MILITARY PURPOSE ACT: AN ALTERNATIVE TO THE POSSE COMITATUS ACT—ACCOMPLISHING CONGRESS'S INTENT WITH CLEAR STATUTORY LANGUAGE

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INTRODUCTION

The Posse Comitatus Act ("PCA") limits the military's role in domestic law enforcement activities.[1] The Act was originally passed in 1878, following the disputed 1876 Presidential election between Rutherford B. Hayes and Samuel J. Tilden.[2] The Act, in its current form as codified in 18 U.S.C. § 1385 states:

> 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.[3]

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1. *See* 18 U.S.C. § 1385 (2006).

2. Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on the 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 MIL. L. REV. 86, 103–05 (2003). The Army was used throughout the South during the Reconstruction Period to protect blacks against racial terrorism that attempted to deny them their civil liberties. The PCA arose out of the South's discontent over the military occupation, which reached a boiling point in 1876 after Federal troops were used at Southern polling places to prevent fraud and coercion in the 1876 Presidential Election. *See id.* at 108–09.

3. 18 U.S.C. § 1385. The Navy has never been included in the language of the PCA. This omission resulted not because the drafters intended that naval personnel, including the Marines, would be available to use as a posse comitatus, but rather because the PCA was originally passed as part of an Army Appropriation Bill. *See* United States v. Walden, 490 F.2d 372, 374 (4th Cir. 1974). The Department of Defense ("DOD"), by regulation, has extended the PCA to include the Navy. U.S. Dep't of Def., Directive No.

With the events of September 11, the continued threat of domestic terrorism, the national debate on border security, and the problem-plagued response to Hurricane Katrina, critics of the PCA argue that by failing to provide clear guidance for domestic military use the Act is detrimental to national security.[4] At the same time, proponents of limiting military involvement in domestic affairs have argued that the PCA's limits on domestic military activities should go even further.[5] Though disagreeing on the appropriate level of domestic military involvement, each side seems to agree that the exact level of involvement allowed by the "execute the laws" language of the PCA is unclear.[6]

Since first passing the PCA in 1878, Congress has enacted a series of laws explicitly allowing the military to be used in certain domestic scenarios. The most significant of these supplemental legislative enactments is the Military Support for Civilian Law Enforcement Agencies Act of 1981 ("MSCLEA").[7] The MSCLEA's purpose is to allow the exchange of information and services between military and law enforcement when necessary to protect the people and interests of the United States.[8] But as this Note will show, instead of clarifying the scope of the PCA, the MSCLEA and similar legislation have only added to the confusion.[9]

This Note will argue that the PCA should be replaced with a law that (1) clearly establishes what assistance the military can provide to civilian authorities, (2) abandons the confusing and unnecessary "execute the laws" language of the PCA, and (3) explicitly recognizes the dual constitutional roles of the President and Congress when it comes to authorizing domestic military

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5525.5, DOD Cooperation with Civilian Law Enforcement Officials, E4.3 (Jan. 15, 1986), *available at* http://www.dtic.mil/whs/directives/corres/pdf/552505p.pdf [hereinafter *DODD 5525.5*].

4. Felicetti & Luce, *supra* note 2, at 88 (arguing the PCA should not interfere with "appropriate national security activities"); Jane Gilliland Dalton, *The United States Security Strategy: Yesterday, Today, and Tomorrow*, 52 NAVAL L. REV. 60, 86 n.129 (2005) (noting that the question of whether the PCA needs to be changed to provide the President with greater authority resurfaced after Hurricanes Katrina and Rita.); Brian R. Wahlquist, *Slamming the Door on Terrorists and the Drug Trade While Increasing Legal Immigration: Temporary Deployment of the United States Military at the Borders*, 19 GEO. IMMIGR. L.J. 551, 568 (2005) (arguing that applying the PCA to limit the President's power to counter illegal immigration would be unconstitutional).

5. Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 953–55 (1997).

6. *See supra* note 4 and accompanying text.

7. 10 U.S.C. §§ 371–82 (2006).

8. Tom A. Gizzo & Tama S. Monoson, *A Call to Arms: The Posse Comitatus Act and the Use of the Military in the Struggle Against International Terrorism*, 15 PACE INT'L L. REV. 149, 173–74 (2003).

9. *See infra* Part III; *see, e.g.*, Linda J. Demaine & Brian Rosen, *Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 167, 225–26 (2006). Linda J. Demaine and Brian Rosen argue that interpreting the MSCLEA and acts like it as an exception to the PCA creates the false impression that the activities involved fall under the PCA's "law enforcement" limitation to begin with. Demaine & Rosen, *supra*, at 225. They assert that many of these activities would not be considered "law enforcement" activities when applying one of the three judicially developed tests for interpreting the PCA. *Id.* at 225–26.

involvement. This Note will show that, though the confusion surrounding the PCA has successfully limited the domestic involvement of the military in law enforcement, the success has come at the cost of preventing our leaders from taking clear and decisive actions when necessary to protect American lives.[10]

To explain the extent of the confusion surrounding the PCA, Part I of this Note will examine the PCA's enigmatic history. Part II will discuss the three main judicial tests for interpreting what constitutes a PCA violation and will show that each test fails to establish a workable standard for what type of military action qualifies as "execut[ing] the laws" under the PCA. Part III will show that the failure of courts to apply a constitutional framework to PCA analysis has made these tests unworkable. Part IV will examine how Congress's attempts at clarifying the PCA have instead created more confusion by failing to identify a clear and consistent standard for applying the PCA's "execute the laws" language. Part V will show that the military has been somewhat effective in creating regulatory enactments to implement the PCA, but has been less successful at applying the PCA in practice. Finally, Part VI will propose an alternative to the PCA that will ensure congressional oversight of domestic military use, eliminate the confusion inherent to the "execute the laws" provision of the PCA, reaffirm the President's constitutional power to protect our nation, and provide clear guidance for civilian law enforcement officials, the military, and courts in effectuating the goal of limiting domestic military involvement.

I. THE HISTORY OF THE POSSE COMITATUS ACT

A. Confusion from the Outset

Ambiguity over the extent that the PCA limits the use of the United States Military in domestic law enforcement activities has existed since the Act was passed in 1878.[11] Prior to the PCA's passage, the Constitution was not interpreted as prohibiting the military's use in domestic law enforcement activities.[12] Before the controversial use of the Army during the Reconstruction Period that spurred the Act's passage, the Army had regularly participated in domestic law

10. Federal troops were not used immediately after the destruction caused by Hurricane Katrina in part because military leaders did not believe that the military could be used without violating the PCA. Eric Schmitt & Thom Shanker, *Military May Propose an Active-Duty Force for Relief Efforts*, N.Y. TIMES, Oct. 11, 2005, at A15 ("Pentagon and military officials say that federal troops could not have been sent into the chaos of New Orleans without breaking the Posse Comitatus law.").

11. *See* Felicetti & Luce, *supra* note 2, at 114–15.

12. *Id.* at 95–96. Evidence suggests that, despite our founding fathers' recognition of the possibility that local law enforcement would use our military as a posse comitatus, they rejected adopting any restriction. As evidence of this proposition, Felicetti and Luce quote Federalist No. 8, where Alexander Hamilton stated that the Army "may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection." *Id.* at 97 (quoting THE FEDERALIST No. 8, at 37 (Alexander Hamilton) (Clinton Rossiter ed., 1999)).

enforcement, including enforcing the Fugitive Slave Act of 1850[13] and conducting general law enforcement in America's western frontier.[14]

When the forty-fifth Congress passed the original version of the PCA, there was wide disagreement over the extent to which the Act affected the President's power to use the military to enforce laws.[15] Some believed the PCA had no effect on presidential power, viewing the act only as a direct repudiation of the Cushing Doctrine that allowed local sheriffs to call out the military to assist in law enforcement.[16] Others, believing the President did not have any inherent constitutional authority to use the military to "execute the laws," felt the PCA directly limited the President's power to use the military in domestic situations to those specifically authorized by Congress.[17]

B. The Posse Comitatus Act Goes Unused for its First Ninety Years

The same year that President Hayes signed the original PCA into law, he used the authority of the President of the United States to deploy troops to the New Mexico Territory in response to the territory's general lawlessness.[18] The deployment, pursuant to a presidential proclamation, occurred without any direct authorization from Congress.[19] Nevertheless, Congress took no action to stop the deployment.[20] These events, which occurred immediately following the PCA's passage, suggested that the PCA had limited to no effect on presidential power.[21]

Subsequent Presidents' use of the military to quell labor disputes further showed how little the PCA in practice limited presidential power.[22] In 1894, President Grover Cleveland deployed troops to restore order following the Chicago Pullman strike, and in 1899, President William McKinley deployed troops to reestablish order following mining strikes in Idaho.[23] Neither deployment was challenged by Congress on PCA grounds.[24]

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13. Ch. 60, 9 Stat. 462 (1850), *repealed by* ch. 166, 15 Stat. 200 (1864).

14. Attorney General Caleb Cushing wrote an opinion in 1854, arguing that the military could be called forth by local law enforcement officials and used as a posse comitatus. This opinion, coined the Cushing Doctrine, was used to justify the use of the military to aid law enforcement from the 1850s up until the Reconstruction Period. John R. Brinkerhoff, *The Posse Comitatus Act and Homeland Security*, J. HOMELAND SEC., Feb. 2002, http://www.homelandsecurity.org/journal/Articles/brinkerhoffpossecomitatus.htm.

15. Felicetti & Luce, *supra* note 2, at 114–15.

16. *Id.*

17. *See id.*

18. *Id.* at 119. The deployment of troops to the New Mexico Territory was in response to what history has coined the Lincoln County War. Arguably, even under an expansive view of the PCA, the use of Federal Troops may have been allowed under the Insurrection Act. *See* 10 U.S.C. §§ 331-334 (2006).

19. *Id.*

20. *Id.*

21. *Id.* at 119–22.

22. *Id.* at 122–25.

23. *Id.*

24. *Id.* at 125. Congress did investigate the President's use of the military in Idaho, but found that the deployment was legal under anti-insurrection laws.

C. The Rebirth of the Posse Comitatus Act and the Wounded Knee Cases

Despite occasional military use by Presidents to enforce laws, the PCA went largely forgotten until the Wounded Knee cases of the 1970s.[25] The Wounded Knee cases arose out of a standoff, beginning on February 27, 1973, between members of the Pine Ridge Indian Reservation and the FBI, Bureau of Indian Affairs, and U.S. Marshals.[26]

During the seventy-one day standoff,[27] the military sent Colonel Volney Warner, an active duty officer from the 82nd Airborne Division, to evaluate whether the military would be needed and to recommend approval or disapproval of requests for military materials and supplies.[28] While there, Colonel Warner advised the Department of Justice ("DOJ") to change their Rules of Engagement from a "shoot-to-kill" to "shoot-to-wound" policy, urged the DOJ to negotiate with the Wounded Knee occupiers, and approved a request for an armored personnel carrier upon the condition that it would only be used defensively.[29] During the standoff, law enforcement agents apprehended multiple individuals trying to enter Wounded Knee.[30] These individuals were charged with interfering with law enforcement officers' lawful performance of duties during a civil disorder.[31]

At trial, the defendants argued that law enforcement agents had not been lawfully performing their duties when they arrested the defendants because they consulted Colonel Warner and used military equipment in violation of the PCA.[32] Though the courts hearing the cases disagreed on whether law enforcement agents violated the PCA,[33] it was clear that the PCA had finally made a mark on American jurisprudence.

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25. Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383, 398 (2003). Sean Kealy argues that the relative "obscurity" of the PCA prior to the 1970s was a testament to its success. *Id.* The reason the PCA had not been actively used is because it had successfully curtailed all but short, objective-specific, domestic uses of the military that were largely authorized by congressional acts, to include Congress's authorization for the use of the military during insurrections. *Id.* at 397.

26. Raj Dhanasekaran, *When Rotten Apples Return: How the Posse Comitatus Act of 1878 Can Deter Domestic Law Enforcement Authorities from Using Military Interrogation Techniques on Civilians*, 5 CONN. PUB. INT. L.J. 233, 249–50 (2006).

27. *Id.* at 249–50.

28. Kealy, *supra* note 25, at 401.

29. United States v. Jaramillo, 380 F. Supp. 1375, 1379–80 (D. Neb. 1974).

30. *E.g.*, *id.* at 1376.

31. *E.g.*, *id.*

32. The defendants were charged under 18 U.S.C. § 231(a)(3) with interfering with a law enforcement officer's lawful performance of his duties. Therefore, one of the elements the Government had to prove was that the law enforcement officers were lawfully performing their duties. *See, e.g.*, United States v. McArthur, 419 F. Supp. 186, 192 (D.N.D. 1975), *aff'd sub nom.* United States v. Casper, 541 F.2d 1275 (8th Cir. 1976).

33. *Compare McArthur*, 419 F. Supp. at 194–95 (no violation of the PCA), *and* United States v. Red Feather, 392 F. Supp. 916, 925 (D.S.D. 1975) (no violation of the PCA), *with Jaramillo*, 380 F. Supp. at 1381 (violation of PCA). These three cases were not

II. JUDICIAL APPLICATION OF THE POSSE COMITATUS ACT

With no guidance from the U.S. Supreme Court, lower courts have been forced to struggle with the vague language of the PCA on their own. The first and only Supreme Court case to mention the PCA was *Laird v. Tatum*,[34] which involved a First Amendment challenge to the Army's domestic surveillance program.[35] The PCA itself was only mentioned in an appendix to Justice Douglas's dissent and was not accompanied by any analysis regarding how it should be applied.[36]

A. The Three Judicial Tests for Whether the Military is Executing the Laws Under the Posse Comitatus Act

In response to PCA challenges arising out of the Wounded Knee standoff, the district courts of North Dakota, South Dakota, and Nebraska were left to devise their own tests for applying the PCA.[37] The cases resulted in three distinct tests, each defining differently the level of military involvement in civilian law enforcement activities allowed under the PCA. These three tests have formed the foundation of PCA jurisprudence over the last thirty years.

1. The McArthur *Test: Are Citizens Being Subjected to Military Power that is Regulatory, Proscriptive, or Compulsory in Nature?*

In *United States v. McArthur*, District of North Dakota Judge Van Sickle undertook the consolidated review of ten indictments resulting from the Wounded Knee standoff.[38] The issue in the case was whether law enforcement officers lawfully performed their duties when they arrested the defendants.[39] Of the ten indictments, Judge Van Sickle dismissed four for insufficient evidence[40] and found the remaining six defendants guilty as charged.[41]

The defendants' challenge stated that law enforcement officers had not lawfully performed their duties during the Wounded Knee standoff because they received assistance from the United States Military in violation of the PCA.[42] To determine whether a PCA violation occurred, Judge Van Sickle, borrowing

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the only ones resulting from the Wounded Knee standoff, but they dealt with the PCA in the greatest detail. *See, e.g.*, United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974).

34. 408 U.S. 1 (1972).

35. *Id.* at 2–3.

36. *See id.* app. I at 32 (Douglas, J., dissenting) (stating that the PCA "forbids the use of military troops as a posse comitatus[]" and quoting the PCA). Without fully explaining why, Justice Douglas stated that the Army's domestic surveillance program violated the PCA.

37. *See McArthur*, 419 F. Supp. at 194; *Red Feather*, 392 F. Supp. at 921; *Jaramillo*, 380 F. Supp. at 1379.

38. *McArthur*, 419 F. Supp. at 190-91. The actual events during the Wounded Knee standoff occurred in South Dakota, but the ten cases in *McArthur* were moved to North Dakota under Rule 21(b) of the Federal Rules of Criminal Procedure. *Id.* at 189.

39. *Id.* at 192.

40. *Id.* at 190–91.

41. *Id.* at 198.

42. *Id.* at 192–93.

language from *Laird v. Tatum*,[43] held that the "execute the laws" provision of the PCA only applied when citizens were "presently or prospectively subject[ed] to regulations, proscriptions, or compulsions imposed by military authority."[44] Under this test, Judge Van Sickle determined that, since Colonel Warner only provided advice to law enforcement officers and did not actually issue orders, the defendants were not subjected to "regulations, proscriptions, or compulsions imposed by military authority," and the PCA was not violated.[45]

2. The Jaramillo *Test: Does the Use of the Military Pervade the Activities of Law Enforcement Officials?*

United States v. Jaramillo provides the second of the three judicial tests for determining what constitutes a law enforcement activity under the PCA.[46] The facts and charges for the two defendants in *Jaramillo* were the same as in *McArthur*.[47] But unlike Judge Van Sickle in *McArthur*, Judge Urbom held that the government failed to meet its burden to show that law enforcement activities at Wounded Knee were lawful.[48]

A conviction under 18 U.S.C. § 231(a)(3) requires the government to show that law enforcement officials were lawfully performing their duties.[49] Since the government failed to show that the involvement of Colonel Warner and military maintenance personnel did not violate the PCA, and therefore failed to show that federal law enforcement officials lawfully performed their duties, Judge Urbom acquitted the defendants.[50]

Judge Urbom's test for assessing whether the military had engaged in law enforcement activities under the PCA turned on whether the use of Army or Air Force personnel "pervaded the activities" of the law enforcement officials.[51] Judge Urbom reasoned that the degree of military involvement ultimately determined whether the military had executed a law.[52] When the military involvement could be said to "pervade" the activities of the law enforcement officials, the PCA was implicated.[53]

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43. 408 U.S. 1 (1972); *see also* notes 34–36 and accompanying text.

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

45. *Id.* at 194–95.

46. 380 F. Supp. 1375 (D. Neb. 1974). Just as in *McArthur*, the two cases in *Jaramillo* had been removed from South Dakota under Rule 21(b) of the Federal Rules of Criminal Procedure. *Id.* at 1376.

47. *Compare McArthur*, 419 F. Supp. at 189–92, *with Jaramillo*, 380 F. Supp. at 1376.

48. *Jaramillo*, 380 F. Supp. at 1381. Judge Van Sickle did not find that the Government violated the PCA, but rather that the Government failed to meet the burden to show that the PCA had not been violated, which was an element of the crime charged.

49. *Id.* at 1376.

50. *Id.* at 1381.

51. *Id.* at 1379.

52. *Id.*

53. *Id.*

Judge Urbom limited his decision by holding that only the use of military personnel, and not equipment, violated the PCA.[54] He noted that the PCA did not cover lending equipment between government agencies, as evidenced by (1) the debate surrounding the original passage of the PCA, (2) Congress's passage of the Economy Act of 1932, which allowed government agencies to exchange equipment,[55] and (3) the language of the PCA itself.[56]

Judge Urbom also noted that, had the President ordered military use at Wounded Knee pursuant to his insurrection powers[57] or had Congress specifically authorized military personnel to provide advice and maintenance assistance to civilian law enforcement, the use of the military at Wounded Knee would have been lawful, even if it "pervaded the activities" of law enforcement officials.[58]

3. The Red Feather *Test: Was the Military Used in a Direct and Active Role?*

The third PCA test comes from *United States v. Red Feather*.[59] The decision involved whether evidence concerning military involvement at the Wounded Knee standoff should be excluded from trial.[60] The government argued that evidence of military involvement was irrelevant in assessing whether law enforcement officers lawfully performed their duties.[61]

District of South Dakota Judge Bogue found the following military actions permissible under the PCA: (1) assessing the need for military intervention, (2) developing contingency plans for possible military involvement, (3) advising law enforcement officers, (4) lending equipment to law enforcement officials and training them on its use and care, and (5) using military personnel to maintain equipment.[62] Judge Bogue reasoned that the above actions were not *direct* and *active* forms of military involvement in domestic law enforcement and therefore did not violate the PCA.[63]

Judge Bogue developed his *direct* and *active* test by breaking the PCA into two separate parts. The first clause, "uses any part of the Army or the Air Force as a posse comitatus or otherwise," indicated that the PCA only applied to the direct use of military personnel and not to the use of military equipment.[64] Judge Bogue relied upon much of the same historical evidence as Judge Urbom in *Jaramillo* to reach this conclusion.[65]

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54. *Id.*
55. 31 U.S.C. § 1535(a) (2006).
56. *Jaramillo*, 380 F. Supp. at 1379.
57. *Id.* (citing Insurrection Act, 10 U.S.C. § 331 (2006)).
58. *See id.* at 1381.
59. 392 F. Supp. 916 (D.S.D. 1975).
60. *Id.* at 918.
61. *Id.* at 920.
62. *See id.* at 925.
63. *See id.*
64. *Id.* at 921 (quoting 18 U.S.C. § 1385 (2006)).
65. *Id.* at 922 (citing United States v. Jaramillo, 380 F. Supp. 1375, 1379 (D. Neb. 1974)).

Judge Bogue stated that the second, or "execute the laws," provision of the PCA created a requirement that military personnel be *active* participants in law enforcement activities before the PCA was implicated.[66] According to Judge Bogue, providing military equipment, advice, maintenance assistance, and training on how to use military equipment constitutes passive participation by the military in the Wounded Knee operation.[67] Therefore, though Judge Bogue did not prohibit the defense from offering *any* evidence of military involvement, he excluded most of the evidence offered.[68]

B. Why the Wounded Knee Cases Fail to Provide Clear Guidance and Effectuate the Intent of the Posse Comitatus Act

The Wounded Knee cases reintroduced the PCA to American jurisprudence.[69] But in reviving the PCA, these cases formulated a triad of highly malleable tests that fail to provide a clear and predictable standard to civilian and military officials.[70] Despite their apparent shortcomings, these tests have nonetheless formed the foundation of modern PCA jurisprudence.[71] Though differing on what level of military involvement in civilian law enforcement

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66. *Id.* at 924. In support of the proposition that the PCA only prohibits active participation by the military in law enforcement activities, Judge Bogue cited both *United States v. Walden*, 490 F.2d 372 (4th Cir. 1974), and *Wrynn v. United States*, 200 F. Supp. 457 (E.D.N.Y. 1961). Neither case actually articulated the active participant test Judge Bogue advocated, but both gave examples of impermissible military involvement that Judge Bogue felt would violate the PCA under his direct and active test. *See Red Feather*, 392 F. Supp. at 924.

67. *Red Feather*, 392 F. Supp. at 925. Judge Bogue also identified activities that he considered to be active participation by the military in civilian law enforcement, and therefore violate the PCA. These activities include assisting law enforcement officials in: (1) making arrests, (2) seizing evidence, (3) searching persons or buildings, (4) investigating crimes, (5) interviewing witnesses, (6) pursuing escaped prisoners, and (7) searching for a suspect. *Id.* The military appears to have adopted Judge Bogue's approach and lists many of the examples he cites as prohibited acts of direct assistance to law enforcement in DOD Directive 5525.5. *DODD 5525.5*, *supra* note 3, at E4.1.3.

68. *Red Feather*, 392 F. Supp. at 925. Judge Bogue refused to consider evidence offered by the defendants that the military had provided civilian law enforcement with military equipment, aerial photos, advice, and maintenance services. *Id.* at 921. Much of this same evidence, which Judge Bogue found irrelevant under the PCA, was used by Judge Urbom in *Jaramillo* to find that the Government failed to show the PCA had not been violated. *Compare id.*, *with Jaramillo*, 380 F. Supp. at 1379–80.

69. Kealy, *supra* note 25, at 388. Despite occasional domestic use of the military throughout the first one hundred years after the PCA was past, it was rarely argued in any case. *Id.* at 398. The PCA was so unused during this period that, when argued in a treason case in 1948, the First Circuit described it as an "obscure and all-but-forgotten statute." Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1949).

70. The malleability and ambiguity of the PCA's "execute the laws" provision can be seen in the differing results of the Wounded Knee courts. *Compare* United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1975) (no violation), *aff'd sub nom.* United States v. Casper, 541 F.2d 1275 (8th Cir. 1976), *and Red Feather*, 392 F. Supp. at 924–25 (military involvement passive therefore no violation), *with Jaramillo*, 380 F. Supp. at 1379–81 (prosecution failed to show no PCA violation).

71. *See infra* note 73 and accompanying text.

constitutes a violation of the PCA, the Wounded Knee tests agree that the critical question is whether the military is executing laws. By focusing so intently on the "execute the laws" provision of the PCA, courts have relegated constitutional limitations on the role of the military to a second, forgotten tier of analysis.[72]

Over the twenty years since the Wounded Knee cases, courts have continued to focus on the PCA's "execute the laws" provision.[73] And by requiring a high level of military involvement for a PCA violation, the courts have found few violations.[74] But by completely avoiding any type of constitutional analysis, and instead quibbling about whether or not the military is executing laws, these cases have only added to the confusion surrounding the PCA.[75]

Due to the confusion over the "execute the laws" provision, courts that have found PCA violations have been hesitant to take any remedial action against the supposed violator.[76] Courts have also been hesitant to provide any relief to the

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72. In *Red Feather*, Judge Bogue did not even mention the Constitution in his opinion outside of the language of the PCA itself. *See* 392 F. Supp. 916 (D.S.D. 1975). One could argue mentioning the Constitution was not necessary because Judge Bogue did not find that the military involvement in question qualified as "execut[ing] the laws." *See id.* (granting in part and denying in part the government's motion in limine). But this example illustrates the mischief caused by the PCA. Just because a form of domestic military assistance is not classified as executing laws under the PCA does not mean that the military use is allowed by the Constitution and vice versa. A complete analysis involving the legality of military use would have addressed under what constitutional authority the military was used.

73. *See, e.g.*, United States v. Bacon, 851 F.2d 1312, 1313 (11th Cir. 1988) (holding that Army criminal investigator making undercover drug buys for Liberty County Sheriff's Department did not fall under the execute the laws provision of the PCA).

74. *See, e.g.*, Hayes v. Hawes, 921 F.2d 100, 103–04 (7th Cir. 1990) (holding that assistance by Navy personnel to civilian law enforcement, including sharing information about drug activities, aiding in surveillance, and making undercover buys, was not pervasive enough to constitute a PCA violation); Miriam Schneider, Note, *Military Spying in the United States: When it is Not Your Neighbor Knocking at Your Door, Where Do You Turn?*, 7 CARDOZO J. CONFLICT RESOL. 199, 205–08 (2005) (discussing how courts generally try to avoid finding PCA violations).

75. Like *Red Feather*, many of these cases did not even mention the Constitution outside of citing the language of the PCA. *E.g.*, *Bacon*, 851 F.2d 1312; United States v. Stouter, 724 F. Supp. 951 (M.D. Ga. 1989); Hall v. State, 557 N.E.2d 3 (Ind. Ct. App. 1990).

76. By its own language, the PCA imposes a fine and/or imprisonment of up to two years on violators. 18 U.S.C. § 1385 (2006). Yet, throughout its history, no one has ever been punished under this provision. Felicetti & Luce, *supra* note 2, at 163.

alleged victim.[77] As a result, the PCA lacks bite and thereby leaves courts with no incentive to clarify the confusion that surrounds the Act.[78]

III. THE ROLE OF THE CONSTITUTION IN APPLYING THE POSSE COMITATUS ACT

Recognizing that the confusion surrounding the PCA has effectively made the Act unenforceable, any effort to salvage the PCA in its current form will require an affirmation of the role of the Constitution in PCA analysis.[79] By examining all domestic military usage questions within the context of the Constitution,[80] a clearer standard of what constitutes a lawful domestic military use will be established.

Courts should look first to the Constitution when dealing with issues of domestic military use because such issues invariably raise constitutional questions. The military has no independent authority given it by the Constitution. All authority to direct, raise, and command the military has been divided between Congress and the President.[81] Therefore, whenever the military is used, the question arises: under what constitutional authority? The PCA itself implicitly recognizes this question by directly incorporating the Constitution within its statutory text.[82] Given that the PCA tells courts to look to the Constitution to determine whether a military use is lawful, it is striking that courts have consistently declined to do so.[83] The result of this has, at a minimum, contributed to the failure of the courts to recognize the PCA's limited applicability to the President.[84]

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77. Recognizing the difficulty of determining whether a PCA violation had occurred, the court in *United States v. Wolffs* avoided the issue by finding that the exclusionary rule would not apply to PCA violations. 594 F.2d 77, 85 (5th Cir. 1979). The majority of cases dealing with the PCA have likewise refused to extend the exclusionary rule to evidence obtained in violation of the PCA. *See, e.g.*, United States v. Johnson, 410 F.3d 137, 149 (4th Cir. 2005); *Bacon*, 851 F.2d at 1313.

78. The Wounded Knee cases were unique in that one of the elements of the crime the defendants were charged with was that law enforcement officers were lawfully performing their duties. *See* United States v. Jaramillo, 380 F. Supp. 1375, 1376 (D. Neb. 1974). In most criminal prosecutions, this issue will not come up since the elements of the crime focus on the conduct of the defendant.

79. As mentioned earlier in this Note, many courts do not even mention the Constitution when assessing the legality of military assistance to civilian law enforcement. *See supra* note 75.

80. Explicitly, this would be done by examining PCA questions within the context of Executive and Legislative Powers. *See* U.S. CONST. arts. I & II.

81. U.S. CONST. arts. I, § 8, cls. 11–15; II, § 2, cl. 1.

82. The first sentence of the PCA states that it does not affect "circumstances expressly authorized by the Constitution." 18 U.S.C. § 1385 (2006).

83. *See supra* note 75 and accompanying text.

84. Judge Urbom in *United States v. Jaramillo* did note that the President failed to use the procedures established by Congress in the Insurrection Act, but never recognized that the President had independent authority to authorize domestic military use. 380 F. Supp. 1375, 1379 (D. Neb. 1974). This Note will show the President's independent

The current judicial PCA tests overlook the President's power to authorize the use of the military in certain domestic situations. The Constitution provides that the President is the commander-and-chief of the military,[85] is the sole holder of Executive power,[86] and is charged with the responsibility to "take Care that the Laws be faithfully executed."[87] Given these constitutional grants of power, the President possesses independent constitutional authority to use the military in response to incidents of domestic lawlessness that cannot be abridged by Congress.[88]

Should the court find the military acted pursuant to presidential authority, the question becomes a constitutional one: does the President possess the authority to use the military in this situation?[89] Should the court find that the President does have the authority, the analysis ends without ever delving into the PCA's problematic "execute the laws" language. Should the court find that the military was not acting pursuant to presidential authority, the court would then turn to the only other possible source of authority by which the military can legally act—Congress. At this point, and no earlier, should PCA specific issues arise.

Adopting a constitutionally based approach to PCA analysis can help courts avoid attempting to unnecessarily categorize an activity as law enforcement when the military is acting pursuant to presidential authority. Instead, courts will have to examine whether the President possesses the authority to act. Though courts typically prefer to avoid questions involving the scope of Executive power, they have nonetheless, by way of Justice Jackson's three categories of Executive power, developed the tools to do so.[90] The same cannot be said of the PCA's "execute the laws" provision, for which the courts have yet to develop any workable test.[91]

Although shifting the first tier of PCA analysis to the Constitution will eliminate the problem of applying the "execute the laws" provision when the military is acting pursuant to presidential authority, there will still be situations

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constitutional authority limits the PCA's applicability to the President. *See infra* notes 85-89.

85. U.S. CONST. art. II, § 2, cl. 1.

86. U.S. CONST. art. II, § 1, cl. 1.

87. U.S. CONST. art. II, § 3.

88. Note, *Riot Control and the Use of Federal Troops*, 81 HARV. L. REV. 638, 649 (1968). The Supreme Court has recognized the inherent authority of the President to use the military to compel obedience to the laws of the United States. *See, e.g.*, *Ex parte* Siebold, 100 U.S. 371, 395 (1880). With the Insurrection Act, Congress legislatively recognized this authority, ch. 1041, 70A Stat. 15 (1956) (codified at 10 U.S.C. §§ 331–35 (2006)), but requires the President to issue a "proclamation . . . to disperse" prior to using the military. 10 U.S.C. § 334.

89. The Constitution only gives the President the authority to execute those laws created by Act of Congress or those rights and duties arising from the Constitution itself. Cunningham v. Neagle, 135 U.S. 1, 64–68 (1890). The President cannot domestically use the military in situations where neither a congressional statute nor constitutional right has been implicated.

90. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

91. *See supra* Part II.B.

where the President did not authorize the use of the military. In these situations, the problem of defining the phrase "execute the laws" will remain.[92] Given the judiciary's interpretive quagmire, any solution to this problem must ultimately come from Congress in its role as author and creator of the PCA.

IV. CONGRESSIONAL ACTS AFFECTING THE POSSE COMITATUS ACT

Much of the difficulty in interpreting the PCA arises from the confused web of congressional acts authorizing, under certain scenarios, domestic military use.[93] Since the PCA only prohibits domestic military law enforcement not authorized by the Constitution or by an Act of Congress, an understanding of the PCA's proscription requires a survey of all congressional acts involving the military. When Congress identifies an activity as law enforcement in nature, but nonetheless permits military involvement as an exception to the PCA, the characteristics of that activity guide courts in understanding the types of activities falling within the "execute the laws" provision's scope.[94] Should an act be misinterpreted as creating an exception to the PCA, rather than as identifying activities beyond the scope of the Act, the effect would be to broaden the definition of executing laws under the PCA beyond what Congress actually intended.[95]

A. Beyond the Scope of the Posse Comitatus Act

Determining whether a congressional act is an exception to, or beyond the scope of the PCA has not been an easy task, with many acts commonly, and wrongfully, perceived as exceptions.[96] The most notable of these misclassified acts include the Military Support for Civilian Law Enforcement Agencies Act ("MSCLEA"),[97] the Insurrection Act,[98] and the Stafford Act.[99] An understanding of why these acts should not be interpreted as exceptions to the PCA requires

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92. *See supra* Part II.B.

93. Demaine & Rosen, *supra* note 9, at 192–203 (briefly discussing many of the statutory exceptions to the PCA).

94. Congress itself recognized this concern when it passed the MSCLEA. In the legislative history accompanying the MSCLEA, Congress specifically indicates that most of the activities identified in the Act were not law enforcement activities as applied to the PCA. *See* H.R. REP. NO. 97-71(II), at 7 (1981) (the first four sections of the MSCLEA identified forms of military assistance that had been viewed as legally permissible, despite the lack of a congressional act authorizing them, indicating that they were non-law enforcement in nature).

95. *See* Demaine & Rosen, *supra* note 10.

96. *See, e.g.*, Jessica DeBianchi, Note, *Military Law: Winds of Change—Examining the Present-Day Propriety of the Posse Comitatus Act After Hurricane Katrina*, 17 U. FLA. J.L. & PUB. POL'Y 473, 486–87 (2006) (describing the Insurrection and Stafford Acts as exceptions to the PCA).

97. 10 U.S.C. §§ 371–82 (2006).

98. 10 U.S.C. §§ 331–34 (2006).

99. 42 U.S.C. §§ 5121–5207 (2006). The Stafford Act allows the President during emergencies to use Department of Defense resources to provide disaster relief work "essential for the preservation of life and property." *Id.* § 5170b(c).

further analysis of (1) to whom the PCA applies and (2) the limited meaning Congress has assigned to the PCA's "execute the laws" provision.

As to the issue of to whom the PCA applies, significant evidence suggests that the PCA does not apply to the President of the United States.[100] As stated above, when Congress passed the PCA, there was widespread debate over whether the Act applied to the President at all.[101] One hundred and twenty-four years later, Congress appears to have resolved the debate with the passage of the Homeland Security Act of 2002 ("HSA").[102]

The HSA states that the PCA does not bar the President from "us[ing] . . . the Armed Forces for a range of domestic purposes, including law enforcement functions, when . . . the President determines that the use of the Armed Forces is required to fulfill the President's obligations under the Constitution. . . ."[103] The HSA also states that, when originally passed, the PCA was "expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing Federal Law."[104] Therefore, though the HSA does not explicitly limit the PCA's applicability to persons other than the President, its effect appears to be exactly that.[105]

As for the "execute the laws" provision of the PCA, Congress appears to have adopted the *direct* and *active* test advanced in *Red Feather*.[106] The House of Representative Reports accompanying the passage of the MSCLEA indicated that only certain types of direct assistance by the military to civilian law enforcement were prohibited by the PCA, listing as examples of prohibited military assistance many of those activities identified by Judge Bogue as active involvement in law enforcement.[107]

Using the interpretation of the PCA given by the HSA and the MSCLEA, we can identify two prongs that will enable us to determine whether a congressional act is an exception to, or beyond the scope of, the PCA: (1) whether the congressional act involves actions taken by the President or by someone else and (2) whether the act in question deals with an activity that constitutes direct and active participation in law enforcement.

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100. *See supra* Part III.

101. *See supra* Part I.A.

102. Pub. L. No. 107-296, 116 Stat. 2135 (codified in 6 U.S.C. § 466 (2006)).

103. *Id.* § 466(a)(4).

104. *Id.* § 446(a)(2). This Act can be seen as making moot any question as to whether the original drafters intended the Act to apply to the President by statutorily resolving the question in the negative.

105. Because the express purpose of the PCA was to prevent Marshals from using the military for law enforcement purpose, and because Congress has recognized the authority of the President to use the military in a domestic law enforcement role, the PCA should be read as not applying to the President. *See id.* § 446.

106. 392 F. Supp. 916, 925 (D.S.D. 1975).

107. H.R. REP. NO. 97-71(II), at 10 (1981) ("The Secretary of Defense is . . . required . . . to ensure that . . . any assistance . . . does not include . . . the direct participation by any member of [the military] . . . in any search, seizure, arrest, or similar activity."). The types of activities described in the House Report were classified as "active" assistance by Judge Bogue in *Red Feather*. 392 F. Supp. 916, 925 (D.S.D. 1975).

1. Beyond the Scope of the PCA: Military Support for Civilian Law Enforcement Activities Act

Congress addressed the meaning of the PCA's "execute the laws" provision when it passed the MSCLEA[108] in response to the growing drug-trade problem in the United States.[109] Congress felt that the confusion surrounding the PCA prevented the military from supporting civilian law enforcement agencies "even when such assistance would in fact be legally proper."[110]

Though the MSCLEA is commonly seen as an exception to the PCA's prohibition on using the military in law enforcement capacities,[111] it is actually an attempt to narrow the understood meaning of the PCA's "execute the laws" language.[112] The MSCLEA does not describe law enforcement activities that the military is authorized to engage in as an exception to the PCA, but rather clarifies certain types of activities that should not be considered law enforcement activities under the PCA at all.[113]

The MSCLEA identifies multiple military activities that are beyond the scope of the PCA.[114] These activities include military assistance to civilian law enforcement involving: (1) information "relevant to a violation of any Federal or State law" within the civilian law enforcement agency's jurisdiction,[115] (2) military equipment to be used for law enforcement purposes,[116] (3) training and advice,[117] (4) the use of military personnel to maintain and operate military equipment,[118] and (5) assistance in the event of an incident involving a "biological or chemical weapon of mass destruction."[119]

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108. 10 U.S.C. §§ 371–82 (2006).

109. H.R. REP. NO. 97-71(II), at 3.

110. *Id.*

111. The MSCLEA is commonly referred to as an exception to the PCA since it specifically delineates ways in which the military is allowed to assist law enforcement agencies. *See, e.g.*, Jessica W. Julian, *Noriega: The Capture of a State Leader and Its Implications on Domestic Law*, 34 A.F. L. REV. 153, 161–62 (1991).

112. H.R. REP. NO. 97-71(II), at 3.

113. *Id.* at 7 (stating that the first four sections of the act were meant to codify current interpretations of the PCA that allow certain military and civilian law enforcement cooperative practices).

114. 10 U.S.C. §§ 371–82 (2006).

115. *Id.* § 371. The "clarification" of the PCA, as it applies to the sharing of information between the military and civilian agencies, is particularly important in light of the difficulties caused by the compartmentalization of national security information by government agencies leading up to and immediately following the events of September 11, 2001. *See* Gizzo, *supra* note 8, at 174–75.

116. 10 U.S.C. § 372.

117. *Id.* § 373.

118. *Id.* § 374.

119. *Id.* § 382. This Act is also, in part, an exception to the PCA, since it authorizes the military to perform traditional law enforcement functions in certain emergency situations involving biological and chemical weapons. *Id.* § 382(d)(2)(B). A similar exception has also been created for situations involving nuclear material. 18 U.S.C. § 831 (2006).

Though the MSCLEA lists activities that both do and do not qualify as law enforcement, it fails to communicate a clear standard for classifying non-listed activities.[120] And since courts have previously found some of the non-law enforcement activities described in the MSCLEA as being prohibited by the PCA, the classification of these activities as being beyond the scope of the PCA is in no way self-evident.[121] Therefore, Congress's effective removal of these activities from the PCA's scope, without providing a clear explanation why, only adds to the confusion.

2. Beyond the Scope of the PCA: The Insurrection and Stafford Acts—Recognition of the President's Emergency Powers

The Insurrection[122] and Stafford Acts[123] each describe emergency situations where Congress has given the President authority to use the military in a domestic capacity.[124] And like the MSCLEA, these acts are more accurately viewed as describing scenarios beyond the scope of the PCA rather than describing exceptions to the PCA.[125]

The Insurrection Act has existed in one form or another since 1792.[126] When originally passed by the Second Congress, pursuant to the "calling forth" clause of Article I of the Constitution,[127] it limited the President to using militia in response to invasion, insurrection, or obstructions of laws "too powerful to be suppressed by the ordinary course of judicial proceedings."[128] Congress later expanded the Insurrection Act to allow the President to use federal troops[129] in response to hostilities with Spain and the Burr Conspiracy.[130] Since then, Congress

120. H.R. Rep. No. 97-71(II), at 7-12(1981). Though Congress appeared to adopt the *Red Feather* direct and active test, the malleability of this test makes it difficult to apply in fact. *See supra* Part II.B.

121. The MSCLEA indicates that the use of military personnel for expert advice and to operate and maintain military equipment does not fall within the "execute the laws" provision of the PCA. 10 U.S.C. §§ 372–74. Yet, the district court in *United States v. Jaramillo* found that these types of activities could constitute PCA violations. 380 F. Supp. 1375, 1381 (D. Neb. 1974).

122. 10 U.S.C. §§ 331–34 (2006).

123. 42 U.S.C. §§ 5121–5207 (2006).

124. It may be more accurate to describe the acts as affirming the President's authority to use the military within certain contexts, rather than as a delegation of congressional authority.

125. The Code of Federal Regulations describes the Insurrection Act as one of the major exceptions to the PCA. 32 C.F.R. § 215.4(c)(2)(i) (2007). But since the Insurrection Act involves actions taken by the President, it would be more accurate to view the Insurrection Act as describing activities beyond the scope of the PCA.

126. Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 159 (2004).

127. U.S. CONST. art. I, § 8, cl. 15.

128. Insurrection Act, ch. 28, 1 Stat. 264, 264 (1792) (repealed 1795).

129. Act of March 3, 1807, ch. 39, 2 Stat. 443, 443 (current version at 10 U.S.C. §§ 331–35 (2006)); Vladeck, *supra* note 126, at 164.

130. During the Burr Conspiracy, former Vice President Aaron Burr tried to get the United States' western frontier to secede from the Union and invade Spanish Mexico.

has continued to include the authorization for federal troops in subsequent versions of the Insurrection Act.[131]

Under the current version of the Insurrection Act, the President has the power to use the military to (1) suppress insurrections,[132] (2) respond to obstructions of the law,[133] (3) respond to major emergencies beyond the capacity of the states, and (4) respond to failures by the states to guarantee the rights, privileges, and immunities guaranteed by the Constitution.[134] In the rare instances where the President has used the military in a domestic law enforcement capacity, the President has justified the use as being pursuant to both the President's constitutional powers and the Insurrection Act.[135]

Even though the Insurrection Act specifically authorizes the President alone to use the military to enforce laws, it has often been viewed as an exception to the PCA.[136] But this interpretation improperly assumes that the PCA applies to the President at all.[137] Given the history of the Act[138] and Congress's own statement concerning the PCA's scope,[139] such an interpretation is inaccurate. A

Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Weapon*, 34 HASTINGS CONST. L.Q. 161, 198–99 (2007).

131. Though the basis for the Insurrection Act continues to lie within Congress's "calling forth" powers of Article I, Section 8 of the Constitution, the President arguably has independent authority to use the military in domestic emergencies. *See* U.S. CONST. arts. II, § 1, cl. 1, § 2, cl. 1, § 3.

132. 10 U.S.C. § 331.

133. *Id.* § 332.

134. *Id.* § 333. The President's authority under the Insurrection Act is qualified by a congressional notice provision. *Id.* § 333(b).

135. For the President to exercise his authority under the Insurrection Act, he must first issue an order for those obstructing the law to disperse. *Id.* § 334. In the twentieth century, Presidents have generally complied with this provision when using the military in order to enforce Federal Law. *See, e.g.*, Exec. Order No. 10730, 22 Fed. Reg. 7628 (Sept. 24, 1957). After issuing a dispersion order, President Eisenhower authorized the use of the military when persons in Little Rock, Arkansas, continued to obstruct the enforcement of a court order to desegregate schools. *Id.* The President cited as the basis for his authority both his Constitutional powers as President and the authority delegated him by Congress in the Insurrection Act. *Id.* Therefore, though following the "proclamation provision" of the Insurrection Act, Eisenhower still affirmed his authority as President to respond independent of the Act. *See id.*

136. *See* Michael Greenberger, *Did the Founding Fathers Do "A Heckuva Job"? Constitutional Authorization for the Use of Federal Troops to Prevent the Loss of a Major American City*, B.U. L. REV. 397, 405 (2007) (describes the Insurrection Act as an exception to the PCA that allows the President to enforce laws with the military).

137. *See supra* Part IV.A.

138. When President Hayes signed the PCA into law in 1878, he, and many of the members of Congress who voted for it, did not recognize it as affecting the powers of the President. Felicetti & Luce, *supra* note 2, at 114–15, 119.

139. In the Homeland Security Act, Congress affirmed the limited scope of the PCA, stating that (1) when the PCA was passed it was "expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing Federal law," and (2) it does not prevent the President from using the military for domestic law enforcement when necessary to fulfill his constitutional duties. 6 U.S.C. § 466 (2006).

more accurate interpretation of the Insurrection Act is that, like the MSCLEA, it lies beyond the scope of the PCA.

Because the Stafford Act specifically authorizes the use of the military in disaster relief activities, it, too, has often been viewed as an exception to the PCA.[140] But when a PCA analysis is actually applied to the Act, it becomes apparent that, like the MSCLEA and the Insurrection Act, the Stafford Act describes a scenario beyond the scope of the PCA.[141]

Congress passed the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act") in 1988.[142] The Stafford Act was the culmination of a series of amendments to the Disaster Relief Act, originally passed in the 1950s to establish a centralized federal disaster relief program.[143] The Stafford Act's purpose is to "provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result" from natural disasters.[144]

Under the Stafford Act, the governor of a state affected by a natural disaster can request that the President declare a major disaster has occurred.[145] Once the President makes such a declaration, the President can direct federal agencies to provide direct assistance to local authorities in order to meet "immediate threats to life and property resulting from [the] . . . disaster."[146]

A governor can specifically request the President make available Department of Defense resources in order to perform emergency work "essential for the preservation of life and property."[147] If approved, the Department of Defense can be used to remove debris and wreckage and to restore "essential public facilities and services."[148] The Act limits the use of the military to ten days.[149]

Though the Stafford Act specifically authorizes domestic military use, it is not an exception to the PCA. As shown earlier in this Note, the PCA is not a restriction on the activities of the President,[150] nor does it deal with military uses that would not qualify as direct and active law enforcement.[151] The Stafford Act

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140. DeBianchi, *supra* note 96, at 486–87.

141. *See supra* Part IV.A.1–2.

142. Pub. L. No. 100-707, 102 Stat. 4689 (codified as amended at 42 U.S.C. §§ 5121–5206 (2006)).

143. Nathan Smith, *Water, Water Everywhere, and Not a Bite to Eat: Sovereign Immunity, Federal Disaster Relief, and Hurricane Katrina*, 43 SAN DIEGO L. REV. 699, 712 (2006).

144. 42 U.S.C. § 5121(b).

145. *Id.* § 5170.

146. *Id.* § 5170b.

147. *Id.* § 5170b(c)(1).

148. *Id.* § 5170b(c)(6)(B).

149. *Id.* § 5170b(c)(1).

150. *See supra* note 105 and accompanying text.

151. *See supra* Part IV.A.1.

authorizes *the President* to use the military in response to disasters.[152] It further limits the activities the military can perform to "emergency work," including clearing debris and providing emergency services, and does not authorize the military to perform law enforcement activities.[153] Therefore, since the PCA does not apply to domestic military activities that are (1) authorized by the President, or (2) non-law enforcement in nature, the Stafford Act is also beyond the scope of the PCA.

B. Exceptions to the Posse Comitatus Act

Though the three acts most frequently cited as exceptions to the PCA are in fact beyond the PCA's scope, this does not mean that Congress has never created an exception. But with each actual exception to the PCA, the act in question allows someone *other than* the President to authorize domestic military use for an activity that involves *direct* and *active* military involvement in law enforcement.[154]

An example of an exception to the PCA would be the congressional enactment authorizing the Secretary of the Army to make available to the Secretary of the Interior military personnel "to prevent trespassers or intruders from entering [National Parks] for the purpose of destroying the game or objects of curiosity therein, or for any other purpose prohibited by law . . . ."[155] Because the military can be used without specific presidential authorization to enforce laws by removing trespassers, this Act qualifies as an exception to the PCA.[156]

Another exception to the PCA is Congress's authorization for the Attorney General to request military assistance in respond to chemical, biological, and nuclear emergencies.[157] These acts allow someone *other than* the President to

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152. 42 U.S.C. § 5170b. Arguably, even without the Act, the President possesses the constitutional authority to respond to these disasters. *See supra* Part III.

153. *Id.* § 5170b(c)(6)(B).

154. The House Report accompanying the passage of the MSCLEA lists multiple acts as exceptions to the PCA. H.R. REP. NO. 97-71(II), at 6–7 (1981). Some of these acts involve actions that can be taken by the President. The inclusion of these acts appears to reflect the general confusion surrounding whether the PCA restricts the President. As stated earlier, I believe the effect of the HSA was to eliminate this confusion, and show that the PCA does not serve as a proscription on presidential power. *See* 6 U.S.C. § 466 (2006); *supra* notes 102–105 and accompanying text.

155. 16 U.S.C. § 23 (2006).

156. Though *United States v. Red Feather* is not clear on what constitutes active military involvement in law enforcement, *see* 392 F. Supp. 916, 924 (D.S.D. 1975), the effect of the *Red Feather* active prong can be gauged by *United States v. McArthur*, which requires a citizen to be subjected to the compulsory power of the military before a PCA violation is found. 419 F. Supp. 186, 194 (D.N.D. 1975), *aff'd sub nom.* United States v. Casper, 541 F.2d 1275 (8th Cir. 1976). Since the forceful detention and removal of trespassers would involve subjecting trespassers to the compulsory power of the military, 16 U.S.C. § 23 should therefore be viewed as authorizing active involvement by the military in civilian law enforcement.

157. 10 U.S.C. § 382 (2006) (biological and chemical material); 18 U.S.C. § 831 (2006) (nuclear material).

authorize domestic military use.[158] Further, when the situation involves an emergency, requiring the "immediate protection of human life" beyond the capacity of civilian law enforcement, the military can engage in such direct and active law enforcement activities as making arrests and conducting searches and seizures.[159] Therefore, these acts create an exception to the PCA.

There are many other congressionally-created exceptions to the PCA, including using the military to (1) protect federal property;[160] (2) protect foreign officials and their families;[161] (3) respond to threats against Congress, the President's Cabinet, and the Supreme Court;[162] (4) respond to threats against the President;[163] and (5) protect certain civil rights by enforcement of warrants issued by a magistrate judge.[164] Though this is not an exhaustive list of all of the exceptions to the PCA created by Congress, the list nonetheless helps show the two characteristics that a congressional exception to the PCA must contain: (1) an authorization for someone *other than* the President to use the military in a (2) *direct* and *active* domestic law enforcement capacity.

At first blush, the analysis of whether a congressional act is an exception to, rather than beyond the scope of the PCA may seem purely semantic, but it is an important distinction to make. To perceive that the PCA covers actions taken by the President, or uses of the military that are non-law enforcement in nature, would allow the PCA to become a proscription against any domestic military involvement not explicitly authorized by Congress and create paralysis in situations where the military is needed.[165] As history has shown, it was exactly this problem that spurred the passage of the MSCLEA.[166] Because it is unreasonable to expect that Congress will be able to anticipate every scenario for which the resources and capabilities of the military may be needed, it is important to understand the true extent of the PCA's proscription.[167]

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158. 10 U.S.C. § 382(a); 18 U.S.C. § 831(d). These acts authorize the Secretary of Defense, upon receiving a request from the Attorney General, to use the military in response to certain situations involving biological, chemical, and nuclear materials.

159. 10 U.S.C. § 382(d)(2)(A)–(B). Making arrests and conducting searches and seizures are activities that were identified by Judge Bogue in *Red Feather* as constituting active military participation in civilian law enforcement. 392 F. Supp. at 925.

160. *See* 18 U.S.C. § 1382 (2006); United States v. Banks, 539 F.2d 14, 16 (4th Cir. 1976).

161. 18 U.S.C. §§ 112(f), 1116(d).

162. *Id.* § 351(g).

163. *Id.* § 1751(i).

164. 42 U.S.C. § 1989 (2006).

165. *See* H.R. REP. NO. 97-71(II), at 3 (1981) (finding that the military was hesitant to assist law enforcement in the war on drugs due to the PCA).

166. *See id.*

167. After the destruction caused by Hurricane Katrina, there was widespread belief that the military could not be used to help respond to the ensuing chaos in New Orleans. *See* Schmitt, *supra* note 10, at A15 ("Pentagon and military officials say that federal troops could not have been sent into the chaos of New Orleans without breaking the Posse Comitatus law."). Therefore, the misunderstanding surrounding the PCA caused the military, and possibly the President, to fail to use the military in what may have been an appropriate situation for military assistance. This example illustrates that the issue of the

V. THE MILITARY'S RESPONSE TO THE POSSE COMITATUS ACT

A common complaint about the PCA is that, since the Wounded Knee cases of the 1970s, the military has tended to view the Act as a more expansive restriction on the domestic use of the military than it really is.[168] As shown earlier in this Note, Congress passed the MSCLEA in response to this problem.[169] A more contemporary example of the military's excessive trepidation in light of the PCA was the military's interpretation that the PCA prohibited military assistance in New Orleans immediately after Hurricane Katrina.[170]

Though the military's actions in response to the PCA demonstrate tepidness, Department of Defense ("DOD") regulations implementing the PCA are fair representations of the restraints imposed by the Act.[171] For example, DOD Directives recognized the PCA's limited applicability with regards to the President of the United States.[172] And though the Directives fail to effectively define what constitutes executing laws under the PCA,[173] they recognize that the PCA does not apply to many activities often mistakenly perceived as falling under the PCA's "execute the laws" provision.[174]

The primary directive implementing the PCA is DOD Directive 5525.5 ("DODD 5525.5").[175] DODD 5525.5 catalogs domestic military activities that do not violate the PCA, either because they are not law enforcement in nature or

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military being too hesitant to assist civilian law enforcement, a concern expressed by Congress over twenty years ago when passing the MSCLEA, still exists today. *See* H.R. REP. NO. 97-71(II), at 3 (1981).

168. *See* Felicetti & Luce, *supra* note 2, at 153–54 (arguing that the military has read the PCA as being overly restrictive).

169. *See supra* Part IV.A.1.

170. *See supra* note 167 and accompanying text.

171. As has been explained earlier in this Note, the two common misconceptions over the actual breadth of the PCA involve (1) whether it applies to actions taken by the President and (2) what constitutes "executing the laws" under the Act.

172. *See, e.g.*, U.S. Dep't of Def., Directive No. 3025.12, Military Assistance for Civilian Disturbances, 4.1.1-3 (Feb. 4, 1994), *available at* http://www.dtic.mil/whs/directives/corres/pdf/302512p.pdf [hereinafter *DODD 3025.12*] (recognizing President's constitutional authority to use the military).

173. *See DODD 5525.5*, *supra* note 3, at E4. The Directive states that the PCA prohibits direct assistance to civilian law enforcement, without making any reference to the active prong of the direct and active test adopted in *United States v. Red Feather*, 392 F. Supp. 916, 925 (D.S.D. 1975), and implicitly adopted by Congress with the MSCLEA, H.R. REP. NO. 97-71(II), at 10 (1981).

174. *See, e.g.*, U.S. Dep't of Def, Directive No. 3025.1, Military Support to Civil Authorities, 4.5 & E2.1.18 (1993), *available at* http://www.dtic.mil/whs/directives/corres/pdf/302501p.pdf [hereinafter *DODD 3025.1*] (authorizing military to respond to imminently serious conditions absent prior presidential approval without violating the PCA).

175. *DODD 5525.5*, *supra* note 3.

because Congress has specifically authorized them.[176] The DOD has dealt with *whom* the PCA applies to in directives that supplement DODD 5525.5.[177]

In DOD Directive 3025.12 ("DODD 3025.12"), the Department of Defense recognizes the constitutional authority of the President to use the military in response to "insurrections, rebellions, and domestic violence," and to ensure that law and order are maintained.[178] DOD Directive 3025.15 ("DODD 3025.15") further recognizes that the "employment of active duty military forces in domestic civil disturbances may be . . . authorized only by the President."[179] Together, these directives appear to support the view that the President is beyond the PCA's purview.

The DOD has not done as well in clarifying the scope of the PCA in terms of what activities constitute a law enforcement activity. DODD 5525.5 states that direct assistance to law enforcement by the military violates the PCA except as otherwise provided in the enclosure 4 of DODD 5525.5.[180] And though DODD 5525.5 goes on to list many of the activities that have been identified by courts and Congress as being beyond the scope of the PCA's "execute the laws" provision by virtue of their passivity,[181] DODD 5525.5 itself fails to make the active/passive distinction.[182] But even though the directive fails to explicitly state that assistance to law enforcement must be characterized as both *direct* and *active* to constitute a PCA violation, the actual effect of this shortcoming is minimal since the directive specifically authorizes those activities courts and Congress have found constitute passive assistance.[183]

The DOD has also recognized that the PCA does not apply to non-law enforcement assistance to civilian authorities required during a disaster or emergency.[184] In DOD Directive 3025.1 ("DODD 3025.1"), the military established guidelines that authorize the military, without any prior approval from the President, to assist civilian law enforcement during "[i]mminently serious conditions" when necessary to "save lives, prevent human suffering, or mitigate great property damage."[185] The types of assistance that the military is authorized to

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176. *Id.* at E4.

177. *DODD 3025.1*, *supra* note 174; *DODD 3025.12*, *supra* note 172; U.S. Dep't of Def., Directive No. 3025.15, Military Assistance to Civil Authorities, *available at* http://www.dtic.mil/whs/directives/corres/pdf/302515p.pdf (Feb. 18, 1997) [hereinafter *DODD 3025.15*].

178. *DODD 3025.12*, *supra* note 172, at 4.1.1-3.

179. *DODD 3025.15*, *supra* note 177, at 4.7.4.

180. *DODD 5525.5*, *supra* note 3, at E4.

181. *See* United States v. Red Feather, 392 F. Supp. 916, 925 (D.S.D. 1975) (holding that lending equipment and giving advice constitute passive assistance to law enforcement and do not violate PCA).

182. *See DODD 5525.5*, *supra* note 3, at E4.1.3 (identifying forms of direct assistance that are prohibited without ever referring to the active nature of the assistance).

183. *DODD 5525.5*, *supra* note 3, at E4.1.4-7. Because Congress and the courts have failed to provide a clear definition of what constitutes passive assistance, the military's avoidance of the issue should be expected. *See supra* Part II.A.3, IV.A.1.

184. *See DODD 3025.1*, *supra* note 174.

185. *Id.* at 4.5, E2.1.18.

provide civil authorities include such things as evacuations, providing medical treatment, and clearing debris.[186] The list does not include any law enforcement activities and thus properly recognizes the limited scope of the "execute the laws" provision of the PCA.[187]

Therefore, despite the criticism that the PCA has been interpreted by the military too broadly,[188] the military has, given the confusion surrounding the Act, done an excellent job of drafting directives to implement it. Yet this conclusion does not mean the PCA is a success, because in practice the military continues to apply the PCA too broadly.[189] As long as the PCA's restraints are applied too broadly in fact by the military, it is irrelevant how well the directives appear to encompass the PCA's true character.

VI. AN ALTERNATIVE TO THE POSSE COMITATUS ACT

Before developing a proposed alternative to the PCA, it is important to recap the Act's weaknesses. This Note illustrates that (1) confusion over whether the PCA applies to the President has existed since its adoption in 1878;[190] (2) in applying the PCA, courts have tended to overlook the constitutional role of the military established by the Constitution;[191] (3) due to the confusing language of the PCA, courts have been unwilling to apply any remedy, even when a PCA violation has been found;[192] and (4) despite clarifications of the Act made by Congress and the relatively well-drafted DOD Directives, the Act continues to be applied too broadly, causing virtual paralysis in situations where the use of the military is both constitutional and necessary.[193]

Because the PCA has historically been applied too broadly, despite congressional efforts to clarify its intended scope,[194] this Note proposes the adoption of a new act that addresses all of the concerns surrounding the PCA, while implementing Congress's purpose of limiting domestic military use.[195]

In possible recognition of the difficulty in applying the PCA's "execute the laws" provision, courts in recent years have started supplementing the Wounded Knee tests with a test examining whether the military's actions were

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186. *Id.* at 4.5.4.

187. *Id.* The Directive properly recognizes the limited scope of the PCA because it does not establish "immediate response" disaster relief operations as constituting a law enforcement activity. *Id.*

188. *See, e.g.*, Felicetti & Luce, *supra* note 2, at 153–54 (arguing that the military has read the PCA as being overly restrictive).

189. *See supra* note 167.

190. *See supra* note 15 and accompanying text.

191. *See supra* Part III.

192. *See supra* notes 76–77 and accompanying text.

193. *See supra* notes 165–167 and accompanying text.

194. *See supra* Part IV.

195. *See* Homeland Security Act of 2002, 6 U.S.C. § 466 (2006) (The purpose is to prevent government agents, "on their own initiative, from calling on the Army for assistance in enforcing Federal Law.").

based upon a "military purpose;"[196] that is to say, a purpose relating to one of the military's recognized functions. Following these courts' lead, any proposed replacement of the PCA should focus on whether the military is acting pursuant to a military purpose.

Adopting the military purpose test, this Note proposes the following replacement to the PCA:

> Military Purpose Act[197]
>
> The use of the armed forces in domestic affairs shall be authorized only under the following situations:
>
> (1) The President may use the military when required to fulfill the President's obligations under the Constitution.[198]
> (2) Lesser officers of the United States do not possess the power to authorize the use of the military, in any capacity, except for those uses otherwise provided for by Congress as being part of the military's purpose.[199]
> (3) Congress may modify, by act, the military's purpose within the limits of the Constitution.[200]
> (4) Violations of this Act will not give rise to civil or criminal remedies against the United States Government or its agents.[201]

An examination of each section of the proposed act will show how it will accomplish Congress's goal of ensuring domestic military use oversight, provide a clear test that will enable the President to take decisive action when necessary, and establish a realistic punishment for violators.[202]

Section 1 of the Military Purpose Act ensures that courts, in applying the Act, look first to the Constitution to determine whether the use of the military in

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196. *See, e.g.*, Hayes v. Hawes, 921 F.2d 100, 103 (7th Cir. 1990) (holding there is no PCA violation if there is an independent military purpose in preventing illicit drug transactions); Brune v. Admin. Dir. of Courts, 130 P.3d 1037, 1042 (Haw. 2006) (holding there is no PCA violation if the military is "pursuing a legitimate military purpose independent of the involvement with civilian law enforcement in question").

197. This proposed act would repeal the Posse Comitatus Act.

198. This provision incorporates, in part, the language of the Homeland Security Act of 2002, 6 U.S.C. § 466.

199. Courts have already started to use a military purpose analysis when applying the PCA in drug cases. *See, e.g.*, *Hawes*, 921 F.2d at 103 (holding no violation of PCA if there is an independent military purpose in preventing illicit drug transactions). The proposed Military Purpose Act would apply this approach to any domestic military activity.

200. This provision is a specific affirmation of Congress's powers to raise, support, and regulate the military and to provide rules for calling forth state militias. U.S. CONST. art. I, § 8.

201. Courts have been hesitant to provide individuals with any remedy when PCA violations have been found. *See, e.g.*, United States v. Wolffs, 594 F.2d 77, 85 (holding the exclusionary rule does not apply to PCA violations). This Section affirms this approach by explicitly stating that no criminal or civil remedy is available for violations of the Military Purpose Act.

202. The current punishment in the PCA has never been used and therefore may be unrealistic. Felicetti & Luce, *supra* note 2, at 163.

question is allowed. It does so by explicitly recognizing the President's duties and obligations under the Constitution.[203] By looking to the Constitution in assessing whether the President's use of the military is lawful, courts will be forced to deal with the constitutional questions surrounding domestic military use.

Section 1 also incorporates the language used by Congress in the Homeland Security Act dealing with presidential authority to use the military in a domestic capacity.[204] Adopting this language eliminates the possibility of interpreting the Military Purpose Act inconsistently with other congressional enactments, including the HSA and the Insurrection Act.

Section 2 of the Act ensures congressional oversight of domestic military use by requiring that Congress authorize any domestic military use taken without presidential authority.[205] By requiring all domestic military uses to be authorized by either the President or Congress, the Act accomplishes the intent originally given to the PCA.[206]

Section 2 also identifies the means by which courts are to determine whether an action is consistent with the military's purpose.[207] The proposed Act states that the military's purpose shall be "provided for by Congress."[208] If the military has acted without express presidential authorization, courts will look to see if the military acted pursuant to a military purpose established by congressional act. Unlike the PCA, this analysis will not require courts to perform the additional task of classifying the nature of the military activity as law enforcement or otherwise.[209] Should a court find that the specific domestic military involvement was neither authorized by the President nor pursuant to a military purpose as defined by Congress, the court should find the military involvement unlawful.

Section 3 establishes that the sole method by which the military's purpose can be amended is by Act of Congress. It also specifically recognizes the constitutional limitations upon Congress in defining the military's purpose.[210] In short, Congress cannot define the military's purpose in a way that would infringe upon the Article II and IV powers of the President.[211]

Finally, Section 4 clarifies any confusion over the remedy for a violation of the Military Purpose Act. Under the PCA, a violation could be punished by fine

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203. *See* U.S. CONST. art. II.

204. 6 U.S.C. § 466(a)(4) (2006).

205. *See supra* note 195 and accompanying text.

206. 6 U.S.C. § 466(a)(2); *see also supra* Part IV.A.

207. This in itself is an improvement over the PCA, which provided courts with no guidance on how to determine whether or not the military was engaged in law enforcement activities. *See* 18 U.S.C. § 1385 (2006).

208. *See supra* note 199 and accompanying text.

209. Under the PCA, courts not only had to look at congressional enactments in order to determine whether a specific domestic military activity was lawful, but also had to assess whether, in the absence of congressional authorization, the military activity should be classified as direct and active law enforcement. *See supra* Part II.

210. *See* U.S. CONST. arts. II, IV, § 4 (recognizing the role of the Federal Government in protecting the States, a role the military undoubtably plays a part in).

211. *Id.*

and/or imprisonment.[212] Yet, in its 129-year history, the punishment has never once been imposed, even when a violation was found.[213] Because courts have been unwilling to impose the punishment, Section 4 does away with the fine and imprisonment language of the PCA.[214]

Section 4 also specifically states that no civil or criminal remedy will be available in the event of a violation. In so doing, the Military Purpose Act adopts the current approach used by courts of denying individual remedies for PCA violations.[215] This does not mean that the Act is completely without teeth. Should a court find that the Military Purpose Act has been violated, it can issue an injunction against the unlawful military activity.[216] To further ensure that the Military Purpose Act prevents excessive military involvement in law enforcement, Congress may wish to establish an expedited procedure by which a court can review challenges.

The Military Purpose Act specifically addresses each of the shortcomings of the PCA. The Act eliminates the two main issues surrounding the PCA: (1) to whom the restrictions apply and (2) what the "execute the laws" provision means.[217] The proposed Military Purpose Act specifically states that it applies to all lesser officers of the United States, but not the President. It also completely jettisons the "execute the laws" language.[218] In its place, it supplements a simple test: under what congressionally defined military purpose is the military acting?

The most significant shortcoming of the proposed Military Purpose Act is that, since every domestic military use will have to be linked to a congressionally authorized military purpose, it will eliminate the flexibility the military has to respond to unanticipated situations without prior presidential or congressional authorization. But as the whole purpose of the act is to eliminate the discretion of federal and state officers to use the military,[219] the resulting lack of flexibility is inevitable. This loss of flexibility is mitigated by the fact that, under the proposed Military Purpose Act, the military can still be used domestically, so long as explicitly authorized by the President.

CONCLUSION

This Note proposes that one way to fix the PCA and eliminate the paralysis caused by the cloud of confusion surrounding it is to replace it.[220] As a

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212. 18 U.S.C. § 1385.

213. Felicetti & Luce, *supra* note 2, at 163.

214. *See* 18 U.S.C. § 1385.

215. *See supra* note 77 and accompanying text.

216. Courts have already shown a willingness to enjoin the military for violating environmental acts. *See, e.g.*, NRDC v. Evans, 279 F. Supp. 2d 1129, 1190–91 (N.D. Cal. 2003) (enjoining the Navy's use of LFA sonar pursuant to the Marine Mammal Protection Act). This same approach can be used when violations are found of the Military Purpose Act.

217. *See supra* Part IV.A.

218. *See* 18 U.S.C. § 1385.

219. *See* Homeland Security Act of 2002, 6 U.S.C. § 466 (2006). This assumes that the purpose of the Military Purpose Act will be the same as the PCA.

220. *See supra* Part VI.

replacement, this Note proposes the adoption of the Military Purpose Act, which explicitly recognizes the authority of the President to use the military pursuant to Article II and IV of the Constitution and focuses the analysis away from whether an activity can be classified as law enforcement, toward a more manageable inquiry of whether Congress authorized the activity.[221]

Given the times we live in, when the destruction caused by terrorism and natural disasters has reached previously unseen levels, it is essential that our leaders are able to respond quickly and decisively to threats. Since confusion serves to prevent decisive action, it is important that Congress adopts legislation that clearly defines any restriction upon the domestic use of the military. By abandoning the PCA in favor of a Military Purpose Act, Congress can both encourage decisiveness during emergencies while simultaneously maintaining the American tradition of limiting domestic military involvement.

221. *See supra* Part VI.

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