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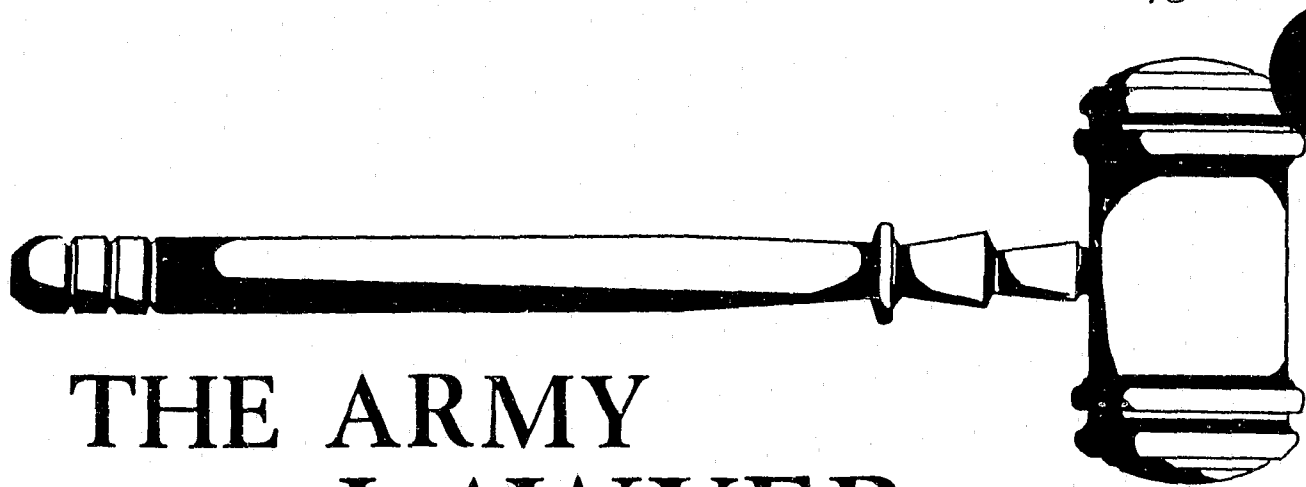
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The Posse Comitatus Act, the Military, and Drug Interdiction: Just How Far Can We Go?

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Introduction

As the Reagan "Revolution" began in 1980, the United States found itself besieged by the ever-increasing problem of drug abuse. Congress viewed the drug problem as a threat to American society,¹ and the President saw the drug problem as a threat to national security.² In time, President Reagan would characterize the fight to eradicate drug abuse as the "war on drugs."³ The Reagan Administration's war plan involved a two-prong attack: 1) reducing domestic demand for illegal drugs through an education and prevention program, and 2) reducing the supply of illegal drugs through interdiction.⁴

The drug interdiction mission faced by federal, state, and local law enforcement personnel was enormous and one for which they were ill prepared. International drug traffickers prevailed when they engaged civilian law enforcement officials in the war on drugs. During the early 1980's, law enforcement officials estimated that they were able to interdict only about fifteen percent of the illegal drugs that traffickers were smuggling into the United States.⁵ Accordingly, to increase the volume of illegal drugs interdicted and to get the upper hand in the war on drugs, the Reagan Administration decided to use

the resources and capabilities available in the military to combat drug smuggling.⁶

Congress was willing to increase the military's role in the drug war but it acted cautiously. Congress indicated that "[i]n fighting this battle, it is important to maximize the degree of cooperation between the military and civilian law enforcement. At the same time, we must recognize the need to maintain the traditional balance of authority between civilians and the military."⁷ Historically, Americans have abhorred military involvement in civilian affairs and have maintained a strong tradition against military intrusion in purely civilian matters.⁸

Thus, Congress faced the "American dilemma" of trying to reconcile immediate needs with traditional values.⁹ That is, how could the Federal Government resolve the immediate American problem of drug abuse by increasing the military's role in drug interdiction—a role that clearly is a civilian law enforcement responsibility—without compromising the long-standing American tradition of excluding the military from civilian affairs? To extricate itself from this dilemma, Congress simply could have justified its use of the military as a temporary retreat from our long-standing tradition in the face of a national crisis.¹⁰ The dilemma, however, persisted.

¹H.R. Rep. No. 71, Part II, 97th Cong., 1st Sess. 1, 3 (1981), reprinted in 1981 U.S. Code Cong. & Admin. News 1781, 1785 [hereinafter H.R. Report No. 71].

²Note, *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?*, 70 Geo. L.J. 1947 n.5 (1987) ("In April 1986, President Reagan signed a classified National Security Decision Directive (NSDD) on Narcotics and National Security ... [which] stated that international drug trafficking presented a national security threat because of its potential for destabilizing democratic government"). In 1985, Admiral James D. Watkins, then Chief of Naval Operations, suggested the drug trade was helping to finance leftist insurgencies in the hemisphere, making the trade a national security problem. *War on Drugs: A New Recruit*, Washington Post, June 21, 1985, at A22.

³*Portrait of the 1980's: Selections From 10 Years of History*, N.Y. Times, December 24, 1989, at 2, col. 1.

⁴See Note, *supra* note 2, at 1947 n.5.

⁵See H.R. Report No. 71, *supra* note 1, at 3.

⁶The term "military" as used in this paper refers to the Army, Navy, Air Force, and Marine Corps.

⁷H.R. Report No. 71, *supra* note 1, at 3.

⁸Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L. Rev. 83, 86 (1975) (American opposition to military involvement in civilian affairs traces back to colonial times, and "the Declaration of Independence specifically enumerated the colonists' objections to military interference with their lives."); see also *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

⁹The author uses the phrase "American dilemma" in this paper to denote the conflict faced by the United States in its war on drugs. On the one hand, the military offers the potential to make a certain impact in the war on drugs. On the other hand, however, a tradition of civilian and military separation restrains an extensive use of the military in the drug war.

¹⁰Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 Mil. L. Rev. 85, 129 (1960) (Congress could have viewed the national drug problem as a "desperate situation when necessity requires" the use of troops); although civilian law enforcement efforts largely have been ineffective in stemming the tide of illegal drugs flowing into this country, some analysts still view the use of the military in drug interdiction as a real threat to the tradition of civilian and military separation. See Note, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 Geo. Wash. L. Rev. 404, 405 (1966); Note, *supra* note 2, at 1947.

The war on drugs survived the Reagan Revolution and is now a major concern of the Bush Administration.¹¹ From 1980 to 1990, the military's drug interdiction role steadily increased, and it probably will expand significantly during the decade of the nineties.¹² This expectation derives from three recent events: 1) a Department of Justice Office of Legal Counsel opinion that the Posse Comitatus Act¹³ (PCA) does not have extraterritorial application;¹⁴ 2) President Bush's January 25, 1990, announcement that defense spending on the war on drugs would increase to \$1.2 billion in fiscal year 1991;¹⁵ and 3) the Supreme Court's February 28, 1990, decision in *United States v. Verdugo-Urquidez*,¹⁶ that the fourth amendment does not apply when agents of the United States search and seize property located in a foreign country and owned by a nonresident alien.

Taken together, these three events portend a vastly expanded drug interdiction role for the military. This article will examine that role by specifically addressing the issue of how far the military can go in enforcing drug laws. An analysis of the military's ability to enforce civilian laws must begin with an examination of the primary limitation Congress has placed on the military with respect to civilian law enforcement—the PCA and its amendments.¹⁷

The second part of this article will examine these statutory limitations to determine their effect on military drug interdiction. Because the PCA's prohibition of the military's direct participation in purely *domestic* drug law enforcement—that is, making arrests, conducting

searches, and seizing property—is well settled,¹⁸ the third part of this article will examine only the *extraterritorial* effect of the Posse Comitatus Act by reviewing judicial and administrative interpretations of the PCA. The fourth part of this article will focus on the current and future uses of the military in drug enforcement by addressing the future use of the military in drug interdiction and by examining how the PCA will affect that use.

The article concludes by asserting that the PCA does not restrict the military's direct participation in civilian law enforcement outside of United States territory. Specifically, military operations to apprehend indicted drug smugglers are legal under United States law. Regular military drug interdiction operations, however, could create foreign relations problems. For example, the recent abduction and apprehension of a Mexican doctor for his alleged involvement in the torture and murder of a United States drug enforcement agent has strained relations between the United States and Mexico.¹⁹ Consequently, although the military's extraterritorial involvement in drug law enforcement is legal, the United States must exercise care as it employs its armed forces to fight the war on drugs.

The Posse Comitatus Act

Origins of the Act

Traditionally, Americans have strongly resisted military involvement in civilian affairs.²⁰ Congress based the PCA on this long-standing American tradition and enacted the PCA specifically to limit the ability of the military to enforce civilian laws.²¹ The Latin term *posse*

¹¹ President Bush called narcotics abuse "the nation's number one concern." *President Unveils New Drug Efforts*, N.Y. Times, Jan. 26, 1990, at 16, col. 3 [hereinafter *New Drug Efforts*].

¹² Although the military's role in drug interdiction began to expand in 1980, the Department of Defense (DOD) did not allocate any Fiscal Year (FY) 1981 funds to support the interdiction mission. In FY 1982, Congress authorized only \$4.9 million, but by FY 1987 the amount authorized had increased to nearly \$72.5 million. See Note, *supra* note 2, at 1947 n.4.

¹³ 10 U.S.C. § 1385 (1982).

¹⁴ Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, Department of Justice, to General Brent Scowcroft, Assistant to the President for National Security Affairs, National Security Council (Nov. 3, 1989) [hereinafter OLC Memo]. This memorandum concerns the application of the PCA outside the territory of the United States. Mr. Barr interprets the PCA and its amendments as not applying to military-civilian law enforcement activities outside the United States. See *id.*

¹⁵ See *New Drug Efforts*, *supra* note 11. The President's program proposes to devote a total of \$10.6 billion to the FY 1991 antidrug effort. The administration will set aside \$1.2 billion of the \$10.6 billion for military use in drug interdiction. *Id.*

¹⁶ 110 S. Ct. 1056 (1990).

¹⁷ 10 U.S.C. § 371-80 (1982). Throughout this article, all citations to the PCA or its amendments refer to the 1982 edition of the United States Code, unless otherwise indicated. Although this article and the United States Code use the word "amendment" to refer to 1981 and 1988 legislation relating to the PCA, the legislation actually did not amend the PCA. Rather, the legislation specified exceptions to the PCA and codified existing practice.

¹⁸ See generally, Furman, *supra* note 10, at 107-26; Note, *A Proposal for Direct Use of the United States Military in Drug Enforcement Operations Abroad*, 23 Tex. Int. L.J. 291 n.48; Meeks, *supra* note 8, at 110-24; DAJA-AL 1972/4991, 18 Oct 1972 (opinion prepared for use in responding to the Chief of Police of Macon, Georgia, who was seeking to have military assistance available to him on an as-required basis). But see *Pentagon to Add Forces to Drug War*, USA TODAY, March 9, 1990, at 1A, col. 1 (reporting that Pentagon will announce plans on March 9, 1990, to add warships and aircraft to its Caribbean forces as part of President Bush's drug plan). The Pentagon plan included making Reserve military personnel available to help federal agents search thousands of cargo containers unloaded from ships sailing into United States ports. *Id.*

¹⁹ *On Language: Keep Your Shirt On*, N.Y. Times, May 13, 1990, at 18, col. 1.

²⁰ Laird, 408 U.S. at 15.

²¹ No specific constitutional provision either permits or prohibits the military from enforcing civilian laws. Several constitutional provisions, however, demonstrate the desire of the framers to control tightly a standing army. For instance, Congress has authority to raise and support armies, to declare war, and to make rules for the government and regulation of the land and naval forces. See U.S. Const. art. I, § 8. Additionally, the Constitution designates the President as Commander in Chief of the military. See *id.* art. 2, § 2; Note, *supra* note 2, at 1951.

*comitatus*²² has its roots in the ancient Roman practice of *comitatus*,²³ which permitted government officials to have attendants who accompanied and protected them during their travels.²⁴ In medieval England the sheriff had the authority to call upon all males in the country over the age of fifteen to assist him in keeping the peace and capturing fugitives.²⁵ This civilian force became known as a *posse comitatus*,²⁶ and was the forerunner of the American sheriff's posse.²⁷

Under authority implied from section 27 of the Judiciary Act of 1789,²⁸ United States marshals began to call upon the military as a *posse comitatus*.²⁹ The practice of using the military as a *posse comitatus* continued until after the Civil War, when the Federal Government often used the Army to execute Reconstruction era policies, to enforce the laws enacted by carpetbagger governments, and to influence the outcome of reconstruction elections.³⁰

The southern states saw this practice of using soldiers to enforce civilian laws as abusive and repressive. The death knell sounded for the practice in the presidential election of 1876, when President Grant ordered soldiers to the polls to guard canvassers and to prevent fraud.³¹ After that election, southern Democrats introduced the forerunner of the PCA as a rider to the Army appropriations bill.³² After a great deal of debate and several changes, a joint conference committee developed a compromise version of the bill, which the President signed into law on June 18, 1878.³³

The current language of the PCA prohibits the use of "any part of the Army or Air Force as a *posse comitatus* or otherwise to execute the laws" unless expressly

authorized by the Constitution or act of Congress.³⁴ Although the PCA does not proscribe expressly the use of the Navy and Marine Corps to enforce civilian laws, the Department of Defense has interpreted the PCA to apply to those branches of the armed forces as a matter of policy.³⁵

Exceptions to the PCA

As the language of the PCA indicates, exceptions to the prohibition against using the military to enforce civilian laws may arise. Two constitutional exceptions exist; both derive from the inherent right of the United States government—through the President—to preserve public order and to carry out government operations.³⁶ For example, in an emergency situation the President can use the military to prevent loss of life, to prevent wanton destruction of property, and to restore governmental functions and public order.³⁷ The President also may use the military "to protect Federal property and Federal governmental operations when ... local authorities are unable or decline to provide adequate protection."³⁸

In addition to these constitutionally-based exceptions, Congress enacted three statutory exceptions to the PCA that supplement the President's constitutional authority.³⁹ The President may use the military 1) to suppress insurrections when requested by the governor or legislature of a state;⁴⁰ 2) to suppress rebellions and enforce federal laws when unlawful obstructions, assemblages, or rebellions impair judicial enforcement of law;⁴¹ and 3) to suppress domestic violence or conspiracy when it deprives citizens of constitutional rights and the state cannot or will not protect those rights.⁴²

²²Literally, "posse comitatus" means "the power or force of the county." Black's Law Dictionary 1046 (5th ed. 1979).

²³See Note, *supra* note 10, at 406.

²⁴See Furman, *supra* note 10, at 87; Note, *supra* note 18, at 293.

²⁵See Furman, *supra* note 10, at 87; Note, *supra* note 18, at 293.

²⁶See Note, *supra* note 10, at 406.

²⁷See Note, *Don't Call Out the Marines: An Assessment of the Posse Comitatus Act*, 13 Tex. Tech. L. Rev. 1467, 1469 (1982).

²⁸Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73.

²⁹See Furman, *supra* note 10, at 87.

³⁰See Note, *supra* note 18, at 294.

³¹See Furman, *supra* note 10, at 94.

³²7 Cong. Rec. 2119 (1877).

³³See Furman, *supra* note 10, at 96.

³⁴18 U.S.C. § 1385 (1982). As codified, a violation of the PCA is a felony punishable by a \$10,000 fine and two years imprisonment, or both. *Id.*

³⁵*United States v. Walden*, 490 F.2d 372, 374-75 (4th Cir.), cert. denied, 416 U.S. 983 (1974); 32 C.F.R. 213.10(c) (1986) (Secretary of the Navy may make exceptions to policy of Navy and Marine Corps adhering to PCA on case-by-case basis).

³⁶32 C.F.R. § 215.4(c)(1) (1986).

³⁷*Id.* § 215.4(c)(1)(i). The Supreme Court in *In re Neagle*, 135 U.S. 1 (1890), held that the President had the authority to use the military in emergency situations.

³⁸32 C.F.R. § 215.4(c)(1)(ii) (1986).

³⁹Congress has enacted other statutory exceptions to the PCA, but they do not supplement the President's constitutional power directly. Some of these exceptions pertain to the protection of Indian lands, National Parks, and government officials. See Furman, *supra* note 10, at 103.

⁴⁰10 U.S.C. § 331 (1982).

⁴¹*Id.* § 332.

⁴²*Id.* § 333.

The military may engage in law enforcement while not violating the PCA in other situations as well. For instance, the Uniform Code of Military Justice (UCMJ) requires military commanders to enforce criminal laws. When a commander acts in a military law enforcement capacity by enforcing the UCMJ against a member of his or her unit, the commander's actions often will benefit civilian law enforcement activities. The Judge Advocate General of the Army has opined that a military law enforcement action that provides an incidental benefit to civilian law enforcement does not violate the PCA as long as the "primary purpose of the action is to fulfill a legitimate military requirement."⁴³ Authorities refer to this "primary purpose/incidental benefit" concept as the military purpose doctrine. Although the military purpose doctrine indirectly provides commanders with lawful authority to assist civilian law enforcement officials, the military generally is reluctant to justify its law enforcement role by relying on the doctrine because of the ambiguities surrounding the application of the PCA.⁴⁴

The 1981 Amendments

To cure the reluctance of military commanders to provide assistance under the military purpose doctrine and to set forth "clear legal principles regarding effective cooperation between the military and civilian law enforcement agencies,"⁴⁵ Congress passed the 1981 amendments to the PCA. Specifically, Congress sought "to clarify the military's authority to assist civilian officials in the war on drug smuggling."⁴⁶ The 1981 amendments codified military-civilian cooperation practices that already were permissible and provided authority for the military to cooperate more with civilian law enforcement officials.⁴⁷ The amendments specifically authorized the military to provide civilian law enforcement personnel with intelligence and information,⁴⁸ facilities,⁴⁹ train-

ing and expert advice,⁵⁰ and assistance in operating and maintaining equipment provided.⁵¹

The 1981 amendments to the PCA also addressed specific prohibitions that circumscribed the military's law enforcement powers. For instance, Congress placed further restrictions on the extent of the military's cooperation with civilian law enforcement by prohibiting direct participation in interdiction, search, seizure, arrest, and similar activities unless otherwise authorized by law.⁵² In addition, Congress prohibited the military from providing assistance to civilian law enforcement agencies if the assistance rendered would affect military preparedness adversely.⁵³ The amended PCA also requires the Secretary of Defense to issue regulations that permit a military department to condition its assistance to civilian law enforcement officials upon their reimbursing the Federal Government for the costs incurred by the armed service.⁵⁴

In the final 1981 amendment to the PCA,⁵⁵ Congress sought to ensure that authorities would not construe the prohibitions in the amendments to the PCA as preempting military assistance to civilian law enforcement that other existing laws—including the original PCA—may authorize.⁵⁶ For instance, the restrictions in the 1981 amendments would not preempt the authority available under the military purpose doctrine to loan civilian law enforcement officials certain types of military property. The 1981 amendments to the PCA, therefore, apparently manifested Congress's attempt to confront the "American dilemma"⁵⁷ by balancing two competing interests: 1) promoting the effectiveness of civilian law enforcement agencies by allowing the armed forces to lend them certain military resources; and 2) controlling military involvement in civilian affairs by placing strict and specific prohibitions on certain military law enforcement activities.

⁴³Meeks, *supra* note 8, at 124-25 nn.226-31.

⁴⁴H.R. Report No. 71, *supra* note 1, at 3.

⁴⁵*Id.*

⁴⁶See Note, *supra* note 18, at 295.

⁴⁷See H.R. Report No. 71, *supra* note 1, at 7.

⁴⁸10 U.S.C. § 371 (1982).

⁴⁹*Id.* § 372.

⁵⁰*Id.* § 373.

⁵¹*Id.* § 374(b) (authorizing military personnel to operate equipment only to monitor and to communicate movement of air and sea traffic). If the Secretary of Defense and Attorney General determined that an emergency situation existed, section 374(c) provided limited authority for military personnel to operate military equipment outside the United States, provided: 1) military personnel operated the equipment for use as a base of operations for civilian law enforcement officials or to transport them on law enforcement operations; and 2) military personnel would not use the equipment to interdict or to interrupt the passage of vessels and aircraft. See *id.* § 374(c).

⁵²*Id.* § 375.

⁵³*Id.* § 376.

⁵⁴*Id.* § 377.

⁵⁵*Id.* § 378.

⁵⁶U.S. Dep't of Justice, *Posse Comitatus: A New Law Lifts Ban on Military Participation in Anti-Drug Smuggling Operations*, 9 Drug Enforcement 17, 20 (Summer 1982).

⁵⁷See *supra* note 9 and accompanying text.

DOD Implementation of the 1981 Amendments

To implement the 1981 amendments, the Department of Defense (DOD) promulgated DOD Directive 5525.5.⁵⁸ Prior to 1981, the DOD's interpretation of the PCA allowed it to exempt the Navy and Marines from the strictures of the PCA on a case-by-case basis. DOD based this interpretation on the PCA's text specifically mentioning only the Army and Air Force. Accordingly, DOD's position was that the PCA applied to the Navy and Marine Corps as a matter of DOD policy, but not as a matter of law. In implementing the 1981 amendments, DOD retained its ability to exempt the naval forces from the PCA by including a provision in DOD Directive 5525.5 that authorizes the Secretary of the Navy to exempt the naval forces in appropriate cases.⁵⁹ If the Secretary of the Navy grants an exception under that provision, the Navy or the Marine Corps may engage in direct military assistance to civilian law enforcement authorities.

Even without the Secretary's action, however, the PCA would allow the Navy to provide direct military assistance under these circumstances because the PCA itself specifically does not prohibit the Navy from providing such assistance. Likewise, the nonpreemption provision⁶⁰ of the 1981 amendments prevents the restrictions contained in the amendments from preempting the PCA and restricting the Navy. Even if, *arguendo*, the restrictions in the amendments preempted the PCA, the amendments still would permit direct military assistance if that assistance is otherwise authorized by law. The Navy, therefore, still could justify direct assistance by arguing that because the PCA specifically does not *prohibit* it

from providing direct military assistance, the Navy must be otherwise authorized to provide direct assistance.

In *United States v. Roberts*⁶¹ the Ninth Circuit examined the legality of the Navy's actions when one of its ships intercepted a civilian vessel that was smuggling drugs. The *Roberts* court held that the PCA's prohibitions, by their plain language, applied to the Army and the Air Force, but not to the Navy.⁶² The court viewed the 1981 amendments to the PCA as "similar proscriptions against military involvement" rather than as amendments.⁶³ Accordingly, the Ninth Circuit found that the Navy violated the restrictions contained in the so-called amendments by intercepting the civilian vessel before receiving the required approval from the Secretary of the Navy.

Other courts have held that the PCA's prohibitions apply to all the services,⁶⁴ and some commentators see the DOD reservation of the authority to exempt the Navy and Marines as nothing more than a way to circumvent the strictures of the PCA.⁶⁵

The 1988 Amendments

Seven years after Congress enacted the 1981 amendments, it once again confronted the "American dilemma," but now Congress had seven years of experience from which to draw. Since 1981, when Congress had increased the military's drug interdiction role, the wall that separated the military from civil affairs had not crumbled and the republic's foundation had not cracked. On the contrary, the military was lending a big boost to the drug interdiction effort.⁶⁶ Nevertheless, because drug

⁵⁸ See 32 C.F.R. § 213 (1989) (entitled DOD Cooperation with Civilian Law Enforcement Officials). This directive reiterates that the PCA prohibits the following forms of direct assistance:

- (1) Interdiction of a vessel, vehicle, aircraft or other similar activity,
- (2) A search or seizure,
- (3) An arrest stop or frisk, or similar activity,
- (4) Use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators or interrogators.

Id. § 213.10(a)(3).

⁵⁹ *Id.* § 213.10(c).

⁶⁰ 10 U.S.C. § 378 (1982).

⁶¹ 779 F.2d 565 (9th Cir.), *cert. denied*, 479 U.S. 839 (1986).

⁶² *Id.* at 567.

⁶³ *Id.* at 568.

⁶⁴ *United States v. Chaparro-Almeida*, 679 F.2d 423, 425 (5th Cir. 1982) (the PCA's prohibition "has been extended to all branches of the armed services"), *cert. denied*, 459 U.S. 1356 (3983); *United States v. Walden*, 490 F.2d 372, 375 (4th Cir. 1974) ("consideration of the legislative history of the Act and interpretative opinions reveals a policy applicable to all of the armed services").

⁶⁵ See Note, *supra* note 2, at 3958; Note, *supra* note 10, at 427. One writer points out that DOD could circumvent the PCA by using the Marines instead of the Army, and the Navy's air arm instead of the Air Force, to execute civilian laws. See Note, *supra* note 2, at 3958. While this argument has some appeal, it ignores a political reality and a primary rule of statutory construction. If Congress wanted the PCA to apply specifically to the Navy, it could have manifested that intention legislatively at any time during the 112-year existence of the PCA. Moreover, Congress could have included the Navy and Marines within the PCA when it added the Air Force in 1956. Alternatively, Congress merely could have stated that the PCA applies to the Navy during the 1981 amendment process. In addition, courts that interpret statutes must give ordinary words their ordinary meaning—that is, Army means Army, not Navy.

⁶⁶ House Conf. Rep. No. 300-456, 100th Cong., 2d Sess. 447 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 2574, 2575.

abuse did not wane,⁶⁷ many people felt that the nation needed even more military assistance in drug interdiction.⁶⁸ In response to those sentiments, Congress established an air and sea surveillance mission and designated the DOD as the agency responsible for orchestrating the operations necessary to accomplish that mission.⁶⁹ Congress perceived the mission as "a major new military requirement" that would enhance the nation's drug interdiction efforts substantially. The 1988 amendments, which effectively constituted a reenactment of the 1981 amendments,⁷⁰ revised the law governing military assistance to civilian law enforcement officials.⁷¹

With these amendments, Congress once again expanded the military's role in drug law enforcement and attempted to grapple with the "American dilemma." Significantly, although Congress apparently remained strongly opposed to military involvement in domestic drug law enforcement, its 1988 amendments to the PCA provided the military with expanded authority in areas where the military would be operating outside the United States. Consequently, the extraterritorial application of the PCA has become a substantial area of concern to everyone involved in the war on drugs.

Extraterritorial Effect of the Posse Comitatus Act Judicial Interpretation

In 1979 one commentator wrote that the case law concerning the extraterritorial application of the PCA was

sparse and inconclusive.⁷² That statement remains true eleven years later.

The first significant case concerning extraterritorial application of the PCA was *Chandler v. United States*.⁷³ In *Chandler* United States Army personnel arrested an American citizen in Germany shortly after World War II. The government charged Chandler with treason against the United States for making anti-American radio broadcasts from Germany during the war. The military returned Chandler to the United States, where they turned him over to civilian authorities who tried and convicted him of treason. On appeal, Chandler argued that Army personnel had arrested him in violation of the PCA. The court rejected his claim, however, and stated "it would be unwarranted to assume that such a statute was intended to be applicable to occupied enemy territory, where the military power is in control and Congress has not set up a civil regime."⁷⁴ The court also indicated in dicta that the PCA was "the type of criminal statute ... presumed to have no extraterritorial application in the absence of statutory language indicating ... [extraterritorial] intent."⁷⁵

Two years after the *Chandler* decision, the District of Columbia Circuit faced similar issues in *Gillars v. United States*.⁷⁶ Like *Chandler*, a federal court convicted Gillars of treason for making propaganda broadcasts from Nazi Germany during World War II. Gillars objected to her conviction on grounds that the military unlawfully

⁶⁷*Id.* at 2576. "Despite substantial increases in interdiction resources, there has been little or no effect on the drug abuse problem. The cocaine smuggled into the United States doubled for 1983 to 1986—from 40-60 tons to over 130 tons." *Id.*

⁶⁸*Id.* at 2578.

⁶⁹*Id.* at 2576.

⁷⁰10 U.S.C. § 373-80 (1982).

⁷¹The 1988 Amendments revised the 1981 amendments in several ways. Sections 371-73 reaffirmed and broadened the military's authority with respect to providing intelligence, equipment and facilities, and training to civilians. *See* 10 U.S.C. § 371-73 (1988). Congress revised section 374 to allow military personnel to engage in aerial reconnaissance and to intercept vessels and aircraft outside of the United States for purposes of communicating with them and directing them to a location designated by civilian officials. *See id.* § 374(b)(2)(B),(C). Section 374 also deleted the requirement that the Secretary of Defense and Attorney General concur in the existence of emergency circumstances. Accordingly, the statute now allows military personnel to operate equipment "in connection with a law enforcement operation outside the United States" if the Secretary of Defense, Attorney General, and Secretary of State jointly approved the operation. *See id.* § 374(b)(2)(E).

Congress deleted from section 375 the prohibition against military personnel directly participating in interdictions, but emphasized that it did not intend this action to authorize military personnel to interrupt the passage of a vessel or aircraft except as otherwise authorized by law. *See id.* § 375. Congress also reenacted section 376, which mandates that military preparedness not suffer because of support to civilian law enforcement, with a minor change. *See id.* § 376. Congress clarified section 377, which pertains to reimbursements for military assistance, by setting forth conditions under which civilian law enforcement agencies must reimburse the branch of the armed forces that has rendered assistance. *See id.* § 377.

Congress also reenacted the provision pertaining to nonpreemption—section 378—by establishing December 1, 1981, as the effective date that preempting laws had to be in existence. *See id.* § 378. Actually, the Department of Justice has pointed out that the reenactment of section 378 "reiterate[s] that no additional restrictions on Executive Branch authority to use the military in enforcement of the laws, beyond those contained in the Posse Comitatus Act, were intended" by Congress. OLC Memo, *supra* note 14, at 24.

Section 379, pertaining to assignment of Coast Guard personnel to Navy vessels, required Coast Guard personnel to be aboard each "surface vessel that transits a drug interdiction area." *See id.* § 379. Congress also revised section 380 to emphasize that DOD had the lead role in advising civilian law enforcement officials of the types of military assistance available. *See id.* § 380.

⁷²Siemer & Effron, *Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act*, 54 St. John's L. Rev. 1, 10 (1979).

⁷³171 F.2d 921 (1st Cir. 1948).

⁷⁴*Id.* at 936.

⁷⁵*Id.*

⁷⁶182 F.2d 962 (D.C. Cir. 1950).

returned her to the United States.⁷⁷ The court followed the *Chandler* rationale and stated "the use of our Army of Occupation in Germany could not be characterized as a posse comitatus since it was the law enforcement agency in Germany at the time of appellant's arrest."⁷⁸ Because the military was not acting as a posse comitatus the court concluded that the PCA was inapplicable to the case and declined to consider its extraterritorial effect.

In *D'Aquino v. United States*,⁷⁹ another World War II treason case, a federal court convicted the defendant for engaging in propaganda broadcasts in the Pacific Theater. Like the defendants in *Chandler* and *Gillars*, D'Aquino raised a jurisdictional issue based on the military's violating the PCA. On appeal, the Ninth Circuit merely relied on *Chandler* and *Gillars* in rejecting D'Aquino's claim.⁸⁰ The court, therefore, did not have to address the issue of whether the PCA had extraterritorial effect.

Twenty years later, however, the Ninth Circuit again confronted a case in which the appellant raised the issue of whether the PCA had extraterritorial effect. In *United States v. Cotten*⁸¹ military personnel apprehended an American civilian in Vietnam and returned him to the United States to face theft and fraud charges. Cotten argued that the military involvement in his return to the United States violated the PCA and, as a result, the court lacked jurisdiction.⁸² The court rejected Cotten's argument and found that even if the military violated the PCA, jurisdiction was still proper⁸³ under the *Ker-Frisbie* doctrine.⁸⁴ The court, however, did not determine whether the military's action violated the PCA, and it once again bypassed the issue of whether the PCA had extraterritorial effect.

Prior to the 1981 amendments, the four cases above represented the only significant judicial efforts at interpreting the extraterritorial effect of the PCA. Not

surprisingly, one authority appropriately has concluded that these cases do not resolve the question of the PCA's extraterritoriality,⁸⁵ noting that 1) the PCA was not applicable in *Chandler*, *Garris*, or *D'Aquino* "because the armed forces at the time lawfully exercised the police authority of an occupying power"; and 2) the *Cotten* court totally avoided the issue of the PCA's extraterritorial effect.⁸⁶ Consequently, the debate over the PCA's application outside United States territory remained unresolved after these cases.

After the 1981 amendments, the courts had additional opportunities to interpret the PCA's extraterritorial effect. *United States v. Roberts* was one of the early post-amendment cases involving the extraterritorial issue.⁸⁷ Because the facts of *Roberts* involved the Navy's interdiction of a ship smuggling drugs outside United States territory in the Pacific Ocean, the extraterritorial issue technically was before the court.⁸⁸ The court once again avoided the larger issue of extraterritoriality, however, and held that the PCA did not by its plain language apply to the Navy.⁸⁹ Accordingly, another opportunity passed without a judicial interpretation of the PCA's extraterritorial coverage in a clear and unambiguous manner. Therefore, an examination of existing *administrative* interpretations of the PCA is essential to an analysis of its extraterritorial application.⁹⁰

Administrative Interpretation by the Military Departments

Prior to the *Chandler* court's holding that the PCA did not apply to the Army of Occupation in postwar Germany, The Judge Advocate General of the Army interpreted the PCA to have worldwide application.⁹¹ Opinions issued after the *Chandler* decision have permitted military personnel overseas to assist stateside civilian law enforcement personnel with "deportations, criminal identification, administration of lie-detector tests, and

⁷⁷*Id.* at 972.

⁷⁸*Id.*

⁷⁹192 F.2d 338 (9th Cir. 1951).

⁸⁰*Id.* at 351.

⁸¹471 F.2d 744 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973).

⁸²*Id.* at 749.

⁸³*Id.* at 747.

⁸⁴*Ker v. Illinois*, 119 U.S. 436 (1886) (state court jurisdiction not lost when authorities forcibly abduct and return defendant to United States); *Frisbie v. Collins*, 342 U.S. 519 (1952) (state court jurisdiction not defeated when defendant forcibly abducted even though authorities may have violated federal kidnapping law). "The *Ker* and *Frisbie* cases establish a powerful rule that forcible abduction neither offends due process nor requires a court to free a suspect seized in violation of international law." Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 Tex. Int'l L.J. 1, 47 (1986).

⁸⁵*Siemer & Efron*, *supra* note 72, at 10.

⁸⁶*Id.*

⁸⁷*See supra* notes 61-63 and accompanying text. Two years before *Roberts*, the court in *United States v. Del Prado-Montero*, 740 F.2d 113 (1st Cir.), *cert. denied*, 469 U.S. 1042 (1984), had an opportunity to rule on the PCA's extraterritorial application, but simply decided that the Navy did not violate the PCA by assisting the Coast Guard in its law enforcement activities. *Id.* at 116.

⁸⁸*Roberts*, 779 F.2d at 566.

⁸⁹*Id.* at 567.

⁹⁰Courts often give due deference to an agency's administrative interpretation of its regulations. *See Siemer & Efron*, *supra* note 72, at 10 n.38.

⁹¹*See Furman*, *supra* note 10, at 107.

interviews of suspects."⁹² In one case, however, the Judge Advocate General of the Air Force gave the PCA extraterritorial application when he opined that Air Force personnel would violate the PCA by serving a state notice of citation on an airman stationed overseas.⁹³ This inconsistent extraterritorial application of the PCA clouds the issue of extraterritorial effect.

Administrative Interpretation by the Department of Justice

The Department of Justice has issued a number of formal opinions interpreting the PCA,⁹⁴ but has yet to issue a formal opinion concerning the extraterritorial effect of the PCA.⁹⁵ The Office of Legal Counsel, however, recently has opined that the PCA has no extraterritorial effect.⁹⁶ It based its conclusion on seven factors: 1) the "strongly domestic orientation" of the PCA's text; 2) an analysis of the PCA's legislative history; 3) the general presumption against extraterritorial application of criminal statutes; 4) the possible infringement on the President's inherent constitutional powers to execute the laws and to conduct foreign policy if the Federal Government applied the PCA extraterritorially; 5) the judicial, administrative, and scholarly interpretations of the PCA's extraterritorial effect; 6) an analysis of the 1981 and 1988 amendments; and 7) an analysis of DOD regulations.

To date, this opinion is the most definitive interpretation of the PCA's extraterritorial application. Until the judiciary provides a more definitive interpretation, the Office of Legal Counsel's opinion will continue to be the only substantial authority for expanded military participation in drug interdiction outside the United States. Even with this authority, however, the problem of defining the permissible scope of military participation in the drug war outside the United States persists.

Current and Future Use of the Military in Drug Enforcement

When Congress amended the PCA in 1981—and first expanded military participation in the war on drugs—the

civilian law enforcement effort became more effective.⁹⁷ With state of the art military equipment available to them, civilian law enforcement officials were now capable of actually waging a war on drugs. The military assistance provided ranged from gathering intelligence on foreign drug trafficking to destroying drug processing labs in foreign jungles and intercepting drug laden ships on the high seas.⁹⁸ Military assistance provided thus far has had a definite impact in the war on drugs; the level of assistance, however, has not been powerful enough to deliver the decisive blow necessary to eliminate drug trafficking. Accordingly, with some analysts calling for even greater military involvement in the war on drugs, government officials still must answer the question: just how far *can* the military go in assisting civilians in the drug war? More specifically, does the PCA permit the Federal Government to increase the level of direct military participation in arrests, searches, and seizures? Are future military operations to apprehend indicted drug smugglers possible and permissible?

As this article discussed earlier,⁹⁹ one of the provisions of the PCA amendments restricts direct military participation in arrests, searches, and seizures.¹⁰⁰ That provision, however, has no extraterritorial effect because it cannot preempt the PCA and the PCA itself has no extraterritorial application. Therefore, because the PCA does not apply outside the United States, the military should be able to engage in police functions outside United States territory.

The Office of Legal Counsel, Department of Justice, also advances the view that the PCA and its amendments, taken together, permit the military to engage in law enforcement functions outside of the United States.¹⁰¹ In the opinion of the Office of the Legal Counsel, military involvement in the drug war "could include direct military participation in law enforcement activities such as the apprehension of persons under indictment who are outside the territorial jurisdiction of the United States, or assistance in interdiction efforts on the high seas."¹⁰² An example of this broad police authority is the recent

⁹²See Siemer & Efron, *supra* note 72, at 12; Furman, *supra* note 10, at 108 n.140 (citing JAGA 1954/140, 10 June 1954 (identification of soldier stationed in Korea); JAGA 1954/6516, 29 July 1954 (administering polygraph to soldier stationed in Europe and accused of violating state law); JAGA 1957/2176, 6 Mar. 1957 (taking statement of soldier stationed in Germany for state police)).

⁹³See Siemer & Efron, *supra* note 72, at 12.

⁹⁴*Id.* at 13 n.45.

⁹⁵*Id.*

⁹⁶See OLC Memo, *supra* note 14, at 27.

⁹⁷See Note, *supra* note 10, at 419.

⁹⁸Note, *supra* note 18, at 308.

⁹⁹See *supra* notes 58-60 and accompanying text.

¹⁰⁰10 U.S.C. § 375 (1988).

¹⁰¹See OLC Memo, *supra* note 14, at 24 ("Since the Posse Comitatus Act does not apply extraterritorially, we conclude that there are no statutory limits on the Executive Branch's authority to employ the military in law enforcement missions outside the territorial jurisdiction of the United States"). *Id.*

¹⁰²*Id.* at 23. A discussion of the international law issues and foreign policy ramifications involved in direct military action are beyond the scope of this paper. See Findlay, *supra* note 84, for a discussion of these issues.

apprehension of General Manuel Noriega during "Operation Just Cause" in Panama.¹⁰³

Although apprehension of General Noriega was not the sole reason for the military operation, the General's apprehension was one of the objectives of the operation.¹⁰⁴ General Noriega, whom a United States grand jury indicted on federal drug charges, sought refuge in the Vatican Embassy in Panama a few days after the operation began. United States soldiers then surrounded the embassy until General Noriega surrendered to military personnel on January 4, 1990.¹⁰⁵ Based on the military's involvement in General Noriega's apprehension, his lawyers foreseeably could argue that the PCA has extraterritorial application and that the military violated the PCA when it apprehended General Noriega.¹⁰⁶ This argument may give the courts yet another opportunity to address directly the issue of the PCA's extraterritorial application.

Based on the *Chandler* line of cases, the Office of the Legal Counsel's opinion, and the other factors discussed in this paper bearing on extraterritorial application of the PCA, courts likely will not hold that the PCA applies outside the United States. Finding no PCA violation, a court probably would then review the apprehension under the *Ker-Frisbie* doctrine,¹⁰⁷ which states that "[a]s long as United States agents avoid using brutal or egregious tactics to apprehend suspects, courts will not inquire into the means of arrest before asserting in personam jurisdiction over abducted terrorists."¹⁰⁸ Given today's drug war environment, a court certainly would not inquire into the means of arrest before asserting in personam jurisdiction over abducted international drug kingpins either.

The recent Supreme Court decision in *United States v. Verdugo-Urguidez* may expand the military drug interdiction role outside the United States further. In *Verdugo-Urguidez* federal narcotics agents suspected that a Mexican citizen residing in Mexico was directing an organization that was smuggling drugs into the United

States. Federal authorities charged the defendant with violating several drug-related offenses, and they obtained a warrant for his arrest. Mexican police officers apprehended the defendant in Mexico and transported him to a United States Border Patrol Station. After the defendant was in custody, a Special Agent with the United States Drug Enforcement Administration coordinated with Mexican officials to search the defendant's Mexican residence.

Officials then made a search of the defendant's residence without obtaining a warrant from a United States court. At trial the defendant predictably moved to suppress evidence seized during the search. The Supreme Court held that the fourth amendment did not apply to the search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country.¹⁰⁹ In rejecting the Court of Appeals' extraterritorial application of the fourth amendment, the Supreme Court stated:

[t]he Court of Appeals' rule would have significant and deleterious consequences for the United States in conducting activities beyond its borders. The rule would apply not only to law enforcement operations abroad, but also to other foreign operations—such as *armed forces action*—which might result in "searches and seizures."¹¹⁰

The Supreme Court's example of the military performing police functions such as searches and seizures is interesting. The language the *Verdugo-Urguidez* Court used may indicate that the Supreme Court does not view the PCA or its amendments as having any effect outside the United States.

The clear implication of the *Verdugo-Urguidez* decision is that military personnel, as agents of the United States, do not need a warrant to search or seize property located outside the United States and owned by an indicted nonresident alien. The Court's closing comment summarizes just how far the military can go in the war on drugs:

¹⁰³*Noriega's Surrender*, N.Y. Times, Jan. 4, 1990, at 12, col. 5. On 20 December 1989, President Bush ordered United States troops to execute "Operation Just Cause," a military operation involving over 20,000 military personnel in Panama. *Id.*

¹⁰⁴*Id.* The stated objectives of Operation Just Cause were to safeguard the lives of American citizens, to help restore democracy in Panama, to protect the integrity of the Panama Canal Treaties, and to bring General Noriega to justice. *See id.*

¹⁰⁵*See Noriega Surrenders to U.S. Authorities*, Wash. Post, Jan. 4, 1990, at A1.

¹⁰⁶Arguably, apprehensions, searches, and seizures in violation of the PCA could result in the suppression of evidence in a criminal trial as "fruit of the poisonous tree." *Cf. Wong Sun v. United States*, 371 U.S. 471 (1963).

¹⁰⁷*See supra* note 84 and accompanying text.

¹⁰⁸Findlay, *supra* note 84, at 51.

¹⁰⁹*Verdugo-Urguidez*, 110 S. Ct. at 1056.

¹¹⁰*Id.* (emphasis added).

Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty or legislation.¹¹¹

Conclusion

Military operations conducted outside of the United States are beyond the reach of the PCA. The President's constitutional powers to conduct foreign policy allow him to use the military to assist civilian enforcement of United States drug laws. Military assistance may range from providing intelligence on drug trafficking to conducting military operations whose objectives are the apprehensions of individuals located outside this country and indicted for, or charged with, drug offenses under United States law. Under the *Ker-Frisbie* doctrine, military apprehension of an international drug smuggler will not defeat jurisdiction, as long as the apprehension was not the product of brutality or egregious conduct.

Furthermore, the *Verdugo-Urguidez* case clearly holds that evidence seized by the military from nonresident aliens outside the United States is beyond the scope of the fourth amendment.

Outside the United States, the military can provide a broad range of support to civilian law enforcement officials in the war on drugs without violating United States law. As the Supreme Court pointed out in *Verdugo-Urguidez*, military support of extraterritorial police activities depends substantially on "the view of the political branches of our Government."¹¹² Accordingly, as a manifestation of domestic policy and politics, military support in the area of enforcing domestic laws outside of the United States may create foreign policy or international law problems.¹¹³ For example, the increased United States military presence along our southwestern border to assist in drug interdiction has caused the Mexican government some concern.¹¹⁴ In addition, when the United States unilaterally proposed positioning naval vessels off the coast of Columbia for surveillance and interdiction purposes, the Columbian government vigorously objected.¹¹⁵ Accordingly, federal officials must consider foreign policy and international law concerns¹¹⁶ as the military's role in the drug war continues its expansion—an expansion that, under the Posse Comitatus Act and its amendments, would most certainly be lawful.

¹¹¹*Id.*

¹¹²*Id.*

¹¹³*Sovereignty Hinders U.S.-Mexican Drug Alliance*, N.Y. Times, Feb. 25, 1990, at 18, col. 1. "The Mexican Government, acting through its embassy in Washington, expressed strong reservations about growing American military activity along the borders." *Id.*

¹¹⁴*Id.*

¹¹⁵*Two U.S. Warships Sailing to Columbia for Drug Patrol*, L.A. Times, Jan. 7, 1990, at 1, col. 5.

¹¹⁶See Findlay, *supra* note 84, at 52.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

Is the Army's Urinalysis Program Constitutional Under the Fourth Amendment in Light of *von Raab* and *Skinner*? The Defense Perspective

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Freedom under law is like the air we breath. People take it for granted and are unaware of it—until they are deprived of it. The clearest way to show what

the rule of law means to us in everyday life is to recall what has happened when there is no rule of law. The dreaded knock on the door in the middle of the night...¹

¹"United States Law Day" address by President Dwight D. Eisenhower (May 1, 1958), *quoted in Time*, May 5, 1958, at 11.