

# PROCESS DANGERS OF MILITARY INVOLVEMENT IN CIVIL LAW ENFORCEMENT: RECTIFYING THE POSSE COMITATUS ACT

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## I.

### INTRODUCTION

Imagine that a group has stolen a substantial amount of civilian-owned high-yield explosives capable of causing significant loss of human life and destruction of property. Based on previously gathered intelligence, it is believed that the group that stole the explosives is part of a terrorist organization and that the explosives were stolen for future, not immediate, attacks. The theft occurred about thirty minutes ago, and it is believed that the perpetrators remain within fifty miles of the site of the theft.

Law enforcement officials wish to establish a perimeter around the targeted area, operate roadblocks on the perimeter and within the

targeted area, and conduct helicopter patrols. They quickly conclude that they do not possess enough manpower or equipment to do so. An Army base is nearby, and law enforcement officials request that the soldiers assist by establishing part of the perimeter and operating some roadblocks.

Is the Army legally permitted to perform these activities? Would the answer differ if it were known that the group was planning to use the high-yield explosives imminently? What if the stolen explosives had been military rather than civilian property? What if the Army's activity would be limited to conducting helicopter surveillance of the targeted area? What if it was known that the group was a part of or otherwise affiliated with Al Qaeda? What if, instead of high-yield explosives, the group had stolen biological, chemical, or radiological materials? Or what if, instead of assistance from the Army, law enforcement officials had requested assistance from the state's Army National Guard, the Marine Corps, or the Army's civilian employees?

The answers to these and other fundamental questions depend on interpretations of the Posse Comitatus Act (PCA),<sup>1</sup> its exceptions, and related laws, regulations, and authorities—collectively referred to herein as the “PCA rules.” The PCA prohibits the military from executing the civil law<sup>2</sup> domestically, thereby upholding a fundamental tenet of American society—that civil authorities, not the military, should enforce the civil law. Numerous exceptions to the PCA attempt to balance this tenet with a complementary tenet—that it may be necessary for the military to enforce the civil law under certain circumstances.<sup>3</sup>

Unfortunately, almost every element of the PCA rules is riddled with uncertainty and complexity. Specifically, it is unclear to what situations the PCA applies, what military activities the PCA prohibits,

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1. 18 U.S.C. § 1385 (2000). Congress enacted the PCA in 1878, motivated generally by resentment of military enforcement of the civil law during Reconstruction and specifically by the controversial stationing of the military at polling places in some southern states during the 1876 Presidential election. See 7 CONG. REC. 384,552, 423,948 (1878). For a detailed history of the passage of the PCA, see Jackson v. State, 572 P.2d 87, 89–91 (Alaska 1977); Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL'Y 99, 10114 (2003); and Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383, 389–98 (2003).

2. “Civil law,” in this context, is distinguished from “military law.” It includes both criminal and civil nonmilitary laws.

3. For the purposes of this Article, “necessary” military activity refers to military activity necessary to prevent human death or mass destruction of property, or to otherwise enforce the law when controlling a situation is beyond the capabilities of readily available civil authorities.

what exceptions to the PCA exist, and the boundaries of the exceptions that do exist.

The most obvious consequence of this uncertainty and complexity is the confusion it instills in policymakers, legal practitioners, and service personnel about what domestic activities the military may perform in what situations. To illustrate, in response to the Los Angeles riots of 1992, and pursuant to the California governor's request, President George H.W. Bush ordered federal troops to restore law and order.<sup>4</sup> Although these troops were operating pursuant to a PCA exception, and thus were permitted to enforce the law, the Joint Task Force commander prohibited them from doing so.<sup>5</sup> Instead, the commander required that each request for assistance "be subjected to a nebulous test to determine whether the requested assignment constituted a law enforcement or a military function"<sup>6</sup> and prohibited the military from engaging in those activities deemed to be law enforcement under the test.<sup>7</sup> This unnecessary step contributed to the slow approval process (requests for assistance took six to eight hours to assess) and the denial of numerous requests for assistance that could have been granted legally.<sup>8</sup> The commander's actions appear to be a direct result of his confusion concerning the PCA.<sup>9</sup>

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4. Exec. Order No. 12,804, 57 Fed. Reg. 19,361 (May 1, 1992).

5. Christopher M. Schnaubelt, *Lessons in Command and Control from the Los Angeles Riots*, 27 PARAMETERS 88, 101 (1997).

6. *Id.* (quoting from JAMES D. DELK, FIRES & FURIES: THE L.A. RIOTS 221–22 (1995)).

7. *Id.*

8. *Id.* at 10102. Before the President authorized the use of federal troops, the California National Guard was assisting law enforcement. *Id.* at 97. Because the California National Guard was operating in state status, it was free from PCA restraints. For a discussion of the PCA's application to the National Guard, see *infra* notes 31–35 and accompanying text. While operating in this capacity, virtually every law enforcement support request made to the National Guard had been approved. After the National Guard was federalized and other federal troops joined the operation, approximately twenty percent of requests were approved. Schnaubelt, *supra* note 5, at 100. This drop in the approval rate occurred despite the fact that the federal troops were operating pursuant to a PCA exception and, thus, should have been as free from PCA restraints as were the National Guard troops operating in a state status. PCA exceptions and their effects are discussed in Part III.

9. After the riots, former Director of the Federal Bureau of Investigation, Judge William Webster, chaired a commission to investigate and report on the military and law enforcement responses to the riots. The Webster Commission found that "despite an express written declaration by the President to the contrary, the federal troop commander . . . 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." DONALD J. CURRIER, *THE POSSE COMITATUS ACT: A HARMLESS RELIC FROM THE POST-RECONSTRUCTION ERA OR A LEGAL IMPEDIMENT TO TRANSFORMATION?* 12 (Strategic Studies Inst., 2003),

As another example of confusion concerning the PCA, in October 2002, at the request of the Federal Bureau of Investigation (FBI) and local civil authorities, the Department of Defense (DoD) provided aerial surveillance of the Washington, D.C. area in an attempt to locate a sniper who had killed several civilians during the preceding weeks.<sup>10</sup> Military personnel were accompanied by federal agents during the surveillance operations.<sup>11</sup> Accounts conflict regarding the precise split in duties between the FBI and military personnel, but there is agreement that the reconnaissance was conducted under the general direction of the FBI.<sup>12</sup> Although the Secretary of Defense contended that the military activity was permissible, vigorous debate regarding its legality ensued.<sup>13</sup> To date, the legality of the action remains in dispute.

As these examples highlight, confusion surrounding the PCA rules creates the potential for a delayed or incorrect decision regarding the permissibility of domestic military activity, either of which may prevent the military from acting effectively when such action is needed. The confusion may also cause the military to interject itself into civil affairs unnecessarily and, perhaps, illegally.

These problems with the PCA rules, compounded by the growing potential for catastrophic domestic acts of terrorism that may necessitate military action, suggest that the rules are no longer well-suited to furthering their underlying tenets. Senator John Warner, the Chairman of the Senate Armed Services Committee, and elements of the Bush Administration, including President George W. Bush, called for a re-examination of the PCA rules after the September 2001 terrorist attacks<sup>14</sup> and again in September 2005 following Hurricane Katrina.<sup>15</sup>

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<http://www.carlisle.army.mil/ssi/pubs/2003/posse/posse.pdf> (quoting CAL. BOARD OF POLICE COMMISSIONERS & WILLIAM H. WEBSTER, *THE CITY IN CRISIS: A REPORT 12* (1992)).

10. John Hendren, *High Degree of Terror Swayed Military to Act*, L.A. TIMES, Oct. 17, 2002, at A9.

11. Steve Vogel, *Military Aircraft With Detection Gear To Augment Police*, WASH. POST, Oct. 16, 2002, at A1; Elaine M. Grossman, *Former JAG: Military Aid in D.C. Sniper Pursuit May Have Broken Law*, INSIDE THE PENTAGON, Nov. 14, 2002, available at [http://www.insidedefense.com/secure/defense\\_docnum.asp?f=defense\\_2002.ask&docnum=PENTAGON-18-46-3](http://www.insidedefense.com/secure/defense_docnum.asp?f=defense_2002.ask&docnum=PENTAGON-18-46-3) (subscription required for access).

12. Grossman, *supra* note 11.

13. *Id.*

14. News Briefing, Secretary of Defense Donald H. Rumsfeld & General Richard Myers (Sept. 20, 2005), [www.defenselink.mil/transcripts/2005/tr20050920-secdef3941.html](http://www.defenselink.mil/transcripts/2005/tr20050920-secdef3941.html). "The threat of catastrophic terrorism requires a thorough review of the laws permitting the military to act within the United States in order to determine whether domestic preparedness and response efforts would benefit from greater involvement of military personnel and, if so, how." OFFICE OF HOMELAND SEC., NAT'L

The DoD's official position was, and remains, that no changes to the law are necessary.<sup>16</sup> Given this conflict, the widespread befuddlement surrounding the PCA, and the urgency of its resolution, Congress badly needs guidance as to the Act's scope and meaning, as well as current Executive Branch policies and practices, in order to clarify the DoD's existing authority and obligations and to rectify the Act's deficiencies.

The present Article serves two main purposes. The first is to dispel existing confusion generated by the current PCA rules, thereby increasing the likelihood of correct determinations regarding whether a given military activity is permissible under the rules. In carrying out this purpose, the Article reveals that much of the confusion is inherent to, and inextricable from, the current PCA rules. This revelation motivates the Article's second purpose—to present and assess alternatives to the current PCA rules that are tailored to more effectively promote the rules' underlying tenets.

The remainder of the Article is organized as follows: Parts II and III outline the PCA and PCA exceptions, respectively. Part IV discusses the major sources of confusion surrounding the PCA rules and the effects of that confusion. Part V sets forth two frameworks—one for emergency situations and another for non-emergency situations—designed to optimize decision making regarding domestic military activity under the current PCA rules. Given the problems inherent to the current PCA rules, Part V proposes two legislative alternatives—one that amends the rules, the other that replaces them with a new model statute conditioning the permissibility of military action on necessity.

## II.

### THE POSSE COMITATUS ACT

The Posse Comitatus Act states in its entirety:

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STRATEGY FOR HOMELAND SEC. 48 (2002); *see also* Vernon Loeb, *Review of Military's Domestic Role Urged*, WASH. POST, Oct. 5, 2001, at A26.

15. Megan Scully, *Rumsfeld Demurs When Asked About Changing Posse Comitatus*, CONG. DAILY, Sept. 21, 2005, available at 2005 WLNR 14901024; Megan Scully, *Pentagon Begins Review of Law on Military's Domestic Role*, CONG. DAILY, Sept. 27, 2005, available at 2005 WLNR 15241103.

16. *Skelton: Rumsfeld Confirms DoD Has No Plans to Alter Posse Comitatus*, INSIDE THE PENTAGON, Oct. 13, 2005, available at 2005 WLNR 16594722 (noting that Secretary of Defense Rumsfeld told Representative Ike Skelton, Ranking Democrat on House Armed Services Committee, "that while the Defense Department is still compiling its proposals for the President, 'changes to Posse Comitatus have not been discussed and the department does not intend to make recommendations that would involve changes to this act'"); Rumsfeld & Myers, *supra* note 14.

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>17</sup>

The brevity of the PCA, its uninformative legislative history, and changes in the missions and composition of the U.S. armed forces since the PCA's enactment have generated numerous questions concerning its application. Most notable are those regarding which service components are governed by the PCA and what activities the Act prohibits.

### A. *Service Components Governed by the PCA*

#### I. *Army, Air Force, Navy, and Marine Corps*

The express language of the PCA applies to only two of the Title 10 services<sup>18</sup>—the Army and the Air Force.<sup>19</sup> Courts generally have held that the PCA does not apply directly to the Navy or the Marine Corps,<sup>20</sup> but that the PCA's proscriptions have been extended to those

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17. 18 U.S.C. § 1385 (2000). "Posse comitatus" literally translates to "power of the county" and refers to the right a sheriff or marshal possessed at common law to call forth the people of the county above fifteen years of age, including members of the military, to aid him in performing his duties. CHARLES DOYLE, *THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW*, CRS REP. NO. 95-9645 S, at 7 & n.14, 8 (2000), <http://www.fas.org/sgp/crs/natsec/95-964.pdf>.

18. Title 10 of the United States Code (U.S.C.) specifies the components of the U.S. armed forces and defines their roles. Title 10 services consist of the Army, Air Force, Navy, and Marine Corps. *See* 10 U.S.C. §§ 3061–3083 (Army); *id.* §§ 5061–5063 (Navy); *id.* § 5063 (Marine Corps); *id.* §§ 8061–8081 (Air Force).

19. The PCA, which was passed as a rider to an Army appropriations bill, originally applied to only the Army. DOYLE, *supra* note 17, at 10. Reference to the Air Force was added in 1956 following the assignment of the Army's aviation responsibilities to the Air Force. *Id.* at 11 n.24.

20. *E.g.*, *United States v. Kahn*, 35 F.3d 426, 431 (9th Cir. 1994) ("The Posse Comitatus Act . . . forbids only the use of the Army or Air Force in law enforcement activities."); *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1477 (11th Cir. 1992) ("The Act by its own terms places no restrictions on Navy involvement with law enforcement agencies. Moreover, nothing in the Act's legislative history suggests its application to naval operations." (citations omitted)); *United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir. 1991) ("Nothing in this history suggests that we should defy the express language of the Posse Comitatus Act by extending it to the Navy, and we decline to do so."); *United States v. Roberts*, 779 F.2d 565, 567 (9th Cir. 1986) ("By its express terms, this act prohibits only the use of the Army and the Air Force in civilian law enforcement. We decline to defy its plain language by extending it to prohibit use of the Navy."); *United States v. Del Prado-Montero*, 740 F.2d 113, 116 (1st Cir. 1984) ("This Act . . . prohibits the use of the Army and Air Force to enforce the laws of the United States, a proscription that has been extended by executive act to the Navy."); *United States v. Walden*, 490 F.2d 372, 374 (4th Cir. 1974) ("[B]y its



services through other statutes and DoD policy.<sup>21</sup> The current sources for this extension are 10 U.S.C. § 375<sup>22</sup> and Department of Defense Directive (DoDD) 5525.5.<sup>23</sup>

Section 375 of title 10, United States Code, directs the Secretary of Defense to promulgate regulations prohibiting direct participation “by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.”<sup>24</sup> Although no such regulations currently exist, DoDD 5525.5 effectively complies with the statute by extending the PCA’s application to the Navy and Marine Corps.<sup>25</sup>

DoDD 5525.5 sets forth DoD policy regarding its cooperation with civilian law enforcement officials and states that the guidance it provides on the PCA applies to the Navy and the Marine Corps as well as the Army and Air Force.<sup>26</sup>

It appears that the PCA’s application to the Navy and Marine Corps may be waived by certain DoD officials. Section 375 of title 10, United States Code, does not place PCA restrictions directly on any of the military services, but rather instructs the Secretary of Defense to do so.<sup>27</sup> Because no statute directly renders the PCA applicable to the Navy or Marine Corps, the Secretary of Defense could repeal the provisions of DoDD 5525.5 that extend the PCA to the Navy and Marine Corps and thereby free these services from PCA restrictions. While such a repeal would violate 10 U.S.C. § 375, section 375 is not a criminal statute, and no penalty automatically at-

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terms the Posse Comitatus Act does not make criminal the use of Marines to enforce federal laws . . . .” (footnote omitted)).

21. *E.g.*, *Kahn*, 35 F.3d at 431; *Yunis*, 924 F.2d at 1094; *Roberts*, 779 F.2d at 567–68; *Del Prado-Montero*, 740 F.2d at 116; *Walden*, 490 F.2d at 375.

22. 10 U.S.C. § 375 (2000).

23. DEP’T OF DEF., DIRECTIVE NO. 5525.5, DoD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (1986), [http://www.dtic.mil/whs/directives/corres/pdf/d55255wch1\\_011586/d55255p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/d55255wch1_011586/d55255p.pdf) (incorporating Change 1, Dec. 20, 1989) [hereinafter DoDD 5525.5].

24. 10 U.S.C. § 375 (2000).

25. After the enactment of 10 U.S.C. § 375, the DoD promulgated the regulations required by the statute. Those regulations were inserted into the Code of Federal Regulations (C.F.R.) as 32 C.F.R. part 213. *See* 32 C.F.R. §§ 213.1–213.11 (1992). In 1993, the DoD removed the regulations, claiming that they had served the purpose for which they had been promulgated. 58 Fed. Reg. 25,776 (Apr. 28, 1993). The regulations were almost identical to the mandates set forth in DoDD 5525.5. DoDD 5525.5, *supra* note 23. In *Kahn*, the court held that the PCA’s proscriptions extend to the Navy, even though the relevant regulations had been removed from the C.F.R. 35 F.3d at 431.

26. DoDD 5525.5, *supra* note 23, § E4.3.

27. 10 U.S.C. § 375 (2000).

taches to its violation. DoDD 5525.5 appears to permit such a waiver insofar as it provides that the PCA applies to the Navy and Marine Corps as a matter of policy and that the Secretary of the Navy may grant exceptions on a case-by-case basis.<sup>28</sup> Although not explicitly stated in the DoDD, the Secretary of Defense may also grant such exceptions, given that the Secretary of Defense always maintains the authority to alter matters of DoD policy.<sup>29</sup>

The right to grant such exceptions and thereby free the Navy or Marine Corps from PCA restraints has never been adjudicated, and it is unclear whether a court would sustain it. Rather, a court may rule that Congress, through 10 U.S.C. § 375, manifested its intent to apply the PCA to all of the services and that the executive branch may not contravene this.

## 2. *Service Reserves*

The PCA applies to the Army Reserve, the Air Force Reserve, the Naval Reserve, the Marine Corps Reserve, and the Coast Guard Reserve when members are on active duty, active duty for training, or inactive duty for training.<sup>30</sup>

## 3. *National Guard*

The PCA applies to members of the National Guard<sup>31</sup> when they operate in federal service as active components of the U.S. Armed Forces under Title 10.<sup>32</sup> The PCA does not apply to members of the

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28. DoDD 5525.5, *supra* note 23, § E4.3.

29. 10 U.S.C. § 113(b) (2000).

30. MICHAEL J. BERRIGAN ET AL., OPERATIONAL LAW HANDBOOK (2002) 332 (Jeanne M. Meyer & Brian J. Bill eds., 2002), <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/1af4860452f962c085256a490049856f?OpenDocument&TableRow=4.2#4>.

31. What is commonly referred to as the “National Guard” is really several distinct military components consisting of the Army National Guard of each state, the Air National Guard of each state, the Army National Guard of the United States, and the Air National Guard of the United States. 10 U.S.C. § 101(c) (2000). For a detailed description of the elements and various statuses of the National Guard, see Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of “In Federal Service”*, ARMY LAW., June 1994, at 36–40. For the remainder of this Article, the term “National Guard” refers collectively to all of these components unless otherwise specified.

32. BERRIGAN, *supra* note 30, at 332. 10 U.S.C. § 12406 authorizes the President to call into federal service the National Guard of any state when the United States is invaded or is in danger of invasion, there is a rebellion or danger of a rebellion, or “the President is unable with the regular forces to execute the laws of the United States” in order “to repel the invasion, suppress the rebellion, or execute those laws.” 10 U.S.C. § 12406 (2000) (emphasis added). With some exceptions, the PCA prohibits the regular forces from executing the laws of the United States. 10 U.S.C.

National Guard when they operate in a state status.<sup>33</sup> However, the governor, not the President, is the commander-in-chief of his or her state's National Guard when it operates in state status.<sup>34</sup> Thus, if employed nationally but in state status, the National Guard would have fifty-one commanders-in-chief, each in charge of his or her own state's National Guard.<sup>35</sup>

#### 4. Coast Guard

The Coast Guard typically operates under the Department of Homeland Security (DHS)<sup>36</sup> and in this capacity is not subject to the

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§ 12406, which was enacted in 1994, appears to assume otherwise and authorizes the President to employ the National Guard to execute the law when the "regular forces" are unable to do so. Because the PCA renders the President unable to execute the law with the regular forces, which is the precondition for the President being authorized to use the National Guard, this provision would permit the President to call forth the National Guard of any state to execute the laws when the PCA prohibits him from using the regular forces to do so.

The language of the statute is open to multiple interpretations, however, and it is unlikely to be interpreted as exempting the National Guard, when in federal service, from PCA restraints. Rather, it likely will be interpreted as permitting the President to employ the National Guard to execute the law in situations that comport with the PCA. The Bush Administration appears to interpret the law in this manner, as it has acted as if the PCA applies to the National Guard when it is in federal service. Most notably, administration attorneys determined that using federalized National Guard troops to assist in providing security at airports after September 11, 2001, would violate the PCA. Eric Schmitt, *Wider Military Role in U.S. Is Urged*, N.Y. TIMES (Late Ed.), July 21, 2002, § 1, at 16.

33. *Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999); *United States v. Hutchings*, 127 F.3d 1255, 1258 (10th Cir. 1997); BERRIGAN, *supra* note 30, at 333; Sean J. Kealy, *supra* note 1, at 415 n.211 (citing U.S. CONST. art. I, § 8, cl. 16); Rich, *supra* note 31, at 42–43. The National Guard has two broad state statuses: Title 32 and State Active Duty. *See* Rich, *supra* note 31, at 42 & n.74.

34. Kealy, *supra* note 1, at 415 n.211; Rich, *supra* note 31, at 43 (quoting *United States v. Kyllo*, 809 F. Supp. 787, 793 (D. Or. 1992)). After administration attorneys determined that federalized National Guard troops would be subject to the PCA in providing security at airports, the President asked the governor of each state to employ the National Guard in state status. Schmitt, *supra* note 32.

35. The fifty-first is the President, who is the commander-in-chief of the District of Columbia National Guard. D.C. CODE ANN. § 49-409 (LexisNexis 2001). The President has delegated this authority to the Secretary of Defense. Exec. Order No. 11,485, 34 Fed. Reg. 15,411 (Oct. 1, 1969). When Puerto Rico, Guam, and the U.S. Virgin Islands are included, the number of commanders-in-chief rises to fifty-four.

36. 14 U.S.C. § 1 (Supp. II 2002).

PCA.<sup>37</sup> On the contrary, when the Coast Guard operates under the DHS, one of its primary functions is law enforcement.<sup>38</sup>

It is less clear whether the Coast Guard is subject to the PCA when it operates as part of the Navy.<sup>39</sup> This issue has not been addressed by Congress, the judiciary, or the executive branch. Most official statements and legal commentary about the PCA state that the Act does not apply to the Coast Guard.<sup>40</sup> However, this claim is usually made in reference to, and is likely limited to, situations in which the Coast Guard enforces the law in its usual capacity as part of the DHS. Although the issue remains unresolved, because the PCA applies to the Navy, the Act likely applies to the Coast Guard when it operates as part of the Navy.

### 5. *Military Personnel Detailed to a Civilian Agency*

The Department of Justice (DoJ) and the DoD have opined that military personnel are not subject to the PCA when they are detailed to a civilian agency, because those personnel act under the supervision of the civilian agency rather than the military.<sup>41</sup> Although the govern-

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37. See *United States v. Chaparro-Almeida*, 679 F.2d 423, 425 (5th Cir. 1982); *Jackson v. Alaska*, 572 P.2d 87, 93 (Alaska 1977). These cases make reference to the Department of Transportation (DoT) rather than the DHS. The Coast Guard operated under the DoT until being transferred into the DHS under the Homeland Security Act of 2002. 6 U.S.C. § 468(b) (Supp. II 2002).

38. 14 U.S.C. § 2 (2000 & Supp. II 2002); 14 U.S.C. § 89 (2000).

39. The Coast Guard operates as part of the Navy when war is declared or when the President directs it to do so. 14 U.S.C. § 3 (Supp. II 2002).

40. *Chaparro-Almeida*, 679 F.2d at 425 (“[T]he Posse Comitatus Act is not applicable to the Coast Guard.”); *Jackson*, 572 P.2d at 93 (“Given the unique dual organizational character of the Coast Guard and the various specific statutory mandates requiring it to enforce certain laws and regulations, we conclude that it would be inappropriate to construe the Posse Comitatus Act as applying to the United States Coast Guard.”) (footnote omitted); David G. Bolgiano, *Military Support of Domestic Law Enforcement Operations: Working Within Posse Comitatus*, FBI L. ENFORCEMENT BULL., Dec. 2001, at 16, 18, <http://www.fbi.gov/publications/leb/2001/dec01leb.pdf> (“The PCA does not apply to . . . members of the Coast Guard during peacetime.”) (footnote omitted); BERRIGAN, *supra* note 30, at 333 (“The PCA does NOT cover . . . [m]embers of the Coast Guard.”) (citations omitted); U.S. Northern Command, Fact Sheet: Posse Comitatus Act, <http://www.northcom.mil/index.cfm?fuseaction=news.factsheets&factsheet=5> (last visited Oct. 5, 2005) (“The PCA does not apply to the U.S. Coast Guard . . .”).

41. See, e.g., Effect of Posse Comitatus Act on Proposed Detail of Civilian Employee to the National Infrastructure Protection Center, Op. Off. Legal Counsel n.5 (May 26, 1998), <http://www.usdoj.gov/olc/pca1fnl.htm> (“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 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.”).

ment operates under this rationale, whether the courts would uphold it is an open question.<sup>42</sup>

## 6. DoD Civilian Employees

The PCA proscribes the use of “any part” of the Army or Air Force to execute the civil law.<sup>43</sup> Most courts have referred to the PCA as applying to “military personnel.”<sup>44</sup> Given that DoD civilian employees are not military personnel, it would thus appear that the PCA does not apply to them. This case law may be of limited value, however, because the question of whether the PCA applies to civilian employees was not at issue, and references to the PCA as applying to military personnel were made merely in passing.

Although courts have rarely explicitly discussed whether the PCA applies to DoD civilian employees, at least one federal court has done so. In *United States v. Chon*, the Ninth Circuit extended application of the PCA to DoD civilian employees even if they are not acting under the direct command and control of a military officer.<sup>45</sup> The court held that although DoD civilian employees will not be bound by the PCA when acting in their private capacities, the PCA will apply to them when they are acting “under the auspices of the military,”<sup>46</sup> which includes actions taken in their professional capacities regardless of whether they are taken under the command and control of civilian or military authorities.<sup>47</sup> It is unclear whether and under what circumstances most courts would apply the PCA to DoD civilian employees.

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42. This rationale appears to be the justification for employing federalized National Guard members at the Mexican and Canadian borders in 2002 in response to requests from federal civil authorities. Anticipated activities for Guard members included inspection of cargo, monitoring of crowds, and crowd control when necessary. At least some of these activities likely would constitute law enforcement under the three judicially derived tests discussed later in this part under the subpart entitled “The Three Judicially Derived Tests.” See *supra* Part II.B.i. The DoD nonetheless complied with the request, stating that the members would be operating under the supervision of the civilian agencies. Ken Ellingwood, *Guard Troops to Be Assigned to Mexican Border*, L.A. TIMES, Feb. 23, 2002, at B1.

43. 18 U.S.C. § 1385 (2000).

44. See, e.g., *United States v. Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988) (per curiam); *United States v. Hartley*, 796 F.2d 112, 115 (5th Cir. 1986); *United States v. Wolffs*, 594 F.2d 77, 84 (5th Cir. 1979); *United States v. Casper*, 541 F.2d 1275, 1278 (8th Cir. 1976).

45. 210 F.3d 990, 993–94 (9th Cir. 2000) (extending application of PCA to Navy Criminal Investigative Service civilian agents through operation of 10 U.S.C. § 375 (2000)).

46. *Id.* at 993.

47. *Id.* (“When the civilian world is confronted by agents of the Navy, it is unlikely to make the fine distinctions asserted by the government between military and civilian NCIS [Naval Criminal Investigative Service] agents.”).

Regardless of what the law requires, the DoD extends application of the PCA to its civilian employees when they act under the command and control of a military officer, but does not do so when its civilian employees act under the command and control of civil authorities.<sup>48</sup> Thus, the DoD permits activity that, according to the Ninth Circuit, violates the PCA, and prohibits activity that other courts could rule permissible.

### 7. *Use of the Term “Military”*

For the remainder of this Article, the term “military” will refer to those service components operating under Title 10 and, consequently, subject to PCA restrictions, whether imposed through statute or DoDD. “Military” will also refer to DoD civilian employees, to the extent the PCA applies to them.

#### B. *Activities Prohibited by the PCA*<sup>49</sup>

The PCA prohibits the military from executing the civil law. It does not prohibit the military from responding to situations that call for homeland defense,<sup>50</sup> nor does it prohibit the military from assisting civil authorities by conducting activities that do not constitute civil law enforcement. Therefore, whether the PCA prohibits an activity depends on the answers to two inquiries.<sup>51</sup>

The first inquiry focuses on the nature of the *situation* presented. This inquiry requires classifying situations as falling into one of two categories: calling for homeland defense or calling for *only* a civil response. Situations calling for both homeland defense *and* a civil

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48. DoDD 5525.5, *supra* note 23, § E4.2.3.

49. This Article analyzes only the PCA rules. To assess whether a military activity is legal requires ensuring that the activity is permissible under the PCA *and* all other applicable law. Other laws may prohibit the activity for myriad reasons. For example, the action may exceed the President’s constitutional authority under Article II, the force used may exceed what the law would permit, or particular acts may be criminal. *See, e.g.,* Padilla v. Rumsfeld, 352 F.3d 695, 699 (2d Cir. 2003) (holding that President does not have constitutional power to detain Padilla as enemy combatant while not ruling on lower court’s finding that PCA does not apply to this situation), *rev’d on other grounds*, 124 S. Ct. 2711 (2004).

50. Historically, discussions about situations that call for the military to defend the nation have used the term “national defense.” Recently, the term “homeland defense” has been used with increasing frequency to describe the same concept. This Article adopts the term “homeland defense” but recognizes no semantic difference between it and “national defense.”

51. If the PCA prohibits an activity, an exception may apply to permit it. PCA exceptions are discussed *infra* Part III.

response are classified as calling for homeland defense.<sup>52</sup> Thus, this inquiry ensures that the categories by which situations are to be classified are mutually exclusive. If the situation calls for homeland defense, then military activity in response to it is not considered execution of the civil law regardless of whether the situation also calls for a civil response.<sup>53</sup> Consequently, the military activity falls outside the scope of the PCA.<sup>54</sup>

If the situation does not call for homeland defense, but rather calls for only a civil response, then the PCA may apply, depending on the answer to the second inquiry—whether the military activity constitutes law enforcement. In comparison with the first inquiry, which focused on the *situation* presented, this inquiry focuses on the *activity* performed. If the activity constitutes law enforcement, then the PCA prohibits it; conversely, if the activity does not constitute law enforcement, then it is permissible under the PCA.

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52. Most situations that would call for homeland defense would involve the commission of acts that constitute crimes under federal and state law. Thus, situations may often call for both homeland defense and a civil response. *See, e.g., Padilla v. Bush*, 233 F. Supp. 2d 564, 588 n.9 (S.D.N.Y. 2002) (noting that Padilla was being detained for homeland defense purposes, not for violating civil law, even though he may have committed such violation), *aff'd in part, rev'd on other grounds sub nom. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711 (2004).

53. *See Padilla*, 233 F. Supp. 2d at 588 n.9.

[T]he [PCA] bars use of the military in civilian law enforcement. Padilla is not being detained by the military in order to execute a civilian law or for violating a civilian law, notwithstanding that his alleged conduct may in fact violate one or more such laws. He is being detained in order to interrogate him about the unlawful organization with which he is said to be affiliated and with which the military is in active combat, and to prevent him from becoming reaffiliated with that organization. Therefore, his detention by the military does not violate the Posse Comitatus Act.

*Id.* (citation omitted).

54. In ruling that the PCA did not apply, the court in *Padilla* appeared to consider the purpose of the military activity to be an important factor. *See id.* The analysis in the present Article focuses not on the purpose of the military activity, but on the situation presented. These apparently different focal points are actually equivalent, because the purpose of a military activity is inextricable from the situation to which it responds. If a situation calls for homeland defense, then military activity truly in response to that situation is for homeland defense. In contrast, military activity claimed to be in response to a situation that calls for homeland defense but that so exceeds what the situation calls for that it cannot reasonably be considered to be responsive to the situation is not for homeland defense. Such military activity falls within the scope of the PCA.

### 1. *Situational Context: Homeland Defense Versus Civil Response*

Situations may be thought of as falling along a spectrum bounded at one end by traditional military attack,<sup>55</sup> which clearly calls for homeland defense, and at the other end by basic criminal activity,<sup>56</sup> which clearly calls for only a civil response. Situations falling between these two end points, such as terrorist attacks by nonstate actors, are more difficult to categorize, because they contain aspects of both military attack and criminal activity.

Authoritative statements on how to classify situations falling between the two ends of the spectrum are limited in number and scope. The Constitution's references to situations calling for homeland defense address only protection from "invasion,"<sup>57</sup> and the fact that an invasion calls for homeland defense is readily apparent.

Congress has expressed an intent to supply an Army and Air Force capable of "providing for the defense of the United States."<sup>58</sup> Nowhere, however, does Congress state what situations call for defense of the United States.

The Supreme Court has defined "national defense," as the term is used in the 1917 Espionage Act, to be "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness."<sup>59</sup> The breadth of this definition renders it unuseful for classifying situations as calling for homeland defense versus only a civil response.

The DoD, in defining the mission of the United States Northern Command (NORTHCOM), has been similarly unspecific. The DoD has assigned to NORTHCOM the mission of homeland defense, which NORTHCOM defines as "the protection of U.S. territory, domestic population and critical infrastructure against military attacks emanating from outside the United States."<sup>60</sup> Embedded within this definition of the mission of homeland defense is a definition of what

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55. "Traditional military attack" may be defined generally as hostile military action taken by military forces or agents of a foreign government and intended to threaten the existence or influence the actions of the target country.

56. "Basic criminal activity" may be defined generally as crimes for which there would be no need for military assistance, such as robbery of a convenience store, battery against an ordinary citizen, or tax evasion.

57. Article I, § 8, clause 15 grants Congress the power to provide for calling forth the militia to repel invasions. U.S. CONST. art. I, § 8, cl. 15. Article IV, § 4 guarantees federal protection against invasion to every state. U.S. CONST. art. IV, § 4.

58. 10 U.S.C. §§ 3062, 8062 (2000).

59. *Gorin v. United States*, 312 U.S. 19, 28 (1941).

60. U.S. Northern Command, Homeland Defense, <http://www.northcom.mil> (follow "Homeland Defense" hyperlink) (last visited Oct. 6, 2005).



situations call for homeland defense—“military attacks emanating from outside the United States.”<sup>61</sup> This definition cannot be used for classifying situations as calling for either homeland defense or only a civil response, because the terms “military attack” and “emanating from outside the United States” are unclear. Construed narrowly, “military attacks” would be limited to attacks by recognized military organizations of foreign states. Under this definition, the terrorist attacks of September 11, 2001, and other similar catastrophic attacks by terrorist groups would not constitute situations that call for homeland defense. Construed broadly, “military attacks” would include any attempt to harm the United States. Under this definition, the phoning in of bomb threats to federal buildings and other small-scale events that typically would be considered criminal matters would constitute military attacks. If the term “emanating from outside the United States” were construed narrowly, it would be limited to attacks launched, operationally, from outside the United States. Under such an interpretation, the attacks of September 11, 2001, again would not constitute situations that call for homeland defense. If the term were construed broadly, it could include attacks by people with a substantial connection to foreign governments, institutions, or organizations, regardless of whether the attacks are launched from within the United States.

The DoD’s regulations for the Security Control of Air Traffic and Air Navigation Aids (SCATANA) and the Emergency Security Control of Air Traffic (ESCAT) also use imprecise language. According to these regulations, the DoD may take control over air traffic or air navigation aids in the event of a probable or imminent attack upon the United States by hostile aircraft or missiles, an overt attack upon the United States, or emergencies for which national security requires the identification and control of aircraft.<sup>62</sup> It is unclear, however, what situations would constitute an attack on the United States or otherwise imperil national security, thereby occasioning the need for homeland defense.

In sum, none of the authorities discussed above assists in classifying situations as calling for either homeland defense or only a civil response. Although the inherent difficulty in classifying situations is generated by any situation that does not unambiguously constitute either traditional military attack or basic criminal activity, acts of terrorism best illustrate the difficulty. Despite the commonality of terrorist attacks and traditional military attacks, it appears that the former gen-

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61. *Id.*

62. 32 C.F.R. §§ 245.1–245.5 (2005).

erally have been considered to be matters for civil authorities. This is evident in DoD documents that set forth military guidance for responding to domestic terrorist events. According to DoDD 3025.12,<sup>63</sup> the Attorney General is responsible for managing the federal response to a domestic terrorist incident, including advising the President as to whether and when to commit military forces.<sup>64</sup> Moreover, at least initially, the FBI is the lead federal agency for responding to terrorist incidents.<sup>65</sup> If terrorist incidents were believed to call for homeland defense, the Attorney General would not have primary initial responsibility for responding to them, and the FBI would not be the lead federal agency. Rather, initial primary responsibility would rest with the Secretary of Defense, or at least jointly with the Attorney General and the Secretary of Defense. A recently acquired understanding of the potential magnitude of the national harm that can result from terrorist incidents may have altered this belief. However, the law and the DoDD remain unchanged.

Despite its problems, this minimal guidance in classifying situations as calling for homeland defense versus only a civil response may be appropriate. Specifically, it may be unwise to attempt to define precisely what situations call for homeland defense in an ever-changing and unpredictable environment, given that improperly defining the term is not unlikely and could result in either unnecessary constraints on the military that hinder an effective response when military activity is necessary or an undesirably low threshold that invites military activity in response to situations that do not necessitate such activity. For example, automatically classifying terrorist events as situations that call for homeland defense could result in military responses to smaller-scale terrorist events that, although intended to harm the United States, threaten few people and are well within the response capabilities and expertise of civil authorities. Conversely, deciding *a priori* that all terrorist incidents fall within the civil response realm may prohibit the military from responding to a large-scale terrorist incident that exceeds the capabilities or expertise of civil authorities.

The difficulty of classifying situations as calling for homeland defense versus only a civil response and the consequences of that difficulty are addressed in greater depth in Part IV, in the context of delineating and ameliorating confusion surrounding the PCA rules.

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63. DEP'T OF DEF., DIRECTIVE NO. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (1994), [http://www.dtic.mil/whs/directives/corres/pdf/d302512\\_020494/d302512p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/d302512_020494/d302512p.pdf) [hereinafter DoDD 3025.12].

64. *Id.* § 4.8.1.1.

65. *Id.* § 4.8.1.2.

## 2. *Within the Civil Response Realm: Determining What Military Activities Constitute Law Enforcement*

If a situation calls for only a civil response, the military still may be able to provide assistance to civil authorities under the PCA without a PCA exception. As mentioned previously, the PCA prohibits only military activities that constitute law enforcement. Thus, for those situations that fall within the civil response realm, determining whether the PCA prohibits a military activity requires a second inquiry—whether the activity constitutes law enforcement.

### *a. The Three Judicially Derived Tests*

Congress has not specified which military civil-assistance activities constitute law enforcement. To analyze PCA issues, courts have developed three separate tests for determining whether military activity constitutes law enforcement.

The first test asks whether the military activities are active or passive. Under this test, “active” military activities are considered law enforcement and prohibited by the PCA, whereas “passive” military activities are not considered law enforcement and thus are not prohibited by the PCA.<sup>66</sup> The court that promulgated this test opined that the following military activities are active: arrests, seizures of evidence, searches of persons and buildings, investigations of crimes, interviews of witnesses, and the pursuit of escaped civilian prisoners.<sup>67</sup> The same court deemed the following military activities to be passive: tactical or logistical advice given to civil law enforcement officers; deliveries of military material, equipment, or supplies; training of local law enforcement on the proper use and maintenance of military material or equipment; and aerial reconnaissance.<sup>68</sup> The “active versus passive” test has been criticized for failing to provide clear guidance in borderline cases,<sup>69</sup> perhaps as a result of its counterintuitive requirement that “active acts” be distinguished from “passive acts.”

The second test courts use to determine whether military activities constitute law enforcement asks whether the military activities pervade civil law enforcement activities.<sup>70</sup> Under this approach, the PCA prohibits “pervading” activities but does not prohibit “non-pervading” activities. To illustrate, in *United States v. Bacon*, the court

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66. *United States v. Red Feather*, 392 F. Supp. 916, 925 (D.S.D. 1975).

67. *See id.*

68. *See id.*

69. *United States v. McArthur*, 419 F. Supp. 186, 194 (D.N.D. 1975), *aff'd sub nom. United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976).

70. *See United States v. Jaramillo*, 380 F. Supp. 1375, 1379–81 (D. Neb. 1974).

found that a military investigator's purchase of drugs as part of an undercover drug operation initiated by civil law enforcement officials did not constitute pervasion.<sup>71</sup> Like the first test, the "pervasion" test has been criticized as applying "too vague a standard,"<sup>72</sup> a weakness that may explain why the courts have failed to specify what types of activities would pass the test. A dictionary definition of "pervade" is "to become diffused throughout every part of."<sup>73</sup> Under this definition, a violation of the second test would require military activity substantially interwoven with the activities of civil law enforcement officials. However, because the courts have not explicitly employed this definition, or any other definition, of "pervade," it is difficult to predict what military activities would constitute law enforcement under the pervasion test.

The third test prohibits military activities that are "regulatory, proscriptive, or compulsory" with regard to citizens.<sup>74</sup> According to the few courts that have attempted to define these terms, an activity is "regulatory" if it controls or directs, "proscriptive" if it prohibits or condemns, and "compulsory" if it exerts coercive force.<sup>75</sup> The court that promulgated this test found that the following activities did not constitute civil law enforcement: the Army furnishing material and equipment used by civil law enforcement officers, the Army giving strategic advice to the DoJ, and the Air Force conducting aerial photographic reconnaissance.<sup>76</sup>

In contrast with the first and second tests, courts have not criticized the third test, perhaps because it employs more clear-cut and objective criteria to determine what activities constitute law enforcement. Despite the lack of judicial criticism, the third test may be problematic insofar as certain activities that are necessary to, and unusually characteristic of, law enforcement could potentially be deemed non-law enforcement under the test. For example, searches of buildings or houses, collection of intelligence for law enforcement purposes, and surveillance of specific individuals generally are considered to be law enforcement activities; however, if military personnel were to conduct these activities without engaging in acts that are regulatory, proscrip-

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71. 851 F.2d 1312, 1313 (11th Cir. 1988) (per curiam).

72. *McArthur*, 419 F. Supp. at 194.

73. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 925 (11th ed. 2003).

74. *McArthur*, 419 F. Supp. at 194.

75. *E.g.*, *United States v. Yunis*, 681 F. Supp. 891, 895-96 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991); *United States v. Gerena*, 649 F. Supp. 1179, 1182 (D. Conn. 1986).

76. *McArthur*, 419 F. Supp. at 193 n.3, 195.

tive, or compulsory, they likely would not be considered law enforcement under the third test.<sup>77</sup>

The DoD appears to endorse the third test, as DoDD 5525.5 adopts the test's language to define what civil assistance activities are permissible.<sup>78</sup> Perhaps recognizing that the third test is too permissive, the DoDD supplements it by expressly prohibiting military personnel from engaging in civil assistance that constitutes searching, surveilling, or pursuing individuals, or from acting as an agent, informant, investigator, or interrogator.<sup>79</sup>

The DoJ Office of Legal Counsel employs its own standard to determine whether military activity constitutes law enforcement, which appears to be a hybrid of the first and third tests.<sup>80</sup> It has concluded that military activities do not violate the PCA where “‘there is no contact with civilian targets of law enforcement, no actual or potential use of military force, and no military control over the actions of civilian officials.’”<sup>81</sup>

Although these tests provide some guidance in determining whether a military activity constitutes law enforcement, rarely do they provide a conclusive answer, especially as to how courts would rule. First, courts ignore the DoJ and DoD tests, and rely exclusively on the judicially derived tests. Second, even among the judicially derived tests, different courts employ different tests, and the tests are often difficult to apply. Either of these factors may result in conflicting conclusions about whether an activity constitutes law enforcement. In addition, courts have listed all three judicially derived tests and then rendered a conclusion about the permissibility of the activity without stating on which test(s) they rely or why a particular activity would or would not constitute law enforcement under the test(s).<sup>82</sup>

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77. For example, if the military conducted these activities without interacting with civilians, the activities likely would not control or direct, prohibit or condemn, or exert coercive force.

78. DoDD 5525.5, *supra* note 23, § E4.1.7.2.

79. *Id.* § E4.1.3.

80. Military Use of Infrared Radars Technology to Assist Civilian Law Enforcement Agencies, 15 Op. Off. Legal Counsel 36, 43 (1991) [hereinafter *Military Use of Infrared Radars Technology*].

81. *Id.* (quoting letter from Mary Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, to Deanne Siemer, General Counsel, Department of Defense (Mar. 24, 1978)). The Office of Legal Counsel emphasized that Congress intended, through 10 U.S.C. § 375, “to bar only the exercise of military authority in direct confrontations with civilians.” Use of Navy Drug-Detecting Dogs by Civilian Postal Inspectors, 13 Op. Off. Legal Counsel 312, 315 (1989).

82. *E.g.*, *United States v. Hartley*, 678 F.2d 961, 978 & n.24 (11th Cir. 1982).

This imprecision may result from the PCA not being the central issue in many of the cases. Most PCA cases are criminal prosecutions in which the defendant has alleged a PCA violation in an attempt to have evidence excluded or to otherwise avoid liability. Within this context, PCA analyses likely were not as thoroughly considered as they would have been if the military's activities had been more central to the case (e.g., in a prosecution of military personnel under the PCA). Regardless of the cause of the imprecision, the sparse case law focusing on PCA violations and the lack of uniformity in court opinions that more peripherally discuss the PCA make it difficult in many situations to draw conclusions *a priori* about whether a court would find that a particular military activity constitutes law enforcement.

*b. Non-Law Enforcement Activities Authorized by Congress*

Congress has specifically authorized the military to conduct certain types of activity that are not considered law enforcement under the PCA and, thus, are not prohibited by the PCA. These activities may be split into two categories—assistance to civil law enforcement and disaster relief.

The types of already permissible military assistance to civil law enforcement Congress has authorized include providing “any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law;”<sup>83</sup> permitting law enforcement officials to use military equipment and facilities;<sup>84</sup> training and advising law enforcement officials;<sup>85</sup> maintaining equipment for law enforcement officials;<sup>86</sup> and operating equipment to perform the following activities: detection, monitoring, and communication of the movement of air and sea traffic; detection, monitoring, and communication of the movement of surface traffic not beyond twenty-five miles of the geographic boundary of the United States when the initial detection occurs outside of the boundary; and aerial reconnaissance.<sup>87</sup>

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83. 10 U.S.C. § 371(a) (2000).

84. *Id.* § 372.

85. *Id.* § 373.

86. *Id.* § 374(a).

87. *Id.* § 374(b). Section 371 through 374 of title 10, United States Code, explicitly authorize the categories of activities listed in the text. The military may perform the final category of activities—operating equipment for law enforcement personnel—only for the purposes of enforcing certain laws regarding controlled substances, immigration, and customs, or as part of a counterterrorism operation. *Id.* Despite the operation of equipment being explicitly authorized only for these purposes, with the exception of the interception of vessels and aircraft, these activities are unlikely to constitute law enforcement under the three judicially derived tests and, therefore, are

The types of military assistance for disaster relief Congress has authorized include debris removal; search and rescue; provision of emergency medical care, shelter, medicine, food, water, and other essential needs; movement of persons or supplies; “clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services; provision of temporary facilities for schools and other essential community services; demolition of unsafe structures which endanger the public; warning of further risks and hazards;” dissemination of public information regarding, and assistance in implementing, health and safety measures; and “provision of technical advice to state and local governments on disaster management and control.”<sup>88</sup>

c. “Willful” Use of the Military to Execute the Law

The text of the PCA prohibits only the “willful” use of the military to execute the law. Typically, criminal statutes require two elements for a violation. First, the defendant must have committed an act proscribed by the statute, the *actus reus*. Second, the defendant must have possessed a certain mental culpability, or *mens rea*, in committing the proscribed act. For most crimes, the *mens rea* requirement is fulfilled when the defendant intentionally engages in the behavior the law prohibits, regardless of whether the defendant knew that such behavior was illegal. Statutes differ in the language they use to convey this requirement, and courts generally interpret criminal statutes that require a “willful” act for their violation to require merely that the act be intentional.<sup>89</sup>

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unlikely to be prohibited by the PCA regardless of the context within or the purpose for which they are conducted.

Because the activities listed in 10 U.S.C. §§ 371–374 (with the exception of the interception of certain vessels and aircraft) would not constitute law enforcement and, thus, would not be prohibited by the PCA, these provisions should not be considered PCA exceptions. Rather, they should be considered congressional confirmation that the activities are permissible under the PCA.

88. 42 U.S.C. § 5170b (2000). These activities are explicitly permitted by the Stafford Act. 42 U.S.C. §§ 5121–5202 (2000). The Stafford Act, which is not a PCA exception, provides for federal assistance for disaster relief, including assistance rendered by the DoD, and sets forth the procedures and conditions for the provision of such assistance. *Id.* §§ 5170, 5170a, 5170b, 5191, 5192. For more information on the Stafford Act and its preconditions for the military to perform disaster relief tasks, see Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., July 1997, at 3, 9–11.

89. For example, if a law makes it a crime to willfully possess certain chemicals, a person has committed this crime if the person intentionally possesses the chemicals regardless of whether the person knows it is illegal to do so.

Few courts have discussed the effect of the term “willful” in the PCA. Most courts that have done so, however, have held that a PCA violation requires that the defendant specifically intend to violate the Act.<sup>90</sup> This differs from the typical *mens rea* requirement by including the additional requirement that an act be committed with the intention of violating the law.<sup>91</sup> Such intent would be lacking when military personnel conduct law enforcement activities under any of three good-faith, albeit mistaken, beliefs—that a situation calls for homeland defense, that an activity does not constitute law enforcement, or that a PCA exception applies to permit an activity that constitutes law enforcement. The sparseness of the case law and the fact that some courts have found that violations of the PCA occurred without addressing whether the adjudged violator held a good-faith belief,<sup>92</sup> however, suggest that it would be unwise to rely on a good-faith belief to justify military activity that would otherwise be prohibited by the Act.

*d. “Use” of the Military to Execute the Law*

The PCA punishes “whoever willfully . . . uses” any part of the military to enforce the civil law. The term “use” raises additional issues about the proper interpretation of the Act. Strictly construing the phrase yields the conclusion that the PCA prevents anyone, including civil authorities and military decision makers, from using the military to execute the civil law, but does not prevent military execution of the civil law generally. Under this interpretation, 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.

This interpretation has some support in the case law. Although most courts have not addressed the issue, two cases raise the possibility that the PCA prohibits only the use of the military to execute the law and not military execution of the civil law generally. In *Riley v.*

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90. See *United States v. Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988) (per curiam) (concluding that “even if the participation by military personnel in this drug investigation is to be considered a violation of the Posse Comitatus Act, it was not a willful violation of the spirit of the Act”); *United States v. Walden*, 490 F.2d 372, 376 (4th Cir. 1974) (noting that “[w]hile the bulk of the evidence was obtained by violating the Instruction, there is totally lacking any evidence that there was a conscious, deliberate or willful intent on the part of the Marines or the Treasury Department’s Special Investigator to violate the Instruction or the spirit of the Posse Comitatus Act. From all that appears, the Special Investigator acted innocently albeit ill-advisedly.”).

91. Such an approach abrogates the general rule of *ignorantia legis non excusat*.

92. See, e.g., *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975).



*Newton*,<sup>93</sup> an Army investigator conducting a joint investigation with a civil law enforcement officer observed the commission of a crime unrelated to their investigation or to any military purpose.<sup>94</sup> The Army investigator, of his own volition, assisted the law enforcement officer by attempting to handcuff one of the suspects.<sup>95</sup> A struggle ensued, and the Army investigator fatally shot the suspect.<sup>96</sup> The Eleventh Circuit stated that the plain language of the PCA requires “a willful use of a military person” to execute the law.<sup>97</sup> In holding that the law enforcement officer did not violate clearly established law, the court stated, “[t]he evidence fails to show that [the officer] at any point instructed or encouraged [the Army investigator] to assist him in the arrests; instead [the investigator] became involved in arresting [the suspect] upon [the investigator’s] own initiative.”<sup>98</sup> Similarly, in *Harker v. State*,<sup>99</sup> the court held that the PCA “is violated when one ‘willfully uses’ the armed forces for civilian law enforcement.”<sup>100</sup> The court rejected the claim of a PCA violation, reasoning that “[t]here is no indication in the record of this case that the police requested assistance from the Army. . . . Therefore, the army [sic] was not ‘willfully used’ for civilian law enforcement.”<sup>101</sup>

The legislative history also permits the more strict interpretation of the PCA. Specifically, it reveals that some congressmen believed that the word “use” limited the application of the Act to military and

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93. 94 F.3d 632 (11th Cir. 1996).

94. *Id.* at 634–35.

95. *Id.* at 635, 637.

96. *Id.* at 634–35.

97. *Id.* at 637.

98. *Id.* The court’s holding does not sustain the argument that violating the PCA requires a willful use of the military. At issue in *Riley* was whether the law enforcement officer was entitled to qualified immunity from civil liability. Qualified immunity protects government officials from liability if their conduct violated no “‘clearly established statutory or constitutional rights.’” *Id.* at 636 (quoting *Lassiter v. Ala. A & M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc) (emphasis added)). Therefore, the plaintiff needed to prove more than that the law enforcement officer violated the PCA; the plaintiff needed to prove that the law enforcement officer violated the PCA *and* that the bounds of the PCA were so clearly established that it was obvious he was violating the law. *Id.* at 636 (quoting *Lassiter*, 28 F.3d at 1149). In upholding the defendant’s claim of qualified immunity, the court did not hold that a PCA violation requires that one willfully use the military. Rather, the court stated, “our case law does not give any guidance as to what constitutes ‘wilful [sic] use’. . . .” *Id.* Thus, the court did not decide that a PCA violation requires one to willfully use the military to execute the law, but rather found that such an interpretation may be valid.

99. 663 P.2d 932 (Alaska 1983).

100. *Id.* at 937.

101. *Id.*

civilian decision makers.<sup>102</sup> However, other congressmen believed that the Act would also apply to those executing the law.<sup>103</sup>

Interpreting the PCA in light of its historical context may lead to an even narrower interpretation. As discussed earlier, “posse comitatus” referred to the right of a sheriff or marshal to summon local citizens and members of the military to assist him in performing his duties.<sup>104</sup> Based on this history, it could be claimed that the PCA prevents only civil authorities from using the military to execute the law, but does not prevent either military decision makers from using the military to execute the civil law or military execution of the civil law generally.<sup>105</sup> Under this view, to violate the PCA requires that civil authorities first request the military to execute the law. No violation can occur if military personnel act on their own accord. The cases cited earlier in this part also support this interpretation, as both specifically noted that no PCA violation could be found because civil authorities did not request the military action.<sup>106</sup>

It should be emphasized, however, that whereas these narrower interpretations of the PCA are supported to varying degrees by the case law, legislative history, and historical context, they run counter to the prevailing interpretation of the PCA’s application. In addition, few courts have addressed this issue, even in cases in which it is clear that military personnel acted without civil authorities having requested their assistance, perhaps based on the assumption that such an interpretation of the PCA is implausible.

### III.

#### EXCEPTIONS TO THE POSSE COMITATUS ACT

As discussed in Part II, whether the PCA prohibits a military activity depends on the answers to two inquiries. The first inquiry is whether a situation calls for homeland defense or only a civil response. The second inquiry is whether the activity constitutes law enforcement. If a given situation calls for only a civil response, as opposed to homeland defense, and the military activity constitutes law enforcement under the three judicially derived tests, then a third inquiry is presented: Does an exception apply to the situation that would

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102. *E.g.*, 7 CONG. REC. 4298, 4301 (1878).

103. *E.g.*, *id.* at 3847, 4242.

104. DOYLE, *supra* note 17, at 7 & n.14, 8.

105. *See* Homeland Security Act of 2002, 6 U.S.C. § 466(a)(2) (Supp. II 2002) (“Enacted in 1878, the Posse Comitatus Act was expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing Federal law.”).

106. *See supra* notes 93–101 and accompanying text.

permit an activity the PCA would otherwise prohibit? While the first and second inquiries focus, respectively, on the nature of the situation and the activity, the third inquiry considers both the situation and the activity. For a PCA exception to permit an activity that the PCA would otherwise prohibit, the situation must be one to which a PCA exception applies, *and* the activity must be permitted or at least not prohibited by the exception.<sup>107</sup> Numerous exceptions to the PCA exist. These exceptions may be divided into two general categories: statutory exceptions, which authorize military activities in specific situations, and more amorphous exceptions, which derive from the Constitution and common law.<sup>108</sup>

### A. *Statutory Exceptions to the PCA*

Statutory exceptions to the PCA may be considered to fall into four categories: major exceptions, possible unintentional major exceptions, pseudo exceptions, and narrow exceptions.

#### 1. *Major Exceptions*

In this Article, major exceptions include (1) exceptions that have the potential to allow for wide-ranging military involvement in civil law enforcement activities, even though the situations that permit them may be rare; and (2) exceptions that allow for circumscribed activity that may occur frequently.

##### a. *Insurrections, Rebellions, and Civil Disturbances*

The military may conduct law enforcement in response to insurrections, rebellions, and other types of civil disturbance. Under these

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107. Most PCA exceptions allow the military to conduct any law enforcement activities in response to the situation to which the exception applies. Some PCA exceptions are more restrictive, however, and explicitly prohibit the military from performing certain law enforcement activities under certain circumstances. For example, as will be discussed in greater detail later in this part, the PCA exception that applies to situations involving chemical or biological weapons of mass destruction prohibits the military from making an arrest, searching for or seizing evidence, or collecting intelligence for law enforcement purposes, unless these activities are considered necessary for the immediate protection of human life and civil law enforcement officials are not capable of performing them. 10 U.S.C. § 382 (2000). Only under these additional conditions does 10 U.S.C. § 382 become a blanket exception. *See infra* notes 118–23 and accompanying text.

108. The text of the PCA states that exceptions to its restrictions can be found only in the Constitution or in Acts of Congress. 18 U.S.C. § 1385 (2000). Nonetheless, some exceptions—namely, the military purpose doctrine and martial law, which are discussed later in this part—have developed within the common law, and courts recognize them to the same extent that they recognize the statutory exceptions. *See infra* notes 163–89 and accompanying text.

PCA exceptions, the military may act in specific circumstances for specific purposes. First, when there is an insurrection in a state, the President may employ the military to suppress the insurrection, upon the request of the state's legislature or upon the request of the governor if the legislature cannot be convened.<sup>109</sup> Under this exception, the President cannot employ military forces until state authorities request assistance. Second, when "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 . . . by the ordinary course of judicial proceedings," the President may employ the military "to enforce [federal laws] . . . or to suppress the rebellion."<sup>110</sup> Third, the President may employ the military to suppress an "insurrection, domestic violence, unlawful combination, or conspiracy," if the situation either: (1) hinders the execution of federal or state law such that any part of a state's citizenry is deprived of a constitutional right and the state authorities are unable or unwilling to protect that right,<sup>111</sup> (2) or obstructs the execution of federal law.<sup>112</sup> Thus, in contrast to the first exception, under which the President must wait for a request from the state, the second and third exceptions permit the President to employ military personnel on his own accord.<sup>113</sup>

The preconditions for military action under these exceptions make it unlikely that they would apply more broadly to other emergencies, such as terrorist attacks. This limited application is likely due to the exceptions having been intended to apply only to the named situations, as evidenced by the requirement that the President issue a proclamation ordering "the insurgents to disperse and retire peaceably to their abodes."<sup>114</sup>

#### *b. Weapons of Mass Destruction and Associated Materials*

Two PCA exceptions permit the military to enforce certain laws regarding weapons of mass destruction (WMD) and their associated materials. The first exception authorizes the military to respond to violations of 18 U.S.C. § 831, a statute that prohibits several activities

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109. 10 U.S.C. § 331 (2000).

110. *Id.* § 332.

111. *Id.* § 333(1).

112. *Id.* § 333(2).

113. In response to the 1992 Los Angeles riots, President George H.W. Bush used one of these exceptions to employ the military to restore law and order. The Executive Order refers to Chapter 15, Title 10, which includes 10 U.S.C. §§ 331–333, but does not specify which of these provisions it invokes. Exec. Order No. 12,804, 57 Fed. Reg. 19,361 (May 1, 1992).

114. 10 U.S.C. § 334 (2000).

with respect to nuclear and radiological materials.<sup>115</sup> In response to a violation of 18 U.S.C. § 831, and upon a request from the Attorney General, the military may perform civil law enforcement activities if (1) the situation poses a serious threat to the United States, (2) “enforcement of the law would be seriously impaired if the assistance were not provided,” and (3) civil law enforcement personnel are incapable of enforcing the law.<sup>116</sup> Importantly, this PCA exception does not limit the activities the military may perform in enforcing 18 U.S.C. § 831.<sup>117</sup>

The second exception, 10 U.S.C. § 382, applies to chemical and biological weapons and their raw elements,<sup>118</sup> and sets forth similar, but slightly different, requirements for military activity.<sup>119</sup> In response to a violation of the law pertaining to a chemical or biological weapon, and upon a request from the Attorney General, the military may perform civil law enforcement activities if (1) the situation poses a serious threat to the United States, (2) enforcement of the law pertaining to chemical or biological weapons would be seriously impaired if the assistance were not provided, and (3) civil capabilities and expertise are not readily available to counter the threat posed by the

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115. 18 U.S.C. § 831 (2000). This statute prohibits the acquisition of nuclear materials and nuclear by-product materials through fraud, force, or threat; the unlawful transfer of such materials; and the unlawful and intentional receipt, possession, use, transfer, alteration, disposition, or dispersal of such materials by one who “thereby knowingly causes the death of or serious bodily injury to any person or substantial damage to property or to the environment.” *Id.* § 831(a). The statute’s definition of nuclear materials and nuclear by-product materials is sufficiently broad to encompass radiological materials. *See id.* § 831(f).

116. *Id.* § 831(e)(2).

117. *See id.* § 831(e)(3). Of course, as mentioned earlier, military activities must comport with all relevant regulatory, statutory, and constitutional mandates.

118. 10 U.S.C. § 382 (2000). Specifically, the exception applies to toxic chemicals and their precursors; munitions for chemical weapons; biological agents, toxins, and vectors; and biological weapon delivery systems. 18 U.S.C. § 175 (2000 & Supp. I 2001) (criminalizing certain activities with respect to biological agents, toxins, or delivery systems for use as weapon); 18 U.S.C. § 175a (2000) (authorizing Attorney General to request military assistance in certain emergencies involving biological weapons of mass destruction); *id.* § 229 (criminalizing certain activities with respect to chemical weapons); *id.* § 229E (authorizing Attorney General to request military assistance in certain emergencies involving chemical weapons); *id.* § 229F (defining chemical weapons to include toxic chemicals, their precursors, and munitions for such weapons); 18 U.S.C.A. § 2332a (West 2000 & Supp. 2004) (criminalizing use of certain weapons of mass destruction, including certain uses of biological agents, toxins, or vectors); 18 U.S.C. § 2332e (Supp. I 2001) (authorizing Attorney General to request military assistance in certain emergencies involving certain weapons of mass destruction).

119. 10 U.S.C. § 382 (2000).

weapon.<sup>120</sup> When these conditions are met, the military may provide any assistance except arresting persons, searching for or seizing evidence, or collecting intelligence for law enforcement purposes.<sup>121</sup>

10 U.S.C. § 382 prohibits *arrests* of persons and searches for or seizures of *evidence*, but it does not prohibit *seizures of persons*.<sup>122</sup> Activities that may constitute a seizure of a person but not an arrest, and thus would be permissible under 10 U.S.C. § 382, include stopping vehicles at a checkpoint,<sup>123</sup> apprehending individuals and holding them for civil authorities, surrounding a building thought to contain hostile actors, and shooting or otherwise disabling an individual. Thus, while 10 U.S.C. § 382 prohibits military personnel from arresting individuals under the described circumstances, it permits them to engage in an array of law enforcement activities that exert force upon individuals. It is unclear whether Congress intended to permit the military to perform these forceful activities. By listing impermissible activities in 10 U.S.C. § 382, Congress may have intended to prohibit the same activities the PCA would prohibit. If so, Congress failed to recognize that the prohibited activities listed in the statute were not coextensive with the activities the PCA would prohibit under the three judicially derived tests.

Under certain circumstances, the chemical and biological weapons exception does not prohibit the military from performing the activities the statute generally proscribes. Specifically, if in addition to

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120. *Id.* § 382(b).

121. *Id.* § 382(d)(2). Because this statute precludes the military from searching for or seizing evidence, and a chemical or biological weapon likely would be evidence in any prosecution or civil lawsuit based on the incident, a literal reading of the statute leads to the conclusion that the military would be prohibited from searching for or seizing the chemical or biological weapon that triggered the military's involvement. This is problematic insofar as one of the primary tasks requested of the military may be searching for or seizing the chemical or biological weapon.

122. For Fourth Amendment purposes, a seizure of a person occurs when, due to physical force or a show of authority by an agent of the government, a reasonable person would not feel free to depart, *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), or otherwise terminate an encounter with the agent. *Florida v. Bostick*, 501 U.S. 429, 438 (1991). Whereas courts have recognized that "words may be used in a statute in a different sense from that in which they are used in the Constitution," *Lamar v. United States*, 240 U.S. 60, 65 (1916) (citation omitted), it is likely that under any definition, a seizure will be effected by a use of physical force that restrains a person's movement.

123. The Supreme Court has held that stopping vehicles at a checkpoint constitutes a Fourth Amendment seizure. *E.g.*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000). Because it involves a direct physical confrontation by the military against civilians, it would also constitute a seizure under the definition employed by the DOJ Office of Legal Counsel. *See Military Use of Infrared Radars Technology, supra* note 80, at 4146.

the three requirements described earlier, a fourth requirement is met—that military action is considered “necessary for the immediate protection of human life, and civilian law enforcement officials are not capable of taking the action”—then the prohibition against the military arresting persons, searching for or seizing evidence, or collecting intelligence for law enforcement purposes does not apply.<sup>124</sup> Under these circumstances, the biological and chemical weapons exception permits any military activity necessary to enforce the law.

*c. Interception of Certain Vessels and Aircraft*

The military may intercept “vessels or aircraft detected outside the land area of the United States” and direct them “to go to a location designated by appropriate civilian officials”<sup>125</sup> if the interception is conducted for purposes of enforcing certain laws regarding controlled substances, immigration, and customs, or if the interception is conducted as part of a counterterrorism operation.<sup>126</sup> Notably, this exception applies only to aircraft and vessels detected outside the land area of the United States. It does not permit the military to intercept an aircraft when the flight is domestic or when the flight originates outside the United States but is not detected until within the land area of the United States.

*2. Possible Unintentional Major Exceptions*

Possible unintentional major exceptions are statutes that do not appear to have been intended to be PCA exceptions but which nonetheless may authorize military activity that falls within the definition of “major exceptions” provided earlier in this part.

*a. United States Secret Service Protective Duties*

The Presidential Protection Assistance Act of 1976 (PPAA) compels all executive departments, including the DoD, to assist the Secret Service in protecting persons eligible to receive Secret Service protection when requested by the Director of the United States Secret Service (hereinafter Secret Service).<sup>127</sup> The PPAA does not reference the

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124. 10 U.S.C. § 382(d)(2)(B) (2000).

125. *Id.* §§ 124(b), 374(b)(2)(D).

126. *Id.* §§ 124(a), 374(b).

127. Presidential Protection Assistance Act, 18 U.S.C. § 3056 note (2000). Persons eligible to receive Secret Service protection include:

(1) The President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice President-elect. (2) The immediate families of those listed in paragraph

PCA or state that it is a PCA exception, but it does specify that executive departments, including the DoD, are to provide “services, equipment, and facilities” to the Secret Service, without limiting what services can be provided.<sup>128</sup> Provisions that authorize military assistance but are not intended to be PCA exceptions typically include language that limits the activities the military may perform. For example, a provision that authorizes the military to render assistance in response to threats or acts of terrorism but prohibits the military from directly participating in a search, seizure, arrest, or other similar activity likely is not a PCA exception.<sup>129</sup> The PPAA contains no such limiting language, but rather broadly authorizes, and indeed requires, the military to provide its services when the director of the Secret Service requests them. Therefore, it appears that the PPAA is a PCA exception.

It should be noted, however, that a court could rule otherwise, and that the legislative history of the PPAA provides no guidance for interpreting this issue.<sup>130</sup> The mandate that executive departments and agencies assist the Secret Service at the director’s request existed prior to the enactment of the PPAA,<sup>131</sup> and the PPAA did not alter this requirement. Rather, the purpose of the PPAA was to place limits and conditions on the expenditure of funds used for protection.<sup>132</sup> Thus, the lack of a clear congressional intent that the PPAA constitutes a PCA exception (or continues an existing PCA exception) may indicate that the PPAA does not authorize military activity the PCA prohibits.

*b. September 18, 2001, Joint Resolution Authorizing Force*

In the wake of the attacks of September 11, 2001, Congress passed a joint resolution that “authorized [the President] to use all necessary and appropriate force against those nations, organizations, or

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- (1). (3) Former Presidents and their spouses [under most circumstances]. (4) Children of a former President [for a certain time period]. (5) Visiting heads of foreign states or foreign governments. (6) Other distinguished foreign visitors to the United States and official representatives of the United States performing special missions abroad when the President directs that such protection be provided. (7) Major Presidential and Vice Presidential candidates and, within 120 days of the general Presidential election, the spouses of such candidates . . . .

*Id.* § 3056(a).

128. *Id.* § 3056 note (emphasis added).

129. See *infra* Subpart III.A.3.i for discussion of “Responses to Acts or Threats of Terrorism” provision in the National Defense Authorization Act for Fiscal Year 2000.

130. See S. REP. NO. 94-1325 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5504.

131. See Pub. L. No. 90-331, 82 Stat. 170 (1968) (requiring “Federal Departments and agencies” to assist Secret Service upon request of Director of Secret Service).

132. S. REP. NO. 94-1325 (1976).



persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”<sup>133</sup> Almost all situations for which the joint resolution authorizes military action call for homeland defense; thus, military action in these situations would not be prohibited by the PCA and would not need to be conducted pursuant to a PCA exception.

It is conceivable, however, that a situation may arise involving individuals connected with the September 11th attacks or otherwise connected with Al Qaeda that does not call for homeland defense, but rather calls for only a civil response. In such a situation, the joint resolution appears to authorize the President to use the military to execute the law against those individuals.<sup>134</sup>

To date, no court has decided whether the resolution constitutes a PCA exception, and it is difficult to predict whether any court will do so. The plain meaning of the joint resolution appears to support a finding that it is a PCA exception, as it authorizes the President to use force and does not limit the type of force to be applied.<sup>135</sup> However, it could be argued that the joint resolution authorizes the President to wage war, not to use the military to execute the civil law. The joint resolution “declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.”<sup>136</sup> In addition, the Congressional Record makes clear that most members of Congress intended to authorize the President to use the military for war and did not contemplate that the joint resolution could be used to permit the military to enforce the law domestically.<sup>137</sup>

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133. Authorization for Use of Military Force, 50 U.S.C. § 1541 note (Supp. I 2001).

134. The joint resolution authorizes action against “organizations” and “persons” the President determines “authorized, committed, or aided” the September 11th attacks. *Id.* Thus, the authorization to use force against persons appears to be limited to those involved in the September 11th attacks. However, the joint resolution also authorizes force against the organizations involved in the attacks. This authorization appears to expand the category of persons against whom force may be used from only those who were involved in the attacks to all members of the organizations that carried out the attacks. Because it has been determined that Al Qaeda planned and committed the September 11th attacks, the joint resolution may authorize the President to use military force against all persons who are members of Al Qaeda, whether within or without the territory of the United States.

135. *See id.*

136. *Id.*

137. *See* 147 CONG. REC. S9422–30, S9459–60, H5638–81 (daily ed. Sept. 14, 2001).

### 3. *Pseudo Exceptions*

The following statutory provisions appear to be major exceptions as that term is defined above,<sup>138</sup> but a careful reading of the relevant laws reveals that they either are not PCA exceptions or are PCA exceptions but authorize only very limited activity that the PCA otherwise would prohibit.

#### *a. Responses to Acts or Threats of Terrorism*

In the National Defense Authorization Act for Fiscal Year 2000 (NDAA FY2000),<sup>139</sup> Congress authorized the military to provide counterterrorism assistance to civil authorities.<sup>140</sup> The relevant provision of the Act permits the use of military personnel and resources to the extent “necessary to prepare for, prevent, or respond to an act or threat of an act of terrorism.”<sup>141</sup> Although this language sounds permissive, the provision expressly forbids military personnel from participating directly “in a search, seizure, arrest, or other similar activity” and “from collect[ing] intelligence for law enforcement purposes.”<sup>142</sup> Given that these restrictions prohibit the military from performing a wide range of law enforcement activities, it is unlikely that the provision constitutes a PCA exception. Rather, the provision appears merely to provide funds for the DoD to assist civil authorities in preparing for or responding to terrorist incidents by performing acts that conform with the PCA.

It could be argued that, despite the provision’s prohibitions and what appears to be Congress’s intent to prohibit assistance that would not conform with the PCA, a strict construction of the statute would permit some, albeit very limited, activity that would otherwise be pro-

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138. *See supra* Subpart III.A.1.

139. Pub. L. No. 106-65, 113 Stat. 512 (1999) (codified as amended generally in scattered sections of 10, 42, and 50 U.S.C.).

140. 10 U.S.C. § 382 note (2000). The fact that the law was enacted as part of an appropriations bill for a specific fiscal year does not render it void at the end of that fiscal year. On the contrary, unless such laws expressly expire on some date or after some time period or are repealed, they remain in effect. The PCA itself is an example. *See supra* note 19.

141. 10 U.S.C. § 382 note (2000).

142. *Id.* These restrictions contrast with those in the chemical and biological WMD exceptions. In those exceptions, the military is prohibited from participating directly in an arrest, searching for or seizing evidence, or collecting intelligence for law enforcement purposes, unless certain preconditions are met. *Id.* § 382. Thus, the key difference is that in the chemical and biological weapons exceptions, under most circumstances, the military is prevented from searching for or seizing *evidence*, whereas in the counterterrorism exception in the NDAA FY2000, the military is prohibited from searching or seizing *generally*. The latter prohibition is far more restrictive.

hibited by the PCA. For example, the provision may authorize military personnel to establish a perimeter around an area in which it is believed a terrorist incident could occur or is occurring, even though that military activity may be considered law enforcement under at least one of the three judicially derived tests.<sup>143</sup> However, the provision does not authorize military personnel to engage in many of the activities that may be necessary to secure the perimeter. For example, if a person refused to comply with the directives given by military personnel, those personnel may need to use force to prevent that person from entering the area, and even limited use of force to compel compliance likely would constitute a seizure, an activity prohibited under the provision.<sup>144</sup>

Thus, the provision does not authorize the military to engage in the majority of activities the military would be needed and called upon to perform in responding to a terrorist incident. More generally, it appears to permit little, if any, activity that would constitute law enforcement and thus be prohibited by the PCA.

*b. Support to Certain Sporting Events*

Section 2564 of title 10, United States Code, permits the Secretary of Defense to authorize the military to assist in support of “essential security and safety” at certain sporting events when the Attorney General certifies that such assistance is necessary, and when the civil authorities responsible for providing law enforcement, security, or safety services to that sporting event request assistance.<sup>145</sup> This statute appears to permit the military to perform security activities that would constitute law enforcement under the three judicially derived tests, such as establishing a secure area either on the ground or in the air.

Similar to the prohibitions in the NDAA FY2000 provision authorizing assistance in response to terrorism, however, a provision in

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143. Under the first test, establishing a perimeter may be considered active. Under the second test, it is unclear whether establishing a perimeter would be deemed to pervade the activities of civil authorities. Under the third test, establishing a perimeter may be considered regulatory and proscriptive, but probably not compulsory, as those terms are defined in the case law. *See supra* notes 66–76 and accompanying text.

144. For a description of activities that constitute a seizure, see *supra* notes 122–23 and accompanying text.

145. 10 U.S.C. § 2564 (2000). In addition, the Secretary of Defense may authorize, under certain conditions, assistance for needs other than essential security and safety. Specifically, military assistance is permitted when no other source can meet those needs, furnishing the assistance will not adversely affect military preparedness, and the organization requesting the assistance reimburses the DoD. *Id.* § 2564(b).

10 U.S.C. § 2564 prohibits the military from performing many law enforcement activities at sporting events. That provision mandates that any assistance rendered be subject to the constraints set forth in 10 U.S.C. § 375.<sup>146</sup> The reference to 10 U.S.C. § 375 indicates a congressional intent for military support of security and safety at sporting events to exclude search, seizure, arrest, or similar activities. As discussed in reference to the NDAA FY2000 provision,<sup>147</sup> these prohibitions preclude the military from performing many of the tasks that would be necessary to support essential security and safety needs.<sup>148</sup> As such, this provision appears to permit little, if any, activity that would constitute law enforcement and be prohibited by the PCA.

#### 4. *Narrow Exceptions*

Congress also has authorized the military to engage in law enforcement for the following specific purposes: protection of Yellowstone, Sequoia, and Yosemite National Parks;<sup>149</sup> prevention of the destruction of the timber of the United States in Florida;<sup>150</sup> assistance in the case of certain crimes against members of Congress, the Supreme Court, and the Cabinet;<sup>151</sup> assistance in the case of certain crimes against the President, presidential staff, Vice President, vice presidential staff, and whoever is immediately next in the line of succession to the presidency;<sup>152</sup> assistance in the case of crimes against foreign officials, official guests, and other internationally protected persons;<sup>153</sup> enforcement of the Fishery Conservation and Management Act;<sup>154</sup> support of the neutrality laws;<sup>155</sup> execution of quarantines and

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146. *Id.* § 2564(f). As discussed earlier, section 375 directs the Secretary of Defense to promulgate regulations prohibiting direct participation “by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.” *Id.* § 375. No such regulations currently exist, but DoDD 5525.5 (1986) (reissued as amended 1989) effectively complies with 10 U.S.C. § 375. See *supra* note 24–25 and accompanying text.

147. See *supra* Subpart III.A.3.i.

148. For example, military personnel could not be used to staff checkpoints or metal detectors, because this activity would entail conducting searches. PCA restrictions, to which 10 U.S.C. § 2564 does not provide an exception, are the likely reason the National Guard, not the title 10 military, is used to supplement security at events such as the Olympic Games.

149. 16 U.S.C. §§ 23, 78 (2000).

150. *Id.* § 593.

151. 18 U.S.C. § 351 (2000).

152. *Id.* § 1751.

153. *Id.* §§ 112, 1116.

154. 16 U.S.C. § 1861 (2000).

155. 22 U.S.C. §§ 408, 461–462 (2000).

other restraints of state health laws on vessels arriving in, or bound to, port;<sup>156</sup> support of certain customs laws;<sup>157</sup> removal of persons unlawfully present on Indian lands;<sup>158</sup> execution of warrants for enforcement of civil rights laws;<sup>159</sup> removal of unlawful enclosures from public lands;<sup>160</sup> protection of the rights of a discoverer of a guano island;<sup>161</sup> and support of territorial governors in civil disorders.<sup>162</sup>

These narrow exceptions have little effect. Most apply only in very limited circumstances, and some, such as protecting the rights of a discoverer of a guano island, seem, at best, antiquated.

### B. *Non-Statutory Exceptions to the PCA*

Unlike the statutory exceptions, which are explicitly, albeit sporadically, contained in the U.S. Code, non-statutory PCA exceptions derive from common law or are inferred from the Constitution. Consequently, they are not clearly set forth by any authoritative source. This results in two levels of uncertainty. First, precisely what non-statutory exceptions exist is unclear, because some of the exceptions that are claimed to exist have no legal basis. Second, the boundaries of the non-statutory exceptions that do exist are unclear. As a result, it is difficult to discern what activities these exceptions permit in what situations.

#### 1. *The Military Purpose Doctrine*

The military purpose doctrine, which developed within the common law, provides an exception to the PCA if the military activity that constitutes civil law enforcement is part of or incidental to furthering a legitimate military purpose.<sup>163</sup> These preconditions raise two ques-

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156. 42 U.S.C. § 97 (2000).

157. 50 U.S.C. § 220 (2000).

158. 25 U.S.C. § 180 (2000).

159. 42 U.S.C. § 1989 (2000).

160. 43 U.S.C. § 1065 (2000).

161. 48 U.S.C. § 1418 (2000).

162. *Id.* §§ 1422, 1591. Most of the exceptions cited in this subpart are listed in DoDD 5525.5, *supra* note 23, § E4.1.2.5, and in ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION, II. TOWARD A NATIONAL STRATEGY FOR COMBATING TERRORISM app. R-1-1 (2000), <http://www.rand.org/nsrd/terrpainel/terror2.pdf>.

163. DoDD 5525.5 describes the military purpose doctrine as permitting activities: [T]hat are taken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities. This provision must be used with caution, and does not include actions taken for the primary purpose of aiding civilian law enforcement officials or otherwise serving as a subterfuge to avoid the restrictions of [the PCA].

tions. First, what is a legitimate military purpose? Second, what activities will be considered part of or incidental to furthering the military purpose?

DoDD 5525.5 provides an answer to the first question by listing five specific military purposes that permit incidental enforcement of the civil law: investigating violations of the Uniform Code of Military Justice (UCMJ); investigating violations of other rules and regulations that are likely to lead to military administrative proceedings; maintaining law and order on a military installation; protecting classified military information or equipment; and protecting DoD personnel, equipment, and official guests.<sup>164</sup>

Few courts have decided what constitutes a legitimate military purpose. The courts that have considered the question seem to accord with the DoDD, finding the following to be legitimate military purposes: investigation of drug possession and distribution by military personnel (which are UCMJ violations),<sup>165</sup> protection and recovery of stolen military equipment,<sup>166</sup> protection of persons on military bases,<sup>167</sup> and on-base enforcement of the civil law.<sup>168</sup> In addition, some courts have cited approvingly the DoDD for the validity of the military purpose doctrine and for what constitutes a legitimate military purpose.<sup>169</sup>

DoDD 5525.5 also provides guidance on the second question—what civil law enforcement activities would be considered incidental and thus covered by the military purpose doctrine—which the courts have adopted. Military personnel will be given considerable latitude so long as the primary purpose of the civil law enforcement activity was to further a military purpose.<sup>170</sup> For example, courts have permit-

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DoDD 5525.5 *supra* note 23, § E4.1.2.1.

164. *Id.* § E4.1.2.1.

165. *E.g.*, *United States v. Hitchcock*, 286 F.3d 1064, 1070 (9th Cir. 2002), *amended on other grounds* by 298 F.3d 1021 (9th Cir. 2002); *Applewhite v. United States Air Force*, 995 F.2d 997, 1001 (10th Cir. 1993).

166. *E.g.*, *United States v. Chon*, 210 F.3d 990, 994 (9th Cir. 2000).

167. *E.g.*, *Harker v. State*, 663 P.2d 932, 937 (Alaska 1983); *Municipality of Anchorage v. King*, 754 P.2d 283, 286 (Alaska Ct. App. 1988).

168. *E.g.*, *United States v. Banks*, 539 F.2d 14, 16 (9th Cir. 1976).

169. *See, e.g.*, *Hitchcock*, 286 F.3d at 1070 (citing portion of DoDD 5525.5 stating that UCMJ investigations are legitimate military purpose); *Chon*, 210 F.3d at 994 (citing portion of DoDD 5525.5 stating that protection of military equipment is legitimate military purpose).

170. *See* DoDD 5525.5, *supra* note 23, § E4.1.2.1; *see also Hitchcock*, 286 F.3d at 1070 (holding that in investigation of on-base drug sales, agents from U.S. Army Criminal Investigative Division and Naval Criminal Investigative Service were permitted to assist Drug Enforcement Administration agent in interviewing civilian suspect, conducting surveillance, and searching civilian suspect's home); *Applewhite*,

ted the interrogation, arrest, search, surveillance, and partial strip search of civilians under the military purpose doctrine.<sup>171</sup> These cases provide helpful, but not conclusive, guidance regarding what military activities fall within the military purpose doctrine, because in future cases, courts may limit those holdings to the particular facts and situations involved. Moreover, the cases typically do not provide a general guideline to evaluate whether military enforcement of the civil law should be considered incidental to the military purpose being furthered. An exception is *Applewhite v. United States Air Force*, wherein the court inquired whether the military activity was reasonable under the circumstances, thereby subjecting the military purpose doctrine to a reasonableness standard.<sup>172</sup>

It could be argued that the military purpose doctrine is not an exception to the PCA, but rather holds that activity undertaken for a military purpose is permissible because such activity can never constitute enforcement of the civil law and thus cannot be prohibited by the PCA. This argument disregards the possibility that the law enforcement activity at issue may be severable from, although closely related to, the activity that furthers the military purpose. For example, if an airman discovers that a civilian attempting to drive onto an Air Force installation is intoxicated, stopping the civilian from entering the base would fulfill the airman's military purpose of protecting on-base personnel.<sup>173</sup> Arresting the civilian for violations of the civil law and turning the civilian over to civil authorities for prosecution are incidental to the airman's military purpose, but do not necessarily further

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995 F.2d at 998, 1001 (holding that Air Force personnel who conducted undercover "sting" operation in off-base apartment as part of effort to curtail illegal on-base drug activity by enlisted personnel were permitted to arrest, transport back to base, detain, and partially strip search civilian whose husband, airman, was also arrested); *Chon*, 210 F.3d at 992, 994 (holding that officers with Naval Criminal Investigative Service, working with civilian law enforcement officers in investigating theft of military equipment, were permitted to interview civilian witnesses, interrogate civilian suspects, conduct photographic line-ups, and search civilian residences); *King*, 754 P.2d at 284–86 (holding that to protect people on-base, Air Force Special Police Officer, who stopped defendant for routine identification check at base entrance, was permitted to administer field sobriety test upon noticing symptoms of intoxication, to arrest defendant when he failed test, and to transport defendant to police department and later to magistrate). *But see* *Taylor v. State*, 645 P.2d 522, 525 (Okla. Crim. App. 1982) (finding that military police officer, in drug investigation of illegal activity by military personnel and civilians that was conducted jointly with civil law enforcement, violated PCA by participating in undercover drug purchase, pulling gun during arrest, actively participating in searching defendant's home, and delivering seized drugs to Oklahoma State Bureau of Investigation, where he filled out submittal forms).

171. *See supra* note 170 and cases cited therein.

172. 995 F.2d at 1001.

173. *See King*, 754 P.2d at 286.

it. Moreover, it is likely that arresting the civilian and turning him or her over to civil authorities would constitute law enforcement under all three of the judicially derived tests. If the military purpose doctrine is not a PCA exception, then the activity would be prohibited. Thus, it appears that the military purpose doctrine is appropriately viewed as a PCA exception.

## 2. *Martial Law*

Martial law may be broadly defined as “the carrying on of government in domestic territory by military agencies, *in whole or in part* . . . .”<sup>174</sup> Although the legal basis of martial law is uncertain,<sup>175</sup> and the “term ‘martial law’ carries no precise meaning,”<sup>176</sup> Supreme Court opinions and other federal authorities have acknowledged its existence and defined its general parameters.<sup>177</sup> These sources reveal that martial law is based on and governed by necessity: “Necessity gives rise to its creation; necessity justifies its exercise; and necessity limits its duration.”<sup>178</sup>

Martial law is imposed when civil authority, in whole or in part, “has become suspended, of itself, by the force of circumstances, and that by the same force of circumstances the military power has had devolved upon it, without having authoritatively assumed, the supreme control of affairs, in the care of the public safety and conserva-

174. FREDERICK BERNAYS WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* 10 (1940).

175. The term “martial law” is not in the U.S. Constitution. The President’s power to impose martial law appears to originate from his duties, either those explicitly charged to him by the Constitution or those that necessarily emanate from the position of President. CHARLES FAIRMAN, *THE LAW OF MARTIAL* RULE 84 (1930). The following passage by President Abraham Lincoln illustrates this position:

My oath to preserve the Constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which the Constitution was the organic law. Was it possible to lose the nation, and yet preserve the Constitution? . . . I felt that measures otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation.

Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67, 89 (2000) (quoting Letter from Abraham Lincoln to A. Hodges (April 4, 1864), in VII COLLECTED WORKS 281 (R. Basler ed., 1953–1955)).

176. *Duncan v. Kahanamoku*, 327 U.S. 304, 315 (1946).

177. See, e.g., *id.* at 324; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866); *Luther v. Borden*, 48 U.S. (7 How.) 1, 45 (1849); 48 U.S.C. § 1422 (2000); *id.* § 1591; 32 C.F.R. § 501.4 (2005); *Martial Law*, 8 Op. Att’y Gen. 365, 374 (1857) [hereinafter *Martial Law*].

178. 32 C.F.R. § 501.4 (2005).



tion.”<sup>179</sup> A threatened or predicted need for martial law is not sufficient; “[t]he necessity must be actual and present.”<sup>180</sup>

Military authority under martial law stands in contrast to, and greatly exceeds, military authority pursuant to other PCA exceptions. Under the latter, the military may execute civil law; under martial law, the military may replace civil law, if the need arises.<sup>181</sup> However, military authority under martial law has limits. The military may do those acts—and only those acts—that “are reasonably necessary for the purpose of restoring and maintaining public order.”<sup>182</sup> Following the rule of necessity, martial law must end when the need for it no longer exists.<sup>183</sup>

Martial law is thus a powerful tool once imposed; however, its precondition—that circumstances cause a suspension of civil authority—ensures that it rarely is used. Historically, martial law has occurred almost exclusively in times of war, rebellion, or insurrection.<sup>184</sup>

179. Martial Law, *supra* note 177, at 374.

180. *Milligan*, 71 U.S. (4 Wall.) at 127; *see also* WIENER, *supra* note 174, at 16 (stating “[t]hat necessity is no formal, artificial, legalistic concept but an actual and factual one: it is the necessity of taking action to safeguard the state against insurrection, riot, disorder, or public calamity”).

181. *E.g.*, *Duncan*, 327 U.S. at 309 (noting that military authorities in Hawaii, acting pursuant to martial law “could and did, by simply promulgating orders, govern the day to day activities of civilians who lived, worked, or were merely passing through there”); 53A AM. JUR. 2D, *Military and Civil Defense* § 437 (1996) (noting that “[m]artial law, in the comprehensive sense of the term, is that which is promulgated and administered by and through military authorities and agencies . . . [M]artial law supersedes all civil authority during the period in which it is in operation.”) (footnotes omitted); Martial Law, *supra* note 177, at 374 (noting that “according to every definition of martial law, it suspends, for the time being, all the laws of the land, and substitutes in their place no law, that is, the mere will of the military commander”).

182. 53A AM. JUR. 2D, *Military and Civil Defense* § 441 (1996); *see also, e.g.*, *Duncan*, 327 U.S. at 335 (Stone, C. J., concurring) (noting that “martial law is the exercise of the power which resides in the Executive Branch of the Government to preserve order and insure the public safety in times of emergency . . . . The exercise of the power may not extend beyond what is required by the exigency which calls it forth.”) (citation omitted); *Luther*, 48 U.S. (7 How.) at 46 (noting “[n]o more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury willfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable.”); 53A AM. JUR. 2D, *Military and Civil Defense* § 442 (1996) (noting that “the power of the military under martial law . . . is limited by the reasonable necessities of the occasion”).

183. *See, e.g.*, *Milligan*, 71 U.S. (4 Wall.) at 127 (commenting that military “is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration . . .”).

184. *See generally* *Duncan*, 327 U.S. 304 (occurring in Hawaii during World War II); *Milligan*, 71 U.S. (4 Wall.) 2 (occurring during Civil War); *Luther*, 48 U.S. (7 How.) 1 (occurring in response to attempt to overthrow government of Rhode Island by military force).

It is conceivable that the precondition of suspended civil authority could permit martial law in situations short of war, rebellion, or insurrection.<sup>185</sup> However, it almost certainly renders martial law inapplicable to more limited and localized exigencies that nonetheless exceed the capabilities of civil authorities, if the local civil authorities are still functioning.

There exists some uncertainty regarding who possesses the authority to impose martial law. Section 501.4 of title 32, Code of Federal Regulations, provides that “the decision to impose martial law may be made by the local commander on the spot, if the circumstances demand immediate action, and time and available communications facilities do not permit obtaining prior approval from higher authority.”<sup>186</sup> Similarly, some scholars claim that military commanders are authorized to impose martial law, should the need exist.<sup>187</sup> However, Supreme Court opinions on martial law have only addressed its imposition by the chief executive (the President, or a state or territorial governor) or the legislature.<sup>188</sup> In addition, federal statutes authorizing the imposition of martial law in the Virgin Islands and Guam grant the right solely to the respective governor of the territory.<sup>189</sup>

### 3. *Constitution-Based Exceptions*

The text of the PCA allows for exceptions “expressly authorized by the Constitution.”<sup>190</sup> It has been argued that this “is a meaningless proviso since the Constitution does not *expressly* authorize such a use of troops.”<sup>191</sup> It has also been argued that the clause is meaningless because, regardless of whether the PCA provides for express or implied Constitution-based exceptions, no statute can restrict the consti-

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185. *But see Milligan*, 71 U.S. (4 Wall.) at 127 (noting that “[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.”).

186. 32 C.F.R. § 501.4 (2005).

187. *E.g.*, WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 460 (1914).

188. *See Duncan*, 327 U.S. at 307–08 (noting that congressional statute authorized Hawaii Territorial Governor to impose martial law under specific conditions); *Luther*, 48 U.S. (7 How.) at 37, 45 (noting that martial law was imposed by act of charter government); *Sterling v. Constantin*, 287 U.S. 378, 387 (1932) (noting that Governor had imposed martial law).

189. 48 U.S.C. § 1422 (2000) (applying to Guam); *id.* § 1591 (applying to Virgin Islands).

190. 18 U.S.C. § 1385 (2000).

191. Note, *Honored in the Breach: Presidential Authority to Execute the Laws with Military Force*, 83 *YALE L.J.* 130, 143 (1973) (emphasis added).

tutional power of the President.<sup>192</sup> These contrasting views capture a fundamental question: What constitutional power does the President possess to employ the military domestically to execute the civil law?

*a. DoD Interpretation of Constitution-Based Exceptions*

According to a DoDD and a C.F.R. provision, the Constitution authorizes two PCA exceptions that permit the military to act: (1) under an emergency authority, and (2) to protect federal property and functions.<sup>193</sup> The emergency authority would permit military action when “sudden and unexpected civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that local authorities are unable to control the situations.”<sup>194</sup> In such circumstances, the military may act “to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order.”<sup>195</sup> The second exception delineated in the C.F.R. provision and the DoDD permits the military to act “to protect Federal property and . . . functions when the need for protection exists and duly constituted local authorities are unable or decline to provide adequate protection.”<sup>196</sup>

Whether the DoDD and the regulation accurately describe Constitution-based PCA exceptions is debatable. The DoDD claims that the listed exceptions derive from the “inherent right of the U.S. Government, a sovereign national entity under the U.S. Constitution, to ensure the preservation of public order and to carry out governmental operations within its territorial limits.”<sup>197</sup> The C.F.R. provision, which was promulgated by the DoD, makes the same claim using sub-

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192. *E.g.*, DOYLE, *supra* note 17, at 18 & n.44 (citing G. NORMAN LIEBER, *THE USE OF THE ARMY IN AID OF THE CIVIL POWER*, 14-5 (1898); Walter E. Lorence, *The Constitutionality of the Posse Comitatus Act*, 8 U. KAN. CITY L. REV. 164, 185-86 (1940)).

193. 32 C.F.R. § 215.4(c)(1) (2005); DoDD 5525.5, *supra* note 23, § E4.1.2.3.

194. 32 C.F.R. § 215.4(c)(1)(i); *see also* DoDD 5525.5, *supra* note 23, § E4.1.2.3.1.

195. 32 C.F.R. § 215.4(c)(1)(i); DoDD 5525.5, *supra* note 23, § E4.1.2.3.1. Although the regulation covers “wanton destruction of property,” it would appear that “mass destruction of property” is the more appropriate phrase. When considering the legality of the military’s response to a situation, the magnitude of property destruction is more relevant than whether the destruction is wanton, which is determined by the actor’s state of mind. Were it otherwise, the military would be permitted to execute the civil law to prevent the wanton destruction of small amounts of property but not to prevent the “unwanton” destruction of mass amounts of property. Consequently, for the remainder of this Article, reference is made to “mass destruction of property” as opposed to “wanton destruction of property.”

196. 32 C.F.R. § 215.4(c)(1)(ii) (2005); DoDD 5525.5, *supra* note 23, § E4.1.2.3.2.

197. DoDD 5525.5, *supra* note 23, § E4.1.2.3.

stantially similar language.<sup>198</sup> The U.S. government almost certainly has the inherent right to use the military to ensure the preservation of public order and to carry out governmental operations, but it does not follow that the Constitution vests that right in the President alone.<sup>199</sup> Thus, the question remains: What constitutional power does the President have to employ the military domestically to execute the civil law?

*b. Justice Jackson's Analytic Framework for Discerning Presidential Authority*

Justice Jackson's oft-cited concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* provides a means for answering this question.<sup>200</sup> After noting that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress,"<sup>201</sup> Justice Jackson described three categories of presidential authority.<sup>202</sup>

First, when the President acts pursuant to either express or implied congressional authorization, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."<sup>203</sup> In this circumstance, the President personifies federal sovereignty:<sup>204</sup> "If his act is held unconstitutional . . . it usually means that the Federal Government as an undivided whole lacks power."<sup>205</sup>

198. 32 C.F.R. § 215.4(c)(1) (2005) ("The constitutional exceptions are two in number and are based upon the inherent legal right of the U.S. Government—a sovereign national entity under the Federal Constitution—to insure the preservation of public order and the carrying out of governmental operations within its territorial limits, by force if necessary.").

199. *See, e.g.*, U.S. CONST. art. IV, § 4 (requiring federal government to protect each state against invasion and, when state requests assistance, against "domestic Violence"). The Article IV duty is imposed on the federal government generally, not specifically on Congress or the President.

200. 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring). At issue in *Youngstown Sheet & Tube Co.* was whether President Harry S. Truman acted within his constitutional authority when he seized steel mills during the Korean War to prevent a strike that he claimed would immediately jeopardize the defense and well-being of the nation. 343 U.S. at 582–83. The Court adopted Jackson's analysis in *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981).

201. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring).

202. *Id.* at 635–38. Jackson recognized that these categories, although analytically useful, are an "over-simplified grouping." *Id.* at 635. *See also Dames & Moore*, 453 U.S. at 669 ("[I]t is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.").

203. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring).

204. *Id.* at 635–36.

205. *Id.* at 636–37.

Second, “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”<sup>206</sup> In this circumstance, Congress’s failure to exercise its authority provides the President greater freedom to act based on his own constitutional powers.<sup>207</sup>

Third, when the President acts contrary to Congress’s express or implied will, his power falls to “its lowest ebb.”<sup>208</sup> In this circumstance, the President “can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.”<sup>209</sup> Thus, for the President’s action to be permissible under this third category, he must possess the exclusive power to act. The matter must be “within [the President’s] domain and beyond control by Congress.”<sup>210</sup>

Justice Jackson’s analytic framework suggests a three-part analysis for determining presidential power in a given situation. The first step is to place the situation into one of the three categories above. This requires discerning whether Congress has expressly or impliedly granted the President authority to act, remained silent on the matter, or expressly or impliedly denied the President authority to act. The second step is to assess the respective constitutional powers of the President and Congress in the particular matter of governance the situation implicates. The third step is to determine whether the President may act constitutionally, which entails applying the congressional and presidential powers discerned in the second step to the category identified in the first step. If the situation falls into the first category, those powers reinforce each other. If the situation falls into the second category, the President must rely on his own powers and Congress’s powers may limit his authority. If the situation falls into the third category, the President’s action will be upheld only if the Constitution grants the President exclusive dominion over the matter.

*c. Applying Justice Jackson’s Analytic Framework*

The determinations required to assess the constitutionality of a presidential action cannot be made in the abstract. Whether Congress

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206. *Id.* at 637.

207. *Id.*

208. *Id.*

209. *Id.* at 637–38.

210. *Id.* at 640.

has authorized or denied the President's action and what powers the President and Congress possess are specific to the particular presidential action and matter of governance. Thus, whether the Constitution provides an exception to the PCA cannot be assessed generally; it can only be assessed in a specific situation.

Recall the hypothetical in Part I involving the Army assisting civil authorities in their response to a theft of high-yield explosives. It is believed that the group responsible is a terrorist organization planning to use the explosives in future terrorist attacks. The question presented is whether a Constitution-based exception exists to permit the President to employ the military to enforce a perimeter and operate roadblocks.<sup>211</sup> Attempting to answer this question requires applying Justice Jackson's analytic framework.

### *Step One: Categorizing Congressional Action*

The first step is to place the situation into one of the three categories Justice Jackson outlined: (1) Congress expressly or impliedly granted authority to the President, (2) Congress neither granted nor denied authority to the President, or (3) Congress expressly or impliedly denied authority to the President.<sup>212</sup> The hypothetical situation falls into either the first or the third category. It cannot fall into the second category because it is clear that Congress has spoken on the matter through the PCA and myriad related provisions, but it is not clear what Congress has said.

A review of Congress's action on this matter does not produce a clear answer as to which of Justice Jackson's categories applies. The PCA is the clearest express congressional denial of presidential authority regarding domestic use of the military to enforce the civil law.

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211. Determining whether a particular activity is permissible under the PCA requires proceeding through the three inquiries presented *supra* in Part II. The first inquiry is whether the situation calls for homeland defense versus only a civil response. Because it appears that this situation calls for only a civil response, the second inquiry is presented—whether the military activity would constitute law enforcement under the three judicially derived tests. Although it is unclear whether, under the circumstances, the activity would be deemed to pervade the activities of civil authorities, it likely would be considered active and certainly would be considered compulsory, regulatory, and proscriptive. Therefore, the activity would be considered law enforcement under at least two of the three tests. This presents the third inquiry—whether a PCA exception applies to permit the activity. No statutory exception applies; neither does the military purpose doctrine exception nor the martial law exception. Therefore, the only available exception would be based on the Constitution. See *infra* Part V for frameworks that aid in determining whether military activity is permissible under the PCA.

212. See *supra* notes 203–210 and accompanying text.

Although the PCA allows for congressional exceptions, Congress has not *expressly* authorized the military to enforce the law in response to the situation presented in the hypothetical. Indeed, if Congress had provided such an express exception, the issue as to whether a Constitution-based exception applies would be moot. Justice Jackson's analysis leaves open the possibility that Congress may be considered to have *impliedly* authorized the activity.<sup>213</sup> Generally, however, it seems doubtful that Congress can impliedly authorize military activities it has expressly prohibited through the PCA.

It could be argued, however, that Congress may impliedly authorize activity it has expressly denied when the implied authorization postdates the express denial. Thus, congressional action subsequent to the enactment of the PCA, and subsequent to reaffirming the PCA, may constitute implied authorization for the President's use of the military. Among these, congressional action or inaction contemporaneous to the President's use of the military may be particularly important for discerning whether Congress has impliedly authorized the activity.

***Arguments That Congress Granted the President Authority.*** The Homeland Security Act of 2002 may constitute congressional authorization for the military activity presented in the hypothetical.<sup>214</sup> Section 886 of the Act, which expounds on the Posse Comitatus Act, states, "Congress finds the following: . . . the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for . . . law enforcement functions, when . . . the *President determines* that [it] is required to fulfill the President's obligations under the Constitution to respond promptly in time of war, insurrection, *or other serious emergency*."<sup>215</sup> This provision conveys an apparent belief by Congress that the President's constitutional obligations enable him to use the military to respond to any serious emergency and that the trigger for the response is the President's belief that the Constitution requires him to do so. The provision therefore may constitute implied authorization for the President to use the military to enforce the law in emergencies such as that presented in the hypothetical.

Viewing section 886 *in toto*, however, militates against this conclusion. The section is entitled "Sense of Congress reaffirming the

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213. Congress's implicit authorization of the activity would not constitute a statutory PCA exception, because statutory PCA exceptions must expressly authorize military activity. 18 U.S.C. § 1385 (2000). Nonetheless, under Justice Jackson's framework, implied congressional authorization of military activity supports the President's constitutional power to authorize that military activity, which in turn provides the foundation for the Constitution-based exceptions.

214. Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C.).  
215. *Id.* § 886(a)(4), 6 U.S.C. § 466(a)(4) (Supp. II 2002) (emphasis added).

continued importance and applicability of the Posse Comitatus Act”<sup>216</sup> and, as already mentioned, the relevant provision begins, “Congress finds the following . . . .”<sup>217</sup> Thus, Congress does not appear to be authorizing new activity in this section, but rather reporting its belief as to the current state of the law.

Moreover, although Congress believes that the Constitution-based exceptions permit such responses, its opinions regarding what the law permits and, particularly, its opinions on matters of constitutional law, are not binding.<sup>218</sup>

Aside from section 886, it could be argued that the joint resolution passed by Congress after the attacks of September 11, 2001, expressly authorizes the President to take the action at issue in the hypothetical.<sup>219</sup> However, the joint resolution “authorized [the President] to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”<sup>220</sup> Under its broadest interpretation, the resolution authorizes action against only those persons the President determines played a role in the attacks of September 11, 2001, and against Al Qaeda generally. By requiring that the President determine that this association exists before using force, and because emergency situations are not conducive to making such determinations, rarely would the joint resolution constitute congressional authority for the President to use the military to enforce the civil law in an emergency.<sup>221</sup>

It could also be argued that Congress may impliedly grant or deny authority to the President through inaction rather than through action. As discussed earlier,<sup>222</sup> a regulation promulgated by the DoD and codified at 32 C.F.R. § 215.4(c)(1) declares that the Constitution

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216. *Id.* § 886, 6 U.S.C. § 466 (Supp. II 2002).

217. *Id.*

218. “It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Even a congressional construction of the Constitution rendered contemporaneous to the Constitution’s enactment will not be binding, though it will be accorded substantial weight. *See Ex parte Quirin*, 317 U.S. 1, 41–42 (1942).

219. 50 U.S.C. § 1541 note (Supp. I 2001).

220. *Id.*

221. The introductory hypothetical assumes that the President does not have enough information to determine whether the group is affiliated with Al Qaeda or was otherwise connected to the attacks of September 11, 2001.

222. *See supra* notes 193–196 and accompanying text.



permits the military to execute the law in certain emergencies.<sup>223</sup> The DoD, in contrast to Congress, cannot grant power to the President, but, the argument goes, by not passing legislation to supercede the regulation, Congress may have implicitly endorsed it. This argument is flawed, for if regulations issued by executive agencies could be considered grants of authority to the President, then the Executive Branch would be able to expand its own authority merely due to congressional inaction. In addition, it places on Congress a burden to be ever-vigilant of executive branch regulations that attempt to improperly expand the executive branch's authority, and to expend time and resources overriding them.

***Arguments That Congress Denied the President Authority.***

Congress has also enacted legislation that impliedly denies the President authority to act in the situation posed by the hypothetical. The section of the NDAA FY2000 that covers responses to acts or threats of terrorism prohibits the military from performing most law enforcement activities,<sup>224</sup> indicating a congressional intent that domestic responses to terrorism are to be handled by civilian authorities, not the military. Specifically, as discussed earlier, the NDAA FY2000 states that “[i]n providing assistance under this section, a member of the Army, Navy, Air Force, or Marine Corps may not, unless otherwise authorized by law . . . directly participate in a search, seizure, arrest, or other similar activity.”<sup>225</sup> Thus, the section expressly prohibits the military from conducting a seizure, which may be necessary in enforcing a perimeter or roadblocks. This invites the conclusion that Congress, through the NDAA FY2000, has prohibited activity the military would conduct in the hypothetical.

A critical phrase in the NDAA FY2000 provision, however, is “under this section.”<sup>226</sup> The section appropriates funds for the military to provide non-law enforcement counterterrorism assistance to civilian authorities. Thus, that part of the NDAA FY2000 specifies that

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223. 32 C.F.R. § 215.4(c)(1) (2005). According to the regulation, the military may execute the law when sudden and unexpected civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that local authorities are unable to control the situations. *Id.* § 215.4(c)(1)(i). The hypothetical situation is probably not a calamity and does not appear to disrupt normal governmental functions, but both could occur if the perpetrators were to carry out an attack using the stolen explosives. Thus, the C.F.R. provision would only apply to the hypothetical situation if it could be read to authorize military activity to preempt, not merely to respond to, civil disturbances, disasters, or calamities.

224. *See supra* Subpart III.A.3.i.

225. 10 U.S.C. § 382 note (2000).

226. *Id.*

the funds provided under that section cannot be used for military activity that constitutes law enforcement in providing counterterrorism assistance to civil authorities.<sup>227</sup> The President could argue that the NDAA FY2000 provision does not generally prohibit him from employing the military to perform activities that constitute law enforcement in response to acts of terrorism, but rather, prohibits him only from paying for such activities out of the account established by the NDAA FY2000 provision.

More generally, though, Congress's passage of statutes that expressly authorize military enforcement of the civil law supports a conclusion that Congress has not impliedly authorized the President to act in such emergencies. These exceptions suggest that when Congress intends to authorize the President to use the military to execute the law, it expressly provides that authorization. That Congress does not provide such authorization in a particular matter implies that it denies that authority.<sup>228</sup> It is therefore doubtful that Congress has impliedly permitted or will permit military execution of the civil law.

***Summary of the Arguments.*** This discourse reveals that it is unclear whether Congress has granted or denied the President authority to employ the military to execute the law in response to the situation presented in the hypothetical (or, more importantly, in any emergency not covered by a PCA exception). As a result, it is impossible to classify the hypothetical situation as falling definitively within either the first or the third of Jackson's categories. This is clearly problematic insofar as classifying the situation is essential to determining, if not itself determinative of, whether the President may employ the military to enforce the law.<sup>229</sup>

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227. *Id.*

228. See *Youngstown Sheet & Tube Co. v. Sawyer*, in which Justice Jackson found that, because Congress covered seizure of private property with three separate statutory policies, none of which aligned with the President's seizure of steel mills, Congress had impliedly denied the President authority for his action. 343 U.S. 579, 639 (1952) (Jackson, J., concurring).

229. If the situation falls into the first category—Congress either expressly or impliedly authorized the activity—then it would be permissible. Under the first category, the federal government acts as an undivided whole, and the President's action will be sustained by the courts unless the federal government lacks the power to act. See *supra* text accompanying notes 203–205. The federal government certainly has the power to authorize the military to execute the civil law; therefore, if the situation falls into the first category, military action in response to it would be permissible. If, however, the situation falls into the third category—that is, Congress has expressly or impliedly denied the President authority to act—the activity is sustainable only if it is within the President's exclusive domain and beyond the control of Congress. See *supra* text accompanying notes 208–210.

*Step Two: Assessing Constitutional Powers*

The second step in Justice Jackson's analysis is to assess the constitutional powers of the President and Congress in the matter at issue.

**General Powers over the Military.** The Constitution vests power over domestic use of the military in both Congress and the President. Whether Congress or the President has supremacy over the use of the military in a specific matter, however, is often the subject of fervent debate.<sup>230</sup>

The Constitution grants to Congress the power to "declare War,"<sup>231</sup> to "make Rules concerning Captures on Land and Water,"<sup>232</sup> to "raise and support Armies,"<sup>233</sup> to "provide and maintain a Navy,"<sup>234</sup> to "make Rules for the Government and Regulation of the land and naval Forces,"<sup>235</sup> to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,"<sup>236</sup> to govern the militia that is called into federal service,<sup>237</sup> and to make all laws that are necessary and proper for executing these and Congress's other constitutional powers.<sup>238</sup>

The Constitution grants to the President the executive power,<sup>239</sup> the role of commander-in-chief,<sup>240</sup> and the duty to "take Care that the Laws be faithfully executed."<sup>241</sup> In addition, the Constitution requires the President to take an oath to "preserve, protect, and defend the Constitution of the United States."<sup>242</sup>

The precise manner in which these various powers and responsibilities align or conflict is unresolved. However, the power most central to the ability to use the military to enforce the domestic law is that

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230. See, e.g., David B. Sentelle, *National Security Law: More Questions than Answers*, 31 FLA. ST. U. L. REV. 1, 612 (2003); Richard Hartzman, *Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress's Power to Restrict the President's Authority to Place United States Armed Forces Under Foreign Commanders in United Nations Peace Operations*, 162 MIL. L. REV. 50 (1999); Mark T. Uyeda, Note, *Presidential Prerogative Under the Constitution to Deploy U.S. Military Forces in Low-Intensity Conflict*, 44 DUKE L.J. 777 (1995).

231. U.S. CONST. art. I, § 8, cl. 11.

232. *Id.*

233. *Id.* cl. 12.

234. *Id.* cl. 13.

235. *Id.* cl. 14.

236. *Id.* cl. 15.

237. *Id.* cl. 16.

238. *Id.* cl. 18.

239. U.S. CONST. art. II, § 1, cl. 1.

240. *Id.* § 2, cl. 1.

241. *Id.* § 3.

242. *Id.* § 1, cl. 8.

of Congress to “provide for calling forth the Militia to execute the Laws of the Union.”<sup>243</sup> Justice Jackson wrote:

Such a limitation on the [commander-in-chief’s] power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution’s policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.<sup>244</sup>

Thus, it would appear that Congress has supremacy over the President for the domestic use of the military to execute the civil law.

***Emergency Powers.*** It could be argued that the President’s constitutional powers grant him inherent authority to use the military to respond to emergencies, even in contexts apparently encompassed by an explicit congressional power.<sup>245</sup> However, Justice Jackson judged such an argument unfavorably:

The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so . . . .<sup>246</sup>

Other Supreme Court opinions imply that the President does have the inherent power to use the military to execute the law domestically in response to an emergency and that this power belongs to the President alone. For example, in sustaining the President’s calling forth of the militia, in *Martin v. Mott* the Court stated, “[w]e are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon

243. U.S. CONST. art. I, § 8, cl. 15. Congress has exercised this power through 10 U.S.C. § 12406 (2000), which authorizes the President to call the National Guard into federal service in certain situations, *see supra* note 32 and accompanying text, and through the various statutory exceptions to the PCA. *See generally supra* Subpart III.A.

244. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring).

245. President Lincoln made such an argument. *See supra* note 175.

246. *Youngstown Sheet & Tube Co.*, 343 U.S. at 649–50 (Jackson, J., concurring) (footnotes omitted).

all other persons. . . . The power itself is to be exercised upon sudden emergencies . . . .”<sup>247</sup> Similarly, in *Duncan v. Kahanamoku*, Chief Justice Stone stated that a power “resides in the executive branch of the Government to preserve order and insure the public safety in times of emergency.”<sup>248</sup> In addition, in *In re Neagle*, the Court concluded that the President’s powers extend beyond the enforcement of Acts of Congress and include “rights, duties and obligations growing out of the Constitution itself.”<sup>249</sup>

None of these cases, however, resolves the question of whether the President has exclusive power to use the military to execute the civil law in all emergencies. In *Mott*, the President called forth the militia during the War of 1812 pursuant to express congressional authorization, specifically, the Act of 1795.<sup>250</sup> Moreover, in *Mott*, the Court opined that the President’s power to call forth the militia “is, in its terms, a limited power, confined to cases” set forth in the act of Congress.<sup>251</sup> Actions in response to emergencies such as the one presented by the hypothetical that opened this Article are not in the context of a traditional war and are not pursuant to an express congressional authorization. *Duncan* specifically referred to the Executive’s power to impose martial law,<sup>252</sup> which is the subject of its own PCA exception.<sup>253</sup> Furthermore, the military was used pursuant to express congressional authorization,<sup>254</sup> eliminating the question of whether a constitutional exception applies. In *Neagle*, a marshal, not the military, was dispatched to execute the law.<sup>255</sup> Thus, the PCA did not apply. In addition, presidential authority in *Neagle* was exercised in the face of congressional silence, not prohibition.<sup>256</sup>

Additional cases could be cited in which the Court expounds on presidential authority, but they also can be distinguished from the question of whether the President has exclusive authority to permit the military to execute the civil law in response to a domestic emergency. This issue remains unresolved to date, and there is no reason to believe a resolution is forthcoming.

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247. 25 U.S. (12 Wheat.) 19, 30 (1827).

248. 327 U.S. 304, 335 (1946) (Stone, C.J., concurring) (noting that martial law is example of exercise of such power).

249. See 135 U.S. 1, 64–69 (1890).

250. 25 U.S. (12 Wheat.) at 29.

251. *Id.*

252. 327 U.S. at 335 (Stone, C.J., concurring).

253. See *supra* Subpart III.B.2.

254. *Duncan*, 327 U.S. at 335 (Stone, C.J., concurring).

255. Specifically, a marshal was dispatched to protect a federal judge who had been threatened. *In re Neagle*, 135 U.S. 1, 52 (1890).

256. *Id.* at 65–68.

*Step Three: Determining the Constitutionality of Presidential Action*

The third step in Justice Jackson's analysis is to determine whether the President acted constitutionally, which entails applying the congressional and presidential powers discerned in the second step to the category of congressional action identified in the first step. The foregoing analysis reveals that it is unclear whether the situation presented in the hypothetical falls into the first or third category. If the situation falls into the first category, the President's action is almost certainly permissible under the PCA.<sup>257</sup> If the situation falls into the third category, the President's action is permitted only if the situation falls within the President's exclusive constitutional power.<sup>258</sup> Because it is unclear whether the hypothetical situation (and, likely, any emergency situation not covered by an express statutory PCA exception) falls into the first or third category, and because it is unclear whether the President has exclusive constitutional power to use the military to execute the civil law in response to such situations, as required by the third category, it cannot be determined whether the Constitution provides the President with a PCA exception to use the military for such activity.

*d. Difficulty in Discerning Presidential Authority*

Reasonable jurists may come to opposite conclusions regarding whether Congress has authorized the President to act and, if Congress has not done so, whether the President's action is within his exclusive constitutional domain. For example, in *Padilla v. Bush*, the district court ruled that Congress had authorized the President to allow the military to detain Jose Padilla, an American citizen, as an enemy combatant.<sup>259</sup> The Second Circuit reversed, holding that Congress had not expressly authorized the President to detain Padilla, but rather had expressly denied the President authority to do so.<sup>260</sup> In addition, the majority held that the President does not possess exclusive constitutional power in this matter.<sup>261</sup> A dissenting Second Circuit judge

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257. See *supra* text accompanying notes 203–05.

258. See *supra* text accompanying notes 208–10.

259. 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002), *rev'd sub nom.* *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd on other grounds*, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004). Although *Padilla* does not address the issue of military execution of the civil law, it is a recent, useful illustration of judges coming to different conclusions about the respective constitutional powers of the President and Congress and whether Congress authorized or denied the President the authority to act in the national security arena.

260. *Padilla v. Rumsfeld*, 352 F.3d at 724.

261. *Id.* at 712–18.

found the opposite, opining that the President had the inherent authority to act as he did and that Congress had expressly authorized the President to take those actions.<sup>262</sup>

The divergent opinions in *Padilla* illustrate the uncertainty regarding whether, under what circumstances, and in what manner the President can use the military domestically. Justice Jackson may have best summarized both this uncertainty and the difficulty of resolving it:

A judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. A Hamilton may be matched against a Madison. Professor Taft is counterbalanced by Theodore Roosevelt. It even seems that President Taft cancels out Professor Taft. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.<sup>263</sup>

The effect of this uncertainty regarding executive authority on interpretations of the PCA is substantial, as it renders questionable the existence and boundaries of Constitution-based PCA exceptions.

*e. Summary*

The descriptions of the PCA rules presented in this Part and in Part II lay the foundation for the subsequent parts of this Article. These subsequent parts outline existing confusion regarding the current PCA rules, set forth frameworks for determining the legality of domestic military activity under the rules, and suggest alternatives to the rules that would better uphold their underlying tenets of preventing the military from enforcing the civil law generally but allowing the military to do so when necessary.

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262. *Id.* at 726 (Wesley, J., dissenting in part).

263. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 & n.1 (1952) (Jackson, J., concurring) (footnote incorporated into text) (citations omitted).

## IV.

CONFUSION SURROUNDING THE POSSE COMITATUS ACT  
AND ITS EXCEPTIONS

Confusion surrounding the PCA derives primarily from two factors: (1) the inherent difficulty in classifying situations as calling for either homeland defense or only a civil response, and (2) misconceptions regarding the PCA that arise from the patchwork of legal authorities governing domestic military assistance to civil authorities discussed in Parts II and III.

A. *A Fundamental Ambiguity: Homeland Defense  
or Only a Civil Response?*

The difficulty in classifying situations as calling for either homeland defense or only a civil response was introduced in Part II. This Part examines the difficulty in more depth and discusses the major consequence of that difficulty—that it is not always possible to state definitively whether an activity is permissible under the PCA.

Consider the following scenario. What seems to be a civilian aircraft is flying in a manner or in an area such that it appears to manifest hostile intent. Decision makers ranging from the President to local military commanders wish to use Air Force aircraft to intercept the threatening aircraft. If the pilot of the threatening aircraft is an agent of a hostile nation that is attempting to attack the United States, then the situation clearly calls for homeland defense. The PCA does not apply, and the Air Force can respond. If the pilot of the threatening aircraft is a civilian intending to harm specific individuals for reasons other than inflicting damage on the nation or influencing its policies, then the situation clearly calls for only a civil response, and the PCA prohibits military activity to counter the threat unless a PCA exception applies.<sup>264</sup> If the pilot is not an agent of any government, but is seeking to inflict large-scale harm for unknown reasons, then the situation does not fall conclusively at either endpoint of the spectrum bounded by traditional military attack and basic criminal activity.

Because the situation could be considered to call for homeland defense or only a civil response, and neither the law nor official definitions of “homeland defense” provide sufficient direction for classifying such situations, it is unclear whether the PCA would bar the Air Force from responding. Further increasing the difficulty of classifying

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264. The ambiguous Constitution-based exceptions are the only PCA exceptions that might permit military activity sufficient to counter the threat presented in this example.



situations as calling for either homeland defense or only a civil response is that the necessary facts for classification, such as the affiliation and intent of the individual(s) creating the situation (the pilot in this scenario), may be unknowable at the time of the incident.

In order to consider the consequences of the difficulty in classifying such a situation, the three inquiries discussed in Part II are revisited. The first inquiry is whether the situation calls for homeland defense or only a civil response. If the situation cannot be classified with certainty, as is the case in the hypothetical situation just presented, answering the first inquiry is postponed because it is assumed that the situation calls for only a civil response. The second and third inquiries are made to assess whether the PCA would prohibit the activity and, if so, whether a PCA exception would permit it nonetheless. Because military activity in response to this situation, such as intercepting the aircraft, likely would be considered law enforcement, and no PCA exception clearly would apply,<sup>265</sup> it appears that the PCA would prohibit the activity if the situation called for only a civil response. Therefore, the legality of necessary military activity in this scenario may depend on the ambiguous classification of the situation as calling for homeland defense or only a civil response.

As discussed previously, violating the PCA may require a willful contravention of its restraints.<sup>266</sup> Military activity may be permissible if those who order and engage in it hold a good-faith belief that the activity is permissible. Specifically, the activity may be legal if there exists a good-faith belief that the situation to which the activity responds calls for homeland defense. Returning to the hypothetical situation described above, if an airplane is flying in an area or in a manner such that the pilot appears to manifest a hostile intent, it is likely that those who order or engage in military activity to counter the threat would hold a good-faith belief that the situation calls for homeland defense, particularly given the events of September 11, 2001. Therefore, even though the situation does not fit neatly into either category, military activity in response to it may be permissible.

A danger exists, however, in basing the permissibility of military activity necessary to save lives or prevent mass destruction of property

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265. Section 374(b)(2)(D) of title 10, United States Code, allows for intercepting aircraft and vessels "detected outside the land area of the United States." If the flight originated domestically, this exception would not apply. It is possible that a Constitution-based exception would authorize the activity, but, given the questions surrounding these exceptions, such a conclusion would be debatable at best. *See supra* Subpart III.B.3.

266. *See supra* Subpart II.B.2.iii.

solely on such subjective beliefs. Simply put, different people are likely to hold different beliefs when presented with the same facts and uncertainties. Thus, people faced with identical situations and contemplating whether a particular military activity is permissible may arrive at opposite conclusions. Moreover, as discussed in Part II,<sup>267</sup> courts have not universally subscribed to the opinion that PCA violations require a willful contravention of the Act's constraints. Thus, it is uncertain whether this good-faith allowance would be upheld by a court ruling on a particular military action. Despite this uncertainty, military commanders operating under the current PCA rules may need to rely on a good-faith belief in some situations, including emergency situations in which immediate military action is necessary to save lives or prevent mass destruction of property.

### *B. Misconceptions Surrounding the PCA and Its Exceptions*

Beyond the fundamental ambiguity inherent to determining whether a situation calls for homeland defense or only a civil response are prevalent misconceptions regarding the PCA rules. These misconceptions have been held by civilian and military policymakers, military commanders, and legal practitioners and commentators.

#### *1. Basic Misconceptions About the PCA*

Much of the confusion surrounding the PCA can be traced to two basic misconceptions about what military activities the Act prohibits. The first misconception is that the PCA prohibits all military assistance to civil law enforcement or to civil authorities generally. As should be evident from Part II, in reality, the PCA prohibits the military only from conducting activities that constitute civil law enforcement, as determined by the three judicially derived tests. The PCA prohibits no other military activities. Individuals who hold the first basic misconception also tend to hold a second misconception—that an exception to the PCA is always necessary for the military to assist civil law enforcement or civil authorities generally. On the contrary, a PCA exception is needed only if a military activity constitutes law enforcement. No PCA exception is needed for the military to conduct activities not constituting law enforcement under the three judicially derived tests, because such activities are not prohibited by the Act.

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267. *Id.*

## 2. Additional Misconceptions

Other misconceptions about the PCA concern the scope and effect of statutes and DoD policy statements that authorize the military to act domestically. These misconceptions are set forth as separate subheadings below and are corrected in the text following the subheadings.

### *a. Misconception: All Statutes Authorizing Military Assistance to Law Enforcement Are Exceptions to the PCA*

Some statutes explicitly authorize activities that are not prohibited by the PCA and thus require no PCA exception. Examples include 10 U.S.C. §§ 124(b)(1)(A) and 124(b)(2), which allow the military to identify, communicate with, and pursue civilian aircraft and vessels;<sup>268</sup> most of the provisions within 10 U.S.C. §§ 371–374, which authorize the military to share information, equipment, and facilities with civil law enforcement, to train and advise civil law enforcement, and to maintain and operate equipment;<sup>269</sup> and the Stafford Act, which permits the military to assist civil authorities by performing disaster-relief functions.<sup>270</sup> None of these activities would constitute law enforcement under the three judicially derived tests. Thus, while these statutes are often stated to be exceptions to the PCA, they are more properly viewed as congressional confirmation that the covered military activities are permissible under the PCA.<sup>271</sup>

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268. 10 U.S.C. § 124(b) (2000). Whether the pursuit of civilian aircraft and vessels constitutes law enforcement is less clear than the other provisions listed in the paragraph accompanying this footnote. Such activity would almost certainly not be considered law enforcement under the third judicially derived test, as it is not regulatory, proscriptive, or compulsory; but it is possible, albeit unlikely, that courts would deem the activity either active or pervasive, and therefore law enforcement, under the first or second test, respectively.

269. *Id.* §§ 371–374. Some of the activities specified in 10 U.S.C. § 374 likely would constitute law enforcement. *Id.* § 374. For example, 10 U.S.C. § 374(b)(2)(D), which, as discussed in Part III, authorizes the military to direct vessels and aircraft to a designated location under certain circumstances, likely would be considered law enforcement under the three tests. Therefore, in contrast to 10 U.S.C. §§ 371–373 and most of 10 U.S.C. § 374, this provision is probably a PCA exception.

270. *See supra* Subpart II.B.2.ii.

271. In the Homeland Security Act of 2002, when discussing statutes that permit the President to use the military to enforce the law and restore public order, Congress stated that “[e]xisting laws, including . . . the [Stafford Act] grant the President broad powers that may be invoked in the event of domestic emergencies . . . and these laws specifically authorize the President to use the Armed Forces to help restore public order.” 6 U.S.C. § 466(a)(5) (Supp. II 2002). Thus, Congress appears to be laboring under the misconception that the Stafford Act constitutes a PCA exception.

The misconception that these statutes are PCA exceptions fuels an additional, related misconception: if a military activity is expressly permitted for a purpose stated in the statute, then it is not permitted for any other purpose. For example, 10 U.S.C. § 374(b)(2)(C) explicitly authorizes the military to conduct aerial reconnaissance for the purpose of assisting civil authorities in enforcing certain laws regarding controlled substances, immigration, and customs, and in a counterterrorism operation.<sup>272</sup> Under the legal principle of *expressio unius est exclusio alterius*,<sup>273</sup> one would infer that aerial reconnaissance is not permitted for other purposes. This inference would be incorrect, however, because aerial reconnaissance is unlikely to be considered law enforcement under the three judicially derived tests. Consequently, it would be permissible for any purpose, even one not specified in the statute.<sup>274</sup> This interpretation is reinforced by 10 U.S.C. § 378, which expressly provides that 10 U.S.C. §§ 371–382 should not be construed to limit the military from performing those activities it was permitted to perform before those sections were enacted. Therefore, even if an activity is conducted for a purpose other than those listed in 10 U.S.C. § 374, it is nonetheless permissible if it is not considered law enforcement under the three judicially derived tests.

*b. Misconception: The PCA Exceptions Cover All Situations for Which Military Activity Would Be Necessary*

PCA exceptions are piecemeal, with individual exceptions authorizing military action only in response to particular situations. When taken as a whole, these piecemeal exceptions do not cover all situations that might require military intervention to save human life or otherwise prevent a catastrophe.<sup>275</sup> For example, some weapons of mass destruction, such as high-yield explosives that may be equally

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272. 10 U.S.C. § 374(b)(2)(C) (2000).

273. *Expressio unius est exclusio alterius* is a principle of statutory construction providing that when one or more items of a class are expressly mentioned, unmentioned others of the same class are excluded.

274. The courts that promulgated the first and third tests—the active-passive test and the regulatory, proscriptive, or compulsory test—found aerial reconnaissance not to be law enforcement, and, thus, to be permissible under the PCA. *United States v. Red Feather*, 392 F. Supp. 916, 925 (D.S.D. 1975); *United States v. McArthur*, 419 F. Supp. 186, 193–95 & n.3 (D.N.D. 1976), *aff'd sub nom.* *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976); *see supra* notes 66–68 and 74–76 and accompanying text. Whether aerial reconnaissance would be considered law enforcement under the second test—the pervasion test—likely would depend on the particulars of the assistance being rendered, the underlying law enforcement operation, and how the court chooses to interpret “pervasion.” *See supra* notes 70–73 and accompanying text.

275. The possibility exists that one of the Constitution-based exceptions would apply, but given the persisting questions surrounding their existence and scope, a con-

deadly as certain chemical or biological weapons, are not subject to an exception. Also not subject to an exception are non-WMD terrorist events, threats of terrorism,<sup>276</sup> or other crises that do not fall within the civil disturbance exceptions,<sup>277</sup> even if such incidents exceed the capabilities or expertise of civil authorities.

*c. Misconception: All Military Civil Law Enforcement Activities Authorized by DoDDs Fall Within Exceptions to the PCA*

DoDDs cannot create exceptions to the PCA.<sup>278</sup> Therefore, any military law enforcement activity authorized by a DoDD must also be authorized by a PCA exception for it to be permissible. Currently, several DoDDs contravene the PCA. For example, DoDD 3025.12 states that the military may respond to “domestic terrorist” incidents, even though Congress has authorized the military to respond only to certain WMD events and to provide non-law enforcement assistance in response to non-WMD terrorism.<sup>279</sup>

As another example, DoDD 3025.1,<sup>280</sup> and DoDD 3025.15<sup>281</sup> by reference to DoDD 3025.1, authorize military personnel to act under an “immediate response” authority in exigent circumstances when civil authorities request assistance and the assistance is necessary to

clusion that one applies necessarily would be subject to dispute. *See supra* Subpart III.B.3.

276. The “Responses to Acts or Threats of Terrorism” provision in the NDAA FY2000 and the restrictions that render it ineffectual are discussed *supra* in Subpart III.A.3.i.

277. *See supra* Subpart III.A.1.i.

278. A DoDD is:

A DoD issuance that transmits information required by law, the President, or the Secretary of Defense that applies to all branches of the Department of Defense on the way they initiate, govern, or regulate actions. DoD Directives: Establish or describe policy, programs, and organizations; Define missions; Provide authority; Assign responsibilities; Do not prescribe one-time tasks or deadline assignments.

OFFICE OF THE SEC’Y OF DEF., DoD DIRECTIVES SYS. PROCEDURES NO. 5025.1-M, § C1.2.3 (2003), [http://www.dtic.mil/whs/directives/corres/pdf/50251m\\_030503/p50251m.pdf](http://www.dtic.mil/whs/directives/corres/pdf/50251m_030503/p50251m.pdf) (incorporating through Change 2, Feb. 2, 2004). DoDDs cannot set forth PCA exceptions, as they are not Acts of Congress, constitutional provisions, or case law, the only forms of law that may constitute exceptions to the PCA.

279. DoDD 3025.12, *supra* note 63, § 4.8. *See supra* Subpart III.A.3.i for a discussion of why the provision in the NDAA FY2000 that authorizes the military to provide counterterrorism assistance to civil authorities permits little, if any, activity the PCA prohibits.

280. DEP’T OF DEF., DIRECTIVE NO. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (1993), [http://www.dtic.mil/whs/directives/corres/pdf/d30251\\_011593/d30251p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/d30251_011593/d30251p.pdf) (governing military assistance for purposes of disaster relief) [hereinafter DoDD 3025.1].

prevent human suffering, save human lives, or mitigate substantial property damage.<sup>282</sup> The DoDDs provide guidance on the types of activities that may be conducted pursuant to this immediate response authority, some of which may constitute civil law enforcement.<sup>283</sup> Despite the fact that the DoDD authorizes these activities, no PCA exception exists to render them permissible.

Some commentators argue that a commander's immediate response authority has a solid legal foundation and derives from the common law principle of necessity.<sup>284</sup> However, most discussions of the immediate response authority merely focus on the legality of a commander to authorize disaster relief activities without first fulfilling the procedural requirements of the Stafford Act.<sup>285</sup> Minimal analysis has been devoted to whether the immediate response authority constitutes a PCA exception that authorizes the military to enforce the law. Moreover, even if the principle of necessity is interpreted to justify the immediate response authority as a PCA exception and to authorize the activities listed in the DoDD, those activities center on disaster relief and managing the consequences of an event. They do not include the type of law enforcement activities that would be performed to prevent or terminate an event.

A third example of a DoDD authorizing activity for which no PCA exception may exist generates from the uncertainty surrounding the Constitution-based exceptions. DoDD 5525.5 expressly authorizes military activity pursuant to the Constitution-based exceptions listed in 32 C.F.R. § 215.4.<sup>286</sup> If the Constitution-based exceptions do not exist, or exist but do not align with the C.F.R., then this DoDD authorizes law enforcement activities for which there is no PCA exception.

A final example is DoDD 2000.15, which sets forth the circumstances under which the military may provide support to special

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281. DEP'T OF DEF., DIRECTIVE NO. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (1997), [http://www.dtic.mil/whs/directives/corres/pdf/d302515\\_021897/d302515p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/d302515_021897/d302515p.pdf) (governing military assistance generally) [hereinafter DoDD 3025.15].

282. *Id.* § 4.7.1; DoDD 3025.1, *supra* note 280, § 4.5.1.

283. For example, DoDD 3025.1 provides that the military may engage in the following activities "resulting from any civil emergency or attack": controlling areas contaminated by radiological, chemical, or biological effects; "roadway movement control and planning"; safeguarding food, essential supplies, and materiel; and "[f]acilitating the reestablishment of civil government functions." DoDD 3025.1, *supra* note 280, § 4.5. Controlling areas and roadway movement, safeguarding food and supplies, and facilitating the reestablishment of civil government functions likely involve tasks that would constitute law enforcement under the three judicially derived tests.

284. *See, e.g.*, Winthrop, *supra* note 88, at 5–6.

285. *See supra* note 88 for a discussion of the Stafford Act.

286. *See supra* notes 193–96 and accompanying text.

events, such as the Olympic Games and the Republican and Democratic national conventions.<sup>287</sup> This DoDD explicitly considers special events to include both athletic and non-athletic events.<sup>288</sup> No statute exists, however, authorizing military support for such events. Section 2564 of title 10, United States Code, permits the military to provide support for certain sporting events, but not for special events generally. Moreover, whether it permits any law enforcement activities is unclear.<sup>289</sup>

It is conceivable that if an individual under Secret Service protection pursuant to 18 U.S.C. § 3056 attends a special event, then the PCA exception that allows the military to aid in protecting that individual may be bootstrapped to also allow the military to aid in protecting the special event.<sup>290</sup> Examples include the Republican and Democratic national conventions and presidential inaugurations. In most cases, however, the authority to assist in protecting the individual will not justify providing assistance in protecting the special event generally. For example, if the special event is spread over a wide geographic area, as the Olympics typically are, and the protected individual confines his presence to a circumscribed location, then it may be a challenge to justify the military providing security over that entire area. In addition, while the military may be able to secure the special event both before and during the protected individual's appearance, if the individual were to depart before the termination of the event, then it would be difficult to justify the military's continued presence at the event based upon its authority to protect the departed individual.

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287. DEP'T OF DEF., DIRECTIVE NO. 2000.15, SUPPORT TO SPECIAL EVENTS (1994), [http://www.dtic.mil/whs/directives/corres/pdf/d200015\\_112194/d200015p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/d200015_112194/d200015p.pdf).

288. *Id.* § 3.1. The DoDD states that the Secretary of Defense may designate non-athletic national or international events to receive support and lists the following as historic examples of such non-athletic events: "Summits, World's Fairs, and the Universal Postal Union Congress." *Id.*

289. See "Support to Certain Sporting Events," *supra* Subpart III.A.3.ii.

290. 18 U.S.C. § 3056 permits the President to direct the Secret Service to participate in the planning, coordination, and implementation of security operations at "special events of national significance" as designated by the President, and such events can be athletic or non-athletic. 18 U.S.C. § 3056(e)(1) (2000). Presidential Decision Directive 62 refers to such events as National Special Security Events (NSSEs) and designates the Secret Service as the lead federal agency for NSSE security planning and execution. United States Secret Service, National Special Security Events, <http://www.secretservice.gov/nsse.shtml> (last visited Nov. 11, 2005). Although the Presidential Protection Assistance Act, 18 U.S.C. § 3056 note, may provide a PCA exception for the DoD to assist the Secret Service in performing its duties with respect to the protection of designated individuals, *see supra* Subpart III.A.2.i, no exception exists for assisting the Secret Service in securing NSSEs generally. *See* 18 U.S.C. § 3056 note (2000).

## V.

## REMEDYING POSSE COMITATUS PROBLEMS

Previous parts of this Article have explored the difficulties associated with interpreting, and acting in accordance with, the current PCA rules. The first portion of this part offers two frameworks designed to help navigate the current PCA rules when attempting to determine whether a particular domestic military activity is permissible under them. The second portion presents and assesses two alternatives to the rules.

A. *Navigating the Current PCA Rules*

The current PCA rules present complex legal issues that may appear daunting when viewed *in toto*. They can be traversed, however, with decision frameworks composed of logically ordered questions that aid in determining whether a particular domestic military activity is permissible. Two frameworks are presented here, one for non-emergency situations and the other for emergency situations.

1. *Decision Framework for Non-Emergency Situations*

The non-emergency-situation framework (see Figure 1) is designed for analyzing the permissibility of military activity when an immediate answer is not required. This framework should be of greatest use to Judge Advocate Generals (JAGs), and general counsels of the military services and the Office of the Secretary of Defense, in rendering opinions on the permissibility of military activity before the activity is undertaken. It also should be useful to judges and attorneys analyzing *post hoc* whether concluded military activity complied with the PCA. The questions in this framework are formulated and ordered to maximize the probability of yielding a legally certain conclusion on the permissibility of military activity, without regard for the amount of time required to answer the questions.

The framework first asks whether the situation at issue fits into one of the spectrum end points of traditional military attack or basic criminal activity. If it does, the analysis is concluded—the military is permitted to respond to the former but not the latter. If the situation does not fit into one of the spectrum end points, then the analysis proceeds to the second question.<sup>291</sup>

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291. The vast majority of situations fall between the two endpoints. The United States last faced a traditional military attack on December 7, 1941. Considering the obvious military power the United States possesses, nations are unlikely to attempt a traditional military attack against it in the foreseeable future. Basic criminal activity



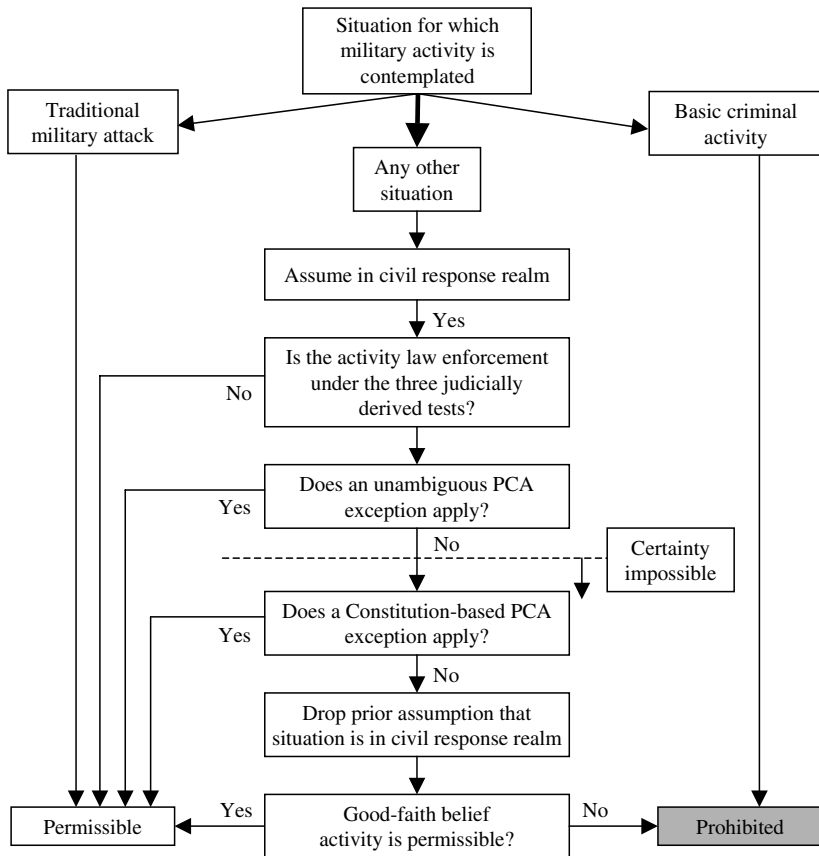


FIGURE 1. NON-EMERGENCY-SITUATION FRAMEWORK FOR ANALYZING THE LEGALITY OF MILITARY ACTIVITY UNDER THE PCA RULES

In proceeding from the first to the second inquiry, one assumes that the situation calls for only a civil response, not homeland defense. The situation may in fact fall within the homeland defense realm, but, because it does not clearly do so, maximizing the probability of reaching a legally certain conclusion requires first exploring whether the activity would be permissible if the situation falls in the civil response realm. If the activity is clearly permissible in the civil response realm, either because it does not constitute law enforcement or because an exception applies, it is unnecessary to rely on the less certain conclusion that the situation calls for homeland defense. The above assump-

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is easily handled by civil law enforcement authorities, making requests for military assistance in response to such situations exceedingly rare.

tion thus postpones having to make an uncertain determination that the situation calls for homeland defense until other avenues leading to a more conclusive decision are exhausted.

Working under the assumption that the situation falls within the civil response realm, the second question asks whether the activity would constitute law enforcement under the three judicially derived tests (i.e., whether the activity is active; pervasive; or regulatory, prescriptive, or compulsory).<sup>292</sup> Answering this question requires knowing in what jurisdiction the activity occurred or will occur, because different jurisdictions employ different tests. If knowing in which specific jurisdiction(s) the activity occurred or will occur is infeasible, it is advisable to assess whether the activity would constitute law enforcement under any of the three tests. If the activity would not constitute law enforcement under the three judicially derived tests, then it is permissible, and the analysis is concluded.

If the activity would constitute law enforcement, then the analysis proceeds to the third question, which asks whether an unambiguous PCA exception applies to the situation and permits the activity. The unambiguous exceptions, those that the law supports with certainty, are the statutory exceptions, the military purpose doctrine, and martial law. If an unambiguous exception applies, then the activity is permissible, and the analysis is concluded. If no unambiguous PCA exception applies, then the analysis proceeds to the fourth question.

Once the analysis reaches the fourth question, it is impossible to conclude with certainty that the military activity is permissible. As stated earlier, the purpose of this framework is to arrive at a legally certain conclusion; at this point, that purpose cannot be achieved. Nevertheless, the remaining questions are included to present the entire analysis for persons who must render legal opinions on domestic use of the military in non-emergency situations.

The fourth question asks whether one of the Constitution-based exceptions applies. If so, then the military activity may be permissible. As discussed in Part III, whether the Constitution-based exceptions exist, and their boundaries if they do exist, are uncertain. Consequently, relying on these ambiguous exceptions to justify the permissibility of military activity may place military personnel, and perhaps civil decision makers, in legal jeopardy.

The fifth question asks whether there exists a good-faith belief that the military activity is permissible. This last question is a combination of three sub-questions: (1) whether there exists a good-faith

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292. See *supra*, Subpart II.B.2.i.

belief that the situation calls for homeland defense; (2) whether there exists a good-faith belief that the activity does not constitute law enforcement under the three judicially derived tests; and (3) whether there exists a good-faith belief that a PCA exception applies to permit the activity. If any of the three sub-questions is answered affirmatively, then there might not be a PCA violation. As with the Constitution-based exceptions, however, it is uncertain whether a good-faith belief that an activity is permissible will preclude a PCA violation.<sup>293</sup> Consequently, relying on a good-faith belief to justify the permissibility of military activity also may place military personnel in legal jeopardy.

## 2. *Decision Framework for Emergency Situations*

The emergency-situation framework (see Figure 2) is designed for analyzing the permissibility of military activity when an immediate answer is required. In contrast to the non-emergency-situation framework, the purpose of the emergency-situation framework is not to maximize the probability of yielding a certain conclusion as to the legality of military activity. Rather, its purpose is to assist military personnel in deciding whether military activity in response to an emergency situation is *plausibly legal* under the PCA rules. Two practical realities underlie the purpose of the emergency-situation framework. First, emergency situations present military decision makers with severe time constraints. Second, military personnel likely will not be overly concerned with the legality of action required to save human lives or prevent mass destruction of property.<sup>294</sup> Recognizing these practical realities, the emergency-situation framework focuses on whether there exists a good-faith belief that the activity is permissible under the PCA rules, as opposed to the non-emergency-situation framework, which begins with the questions that are based on a more solid legal foundation and uses good-faith belief as a last resort.

This framework should be of most use to individuals who have the authority to order the military to act, such as local military commanders or officers higher in the chain of command, when presented

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293. As discussed earlier, an intent to violate the PCA may be required, and this intent would not be present if the individual ordering or engaging in the military activity acts under a good-faith, albeit incorrect, belief that the military activity is permissible under the circumstances. *See supra* Subpart II.B.2.iii.

294. To the extent that this assumption is invalid, military personnel would use the non-emergency-situation framework in emergency situations, resulting in a more legally grounded but delayed decision regarding whether to respond.

with emergency situations in which the military must act without delay for the activity to be effective.

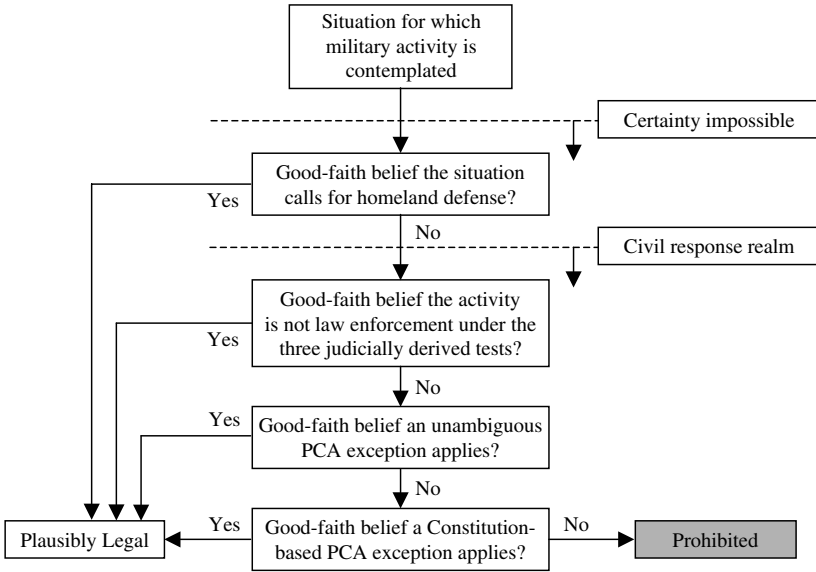


FIGURE 2. EMERGENCY-SITUATION FRAMEWORK FOR ANALYZING THE LEGALITY OF MILITARY ACTIVITY UNDER THE PCA RULES

The first question asks whether those ordering or performing the military activity have a good-faith belief that the situation calls for homeland defense. If the question is answered affirmatively, then military activity in response to the situation will be plausibly legal. If it is answered negatively, the situation calls for only a civil response, and the analysis proceeds to the second question.

Working within the civil response realm, the second question asks whether there exists a good-faith belief that the activity does not constitute law enforcement under the three judicially derived tests (i.e., that the activity is not active; not pervasive; and not regulatory, proscriptive, or compulsory). If such a belief exists, then the activity is plausibly legal, and the analysis is concluded. If no such belief exists, then the activity likely constitutes law enforcement, and the analysis proceeds to the third question.

The third question asks whether there exists a good-faith belief that an unambiguous PCA exception—that is, a statutory exception, the military purpose doctrine, or martial law—applies to the situation and permits the activity. If such a belief exists, then the activity is

plausibly legal, and the analysis is concluded. If no such belief exists, then the analysis proceeds to the fourth question.

The fourth question asks whether there exists a good-faith belief that a Constitution-based exception applies to permit the military activity. If such a belief exists, then although the uncertainty regarding the Constitution-based exceptions renders the legality of any action taken in reliance on them questionable, such activity is plausibly legal.

### 3. *The Necessary Limits of the Frameworks: Unsolvable Problems of the PCA Rules*

While the non-emergency-situation and emergency-situation frameworks can be used to minimize incorrect decisions under the current PCA rules, some problems with the rules can be resolved only through changes in the law.

The first problem, discussed in Part II and earlier in this Part, is the need to make a questionable determination as to whether a situation calls for homeland defense or only a civil response. The frameworks do not resolve this problem. Indeed, no framework could do so, for the determination is inherently ambiguous, despite the fact that the legality of military activity may depend on it.

The second problem is that there is no single, consistent legal standard for determining what activities constitute law enforcement and thus are prohibited by the PCA. As discussed in Part II, courts use different tests to distinguish law enforcement activity from non-law enforcement activity and draw the line in different places. These differences introduce an additional element of uncertainty into analyses of military activity and can lead to the illogical conclusion that the same military activity conducted in neighboring jurisdictions as part of a single operation would be deemed permissible in one jurisdiction yet impermissible in another.<sup>295</sup>

The third problem is the vast array of piecemeal exceptions, each of which permits activity in only the specific situation(s) addressed by the exception. The current situation-by-situation exception approach carries with it the danger that the array of situations for which exceptions exist is incomplete, possibly excluding situations that would ne-

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295. See, e.g., *United States v. McArthur*, 419 F. Supp. 186 (D.N.D. 1975), *aff'd sub nom.* *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976); *United States v. Jaramillo*, 380 F. Supp. 1375 (D. Neb. 1974). In *McArthur*, a federal district court in North Dakota found that certain military activities did not constitute civil law enforcement and thus were permissible under the PCA, whereas in *Jaramillo*, a federal district court in Nebraska rendered a different conclusion regarding the same activities. *McArthur*, 419 F. Supp. at 194; *Jaramillo*, 380 F. Supp. at 1381.

cessitate a military response. For example, as discussed in Part III, no statutory exception exists to permit the military to respond to events involving non-WMD that may be as deadly as WMD, such as high-yield explosives or other military-type ordnance. In addition, as underscored by the discussions in Parts III and IV and by the frameworks themselves, the numerous piecemeal exceptions carve a maze through the U.S. Code, public laws, and case law that makes it difficult to determine precisely what exceptions exist and what military activities they permit. The regulations and DoDDs that expound upon—and at times improperly attempt to expand—these exceptions compound the problem.

The combined effect of these problems is that it may be impossible to garner a clear understanding of what activities in what situations the PCA rules permit. This is illustrated by the need for two frameworks, one that is time-consuming but has as its aim a legally certain conclusion and the other that produces a timely answer but has as its aim merely a conclusion as to whether military activity in response to an emergency situation is plausibly legal. That a framework for analysis intended to yield legally certain conclusions is impracticable for use in emergency situations—times in which certainty as to what is permissible is perhaps most necessary—underscores the inadequacy of the current PCA rules.

### B. Policy Alternatives

To date, the problems with the current PCA rules have been tolerated. In responding to questions about how the PCA affected the decision to authorize military assistance to law enforcement in the October 2002 hunt for the Washington, D.C.-area sniper, Secretary of Defense Donald Rumsfeld stated, “[c]ommon sense and national need sometimes make military assistance necessary.”<sup>296</sup> This is undoubtedly true. Unfortunately, it is unclear whether the current PCA rules permit the military to act in accord with common sense during times of national need. It is unwise to continue to force civil decision makers and military personnel to operate under such ambiguous legal authority and constraints, particularly when the ambiguity is remediable.

The emerging threat environment and the resulting contemplation of increased domestic military activity heighten the likelihood of faulty decision making and its attendant consequences. Adversaries may create situations that cannot be assessed quickly or easily under

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296. Currier, *supra* note 9, at 15 (quoting *Sniper Hunt: Army Spy Plane Called in, Former DoD Teacher Among Victims of DC Killer*, ARMY TIMES, Oct. 28, 2002, at 2).

the current PCA rules, that threaten to cause death or mass destruction of property, and that exceed the capabilities or expertise of civil authorities. The problems with the current PCA rules create the possibility that military activity necessary to respond to these situations either will be prohibited or will be permissible but delayed due to confusion as to what the PCA prohibits. Dire consequences could result either way, indicating that the PCA rules should be made clearer and more flexible to ensure that military activity necessary to respond to a range of unanticipated situations that may result in loss of life or mass destruction of property is clearly permissible.<sup>297</sup>

Hurricane Katrina, although a natural rather than manmade disaster, underscores how, when the PCA prohibits necessary military activity, the President is faced with two unappealing options: either do not order the necessary military activity or order the activity while stretching, if not breaking, the law. In the aftermath of Katrina, civil authorities proved incapable of responding to the destruction of property and breakdown of civil order in the Gulf Coast.<sup>298</sup> In response, President George W. Bush dispatched Title 10 forces to the area.<sup>299</sup> Because the PCA prohibited them from engaging in law enforcement, their role was limited to such activities as performing search-and-rescue missions and tending to the sick and injured.<sup>300</sup>

Officials sought a greater role for the Title 10 military, however, by creatively exploiting the convoluted web of PCA rules to circumvent PCA restraints. First, the Bush administration advocated swearing a Title 10 officer into the Louisiana National Guard. The officer's dual-hatted status would have permitted a federal commander to issue

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297. Alexander Hamilton expressed a similar perspective:

[I]t is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.

THE FEDERALIST No. 23 (Alexander Hamilton) (emphasis omitted). Although Hamilton wrote of being free from constitutional shackles, statutory shackles, such as those the current PCA rules impose, are equally perilous, if less resistant to change.

298. Bradley Graham, *Some Urge Greater Use of Troops in Major Disasters*, WASH. POST, Sept. 9, 2005, at A15.

299. Robert Burns, *U.S. Looks at Role for Military; Some Want to Change Law to Permit Using Soldiers in Disasters*, CHI. SUN-TIMES, Sept. 18, 2005, at 15, available at 2005 WLNR 16707766.

300. *Id.*; Jonathan Bor, *'An Opportunity to Help Our Own'; Hospital Ship Comfort Sent from Baltimore on Hurricane Relief Mission; Katrina's Wake*, BALT. SUN, Sept. 3, 2005, at 14A, available at 2005 WLNR 13942560.

orders through him to the state Guard troops under his command.<sup>301</sup> Thus, state Guard troops would have been subject to the orders of a federal commander without having been federalized, freeing them from PCA constraints while acting as *de facto* federal troops. This proposal was rejected by the governor of Louisiana,<sup>302</sup> leading to a second attempt to creatively circumvent the PCA. A unified chain of command for federal and state troops was established unofficially through the ability of Lt. Gen. Russel Honore, the federal commander, to forge a close working relationship with the Louisiana and Mississippi National Guard commanders.<sup>303</sup> According to an administration official, “By sheer force of personality and because of the mayor’s and governor’s praise of Gen. Honore, he through practice put into effect a single chain of command.”<sup>304</sup> But for the approval of a state’s governor and the willingness of National Guard commanders to take orders from the federal commander, posse comitatus restraints force the President to choose between disparate, possibly conflicting chains of command in which troops may enforce the law and a unified chain of command in which the PCA prohibits troops from enforcing the law.

Some current and former DoD officials claim the first two creative circumventions of the PCA were unnecessary, because a PCA exception would have permitted Title 10 troops to enforce the law. This claim is actually a third creative way to circumvent the PCA, as it entails an unobvious and possibly untenable interpretation of a PCA exception. Specifically, those officials argue that one of the exceptions applying to insurrections, rebellions, and civil disturbances—10 U.S.C. § 332<sup>305</sup>—permitted the President to employ the military to enforce the law.<sup>306</sup> This statute provides that:

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301. STEVE BOWMAN ET AL., HURRICANE KATRINA: DoD DISASTER RESPONSE, CRS REP. NO. RL33095, at 10–11 (2005), <http://www.fas.org/sgp/crs/natsec/RL33095.pdf>. This is a variation of a practice in which a single National Guard officer is placed in Title 10 status under the command and control of a combatant commander while remaining in Title 32 status to command National Guard forces. It is authorized by the National Defense Authorization Act for FY2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003), and was utilized at the G8-summit in Sea Island, Georgia, and at the 2004 Democratic and Republican conventions. BOWMAN, *supra*, at 10.

302. BOWMAN, *supra* note 301, at 11.

303. Peter Gosselin & Doyle McManus, *Wider Powers for U.S. Forces in Disasters Are Under Review*, L.A. TIMES, Sept. 11, 2005, at A36; Rumsfeld & Myers, *supra* note 14.

304. Gosselin & McManus, *supra* note 303.

305. See “Insurrections, Rebellions, and Civil Disturbances,” *supra* Subpart III.A.1.i.

306. Burns, *supra* note 299 (referring to statements made by DoD spokesman Lawrence Di Rita); John Yoo, *Trigger Power*, L.A. TIMES, Oct. 2, 2005, at M5.



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 . . . by the ordinary course of judicial proceedings, he may [use Title 10 troops] as he considers necessary *to enforce those laws or to suppress the rebellion*.<sup>307</sup>

Arguably, the unrest that followed Hurricane Katrina constituted an unlawful obstruction, combination, or assemblage that made it impracticable to enforce certain federal laws. One former DoJ official specifically referred to laws “protecting mail, telecommunications or interstate commerce and travel” as the federal laws whose unenforceability justified the use of federal troops.<sup>308</sup> The purpose of using troops in response to Katrina, however, would not have been to enforce these or any other federal laws or to suppress a rebellion, which are the only permissible uses of Title 10 troops under the statute. Rather, the purpose of using troops would have been to quell unrest and protect human life and property in a situation in which civil authorities proved incapable of doing so. Because enforcing federal laws, such as those that apply to mail and telecommunications, would have been the pretext, not the purpose, for the use of federal troops, it is unlikely that 10 U.S.C. § 332 would have permitted their use.

These machinations engaged in to provide assistance following Katrina reinforce the need to revise the PCA. The following subparts describe two proposed alternatives to the current PCA rules. One alternative is to amend the PCA rules. Another alternative is to replace the PCA rules with a more practicable, unified statute that better upholds the rules’ underlying tenets.

### *1. Alternative 1: Amend the Current PCA Rules*

The first alternative to retaining the current PCA rules is for Congress to clarify areas of confusion and fill lacunae in the rules. This alternative consists of the following recommended actions for Congress:

1. Explicitly provide that the PCA applies to all Title 10 service personnel.<sup>309</sup>

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307. 10 U.S.C. § 332 (2000) (emphasis added).

308. Yoo, *supra* note 306.

309. As discussed in Part II, the language of the statute applies to only the Army and Air Force, with coverage currently extended to the Navy and Marine Corps by a DoDD that accords with a statutory directive to the Secretary of Defense to so extend its coverage. The DoDD states that the Secretary of Defense may grant exceptions. *See supra* Subpart II.A. A suggested definition of “Title 10 Service Personnel” is

2. Explicitly provide that the PCA does not apply to situations that call for homeland defense.
3. Provide specific criteria for determining what military activities constitute law enforcement so that future determinations of what activities the PCA prohibits will be based on a single, appropriate, and practicable legal standard.<sup>310</sup>
4. Explicitly provide that a violation of the PCA requires a specific intent to do so.<sup>311</sup>
5. Add a PCA exception that permits the military to assist civil authorities, upon the latter's request, to enforce the law regarding the illegal transaction, possession, or use of certain types of high-yield explosives or military ordinance.
6. Add a PCA exception that permits the military to assist civil authorities, upon the latter's request, to the extent necessary to prepare for, prevent, or respond to an act of terrorism.
7. Amend 10 U.S.C. § 124(b) and 10 U.S.C. § 374(b)(2)(D), which allow for intercepting aircraft and vessels "detected outside the land area of the United States,"<sup>312</sup> to also include aircraft and vessels detected within the land area of the United States.

## 2. *Alternative 2: Replace the Current PCA Rules*

The second alternative to retaining the current PCA rules is for Congress to repeal the PCA and its convoluted web of exceptions and replace them with a single statute, a model of which follows:

### 1) General Rule

Title 10 Service Personnel are prohibited from Willfully Executing Civil Law in the United States and its territories and possessions, except under the following circumstances:

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offered in the model statute discussed in "Alternative Two: Replace the Current PCA Rules." See *infra* Subpart V.B.2.

310. For example, Congress might use an expanded version of the third judicially derived test such as that employed in the model statute. See *infra* Subpart V.B.2. The third test is chosen as the basis for the definition of law enforcement because it provides simple and concrete criteria for determining whether an activity constitutes law enforcement, and because the criteria focus on the degree of power the military would exert upon individuals. However, the third test would not proscribe several activities that appear to be law enforcement and that the DoD currently proscribes in DoDD 5525.5, such as searching an unoccupied home or acting as an undercover agent. *Supra* note 23, § E4.1.3. Consequently, the model statute supplements the third test.

311. The authors support the adoption of this specific intent requirement on the grounds that it is beneficial for military personnel to be legally unencumbered to respond in times of emergency and that this *mens rea* fosters military response insofar as it bases the legality of military action on a good-faith belief that it is permissible.

312. 10 U.S.C. § 124(b) (2000); *id.* § 374(b)(2)(D).

- a) Civil Authorities request assistance from the Secretary of Defense or an Authorized Local Military Commander; and
  - b) The Attorney General declares that the situation to which Title 10 Service Personnel would respond exceeds the capabilities or expertise of Readily Available Civil Authorities; and
  - c) The Secretary of Defense declares that the situation to which Title 10 Service Personnel would respond exceeds the capabilities or expertise of Readily Available Civil Authorities.
- 2) Exigency
- a) When an immediate response to a situation is required to prevent loss of human life or mass destruction of property, making consultation with Civil Authorities, the Attorney General, or the Secretary of Defense impractical, the Authorized Local Military Commander or an individual higher in the chain of command is authorized to assess whether the situation exceeds the capabilities or expertise of Readily Available Civil Authorities in place of the individual or individuals that cannot be consulted.
  - b) Contact requirements
    - i) As soon as reasonably practicable, the Civil Authorities, the Attorney General, and the Secretary of Defense shall be contacted.
    - ii) When contact is made with the Civil Authorities, Title 10 Service Personnel shall continue to Execute Civil Law only if the Civil Authorities request that the Title 10 Service Personnel continue to do so.
    - iii) When contact is made with the Attorney General, Title 10 Service Personnel shall continue to Execute Civil Law only if the Attorney General determines that the situation exceeds the capabilities or expertise of Readily Available Civil Authorities.
    - iv) When contact is made with the Secretary of Defense, Title 10 Service Personnel shall continue to Execute Civil Law only if the Secretary of Defense determines that the situation exceeds the capabilities or expertise of Readily Available Civil Authorities.

- 3) **Duration of Military Activity Permitted in the Execution of Civil Law**  
When permitted to Execute Civil Law under this Act, Title 10 Service Personnel shall cease Executing Civil Law when the Authorized Local Military Commander or an individual higher in the chain of command determines that the situation no longer exceeds the capabilities or expertise of Readily Available Civil Authorities.
- 4) **Limitation to Executing Civil Law**  
Nothing in this section prohibits Title 10 Service Personnel from assisting Civil Authorities, including civil law enforcement authorities, by acting in a manner that does not constitute Executing Civil Law.
- 5) **Exclusion of Situations Calling for Homeland Defense**  
Nothing in this section prohibits Title 10 Service Personnel from responding to situations calling for homeland defense.
- 6) **Exclusion of Activity Conducted Primarily for a Military Purpose**  
Nothing in this section prohibits Title 10 Service Personnel from Executing Civil Law if:
  - a) The primary purpose of the activity is to further a legitimate military purpose; and
  - b) Executing Civil Law is part of or incidental to furthering that purpose.
- 7) **Penalty Provision**  
Individuals convicted under this Act shall be fined under this Title, imprisoned not more than two years, or both.<sup>313</sup>
- 8) **Definitions**  
For purposes of this Act, the following definitions apply:
  - a) “Attorney General” means the Attorney General of the United States or any official or employee of the Department of Justice whom the Attorney General designates to fulfill the responsibilities this Act imposes upon the Attorney General.
  - b) “Authorized Local Military Commander” means the person whom the Secretary of Defense, through prior published regulations, has authorized to exercise the authority granted by this Act.

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313. For purposes of this model statute, the authors adopt the current penalty for violating the PCA. 18 U.S.C. § 1385 (2000). They withhold judgment as to whether this is the most appropriate penalty.

- c) “Civil Authorities” means those who have authority under State or Federal law to respond, or to authorize or order a response, to the situation presented.
- d) “Execute Civil Law” or “Executing Civil Law” means any of the following:
  - i) Assistance by Title 10 Service Personnel that subjects civilians to activity that is regulatory, proscriptive, or compulsory.
    - (a) An activity is regulatory if it controls or directs individuals.
    - (b) An activity is proscriptive if it prohibits individuals from, or condemns individuals for, engaging in some act.
    - (c) An activity is compulsory if it exerts some coercive force upon individuals.
  - ii) Direct participation by Title 10 Service Personnel in—
    - (a) the collection of intelligence for law enforcement purposes;
    - (b) a search involving physical contact with a civilian or a civilian’s property;
    - (c) a seizure;<sup>314</sup> or
    - (d) surveillance or pursuit of pre-identified individuals.
  - iii) Use of Title 10 Service Personnel as undercover agents, informants, investigators, or interrogators.
- f) “Readily Available” means able to respond to the situation in a timely manner.
- g) “Secretary of Defense” means the Secretary of Defense of the U.S. Department of Defense or any official or employee of the Department of Defense whom the Secretary of Defense designates to fulfill the responsibilities this Act imposes upon the Secretary of Defense.
- h) “Title 10 Service Personnel” means members of the components of the Army, Air Force, Navy, or Marines described in, and operating pursuant to, Title 10 of the U.S. Code.
  - i) It also includes—

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314. Seizure includes arrest, as an arrest would also constitute a seizure.

- (a) civilian employees of the DoD when operating under the direct command and control of a military officer; and
  - (b) the Coast Guard when operating as part of the Navy.
- ii) It does not include—
- (a) the Coast Guard when operating as part of the Department of Homeland Security;
  - (b) civilian employees of the DoD when not operating under the direct command and control of a military officer;
  - (c) DoD personnel detailed to a civilian agency and not operating under the direct command and control of a military officer;
  - (e) members of the Army National Guard or Air National Guard not called into federal service; or
  - (f) members of the Army National Guard of the United States or Air National Guard of the United States when not on Active Duty.
- iii) Army National Guard, Air National Guard, Army National Guard of the United States, Air National Guard of the United States, and Active Duty have the same meaning as set forth in 10 U.S.C. § 101.
- i) “Willfully” means that, to sustain a conviction under this Act, it must be proved beyond a reasonable doubt that the defendant intended to violate this Act.

This alternative would discard the situation-by-situation exceptions of the current PCA rules and replace them with a single, comprehensive statute designed to better effectuate the underlying tenets of the PCA rules and to satisfy the concerns of both civil and military authorities.

The DoD’s official position is that changes to the PCA rules are unnecessary because current law grants the DoD sufficient authority to respond to any situation that may arise.<sup>315</sup> This is correct only to the extent that the immediate response authority is legal and the Constitution-based exceptions exist and apply, all of which is highly question-

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315. *Skelton*, *supra* note 16; *Rumsfeld & Myers*, *supra* note 14; *see also* Matt Kelley, *Administration Mulls Whether to Give Military More Power Within U.S. Borders*, ASSOCIATED PRESS, July 29, 2002.

able.<sup>316</sup> It may be that the DoD prefers to maintain the current PCA rules because the ambiguity surrounding so many of them permits the DoD a substantial degree of flexibility. The DoD can refuse to assist civil authorities in certain instances by claiming the law does not permit it to act, while utilizing the uncertainty in order to act when it believes situations demand it.

Relying on questionable legal authority is inadvisable, however, for at least three reasons. First, as discussed earlier, military personnel and civil decision makers may incur civil or criminal liability when they take action the PCA prohibits. Thus, the current PCA rules may place military personnel in legal jeopardy despite their having followed DoD doctrine. Second, also as discussed earlier, the current PCA rules cause confusion, which may delay or otherwise hinder a military response when one is necessary and legal. Third, if the DoD is correct that the current PCA rules permit it to act when necessary, then the only effect of Alternative 2 would be to make clear that they are permitted to do so. Even under the DoD's interpretation of the current PCA rules, Alternative 2 would not expand when the military can act. Rather, it would only clarify that the military can act when necessary and civil authorities request assistance.

The model statute offers a clear means for determining: (1) whether a given domestic military activity constitutes law enforcement, and (2) what military activities that constitute law enforcement are permissible. The statute imposes two basic preconditions for the military to conduct law enforcement activities. First, civil authorities must request military assistance. Second, the situation must exceed the capabilities or expertise of readily available civil authorities, as determined by the Attorney General and the Secretary of Defense.

If an immediate response would be required to prevent loss of human life or mass destruction of property, making consultation with civil authorities, the Attorney General, and the Secretary of Defense impractical, the requirements for the military to conduct law enforcement are streamlined. The military may do so if the authorized local military commander or an individual higher in the chain of command makes a good-faith determination that the situation exceeds the capabilities or expertise of readily available civil authorities. The model statute requires the military to attempt to notify the civil authorities,

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316. The immediate response authority is discussed in the Subpart entitled "Misconception: All Military Civil Law Enforcement Activities Authorized by DoDDs Fall Within Exceptions to the PCA." See *supra* Subpart IV.B.2.iii. The Constitution-based exceptions are discussed in the Subpart entitled "Constitution-Based Exceptions." See *supra* Subpart III.B.3.

the Attorney General, and the Secretary of Defense as soon as reasonably practical, and to thereafter act in accordance with the decision(s) made by those individuals who can be reached. It also requires the military to cease executing civil law when the situation no longer exceeds the capabilities or expertise of readily available civil authorities.

One benefit of the model statute is that it resolves ambiguity regarding the PCA without materially altering the military's domestic role.<sup>317</sup> As under the current PCA rules, the model statute permits the military: (1) to respond to situations calling for homeland defense; (2) to execute the civil law if the primary purpose of the activity is to further an already permitted military function; and (3) to perform activities that do not constitute law enforcement, regardless of whether such activities are necessary to save human life or prevent mass destruction of property. Moreover, the model statute sets forth specific and universally applicable criteria for determining which military activities constitute law enforcement, thereby facilitating determinations as to whether a particular activity is permissible. Finally, the model statute provides that to violate it requires a specific intent to do so, which clarifies another uncertain aspect of the current PCA rules.

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317. The model statute permits the military to execute the civil law in the situations covered by the major exceptions to the PCA. In brief, the civil disturbance exceptions require, either explicitly or implicitly, that the situation exceed the capabilities of readily available civil authorities. *See* 10 U.S.C. §§ 331–333 (2000). The WMD exceptions require that the Attorney General request assistance from the Secretary of Defense and that both the Attorney General and the Secretary of Defense determine that an emergency situation exists. *Id.* § 382(a)(1); 18 U.S.C. § 831(e)(1) (2000). Additionally, under the WMD exceptions, for an emergency to exist, the situation must exceed the capabilities of civil authorities. 10 U.S.C. § 382(b) (2000); 18 U.S.C. § 831(e)(2) (2000). The exception for interception of vessels and aircraft for purposes of enforcing laws regarding controlled substances, immigration, and customs, or if the interception is conducted as part of a counter-terrorism operation, would also be available. 10 U.S.C. §§ 124(b), 374(b)(2)(D) (2000). Generally, the demands of these situations—patrolling thousands of miles of seas and airspace and forcing vessels and aircraft to designated locations—exceed the capabilities and/or expertise of civil authorities.

The model statute also clearly permits the military to execute the civil law in situations that the possible unintentional major exceptions cover but for which the exceptions do not clearly authorize military activity. The military would be permitted to assist the Secret Service in its protective duties, as the demands of protecting certain officials, such as the President, exceed the capabilities of civil authorities, and the Presidential Protection Assistance Act currently mandates that the director of the Secret Service request assistance from the DoD before military assistance can be provided. 18 U.S.C. § 3056 note (2000). The post-September 11, 2001, joint resolution authorizing force may also constitute a PCA exception. *See supra* Subpart III.2.ii. It is likely that if the model statute were enacted and the PCA and its exceptions were repealed, the joint resolution would not also be repealed. Thus, the model statute would not affect the President's authority under the joint resolution to order the military to enforce the law against Al Qaeda.



### C. *Assessment of the Alternatives*

In this subpart, three fundamental criteria are used to assess the proposed alternatives to the current PCA rules. The criteria reveal the extent to which each alternative furthers the tenets that underlie the PCA rules—general prevention of military enforcement of the civil law and the permissibility of military enforcement of the civil law when necessary—and are defined as follows:

- Transparency—the extent to which an alternative would facilitate a clearer understanding of what military activities are permissible under what circumstances, thereby reducing the risk of confusion;
- Completeness—the extent to which an alternative would ensure that the military is permitted to respond when necessary;
- Overextension—the extent to which an alternative would prevent unnecessary military enforcement of the civil law.<sup>318</sup>

#### 1. *Transparency*

Amending the current PCA rules as described in Alternative 1 would improve their transparency. However, adding more statutory provisions to an already unwieldy and diffuse body of law may dilute some of the gains. In addition, implementing Alternative 1 would not resolve two of the greatest hindrances to transparency—the need to classify situations as calling for homeland defense versus only a civil response and the potential need to rely on the ambiguous Constitution-based exceptions.

By comparison, replacing the current PCA rules with a single statute such as that proposed in Alternative 2 dramatically improves transparency by: (1) replacing the web of exceptions with a single, clear criterion—necessity—for determining when the military may enforce the civil law, (2) eliminating the need to base the permissibility of military action on a nebulous legal foundation,<sup>319</sup> and (3) explicitly defining the meaning of law enforcement.

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318. Preventing an overextension of military enforcement of the civil law simultaneously furthers the tenets of the PCA rules and addresses policymakers' concerns that too much involvement in civil affairs will decrease the military's readiness to carry out its primary function of defense.

319. The model statute eliminates the need to rely on the Constitution-based exceptions by permitting military law enforcement activities when they are necessary. The statute minimizes, but does not entirely eliminate, the need to distinguish situations calling for homeland defense from those calling for only a civil response, because the possibility remains that situations calling for homeland defense will not exceed the capabilities or expertise of civil authorities. The paragraph of the model statute enti-

The model statute also increases transparency by resolving one other ambiguity that would remain if Congress were merely to amend the current PCA rules as described in Alternative 1. Namely, it makes clear that an authorized local military commander or an individual higher in the chain of command can order activity, even activity constituting law enforcement, to respond to an emergency if the response is required to prevent loss of human life or mass destruction of property.<sup>320</sup>

## 2. *Completeness*

This Article has detailed several areas in which the PCA may prohibit the military from taking action needed to respond effectively to situations that exceed the capabilities or expertise of civil authorities. Amending the current PCA rules as suggested in Alternative 1 would alleviate some of their incompleteness; however, it is impossible to anticipate all types of situations that would necessitate military activity. For this reason, the current PCA rules' situation-by-situation approach to PCA exceptions, which Alternative 1 does not alter, makes completeness unattainable. Replacing the current PCA rules with legislation that uses the necessity of military activity as the trigger for the activity's permissibility, as the model statute does, may be the only means by which to achieve completeness.

## 3. *Overextension*

It is equally important to prevent the military from enforcing the civil law when civil authorities are available and capable of doing so. Amending the current PCA rules as suggested in Alternative 1 would not alter the probability that the military would be permitted to enforce the civil law in a situation that does not necessitate it. Replacing the current PCA rules with legislation that uses the necessity of military

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tled "Exclusion of Situations Calling for Homeland Defense" ensures that the military retains permission to respond to such situations.

320. See *supra* notes 280–85 and accompanying text for a discussion of why the immediate response authority likely is not a PCA exception. This provision empowers mid-level military personnel to authorize military enforcement of the civil law in some emergency situations. Although ideally such decisions would be made at a higher level, emergencies may require local military commanders to authorize activity needed to prevent loss of human life or mass destruction of property.

The purpose of Alternative 1 is to fill lacunae and resolve confusion in the current PCA rules, but not change their general structure. An "immediate response authority" exception could be added to Alternative 1, but it would be a dramatic shift from the current PCA rules, in which exceptions are situation-specific and not based on necessity. If it were considered advisable to base PCA exceptions on necessity, then adoption of Alternative 2 would be preferable.

enforcement of the civil law as the trigger for the permissibility of that enforcement, as proposed in Alternative 2, greatly increases the likelihood that the military will enforce the civil law only when a situation requires it.

Some of the reduction in overextension achieved by linking the permissibility of military action with the necessity for that action may be mitigated by eliminating the situation-specific PCA exceptions. Any mitigation would be slight, however, due to the preconditions the model statute imposes for military execution of the civil law. Unless an exigency exists that makes consultation between the local military commander and the DoJ and/or consultation between the local military commander and the DoD impractical, both the DoJ and the DoD must authorize the activity. Moreover, the political consequences that could result from high-level executive branch officials authorizing the military to execute the law when it is not necessary should ensure that authorization is granted only when necessary. Finally, the DoD is generally reluctant to become involved in civil affairs,<sup>321</sup> and it is particularly reluctant to be relied upon as a first responder.<sup>322</sup>

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321. In a letter to Senator John W. Warner, DoD General Counsel William J. Haynes stated four reasons for the DoD's reluctance:

- (1) a longstanding distaste on the part of the citizenry for the use of military as a police force;
- (2) a lack of formal training on the part of most service members to engage in domestic police activities involving functions such as arrest, execution of warrants, searches and seizures, and the protection and preservation of evidence;
- (3) an unwillingness within the military to permit service members to undertake extensive law enforcement training because such training may well interfere with a servicemember's ability to train for our warfighting missions; and
- (4) a significant concern that the addition of a law enforcement mission to the many high demands already shouldered by the Armed Forces in defending the country will degenerate or destroy the ability to accomplish those already existing demands.

Letter from William J. Haynes II, General Counsel, Dept. of Def., to Senator John W. Warner (Oct. 30, 2001), [http://www.insidedefense.com/secure/defense\\_docnum.asp?f=defense2001.ask&docnum=01\\_223](http://www.insidedefense.com/secure/defense_docnum.asp?f=defense2001.ask&docnum=01_223) (subscription required for access); *see also* Military Use of Infrared Radars Technology, *supra* note 80, at 39–40, in which the DoJ opined that the DoD was too restrictive in its assessment as to what activities are permissible under the PCA and 10 U.S.C. § 375.

322. David E. Sanger, *Bush Wants to Consider Broadening of Military's Powers During Natural Disasters*, N.Y. TIMES, Sept. 27, 2005, at A18. The model statute recognizes, however, that if a catastrophic event overwhelms the capabilities of local and state first responders, the DoD should be the first responder of last resort.

#### *D. Recommendation*

Given the significant problems inherent in the current PCA rules, it is recommended that Congress replace the rules with a more coherent set of guidelines such as those set forth in the model statute in Alternative 2. As demonstrated in this part, Alternative 2 is superior to either amending the rules as discussed in Alternative 1 or leaving them unchanged, on every assessment criteria.

### VI.

#### CONCLUSION

This Article sheds light on the current PCA rules in order to reduce widespread confusion surrounding the rules and to assess the degree to which they further their underlying tenets of generally prohibiting the military from conducting civil law enforcement while permitting the military to do so should the need arise. After reviewing the current PCA rules, examining the main areas of confusion concerning the rules, and presenting frameworks for determining the legality of domestic military activities, it becomes apparent that the PCA rules suffer from intractable problems. These problems cause the rules to fall short of the ideal and, more importantly, short of a viable legal regime governing domestic military activity.

Too often, the current PCA rules simply do not produce definitive answers regarding the legality of military activities, thereby creating potential impediments to effective military action when such action is necessary or enabling military action when it is not. Consequently, the current PCA rules should be replaced with a single statute, such as the model statute discussed in Part V, that permits the military to enforce the civil law when, and only when, a situation exceeds the capabilities or expertise of readily available civil authorities. Such a law would provide the most direct means of preventing the military from engaging in civil law enforcement activities under routine circumstances while recognizing that an unpredictable environment may present emergency situations in which the military is the only institution capable of responding effectively.