ARTICLES

The Military’s Involvement in Law Enforcement: The Threat Is Not What You Think

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I. INTRODUCTION

The use of the military in law enforcement, both domestically and internationally, has been praised and decried from both ends of the political spectrum. It has been written about in countless articles, from serious academic journals\(^1\) to sensationalistic popular magazines.\(^2\) Organizations, depending on their political viewpoints, voice grave concern or trumpet strong support over such efforts from websites across the Internet.\(^3\) The military’s engagement in civilian law en-

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1. See, e.g., Ronald J. Sievert, Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth Century Constitutional Law, 37 Hous. L. Rev. 1421 (2000).

2. See, e.g., James L. Pate, The FBI’s New HR—Soldiers or Policemen? Black Suits, Badges and Bradleys, Soldier of Fortune, August 1996, at 56. This article represents a right-wing, almost militia-esque view of posse comitatus, and relies on unnamed sources as well as cites to “classified portions” of Presidential Decision Directive (PDD) 25 (of which only the executive summary is unclassified and available to the public) of the Clinton Administration that purportedly “exempts” portions of the military from the Posse Comitatus Act (PCA). PDD-25 deals with the reform of multinational peacekeeping organizations, not the use of the United States military in law enforcement, and it is dubious whether an executive order can override a duly enacted congressional statute. The best that can be said of this type of article is that it represents, and reinforces, the opinions and beliefs of those who already are deeply suspicious of any activity by any organization of the federal government.

forcement, and the law surrounding this engagement, has been fodder for an innumerable number of dissertations, articles, and theses.\(^4\) In addition, it has been a frequent topic of discussion within the military itself.\(^5\) Since 1990, there have been no less than thirteen articles published in The Army Lawyer, which is a publication of the Judge Advocate General’s School of the United States Army.\(^6\)

It is likely that this interest in the use of the military in law enforcement, along with the topic of the Posse Comitatus Act (PCA),

The Border Action Network is an organization that, in its own words, “consists of activists and organizers from the environmental, human rights, labor, and social justice movements who came together to oppose military and Border Patrol expansions on the border and to hold them accountable to the public. We see ourselves as a ‘new generation’ of activists who believe in the importance of multi-issue organizing and coalition building.” Id.


5. See, e.g., Colonel Charles J. Dunlap, Jr., USAF, Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military, 29 WAKE FOREST L. REV. 341 (1994). Colonel Dunlap takes, in his own words, “a less optimistic view” of the possibility of lessening civilian control over the military. Id. at 341.

stems from traditional American antimilitarism.\footnote{This antimilitarism was exemplified by the colonists' rage over the stationing of British troops in the Colonies, ostensibly to keep the power of the King. This rage gave voice to the Declaration of Independence, which, in clause 14, states, "He has affected to render the Military independent of and superior to the Civil power." The Declaration of Independence of the Thirteen Colonies, Indiana University School of Law-Bloomington, available at http://www.law.indiana.edu/uslawdocs/declaration.html (last visited Apr. 29, 2002).} This antimilitarism grew out of the experiences of the rebellious royal subjects who led the nation to independence. Some argue that antimilitarism has changed to "postmodern militarism," as described by Colonel Charles J. Dunlap, Jr., USAF.\footnote{"[P]ostmodern militarism is not marked by overt military dominance or even a societal embrace of martial values. To the contrary, in the United States it arises in a citizenry which largely embraces permissive individualism—hardly a military trait. Postmodern militarism admires the effectiveness of the military but rejects for civilian society the discipline and sacrifice necessary to achieve it." Dunlap, supra note 5, at 387 (emphasis in original).} This change in America's attitudes came about as the problems faced by the country grew in complexity and danger. Civilian law enforcement agencies were perceived to be unable to handle the increasing threat from narcotics smuggling, illegal immigration, and terrorism. As a result, Colonel Dunlap argues, the mood of antimilitarism changed to one of a belief that the military services, as results-oriented "can do" organizations, were naturally the best suited to handle these intractable problems.\footnote{Id. at 360–61.} And so the military was given extensive missions in all kinds of traditionally civilian areas, from disaster relief, to anti-drug smuggling, to domestic counterterrorism operations. This trend continues, as can be seen recently with the Department of Defense (DOD) providing sophisticated intelligence gathering aircraft to assist in the hunt for the Washington sniper in the fall of 2002. Whether this is a wise policy choice or not depends largely on one's political perspective. Certainly the questions spark spirited debate.

The real issue that should be of concern to policymakers is not whether the military's involvement in law enforcement can be reconciled under both the PCA and our concept of civil liberties; that is likely possible. The real concern with widening the military's participation in law enforcement (as well as other nontraditional military missions) is not an erosion of civil liberties, but an erosion of military capabilities.

This Article will first briefly discuss the Posse Comitatus Act and its applicability in different situations, the exceptions to the PCA, and the use of DOD military services in counter-drug operations. Next, extraterritorial applications of the PCA will be briefly exam-
ined. Finally, the effects law enforcement activities may have on military readiness will be discussed.

This Article does not claim to be exhaustive; its goal is simply to put forward a thesis not often seen in legal periodicals. Nor does this Article claim to have the definitive answer as to whether the use of military forces in counter-drug operations, or law enforcement in general, is a good or bad thing. In the end, the use of the military in law enforcement is somewhere in the middle. On the one hand, there are good points. For example, the military’s logistical and power projection capabilities increase the reach of American law enforcement. On the other hand, there are bad points. The military tends to think in terms of “complete victory” over an opponent through the use of overwhelming force, which may not be a useful mindset in law enforcement operations. Additionally, using military units for direct or indirect law enforcement degrades those units’ readiness for combat operations.

The United States military is unlikely to become the tool of oppression feared by liberal legal scholars and pundits, but neither is it likely to be the “always successful” organization that those on the right think it is. The real threat posed by increasing military participation in law enforcement is that use of the military in law enforcement operations will dull the critical war-fighting skills the military services need. Fundamentally, the nation must think and choose wisely, using the military in law enforcement judiciously, when its capabilities can be of most use, of greatest success, and complementary to the skills the military needs to be effective in a modern combat environment.

II. THE POSSE COMITATUS ACT

The Posse Comitatus Act, which was enacted in 1878, is found in Title 18 of the United States Code, Crimes and Criminal Procedure. The text of the Posse Comitatus Act states as follows:

Use of Army and Air Force as posse comitatus.10 Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to

10. *Black's Law Dictionary* defines "posse comitatus" as follows: "Lat. The power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases as to aid him in keeping the peace, in pursuing and arresting felons, etc." *BLACK'S LAW DICTIONARY* 1162 (6th ed. 1990).
execute the laws shall be fined under this title or imprisoned not more than two years, or both.\textsuperscript{11}

The PCA is deceptive because, on its face, it is a proscriptive law, creating criminal penalties for persons who use specific branches of the military to enforce the laws of the United States. Yet it does not appear that there have ever been any successful prosecutions for violations of the PCA.\textsuperscript{12} In fact, the PCA has been used as a limit to the military services themselves, not for individuals in the military or for civilians in charge of the various military branches.

The black letter law of the PCA makes it applicable only to the Army or the Air Force. This likely came about from the Act’s origin as a response to the use of the Army to enforce the law during Reconstruction after the Civil War. To keep order at southern polling stations in the election of 1876, President Grant had Union troops man the polls throughout the South. The Republican candidate, Rutherford B. Hayes, was eventually declared the winner after much confusion and dispute. Many southerners and Democrats believed that these troops “stole” the election from the Democratic candidate, Samuel J. Tilden,\textsuperscript{13} and helped to bring about passage of the Act. The Air Force was added to the Act in 1947, when it was created out of the former Army Air Forces. A technical amendment made most statutes applicable to the Army also applicable to the Air Force.\textsuperscript{14} Thus, it does not appear that Congress gave conscious thought as to whether or not the Air Force should specifically be covered by the PCA.

Because only the Army and Air Force are named in the text of the Act, by the letter of the statute, the PCA does not apply to the Navy, Marine Corps, Coast Guard, or National Guard when not operating in federal status. As a result, no one could be charged with the theoretical crime of using these branches of the military to execute laws.\textsuperscript{15} (Since no one has evidently been prosecuted, it is highly unlikely anyone ever would be.) Furthermore, while the Coast Guard


\textsuperscript{12} See Hammond, supra note 4, at 961. Army officers were indicted in Texas in 1879, one year after the PCA was enacted, for providing troops to a United States Marshall to enforce revenue laws. It is not known whether or not these two Army officers were ever prosecuted. \textit{Id.} n.53.


\textsuperscript{14} In 1947, a separate Air Force was created. All laws pertaining to the Army, including posse comitatus, were amended to include the Air Force. See \textit{United States v. Walden}, 490 F.2d 372, 375 n.5 (4th Cir. 1974).

\textsuperscript{15} 18 U.S.C. § 1385.
may be transferred to the Department of the Navy as a result of a declared war or by executive order,\textsuperscript{16} the PCA still would not apply to the Coast Guard.\textsuperscript{17}

Some courts have interpreted the PCA as applicable to the other branches (except the Coast Guard),\textsuperscript{18} while other courts have found that the PCA does not apply to the other branches.\textsuperscript{19} Regardless, the Department of Defense, the cabinet-level department of all the armed services except the peacetime Coast Guard, has extended the restrictions of the PCA to its constituent services by regulation.\textsuperscript{20}

In the 1980s, Congress attempted to more clearly define what roles the military could play in supporting civilian law enforcement agencies. These changes were codified in Chapter 18 of Title 10, United States Code, titled \textit{Military Support for Civilian Law Enforcement Agencies}.\textsuperscript{21} However, Congress stated in the legislative history for Chapter 18 that these statutes were not additional restrictions on the PCA, but rather that they were "clarifications" to the law, and in no way increased any restrictions on the military's participation in law enforcement activities. Regardless of this divergence of opinion, it is clear that only the PCA has criminal penalties for its violation; 10 U.S.C. sections 371–382 and the DOD regulations do not.

As stated earlier, DOD policy made the provisions of the PCA applicable to the Navy and Marine Corps.\textsuperscript{22} Nevertheless, the DOD services can and do provide support to civilian law enforcement agencies (LEAs), and thus, at least indirectly, engage in law enforcement. The military may be indirectly involved with an LEA or provide assistance to an LEA that is incidental to a military purpose. (For these purposes, the Coast Guard is considered a law enforcement agency despite its being an armed military service.\textsuperscript{23}) Furthermore, Congress,

\textsuperscript{16} Authority to transfer the Coast Guard to the Navy can be found at 14 U.S.C. § 3 (1990).

\textsuperscript{17} \textit{See Secretary of the Navy Instruction} 5820.7 (series).

\textsuperscript{18} See, for example, the Ninth Circuit's decision that the PCA applies to the Navy through 10 U.S.C. § 375 and 32 C.F.R. § 213.10 in United States v. Kahn, 35 F.3d 426, 431 (9th Cir. 1994).

\textsuperscript{19} The D.C. Circuit wrote, "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." United States v. Yunis, 924 F.2d 1086, 1093 (D.C. Cir. 1991).


\textsuperscript{22} \textit{See generally} 32 C.F.R. § 215.1–10 (2003).

\textsuperscript{23} § 3.11.3.2 \textit{The Commander's Handbook on the Law of Naval Operations}, NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7.
via statute, has defined certain functions as outside the scope of the PCA, and such functions are therefore by definition "indirect" assistance to law enforcement. One of these functions, and perhaps the most controversial, is the authorization to allow the DOD, particularly the Navy, to engage in "[i]nterception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with such vessels and aircraft to direct such vessels and aircraft to go to a location designated by appropriate civilian officials." 

The practice is most common when a Coast Guard Law Enforcement Detachment (LEDET) is assigned to a United States Navy ship. Statute determines when an LEDET should be assigned. When the Navy ship with an LEDET on board begins a drug interdiction operation, it shifts tactical control (TACON) from the Navy to the United States Coast Guard.

Tactical control is defined as "the temporary authority to direct activities of a specific unit on a specific mission for a specific period of time. This authority is assigned by the operational commander. The organizational element with TACON of a unit is the tactical commander of that unit." Simply, what this means is that the Coast Guard, not the Navy, directs the actions of the Navy ship. The Coast Guard decides what targets to pursue, whether or not to seek permission to board a vessel, and what actions to take. If a foreign-flagged vessel is to be boarded, the procedures in the Coast Guard Maritime Law Enforcement Manual are followed. Permission to board a foreign-flagged vessel is obtained from its flag state by making a request up the Coast Guard chain of command, and then, via the Department of State, to the foreign flag state. The DOD does not control the process nor can it direct the process.

26. 10 U.S.C. § 379 requires the Secretary of Defense and the Secretary of Transportation (now Secretary of Homeland Security) to assign Coast Guard LEDETs to every appropriate surface naval vessel operating at sea "in a drug-interdiction area." A "drug-interdiction area" is an area outside the land area of the United States in which the Secretary of Defense determines that activities involving smuggling of drugs into the United States is ongoing. Id. Most commonly these areas are the Caribbean and the Eastern Pacific Ocean off the coast of Central and South America.
29. Id.
Nonetheless, this is perhaps the area where most opponents of military law enforcement operations feel the PCA is being violated, if not in the letter of the law, then in its spirit. Many authors feel that this type of operation is in fact using the military directly in law enforcement. An oft-cited example is the 1983 interdiction of the vessel RANGER by Coast Guard personnel assigned to the U.S.S. KIDD. The First Circuit described the situation in United States v. Del Prado-Montero\(^\text{30}\) as follows:

On July 14, 1983, after making radar contact, Coast Guard officials aboard a U.S. Navy destroyer, the U.S.S. KIDD, sighted the RANGER at twilight, noting that it was heading due west toward both the Bahamas and the United States, that it carried 5 or 6 antennae (more than normal) and that it obviously carried some cargo, the hull being down to the waterline. No name or markings could be seen at the time. By radio the RANGER’s master responded to inquiries, saying that there was no cargo, that the vessel was being delivered from Antigua to new owners in Freeport in the Bahamas, and that there were no documents aboard nor any main beam number discoverable. The master also reported that the vessel was of Honduran registry. He first gave 31483 as the registration number, then he gave 331483. Neither number included the three letters traditionally denoting Honduran registry. When asked why the vessel was northeast of a normal course from Antigua to Freeport, he evidenced no concern. He refused a consensual boarding, saying that the RANGER had a faulty governor and could not start once it had stopped.

Subsequently, the Coast Guard initiated a request through governmental channels and ascertained, by 1:30 p.m. of the following day, July 15, that the RANGER’s registry had been “refuted” by Honduras. The KIDD, after ordering the RANGER to stop twice and being twice refused, sounded General Quarters. At 7:00 p.m., the Coast Guard ensign was raised on the KIDD, signifying its Coast Guard control and mission. The KIDD fired warning shots on both the evening of the 15th and the morning of the 16th, and then resorted to firing disabling shots, which finally brought the RANGER to a halt. Thereafter the RANGER was boarded by a party headed by a Coast Guard officer.

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The observations made by the boarding party, as testified to by Coast Guard witnesses, are relevant to and dispositive of the challenge all defendants make to the sufficiency of the evidence. Just before the boarding a person on board the RANGER was seen shredding and throwing into the ocean a paper containing what looked like the contour lines, longitude and latitude markings of a chart. The total crew consisted of nine and had been on this voyage for 14 days. Only three or four would have been required if there had been no need to unload cargo, i.e., if the only obligation of the crew was to deliver the vessel to Freeport. On boarding the RANGER, the Coast Guard personnel found the odor of marijuana "very noticeable." In the middle and aft holds, 881 bales of marijuana, weighing over 57,000 pounds, were found. The middle hold was close to the crew's living area and was covered only by wood planks. The aft hold was covered by a heavy metal lid, which the crew refused to help the Coast Guard open. A powdered milk container similar to others found in the galley was found in the middle hold; a case of empty Coca-Cola bottles similar to those found in the living quarters was found in the aft hold. The main engine appeared to have been tampered with.31

It is worth noting that the KIDD interdiction described above occurred in 1983,32 before the rewriting of 10 USC section 375. (The rewriting of this statute is discussed later in the Article.)

Those who consider the actions taken by the U.S.S. KIDD as described in Del Prado-Montero to be a violation of the PCA often describe it as an example of direct law enforcement action by a prohibited branch of the military.33 Opponents of using the military in law enforcement activities often maintain that raising the Coast Guard ensign is merely a canard, an action of no significance that does nothing to change the essential characteristic of the enforcement action as one by the United States Navy.

These critics fail to grasp the inherent control of such operations by the United States Coast Guard. This control extends beyond the

31. Id. at 114–15.
32. Id. at 114.
33. 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, 1961 (1987), where the author writes as follows:

The scenario described . . . violates the proscriptions of the Posse Comitatus Act—at least as evaluated by a standard of participation defined by one sister service. It also appears to violate the 1981 Act’s restriction on ‘direct participation’ in an interdiction or search and seizure by a member of the Navy.

Id.
Coast Guard Officer-in-Charge (OIC) of the Law Enforcement Detachment, who is often a junior officer such as an Ensign or Lieutenant, Junior Grade. Neither the Coast Guard Officer-in-Charge nor the Navy ship's commanding officer, who usually significantly outranks the Coast Guard officer, could take these steps without authority from the tactical commander of the operation, who would be the Coast Guard admiral in charge of that particular area. 34 The Navy never acts alone in such scenarios; it always acts at the direction of the Coast Guard. The Navy does not intercept the ship, the Coast Guard does.

The Coast Guard ensign was designed to distinguish Revenue cutters from Navy vessels. 35 This allowed vessels, in the days before effective sound communication between ships at sea, to recognize that it was not a Navy ship seeking to approach. When a Navy ship raises the Coast Guard ensign, it represents a fundamental change in control of that warship. The Navy Captain cannot act with impunity. He becomes a support platform for the Coast Guard and follows the orders of the Coast Guard, from the tactical commander through the LEDET Officer-in-Charge.

As mentioned previously, in the 1980s Congress sought to more clearly define what actions the military could take when assisting law enforcement agencies. In 1988, as part of that effort, Congress clarified the issue of whether or not the actions such as those of the U.S.S. KIDD represented an interception by updating 10 USC section 375. Pre-1988, the statute read this way:

The Secretary of Defense shall issue such regulations as may be necessary to insure that the provision of any assistance (including the provision of any equipment or facility or the assignment of any personnel) to any civilian law enforcement official under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law. 36

In 1988, the law was revised to read as follows:

34. In the early to mid 1980s this would likely have been the Commander, Seventh Coast Guard District.
35. The Revenue Cutter Service was a predecessor service of the Coast Guard. It merged with the United States Lifesaving Service to form the Coast Guard in 1915.
The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that the provision of any support (including the provision of any equipment or facility or the assignment or detail of any personnel) to any civilian law enforcement official 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 and seizure, an arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.\(^\text{37}\)

Importantly, the 1988 revision left out interception of vessels. Also, since the revision, courts have routinely ruled that Navy support of interception of smuggling vessels is not a violation of the law.\(^\text{38}\) Therefore, Congress and the judiciary have decided that, at least in this situation, this is not a violation of the PCA. As a result of the enactment of Chapter 18, Title 10 of the United States Code, Congress has largely determined the extent to which the armed forces may assist law enforcement agencies. Statutorily, at least, assistance to a law enforcement agency is not the actual exercise of law enforcement powers. Whether it is a good policy choice to use the United States Navy as a platform for drug interdiction operations, or to use any other element of the military in support of law enforcement missions, will be discussed later.

III. EXTRATERRITORIAL APPLICATION OF THE POSSE COMITATUS ACT

It may be apocryphal, but it is rumored that sometime in the past a Coast Guard Admiral once said, "The Constitution does not go to Sea." What he may have meant by that comment, if it was ever uttered at all, is lost in the mists of time. Nevertheless, the one statutory provision governing the potentiality of the military engaging in law enforcement, the PCA, on its face makes no distinction between the uses of the military in domestic versus extraterritorial law enforcement.\(^\text{39}\) The issues involving whether or not United States criminal laws in general have any proscriptive effect beyond the territory controlled by the United States are well beyond the scope of this Article. Basically, some are, and some are not. Assuming, arguendo, that at least criminal provisions involving drug smuggling are effective extraterritorially, the question then becomes whether or not the restrictions


\(^\text{38}\) See, e.g., United States v. Klimavicius-Viloria, 144 F.3d 1249 (9th Cir. 1998), cert. denied, 528 U.S. 842 (1999).

on the military’s engagement in law enforcement end once the military exits United States airspace or territorial seas.

The Department of Justice ("DOJ") Office of Legal Counsel issued an opinion in November 1989 stating its conclusion that the Posse Comitatus Act does not apply outside the territory of the United States.\(^{40}\) The DOJ arrived at this conclusion by examining the Congressional debate over the statute, the text of the statute, and the history surrounding its passage in 1878.\(^{41}\) Further, the opinion considered the general presumption against extraterritorial application of criminal statutes,\(^{42}\) constitutional concerns (such as the prerogatives of the President as Commander in Chief),\(^{43}\) court decisions,\(^{44}\) subsequent legislation (10 U.S.C. sections 371–382),\(^{45}\) and the DOD regulations implementing those statutes.\(^{46}\) The author of this opinion, William P. Barr, later became Attorney General of the United States.\(^{47}\) Undoubtedly, this reflects the seriousness with which the former administration took the issue of extraterritorial application of the PCA.

This legal opinion is perhaps the most definitive policy document regarding extraterritorial application of the PCA. It has been the basis of the United States’s use of the military outside the territory of the United States, at least in limited scope, for the last decade and for the last three administrations. No court opinions on point have been found challenging the conclusion of the Attorney General’s opinion. Therefore, any advocate in favor of applying the PCA extraterritorially faces a difficult challenge.

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40. William P. Barr, Extraterritorial Effect of the Posse Comitatus Act: The Posse Comitatus Act does not apply outside the territory of the United States, in OPINIONS OF OFFICE OF LEGAL COUNSEL, 13 Op. O.L.C. 321 (1989). Interestingly enough, although the opinion was written in 1989, it was not released to the public until 1992, three years later. The reasons for this delay are unknown, and a full discussion is beyond the scope of this Article. One could speculate and come to all sorts of scenarios ranging from the straightforward (policymakers desiring to avoid controversy) to the nefarious (policymakers wishing to expand military law enforcement activities). However, it can be argued that the delay likely resulted from executive as well as work-product privilege concerns.

41. Id.

42. Id. at 329.

43. Id. at 332.

44. Id. at 334.

45. Id. at 337.

46. Id. at 342.

IV. THE EFFECT ON MILITARY READINESS

"The sinews of war are not gold, but good soldiers." – Machiavelli

Politicians have enlisted the military in “the war on drugs,” with assurances that military readiness will not be affected.48 (Usually this is a case of the politics of convenience. Politicians routinely promise a course of action claiming that mutually exclusive goals can be achieved.) Scholars have argued that, with the end of the Cold War, “[a]s the military threat to the United States changes and defense resources are reduced,” the military should perform more than traditional war fighting, and provide a range of noncombat services at home and abroad.49 In order to effectuate these policy objectives, some have advocated a rethinking of the PCA and the limits that should be placed on involvement of the military in law enforcement.

However, these scholars fail to recognize that there are real effects on the military’s readiness and war-fighting capabilities from engaging in direct or indirect law enforcement missions, as well as other noncombat missions. In a report on the effects of noncombat missions on military readiness, the GAO wrote, “[S]uch participation can . . . degrade a unit’s war-fighting capability. The extent of degradation depends on a number of factors . . . . It can take up to 6 months for a ground combat unit to recover from a peace operation and become combat ready.”50 Even authors who have asserted that the military can meet the demand for future nontraditional missions51 have recognized that there would be serious difficulties with meeting these demands, up to and including that the United States military may not be immediately or fully available for major theater warfare.52 However,

48. In a speech during her failed 2000 presidential bid, candidate Elizabeth Dole said, [I]n addition to increasing funds, I will task the military to fully engage in the war on drugs on land, at sea, and in the air . . . . As president, I will expand the role of the military, including the National Guard in the War on Drugs in a manner that would not detract from military readiness and would maintain the separation of military and law enforcement. I will provide the National Guard the funding it needs to serve at the forefront of this crusade.

Elizabeth Dole, Address on the War on Drugs at Borderfield State Park (Oct. 7, 1999), at http://www.wage-slave.org/doespeech.html (last visited May 18, 2003). In 2002, Senator Elizabeth Dole was elected to the United States Senate for the state of North Carolina.

49. JOHN Y. SCHRADER, THE ARMY’S ROLE IN DOMESTIC DISASTER SUPPORT: AN ASSESSMENT OF POLICY CHOICES iii (RAND 1993). Mr. Schrader was speaking primarily of the U.S. Army when writing this comment.

50. GAO REP. NSIAD-96-14 at 2–3.


52. Id. at 50.
few who support or oppose this policy of nontraditional mission activity for the military would support having enough forces available to conduct a major theater war and noncombat contingencies at the same time; the costs would be extremely high.\footnote{Id. at 51.}

Another problem that results from engaging in nontraditional missions such as military support to law enforcement agencies is the problem of the heavy reliance on National Guard and Reserve units, not only for nontraditional missions, but also for combat. The modern American military relies on these types of units for operational missions. After the Second World War, there was a conscious shift in United States doctrine to turn over many support and combat units to the National Guard and Reserve. This turnover allowed the United States to focus its active duty forces primarily on combat units, while keeping enough support units on active duty to begin initial combat operations. The bulk of the support units would then come into the operation as National Guard and Reserve components were called up and mobilized. Whether this policy has been successful is a matter of debate. A post-mobilization study of Reserve units after the Gulf War showed deficiencies in general proficiency, maintenance, and leadership. In fact, not a single Army Reserve armor or mechanized infantry unit saw action.\footnote{DEP'T OF DEF., FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR 559–60 (App. H) (1992).} Furthermore, many of these Reserve units were combat units designated for “round out” of active duty units. For example, an army division is traditionally composed of three brigades. Under current United States doctrine, there are only enough subunits to form two active duty brigades assigned to many divisions. The third brigade needed to fully complete the division is composed of Reserve or National Guard units.

This means that in order to engage in a major theater war, prolonged peace-keeping mission, or any other sustained operation, the United States must rely on Reserves and the National Guard. But it is precisely these units, especially the National Guard when it is not in a federal status, that conduct the bulk of military support to civilian law enforcement agencies. These units engage either directly or indirectly in law enforcement. If the operations tempo of United States forces continues to increase, as it has over the last decade, it will become increasingly difficult to conduct multiple sustained operations.

This operating tempo is difficult for these forces to maintain and is detrimental to units through increased retention problems of per-
sonnel. People are not able to sustain the pace. They burn out and leave the Reserves and National Guard. The combination of peace-keeping operations in Bosnia-Herzegovina and Kosovo, combat in Afghanistan, drug detection and interdiction operations in the Caribbean and Eastern Pacific, not to mention a major theater war,\textsuperscript{55} becomes an ever-increasing and protracted burden on the men and women who make up these Reserve and National Guard units. This burden may result in increased retention problems for the National Guard and Reserve.\textsuperscript{56} These men and women are expected to give up their civilian lives for weeks, months, and even years at a time so that their units may be used for these missions. When the deployment is over, they are then let go to return to their civilian lives. With this type of deployment schedule, many Reservists and National Guardsmen may find their "part-time soldiering" increasingly incompatible with a civilian career and life. They may choose to opt out, causing a retention problem.

One suggested solution is to swap combat units for units more suited for missions such as law enforcement or support of civil authorities. However, it is highly unlikely that the DOD or its component services would ever support such a move. This solution would likely be highly unpopular, not to mention highly degrading to the military readiness needed to engage in combat operations.\textsuperscript{57} For example, military commanders are not likely to be in favor of replacing light infantry units, such as airborne troops, or special forces groups, which are immensely valuable to the military commander's perceived primary mission of winning wars, with more law enforcement oriented units. Law enforcement oriented units may have some utility in fighting wars, but not as much as a unit that is solely dedicated to combat. It would not be perceived as a fair trade in the best interests of the country they have sworn to serve.

V. A FRAMEWORK FOR ANALYZING READINESS

When examining the effect of law enforcement activities on military readiness, it is perhaps easiest to view the issues in terms of the following three basic questions:\textsuperscript{58}

\textsuperscript{55} At the time of the writing of this Article, the United States had yet to engage in combat operations against the Iraqi regime of Saddam Hussein. Hence, it is not discussed here, but note that Reserve and National Guard units are involved in that campaign.

\textsuperscript{56} PIRNIE & FRANCISCO, supra note 51, at 54.

\textsuperscript{57} Id. at 85.

\textsuperscript{58} These three questions and their descriptions are taken from RICHARD K. BETTS, MILITARY READINESS: CONCEPTS, CHOICES, CONSEQUENCES 33 (The Brookings Institution
(1) Readiness for when? This is a timeframe measurement. Now? Sooner? Later? Related to this is the question of what is the proper size of the peacetime gap between actual and potential military power.

(2) Readiness for what? The kind of mission determines the requirement for the type of military forces needed. Elements of the mission include what adversaries will be faced, what conditions will be encountered, and what strategy should be used.

(3) Readiness of what? What kinds of forces are needed? Small, highly maneuverable but lightly armed forces? Or big units packing a lot of fire power? An important issue with this question is that by emphasizing one set of capabilities it detracts from another.

The first issue to be addressed is the impact of using the military in law enforcement on the “readiness for when” question. Law enforcement missions increase the gap between actual and potential military power. When military units engage in law enforcement or law enforcement support, they are not engaged in the activities necessary to support their primary combat-related missions: units are not training for combat or participating in live-fire or maneuver exercises. For example, staring through binoculars across the Rio Grande looking for drug “mules” does not enhance an infantry unit’s critical war-fighting skills. Engaging in noncombat missions distracts a unit that might otherwise be available for training or for combat. The unit, and the individual service members that make up the unit, must spend valuable time re-training and re-learning the conditions, the elements, and the doctrine of war-fighting, because the skills required for combat and law enforcement are very different.

There is some overlap in the skills required for combat and law enforcement missions. However, a unit does not exercise all essential combat skills while engaging in law enforcement activities. To illustrate, a naval vessel engaged in drug interdiction operations on the high seas uses the skills needed to operate and navigate the vessel while under way. But, in today’s high-tech combat environment, that ship’s crew is not engaged in critical training using the highly complex sensor and targeting systems needed for modern sea combat. Just as a carpenter would not use a sledgehammer to pound in a penny nail, a

ship's crew would not use modern advanced fire control systems designed for fleet defense to track a drug smuggler in a "go fast" boat, or use an F-16 to simply intercept a Cessna loaded with cocaine. All three are examples of attempting to use the wrong tool for the job. Engaging in noncombat missions takes time away from training and exposure to circumstances that resemble combat as closely as possible.

Training is at the heart of readiness. During the Cold War, United States troops trained far more than their Soviet counterparts. The Soviets often diverted their troops to civilian functions. This resulted in lower average readiness of Soviet forces when compared to United States forces.\(^{59}\) It has been recognized for years that training is perhaps the most critical aspect of readiness. Also widely recognized is the need for there to always be a sufficient number of forces ready at any given time, while at the same time having a sufficient number of forces available for training. "With virtually no slack in the force structure, U.S. readiness posture must be rebalanced across the force every time some element of the force engages in even the least demanding tasks."\(^ {60}\)

Military involvement in law enforcement also affects the "readiness for what" question. Again, the issue is that these are very different missions with very different adversaries and goals. Modern combat is very fast-paced: decisions are made quickly in the heat and stress of a life-and-death struggle. Soldiers are highly trained to use force in the furtherance of the mission. They are trained to respond with force when facing an adversary because the adversary is likely to do the same. Being under fire changes the landscape and changes the stakes. However, the typical adversary in drug interdiction missions is not usually trying to kill the members of an interdiction force. Thus, in a drug interdiction scenario, the use of deadly force is rarely required. As a result, the thought processes military personnel use to decide when to bring deadly force to bear are not exercised. Military personnel have different approaches to tactical situations than what is required in a law enforcement situation. The appropriate reaction in an adversarial law enforcement situation is not necessarily the use of deadly force; a more deliberative approach may be more appropriate. Conversely, military personnel involved in a combat situation need to quickly decide when deadly force should be used. Moving military

\(^{59}\) BETTS, supra note 58, at 151.

\(^{60}\) Secretary of Defense Les Aspin, 1994 ANNUAL REPORT TO THE PRESIDENT AND CONGRESS 29.
personnel between these two situations may cause the soldier to misread or misunderstand a situation and use the wrong kind of force.

Perhaps the impact of using the military in law enforcement becomes most apparent with the "of what" question. Law enforcement missions emphasize the ability to loiter, concealment from the adversary, detection of the adversary through the analysis of indicators and warnings, and, finally, interception, all under strict constitutional and legal guidelines. Modern combat emphasizes fast maneuver warfare, using massive amounts of data for pinpoint targeting by highly technologically advanced weapons. To be successful under these conditions, units need time to focus on training that is appropriate for the expected mission. A light infantry unit must focus its training on maneuver warfare, not arrest procedures and rules of evidence.

However, with limited training resources and commanders for whom success during peacetime is measured by combat readiness, there is a fundamental conflict. Commanders will protect, to the greatest extent possible, time and funding from claimants that do not directly contribute to combat readiness. The military law enforcement mission is one of those claimants, and military commanders resist giving precious training time to support it.

VI. CONCLUSION

The Posse Comitatus Act is a useful prohibition on the use of the military in law enforcement. It safeguards fundamental rights and liberties that are at the core of our political and juridical philosophies. The PCA reinforces the concept of civilian control of the military, but it does not provide the bulwark against potential military oppression that many feel it either does, or should. The true defense against military tyranny and oppression rests in the hearts and minds of the members of our armed forces and in our over two hundred year tradition of civilian control of the military. It has been so ingrained within our armed forces that it is highly unlikely that the military would let itself become a force for oppression. Arguably, there are fewer controls and protections when the military is used for extraterritorial law enforcement where the PCA does not apply. In these situations, there still is the protection of the innate character of military service members to follow civilian control. This protection is further enhanced by the general attitude of the leadership of the DOD services. Traditionally, the DOD is opposed to any activity that detracts from its focus on fighting and winning wars.

Military use in law enforcement is a distraction that threatens the United States' ability to project effective, overwhelming force virtually anywhere in the world to accomplish its objectives. It reduces the readiness of combat forces to the extent that it detracts from the armed forces' ability to provide meaningful training and time to ensure full combat readiness. This distraction is as real a drag on military readiness as are shortages of spare parts, fuel, and equipment. We do not have enough military personnel and equipment to be everywhere and do everything. Since September 11, 2001, this situation has grown even more apparent. Coast Guard cutters that would normally be under way in the Caribbean in an effort to stop drug smugglers now are hugging close to the homeland to provide port security. Airborne Warning and Control System (AWACS) aircraft that might be used to detect aerial smuggling are now overseas in the air war over Afghanistan. National Guard units that would have patrolled the southern border are relieving active duty units in Kosovo so they in turn can relieve Marines in Kandahar. DOD is reorganizing its joint staff and reducing the drug detection staff from fifteen to two. The needs are simply elsewhere.

The PCA will continue to play a role in the larger debate on homeland security. There are those who advocate a loosening of its strictures in light of the new environment. A greater United States military presence in Colombia to assist in protecting strategic interests such as pipelines is under discussion. Policymakers are increasingly noticing the link between narco-traffickers and terrorism funding.

Some are arguing that drug smuggling is a homeland security issue, and military response should be part of the equation. The National Strategy for Homeland Security, released in July 2002, lists a number of initiatives the federal government plans to take, including the following:

*Review authority for military assistance in domestic security.* Federal law prohibits military personnel from enforcing the law.

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62. Senator Warner wrote a letter to Secretary of Defense Rumsfeld late last year urging the DOD take such a review. See Letter from Senator John Warner (R-Va.) to Donald Rumsfeld, Secretary of Defense (Oct. 12, 2001) (on file with the author).

63. In the fall of 2002, the United States established the Northern Command (NORTHCOM), the first combatant command with geographic responsibility for all military operations in North America (the United States, Canada, Mexico, and Cuba). The first commander of NORTHCOM, Air Force General Bernard Ebbers, has given a number of press interviews that indicate that the military's role in law enforcement within the domestic United States should be reviewed, given the new terrorist threat that the nation faces. See U.S. Northern Command Fact Sheets at http://www.northcom.mil/index.cfm?Fuseaction=news.factsheets#usnorthcom (last visited May 18, 2003).
within the United States except as expressly authorized by the Constitution or an Act of Congress. The threat of catastrophic terrorism requires a thorough review of the laws permitting the military to act within the United States in order to determine whether domestic preparedness and response efforts would benefit from greater involvement of military personnel and, if so, how.64

Time will tell if anything is to come of this initiative. What is clear, however, is that the issue of the military’s involvement in law enforcement will continue to be debated, studied, and worried over.

If the military is to continue to be involved in law enforcement, a policy review is needed. We must recognize that trying to get the DOD services to do everything is not the answer. It would be better to focus our time and resources on those organizations, both military (such as the United States Coast Guard and the several states’ National Guard) and nonmilitary (traditional civilian law enforcement agencies), that can best focus on the specialized requirements of a law enforcement mission. We should keep the rest of the military focused on that which it does well: projecting power and fighting wars. Fundamentally, we, as a nation, must think and choose wisely, using the military in law enforcement judiciously when its capabilities can be of most use, of greatest success, and complementary to the skills the military needs to be effective in a modern combat environment.

64. OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY 48 (July 2002).