



Emory University School of Law
Emory Law Scholarly Commons

Faculty Articles


Faculty Scholarship

2014

Unintended Consequences: The Posse Comitatus Act in the Modern Era

Mark P. Nevitt

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/faculty-articles>

 Part of the [Military, War, and Peace Commons](#), [National Security Law Commons](#), [Other Political Science Commons](#), and the [United States History Commons](#)

UNINTENDED CONSEQUENCES: THE POSSE COMITATUS ACT IN THE MODERN ERA

Commander Mark P. Nevitt, U.S. Navy†

America was born in revolution. Outraged at numerous abuses by the British crown—to include the conduct of British soldiers in the colonists’ daily lives—Americans declared their independence, creating a new republic with deep suspicions of a standing army. These suspicions were intensely debated at the time of the nation’s formation and enshrined in the Constitution. But congressional limitations on the role of the military in day-to-day affairs would have to wait. This did not occur until after the Civil War when Southern congressmen successfully co-opted the framers’ earlier concerns of a standing army and passed a criminal statute—the 1878 Posse Comitatus Act (PCA)—that restricted the ability of the army to be used as a “posse comitatus” to “execute the laws.” Today, the PCA’s history and scope are often misunderstood with continual unintended consequences for today’s modern military that are far removed from the law’s earlier constitutional and statutory origins.

This Article addresses a significant unintended consequence in the modern era: the PCA’s peculiar modern application to the Navy. The text of the PCA is silent on the Navy, yet the Department of Defense (DoD) has determined that the PCA applies to the Navy worldwide. The early civil libertarian concerns that originated with the birth of the republic and at the time of the PCA’s passage are based on concerns over a standing army. These are fundamentally distinguishable from the navy, the maritime-based armed force that largely operates on the high seas, far away from America’s geographic borders and removed from its citizenry. And the Navy’s modern mission includes the maintenance of freedom of the seas to include the suppression of piracy. But the DoD’s application of the PCA to the Navy limits its ability to participate in the

† Commander (CDR), United States Navy. CDR Mark P. Nevitt is an active duty Navy judge advocate (JAG). He obtained his LL.M. and J.D. at the Georgetown University Law Center, and his B.S.E. from the University of Pennsylvania. CDR Nevitt is currently assigned as the Regional Environmental Counsel for the Mid-Atlantic Region in Norfolk, Virginia. The positions and opinions in this Article are those of the author and do not represent the official views of the Department of Defense or the United States Navy. He would like to thank Prof. Paul Diller, Prof. Alan Cohn, Lieutenant Commander Steven Obert, JAGC, USN, and the editors of the *Cardozo Law Review* for their help and insights with this Article.

full array of maritime missions—of continual concern with the rise of maritime terrorism that continually blurs the line between law enforcement and military activities. Building on the Navy example, this Article concludes by offering recommendations to remedy this historical incongruity while touching upon other areas—such as the rise of the National Security Agency and the complex modern military organization—where the PCA and associated civil-military relationship need further re-examination.

TABLE OF CONTENTS

INTRODUCTION	121
I. HISTORICAL BASIS: THE ENACTMENT OF THE POSSE COMITATUS ACT OCCURRED DURING RECONSTRUCTION.....	125
A. <i>Phase One: The Framers’ Concerns Focused on the Dangers of a Standing Army, Not a Standing Navy</i>	125
1. Text of the Declaration of Independence and Constitution.....	125
2. Constitutional Debates and the Federalist Papers	127
B. <i>Second Phase: The Posse Comitatus Act Emerged to Counter- Balance a Large “Occupying” Army During Reconstruction</i>	134
1. Congress Passes the PCA During the Reconstruction Era	134
2. The PCA’s Complicated Post-Reconstruction Legacy	137
3. “Posse Comitatus” Lacks Meaning in the Maritime Context....	138
C. <i>Third Phase: Subsequent Amendments to the PCA During the War on Drugs Add Further Confusion</i>	140
1. Congress Passes the Military Cooperation with Law Enforcement Act (MCLEA) in 1981, Modifying the Military’s Role in Law Enforcement	141
2. Additional Congressional and Executive Actions in the 1980s Combat Illicit Drug Activity	143
3. Legislative History of the Drug War Amendments: DoD Reluctance and Local Leader Frustration.....	145
II. THE MODERN MILITARY ORGANIZATION CREATES ADDITIONAL LAYERS OF COMPLEXITY TO THE PCA’S MODERN APPLICATION	147
A. <i>Whom—The PCA and the Five Military Services</i>	148
B. <i>Where the PCA Applies: The PCA Lacks a Clear Extraterritorial Application</i>	149
C. <i>What the PCA Applies to: Restrictions on “Active” Support, but Allowances for “Indirect” Support</i>	150
D. <i>DoD Regulations Muddle the Drug War Amendments and the PCA, Restricting the Navy and Confusing Federal Courts</i>	152

2014]	UNINTENDED CONSEQUENCES	121
	1. <i>Chandler v. United States</i> (1948)	155
	2. <i>United States v. Walden</i> (1974).....	156
	3. <i>United States v. Roberts</i> (1986)	157
	4. <i>United States v. Yunis</i> (1991)	159
III.	THE POSSE COMITATUS ACT AND ITS MODERN APPLICATION TO THE NAVY	160
	A. <i>Both the Navy and Coast Guard are Maritime Services that Share a Common Heritage and Modern Missions</i>	160
	B. <i>The U.S. Navy Has Demonstrated Its Ability to Successfully Thwart Piracy—A Federal Crime—on the High Seas</i>	163
	C. <i>Naval Operations Combatting Maritime Terrorism</i>	165
IV.	THE NEED FOR A FOURTH PHASE: CLARIFYING THE PCA FOR THE CHALLENGES OF THE TWENTY-FIRST CENTURY.....	168
	A. <i>The Navy’s Role in Future Law Enforcement Activities: A Challenge that Can Be Overcome</i>	169
	1. Challenge: Civil Libertarian Concerns	169
	2. Challenge: The Navy Lacks Proper Training.....	169
	3. Challenge: Military Readiness.....	171
	B. <i>Recommendations for Updating the PCA for the Modern Era</i>	172
	CONCLUSION.....	174

INTRODUCTION

America arose from revolution. The reasons are many and well documented, but among them was the intrusive conduct of British soldiers in homes prior to the Revolutionary War.¹ Their aggressive conduct included the forceful entry into colonial homes without probable cause, outraging the American Colonists. The British Army’s presence and actions served as a daily reminder that the British Crown had enormous power over the early Americans in *all* matters, both civil and military. Indeed, this violation of pre-Revolutionary homes by British soldiers was seen as a gross injustice, forming a strong basis for declaring independence from England.²

Today, it is perhaps unsurprising in light of earlier concerns of a standing army that emerged from this pre-Revolutionary War experience that there are legal restrictions—including the uniquely named criminal Posse Comitatus Act (PCA)—limiting the use of the

¹ See, e.g., CHARLES DOYLE & JENNIFER K. ELSEA, CONG. RESEARCH SERV., THE POSSE COMITATUS AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 3–4 (2012).

² THE DECLARATION OF INDEPENDENCE para. 12–16 (U.S. 1776) (asserting that British tyrannical acts over the colonists include the use of standing armies and rendering the military superior and independent to civil authorities).

Army in civil affairs.³ But this statute was not passed until after the Civil War, fully one hundred years after the Revolutionary War in response to federal troops occupying the defeated South. Both the constitutional and PCA debates focused on the dangers of a standing army, without mention of a navy. However, the Department of Defense (DoD) applies the PCA to the Navy as a matter of military policy.⁴ This effectively places a legal straitjacket on the Navy's ability to "execute the laws" wherever it operates, continually constraining the Navy from engaging in the full spectrum of maritime enforcement actions.

This Article looks at the modern PCA's applicability through two lenses: (1) its often-misunderstood historical basis; and (2) its application to the modern military, focusing on its practical application to the U.S. Navy. In doing so, it hopes to make two principle contributions.

First, this Article provides an in-depth historical analysis addressing the apprehensions over a standing army as compared to a standing navy. This Article asserts that the underlying disparate civil libertarian concerns when comparing a standing army with that of a standing navy discussed at the nation's birth were deftly co-opted during Reconstruction, only muddying the historical waters. Rather, the PCA is best seen as a product of a unique period of American history caught in the maelstrom of Reconstruction Era politics.⁵ While the PCA has changed little since its passage in 1878,⁶ the military's role in law enforcement was later comprehensively addressed when Congress passed laws in the 1980s that sought to increase the military's

³ 18 U.S.C. § 1385 (2012). The PCA statute limits only the Army and Air Force as a "posse comitatus . . . to execute the laws." *Id.*

⁴ DEP'T OF DEF., DIRECTIVE 5525.5: DoD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (1986) [hereinafter DOD 5525.5].

⁵ Further obfuscating the matter are continual misunderstandings behind the original history, purpose, and text of the PCA, which has taken on a near talismanic value by civil libertarians as the statutory exemplification of civilian control over military affairs. See Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 91 (2003) (describing how the PCA has allowed courts to "discern a broader policy or 'spirit' behind the Act that is not supported by the historical record or the statute's text"). The PCA was recently invoked in a Senate debate over the use of executive authority domestically by Senator Rand Paul (R-KY) who, during a Senate filibuster, asserted that the PCA broadly restricted the military from enforcing laws in the United States. See Sam Tanenhaus & Jim Rutenberg, *Rand Paul's Mixed Inheritance*, N.Y. TIMES, Jan. 26, 2014, at A1. And the recent unrest in Ferguson, Missouri related to the shooting of an unarmed teenager by a local police force have called into question the erosion of the PCA and the related militarization of the police force, with commentators describing the PCA as a longstanding "principle in federal law." Dennis J. Kucinich, *Militarized Policy and the Threat to Democracy*, HUFFINGTON POST BLOG (Aug. 18, 2014, 11:18 AM), http://www.huffingtonpost.com/dennis-j-kucinich/police-militarization_b_5687598.html.

⁶ The Air Force was added in 1956. Cf. 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, 156 (2003) (describing the PCA's statutory history).

involvement in law enforcement activities to combat illicit drug trafficking.⁷

Second, this Article asserts that the limitation on the Navy's involvement in law enforcement matters continues due to a strange mixture of misunderstood civil libertarian concerns—with little historical basis—and an apparent institutional military reluctance that combine to unnecessarily constrain the Navy in its worldwide operations.⁸ The Navy has been actively involved in both counter-terrorism based Maritime Interception Operations (MIO),⁹ combating piracy,¹⁰ and providing indirect assistance to counter-drug operations. All have military and law enforcement dimensions.¹¹ But the Navy is presently restricted from participating in many such operations for reasons lacking in a sound historical and statutory basis.¹² Further, domestic disaster relief operations and the worldwide military response to terrorism during the past ten years by the military have only blurred distinctions between operations with a clear military purpose and those that are of a law enforcement nature.¹³ Additional modern challenges—

⁷ 10 U.S.C. §§ 371–375 (2012). Furthermore, the 1980s likely foreshadowed the militarization of police departments, with mayors of major cities clamoring for assistance from the military to assist them in thwarting the illicit drug trade entering American cities. During congressional testimony, the military demonstrated continual institutional reluctance to engage in missions that could divert resources from more traditional military roles. *See infra* Part I.C.

⁸ See Christopher A. Abel, Note, *Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy, and Federal Law Enforcement at Sea*, 31 WM. & MARY L. REV. 445, 476–78 (1990). Most nations of the world do not have both a coast guard and navy. And naval leaders appear exceedingly reluctant to take on more law enforcement functions due to unfunded mandates to broaden their mission sets without a corresponding increase in funding. *See infra* Part I.C.

⁹ See, e.g., Vernon Loeb, *Fighting Terror on the High Seas: European Command's Overshadowed—but Key—Role in War*, WASH. POST, June 11, 2002, at A15.

¹⁰ See *United States v. Said*, No. 2:10cr57, 2014 WL 806230 (E.D. Va. Feb. 28, 2014); *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010). Piracy is defined in the United Nations Convention on the Law of the Sea (UNCLOS) and domestically in the current United States piracy statute: “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.” 18 U.S.C. § 1651 (2012). The successful prosecution of Somali pirates in that case suggests that the Navy has a service capability to conduct law enforcement operations to include evidence collection in a complex and successful federal prosecution.

¹¹ For example, while piracy is considered both a crime under domestic and international law, suspected pirates are not considered combatants within the meaning of international humanitarian law. Rather, they are treated largely as suspected criminals, issued *Miranda* warnings, and tried before federal courts of law.

¹² See *Navy Organization*, AMERICA'S NAVY, www.navy.mil/navydata/organization/org-top.asp (last visited Mar. 14, 2014). The PCA, once characterized as an “obscure and all-but-forgotten statute” has taken on a renewed significance today that may paradoxically undermine civil liberties as municipal police forces are militarizing to fill the gaps that cannot be filled by law enforcement ground that has been ceded by the military and the rise of technology—particularly unmanned aerial vehicles—may be used by law enforcement agencies. *See Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948).

¹³ See, e.g., GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 164–66 (2010); *see also* Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, *Authority for Use of*

rising natural resource tensions in international waters,¹⁴ the physical transformation of the Arctic waters in the face of climate change, the continual threat of domestic terrorism at our nation's ports, and the continual challenge of combating illicit drug trafficking¹⁵—all have implications for the Act's modern application. The PCA has never included the Navy in its text and to this day it continues to be cloaked in fundamental misunderstandings on its true origins and scope.¹⁶

This Article asserts that a reassessment of the PCA is needed to keep pace with the modern military organization, modern mission sets, and emergent concerns. The United States has developed a long and proud tradition of civilian control of the military and guarding the military from intrusion into civilian affairs in part due to the PCA.¹⁷ Yet the PCA and the subsequent drug war amendments require a fresh look in light of a complex military force structure and enormous recent technological strides in intelligence gathering capacity.

Part I discusses the historical basis of civilian control over military affairs and the disparate concerns of a standing army as compared to a standing navy. Part II discusses the modern military's organization and the accompanying challenges in applying the PCA in the modern era. This includes a discussion of how federal courts have struggled with this question. Part III addresses the modern realities of naval operations—to include counter-piracy and maritime interdiction of terrorists on the

Military Force to Combat Terrorist Activities Within the United States, at 18 (Oct. 23, 2001) [hereinafter Yoo PCA Memo], available at <http://www.justice.gov/opa/documents/memomilitaryforcecombatus10232001.pdf> (noting that “distinguishing between the two functions is no easy matter”). *But see* Memorandum for the Files from Stephen G. Bradbury, Principal Deputy Assistant Attorney Gen., *Re: October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities* (Oct. 6, 2008), available at <http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memoolcopiniondomesticusemilitaryforce10062008.pdf> (criticizing Yoo's memorandum's reliance on the military purpose doctrine in the context of the PCA's inapplicability in the domestic deployment of the Armed Forces to prevent and deter terrorism).

¹⁴ See, e.g., Eric Schmitt, *Gates Warns China Not to Bully Region on Energy*, N.Y. TIMES, May 31, 2008, at A9.

¹⁵ The United States' ability to counter the drug smuggling trade into the United States has been seriously degraded in recent years. The Marine General in charge of counter-drug operations recently stated before Congress, “Because of asset shortfalls, we're unable to get after 74 percent of suspected maritime drug smuggling.” See Ernesto Londoño, *Head of Southern Command Says He Lacks Resources to Fight Drug Trafficking*, WASH. POST (Mar. 13, 2014), http://www.washingtonpost.com/world/national-security/head-of-southern-command-says-he-lacks-resources-to-fight-drug-trafficking/2014/03/13/89dbff28-aaf1-11e3-98f6-8e3c562f9996_story.html.

¹⁶ 18 U.S.C. § 1385 (2012); see also Felicetti & Luce, *supra* note 5, at 91–92. In addition, there are two modern trends that threaten that civil-military balance and likely deserve attention in a separate Article. The first is the rise in the militarization of municipal law enforcement activities, aided by military equipment transfer laws and policies that have been all too willing to fill the void. The second is the rise in domestic surveillance brought about by the National Security Agency (NSA), an organization led by an active-duty military officer.

¹⁷ See, e.g., John P. Coffey, Note, *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?*, 75 GEO. L.J. 1947 (1987).

high seas—that instruct a new approach to the PCA’s application to the Navy. Part IV advocates for a new *fourth* phase in the PCA’s long history, offering recommendations to best harmonize the PCA’s place in the modern era and alleviate its continual unintended consequences.

I. HISTORICAL BASIS: THE ENACTMENT OF THE POSSE COMITATUS ACT OCCURRED DURING RECONSTRUCTION

The PCA’s history, and the constitutional and congressional role in addressing the military’s role in civilian affairs, can be separated into three phases, each roughly one hundred years apart. Each phase reflects historical moments when the nation’s Founders and Congress grappled with the proper role of the military to enforce domestic law. The first phase looks at early fears of the military in the Declaration of Independence, codified in the Constitution and debated by the Framers. The second phase delves into the history of the PCA’s passage during the post-Civil War Reconstruction Era. The statute’s unique origins sought to address the perceived abuses of the “occupying” federal army in the South.¹⁸ The third phase encompasses the 1980s drug war amendments and examines how federal courts, beginning in the 1970s with the rise of exclusionary rule litigation, have attempted to muddle their way in applying the PCA and accompanying DoD regulations to the Navy.

A. *Phase One: The Framers’ Concerns Focused on the Dangers of a Standing Army, Not a Standing Navy*

1. Text of the Declaration of Independence and Constitution

Prior to the signing of the Declaration, British soldiers in colonial America were deployed to colonial cities and “were allowed to enter private homes, confiscate what they found . . . often keep[ing] the bounty for themselves.”¹⁹ Indeed, the “positioning [of] soldiers trained for warfare on city streets, among the civilian populace, and using them to enforce laws . . . enraged colonists.”²⁰ Outraged by these actions, on July 4th, 1776, the newly formed Continental Congress signed a Declaration of Independence. Thomas Jefferson and his American friends were not pleased with the British Army. To prove the “repeated

¹⁸ Felicetti & Luce, *supra* note 5, at 106–10.

¹⁹ RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES 14 (2013).

²⁰ *Id.*

Injuries and Usurpations”²¹ being inflicted on the colonists by King George III, the Declaration objected that “He [kept] among us, in Times of Peace, Standing Armies, without the consent of our Legislatures. . . . [While affecting] to render the Military independent of and superior to the Civil Power.”²² The Declaration of Independence denounced King George III’s use of armies “to compleat the Works of Death, Desolation, and Tyranny . . . totally unworthy . . . of a civilized Nation.”²³ The signers of the Declaration further protested that the King “quarter[ed] large Bodies of Armed Troops among us.”²⁴

The text of the Constitution memorializes the important distinction between the army and navy, addressing the early concerns about a standing army without a similar concern regarding the establishment of a standing navy.²⁵ The Constitution states that Congress has the power to “provide and maintain a Navy”²⁶ without any specific time limitations on naval appropriations expiring. This phrasing may be contrasted to the language stating that Congress only has the power to “raise and support Armies” with appropriations limited to two years.²⁷ The language ensured that Congress addressed the issue of a standing army every two years through its funding power, placing an important check on the executive branch to prevent a continual amassing of a large standing force.²⁸ The early state constitutions of the original colonies also addressed the dangers associated with standing armies.²⁹

The Constitution further places a civilian President as the Commander-in-Chief of the Army, Navy, and Militia.³⁰ In turn, the United States as a federal entity guarantees a republican form of government to each state and to protect each state from invasion and against domestic violence.³¹ And the Third Amendment of the Constitution places restrictions on quartering soldiers in homes without

²¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²² *Id.* at para. 13-14.

²³ *Id.* at para. 27.

²⁴ *Id.* at para. 16.

²⁵ Compare U.S. CONST. art. I, § 8, cl. 12, with U.S. CONST. art. I, § 8, cl. 13.

²⁶ U.S. CONST. art. I, § 8, cl. 13.

²⁷ U.S. CONST. art. I, § 8, cl. 12.

²⁸ *Id.*

²⁹ See, e.g., H.W.C. Furman, *Restrictions upon the Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 92 n.41 (1960). There is no evidence of a corollary abuse by British sailors, and the Declaration of Independence did not list abuses brought about by the British Navy as part of its repeated injuries inflicted upon the colonists.

³⁰ U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . .”).

³¹ U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

consent of the owner, echoing concerns from a British practice that was addressed in the Declaration of Independence.³² There is no mention on the prohibition of quartering sailors or navy personnel within the Third Amendment.³³

Of particular importance to the Navy, the Constitution specifically addresses the crime of piracy on the high seas, providing Congress with the enumerated power to define and punish piracy on the high seas.³⁴ And one of the first acts of Congress was the authorization of “public vessels” to combat piracy.³⁵

2. Constitutional Debates and the Federalist Papers

The Constitutional Convention in Philadelphia debated at length the dangers of a large standing army.³⁶ Despite these concerns, the Constitution lacks a prohibition that would prevent the armed forces from enforcing federal law.³⁷ In contrast to a standing army, the Constitutional Convention debates did not address the dangers of a standing navy. As one scholar noted:

There was a good deal of debate which was concerned with the danger to popular liberty from a standing army or from the abuse of state militia by the proposed federal government, but no one cited a standing navy as a menace to the liberty of the whole people.³⁸

And there was “no trace of a discussion of naval war power apart from the general war power.”³⁹

Following the Constitutional Convention in Philadelphia, Alexander Hamilton, James Madison, and John Jay urged rapid ratification of the Constitution by the states. This debate, memorialized in the Federalist Papers, discussed the relative merits of a federal standing army and the importance of maintaining a navy.⁴⁰ The

³² U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

³³ *Id.*

³⁴ U.S. CONST. art. I, § 8, cl. 10 (“The Congress shall have Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”).

³⁵ 33 U.S.C. § 381 (2012) (“The President is authorized to employ so many of the public armed vessels as in his judgment the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States and their crews from piratical aggressions and depredations.”). The original act dates from 1819.

³⁶ See, e.g., Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 157–58 (2004).

³⁷ See, e.g., Abel, *supra* note 8, at 450.

³⁸ *Id.* at 457 n.76 (quoting MARSHALL SMELSER, *THE CONGRESS FOUNDS THE NAVY 1787-1798*, at 6 (1959)).

³⁹ *Id.*

⁴⁰ See, e.g., THE FEDERALIST NOS. 24–25 (Alexander Hamilton). Debates in the Federalist Papers did not distinguish between Navy and Coast Guard. Indeed, Alexander Hamilton did not

Federalists believed that the Constitution would serve an important role—previously left unaddressed by the Articles of Confederation—of providing for a maritime force. This force could be used to protect both the new nation’s maritime commercial interests and defend its shores from foreign invasion.⁴¹

Madison and Hamilton were especially concerned about the role of standing armies after the unpopular use of British troops to maintain order in the pre-Revolutionary colonies.⁴² The issue of a standing navy, also absent from the Declaration’s list of repeated “Injuries and Usurpations,”⁴³ received a far different treatment. Both Madison and Hamilton, the leading Federalists, acknowledged the Navy’s critical role for the new nation.⁴⁴ A maritime force was essential, they reasoned, to protect the new nation’s commercial interests and to assist in the collection of custom taxes.⁴⁵

Madison specifically characterized a standing army as a dangerous force.⁴⁶ During the Federalist debates, Madison so feared a standing army on an extensive scale that he believed that it could prove fatal to the young republic if left unchecked.⁴⁷ But Madison referred to a strong navy as one of the new nation’s “greatest blessings” and the principle source of security from abroad.⁴⁸ Consider these words from Madison, underscoring his view that the navy could ensure the defense of the new nation, while not threatening American freedoms:

create the Coast Guard until after the Constitution was ratified and the Federalist Papers are silent on any mention of “Coast Guard.” See *infra* Part II.

⁴¹ SMELSER, *supra* note 38, at 6–7.

⁴² See, e.g., Furman, *supra* note 29, at 92.

⁴³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁴⁴ See, e.g., THE FEDERALIST NO. 11, at 81–83 (Alexander Hamilton); accord THE FEDERALIST NO. 41, at 254 (James Madison). Indeed, it was the French Navy and not the relatively weak Continental Navy at Yorktown, Virginia that was the decisive factor in the British Army’s defeat in the Revolutionary War.

⁴⁵ See, e.g., THE FEDERALIST NO. 11, *supra* note 44, at 81–83 (Alexander Hamilton). The paper, entitled “The Utility of the Union in Respect to Commercial Relations and a Navy,” states that, “There can be no doubt that the continuance of the Union under an efficient government would put it in our power, at a period not very distant, to create a navy which, if it could not vie with those of the great maritime powers, would at least be of respectable weight if thrown into the scale of either of two contending parties. . . . [t]o this great national object, a NAVY, union will contribute in various ways.” *Id.*

⁴⁶ THE FEDERALIST NO. 41, *supra* note 44, at 254 (James Madison) (“A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision.”).

⁴⁷ *Id.* (“On the smallest scale [a standing force] has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.”). Madison takes care to distinguish a “standing force” and “army” from a navy in Federalist 41. Hence, Madison’s reference to a “force” should be read as synonymous with “army.” *Id.*

⁴⁸ *Id.* at 256 (emphasis added).

The palpable necessity of the power to provide and maintain a navy has protected that part of the Constitution against a spirit of censure, which has spared few other parts. It must, indeed, be numbered among the greatest blessings of America, that as her Union will be the only source of her maritime strength, so this will be a principal source of her security against danger from abroad. In this respect our situation bears another likeness to the insular advantage of Great Britain. The batteries most capable of repelling foreign enterprises on our safety, are happily such as can *never be turned by a perfidious government against our liberties*.⁴⁹

Madison supported a strong navy and believed this would serve as a symbol of America's maritime strength that would protect America's emerging economic interests. And distinct from a standing army, a strong federal navy could never be turned against its own citizens' liberties.⁵⁰

Hamilton, in urging ratification of the Constitution, argued that the Constitution safely kept the military away from the "deleterious role in the day-to-day operation of peacetime society."⁵¹ He recognized that a small standing army was likely in the new republic, but this would prove useful to "aid the magistrate to suppress a small faction, or an occasional mob, or insurrection."⁵²

Hamilton, the future Secretary of the Treasury, viewed the navy as a necessity if the United States were to emerge as a commercial and economic power. Hamilton asserted that a powerful fleet would supersede the need for army garrisons that would normally protect the "dock-yards and arsenals."⁵³ Indeed, Hamilton saw the maintenance of a strong federal Navy as an effective counterbalance to a standing army, potentially alleviating the need for a large and continually garrisoned force.

⁴⁹ *Id.* (emphasis added).

⁵⁰ *Id.* at 254–56.

⁵¹ Abel, *supra* note 8, at 450; see THE FEDERALIST NOS. 28–29 (Alexander Hamilton). In Federalist 29, Hamilton addressed the lack of a posse comitatus provision in the Constitution:

[I]t has been remarked that there is nowhere any provision in the proposed Constitution for calling out the POSSE COMITATUS, to assist the magistrate in the execution of his duty, whence it has been inferred, that military force was intended to be his only auxiliary. . . . The same persons who tell us in one breath, that the powers of the federal government will be despotic and unlimited, inform us in the next, that it has not authority sufficient even to call out the POSSE COMITATUS.

THE FEDERALIST NO. 29, *supra* note 44, at 179 (Alexander Hamilton).

⁵² THE FEDERALIST NO. 8, *supra* note 44, at 64 (Alexander Hamilton).

⁵³ THE FEDERALIST NO. 24, *supra* note 44, at 158 (Alexander Hamilton). Hamilton looked to Great Britain as an example of a nation with a "powerful marine" that served to guard the nation from foreign invasion, having the additional benefit of "supersed[ing] the necessity of a numerous army within the kingdom." THE FEDERALIST NO. 8, *supra* note 44, at 64 (Alexander Hamilton).

John Adams, Alexander Hamilton, and Thomas Jefferson famously debated and disagreed about the fundamental issues facing the United States and had different visions for America's role in the world. Nevertheless, all three agreed that the establishment and maintenance of a standing federal navy would not endanger American liberties.⁵⁴ Indeed, Jefferson stated that "a naval force can never endanger our liberties, nor occasion bloodshed; a land force would do both."⁵⁵ Jefferson's objections to a naval force were more practical: he was concerned about the debt incurred and felt that a navy was not a prudent expenditure of federal money.⁵⁶

Adams, the second President of the United States, campaigned hard for a robust navy prior to the signing of the Constitution, advocating for a strong navy to protect America's commercial interests.⁵⁷ Writing in 1780, Adams stated, "If I could have my will, there should not be the least obstruction of navigation, commerce or privateering . . . because I firmly believe that *one* sailor will do us more good than *two* soldiers."⁵⁸ Like his contemporaries, Adams—described as the "greatest advocate of the navy of any American statesman of his generation"⁵⁹—was deeply suspicious of a large standing army.⁶⁰

Not surprisingly, the Anti-Federalists, who opposed ratification of the Constitution and were generally suspicious of a large federal government, were less interested in a strong, federal maritime force. But they were dismissive of a navy for more practical concerns that were not based on the fears of an excessive role of the military in civilian affairs.⁶¹ Both the Federalists and Anti-Federalists were primarily concerned with the dangers of standing armies that stemmed from the British experience. As one recent author noted when describing the early

⁵⁴ *Historical Overview of the Federalist Navy, 1787-1801*, NAVAL HIST. CENTER, <http://www.history.navy.mil/biblio/biblio4/biblio4a.htm> (last visited Aug. 5, 2014) (quoting Letter from Thomas Jefferson to James Monroe (Aug. 11, 1786), in 10 THE PAPERS OF THOMAS JEFFERSON 225 (Julian P. Boyd ed., 1954); accord THE FEDERALIST NO. 11, *supra* note 44 (Alexander Hamilton); THE FEDERALIST NO. 41, *supra* note 44 (James Madison)).

⁵⁵ NAVAL HIST. CENTER, *supra* note 54, at n.2 and accompanying text.

⁵⁶ DAVID MCCULLOUGH, JOHN ADAMS 501 (2001).

⁵⁷ *Id.* at 248.

⁵⁸ *Id.* at 248. John Adams stated in a letter that, "[a] navy is our natural and only defense." *Id.*

⁵⁹ *Id.* at 499.

⁶⁰ *Id.*

⁶¹ The Anti-Federalists had four practical concerns. First, they believed that the nation was not in danger due to the wide expanse of the Atlantic Ocean; second, Anti-Federalists often saw the issue of a standing navy along sectional lines, believing that it would favor New England interests and could be used as an "instrument to oppress the South"; third, opponents of a navy believed the mere existence of a navy could provoke Europe to attack; and fourth, Anti-Federalists argued that a navy could bankrupt the large republic and was something that the new nation could not afford. They believed this would enrich very few select shipbuilders who had access to politicians. Anti-federalists argued, too, that a written constitution was not required to build a navy, insisting that the existing Articles of Confederation could already raise money for such a purpose. SMELSER, *supra* note 38, at 13–16; see also NAVAL HIST. CENTER, *supra* note 54.

debates over the size of the early military, the Navy's proper size and role "could never pose an equivalent threat" to that of standing armies.⁶²

Early supporters of the Constitution also viewed the Navy as an important tool to enforce regulations proscribed by the republic.⁶³ The Articles of Confederation demonstrated the critical importance of enforcing customs and taxes and the different roles played by the army and the navy.⁶⁴ Drafters of the Constitution desired a robust navy to assist in collecting taxes and revenue, similar to the role that the British Navy had played during the colonial period.⁶⁵ This was prior to the creation of the Coast Guard, a service that initially was organizationally part of the Department of the Treasury.⁶⁶

The early Navy served as floating customs law enforcement vehicles and participated in many of the missions undertaken by today's Coast Guard.⁶⁷ Discussion of a Coast Guard is absent from the text of the Constitution, its debates, and the Federalist papers. The early Congress appointed naval officers as officers of the customs, authorizing the purchase of six frigates to enforce customs laws afloat as one of its first acts.⁶⁸ Enforcing taxes, customs, duties, and regulations at sea were undertaken by the early Navy but are now the responsibility of today's Coast Guard. But at the time of the Constitution there was little discussion differentiating the distinct roles that these two maritime forces would play.⁶⁹ Today, both are military services and branches of the armed forces.⁷⁰ And the PCA's text is silent on the Coast Guard and Navy. Yet the modern Coast Guard—with a shared heritage with the Navy—operates free from any PCA legal restrictions.

Lastly, the Constitution takes care to distinguish the state-based militia from a federal army and navy. Both Federalists and Anti-Federalists viewed the state militia with considerably less skepticism as

⁶² IAN W. TOLL, *SIX FRIGATES* 42 (2006).

⁶³ See Felicetti & Luce, *supra* note 5, at 95–96.

⁶⁴ ARTICLES OF CONFEDERATION of 1781, art. IX, para. 5 ("Congress . . . shall have the authority . . . to borrow money, or emit bills on the credit of the United States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted—to build and equip a navy—to agree upon the number of land forces . . .").

⁶⁵ Abel, *supra* note 8, at 457 n.78.

⁶⁶ See *History of the Treasury*, U.S. DEP'T OF TREASURY, http://www.treasury.gov/about/history/Pages/edu_history_brochure.aspx (last visited Aug. 7, 2014) (describing the Coast Guard's history within the Department of the Treasury until it transitioned to the Department of Transportation in 1967).

⁶⁷ *Id.*

⁶⁸ Abel, *supra* note 8, at 457 n.79.

⁶⁹ Both services postdate the Constitutional debates, and the Coast Guard was not founded until 1790 through the efforts of Alexander Hamilton. While the U.S. Navy traces its beginnings to 1775 with the birth of the Continental Navy, it was disbanded after the Revolutionary War and did not begin to acquire ships until the 1790s when Congress authorized the purchase of six frigates. See generally TOLL, *supra* note 62.

⁷⁰ 14 U.S.C. § 1 (2012) ("The Coast Guard, established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times.").

compared to a federal standing army. The Constitution grants Congress the power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”⁷¹ Congress soon passed the Militia and Insurrection Acts of 1792 that authorized the President to call forth the militia of other states to suppress a domestic insurrection.⁷² Today, the Insurrection Acts allow the President to use the armed forces to assist the states and enforce federal law when state governments cannot effectively carry out their own law enforcement duties.⁷³ This is an important power entrusted to the President, and courts have found that the President’s pursuant to the Insurrection Act is not subject to judicial review.⁷⁴

Today’s National Guard is the progeny of the militia that existed at the time of the Constitution’s ratification.⁷⁵ As discussed in detail in Part II, the PCA does not apply to the National Guard when it is under the cognizance of the state Governor and acting pursuant to state authorities.⁷⁶ And a modern Navy National Guard that grew out of the earlier naval militias is virtually non-existent unlike the relatively large modern Air Force and Army National Guard.⁷⁷

⁷¹ U.S. CONST. art. I, § 8, cl. 15.

⁷² The Militia Act of 1792, ch. 28, 1 Stat. 264 (1792) (current version at 10 U.S.C. §§ 331–335 (2012)).

⁷³ 10 U.S.C. § 331 (“Whenever there is an insurrections in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.”); 10 U.S.C. § 332 (“Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.”); *see also* Abel, *supra* note 8, at 452.

⁷⁴ *See, e.g.,* Monarch Ins. Co. of Ohio v. District of Columbia, 353 F. Supp. 1249 (D.D.C. 1973), *aff’d*, 497 F.2d 684 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1021 (1974); *see also* Gizzo & Monoson, *supra* note 6, at 157.

⁷⁵ 10 U.S.C. § 311 (2012).

(a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

(b) The classes of the militia are—

(1) the organized militia, which consists of the National Guard and the Naval Militia; and

(2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

Id.; *see also* *Legal Basis of the National Guard*, ARMY NAT’L GUARD, <http://www.arng.army.mil/aboutus/history/Pages/ConstitutionalCharteroftheGuard.aspx> (last visited Aug. 5, 2014).

⁷⁶ *See* United States v. McArthur, 419 F. Supp. 186, 194–95 (D.N.D. 1975), *aff’d sub nom.* United States v. Casper, 541 F.2d 1275 (8th Cir. 1976); Gizzo & Monoson, *supra* note 6, at 165.

⁷⁷ More modest-sized naval militias existed for the first 125 years and at the time of the PCA’s

Clearly, the newly formed United States, as demonstrated by the Declaration of Independence, the Constitution, its accompanying debates, and Federalist papers began with different earlier views towards the army and navy. The army was seen as a potentially dangerous force that could undermine the fabric of the new republic as was seen in pre-Revolutionary times. The navy presented a more limited threat—indeed Hamilton felt that a larger maritime force modeled after Great Britain could *reduce* the need for garrisoned Armies.⁷⁸

At the outset of the republic, United States Marshals were permitted to call upon the military as a posse comitatus pursuant to authority derived from the Judiciary Act of 1789.⁷⁹ Today there is a longstanding tradition of civilian control of the military, due in part to the various constitutional provisions that prescribe the military's role.⁸⁰ But there was initially no express constitutional barrier addressing the use of the military to execute the laws; that would have to wait a hundred years.⁸¹ The earlier constitutional debates regarding a standing army lay fallow for a century only to be resurrected in the post-Civil War Reconstruction. This time the "occupying" army was American. And it was not in Boston but in the Reconstruction Era South. And they were not adorned with Redcoats favored by the British but with blue Federal uniforms favored by the victorious Union troops with the mandate to enforce voting laws and federal Reconstruction policies.

passage in 1878. But they were effectively integrated into the modern Naval Reserve in 1916 with the passage of the Naval Appropriations Act. Today's Naval Reserve is the evolutionary successor to the earlier state naval militias—it only acts pursuant to federal authorities and is, therefore, normally constrained by the PCA as a matter of DoD and Navy policy. See U.S. DEP'T OF THE NAVY, SEC'Y OF NAVY INSTRUCTION 5820.7C: COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (2006) [hereinafter SECNAVINST 5820.7C], available at http://www.hqmc.marines.mil/Portals/135/JAO/SECNAVINST%205820.7C%20Cooperation%20with%20Civilian%20Law%20Enforcement%20Officials_26%20Jan%202006.pdf. The Framers envisioned that a state militia could enforce the law and provide domestic order within each state. Abel, *supra* note 8, at 458. At a minimum, there should be some recognition that the states lack a naval militia force (all are currently integrated within one U.S. Navy), and should be able to provide some level of law enforcement on the high seas. *Id.*

⁷⁸ THE FEDERALIST NO. 24 (Alexander Hamilton).

⁷⁹ See ALAN COHN, DOMESTIC PREPAREDNESS: LAW, POLICY, AND NATIONAL SECURITY 6–20 (on file with author).

⁸⁰ Civilian control over the military is often cited as one of America's greatest and most enduring strengths. In his testimony to Congress in 1987, Marine Lieutenant General Stephen Olmstead stated, "One of [America's] greatest strengths is that the military is responsive to civilian authority, and that we do not allow the Army, Navy, and the Marines and the Air Force to be a police force. History is replete with the countries that allowed that to happen. Disaster is the result." BALKO, *supra* note 19, at 11 (alteration in original).

⁸¹ David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 265–66 (1996).

B. *Second Phase: The Posse Comitatus Act Emerged to Counter-Balance a Large “Occupying” Army During Reconstruction*

1. Congress Passes the PCA During the Reconstruction Era

The unique distinctions between the army and navy were further reinforced following the Civil War, when a uniquely named criminal statute that conjures images of the Frontier West—the Posse Comitatus Act—placed restrictions on utilizing the army as a “posse comitatus” to “execute the laws.”⁸²

The history and unique historical context of the PCA’s passage are instructive. Following the Civil War, the Northern-dominated Congress was concerned about the enforcement of federal law and election law in the Reconstruction Era South. Federal troops—including many African-American troops—were sent south to oversee federal Reconstruction efforts.⁸³ The military was given broad powers by the President in the Reconstruction South to combat the Ku Klux Klan under the terms of the 1871 Ku Klux Klan Act.⁸⁴ Many of these federal troops were African-Americans—often former Union soldiers—causing further Southern resentment.⁸⁵

The South was badly defeated following the Civil War and Southerners were disgraced by the presence of the Federal Army, a continual reminder to Southerners of their loss of their way of life. Southerners perceived the troops as an outside and occupying force and were outraged at their continual presence. Former members of the Confederate Army did not always have the right to vote until they took an oath of allegiance to the Union, only adding to the Reconstruction tension.⁸⁶ Southerners were brought before Freedmen Bureau Courts where they had to testify against charges from southern blacks, further inflaming the outrage at the “occupying” troops.⁸⁷ These perceived injustices fueled further anger and resentment toward the army and the already maligned and Northern-favored Republican Party.

The resentment came to a climax following the 1876 Presidential election. During this election, federal troops were put in polling places

⁸² 18 U.S.C. § 1385 (2012).

⁸³ For an outstanding summary of the racial tension that served as the impetus behind the PCA’s passage, see Felicetti & Luce, *supra* note 5, at 104–14.

⁸⁴ See generally ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 (1988).

⁸⁵ Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH U. J.L. & POL’Y 99, 109–10 (2003).

⁸⁶ Cf. BALKO, *supra* note 19, at 23 (asserting racial tensions already ran high due to the presence of federal troops who prevented former Confederate states from denying blacks the right to vote).

⁸⁷ *Id.*

throughout the South to ensure that the newly formed Ku Klux Klan would not intimidate Republican voters.⁸⁸ This bitterly contested election saw the Southern-favored Democrat, Samuel Tilden, win the initial popular vote, but ultimately lose the Presidency to the Northern-favored Republican, Rutherford B. Hayes. Many Southerners saw this outcome as a corrupt compromise and this election marked the beginning of the end of the Reconstruction Era.⁸⁹

Congress acted. Resurrecting the earlier bona fide Framers' debates and concerns about the dangers of a standing army, Southern Democrats rebelled against the radical Republicans in the North and proposed legislation severely limiting the Army's law enforcement activities. Congressional leaders viewed "military supervision of polling places . . . [as] a tyrannical and unconstitutional use of the Army to protect and keep in power unelected tyrants."⁹⁰

After intense debates led by Southern Congressmen, the Reconstruction Congress accomplished what was not done in the formation of this country: a congressional law prohibiting the Army's role to execute civilian laws as a "posse comitatus." The Posse Comitatus Act was passed in 1878, one hundred years after the American Revolution. It was initially passed as part of an Army appropriations rider, and there is little indication in its legislative history that the law was ever intended to apply to the Navy (the Navy's role in Reconstruction was quite limited).⁹¹ In 1878, the Department of Defense (DoD) did not exist in its modern form and congressional military appropriations were divided between the Departments of the Navy and Army. Similar to the debates at the formation of this nation, the congressional debates surrounding the PCA's passage addressed the army's intrusion into civilian affairs.⁹² Much of the debate surrounding the House version of the Act focused on the bitterness resonating from the 1876 elections and the role that federal army troops played in the enforcement of Reconstruction Era election laws.⁹³

⁸⁸ *Id.*

⁸⁹ Felicetti & Luce, *supra* note 5, at 109–11. President Hayes emerged as the winner, but began to pull troops out of the South, effectively ending Reconstruction in what became known as the "Compromise of 1877." BALKO, *supra* note 19, at 24.

⁹⁰ Felicetti & Luce, *supra* note 5, at 110.

⁹¹ Abel, *supra* note 8, at 460–61.

⁹² *Id.*

⁹³ *Id.* Indeed, as discussed below, the word "posse" conjures up an image of a sheriff in the nineteenth century Western Frontier with no practical maritime application. In one of the earlier versions of the Posse Comitatus Act, there was mention of restricting "land or naval forces" from executing the laws as a posse comitatus, but any reference to naval was soon dropped. This was placed in an Army Appropriations Act and the concerns were wholly domestic in nature. 7 CONG. REC. 3586 (1878) (statement of Rep. Kimmel); *see also* Extraterritorial Effect of the Posse Comitatus Act, 13 Op. O.L.C. 321, 324–25 (1989) (discussing the domestic focus of Rep. Kimmel's introduction of the Posse Comitatus Act).

The PCA is codified as a criminal law at Section 1385 of Title 18 of the United States Code. The Act utilizes a specific legal term of art—“posse comitatus”—to restrict the military’s involvement in civilian law enforcement matters. The law was not written—nor has it ever been amended in the 125 years since its initial passage—to specifically apply to the Navy. Similarly to the debates at the Constitutional Convention, the Congressional debates surrounding the passage of the Act focused on the dangers of a federal army involved in domestic affairs.⁹⁴ The Act in its original form read:

[I]t shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by an act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor⁹⁵

Over time, the Act was somewhat condensed and the Air Force, a new branch of the armed forces that grew out of the Army Air Corps, was added in 1956.⁹⁶ The two maritime services, the Navy and Coast Guard, have never been explicitly mentioned in the Act.⁹⁷ In its present form, the PCA reads,

Whoever, except in cases and under circumstances 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.⁹⁸

As noted earlier, the Constitution and earlier statutes prescribing the role of the military had previously not restricted the military in executing or enforcing domestic laws. The PCA changed that. The key terms of the PCA are “posse comitatus” and “execute the laws.” Prior to its passage, local law enforcement had the legal authority to utilize

⁹⁴ But this has not stopped federal judges from finding a broader “spirit” behind the PCA that protects unnecessary military involvement in civilian affairs. *United States v. Walden*, 490 F.2d 372, 375–76 (4th Cir. 1974); *see also* Felicetti & Luce, *supra* note 5, at 116–18.

⁹⁵ Posse Comitatus Act of 1878, ch. 263, § 15, 20 Stat. 145, 152 (1878) (current version at 18 U.S.C. § 1385 (2012)); *see also* Felicetti & Luce, *supra* note 5, at 113.

⁹⁶ Act of Aug. 10, 1956, ch. 1041, § 18(a), 70A Stat. 626 (1956) (current version at 18 U.S.C. § 1385 (2012)). The Air Force was initially part of the Army Air Corps and became a separate military service in 1947.

⁹⁷ The Marine Corps is organizationally within the Department of the Navy and ultimately reports to the Secretary of the Navy. 10 U.S.C. § 5061 (2012).

⁹⁸ 18 U.S.C. § 1385 (2012).

federal army personnel as a “posse comitatus” to enforce state and local laws.⁹⁹ The PCA effectively prohibits the Army or Air Force from “execut[ing] the laws” as a posse comitatus *unless* there is an express constitutional or congressional authorization.¹⁰⁰

2. The PCA’s Complicated Post-Reconstruction Legacy

The PCA has been described as the statutory embodiment of “American insistence on exclusion of the military from civilian law enforcement”¹⁰¹ but its history and underlying intent are far less pristine and much more complicated. And the use of federal troops to enforce domestic law has a complex and varied record in American history. Federal soldiers were utilized prior to the Civil War to enforce the ignominious Fugitive Slave Act, returning runaway slaves to their owners. But federal soldiers were also utilized during the Reconstruction Era to enforce the provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments and guarantee voting rights that were previously out of reach for Southern blacks.¹⁰² Based in part on the military’s role in enforcing such laws, the Reconstruction period saw a remarkable (albeit short-lived) resurgence in African-American advancement in the South.¹⁰³ The Freedmen’s Bureau was established, literacy for recently freed slaves surged, and blacks began to hold elected office in the South.¹⁰⁴ In 1870, fifteen percent of all Southern elected officials were black, a number that would not be surpassed for a hundred years.¹⁰⁵

The PCA—enacted as a purported safeguard to protect the liberties of civilians against unnecessary military intrusion into civil affairs—also coincided with the Compromise of 1877 that ended the Reconstruction period in the South. The federal government disengaged from actively

⁹⁹ See *Extradition of Fugitives from Serv.*, 6 Op. Att’y Gen. 466, 473 (1854); Matthew C. Hammond, Note, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 959 (1997).

¹⁰⁰ 18 U.S.C. § 1385.

¹⁰¹ *United States v. Walden*, 490 F.2d 372, 376 (4th Cir. 1974) (“[O]ur interpretation of the scope and importance of the letter and spirit of the Posse Comitatus Act . . . as standards governing primary behavior is influenced by the traditional American insistence on exclusion of the military from civilian law enforcement, which some have suggested is lodged in the Constitution.”).

¹⁰² See, e.g., Felicetti & Luce, *supra* note 5, at 100–09 (describing the role that federal troops played in protecting recently freed African-Americans in the Reconstruction-era South). In addition, President Eisenhower ordered active-duty Army troops from the 101st Airborne Division into Little Rock, Arkansas and federalized the entire Arkansas National Guard in 1957 to enforce a court order ending segregation. This became a critical moment in the civil rights moment. See DOYLE & ELSEA, *supra* note 1, at 40.

¹⁰³ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 29 (2012).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

protecting the voting rights and civil liberties of recently freed slaves. And federal troops were sent away from the South. The result? The Ku Klux Klan gained power and the South saw a remarkable rise in violence against blacks.¹⁰⁶ Jim Crow and Black Laws crept back into Southern states, ultimately destroying the hopes and aspirations of Southern blacks.¹⁰⁷ Without federal troops to enforce the recently passed Thirteenth, Fourteenth, and Fifteenth Amendments in the South, civil rights atrophied for another hundred years until the civil rights movement in the 1960s, when, once again, the federalized military was called into the South.¹⁰⁸

Unfortunately, the framers' early legitimate concerns regarding a large standing army cloaked the true purpose of this racially motivated act. And the earlier, constitutional debates regarding a standing army provided a misplaced imprimatur on the newly enacted PCA that continues to this day.

3. "Posse Comitatus" Lacks Meaning in the Maritime Context

The PCA places limitations on the military, but only when it is acting as a "posse comitatus." What did "posse comitatus" mean to the drafters of this law in 1878? And why was this term used? As a fundamental matter, both "posse" and "comitatus" are difficult to apply in the maritime law enforcement context and it is exceedingly difficult to apply to the Navy.¹⁰⁹ Posse comitatus is defined as:

[T]he power or force of the county. A group of citizens who are called together to help the sheriff in keep the peace or conduct rescue operations. Often shortened to *posse*.¹¹⁰

"Comitatus" has origins in ancient Rome from personnel who accompanied proconsuls for protection.¹¹¹ In medieval England, this was expanded to include "a retinue of warriors or nobles attached to a

¹⁰⁶ *Id.* at 30–31.

¹⁰⁷ See generally FONER, *supra* note 84.

¹⁰⁸ See generally DOYLE & ELSEA, *supra* note 1.

¹⁰⁹ The term "posse comitatus" is difficult, if not impossible, to apply in the maritime context. It is absent from the core Law of the Sea Treaties, from the 1958 Convention on the High Seas, and from the landmark 1982 United Nations Convention on the Law of the Sea. The term is absent, too, from U.S. Navy Regulations that date from the eighteenth century. *U.S. Navy Regulations 1990*, DEP'T OF THE NAVY ISSUANCES, <http://doni.daps.dla.mil/navyregs.aspx> (last visited Aug. 5, 2014); see also 10 U.S.C. § 5013 (2012).

¹¹⁰ BLACK'S LAW DICTIONARY 1281 (9th ed. 2009).

¹¹¹ Cf. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 248 (11th ed. 2003) (defining "comitia" as "any of several public assemblies of the people in ancient Rome for legislative, judicial, and electoral purposes"). For an overview of "posse comitatus" and the Act's history within the United States, see Clarence I. Meeks III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 86, 86–93 (1975).

person.”¹¹² Comitatus has earlier origins corresponding with “[a] county or shire” and includes “[t]he territorial jurisdiction of a count or earl.”¹¹³

In English common law “posse comitatus” is a “force armed with legal authority; a body (of constables).”¹¹⁴ It also includes a body of persons summoned by a sheriff to assist in preserving the public peace usually in an emergency.¹¹⁵ In Blackstone’s commentaries, this included “keeping the peace and pursuing felons; [the sheriff] may command all the power to attend him.”¹¹⁶ The phrase “posse comitatus” is literally translated from Latin as the “power of the county” and is defined in common law to refer to all those over the age of fifteen upon whom a sheriff could call for assistance in preventing any type of civil disorder” and to assist the sheriff in keeping the peace.¹¹⁷ It includes the body of men above the age of fifteen in a county (exclusive of peers, clergymen, and infirm persons) whom the sheriff may summon or “raise” to repress a riot or other purposes.¹¹⁸

In the United States, the posse comitatus emerged as an important institution on the Western Frontier in the nineteenth century to enforce laws, where it was often simplified to “posse.”¹¹⁹ During the 1800s, western sheriffs used this “power of the county” to assemble able-bodied men to assist with law enforcement functions.¹²⁰ As the American West rapidly expanded following the Civil War, western sheriffs increasingly called on the military as a posse comitatus to enforce the law through the “commandeering” of Army troops on the Western Frontier.¹²¹ The PCA addressed, in part, the concern that federal troops were being called into service as a “posse comitatus” in a somewhat arbitrary manner by local enforcement.¹²²

In 1854, in what later became known as the “Cushing Doctrine,” the U.S. Attorney General, Caleb Cushing, addressed whether the

¹¹² 3 OXFORD ENGLISH DICTIONARY 538 (2d ed. 1989).

¹¹³ BLACK’S LAW DICTIONARY 303 (9th ed. 2009).

¹¹⁴ 12 OXFORD ENGLISH DICTIONARY 171 (2d ed. 1989).

¹¹⁵ *Posse Comitatus Definition*, MERRIAM WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/posse%20comitatus> (last visited Mar. 14, 2014).

¹¹⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES *343. Posse comitatus has its roots in ancient English Law, growing out of a citizen’s traditional duty to raise a hue and cry whenever a serious crime occurred in a village, thus rousing the culprit. *See id.* By the seventeenth century, trained militia bands were expected to perform the duty of assisting the sheriff in such tasks but all males age fifteen and older still had the duty to serve on the posse comitatus. *Id.*

¹¹⁷ *See, e.g., United States v. Hartley*, 796 F.2d 112, 114 n.3 (5th Cir. 1986).

¹¹⁸ 12 OXFORD ENGLISH DICTIONARY 171 (2d ed. 1989).

¹¹⁹ WEST LEGAL ENCYCLOPEDIA 41 (2d ed. 2004).

¹²⁰ *See* Craig Trebilcock, *Resurrecting Posse Comitatus in the Post-9/11 World*, ARMY, May 2009 (magazine), at 21, available at http://www.ansa.org/publications/armymagazine/archive/2009/5/Documents/FC_Trebilcock_0509.pdf.

¹²¹ U.S. ARMY JUDGE ADVOCATE GEN.’S LEGAL CENTER & SCH., OPERATIONAL LAW HANDBOOK 168 (Maj. Sean Condrone ed., 2011) [hereinafter OPLAW HANDBOOK], available at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf.

¹²² *See, e.g., Gizzo & Monoson, supra* note 6, at 154.

military may be part of a local posse comitatus that is called upon to enforce local domestic law.¹²³ He concluded that the posse comitatus *does* include the military:

Posse comitatus comprises every person in the district or county above the age of fifteen years, whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines, all of whom are alike to obey the commands of the sheriff or marshal. The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any way wise affect their legal character. They are still the posse comitatus.¹²⁴

While Cushing expressly included military “of all denominations” as comprising the posse comitatus, he took care to mention only three military categories: militia, soldiers, and marines. Absent was any reference to sailors or Navy personnel.¹²⁵ Indeed, a “naval posse” is difficult to imagine as both the origin of posse comitatus and its usage on the Western Frontier lack meaning and context applicable to the maritime domain.

C. *Third Phase: Subsequent Amendments to the PCA During the War on Drugs Add Further Confusion*

In 1981, Congress began to address military support to civilian law enforcement activities in response to the danger of illegal drug trafficking entering the United States. Against this backdrop, Congress moved in 1981 to *increase* the amount of cooperation between the military and civilian law enforcement through the passage of the Military Cooperation with Law Enforcement Act (MCLEA).¹²⁶ This was done through changes in the National Defense Authorization Act (NDAA).¹²⁷

¹²³ Extradition of Fugitives from Serv., 6 Op. Att’y Gen. 466, 473 (1854) (citation omitted).

¹²⁴ See *id.* This opinion, drafted by Attorney General Cushing, is known as the “Cushing Doctrine”; see also Felicetti & Luce, *supra* note 5, at 99; Hammond, *supra* note 99, at 953–54.

¹²⁵ Felicetti & Luce, *supra* note 5, at 116 (“One item not in dispute was the Act’s inapplicability to the U.S. Navy.”). As discussed earlier, Congressional debates surrounding the 1878 PCA also focused on the dangers of a standing army at home in a relative time of peace. The bill was first introduced as a rider to an Army Appropriations Act. 7 CONG. REC. 3587 (1878); Extraterritorial Effect of the Posse Comitatus Act, 13 Op. O.L.C. 321, 331–36 (1989). Further, the only mention of a foreign affairs application was limited to an obscure amendment proposed by a Texas congressman concerning the robbery of cattle along the border with Mexico. 7 CONG. REC. 3848 (1878) (statement of Sen. Schleicher). In a federal court case decided shortly after the signing of the PCA, the court defined posse comitatus as “composed of all able-bodied persons of sound mind and of sufficient ability to assist the sheriff, and may be younger or older than the military age.” See *Worth v. Craven Cnty. Comm’rs*, 24 S.E. 778, 779 (N.C. 1896).

¹²⁶ Title 10 is the statutory title addressing the Armed Forces.

¹²⁷ Today, defense appropriations are now fully integrated among services as part of the

1. Congress Passes the Military Cooperation with Law Enforcement Act (MCLEA) in 1981, Modifying the Military's Role in Law Enforcement

The MCLEA sought to utilize more military assets—including the Navy—to actively search for drug smugglers entering the country undetected. Local law enforcement lacked the resources and capacity to respond, detect, and thwart drug smugglers prior to entering the country. State and municipalities suffered from drug-related crimes, and Congress sought to help by freeing up restrictions on the military to interdict drugs prior to entry into the country.¹²⁸ In addition, the MCLEA sought to increase local police department access to military intelligence, training, and equipment to combat illicit drug trafficking.¹²⁹ The 1981 amendments reiterate the existing practice of providing information, assistance, and equipment to civilian authorities.¹³⁰ It also added a new permissible activity: DoD personnel could now operate equipment already on loan to civilian law enforcement agencies under certain circumstances.¹³¹ Congress also required the DoD to issue regulations to limit military involvement in certain law enforcement activities while operating the equipment.¹³² Understanding the potential impact on the military's broader duties of defending the nation, the MCLEA adds an important caveat that specifically prohibits military assistance that would adversely affect military preparedness.¹³³

The MCLEA did not modify the PCA—it is located within Title 10 of United States Code and the text of the PCA in Title 18 was left untouched.¹³⁴ Unlike the PCA, the MCLEA applies to the entire DoD *to include the Navy*.¹³⁵ But as Congress addressed all of the DoD's branches of the armed services in the 1981 law, the MCLEA's interplay between the PCA—which only spoke to the Air Force and Army—created additional uncertainty that continues to this day.

Two provisions are particularly important to decipher the interplay between the MCLEA and the PCA. First, 10 U.S.C. § 375 states that the DoD should issue internal regulations to implement the statute to limit

congressional process, unlike the separate Army and Navy appropriations found during the PCA's 1878 passage. *See infra* Part II.B.

¹²⁸ Felicetti & Luce, *supra* note 5, at 149–50.

¹²⁹ BALKO, *supra* note 19, at 145.

¹³⁰ *See, e.g.*, 10 U.S.C. §§ 371–372 (2012); Felicetti & Luce, *supra* note 5, at 149–53.

¹³¹ 10 U.S.C. § 374 (2012).

¹³² Felicetti & Luce, *supra* note 5, at 150.

¹³³ 10 U.S.C. § 376 (2012).

¹³⁴ Gizzo & Monoson, *supra* note 6, at 173.

¹³⁵ 10 U.S.C. §§ 371–378 (2012) (emphasis added).

the DoD's direct participation in "a search, seizure, arrest, or other similar activit[ies]."¹³⁶ It reads:

Restriction on direct participation by military personnel. The Secretary of Defense *shall prescribe such regulations* as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) *under this chapter* does not include or permit 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 is otherwise authorized by law.¹³⁷

This provision directs the DoD to issue regulations to further refine the activities that do not rise to the level of direct participation.¹³⁸ This provision is located at Chapter 18 of Title 10 U.S. Code.¹³⁹ But these regulations address activities that apply *under this chapter only*. "This chapter" refers to Chapter 18 of Title 10 U.S. Code where § 375 of Title 10 is located. So DoD regulations that are issued pursuant to the MCLEA should apply within the MCLEA statutory construct alone and outside of *Title 18* where the PCA resides.

Second, another provision of the MCLEA, 10 U.S.C. § 378, entitled "Nonpreemption of other law" states that the MCLEA should not be read to preempt or otherwise further restrict the PCA. It states, "[n]othing in this chapter [10 U.S.C. §§ 371–382] shall be construed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law before December 1, 1981."¹⁴⁰ The MCLEA's Conference Report reinforces this preemption provision by using parallel language in stating that "[n]othing in this chapter should be construed to expand or amend the Posse Comitatus Act."¹⁴¹

Clearly, Congress desired to increase the DoD's involvement and support to counter the drug war. It took care to expressly note that the new amendments should not be read to limit the authority of the military. Nevertheless, as discussed below, the DoD regulations that followed had the impact of broadening the PCA's effective scope to include its application to the Navy.

¹³⁶ *Id.* § 375.

¹³⁷ *Id.*; H.R. REP. NO. 97-311, at 121 (1981) (Conf. Rep.), *reprinted in* 1981 U.S.C.C.A.N. 1853, 1862 (emphasis added).

¹³⁸ 10 U.S.C. § 378.

¹³⁹ 10 U.S.C. § 375 is located in Chapter 18, Title 10 of the United States Code.

¹⁴⁰ 10 U.S.C. § 378.

¹⁴¹ Felicetti & Luce, *supra* note 5, at 152 (quoting H.R. REP. NO. 97-311, at 122).

2. Additional Congressional and Executive Actions in the 1980s Combat Illicit Drug Activity

In 1986, President Reagan signed National Security Decision Directive 221 (NSDD-221), entitled “Narcotics and National Security” that directed specific actions to increase effectiveness of counter-narcotics efforts.¹⁴² This further blurred the lines between domestic law enforcement and military functions.¹⁴³ Under NSDD-221, the Secretary of Defense was directed to “develop and implement any necessary modifications to applicable statutes, regulations, procedures, and guidelines to enable United States military forces to support counter-narcotics efforts more actively, consistent with the maintenance of force readiness and training.”¹⁴⁴ In 1987 the Secretary of Defense was ordered by Congress to notify local law enforcement agencies about the availability of surplus military equipment that could be obtained by their departments.¹⁴⁵ And an office within the Pentagon was set up specifically to facilitate transfers of military gear to law enforcement agencies.¹⁴⁶

Congress again addressed the military’s role in law enforcement matters in 1988 in a second drug-era amendment that updated the 1981 MCLEA. Congress authorized the DoD to add the aerial and maritime surveillance mission to combat drug trafficking, making the DoD the lead agency for the detection and monitoring of drugs into the United States.¹⁴⁷ Once again, Congress did not specifically amend the PCA and the MCLEA non-preemption provision at 10 U.S.C. § 378 was re-enacted.¹⁴⁸

Shortly thereafter, the Office of Legal Counsel (OLC) addressed the interplay between the PCA and the drug war amendments from the 1980s. It stated that because “nothing [in the MCLEA] is to be construed as creating *additional restrictions* on the Executive’s authority to use the military to enforce the laws . . . [section 375] should be interpreted to require the promulgation of regulations that do no more than enforce the Posse Comitatus Act.”¹⁴⁹

¹⁴² NATIONAL SECURITY DECISION DIRECTIVE NO. 221 (Apr. 8, 1986).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 3.

¹⁴⁵ BALKO, *supra* note 19, at 158. This is yet an additional unintended consequence of the PCA and its related laws: the militarization of local law enforcement, as evidenced by the recent focus on the heavily militarized Ferguson, Missouri police department. *See, e.g.*, Julie Bosman & Matt Apuzzo, *In Wake of Clashes, Calls to Demilitarize Police*, N.Y. TIMES, Aug. 15, 2014, at A1.

¹⁴⁶ Not long after this, the Los Angeles Police Department acquired a military armored personnel carrier and military-grade weapons. BALKO, *supra* note 19, at 158.

¹⁴⁷ 10 U.S.C. § 124 (2012).

¹⁴⁸ *Id.* § 378.

¹⁴⁹ Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, Extraterritorial Effect of the Posse Comitatus Act 339 (Nov. 3, 1989) (emphasis added).

Separately, Congress passed a law in 1986 mandating that Coast Guard personnel trained in law enforcement accompany navy surface combatants in drug-interdiction areas.¹⁵⁰ These Law Enforcement Detachments (LEDET) continue to serve on naval vessels, taking the lead to interdict and apprehend suspected drug traffickers at sea.¹⁵¹ The Navy treats the LEDET requirement as limiting the Navy to “indirect” assistance as the Coast Guard crewmembers take tactical control of the Navy warship during the interdiction.¹⁵² The use of LEDETs appears to be based on both the law enforcement institutional expertise inherent in the Coast Guard and continued uncertainty about the legal restrictions on the Navy acting independently on the high seas. During a drug interdiction, a Coast Guard LEDET is onboard a Navy vessel and the Coast Guard now takes “tactical control” of the operations during the drug interdiction with the Navy playing a supporting role.¹⁵³ If there was

¹⁵⁰ 10 U.S.C. § 379 (2012).

(a) The Secretary of Defense and the Secretary of Homeland Security shall provide that there be assigned on board every appropriate surface naval vessel at sea in a drug-interdiction area members of the Coast Guard who are trained in law enforcement and have powers of the Coast Guard under title 14, including the power to make arrests and to carry out searches and seizures.

(b) Members of the Coast Guard assigned to duty on board naval vessels under this section shall perform such law enforcement functions (including drug-interdiction functions)—

(1) as may be agreed upon by the Secretary of Defense and the Secretary of Homeland Security; and

(2) as are otherwise within the jurisdiction of the Coast Guard.

(c) No fewer than 500 active duty personnel of the Coast Guard shall be assigned each fiscal year to duty under this section. However, if at any time the Secretary of Homeland Security, after consultation with the Secretary of Defense, determines that there are insufficient naval vessels available for purposes of this section, such personnel may be assigned other duty involving enforcement of laws listed in section 374(b)(4)(A) of this title.

(d) In this section, the term “drug-interdiction area” means an area outside the land area of the United States (as defined in section 374(b)(4)(B) of this title) in which the Secretary of Defense (in consultation with the Attorney General) determines that activities involving smuggling of drugs into the United States are ongoing.

Id.

¹⁵¹ *Id.* In addition, the DoD is the lead agency for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States. *Id.* § 124.

¹⁵² OPLAW HANDBOOK, *supra* note 121, at 183. Yet this usually involves the use of a military warship and ferrying the Coast Guard boarding party to the suspected vessel. Abel, *supra* note 8, at 472 n.172.

¹⁵³ In military policy, tactical control is defined as “[t]he authority over forces that is limited to the detailed direction and control of movements or maneuvers within the operational area necessary to accomplish missions or tasks assigned.” See WILLIAM E. GORTNEY, CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02: DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 250 (2010) (as amended through 2014), available at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

a known drug smuggler that the Navy could easily interdict and a LEDET was not onboard the Navy vessel, the Navy would be unable to directly interdict. This includes the high seas far away from the United States shores. Indeed, the Navy would be limited to mere indirect participation and support.¹⁵⁴

3. Legislative History of the Drug War Amendments: DoD Reluctance and Local Leader Frustration

Throughout the legislative history of the 1981 and 1988 drug war amendments to 10 U.S.C. §§ 371–378, themes began to emerge. Congress sought to fully utilize the military as a valuable resource to address an issue of national importance while military leaders appeared reluctant to take on more law enforcement missions, concerned that doing so would detract from the military’s capacity to defend the nation. During the congressional hearings on the military’s role to combat illicit drug trafficking, local officials appeared to be perplexed at the PCA’s applicability to the Navy and the DoD’s apparent institutional reluctance to provide greater assistance to municipalities. Consider these comments from New York City Mayor Edward Koch in 1988 before a Joint Armed Services Committee. Mayor Koch was extremely frustrated by the Navy’s inability to provide the necessary help and assistance needed to combat the drug trafficking entering New York City:

[B]ut every time I have talked to military people, Navy people, they say we know what ships are coming through those very narrow channels that the ships in the Caribbean to get here. We know. But most people don’t know the Navy is not allowed to board them on the high seas. Only the Coast Guard is allowed to board; the Navy cannot. They are not allowed wider Posse Comitatus to make arrests, to interdict. . . . So what is it that we want the various armed forces to do? We want the Navy with the Air Force on the high seas to detect, apprehend and arrest the drug smugglers. At this particular moment only the Coast Guard can do that . . . [s]econd, why? Why can’t the Navy do this?¹⁵⁵

¹⁵⁴ Courts have continued to struggle with what exactly encapsulates indirect participation, and have utilized three different tests to determine whether the use of military personnel has violated the PCA. OPLAW HANDBOOK, *supra* note 121, at 169–70. The first test is whether the action was active or passive. *United States v. Yunis*, 681 F. Supp. 891, 892 (D.D.C. 1988), *aff’d*, 924 F.2d 1086 (D.C. Cir. 1991). The second test is whether the military pervaded the activities of civilian law enforcement officials. *Hayes v. Hawes*, 921 F.2d 100, 102–04 (7th Cir. 1990). The third test is whether the military subjected citizens to the exercise of military power that was regulatory, proscriptive, or compulsory. *United States v. Kahn*, 35 F.3d 426, 431–32 (9th Cir. 1994).

¹⁵⁵ *Role of the Military in Drug Interdiction: Joint Hearing Before the House and Senate Armed Services Committees*, 100th Cong. 227–28 (1988) (statement of Edward Koch, Mayor of New York

Senior military officials were reluctant to promise too much support or take on missions outside of the traditional military functions. These concerns were focused on constraints to military resources and general institutional competence.¹⁵⁶ Secretary of Defense Frank Carlucci was specifically concerned about the stress on DoD's resources that would arise from increased military involvement.¹⁵⁷ The Navy's Chief of Naval Operations at the time, Admiral Frank Kelso, was concerned about the Navy's lack of training in such matters and related readiness concerns if Navy personnel were required to testify in court and were removed from their command.¹⁵⁸ New York City Mayor Edward Koch was skeptical of some of the underlying perceived civil libertarian and training concerns:

Well, with respect to [a request for interdiction to the Navy], it was a naval ship, and there was a drug ship out there, but the *Kidd* didn't have the power to interdict the drug vessel and to seize them. They were really going wild. So they called, and what happened? They had to fly in a Coast Guard flag—an ensign . . . and turn [the Navy warship] into a Coast Guard boat so they could seize the contraband. Is that Alice in Wonderland? I think it's Alice in Wonderland.

Now, does anybody think that civil liberties of the American people would be violated if the Navy, without calling in to convert itself into a Coast Guard boat, because suddenly they brought a flag, a Coast Guard flag, if they had gone and seized that boat?¹⁵⁹

Mayor Koch was focusing on the artificial distinctions (“Alice in Wonderland” scenarios such as flying a Coast Guard flag) that take place to avoid civil libertarian concerns. As Koch noted, it is unclear

City). Koch's desire may be contrasted from Secretary of Defense Frank Carlucci's concern that the loosening of posse comitatus would negatively impact the DoD's core mission. *Id.* at 279, 281. (statement of Frank Carlucci, Secretary of Defense) (“The primary role of the Department of Defense is to protect and defend this country from armed aggression. Nothing must stand in the way of our readiness or our preparedness to perform this task. . . . And I am even more firmly opposed to any relaxation of posse comitatus restrictions on the use of the military to search, seize, and arrest.”); *see also* Peter M. Sanchez, *The ‘Drug War’: The U.S. Military and National Security*, 34 A.F. L. REV. 109, 126 n.154 (1991).

¹⁵⁶ 100th Cong. 279–81 (statement of Frank Carlucci, Secretary of Defense). Few, if any, precedents exist regarding the distinction between the law enforcement and military function. *See* Yoo PCA Memo, *supra* note 13.

¹⁵⁷ 100th Cong. 283 (statement of Frank Carlucci, Secretary of Defense) (“Armed Forces should not become a police force, nor can we afford to degrade readiness by diverting badly needed resources from their assigned missions.”); *see also* Sanchez, *supra* note 155, at 124.

¹⁵⁸ 100th Cong. 313 (statement of Admiral Frank Kelso, Chief of Naval Operations) (“There are some unique Navy impacts. Navy people are not trained to do police work, and requiring Navy personnel to appear at court proceedings would create readiness impacts on individual commands. We can anticipate tying [sic] up naval personnel from parent commands in long court cases.”).

¹⁵⁹ *Military Cooperation with Civilian Law Enforcement: Hearing Before the Senate Comm. on Crime of the House Comm. on the Judiciary*, 99th Cong. 76 (1985) (statement of Edward Koch, Mayor of New York City).

what threats, exactly, to civil liberties exist if the Navy were to act unilaterally without Coast Guard intervention. And this is particularly true for operations that occur on the high seas, far away from the American civilian population. Yet, as discussed later, the Navy has once again recently demonstrated that it can successfully combat piracy on the high seas, resulting in the successful prosecution of pirates in federal court.¹⁶⁰

II. THE MODERN MILITARY ORGANIZATION CREATES ADDITIONAL LAYERS OF COMPLEXITY TO THE PCA'S MODERN APPLICATION

The constitutional concerns regarding military interference in civilian matters continue today, but all five of the modern military services have transformed in novel ways since the country's founding and the PCA's passage. Today's DoD is the largest and most complex organization in the world, employing over three million civilian and military personnel.¹⁶¹ And there is a continual standing army that would have been unimaginable in the Framers' time. The PCA, which was passed in 1878, has been amended over time, but not in a lock-step manner that has kept up with rapid technological change and the modern military. Further, the rise of civil-military intelligence agencies—best exemplified by the NSA—creates additional challenges.¹⁶²

Within the five military services, the status of individual uniformed service members may further vary whether serving in the (1) National Guard under federal authority; (2) National Guard under state authority; (3) Title 10 military service in an active component status; or (4) Title 10 military service in a reserve component status.¹⁶³ For example, under the plain meaning of the PCA, it would likely be a violation if an Army active-duty officer arrested a civilian within the United States while operating pursuant to federal authorities. But what about an active-duty Navy or Marine Corps officer? And what if the Army officer referenced above is a member of the National Guard

¹⁶⁰ See, e.g., *United States v. Hasan*, 686 F.3d 1159 (10th Cir. 2012).

¹⁶¹ See Ruth Alexander, *Which is the World's Biggest Employer?*, BBC NEWS (Mar. 19, 2012), <http://www.bbc.co.uk/news/magazine-17429786>.

¹⁶² See, e.g., RICHARD A. BEST, JR., CONG. RESEARCH SERV., RL34231, *DIRECTOR OF NATIONAL INTELLIGENCE STATUTORY AUTHORITIES: STATUS AND PROPOSALS* (2011) (providing an overview of the 2004 Intelligence Reform and Terrorism Prevention Act and addressing the challenges raised by the complex intelligence organization). The military has significantly increased the role that contractors play in wartime, creating yet another challenging layer when attempting to apply the PCA.

¹⁶³ Further, each service has non-uniformed civilian employees as well as contractors that work for and support each service's mission. All of these variables add additional layers of complexity in determining exactly how the PCA applies today.

operating pursuant to state authorities?¹⁶⁴ The answers to the above scenario highlight the difficulty in applying the PCA to the modern military. Upon closer examination, the broader problem of determining *whom*, exactly, the PCA applies to is complex. This problem is further compounded when seeking to determine *where* the PCA applies in the absence of an express extraterritorial provision and *what* activities, specifically, violate the PCA.

A. *Whom—The PCA and the Five Military Services*

The text of the PCA clearly applies to the Army and Air Force. But there are five branches of the Armed Forces—Army, Air Force, Coast Guard, Marines, and Navy—with the Coast Guard effectively serving as a hybrid service.¹⁶⁵ In addition, the modern National Guard (Army and Air Force) can act pursuant to either the executive branch under Title 10 (U.S. Armed Forces) or the respective state governor under Title 32 (National Guard) authorities. It is well settled that the National Guard is exempt from the PCA's limitations when it operates under Title 32 state authorities.¹⁶⁶ When acting pursuant to its Title 14 authorities, courts have held that the Coast Guard is effectively unconstrained by the limitations of the PCA.¹⁶⁷

The Army and Air Force Guard are the modern successors to the militia forces that emerged at the nation's founding.¹⁶⁸ Today, the size of Army National Guard personnel is larger than the *entire* U.S. Navy force, with over 355,000 personnel serving as Army National Guardsman, constituting thirty-nine percent of the modern Army's

¹⁶⁴ In addition, the PCA does not apply to civilian employees of the DoD. *See* Furman, *supra* note 29, at 102–03 n.109 (citing a 1956 opinion of the Judge Advocate General of the U.S. Army that did not consider civilian employees to be part of the military). *But see* SECNAVINST 5820.7C, *supra* note 77, § 8(a) (extending the PCA prohibitions to the Navy's civilian employees).

¹⁶⁵ *Jackson v. State*, 572 P.2d 87 (Alaska 1977) (holding that the PCA does not apply to the Coast Guard). Legally, the Coast Guard is considered “a military service and a branch of the armed forces of the United States at all times.” 14 U.S.C. § 1 (2012). The Coast Guard is organizationally part of the Department of Homeland Security but is actively engaged with the Navy through LEDET operations and falls under the Department of the Navy during times of war or pursuant to presidential declaration. *Id.* § 3.

¹⁶⁶ DOYLE & ELSEA, *supra* note 1, at 36–39.

¹⁶⁷ *See Jackson*, 572 P.2d 87. Title 10 of the United States Code defined the term “armed forces” to include the Army, Navy, Marine Corps, Air Force, and their Reserve components. 10 U.S.C. § 101 (2012).

¹⁶⁸ The Navy lacks a National Guard, unlike the Air Force and Army which have National Guards that fall outside the scope of the PCA when acting pursuant to Title 32 state authorities. Title 10 is “Armed Forces,” Title 14 is “Coast Guard,” and Title 32 is “National Guard.”

overall operating force.¹⁶⁹ The Air Force National Guard constitutes well over 100,000 personnel in all fifty states.¹⁷⁰

B. *Where the PCA Applies: The PCA Lacks a Clear Extraterritorial Application*

The PCA statute lacks an extraterritorial provision.¹⁷¹ The extraterritorial application is particularly important for the Navy and Coast Guard, which largely operate outside the territory of the United States on the high seas, defined as “all parts of the sea that are not included . . . in the territorial sea or in the internal waters of a State.”¹⁷² The lack of an extraterritorial provision by the PCA is reinforced by the 1989 Office of Legal Counsel opinion:

Neither the language, history, nor legislative history of the Act suggests that Congress intended for the Act to apply extraterritorially [There are] no statutory limits on the executive branch’s authority to employ the military in law enforcement missions outside the territorial jurisdiction of the United States.¹⁷³

Complicating matters, the drug war amendments at 10 U.S.C. §§ 371–378 lack a blanket extraterritorial application but do reference extraterritorial activities that may occur outside the territorial seas.¹⁷⁴ And the DoD directive defining its role in cooperation with law enforcement officials applies worldwide.¹⁷⁵ The Secretary of Defense may grant exemptions to the military when acting outside the United States, but such exceptions are only granted when there are “compelling and extraordinary circumstances to justify them.”¹⁷⁶ This serves as yet another example whereby the DoD is imposing restrictions on the Navy. The constraints exist despite clear intent and language from Congress to

¹⁶⁹ See *ARNG by the Numbers*, ARMY NAT’L GUARD, <http://www.arng.army.mil/Pages/ByTheNumbers.aspx> (last visited Aug. 6, 2014).

¹⁷⁰ See *Air Force Personnel Center*, U.S. AIR FORCE (July 24, 2006), <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104554/air-force-personnel-center.aspx>.

¹⁷¹ See 18 U.S.C. § 1385 (2012); *Extraterritorial Effect of the Posse Comitatus Act*, 13 Op. O.L.C. 321 (1989). There is a presumption against extraterritorial application of a statute absent express congressional intent. See *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

¹⁷² U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. While the 1982 Law of the Sea Convention does not specifically define the high seas, it “certainly includes the water column outside any zone of national jurisdiction.”

¹⁷³ *Extraterritorial Effect of the Posse Comitatus Act*, 13 Op. O.L.C. at 321, 341.

¹⁷⁴ See, e.g., 10 U.S.C. § 379(a) (2012) (mentioning “naval vessels at sea”).

¹⁷⁵ DOD 5525.5, *supra* note 4, ¶ 8.1.

¹⁷⁶ *Id.*

not restrict the military during the passage of the drug war amendments.¹⁷⁷

C. *What the PCA Applies to: Restrictions on “Active” Support, but Allowances for “Indirect” Support*

The PCA does not apply to independent military purpose activities, which include “[a]ctions that 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.”¹⁷⁸ There are generally three separate tests that courts have applied to determine whether the military has violated the PCA: (1) whether the action of military personnel was active or passive; (2) whether the use of the armed forces pervaded the activities of civilian law enforcement activities; and (3) whether the military personnel subjected citizens to military power that was regulatory, proscriptive, or compulsory.¹⁷⁹ Further, the precise lines between law enforcement and military operation have blurred in recent years, making this distinction increasingly murky.¹⁸⁰

The President has separate executive authorities to use the military pursuant to both the Insurrection Act (also referred to as the “Calling Forth” Act) and the Stafford Act. Dating from 1793, the Insurrection Act authorizes the President to call into service the militia to suppress an insurrection against the Governor of a state and it also authorizes the President to use the militia or the Armed Forces to restore public order and enforce the laws of the United States.¹⁸¹ The Stafford Act authorizes the federal government to help state and local governments alleviate the suffering and damage caused by emergencies and natural disasters.¹⁸² It grants the President broad powers that may be invoked in the event of domestic emergencies, including an attack against the nation using weapons of mass destruction.¹⁸³ The Stafford Act specifically authorizes the President to use the Armed Forces to help restore public order.¹⁸⁴

¹⁷⁷ 10 U.S.C. § 378 (2012). Courts have struggled in applying the restrictive DoD regulations that apply worldwide. *Extraterritorial Effect of the Posse Comitatus Act*, 13 Op. O.L.C. at 343 (quoting *United States v. Del Prado-Montero*, 740 F.2d 113 (1st Cir. 1984), *cert denied*, 469 U.S. 1021 (1984)). The Office of Legal Counsel opinion also quotes cases from the Ninth Circuit and Federal District Courts, noting that courts have treated the more limiting agency regulations as law. *See Extraterritorial Effect of the Posse Comitatus Act*, 13 Op. O.L.C. at 343.

¹⁷⁸ DOD 5525.5, *supra* note 4, ¶ E4.1.2.1.

¹⁷⁹ *Bissonette v. United States*, 776 F.2d 1384 (8th Cir. 1985); OPLAW HANDBOOK, *supra* note 121, at 169–70.

¹⁸⁰ *See, e.g.*, Yoo PCA Memo, *supra* note 13.

¹⁸¹ 10 U.S.C. § 331 (2012).

¹⁸² 42 U.S.C. §§ 5121–5207 (2012).

¹⁸³ *Id.*

¹⁸⁴ 6 U.S.C. § 466 (2012). In 2002, Congress passed another law, titled “Sense of Congress

This authority effectively falls outside the purview of the PCA: both the Stafford Act and Insurrection Acts are express grants of authority from Congress to the President.¹⁸⁵

There are also a number of exceptions to the PCA. Military support to disaster relief operations (i.e. logistics, health care, transportation) are generally *not subject* to PCA restrictions. The military is largely unrestrained by the PCA from assisting in humanitarian assistance and disaster response in a permissive and safe environment where there is little need for an active law enforcement presence. But once the security situation degrades—as seen in Hurricane Katrina—the PCA and accompanying DoD regulations would limit the U.S. military operating in a “Title 10 status” from providing direct assistance subject to the limitations discussed above. This has the potential impact of delaying needed disaster relief as operational environments and security situations often change and degrade rapidly. While the military may continue to provide full support at the state level through its National Guard personnel and units, the “Title 10 Armed Forces” would be limited in what, exactly, could be supported if deployed outside Insurrection Act authorities.¹⁸⁶

Lastly, military agencies such as the National Security Agency are actively engaged with the collection of intelligence at home and abroad. And the military intelligence structure is increasingly intertwined between domestic and military agencies. When addressing the legality of such activities, courts have focused on Fourth Amendment jurisprudence in finding constitutional violations without addressing any potential violations of the PCA.¹⁸⁷ Despite claims and federal court rulings that the PCA embodies a larger spirit embodying civilian control over the military,¹⁸⁸ it has proven ineffectual to combat civil liberty concerns associated with domestic surveillance. Implementing the DoD policy is largely silent on the NSA’s role, merely stating that the Director of the NSA “shall establish appropriate guidance [to cooperate with civilian law enforcement officials].”¹⁸⁹ While it is beyond the scope of this Article to provide an in-depth analysis of the NSA’s role in modern

reaffirming the continued importance and applicability of the Posse Comitatus Act.” *Id.* While reaffirming that the PCA “has served the Nation well in limiting the Armed Forces to enforce the law” it reinforces existing laws such as the Stafford Act and Insurrection Act where the President has broad powers in the event of domestic emergency. *Id.*

¹⁸⁵ 10 U.S.C. §§ 331–335. The PCA prohibits the use of the military as a posse comitatus by the President “except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.” 18 U.S.C. § 1385 (2012).

¹⁸⁶ The federal military response can consist of active component or Reserve or National Guard personnel.

¹⁸⁷ *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013).

¹⁸⁸ *United States v. Walden*, 490 F.2d 372, 375–76 (4th Cir. 1974).

¹⁸⁹ DoD 5525.5, *supra* note 4, ¶ 5.5.

society, the PCA, MCLEA, and implementing DoD Directives have not kept pace with this new civil libertarian concern.

The table below demonstrates the complex results of the PCA's application to the Armed Forces in the modern era.

Table 1

<i>Military Department</i>	<i>Posse Comitatus Act Applies as a Matter of Law?</i>	<i>Posse Comitatus Act Applies as a Matter of Policy?</i>
U.S. Army	Yes	Yes
U.S. Air Force	Yes	Yes
U.S. Navy	No ¹⁹⁰	Yes
Naval Militia / National Guard	N/A ¹⁹¹	N/A
U.S. Marine Corps	No	Yes
U.S. Coast Guard	No	No
Army National Guard	Depends ¹⁹²	No
Air Force National Guard	Depends ¹⁹³	No
DoD Civilians	Depends ¹⁹⁴	Depends
Extraterritorial Application?	No ¹⁹⁵	Yes ¹⁹⁶
National Security Agency (NSA) and Domestic Surveillance Activities	No ¹⁹⁷	No ¹⁹⁸

D. *DoD Regulations Muddle the Drug War Amendments and the PCA, Restricting the Navy and Confusing Federal Courts*

In recent years, Congress has sought to *increase* the military's role in civilian law enforcement operations while the DoD has decreased the

¹⁹⁰ Under a strict textual examination of the PCA, the Navy, Coast Guard, Marine Corps are not mentioned. Only the Army and Air Force are mentioned in the text. 18 U.S.C. § 1385.

¹⁹¹ The Naval militia was absorbed into the Reserve Navy in 1916 and only small state naval militias exist today that are diminutive in size. Abel, *supra* note 8, at 458 n.83.

¹⁹² The PCA applies to the National Guard when operating under federal Title 10 authority. Under state Title 32, it does not apply.

¹⁹³ Abel, *supra* note 8, at 458 n.83.

¹⁹⁴ Civilian employees of the DoD are constrained by the limitations of DoD Directive 5525.5 when under the direct command and control of a military officer. See DOD 5525.5, *supra* note 4, ¶ E4.2.3.

¹⁹⁵ As discussed earlier, the PCA lacks a clear extraterritorial application. See *supra* Part II.B.

¹⁹⁶ See DOD 5525.5, *supra* note 4, ¶ 8.1 (effectively applying the restrictions of the PCA on military activities outside the territorial jurisdiction of the United States and allowing for an exception only under "compelling and extraordinary circumstances").

¹⁹⁷ While the NSA prohibits the Army from executing the laws, the NSA's intelligence gathering activities likely fall short of active involvement that would violate the PCA.

¹⁹⁸ The DoD Directive is largely silent on the role of the NSA, effectively delegating what limitations prescribed by the PCA to the NSA director: "The Director, National Security Agency/Chief, Central Security Service shall establish appropriate guidance for the National Security Agency/Central Security Service." DOD 5525.5, *supra* note 4, ¶ 5.5.

military's active participation as a matter of regulation and policy. While it is somewhat unclear why, precisely, this has occurred, the DoD has shown a general institutional reluctance to utilize its assets to respond to domestic threats out of fear that this would negatively impact its broader national defense mission to fight and win wars.¹⁹⁹

The key DoD policy document, entitled "DoD Cooperation with Civilian Law Enforcement Officials" applies to all branches of the Armed Forces and allows for information and equipment sharing with civilian law enforcement officials.²⁰⁰ This directive was last updated in 1989 and is the governing policy document detailing DoD's cooperation with civilian law enforcement. It effectively incorporates the PCA and drug war amendments. "Civilian law enforcement official" is defined as "[a]n officer or employee of a civilian agency with responsibility for enforcement of the laws within the jurisdiction of that agency."²⁰¹ This includes municipal police departments. And state and local law enforcement departments have been the beneficiaries of enormous amounts of military equipment in recent years.²⁰²

Besides applying the PCA to the Navy,²⁰³ the DoD directive places limits on military support to law enforcement to include prohibiting: (1) the interdiction of a vehicle, vessel, aircraft, or other similar activity; (2) a search or seizure; (3) an arrest, apprehension, stop and frisk, or similar activity; and (4) use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.²⁰⁴

¹⁹⁹ Felicetti & Luce, *supra* note 5, at 150 n.316. The DoD announced its reluctance during Congressional debates. *See, e.g.*, 127 CONG. REC. 15,685 (1981) ("The reason we are here today is because the Secretary of Defense does not want this authority anyway. He does not want to cooperate.").

²⁰⁰ *See generally* DoD 5525.5, *supra* note 4; *see also* 10 U.S.C. §§ 372, 375. Current Navy policy is aligned with DoD policy. The most recent guidance addressing Navy support to law enforcement officials is entitled "Cooperation with Civilian Law Enforcement Officials." SECNAVINST 5820.7C, *supra* note 77. The initial version was signed in 1984 and the most recent guidance dates from 2006. It outlines procedures for the transfer of relevant information, request for equipment, facilities, and personnel and reiterates the DoD's policy making the PCA applicable to the Navy. *Id.* While the Coast Guard is a branch of the Armed Forces, it is organizationally part of the Department of Homeland Security, hence DoD directives do not normally apply.

²⁰¹ DoD 5525.5, *supra* note 4, ¶ 3.2.

²⁰² *Id.* ¶ E4.1.6. As a result of this equipment exchanges, commentators have expressed concerns regarding the rapid militarization of law enforcement. *See generally* BALKO, *supra* note 19.

²⁰³ *See* DoD 5525.5, *supra* note 4, ¶ E4.3 ("DoD guidance on the Posse Comitatus Act (reference (v)), as stated in enclosure E3., is applicable to the Department of the Navy and the Marine Corps as a matter of DoD policy, with such exceptions as may be provided by the Secretary of the Navy on a case-by-case basis.").

²⁰⁴ *Id.* ¶ E4.1.3. Further, there are four military status exemptions within the directive whereby certain DoD personnel are not exempt from the PCA's limitations: (1) members of the Reserve component when not on active duty; (2) members of the National Guard when not in the federal service; (3) a civilian employees of the DoD; and (4) members of a military service when off duty,

Of particular concern is the blanket prohibition on the Navy's support to law enforcement on the interdiction of a vehicle, vessel, aircraft, or similar activity. The line between what is a military activity and what is a law enforcement activity has blurred in recent years; this has additional consequences. For example, a Navy commanding officer may take a conservative approach and fail to interdict a vessel suspected of illicit activity if he or she feels that this action is more closely akin to a law enforcement activity that is prohibited per DoD and Navy regulations.

Little attention was paid to the PCA in federal court after its passage and virtually no court decisions addressed the contours and applicability of the PCA until well into the twentieth century. Indeed, the PCA was referred to as an "obscure and all-but-forgotten" statute in an early federal case addressing its applicability.²⁰⁵ But as discussed in greater detail below, the Department of the Navy as a matter of policy—and not out of a legal requirement—began to strictly adhere to the PCA's restrictions.²⁰⁶ This created additional confusion as the courts sought to reconcile a military *policy* directive that was more restrictive than the actual corresponding *law*.²⁰⁷

Although the PCA is a criminal statute, no prosecutions for PCA violations have occurred.²⁰⁸ While the Supreme Court has not ruled on the application of the Act to the Navy, federal courts have been reluctant to find exclusionary rule violations or to otherwise fully apply the Act to the Navy.²⁰⁹ A summary of these rulings are provided below.

and in a private capacity. *Id.* § 4.2. The DoD Directive also addresses equipment exchange between the DoD and state and local law enforcement agencies: "Military Departments and Defense [a]gencies may make equipment, base facilities, or research facilities available to Federal, State, or local civilian law enforcement officials for law enforcement purposes in accordance with this enclosure." *Id.* § E3.1.

²⁰⁵ *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948).

²⁰⁶ Meeks, *supra* note 111, at 101 (quoting a 1965 opinion of the Navy Judge Advocate General).

²⁰⁷ See, e.g., *United States v. Kahn*, 35 F.3d 426, 431 (9th Cir. 1994). The DoD's initial position, supported by the Navy, was that the statute did not legally apply to the Navy. Yet this slowly began to change as the DoD and Navy instructions began to apply the PCA to the Navy—stating that the Act applied to the Navy as a matter of policy—while maintaining that there was no legal requirement to apply. Meeks, *supra* note 111, at 97. "The Opinions of The Judge Advocate General of the Navy have shifted from: '[the Act] has no application since that statute does not apply to naval personnel' to '[a]lthough . . . not prohibited under the Posse Comitatus Act . . . the policy of the Navy is to follow the spirit of the statute . . . ' and ' . . . it is the policy of the Navy and Marine Corps generally to comply with the restriction imposed by the statute.'" *Id.* at 100 (alterations in original) (footnotes omitted).

²⁰⁸ Felicetti & Luce, *supra* note 5, at 164.

²⁰⁹ See, e.g., *United States v. Mendoza-Cecelia*, 736 F.2d 1467 (11th Cir. 1992); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *United States v. Roberts*, 779 F.2d 565 (9th Cir. 1986), *cert denied*, 479 U.S. 839 (1986); *United States v. Acosta-Cartegena*, 128 F. Supp. 2d 69 (D.P.R. 2000).

1. *Chandler v. United States* (1948)

The PCA was left largely unnoticed and its scope and applicability went unchallenged until 1948. The first challenge to the Act occurred seventy years following the PCA's passage with the First Circuit's decision in *Chandler v. United States*.²¹⁰ In *Chandler*, an American citizen was charged with treason for assisting the Nazis during World War II.²¹¹ The U.S. Army arrested Chandler in Germany following the end of the war. Chandler was brought back to the United States, where he was found guilty of treasonous acts against the United States.²¹² The defense counsel in *Chandler* asserted that his arrest by the Army overseas violated the PCA.²¹³ The court quickly dismissed this challenge, focusing on the legislative history of the Reconstruction Era Act that "indicat[ed] that the immediate objective was to put an end to the use of federal troops to police state elections in the ex-Confederate states where civil power had been reestablished."²¹⁴ The court also opined that the PCA did not apply extraterritorially.²¹⁵

As discussed below, federal courts have generally been reluctant to find PCA violations when applied to the Navy.²¹⁶ But courts appear perplexed about how, exactly, to apply the DoD's more restrictive PCA policy. Following *Chandler*, PCA exclusionary rule challenges increased following the Supreme Court's decision in *Mapp v. Ohio*, which held that evidence obtained in violation of the Fourth Amendment may not be used in state law criminal prosecutions.²¹⁷ After *Mapp*, defense counsel began asserting exclusionary rule evidentiary violations under the PCA.²¹⁸

²¹⁰ See 171 F.2d 921, 936 (1st Cir. 1948). Based upon the novelty of raising a claim under the PCA in *Chandler*, the federal district court judge applauded the skill and creativity of the defense counsel for turning up what was viewed by the Court as an obscure statute. *Id.* ("The turning up of this . . . statute is a credit to the industry of counsel; but we know perfectly well that if the members of the Armed Forces who took Chandler into custody were prosecuted . . . such prosecution would surely fail.")

²¹¹ *Id.* at 924–28.

²¹² *Id.*

²¹³ *Id.* at 935–36.

²¹⁴ *Id.* at 936.

²¹⁵ *Id.*

²¹⁶ See also *United States v. Khan*, 35 F.3d 426 (9th Cir. 1994) (stating that none of the Navy's activities during a maritime drug interdiction was illegal).

²¹⁷ *Mapp v. Ohio*, 367 U.S. 643 (1961).

²¹⁸ BLACK'S LAW DICTIONARY 647 (9th ed. 2009). The exclusionary rule "excludes or suppresses evidence obtained in violation of a person's constitutional rights." *Id.*

2. *United States v. Walden* (1974)

The Fourth Circuit addressed the Act's applicability to the Marine Corps in *United States v. Walden*.²¹⁹ In *Walden*, Marine Corps investigators assisted a federal law enforcement agency, resulting in the conviction of civilians outside the Quantico, Virginia military base. The active-duty Marines were operating pursuant to Title 10 authorities and were used as the principal investigators of a civilian crime.²²⁰ The Department of the Navy had earlier issued internal regulations in 1969 that effectively applied the PCA's restrictions to the Navy and Marine Corps as a matter of policy.²²¹

The court in *Walden* was left with a quandary: the PCA's plain meaning omitted the Navy and Marine Corps but the DoD and Navy had issued its own more restrictive regulations that applied the PCA to the Navy.²²² The court ruled that while the Navy did not violate the PCA, it did violate its own self-imposed administrative regulation that would require the court to provide relief, stating,

We do not think that the letter of the Act was violated. We conclude, however, that there was a violation of the regulations; but, because this case presents the first instance of which we are aware in which illegal use of military personnel in this manner has been drawn into question, we decline to impose the extraordinary remedy of an exclusionary rule at this time, or to reverse the judgments. We reserve, however, the possibility that such a rule may be called for should repeated cases involving military enforcement of civilian laws demonstrate the need for the special sanction of a judicial deterrent.²²³

²¹⁹ 490 F.2d 372, 373 (4th Cir. 1974). The Marine Corps is organizationally part of the Department of the Navy.

²²⁰ *Id.* at 377.

²²¹ *Id.* at 373-74.

²²² *Id.* The DoD issued an administrative directive applying the PCA to the Navy and Marine Corps in 1968, stating that "[a]lthough the Navy and Marine Corps are not expressly included within its provisions, the act is regarded as national policy applicable to all military services of the United States." *Id.* at 374 n.4.

²²³ *Id.* at 373. The court stated:

[T]hroughout the United States, it is a fundamental policy to use civilian, rather than military, officials and personnel to the maximum extent possible in preserving law and order. In the Federal Government this policy is reflected by the Posse Comitatus Act (18 USC § 1385) which prohibits the use of any part of the Army or Air Force to enforce local, state, or Federal laws except as Congress may authorize. Although not expressly applicable to the Navy and Marine Corps, that act is regarded as a statement of Federal policy which is closely followed by the Department of the Navy.

Id. (quoting U.S. DEP'T OF THE NAVY, SEC'Y OF NAVY INSTRUCTION 5400.12: COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (1969) [hereinafter SECNAVINST 5400.12]).

In affirming the lower courts conviction, the Fourth Circuit stated that while the law was not violated, the door was left open for possible future violations of the military's own policy. *Walden* is also significant because the court looked to the PCA to find a broader "spirit" as the statutory embodiment on the limits of the military to enforce domestic laws.²²⁴ In doing so, the court looked to the legislative history at the time of the PCA's passage and linked the PCA to broader concerns regarding the separation of military and civilian affairs.²²⁵ The Supreme Court underscored this principle two years earlier in *Laird v. Tatum*.²²⁶ In *Laird*, the legality of the Army's domestic surveillance program was challenged after it was reported that the Army was gathering intelligence on civilians and non-military organizations in the United States.²²⁷ While the Court ultimately dismissed the challenge against the Army for lack of ripeness, the dissenting opinion by Justice Douglas stressed important historical and constitutional values of privacy, civilian control over the military, and freedom from government surveillance.²²⁸

3. *United States v. Roberts* (1986)

Following the passage of the MCLEA, the Ninth Circuit decided *United States v. Roberts* in 1986.²²⁹ In *Roberts*, a naval frigate with a United States Coast Guard (USCG) LEDET onboard stopped and apprehended a vessel involved in drug trafficking on the high seas.²³⁰ The Coast Guard personnel came onboard the suspected vessel, and

²²⁴ *Walden*, 490 F.2d at 376.

²²⁵ *Id.* at 374–76.

²²⁶ 408 U.S. 1, 32 (1972) (emphasizing the historical importance of military operations in peacetime). In another case around the time of *Walden*, the United States Army provided law enforcement equipment and offered advice to FBI officials during rioting at Wounded Knee, South Dakota. *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975). In discussing the Act's applicability to domestic law enforcement, the court stated that the PCA made "unlawful the use of federal military troops in an active role of direct law enforcement by civil law enforcement officers." *Id.* at 925.

²²⁷ *Laird*, 408 U.S. at 4–8.

²²⁸ *Id.* at 28–29 (Douglas, J., dissenting) ("The Constitution was designed to keep government off the backs of the people. The Bill of Rights was added to keep the precincts of belief and expression, of the press, of political and social activities free from surveillance. The Bill of Rights was designed to keep agents of government and official eavesdroppers away from assemblies of people. The aim was to allow men to be free and independent and to assert their rights against government. There can be no influence more paralyzing of that objective than Army surveillance. When an intelligence officer looks over every nonconformist's shoulder in the library, or walks invisibly by his side in a picket line, or infiltrates his club, the America once extolled as the voice of liberty heard around the world no longer is cast in the image which Jefferson and Madison designed, but more in the Russian image . . ."). But *Laird* did not specifically address the PCA in finding a similar spirit in a longstanding American tradition of civilian control over military institutions.

²²⁹ *United States v. Roberts*, 779 F.2d 565 (9th Cir. 1986).

²³⁰ *Id.* at 565.

ultimately seized bales of marijuana.²³¹ This resulted in the successful prosecution of the defendants on related drug charges.²³² The defense asserted that the Navy violated both the PCA and the proscriptions against military involvement in civilian law enforcement contained in 10 U.S.C. §§ 371–378 and addressed in both the DoD and Navy regulations.²³³ The court, however, ultimately rejected these legal challenges, making a difficult decision on how to apply the military’s more restrictive policy.²³⁴

First, the court relied upon the text and plain meaning of the PCA in ruling that the Navy’s violation of the PCA is “plainly without merit.”²³⁵ “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.”²³⁶

Second, the court tackled the more complex question of how to apply the MCLEA and the accompanying DoD regulations to the Navy.²³⁷ The defense asserted that the Navy had violated the terms of 10 U.S.C. § 374(b) which only permit the Navy to use equipment for “monitoring and communicating the movement of air and sea traffic” and also expressly limits the Navy from interdicting or interrupting the passage of vessels.²³⁸ In *Roberts*, the Navy vessel was utilized as the major platform to interdict the drug-smuggling vessel.²³⁹

But the court did not find a violation of the MCLEA provisions, noting that similar courts have refused to find exclusionary rule violations.²⁴⁰ Quoting the Fourth Circuit’s opinion in *Walden*, the Court stated that “the extraordinary remedy of exclusion was inappropriate until such time as ‘widespread and repeated violations’ of the Posse Comitatus Act demonstrated the need for such a remedy.”²⁴¹ In doing so, the Court emphasized that there must be a weighing of costs and benefits in finding purported exclusionary rule violations and there was not a clearly demonstrated need to deter future violations.²⁴² In sum, the court in *Roberts* effectively co-mingled the PCA, MCLEA, and accompanying military regulations but ultimately declined to find an exclusionary rule violation.²⁴³

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 567–68.

²³⁵ *Id.* at 567.

²³⁶ *Id.* at 566.

²³⁷ 10 U.S.C. §§ 371–378 (2012); *see supra* Part II.

²³⁸ *Roberts*, 779 F.2d at 567.

²³⁹ *Id.*

²⁴⁰ *Id.* at 568.

²⁴¹ *Id.* (quoting *United States v. Walden*, 490 F.2d 372, 377 (4th Cir. 1974)).

²⁴² *Id.*

²⁴³ *Id.* at 567–69. *But see* *United States v. Chon*, 210 F.3d 990 (9th Cir. 2000) (ruling that the

4. *United States v. Yunis* (1991)

The D.C. Circuit decided *United States v. Yunis* in 1991.²⁴⁴ In *Yunis*, the defendant invoked the PCA in challenging the legality of the Navy's seemingly active role in interdicting a terrorist act on the high seas.²⁴⁵ A rare federal case of maritime terrorism on the high seas that foreshadowed future military operations after September 11, 2001, the federal court ruling on a maritime law enforcement fact-pattern that raised novel issues of both domestic and international law.²⁴⁶

In *Yunis*, members of an armed Lebanese militia group led by defendant Fawaz Yunis hijacked a Royal Jordanian Airlines flight at Beirut airport in Lebanon.²⁴⁷ The plane eventually landed back at Beirut airport where Yunis and his co-conspirators released the passengers, blew up the airplane, and fled.²⁴⁸ FBI agents obtained an arrest warrant for appellant Yunis and planned an elaborate scheme labeled "Operation Goldenrod" that resulted in Yunis being arrested on the high seas.²⁴⁹ He was eventually transferred to both a U.S. Navy munitions ship and a Navy aircraft carrier. He was interrogated by the FBI on the aircraft carrier before being flown to the United States for federal prosecution.²⁵⁰

Yunis challenged his convictions on conspiracy, aircraft piracy, and hostage taking, asserting that the Navy played a direct and active role in Operation Goldenrod that violated the PCA and DoD's own regulations.²⁵¹ The court dismissed Yunis' direct challenge to the PCA, ruling:

We cannot agree that Congress' words admit of any ambiguity. By its terms, 18 U.S.C. § 1385 places no restrictions on naval participation in law enforcement operations; an earlier version of the measure would have expressly extended the bill to the Navy, but the final legislation was attached to an Army appropriations bill and its language was accordingly limited to that service.²⁵²

omission of the Navy from the PCA did not equate to congressional approval for Navy involvement in law enforcement activities); *Hayes v. Hawes*, 921 F.2d 100, 102-03 (7th Cir. 1990) (noting that the regulations promulgated pursuant to the PCA apply to the Navy, effectively limiting the Navy's involvement in law enforcement activities).

²⁴⁴ *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

²⁴⁵ *Id.* at 1090.

²⁴⁶ *Id.* at 1088.

²⁴⁷ *Id.* at 1089-90.

²⁴⁸ *Id.* at 1089.

²⁴⁹ While it is beyond the scope of this Article to discuss in detail the facts behind *United States v. Yunis*, it is this author's humble opinion that the *Yunis* fact pattern would rival that of the 2013 Academy Award Best Picture, *Argo*. See *ARGO* (GK Films 2012).

²⁵⁰ *Yunis*, 924 F.2d at 1089.

²⁵¹ *Id.* at 1088.

²⁵² *Id.* at 1090.

Second, the court in *Yunis* refused to find a violation of military regulations, noting that such violations would not rise to the level of being a constitutional violation that would warrant the application of the exclusionary rule.²⁵³ In doing so, it reaffirmed the lower court's three-part test that only found PCA violations if the military's activities constituted the exercise of regulatory, proscriptive, or compulsory military power.²⁵⁴

Despite having an aircraft carrier—the world's largest naval vessel—to transport Yunis after his apprehension, the court refused to find any direct involvement by the Navy.²⁵⁵ In doing so, the court found that the Navy's role was subordinate to that of the FBI throughout Yunis' capture and transfer, reaffirming the lower court's ruling that the Navy's "direct active involvement in the execution of the laws" did not "pervade the activities of civilian authorities."²⁵⁶ The court did note that military regulations required Navy compliance with the restrictions of the PCA, but the Navy's activities did not constitute "the exercise of regulatory, proscriptive, or compulsory power."²⁵⁷ Lastly, the Court discussed the extraterritorial application of the Act, noting that Congress intended to preclude military intervention in domestic affairs.²⁵⁸

In sum, this trilogy of cases—*Walden*, *Roberts*, and *Yunis*—demonstrate that while federal courts are reluctant to find statutory PCA legal violations, they are far less sure of what to make of the restrictive DoD regulations and have difficulty deciphering the PCA, MCLEA, and accompanying military regulations.²⁵⁹

III. THE POSSE COMITATUS ACT AND ITS MODERN APPLICATION TO THE NAVY

A. *Both the Navy and Coast Guard are Maritime Services that Share a Common Heritage and Modern Missions*

There are enormous similarities between the Navy and Coast Guard that suggest a less restrictive approach when applied to the

²⁵³ *Id.* at 1094.

²⁵⁴ For the lower court test, see *United States v. Yunis*, 681 F. Supp. 891, 895 (D.D.C. 1988).

²⁵⁵ *Yunis*, 924 F.2d 1086.

²⁵⁶ *Id.* at 1086 (quoting *Yunis*, 681 F. Supp. at 895–96).

²⁵⁷ *Id.* at 1094 (quoting *Yunis*, 681 F. Supp. at 895–96).

²⁵⁸ *Id.*

²⁵⁹ *But see United States v. Chon*, 210 F.3d 990 (9th Cir. 2000).

Navy.²⁶⁰ Both services are not specifically mentioned in the text of the PCA.²⁶¹ And the Coast Guard and Navy have an interconnected and closely related historical origin and common heritage as the nation's maritime services that have worked hand-in-hand with similar and overlapping mission sets. Additionally, it is unclear whether the "[t]he Coast Guard can claim no inherent institutional superiority to . . . civilian law enforcement work."²⁶² Indeed, the early constitutional debates about a naval maritime force did not neatly distinguish between a distinct military naval force and a Coast Guard.²⁶³ Hamilton and Madison spoke generally about the need for a Navy and some of the functions that the new nation desired from a maritime force—such as revenue collection.²⁶⁴ But clear distinctions were not made between the two services and their comparable threats to civil liberties at the nation's founding.

The Navy can trace its beginnings to 1775 when the Revolutionary War-era Continental Congress founded the Continental Navy.²⁶⁵ Following the Treaty of Paris and the end of the Revolutionary War, the Continental Navy disbanded, ships were sold, and the officers and sailors returned home.²⁶⁶ It was not until 1794 that Congress authorized the purchase and manning of six frigates that the Navy began to emerge as an active branch of the Armed Forces.²⁶⁷ The Department of the Navy was not formally established until 1798.²⁶⁸

Alexander Hamilton is credited with founding the Coast Guard in 1790 after the Constitutional Convention and the Federalist debates. The Coast Guard was originally part of the Department of the Treasury and the modern Coast Guard is the successor of the earlier Revenue Cutter Service. The Coast Guard was declared "a military service and a

²⁶⁰ See, e.g., Timothy E. Steigelman, *New Model for Disaster Relief: A Solution to the Posse Comitatus Conundrum*, 57 *NAVAL L. REV.* 105, 139 (2009). As discussed earlier, the Coast Guard has the operational flexibility of operating in both Title 14 (civilian) and Title 10 (military authority).

²⁶¹ 18 U.S.C. § 1385 (2012).

²⁶² Abel, *supra* note 8, at 479 ("[To] say that they [the Coast Guard] are much more capable of doing [law enforcement missions] than the military is not true." (quoting 127 *CONG. REC.* 15,675 (1981) (statement of Rep. Bennett) (first alteration in original)).

²⁶³ See *supra* Part I. The term "Coast Guard" is not mentioned specifically in the Federalist Papers, the text of the Constitution, or the constitutional debates. Alexander Hamilton was an early proponent of a Coast Guard. He advocated for the creation of "a few armed vessels." *THE FEDERALIST NO. 12* (Alexander Hamilton) ("A few armed vessels, judiciously stationed at the entrances of our ports, might at a small expense be made useful sentinels of the laws.").

²⁶⁴ See *THE FEDERALIST NO. 12*, *supra* note 263 (Alexander Hamilton); *THE FEDERALIST NO. 41*, *supra* note 44 (James Madison).

²⁶⁵ *Navy Birthday Information*, *NAVAL HIST. & HERITAGE COMMAND*, <http://www.history.navy.mil/birthday.htm> (last visited Aug. 6, 2014).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

branch of the armed forces of the United States at all times”²⁶⁹ in 1915 after merging with the United States Lighthouse Service.²⁷⁰ Today, it is not part of the organizational hierarchy of the DoD during day-to-day peacetime operations.²⁷¹ The Coast Guard was moved to the Department of Transportation in 1967 and the Department of Homeland Security in 2003, where it currently resides except when it is operating as a service within the Department of the Navy.²⁷²

Besides being military services, both are subject to the Uniform Code of Military Justice for criminal matters.²⁷³ While it is well settled that the PCA does not apply to the Coast Guard,²⁷⁴ substantive commonalities exist between the sea services.²⁷⁵ Remarkably, the PCA’s prohibitions apparently do not apply to the Coast Guard *even* when it is operating as a part of the Department of the Navy.²⁷⁶ Indeed, the Navy

²⁶⁹ 14 U.S.C. § 1 (2012).

²⁷⁰ See *U.S. Coast Guard History*, U.S. COAST GUARD, http://www.uscg.mil/history/web/USCG_briefhistory.asp (last visited Aug. 31, 2014).

²⁷¹ See *id.*; see also 14 U.S.C. §§ 3–4 (2012).

²⁷² *Id.* § 3(a) (“[This transfer occurs] upon the declaration of war if Congress so directs in the declaration or when the President directs, the Coast Guard shall operate as a service in the Navy.”).

²⁷³ Abel, *supra* note 8, at 482 n.215.

²⁷⁴ See *Jackson v. State*, 572 P.2d 87 (Alaska 1977).

²⁷⁵ *Id.*

²⁷⁶ *Id.* Title 14, the Coast Guard’s authorities are “in addition to” those provided in Title 10. See 14 U.S.C. § 89 (2012) (entitled “Law Enforcement”). Section 89 of Title 14 states:

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship’s documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

operates in the same maritime environment as the Coast Guard—often on the high seas and far away from the domestic shoreline—with many of the same unique challenges.²⁷⁷

Modern military guidance cements the unique relationship that the Navy shares with the Coast Guard.²⁷⁸ The Navy has historically and doctrinally far more in common with the Coast Guard in its mission and operations than either the Army or Air Force.²⁷⁹ This was most recently exemplified by the “Cooperative Strategy for 21st Century Sea Power,” a key strategic document that highlighted the enormous commonalities and overlapping mission sets among the maritime services.²⁸⁰ This document, the first tri-service policy document signed by the three sea services (Navy, Coast Guard, Marines) serves as a blueprint for how each service will work together to face threats arising from the maritime domain. And it highlights the importance of close coordination essential to mitigating threats short of war to include piracy, terrorism, weapons proliferation, drug trafficking, and other illicit activities.²⁸¹

B. *The U.S. Navy Has Demonstrated Its Ability to Successfully Thwart Piracy—A Federal Crime—on the High Seas*

The crime of piracy has a long history and was of such a concern at the nation’s founding that Congress was specifically provided with the constitutional power to “define and punish Piracies and felonies committed on the High Seas.”²⁸² The Navy has served as the main instrument to combat piracy since the country’s beginning. As discussed below, the counter-piracy mission shares many similarities with other maritime law enforcement missions in which the Navy is prohibited from direct participation.

(c) The provisions of this section *are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States.*

Id. (emphasis added).

²⁷⁷ And since the passage of the PCA in 1878, there have been numerous Congressional initiatives to require the Navy to take over the Coast Guard’s law enforcement functions. Abel, *supra* note 8, at 482 n.217.

²⁷⁸ See DOD 5525.5, *supra* note 4.

²⁷⁹ See A COOPERATIVE STRATEGY FOR 21ST CENTURY SEA POWER (2007), available at <http://www.navy.mil/maritime/Maritimestrategy.pdf> (stating that the report “binds our services more closely together than they have ever been before to advance the prosperity and security of our Nation”).

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² U.S. CONST. art I, § 8, cl. 10.

International law, too, has addressed the scourge of piracy and has long recognized the responsibility for nations to cooperate in its repression. This historical obligation is reinforced in both the 1958 Geneva Convention on the High Seas and the 1982 UNCLOS Convention²⁸³ which provide, “[a]ll States *shall* cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”²⁸⁴ Domestically, the crime of piracy is codified as a criminal statute under Title 18.²⁸⁵ Naval warfare publications define piracy as “an international crime consisting of illegal acts of violence, detention, or depredation committed for private ends by the crew or passengers of a private ship or aircraft in or over international waters against another ship or aircraft or persons and property on board.”²⁸⁶ Congress has specifically empowered the Navy to combat piracy, so there is a historical, legal and cultural basis for the U.S. Navy to combat piracy on the high seas.²⁸⁷ But on closer

²⁸³ THE ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 3.5 (1997) [hereinafter NWP 1-14 ANNOTATED] (on file with author).

²⁸⁴ UNCLOS, *supra* note 172, art. 100 (emphasis added). Piracy is defined by UNCLOS as to include any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Id. art. 101.

²⁸⁵ 18 U.S.C. § 1651 (2012) (“Whoever on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”).

²⁸⁶ THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NAVAL WARFARE PUBLICATION 1-14M, at 3–5 (2007) [hereinafter NWP 1-14M], available at [http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_\(Jul_2007\)_\(NWP\)](http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/1-14M_(Jul_2007)_(NWP)).

²⁸⁷ 33 U.S.C. § 381 (2012) (“The President is authorized to employ so many of the public armed vessels as in his judgment the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States and their crews from piratical aggressions and depredations.”); *Id.* § 382 (“[I]nstruct the commanders of the public armed vessels of the United States to subdue, seize, take, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas.”).

examination, many of the maritime interdiction and law enforcement operations on the high seas share commonalities with piracy.

Recently, the Navy has invested enormous resources in combating piracy off the coast of Somalia. This is broadly aligned with the U.S. Navy's broader mission of deterring aggression and maintaining freedom of the seas.²⁸⁸ The recent successful prosecution of pirates in U.S. federal courts demonstrates the Navy's existing institutional competence to handle a complex law enforcement operation on the high seas that ended up in federal court in the United States.²⁸⁹ In *United States v. Abdi Wali Dire*,²⁹⁰ the Fourth Circuit affirmed the lower court's piracy conviction, detailing the work that the Navy and its investigative arm (the Naval Criminal Investigative Service) did in collecting evidence, issuing Miranda warnings, and providing the law enforcement expertise necessary in upholding the conviction of Somali pirates.²⁹¹

Despite being understood as a clear Navy mission that is not hindered by the DoD's interpretation of the PCA, the naval counter-piracy mission shares many similarities with maritime interdiction operations and counter drug trafficking operations. Suspected pirates are ultimately prosecuted in a federal court of law within the United States or abroad, similar to suspected drug smugglers. Piracy, MIO, and illicit drug trafficking largely take place in international waters outside an international humanitarian law legal regime that distinguishes between combatants and non-combatants.²⁹² The suspected pirates are not deemed "enemy combatants" within the meaning of international humanitarian law. Rather, suspected pirates are treated as criminal defendants afforded the full menu of constitutional rights and evidentiary standards required for trial in U.S. federal court. And the drug traffickers, hostage takers, and pirates who operate on the high seas ultimately end up in federal court subject to criminal prosecution.

C. *Naval Operations Combatting Maritime Terrorism*

MIO is another broad mission set that includes combating maritime terrorism. It provides another example of the existing legal

²⁸⁸ See *Navy Organization*, AMERICA'S NAVY, <http://www.navy.mil/navydata/organization/org-top.asp> (last visited Aug. 7, 2014).

²⁸⁹ See *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010), *aff'd sub nom.* *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012).

²⁹⁰ 680 F.3d 446 (4th Cir. 2012).

²⁹¹ *Id.*

²⁹² International Humanitarian Law—sometimes referred to as the law of armed conflict—has the express purpose of limiting the effects of an armed conflict. It only applies when there is an international or non-international armed conflict. See, e.g., *What Is International Humanitarian Law?*, INT'L COMMITTEE FOR THE RED CROSS, http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf (last visited Mar. 14, 2014).

confusion between clear military activities and law enforcement activities.²⁹³ The international legal basis for boarding vessels can be found under UN Security Council Resolutions²⁹⁴ and is rooted in the principle of self-defense and the law of the sea. The UNCLOS provides for the “right of visit” for a ship on the high seas where there is a reasonable ground for suspecting that the ship is engaged in piracy.²⁹⁵

Under UNCLOS, warships are authorized to approach any vessel in international waters to verify its nationality.²⁹⁶ Unless the vessel encountered is a warship or government vessel of another nation that enjoys immunity under international law, the vessel may be stopped and boarded under certain conditions. There must be reasonable grounds to suspect that the vessel is either: (1) engaged in piracy; (2) engaged in the slave trade; (3) engaged in unauthorized broadcasting; (4) without nationality; or (5) though flying a foreign flag or refusing to show its flag, the vessel is, in reality, of the same nationality of the warship.²⁹⁷ International legal authorities authorizing the right of visit on the high seas overlap the United States domestic authorities, adding another layer of complexity a PCA analysis. Consider a vessel suspected of maritime terrorism operating on the high seas that is approaching the coastline. Questions arise: is a response a law enforcement or military purpose activity? Do the underlying legal authorities change as the suspected vessel enters the territorial waters of the United States?

Port security is another area in which the Navy is limited from fully participating due to overly restrictive DoD directives. Providing port security is subject to continual threats and the Navy lacks explicit authority to act in this area. United States port security is currently handled by the U.S. Coast Guard and is under-resourced and understaffed.²⁹⁸ The Coast Guard and the Bureau of Customs Border

²⁹³ See NWP 1-14M, *supra* note 286, at 4–6 (“Nations may desire to intercept vessels at sea in order to protect their national security interests. The act of ‘intercepting’ ships at sea may range from querying the master of the vessel to stopping, boarding, inspecting, searching, and potentially even seizing the cargo or the vessel.”).

²⁹⁴ See, e.g., Richard Zeigler, *Ubi Sumus? Quo Vadimus?: Charting the Course of Maritime Interception Operations*, 43 NAVAL L. REV. 1, 18 (1996).

²⁹⁵ UNCLOS, *supra* note 172, art. 110. There is also a duty for all states to cooperate in the repression of piracy. *Id.* art. 100.

²⁹⁶ NWP 1-14 ANNOTATED, *supra* note 283, § 3.4.

²⁹⁷ *Id.*

²⁹⁸ See *Port Security [John Kerry–Election Issue]*, FREE REPUBLIC (Jan. 31, 2004, 7:07 PM), <http://www.freerepublic.com/focus/f-news/1069236/posts> (“The United States’ maritime borders include 95,000 miles of open shoreline, 361 ports and an Exclusive Economic Zone that spans 3.5 million square miles. The United States relies on ocean transportation for 95 percent of cargo tonnage that moves in and out of the country. Each year more than 7,500 commercial vessels make approximately 51,000 port calls, and over six million loaded marine containers enter U.S. ports. Current growth predictions indicate that container cargo will quadruple in the next twenty years.”). This important issue rose to national attention in the 2004 Presidential election and John Kerry made bolstering port security a campaign issue.

Protection (CBP) are the lead agencies for port and maritime security within the United States. The Navy will support the USCG and CBP in the port security mission, but this is limited to traditional military missions such as air defense or antisubmarine warfare.²⁹⁹ The Coast Guard is the lead federal agency for maritime homeland security and the Navy is lead for maritime homeland defense, but there is considerable overlap—and potential confusion—between these mission sets.³⁰⁰

Current DoD directives take a cautious approach, limiting the DoD's involvement in civilian law enforcement matters *wherever* they operate, effectively magnifying the reach of the PCA as applied.³⁰¹ Congress has not amended the PCA to apply to the Navy nor has it directed the DoD and Navy to place limits on the Navy's role in law enforcement operations. Quite the opposite has occurred. Indeed, it appears that the DoD may be acting contrary to the express statutory intent of Congress, which insisted that the 1980s drug war amendments “[S]hall [not] be construed to limit the authority of the executive branch [in these amendments] in the use of military personnel or equipment for civilian law enforcement purposes [prior to the law's passage].”³⁰²

²⁹⁹ See generally RONALD O'ROURKE, CONG. RESEARCH SERV., RS21230, HOMELAND SECURITY: NAVY OPERATIONS—BACKGROUND AND ISSUES FOR CONGRESS (2005), available at http://assets.opencrs.com/rpts/RS21230_20050201.pdf. The Navy does have Port Security Units (PSUs), but their mission is focused on homeland defense missions such as anti-terrorism and force protection of Navy installations and military units. *Id.* at 309.

³⁰⁰ *Cf. id.* (“Given the partial overlap in definitions between [maritime homeland security] and [maritime homeland defense], situations involving potential terrorist attacks in the maritime domain close to the United States could pose a question as to . . . [who] should take the lead in responding.”).

³⁰¹ DoD regulations place limitations on direct assistance to civilian law enforcement authorities, effectively expanding the PCA to all the branches of the service except the Coast Guard:

E4.1.3. Restrictions on Direct Assistance. Except as otherwise provided in this enclosure, the prohibition on the use of military personnel ‘as a posse comitatus or otherwise to execute the laws’ prohibits the following forms of direct assistance:

E4.1.3.1. Interdiction of a vehicle, vessel, aircraft, or other similar activity.

E4.1.3.2. A search or seizure.

E4.1.3.3. An arrest, apprehension, stop and frisk, or similar activity.

E4.1.3.4. Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.

DOD 5525.5, *supra* note 4.

³⁰² 10 U.S.C. § 378 (2012).

IV. THE NEED FOR A FOURTH PHASE: CLARIFYING THE PCA FOR THE CHALLENGES OF THE TWENTY-FIRST CENTURY

After the attacks on September 11th and the attack on the USS Cole, the U.S. Navy renewed its focus on the threats of maritime terrorism. Today the United States continues to face a myriad of threats from the sea³⁰³ that make it difficult to clearly distinguish traditional military functions from law-enforcement functions.³⁰⁴ Such emergent mission areas should serve as an impetus for both Congress and the DoD to fundamentally re-examine the current application of the PCA to the Navy. These threats include maritime terrorism³⁰⁵ threats to port security,³⁰⁶ and domestic disaster operations.³⁰⁷

The PCA, however, has not been re-examined to clearly address the Navy's role in these emergent mission sets. And legal seams remain between "homeland security" and "homeland defense" when looking to protect the homeland and countering international maritime terrorism at sea.³⁰⁸ An overly restrictive view of international terrorism as purely a law enforcement and homeland security mission may ultimately restrict the full resources of the Navy to respond to these threats.

³⁰³ See, e.g., Douglas Daniels, Note, *How to Allocate Responsibilities Between the Navy and Coast Guard in Maritime Counterterrorism Operations*, 61 U. MIAMI L. REV. 467, 468-73 (describing the potential threats from maritime terrorism and need to properly allocate responsibilities between the Navy and Coast Guard).

³⁰⁴ Yoo PCA Memo, *supra* note 13 (noting that "distinguishing between the two functions is no easy matter. . . . It is also because, in the conflict against terrorism, national security and law enforcement activities, objectives and interests may inevitably overlap"); see also William Safire, Essay, *Thataway, Posse Comitatus*, N.Y. TIMES, Feb. 28, 1986, at A31 (asserting that a porous border exists that is not well defended by the Departments of Justice, Treasury and Defense due to different agencies focusing on different missions).

³⁰⁵ See, e.g., Zeigler, *supra* note 294, at 63. In United States law, acts of terrorism are crimes that can be either domestic or international in nature, rendering the prosecution of such acts a law enforcement function. See 18 U.S.C. § 2331 (2012). Crimes that occur outside the territorial jurisdiction of the United States are also within the definition of criminal code. *Id.* § 2331(1)(c).

³⁰⁶ Cf. Daniels, *supra* note 303, at 489-90 (describing the Navy's assistance with the Coast Guard in port security operations after 9/11).

³⁰⁷ See, e.g., Scott Tkacz, Note, *In Katrina's Wake: Rethinking the Military's Role in Domestic Emergencies*, 15 WM. & MARY BILL RTS. J. 301 (2006).

³⁰⁸ As defined, "homeland defense"—the province of the DoD and "homeland security"—is not easily bifurcated, further muddying the waters between law enforcement and military purpose missions. See, e.g., Daniels, *supra* note 303, at 495 ("[D]istinctions between 'Homeland Defense' and 'Homeland Security' are 'artificial' and 'impractical.'" (quoting *Hearing Before the Subcomm. On Terrorism, Unconventional Threats & Capabilities*, 109th Cong. 5 (2005) (statement of the Hon. Paul McHale, Assistant Secretary of Defense for Homeland Defense))).

A. *The Navy's Role in Future Law Enforcement Activities: A Challenge that Can Be Overcome*

1. Challenge: Civil Libertarian Concerns

Critics of a more expansive role for the Navy in law enforcement on the high seas may assert that an increased Navy role will undermine civil liberties and the longstanding tradition of the military keeping a safe distance from civil law enforcement matters. This criticism deserves careful consideration in light of the longstanding and historical tradition of civilian control of the military in the United States.³⁰⁹ But the dangers faced by a standing navy as compared to a standing army are fundamentally distinguishable. As discussed at length in Part I, the dangers at the birth of the nation and during the PCA's passage in 1878 were fundamentally concerned with a large standing army's role in enforcing domestic law, not the Navy's.³¹⁰

The Navy, particularly on the high seas and operating far away from the nation's shores, should not be encumbered by the PCA to take on missions that are consistent with its core mission and strategies. On the high seas and foreign soil, the military is truly the "only means at the executive branch's command to execute the laws. Giving extraterritorial effect to the Posse Comitatus Act . . . deprive[s] the executive branch of any effective means to fulfill this constitutional duty."³¹¹

2. Challenge: The Navy Lacks Proper Training

Critics of an expansive role for the Navy in law enforcement missions on the high seas have asserted that military members lack a proper mindset and the training as "military personnel are trained to act in circumstances where defeat of the enemy, rather than the protection of constitutional freedoms, is the paramount concern."³¹² Skeptics assert

³⁰⁹ For a fascinating critique of the dangers posed by a diversion of military forces and the associated expansion of legal authorities to the military, see Charles J. Dunlap, Jr., *The Origins of the Military Coup of 2012*, 12 *PARAMETERS* 2 (1992–1993).

³¹⁰ See *supra* Part I.

³¹¹ Extraterritorial Effect of the Posse Comitatus Act, 13 *Op. O.L.C.* 321, 334 (1989).

³¹² Sean McGrane, Note, *Katrina, Federalism, and Military Law Enforcement: A New Exception to the Posse Comitatus Act*, 108 *MICH L. REV.* 1309, 1321–22 n.81 (2010) ("It is the nature of their primary mission that military personnel must be trained to operate under circumstances where the protection of constitutional freedoms cannot receive the consideration needed in order to assure their preservation. The posse comitatus statute is intended to meet that danger." (quoting *United States v. McArthur*, 419 F. Supp. 186, 193–94 (D.N.D. 1975))). Interestingly, one of the most tragic examples of the military being used for law enforcement purposes involved Ohio National Guardsmen operating pursuant to state authorities. The PCA does not apply to the National Guard. See *supra* Part I; see also Jerry M. Lewis & Thomas R. Hensley, *The May 4*

that military service members are uniquely trained to operate in a non-permissive environment subject to military rules of engagement. This is in contrast to domestic law enforcement—such as municipal police forces—that are trained to operate in a peaceful environment subject to gradually escalating rules for the use of force.³¹³ Further, skeptics assert that military members lack the training in evidence collection and law enforcement methods that could be upheld in a domestic court. But three recent developments should alleviate many of those concerns.

First, the military services have shown an ability to handle traditional military missions and provide support to state law enforcement functions. While the Navy lacks an equivalent National Guard, the experience of the Army and Air Force National Guard should inform the discussion. The respective National Guards already regularly “shift authorities” between Title 10 (federal) and Title 32 (state) as they have operated and deployed both domestically and throughout the world in record numbers.

No longer can the National Guards be considered stateside militias as earlier envisioned by the framers—they augment the operational arms of the Army and Air Force. The wars in Afghanistan and Iraq have relied heavily upon a mixture of active-duty, reserve, and National Guard service members. And National Guardsmen have regularly deployed overseas to hostile environments pursuant to Title 10 military authorities. They then return stateside where they operate in a peaceful environment under state authorities without PCA limitations. The interchangeability of the Army and Air Force Guard from military to state authorities has overall been an enormous success. In addition, Coast Guardsmen have demonstrated the flexibility to operate under both Title 14 and Title 10 authorities as Coast Guardsmen have also been utilized in both Iraq and Afghanistan, performing admirably under the direction of the DoD.³¹⁴

Shootings at Kent State University: The Search For Historical Accuracy, 34 OHIO SOC. STUD. REV. 1, 9–21 (1998), available at <http://dept.kent.edu/sociology/lewis/lewi.htm>.

³¹³ Within the Department of Defense, guidance is promulgated for rules of engagement defined as “[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States [naval, ground and air] forces will initiate and/or continue combat engagement with other forces encountered.” GORTNEY, *supra* note 153, at 224. Within the Rules of Engagement, there exists both the Standing Rules for the Use of Force (SRUF) that apply domestically and when the DoD is providing law enforcement support function and the Standing Rules of Engagement (SROE) that apply to military operations and contingencies. The SRUF anticipates a more permissive environment and largely applies within United States territory. See CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION: 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (June 13, 2005) [hereinafter CJCSI 3121.01B], available at http://www.alphaomega777.com/Documents/US_Rules_Of_Engagement.pdf.

³¹⁴ See Vice Admiral James Hull et al., *What Was the Coast Guard Doing in Iraq?*, 129 PROCEEDINGS MAG. 1206 (Aug. 2003), available at <http://www.usni.org/magazines/proceedings/2003-08/what-was-coast-guard-doing-iraq> (“Military missions for the Coast Guard [as] an

Second, as discussed above, the DoD and the Navy already engage in broad mission sets that do not neatly fit in the category of an independent military purpose or law enforcement. The Navy is already charged with conducting a broad range of missions from humanitarian assistance, MIO, counter-piracy operations, and participation in major combat operations. The ability to go from one operating environment to the next requires flexibility and adaptability. Hence, any critique about military members lacking the proper mindset to handle more permissive environments must take into account the continual agility that members of the military perform in a broad array of mission sets today.

Third, significant law enforcement expertise is already organic within the Navy. Each branch of the military has its own internal law enforcement experts that routinely collect evidence and assists in the law enforcement function. Within the Navy, the Naval Criminal Investigative Service (NCIS) is a federal law enforcement agency charged with both the counterterrorism mission and conducting investigations into felony activities throughout the world. Most recently, NCIS agents issued Miranda warnings and handled the evidence collection and law enforcement functions warnings to piracy suspects onboard a Navy warship, ultimately resulting in their successful conviction of the piracy suspects.³¹⁵ NCIS as well as uniformed Navy law enforcement personnel already act as a law enforcement force within an armed force. These assets could be better integrated into existing maritime law enforcement missions to ensure, among other things, that defendants are provided with their constitutional rights and evidence is properly handled.³¹⁶

3. Challenge: Military Readiness

Critics of an increased naval involvement in law enforcement may assert that having the Navy involved in additional missions may impact military readiness. But Congress has already put in place a specific statutory provision that prohibits the DoD from assisting law enforcement if this “will adversely affect the military preparedness of the

important part of the national strategy and an instrumental part of those forces that defend the peace.”). Interestingly, in the criminal context, the Coast Guard service members are subject to the Uniform Code of Military Justice. Critics may assert that this analogy is not relevant to the Navy, which lacks a National Guard. But a “naval militia” has already been integrated into the regular Navy; surely an analogous Navy National Guard would be outside the limitations of the PCA.

³¹⁵ *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010).

³¹⁶ Expertly trained in law enforcement matters, NCIS and Navy Master-at-Arms normally operate with the more restrictive SRUF domestically. See CJCSI 3121.01B, *supra* note 313.

United States.”³¹⁷ This ensures that any involvement does not undermine military readiness.

Lastly, having a DoD policy that acknowledges this fundamental difference and such historical inconsistencies could serve to be an enormous boost to the inherent tools that our nation already has to combat the myriad threats facing our homeland. This is an important argument for maintaining a viable and strong Navy while getting maximum return on investment in a time of severe federal budgetary constraints.³¹⁸ And this would be better aligned with Congress’ intent to increase military support to law enforcement as envisioned during the drug war amendments.³¹⁹

B. *Recommendations for Updating the PCA for the Modern Era*

Today’s Navy effectively serves as the nation’s worldwide maritime force with a mission of ensuring worldwide freedom of navigation. But as DoD regulations apply worldwide, this places an extraterritorial application of the PCA as a matter of policy, requiring the Secretary of Defense’s approval for military action outside the territorial jurisdiction of the United States.³²⁰ This is contrary to the plain reading of both the PCA and drug-era amendments, both of which lack an express extraterritorial provision.³²¹ And this is counter to the 1989 Office of Legal Counsel opinion that concluded that the PCA lacked extraterritorial application.³²² In sum, current DoD policy represents an unfounded degree of caution in the military’s ability to be involved in civilian affairs that is magnified when examining the historical prism of the constitutional debates focused on a standing army within the United States’ borders.

The PCA needs a frank reassessment to match the challenges of the modern era. The current patchwork of laws, regulations, and authorities creates unintended consequences. Is the suppression of piracy substantively that different from counter-drug operations or other traditional maritime law enforcement functions that are effectively

³¹⁷ 10 U.S.C. § 376 (2012) (“Support (including the provision of any equipment or facility or the assignment or detail of any personnel) may not be provided to any civilian law enforcement official under this chapter if the provision of such support will adversely affect the military preparedness of the United States. The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that the provision of any such support does not adversely affect the military preparedness of the United States.”).

³¹⁸ See, e.g., Editorial, *A Pentagon the Country Can Afford*, N.Y. TIMES, Dec. 11, 2011, at SR10.

³¹⁹ 10 U.S.C. § 375 (2012).

³²⁰ DOD 5525.5, *supra* note 4, ¶ 8.1.

³²¹ Federal statutes lack an extraterritorial application absent specific language within the statute. See, e.g., *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

³²² Extraterritorial Effect of the Posse Comitatus Act, 13 Op. O.L.C. 321 (1989).

precluded by the PCA via the DoD directives? Both suspects end up in federal court. Further, similar to the duty to thwart piracy, all nations are required to cooperate in the suppression of the illicit traffic in narcotic and psychotropic drugs in international waters.³²³

Intelligence gathering and the modern intelligence structure create its own set of issues and concerns that the PCA is unprepared to address. Today's intelligence community is made up of sixteen intelligence agencies under the cognizance of one Director of National Intelligence. Despite assertions by some that the PCA protects civil liberties and ensures the military is excluded from civilian law enforcement matters, it has proven to be ineffectual in the ongoing debate regarding the proper role of the NSA in domestic surveillance. The NSA is jurisdictionally part of the Armed Forces and is led by a four-star active duty military officer, who is also "dual-hatted" as Cyber Command.³²⁴ The domestic surveillance of Americans at home is more of a civil libertarian concern than the enforcement of laws on the high seas; yet the PCA has proven ineffectual to match this new concern. It is beyond the scope of this Article to address all the constitutional implications of all the NSA's activities, but it serves to highlight additional unintended consequences as the PCA is applied today. Under this current patchwork, the Navy is limited in engaging in the full spectrum of maritime missions with a law enforcement dimension while the NSA, led by a senior military officer, is effectively unencumbered from PCA restrictions. Recommendations follow to counterbalance the problems caused by the PCA's modern application.

First, Congress should re-direct DoD to change its underlying regulation. The applicable DoD Directive was last updated in 1989 and does not accurately reflect the plain meaning of the PCA, the express purpose of Congress in the 1980 drug-era amendments, and the modern realities of maritime law enforcement. Further, as discussed in Part I, it appears to contravene the MCLEA that sought to increase the military's ability to assist local law enforcement.

Second, Congress should change the law to align the modern military with the historical basis for the PCA. Much of today's confusion resides in the drug amendments to the PCA during the mid-1980's that direct the DoD to issue regulations that define and manage how these drug laws will be implemented. Simplicity and succinctness should be favored and would go a long way to create clear direction. The current

³²³ NWP 1-14 ANNOTATED, *supra* note 283, § 3.8; *see also* U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, 28 I.L.M. 497, art. 17 (entered into force Nov. 11, 1990). Implemented by the U.S. at 46 U.S.C. §§ 1901–1904 (2012), 49 U.S.C. §§ 781–789 (2012), and 14 U.S.C. § 89 (2012).

³²⁴ *See, e.g.,* Ellen Nakashima, *U.S. Won't Split Leadership at NSA, Cyber Command*, WASH. POST, Dec. 14, 2013, at A6.

patchwork of laws on a complicated and important issue—the exact authority and limitations on the military’s participation in law enforcement operations—should be clarified. To alleviate civil libertarian concerns, a sunset provision of a moderate time frame—perhaps five years—could be placed into the PCA to allow Congress to re-authorize in a future time period. The drug war amendments may have facilitated the militarization of local law enforcement through that liberalization of military indirect support in intelligence gathering, training, and equipment exchange. This, too, should be re-examined to ensure that applicable equipment and training is aligned with bona fide local law enforcement functions. Ironically, this unintended consequence—the PCA does not apply to local and municipal law enforcement—may serve as a much graver threat to civil liberties.³²⁵

If amendments to the PCA or accompanying drug war amendments are not feasible, Congress should consider increasing funding for the National Guard and Coast Guard. After all, these military services have the most operational flexibility and clear legal authority to act today. They are not hamstrung by the DoD policy from participating in the full spectrum of military and law enforcement operations. Consider the recent disaster response in Hurricane Katrina and the critical role that the National Guard and Coast Guard played. Add in the enormous military support in Iraq and Afghanistan provided by both the Coast Guard and National Guard, and one can see the benefits of increased reliance on such forces.

Alternatively, the patchwork of laws governing the role that the Armed Forces have in society could be overhauled in a systematic comprehensive manner to address the modern military and intertwined intelligence establishment that has grown in ways unrecognizable to the framers.³²⁶ A standing federal army, a DoD organization exceeding three million people, and a complex military-civil intelligence community are the new reality for the foreseeable future. An update to the PCA and its related laws and regulations is needed.

CONCLUSION

More than two hundred years following the signing of the Declaration of Independence and the Constitution, our nation’s “greatest blessing”—the Navy—remains constrained by fundamental misunderstandings regarding the Framers’ fears of a standing army and a Reconstruction Era statute that emerged out of misplaced Southern

³²⁵ See *supra* note 145 and accompanying text.

³²⁶ In *Laird v. Tatum*, Justice Douglas asserted that there are only nine such laws: “The entire domestic mission of the armed services is delimited by nine statutes.” 408 U.S. 1, 29 (1972).

fears associated with an “occupying” federal army.³²⁷ This lacks a sound basis in the Framers’ underlying fears regarding a standing army and the historical context during the PCA’s passage. At present, the legal authority for the Navy to engage in civilian law enforcement operations is unnecessarily restrictive and prohibitive in the face of real threats.

Indeed the very mission of the Navy—the safeguarding of seaborne navigation and the maritime defense of this nation—involves the interception of vessels harboring pirates and terrorists resulting in criminal prosecution in federal court. The realities of maritime terrorism, piracy, and the risks associated with domestic operations now call the earlier, more restrictive model into question. And the rise of technology and the intelligence community’s ability to monitor domestic activities outside the PCA’s limitations further demonstrate the modern inadequacies of a Reconstruction Era law. It is against this backdrop that an honest look at the purpose and meaning of *posse comitatus* is needed.

It is time that we look at a standing navy with fresh eyes and look again to the historical fears of a standing army as evidenced by the Declaration of Independence, the Federalist Papers, Constitution, and the *Posse Comitatus* Act. This would free our nation’s “greatest blessing” to approach these new maritime threats unencumbered by any fundamental misunderstandings of its proper role and responsibility in defense of our nation. And this could serve as an important springboard for a wider discussion of the proper role and underlying executive and congressional authorities as applied to the modern military organization.

³²⁷ DOD 5525.5, *supra* note 4; SECNAVINST 5820.7C, *supra* note 77.

CARDOZO LAW REVIEW

