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[40] ARTICLES OF CONFEDERATION of 1778, art. VI, para. 4-5.

[41] *Id.*

[42] *Id.* art. VII.

[43] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 329-35 (Max Farrand ed., rev. ed. 1937) [hereinafter RECORDS]; *see also* Perpich v. Dep't of Def., 496 U.S. 334, 340 & n.5 (1990) (noting that "widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate [s]tates" was expressed at Constitutional Convention).

[44] Luther Martin, a Convention delegate, spoke against a standing army to the Maryland legislature in November 1787, asserting that "when a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army for that purpose." 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 209 (Max Farrand ed., 1911) (emphasis omitted).

[45] *See* Furman, *supra* note 26, at 92-93 ("Congress preferred to rely on an undependable militia system, not recognizing the Army until 1789, when they authorized it a force of 700 men and two companies of artillery.") (footnote omitted).

[46] THE FEDERALIST NO. 8, at 122 (Alexander Hamilton) (Benjamin Fletcher Wright ed., Barnes & Noble, Inc. 1996). Specifically, Hamilton wrote:

> The smallness of the army renders the natural strength of the community an over-match for it; and the citizens, not habituated to look

placate opponents concerned about the dangers of a strong military force, the Framers included several safeguards in the Constitution against an encroachment of military power on the civil government.[47] For example, Congress has the authority to raise a standing army[48] and to control the state militias when in federal service,[49] and Congress would appropriate funds for no longer than two years at a time.[50] Further, the President, a civilian, is designated Commander in Chief of the armed forces,[51] and only Congress may declare war.[52] Finally, further safeguards were provided in the Bill of Rights. The Second Amendment provides for state militias and the right of citizens to bear arms,[53] and the Third Amendment restricts the quartering of soldiers in private homes.[54]

The Constitution did not provide for a federal police force. Law enforcement was still deemed the responsibility of local authorities. Accordingly, the Constitution contains only four references to federal jurisdiction over criminal matters: counterfeiting,[55] "Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,"[56] crimes committed within federal enclaves,[57] and Treason.[58] There was

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> 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 exerted to the prejudice of their rights. The army under such circumstances may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection; but it will be unable to enforce encroachments against the united efforts of the great body of the people.

Id.

[47] *See* 2 GEORGE TICKNOR CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES: FROM THEIR DECLARATION OF INDEPENDENCE TO THE CLOSE OF THEIR CIVIL WAR 527-28 (Joseph Culbertson Clayton ed., 1896).

[48] U.S. CONST. art. I, § 8, cl. 12.

[49] *Id.* cl. 16.

[50] *Id.* cl. 12.

[51] U.S. CONST. art. II, § 2, cl. 1.

[52] *Id.* art. I, § 8, cl. 11.

[53] *Id.* amend. II.

[54] *Id.* amend. III.

[55] *Id.* art. I, § 8, cl. 6.

[56] *Id.* cl. 10.

[57] *Id.* cl. 17.

no provision, however, granting the Attorney General of the United States any agents or personnel to enforce these laws.

During the ratification process, criminal law enforcement was largely a non-issue; the Framers apparently expected the states to retain the traditional responsibility of enforcing criminal laws.[59] Responding to opponents who suggested the proposed Constitution failed to provide for the use of armed forces to keep the peace, Alexander Hamilton argued the authority was implicit in the Necessary and Proper Clause, stating:

> It being therefore evident that the supposition of a want of power to require the aid of the POSSE COMITATUS is entirely destitute of color, it will follow, that the conclusion which has been drawn from it, in its application to the authority of the federal government over the militia, is as uncandid as it is illogical.[60]

After the ratification of the Constitution, the first Congress passed additional legislation addressing the role of the military in law enforcement. In the Judiciary Act of 1789, Congress defined the duties of federal marshals, providing in part that the Federal Marshal "shall have the power to command all necessary assistance in the execution of his duty."[61] Although this Act did not specifically authorize federal marshals to call upon the military for assistance, in 1792 Congress passed an act authorizing marshals to use the militia

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[58] U.S. CONST. art. III, § 3.

[59] *See* THE FEDERALIST NO. 45, *supra* note 46, at 328 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; *and the internal order*, improvement, and prosperity of the State.") (emphasis added); *see also* Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117, 118 (1987) ("Obviously, the Framers expected that general criminal jurisdiction would remain with the States.").

[60] THE FEDERALIST NO. 29, *supra* note 46, at 228 (Alexander Hamilton).

[61] Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

as a posse to assist in enforcing the law.[62] Further, although the language of the 1792 Act was limited to the militia, over time the distinction was disregarded and marshals enlisted regular soldiers (ostensibly acting in their status as citizens who happened to be soldiers) to assist in civilian law enforcement.[63]

C. Military Involvement in Law Enforcement During the Nineteenth Century

During the first 100 years of the Republic, the federal government used soldiers to enforce civil laws on scores of occasions.[64] The federal government's use of military personnel

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[62] The act authorized the President to call out the militia "whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals." Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264, 264. The Act was amended in 1795 to eliminate a requirement that the President give judicial notification as a prerequisite to exercising his authority under the Act, and in 1807 to clarify that the President had the authority to use both the militia and "such part of the land or naval force of the United States, as shall be judged necessary." Act of March 8, 1807, ch. 39, 2 Stat. 443; *see also* Act of Feb. 28, 1795, ch. 36, §§ 1-10, 1 Stat. 424.

[63] *See* Engdahl, *supra* note 32, at 49; *see also* Emp't of the Military as a Posse, 16 Op. Att'y Gen. 162, 162-64 (1878). In reference to the Act of 1792, the Attorney General of the United States explained "[i]t has been the practice of the Government since its organization (so far as known to me) to permit the military forces of the United States to be used in subordination to the marshal." *Id.* at 163. This conclusion follows on the heels of two other opinions by the Attorney General in which he concluded that when the military was called out by the marshal, the soldiers acted in their capacity as male citizens who had a duty to respond to the call for assistance. Thus, in 1854 the Attorney General opined that persons serving in a posse comitatus were performing a citizen's duty, regardless of their military status. Extradition of Fugitives from Serv., 6 Op. Att'y Gen. 466, 473 (1854). Accordingly, the Attorney General opined that marshals could raise a posse to enforce the civil law by calling upon any male over the age of fifteen, "whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a sheriff or marshal." *Id.* The Attorney General reiterated this position in 1860, adding the admonition that on "such occasions especially, the military power must be kept in strict subordination to the civil authority, since it is only in aid of the latter that the former can act at all." Power of the President in Executing the Laws, 9 Op. Att'y Gen. 516, 522-23 (1860).

[64] *See* Candidus Dougherty, *While the Government Fiddled Around, the Big Easy Drowned: How the Posse Comitatus Act Became the Government's Alibi for*

to enforce civil laws before the Civil War has been described as commonplace and routine.[65] Prior to the Civil War, the federal government called out the military to enforce civil law in response to a variety of events. For example, the federal government called out the troops to quell Shay's Rebellion in Massachusetts in 1786, the Whiskey Rebellion in Pennsylvania in 1794, and the Dorr Rebellion in Rhode Island in 1842.[66] The government also periodically relied upon the military to put down riots, such as the race riots in Philadelphia in the early 1800s.[67]

In the years leading up to the Civil War, federal troops became entangled with enforcing slavery. On the one hand, the military was used to keep the peace between those supporting slavery and those opposing it, suppressing the violence between the pro-slavery and anti-slavery factions in the Kansas Territory prior to its statehood.[68] On the other hand, the military was used to enforce the Fugitive Slave Act, which required federal marshals to find and return fugitive slaves to

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the Hurricane Katrina Disaster, 29 N. ILL. U. L. REV. 117, 121 (2008) ("[B]etween 1877 and 1945, the military was involved in domestic affairs 125 times."); Furman, *supra* note 26, at 93 (stating that the army "was involved in . . . seventy domestic disturbances, including labor disputes, racial disorders, lynchings, natural disasters and reconstruction elections" between 1775 and 1878) (footnote omitted); Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 960 (1997) (noting that the "use of the military by federal marshals became common" during a period before the Civil War).

[65] McGrane, *supra* note 9, at 1319-20 ("Indeed, between the ratification of the Constitution in 1789 and the passage of the PCA almost ninety years later, the use of the Army and other military personnel for domestic law enforcement purposes was commonplace."); Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383, 393 (2003) (referring to the period after the Constitution and before the Civil War and stating that "[d]espite 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") (citing Meeks, *supra* note 33, at 88).

[66] *See* Engdahl, *supra* note 32, at 49 n.236; *see also* Furman, *supra* note 26, at 88 n.18 (noting President Washington's use of military under Act of 1792 to suppress Whiskey Rebellion).

[67] *See* JOHNSON, *supra* note 20, at 23 (noting that soldiers were called out five times between 1829 and 1850 to quash race riots in Philadelphia).

[68] *See* Furman, *supra* note 26, at 93 (describing use of troops to suppress violence in Kansas in 1855).

their owners.[69] In 1854, United States Attorney General Caleb Cushing opined that federal marshals could use the military, even entire military units, as a posse comitatus to enforce the Fugitive Slave Act.[70]

Dramatic events during the Civil War resulted in a further blurring of the line between the military and civil law enforcement. In 1861, in response to the national crisis brought on by the secession of Southern states, Congress eliminated the portion of the 1792 Act which limited presidential use of the military force to situations where order could not be restored by ordinary law enforcement measures.[71] In its place, Congress added a new provision permitting the President to call out militia or regular army forces when, in his judgment, it became impracticable to enforce the law with ordinary law enforcement measures.[72] President Abraham Lincoln proceeded to wield this power extensively, even though all the courts, including the United States Supreme Court, eventually held the government's use of troops against civilians was unconstitutional and anathema to the principles of American democracy.[73]

The use of troops in law enforcement activities continued during the post-Civil War reconstruction period. After the Civil War, soldiers marched in to provide civilian law enforcement in the conquered South until civilian authority could be restored. In the Reconstruction Act of 1867,[74] Congress divided the South into military districts, governed by military commanders. From 1866 through 1877, the government frequently used federal troops to quell disorders throughout the South. For example, in 1871 under the authority of the Ku

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[69] Fugitive Slave Act of 1850, ch. 60, § 5, 9 Stat. 462, 462-63.

[70] *See* Extradition of Fugitives from Serv., 6 Op. Att'y Gen. 466, 466-67 (1854).

[71] The 1792 Act provided the President could call out the militia as a military force, but only when neither local law enforcement authorities nor the marshal could suppress the disorder. Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264, 264.

[72] Act of July 29, 1861, ch. 25, 12 Stat. 281.

[73] *See* Beckwith v. Bean, 98 U.S. 266, 296-98 (1878); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 124-25 (1866); Milligan v. Hovey, 17 F. Cas. 380, 381 (C.C.D. Ind. 1871) (No. 9,605); Johnson v. Jones, 44 Ill. 142, 160-61 (1867); Griffin v. Wilcox, 21 Ind. 370, 388-89 (1863).

[74] Reconstruction Act of 1867, ch. 153, 14 Stat. 428.

Klux Klan Act,[75] President Ulysses S. Grant sent federal troops into South Carolina to arrest members of the Klan.[76] Federal troops also aided revenue officers in suppressing illegal production of whiskey, quelling labor disturbances, and ensuring the sanctity of Southern elections by posting guards at polling places.[77] At Reconstruction's height immediately after the war, approximately 20,000 federal troops were stationed in the eleven occupied former Confederate states.[78]

By 1874, the Democrats had regained control of the House of Representatives[79] and by 1877 Democrats had reasserted political control of all Southern states except for Florida, South Carolina, and Louisiana.[80] The Republicans used federal forces, both civil and military, in an effort to ensure that African Americans retained the effective right to vote, presumably for Republicans. Thus, during the 1876 Presidential election, Republican President Grant sent seven thousand special deputy marshals into Florida, South Carolina, and Louisiana, ostensibly to watch the polls and ensure a fair election.[81] Only two months before the election, in response to a request from the Republican Governor of South Carolina, President Grant also sent federal troops into South Carolina to perform law enforcement functions.[82]

When the election was over, Samuel Tilden, the Democratic candidate, had 184 uncontested electoral votes to 165 for the Republican candidate, Rutherford B. Hayes.[83] A

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[75] Ku Klux Klan Act of 1871, ch. 22, § 3, 17 Stat. 13, 14.

[76] 7 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1907, at 132-41 (1897).

[77] *See* Note, *Honored in the Breech: Presidential Authority to Execute the Laws with Military Force*, 83 YALE L.J. 130, 142-43 (1973).

[78] *See* William Rosenau, *Non-Traditional Missions and the Future of the U.S. Military*, 18 FLETCHER F. WORLD AFF., Winter/Spring 1994, at 31, 43.

[79] Edwin Erle Sparks, *National Development 1877-1885*, *in* 23 THE AMERICAN NATION: A HISTORY 119 (Albert Bushnell Hart ed., 1907).

[80] 5 WOODROW WILSON, A HISTORY OF THE AMERICAN PEOPLE 99 (1902).

[81] Sparks, *supra* note 79, at 124; Furman, *supra* note 26, at 94.

[82] 7 JAMES FORD RHODES, HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850 TO THE FINAL RESTORATION OF HOME RULE AT THE SOUTH IN 1877, at 225 (1906).

[83] Lorence, *supra* note 25, at 173.

special commission composed of eight Republicans and seven Democrats voted along partisan lines to award a total of twenty disputed electoral votes to Hayes, thus making him the new President.[84] Not surprisingly, the Democrats concluded the Republicans stole the election from them, at least in part through an improper use of the military.

After the election the House of Representatives, dominated by Southern Democrats, demanded President Grant provide a report on the use of military forces in the South during the election. The report asserted troops were used as a posse to assist the marshals to "secure the better execution of the laws" by preventing Southern whites from intimidating voters.[85] The Congressional response was harsh: "American soldiers policemen! Insult if true . . . ."[86] Congress charged the Attorney General had directed that "any marshal . . . may, upon his own private judgment, order any officer, even the General of the Army, to obey his command."[87]

The following year Congress expressed continued dissatisfaction with the military involvement in civil law enforcement. During debates on the Army Appropriations Bill for the fiscal year ending June 30, 1878, Representative E. John Ellis argued the appropriations request constituted an attempt to establish a "national gendarmerie, . . . a national police [force]."[88] To guard against this, the House voted to

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[84] 7 RHODES, *supra* note 82, at 261-79; *see also* Hammond, *supra* note 64, at 960-61 (relating history of passage of the Act).

[85] 7 RICHARDSON, *supra* note 76, at 421.

[86] 5 CONG. REC. 2112 (1877) (statement of Rep. Atkins).

[87] Representative H.B. Banning, The Object of Our Army, Speech Before the U.S. House of Representatives (Mar. 2, 1877), *in* G. NORMAN LIEBER, THE USE OF THE ARMY IN AID OF THE CIVIL POWER 61, 68 (1898). When the bill reached the Senate, Senator Bayard stated:

> It is not merely the cost of the Army; it is the question of the employment of the Army. Th[is] is the cause of the deep feeling which pervades the people of this country to-day[sic] . . . . [T]he fact is that a widespread belief exists that the Army of the country has been employed and is still being used for purposes dangerous to the liberties of the country.

LIEBER, *supra*, at 11-12 (emphasis omitted).

[88] 7 CONG. REC. 3718 (1878) (statement of Rep. Ellis).

amend the Appropriations Act to prohibit using the Army in a law enforcement role.[89] The Senate, though initially reluctant, approved the Bill when it was satisfied the Act would not prohibit the use of troops for purposes specifically authorized by the Constitution or Congress (as opposed to the President).[90]

This amendment, known as the Posse Comitatus Act, was theoretically designed to put an end to the unbridled use of the military by the federal government to enforce national laws,[91] and sometimes had that effect.[92] Nevertheless, the military continued to assist in law enforcement during the remainder of

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[89] 7 CONG. REC. 3845, 3877 (1878) (statement of Rep. Knott and subsequent vote on amendment).

[90] 7 CONG. REC. 4648 (1878) (statement of Sen. Sargent). As originally enacted, the Army Appropriations Act for the fiscal year 1878 provided:

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

Army Appropriation Act of June 18, 1878, ch. 263, § 15, 20 Stat. 152, 152 (codified as amended at 18 U.S.C. § 1385 (2012)) (emphasis added).

[91] *See* Charles Bloeser, *A Statute in Need of Teeth: Revisiting the Posse Comitatus Act After 9/11*, FED. LAW., May 2003, at 24, 26. ("Inherent in the Posse Comitatus Act is the view that America's first line of defense is local authority comprising those who know a community and its people and who have a vested interest in securing its safety.").

[92] The PCA was cited on several occasions in the last half of the nineteenth century as a ground for prohibiting the use of troops for law enforcement purposes. For example, in 1878 an Internal Revenue officer was refused the aid of soldiers in contending with armed resistance in Arkansas. 16 Op. Att'y Gen. 162, 162-63 (1878). In 1881, United States Marshals were denied the authority to use troops to arrest persons suspected of robbing a federal government clerk. 17 Op. Att'y Gen. 71, 71-72 (1881). In the same year, soldiers were prohibited from assisting in the apprehension of criminals in Arizona. 17 Op. Att'y Gen. 242, 242-44 (1881). In 1894, United States Marshals were again denied a request for military assistance, this time in arresting bandits in the Indian Territory. 21 Op. Att'y Gen. 72, 72-73 (1894).

the nineteenth century.[93] For example, the United States Calvary was called out in 1892 to end a dispute in Wyoming when large cattle companies battled small ranchers over grazing rights in what became known as the Johnson County War.[94] Troops were also sometimes used to suppress a new perceived danger, organized labor, such as when soldiers suppressed protesting railroad workers in the Milwaukee Riots of 1886[95] and the Pullman Strike of 1894.[96]

D. Military Involvement in Law Enforcement During the Twentieth Century

Over time, Americans altered their view of the military. The two World Wars, America's emergence as a military superpower, and the war on terrorism have transformed the image of soldiers from underclass into heroes.[97] Although the American public's favorable view of the military has ebbed at times, for example during the Vietnam conflict, people now generally view the military as one of America's greatest

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[93] The government used the military extensively, of course, against Indian tribes in the West, but Indians were not viewed as civilians. 14 Op. Att'y Gen. 249, 253 (1873). Further, the military actions often took place in territories in which no civilian governments were in place with their own law enforcement officers.

[94] *See* JOHNSON, *supra* note 20, at 94-96.

[95] *See* Jerry M. Cooper, *The Wisconsin National Guard in the Milwaukee Riots of 1886*, *in* THE MILITARY IN AMERICA: FROM THE COLONIAL ERA TO THE PRESENT 194-209 (Peter Karsten ed., 1980) (describing use of National Guard to suppress labor activists).

[96] Engdahl, *supra* note 32, at 62, 64-65; *see also* Furman, *supra* note 26, at 90 (describing President Grover Cleveland's dispatch of federal troops to Chicago in 1894 "to prevent rioting Pullman strikers from destroying Federal property and to remove obstructions to the United States mails").

[97] *See* Dunlap, *supra* note 23, at 353 (noting that "[i]nstead of drawing from the dregs of society, today's military picks from among the nation's finest," and relating statistics demonstrating that average soldier is better educated); *see also* Jessica DeBianchi, Note, *Military Law: Winds of Change—Examining the Present-Day Propriety of the Posse Comitatus Act After Hurricane Katrina*, 17 U. FLA. J.L. & PUB. POL'Y 473, 500 (2006) ("The rise of American nationalism post-September 11th causes citizens to perceive soldiers as heroes, not villains, and to perceive the Army as protector of safety, not an imposer of threat.").

strengths.[98] This change in attitude toward the military has been reflected in the increased use of the military in civilian law enforcement,[99] though the military still has not engaged in general law enforcement duties.[100] The use of the military to enforce civil laws increased in frequency after the turn of the century. Troops were occasionally used during the beginning of the century to restore order during labor disputes.[101] There were, however, four primary situations in which the United States military was deployed against civilians: racial disputes, anti-Vietnam War protests, the uprising of Native Americans, and the war on drugs.

Racial disputes spanned the twentieth century, resulting in the repeated use of the military to enforce civil rights laws and to suppress race riots. For example, in 1957 President Dwight Eisenhower dispatched 1,000 paratroopers from the 101st Airborne Division to occupy the Central High campus in Little Rock, Arkansas, to protect minority children from a white mob angry at the racial integration of the public schools.[102] The Kennedy Administration repeatedly deployed federal troops to assist federal marshals in enforcing civil

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[98] *See* Dunlap, *supra* note 23, at 354 ("The American public no longer views the armed forces with the fear and loathing that produced the antimilitarism that provided the intellectual infrastructure for civilian control of the military in this country. In 1993 the steadily climbing approval rating for the military reached a twenty-seven-year high. A Harris poll spokesman reported that '[n]o other major institution, profession, or interest group comes close [to the military].'") (quoting John T. Correll, *Opinions*, AIR FORCE, June 1993, at 26) (footnote omitted).

[99] *See* Jack H. McCall, Jr. & Brannon P. Denning, *Mission Im-Posse-ble: The Posse Comitatus Act and Use of the Military in Domestic Law Enforcement*, TENN. B.J., June 2003, at 26, 31 (asserting that "between 1877 and 1945 . . . troops were called out on some 125 occasions" to enforce domestic laws).

[100] *See* Cooper, *supra* note 95, at 196-97 (describing the events of the Milwaukee labor strike which indicates that, though involved in quelling domestic disputes, military not engaged in general law enforcement duties).

[101] For example, the National Guard was called out in 1934 to suppress a strike at Toledo's Electric Auto-Lite Company, shooting twenty-seven workmen in the process. WILLIAM MANCHESTER, THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA 1932-1972, at 133 (1974).

[102] *See* CHARLES C. ALEXANDER, HOLDING THE LINE: THE EISENHOWER ERA 1952-1961, at 197-99 (1975) (federal troops deployed when United States Marshals were unable to maintain order); *see also* MANCHESTER, *supra* note 101, at 805-06 (discussing deployment of troops to Little Rock in 1957).

rights laws.[103] President Lyndon Johnson also called out troops in response to racial tensions.[104] In particular, President Johnson used troops to suppress a massive, nationwide riot that erupted after the assassination of Dr. Martin Luther King, Jr.[105] United States Marines, along with National Guard soldiers, were deployed again in Los Angeles to suppress the race riots that broke out after white police officers were acquitted in the beating of Rodney King, a black man.[106]

The government also used the military in connection with protests against the Vietnam War. In 1970, National Guardsmen were deployed on the campus of Kent State to suppress protesters against the Vietnam War. Before the smoke cleared, four unarmed college students were killed.[107] Two years later 7,500 soldiers were airlifted from Fort Hood, Texas, to Chicago to assist the local police in suppressing anti-war protests at the Democratic National Convention.[108]

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[103] *See* GODFREY HODGSON, AMERICA IN OUR TIME 156-57 (1976) (noting that on June 11, 1963, President Kennedy sent federal troops to University of Alabama at Tuscaloosa to enforce racial integration); *see also* MANCHESTER, *supra* note 101, at 1154 (National Guard called out in 1961 to back up United States Marshals protecting freedom riders in Alabama); *id.* at 944-51 (describing the course of events during which Kennedy called out regular military forces in 1962 to support United States Marshals in registering James Meredith at University of Mississippi).

[104] *See* MANCHESTER, *supra* note 101, at 1057-61 (stating that President Johnson sent troops to protect Selma Marchers in 1965); *see also id.* at 1062-64 (further stating that President Johnson deployed troops to suppress 1965 race riots in Los Angeles); *id.* at 1079-80 (describing President Johnson's deployment of 2,600 National Guardsmen to suppress race riots in Newark, New Jersey); HODGSON, *supra* note 103, at 430-31 (stating that President Johnson deployed elements of two airborne divisions in June 1967 to restore order during race riots in Detroit).

[105] *See* HODGSON, *supra* note 103, at 361-62 ("By the end of the week [after King's assassination], there had been riots in more than a hundred cities. Thirty-seven people had been killed, twelve of them in Washington, where looting crowds of black rioters swarmed through wide swaths of the city, setting fires not only in the ghettoes but in the downtown shopping streets as well. By dawn on April 6, a pall of black smoke from those fires hung over the national monuments. The capital of the United States was under military occupation.").

[106] *See* McGrane, *supr*a note 9, at 1323 (noting President George H. W. Bush called out 4,000 soldiers and marines to help quell violence following verdict).

[107] *See* MANCHESTER, *supra* note 101, at 1213-15.

[108] *Id.* at 1142 (troops placed on standby to assist local police).

One of the most controversial uses of the United States military against civilians occurred in the nation's capital during the Great Depression. World War I veterans formed a self-proclaimed "Bonus Expeditionary Force" of 25,000 people, their ranks including wives and children, marching on and camping in Washington, D.C., to demand immediate payment of bonuses authorized by the Adjusted Compensation Act of 1924, but not due until 1945.[109] President Hoover soon called out the troops to "put an end to rioting and defiance of civil authority."[110] The Army Chief of Staff, Douglass MacArthur, personally led the attack on the Bonus Army, deploying tanks under the command of Major George Patton.[111] The regular Army routed the protesters, causing over 100 casualties and killing two babies as a result of tear gas.[112]

Another very controversial use of the United States military to aid civil law enforcement occurred in response to the Native American uprising at Wounded Knee, South Dakota, in the Pine Ridge Indian Reservation.[113] In 1973 more than 100 members of the American Indian Movement occupied the town of Wounded Knee, the site of an Indian massacre a century before, to protest treatment of American Indians.[114] Federal law enforcement authorities, with the assistance of local authorities, surrounded the Indians, and a prolonged stalemate ensued.[115] The Department of Defense dispatched two Army Colonels to the site to determine if federal troops

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[109] *See id*. at 3.

[110] *Id*. at 12-13. Interestingly, MacArthur's assistant, Dwight Eisenhower, protested the use of troops, insisting, "This is political, political." *Id*. at 12.

[111] *See id*. at 13.

[112] *Id*. at 16.

[113] The use of troops at Wounded Knee is significant largely because it revived discussion of the Posse Comitatus Act, which had lain dormant for nearly a century. *See infra* text accompanying notes 265-82 (discussing cases ruling on PCA in connection with Wounded Knee uprising).

[114] *See* United States v. Jaramillo, 380 F. Supp. 1375, 1376-77 (D. Neb. 1974) (relating facts of uprising); *see also* Hohnsbeen, *supra* note 21, at 409 (providing background of Wounded Knee incident).

[115] *See* John D. Gates, Comment, *Don't Call Out the Marines: An Assessment of the Posse Comitatus Act*, 13 TEX. TECH L. REV. 1467, 1475-77 (1982) (relating history of uprising).

were necessary pursuant to federal law.[116] One of the Colonels quickly assumed an active role, however, ordering the delivery of military equipment and material (including armored personnel carriers), determining placement of the equipment using military personnel, and ordering aerial surveillance using military aircraft.[117]

A less dramatic but more lasting use of the military in civil law enforcement has occurred in fighting the war on drugs. Starting in the 1970s, the military became increasingly active working with both local and federal law enforcement authorities in conducting operations against drug smugglers and distributors. Some of the initial involvement grew out of military efforts to enforce drug laws on military bases and involving military personnel.[118] In the 1980s, however, the military became involved in drug interdiction in the War on Drugs after the government determined the drug trade was a threat to national security.[119] Active and reserve soldiers have since served by training law enforcement personnel, eradicating marijuana, and providing air and ground transportation to civilian law enforcement.[120] A large amount of money was devoted to the military's assistance in the drug war.[121]

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[116] *Id.* at 1476 (noting the determination made under 10 U.S.C. § 331 (1976)).

[117] *Jaramillo*, 380 F. Supp. at 1379-80.

[118] For example, in *Burns v. State*, 473 S.W.2d 19, 20-21 (Tex. Crim. App. 1971), a civilian undercover agent worked with the military in investigating drug activity on the Fort Hood, Texas, military post. Similarly, *United States v. Brown*, 9 M.J. 666, 667-68 (N.C.M.R. 1980), involved military personnel assisting state, local, and federal law enforcement officers in the arrest of a Marine drug dealer. Likewise, *State v. Trueblood*, 265 S.E.2d 662, 664 (N.C. Ct. App. 1980), involved joint military-civilian drug enforcement efforts against an Army soldier.

[119] *See* John P. Coffey, Note, *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?* 75 GEO. L.J. 1947, 1948 (1987) ("In April 1986, President Reagan signed a classified National Security Decision Directive (NSDD) on Narcotics and National Security[,] . . . [concluding] that international drug trafficking presented a national security threat because of its potential for destabilizing democratic governments.").

[120] Rosenau, *supra* note 78, at 34.

[121] In 1993, for example, the Department of Defense spent more than $1.2 billion toward drug interdiction activities. *Id.*

The military has also been increasingly used to assist law enforcement against terrorism, both domestic and international in origin. After the attacks on September 11, 2001, National Guard troops took station at critical locations, such as airports.[122] The Department of Defense also established a North American Command, which has operated air patrols over American cities and coasts.[123] When two snipers began killing people in the Washington, D.C., area in 2002, military aircraft were used in the search for the gunmen.[124]

Thus, a brief review of the history of military involvement in law enforcement shows the federal government has used the military to assist in law enforcement throughout the history of the United States. Although that involvement has not been long in duration at any given time, it has been consistent. There is no reason to believe that will change in the future. This is true even though, as the next Part shows, the federal government has become increasingly involved in law enforcement through civilian law enforcement agencies.

II. THE HISTORY OF FEDERAL INVOLVEMENT IN LAW ENFORCEMENT

To determine whether and when a soldier should be used as a law enforcement officer, it is first necessary to consider the role of the federal government in law enforcement. When our nation was founded—indeed, when the Posse Comitatus Act was passed—the federal government had a very limited role in law enforcement. As discussed next, the federal government's involvement in law enforcement, however, has grown exponentially during the last couple hundred years.

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[122] Elisabeth Frater, *Whoa! Keep the Reins Tight on That Posse*, 33 NAT'L J. 3266, 3266-67 (2001).

[123] *See* Eric Schmitt, *Wider Military Role in U.S. Is Urged*, N.Y. TIMES (July 21, 2002), http://www.nytimes.com/2002/07/21/us/wider-military-role-in-us-is-urged.html [http://perma.cc/68E2-MJ6S].

[124] *See* Adam Clymer, *The Nation; Big Brother Joins the Hunt for the Sniper*, N.Y. TIMES (Oct. 20, 2002), http://www.nytimes.com/2002/10/20/weekinreview/the-nation-big-brother-joins-the-hunt-for-the-sniper.html [http://perma.cc/8J6H-LHP8].

A. Federal Law Enforcement During the Nineteenth Century

During the first hundred years following the adoption of the Constitution, law enforcement in America remained largely within local control, though beginning with the Civil War, the federal law enforcement apparatus began to form.[125] Because its growth resulted from an unplanned, agency-by-agency evolution, there was little debate about its wisdom.[126] The United States Post Office was the first federal agency to increase significantly the scope of its law enforcement duties. After the Civil War, Congress broadened the scope of federal law enforcement responsibilities from enforcing crimes against mail theft to include crimes against public morals, fraud, and swindling.[127] Prior to the Civil War, the Post Office had only a few dozen criminal investigators, but by 1875 the Post Office established the Division of Postal Inspectors and Mail Depredations with scores of agents nationwide.[128]

Similarly, the Secret Service emerged as a major new law enforcement agency from a modest beginning. In 1861, as a result of the strains on the currency brought about by the Civil War, the United States began to issue paper money for the first time since the Revolution, vastly increasing the problem of counterfeiting.[129] In 1864, the Secretary of the Treasury was compelled to hire a few private detectives to fight the counterfeiters.[130] By 1865, the Secretary appointed a permanent force of roughly thirty agents to do the job.[131]

These new Secret Service agents developed effective investigation and enforcement techniques.[132] Their successes, however, brought them into high demand by other federal agencies, such that by the late nineteenth century, the Secret Service became a de facto general federal law enforcement

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[125] *See* FRIEDMAN, *supra* note 30, at 261.

[126] JOHNSON, *supra* note 20, at 74.

[127] *Id.* at 75.

[128] *Id.* at 78.

[129] *Id.* at 81-83.

[130] *Id.* at 83.

[131] *Id.*; *see also* Eric H. Monkkonen, *History of Urban Police*, *in* MODERN POLICING 547, 569 (Michael Tonry & Norval Morris eds., 1992).

[132] JOHNSON, *supra* note 20, at 84.

force for any agency in need of assistance.[133] Indeed, when Congress established the Department of Justice in 1870, it did not authorize the Attorney General to employ any of his own law enforcement personnel, so he used Secret Service agents instead.[134]

B. Federal Law Enforcement During the Twentieth and Twenty-First Centuries

After the turn of the century, and continuing today, federal involvement in law enforcement has grown significantly. As related below, the expansion began during the Progressive Era when Americans came to believe that government could, and should, help solve the nation's problems.[135] Responding to public demand, Congress passed a great number of laws under the authority of the Commerce Clause, fundamentally changing the role of the federal government, including the role of federal law enforcement.[136]

Two years after its formation in 1908, the Federal Bureau of Investigation (FBI)[137] expanded from eight agents to nearly

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[133] *Id.* at 84-85; *see also* RICHARD GID POWERS, SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER 133 (1987) ("[T]he practice had been for the different departments, including Justice, to use their funds appropriated for the investigation of crimes to borrow Secret Service agents from the Treasury Department.").

[134] JOHNSON, *supra* note 20, at 85.

[135] *Id.* at 168.

[136] Some of these laws had little impact on the growth of federal law enforcement. For example, there is no indication the number of federal agents dramatically increased when Congress made it a federal crime in 1913 to take commercial sponges from the Gulf of Mexico, or when Congress made it a federal offense to violate the Cotton Futures Act. *See* Act of Aug. 15, 1914, ch. 253, 38 Stat. 692; United States Cotton Futures Act, ch. 255, 38 Stat. 693, 697 (1914).

[137] The genesis of the FBI is interesting and gave no hint of the establishment it would someday become. In 1908, Attorney General Charles J. Bonaparte asked Congress for authority to hire some permanent law enforcement agents to assist him in enforcing these new laws, but was turned down. Undeterred, on July 1, 1908, he simply acted on his own authority and created the Bureau of Investigation, later to become the Federal Bureau of Investigation. It was initially staffed by eight Secret Service agents transferred to the new agency. *See* JOHNSON, *supra* note 20, at 168; *see also* SANFORD J. UNGAR, FBI 39-40 (1976); BARRY DENENBERG, THE TRUE STORY OF J. EDGAR HOOVER AND THE FBI 10-12 (1993).

300 agents in response to the passage of the Mann Act, which prohibited the interstate transportation of women for immoral purposes.[138] Then in 1914, Congress passed the Harrison Act,[139] which regulated the importation and distribution of drugs, the responsibility for which Congress gave to the Bureau of Internal Revenue within the Treasury Department.[140] In response, the Treasury Department created a Narcotics Section within the Department, a precursor to the Drug Enforcement Agency.[141] In 1919, Congress enacted the Dyer Act,[142] prohibiting the interstate transportation of stolen motor vehicles, adding to the FBI additional responsibilities. Then, in 1922 Congress passed the Narcotic Drug Import and Export Act of 1922, causing the Narcotics "[s]ection" to grow into a "[d]ivision."[143]

Early court decisions sanctioned this newly expanded role for the federal government in law enforcement. In *Champion v. Ames*,[144] the Supreme Court rejected a constitutional challenge to the Lottery Suppression Act, upholding Congress' broad authority under the Commerce Clause to enact legislation on matters involving interstate transportation of articles of commerce.[145] Ten years later, in 1913, the Supreme Court in *Hoke v. United States*,[146] upheld the constitutionality of the Mann Act, finding the Commerce Clause permitted Congress to adopt means that "may have the quality of police regulations."[147] In 1925, in *Brooks v. United States*,[148] the

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138 18 U.S.C. § 2421 (2012).

139 Act of Dec. 17, 1914, ch. 1, 38 Stat. 785.

140 JOHNSON, *supra* note 20, at 169.

141 *See id.*

142 18 U.S.C. §§ 2311-2313 (2012)).

143 JOHNSON, *supra* note 20, at 169.

144 188 U.S. 321 (1903).

145 *Id.* at 353 (holding power of congress to regulate commerce is "plenary, complete in itself, and may be exerted by Congress to its utmost extent").

146 227 U.S. 308 (1913).

147 *Id.* at 323. The *Hoke* Court held that the power of Congress to regulate commerce includes power to prevent "systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls." *Id.* at 322.

148 267 U.S. 432 (1925).

Supreme Court unanimously upheld the Dyer Act, expressing its belief that "radical change[s] in transportation" created a need for federal intervention in law enforcement.[149]

In 1920, the Eighteenth Amendment instituted Prohibition in the United States.[150] Congress passed the Volstead Act[151] to enforce Prohibition, giving federal law enforcement officers a significant new responsibility. It has been argued that Prohibition was the most significant factor responsible for expanding the role of federal law enforcement during the first half of this century.[152]

In addition to Prohibition, three other events were instrumental in instigating the second era of expansion: the Lindbergh kidnapping, the Kansas City Massacre in 1933, and the election of President Franklin D. Roosevelt.[153] The 1932 kidnapping and murder of Charles Lindbergh's baby led to a public outcry and demand for federal action.[154] Congress subsequently passed the Lindbergh Law,[155] making it a federal crime to take a kidnapping victim across state lines and creating a special unit within the FBI to handle kidnapping cases.[156] Within four years the Lindbergh kidnapper was captured and executed, bolstering the FBI's reputation.[157]

In 1933, "Pretty Boy" Floyd and two companions made a failed attempt to rescue one of Floyd's gang members from being returned to federal prison.[158] Floyd ambushed the officers transporting the prisoner through Union Station in Kansas City, gunning them down and murdering five men,

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149 *Id.* at 438.

150 U.S. CONST. amend. XVIII.

151 National Prohibition (Volstead) Act, ch. 85, 41 Stat. 305 (1919), *repealed by* U.S. CONST. amend. XXI.

152 *See* FRIEDMAN, *supra* note 30, at 339-40; *see also* JOHNSON, *supra* note 20, at 143.

153 JOHNSON, *supra* note 20, at 173.

154 *Id.*

155 18 U.S.C. §§ 1201-1202 (2012).

156 JOHNSON, *supra* note 20, at 173; *see also* Horace L. Bomar, Jr., *The Lindbergh Law*, 1 LAW & CONTEMP. PROBS. 435, 439 (1934).

157 JOHNSON, *supra* note 20, at 173.

158 *See* POWERS, *supra* note 133, at 183 (noting that Floyd claimed that he was not present during the ambush).

including the prisoner, an FBI agent, and three police officers.[159] J. Edgar Hoover immediately instigated a national manhunt for the killers, which he maintained until they were apprehended or killed by other gangsters.[160] Hoover then parlayed this success into a greater role for the FBI in fighting violent criminals and greater prestige for the FBI and himself.[161] Significantly, the Kansas City Massacre also became one of the justifications for arming FBI agents who, until 1934, were not authorized to carry weapons.[162]

Federal law enforcement power also expanded upon the election of Franklin Roosevelt as President in 1932[163] and Roosevelt's appointment of Homer Stillé Cummings as United States Attorney General.[164] Under Roosevelt's leadership and Cummings' advocacy, Congress enacted a series of laws vastly expanding the scope of federal law enforcement jurisdiction.[165]

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[159] *See* JOHNSON, *supra* note 20, at 173 (describing Kansas City Massacre); POWERS, *supra* note 133, at 183 (also describing Kansas City Massacre).

[160] *See* JOHNSON, *supra* note 20, at 173.

[161] *See id.* at 173-74 (noting that Hoover used Kansas City Massacre as basis for increasing role and prestige of FBI); POWERS, *supra* note 133, at 183-84 (describing Hoover's seizure of greater power in aftermath of Kansas City Massacre).

[162] DENENBERG, *supra* note 137, at 50 (FBI given authority in 1930s for first time to carry firearms); *see also* POWERS, *supra* note 133, at 183-84, 190 (noting the impact of the Kansas City Massacre on the notoriety of the FBI and the Bureau agents' later ability to carry weapons).

[163] Interestingly, at least publicly Hoover asserted crime was a local problem and not one that called for a national police force, arguing instead the federal government, and the FBI in particular, should serve as leaders and resources. *See* POWERS, *supra* note 133, at 199-200; *see also id.* at 186 ("Hoover wrote that 'it is perhaps not overlooked, but it is certainly under-emphasized, that the [crime] problem is a State one.'"). There is some support that Hoover did not desire the FBI to become a national gendarmerie, for he repeatedly fought off attempts to expand the size of the FBI. *See id.* at 176-77, 199-200. Nevertheless, Hoover's promotion of the FBI as the national crime-fighting machine had the opposite effect. Perhaps Hoover, ever the expert of manipulating public attitude, disclaimed a desire for power as a means of minimizing the resistance to his assumption of power. In any event, Roosevelt's general expansion of the federal government during the New Deal included an expansion of Hoover's FBI, whether Hoover in fact favored it or not.

[164] *See* POWERS, *supra* note 133, at 181-89 (describing Cummings' significant role in developing "national police force" under Hoover's leadership).

[165] JOHNSON, *supra* note 20, at 174; *see also* POWERS, *supra* note 133, at 185-86 (describing Cummings' efforts to obtain federal legislation creating new federal

For example, in 1934, Congress made it a federal offense to rob a federally insured bank,[166] flee across state lines to avoid prosecution,[167] engage in interstate racketeering,[168] or transport stolen property across state lines.[169] In addition, Roosevelt gave the FBI increased responsibilities in the area of counterespionage, domestic espionage, and sabotage, such that the Bureau grew steadily during the Roosevelt administration.[170] The FBI consequently expanded from 772 agents and employees in 1934 to 4,370 in 1941, emerging as a powerful national police force for the first time in American history.[171]

Federal law enforcement continued to grow after World War II.[172] There are a number of factors responsible for the growth in federal law enforcement during this period. First, organized crime required a national response because state and local police forces were incapable of handling national and international crime syndicates.[173] Second, federal authorities also received calls to help control a perceived increase in local crime which state police forces seemed unable to suppress.[174] Third, the social protest movements in favor of civil rights for

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crimes and noting a push to enforce more vigorously existing federal criminal laws).

166 18 U.S.C. § 2113 (2012).

167 *Id.* § 1073.

168 *Id.* § 875.

169 *Id.* §§ 2314-2315.

170 JOHNSON, *supra* note 20, at 175; *see also* POWERS, *supra* note 133, at 218 (noting that FBI grew from 391 agents in 1933 to peak during World War II of almost 4,900 agents).

171 JOHNSON, *supra* note 20, at 175; *see also* FRIEDMAN, *supra* note 30, at 271 (noting the growth of the FBI during the 1930s).

172 As Professor Friedman has said: "Crime popped out again as a major national issue after World War II, and nobody was able to put the jinni back in the bottle after that." FRIEDMAN, *supra* note 30, at 274.

173 *See* JOHNSON, *supra* note 20, at 176-77 (noting that federal government became involved fighting national Cosa Nostra organized crime syndicate in early 1960s).

174 *Id.* (relating public perception that crime had become national problem requiring intervention by federal government).

minorities and against the Vietnam War resulted in an expansion in federal law enforcement activities.[175]

Thus, from 1950 through the 1980s, Congress engaged in a wholesale expansion of the federal criminal law. For example, during the 1950s, Congress enacted federal criminal laws relating to gambling[176] and the embezzlement of labor union funds,[177] both believed to be areas of Mafia influence, and outlawing switchblade knives.[178] In the 1960s, Congress enacted the Travel Act,[179] which prohibits interstate travel in connection with the violation of certain crimes traditionally prosecuted at the state level, along with statutes making federal offenses out of such matters as the embezzlement of employee benefit plan funds,[180] engaging in riots,[181] and the abuse of guns[182] and explosives.[183] The 1970s saw substantive federal criminal legislation relating to racketeering,[184] gambling[185] (again), drugs[186] (again), and the exploitation of children.[187] Finally, in the 1980s and early 1990s, Congress enacted new federal criminal laws relating to such areas as robbery or burglary of pharmacies,[188] hostage taking,[189] counterfeiting securities issued by states,[190] and drive-by shootings.[191] Indeed, for several decades Congress enacted "comprehensive" crime bills, imposing broader and harsher

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[175] *Id.* (stating that new congressional laws regarding civil rights and national security during wartime, brought about by civil rights crusade and antiwar movement, became basis for federal intervention).

[176] 15 U.S.C. §§ 1171-1177 (2012).

[177] 29 U.S.C. § 501 (2012).

[178] 15 U.S.C. § 1242 (2012).

[179] 18 U.S.C. § 1952 (2012).

[180] *Id.* § 664.

[181] *Id.* §§ 2101-2102.

[182] *Id.* §§ 921-928.

[183] *Id.* §§ 841-848.

[184] *Id.* §§ 1961-1968.

[185] *Id.* § 1955.

[186] 21 U.S.C. § 801 (2012).

[187] 18 U.S.C. §§ 2251-2252 (2012).

[188] *Id.* § 2118.

[189] *Id.* § 1203.

[190] *Id.* § 513.

[191] *Id.* § 36.

federal criminal laws.[192] The ranks of federal law enforcement officers have swelled in response to the need to respond to evolving criminal conduct that increasingly crossed state lines and affected the nation as a whole. Today, federal law enforcement agencies have tens of thousands of armed agents.[193] In addition to the primary federal law enforcement agencies, such as the FBI, DEA, and ATF, there are tens of thousands of additional federal law enforcement agents in other federal departments and agencies, such as the Environmental Protection Agency, the Internal Revenue Service, and the Immigration and Customs Enforcement to name just a few. Arguably, we now have a national gendarmerie, a national police force, the very entity Congress was purportedly attempting to prevent the military from becoming when it passed the Posse Comitatus Act.

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[192] *See, e.g.*, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered sections of 5, 18, and 42 U.S.C.), *declared unconstitutional by* Mance v. Holder, 74 F. Supp. 3d 795 (N. D. Tex. 2015)); Pub. L. No. 91-452, § 201(a), 84 Stat. 922, 926-28 (1970) (codified at note following 18 U.S.C. § 1961 (2012)); 21 U.S.C. § 801 (2012)); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976 (codified as amended in scattered sections of 18 U.S.C.); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended primarily in scattered sections of 18, 21, and 42 U.S.C.); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended primarily in scattered sections of 21, 25, and 42 U.S.C.); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended primarily in scattered sections of 18, 21, and 42 U.S.C.); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, 108 Stat. 1796 (codified as amended in scattered sections of 16, 25, 30, 43, and 48 U.S.C.).

[193] *See* NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 7 (2d ed. 1993) (stating that as of 1993, FBI had more than 10,314 special agents, Drug Enforcement Agency (DEA) more than 3,400 agents, Bureau of Alcohol, Tobacco and Firearms (ATF) more than 2,230 agents, and Secret Service more than 2,060 agents); NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 7-8 (3d ed. 2000) (stating that as of 1999, FBI had more than 11,603 special agents, DEA more than 4,500 agents, ATF more than 2,000 agents, and Secret Service more than 2,100 agents); Kealy, *supra* note 65, at 428 n.301 (noting that as of 2003, FBI had more than 11,000 special agents, DEA had 4,601 agents, and United States Marshals had more than 4,000 deputy marshals and career employees).

III. DEFICIENCIES OF THE POSSE COMITATUS ACT

Though ostensibly adopted to restrict the United States military from becoming involved in the states' traditional role in law enforcement, the PCA suffers from several deficiencies. First, the language of the statute is limited in its scope of application.[194] Second, Congress has enacted a large number of statutes that function as exceptions to the PCA.[195] Third, in interpreting the PCA, courts have added further exceptions and rejected remedies for violations of the Act.[196] Finally, analyzing the PCA as if it were the criminal statute it claims to be reveals it to be poorly drafted to achieve its purported goals.[197]

A. Limited Scope of the Posse Comitatus Act

As drafted, the scope of the PCA is limited both geographically and with regard to the military forces subject to its control. Geographically, the general consensus is the PCA does not apply to any activities occurring outside United States territory.[198] This issue was complicated, however, by language in the amendments to the PCA which includes specific authorizations for and limitations on military assistance in federal drug and immigration law enforcement outside of

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[194] *See infra* text accompanying notes 198-204.

[195] *See infra* text accompanying notes 205-30.

[196] *See infra* text accompanying notes 231-300.

[197] *See infra* text accompanying notes 301-18.

[198] *See* Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948) (finding PCA did not have extraterritorial application); United States v. Marcos, No. SSSS 87 CR. 598 JFK, 1990 WL 20160, at *8-9 (S.D.N.Y. Feb. 28, 1990) (finding PCA, as criminal statute, had no extraterritorial application). *See generally* Bryant, *supra* note 24, at 12 (concluding that PCA does not restrict military's direct participation in civilian law enforcement outside United States territory); Furman, *supra* note 26, at 107 ("[T]he Posse Comitatus Act applies in the continental United States, its territories and its possessions . . . . It does not apply in foreign countries, where military forces of the United States are frequently stationed."); Keig, *supra* note 26, at 296-97 (arguing PCA does not apply extraterritorially, but suggesting additional legislation providing express authority for such use); Christopher A. Donesa, Note, *Protecting National Interests: The Legal Status of Extraterritorial Law Enforcement by the Military*, 41 DUKE L.J. 867, 870-82 (1992) (concluding PCA does not apply overseas or in operations conducted for national security purposes).

United States territory.[199] Although the Act itself does not specifically limit its scope to law enforcement activities only in the United States, such a limitation logically follows from the Act's origin. Use of the military against American civilians, and the threat that such use poses, arguably does not exist when the military is used for law enforcement duties outside of the United States.

The PCA also does not apply to all of the armed forces.[200] On its face, the PCA applies only to the United States Army and Air Force. It has been extended to the Navy and Marines as a matter of Department of Defense policy, but the policy is not binding and its scope is subject to interpretation.[201] The PCA does not apply to the National Guard unless the Guard has been nationalized by the President.[202] Further, the PCA

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[199] *See* 10 U.S.C. § 374 (2012); *see also* United States v. Kahn, 35 F.3d 426, 431 n.6 (9th Cir. 1994) (noting that in light of 1985 amendments to PCA, it may have extraterritorial application).

[200] Though the PCA expressly applied only to the United States Army when originally enacted, the legislative history suggests there was some intent for it to apply to all armed forces. *See* 7 CONG. REC. 3,586 (1878) (statement of Rep. Kimmel) ("That from and after the passage of this act it shall not be lawful to use any part of the land or naval forces of the United States to execute the laws either as a *posse comitatus* or otherwise, except in such cases as may be expressly authorized by act of Congress.") (alteration in original).

[201] The Department of Defense has interpreted the PCA as applying to the Navy and Marine Corps as a matter of policy. *See* H.R. REP. NO. 97-71, pt. 2, at 4 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1785, 1787. This policy is not binding, however, and is subject to interpretation by the Secretary of the Navy. *See* United States v. Walden, 490 F.2d 372, 373-75 (4th Cir. 1974) (holding that undercover use of Marines violated only Navy regulations and not Posse Comitatus Act because Secretary of Navy may make exceptions to policy of Navy and Marine Corps adhering to PCA).

[202] *See, e.g.*, Gilbert v. United States, 165 F.3d 470, 472-74 (6th Cir. 1999) (finding PCA was not violated because it did not apply to National Guard personnel acting under state authority); United States v. Benish, 5 F.3d 20, 26 (3d Cir. 1993) (holding PCA did not apply to use of National Guard under direction of Pennsylvania police because Guard was not "in federal service"); United States v. Kyllo, 809 F. Supp. 787, 793 (D. Or. 1992) (holding that use of Oregon National Guard sergeant to operate thermal imaging device to assist federal law enforcement officers did not violate PCA); *see also* 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, 42 (concluding PCA does not apply to National Guard unless in federal service); McGrane, *supra* note 9, at 1321 (concluding PCA applies to the

does not apply to the United States Coast Guard.[203] It is clear from the Act's legislative history that Congress has considered and rejected the idea of making the PCA applicable to all branches of the armed forces. In 1975, in particular, a member of Congress attempted to amend the PCA by substituting the words "Armed Forces of the United States" for "Army and Air Force," but the amendment never got out of the committee.[204]

B. Statutory Exceptions to the Posse Comitatus Act

As related previously, the Posse Comitatus Act grew out of a reaction to perceived post-Civil War abuses of military forces in "policing" the polls.[205] At the time of its passage, the Act was justified by patriotic rhetoric harkening to the Founding Fathers' concern to ensure civilian control of the military.[206] Over time, however, Congress has recognized the need for the military to assist law enforcement, and thus has enacted numerous statutes authorizing the military to enforce civil laws, which are more or less accurately described as exceptions to the PCA.

National Guard only when called into federal service). *But see* United States v. Jaramillo, 380 F. Supp. 1375, 1379-80 (D. Neb. 1974) (stating that district court considered National Guard "part of the Army" for purposes of determining whether PCA was violated, although court did not specifically address issue of whether National Guard had been federalized), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

[203] *See* United States v. Chaparro-Almeida, 679 F.2d 423, 425 (5th Cir. 1982) (holding PCA does not apply to Coast Guard because Act excepts from its prohibition "cases and circumstances expressly authorized by . . . Congress" and Congress specifically provided Coast Guard with authority to "enforce or assist in the enforcement of all applicable Federal laws on and under the high seas"); Jackson v. State, 572 P.2d 87, 93 (Alaska 1977) (finding that unique dual role of Coast Guard as having both law enforcement duties and military duties, combined with specific exclusion of Coast Guard from statute and legislative history, excludes Coast Guard from PCA); *see also* Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for* Posse Comitatus, 12 WASH. U. J.L. & POL'Y 99, 124 & n.183 (2003) (stating PCA does not apply to Coast Guard); Furman, *supra* note 26, at 98 (noting PCA does not restrict Coast Guard from enforcing civilian laws).

[204] Jackson v. State, 572 P.2d 87, 91 (Alaska 1977) (relating history of attempt to amend PCA).

[205] *See supra* text accompanying notes 74-92.

[206] *See supra* note 11.

In the Insurrection Act,[207] Congress authorized the President to use the military to enforce civilian laws when requested to do so by the governor or legislature of a state to assist in suppressing an insurrection.[208] The Insurrection Act is not really an exception to the PCA because it was originally enacted before the PCA.[209]

On the other hand, Congress has enacted dozens of exceptions to the PCA after its enactment.[210] For example, Congress authorized the President to use the military to enforce the law when unlawful obstructions, assemblages, or rebellions impair judicial enforcement of the law.[211] Remedying the vagueness of Article IV, Section 4,[212] Congress expressly authorized the President to use the military to suppress domestic violence and preserve constitutional rights when a state cannot or will not do so.[213] Similarly, the President may use the military to prevent the loss of life, destruction or property and to restore order in emergency situations.[214] The President may also use the military "to protect Federal property and Federal governmental functions when . . . local authorities are unable or decline to provide adequate protection."[215] In 1974, Congress authorized the President to use military personnel to enforce the laws in the event of natural disasters.[216]

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[207] 10 U.S.C. §§ 331-35 (2012).

[208] *Id.* § 331.

[209] Congress passed the original Insurrection Act in 1861. *See* Act of July 29, 1861, ch. 25, 12 Stat. 281, 281-82.

[210] *See* DOYLE, *supra* note 5, at 20-29.

[211] 10 U.S.C. § 332 (2012).

[212] Article IV, Section 4, provides the federal government "shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence." U.S. CONST. art. IV, § 4.

[213] 10 U.S.C. § 333 (2012).

[214] 32 C.F.R. § 215.4(c)(1)(i) (2015).

[215] *Id.* § 215.4(c)(1)(ii).

[216] 42 U.S.C. § 5121 (2012). Known as the Stafford Act, it was passed by Congress in 1974 and authorizes the President to use military forces upon the request of a governor in the event of a natural disaster. *See id.*

Congress authorized the Attorney General of the United States to request military assistance to enforce the law prohibiting transactions in nuclear material.[217] Similarly, Congress authorized federal law enforcement authorities to request the assistance of the military to investigate attacks on the President, members of Congress, and other high-ranking federal officials, "any statute, rule, or regulation to the contrary notwithstanding."[218]

The War on Drugs motivated Congress to give greater freedom to the military to assist civilian law enforcement in fighting the drug trade.[219] So, in 1981, Congress enacted the Military Cooperation with Civilian Law Enforcement Agencies Act,[220] which permits the military to help enforce drug, immigration, and tariff laws, authorizing the military to provide equipment, research facilities, and information, and to train and advise law enforcement officers. This act effectively amended the PCA.[221] This amendment authorizes the military to furnish information, equipment and facilities, and training and advice to civilian law enforcement agencies.[222] The Act expressly permits the military to assist civilian law enforcement by detecting and monitoring air and sea traffic, conducting aerial reconnaissance, intercepting vessels or aircraft outside of the United States, and transporting law

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[217] 18 U.S.C. § 831(c)-(e) (2012).

[218] *Id.* § 351(g).

[219] Congress sought "to clarify the military's authority to assist civilian officials in the war on drug smuggling." Keig, *supra* note 26, at 295; *see also* H.R. REP. NO. 97-71, pt. 2, at 3 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1785, 1785 (reflecting military's reluctance to enter war on drugs given restrictions under PCA).

[220] *See* 10 U.S.C. §§ 371-380 (2012)).

[221] Although it is not entirely clear that the Act was an amendment to the PCA, the absence of any penalty provision within the Act strongly suggests it must be read as part of the PCA. *See* Keig, *supra* note 26, at 295 & n.36 (concluding 1981 Act constituted an amendment to PCA); *see also* Bryant, *supra* note 24, at 7 (treating 1981 Act as amendment to PCA); Hohnsbeen, *supra* note 21, at 417 (concluding 1981 Act amended PCA).

[222] Hohnsbeen, *supra* note 21, at 417-18; *see also* 10 U.S.C. § 371 (2012) (allowing the military to provide information); *id.* § 372 (equipment and facilities); *id.* § 373 (training and advice).

enforcement personnel and equipment.[223] The military is permitted to assist federal, state or local law enforcement officials with the enforcement of other laws only so long as such activities do not involve "direct participation" by military personnel in a civilian law enforcement operation "unless such direct participation is otherwise authorized by law."[224] The amendment specifically prohibits the military from directly participating in the search, arrest, or other similar activity, unless otherwise authorized by law.[225] Congress further authorized the use of full-time National Guardsmen for the "purpose of carrying out drug interdiction and counter-drug activities."[226]

Finally, Congress has enacted additional exceptions to allow the military to assist law enforcement in combating terrorism. In 1996 and again in 2003, Congress granted greater authority to the military to assist law enforcement in responding to terrorist attacks.[227] Congress also authorized the use of the military in limited situations involving the use of chemical or biological agents.[228]

The exceptions have swallowed the PCA. With each crisis, whether it is a natural disaster, the drug trade, or terrorists' attacks, Congress creates another exception to the PCA. Some commentators have proposed even more exceptions to the Posse Comitatus Act to respond to recent terrorist attacks and natural disasters.[229] As a result of the many exceptions to the

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[223] *See* 10 U.S.C. § 374 (2012).

[224] *Id.* § 374(c).

[225] *Id.* § 375.

[226] 32 U.S.C. § 112(b) (2012).

[227] 10 U.S.C. § 372 (2012); 32 C.F.R. § 215.5 (2015).

[228] *Id.* § 382(d), *amended by* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. 111-383, § 1075(b)(10)(B), 124 Stat. 4137, 4369 (amendment striking "chemical or biological" from section heading).

[229] The calls for more exceptions arise with each new crisis. For example, after the terrorist attacks of 9/11, several commentators called for more exceptions to the Posse Comitatus Act to authorize the use of the military to respond to terrorists. *See generally, e.g.*, Linda J. Demaine & Brian Rosen, *Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 167 (2005) (proposing legislation to amend or replace PCA so as to eliminate confusion and authorize use of military when necessary in response to terrorist attacks or other emergencies); Schmidt &

Posse Comitatus Act, it is today a dead letter as a criminal law.[230]

C. Judicial Interpretation of the Posse Comitatus Act

The PCA has been raised in courts by both criminal defendants and private litigants. In these contexts, courts have interpreted the PCA narrowly and inconsistently, while almost uniformly rejecting remedies for alleged violations of the Act.

There were very few reported cases concerning the Act during its first eighty years on the books. Beginning in the 1970s, however, resourceful defense attorneys began using the PCA as a defense, and the number of reported decisions citing the PCA has grown ever since. Unfortunately, there is no consensus in the case law on its scope and application. Importantly, the United States Supreme Court has never addressed any aspect of the PCA.

1. Early Decisions

The first reported case in which a party invoked the PCA arose from the 1882 court-martial of a soldier who, assigned to serve guard duty at a civilian jail in New York, discharged his

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Klinger, *supra* note 15, at 668 (arguing for new, "narrow exception" to PCA to allow military to "assist the police when dealing with terrorists"). Similarly, after Hurricane Katrina laid waste to the Gulf Coast and some in power blamed the PCA for the lackluster federal response, commentators called for yet more exceptions to the PCA. *See generally, e.g.*, Ashley J. Craw, Comment, *A Call to Arms: Civil Disorder Following Hurricane Katrina Warrants Attack on the Posse Comitatus Act*, 14 GEO. MASON L. REV. 829, 830 (2007) (arguing Congress should enact exception to PCA allowing for military enforcement of domestic laws in times of civil unrest following natural disasters); DeBianchi, *supra* note 97, at 501-09 (arguing for new exception to PCA to expand role of military in civilian law enforcement in response to natural disasters); McGrane, *supra* note 9, at 1333 (proposing new exception to PCA to authorize use of military to engage in civilian law enforcement in wake of natural disasters).

[230] There are those who argue, however, that the fact that no one has ever been prosecuted for violating the Act shows how effective it has been. *See, e.g.*, McCall & Denning, *supra* note 99, at 31 (arguing PCA "has proved in the main to be a fairly effective tool to curb military incursions into domestic law enforcement"). This is, at best, speculation and is belied by the continued use of the military to assist law enforcement.

musket in an attempt to kill a prisoner.[231] The soldier was tried, convicted, and was serving a prison sentence when he sought relief from the federal courts pursuant to a habeas corpus petition. At the district court level, the soldier asserted the Judge Advocate General's finding that the soldier's service as a guard in a civilian jail deprived the military of jurisdiction to try him for violating military laws.[232] The district court held the Judge Advocate General's finding inadmissible, however, and the circuit court found the soldier's argument unpersuasive because the United States Supreme Court had unanimously determined in a previous decision that the soldier's offense was one against the military, thereby granting the military jurisdiction.[233]

From 1882 until 1948, there were no other reported decisions mentioning the PCA. Post-World War II treason prosecutions of American expatriates who assisted the Axis cause resulted in three reported decisions. In the first such decision, *Chandler v. United States*,[234] the First Circuit paid tribute to defense counsel's "industry" in "turning up . . . this obscure and all-but-forgotten statute . . . ."[235] The court nevertheless rejected the defense counsel's argument that the military's arrest and transportation of the defendant back to the United States violated the PCA and thus deprived the court of jurisdiction. The *Chandler* court reasoned, "[T]his is the type of criminal statute which is properly presumed to have no extraterritorial application in the absence of statutory language indicating a contrary intent," therefore the military was not prohibited from arresting someone overseas.[236] Not surprisingly, in the other two cases arising from World War II treason prosecutions, *Gillars v. United States*[237] and *D'Aquino*

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[231] *Ex parte* Mason, 256 F. 384, 385 (N.D.N.Y. 1882).
[232] *Id.* at 386.
[233] *Id.* at 387.
[234] 171 F.2d 921 (1st Cir. 1948).
[235] *Id.* at 936.
[236] *Id.*
[237] 182 F.2d 962 (D.C. Cir. 1950).

v. United States,[238] the courts reached essentially identical conclusions.[239]

There was only one other reported decision mentioning the PCA after World War II and prior to the 1970s. In *Wrynn v. United States*,[240] a plaintiff brought a civil action against the United States to recover damages for injuries suffered when a military helicopter crashed while assisting local law enforcement authorities search for an escapee.[241] The district court judge reviewed the history of the PCA and declared, "The statute is not an anachronistic relic of an historical period the experience of which is irrelevant to the present."[242] Applying the Act's prohibitions to the facts of the case, the *Wrynn* court went on to hold that law enforcement's "use of the helicopter and its personnel here to aid in executing the laws of New York was a forbidden use" under the PCA.[243] Accordingly, the court held the Air Force pilot was acting outside of his authority, thereby removing the United States from liability for the pilot's actions.[244]

Beginning in the 1970s, the PCA began to appear in more cases. Between 1971 and 1974 when the influential Wounded Knee decisions were issued, criminal defendants raised the

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[238] 192 F.2d 338 (9th Cir. 1951).

[239] The *Gillars* court held that, even assuming the defendant was illegally arrested, it did not prevent the government from prosecuting her for treason. 182 F.2d at 972-73. In any event, the *Gillars* court found the PCA did not apply to the military in occupation of a foreign country. *Id.* The *Gillars* court reasoned the military could not be acting as a posse comitatus assisting law enforcement authorities because in Occupied Germany it was the only law enforcement authority. *Id.* Because it otherwise dispensed with the applicability of the statute, the *Gillars* court specifically refused to rule on the extraterritorial scope of the PCA. *Id.* at 973. The *D'Aquino* court dismissed the defendant's argument under the Posse Comitatus Act with a one-line holding: "For the reasons stated in those cases [*Chandler* and *Gillars*], we hold this argument without merit." 192 F.2d at 351.

[240] 200 F. Supp. 457 (E.D.N.Y. 1961).

[241] *Id.* at 458.

[242] *Id.* at 465.

[243] *Id.*

[244] *Id.*

PCA in four state cases[245] and two federal cases.[246] In the first reported decision by a state court addressing the PCA, *Burns v. State*,[247] the court found the PCA "vague,"[248] but nevertheless found the Act was not violated when the defendant was a soldier and the military participation in the criminal investigation occurred only on a military base.[249] All three of the other state cases arose out of drug investigations by military investigators operating out of Fort Sill in Oklahoma.[250] In each of the three cases, the Oklahoma Court of Criminal Appeals rejected the defendants' arguments that the military investigators were incompetent to testify on the ground they allegedly violated the PCA by operating as undercover agents in making drug buys from civilians off base; the court reasoned that in each case the military investigators were not exercising military power, did not participate in any arrest, and were merely acting in the same manner as any civilian might act.[251]

The two federal decisions in the early 1970s were United *States v. Cotten*[252] and *United States v. Walden*.[253] The defendants in *Cotten*, whom a jury found guilty of theft of government property in Japan, objected that the use of Air Force planes and personnel to transport them back to Hawaii to stand trial violated the PCA.[254] The Ninth Circuit avoided deciding whether the use of the Air Force violated the PCA by

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[245] Lee v. State, 513 P.2d 125 (Okla. Crim. App. 1973); Hildebrandt v. State, 507 P.2d 1323 (Okla. Crim. App. 1973); Hubert v. State, 504 P.2d 1245 (Okla. Crim. App. 1972); Burns v. State, 473 S.W.2d 19 (Tex. Crim. App. 1971).

[246] United States v. Walden, 490 F.2d 372 (4th Cir. 1974); United States v. Cotten, 471 F.2d 744 (9th Cir. 1973).

[247] 473 S.W.2d 19.

[248] *Id.* at 21.

[249] *Id.* at 21-22.

[250] *See Lee*, 513 P.2d 125; *Hildebrandt*, 507 P.2d 1323; *Hubert*, 504 P.2d 1245.

[251] *See Hubert*, 504 P.2d at 1246-47; *Hildebrandt*, 507 P.2d at 1325; *Lee*, 513 P.2d at 126.

[252] 471 F.2d 744 (9th Cir. 1973).

[253] 490 F.2d 372 (4th Cir. 1974).

[254] *Cotten*, 471 F.2d at 747.

holding that, even if violated, the PCA did not provide a remedy for the criminal defendants.[255]

Walden is the most interesting of the early decisions addressing the PCA. In *Walden*, agents of the ATF sought the assistance of Marines to act as undercover agents to purchase weapons from civilians who were engaged in a scheme to sell guns to minors in violation of federal law.[256] The Fourth Circuit Court of Appeals found a violation of the spirit of the PCA, though it found that technically there was no actual violation of the PCA because it did not cover the Navy and therefore did not apply to the Marine Corps.[257] Nevertheless, the *Walden* court found the legislative history suggested the PCA was intended to apply to all branches of the Armed Forces,[258] and the Navy had enacted regulations adopting the same rule established by the PCA.[259] The *Walden* court went on to find the ATF's use of the military personnel to act as undercover agents violated the Navy regulations and the spirit of the PCA, but nevertheless rejected the exclusionary rule as a remedy for several reasons.[260]

The primary reason the *Walden* court rejected the exclusionary rule, however, was it found "this case is the first instance to our knowledge in which military personnel have been used as the principal investigators of civilian crimes in

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[255] *Id.* at 749.

[256] *Walden*, 490 F.2d at 373.

[257] *Id.* at 375-76.

[258] *Id.* at 374-75. Interestingly, the following year when there was an attempt to amend the PCA to make it explicitly applicable to all branches of the armed forces, the amendment died in committee. *See supra* text accompanying note 204. This suggests that, even if the Fourth Circuit was correct that Congress originally intended the PCA to apply to all branches of the armed forces, it no longer does.

[259] *Walden*, 490 F.2d at 374.

[260] *Id.* at 377. The Fourth Circuit listed four reasons for rejecting the exclusionary rule as a remedy: First, the proscription against using Marines to assist in civilian law enforcement was less clear than the Fourth Amendment proscriptions; second, the proscription under the Navy regulation (and presumably the PCA) "expresses a policy that is for the benefit of the people as whole" and not one designed to protect individuals; third, the proscription does not provide any remedy for its own enforcement; fourth, it found this was the first instance of any abuse. *Id.*

violation of" the Navy regulation.[261] The court also apparently found it significant "there is totally lacking any evidence that there was a conscious, deliberate or willful intent" to violate the Navy regulation or the spirit of the PCA,[262] though the court stopped short of relying on this lack of intent as a specific ground for rejecting the exclusionary rule. The Fourth Circuit went on to warn, in oft repeated language,[263] it was rejecting the exclusionary rule as a remedy "at this time," but "[s]hould there be evidence of widespread or repeated violations in any future case, or ineffectiveness of enforcement by the military, we will consider ourselves free to consider whether adoption of an exclusionary rule is required as a future deterrent."[264]

2. Wounded Knee Decisions

The American Indian Movement uprising at Wounded Knee, South Dakota, in 1973 resulted in four influential, albeit inconsistent, decisions on the scope of the PCA. Although based upon almost identical facts, the four courts reached different conclusions and used different tests to determine whether the government violated the PCA. In the Wounded Knee decisions, the defendants were all charged with obstructing justice by interfering with a law enforcement officer "lawfully engaged in the lawful performance of his official duties."[265]

In *United States v. Banks*,[266] a federal district judge in South Dakota found that the mere presence of military

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[261] *Id.* The Walden court labeled this reason as "[m]ore important than any of the foregoing" reasons for rejecting the exclusionary rule remedy. *Id.* Interestingly, when in October 1973 the court based its ruling on the alleged lack of other abuses, all three of the Oklahoma cases had been decided in which soldiers acted as undercover agents in the same manner that the Fourth Circuit found violated the spirit of the PCA. *See supra* note 251.

[262] *Walden*, 490 F.2d at 376.

[263] *See, e.g.*, United States v. Johnson, 410 F.3d 137, 149 (4th Cir. 2005) (rejecting exclusionary rule because there was no evidence of widespread and repeated violations of PCA); United States v. Mullin, 178 F.3d 334, 343 (5th Cir. 1999) (same); Hayes v. Hawes, 921 F.2d 100, 104 (7th Cir. 1990) (same).

[264] *Walden*, 490 F.2d at 377.

[265] 18 U.S.C. § 231(a)(3) (2012).

[266] 383 F. Supp. 368 (D.S.D. 1974).

advisers at the scene clearly violated the PCA.[267] The *Banks* court emphasized, however, that it was not finding there was a criminal violation of the PCA; rather, it was simply holding the government was barred from prosecuting the defendant on a charge of interfering with a law enforcement officer's "lawful performance of [his] official duties" because there was insufficient evidence the officer's performance was lawful.[268] The court vaguely based its ruling on the "sufficiency of the evidence,"[269] however, and did not thoroughly discuss the factors it found decisive or articulate a test. Therefore, the *Banks* opinion fails to provide any real guidance on interpreting the parameters of the PCA.

In *United States v. Jaramillo*,[270] the district court in Nebraska similarly held in favor of the defendant, but arrived at its holding from a different approach. The *Jaramillo* court held the simple presence of military personnel at the scene of criminal law enforcement is not enough to violate the PCA; rather, the military involvement must pervade or influence the actions of civilian law enforcement personnel.[271] The court concluded the military involvement at Wounded Knee in providing advice to law enforcement officers at the scene and conducting repairs and maintenance on military equipment loaned to the law enforcement officials so pervaded the law enforcement activities that it created a "reasonable doubt as to whether the law enforcement officers were 'lawfully engaged in the lawful performance of their official duties.'"[272] Like the *Banks* court, however, the *Jaramillo* court emphasized it was not making any finding on whether there was a criminal violation of the PCA.[273]

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[267] *Id.* at 375.

[268] *Id.* at 376.

[269] *Id.*

[270] 380 F. Supp. 1375 (D. Neb. 1974).

[271] *Id.* at 1379 ("If there was 'use' of 'any part of the Army or the Air Force' to 'execute the laws' and if that use pervaded the activities of the United States marshals and the Federal Bureau of Investigation agents, the marshals and the agents cannot be said to have been 'lawfully engaged' in the 'lawful performance' of their official duties.").

[272] *Id.* at 1379, 1381.

[273] *Id.* at 1381.

In *United States v. Red Feather*,[274] however, a different district judge in the Nebraska district court held the presence of military personnel does not violate the PCA so long as it does not involve the "direct active use" of federal troops in law enforcement functions.[275] In other words, the court held the PCA prohibited the military from engaging in activities such as making arrests, seizing evidence, searching persons or buildings, interviewing witnesses, pursuing escaped criminals, and searching for suspects.[276] Reviewing the Wounded Knee facts, the *Red Feather* court held the indirect aid the military provided to law enforcement officers, including advice on tactics and logistics, planning, training, aerial reconnaissance, and coordinating the delivery and maintenance of loaned military equipment, did not violate the PCA.[277] The *Red Feather* court agreed with the *Jaramillo* court that the PCA does not prohibit the military from lending military equipment to law enforcement officers.[278]

In the final Wounded Knee decision, a South Dakota district court judge criticized the approaches taken in both *Jaramillo* and *Red Feather*. The court in *United States v. McArthur*[279] found the *Jaramillo* test of whether the military involvement "pervad[ed]" civilian law enforcement "too vague" and the *Red Feather* direct-active-use test "too mechanical."[280] Instead, the court found its own test just right: the PCA is violated when the military involvement subjects civilians to an exercise of military power that is "regulatory, proscriptive, or compulsory."[281] The *McArthur* court concluded the military assistance provided during the Wounded Knee uprising did not violate the PCA under this test. The Court agreed with the *Jaramillo* and *Red Feather* courts that the military may lend

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[274] 392 F. Supp. 916 (D.S.D. 1975).

[275] *Id.* at 921.

[276] *Id.* at 925.

[277] *Id.*

[278] *Id.* at 923.

[279] 419 F. Supp. 186 (D.N.D. 1975), *aff'd sub nom.* United States v. Casper, 541 F.2d 1275, 1278 (8th Cir. 1976) (per curiam).

[280] *Id.* at 194.

[281] *Id.*

material and equipment, including advisers, to civilian law enforcement authorities without violating PCA.[282]

3. Decisions Since Wounded Knee

The conflicting Wounded Knee decisions set the parameters for future debates on the meaning and scope of the PCA. In the years since they were decided, an increasing number of cases have addressed the PCA, primarily when the military has been involved in drug enforcement activities or when crimes occur in or near military bases or involve military personnel. The courts have done little in these cases to clarify the question of when military involvement in civilian law enforcement activities violates the PCA.

Judicial decisions interpreting the scope and elements of the PCA are conflicting and confusing, failing to agree on a single test to determine if military involvement violates the Act. Courts have variably applied each of the various tests set forth in the Wounded Knee decisions, or combinations of the tests, to determine if military involvement violated the PCA.[283]

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[282] *Id.* at 194-95.

[283] Some courts analyzed alleged violations of the PCA solely under the *McArthur* standard of whether the use of the military was regulatory, proscriptive or compulsory. *See, e.g.*, United States v. Stouder, 724 F. Supp. 951, 953-54 (M.D. Ga. 1989) (holding that assistance of Air Force personnel in conducting search of factory did not violate PCA because involvement was not regulatory, proscriptive or compulsory); United States v. Gerena, 649 F. Supp. 1179, 1181-83 (D. Conn. 1986) (concluding that transportation of prisoners from Puerto Rico to New York aboard Air Force plane did not violate PCA because military involvement was not regulatory, proscriptive or compulsory); Hall v. State, 557 N.E.2d 3, 5 (Ind. Ct. App. 1990) (finding that use of soldier in undercover capacity did not violate PCA because involvement of military was not regulatory, proscriptive or compulsory).

A couple of courts utilized the *Jaramillo* test in analyzing alleged violations of the PCA by determining whether the military involvement "pervaded" the civilian law enforcement activities. *See, e.g.*, Hayes v. Hawes, 921 F.2d 100, 104 (7th Cir. 1990) (applying 10 U.S.C. § 375, a statute making § 1385 applicable to the Navy, and holding that use of civilian Navy investigator in undercover capacity did not violate PCA because involvement did not pervade civilian law enforcement activities); United States v. Torres, Nos. 93-40003-01-SAC to -09-SAC, 1993 WL 463413, at *3-5 (D. Kan. 1993) (finding that use of Army investigator in undercover capacity did not violate PCA because involvement did not pervade civilian law enforcement activities).

Some courts have also taken language from the Federal Regulations, promulgated by the Secretary of Defense as required under the 1985 amendments to the Act, and created an exception to the PCA where military involvement in civilian law enforcement activities was justified because the military was involved with the purpose of furthering an "independent military purpose" or interest.[284] Neither the PCA itself, nor any of the statutory exceptions, however, make the purpose of the military involvement an element of the crime or an exception to a violation of the Act.

Other courts have created new elements to determine whether military involvement in civilian law enforcement activities violates the PCA, considering factors such as whether the soldier was in uniform or armed.[285] Tennessee courts apparently find an exception to the PCA when both the perpetrator and victim of the alleged violation of the PCA are

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Other courts have used the test enunciated by the *Red Feather* court: whether the military involvement was direct and active. *See, e.g.*, United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (finding no violation of the PCA because military involvement was not direct and active); State v. Short, 775 P.2d 458, 459-60 (Wash. 1989) (en banc) (finding use of Navy officer in undercover capacity did not violate PCA because military involvement was not direct and active).

Still other courts have used combinations of the three Wounded Knee tests. *See, e.g.*, United States v. Kahn, 35 F.3d 426, 431-32 (9th Cir. 1994) (analyzing case under all three tests and noting that violation of any of three tests means military involvement violated PCA); United States v. Bacon, 851 F.2d 1312, 1313-14 (11th Cir. 1988) (per curiam) (finding that use of soldier in undercover capacity did not violate PCA under the *Jaramillo* and *McArthur* tests); United States v. Hartley, 796 F.2d 112, 115 (5th Cir. 1986) (finding that use of Airborne Warning and Controls Systems (AWACS) plane and Air Force personnel to detect and monitor drug smugglers did not violate PCA under *Jaramillo* and *Red Feather* tests).

[284] *See, e.g.*, United States v. Hitchcock, 286 F.3d 1064, 1069-70 (9th Cir. 2002) (finding no violation of PCA where there existed an independent military purpose for use of military in investigation); United States v. Chon, 210 F.3d 990, 994 (9th Cir. 2000) (same); United States v. Lewis, 824 F. Supp. 2d 169, 174 (D.D.C. 2011) (finding no violation of PCA because military had an "independent military purpose for participating in the investigation of Defendant's activities").

[285] *See, e.g.*, People v. Taliferro, 520 N.E.2d 1047, 1050-51 (Ill. App. Ct. 1988) (finding no violation of PCA in part because soldier was unarmed); State v. Trueblood, 265 S.E.2d 662, 664 (N.C. Ct. App. 1980) (finding no violation of PCA in part because solider was not in uniform or armed).

both members of the military and on active military duty.[286] Still other courts have focused on whether civilians have requested, and therefore "willfully" used, military assistance, finding the lack of such a request a basis for determining the PCA was not violated.[287]

4. Judicial Remedies for Violations of the Posse Comitatus Act

The judiciary has also struggled with what remedy exists for someone who claims to have suffered some prejudice as a result of a violation of the PCA. As shown above, the judiciary has only addressed the PCA when it has been raised by third parties and never in the context of an actual prosecution under the Act.[288]

Third parties have attempted to claim that violations of the PCA should be remedied in three ways. First, criminal defendants have argued that evidence obtained as a result of a violation of the PCA should be suppressed. Second, criminal defendants have sought to dismiss their prosecutions when the PCA was violated in the course of the criminal investigation. Finally, third parties have attempted to sue for money damages for alleged violations of the PCA. Generally, the courts have rejected each of these remedies.

a. Exclusion of Evidence

The exclusionary rule is a judicially created remedy designed to deter "unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against

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[286] *See, e.g.*, State v. Poe, 755 S.W.2d 41, 44-45 (Tenn. 1988) (holding PCA was not violated by military involvement in civilian law enforcement duties when both participants were soldiers on active military duty); State v. Cameron, 909 S.W.2d 836, 847-48 (Tenn. Crim. App. 1995) (same).

[287] *See supra* note 2 for quoted language used in the PCA; *see also, e.g.*, State v. Gunter, 902 S.W.2d 172, 175 (Tex. Ct. App. 1995) (finding no violation of PCA where there was no request by civilian authorities for military assistance); State v. Hayes, 404 S.E.2d 12, 14-15 (N.C. Ct. App. 1991) (same); McNeil v. State, 787 P.2d 1036, 1037 (Alaska Ct. App. 1990) (same).

[288] *See supra* text accompanying notes 231-87.

unreasonable searches and seizures."[289] Only rarely have courts used the exclusionary rule to suppress evidence obtained in violation of statutes, as opposed to the Constitution.[290] Thus far, it appears only two state courts have excluded evidence based upon a finding the authorities violated the PCA.[291] Every federal court and all other state courts have rejected the exclusionary rule, generally because they have found no evidence of "widespread" violations of the Act that would call for adoption of the exclusionary rule.[292] Arguably, however, there have been sufficient recorded violations to overcome that justification for rejecting the exclusionary rule.[293]

In any event, the exclusionary rule is an inappropriate remedy even in cases of widespread violations of the PCA. Nothing in the statute itself, or in the legislative history, suggests Congress intended the exclusionary rule to apply for violations of the Act.[294] The PCA is a criminal statute, which

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[289] United States v. Calandra, 414 U.S. 338, 347 (1974).

[290] *See* Lee v. Florida, 392 U.S. 378, 385-87 (1968) (excluding evidence obtained in violation of the Federal Communications Act).

[291] *See* State v. Pattioay, 896 P.2d 911, 922-26 (Haw. 1995) (violation found, evidence suppressed); Taylor v. State, 645 P.2d 522, 525 (Okla. Crim. App. 1982) (same). Other trial courts have initially suppressed evidence based on violations of the PCA, but have been reversed on appeal. *See, e.g.*, People v. Burden, 303 N.W.2d 444, 447 (Mich. 1981) (per curiam) (reversing lower court's finding of violation of PCA and suppression of evidence).

[292] *See* Hayes v. Hawes, 921 F.2d 100, 103-04 (7th Cir. 1990) (rejecting application of exclusionary rule for PCA violation, but warning that it might be applicable in the future if there is evidence of "widespread" violations); *see also* Gilbert v. United States, 165 F.3d 470, 474 n.2 (6th Cir. 1999) (noting that every federal court has rejected the exclusionary rule as a remedy, and collecting cases); United States v. Al-Talib, 55 F.3d 923, 930 (4th Cir. 1995) (rejecting exclusionary rule as remedy for violation of the PCA).

[293] *See, e.g.*, United States v. Roberts, 779 F.2d 565, 568 (9th Cir. 1986) (finding violation of PCA, but rejecting exclusionary rule); United States v. Walden, 490 F.2d 372, 376-77 (4th Cir. 1974) (same); *see also, e.g.*, United States v. Johnson, 410 F.3d 137, 149 (4th Cir. 2005) (not finding a violation of the PCA, but in the alternative rejecting the exclusionary remedy); United States v. Bacon, 851 F.2d 1312, 1314 (11th Cir. 1988) (per curiam) (same).

[294] *See* Larry L. Boschee, Note, *The Posse Comitatus Act as an Exclusionary Rule: Is the Criminal to Go Free Because the Soldier Has Blundered?*, 61 N.D. L. REV. 107, 129 (1985) ("There is no evidence that Congress intended the Posse Comitatus Act to double as an exclusionary rule.").

provides its own remedy of criminal sanctions for a violation of the Act.[295] Further, the exclusionary rule is generally limited to violations of defendants' constitutional rights. A violation of the PCA is neither a violation of a right held by a criminal defendant, nor a constitutional provision.[296]

b. Dismissal of Charges

Courts have uniformly denied motions by criminal defendants to dismiss charges against them for alleged violations of the PCA.[297] Courts have held, with very little discussion, that there is simply nothing in the PCA or any other authority to support dismissal of charges as a remedy for violations of the PCA.[298]

c. Money Damages

Courts have also uniformly held there is no private cause of action to be had for violations of the PCA.[299] Again, courts

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[295] *See, e.g.*, State v. Valdobinos, 858 P.2d 199, 204 (Wash. 1993) (en banc) (noting the PCA provides a criminal sanction for violations of the Act, so exclusion of evidence is not a proper remedy).

[296] *See, e.g.*, *Al-Talib*, 55 F.3d at 930 (finding exclusionary rule is not remedy for violation of PCA); United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (same).

[297] *See, e.g.*, United States v. Wooten, 377 F.3d 1134, 1140-41 (10th Cir. 2004) (finding dismissal of criminal charges is not remedy for violations of PCA); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1478 n.9 (11th Cir. 1992) (finding that PCA "provides no basis for the proposed remedy of dismissal of all charges"); *Roberts*, 779 F.2d at 568 (holding that, even where defendant proved violation of PCA, dismissal of criminal charges was not an appropriate remedy).

[298] *See, e.g.*, United States v. Sullivan, 227 Fed. App'x 380, 382 (5th Cir. 2007) (per curiam) (rejecting defendant's motion to dismiss for violation of PCA and stating that "the appellants have not demonstrated that the dismissal of their case would have been an appropriate remedy if the Act was violated"); United States v. Vick, 842 F. Supp. 2d 891, 894 (E.D. Va. 2012) (rejecting defendant's motion to dismiss in single sentence, stating that "[f]irst, there is no authority to support a motion to dismiss an indictment for a violation of the PCA").

[299] *See, e.g.*, Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 511 (2d Cir. 1994) (holding PCA is a criminal statute that does "not provide [a] private cause[ ] of action"); Panagacos v. Towery, 782 F. Supp. 2d 1183, 1190 (W.D. Wash. 2011) ("The PCA is a criminal statute. It does not authorize a civil cause of action."); Smart v. Holder, No. EP-09-CV-101-KC, 2009 WL 2498213, at *4 (W.D. Tex. Aug. 12, 2009) ("The Posse Commitatus [sic] Act is a 'criminal statute [that]

have denied private causes of action almost summarily, with little discussion other than to point out the PCA is a criminal statute and makes no provision for a private cause of action.[300]

All that can certainly be said about the judicial interpretation and application of the PCA is that there is no certainty. There is no single, uniformly adopted test for evaluating the use of the military and whether it runs afoul of the Act.

D. Analyzing the PCA as a Criminal Statute

Some of the shortcomings of the Posse Comitatus Act become apparent when the Act is examined as a criminal statute. Because the government has never prosecuted anyone for violating the PCA, no court has ever determined the elements of the offense. Thus, identifying the elements is an academic exercise. To define the elements of the offense, one must determine who is subject to the Act, the actus reus, and the mens rea required to violate the act.

1. Who Is Subject to the Posse Comitatus Act?

The PCA makes it an offense for "whoever" "uses" the Army or Air Force "to execute the laws." The first question that arises is defining to whom "whoever" refers. The plain language of the Act suggests it applies to anyone who uses a member of the Army or Air Force to execute the laws.[301] When combined with the following word "uses," however, it becomes more complicated.

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does not provide a private right of action.'") (quoting Kervin v. City of New Orleans, No. 06-3231, 2006 WL 2849861, at *3 (E.D. La. Sep. 28, 2006)).

[300] *See, e.g.*, Smith v. United States, 293 F.3d 984, 988 (7th Cir. 2002) (rejecting defendant's argument in single sentence, stating that "[i]n any event, the Posse Comitatus Act, which prohibits [the] Army and Air Force personnel from engaging in civilian law enforcement, is a criminal statute that provides no private cause of action").

[301] United States Representative J. Proctor Knott, "who introduced the Section as an amendment to the Appropriation Bill, . . . envisaged the penalty he proposed as applying to everyone, from the Commander in Chief to the lowest officer." Wrynn v. United States, 200 F. Supp. 457, 464 (E.D.N.Y. 1961) (citing 7 CONG. REC. 3846-47 (1878)).

For a person to "use" a member of the military implies a sense of control by another over the soldier. It follows, then, that the PCA would apply to anyone who use members of the military to enforce laws.[302] In contrast, the plain language of the PCA would suggest it should not apply to members of the military who are being "used."[303]

Given the historic context of the PCA, however, one could argue the Act should apply only to civilians like United States Marshals, who use the military, and not to members of the military.[304] The Department of Justice, the military, and the courts have reached mixed results on this issue. Courts have found the PCA applies equally to members of the military who "use" other members of the military to enforce the laws.[305] On the other hand, when a member of the military is assigned on detail to work for a civilian agency, the Departments of Justice and Defense have concluded the PCA does not apply to that soldier even when that agency then uses the soldier to execute the laws.[306] Yet, courts have found the PCA applies to civilian

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[302] *See* Harker v. State, 663 P.2d 932, 937 (Alaska 1983) (stating that in all cases where a violation of the PCA was found, civil authorities had requested military assistance).

[303] *See* Meeks, *supra* note 33, at 128-30 (reviewing legislative history, Attorney General Opinions, and court dicta to conclude PCA theoretically applies to civil and military officials alike, but probably not to individual soldiers carrying out orders); Demaine & Rosen, *supra* note 229, at 190-91 (noting one interpretation, which has "some support in the case law," is that the PCA "prevents anyone from requesting or ordering the military to execute the law, but does not prevent service members from enforcing the law pursuant to those requests or orders, or on their own accord").

[304] *See* DOYLE, *supra* note 5, at 7-8 & n.14.

[305] *See, e.g.*, United States v. Bacon, 851 F.2d 1312, 1313 (11th Cir. 1988) (per curiam) (finding PCA applies to "military personnel"); United States v. Hartley, 796 F.2d 112, 115 (5th Cir. 1986) (same); United States v. Wolffs, 594 F.2d 77, 84-85 (5th Cir. 1979) (same); *see also* Mark Maxwell, *The Enduring Vitality of the Posse Comitatus Act of 1878*, THE PROSECUTOR, May/June 2003, at 34-35 (arguing plain reading of "whoever" means PCA applies "only . . . to army and air force personnel" or federalized national guard soldiers).

[306] *See, e.g.*, Permissibility Under Posse Comitatus Act of Detail of Def. Dep't Civilian Emp. to the Nat'l Infrastructure Prot. Ctr., 22 Op. O.L.C. 103, 106 n.5 (1998), http://www.justice.gov/sites/default/files/olc/opinions/1998/05/31/op-olc-v022-p0103.pdf [http://perma.cc/EUW9-DLZ7] ("Earlier opinions of this Office concluded that military personnel who are detailed to a civilian agency are not covered by the PCA because they are employees of the civilian agency for the

members of the Naval Criminal Investigation Service (NCIS) because, eventually, the chain of command has at its head a member of the military.[307]

A further question is whether the PCA applies to only federal authorities, such as United States Marshals. The historic context of the Act would suggest that it was intended only to restrict federal civilian authorities from using the military to enforce the law. Nothing in the statute, regulations, or case law, however, makes any distinction between whether the civilian authority who uses the military is a federal or state employee. Thus, courts have found both federal and state authorities covered by the PCA.[308]

A determination that the PCA is implicated when civilians, and even state civilians, utilize the military to enforce the laws belies the purported purpose of the PCA. If, as has been established, the goal of the PCA was to maintain civilian control of the military, the PCA should not be implicated when civilian authorities, such as U.S. Marshals, use the military to help enforce the laws. Rather, the law should only prohibit a member of the military from using the military to enforce the laws. If another purported goal of the PCA was to limit federal power over local law enforcement, then the PCA also should be implicated only when federal, but not state, authorities use soldiers to enforce the law. The PCA, therefore, is poorly drafted to effectuate the purported policy goals of maintaining civilian control over the military and restricting federal involvement in law enforcement.

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duration of their detail, 'subject to the exclusive orders' of the head of the civilian agency, and therefore 'are not "any part"' of the military for purposes of the PCA.").

[307] *See* United States v. Chon, 210 F.3d 990, 993 (9th Cir. 2000). NCIS is now headed by a civilian, presumably removing members of NCIS from being subject to the PCA.

[308] *See, e.g.*, United States v. Johnson, 410 F.3d 137, 141-49 (4th Cir. 2005) (finding PCA violation when U.S. Park police had blood sample examined by Armed Forces Institute of Pathology); State v. Pattioay, 896 P.2d 911, 912-22 (Haw. 1995) (finding PCA violation when state police used military personnel to make controlled buys of narcotics from civilians selling drugs to military personnel).

2. Actus Reus

The actus reus language of the statute is "to execute the laws." Most of the case law extant has focused on what it means to "execute" the laws. As related above, courts have derived three tests for determining whether the military was used to "execute" the law. The first turns on whether the military involvement was passive or active.[309] The second focuses on whether the military activity "pervaded" the civilian law enforcement activities.[310] Finally, under the third test courts look to see whether the military action was "regulatory, proscriptive, or compulsory" in nature.[311] Again, there is no consistency in the case law, but it appears most courts have adopted the last test.

There has been no discussion about what "laws" are at issue. It is presumed that the laws at issue are criminal laws. In discussing the PCA, courts have focused on the essential function of criminal law enforcement, such as search, seizure, and interrogations.[312] Given the historic context of the PCA, however, there is nothing to suggest that it would be limited to criminal laws. As explained above, it was the government's use of troops to enforce voting laws, not criminal statutes, that gave rise to the PCA.[313] Therefore, presumably the PCA would apply to the use of the military to enforce any law, not just criminal laws.

3. Mens Rea

To determine the mental state necessary to violate a federal criminal offense requires an examination of the "construction of the statute and . . . inference of the intent of Congress."[314] The mental state necessary to violate the PCA is willfulness. "Willfully" is "a word of many meanings," often

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[309] United States v. Red Feather, 392 F. Supp. 916, 925 (D.S.D. 1975).

[310] United States v. Jaramillo, 380 F. Supp. 1375, 1379 (D. Neb. 1974).

[311] United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1975), *aff'd*, 541 F.2d 1275 (8th Cir. 1976).

[312] *See supra* text accompanying notes 231-87.

[313] *See supra* notes 77-90.

[314] United States v. Balint, 258 U.S. 250, 253 (1922).

dependent upon the context of the statute.[315] Generally speaking, when used in a criminal statute "willfully" means an act "undertaken with a 'bad purpose.'"[316] In other words, in a federal criminal statute, "willfully" usually requires "the Government [to] prove that the defendant acted with knowledge that his conduct was unlawful."[317] The one court that addressed this issue noted the PCA requires proof the defendant specifically intended to violate the Act.[318]

Thus, if the government ever prosecuted anyone for a violation of the PCA, it appears the elements of the offense would be:

> (1) The defendant was a person (civilian or military, federal or state);
>
> (2) The defendant used a member of the Army or Air Force, meaning the defendant exercised regulatory, proscriptive, or compulsory power over the member of the military;
>
> (3) The defendant did so to enforce a federal law;
>
> (4) The defendant did so willfully, meaning the defendant knew that his conduct was unlawful at the time he committed the act.

Accordingly, when the PCA is analyzed as a criminal statute, it becomes readily apparent the statute is lacking in clarity. Given the confusion over when, how, and to whom the PCA applies, it is hard to imagine the government ever being able to prove a defendant knew his conduct violated the PCA. Perhaps this explains why, in its more than 130-year existence and despite repeated alleged violations, no one has ever been prosecuted for violating the PCA.

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[315] Spies v. United States, 317 U.S. 492, 497 (1943).

[316] Bryan v. United States, 524 U.S. 184, 191 (1998).

[317] Ratzlaf v. United States, 510 U.S. 135, 137 (1994).

[318] *See* United States v. Walden, 490 F.2d 372, 376 (4th Cir. 1974) (noting there was no evidence of "conscious, deliberate or willful intent" to violate PCA).

IV. THE POSSE COMITATUS ACT IS UNENFORCEABLE, INEFFECTIVE, AND UNNECESSARY

The need remains for a separation between the military and strictly civilian law enforcement activities.[319] No crisis in American history should detract from the concern expressed at the founding of our nation about restricting the role of the military in order to maintain civilian control of the government.[320] The PCA, however, is not, and never has been, the proper or effective means for achieving this policy goal.

After more than 130 years without a charge under the PCA, it can no longer be enforced as a criminal law. Even stripped of its criminal sanctions, the numerous exceptions Congress has enacted have long ago swallowed the PCA. Thus, as an effective criminal statute, or even a symbolic statement of a political philosophy, the Act is wholly ineffective. Further, there are other restrictions over the military that are more effective in maintaining a separation of the military from civilian law enforcement.

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[319] Members of Congress continue to express concerns about military involvement in law enforcement. *See* Holly Idelson, *Plans to Expand Police Powers Follow in Bombing's Wake*, 53 CONG. Q. 1177 (1995) (noting that Senator Dole expressed misgivings about plan to create another exception to PCA for cases involving domestic terrorism); 141 CONG. REC. S14974 (daily ed. June 6, 1995) (statement of Sen. Craig) (expressing concerns about importance of maintaining separation of military from civilian population). Similarly, the Department of Defense stated as "a matter of general principle . . . we ought to limit military influence in civilian affairs, both overseas and at home." Rosenau, *supra* note 78, at 39 (quoting U.S. Dep't of Def., *Peacetime Engagement: A Policy for the Environment Short of War* (Office of the Assistant Sec'y of Def. (Special Operations/Low-Intensity Conflict), Working Paper No. 26, 1993).

[320] As Alexander Hamilton asserted:

> 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.

THE FEDERALIST NO. 8, *supra* note 46, at 120 (Alexander Hamilton).

A. The Posse Comitatus Act Is Unenforceable Because It Has Not Been Enforced

Desuetude has been described as an "obscure doctrine[321] by which a legislative enactment is judicially abrogated following a long period of nonenforcement."[322] Desuetude means "disuse" or the "cessation or discontinuance of use."[323] Whether the doctrine has force in American jurisprudence, particularly with regard to criminal statutes, is debatable.[324] The Supreme Court has not directly addressed whether the Desuetude Doctrine would bar application of a disused criminal statute.[325]

The Desuetude Doctrine reflects a fairness, or due process, concern when the government dusts off a never-used statute to charge a defendant with a criminal offense.[326] Where it is recognized, courts have found the doctrine applies where the

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[321] Perhaps ironically, the Posse Comitatus Act has also been described as an "obscure" law. Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948).

[322] Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006); *see also* United States v. Agriprocessors, Inc., No. 08-CR-1324-LRR, 2009 WL 2255728, at *16 (N.D. Iowa July 27, 2009) ("'Desuetude is a civil law doctrine rendering a statute abrogated by reason of its long and continued non-use.'") (quoting United States v. Elliott, 266 F. Supp. 318, 325 (S.D.N.Y. 1967)).

[323] *Desuetude*, BLACK'S LAW DICTIONARY (5th ed. 1979).

[324] *See, e.g.*, Cent. Nat'l Bank of Mattoon v. U.S. Dep't of Treasury, 912 F.2d 897, 906 (7th Cir. 1990) (ruling against defendant in civil case, but holding open possibility Desuetude Doctrine might apply); *Agriprocessors*, 2009 WL 2255728, at *16-18 (*sua sponte* applying doctrine in criminal case, but finding against defendant); United States v. Jones, 347 F. Supp. 2d 626, 628-29 (E.D. Wis. 2004) (in criminal case, assuming doctrine applies, but ruling against defendant); *see also* Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 395-409 (1964) (arguing Desuetude Doctrine is not part of English jurisprudence, although it is recognized in law of Scotland.); Note, *supra* note 322, at 2209 (concluding doctrine "currently enjoys recognition in the courts of West Virginia and nowhere else").

[325] In *Poe v. Ullman*, 367 U.S. 497 (1961), the Supreme Court stated, "The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. . . . 'Deeply embedded traditional ways of carrying out state policy . . .'—or not carrying it out—'are often tougher and truer law than the dead words of the written text.'" *Poe*, 367 U.S. at 502 (quoting Nashville, C & St. L. Ry. v. Browning, 310 U.S. 362, 369 (1940)).

[326] *See Elliott*, 266 F. Supp. at 326 ("In some situations a desuetudinal statute could prevent serious problems of fair notice.").

defendant can show three things: 1) the crime in question must be malum prohibitum; 2) there must be "open, notorious, and pervasive violation of the statute for a long period;" and 3) there must be a "conspicuous policy of nonenforcement."[327] All three factors must be met, or a court would conclude that "[t]he law hath not been dead, though it hath slept."[328]

Under this test, the PCA is not sleeping—it's dead. First, the law is malum prohibitum, meaning the act is wrong because it is prohibited, not because it is wrong in itself.[329] There is nothing inherently evil, immoral, or injurious about the military being involved in civilian law enforcement. Second, there arguably have been open and pervasive violations of the statute for a long period of time. Courts have found the statute violated multiple times since its passage.[330] Finally, there has been a conspicuous period of nonenforcement. The government has never charged anyone with a violation of the PCA.

Therefore, the PCA is unenforceable because it has been unenforced.

B. The Posse Comitatus Act Is Unnecessary to Ensure Civilian Control of the Military

The PCA is unnecessary because there are other more effective means of advancing the legitimate interest in ensuring the military does not assume control over civil law enforcement duties. First, there are restraints written into the Constitution. Second, there are other statutes that restrain military involvement in civil law enforcement. Finally, there are institutional characteristics that restrain the military from becoming enmeshed in civilian law enforcement duties.

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[327] Comm. on Legal Ethics v. Printz, 416 S.E.2d 720, 726 (W. Va. 1992) (stating elements); *see also Elliott*, 266 F. Supp. at 326 (same).

[328] *Elliott*, 266 F. Supp. at 326 (quoting WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 2, sc. 2).

[329] *Malum in se* & *Malum prohibitum*, BLACK'S LAW DICTIONARY (5th ed. 1979).

[330] *See supra* note 4.

1. Constitutional Restraints

The PCA specifically prohibits the military from directly participating in civil law enforcement duties, *except* when "expressly authorized" by the Constitution or an act of Congress.[331] The Constitution only vaguely authorizes the President of the United States to use the military to enforce the law. Article IV, Section 4, provides that the federal government "shall guarantee to every state in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."[332] Although this provision does not specifically address the use of the military to enforce the law, at the time there was no federal law enforcement apparatus as there is today. Were the federal government to protect a state against domestic violence, for example, the only force available to the President to do so was the Army, Navy, and the militia of the several states.[333]

At the same time, the Founding Fathers effectuated civilian control over the military by the manner in which it structured the government in the Constitution.[334] To begin with, the Constitution provides that the Commander-in-Chief of the military is the civilian President of the United States.[335] Further, the Constitution invests Congress with the authority

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[331] 18 U.S.C. § 1385 (2012).

[332] U.S. CONST. art. IV, § 4.

[333] *See In re* Neagle, 135 U.S. 1 (1890) (noting that President has inherent authority to use military in emergency situations). Indeed, given the President is charged in the Constitution with the responsibility to "take care that the laws be faithfully executed," U.S. CONST. art. II, § 3, and given that at the time of enactment Congress provided for no federal law enforcement apparatus, one could argue the President was granted inherent authority to use the only force available, the military, to see the laws were faithfully executed.

[334] *See* J. Bryan Echols, *Open Houses Revisited: An Alternative Approach*, 129 MIL. L. REV. 185, 200 (1990) (arguing structure of Constitution effectuates civilian control over military).

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

to regulate the armed forces.[336] The Constitution also provided Congress with control over the military purse strings.[337] Finally, the Third Amendment to the Constitution bars the quartering of troops in private homes.[338]

2. Statutory Restraints

The 1981 Military Cooperation with Law Enforcement Officials Act contains language that furthers the goal of limiting the direct use of the military in executing traditional law enforcement functions.[339] The statute requires the Secretary of Defense to prescribe regulations to ensure that military personnel do not directly participate "in a search, seizure, arrest, or other similar activity" unless otherwise permitted by law.[340] To the extent that eliminating the PCA is deemed too radical, a second alternative would be to remove it from the criminal code and recodify it under Title 10 where it could remain to serve the function of expressing the policy of maintaining civilian control over the military.[341] Although better than retaining the PCA as a criminal statute, retaining the law in a non-criminal form does not address the problems the Act, and its exceptions, have created in defining the authority of the civilian authorities to call upon the military for aid in enforcing civil law.

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[336] *Id.* art. I, § 8, cl. 14 ("To make Rules for the Government and Regulation of the land and naval Forces . . . .").

[337] *Id.* art. I, § 8, cl. 12 ("The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . . ."). It is interesting the Constitution does not so limit appropriations for the Navy for two years. *Id.* cl. 13. This suggests the purpose of the term limit for the Army reflected an effort to exert more control over the Army because it posed more of a threat to civilian control of the military.

[338] *Id.* 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.").

[339] 10 U.S.C. § 375 (2012).

[340] *Id.*

[341] *See* Hammond, *supra* note 64, at 981 (proposing "a repeal of the PCA in Title 18, Crimes and Criminal Procedure, and recodification into Title 10, Armed Forces," and concluding that such recodification "would bring the law into line with its current function and force . . . [as] a law [expressing] policy . . . ").

3. Institutional Restraints

The United States Military has consistently exhibited disdain for, and a reluctance to become enmeshed in, using the military for civilian law enforcement duties. The military has, at times, used the PCA as an excuse not to get involved in civilian law enforcement matters, even when such involvement may not have violated the Act.[342] The reasons for this military reluctance are many. Military involvement in civilian law enforcement duties carries with it the danger that it will decrease the military's preparedness for waging war.[343] The military asserts that involvement in non-traditional activities, such as law enforcement, erodes combat effectiveness and potentially leads to a dangerous level of military involvement in civilian affairs.[344] With this in mind, and at the urging of the Department of Defense,[345] Congress authorized the military to deny a request for assistance if it would adversely affect military preparedness.[346]

Some reluctance also comes from the feeling that civilian law enforcement is a subservient role for military forces. Traditionally, military authorities have viewed the use of troops for civilian law enforcement duty beneath the dignity of the service.[347] Law enforcement activities may also expose the

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[342] *See* Furman, *supra* note 26, at 128 (asserting military has used PCA to avoid duties which would not have violated PCA).

[343] The military must be "organized and governed on true military principles" so it does not lose "the habits and usages of war." SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS 231 (1957) (quoting General Sherman).

[344] *See* Rosenau, *supra* note 78, at 37.

[345] *See Posse Comitatus Act: Hearing on H.R. 3519 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 97th Cong. 14, 18-19 (1981) (statement of William Taft IV, General Counsel, Department of Defense).

[346] *See* 10 U.S.C. § 376 (2012) ("Support . . . may not be provided to any civilian law enforcement official under this chapter if the provision of such support will adversely affect the military preparedness of the United States.").

[347] General William Tecumseh Sherman objected to the use of federal troops in the South after the Civil War, asserting it was beneath a soldier's dignity to participate in law enforcement duties. HUNTINGTON, *supra* note 343, at 231. Other military commanders similarly disliked using troops for law enforcement duties and made their views known in Washington. 7 CONG. REC. 3,579-82 (1878)

military, an institution that values secrecy, to the light of the courtroom, subjecting the Department of Defense to criminal discovery that may jeopardize military secrets. Some in the military are also reluctant to throw combat troops into law enforcement duties because they are not trained for law enforcement.[348] Except, perhaps, for those serving as military police, soldiers are not trained in law enforcement, the scope and limits of police power, and most importantly, on the constitutional rights of the accused. Rather, military personnel are generally trained to locate and destroy enemy forces, while law enforcement personnel are trained to investigate and restrain criminals.[349]

The most significant source of reluctance in the military to involvement in civilian law enforcement activities, however, comes from an appreciation for the historic and fundamental value Americans have placed on the separation of the military from civilian affairs.[350] The military is nothing if not an institution driven by a strong attachment to tradition and principles. From this author's discussions with military personnel about the involvement of the military in civilian law enforcement activities,[351] and from the general comments by

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(statement of Rep. Kimmel) (relating views of military commanders who expressed displeasure with using troops as police officers).

[348] *See* 127 CONG. REC. 15,659 (1981) (statement of Rep. Hughes) (arguing military is not trained in law enforcement, creating potential for mistakes, excessive use of force, and costly retaining).

[349] As another author has more succinctly put it, "[L]aw enforcement personnel search and capture, while the military search and destroy." MARK C. WESTON, U.S. ARMY WAR COLLEGE STRATEGY RESEARCH PROJECT, REVIEW OF THE POSSE COMITATUS ACT AFTER HURRICANE KATRINA 1, 16 (2006), www.dtic.mil/cgi-bin/GetTRDoc?AD=ada448803 [https://perma.cc/XA4C-D6NG].

[350] *See* United States v. Johnson, 410 F.3d 137, 146-47 (4th Cir. 2005) (stating it is an "American tradition" that the military not be used to enforce civil laws except where "Congress has recognized a special need for military assistance"); *see also* Edward M. Coffman, *The Army Officer and the Constitution*, PARAMETERS, Sept. 1987, at 2 (arguing that, within the military, there is "an implicit—one could almost say instinctive—acceptance of the civil power's superiority to the military in government").

[351] Interviews with Major General Patrick Reinert, U.S. Army Reserve, Colonel Jeff Davis, U.S. Army (retired), and Lieutenant Colonel Robert Butler, U.S. Army (retired) (notes on file with author).

military authors of articles about this subject,[352] it is apparent that the military reluctance is largely based on a fundamental appreciation that the military not impede civil liberties and remains within the confines of its traditional role.

C. The Posse Comitatus Act Is Ineffective in Restricting Federal Involvement in Law Enforcement

As related previously, our desire for preventing the military from participating in civilian law enforcement activities was based upon an apprehension of strong, centralized control and a history of abuses at the hands of English troops. Thus, steps were taken to ensure that law enforcement would remain the responsibility of local, civilian authorities. It was never envisioned that we would have a federal law enforcement establishment.

Thus, to the extent the PCA is justified as a necessary restraint on the federal government from invading the traditional state control over law enforcement duties, the argument fails to account for the growth of the federal law enforcement establishment. Our federal law enforcement agencies have grown from a handful of unarmed postal inspectors to tens of thousands of armed agents. Indeed, our federal law enforcement agencies, taken as a whole, probably constitute a stronger military force than the armies of many third-world nations. The federal government is now heavily involved in law enforcement and has, effectively, a national gendarmerie.

On one hand, federal law enforcement forces arguably pose the same threat to liberty as the formal military. It constitutes a centralized force capable of overpowering all but the military itself, which is intimately involved with the enforcement of civilian laws. On the other hand, the historic dangers of military involvement are not necessarily present with a civilian law enforcement body, no matter how strong in terms of firepower that force may be. There is no danger of the

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[352] *See generally* Bryant, *supra* note 24; Felicetti & Luce, *supra* note 11; Furman, *supra* note 26; Rich, *supra* note 202; WESTON, *supra* note 349.

force acting independent of civilian authority—it is the civilian authority. Further, federal agents are trained to enforce the law, not make war, and therefore do not pose the same threat of trampling on constitutional rights that the military poses. Finally, as a practical matter, the federal law enforcement establishment is relatively lightly armed, compared to the military.

Though some commentators express concern that the law enforcement establishment has grown into a paramilitary force,[353] there are reasons to embrace a robust law enforcement establishment consistent with the policy underlying the PCA. If the law enforcement establishment were weakened, when significant force is necessary to respond to an emergency authorities would be left calling upon the military for assistance, thus exacerbating the problem of keeping the military out of civilian law enforcement. A strong federal civilian law enforcement establishment may, therefore, preserve our liberties by decreasing the need to rely upon the military. Indeed, an argument could be made that a strong civilian law enforcement establishment creates a sort of counter-balance to a strong military force.[354] Our federal law enforcement establishment, therefore, does not pose the same threat to liberty as the use of the military in civilian law enforcement.

CONCLUSION

As a symbolic expression of the traditional American value of maintaining civilian control of the military, the Posse Comitatus Act fails. The Act imposes criminal sanctions on

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[353] *See* RADLEY BALKO, OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA 3-4 (2006), http://www.cato.org/pubs/wtpapers/balko_whitepaper_2006.pdf [http://perma.cc/54BW-PXXF]; Dru Stevenson, *Effect of the National Security Paradigm on Criminal Law*, 22 STAN. L. & POL'Y REV. 129, 164-65 (2011).

[354] In a manner, therefore, a robust federal law enforcement establishment serves a function similar to the state militias in counterbalancing the power of the military establishment. *See* 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.").

civilian authorities that use the military to enforce laws, rather than limit criminal sanctions to military authorities that usurp civilian control. As a practical tool to effectuate lofty means of maintaining a separation between the military and civilian law enforcement, it likewise fails.[355] Its vague language has caused nothing but confusion and motivated Congress to enact so many exceptions to the Act that it has long since been swallowed. The Act also fails to effectuate the stated purpose of restraining the central government from infringing upon states' rights. The Act has no practical effect on the balance of power between the federal and state governments in the area of law enforcement. In light of the development of a significant federal law enforcement apparatus, federal power is no longer limited to military power.[356]

The PCA should be repealed. The PCA is unenforceable, unnecessary, and ineffective. It was born out of political and racial strife, but clothed with platitudes about the need for control over the military. It is a relic of history, with little relevance to the current environment where the federal government has a large law enforcement apparatus and non-state actors wage unconventional war. To the extent the PCA was designed to maintain a balance of power between the federal and state governments in the area of law enforcement, times have changed. The PCA has served only as an obstacle to

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[355] *See* Felicetti & Luce, *supra* note 11, at 179 ("Unfortunately, the current interpretation of the Posse Comitatus Act, namely, a set of overbroad limits that bear little resemblance to the actual law combined with a bewildering patchwork of 'practical' exceptions, both impedes this important mission [of combating terrorism] and does little to protect civil liberties.").

[356] Federalism is concerned with the proper balance of power between the central and state governments. It is true the military is an arm of the federal government and use of the military to enforce laws within the states implicates federalism concerns. It is equally true, but unappreciated, that the federal government can similarly impact state authority through the use of federal law enforcement agencies. The rise in federal law enforcement authority and power in some ways renders moot the federalism concerns about the PCA.

the federal government's ability to effectively respond to crises,[357] or as an excuse for its failure to do so.[358]

Admittedly, once a law is on the books, it is exceedingly difficult to erase it.[359] The real reason Congress enacted the PCA, the racial and political struggle that followed a civil war caused by slavery and military occupation of part of the nation, was transient and no longer exists. As Oliver Wendell Holmes found it "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV," he found it "still more revolting if the grounds upon which [the law] was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[360]

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[357] *See* WALTER LAQUEUR, THE AGE OF TERRORISM 133 (1987) (arguing police forces, even federal law enforcement agencies, are not as capable as military in responding to acts of terrorism).

[358] *See supra* note 7.

[359] *See* William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1918, 1942 (1993) (arguing inertia keeps unenforced laws on books because "[i]t is hard to mobilize either the legislative or popular support needed to secure the repeal of a statute when it is unenforced"); *see also* Alexander M. Bickel, *The Supreme Court, 1960 Term–Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 63 (1961) ("When [a] law is consistently not enforced, the chance of mustering opposition sufficient to move the legislature is reduced to the vanishing point.").

[360] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).