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The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?

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Donald J. Currier

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PREFACE

The U.S. Army War College provides an excellent environment for selected military officers and government civilians to reflect and use their career experience to explore a wide range of strategic issues. To assure that the research developed by Army War College students is available to Army and Department of Defense leaders, the Strategic Studies Institute publishes selected papers in its Carlisle Papers in Security Strategy Series.

The author of this Carlisle Paper, Lieutenant Colonel Donald J. Currier, member of the Class of 2003, contends that the Posse Comitatus Act was too broad when it became law in 1878, although it appears straightforward. Since then, the law increasingly has become difficult for the military to interpret and apply.

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ABOUT THE AUTHOR

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ABSTRACT

The Secretary of Defense should seek repeal of The Posse Comitatus Act (PCA). This Act presents a formidable obstacle to our nation's flexibility and adaptability at a time when we face an unpredictable enemy with the proven capability of causing unforeseen catastrophic events. The difficulty in correctly interpreting and applying the Act causes widespread confusion at the tactical, operational, and strategic levels of our military.

Given that future events may call for the use of the military to assist civil authorities, a review of the efficacy of the PCA is in order. This paper documents the historical context of the PCA, explains the parameters of the law, and provides an analysis of the PCA's value in today's security environment. An analysis of the PCA will reveal that, although the policy goals behind the Act are generally sound and desirable, Congress could better implement their intent through other means.

THE POSSE COMITATUS ACT: A HARMLESS RELIC FROM THE POST-RECONSTRUCTION ERA OR A LEGAL IMPEDIMENT TO TRANSFORMATION?

As originally passed, the Posse Comitatus Act (PCA) read,

> 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.[1]

With the exception of a short amendment, i.e., extending the Act to include the Air Force, the PCA remains substantially as it was when Congress added its language to the Army appropriations bill in 1878. Only 52 words long, it deceivingly appears straightforward. As this paper will demonstrate, however, the Act was overly broad at its inception, and it increasingly has become both ambiguous and complex in its ramifications.

The Secretary of Defense should seek repeal of PCA because the ambiguity of the Act causes widespread confusion at the strategic, operational, and tactical levels of our military. Although the law has little practical effect regarding its intended purpose, the complexity and rigidity of the Act present a formidable obstacle to our nation's defense flexibility and adaptability. We can ill afford such anachronistic restraints at a time when we face an unpredictable enemy with the proven capability of causing unforeseen catastrophic events.

The possibility that such future events may call for military assistance to civil authorities (MACA) requires that we review the efficacy of the PCA. This paper will document the historical context of the PCA, clearly explain the parameters of the law, and provide an analysis of the PCA's value in today's security environment. An analysis of the Act will reveal that although the policy goal behind the Act is generally sound and desirable, Congress could have better implemented its intent on this subject through means other than a criminal statute.

HISTORICAL CONTEXT

The PCA is a federal criminal law that prohibits using federal troops to enforce civil laws, under penalty of fine and or imprisonment. Congress originally enacted the PCA in 1878 (as an amendment to the Army appropriation bill) after the Reconstruction. According to the Homeland Security Act of 2002, when Congress passed the Act, it "expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing federal law."[2] Others have argued that Congress intended the law to "prevent the military forces of the U.S. from becoming a national police force or *guardia civil*."[3] Whether or not Congress intended it to be so broad, the PCA generally prohibits any person from using the Army or Air Force to enforce civil law, unless otherwise provided for in law.

Early Use of the Army in Civil Disturbances.

The military has a long tradition of being the force of last resort to quell riots. Such use in the United States can be traced back as early as the New York City Doctors' Riot in April of 1788.[4] The riot started when widespread reports of doctors robbing graves for medical research circulated throughout the city. A large mob marched on the New York City hospital, where the doctors had taken refuge from angry demonstrators. Having no police force large enough to control the crowd, New York City officials asked the governor to call out the militia to disperse the mob. The commanding officer ordered several volleys of musket fired directly into the crowd before they

dispersed. The militia remained on the streets for several days before they were able to restore calm and order.[5]

President George Washington "federalized" the New Jersey, Virginia, Maryland, and Pennsylvania militias to quell the Whiskey Rebellion of 1794 in Pennsylvania. Congress had passed the Excise Act in 1791, which carried heavy taxes for distilled spirits. The new federal taxes brought by the Excise Act created widespread dissatisfaction with the Federal Government among Pennsylvanians. This dissatisfaction quickly led to civil unrest in a handful of Pennsylvania counties. After several disruptive incidents, President Washington issued a proclamation condemning activities that "obstruct the operation of the laws of the United States." On July 16, 1794, the situation turned violent. A mob of 500 local militiamen attacked the home of a revenue collector, General Neville, near Pittsburgh. The militia captured Major Kirkpatrick and ten of the soldiers from Fort Pitt who were defending the home. Four of Kirkpatrick's soldiers received serious wounds, and the militia commander, James McFarlane, died in the action.[6] An armed force of 7,000 "malcontents" marched on Pittsburgh on August 1, intending to capture Fort Pitt. Although the mob dispersed before an attack on the fort was mounted, Governor Mifflin asked the President for help on August 4, 1794.

Secretary of the Treasury Alexander Hamilton had fought closely with General Washington during the Revolutionary War. Hamilton estimated that the Government would need 12,000 men to suppress the violence.[7] In his estimation, the disturbance was more than a spontaneous riot, but less than a "rebellion."[8] The number of troops called for exceeded the capability of the Pennsylvania Militia. Three days later, President Washington issued a proclamation directing "all persons being insurgents, as aforesaid, are commanded on or before the first day of September next, to disperse and retire peaceably to their respective abodes."[9] He relied on the "Calling Forth Act"[10] as his authority to mobilize a militia force of 15,000 men to engage the estimated 16,000 rioters.

He met with the troops in Carlisle, Pennsylvania, in October to give them their orders. He directed them to overcome any armed opposition and to support the civil officers in the means of executing the laws. The troops met no resistance, and the civil disturbance ended as soon as the troops deployed.[11] President Washington's action in employing federal troops established a precedent for using the Army to quell riots and suppress rebellion. As it is the President's duty under the Constitution to "take care that the laws be faithfully executed" and "insure domestic tranquility," the tradition has continued to this day.

History of the PCA.

The history of the PCA really begins with the Judiciary Act of 1789, which established the Federal District Courts.[12] In that act, Congress provided each district court with a U.S. Marshal. They gave the U.S. Marshals authority to employ the common law "power of the county" or "posse comitatus" to assist them in capturing fugitives from federal justice and to enforce the orders of the court. As a rule, U.S. Marshals did not make a practice of using the military to form their posse. When needed by U.S. Marshals, military support would be requested through the military chain of command and would require approval by the President. When supporting the U.S. Marshals, the Army would maintain its chain of command and perform the mission for a short period.[13]

The practice did not become controversial until Congress enacted the Slave Trade Act of 1850.[14] After Congress enacted this act, U.S. Marshals began arresting fugitive slaves in the northern United States who had escaped from slave states in the South. U.S. Marshals became the object of scorn and outrage and were often the victim of physical assaults. They began turning to the military for help with greater frequency. The military understandably resisted participation in the unpopular practice of assisting in the capture of runaway slaves. In 1854, Attorney General Caleb Cushing rendered an opinion declaring that the

practice of impressing the military (without the approval of their chain of command) into federal posses was legal.[15] The U.S. Marshal's authority had been somewhat vague and ambiguous until Attorney General Cushing issued his opinion on the issue, stating that:

> A marshal of the United States, when opposed in the execution of his duty by unlawful combinations, has authority to summon the entire able-bodied force of his precinct as a posse comitatus. This authority comprehends, not only bystanders and other citizens generally, but any and all organized armed force, whether militia of the State or officers, soldiers, sailors, and marines of the United States.[16]

It is important to note that this issue revolved around the propriety of U.S. Marshals using the military to assist in the capture of criminals wanted for federal crimes and the compulsion of military forces to protect federal courts and judges during times of civil unrest. The concern raised was not compulsory participation of the military in the posses raised by local sheriffs or police. Local officials never had the authority to summon the aid of federal troops. The issue once arose in relation to a local sheriff who asked for but did not receive military assistance in the state of Texas. In March of 1877, the Judge Advocate General (JAG) of the Army issued an opinion stating, "A sheriff or other state official has no such authority as that possessed by a United States Marshal to call upon United States troops as such to serve upon a posse." [17] In June of 1878, before passage of the PCA, the JAG opined that his previous opinion also applied to the Territory of New Mexico, where local law enforcement officials were outgunned and outmanned by their criminal opponents. The JAG correctly pointed out in his opinion that the U.S. military acts as an agent for the executive branch of the Federal Government, which is beyond the command and direction of state and local authorities.

There were two underlying reasons why Congress inserted the language of the PCA in the Army's annual appropriations bill in 1878. The first revolved around the practice of U.S. Marshals impressing military members into a posse under the authority granted by the Judiciary Act of 1789.[18] Soldiers and their leadership often saw the practice as necessary, but found it nonetheless difficult and distasteful.[19]

The other reason that Congress enacted the law was the urging of southern Democrats, who deeply resented President Grant's use of the Army during Reconstruction in the South. A common belief is that Congress had a visceral reaction against the use of the Army to guard the polls during the presidential election of 1876, guaranteeing the right of African-Americans to vote and thus improving the chances for victory of the President's own party. This view is an oversimplification of what really happened during those few years preceding the vote on the PCA. To appreciate the Army's role during the years preceding enactment of the PCA, it is necessary to examine the historical period of Reconstruction of the South after the Civil War.

RECONSTRUCTION

As the American Civil War came to an end in April of 1865, President Lincoln advised the nation to show "malice toward none, with charity for all . . . let us strive on to finish the work we are in, to bind up the nation's wounds."[20] It seems that not many in Congress were much interested in remembering President Lincoln's advice after his assassination. Initially, President Johnson and Congress agreed that each state individually would have to ratify the Fourteenth Amendment to the Constitution before military occupation would end in that state. In 1867, when southern states resisted the grant of civil rights to African-Americans, Senator Thaddeus Stevens introduced a drastic reconstruction bill. In his speech promoting the bill, he argued that the former Confederates in the South could not be trusted. "Not only had they tried to tear the Union apart, but since the war they had acted as barbarians . . . murdering loyal whites daily and daily putting into secret graves not only hundreds but thousands of colored people."[21] Congress passed a compromise reconstruction

bill in March 1867, giving blacks the right to vote and dividing the South into five military districts. A general officer commanded each district. Congress gave the Army the responsibility to "supervise elections, maintain order, and enforce the law."[22] Two subsequent reconstruction acts, passed the same year, authorized the Army to bar voters and discharge southern officials.[23]

Louisiana.

The end of Reconstruction in Louisiana started on June 25, 1868, when the state legislature ratified the Fourteenth Amendment to the U.S. Constitution. On July 13, 1868, the Military Department of New Orleans issued Special Order No. 154, officially ending military law in that state.[24] Within 1 month, 50 men were murdered, and civil law was in serious peril. Within 45 days, the state was in chaos. More than 150 people were murdered, most being African-American. On July 30, an angry mob threatened to attack the state legislature, but the presence of federal troops deterred them. General Grant, then General of the Army, directed that troops remain in Louisiana to be ready to restore order. Major General Buchanan, the Louisiana Military Department Commander, issued instructions and guidelines regarding the use of military forces by U.S. Marshals to enforce the laws of the United States when no other mechanism was available to restore order and preserve lives.[25]

In September 1874, a simmering political controversy boiled over. Since the end of Reconstruction, Louisiana had held a series of elections that resulted in competing claims to power by two governors, two lieutenant governors, and two legislatures. Election fraud was so extensive that it was impossible to discern the rightfully elected government, although one party enjoyed the ratification of the state courts. On September 14, 1874, D. B. Penn, one of the disputants whom the Louisiana courts had not recognized as an officeholder, issued a proclamation raising an outlaw militia. One of the grievances listed in his proclamation was that "the judicial branch of your government has been stricken down by the conversion of the legal posse comitatus of the sheriff to the use of the usurper, for the purpose of defeating the decrees of the courts, his defiance of the law leading him to use the very force for the arrest of the sheriff, while engaged in the execution of a process of the court."[26] Penn raised an army of 10,000 men and seized the City of New Orleans from the metropolitan police, effectively staging a forcible coup d'état. The recognized governor, William Kellogg, asked President Grant to send federal troops to put down the rebellion. The President issued a proclamation and dispatched federal troops. The outlaw militia surrendered to the federal soldiers, thus restoring order.

A turbulent election took place in November, resulting in a 54-50 majority of Republicans in the State Legislature. The first day the legislature returned to New Orleans, the Democratic minority staged a forcible coup d'état in the statehouse, drawing knives and pistols and physically beating the Republicans into submission. The Democrats installed five additional nonelected legislators. The Governor called for assistance, and federal troops again restored order. General Sheridan, the district commander, remarked that bloodshed would have ensued had federal troops not intervened. The Democrats sent a letter to President Grant, objecting to federal intervention in the political affairs of their state. This event caused great political tumult throughout the nation. Congress demanded an explanation from the President. On January 13, 1875, he responded in part that "the task assumed by the troops is not a pleasant one to them; that the Army is not composed of lawyers capable of judging at a moment's notice of just how far they can go in the maintenance of law and order, and that it was impossible to give specific instructions providing for all possible contingencies that might arise."[27]

Arkansas.

A similar situation occurred in Arkansas in 1874. Two different groups claimed the right to the statehouse. Both requested the assistance of the Federal Government to eject the imposter on

the other side. The President used federal troops to prevent either side from using their militias to settle the dispute. After consulting with Congress, the President finally recognized one of the parties, and the other disputant disarmed under threat of force from federal troops.

South Carolina.

In 1865, six former Confederate soldiers formed an organization they called the Ku Klux Klan. The organization quickly grew throughout the former states of the Confederacy. By the late 1860s, the Klan had a membership of more that 500,000 men.[28] Its "Grand Wizard," former Confederate General Nathan Bedford Forrest, formally disbanded the Klan in 1869. Yet, the activity of the Klan continued.[29] On April 20, 1871, Congress responded by enacting the Ku Klux Klan Act. The following month, President Grant began issuing a series proclamations, warning of the impending use of troops, suspending the writ of habeas corpus, and finally deploying soldiers to suppress the activities of the Klan.[30] Federal troops arrested more than 500 men, many of whom faced trial and conviction in federal court for violating the Ku Klux Klan Act.[31] Many people in the South deeply resented the President's actions. According to one historian, "It was felt in the South to be an abominable outrage, and the Democrats of the North held the same opinion."[32] In 1876, violent confrontations, instigated by the Ku Klux Klan, broke out between armed members of opposite political parties in South Carolina, resulting in several deaths. Other groups, variously known as Rifle Clubs, Democratic Military Clubs, and Red Shirts, actively resisted Negro suffrage. *Atlanta* magazine provides a chilling recitation of the Democratic campaign plan for 1876:

> Every club must be uniformed in a red shirt. The clubs are to be armed with rifles and pistols and organized in to companies with experienced captains. Every Democrat must feel honor bound to control the vote of at least one Negro, by intimidation, purchase, keeping him away or as each individual may determine.... Never threaten a man individually. If he deserves to be threatened, the necessities of the times require that he should die.[33]

Again, the President used federal troops to enforce the law and suppress violence. During the presidential election in South Carolina, he stationed federal troops in 70 locations throughout the state to reduce the likelihood of violence. After the election, two men claimed the Governor's seat. Newly elected President Rutherford Hayes invited both of the South Carolina disputants to the White House for a meeting, wherein they reached an agreement that avoided violence. The President ordered most of the remaining troops to be withdrawn.

One cannot overstate the deep cultural differences between the North and South during Reconstruction. The hatred and disaffection among the white majority in the southern states is almost unimaginable in American society today. More than 50 years after Reconstruction, the Democratic presidential candidate, Strom Thurmond, illustrated the depth and persistence of the attitude towards blacks in the Carolinas. During his 1948 campaign, candidate Thurmond claimed, "There's not enough troops in the Army to force the Southern people to break down segregation and admit the niggarace into our theaters, into our swimming pools, into our homes, and into our churches."[34]

In 1877, the 44th Congress hotly debated the practice of preserving the peace in southern states with federal troops when they considered the Army's appropriation bill. Congress did not pass a funding bill for the Army before adjourning the session. When the 45th Congress returned in 1878, they resumed the debate and finally approved the appropriation bill, with an amendment now known as the PCA. Congress apparently saw the use of federal troops in the South as an unacceptable use of federal power to influence local elections. During the debate, the sponsor of the amendment, Senator Knott, said that it expressed "the inherited antipathy of the American to the use of troops for civil purposes."[35]

Shortly after the law passed, the *New York*

Times declared that "the move in Congress to restrict the use of the Army for checking great and dangerous domestic violence is, in short, a move against economy and efficiency, as well as against principle and precedent."[36] The Secretary of War was disappointed when he learned that the Army's appropriation act contained the Knott Amendment. In his annual report to the Congress, he said, "In my judgment it is important either that this provision be repealed, or that the number of cases in which the use of the Army shall be 'expressly authorized' be very much enlarged."[37]

AMERICAN DISTRUST OF A STANDING ARMY

There has always been popular support in the United States for limiting the power of the Federal Government. Colonists believed their states were perfectly capable of regulating and enforcing community standards. They saw no utility in national police powers of the Federal Government.[38] Our Founding Fathers had an even stronger distrust of a large standing army. Before the Revolutionary War, the British Army provided the colonists with "protection." Many colonists believed they received their only real protection from their own local militias, and that the British army was there only to protect the King's interests—often to their detriment. The British had an unpleasant habit of quartering their soldiers in the homes of the colonists, often without remuneration. Some of the grievances listed by the colonists against the King of England in the Declaration of Independence were that "he has affected to render the Military independent of and superior to the civil power . . . for quartering large bodies of armed troops among us." The Third Amendment to the U.S. Constitution now prohibits the quartering of soldiers in private homes, unless specifically provided for by Congress.

The men in attendance at the Constitutional Convention also had a deep distrust of standing armies, believing them to be "dangerous to liberty."[39] During the Convention, Luther Martin of Maryland said, "When a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army."[40] Prior to the ratification of the Constitution, John Adams wrote in *Brutus Number 10* that "just like a standing army was a danger to Rome, a standing army would pose great risk to the liberty of the United States."[41]

The Constitution provides Congress with the power to "raise and support armies"[42] but restricts funding for the Army to two years at a time. Alexander Hamilton explained why in *The Federalist Number 26*:

> The Legislature of the United States will be *obliged* by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents.[43]

The Navy has no such restriction on its budget because Congress saw it as necessary to ensure free trade. They did not view the Navy as a threat to liberty. The PCA may appear to be a straightforward reaction to President Grant's action after the Civil War, but it reflected the larger issue of Americans' traditional discomfort with a powerful army on its soil. Over the past 120 years, the PCA has become symbolic of America's distrust of a powerful army. When interpreting the provisions of the PCA, courts have been openly hostile to the idea of using the military to enforce civil law. When the opportunity arises to interpret congressional intent on the matter, courts have consistently found that the PCA is a manifestation of the American tradition of subordination of the military to civil authorities. Supreme Court Chief Justice Warren Burger commented on this tradition in the important U.S. Supreme Court case of *Laird v. Tatum*:

> [There is] a traditional and strong resistance of Americans to an military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against

> quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions . . . explain our traditional insistence on limitations on military operations in peacetime.[44]

In *U.S. v. McArthur*, Judge Bruce Van Sickle avers that "history tells us that Americans are suspicious of a military authority as a dangerous tool of dictatorial power—dangerous, that is, to the freedom of individuals."[45] Some authors and pundits have referred to the provisions of the PCA as constitutional requirements. But, while there may be profound skepticism toward using the military to enforce civil laws, there is no constitutional prohibition to such conduct. In *U.S. v. Walden*, the Fourth Circuit Court of Appeals found that "the Constitution recognizes that in certain circumstances, military preservation and enforcement of civilian law is appropriate; the policy consideration underlying the Posse Comitatus Act is not absolute."[46]

WHAT THE PCA PROSCRIBES

As we saw earlier, the text of the PCA today is not much different than it was in 1878. It is still relatively short and appears straightforward:

> 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.[47]

As straightforward as the Act appears, however, it is far more complex and perplexing than meets the eye. As an example, the courts have found several circumstances where federally paid soldiers are not in violation of the PCA, even though they are acting contrary to the plain language of the statute. The courts have applied three different tests to determine whether a person's acts violate the PCA (see Appendix 1).

WHEN THE LAW DOESN'T APPLY

Courts have found that the PCA does not apply to:

- Extraterritorial conduct of a military force.
- Indirect involvement in civil law enforcement.
- Enforcement of civil law for civilians on a military installation.
- Commanders, when exercising their inherent authority to protect their installation from attack or take immediate steps to protect the loss of life.
- The National Guard, when used in a "state status."
- Extraordinary cases where the President employs his Constitutional authority to maintain order.
- Conduct or actions that have been specifically exempted by Congress.

Arresting a person outside the United States for the purpose of bringing him or her to justice in federal court is not a violation of the Act. Nor is it a violation to arrest civilians in a foreign country for a violation of their own civil law. While most courts have long held that the PCA does not apply to extraterritorial activities of the military,[48] the Ninth Circuit has written, *in dicta*, that those courts have wrongly decided the extraterritorial issue, thus making the issue ripe for Supreme Court review.[49]

The PCA does not apply to indirect involvement in law enforcement activities. The test to determine directness hinges upon whether or not the military has "subjected civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature." [50] The indirect conduct interpretation has provided the military with the authority to assist local law

enforcement with equipment and manpower, as long as it does not directly participate in law enforcement tasks, such as search and seizure. A request for transportation of a police armored vehicle, for example, would not require the military's direct involvement in law enforcement. Training police officers in the effective use of their armored vehicle, or even the maintenance of that vehicle, would likewise not violate the Act. If, however, a soldier were to drive the vehicle to the scene of a bank robbery to extract police officers under fire, the action would be a violation of the PCA. Other examples of violations would be the manning of roadblocks and traffic control points that would bring the military member in direct contact with the public.

The military may also provide advice to civil law enforcement. However, if that advice becomes so pervasive that the service member actually exerts some control over the operation, the court will interpret the act of providing advice as direct involvement. The difference between active and indirect conduct can be somewhat difficult to determine. It is clear that loaning and maintaining equipment are not violations when the military is not on hand to help use it. It is also clear that a soldier who makes an arrest, upon the request of law enforcement personnel, is in violation of the PCA. It is not so clear in a situation where an Air Force pilot is flying surveillance at the direction of and in a manner directed by law enforcement personnel on board. In at least one case, courts have held that an Air Force pilot using an Air Force helicopter acted in violation of the PCA when he assisted law enforcement personnel by searching for an escaped criminal.[51]

The courts have consistently held that the military can enforce civil law when they are doing so on a military installation. Commanders are responsible for maintaining order and safeguarding military equipment. Military police have the authority to conduct law enforcement activities on military installations with exclusive and concurrent jurisdiction. In those cases, civilians are subject to federal law while they are on the installation, and military police have the authority to apprehend them when appropriate.

The courts have also held that when a military commander exercises his or her inherent authority to protect a military base, equipment, or personnel, the PCA does not prohibit the commander from taking actions directly against civilians. While this exception sounds straightforward, its application remains problematic in practice. In September 1885, coal miners were in the midst of a labor dispute with the Union Pacific Railroad. Violence broke out between white miners, who wanted to strike, and Chinese workers, who were content with the conditions. Twenty-eight Chinese were killed and 15 wounded before the Army intervened. Major General John Schofield, the local military commander, reasoned that because the trains carried troops and the Union Pacific was supplying coal for the trains, he could protect the railroad equipment and the Chinese under this exception.[52] Like most instances of military intervention on the frontier, the action never faced a test in court. It is unlikely that a commanding general would take such action today, even if ordered to do so. Military lawyers, unsure of the applicability of the PCA, would likely advise their commander that the order was unlawful, and that, if they followed it, they could be violating the PCA.

THE NATIONAL GUARD AS AN EXCEPTION UNLESS FEDERALIZED

Perhaps the most confusing aspect of the Act to the average American (and to the average soldier) is the fact that a National Guardsman who wears the same Army or Air Force uniform and markings as active federal forces, is not subject to the PCA when in a "state status." Of course, the public has no way of knowing whether the soldier is in a "state status." The courts have held that, even though the Federal Government is paying a soldier's salary and providing him with the uniform and equipment of the Regular Army, the PCA does not apply to National Guardsmen unless the President orders them to active duty.[53] The rationale for this finding is that the Congress never intended to limit the authority of state governors to use their militia to enforce state

law. Although this makes perfectly good sense to attorneys, governors, and lawmakers, it tends to confound troops, their leaders, and members of the public.

EXCEPTIONS UNDER THE PRESIDENT'S CONSTITUTIONAL AUTHORITY

By the terms of the law itself, the PCA does not apply when the President employs the Army under authority granted to him under the Constitution. The President's inherent authority derives from a combination of sections found within Article II. Section 1 of Article II provides that "the executive Power shall be vested in a President of the United States of America." Section 3 requires the president to "take care that the laws be faithfully executed."

Congress has enacted a number of statutes codifying the President's authority under a variety of circumstances. The most heavily relied upon are the "Insurrection Statutes" found in Title 10, Chapter 15, of the U.S. Code. Section 331 is an amended version of the "Calling Forth" statute relied upon by President Washington during the Whiskey Rebellion in Pennsylvania in 1794.[54] This section authorizes the President to "federalize" or "call forth" the militia of any state to suppress an insurrection upon the request of the state legislature or the governor. As we saw earlier, this occurred during the fall of 1794 when President Washington used "federalized militia" from Pennsylvania, Maryland, New Jersey, and Virginia to suppress the Whiskey Insurrection in Pennsylvania.[55] Section 332 gives the President the authority to use the militia of any state or the regular armed forces to enforce the laws of the United States or to suppress unlawful rebellion.[56] For example, when a state cannot or will not enforce the civil law, the President can use federal troops to restore order and enforce the law. As noted above, President Grant used this authority to send federal troops to restore order in Louisiana, Alabama, Arkansas, and South Carolina before the general election of 1876. Section 333 applies to situations where insurrection or domestic violence is preventing a class of people from exercising rights or immunities granted to them by the Constitution.[57] Section 334 requires the President to issue a proclamation, ordering the insurgents to "disperse and retire peaceably to their abodes" before employing any of the previous three sections.[58] Although modern-day proponents of the PCA often point to these types of situations as valid examples of why the PCA is necessary,[59] none of these events would fall under the PCA, as they would each be within the President's constitutional authority to restore order.

President John Kennedy provides us some more recent examples of a president's exercise of Constitutional authority. On September 11, 1963, he federalized the Alabama Army and Air National Guard to enforce civil rights laws in that state.[60] Governor George Wallace had prevented African-American students from attending classes at the University of Alabama. The Governor used state police and eventually Alabama National Guard soldiers to enforce his orders resisting the federal court integration order. After federalizing the Alabama National Guard, President Kennedy spoke to the American public in a radio address. He explained that "the presence of the Alabama National Guardsmen was required on the University of Alabama to carry out the final and unequivocal order of the United States District Court of the Northern District of Alabama."[61]

President Kennedy also used federalized National Guard units, as well as Regular Army units, to assist Federal marshals at the University of Mississippi from October 1962 through July 24, 1963. In Mississippi, an African-American student by the name of James Meredith had tried to attend classes under an order from the federal district court. The State of Mississippi blocked his attendance, setting off a series of riots. The duties of the troops included patrolling, intelligence-gathering, operating checkpoints, and providing security for Federal marshals.

In both of these civil rights incidents, the President relied on the Insurrection Statues, found in Title 10, sections 331-334, of the U.S. Code as his authority to call out the National Guard and to use federal troops against those

"who posed organized resistance to the execution of the laws of the United States."[62] The President could have relied upon his inherent authority as Commander-in-Chief as well as his obligation under the Constitution to ensure that the "laws are faithfully executed," as authority for employing federal troops to overcome resistance to federal law in Alabama.

The irony of these incidents is that the PCA could not prevent the very thing that the post-Reconstruction Congress hoped the law would address—a U.S. President enforcing civil law in a southern state by use of federal troops. If a state were to try to prevent African-Americans from voting today, there is little doubt that a President would employ federal troops to ensure free elections, just as President Grant did in 1876.

Congress has carved out several specific exceptions to the PCA. Among the more notable are the disaster relief and protection of public health and safety provisions of the Stafford Act. Other statutes grant authority to provide certain assistance to customs officials and for sanctioned counterdrug activities. The Stafford Act is important because it gives the President "broad discretion to find that a major disaster exists, requiring emergency response."[63] There are several valid but lesser used exceptions to the PCA listed in Appendix 2. The fact that there is no comprehensive list of these exceptions adds to the complexity of the Act. This reality strengthens the argument that a criminal statute is the wrong tool to implement congressional intent in this area.

POLICY GOALS AS DISTINGUISHED FROM LAW

It is important to distinguish the PCA statute from the policy goal of prohibiting U.S. military forces from enforcing civil law. There is a variety of means available to implement policy. Enacting a federal statute is the most rigid and inflexible method available to the government, short of a Constitutional Amendment. Congress can, and often does, pass nonbinding resolutions, declaring its intent on a particular policy issue or matters of public concern. Congress can even pass a law directing the President or an agency head to publish certain rules on a particular topic. They have already done so for military support to law enforcement authorities.[64] The administration can issue an administrative rule or regulation directing an agency of the Federal Government, including the military, to take certain actions or refrain from taking certain actions in areas of their jurisdiction. The President can also publish an executive order with much the same effect. The military can issue administrative directives, orders, policy memoranda, and regulations which govern the conduct of its members. The Department of Defense (DoD) has a longstanding policy of prohibiting the Navy from directly participating in civil law enforcement activities, even though the PCA does not prohibit the Navy from doing so. The DoD enforces this policy by way of a DoD Directive[65] and a Navy Regulation. The civilian leadership of the military can modify these regulatory mechanisms as the need to do so arises.

SOUNDNESS OF THE POLICY GOAL

The United States has a strong tradition of civilian primacy in domestic matters. As mentioned above, much of this tradition stems from fear of a powerful Federal Government and a standing army. Even before Congress enacted the PCA, the President used military units to enforce the rule of law only after exhausting all other means at his disposal.

The Constitution provides for civilian control over the military by establishing the President as the Commander-in-Chief[66] and by giving Congress the authority to raise armies and maintain a navy. Congress has further clarified the military's subordinate role in Title 10 of the U.S. Code. One could make three persuasive arguments in favor of the policy goals behind the PCA. The first is that civil liberties are more likely trampled by a strong Federal Government and its military, than by state governments. The framers of the Constitution crafted the Bill of Rights to address their fears of a powerful federal government bent upon usurping the individual rights of citizens. It

was not until 1949 that the Supreme Court began applying the individual protections found in the Bill of Rights to the states. In *Palko v. Connecticut*, the court held that the Fourth Amendment to the Constitution (found in the original Bill of Rights) applied to the states through the Due Process Clause of the Fourteenth Amendment.[67]

Americans jealously guard their civil rights and individual freedoms. They often view with suspicion any government action, either local or federal, that could intrude upon their way of life. The United States has a long history of limiting the size of its federal law enforcement apparatus, in large part because of the perception of potential for abuse.[68] As the federal government increases its size, we are often reminded that our "Founding Fathers never envisioned a national police power. Indeed, they were skeptical about general federal jurisdiction."[69] As an arm of the Federal Government, the military is less susceptible to local political influence than local and state law enforcement agencies. While some would see such independence by the military as benefitting operational efficiency, it causes discomfort for citizens who wish to participate in government decisions that affect their lives. The stronger the military presence at home and the more legal power it has to participate in domestic matters, the higher the perceived potential for abuse.

The second argument in favor of the policy behind the PCA is that the Army should focus on its primary mission instead of enforcing civil law. Since military units have only a finite amount of time to train for a myriad of missions, any additional mission requirements will necessarily reduce the amount of training time available for those most central. Time spent away from training translates to lower proficiency on warfighting tasks. (Note, however, that military police units conduct law enforcement duties as one of their wartime tasks.) Therefore, we can expect the military to resist any attempt to support law enforcement at home. Although such is understandable, supporting the continued existence of the PCA for these reasons alone is shortsighted and dangerously parochial.

The third and perhaps most cogent reason why the policy goals behind the PCA are sound is that, with the exception of military police units, soldiers do not receive training in law enforcement or practice escalating levels of police-type force. Soldiers do not routinely receive training in the determination of probable cause or the reasonable use of force. The military does not routinely train soldiers to tread carefully where they might be infringing on a citizen's constitutional rights. Nor does the Army train soldiers to collect and protect evidence. Instead, it trains them to use force to destroy an opposing military unit. As one law review writer comments, "Soldiers are taught to violently and effectively destroy the enemy, and their training does not include sensitivity to constitutional limitations on search, seizure, and the use of reasonable force."[70] The other side of this argument is that military units have adapted well to peacekeeping missions around the world when they receive adequate training for the mission.

American military leaders have a tradition of resisting any attempts to involve them in domestic entanglements, a tradition that existed long before the Congress enacted the PCA. Since the Federal Government has never prosecuted successfully anyone for violating the PCA, the criminal penalties hardly act as a persuasive deterrent to the proscribed conduct. It is important to note that despite the lack of prosecutions for violations of the PCA, the act carries potentially severe adverse collateral consequences when a court finds a violation. These consequences range from personal pecuniary liability in civil cases to potential charges of suppression of evidence in criminal cases. The natural abhorrence of the military to domestic duty, coupled with existing regulatory prohibitions[71] promulgated to satisfy other existing statutes,[72] are much more likely to be the reason why there have been so few recorded violations and no convictions of the Act.

But while the policy goals behind the law are sound, we must reexamine our priorities in light of the current security environment, and objectively analyze the PCA to validate its efficacy.

THE CONFUSING LAW

Sun-Tzu warns, "Vacillation and fussiness are the surest means of sapping the confidence of an army."[73] Not only is the law confusing to pundits and commentators, it is confusing to soldiers of all ranks, as well as political leaders in Congress[74] and the executive branch. Even military lawyers, who have the luxury of spending time in academic settings studying the Act, have found it to be confusing.[75] Accordingly, "deep understanding of the Act is uncommon."[76] In 1981, Congress attempted to clarify the conduct prohibited by the Act by enacting sections 371 through 378 of Title 10, U.S. Code.[77] This attempt at clarification appears to have been in vain.

The Los Angeles riots of 1992 are a case in point. Acting on a request from Mayor Tom Bradley, Governor Pete Wilson called out the California National Guard to quell the riot. Soldiers began working on the streets of Los Angeles in direct support of law enforcement personnel within hours. Soon, an uneasy calm had replaced the random violence, fires, and looting. Believing the National Guard was responding too slowly, Secretary of State Warren Christopher urged Governor Wilson and Mayor Bradley to request federal military assistance. President George H. Bush honored the Governor's request and federalized the California National Guard, placing them under the command of a federal Joint Task Force (JTF). The President ordered Marines from Camp Pendleton and soldiers of the Army's 7th Infantry Division (Light) at Fort Ord to join the JTF in Los Angeles for the purpose of "restoring law and order."

By the time federal troops arrived, local law enforcement officers and California National Guardsmen had already restored law and order. Concerned that federal troops (including federalized NG troops) were acting in inappropriate roles, the JTF Commander, Major General Marvin Covault, issued an order keeping all troops in staging areas and prohibiting them from directly supporting law enforcement personnel. He ordered a review of each mission and a validation of each mission every 24 hours, and authorized the continuation of only 20 percent of the missions previously conducted by the California National Guard.[78] Soldiers were often told by their leaders that the reason they were no longer authorized to assist law enforcement officers was that such conduct was prohibited under the Posse Comitatus Act.[79] General Covault later denied misunderstanding the PCA in a letter to Major General James Delk, who later wrote a book on the subject. Despite his assertions to General Delk, many observers have attributed misunderstanding of the Act to General Covault, particularly as to the confusion surrounding which missions were permissible and which missions were not.[80] After the riots, Judge William Webster chaired a commission to investigate the causes and handling of the riot. The Webster Commission found that:

> Despite an express written declaration by the President to the contrary, the federal troop commander, Major General Covault, took the position that the Defense Department's internal plan for handling domestic civil disturbances coupled with the *posse comitatus* statute prohibited the military from engaging in any law enforcement functions.[81]

There is some controversy as to whether or not Mr. Mueller, the senior civilian representative of the Attorney General, advised General Covault that the PCA prohibited him from directly supporting law enforcement personnel. If Mr. Mueller did so, he was wrong. As noted above, the PCA does not apply in situations where the President has proclaimed that a state is either unable or unwilling to enforce the law. President Bush signed a proclamation on May 1, 1992, directing the persons engaged in violence to cease and desist, thus clearing the way for him to employ his constitutional powers to quell the riot with federal troops.[82]

The Los Angeles riot is but one example of the difficulty of applying the PCA in the field. In the case of *Wrynn v. U.S.* mentioned above, an Air Force pilot by the name of Lieutenant Pickering received instructions from base operations to assist the local sheriff with a search for an escaped

prisoner. The sheriff had asked for assistance from the local Air Force base and the local Army post. During the course of the operation, the helicopter, commanded by Lieutenant Pickering and flown by another experienced pilot, landed on an unprepared landing site. A 17-year-old bystander named Wrynn was injured during the landing, presumably from flying debris. Although there is no suggestion that criminal charges were contemplated, the Federal Government defended the civil lawsuit on the grounds that Lieutenant Pickering violated the PCA when he followed his instructions to assist the sheriff in looking for the fugitive. The court agreed with the government that it was not liable for the actions of the pilots who, by law, were acting on their own. This left Lieutenant Pickering personally liable for any damages arising from the lawsuit. One is reminded of President Grant's words to Congress that "the Army is not composed of lawyers capable of judging at a moment's notice of just how far they can go in the maintenance of law and order."[83] Lieutenant Pickering was a well-educated and well-trained search-and-rescue pilot who presumably had been familiar with the provisions of the PCA.

One example of overly conservative advice that military lawyers provide is the opinion issued by the Judge Advocate General in 1952, when he advised the Army's Provost Marshal General that military police joint patrols (police patrols conducted jointly with local law enforcement officials) were a violation of the Posse Comitatus Act.[84] A subsequent opinion issued by the Judge Advocate General in 1956 described the earlier opinion on the same topic as "unduly pessimistic and restrictive."[85]

Some orders, such as an order to kill unarmed civilians, are unlawful on their face. Others, like directly supporting law enforcement officers during times of emergency and confusion, are more problematic for the soldier in the field. Not only are the facts sometimes difficult to apply to the law, but also, intuitively, soldiers at ground level want to help. As a matter of public policy, America does not want commanders to question their orders to assist civil authorities. The PCA interjects an unnecessary degree of confusion into already confusing situations.

THE PCA AS A SHIELD TO AVOID CIVILIAN ENTANGLEMENTS

Since Reconstruction, the military has loathed performing domestic law enforcement duties.[86] The PCA provides DoD with a convenient shield to protect it from missions that it does not want. On occasion, the Army has misconstrued the PCA to avoid providing assistance to civilian law enforcement.[87] Former DoD official John Deutch once remarked that the PCA was not a barrier preventing a military response to a genuine threat, but rather a bureaucratic reason not to do something perceived as less than a genuine threat.[88]

President George W. Bush established protection of the homeland as the most important mission for the military in the *National Security Strategy* of 2002.[89] Secretary of Defense Donald Rumsfeld lists homeland defense as the military's highest priority in the 2001 *Quadrennial Defense Review* (QDR).[90] Regardless of the importance of homeland defense to our national security, the focus of our military will continue to be on fighting and winning our nation's wars overseas. To those in the Defense Department who are concerned about losing the focus on warfighting, the PCA serves as a comforting legal impediment preventing the military from being distracted from its focus on wars overseas.

THE PCA AS A LEGAL IMPEDIMENT TO TRANSFORMATION

The constitutional mandate for our military is to provide for the common defense. The President's national security strategy designates homeland security as the most important of all security interests.[91] The *National Military Strategy* also lists homeland defense as the most important priority of the military today. The strategy adopted by the President and by DoD for securing the homeland is to project power overseas, attacking and destroying threats before

they threaten the U.S. homeland. Yet when facing an agile, shrewd, and versatile adversary, we may not always be able to address the threat before we find it has reached our soil. The PCA interferes with the nation's ability to defend itself against such a nimble asymmetric enemy.

The PCA presents a legal impediment to agility, a hallmark of our transforming military. We face the likelihood that our future enemies will adapt to our doctrine in innovative ways to create and exploit our weaknesses. In order to maintain dominance across the full spectrum of combat, we must be agile enough to stay ahead of our enemy's ability to adapt. We expect to face asymmetrical state and nonstate actors in the future. Such is the enemy we find ourselves opposing today. President Bush recently made public his direction to the Central Intelligence Agency (CIA) operationalizing his authority to use lethal force against specific enemy targets overseas.[92] Extension of this authority to the Continental United States (CONUS) presents a vexing problem. Current law prohibits the CIA from engaging in covert operations at home. This puts the burden on other agencies or the military. Harold Hongju Koh, a professor of international law at Yale University, recently remarked that "the inevitable complication of a politically declared but legally undeclared war is the blurring of the distinction between enemy combatants and other nonstate actors."[93] This is not news to military officers who have observed the change in paradigm between crime and war, and are grappling with how to approach it.[94] Certainly the lethality of terrorist weapons grows greater every day. This blurring of distinctions among enemy combatants, criminals, terrorists, and other nonstate actors increases the onerous task of distinguishing lawful from unlawful actions under the PCA.

If our next battle takes place where our greatest vulnerability exists at home—the proper military force to respond may be the National Guard. One of the advantages cited in using the National Guard for homeland security is its exemption from the PCA when on state-mandated duty.[95] Certainly the National Guard provides a valuable resource that must be included in any plans for the defense of our homeland. In fact, the constitutional mandate of the National Guard or "Militia" is to "execute the laws of the union, suppress insurrections, and repel invasions."[96] Resource constraints and cross-border jurisdictional issues make the National Guard a poor candidate for this type of federal mission at present. It is unwise to plan to leave the National Guard in a state status simply to avoid the provisions of the PCA. In the war on terror, situations change quickly and our military must have the agility to adapt just as quickly. The PCA is a legal impediment to that adaptability. Our nation needs a force that is capable of implementing the National Security Strategy within the territorial boundaries of the United States. With additional planning and resources, the National Guard may be the right force.

CURRENT CONGRESSIONAL INTENT

Congress recently expressed its intent on the matter of the PCA when it enacted the Homeland Security Act of 2002. In section 780, the Act states:

> The Posse Comitatus Act has served the Nation well in limiting the use of the Armed Forces to enforce the law. Nevertheless, by its express terms, the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces is authorized by Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President's obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency.[97]

While Congress' practice of limiting the role of the military in civilian law enforcement has served the nation well, the criminal provisions of the PCA have proven to be the wrong tool for this important job. Governments enact criminal statutes to set punishment for crimes. They enact organic statues in order to establish, expand, or

limit the jurisdiction of government agencies. Some of the strongest supporters of the PCA acknowledge that the policy goals of the Act could be better accomplished if the PCA were repealed and recast into a noncriminal, organic statute.[98]

EFFICACY OF THE PCA

Although the PCA works well as a shield for the military from missions it does not want, it appears that our military and political leaders are prepared to disregard it when necessary. No one has been convicted of violating the statute in its 124-year history. The military possesses unique capabilities that local, state, and even federal law enforcement agencies do not. In the event of a national emergency, we do not expect our political and military leaders to spend precious time reviewing statutes to determine whether or not their actions to respond to a catastrophic threat are legal. In his testimony before the Senate Governmental Affairs Committee on June 20, 2002, Senator Gary Hart correctly pointed out that in the case of a "catastrophic attack of some kind, obviously, every asset of this country is going to come into play. Nobody's going to be worrying about the *niceties of the Posse Comitatus Act* (emphasis added)."[99] Recently, two random snipers terrorized the Washington, DC, area. After authorizing the use of sophisticated equipment such as surveillance aircraft to aid law enforcement officers, the Secretary of Defense responded to questions about the effect of the PCA on his actions. His response was appropriate but telling. He said, "Common sense and national need sometimes make military assistance necessary."[100]

It is somewhat comforting to know that our political and military leaders are willing to disregard an impediment to our national security in times of crisis in favor of more expedient means that would save many lives. Similarly, Supreme Court Justice Robert Jackson once said, "There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[101] The concept is consistent with the Secretary of Defense's observation that one must construe the PCA with common sense.

Conveniently circumventing the law during time of war is not a new or novel concept. The Latin phrase *Inter arma silent leges* is a legal maxim from the Roman Empire meaning, "In time of war the laws are silent." American courts, just as the courts of other countries throughout history, have used a variety of similar legal tactics to avoid interfering with their leader's prosecution of war. Although courts in the United States have been reluctant to interfere with the executive branch during wartime, they have enthusiastically addressed conduct that violated civil rights when the conflict ended.[102]

It is unlawful and unwise to plan to disregard the law as we see fit. The resultant ambiguity leaves soldiers and their leader potentially liable for civil and criminal penalties when they do what they think is right to protect public safety. We must strike a balance between the tradition of the military avoiding civil entanglements and the need for military involvement to preserve the public safety in times of crisis. Many argue that there are enough exceptions to the PCA to provide such a balance. However, this myriad of exceptions only complicates matters, inviting argument rather than resolving it. It undercuts intuitive common sense, causing military and political leaders to equivocate when they should be exerting their leadership.

The PCA has helped to create an environment where military and political leaders will not act before receiving advice of counsel. The advice of attorneys is predictably conservative because of the potential for criminal and civil liability.[103] Soldiers obey orders at their own peril. True, the threat of criminal prosecution is illusory, but the risk of civil penalties is real. Military members who dare to follow a directive to track a suspected terrorist could find themselves in court defending a civil suit for damages because the government chose to use the PCA to defend itself against liability, as it did in the *Wrynn* case. The commonsense solution to this difficult balancing act is to rely on Congress' previous expression of

their intent in Title 10 of the U.S. Code, sections 371-378.[104] Congress should frame new statutes providing closer congressional oversight to military assistance to civil authorities for the first few years upon repeal of the PCA. If Congress finds that the civilians who control the military have abused their power, they can reenact a criminal law similar to the PCA, more narrowly tailored to attack the problem then presented. In the meantime, Congress should remove the legal impediment that the PCA presents to a more effective and efficient military.

The message sent by Congress and the administration will be that we are prepared to use any means at our disposal to protect the American public. We recognize the inherent danger in using the military in a domestic role and will therefore clearly state our intent and closely monitor the situation for abuses.

CONCLUSION AND RECOMENDATION

At the time Congress enacted the PCA, it served two purposes. First, it was an expression of Congress' distaste for using the military in a civil law enforcement role. Second, it ended the practice of U.S. Marshals using the military to assist them in apprehending fugitives. The balance of political power had changed in Congress, and the new majority wanted to seize upon the opportunity to prevent the involvement of the Army in southern political matters forevermore—regardless of any potential adverse collateral consequences. More important than what the PCA did accomplish is what it did not do. It did not prevent subsequent presidents from using the military in exactly the same manner as President Grant did during Reconstruction. It has not stopped subsequent presidents from using the military for domestic purposes when the need was compelling. At its inception, PCA was the wrong tool for the wrong job. An angry Congress used a criminal statute of the type found in Title 18 of the U.S. Code instead of an organic statute of the type found in Title 10 of the U.S. Code. Congress attempted to clarify its intent more than 100 years later by enacting more specific military assistance statutes. They codified the new statutes more appropriately in Title 10 of the U.S. Code, sections 371-378. They should have concurrently repealed the existing PCA. Over the past 124 years, the Act has slowly been evolving into a mischievous relic from the post-Reconstruction era. The PCA today stands as a dangerous legal impediment to the agility and adaptability of our national defense.

The Secretary of Defense should immediately seek repeal of the PCA. Because the Act has become a symbol of civilian supremacy over the military, this will be a formidable, but not impossible, political task. The potential operational and political consequences of ignoring the PCA are worse. If, as some have suggested, we are prepared simply to disregard the PCA in the future, we are inviting political harm for our leaders and potential personal civil and criminal liability for our soldiers. Worse yet, the Act will continue its chilling effect upon those who would act boldly, at the very moment when our national survival may depend on boldness.

The lack of successful prosecutions under the Act indicates its uselessness as a criminal statute. Just as the Navy and Marine Corps have been successfully prevented from inappropriate participation in civil law enforcement by DoD directives, so too can the Army and Air Force be adequately restrained. The more specific existing DoD policy directives, coupled with the current provisions of Title 10 of the U.S. Code evincing congressional intent, are much better suited than the PCA to implement the policy goals of minimizing military involvement in civil law enforcement.

APPENDIX 1

THREE TESTS USED BY COURTS TO DETERMINE VIOLATIONS OF THE PCA

Both the PCA and DoD policy prohibit service members from directly participating in law enforcement activities. This chart describes the three tests used by courts. If any of the three situations below are present, an exception to the PCA must exist in order for the conduct to be permissible under the Act. The "regulate, proscribe, or compel test" is the test most often used.

Test	Application	Conduct	Regulation	Statute	Case
Regulate, Proscribe, or Compel Test	Did the military **regulate, proscribe, or compel civilians** as part of the operation?	This test is met if the military exerts any type of direct control or coercive power over civilians, such as road blocks, searches, or detentions	DoD 5525.5	10 U.S.C 375	*U.S. v. McArthur*[105]
Direct Active Use Test	Did the military **directly and actively participate** in the law enforcement activity?	Transportation, furnishing equipment, supplies, or services, e.g., providing medical care to prisoners is "indirect use" and therefore permitted. If, however, the military takes a direct role, such as operating equipment or providing direct assistance, the action is impermissible unless covered by an exception.	DoD 5525.5	10 U.S.C 372-375	*U.S. v. Red Feather*[106] *U.S. v Hartley*[107]
Pervasiveness Test	Did the military activity **pervade** the activities of the civilian authorities?	Joint operations with law enforcement meet this test, even if the only participation is decisionmaking during the execution of the operation. The PCA does not prohibit "Advice," by itself, unless it is "controlling" to the point of pervading the activities of civilian authorities.	DoD 5525.5		*U.S. v. Jaramillo*[108]

APPENDIX 2

EXCEPTIONS TO THE PCA

Each of the exceptions listed below is for general reference. This is not an all-encompassing list of situations where federal troops can provide support to civil authorities without violating the PCA. Some of these exceptions are contained within the many pages of specific provisions or conditions that must all be present before an exception may be valid. Note that many of the exceptions listed below combine with others in the interest of brevity and space restrictions.

Exception	Conduct	Regulation	Statute	Case
Extraterritorial conduct of a military force	When military authorities enforce U.S. law outside the United States, whether or not the suspect is a U.S. citizen, or when they assist foreign officials enforce their own laws. Arrest of foreign nationals overseas.	DoD 5525.5, Sec 8.1 requires Sec Def or Deputy Sec Def Approval	But see *U.S. v. KhaN*,[109] holding that 10 U.S.C 372 applies extraterritorially.	*Chandler v. U.S.*[110]
Indirect involvement	Incidental or conduct supporting law enforcement activities, such as providing equipment, training, maintenance, and non-binding advice.	DoD 5525.5	10 U.S.C 372-377	*U.S. v. Yunis*[111]
Military law enforcement on military installations	Law enforcement conduct directed against service members and civilians on military installations.	DoD 5525.5 E4.2.1.3	18 U.S.C 1382	*U.S. v. Banks*[112]
Commanders' inherent authority to repel attacks, or protect immediate loss of life	When commanders exercise their inherent authority to protect their installation from attack or take immediate steps to protect the loss of life.	DoD 5525.5 E4.1.2.3. & E4.1.2.3.2 DoD 3025.12	10 U.S.C 809(e)	*Cafeteria Workers v. McElroy*[113]
National Guard	The National Guard, when used in a "state status."	DoD 5525.5		*Gilbert v. U.S.*[114]
Military purpose doctrine	The PCA does not apply to actions performed primarily for a military purpose, such as Investigating crimes against the military.	DoD 5525.5 E4.1.2.1		*Cafeteria Workers v. McElroy*[115]

Riot, Insurrection, or lawlessness	Extraordinary cases where the President employs his Constitutional authority to maintain order.	DoD 5525.5 E4.1.2.4 DoD 3025.12	10 U.S.C 331-334, & 12406 U.S. Const., Art II	
Other Congressional Exceptions:				
Dignitary protection	Protection of members of Congress, executive cabinet members, Supreme Court justices, diplomats, President, VP & White House staff.	DoD 5525.5	18 U.S.C 351 (g), 1201(f), 1751/ 112 & 116	
Disaster relief	Troops providing relief during times of national disaster.	DoD 5525.5 DoD 3025.1 DoD 3025.15	Robert T. Stafford Disaster Relief and Emergency Assistance Act 42 U.S.C. 5121 et seq.	
Quarantine	If an individual has a specifically identified communicable disease, heath authorities may detain them. The President may use the military to assist the Surgeon General execute his duties.	DoD 5525.5 DoD 6000.12	42 U.S.C 97 & 264 (d)	
Drug interdiction	Sharing of information and intelligence.	DoD 5525.5	10 U.S.C 371	
Customs & immigration	Sharing of information and intelligence.	DoD 5525.5 E4.1.2.5.14	50 U.S.C 220	
Customs & immigration	Sharing of equipment and facilities.	DoD 5525.5	10 U.S.C 372	
WMD/E & protection of nuclear materials	Provide assistance to Dept. of Justice where a biological or chemical weapon of mass destruction poses a serious threat and civilian authorities require DoD assistance.	DoD 5525.5 E4	10 U.S.C 382 & 831 50 U.S.C 2301&2(1) 18 U.S.C 831	
Protecting U.S. forests & fisheries	Removing enclosures from public lands.	DoD 5525.5 E4.1.2.5.1/ 5.2	42 U.S.C 1065 16 U.S.C 23 & 593 16 U.S.C 1861(a)	
Indirect cooperation	Loan of equipment to other agencies.		31 U.S.C 1535	*U.S. V. Jarmillo*

ENDNOTES

1. Posse Comitatus Act, U.S. Code, Title 18, sec. 1385, 1878.

2. Homeland Security Act, Public Law, 107-296, sec. 886, 2002.

3. Craig T. Trebilcock, "The Myth of Posse Comitatus," *Journal of Homeland Security*, October 2000 [journal on-line]; available from *http://homelandsecurity.org/journal/articles/Trebilcock.htm*; Internet; accessed August 21, 2002.

4. Joel Tyler Headley, *Pen and Pencil Sketches of the Great Riots*, New York: Arno Press, 1969, p. 61.

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8. Slaughter, p. 180.

9. Frederick T. Wilson, *Federal Aid in Domestic Disturbances, 1787-1903*, Washington, DC: US Adjutant General's Office, US Army, 1903, p. 35.

10. *An Act to Provide for Calling Forth the Militia to Execute the Laws of The Union, Suppress Insurrections, and Repel Invasions, Statutes at Large*, 264, Vol. 1, sec. 264, 1792.

11. Wilson, p. 41.

12. *The Judiciary Act, Statutes at Large*, Vol. 73, secs. 92-93, 1789.

13. Michael L. Tate, *The Frontier Army in the Settlement of the West*, Norman: University of Oklahoma Press, 1999, p. 82.

14. Attorney General Caleb Cushing wrote, "A marshal of the United States, when opposed in the execution of his duty by unlawful combinations, has authority to summon the entire able-bodied force of his precinct as a posse comitatus. This authority comprehends, not only bystanders and other citizens generally, but any and all organized armed force, whether militia of the State or officers, soldiers, sailors, and marines of the United States." *Extradition of Fugitives From Service*, U.S. Attorney General Opinion, Vol. 6, 466, 1854.

15. *Ibid.*

16. *Ibid.*

17. Wilson, p. 338.

18. *The Judiciary Act.*

19. Complaining about the necessity of using the Army for the "preservation of peace and order," Brevet Major General C. C. Augur reported that, "It is a very delicate and unpleasant duty thus forced upon us, and one from which we would gladly be relieved by the establishment and enforcement of the civil laws." U.S. War Department. *Annual Report of the Secretary of War*, Washington, DC: U.S. War Department, 1867, p. 60.

20. David Lindsey, *Americans in Conflict: The Civil War and Reconstruction*, George E. Mowry, ed., Boston, MA: Houghton Mifflin Company, 1974, pp. 198-206.

21. *Ibid.*

22. *Ibid.*, p. 199.

23. *Ibid.*, p. 200.

24. Wilson, p. 143.

25. *Ibid.*, p. 144.

26. *Ibid.*, p. 153.

27. *Ibid.*, p. 163.

28. Betty A. Dobratz and Stephanie Shanks-Meile, *"White Power, White Pride!" The White Separatist Movement in the United States*, New York: Twayne Publishers, 1997, p. 37.

29. *Ibid.*

30. John William Burgess, *Reconstruction and the Constitution, 1866-1876*, New York: C. Scribner's Sons, 1902, pp. 260-261.

31. *Ibid.*

32. *Ibid.*

33. Richard N. Current, ed., *Reconstruction, 1865-1877*, Eyewitness Accounts of American History Series, Englewood Cliffs, NH: Prentice-Hall, Inc., 1965, pp. 155-157.

34. Gloria Borger, "A Bad Good Ol' Boy," *US News & World Report*, December 23, 2002, p. 25.

35. The Court discusses the floor debate on the Senate amendment to the Army appropriations bill and reasons that the language was intended as a broad prohibition on anyone from using the Army to enforce civil law, not just a restriction on its use as a posse comitatus. Wrynn v. United States, 200 F. Supp. 457, 464-465, E.D. N.Y. 1961.

36. "The Army and The Militia," *New York Times*, June 11, 1878, editorial page.

37. In 1878, Secretary of War George McCrary complained of the lack of flexibility in the Act in his annual report to Congress. He wrote,

> During the year numerous attacks have been made upon the mail-coaches in New Mexico and Arizona, for purposes of robbery and plunder; and while I have been of the opinion that the mails of the United States may be defended by the use of troops, I have been obliged to give instructions that they cannot, without disregarding the act of Congress, be employed to aid the officers of the law in capturing the robbers after they have committed the crime. In doing so they would act as a posse comitatus, and this is nowhere by law "expressly authorized."

U.S. War Department, *Annual Report of the Secretary of War*, Washington, DC: U.S. War Department, 1878, p. vi.

38. Kathleen F. Brickey, "Criminal Mischief: The Federalization of American Criminal Law," *Hastings Law Journal*, Vol. 46, 1995, p. 1135.

39. Max Farrand and David Maydole Matteson, *The Records of the Federal Convention of 1787*, Vol. 2, Max Farrand, ed., New Haven, CT, and London: Yale University Press, 1937, p. 329.

40. *Ibid.*, Vol. 3, p. 209.

41. Herbert J. Storing and Murray Dry, eds., *Brutus Number 10, John Adams 24 Jan. 1788*, in *The Complete Anti-Federalist*, Vol. 2, Joseph Story, ed., Chicago: University of Chicago Press, 1981, pp. 413-414.

42. *Constitution*, art. II, sec. 2.

43. Alexander Hamilton, James Madison, and John Jay, *The Federalist*, Benjamin F. Wright, ed., New York: MetroBooks, 1961, p. 216.

44. *Laird v. Tatum*, 408 U.S. 1, 15, 1972.

45. *U.S. v. McArthur*, 419 F.Supp 186, 193-194, N.D. Dist. Ct., SW Div. 1975.

46. *U.S. v. Walden*, 490 F.2d 372, 377, 4th Cir. 1974.

47. *Posse Comitatus Act.*

48. *Chandler v. U.S.*, 171 F.2d 921, 936, 1st Cir. 1948.

49. *U.S. v. KhaN*, 35 F.3d 426, 431, 9th Cir. 1994.

50. *U.S. v. Casper*, 541 F.2d 1275, 1278, 8th Cir. 1976.

51. *Wrynn v. United States.*

52. Tate, p. 99.

53. *Gilbert v. U.S.*, 165 F.3d 470, 6th Cir. 1999.

54. "Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection," Insurrection Act, U.S. Code, Vol.10, sec. 331, 2003. " Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion," Insurrection Act, U.S. Code, Vol.10, sec. 332, 2003:

55. "The Whiskey Insurrection from The Diaries of George Washington 30 September-19 October 1794," The Papers of George Washington, July 11, 2002; available from *http://gwpapers.virginia.edu/whiskey/*; Internet; accessed November 28, 2002.

56. "Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion." Insurrection Act, U.S. Code, Vol. 10, sec. 332, 2003.

57. "The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—(1) so hinders the execution of the laws of that State, and of the United States within the

State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or, 2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause, 1, p. the State shall be considered to have denied the equal protection of the laws secured by the Constitution." Insurrection Act, U.S. Code, Vol. 10, sec. 333, 2003.

58. "Whenever the President considers it necessary to use the militia or the armed forces under this chapter [10 U.S.CS §§ 331 et seq.], he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time." Insurrection Act, U.S. Code, Vol. 10, sec. 334, 2003.

59. Matthew Carlton Hammond, "The Posse Comitatus Act: A Principle in Need of Renewal," *Washington University Law Quarterly*, Vol. 75, No. 2, 1997, p. 953.

60. Robert W. Coakley, Paul J. Scheips, and Vincent H. Demma, *Use of Troops in Civil Disturbances Since World War II 1945-1965*, Washington, DC: Department of the Army, Histories Division, Office of the Chief of Military History, 1967; reprint, revised 1971, p. 98.

61. John F. Kennedy, "Radio and Television Report to the American People on Civil Rights on June 11, 1963," available from *http://www.cs.umb.edu/jfklibrary/j061163.htm*; Internet; accessed January 14, 2003.

62. John F. Kennedy, Executive Order No. 11118, F.R., 28, 9863, 1963.

63. Paul Schott Stevens, *U.S. Armed Forces and Homeland Defense. The Legal Framework*, Washington, DC: Center for Strategic and International Studies, October 2001, p. 17.

64. In sections 371-378, Congress directs the Secretary of Defense to issue regulations prohibiting "direct participation" by military personnel in a civilian "search, seizure, arrest, or other similar activity" unless expressly authorized by law. Military Support For Civilian Law Enforcement Agencies, U.S. Code, Vol. 10, 371-378, 2002.

65. Department of Defense, *Department of Defense Cooperation with Civilian Law Enforcement*, DoD Directive 5525.5, Washington, DC: U.S. Department of Defense, 1986.

66. *Constitution*, art. I, sec. 8, clause 12.

67. *Palko v. Connecticut*, 302 U.S. 319, 1937.

68. Joseph A. Califano Jr., "Too Many Federal Cops," *Washington Post*, December 6, 2001, p. 39.

69. Brickey, p. 3.

70. John Flock, "Notes & Comments: The Legality of United States Military Operations Along the United States-Mexico Border," *Southwestern Journal of Law and Trade in the Americas*, 1998, p. 454.

71. DoD Directive 5525.5.

72. *Military Support For Civilian Law Enforcement Agencies.*

73. Lionel Giles, *Sun Tzu on the Art of War; the Oldest Military Treatise in the World*, London: Luzac & Co, 1910, p. 99.

74. Congresswoman Chenoweth-Hage made the statement on the floor of the House, "We must get to the bottom of why the Federal Government waived the Posse Comitatus Act and involved the military in this domestic law enforcement action." If she understood the PCA, she would know that the Federal Government cannot "waive" the PCA. The complexities of the PCA understandably delude the congresswoman into believing the military's actions at Waco, Texas, would have violated the PCA if they had not been "waived" by the "Federal Government. Congress. House of Representatives, Congresswoman Chenoweth-Hage of Idaho speaking on the investigation of Waco, 106th Cong., 1st sess., *Investigation WACO, Congressional Record*, November 3, 1999, Vol. 145, pt. 153, p. 11444.

75. Paul Rice, "New Laws and Insights Encircle the Posse Comitatus Act," *Military Law Review*, Vol. 104, 1984, p. 109.

76. Gregory D. Grove, *The U.S. Military and Civil Infrastructure Protection: Restrictions and Discretion under the Posse Comitatus Act*, Stanford: Center for International Security and Cooperation, October 1999, p. 13.

77. *Military Support For Civilian Law Enforcement Agencies.*

78. Christopher M. Schnaubelt, "Lessons in Command and Control from the Los Angeles Riots," *Parameters*, Vol. 27, Summer 1997, pp. 88-109.

79. Based on the author's personal experience as commander of the 270th Military Police Company, CA ARNG, during its deployment to Los Angeles during the riots of 1992.

80. William W. Mendel, *Combat in Cities: The LA Riots and Operation Rio*, Fort Leavenworth, KS: Foreign Military

Studies Office, July 1996, p. 3.

81. Los Angeles, Calif.. Board of Police Commissioners and William H. Webster, *The City in Crisis : A Report*, Los Angeles, CA: Special Advisor Study Inc, 1992, p. 12.

82. James D. Delk, *Fires and Furies: The Los Angeles Riots of 1992*, Palm Springs, CA: ETC Publications, 1995, p. 111.

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87. Rice, 112.

88. Grove, 23.

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90. U.S. Department of Defense, "Quadrennial Defense Review Report," September 30, 2001; available from *http://www.comw.org/qdr/qdr2001.pdf*; Internet; accessed September 21, 2002.

91. Bush, p. 31.

92. James Risen and David Johnston, "Bush Has Widened Authority of C.I.A. to Kill Terrorists," *New York Times*, December 15, 2002, p. 1.

93. *Ibid.*

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95. Reid K. Beveridge, "Bulwark of Civilian Supremacy, Posse Comitatus Act Has Stood the Test of Time," *Armed Forces Journal International*, October 2002, pp. 22-25.

96. *Constitution*, art I, sec. 8, clause 15.

97. *Homeland Security Act.*

98. Hammond, 963.

99. Congress, Governmental Affairs Committee, *Hearing on the Homeland Security Department*, 107th Cong., 2nd sess., June 20, 2002, p. 63.

100. "Sniper Hunt: Army Spy Plane Called in; Former DoD Teacher among Victims of DC Killer," *Army Times*, October 28, 2002, p.2.

101. *Terminiello v. Chicago*, 337 U.S. 1, 1949.

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104. *Military Support For Civilian Law Enforcement Agencies.*

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111. *U.S. v. Yunis*, 924 F.2d 1086, Wash. DC Dist. Ct. 1991.

112. *U.S. v. Banks*, 539 F.2d 14, 9th Cir. 1976.

113. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 1961.

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