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NOTES

A SOLDIER'S-EYE VIEW OF THE HOMEFRONT: EXAMINING DOMESTIC MILITARY LAWS THROUGH THE LENS OF MILITARY DOCTRINE

*Joseph Florczak**

INTRODUCTION

The military's domestic law enforcement role creates intense debate over United States law and policy. Some scholars argue for only limited use and strict control over domestic use of force and military law enforcement, arguing that such usage impinges upon important civil rights and carries too high a risk of tragedy or abuse.¹ They propose substantial checks on this executive power similar to those present upon civilian law enforcement agencies.² In the opposing camp, commentators argue that abstract concerns over civil rights fail to respond to real-world emergencies and threats.³ They point to natural disasters and looming terrorist threats as situations ill-suited to

* J.D. Candidate, University of Notre Dame Law School, Class of 2013. This Note is dedicated to the memory of my father, Joseph D. Florczak, always the role model and mentor. I am grateful to Professor Jeffrey Pojanowski for his guidance, Bryan Bond and Spencer Durland for their outstanding editing support, and the entire *Notre Dame Law Review* staff for their suggestions and hard work. I give special thanks for the support of my wife and best friend, Mary Megan, her family, and my mother, Dr. Kristine Florczak. To all the soldiers I served beside in the United States Army and the Illinois Army National Guard, it has been the honor of a lifetime.

1 See, e.g., Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 *YALE L. & POL'Y REV.* 383, 439 (2003) (discussing the checkered history of domestic martial law, inadequate military training for law enforcement tasks, and military threats to individual liberties).

2 See, e.g., Miriam Schneider, *Military Spying in the United States: When It Is Not Your Neighbor Knocking at Your Door, Where Do You Turn?*, 7 *CARDOZO J. CONFLICT RESOL.* 199, 231 (2005) (advocating for the application of warrants to domestic military surveillance under a Foreign Intelligence Surveillance Court structure).

3 See John R. Brinkerhoff, *The Role of Federal Military Forces in Domestic Law Enforcement*, *JOINT CENTER FOR OPERATIONAL ANALYSIS AND LESSONS LEARNED Q. BULL.*, Dec.

burdensome safeguards.⁴ Often these arguments call for lifting restrictions on the executive branch to enable both rapid action and full application of military capability to meet exigent circumstances.⁵

Likewise, commentators debate over the desired means of domestic military control. Some insist that careful and clear language from Congress will serve as the best safeguard.⁶ A few voices in the debate discuss the role of state authority on the issue.⁷ Others insist that judicial restrictions are the most appropriate.⁸

These debates lack substantial reflection on how these various compromises translate into successful *execution* of these policy goals. The ideas governing the military forces are more fluid than the forces themselves. Successful military operations almost always adhere to classic “doctrinal” military principles—principles that often determine whether the military aims *can* be achieved, as distinguished from whether the aims *should* be achieved.⁹

2004, at 23 (“The real effect of the *Posse Comitatus Act* has been to slow down the response time for the use of federal troops.”).

4 See Jessica DeBianchi, Note, *Military Law: Winds of Change—Examining the Present-Day Propriety of the Posse Comitatus Act After Hurricane Katrina*, 17 U. FLA. J.L. & PUB. POL’Y 473, 509 (2006) (calling for amendments to the Posse Comitatus Act to “clear away the political debris” from military intervention after a natural disaster); John B. Longley III, Note, *Military Purpose Act: An Alternative to the Posse Comitatus Act—Accomplishing Congress’s Intent with Clear Statutory Language*, 49 ARIZ. L. REV. 717, 719 (2007) (asserting that confusion over current law “prevent[s] our leaders from taking clear and decisive actions when necessary to protect American lives” and highlighting domestic terrorism, border security, and the Hurricane Katrina response as circumstances that necessitate protection).

5 See Candidus Dougherty, “Necessity Hath No Law”: Executive Power and the *Posse Comitatus Act*, 51–52 (March 2008) (unpublished article) (on file with Rutgers University), available at http://works.bepress.com/candidus_dougherty/2 (arguing that the Posse Comitatus Act was intended to restrict civilian law enforcement officers and not the President). Much commentary maintains that restrictions on domestic military use are self-imposed or result from legal misunderstanding.

6 See Longley, *supra* note 4, at 718.

7 See Ashley J. Craw, Note, *A Call to Arms: Civil Disorder Following Hurricane Katrina Warrants Attack on the Posse Comitatus Act*, 14 GEO. MASON L. REV. 829, 855–65 (2007) (discussing a “Natural Disaster Act” that would authorize federal military law enforcement after a natural disaster at the request of a state governor and analyzing that the law’s interaction with military doctrine confirms a variation of this principle is likely the best compromise).

8 See Sean McGrane, Note, *Katrina, Federalism, and Military Law Enforcement: A New Exception to the Posse Comitatus Act*, 108 MICH. L. REV. 1309, 1332–39 (2010) (describing a proposed “PCA Court” that would issue warrants to allow domestic military law enforcement in case-by-case situations).

9 HEADQUARTERS, U.S. DEPT. OF THE ARMY, FM 3-0 OPERATIONS, A-1 (2008) [hereinafter FM 3-0] (“The nine principles of war represent the most important nonphysi-

This Note aims to explore this gap in the current discussion. It seeks to illustrate what “right” looks like in protecting individual liberties alongside the common welfare. It evaluates the current alignment of laws and policies against principles of military doctrine and determines how well they work together to facilitate success. Finally, it proposes that use of state-federal controls on domestic military use, along with some limitations on the existing federal role, would strike a better balance than the current and proposed federal-only controls.

Part I of this Note begins by defining what “right” looks like in finding a proper balance between protecting individual liberties from military incursion and protecting the common security by maximizing military options. Part II examines the instruments of that social policy and will highlight important differences in the capability and domestic authority of U.S. federal and state military forces.¹⁰ It will also introduce the doctrinal principles critical to their ability to succeed. Part III evaluates whether current federal laws implement sound policy and whether they facilitate doctrinally-sound military operations. Part IV explores some alternate views, proposed changes to federal laws, and how successfully they balance social policy and enable military success. Part V concludes that state-federal controls and some federal limitation might bring about the best three-way balance between liberty, common welfare, and military success.

I. BALANCING LIBERTY AND SECURITY INTERESTS: WHAT RIGHT LOOKS LIKE

Commentator debates over the military’s proper domestic role fracture along lines similar to debates on traditional law enforcement functions. The essential arguments contrast individual liberty with collective security, and various commentators place differing normative value on each.¹¹ Though the requirements of each can be at odds, common ground can be found between them.

cal factors that affect the conduct of operations. . . . [T]hey summarize characteristics of successful operations.”).

10 National Guard forces are the state-controlled forces addressed by this Note. Part II.A explores their dual state and federal roles in greater depth.

11 Compare Matthew Carlton Hammond, Note, *The Posse Comitatus Act: A Principle In Need of Renewal*, 75 WASH. U. L. Q. 953, 984 (1997) (arguing that expansion of the military role in “‘the war’ on drugs” is a “danger[] to our individual rights and to the . . . underlying structure of the United States”), with Steven L. Miller, *The Military, Domestic Law Enforcement, and Posse Comitatus: A Time for Change*, 29–30 (Apr. 2000) (unpublished research report) (on file with the Air War College), available at <http://www.dtic.mil/cgibin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=x>

Recent history provides illustrative examples of the domestic military playing the role of both hero and villain. The military might readily abuse individual civil rights by using excessive lethal force, interfering with freedoms of expression or assembly, or conducting unmonitored, intrusive surveillance. Moreover, combined military and law-enforcement training may “leak” these undesired attributes into the organizations focused on routine law enforcement. Nevertheless, the military has superior capabilities to address certain types of emergencies and incidents. Suppressing insurrection, enforcing federal law in the face of state opposition, restoring order to cities torn by man and nature, and countering criminal use of military technology are tasks where no other government agency can respond as rapidly and effectively. A proper balance depends upon preventing unwanted abuses without crippling needed capabilities.

A. *Civil Rights Concerns*

1. Military Use of Lethal Force

One of the most obvious risks in domestic military interventions is that of excessive lethal force. Military formations are built to inflict maximum lethal force in the shortest time possible.¹² The prospect of sudden, violent, and summary execution is directly at odds with constitutional guarantees of due process.¹³ Such incidents damage government credibility and leave lasting impressions on the public.¹⁴ The Kent State Massacre grimly illustrates this danger.¹⁵ In that 1970 incident, Ohio National Guard troops shot and killed a number of unarmed college students while responding to campus protests against the Vietnam War.¹⁶ In 1993, military armored vehicles breached and rubble the Branch Davidian compound in Waco,

ADA393971 (urging expanded military participation in anti-drug interdiction and citing the need to combat the problem with multiple agencies).

12 See FM 3-0, *supra* note 9, at 4-1 (discussing the definition of combat power to include “the total means of destructive . . . capabilities that a military unit/formation can apply at a given time”).

13 U.S. CONST. amend. V (“[No person shall] be deprived of life, liberty, or property without due process of law.”).

14 See Sam Howe Verhovek, *5 Years After Waco Standoff, the Spirit of Koresh Lingers*, N.Y. TIMES, Apr. 19, 1998, at 1 (describing lingering effects on the Waco community following the siege and deaths at the Branch Davidian compound); see also *infra* notes 15–16 and accompanying text (describing other domestic military incidents).

15 See Gary Tuchman, *Kent State Forever Linked with Vietnam War Era*, CNN (May 4, 2000, 1:08 PM), <http://www.cnn.com/SPECIALS/views/y/2000/04/tuchman.kent.state.may4>.

16 See *id.*

Texas while acting under the direction of the Bureau of Alcohol, Tobacco, and Firearms (ATF).¹⁷ The ensuing fire and violent chaos killed numerous men, women, and children.¹⁸ These deaths occurred without the intense due process that accompanies ordinary use of the death penalty.¹⁹

Amplifying this danger, such lethal force may arise because of the fundamental mismatch in the organization and training between the military and law enforcement. An anecdotal example illustrates the point: during the 1992 riots in Los Angeles, Marines escorted a police officer to the scene of a domestic disturbance.²⁰ After someone in the house shot at them, the officer called for the Marines to “cover him” as he approached the house.²¹ In law enforcement training, “to cover” is to point a weapon towards an area and to fire if necessary.²² In Marine Corps training, “to cover” is to saturate an enemy position with a large amount of gunfire to prevent accurate enemy return fire.²³ The Marines “covered” the officer according to the latter definition, firing nearly 200 bullets into the house before the police officer could stop them.²⁴ Though no injuries resulted, the dangers of miscommunication in such an environment are obvious.²⁵

2. Military Intrusion on Individual Civil Liberties

Both intentional and incidental suppression of the freedoms of speech and assembly by the military are concerns. Freedom from such assertions of governmental power was a core concern of the Constitution’s framers, and these concerns continue to be relevant.²⁶ The

17 See JOHN C. DANFORTH, FINAL REPORT TO THE DEPUTY ATTORNEY GENERAL CONCERNING THE 1993 CONFRONTATION AT THE MT. CARMEL COMPLEX WACO, TX 139, 155–63 (2000) [hereinafter DANFORTH REPORT] (describing armored vehicle support to FBI and ATF agents and their use in assault and breaching of the Branch Davidian compound).

18 See Verhovek, *supra* note 14, at 1.

19 See, e.g., FLA. DEP’T OF CORRECTIONS, DEATH ROW FACT SHEET (2011), available at <http://www.dc.state.fl.us/oth/deathrow/> (“14.12 years is the average number of years between offense and execution.”).

20 See JAMES D. DELK, FIRES & FURIES 221–22 (1995).

21 See *id.*

22 See *id.*

23 See *id.*

24 See *id.*

25 See *id.* It was later discovered that the suspect’s children were in the targeted house.

26 See Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL’Y 99, 106–09 (2003) (describing early U.S. mistrust of standing military forces).

internment of Japanese and Japanese-American citizens during the Second World War aptly illustrates the dangers of routine domestic military law enforcement.²⁷ Military restrictions escalated from nightly registrations and curfews to forcible relocation of families based merely on the threat of military sabotage.²⁸

The Reconstruction period following the American Civil War illustrates the danger of incidental rights suppression by a constant military law enforcement presence.²⁹ Tensions over the South's military occupation peaked when federal troops protected presidential polling sites, and the perceived effect on voters in a close presidential election angered citizens.³⁰ More recently, President Bush considered using military members to arrest members of a suspected terrorist cell, and raised the possibility of abuse to politically unpopular, vulnerable groups.³¹

Hidden or covert military presence may endanger civil liberties as much as an oppressive, overt presence. Law enforcement agencies focus on gathering evidence for use in later judicial actions. Military intelligence assets focus on gathering relevant information as completely as possible for operational use.³² Military electronic eavesdropping and other surveillance devices can intrude substantially into civilian privacy and constitute unreasonable searches and seizures.³³ Recent incidents highlight these risks. In 2002, the Secretary of Defense authorized domestic military electronic surveillance to assist

27 See *Ex parte* Endo, 323 U.S. 283, 291 (1944) (describing the forcible resettlement of Japanese citizens to centralized internment camps); *Korematsu v. United States*, 323 U.S. 214, 215–18 (1944) (describing the military-ordered exclusion of same persons from “Military Areas” despite having permanent domicile there); *Hirabayashi v. United States*, 320 U.S. 81, 88–89 (1943) (describing curfew restrictions on persons of Japanese, German, and Italian ancestry).

28 See *supra* note 27.

29 See Canestaro, *supra* note 26, at 111–14 (discussing military rule during Reconstruction and tensions therein).

30 See *id.*

31 See Mark Mazzetti & David Johnston, *Bush Weighed Using Military in U.S. Arrests*, N.Y. TIMES, July 25, 2009, at A1, A3 (examining high-level decision making about possible authority to use the military to facilitate domestic arrests in counter-terrorism settings); see also *supra* note 27 and accompanying text (offering evidence that the civil rights of groups forming a perceived national security threat are more easily violated).

32 See FM 3-0, *supra* note 9, at 4-3 (observing that “information has become as important as lethal action in determining the outcome of operations” and discussing the critical role information plays in shaping stability operations).

33 See generally HEADQUARTERS, U.S. DEP’T OF THE ARMY, ARMY REGULATION 381-10: U.S. ARMY INTELLIGENCE ACTIVITIES (discussing military authorization to conduct electronic eavesdropping, physical searches, and surveillance of non-U.S. persons abroad without warrants).

in the capture of the “D.C. sniper,”³⁴ and controversy ensued after military intelligence agents questioned members of an Islamic law symposium at the University of Texas.³⁵ Court reluctance to impose an “exclusionary rule” on evidence gathered by unauthorized military participation in law enforcement exacerbates the concerns.³⁶

3. Military Influence on Law Enforcement

Military threats to civil liberties do not come solely from military forces. Such threats can exist where the military merely extends influence.³⁷ Close cooperation and shared training between military and law enforcement members can result in undesired military attributes crossing over to law enforcement agents.³⁸ For example, police S.W.A.T. teams are often composed of former military members, carry weaponry and protective gear similar to military forces, and employ variations of military tactics.³⁹ Though some of these techniques may be necessary to deal with certain dangerous or violent criminals, creation of such a “para-military” organization may undermine the Ameri-

34 See Barbara Starr, *Rumsfeld OKs Military Assist in Sniper Hunt*, CNN (Oct. 15, 2002, 6:50 PM), http://articles.cnn.com/2002-10-15/us/sniper.pentagon_1_sniper-hunt-law-enforcement-posse-comitatus-act?_s=PM:US.

35 See Press Release, American-Arab Anti-Discrimination Committee, Pressed by ADC, US Army Concludes Special Agents Exceeded Authority at UT Austin (Nov. 21, 2011), *available at* <http://www.adc.org/index.php?id=2174>.

36 The appropriateness of such an exclusionary rule is a point of contention. Compare Canestaro, *supra* note 26, at 143 (“The judiciary, demonstrating their traditional deference to military activity, has undermined efforts to broaden the prohibitions of the [Posse Comitatus Act] by including an exclusionary power.”), with Major Saviano, Note, *The Exclusionary Rule’s Applicability to Violations of the Posse Comitatus Act*, ARMY LAW. July 1995, at 61 (1995) (predicting courts will only apply the exclusionary rule to widespread or egregious violations of the Posse Comitatus Act).

37 Some commentators extend this danger to veteran participation in law enforcement. See Raj Dhanasekaran, *When Rotten Apples Return: How the Posse Comitatus Act of 1878 Can Deter Domestic Law Enforcement Authorities from Using Military Interrogation Techniques on Civilians*, 5 CONN. PUB. INT. L.J. 233, 233 (2005) (citing hazards from Iraq war veterans importing “torture” techniques into domestic law enforcement).

38 See David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement*, 30 AKRON L. REV. 619, 646–52 (1997) (describing the militarization of law enforcement at the federal, state, and local levels).

39 See LOS ANGELES POLICE DEP’T, S.W.A.T. SPECIAL WEAPONS AND TACTICS, http://www.lapdonline.org/inside_the_lapd/content_basic_view/848 (last visited Mar. 7, 2012) (describing initial formation of L.A.P.D. S.W.A.T. from former military members and their shared training with elite international special operations forces).

can civil law enforcement tradition.⁴⁰ The 1993 Waco siege is again instructive. In that incident, federal law enforcement agents served a “search warrant” with dozens of agents and military air support, and the agents used military rifles, grenades, and vehicles to lay siege to the compound.⁴¹ The ensuing violence claimed many lives without the protections of due process.⁴² Extensive training in military tactics necessarily makes police more likely to choose them, even where alternative solutions exist.⁴³

More direct subversion of civil law enforcement may occur through administrative action. For example, an administrative “transfer” of military members from the Department of Defense to the Department of Homeland Security might allow the government to avoid the legal restrictions on domestic military use.⁴⁴ In more sinister scenarios, other agencies might color the truth of situations to prompt military involvement.⁴⁵ Such dubious practices might comply with the letter of the law in statutes restricting domestic military use, but do little to address the underlying threat to personal freedoms.

B. Domestic Situations Uniquely Suited to Military Intervention

Though domestic use of the military presents significant dangers to civil liberties, situations exist where the need to protect life, property, and the “general welfare” outweighs that threat. The military may be the only force able to uphold laws and protect citizens where state agencies refuse or are unable to meet that obligation. For example, the military may be the only organization with the manpower and logistical capability to deliver humanitarian relief and protect citizens

40 See *Bissonette v. Haig*, 776 F.2d 1384, 1387 (8th Cir. 1985) (discussing risks of military enforcement of civil law to rights and the long American tradition against abuses of standing armies).

41 See DANFORTH REPORT, *supra* note 17, at 131–34 (describing the official report of the initial raid on the Branch Davidian compound); Kopel & Blackman, *supra* note 38, at 631–35 (discussing the use of military style weaponry during the Waco siege).

42 See DANFORTH REPORT *supra* note 17, at 131–34.

43 See EDWARD S.G. DENNIS, JR., EVALUATION OF THE HANDLING OF THE BRANCH DAVIDIAN STAND-OFF IN WACO, TEXAS FEBRUARY 28 TO APRIL 19, 1993 43–44 (1993) (highlighting dysfunction between negotiating and tactical teams and the use of force despite recommendations to do otherwise).

44 See Melvin G. Deaile, *Crossing the Line: A Study of the Legal Permissibility of Using Federalized Troops to Protect the Nation's Borders* 10 (Jun. 2003) (unpublished research report) (on file with the U.S. Army War College), *available at* <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADa416373>

45 See Kopel & Blackman, *supra* note 38, at 628 (“[Military agencies are] often aware that civilian agencies are fabricating a pretext for military involvement, but . . . [do not] even care.”).

in areas ravaged by natural disasters. In some circumstances, the military responsibility to defend our borders can overlap with the need to carry out domestic law, as in monitoring national borders or combating transnational threats backed by criminal enterprises.

1. Military Law Enforcement Where Other Agencies Fail

The United States Constitution guarantees all citizens equal protection of the laws.⁴⁶ Individual states, at various times, interposed their authority to circumvent that protection and frustrate federal law enforcement efforts.⁴⁷ For example, during the Civil Rights movement of the 1950s and 1960s, Army troops enforced federal court orders mandating the integration of public schools.⁴⁸ Federal military forces confronted, at least symbolically, state police and military forces in the process. In many cases, the military is the only federal organization with the power to overcome such state defiance. Those interventions are happily rare, but this capability is necessary to prevent states from encroaching on federal authority or oppressing their own citizens.

More complex issues surround military intervention where states have proven incapable of enforcing federal laws or their own laws. Such situations can be prompted by sudden outbursts of widespread civil unrest.⁴⁹ They can also occur in areas ravaged by natural disaster where basic social services and governance have broken down.⁵⁰ In such circumstances, military law enforcement may be preferable to no law enforcement. The need to protect life and property conflicts with the limitations of federal authority: under the limited powers granted by the Constitution, the federal government has no general police

46 U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

47 See, e.g., WILLIAM DOYLE, *AN AMERICAN INSURRECTION* 6 (2003) (describing Arkansas’s use of National Guard troops to block minority elementary students from entering school).

48 *Id.* at 296 (summarizing use of National Guard and Army troops to enforce desegregation of the University of Mississippi).

49 Los Angeles, California has twice been ravaged by riots so severe that they required military intervention. See *infra* notes 91–94 and accompanying text for discussions of the 1965 Watts riots and the 1992 Rodney King riots in Los Angeles.

50 In 1992, Hurricane Andrew prompted a federal military relief effort along these lines, and 2005’s Hurricane Katrina is perhaps the most famous case-study of this situation. See Edmund L. Andrews, *Bush Sending Army to Florida Amid Criticism of Relief Effort: Urgency Is Growing*, N.Y. TIMES, Aug. 28, 1992, at A1; see also *infra* notes 98–102 and accompanying text discussing lessons learned from Hurricane Katrina.

power to protect the health, welfare, and safety of citizens.⁵¹ However, immediate threats of human injury, death, and loss of livelihood put significant pressure on the federal government to act even when proper authority is uncertain. For example, the federal relief effort to Hurricane Katrina—ravaged New Orleans was widely criticized as inadequate, despite the fact that primary disaster relief responsibility rested with state and local officials.⁵² As looting and lawlessness overwhelmed an American city, the specter of idle federal troops prompted much controversy.⁵³ Resolving this mismatch in capability and authority is hotly debated and remains a challenge.

2. Situations Where the Line Between Crime and National Security is Blurred

Domestic emergencies are not the only domain where military use may be favored. Emerging threats in the twenty-first century have blurred distinctions between foreign threats best handled by the military and criminal activity in the purview of law enforcement. For example, border security implicates both protection against terrorist attacks and civil concerns such as immigration control.⁵⁴ The illegal drug trade both ravages communities at home and funds activities of foreign enemies, and often extends across borders and nation-states.⁵⁵ Fiscal constraints push against investment in redundant capabilities, such as purchasing separate radar systems for law enforcement and defense uses. In some circumstances, criminal elements turn to military technologies to further their aims. For example, South American drug cartels use stealth submarines to facilitate drug smuggling undetected by civil authorities.⁵⁶ Traditional law enforcement is ill-equipped to address this type of threat. The military has unique capa-

51 See U.S. CONST. art. I, § 8; *id.* amend XIV, § 5 (enumerating authorized federal powers).

52 See Sean Alfano, *Katrina Response Sparks Outrage*, CBS NEWS (Feb. 11, 2009, 7:10 PM), <http://www.cbsnews.com/stories/2005/09/05/60minutes/main815179.shtml> (reporting on frustrations over bureaucratic friction that contributed to a lack of action during Hurricane Katrina's aftermath).

53 See *id.*

54 See generally Brian R. Wahlquist, Note, *Slamming the Door on Terrorists and the Drug Trade While Increasing Legal Immigration: Temporary Deployment of the United States Military at the Borders*, 19 GEO. IMMIGR. L.J. 551 (2005) (arguing for militarization of the southern U.S. border to suppress drug activity and interdict terrorist infiltration).

55 See Eric Schmitt, *Diverse Sources Pour Cash into Taliban's War Chest*, N.Y. TIMES, Oct. 19, 2009, at A1. (discussing diverse funding from drugs and other criminal activity to Afghanistan's Taliban fighters).

56 See William Booth & Juan Forero, *Plying the Pacific, Subs Surface as Key Tool of Drug Cartels*, WASH. POST, June 6, 2009, at A1.

bilities useful to law enforcement in certain scenarios, such as tracking and intercepting foreign air and sea threats, or gathering information in far-flung combat zones relevant to domestic criminal matters. Managing these capabilities responsibly remains an elusive, yet necessary, goal.

II. HOW TO HANDLE THE SPEAR: MILITARY FORCES AND DOCTRINAL EMPLOYMENT

A. *Military Organizations and Their Legal Authority*

Evaluation of laws that govern domestic military use-of-force requires consideration of not only competing policy objectives, but also the capabilities of the forces they govern. To understand what is appropriate *and* possible for military forces to accomplish, a basic understanding of military structure is required.

1. Federal Military Forces

The Army, Air Force, Navy, Marine Corps, and Coast Guard are the five primary armed services of the United States.⁵⁷ Each has both active-duty and reserve components.⁵⁸ Active duty military members serve full-time and are professional members of the standing military force.⁵⁹ The reserve force is composed of military personnel that train part-time, and simultaneously maintain other careers.⁶⁰ These forces may only support federal missions when called into active-duty

57 The Army, Air Force, Navy, and Marine Corps are “Military Departments” organized under the Secretary of Defense. See U.S. DEP’T OF DEF., MILITARY DEPARTMENTS, (2011), available at <http://www.defense.gov/orgchart/#3>. The Coast Guard is unique in that it is the only armed service of the United States organized under the Department of Homeland Security and has an express charter to perform law enforcement functions in U.S. territorial waters. See U.S. COAST GUARD, U.S. COAST GUARD HISTORY, <http://www.uscg.mil/history/> (last visited Mar. 7, 2012).

58 10 U.S.C. § 10101 (2006) (naming the reserve components of armed forces).

59 See, e.g., U.S. DEP’T OF THE ARMY, ACTIVE DUTY & ARMY, <http://www.goarmy.com/about/service-options/active-duty-and-reserve-duty.html> (last visited Mar. 7, 2012).

60 These reserve forces form a pool of readily trained and equipped individuals who can be activated to support military missions as needed. When not needed, they resume civilian employment. This allows for instant “growth” of an armed service for a mission without the cost of employing those members full-time.

service.⁶¹ Both active-duty and reserve forces are limited to federal constitutional authority and are subject to federal laws.⁶²

2. State National Guard: A Dual-Role Force

In contrast, military forces under state control are called the National Guard.⁶³ The very text of the Constitution forbids states from maintaining standing, professional military forces.⁶⁴ As such, all National Guard forces train part-time in a manner similar to federal reserve forces until activated.⁶⁵

When activated by a state governor, the National Guard operates under state law and under the broader scope of state general sovereignty.⁶⁶ In this status, known as state active duty, Guard forces may take any action consistent with constitutional guarantees and their state's laws to protect public health, welfare, and safety.⁶⁷ In a similar status referred to as "Title 32," National Guard members may operate at state direction with federal funding.⁶⁸ Typical state-controlled missions for National Guard members include relief efforts following a natural disaster and responses to widespread civil disorder that overwhelms normal law enforcement.⁶⁹

National Guard forces must serve two masters. The "Calling Forth" clause of the Constitution authorizes the President to exert control over state militias when called into federal service.⁷⁰ Thus, presidential orders can fold National Guard members instantly into the federal military to perform federal missions. When so "federalized," National Guard forces operate only with federal authority, and

61 See LAWRENCE KAPP, RESERVE COMPONENT PERSONNEL ISSUES 7–8 (2010) (describing differences in federal reserve forces and the dual status of the National Guard).

62 See *id.* at 11 (describing Posse Comitatus Act restrictions on active and reserve components of federal armed services).

63 See *id.* at 8.

64 U.S. CONST. art. I, § 10 ("No State shall . . . keep Troops, or Ships of War in time of Peace.").

65 See KAPP, *supra* note 61, at 8 (explaining that National Guard forces are considered descendent from state militias within the Constitution's meaning).

66 *Id.* at 10.

67 See *id.* at 21.

68 See *id.*

69 See *id.* at 18–19.

70 See U.S. CONST. art. I, § 8 (granting Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"); U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army . . . and of the Militia of the several States, when called into the actual Service of the United States.").

their range of permissible actions is narrower.⁷¹ In this status, National Guard forces perform the full range of federal military missions, including combat rotations in foreign conflict zones.⁷²

To ensure National Guard readiness to meet federal missions, the federal government spends considerable resources to train and equip them.⁷³ National Guard military organization, equipment, and training is nominally identical to their active-duty counterparts.⁷⁴ After the September 11th attacks, it became commonplace for nominally part-time National Guard units to train for and deploy to numerous foreign combat rotations.⁷⁵ Therefore, National Guard forces differ from active-duty forces only in three respects: their orders may come from a governor or the President; they may be employed according to general state sovereignty or limited federal sovereignty; and by Constitutional mandate they must be part-time.

B. *Principles of Military Doctrine: Guideposts for Success*

To correctly employ military forces, military leaders must give orders that translate political goals into specific military actions. Federal laws and political leaders often focus on whether military force *should* be used. Laws, decision-making processes, and executive decisions, however, can also impact whether the military *can* be successfully used. Military planning doctrine identifies certain characteristics that embody successful operations, and these may not be well understood by the controlling political leadership.⁷⁶ This misunderstanding can interfere with mission success and lead to undesired outcomes. In

71 See KAPP, *supra* note 61, at 19–20.

72 See OFFICE OF THE UNDER SEC'Y OF DEF. FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS, DEFENSE SCIENCE BOARD TASK FORCE ON DEPLOYMENT OF MEMBERS OF THE NATIONAL GUARD AND RESERVE IN THE GLOBAL WAR ON TERRORISM 9 (2007), available at <http://www.acq.osd.mil/dsb/reports/ADA478163.pdf> [hereinafter DSB Report] (detailing deployments of multiple National Guard Brigade Combat Teams for Iraq and Afghanistan).

73 See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06170T, RESERVE FORCES: ARMY NATIONAL GUARD'S ROLE, ORGANIZATION, AND EQUIPMENT NEED TO BE REEXAMINED 18 (2005) (statement of David M. Walker, Comptroller General of the United States) [hereinafter GAO Report] (examining the budget needed to reorganize National Guard formations to the same structure as the Army).

74 *Id.* at 8 (“While the Army National Guard performs both federal and state missions, the Guard is organized, trained, and equipped for its federal missions, and these take priority over state missions.”).

75 See DSB REPORT, *supra* note 72, at 9.

76 See FM 3-0, *supra* note 9, at A-1 (discussing the fundamental nature of the principles of war to successful operations and noting that their tenets have stood the tests of analysis, experimentation, and practice).

a domestic context, this Note considers the four “Principles of War” most relevant to domestic military use: Objective, Mass, Simplicity, and Unity of Command.⁷⁷

1. Objective

“Objective” requires that planners “[d]irect every military operation toward a clearly defined, decisive, and attainable objective”; to use only “appropriate” force (*i.e.*, lethality); and to ensure achievement of “political goals” that foster the “willing acceptance of a lawfully constituted government.”⁷⁸

Successful operations embody this principle. For example, Army paratroopers enforced the integration of Arkansas schools in 1957. Their objective was clearly defined: protect nine minority elementary students from state or other interference during their enrollment at an integrated school.⁷⁹ Their objective was attainable: the overwhelming troop presence, 1,000 soldiers for a single school, guaranteed that no one would interfere with the integration.⁸⁰ And, most importantly, their objective was decisive: the demonstration of federal resolve to enforce federal integration policy achieved the President’s goal of judicial enforcement.⁸¹ The volume of troops employed also eliminated the need for lethal force that may have undermined the federal government’s legitimacy.⁸²

Conversely, failed operations often ignore this tenet of clearly defining a decisive and attainable objective. For example, in the 1990s, small Marine Corps units deployed to the U.S. border with Mexico to assist law enforcement in surveillance of drug traffic.⁸³ The

77 The remaining five principles of war (Maneuver, Offensive, Surprise, Security, and Economy of Force) are no less critical to military operations. However, they are more relevant to traditional combat operations and reflect military concerns not readily influenced by domestic law and policy. See *id.* at A-1, A-2 for a discussion of these principles.

78 *Id.* at A-1.

79 See DOYLE, *supra* note 47, at 13–16 (describing military action to protect the Little Rock Nine).

80 KASEY S. PIPES, *IKE’S FINAL BATTLE* 243–44 (2007) (describing President Eisenhower’s federalization of the Alabama National Guard and deployment of the 101st Airborne Division to Little Rock).

81 *Id.* at 240 (“[The President] will use the full power of the United States including whatever force may be necessary to prevent any obstruction of the law and to carry out the orders of the Federal Court.”).

82 See DOYLE, *supra* note 47, at 16 (“The ‘Battle of Little Rock’ was over nearly as soon as it started, without a single serious injury and without a shot fired.”).

83 See MAJOR GENERAL JOHN T. COYNE, *INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING THE JOINT TASK FORCE-6 (JTF-6) SHOOTING INCIDENT THAT*

objects of the assistance were not clearly defined, and, as such, Marine Corps leaders viewed the mission primarily as a training opportunity for their combat mission.⁸⁴ The object was not attainable: the amount of troops used was too small to successfully interdict smuggling, leading to a long-term presence.⁸⁵ The resulting operation was expensive and not decisive. These flaws came to light after a hidden Marine outpost accidentally shot and killed a teenage shepherd in Texas.⁸⁶ Of course, certain military objectives might be “decisive” and “attainable” but still problematic. Viewed in callous terms, the 1970 Kent State shootings achieved a decisive end to disorderly protests on the campus, though it is hard to imagine the incident being hailed as legitimate or successful.⁸⁷

2. Mass

U.S. military doctrine refers to “mass” in civil-assistance roles as “providing the proper forces at the right time and place to alleviate suffering and provide security.”⁸⁸ Examining different domestic military responses reveals two main factors crucial to achieving this principle: the speed of response and the quantity of forces.⁸⁹ Unsurprisingly, swift responses by large, capable forces generate better outcomes than delayed responses by small, ineffective forces.

Constitutional requirements factor prominently into the military’s ability to respond quickly. The Constitution mandates that state military forces be based on a part-time militia model.⁹⁰ As such, delays are inevitable when disparate force members must receive an alert, travel to armories, draw equipment, and then plan and issue instructions. More indirectly, part-time leadership can lead to planning delays and “friction” during mobilization. The California National Guard response to the 1992 Los Angeles riots illustrates the difficulties. Following the alert, seventeen hours elapsed before signif-

OCCURRED ON 20 MAY 1997 NEAR THE BORDER BETWEEN THE UNITED STATES AND MEXICO 1 (1998) [hereinafter COYNE REPORT].

84 See *id.* at 25 (“This [Marine Unit] has received a great training deployment opportunity in support of the nation’s war on drugs. . . . [The desired end state is:] . . . professional support to assigned law enforcement agencies . . . and a more combat ready unit.”).

85 See *id.* at 8 (detailing over one-hundred missions over a five-year period).

86 See *Marine to be Charged in Border Shooting*, N.Y. TIMES, June 22, 1997, at A11.

87 See *supra* notes 15–16 and accompanying text.

88 FM 3-0, *supra* note 9, at A-2.

89 FM 3-0’s emphasis on “massing effects” is generally applicable only for traditional warfighting missions.

90 See *supra* note 64 and accompanying text.

icant National Guard forces were mobilized.⁹¹ The alert was frustrated by staff-planning details such as movement of aircraft, delivery of ammunition, and availability of required weapons components.⁹² During those lost hours, chaos raged in the city resulting in millions of dollars of property damage.⁹³ Frustrations over the delays eventually led the California governor to request a federal troop intervention.

The difficulties during the 1992 response stand in stark relief to an almost identical California Guard alert to the 1965 Los Angeles riots. There, by coincidence, nearly 14,000 Guardsmen had assembled for an annual two-week training exercise on the eve of the riots.⁹⁴ The National Guard response to that incident was far more decisive, as the logistics of mobilization were already accomplished.⁹⁵

Delays in state response often arise from the structure of a part-time militia force. In contrast, delays in federal responses can result from procedural requirements or hesitation by political leaders. Lacking general sovereign authority, federal forces may only respond if authorized by the Constitution or federal law.⁹⁶ Ensuring compliance with statutory criteria takes time, as does determining the appropriate role for forces if committed.⁹⁷ Political infighting or contests for control can also add to delay.⁹⁸ Often the decision-making process can last longer than the physical deployment of troops. For example, the Department of Defense alerted federal paratroopers for an assistance mission to the overwhelmed Louisiana National Guard in the after-

91 See Christopher M. Schnaubelt, *Lessons in Command and Control from the Los Angeles Riots*, PARAMETERS, Summer 1997, 88, 96–98, available at <http://www.hsdl.org/?view&did=445945>.

92 See *id.*

93 See *id.* at 88–89 (describing the scale of destruction during the 1992 L.A. riots).

94 CALIF. NAT'L GUARD, A REPORT CONCERNING THE CALIFORNIA NATIONAL GUARD'S PART IN SUPPRESSING THE LOS ANGELES RIOT—AUGUST 1965 10 (1965) available at <http://www.militarymuseum.org/Watts.pdf> (describing readiness posture of the California Air and Army National Guard on August 13, 1965).

95 See *id.* at 13–14 (describing the total time from initial alert to battalion-sized deployment at only eight hours).

96 See *supra* notes 62–63 and accompanying text.

97 See Schnaubelt, *supra* note 91, at 14 (describing the multiple layers of bureaucracy that mission approval required during the federal troop occupation in 1992 and noting that this approval process often took six to eight hours and required daily revalidation).

98 See Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1.

math of Hurricane Katrina.⁹⁹ Though capable of responding worldwide within eighteen hours, the paratroopers' movement to flood-stricken New Orleans did not occur for nearly a week amidst conflicting reports of need and federal and state political debate.¹⁰⁰ Even then, the movement came only after the military commander's initiative to hold an emergency "training exercise," with the so-called scenario involving the division's assistance to New Orleans after a catastrophic hurricane.¹⁰¹ Once there, the large, full-time force quickly contributed to the Katrina relief efforts.¹⁰²

3. Simplicity

The United States Army manual for operations directs leaders to "[p]repare clear, uncomplicated plans and clear, concise orders to ensure thorough understanding."¹⁰³ This common sense principle plays a large part in the success or failure of domestic military missions.

Unfortunately, the requirements of federal law can add layers of bureaucracy that slow responses and limit options. The 1992 Los Angeles riots again provide a useful vignette. Following the California Guard's slow mobilization, military leaders directed that their units directly assist Los Angeles police in their law enforcement districts.¹⁰⁴ This avoided duplicate planning and further delays, and the scheme took advantage of police familiarity with their districts.¹⁰⁵ Under this model, nearly all police requests for assistance were approved.¹⁰⁶ The influx of troops and close cooperation quickly reduced violence in the city. This efficient arrangement did not survive federalization. When President George H.W. Bush assumed control of the California Guard and dispatched federal troops to Los Angeles, the federal military units scrutinized each request for assistance for compliance with federal law.¹⁰⁷ Law enforcement request-approval plummeted to twenty

99 See Julian E. Barnes, *Diary of a Mad Hurricane: The 82nd Airborne—A Waiting Game*, U.S. NEWS & WORLD REP. (Sept. 17, 2005), <http://www.usnews.com/usnews/news/articles/050917/17airborne.htm>.

100 See *id.*

101 See *id.*

102 See Gerry J. Gilmore, *82nd Airborne Division Becomes 'Waterborne' in New Orleans*, U.S. DEPT. OF DEF. (Sept. 21, 2005), <http://www.defense.gov/news/newsarticle.aspx?id=17253>.

103 See FM 3-0, *supra* note 9, at A-3.

104 See Schnaubelt, *supra* note 91, at 11.

105 See *id.*

106 See *id.* at 13.

107 See *id.*

percent, as missions authorized the day prior to federalization were illegal the next day, even though some of the same forces were involved.¹⁰⁸ Further, federal military commanders divided their operations along military terrain features rather than police districts.¹⁰⁹ In some circumstances, this resulted in single military units attempting to coordinate with multiple law enforcement districts.¹¹⁰ This “reinventing the wheel” to ensure tight, centralized control reduced the effectiveness of the responding troops.¹¹¹

4. Unity of Command/Unity of Effort

Unity of Command is achieved when “a single commander directs and coordinates the actions of all forces toward a common objective.”¹¹² Where both military and non-military organizations are involved, doctrine directs commanders to “cooperate, negotiate, and build consensus to achieve unity of effort.”¹¹³ Unity of Command and Effort enables the preceding three principals to flourish by preventing confusing, contradictory, overlapping, and misaligned orders.

The 1957 military integration of Little Rock represents the classic implementation of this principal. All responsibility for the mission was placed with a military general, who efficiently directed a purely-military force to carry out the mission.¹¹⁴ A similar federal intervention in 1962 demonstrated the consequences when leaders ignore this principle. The federal integration of the University of Mississippi involved U.S. Marshals, regular U.S. Army units, and federalized elements of the Mississippi National Guard.¹¹⁵ At various times during the crisis, contradictory orders arrived from the President, the Army commanding general, and the Deputy Attorney General.¹¹⁶ Despite the urgency of a violent, deadly, 2000-person campus riot, the employed forces only managed a piecemeal, halting, and confused

108 *See id.*

109 *See id.* at 12–13.

110 *See id.*

111 *See id.* at 13.

112 *See* FM 3-0, *supra* note 9, at A-3.

113 *See id.*

114 *See* DOYLE, *supra* note 47, at 13–16 (describing Major General Walker’s direction of the Little Rock mission).

115 *See id.* at 104–09 (describing the organization of Marshals and Army troops for the University of Mississippi integration mission); *id.* at 239–40 (describing the federalization of a dutiful, if reluctant, Mississippi National Guard for the same purpose).

116 *See id.* at 228–29 (describing the sharp breakdown in command during the riot response).

response.¹¹⁷ Cooperation among these elements eventually achieved a coordinated response to the situation, but it bore little resemblance to the orderly Little Rock intervention.¹¹⁸

In examining lessons learned from the Hurricane Katrina relief effort, the U.S. government recognized that achieving unity of effort was a systemic difficulty.¹¹⁹ Since then, agencies such as the Federal Emergency Management Agency (FEMA) devote greater energy to training under a common planning template for federal, state, and local agencies to help achieve unity of effort.¹²⁰ Lawmakers also passed short-lived laws expanding Presidential authority in such situations to allow a single chain-of-command to the executive branch.¹²¹ Those statutes ran afoul of concerns over potential abuses of executive power and encroachment on state authority.¹²²

III. FEDERAL LAW: BRIDGING THE GAP BETWEEN SOCIAL POLICY AND MILITARY DOCTRINE

The Constitution and federal laws form a connecting bridge between the policy considerations of domestic military use and doctrinally sound military employment. Both realms are essential: a doctrinally sound intervention that compromises social policies is as undesirable as a politically sound intervention that fails to comply with essential doctrine. A proper evaluation of current laws must first assess the laws according to how well they balance these competing priorities.

A. *The Posse Comitatus Act*

Perhaps the most controversial and ill-understood federal law regulating domestic military operations is the Posse Comitatus Act of 1878 (PCA). Passed into law during the Reconstruction period following the American Civil War, the as-amended PCA in its entirety reads

117 See *id.* at 233–45 (describing the chaos of troop deployment).

118 See *id.*

119 See FRANCES FRAGOS TOWNSEND, *THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA* 13, 55 (2006).

120 See FED. EMERGENCY MGMT. AGENCY, *NATIONAL INCIDENT MANAGEMENT SYSTEM TRAINING PROGRAM* (2011), available at <http://www.fema.gov/emergency/nims/NIMSTrainingCourses.shtm> (outlining national response framework training according to post-Katrina requirements).

121 See PAUL J. SAUSVILLE, *DoD Response to Natural Disasters—Why the National Guard Is Off Limits* 9–14 (2008), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA480193>.

122 See *id.* at 2.

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.¹²³

Literally translated from Latin, *posse comitatus* means the “power of the county.” At common-law, this concept allowed law enforcement officials to summon able bodied men as a temporary police force to combat riots or to pursue felons and was roughly analogous to summoning a militia for law enforcement purposes.¹²⁴ Most policy makers and military commanders interpret the law as a general prohibition against using the military to enforce domestic laws.¹²⁵

Substantial disagreement exists about the PCA’s policy aims and its effectiveness. Some commentators characterize it as a burdensome straitjacket, needlessly restricting military use in emergency situations.¹²⁶ Others claim that it is a proper bulwark against military tyranny and that it reflects a long-standing American tradition of civilian law enforcement.¹²⁷ Still others argue that it is essentially meaningless and merely offers political cover for politicians who fail or choose not to act.¹²⁸

While the PCA’s policy aims may be hotly debated, the Act exerts substantial influence on military planners.¹²⁹ The PCA clearly prohib-

123 18 U.S.C. § 1385 (2006).

124 See *Scott v. Vandiver*, 476 F.2d 238, 240–41 (4th Cir. 1973) (“English common law . . . authorized a sheriff to summon bystanders to assist him in apprehending felons.”).

125 See Michael Greenberger, *Did the Founding Fathers Do “A Heckuva Job”? Constitutional Authorization for the Use of Federal Troops to Prevent the Loss of a Major American City*, 87 B.U. L. REV. 397, 410 (2007) (“[L]ay observers, especially military commanders and first responders at all levels of government, focus [] almost exclusively on the prohibition within the PCA . . .”).

126 See, e.g., Commander Gary Felicetti & Lieutenant 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, 179 (2003) (“[T]he current interpretation of the Posse Comitatus Act . . . impedes [the counter-terrorism] mission and does little to protect civil liberties.”).

127 See generally Hammond, *supra* note 11 (arguing for the protection of PCA restrictions); Kealy, *supra* note 1 (cautioning against the militarization of law enforcement and appropriateness of PCA).

128 See Candidus Dougherty, *While the Government Fiddled Around, the Big Easy Drowned: How the Posse Comitatus Act Became the Government’s Alibi for the Hurricane Katrina Disaster*, 29 N. ILL. U. L. REV. 117, 146–47 (2008) (describing how the PCA was allegedly used as an excuse for operational failures).

129 See *supra* notes 104–111 and accompanying text.

its certain classes of actions, such as searches and seizures.¹³⁰ Others are permitted and uncontroversial, such as military delivery of relief supplies under the Stafford Act.¹³¹ Without explicit authority, the PCA's vague contours can make military commanders overly cautious and impede effectiveness. For example, the PCA can compromise setting decisive objectives: a federal soldier delivering relief supplies under the Stafford Act may not stop looters or respond to other lawlessness, where an identically trained and equipped state National Guard soldier may perform both roles. Additionally, the PCA can hamper simplicity. The ability for military planners to issue simple, concise orders can be compromised when commanders must scrutinize every decision for compliance with the uncertain boundaries of the PCA.¹³²

Nevertheless, the PCA is a valuable safeguard against unrestricted military use and encroachment on civil liberties. This Note suggests the problems associated with the PCA are better addressed through coherent, flexible exceptions to the PCA rule, rather than abolition of the rule itself.

B. *The Insurrection Act*

The Insurrection Act predates the PCA,¹³³ and it outlines the criteria that must be satisfied for the President to use the "militia" and "armed forces" in response to domestic emergencies. The first section of the amended Act authorizes the president to use military force to assist states in suppressing insurrections against their governments, provided the legislature or governor of that state has requested the

130 See, e.g., *Taylor v. State*, 645 P.2d 522, 525 (Okla. Crim. App. 1982) (excluding evidence seized by an Army Central Intelligence Division agent during a civilian drug search).

131 See 42 U.S.C. § 5170a (2006). This section of the Stafford Act justifies use of Department of Defense resources to deliver relief supplies and other aid and draws little controversy. In the case of Hurricane Katrina, it appears that while authority to deliver relief supplies immediately was not in question, military planners were reluctant to send federal troops into a volatile and largely lawless situation with limited ability to protect themselves or the supplies. See Lipton et al., *supra* note 98 and accompanying text.

132 The vague scope of the PCA exacerbates the problem. The military leadership during the 1992 Los Angeles riots parsed their orders to "restore order" as an uncertain mandate to "maintain" law and order. They therefore scrutinized missions for compliance with the PCA even when operating under a Congressional PCA exception. See Schnaubelt, *supra* note 91, at 13.

133 Act of May 2, 1792, ch. 28, 1 Stat. 264 (codified as amended at 10 U.S.C. §§ 331–335).

assistance.¹³⁴ The second section addresses unilateral action by the President, which is authorized when there are “combinations, assemblages, or rebellion against the authority of the United States” that make it impracticable to enforce federal laws in “ordinary . . . judicial proceedings.”¹³⁵ The third and final section allows the President to use military force when “insurrection[s], domestic violence, unlawful combination[s], or conspirac[ies]” threaten equal protection of Constitutional privileges or obstruct federal law enforcement, and states are unable, fail, or refuse to enable that equal protection.¹³⁶

The Insurrection Act is clearly rooted in constitutional authority and articulates a clear policy balance.¹³⁷ The narrow employment criteria mitigate the dangers of excessive lethal force and military threats to civil liberties. Only incidents that threaten enforcement of laws or jeopardize class-wide constitutional rights warrant military use of force. These criteria are defined with enough precision to allow political confidence in taking military action.¹³⁸ The military-enforced

134 See 10 U.S.C. § 331, which states,

Whenever there is an insurrections [sic] 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.

135 See 10 U.S.C. § 332, which states in full,

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.

136 See 10 U.S.C. § 333, which reads,

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

137 See *supra* note 70 and accompanying text.

138 See *supra* Part I.B.1.

school integrations at Little Rock and the University of Mississippi raised little question of proper military authority in the face of state defiance of judicial order and obstruction of federal law.¹³⁹ The Act reflects an enhanced scope of authority with state consent, as federal military forces may assist in suppressing purely state insurrections with state consent.¹⁴⁰

In terms of military doctrine, the Insurrection Act fosters formation of “defined, attainable, and decisive” objectives.¹⁴¹ The text permits much freedom of action to defeat law-threatening insurrections, conspiracies, or state defiance.¹⁴² Enforcement of federal law and the equal protection of constitutional rights supports the objective principle’s legitimacy prong. The Act also supports “mass”; reliance on presidential judgment or state judgment alone presents little obstacle to rapid deployment of sufficient forces. Achievement of simplicity is also supported, as dispersal of rioters, gaining control of ground, and suppression of widespread violence are traditional military roles and lend themselves to uncomplicated orders. This same freedom additionally fosters simple directives from a unified chain-of-command. All authority is expressly vested in the President as commander-in-chief, and the conditions of employment necessarily involve traditional military competencies.

The Act’s narrow military intervention criteria, however, can limit federal options in lawless situations caused by natural disaster or other catastrophes. Oriented towards criminal actions and other intentional obstruction of laws, the Insurrection Act’s authority does not clearly extend to chaos resulting from natural disasters or other conditions that threaten the “health, welfare, and safety” of citizens outside of specific federal jurisdiction. These gaps in capability form the core of arguments for repeal of the PCA or for expanding the role of the Insurrection Act.¹⁴³

139 See *supra* note 47 and accompanying text.

140 See 10 U.S.C. § 331.

141 See *supra* notes 76–78 and accompanying text.

142 See *supra* notes 134–37 (clarifying that the use of military force comes at the President’s discretion).

143 See Greenberger, *supra* note 125, at 414 (discussing Congressional concerns that the Insurrection Act did not clearly specify natural disasters and other calamitous events).

*C. Military Cooperation with Civilian Law Enforcement
Officials (MCCLLE)*

Originally passed in 1981,¹⁴⁴ the as-amended laws authorizing military cooperation with civilian law enforcement span ten sections of the federal code and establish criteria for military cooperation with civilian law enforcement officials. They are designed to support counter-drug interdiction, counter-terrorism, customs and border security, and responses to threats posed by weapons of mass destruction.¹⁴⁵ They encourage the Department of Defense to share information and intelligence with civilian law enforcement agencies.¹⁴⁶ They allow military personnel to perform surveillance on air, sea, and certain surface traffic, provided the initial detection occurred outside U.S. borders.¹⁴⁷ They authorize military members to transport law enforcement agents, but the laws contain a general provision against “direct participation” in law enforcement by military members.¹⁴⁸ The laws define direct participation as participation in a search, seizure, or similar activity.¹⁴⁹

The two most troublesome parts of these laws are provisions that permit military training of law enforcement and authorize military-to-police loans of “equipment” and “equipment operators,” even when the police role does not directly enforce federal laws or policy objectives.¹⁵⁰

The policy picture presented by these laws is unclear. The Act’s provisions address some intersections between criminal law and national security, specifically terrorist threats and the threat posed by weapons of mass destruction.¹⁵¹ However, the original act oriented on combating the drug trade, and its provisions reflect this focus—particularly in how expansive assistance can be to local law enforcement. Concerns over use of lethal force remain, as shown by past incidents such as the Waco siege and the Marine Corps Texas border shooting.¹⁵² Similarly, concerns over military encroachment on civil liberties persist despite a prohibition against “direct participation” in

144 Department of Defense Authorization Act of 1982, Pub. L. No. 97-86, § 905, 95 Stat. 1114, 1114–16 (1981).

145 See 10 U.S.C. §§ 371–382.

146 See *id.* at § 371.

147 See *id.* at § 374(b)(2)(B).

148 See *id.* at § 374(b)(2)(F)(i), § 374(c).

149 See *id.* at § 375.

150 See *id.* at §§ 374–375.

151 See *id.* at § 374(b)(1)(C), § 382.

152 See *supra* notes 41–43, 83–86 and accompanying text.

“searches and seizures.”¹⁵³ Concerns regarding surveillance and invasion-of-privacy are also present, aggravated by the Act’s directive to share military intelligence with civilian law enforcement agencies.¹⁵⁴ “Militarization” of civilian law enforcement is aggravated by military-provided experts, equipment, and equipment operators.¹⁵⁵

The “power of the purse” is the most effective check on abuse within this Act; other law enforcement agencies must pay costs for military use unless the participation is in pursuit of federal aims.¹⁵⁶ This can be a powerful deterrent given the high costs of military equipment, but it can also lead to pretextual interventions under weak (or manufactured) evidence supporting a federal role.¹⁵⁷ Another check on abuse is the requirement that military combat readiness cannot be reduced by law enforcement missions.¹⁵⁸ While presumably preventing the Secretary of Defense from turning the million-plus members of the armed services into national police, the scope of this restriction remains ill-defined.¹⁵⁹

This law-enforcement-assistance mission presents vexing problems to military leaders attempting to adhere to planning doctrine. The dual requirements to avoid direct participation and maintain combat readiness severely constrain military options, and they inhibit defining decisive and attainable objectives.¹⁶⁰ Routine military participation in law enforcement invites excessive use of force or military searches and surveillance; these undermine the objective principle’s legitimacy component.¹⁶¹ The readiness constraint disrupts the ability to achieve mass, as every unit detailed to law enforcement is unavailable for combat missions.¹⁶² Simplicity is compromised by these confusing, contradictory, and misaligned requirements. Contradictory instructions from military and law enforcement leaders can

153 See *supra* notes 29–31 and accompanying text (describing when these prohibitions were not obeyed).

154 See *id.*; 10 U.S.C. § 371.

155 See *supra* Part I.B.3.

156 See 10 U.S.C. § 377.

157 See Kopel & Blackman, *supra* note 38, at 624–27 (discussing alleged drug pretext in the Waco raid).

158 See 10 U.S.C. § 376.

159 No metric for “readiness” is specified in the statute. See *id.*

160 See *supra* notes 148, 158. In regards to the multi-billion dollar drug problem, any decisive and attainable military role would almost certainly reduce readiness and require direct participation.

161 See *supra* Part I.B.1.

162 See COYNE REPORT, *supra* note 83, at 43 (reporting that from a Marine Division numbering over 10,000, only thirty-two Marines participated in the border surveillance mission).

easily frustrate Unity of Command.¹⁶³ Unity of Effort is similarly compromised by the partial participation allowed by military members.¹⁶⁴ In light of these difficulties, the comparable lack of effectiveness and tragic history of the MCCLE mission is not surprising.

The sum effect of these laws is as follows: the PCA essentially prohibits all military law enforcement without a clear Congressional mandate. It exerts a strong background presence because of vague contours and its interpretation by political and military leaders.

The Insurrection Act is well-tailored to state or criminal defiance of laws but has uncertain provisions to address other calamities impacting civil law enforcement. Part-time state military forces can have difficulty countering these situations alone.

Laws governing MCCLE help combat hybrid national security and criminal threats and prevent fiscal waste from redundant capabilities. These benefits come at the cost of excessive use of force, reduced military readiness or ineffective missions, and militarization of civil law enforcement agencies.

IV. WEIGHING THE ALTERNATIVES: PROPOSED CHANGES TO FEDERAL LAW

A. “Loosing The Dogs” — A Political-Safeguards Only Model

Commentators chafing at the PCA’s restrictions often argue for a substantial narrowing of its interpretation.¹⁶⁵ Alternatively, proponents of the MCCLE laws argue that Congress must lift the restrictions regarding search and seizure to achieve the desired ends.¹⁶⁶ Frustration regarding artificial limitations on military options is the driving force behind these views, and the core idea is that mission success can only result from full application of military muscle.

From a military doctrine standpoint, this notion has great appeal. A repeal of the PCA would eliminate the time consuming process of parsing military versus law-enforcement missions.¹⁶⁷ This freedom would allow the President the full spectrum of military capability to implement the most defined, decisive, and attainable objectives. The freedom also helps to achieve mass by permitting use of any force quantity deemed appropriate. Simplicity is enhanced as orders avoid

163 Military participation as “equipment operators” and “experts” necessarily implicates that they will not direct the operations they participate in. *See supra* note 150. Thus, military equipment is directed by persons less trained in their use.

164 *See id.*

165 *See generally* Dougherty, *supra* note 5 (arguing that the PCA is unnecessary).

166 *See* Miller, *supra* note 11 and accompanying text.

167 *See supra* notes 104–108 and accompanying text.

awkward restrictions that prohibit necessary law enforcement tasks. Further, having all authority flow downward from the President exemplifies classic unity of command.¹⁶⁸ The PCA's repeal would also alleviate absurd results—federal forces would enjoy the same freedom of action during employment as state National Guard forces.

However, the desire for efficient military operations cannot trump our fundamental principles of government. Repeal of the PCA or otherwise expanding military power in this realm may inadvertently create a more efficient instrument of tyranny. The blurred lines between national security threats and domestic criminal activity may be used to justify greater, unwanted involvement of the military in domestic law enforcement.¹⁶⁹ The dangers of unnecessary lethal force and chilled civil liberties remain unresolved. Additional training of military personnel for law enforcement roles may be unsuccessful, or the additional missions may detract too heavily from wartime readiness.¹⁷⁰ Perhaps the most ominous risk is the potential for blurred lines of accountability between states and the federal government for law enforcement. State officials might ask the federal government to undertake politically unpopular military interventions in their home state or use military forces to send a political message.

Indeed, the adoption and subsequent repeal of Insurrection Act amendments demonstrate a lack of broad-based political support for measures of this type. In 2007, Congress passed the “Warner Amendments” to the Insurrection Act that dramatically increased the scope of the President’s authority.¹⁷¹ The revised statute contained provisions authorizing interventions for insurrection, natural disaster, public health emergencies, and “any other condition” that would serve to deprive a class of persons the equal protections of the law.¹⁷² Notably, the amendments included no provision for state consent.¹⁷³ This may be unsurprising given the lack of state-federal cooperation exhibited during the Hurricane Katrina relief effort. Nevertheless, concerns over this dramatic expansion of Presidential authority caused repeal of the revised statute only a year later.¹⁷⁴ The clear implication is pub-

168 See *supra* note 47 and accompanying text.

169 See *supra* Part I.B.2.

170 Blending the two has proven to be difficult to balance. See *Marine to Be Charged*, *supra* note 86.

171 See Greenberger, *supra* note 125, at 414–15 (discussing the 2007 Warner Amendments to the Insurrection Act).

172 See *id.* at n.132.

173 See *id.* at 415–16.

174 See SAUSVILLE, *supra* note 121, at 21–22.

lic discomfort with the notion of political pressures as the sole safeguard inhibiting military use-of-force on the homefront.

B. *Federal Procedural Safeguards*

Another commentator proposed a model that involved judicial-procedural safeguards to permit case-by-case expansion of federal authority in situations where state governments are unable to protect citizens' health, safety, and welfare.¹⁷⁵ Based on the Foreign Intelligence Surveillance Act ("FISA") court structure and operation, the model would involve "on-call" judges that the President would petition through the Attorney General for a "warrant" authorizing military law-enforcement powers after making out a *prima facie* case that primary state law enforcement in the affected area has failed.¹⁷⁶ The idea is animated by a view of state authority as an obstacle to military intervention, and specifically highlights Louisiana Governor Kathleen Blanco's insistence on state control over the Hurricane Katrina response and the resulting delays in federal intervention.¹⁷⁷

In terms of protecting civil liberties, the model has appeal. Court approved warrants are a long-standing safeguard against government excess.¹⁷⁸ Additionally, the Courts are more isolated from fluctuating political winds, and are theoretically more likely to preserve civil liberties even in the passions of the moment.¹⁷⁹ Delays from the process may be mitigated by the traditional Presidential authority under the Insurrection Act and Stafford Acts to uphold federal laws and deliver humanitarian relief.¹⁸⁰ The model specifies such a "warrant" would only apply to enhanced authority for "general" law enforcement.¹⁸¹ This concept might also provide a valuable safeguard against abuses under MCCLE laws in routine, day-to-day matters that lend greater risk to civil liberty infringement.

175 See McGrane, *supra* note 8, at 1332–39 (2006) (discussing a proposed PCA Court to generate "warrants" for federal law enforcement in states that cannot enforce their own laws).

176 See *id.* at 1335.

177 See *id.* at 1326–32.

178 See U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

179 Federal judges enjoy life tenure and may only be removed from office for cause. See U.S. CONST. art. III ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior.").

180 See McGrane, *supra* note 8, at 1335–36 (discussing presidential options to unilaterally invoke the Insurrection Act or seek a "PCA Court" warrant).

181 *Id.*

The proposed system, however, is constitutionally questionable and does not provide clear, coherent criteria to military planners. Whereas the FISA courts' jurisdiction extends over requests for surveillance of individuals suspected of foreign intelligence gathering, the proposed PCA court would control details of a military operation involving thousands of soldiers and an even greater numbers of civilians.¹⁸² There is substantial question if such authority is within the scope of the "judicial power" vested in the judiciary by the Constitution.¹⁸³ Some federal judges balked at the requirements to evaluate scientific testimony outside of their traditional expertise, and one can imagine similar discomfort in determining if a state can still provide equal protection in the contradictory, fast-paced, and confused reporting typical of a widespread emergency.¹⁸⁴ Further, PCA-Court and Presidential disagreement might result in decision-making breakdowns similar to those between President Bush and Governor Blanco during the Katrina response, with the Court enjoying insulation from election-based pressures.¹⁸⁵

Military planners would likely share the frustration of political leaders. Judicial restrictions might include limitations on the number of troops used, how they could be used, or the acceptable duration of a mission. This could seriously interfere with military determination of decisive, clearly defined objectives and attainment of sufficient "mass."¹⁸⁶ Military leaders would have to scrutinize military missions according to the judicial warrant's criteria, which are a moving-target compared to the static terms of the PCA. Therefore, case-by-case standards might create even more uncertainty than the vague PCA contours. These factors would seriously complicate achieving doctrinal simplicity. Worse, military commanders would answer to two bosses in a fractured, non-unified command structure—the President and the PCA judge.

Exchanging statutorily-imposed frustrations for judicially-imposed frustrations seems ill-suited to creating a workable system for

182 See *id.* at 1333–34 (explaining the history of the FISA Courts).

183 See U.S. CONST. art. III. But see McGrane, *supra* note 8, at 1334 (highlighting how the FISA Courts have survived other constitutional challenges).

184 See *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1315–16 (9th Cir. 1995) (discussing circuit judge discomfort with requirements to evaluate complex testimony outside their area of expertise).

185 Sean McGrane's model posits that the President may unilaterally invoke the PCA even without a warrant. Though true, the political pressures involved with overruling both a state governor and a federal judge are immense. See McGrane, *supra* note 8, at 1335–36.

186 The Constitution may even *require* such limitations on issued warrants.

balancing the civil-liberty, emergency response capability, and doctrinal triad. State-federal controls can enable rather than hinder the balance of these goals.

V. STATE FOCUSED CONTROL AND FEDERAL MCCLE LIMITATION

A. *State-Focused Enhancement of the Insurrection Act*

The problematic portion of the repealed Warner Amendments was not their criteria for domestic military intervention, but rather the excessive consolidation of power at the President's sole discretion. Those same criteria might serve as a guidepost for enhanced authority in the first section of the Insurrection Act, specifically those based upon state request or consent.¹⁸⁷ As such, the criteria of "insurrection, domestic violence, natural disaster or other condition" may allow military intervention *with consent of the state executive* to perform operations under that state's general sovereign powers. Constitutional justification for such a modification may be found in either the Commerce Clause or the Equal Protection Clause of the Fourteenth Amendment.¹⁸⁸

Presumably, the dueling political safeguards would serve to balance civil-liberty and military-capability concerns. Presidential discretion would serve to prevent frivolous federal military use, but would permit military intervention outside of state jurisdiction or in emergency situations. State executive discretion would serve to prevent federal intrusion, preserve civil liberties, and prevent abusive surveillance, searches, and seizures. This consent-based model does not rely on preordained statutory criteria or judicial determinations, but rather the considered judgment of the executives answerable to the electorate. The recent response to Hurricane Irene served as a test case of the principle, using "dual-status" commanders to facilitate merging National Guard and active duty forces under one responsible commander.¹⁸⁹

187 See 10 U.S.C. § 331 (2006).

188 It is difficult to imagine a widespread catastrophe not disrupting equal protection of constitutional rights, or not substantially affecting interstate commerce. The Insurrection Act already incorporates the Equal Protection clause. See 10 U.S.C. § 332; see also Greenberger, *supra* note 125, at 418–20 (discussing Commerce Clause justification for the Warner Amendments).

189 See Staff Sgt. Jim Greenhill, *New Capabilities Enhance Guard Response to Hurricane Irene*, U.S. ARMY (Aug. 29, 2011), www.army.mil/article/64452 (describing the multi-state National Guard response to Hurricane Irene and the use of dual-status commanders). Their roles in this circumstance were limited to relief efforts, but the same model might support law enforcement roles as well. *Id.*

The possibility of collusion between a President and a Governor to effect undesirable military operations demands a separate safeguard. Congressional power of the purse may also serve as a check on collusion between the President and state executives. Congress would retain the ability to restrain improper or reckless military usage if such operations were funded only by specific appropriations for the purpose.¹⁹⁰ In effect, the purse-strings form a tangible factor requiring that the military objectives be legitimate.

From an operational standpoint, two options exist for employment: federal forces may operate under a federal chain-of-command with consent of the state, or federal forces may operate under the command of the state executive with Presidential consent. The interoperable¹⁹¹ nature of the military formations allows for state command of federal force. Indeed, in recent foreign combat missions National Guard headquarters commanded active duty units successfully.¹⁹² A state executive may desire federal command if a situation degraded the state's ability to assess and respond properly, or she may desire a state-controlled response in which command is not a problem but where force quantity or response time is at issue.¹⁹³

In this model, federal forces act to directly support state authorities with their consent, much as the California National Guard directly assisted Los Angeles police in 1992.¹⁹⁴ The overall responsibility for carrying out police powers remains with the state, as the military participation depends on their consent. The President may choose to assist using this expanded authority, to assist using only traditional powers, or to not assist at all.

From a military perspective, planning is greatly simplified. "Defined, decisive, and attainable"¹⁹⁵ objectives may be determined solely by their effectiveness and constitutionality. Mass is enhanced, as

190 In this concept, Congress authorizes a set, small amount of funds for domestic military operations. As operations consume the budget, the Congress must ratify the President's action by providing additional funding or may simply allow the funding to lapse.

191 As illustrated in Part II.A.2, the National Guard and the active duty military share identical command structures, equipment, and training. As such, either element may successfully command the other.

192 See Lt. Col. Robert Preiss, *Texas National Guard Division Takes Charge in Iraq*, ARMY NATIONAL GUARD (Jan. 7, 2011), <http://www.arng.army.mil/News/Pages/TexasNationalGuardDivisionTakesChargeinIraq.aspx>.

193 Widespread emergencies might adversely affect a Governor's command of state forces. See Scott Shane & Thom Shanker, *When Storm Hit, National Guard Was Deluged Too*, N.Y. TIMES, Sept. 28, 2005, at A1.

194 See *supra* notes 104–109 and accompanying text.

195 See *supra* note 78 and accompanying text.

state officials are not limited to part-time National Guard forces that may take too long to assemble.¹⁹⁶ Simplicity is easier to achieve, as proposed actions require only presidential and state consent, rather than burdensome procedural safeguards far from the flow of information. Further enhancing simplicity, law enforcement functions taken with state consent would meet the “congressional exception” under the PCA and would reduce the need to analyze missions case-by-case for statutory compliance.¹⁹⁷ Establishing a unified chain-of-command, either federal or state, furthers unity of effort and enables the other principles to flourish.¹⁹⁸

This model has drawbacks. Presidential and state discord was a primary factor in the delays and frustrations of the federal military intervention after Hurricane Katrina.¹⁹⁹ Such dissent might affect any safeguard mechanism involving people, but at minimum this model preserves military authority in its proper spheres. Dissent may not be the only danger. Overeager partnership may invite threats to civil rights in routine situations that do not warrant military intervention. Though a congressional funding provision may provide an ultimate check, military forces might cause catastrophic damage if used improperly. As with any model, this one involves compromise to achieve a proper balance.

B. *Federal Limitation of MCCLE*

The above revisions to the Insurrection Act may add needed capability to respond rapidly to a narrow class of rare, emergency situations that justify the risks of using military units as law enforcement. It does not address, however, the policy concerns of a sustained military presence, domestic military surveillance, or the “militarization” of civilian law enforcement in counter-drug operations.²⁰⁰ These concerns are more properly addressed in the context of modifying the MCCLE laws.²⁰¹ This Note’s central premise in this regard is not sophisticated—as a routine matter, limit military law enforcement to rare, emergency situations that justify the attendant risks. This can be accomplished by repealing Title 10 provisions that allow loans of personnel and equipment and those that authorize joint military and law

196 See *supra* Part I.B.2.

197 See *supra* part I.B.3.

198 See *supra* part I.B.4.

199 See *supra* note 98 and accompanying text.

200 See *supra* Part I.A.2–3.

201 These laws specifically charter the military’s counter-drug role. See *supra* note 144 and accompanying discussion.

enforcement training. Routinely blending the roles, experience has shown, leads to unacceptable violations of civil rights while detracting from military readiness.²⁰² To facilitate rare circumstances where military assistance is desired, procedural safeguards such as a “PCA Court”, or an equivalent state institution for National Guard forces, may be an appropriate governing mechanism.

CONCLUSION

Military interventions are rarely surgical, and there remains significant tension between civil rights concerns, societal necessity, and military needs in the domestic realm. The current mix of laws governing domestic military use is over- and under-inclusive. The combination of the PCA and the Insurrection Act shackle military options in emergency situations and can force reliance on part-time forces ill-suited to rapid response. In contrast, the MCCLE laws prompt routine participation in law enforcement actions that invite abuse, erode liberties, and make little progress toward achieving their missions.

The changes needed to address these deficiencies are not complex. Congress should ordain broader criteria that allow emergency intervention with state consent. MCCLE laws should be curtailed to allow only information sharing and operations outside state jurisdiction, and the practice of loaning military equipment and personnel to law enforcement agencies should end. This series of measures involves compromise but will result in a better balance of social policies and allow military planners to accomplish their missions. More importantly, it will assist in protecting the United States in times of emergency without compromising our fundamental principles.

202 *See supra* Part III.C.

