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Defending Against the Military: The Posse Comitatus Act's Exclusionary Rule

Anthony Ghiotto

ARTICLE

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Anthony J. Ghiotto*

* Assistant Professor of Law, Campbell University School of Law. J.D. 2005, Emory University School of Law; B.A. 2001, University of Illinois. I thank Callie Davis, Michelle Dewkett, Derek Dittmar, Santiago Arroba-Rodriguez, and Sarah Sponaugle for their research assistance. I also thank Prof. Shawn Fields for his insight and support and Lt Col Randy Hicks for introducing me to the wealth of caselaw on posse comitatus act violations.

Abstract

On any given day, American military members engage in domestic law enforcement activities. Whether it's patrolling the border, interdicting the flow of illegal drugs, monitoring internet file-sharing sites looking for potential child sex offenders, or representing the United States in federal court to enforce federal immigration laws, there has been a gradual encroachment by the military into civilian law enforcement matters. While these activities are often met with a presidential endorsement or a shrug of the shoulders by the American people, many of them are in fact a violation of federal law. The Posse Comitatus Act, passed by Congress at the end of Reconstruction, expressly prohibits the military from enforcing civilian laws. In practice, though, the Posse Comitatus Act is rarely, if ever, enforced. The judiciary is complicit in the weakening of the Posse Comitatus Act by both limiting what constitutes a violation of the Act and then refusing to apply the exclusionary rule to exclude any unlawfully obtained evidence when a violation does occur.

Nonetheless, as the military increasingly encroaches into American society, the purpose and enforcement of the Posse Comitatus Act via the exclusionary rule needs to be reexamined; otherwise, there may be little legal protection against a gradual erosion into military control. This Article makes a relatively straightforward argument: the Constitution affords each American a right to be free from military control and that the Posse Comitatus Act is an effort by Congress to protect that constitutional right. As a statute designed to safeguard a constitutional right, there must be an effective enforcement mechanism. The most appropriate enforcement mechanism available for violations of the Posse Comitatus Act is the exclusionary rule, which would allow courts to suppress evidence obtained in violation of the Posse Comitatus Act in order to deter similar encroachment in the future.

While seemingly straightforward, this argument is in fact novel. Courts and scholars have long struggled with the applicability of the exclusionary rule to the Posse Comitatus Act. Courts have been hesitant to place the Posse Comitatus Act in its true constitutional context and the growing trend is to apply the exclusionary rule only to the most egregious intentional Fourth and Fifth Amendment violations. This Article contributes to the discussion by grounding the Posse Comitatus Act in its constitutional context. By doing so, it supports the establishment of a Posse Comitatus Act exclusionary rule, built upon procedural due process, which serves to preserve the Posse Comitatus Act as an effective subconstitutional check protecting the right to be free from military control.

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Introduction

On March 10, 2009, Michael McClendon shot and killed his mother in their hometown of Kinston, Alabama.[1] He then travelled to Samson, Alabama, where he shot and killed five additional family members.[2] McClendon then fled in his vehicle, continuing to shoot other motorists and innocent bystanders all while leading police on a twenty-four mile chase throughout rural Alabama.[3] The chase ended in a police shootout and resulted in McClendon committing suicide.[4] In total, McClendon's shooting spree resulted in ten deaths and lasted less than one hour.[5]

Beyond the loss of life, McClendon's killing spree caused concern and havoc in these small rural communities.[6] It also overwhelmed local law enforcement, which was tasked with apprehending McClendon while also providing security and order to the concerned community.[7] Local law enforcement turned to the U.S. Army, located nearby at Fort Rucker, for assistance.[8] The Army, acting with the intent to "be a good Army neighbor and help local civilian authorities facing a difficult, unique tragedy," sent twenty-two military police officers to relieve law enforcement at traffic checkpoints around the multiple crime scene areas.[9]

Although this use of the Army to aid civilian law enforcement appears rather innocuous and was an attempt to be "a good Army neighbor," it was in fact a violation of federal law.[10] The Posse Comitatus Act ("PCA"), codified in 18 U.S.C. § 1385, provides:

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[1] Shaila Dewan & A.G. Sulzberger, *Officials Identify Alabama Gunman*, N.Y. TIMES (Mar. 11, 2009), https://www.nytimes.com/2009/03/12/us/12alabama.html [https://perma.cc/6PJ9-6F4T].
[2] *Id.*
[3] *Id.;* Emily Friedman, *Alabama Shooter Michael McClendon Was 'Quiet'*, ABC NEWS (Mar. 11, 2009), https://abcnews.go.com/US/story?id=7056936&page=1 [https://perma.cc/R3J6-Z2GG].
[4] *Eyewitnesses Describe Alabama Shooting Terror*, TODAY (Mar. 11, 2009), https://www.today.com/news/eyewitnesses-describe-alabama-shooting-terror-1C9015667 [https://perma.cc/S678-27GK].
[5] Jay Reeves, *24 Miles of Terror: Alabama Killer's Massacre Mapped*, NBC WASHINGTON (Mar. 12, 2009, 10:15 PM), https://www.nbcwashington.com/local/24-miles-of-terror-alabama-killers-massacre-mapped/1887755/ [https://perma.cc/9YPB-3DK9].
[6] *Shooter Planned 'To Go Out in Grand Style,' Investigator Says*, CNN (Mar. 12, 2009, 9:58 PM), http://www.cnn.com/2009/CRIME/03/12/alabama.shooting/index.html [https://perma.cc/P6DK-3CW5].
[7] *Army: Troop Use in Ala. Shootings Broke Law: Investigation Concludes Soldiers Should Not Have Been Sent to Help*, NBC NEWS (Oct. 19, 2009, 9:51 PM), http://www.nbcnews.com/id/33388485/ns/us_news-military/t/army-troop-use-ala-shootings-broke-law/#.XWmP2vZFzhk [https://perma.cc/JL2J-HCLW].
[8] *Id.*
[9] *See id.*
[10] Melissa Braun, *Inquiry Finds Soldier Acted in Samson Illegally*, SE. SUN (Nov. 8, 2009), http://www.southeastsun.com/fortrucker/article_c670ef99-33d4-57fe-90c7-4ca41108e052.html [https://perma.cc/SU3X-39S8].

> 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.[11]

In effect, the PCA "eliminate[s] the direct active use of Federal troops by civil law authorities"[12] and "prohibits Army and Air Force military personnel from participating in civilian law enforcement activities."[13]

In many ways, the McClendon murders are symptomatic of the issues regarding the PCA. First, the PCA appears to tie the hands of both the military and local law enforcement. The military has a seemingly endless budget, a wealth of manpower, and endless capabilities.[14] It is somewhat counterintuitive to restrict the use of those capabilities to assist a community in need.[15] Second, it is not always clear what constitutes a violation of the PCA.[16] The commander of the Alabama Bureau of Investigation office in Dothan, Alabama, noted that "I myself am a retired lieutenant colonel . . . I understand about Posse Comitatus and how that works . . . I know where the line is—and I didn't see that line crossed."[17] Third, the PCA presents serious enforcement issues. Under the PCA, the Army commander who deployed the soldiers is subject to a fine or two years of confinement;[18]

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[11] 18 U.S.C. § 1385 (2018) (originally enacted as Act of June 18, 1878, ch. 263, 20 Stat. 152); *see also* United States v. Dreyer, 804 F.3d 1266, 1272 (9th Cir. 2015) (en banc) ("Posse comitatus (literally 'power of the country') was defined by common law as all those over the age of 15 upon whom a sheriff could call for assistance in preventing any type of civil disorder."); Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 LAW & HIST. REV. 1, 2 (2008) ("In antebellum America, as in pre-industrial England, it was commonplace to witness civilians accompanying sheriffs and justices, scouring the countryside in search of scoundrels, scalawags, and other law-breakers. These civilians were the *posse comitatus*, or uncompensated, temporarily deputized citizens assisting law enforcement officers.").

[12] United States v. Banks, 539 F.2d 14, 16 (9th Cir. 1976).

[13] *Dreyer*, 804 F.3d at 1272.

[14] *See* ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING 318–19 (2016) ("The United States spends more on defense than any other nation. In fact, it accounts for 41 percent of global defense spending . . . with its vast budget and complex accounting system, the Pentagon is an infamous money pit.").

[15] *See* Joshua M. Samek, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?*, 61 U. MIAMI L. REV. 441, 443 (2007) ("In the weeks immediately following Hurricane Katrina, many politicians called for reform or repeal of the Posse Comitatus Act, arguing that it prevented the military from rapidly deploying forces into New Orleans to restore order and conduct humanitarian missions.").

[16] *See* Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstandings Before Any More Damage is Done*, 175 MIL. L. REV. 86, 144–50 (2003).

[17] Pete Winn, *Army MP's 'Just Showed Up' and 'Didn't Cross the Line,' Alabama Law Enforcement Official Says*, CNSNEWS (Mar. 18, 2009, 6:41 PM), https://www.cnsnews.com/news/article/army-mp-s-just-showed-and-didn-t-cross-line-alabama-law-enforcement-official-says [https://perma.cc/YTT5-ERKK].

[18] 18 U.S.C. § 1385.

however, no charges were brought against him.[19] In fact, the primary investigation into whether these actions violated the PCA was an Army Office of the Inspector General investigation, with there being no indication of any other federal or criminal investigation.[20] The Army Inspector General concluded that the use of military for civilian law enforcement was a PCA violation, but the only consequence was administrative action taken against an unnamed individual.[21] Considering that no one has been charged under PCA[22] and the military holds the public's trust and confidence, it is unlikely that an elected government official would prosecute a military member for a PCA violation, especially when the violative act was well-intentioned. The result is that the regulated agency—the military—is left to decipher and enforce the criminal statute that is meant to restrict its behavior.[23]

Nonetheless, these issues should not result in continued disregard of the PCA, but should rather lead to a reexamination of it. This Article makes a relatively straightforward but novel argument—the Constitution affords each American a right to be free from military control, meaning each individual has the right to be free from the federal military exercising or threatening any actual or apparent authority over her actions unless Congress or the President has constitutionally granted the military such authority. Because the enforcement of civilian law inherently involves the military exercising some control over a citizen, this Article argues that the PCA is an effort by Congress to protect that right. As a statute designed to safeguard a constitutional right, there must be an effective enforcement mechanism. The most appropriate enforcement mechanism available for violations of the PCA is the exclusionary rule, which allows courts to suppress illegally obtained evidence and thereby deters future violations.

This Article proceeds in five parts. Part I addresses the constitutional right to be free from military control and the threat posed by the military enforcing civilian law. It begins by examining the Framers' fears of standing armies;

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[19] *See Army: Troop Use in Ala. Shootings Broke Law: Investigation Concludes Soldiers Should Not Have Been Sent to Help*, *supra* note 7.

[20] *See Army: Troop Use in Ala. Shootings Broke Law: Investigation Concludes Soldiers Should Not Have Been Sent to Help*, *supra* note 7.

[21] *See Army: Troop Use in Ala. Shootings Broke Law: Investigation Concludes Soldiers Should Not Have Been Sent to Help*, *supra* note 7.

[22] *See* Felicetti & Luce, *supra* note 16, at 163 n.337 (citing H.R. REP. NO. 97-71, pt. I (1981), *as reprinted in* 1981 U.S.C.C.A.N. 1787) ("According to a spokesman for the Department of Justice, no one has been charged or prosecuted under the Posse Comitatus Act since its enactment. Testimony of Edward S.G. Dennis Jr. on behalf of the Department of Justice."); *see also* City of Airway Heights v. Dilley, 45 Wash. App. 87 (Wash. App. 1986) ("Nor is there authority that a prosecution [has ever been] pursued for violation of the act.").

[23] *Cf.* THE FEDERALIST NO. 51 (James Madison) ("Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.").

specifically, that standing armies, whether on their own initiative or at the direction of the Executive, may overthrow the republican government or deprive individuals of their basic liberties.[24] Based on this fear, the Framers guaranteed the right to be free from military control by constitutionalizing protections against the military exerting control over civilians absent a constitutionally permissible grant of authority by Congress or the President. These protections included subordinating the military to civilian leadership under the President as Commander-in-Chief, diffusing authority over the military via the constitutional separation of powers, and guaranteeing the right through the Bill of Rights.

Part II argues that the PCA is a subconstitutional check that protects the constitutional right to be free from military control. The use of military power in civilian affairs will always be a temptation for government officials. The early history of the United States illustrates this temptation, as several presidential administrations utilized the military for law enforcement purposes.[25] And when the public supports the use of military power or excessively trusts the military, this temptation only increases.[26] Congress witnessed "gross abuses" of military involvement in civilian law enforcement during the Reconstruction Era and determined that the constitutional provisions ensuring the freedom of civilians to be free from military control did not provide enough protection against such abuses.[27] This led Congress to enact the PCA as a subconstitutional check to protect the right to be free from military control, providing a second layer of protection.[28]

Part III shifts focus to the exclusionary rule. Although the PCA provides its own enforcement mechanisms—a fine, two years of confinement, or both—such enforcement is unlikely. There have been no prosecutions under the PCA.[29] As such, there is little, if any, deterrence for violating the PCA.[30] This Article argues that excluding any evidence obtained as a result of violating the PCA would provide a third level of protection against military control. But while applying the

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[24] *See* Laird v. Tatum, 408 U.S. 1, 18 (1972) (Douglas, J., dissenting) (quoting Luther Martin, Genuine Information, *in* 3 RECORDS OF THE FEDERAL CONVENTION 209 (Max Farrand ed., 1911)) ("[W]hen a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army.").

[25] *See, e.g.*, Felicetti & Luce, *supra* note 16, at 97–99 ("Legislative and executive action in the early days of the American republic confirm that the use of federal troops or federalized militia to preserve domestic order, either as part of a posse comitatus or otherwise, was an accepted feature of American life under the new Constitution.").

[26] *See generally* Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 357–361 (1994).

[27] State v. Pattioay, 896 P.2d 911, 927 (Haw. 1995) (Ramil, J., concurring) (citing Clarence I. Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 69 MIL. L. REV. 83, 89-92 (1975)). *Cf.* United States v. Hartley, 486 F. Supp. 1348, 1357 (M.D. Fla. 1980) (stating that the PCA guards against military permeation of civil law enforcement).

[28] *See* S. REP. NO. 97-58, at 148 (1981) ("The Posse Comitatus Act . . . embodies the inveterate and traditional separation between the military's mission and civilian law enforcement efforts.").

[29] Felicetti & Luce, *supra* note 16, at 163 n.337.

[30] *Cf.* Lee v. Florida, 392 U.S. 378, 386–87 (1968) (discussing the necessity of the exclusionary rule to disincentivize violations of § 605 of the Communications Act because the Act's penal provisions alone had failed to do so).

exclusionary rule to violations of statutes like the PCA would prevent such violations, the question remains whether courts have the power to do so. This question is especially relevant because recent cases have called into question the continued viability of long-held precedent allowing for the exclusionary rule as a remedy to statutory violations.[31] This Part traces the development of the exclusionary rule through the lens of what government activities trigger the exclusionary rule as a potential remedy and what tests the courts use in applying it.

Part IV explores the tension between the exclusionary rule and the PCA, focusing on defining what constitutes a PCA violation, whether a PCA violation can trigger the exclusionary rule as a potential remedy, and how courts can apply the rule if it is triggered.

This Article concludes in Part V by establishing that violations of the PCA not only can trigger the exclusionary rule, but should trigger it, because its application will deter future violations, establish respect and compliance for the PCA, and fulfill the PCA's purpose as a subconstitutional check. The Article then proceeds to make a normative argument for a transition away from a Fourth Amendment exclusionary rule and towards a Posse Comitatus Act exclusionary rule built upon a procedural due process analysis in its application.

I. The Constitutional Right to Be Free From Military Control

On any given day, American federal military members engage in domestic law enforcement activities. Whether it's patrolling the border,[32] interdicting the flow of illegal drugs,[33] monitoring internet file-sharing sites looking for potential child sex offenders,[34] or representing the United States in federal court to enforce federal immigration laws,[35] there has been a gradual encroachment by the federal

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[31] *See, e.g.*, Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1 (2012); Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009); Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183 (2012); David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567 (2008).

[32] Robert Moore, *Troops Deployed to Border Take Over Mobile Security Mission*, WASH. POST (June 6, 2019), https://www.washingtonpost.com/world/national-security/troops-deployed-to-border-take-over-mobile-security-mission/2019/06/06/d05423fe-8877-11e9-98c1-e945ae5db8fb_story.html [https://perma.cc/YQ6J-ZWWX].

[33] *U.S. Military Expands Its Drug War in Latin America*, USA TODAY (Feb. 3, 2013, 10:13 AM), https://www.usatoday.com/story/news/world/2013/02/03/us-expands-drug-war-latin-america/1887481 [https://perma.cc/9AX7-SN28].

[34] United States v. Dreyer, 804 F.3d 1266, 1270 (9th Cir. 2015) (en banc) ("In 2010, Logan and two other NCIS agents initiated a criminal investigation of the distribution of child pornography on the internet.").

[35] *See, e.g.*, Anthony Ghiotto, *Military Lawyers Will Prosecute Border Cases. They Shouldn't*, NEWS & OBSERVER (June 26, 2018, 8:16 AM), https://www.newsobserver.com/opinion/article213802934.html [https://perma.cc/B7F9-YPAZ]; Alex Johnson & Courtney Kube, *Pentagon Sending Military Lawyers to Border to Help Prosecute*

military into civilian law enforcement matters.[36] Some of these activities are legal exercises of federal military power sanctioned by statutory exceptions to the PCA,[37] some fall within the twilight zone of statutory exceptions and PCA violations,[38] and some are still explicit violations of the PCA. Whether sanctioned or direct violations of the PCA, these activities are often met with a presidential endorsement[39] or a shrug of the shoulders by the American people.[40]

Beyond the use of federal military power, state governors often utilize their state National Guard units for domestic operations.[41] National Guard units are generally understood to be the successors of the "militias" referred to in the Constitution.[42] These Guard members generally wear three hats—"a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time."[43] They wear their "army hat" only when called to federal service, at which point they fall under the authority of the federal military and ultimately the President.[44] In contrast, they wear their "state militia hat" when they are performing

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Immigration Cases, NBC NEWS (June 20, 208, 11:10 PM), https://www.nbcnews.com/storyline/immigration-border-crisis/pentagon-sending-military-lawyers-border-help-prosecute-immigration-cases-n885216 [https://perma.cc/JPH9-ZTRT].

[36] *See* Dunlap, *supra* note 26, at 359 ("With more than 5,000 troops conducting law enforcement activities throughout the country on any given day, America is witnessing the beginning of what it never has had before: a *national* uniformed police agency.").

[37] Following the initial passage of the PCA in 1878, Congress carved out exceptions for the use of the military in law enforcement activities. *See generally* Felicetti & Luce, *supra* note 16, at 127–45.

[38] *See, e.g.*, United States v. Wolffs, 594 F.2d 77, 84–85 (5th Cir. 1979) (noting that the issue of whether the U.S. Army's passive involvement in the defendant's purchase and possession of marijuana violated the PCA was "complex and difficult").

[39] James LaPorta, Ramsey Touchberry & Chantal Da Silva, *Exclusive: Donald Trump Has Ordered Thousands More Troops to Mexican Border, New Deployment Document Suggests*, NEWSWEEK (Apr. 16, 2019, 3:15 PM), https://www.newsweek.com/donald-trump-troops-border-mexican-nielsen-1397532 [https://perma.cc/X3SE-W6Z9].

[40] *Voters Show More Support for Troops on the Border*, RASMUSSEN REPORTS (Nov. 2, 2018), https://www.rasmussenreports.com/public_content/politics/current_events/immigration/october_2018/voters_show_more_support_for_troops_on_the_border [https://perma.cc/M7H9-Q9VJ] ("A new Rasmussen Reports national telephone and online survey finds that 50% of Likely U.S. Voters think the U.S. military should be used along the border with Mexico to prevent illegal immigration.").

[41] *See, e.g.*, Sean McGrane, Note, *Katrina, Federalism, and Military Law Enforcement: A New Exception to the Posse Comitatus Act*, 108 MICH. L. REV. 1309, 1322–23 (2010).

[42] *See* U.S. CONST. art. I, § 8, cl. 15.; *see also* Maryland *ex rel.* Levin v. United States, 381 U.S. 41, 46 (1965) ("The National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16, of the Constitution."), *vacated on other grounds*, 382 U.S. 159 (1965); Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383, 415 (2003); Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 195 (1940) ("Essentially, the Dick Act provided for an Organized Militia, to be known as the National Guard . . . .").

[43] Perpich v. U.S. Dep't of Def., 496 U.S. 334, 348 (1990).

[44] *See* U.S. CONST. art. I, § 8, cl. 15 ("[The Congress shall have Power to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."). *See, e.g.*, 32 U.S.C. § 901–907 (2001).

state service under the authority of the state governor.[45] This distinction is important because it allows Guard members, when serving as part of the militia, to be used for law enforcement roles in accordance with state law.[46]

The PCA also draws a distinction between the National Guard as the militia and the federal military, prohibiting only members of the federal Army and Air Force from enforcing civilian law.[47] The result is that National Guard members may enforce civilian law when operating as part of the state militia, under the authority of their governor, instead of the federal military.[48] When encountering an American servicemember in uniform enforcing civilian law, very few Americans may be aware of whether that servicemember is part of the federal military or part of the National Guard, or whether that servicemember is receiving her orders from the Governor or the President.[49] Instead, they are likely to trust the military and provide support to the military activities.[50]

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[45] *See* Kealy, *supra* note 42, at 415 n.211 ("The militia, however, remains primarily a state entity because unless the militia is called into federal service, the state governor is the commander-in-chief and appoints the militia's officers."); *see also* United States *ex rel.* Gillet v. Dern, 74 F.2d 485, 487 (D.C. Cir. 1934) ("[E]xcept when employed in the service of the United States, officers of the National Guard continue to be officers of the state and not officers of the United States or of the Military Establishment of the United States.").

[46] Kealy, *supra* note 42, at 415.

[47] *See* United States v. Benish, 5 F.3d 20, 25–26 (3d Cir. 1993) ("[T]he use of the Pennsylvania National Guard did not violate any federal law. Although Benish refers to the Posse Comitatus Act . . . that Act precludes use of 'the Army or Air Force' and Benish concedes that the Pennsylvania National Guard unit was not in federal service at the time of its operation. Thus, the Posse Comitatus Act is inapplicable."); *see also* Matthew Carlton Hammond, Note, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L. Q. 953, 963–65 (1997) ("[T]he PCA only applies to forces in federal service, and therefore, the National Guard is not limited by the PCA in its normal status of state service."); Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of In Federal Service*, ARMY LAW, June 1994, at 35, 42–43.

[48] *See Benish*, 5 F.3d at 25–26; *but see* Julie Hirschfeld Davis & Katie Rogers, *Trump Will Work With Governors to Deploy National Guard to the Border*, N.Y. TIMES (April 4, 2018), https://www.nytimes.com/2018/04/04/us/politics/trump-governors-national-guard-border-mexico.html [https://perma.cc/WGB7-X9XB] (reporting that President Trump would be "mobilizing the National Guard" to "guard" the border with Mexico, "a step that previous presidents have taken to support border enforcement"); Rose L. Thayer, *National Guard Troops to Stay on Border for Another Year*, STARS AND STRIPES (Aug. 31, 2018), https://www.stripes.com/news/us/national-guard-troops-to-stay-on-border-for-another-year-1.545308 [https://perma.cc/H76U-NHAV].

[49] *See generally* James Fallows, *The Tragedy of the American Military*, ATLANTIC (Jan. 5, 2015), https://www.theatlantic.com/magazine/archive/2015/01/the-tragedy-of-the-american-military/383516 [https://perma.cc/6SRZ-54DK] ("Now the American military is exotic territory to most of the American public"); Alex Ward, *National Guard Troops Are Deploying To Help with Coronavirus. Here's What They're Doing*, VOX (Mar. 24, 2020, 9:10 AM), https://www.vox.com/2020/3/24/21188088/coronavirus-national-guard-testing-food-cleaning-martial [https://perma.cc/2AL6-HYYB].

[50] *See* Courtney Johnson, *Trust in the Military Exceeds Trust in Other Institutions in Western Europe and U.S.*, PEW RESEARCH CENTER (Sept. 4, 2018), https://www.pewresearch.org/fact-tank/2018/09/04/trust-in-the-military-exceeds-trust-in-other-institutions-in-western-europe-and-u-s [https://perma.cc/4BM6-Y5DR].

So why care about the PCA? Why not discard it as a relic of Reconstruction and allow local, state, and federal governments to tap into the vast resources of the military?[51] Why continue drawing an apparently unnecessary and unclear distinction between federal and state military power?[52] Why not follow the example of several western European democracies that utilize their federal military to enforce civilian law?[53] After all, despite both the legal and illegal use of the federal military to enforce domestic civilian law on a daily basis, the federal military has not overthrown the United States government. To the contrary, very few Americans fear a military coup.[54] Americans appear to have the opposite reaction to the military—holding it in the highest regard[55]—with some even believing that it serves as an important check on presidential ambition.[56]

This Part argues that the PCA matters because it speaks to a broader constitutional right to be free from military control; specifically, that each individual American has the right to be free from the federal military exercising or threatening any actual or apparent authority over their actions unless Congress or the President has constitutionally granted the federal military such authority.[57] When the federal military enforces civilian law, it begins to call this right into question as the military—an undemocratic and unaccountable entity trained in war and not in enforcing community standards—imposes its will upon a citizen not

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[51] *But cf.* Wrynn v. Unites States, 200 F. Supp. 457, 465 (E.D.N.Y. 1961) ("The [PCA] is not an anachronistic relic of an historical period the experience of which is irrelevant to the present. It . . . [expresses] 'the inherited antipathy of the American to the use of troops for civil purposes.' . . . Its relevance to this age is sadly clear.").

[52] *Cf.* Felicetti and Luce, *supra* note 16, at 179–81.

[53] *Cf.* Alissa de Carbonnel & Robert-Jan Bartunek, *Soldiers on Europe's Streets Dent NATO's Defense Edge*, REUTERS (Sept. 14, 2017, 6:56 AM), https://www.reuters.com/article/us-europe-attacks-military-analysis/soldiers-on-europes-streets-dent-natos-defense-edge-idUSKCN1BP1CA [https://perma.cc/2PGK-UXJ5].

[54] *Cf.* Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, NAVAL WAR C. REV., Summer 2002, at 9, 24–25 ("The American people . . . have lost their traditional skepticism about the professional military that made civilian control a core political assumption . . . . Simply put, the public no longer thinks about civilian control . . . .").

[55] Benjamin Wittes & Cody Poplin, *Public Opinion, Military Justice, and the Fight Against Terrorism Overseas, in* WARRIORS & CITIZENS: AMERICAN VIEWS OF OUR MILITARY 143, 145 (Kori Schake & Jim Mattis eds., 2016) ("Americans express a high degree of confidence in the military. It is the only government institution with a consistently positive rating; a full 78 percent of Americans expressed confidence in the military in a June 2011 Gallup poll.").

[56] *See* Jeffrey Goldberg, *The Man Who Couldn't Take It Anymore*, ATLANTIC (October 2019), https://www.theatlantic.com/magazine/archive/2019/10/james-mattis-trump/596665 [https://perma.cc/Y26X-8TV4]; Quinta Jurecic, *Did the 'Adults in the Room' Make Any Difference with Trump*, N.Y. TIMES (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/opinion/james-mattis-trump.html [https://perma.cc/S2GL-L3CZ].

[57] *See, e.g.*, Insurrection Act, 10 U.S.C. §§ 251–255 (2018). Specifically, § 252 provides, "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."

subject to the military's jurisdiction.[58] This use of military power is ripe for abuse by two actors: (1) the military itself, should it elect to impose its own will on the American people and use law enforcement actions as an enforcement mechanism,[59] and (2) by the President, should he begin to use the military power at his disposal as the Commander-in-Chief to serve as his own personal police force to achieve and enforce his own objectives.[60] The constitutional design protects the right to be free from military control from these potential abuses by subordinating the military to civilian control and the constitutional separation of powers, but that design requires constant vigilance.[61]

Although a military coup achieved by either the military or President's use of the federal military does not appear imminent, "the axiom of subordination of the military to the civil is not an anachronism."[62] Instead, "it is so deeply rooted in our national experience that it must be regarded as an essential constituent of the fabric of our political life,"[63] and sets the United States apart from the continental European nations that utilize the military for law enforcement purposes. The fundamental nature of this right protects against not just a hostile military takeover, but also against a gradual takeover, where incremental encroachment of the military into the civilian sphere potentially results in the military asserting control over civilians.[64]

This Part begins by exploring the establishment of the right to be free from military control. It examines the Framers' fear of standing armies and their belief that the use of standing armies in civil affairs—both acting on its own initiative and

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[58] *See* Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985) ("Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties."). *Cf.* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955) ("Unlike courts, it is the primary business of armies and navies to fight . . . wars should the occasion arise.").

[59] *See* Reid v. Covert, 354 U.S. 1, 23–24 (1957) ("The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. . . . The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders.")

[60] *See* David Luban, *On the Commander-in-Chief Power*, 81 S. CAL. L. REV. 477, 518–19 (2008) (quoting Centinel II, *Letter to the Editor* (Oct. 24, 1787), *reprinted in* THE ORIGIN OF THE SECOND AMENDMENT 58–59 (David E. Young ed., 2d ed. 1995)) ("The fear that a standing army would empower a tyrant appears again and again in the ratification debates over the new Constitution. . . . 'A standing army with regular provision of pay and contingencies, would afford a strong temptation to some ambitious man to step up into the throne, and to seize absolute power.'").

[61] *See Ex parte* Milligan, 71 U.S. 2, 125 (1866) ("This nation, as experience as proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution.").

[62] Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 186 (1962).

[63] *Id.*

[64] *See* Dunlap, *supra* note 26, at 341–42 ("Civilian control of America's still sizeable military is instead eroding, albeit slowly and often inconspicuously. The erosion of civilian control does not imply that a malevolent conspiracy exists within the armed services. Instead, the decline in civilian control is a subtle drift towards an uncertain destination.").

at the unchecked direction of the President—posed a threat to individual liberty and the success of a free republic. These fears resulted in establishing the right to be free from military control, which would be protected by subordinating the military to the civilian. Section B explores the constitutional mechanisms created to ensure that the military remained subordinate to the civil and thus preserving the individualized right to be free from military control. This Part concludes by addressing the scope of this right and the threat posed by gradual encroachment of the military into civilian matters, especially in the realm of domestic law enforcement.

A. *Establishing the Right to Be Free From Military Control*

At the time of George Washington's inauguration, the American Army consisted of 672 soldiers.[65] Compared to today's military, which consists of 1.3 million active duty servicemembers[66] bolstered by a more-than $600 billion budget,[67] the nation's first standing army did not appear to pose too much of a threat to the fledgling republic. Nonetheless, the Framers feared that the mere existence of a standing army "would undermine particular Constitutional values, including the protection of individual rights and the maintenance of a noncorrupt, politically accountable system of government."[68]

The potential threats posed by a standing army dominated the debate considering the Constitution's ratification.[69] Of particular controversy were the historical examples of the executive using the military power at his disposal as an enforcement mechanism to impose his own will on the citizens. For instance, at the Constitutional Convention, Luther Martin argued that "when a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army."[70] James Madison turned to the experience of Rome to warn that "the liberties of Rome proved the final victim of her military triumphs."[71] One Anti-Federalist in New York warned:

> The liberties of a people are in danger from a large standing army, not only because the rulers may employ them for the purposes of supporting themselves in any usurpations of power . . . but there is

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[65] Warren, *supra* note 62, 187.
[66] K.K. Rebecca Lai, Troy Griggs, Max Fisher & Audrey Carlson, *Is America's Military Big Enough?*, N.Y. TIMES (Mar. 22, 2017), https://www.nytimes.com/interactive/2017/03/22/us/is-americas-military-big-enough.html?searchResultPosition=1 [https://perma.cc/52BN-DL84].
[67] *See* Niall McCarthy, *The Biggest Military Budgets as a Share of GDP in 2018*, (Apr. 29, 2019, 7:06 AM), https://www.forbes.com/sites/niallmccarthy/2019/04/29/the-biggest-military-budgets-as-a-share-of-gdp-in-2018-infographic/#78ddadfd7508 [https://perma.cc/46R4-8SLF].
[68] Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 857 (2012).
[69] *See* Laird v. Tatum, 408 U.S. 1, 18–22 (1972) (Douglas, J., dissenting).
[70] *Id.* at 18 (quoting Luther Martin, Genuine Information, *in* 3 RECORDS OF THE FEDERAL CONVENTION 209 (Max Farrand, ed., 1911)).
[71] THE FEDERALIST NO. 41 (James Madison).

> great hazard, that an army will subvert the forms of the government, under whose authority, they are raised.[72]

A Massachusetts critic of the Constitution warned of the "fatal effects of standing armies, that bane of republic governments."[73] While these debates do not speak directly to the use of standing armies to enforce civilian law, they do contemplate the military serving as an enforcement mechanism by the Executive, responsive only to himself and his own objectives.

The Framers' skepticism towards a standing army—and its use by an unchecked Executive—was rooted in both the traditional English view that standing armies were instruments of tyranny and their own experiences as colonists.[74] Professor David Luban succinctly links the constitutional debate to the "long-recurrent English aversion to standing armies."[75] He cites Blackstone, who expressed that, "[i]n a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. . . . The laws therefore and constitution of these kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war."[76]

The English aversion to standing armies predated even Blackstone. As early as the 14th century, British courts drew a line "between war and civil disorder, and between sheer armed force and due process of law."[77] The expediency and brutishness of military justice increasingly became inconsistent with growing common law understandings of due process.[78] Additionally, Parliament passed statutes that defined the jurisdiction of the Court of the Constable and Marshall of England,[79] which operated as pseudo-military courts,[80] and prohibited them from hearing matters that touched upon the common law.[81] These cases and statutes established the idea that "due process of the law of the land would tolerate no infringement by martial law."[82]

Despite these attempts to separate the military from the civilian, British monarchs soon pushed the boundaries. The York and Tudor monarchies established

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[72] BRUTUS NO. 10, *available at* https://constitution.org/afp/brutus10.htm [https://perma.cc/BV2Z-HS6X].
[73] DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Feb. 1, 1788) (statement of Samuel Nason), *available at* https://www.constitution.org/rc/rat_ma.htm [https://perma.cc/RT42-XJCE].
[74] *See* Dunlap, *supra* note 26, at 345; *see also* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 16–17 (2002).
[75] *See* Luban, *supra* note 60, at 515.
[76] *Id.* at 516 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *262, *408).
[77] David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 7 (1971).
[78] *See id.*
[79] *See id*.
[80] *See id.* at 3.
[81] *See id.* at 7.
[82] *Id.*

courts resembling military tribunals and authorized royal officers to exercise powers under martial law for offenses that called for common law courts and civil officers.[83] The Stuarts then pushed these boundaries even further. Charles I, lacking funds to pay for military barracks, compelled British citizens to house soldiers.[84] Not surprisingly, riots and quarrels between the citizens and the soldiers soon followed.[85] The crown imposed martial law upon both the soldiers and civilians, and sent armed soldiers to restore order.[86] The soldiers soon subjected the civilians to military authority, detaining them without disclosing lawful cause and subjecting them to military trials without the due process guaranteed by common law.[87]

Charles I's frequent use of his standing army to compel order and to punish crimes committed by civilians resulted in Parliament passing the Petition of Right, which outlawed both quartering and martial law commissions, and condemning Charles I for levying taxes without the approval of Parliament.[88] Despite Parliament's clear intent to separate military and civil authority, Charles I largely ignored the Petition of Right and continued to exercise "the military prerogatives which the crown had always assumed."[89] This continued abuse of military authority precipitated the civil wars that culminated in Charles I's execution and Oliver Cromwell's rise to power.[90] The transition from a monarchy under Charles I to a commonwealth under Cromwell did not quell concerns over standing armies.[91] Instead, Cromwell established the "New Model Army" as the largest and most well-funded peacetime army in British history and allowed it to remain standing for fifteen years.[92] The New Model Army also operated in an overtly political manner, refusing to disband at Parliament's order.[93]

Following Cromwell and the Restoration of Charles II, the Glorious Revolution included efforts by Parliament to exercise increased control over the military; specifically, the Mutiny Act of 1689 provided that Parliament had the authority to budget the army on an annual basis.[94] Nonetheless, criticism of standing armies remained strong.[95] John Trenchard and Thomas Gordon, two English essayists, wrote:

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[83] *See id.* at 9.
[84] *Id.* at 10.
[85] *See id.*
[86] *Id.*
[87] *Id.* at 10–11.
[88] LOIS G. SCHWOERER, NO STANDING ARMIES!: THE ANTIARMY IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND 19 (1974).
[89] *Id.* at 32.
[90] *See* Engdahl, *supra* note 77, at 13–14.
[91] SCHWOERER, *supra* note 88, at 51 ("The parliamentary gentry grew to dislike the army Cromwell created in 1645 even more than the army Charles I had raised in the 1620s. They feared the protector's military prerogative just as they had the king's power to command the militia.").
[92] SCHWOERER, *supra* note 88, at 51–53.
[93] SCHWOERER, *supra* note 88, at 52–53.
[94] *See* Luban, *supra* note 60, at 515.
[95] Luban, *supra* note 60, at 515–16.

> They tell us that matters are come to that pass, . . . that we must submit to this great evil [i.e., a standing army], to prevent a greater: As if any mischief could be more terrible than the highest and most terrible of all mischiefs, universal corruption, and a military government.[96]

Trenchard subsequently wrote, "[i]t is certain, that all parts of Europe which are enslaved, have been enslaved by armies; and it is absolutely impossible, that any nation which keeps them amongst themselves can long preserve their liberties."[97]

The English tradition clearly warned the Framers that standing armies posed a threat to liberty.[98] English monarchs had subjected British citizens to the authority and control of the military, tried civilians before military tribunals without due process of law, and maintained a military government. But the Framers had their own experiences as colonists that also rendered them highly skeptical of military power.[99] The Declaration of Independence included as grievances the King's use of a standing army to subordinate the civil power to the military: specifically, "[f]or Quartering large bodies of armed troops among us" and "affect[ing] to render the Military independent of and superior to the Civil power," in addition to "transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation."[100]

As noted by Chief Justice Earl Warren in 1962, "[o]ur War of the Revolution was, in good measure, fought as a protest against standing armies."[101] Thomas Jefferson captured the argument more contemporaneously when he wrote that the King had "no right to land a single armed man on our shores," and argued that "his majesty had expressly made the civil subordinate to the military."[102] Jefferson would merely need to point to the Boston Massacre to support his

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[96] John Trenchard & Thomas Gordon, *No. 94, Against Standing Armies* (Sept. 15, 1722), *available at* https://oll.libertyfund.org/titles/trenchard-catos-letters-vol-3-march-10-1722-to-december-1-1722-lf-ed#lf0226-03_head_029 [https://perma.cc/JC7R-JVZ2].

[97] John Trenchard, *No. 95, Further Reasonings Against Standing Armies* (Sept. 22, 1722), *available at* https://oll.libertyfund.org/titles/trenchard-catos-letters-vol-3-march-10-1722-to-december-1-1722-lf-ed#lf0226-03_head_029 [https://perma.cc/APE2-Z9Z5].

[98] *Cf.* Luther v. Borden, 48 U.S. 1, 62 (1849) (Woodbury, J., dissenting) ("[I]n every country which makes any claim to political or civil liberty, 'martial law,' as here attempted and as once practised [sic] in England against her own people, has been expressly forbidden there for near two centuries, as well as by the principle of every other free constitutional government. And it would be not a little extraordinary, if the spirit of our institutions, both State and national, was not much stronger than in England against the unlimited exercise of martial law over a whole people . . . .").

[99] *See* Turley, *supra* note 74, at 15–17.

[100] THE DECLARATION OF INDEPENDENCE paras. 14, 16, 27 (U.S. 1776).

[101] Warren, *supra* note 62, at 184.

[102] Thomas Jefferson, *A Summary View of the Rights of British America* (1774), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 273, 287 (Adrienne Koch & William Peden eds., 1998).

argument. The colonists involved in that incident understood that the King's use of military troops to control civil unrest violated the "English tradition against domestic use of military troops."[103] Not lost on the colonists was the fact that "[m]embers of a distrusted standing army, whose quartering was in violation of the Petition of Right, and whose preparation to militarily suppress possible civil disorder was inconsistent with the oldest of England's own traditions, had slain English civilians in a time of peace."[104] Consequently, "they shed their blood to win independence from a ruler who they alleged was attempting to render the 'Military independent of and superior to the Civil power.'"[105]

The Framers' skepticism towards military power, based upon their legal inheritance from England and their own experiences as colonists, pressed upon them two primary risks associated with standing armies: (1) the threat that the military could overthrow a republican form of government and impose military rule;[106] and (2) the threat that the military could deprive citizens of their individual liberties, leading to a gradual subordination of the civilian to the military. [107] Additionally, they were aware that the threat did not rest in the military and within military leadership alone; instead, the Executive abusing the military power at its disposal posed the greatest risk both to the republican form of government and individual liberties.[108]

From these experiences and understandings of the risks associated with military power, the Framers established the right to be free from military control. This right directly derives from the risks associated with standing armies. First, the fear that a standing army would overthrow a republican form of government and establish a military government resulted in the generalized right to a republican form of government explicitly provided for by the Constitution.[109] Second, the fear that a standing army—acting either on its own initiative or at the direction of an unchecked Executive—could deprive citizens of their individual liberties led to an

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[103] *See* Engdahl, *supra* note 77, at 24.
[104] *See* Engdahl, *supra* note 77, at 25.
[105] Duncan v. Kahanamoku, 327 U.S. 304, 325 (1946) (Murphy, J., concurring).
[106] *See* Reid v. Covert, 354 U.S. 1, 23–24 (1957) ("The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. . . . The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders.").
[107] *See* Perpich v. U.S. Dep't of Def., 496 U.S. 334, 340 (1990) ("[T]here was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States . . . .").
[108] *Cf. Reid*, 354 U.S. at 24–26 ("[The Framers] were familiar with the history of Seventeenth Century England, where Charles I tried to govern through the army and without Parliament. . . . Later, James II used the Army in his fight against Parliament and the people.").
[109] *See* U.S. CONST. art. IV, § 4 ("[T]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."); *see also* Luther v. Borden, 48 U.S. 1, 45 (1849) ("Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it.").

individualized right to be free from military control; more specifically, the right to be free from the exercise or threat of actual or apparent authority over one's actions by the federal military, unless Congress or the President has constitutionally granted the military such authority.[110]

While the Supreme Court has never explicitly recognized this individualized right, the Court did provide that an "actual or threatened injury by reason of unlawful activities of the military" could be subject to judicial review and remedy.[111] In *Laird v. Tatum*, the Court considered whether the Army unlawfully created "a 'chilling' effect on the exercise of [petitioners'] First Amendment rights" by conducting surveillance of lawful civilian political activity.[112] The Court rejected the claim on justiciability grounds, finding that there was no showing of "specific present objective harm or a threat of specific future harm."[113] However, in the majority opinion, Chief Justice Burger alluded to the potential of a cognizable and remedial injury caused by unlawful military intrusions, asserting that:

> The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveillance activities . . . reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history . . . . [T]heir philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime.[114]

He concluded that, "when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury."[115] Under the Court's reasoning, an individual injured by the military intruding into the civilian sector has standing to assert a claim in court, strongly suggesting the right to be free from military control is an individualized right.

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[110] *Cf. Reid*, 354 U.S. at 30 ("[I]t seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were 'necessary and proper' for the regulation of the 'land and naval Forces.' Such a latitudinarian interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority."); United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 22–23 (1955) ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. . . . We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts . . . .").
[111] *See* Laird v. Tatum, 408 U.S. 1, 15–16 (1972).
[112] *See id*. at 3.
[113] *Id.* at 13–14.
[114] *Id*. at 15.
[115] *Id.* at 15–16.

B. *Constitutionalizing the Right to Be Free From Military Control*

Protecting individuals from military control via the subordination of the military to the civil would become "one of our great heritages,"[116] but first the Framers would need to devise a way to ensure the continued dominance of the civil over the military. The Framers feared the threats associated with standing armies, but they were also aware that the new republic could not survive defenseless. Madison noted:

> A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and . . . will exert all its prudence in diminishing both the necessity and the danger of resorting to [a resource] which may be inauspicious to its liberties.[117]

Chief Justice Warren stated it more simply: "The maintenance of the balance is made more difficult by the fact that while the military serves the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in a free society."[118]

To strike this balance—protecting the right to be free from military control while allowing for a standing army—the Framers constitutionalized the right to be free from military control. By including the right to be free from military control in the Constitution, the Framers not only recognized the right, but also provided means to protect it: (1) they subordinated the military to civilian leadership; (2) they diffused authority over the military to the different governmental branches through the separation of powers; and (3) they guaranteed the right to be free from military control in the Bill of Rights.

First, the Framers subordinated the military by making the President the Commander-in-Chief.[119] Because of the fear that a standing army would overthrow the republican government and impose military rule, the Framers made the military accountable to a civilian: the President.[120] The danger posed by a military coup was so "obvious, the Commander in Chief Clause instituted civilian control of the military with virtually no debate at the Philadelphia convention."[121] By appointing

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[116] Duncan v. Kahanamoku, 327 U.S. 304, 325 (1946) (Murphy, J., concurring).
[117] THE FEDERALIST NO. 41 (James Madison).
[118] Warren, *supra* note 62, at 182.
[119] U.S. CONST. art. II, § 2, cl. 1.
[120] *See generally* Luban, *supra* note 60, at 508–14.
[121] Luban, *supra* note 60, at 508–14.

the civilian President as Commander-in-Chief, the Framers established "the executive as an indispensable element of civilian control."[122]

Second, the Framers constitutionalized the right to be free from military control through the structural separation of powers.[123] The Framers achieved this separation of powers by making the President Commander-in-Chief, but then gave Congress the powers to provide for the common defense; to declare war; to make rules for the government and regulation of the land and naval forces; to raise and support armies; and to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions."[124]

Seeing as the Framers viewed military power as one of the greatest threats to individual liberty, it is no surprise that they subjected military control to the Madisonian separation of powers.[125] The idea behind diffusing authority over military power was simple: investing the authority as the Commander-in-Chief to the President may prevent the military staging a coup, but it risked the President using the military as his own police enforcement tool at the cost of liberty; in turn, the separation of authority over military matters would check this risk.[126] Congress would be able to check the President in his use of military power.[127] The end result would be that military authority would be distributed between two branches of government, thereby securing the right to be free from military control.[128]

Third, the Framers went beyond the structural separation of powers and utilized the Bill of Rights to guarantee the right to be free from military control. Chief Justice Warren noted that the diffusion of control over the military did not assuage fears of a standing army during the constitutional ratification debates.[129] He argued that "the safeguards in the main body of the Constitution did not satisfy the people on their fear and concern of military dominance."[130] For instance, two delegates to the Constitutional Convention, Edmund Randolph and Elbridge Gerry,

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[122] Dunlap, *supra* note 26, at 370; *see also* Luban, *supra* note 60, at 530 ("The fundamental point was that, given the need for civilian control of the military, the choice of making the president commander in chief prevailed because it was universally regarded as better than the alternatives of making Congress the commander in chief or having multiple commanders in chief.").

[123] *See* Turley, *supra* note 74, at 22 ("[T]he Framers closely associated unchecked authority over standing armies with the excesses of the British Crown. The division of power in the Madisonian system alleviated this concern to some degree.").

[124] U.S. CONST. art. I, § 8.

[125] *See* Turley, *supra* note 74, at 22 ("The Framers approved a standing army and the states ratified it because of their tentative faith in the Madisonian system.").

[126] *See* Luban, *supra* note 60, at 522–25.

[127] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power to better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.").

[128] *See* Turley, *supra* note 74, at 22. *But see* Pearlstein, *supra* note 68, at 818 (noting that under agency-theory terms, the separation of powers enables the military to play one principal off the other and advancing its own preferences over the President or Congress).

[129] *See* Warren, *supra* note 62, at 185.

[130] *See* Laird v. Tatum, 408 U.S. 1, 22 (1972) (Douglas, J., dissenting) (citing Warren, *supra* note 62, at 185).

refused to sign the Constitution in part because of the establishment of a standing army.[131] This reluctance to ratify the Constitution without further guarantees resulted in the Second and Third Amendments of the Bill of Rights.[132] Specifically, the Second Amendment guaranteed the right to decentralized militias and the right to bear arms, and the Third Amendment prohibited the quartering of troops in any house in time of peace without the consent of the owner.[133] These measures speak to the Framers' "determination to guarantee the preeminence of civil over military power."[134] Chief Justice Warren's argument that the Constitution fell short in protecting the right to be free from military control, resulting in additional protections through the Bill of Rights, is significant. By guaranteeing the right to be free from military control in the Bill of Rights, any individual who suffers an injury from such an encroachment, may then be able to receive judicial review and a judicial remedy.[135]

In sum, the Framers prioritized the right to be free from military control. To protect that right, the Framers embedded in the Constitution the subordination of the military to civilian control, the distribution of authority over military power to different government branches via the separation of powers, and the Second and Third Amendments.

C. *Defining the Scope of the Constitutionalized Right to Be Free from Military Control*

The establishment and constitutionalizing of the right to be free from military control has had a lasting impact on American law. The Supreme Court has noted that there is a "traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history."[136] Expounding on this tradition, Justices have noted that "[o]ur tradition reflects a desire for civilian supremacy and subordination of military power"[137] and that

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[131] *See* Turley, *supra* note 74, at 22.
[132] *Laird*, 408 U.S. at 22 (1972) (Douglas, J., dissenting).
[133] U.S. CONST. amends. II, III.
[134] *Laird*, 408 U.S. at 23 (1972) (Douglas, J., dissenting); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) ("That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history. Time out of mind . . . a military commander can seize private housing to shelter his troops. Not so, however, in the United States, [on account of the Third Amendment].").
[135] *See, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304, 324–25 (1946) (Murphy, J., concurring) ("[T]hese [military] trials [of civilians] were forbidden [not only by the martial law provisions of the Hawaiian Organic Act, but also] by the Bill of Rights of the Constitution of the United States . . . . Indeed, the unconstitutionality of the usurpation of civil power by the military is so great in this instance as to warrant this Court's complete and outright repudiation of the action."); *Laird*, 408 U.S. at 16 ("[T]here is nothing in our Nation's history or in this Court's decided cases . . . that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.").
[136] *Laird*, 408 U.S. at 15.
[137] *Id.* at 19 (Douglas, J., dissenting).

"[a]bhorrence of military rule is ingrained in our form of government. Those who founded this nation knew full well that the arbitrary power of conviction and punishment for pretended offenses is the hallmark of despotism."[138]

Although the Court recognizes the right to be free from military control, what constitutes a violation of that right is not always abundantly clear. A complete usurpation of civilian authority by the military, perhaps by a military coup, may provide the surest example of a violation.[139] The military's seizure of a citizen who is then detained by the military, tried by the military, and punished by the military, all performed without the constitutional authority of either Congress or the President, is also a clear example of a violation.[140] But over 200 years of American history have taught us that these situations are unlikely to occur, especially during peacetime. Instead, gradual encroachments of the military into the civilian sphere pose the most likely threat to the right to be free from military control.[141]

Professor Charles Dunlap warned against this risk in the mid-1990s.[142] He posited that Americans no longer share the Framers' skepticism towards the military.[143] Rather, the military has overwhelming public support, especially when compared to government officials.[144] The military is also increasingly being tasked by the federal government as a "deliverer," meaning that military officers are given domestic duties that they deliver on with surprising frequency.[145] Professor Dunlap quotes an observer who declared, "I am beginning to think that the only way the national government can do anything worthwhile is to invent a security threat and turn the job over the military."[146] As the military receives more civilian-oriented tasks, the more chances they will have to prove their competence and value to the public, leading to more responsibilities in the civil sphere.[147] When citizens begin

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[138] *Duncan*, 304 U.S. at 325 (Murphy, J., dissenting).

[139] *See generally* Aurel Croissant et al., *Beyond the Fallacy of Coup-ism: Conceptualizing Civilian Control of the Military in Emerging Democracies*, 17 DEMOCRATIZATION 950, 953 (2010) ("[I]t is the military which is particularly well situated to encroach on the democratically elected representatives' power to govern. . . . [A]ll societies and political regimes must ensure that the military is subordinate to legitimate political decision-makers.").

[140] *Cf. Ex parte* Milligan 71 U.S. 2, 123–24 (1866) ("When peace prevails, and the aythority [sic] of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected . . . but if society is disturbed by civil commotion . . . these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws.").

[141] *See* Kohn, *supra* note 54 ("The issue is not the nightmare of a coup d'état but rather the evidence that the American military has grown in influence to the point of being able to impose its own perspective on many policies and decisions.").

[142] *See generally* Dunlap, *supra* note 26.

[143] Dunlap, *supra* note 26, at 354–56.

[144] Dunlap, *supra* note 26, at 356.

[145] Dunlap, *supra* note 26, at 357.

[146] Dunlap, *supra* note 26, at 357.

[147] *See* BROOKS, *supra* note 14, at 305–18 ("In Washington, many top civilian policy makers want the military to do anything and everything . . . . They imagine the military power can be used to solve virtually any problem . . . ."); *see also* David T. Burbach, *Partisan Dimensions of Confidence*

to rely on the military for basic civil services and trust in its ability to deliver those services, citizens may become more likely to acquiesce to military authority.[148] Once citizens voluntarily submit to shows of military authority, the right to be free from such control diminishes and gives the military the opportunity to abuse that diminished right to deprive the citizenry of liberty.[149]

Justice William Douglas recognized that the danger of military control "exists not only in bold acts of usurpation of power, but also in gradual encroachments."[150] The Court has protected against this danger by holding that civilians cannot be subject to military tribunals when civilian courts are functioning;[151] that court-martial jurisdiction cannot be extended to reach any person who is not a member of the military at the time of both the offense and the trial;[152] and that the military does not have criminal jurisdiction over civilian employees or dependents.[153]

As the military becomes a "deliverer" of services, it may be tasked even more regularly to provide law enforcement services in the civilian sphere.[154] The Supreme Court has not explicitly ruled where the line rests between assisting in civilian law enforcement and unconstitutionally encroaching on civilian matters, but several federal circuit and state courts have warned of the risk of allowing military members to enforce civilian law.[155] The Eighth Circuit acknowledged that:

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in the U.S. Military, 1973–2016, 45 ARMED FORCES & SOC'Y 211, 213–14 (2019) ("[T]he military has demonstrated success at what it does" and is "objectively rewarded for professional competence"). *But see* Paul Gronke & Peter Feaver, *Uncertain Confidence: Civilian and Military Attitudes About Civil-Military Relations*, *in* SOLDIERS AND CIVILIANS 129 (Peter D. Feaver & Richard H. Kohn eds., 2001).

[148] *See* Dunlap, *supra* note 26, at 342.

[149] *See* Dunlap, *supra* note 26, at 342.

[150] Laird v. Tatum, 408 U.S. 1, 18 (1972) (Douglas, J., dissenting).

[151] *See* Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946).

[152] *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955).

[153] *See* McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 286 (1960); *see also* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 249 (1960).

[154] *See, e.g.*, Gordon Lubold & Nancy A. Youssef, *Military Role Widens in Pandemic Response*, WALL ST. J. (Mar. 20, 2020), www.wsj.com/articles/military-role-widens-in-pandemic-response-11584746488 [perma.cc/ZH6Y-KKEW].

[155] *See, e.g.*, United States v. Dreyer, 804 F.3d 1266, 1279 n.7 (9th Cir. 2015) (en banc) ("[U]se of military power to discharge duties of civil officers supplants a 'government of liberty . . . founded in the consent of the people' with a 'a government of force.'"); Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985); United States v. Walden, 490 F.2d 372, 375 (4th Cir. 1974) ("The [PCA] was no more than an expression of constitutional limitations on the use of the military to enforce civil laws."); State v. Pattioay, 896 P.2d 911, 929 (Haw. 1995) (Ramil, J., concurring) ("There is no question that the history in this state exemplifies the potential dangers that exist when civilian life is under military rule. . . . It is also true when we are dealing with incidents, such as the one before us, where the impact is not felt on a large scale."); State v. Danko, 548 P.2d 819, 824 (Kan. 1976) ("[T]he policy that military involvement in civilian law enforcement should be carefully restricted has deep roots in American history and that the policy is viable in present day governmental affairs."); People v. Burden, 303 N.W.2d 444 (Mich. 1981) ("[T]he fundamental tenet of non-interference by the military in civilian affairs must be vigorously upheld . . . ."); State v. Cooper,

> Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.[156]

As the military gradually encroaches more into the civilian sphere, especially in the area of law enforcement, one must ask whether the constitutional limits will cease to function. What other protections can deter the military from excessively encroaching into civilian affairs?

II. The Posse Comitatus Act

The Framers recognized the right to be free from military control and constitutionalized that right in part through the separation of powers. Their intent was that, by diffusing authority over the military to the different branches, each would check one another from abusing military power to control civilians. Through the Madisonian separation of powers, the Framers made constitutional checks "integral to the American constitutional system"[157] in order to preserve liberty from numerous threats, including military control.

However, the constitutional separation of powers may at times fall into dysfunction.[158] Whether it is because one branch has exceeded its authority, two branches have colluded together to infringe upon a right, or because other branches have abrogated their "checking" responsibilities, a constitutionally dysfunctional state calls into question the viability and survivability of the impacted constitutional right.[159] To protect against this threat, courts or legislatures may craft safeguards to "insure that constitutional violations will not occur."[160] Scholars sometimes refer

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972 P.2d 1, 4 (N.M. Ct. App. 1998) ("[U]nderlying the PCA is the continuing recognition of the threat to civil liberties caused by the use of military personnel to execute civilian laws."). *Cf.* Laird v. Tatum, 408 U.S. 1, 16 (1972) ("[T]here is nothing in our Nation's history or in this Court's decided cases. . . that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.").

[156] *Bissonette*, 776 F.2d at 1387.

[157] Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1072 (2017).

[158] *See generally* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

[159] *See* Baughman, *supra* note 157, at 1072–75.

[160] *See* Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105 (1985).

to these safeguards as "subconstitutional checks"[161] or "prophylactic rules,"[162] but the intent behind these safeguards are the same: "[they] ensure that the government follows constitutionally sanctioned or required rules. They are directed against the risk of noncompliance with a constitutional norm."[163]

This Section argues that the PCA is a subconstitutional check to safeguard the constitutional right to be free from military control. To support this argument, this Section begins by exploring the dysfunction of the constitutional structure during Reconstruction. From there, it examines the debate and passage of the PCA to highlight its intended purpose as a constitutional safeguard against the military's encroachment into the civilian sphere.

A. *Reconstruction and the Use of the Army*

The federal government's use of the federal military to secure Reconstruction in the South following the Civil War is a complex issue with severe racial undertones.[164] Following the war's conclusion, federal forces—free blacks among them—occupied the majority of the South.[165] "For some Southerners, the military occupation was worse than the battlefield defeat. The presence of victorious Union troops, including former slaves, humiliated many former Confederates."[166]

Although the military demobilized shortly after the war,[167] federal forces returned to the South after the Republican Congress wrested control of Reconstruction from President Johnson.[168] Under President Johnson's "Restoration Plan," Southern state governments provided very little protections for freed blacks and imposed "Black Codes" that "consigned blacks to a hopelessly inferior status slightly better than serfdom."[169] In response, Congress passed the First Reconstruction Act, which "imposed temporary army occupation in the South, imposed restrictions on voting and office-holding on former Confederates, granted suffrage to blacks, and mandated ratification of the then-pending Fourteenth Amendment."[170] In authorizing the use of military forces to enforce civilian law,

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[161] *See* Baughman, *supra* note 157, at 1074–75.
[162] *See* Grano, *supra* note 160, at 105.
[163] Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rights*, 66 TENN. L. REV. 925, 926–27 (1999); *see also* Baughman, *supra* note 157, at 1074–75 ("Subconstitutional checks are stopgaps formed to effectuate the rights in the Constitution when the system is stalled in dysfunction, when one branch has subjugated the others, or when one branch has colluded with another. Subconstitutional checks are not derived explicitly from constitutional language but from an interest in protecting explicit constitutional structure and to give substance to specifically enumerated constitutional rights.").
[164] *See generally* Rao, *supra* note 11, at 46–53.
[165] *See* Felicetti and Luce, *supra* note 16, at 100.
[166] *See* Felicetti and Luce, *supra* note 16, at 100.
[167] *See* Felicetti and Luce, *supra* note 16, at 101.
[168] *See* Felicetti and Luce, *supra* note 16, at 105.
[169] Felicetti and Luce, *supra* note 16, at 102–03.
[170] Buttaro, *supra* note 25, at 148.

and thereby subjecting Southerners to military control, Congress expressed little concern for the presidential check on this use of military power.[171] One member of Congress noted that, "[t]he President has no power to control or influence anybody and legislation will be carried on entirely regardless of his opinions or wishes."[172] When President Johnson did try to check this use of military power, Congress was able to override his veto.[173]

Under the First Reconstruction Act, federal troops performed a variety of traditional law enforcement functions: they "kept public order, enforced taxes on whiskey production, arrested members of the Klu [sic] Klux Klan, and guarded polling places."[174] Additionally, federal troops were used to "seize" state legislatures.[175] Unsurprisingly, this use of federal troops angered Southern whites, with some politicians arguing that, "under the pretext of protecting the people, the people [were] being enslaved; under the pretext of establishing order, liberty [was] being overthrown."[176]

The enforcement of voting laws proved especially problematic for Southern whites, who "generally loathed the idea of black voting and placed formidable roadblocks in its path."[177] The use of federal troops to secure voting rights for black voters reached its climax in the 1876 presidential election.[178] Southern Democrats strongly favored Samuel Tilden, who they believed would end Reconstruction, as opposed to the Republican, Rutherford B. Hayes, who was seen as a traditional Republican in favor of Reconstruction.[179] In an election dominated by allegations of fraud and voter intimidation, Tilden won the popular vote, but Hayes won the electoral college by winning South Carolina, Louisiana, and Florida.[180] Democrats challenged the electoral results in these states because the incumbent Republican President Grant had ordered federal troops to protect the polling stations in all three states.[181] Democrats alleged that the military presence at the polls tilted these elections to Hayes and thus handed him the presidency.[182] Because of these disputes, the Electoral College could not produce a winner, and the selection of the

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[171] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 271–72 (2014).
[172] *Id*. at 271.
[173] *Id*. at 276.
[174] Patrick Walsh & Paul Sullivan, *The Posse Comitatus Act and the Fourth Amendment's Exclusionary Rule*, 8 AM. U. NAT'L SECURITY L. BRIEF 3, 15 (2018).
[175] *See id.*
[176] Buttaro, *supra* note 16, at 149 (quoting Ky. Rep. William Arthur, CONG. GLOBE, 42d Cong., 1st Sess., 364 (1871)).
[177] Buttaro, *supra* note 16, at 148.
[178] *See* James P. O'Shaughnessy, Note, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13. AM. CRIM. L. REV. 703, 707 (1976).
[179] *Id.*
[180] *See* McGrane, *supra* note 41, at 1320–21; *see also* Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL'Y 99, 113 (2003); FONER, *supra* note 171, at 575.
[181] McGrane, *supra* note 41, at 1320–21.
[182] McGrane, *supra* note 41, at 1320–21.

President fell to Congress.[183] Hayes was able to reach an agreement with congressional Democrats to make him President, but in return he agreed to end Reconstruction and remove federal troops from the South.[184]

B. *Passage of the Posse Comitatus Act*

Congress passed and President Hayes signed into law the PCA in 1878, shortly after the end of Reconstruction and the contested election of 1876.[185] Some critics have used this historical context—specifically, that the PCA was a response of Southern whites angry that the Northern whites used the federal government to secure the rights of freed blacks—to diminish the legitimacy of the PCA.[186] However, the PCA is not "an anachronistic relic of an historical period the experience of which is irrelevant to the present."[187] Although Congress passed the PCA in the context of Reconstruction and attempts by Southerners to maintain white supremacy, arguments for its adoption could easily have been made prior to the Civil War, when federal troops were used to enforce the Fugitive Slave Act.[188] As a subconstitutional check, the purpose of the PCA is to protect the right of individuals to be free from military control, both from benevolent and malevolent uses of military power.[189]

The congressional debate regarding the PCA reflects its status as a subconstitutional check designed to safeguard the constitutional right to be free from military control.[190] Proponents of the bill commonly referred to the inherent dangers of standing armies, noting that "whenever you conclude that it is right to use the Army to . . . discharge those duties that belong to civil officers and to the citizens, then you have given up the character of your Government; it is no longer a government for liberty."[191] Upon establishing the inherent threats to liberty posed

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[183] Dan Bennett, Comment, *The Domestic Role of the Miltiary in America: Why Modifying or Repealing the Posse Comitatus Act Would Be a Mistake*, 10 LEWIS & CLARK L. REV. 935, 941–42 (2006).
[184] Arthur Rizer, *Trading Police for Soldiers: Has the Posse Comitatus Act Helped Militarize Our Police and Set the Stage for More Fergusons?*, 16 NEV. L.J. 467, 475–76 (2016).
[185] *See* Hammond, *supra* note 47, at 960–61.
[186] *See, e.g.*, Felicetti & Luce, *supra* note 16, at 102–113.
[187] Wrynn v. United States, 200 F. Supp. 457, 465 (E.D.N.Y. 1961).
[188] *See* Rao, *supra* note 11, at 54 ("From 1850 to 1865, the federal *posse comitatus* functioned to keep slaves as slaves and to force citizens to serve the state."); *see also* David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 798–800 (2014) ("The *posse comitatus* provisions of the Fugitive Slave Act of 1850 forced the North to become complicit in enforcing slavery . . . . Making things even worse, the federal government began using federal soldiers on slave hunts and claimed that these men were merely acting as *posse comitatus*.").
[189] *See* United States v. Jaramillo, 380 F. Supp. 1375, 1381 (D. Neb. 1974) ("The fact remains that Congress has authoritatively declared that no part of the Army or the Air Force shall be used to execute the laws . . . . It does not matter whether the use is to good effect or bad effect or whether the advice taken is good advice or bad advice.").
[190] *See* United States v. Dreyer, 804 F.3d 1266, 1282–83 (9th Cir. 2015) (en banc) (Berzon, J., concurring); *Wrynn*, 200 F. Supp. at 464–65.
[191] 7 CONG. REC. 4,247 (1878) (statement of Sen. Hill).

by standing armies, proponents turned to issues relating to the use of the Army to enforce civilian law. One senator noted that "[t]he people are interested in the law; it is their law; it is their duty to execute it, and the Army, their Army . . . is only to be used in extreme cases and in the last resort."[192] The Ninth Circuit succinctly summarized the constitutional foundations of the PCA:

> In 1878, when Congress was considering enacting the PCA, its members repeatedly referred to these constitutional concerns. *See* 7 Cong. Rec. 3583 (remarks of Rep. Kimmel) ("In every page of the history of the earlier period, long before, at the time of, and long after the adoption of the Constitution, the warnings against the dangers of standing armies are loud, distinct, and constant."); *id.* at 4240 (remarks of Sen. Kernan) ("I suppose no one claims that you can use the Army as a *posse comitatus* unless that use is authorized by the Constitution, which it clearly is not, or by act of Congress"); *id.* at 4243 (remarks of Sen. Merrimon) ("The Army, under the Constitution, is not to be used for the purpose of executing the law in the ordinary sense of executing the law. It can only be called into active service for the purpose of suppressing insurrection . . . ."). As these comments evince, when Congress enacted the PCA, it understood that the Act implemented a principle already embedded in the Constitution.[193]

This congressional intent remains prevalent in the PCA. Despite "calls for the military to be directly involved in search, seizure, and arrests," Congress refused to do so.[194] Instead, members of Congress found it not "appropriate to make such a radical break with the historic separation between military and civilian functions."[195] They expanded on this reticence, providing that "[t]he historical tradition which separates military and civilian authority in this country has served both to protect the civil liberties of our citizens and to keep our Armed Forces militarily focused and at a high state of readiness."[196]

From its legislative history, it is clear that the PCA was intended to serve as a subconstitutional check to protect the right to be free from military control. It provides a second layer of protection, above the constitutional protections, which becomes especially relevant in times of constitutional dysfunction. But for it to be a successful constitutional safeguard, it must have an enforcement mechanism.

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[192] People v. Burden, 303 N.W.2d 444, 446 (Mich. 1981).
[193] *Dreyer*, 804 F.3d at 1282–83.
[194] *See* State v. Pattioay, 896 P.2d 911, 917 (Haw. 1995) (quoting H.R. REP. NO. 100-989, at 452 (1988) (Conf. Rep.)).
[195] *Id.*
[196] *Id.*

III. The Exclusionary Rule

The Framers constitutionalized the right to be free from military control and afforded it constitutional protections: primarily, the subordination of the military to civilian leadership, the diffusion of military authority amongst the branches of government, and the guarantee of freedom from military control in the Bill of Rights.[197] However, these constitutional protections alone proved ineffective at preventing the military from being used to enforce civilian laws.[198] From the founding of the republic to Reconstruction, government officials utilized the military for these purposes. For example, President Washington used the federal military to quell the Whiskey Rebellion and to enforce the Neutrality Proclamation that kept the United States neutral in a naval conflict between France and Britain.[199] To a certain degree, however, this encroachment into the civil sphere was tolerated because the purposes were benevolent.[200] Reconstruction, though, alerted the nation again to the danger military encroachment presented to the right to be free from military control, leading to the enactment of the PCA to provide a second layer of protection.[201] The PCA criminalized the use of the military to enforce civilian law, creating a deterrence for both military members and Executive Branch officials who exercise operational control of the military, from violating the constitutional right to be free from military control.[202]

Since the passing of the PCA, however, the military has still been used to enforce civil law.[203] And yet, to date there have been no prosecutions for violations of the PCA.[204] Absent any criminal prosecutions to deter violations of the PCA, what incentive is there for the military or government officials to adhere to it?[205]

This Article argues that a third layer of protection is necessary to protect the right to be free from military control. As the threat posed in this context is the gradual encroachment of the military into the civilian through the enforcement of civilian law, the exclusionary rule provides that third layer of protection by deterring government and military officials from violating the PCA.

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[197] *See supra* Section I.B.
[198] *See supra* Section II.A.
[199] *See* Sean J. O'Hara, Comment, *The Posse Comitatus Act Applied to the Prosecution of Civilians,* 53 U. KAN. L. REV. 767, 770 (2005).
[200] *See supra* Part II.
[201] *See supra* Part II.
[202] *See* 18 U.S.C. § 1385, *supra* note 11.
[203] *See* Dunlap, *supra* note 26, at 357–59.
[204] Felicetti & Luce, *supra* note 16, at 163 n.377.
[205] *See, e.g.,* State v. Pattioay, 896 P.2d 911, 929 (Haw. 1995) (Ramil, J., concurring) ("[W]hile the PCA, as many courts have noted, contains its own independent mechanism for enforcement, *i.e.,* 'serious criminal conditions,' . . . I find it significant, as the Supreme Court did in [*Lee v. Florida*, 392 U.S. 378 (1968),] with respect to the FCA, that no one has been charged or prosecuted under the PCA since its enactment in 1865. Clearly, the only existing 'deterrent' is not much of deterrent at all.").

The application of the exclusionary rule to PCA violations is not without controversy or uncertainty.[206] It raises issues about the purpose of the exclusionary rule, its application to statutory violations as opposed to Fourth Amendment violations, the Supreme Court's gradual deconstruction of the exclusionary rule, and the extent of the PCA's constitutional underpinnings. The potential use of the exclusionary rule for PCA violations involves a two-step analysis: (1) whether a violation of the PCA triggers the exclusionary rule as a potential remedy for the violation; and (2) what test courts should use to apply it. This Article argues that violations of the PCA should trigger the exclusionary rule as a potential remedy because it will deter future encroachments by the military into civilian law enforcement and give extra teeth to this important subconstitutional check. This Section explores what types of government activities trigger the availability of the exclusionary rule as a potential remedy and then, if triggered, what test the courts use to determine what is the appropriate remedy to address the violation.

A. *The Exclusionary Rule's Beginnings*

The Framers' concerns about threats to liberty were not limited to military power and standing armies; they were just as concerned about civilian law enforcement activities that would infringe upon individual liberty.[207] This concern stemmed from their colonial experience, where the British utilized "general warrants" to search homes without any suspicion and compelled testimony in front of royal courts.[208] To address these concerns, the Framers secured an individual's right to be secure in his person, papers, and effects from unreasonable searches and seizures via the Fourth Amendment,[209] and from compelled self-incrimination via the Fifth Amendment.[210]

But what if the government violated the protections afforded by either the Fourth or Fifth Amendment? The Supreme Court has held that the Self-Incrimination Clause "contains its own exclusionary rule" by providing that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[211] The Fourth Amendment, however, contains no such prohibition against using evidence obtained through an unreasonable search or seizure.[212] Consequently, the Supreme Court was left to define the enforcement mechanism

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[206] *See* H.W.C. Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 87–92 (1960) (arguing that the PCA is not constitutional in nature); Roger Blake Hohnsbeen, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 GEO. WASH. L. REV. 404, 413–15 (1985); Sean J. Kealy, *supra* note 42, at 405–08; Paul Jackson Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. L. REV. 109, 129–33 (1984). *See generally* Walsh & Sullivan, *supra* note 174 (arguing against the application of the exclusionary rule for PCA violations).

[207] *See, e.g.*, Boyd v. United States, 116 U.S. 616, 625–29 (1886).

[208] *See, e.g.*, Weeks v. United States, 232 U.S. 383, 390–91 (1914); *Boyd*, 116 U.S. at 625–29.

[209] U.S. CONST. amend. IV.

[210] U.S. CONST. amend. V.

[211] United States v. Patane, 542 U.S. 630, 640 (2004) (quoting U.S. CONST. amend. V); *see also* Mapp v. Ohio, 367 U.S. 643, 664–66 (1961) (Black, J., concurring).

[212] *See* United States v. Leon, 468 U.S. 897, 906 (1984).

available for a Fourth Amendment violation, and they did so through the exclusionary rule. [213]

In 1914, the Supreme Court first applied the exclusionary rule to evidence obtained solely in violation of the Fourth Amendment.[214] In *Weeks v. United States*,[215] law enforcement officers entered Weeks's home when he was at work and seized books, letters, money, papers, notes, stocks, insurance policies, and other financial documents, all without a search warrant.[216] The prosecution then used many of these documents in Weeks's trial, over his objection that the introduction of such documents violated his Fourth and Fifth Amendment rights.[217] The Court agreed with Weeks, holding that "the letters in question were taken from the house of the accused by an official of the United States . . . in direct violation of the constitutional rights of the defendant."[218] In determining the remedy for this constitutional breach, the Court noted that "[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value."[219] As such, the Court held "for the first time" that "in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure."[220]

In *Weeks*, the Supreme Court established a bright-line rule that Fourth Amendment violations would trigger the exclusionary rule.[221] The Supreme Court soon extended that same protection against certain statutory violations in the twin cases of *Nardone v. United States*.[222] In those cases, Nardone alleged that the government wrongfully used evidence obtained by wiretap in violation of section 605 of the Communications Act of 1934 to convict him of smuggling, possession, and concealment of alcohol.[223] The relevant portion of the Communications Act provided, in part, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person."[224] The Court noted that the Communications Act of 1934 was Congress's "guaranty

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[213] *See* United States v. Calandra, 414 U.S. 338, 348 (1974).
[214] *See* Weeks v. United States, 232 U.S. 383 (1914). The Supreme Court had previously applied the exclusionary rule to evidence obtained in violation of both the Fourth and Fifth Amendments. *See* Boyd v. United States, 116 U.S. 616 (1886).
[215] 232 U.S. 383 (1914).
[216] *Id.* at 386–87.
[217] *See id.* at 388–89.
[218] *See id.* at 393–94, 398.
[219] *See id.* at 393.
[220] Mapp v. Ohio, 367 U.S. 643, 648 (1961) (quoting Wolf v. Colorado, 338 U.S. 25, 28 (1949)).
[221] *See* Hudson v. Michigan, 547 U.S. 586, 608 (2006) (Breyer, J., dissenting) ("[E]ver since *Weeks* (in respect to federal prosecutions) and *Mapp* (in respect to state prosecution), the 'use of evidence secured through an illegal search and seizure' is 'barred' in criminal trials.") (quoting Wolf v. Colorado, 338 U.S. 25, 28 (1949)).
[222] *See* Nardone v. United States (*Nardone I*), 302 U.S. 379 (1937); Nardone v. United States (*Nardone II*), 308 U.S. 338 (1939).
[223] *See Nardone I*, 302 U.S. at 380.
[224] *Id.* at 381.

against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution."[225]

After holding in *Nardone I* that federal law enforcement officers violated the statute by recording Nardone's conversations, the Court then turned in *Nardone II* to the issue of whether those conversations should be admitted in trial.[226] Justice Frankfurter, writing for the majority, noted that "[a]ny claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped."[227] Yet, Justice Frankfurter recognized that a statutory violation such as the one at issue in *Nardone* may lead to the exclusion of evidence if "justified by an over-riding public policy expressed in the Constitution or the law of the land."[228] In examining the statutory violation in *Nardone*, the Court found that the Communications Act was the "translation into practicality of broad considerations of morality and public well-being," and that allowing evidence obtained in violation of it to be used in trial would "stultify the policy."[229] Consequently, the Court held that the exclusionary rule applied, and suppressed the phone conversation.[230]

Thus, after *Nardone*, two types of government activity could trigger the exclusionary rule: violations of the Fourth Amendment[231] and violations of statutes that are justified by "an over-riding policy expressed in the Constitution or the law of the land."[232]

Once the exclusionary rule is triggered as a potential remedy, the question turns to what test courts should use in applying it. Initially, the Court used a bright-line test: if law enforcement obtained evidence through a violation of the Fourth Amendment or a qualifying statute, the Court would exclude the evidence without any additional analysis.[233] Justice Holmes noted that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[234]

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[225] *Id.* at 383.
[226] *Nardone II*, 308 U.S. at 339.
[227] *Id.* at 340.
[228] *See id.*
[229] *See id.*
[230] *See id.* at 340–43.
[231] *See, e.g.*, McNabb v. United States, 318 U.S. 332, 339 (1943) ("It is true . . . that a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand.").
[232] *See, e.g.*, Miller v. United States, 357 U.S. 301 (1958) (holding that an arrest made after forced entry into an apartment, in violation of 18 U.S.C. § 3109, "was unlawful, and the evidence seized should have been suppressed"); Benanti v. United States, 355 U.S. 96 (1957) (suppressing evidence obtained in violation of the Communications Act).
[233] *See, e.g.*, Agnello v. United States, 269 U.S. 20 (1925); Gouled v. United States, 255 U.S. 298 (1921); Weeks v. United States, 232 U.S. 383, 398 (1914).
[234] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). *But cf.* Wolf v. Colorado, 338 U.S. 25, 31 (1949) (introducing the idea of a deterrence-based model for application of the exclusionary rule, noting, "[g]ranting that in practice the exclusion of evidence may be an effective

Ultimately, the Court imposed a "but-for" test for the application of the exclusionary rule, asking whether, but-for the constitutional violation, the evidence would have been obtained.[235] If the answer was no, the Court would suppress the evidence.[236]

B. *The Exclusionary Rule's Free-Form Era*

Professor Orin Kerr notes that the Supreme Court and lower federal courts entered into a "free-form" era in the mid-20th century.[237] During this era, the Court exercised its "inherent power to control evidence in their own cases" and became increasingly likely to suppress evidence via the exclusionary rule.[238] The high-water mark of this era, and perhaps the exclusionary rule itself, likely came in 1961 with *Mapp v. Ohio*.[239] There, the Court applied the exclusionary rule to Fourth Amendment violations arising in state courts.[240] Whereas the Court had earlier held that the exclusionary rule was "not derived from the explicit requirements of the Fourth Amendment," but was rather a "matter of judicial implication,"[241] the *Mapp* Court concluded that the "exclusionary rule was required by the Constitution itself."[242] Specifically, the Court reasoned that, without the rule, the "assurance against unreasonable federal searches and seizures would be a 'form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties."[243] The Court referred to the exclusionary rule not as a rule of evidence or a mere deterrent, but as something mandated by the Constitution to protect judicial integrity.[244]

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way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective").

[235] *See* Segura v. United States, 468 U.S. 796, 815 (1984) ("[O]ur cases make clear that evidence will not be excluded as 'fruit' unless the illegality is at least the 'but for' cause of the discovery of evidence."); *see also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.").

[236] *See id.*

[237] Orin Kerr, *The Posse Comitatus Case and Changing Views of the Exclusionary Rule*, WASH. POST (Sept. 15, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/15/the-posse-comitatus-case-and-changing-views-of-the-exclusionary-rule [https://perma.cc/5YLB-FE95].

[238] *See id.*

[239] 367 U.S. 643 (1961).

[240] *Id.* at 660.

[241] Wolf v. Colorado, 338 U.S. 25, 28 (1948).

[242] *See* Virginia v. Collins, 138 S. Ct. 1663, 1677 (2018) (Thomas, J., concurring).

[243] *Mapp*, 367 U.S. at 655.

[244] *See Mapp*, 367 U.S. at 659 (referring to the exclusionary rule as "our constitutional exclusionary doctrine," and noting that its consequence might be that "[t]he criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws"); *see also* Elkins v. United States, 364 U.S. 206, 222–23 (1960) ("But there is another consideration—the imperative of judicial integrity . . . . Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold."); McNabb v. United States, 318 U.S. 332, 345 (1943) ("[A] conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to

This point was further developed in the later case of *Lee v. Florida*,[245] where the Court suppressed evidence obtained as a result of a violation of the Federal Communications Act.[246] In so holding, the Court affirmed, "[u]nder our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States,' laws by which 'the Judges in every State are bound . . . .'"[247] The exclusionary rule was a necessary means of enforcing such respect for the law: "as we concluded in *Elkins* and in *Mapp*, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law."[248] Of note, this judicial integrity was tied to protecting not only constitutional violations,[249] but also the "Laws of the United States," which authorized the Court to continue using the exclusionary rule for statutory violations.[250] Thus, the Court in the "free-form" era applied the exclusionary rule in a bright-line manner, suppressing evidence almost automatically upon determining that either the Fourth Amendment or a qualifying statute was violated.

C. *The Exclusionary Rule's Deterrence and Erosion Era*

The end of the Warren Court, though, marked the beginning of the steady decline of the exclusionary rule, starting with the rise of a deterrence-based theory.[251] During much of the exclusionary rule's history, a Fourth Amendment violation or a violation of a statute with constitutional underpinnings would automatically trigger the potential application of the exclusionary rule. Nonetheless, since the Warren Court's end, and especially during the rise of the Roberts Court, what triggers the availability of the exclusionary rule as a potential remedy is much less clear.[252] Consider Fourth Amendment violations: the post-Warren Court has noted that not all Fourth Amendment violations trigger the exclusionary rule; rather, "the Constitution requires the exclusion of evidence obtained by *certain* violations of the Fourth Amendment."[253]

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stand without making the courts themselves accomplices in willful disobedience of the law."); Morgan Cloud, *A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L., 477, 486 (2013).

[245] 392 U.S. 378 (1968).

[246] *Id.*

[247] *Id.* at 385–86.

[248] *Id.* at 386–87.

[249] *Cf., e.g.*, *Elkins*, 364 U.S. at 223 (recognizing that the *McNabb* Court had previously applied the exclusionary rule to evidence obtained in violation of a statute because allowing a conviction secured with such evidence to stand would make "the courts themselves accomplices in willful disobedience of law" and, even worse, "accomplices in the willful disobedience of a Constitution they are sworn to uphold") (quoting *McNabb*, 318 U.S. at 345).

[250] *Cf., e.g.*, Sabbath v. United States, 391 U.S. 585 (1968) (applying exclusionary rule to a violation of federal statute governing knock-and-announce execution of a warrant).

[251] *See* Cloud, *supra* note 244, at 510–18.

[252] *See* David A. Moran, *Hanging on by a Thread: The Exclusionary Rule (or What's Left of it) Lives for Another Day*, 9 OHIO ST. J. CRIM. L. 363, 374–78 (2011); *see also* Cloud, *supra* note 244, at 510–18.

[253] Sanchez-Llamas v. Oregon, 548 U.S. 331, 348 (2006) (emphasis added).

Chief Justice Roberts has given some definition to what those "certain" violations are. In *Herring v. United States*,[254] Roberts, writing for the majority, noted that, "to trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[255] He posited that the exclusionary rule only serves to "deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systematic negligence."[256] *Herring* represents a significant departure from *Weeks* and *Mapp*. Whereas during the Warren Court era the Court had not recognized any limits on which Fourth Amendment violations could trigger the exclusionary rule as a potential remedy, it is now clear under the Roberts Court that the exclusionary rule is triggered as a potential remedy only where law enforcement committed a Fourth Amendment violation deliberately, recklessly, or with gross negligence.[257]

The same shift has occurred regarding statutory violations. While the Warren Court consistently found that statutory violations triggered the exclusionary rule as a potential remedy, the Roberts Court has also limited the applicability of the exclusionary rule to these violations. Writing for the majority in *Sanchez-Llamas v. Oregon*, Roberts noted, "We have applied the exclusionary rule primarily to deter constitutional violations."[258] Roberts was referring to two cases in particular: *Miller v. United States*[259] and *McNabb v. United States*.[260] In both cases, the Court applied the exclusionary rule to statutory violations.[261] More specifically, in *McNabb* the Court suppressed evidence for the violation of a federal statute requiring individuals arrested without a warrant to be promptly presented to a magistrate.[262] In *Miller*, the Court suppressed evidence obtained in a search incident to an arrest that violated a federal statute.[263] The Petitioner in *Sanchez-Llamas* relied on these cases to argue for a more expansive reading of the exclusionary rule, one not tethered to deliberate Fourth Amendment violations.[264]

Roberts rejected these arguments and instead distinguished *Miller* and *McNabb*.[265] He argued that in those cases the Court suppressed evidence for statutory violations because "the excluded evidence arose directly out of statutory violations that implicated important Fourth and Fifth Amendment interests."[266]

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[254] 555 U.S. 135 (2009).
[255] *Id.* at 144.
[256] *Id.*
[257] *See* Moran, *supra* note 252, at 375–77 (noting that Chief Justice Roberts's 'officer-culpability' requirement is dicta and that *Mapp* has not been overturned).
[258] *Sanchez-Llamas*, 548 U.S. at 348.
[259] 357 U.S. 301 (1958).
[260] 318 U.S. 332 (1943).
[261] *See Sanchez-Llamas*, 548 U.S. at 348.
[262] *See McNabb*, 318 U.S. at 341–42.
[263] *See Miller*, 357 U.S. at 313–14.
[264] *See Sanchez-Llamas*, 548 U.S. at 345.
[265] *See id.* at 348–49.
[266] *Id.* at 348.

This distinction by Roberts is significant. Whereas previously in *Nardone*[267] and *Lee*[268] the Court acknowledged that statutory violations may trigger the exclusionary rule when there are constitutional interests at stake, Roberts appears to take this one step forward. To Roberts, it is not just a constitutional interest that triggers the availability of the exclusionary rule as a remedy for a statutory violation, but rather the statute's nexus to a Fourth or Fifth Amendment interest.[269] Albeit significant, Roberts's decision did not completely rule out the availability of the exclusionary rule for statutory violations. Nor did his decision clarify what constitutes a sufficient constitutional interest or a significant nexus to a Fourth or Fifth Amendment interest. As such, *Sanchez-Llamas* leaves open the possibility that the exclusionary rule can still be triggered by a statutory violation that "implicate[s] important Fourth and Fifth Amendment interests,"[270] or potentially one that speaks to constitutional norms.[271]

Even if government activities trigger the exclusionary rule, courts must still decide what test or approach to utilize in applying it—is the suppression of evidence mandatory or is there judicial discretion? While the earlier eras saw the exclusionary rule as a matter of judicial integrity, there was language in several of these cases discussing its deterrent effects.[272] For example, the Court in *Elkins*, after discussing judicial integrity and constitutional protections, noted, "[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[273] *Mapp* echoed these sentiments, providing that "this Court has held [the exclusionary rule] to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard."[274] *Lee* considered deterrence in the statutory violation realm, noting that no law enforcement officers had been prosecuted for violating the Communications Act and, as such, the exclusionary rule was the only available deterrent for future violations.[275]

Despite confirming that deterrence was one of the goals of the exclusionary rule, the Court in these cases did not ask whether the suppression of evidence would deter similar police misconduct in the future; instead, the Court applied the exclusionary rule because the Constitution required it, regardless of whether it

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[267] *See* Nardone v. United States (*Nardone II*), 308 U.S. 338, 340–41 (1939).
[268] *See* Lee v. Florida, 392 U.S. 378, 385–86 (1968).
[269] *See Sanchez-Llamas*, 548 U.S. at 348.
[270] *See id.*
[271] *See* United States v. Dreyer, 804 F.3d 1266, 1279 (9th Cir. 2015) (en banc) (citing *Sanchez-Llamas*, 548 U.S. at 348) ("[T]he Supreme Court has not specifically identified 'statutory violations that enforce constitutional norms . . . .'").
[272] *See, e.g.*, LaFave, *supra* note 31, at 760–61.
[273] Elkins v. United States, 364 U.S. 206, 217 (1960).
[274] Mapp v. Ohio, 367 U.S. 643, 648 (1961).
[275] *See* Lee v. Florida, 392 U.S. 378, 386–87 (1968).

would actually meet its goal of deterrence.[276] Justice Brennan later emphasized that this approach was consistent with the earliest application of the exclusionary rule, noting:

> the question whether the exclusion of evidence would deter future police misconduct was never considered a relevant concern in the early cases from *Weeks* to *Olmstead.* In those formative decisions, the Court plainly understood that the exclusion of illegally obtained evidence was compelled not by judicially fashioned remedial purposes, but rather by a direct constitutional command.[277]

Therefore, under this approach, if the evidence was obtained as a result of a Fourth Amendment or statutory violation, the Court would suppress the evidence, regardless of whether it would deter similar misconduct in the future.[278]

In 1974, with *United States v. Calandra*,[279] the Court shifted away from the mandatory application of the exclusionary rule to Fourth Amendment violations and started moving towards only applying the remedy when doing so would deter similar government misconduct in the future. In *Calandra*, the Court moved away from defining the exclusionary rule as "constitutional" and instead noted that it was a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."[280] In subsequent cases, the Court explicitly rejected the mandatory application of the exclusionary rule as a "necessary consequence of a Fourth Amendment violation,"[281] and instead held that it should only be applied when it could "provide some incremental deterrent, that possible benefit must be weighed against the substantial social costs."[282] Moving directly

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[276] *See id.* at 385–87 ("Under our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States' . . . . We conclude, as we concluded in *Elkins* and in *Mapp*, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law . . . .").

[277] United States v. Leon, 468 U.S. 897, 938–39 (1984) (Brennan, J., dissenting) ("[I]n *Mapp v. Ohio* . . . the Court restored the original understanding of the *Weeks* case . . . . In the Court's view, the exclusionary rule was not one among a range of options to be selected at the discretion of judges; it was 'an essential part of both the Fourth and Fourteenth Amendments.'") (citing *Mapp*, 367 U.S. at 657).

[278] *See* Herring v. United States, 555 U.S. 135, 152 (2009) (Ginsburg, J., dissenting) ("The exclusionary rule is 'a remedy necessary to ensure that' the Fourth Amendment's prohibitions 'are observed in fact.' . . . Beyond doubt, a main objective of the rule 'is to deter . . . .' But the rule also serves other important purposes: It 'enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,' . . . 'thus minimizing the risk of seriously undermining popular trust in government.'"); Hudson v. Michigan, 547 U.S. 586, 608–09 (2006) (Breyer, J., dissenting).

[279] 414 U.S. 338 (1974).

[280] *Id*. at 348.

[281] Herring v. United States, 555 U.S. at 141.

[282] Illinois v. Krull, 480 U.S. 340, 352 (1987) (internal quotation marks omitted); *see also* United States v. Leon, 468 U.S. 897, 908 (1984) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)) ("Indiscriminate application of the exclusionary rule, therefore, may well '[generate] disrespect for the law and administration of justice.' Accordingly, '[as] with any remedial device,

away from the language in *Mapp* (which the Court has since described as "dicta"[283]), the Court noted that the cost of applying the exclusionary rule is "setting the guilty free and the dangerous at large," and suggested that the rule be applied as last resort.[284]

The changing perception of the exclusionary rule—from a constitutional rule to a judicially created rule, and from a necessary component of judicial integrity to a last resort predicated solely upon deterrence[285]—allowed the Court to fashion a new test for applying the exclusionary rule.[286] Rather than applying the traditional "but-for" test, the Court now balances the costs of excluding the evidence—framed as letting a guilty person go free—against the deterrent effect, focusing on whether suppression would deter similar misconduct in the future.[287] The Court has proceeded to tip the balance in favor of the social cost of exclusion, noting that more external deterrence mechanisms are available presently than during the time *Mapp* was decided. For example, the Court has pointed to growing evidence that "police forces across the United States take the constitutional rights of citizens seriously,"[288] and that believing otherwise "would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago."[289]

In sum, the current standard appears to be that only two circumstances in the Fourth Amendment context trigger the exclusionary rule as a potential remedy: Fourth Amendment violations arising from reckless, deliberate, or grossly negligent behavior on the part of police officers,[290] and violations of statutes that implicate Fourth and Fifth Amendment concerns.[291] Yet, much of the language in *Herring* is arguably dicta,[292] and the Court in *Sanchez-Llamas* failed to establish "the degree of constitutional nexus required to invoke suppression for a statutory violation."[293] As a result, lower courts are likely to struggle with whether a statutory

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the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.'").

[283] *See Hudson*, 547 U.S. at 591.

[284] *See id.*

[285] *See* Davis v. United States, 564 U.S. 229, 236–37 (2011) ("The [exclusionary] rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations."). *See generally* LaFave, *supra* note 31, at 760–63.

[286] *See* Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 L. & CONTEMP. PROBS. 211, 212 (2010) (noting the Court is "dissatisfied with the mandatory aspect of the *Mapp* rule" and "has indicated that the rule should be changed but has stopped short of mandating a broad alteration").

[287] *See Hudson*, 547 U.S. at 592–96 ("Exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence.").

[288] *Id.* at 598–99.

[289] *Id.* at 597.

[290] *See* Herring v. United States, 555 U.S. 135, 144 (2009).

[291] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 348 (2006).

[292] *See* Davis v. United States, 564 U.S. 229, 258–59 (2011) (Breyer, J., dissenting) ("[Our] broad dicta in *Herring*—dicta the Court repeats and expands upon today—may already be leading lower courts in this direction.").

[293] United States v. Dreyer, 804 F.3d 1266, 1279 (9th Cir. 2015) (en banc).

or non-deliberate Fourth Amendment violation triggers the exclusionary rule as a potential remedy. If it does, they must also determine if they can still apply the but-for test and, if not, how to balance the social cost of exclusion against deterrence. This potential unpredictability and uneven application is especially apparent when utilizing the exclusionary rule as a potential remedy for PCA violations.

IV. The Posse Comitatus Act Meets the Exclusionary Rule

The PCA serves as a subconstitutional check protecting the constitutional right to be free from military control. But to serve that purpose, it must have an enforcement mechanism. The PCA provides its own enforcement mechanism—potential confinement and a fine—but no individual has ever been prosecuted under the PCA.[294] This Article argues that the exclusionary rule serves as a better enforcement mechanism than criminal sanctions because it is more likely to be used and will still deter the use of the military in civilian law enforcement.

Yet the application of the exclusionary rule to PCA violations has proven problematic to the courts. These judicial struggles speak to two broader issues: defining the constitutional nature of the PCA and the Supreme Court's erosion of the exclusionary rule. This Part explores the tension between the exclusionary rule and the PCA, focusing on defining what constitutes a PCA violation, whether a PCA violation triggers the exclusionary rule, and how to apply the rule if it were to be triggered.

A. *Defining a PCA Violation*

The text of the PCA expressly prohibits the use of the Army or Air Force "to execute the laws;"[295] nonetheless, courts have struggled in determining when federal military involvement in civilian law enforcement amounts to a PCA violation. To make this determination, courts have primarily used three tests, all of which derive from the same fact pattern: a civil disturbance arising in Wounded Knee, South Dakota.[296]

On February 27, 1973, nearly 200 Oglala Lakota (Sioux) and American Indian Movement ("AIM") members seized the town of Wounded Knee, South Dakota.[297] These actions were in protest of Richard Wilson, President of the Pine Ridge Reservation of South Dakota, whom the Lakota accused of massive financial corruption, nepotism, refusal to consult with members on tribal affairs, civil rights

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[294] *See* Felicetti & Luce, *supra* note 16, at 163 n.377.
[295] *See* 18 U.S.C. § 1385 (2018).
[296] *See generally* United States v. McArthur, 419 F. Supp. 186 (D.N.D. 1975); United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975); United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974).
[297] *See* Emily Chertoff, *Occupy Wounded Knee: A 71-Day Siege and a Forgotten Civil Rights Movement*, ATLANTIC (Oct. 23, 2012), https://www.theatlantic.com/national/archive/2012/10/occupy-wounded-knee-a-71-day-siege-and-a-forgotten-civil-rights-movement/263998 [https://perma.cc/QZ3L-55L8].

violations, and inflicting terror and violence against any challenge to his authority.[298] Lakota and AIM members chose Wounded Knee in part because the Pine Ridge administrative center was well-guarded, but also because it had special meaning as the site of the Wounded Knee Massacre of 1890, which involved a U.S. cavalry detachment slaughtering a group of Lakota warriors.[299]

The FBI, the U.S. Marshall Service, and the Bureau of Indian Affairs responded to the siege, and an approximately three-month standoff between the protesters and federal authorities ensued.[300] During the standoff, the Department of Defense ordered two active duty Army colonels to Wounded Knee to provide an opinion as to whether federal troops were necessary and to track the use of equipment supplied by the military. [301] One of the colonels advised against using the federal military to quell the protest, but soon took an active role himself.[302] He ordered the delivery of military supplies, dictated to federal law enforcement where and how the equipment should be used, and recommended Rules of Engagement for the potential use of lethal force against AIM members.[303] Beyond this colonel's involvement, the Nebraska National Guard also made at least one aerial reconnaissance flight at the FBI's request, and the South Dakota National Guard provided mechanics to repair government personnel carriers.[304]

As the standoff continued, federal law enforcement officials arrested AIM and Lakota members attempting to enter the compound with arms and ammunition.[305] The government charged these members with obstructing justice by interfering with a law enforcement officer "lawfully engaged in the lawful performance of his duties."[306] But at each of these trials, the members argued that the law enforcement officers were not engaged in the lawful performance of their duties because the assistance received from the federal military violated the PCA.[307]

1. Test 1—the *Jaramillo* Test

Three separate courts reviewed these potential PCA violations and surmised three different rules. In *United States v. Jaramillo*, the United States District Court for the District of Nebraska recognized an expansive reading of the PCA and its

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[298] *See id.*; Ward Churchill, *Death Squads in the United States: Confessions of a Government Terrorist*, 3 YALE J. L. & LIBERATION 83, 85–87 (1992); Albert J. Kreiger, *Wounded Knee Revisited: The Personal Reflections of a Defense Attorney Upon a Water-Shed Life Experience*, 10 ST. THOMAS L. REV. 45, 45 n.3 (1997).
[299] *See* MARY CROW DOG & RICHARD ERDOES, LAKOTA WOMAN 124–25 (1991); *see also* Chertoff, *supra* note 297.
[300] *See Jaramillo*, 380 F. Supp. at 1377; Chertoff, *supra* note 297.
[301] *See Jaramillo*, 380 F. Supp. at 1379–380.
[302] *See id.*
[303] *See Jaramillo*, 380 F. Supp. at 1379–380; *see also* C.J. Williams, *An Argument for Putting the Posse Comitatus Act to Rest*, 85 MISS. L.J. 99, 121–22 (2016).
[304] *See Jaramillo*, 380 F. Supp. at 1380.
[305] *See* Kealy, supra note 206, at 401–02.
[306] Williams, *supra* note 303, at 143.
[307] Kealy, *supra* note 42, at 402.

purpose in safeguarding the constitutional right to be free from military control.[308] In arriving at this reading, the court examined the intent of the statute: to "eliminate the use of federal troops to execute the laws of the United States."[309] The court also turned to the Supreme Court's majority decision in *Laird v. Tatum* to justify the importance of preventing federal troops from enforcing civilian law. Specifically, the court cited that:

> [There is] a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military.[310]

Based on its expansive reading of the PCA, the court defined the test of a PCA violation as whether the "use of any part of the Army or Air Force . . . pervaded the activities" of civilian law enforcement.[311] Because the government had failed to prove that the Army's activities did not pervade the activities of federal law enforcement at Wounded Knee, the court acquitted the defendant.[312] In recognizing the difficulty of acquitting this particular defendant, the court noted that:

> It does not matter whether the use is to good effect or bad effect or whether the advice taken is good advice or bad advice. Congress already has provided that the President could use military personnel in quelling civil disorders, but the President did not do so with respect to Wounded Knee. Congress could have passed and may yet pass legislation to permit the use of a limited or unlimited number of Army or Air Force persons to assist law enforcement officers to execute their duties in a civil disorder without presidential order. But it has not done so. The people could have amended or could yet amend the Constitution to permit use of the military services under whatever circumstances they declare. But they have not done so. I am bound to follow the law as it is, not as it will or could become.[313]

2. Test 2—the *Red Feather* Test

The United States District Court for the District of South Dakota in *United States v. Red Feather* applied a more restrictive understanding of the PCA.[314]

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[308] See *Jaramillo*, 380 F. Supp. at 1379, 1381.
[309] *Id.* at 1379.
[310] *Id.* at 1381–82 (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)).
[311] *See id.* at 1379 (internal quotation marks omitted) (quoting 18 U.S.C. § 1385).
[312] *Id.* at 1381.
[313] *Id.*
[314] 392 F. Supp. 916 (D.S.D. 1975).

Specifically, it held that Congress intended the PCA "to eliminate the direct active use of federal troops" in civilian law enforcement.[315] As such, the *Red Feather* court established an "active vs. passive" rule to PCA violations. The court held that the PCA prohibits active military involvement in direct law enforcement, while allowing for passive roles which "might indirectly aid law enforcement."[316] Of note, the court made no reference to the constitutional underpinnings of the PCA or of the importance of civilian control of the military in establishing the active vs. passive test. Instead, the court cited the legislative history discussing abuses of military power during Reconstruction and determined the intent of the PCA was to limit the more active policing of federal troops, rather than a gradual encroachment of the military into the civil.[317] Under this rationale and test, the court granted in part a government motion *in limine* requesting the court to restrict the defense from discussing military involvement at Wounded Knee when the military involvement was merely passive in nature, but also denied in part the motion *in limine* when the military involvement was active. [318]

3. Test 3—the *McArthur* Test

The United States District Court for the District of North Dakota in *United States v. McArthur* crafted a third test.[319] The *McArthur* court began its analysis recognizing that "Americans are suspicious of military authority . . . dangerous, that is, to the freedom of individuals," and that the "posse comitatus statute is intended to meet that danger."[320] Nonetheless, the PCA "must be interpreted in the light of the statutory framework which surrounds it."[321] In particular, the court noted that the Economy Act allowed the military to provide equipment and support to federal officials.[322] Considering this framework, the court assessed the *Jaramillo* and *Red Feather* tests and found them both to be insufficient. In considering the *Jaramillo* test, the court acknowledged that it represented an "approach well established in constitutional law," but required a "judgment be made from too vague a

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[315] *See id.* at 922.
[316] *See id.* at 925 (emphasis omitted). The court in *Red Feather* also provided examples of what would be considered active: "arrest; seizure of evidence; search of a person; search of a building; investigation of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect and other like activities." *Id.* It also provided examples of passive, indirect assistance: "mere presence of military personnel under orders to report on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of military personnel to deliver military materiel, equipment or supplies, to train local law enforcement officials on the proper use and care of such material or equipment, and to maintain such materiel or equipment; aerial photographic reconnaissance flights and other like activities." *Id.*
[317] *See id.* at 922–23.
[318] *See id.* at 918, 925.
[319] 419 F. Supp. 186 (D.N.D. 1975).
[320] *Id.* at 193–94.
[321] *Id.* at 194.
[322] *See id.* (citing 31 U.S.C. § 686, which "authoriz[es] any department or agency of the government to 'place orders' for materials, supplies, equipment, *work* or *services* of any kind that the requisitioned federal agency may be in a position to supply.").

standard."[323] On the other hand, the court recognized the *Red Feather* test was "too mechanical, and inevitably when . . . applied to borderline cases, it will crumble at the edges."[324]

Acknowledging the limitations of applying these approaches to future cases—one being too vague and the other too mechanical—the court fashioned its own test, asking whether the military personnel "subjected the citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature."[325] In applying the test to Wounded Knee, the court concluded the military did not violate the PCA because the federal law enforcement officers "borrowed" the colonel "as a vehicle might be borrowed" and the military did not exercise any control over citizens.[326]

4. Applying the Three Wounded Knee Tests

Following the Wounded Knee cases, there were three tests for whether military involvement in civilian law enforcement violated the PCA: (1) whether any part of the military "pervaded" federal law enforcement; (2) whether there was a direct active use of federal military troops; and (3) whether the use of military personnel subjected citizens to the exercise of military power that was regulatory, proscriptive, or compulsory in nature.

Federal and state courts have utilized these tests differently. For example, the Eighth Circuit is the only circuit to expressly adopt one test, and it chose the *McArthur* test.[327] Others, such as the Eleventh Circuit, have held that military involvement must meet all three tests to constitute a PCA violation.[328] Still other courts, such as the Seventh Circuit, have attempted to capture the spirit of all three rules by recognizing that "where military involvement is limited and where there is an independent military purpose . . . to support the military involvement, the

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[323] *Id.*
[324] *Id.*
[325] *See id.*
[326] *See id.* at 194–95.
[327] *See* United States v. Casper, 541 F.2d 1275, 1278 (8th Cir. 1976) (affirming the convictions in *McArthur* and upholding the trial court's reasoning). Several other courts have applied solely the *McArthur* test. *See, e.g.*, Hall v. State, 557 N.E.2d 3, 5 (Ind. Ct. App. 1990). *Cf.* United States v. Gerena, 649 F. Supp. 1179, 1181–82 (D. Conn. 1986) (holding that the use of Navy helicopters to transport defendants did was not unlawful in part because it did not contravene 32 C.F.R. § 213.10(a)(7), which regulated the Department of Defense's use of military equipment for law enforcement purposes, and required that such use "not subject civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature").
[328] *See* United States v. Hartley, 678 F.2d 961, 978 & n.24 (11th Cir. 1982). *Cf.* United States v. Dreyer, 804 F.3d 1266, 1275 (9th Cir. 2015) (en banc) (holding that "PCA-like restrictions prohibit[ing] direct military involvement in civilian law enforcement activities" require that military assistance meet all three of the Wounded Knee tests); United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (holding that transporting the defendant on a Navy aircraft carrier did not violate regulations promulgated by the Department of Defense, which "are consistent with judicial interpretations of the Posse Comitatus Act" and "incorporate one of three tests [i.e., the *McArthur* test] employed to identify violations").

coordination of military police efforts with those of civilian law enforcement officials does not violate [the PCA]," but where such involvement is "pervasive" or permeates civilian law enforcement, it is unlawful.[329]

These varying approaches establish a case-by-case analysis as to whether military involvement with civilian law enforcement violates the PCA. Courts must review military conduct and determine if it is active or passive, direct or indirect, sufficiently pervasive, or subjects an individual to the military's control. But beyond making the PCA unpredictable, the different tests vary as to whether the PCA protects against systematic and widespread assertions of military control, or is limited to protecting against individual incursions. For example, under the *Jaramillo* test, which asks whether the military presence was pervasive, courts would not need to address if the military and the defendant had any direct contact, but would rather look at the military's conduct in its totality.[330] In *Jaramillo* itself, the military had no contact with the defendant, but its presence was pervasive enough for the court to consider it a PCA violation.[331] By contrast, as courts have increasingly embraced the *McArthur* test, they must look at the actual contact between the military and the defendant, asking whether the military subjected the individual to its authority.[332] This analysis, which emphasizes standing, dictates that no PCA violation can occur if the defendant has no direct contact with the military, no matter how pervasive the conduct.[333]

B. *Determining Whether a PCA Violation Triggers the Exclusionary Rule*

In adopting the different tests to establish whether the military committed a PCA violation, the courts have narrowed the reach of the PCA. However, the Wounded Knee cases did not discuss the exclusionary rule as a potential remedy for PCA violations. The lack of guidance from the Supreme Court has left lower

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[329] *See* Hayes v. Hawes, 921 F.2d 100, 103–04 (7th Cir. 1990); *see also* State v. Cooper, 972 P.2d 1, 4–7 (N.M. Ct. App. 1998) (citing *Hayes*, 921 F.2d at 103) ("[W]here military involvement is limited and does not invade the traditional functions of civilian law enforcement officers, such as making arrests, conducting searches or seizing evidence, the coordination of military efforts with those of civilian law enforcement does not violate the PCA.").

[330] *See* United States v. Jaramillo, 380 F. Supp. 1375, 1378–82 (1974).

[331] *See id.*

[332] *See* Bissonette v. Haig, 776 F.2d 1384, 1390 (8th Cir. 1985) (applying the *McArthur* test, the court noted "that military involvement . . . does not violate the Posse Comitatus Act unless it actually regulates, forbids, or compels some conduct on the part of those claiming relief"). The facts of *Bissonette* arise out of the Wounded Knee occupation. The court found that the plaintiffs, who were confined within the federal authorities' armed perimeter around Wounded Knee, had standing to raise an "unreasonable seizure" claim under the Fourth Amendment on account of the military participation in the siege. However, they did not have standing to raise an "unreasonable search" claim for the aerial surveillance conducted by the military because there was no allegation the aerial surveillance took place in an area where they had a reasonable expectation of privacy. *See id.* at 1385, 1391.

[333] *Cf.* State v. Pattioay, 896 P.2d 911, 922 & n.21 (Haw. 1995) (applying a "primary military purpose" test to determine whether the PCA was violated, and concluding that such a violation could only lead to the suppression of evidence if the defendant could establish that "his own constitutional rights were violated by the search and seizure challenged").

federal and state courts to determine whether a violation of the PCA triggers the exclusionary rule as a remedy, and the results have been inconsistent both in rationale and application.

1. The Federal Courts' Approach to PCA Violations

Similar to their approach in Fourth Amendment exclusionary rule cases, courts must first determine whether a PCA violation triggers the exclusionary rule as a potential remedy. Most cases that have considered extending the exclusionary rule to PCA violations have arisen during the "deterrence and erosion" era of the Supreme Court and accordingly emphasize deterrence. One early example is the 1974 case of *United States v. Walden*,[334] in which the Fourth Circuit found that an undercover investigation carried out by Marines at the request of the Alcohol, Tobacco, and Firearms Division of the U.S. Treasury Department violated Navy military regulations that mirrored the prohibitions in the PCA.[335] Although the Navy's regulations were an "extension of the policy of the Posse Comitatus Act,"[336] which was itself reflective of "the traditional American insistence on exclusion of the military from civilian law enforcement, which some have suggested is lodged in the Constitution,"[337] the court declined to apply the exclusionary rule.[338] In reaching this decision, the court looked to the rationales underlying the Fourth Amendment exclusionary rule—that it was "an essential ingredient of the Fourth Amendment" and that "alternative remedies for Fourth Amendment violations ha[d] proved ineffectual"—and said that neither applied.[339] However, the court acknowledged that PCA violations might still trigger the exclusionary rule as a remedy in some circumstances, stating that if there should "be evidence of widespread or repeated violations in any future case, or ineffectiveness of enforcement by the military, we will consider ourselves free to consider whether adoption of an exclusionary rule is required as a future deterrent."[340]

Following the Fourth Circuit's decision in *Walden*, several other courts followed suit and found that the PCA only triggered the exclusionary rule if there was evidence of widespread violations or ineffective enforcement by the

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[334] United States v. Walden, 490 F.2d 372 (4th Cir. 1974).
[335] *Id.* at 373.
[336] *Id.* at 374.
[337] *Id.* at 376.
[338] *Id.* at 376–77.
[339] *Id.* (stating four reasons for why the exclusionary rule was unnecessary: (1) that the regulation's proscription against Marines participating in civilian law enforcement was unclear and not widely known; (2) that the regulation was "for the benefit of the people as a whole," not the protection of "the personal rights of defendants"; (3) that the regulation's lack of enforcement mechanism meant the courts could admit evidence obtained in contravention of the regulation without condoning "dirty business"; and (4) there were no other known cases where the regulation had been violated).
[340] *Id.* at 377.

military.[341] For example, in *United States v. Roberts*,[342] the Ninth Circuit examined the legality of a joint Navy/Coast Guard drug interdiction operation in which Coast Guard personnel used a Navy boarding boat with a Navy crew to approach and board a civilian sailboat carrying marijuana, detained the sailboat's crew on a Navy vessel, and used that vessel to tow the sailboat.[343] The Ninth Circuit found that the Navy's participation in this instance of civilian law enforcement violated a statutory regime that reflected the PCA,[344] but declined to invoke the exclusionary rule because the "record does not reflect that the Navy has engaged in widespread and repeated violations" to demonstrate a need to deter future violations.[345] In *United States v. Wolffs*,[346] the Fifth Circuit refrained from determining whether the Army violated the PCA by participating in a drug investigation, holding that "[w]e need not decide that complex and difficult issue because, assuming without deciding that there was a violation, application of an exclusionary rule is not warranted."[347] The court inferred that the Army's participation here was limited, noting that "[i]f this Court should be confronted in the future with widespread and repeated violations of the Posse Comitatus Act an exclusionary rule can be fashioned at that time."[348]

In keeping open the possibility of using the exclusionary rule to enforce the PCA, these courts alluded to the "important function of the [PCA] in 'upholding the American tradition of restricting military intrusions into civilian affairs.'"[349] Consistent in these cases is the acknowledgement that the statutory nature of the PCA did not preclude the triggering of the exclusionary rule as a potential remedy. Also consistent in these cases, and similar to Fourth Amendment exclusionary rule cases, are the requirements that there be showings of widespread and repeated

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[341] *See, e.g.*, Hayes v. Hawes, 921 F.2d 100, 104 (7th Cir. 1990) (holding that, even if there had been a PCA violation, the exclusionary rule could not be applied "absent widespread and repeated violations"); United States v. Hartley, 796 F.2d 112, 114 (5th Cir. 1986) (finding "no basis to warrant the creation or application of an exclusionary rule" where the defendant had failed to show "widespread or direct participation of the military in the interdiction of a vessel or aircraft, or in any search, seizure, or arrest"); United States v. Roberts, 779 F.2d 565, 568 (9th Cir. 1986) (refusing to invoke the exclusionary rule absent a demonstrated need for deterrence and an indication that the Navy did not act in good faith).

[342] 779 F.2d 565 (9th Cir. 1986)

[343] *Id.* at 566.

[344] *Id.* at 567. The PCA does not expressly prohibit the Navy from enforcing civilian law. However, 10 U.S.C. §§ 371–78 established a framework for how the Navy and Coast Guard could cooperate for law enforcement purposes. Specifically, the Coast Guard was allowed to use the Navy's equipment and the Navy was allowed to assign personnel to operate this equipment, see *id.* (citing 10 U.S.C. § 372), but such equipment could not be used "to interdict or to interrupt the passage of vessels . . . ," see *id.* (citing 10 U.S.C. § 374(c)(1)). Moreover, the Secretary of the Navy had the authority to approve exceptions to policies (like the one at issue here) that contravened the general policy of the PCA, i.e., preventing the military from engaging in civilian law enforcement. *See id.* at 567–68. The court found that the Secretary of the Navy had not approved an exception in this case, and therefore the Navy's activity violated 10 U.S.C. § 374. *See id.* at 568.

[345] *Id.* at 568.

[346] 594 F.2d 77 (5th Cir. 1979).

[347] *Id.* at 85.

[348] *Id.*

[349] United States v. Johnson, 410 F.3d 137, 149 (4th Cir. 2005) (quoting United States v. Al-Talib, 55 F.3d 923, 930 (4th Cir. 1995)).

abuses of the PCA and that excluding the evidence obtained through PCA violations would deter similar conduct in the future.

Although these cases implied that violations of statutes like the PCA could trigger the exclusionary rule as a potential remedy, the Supreme Court's decision in *Sanchez-Llamas* calls into question whether the exclusionary rule could be applied to the PCA even if violations were widespread and the suppression of the evidence would deter similar misconduct in the future. Although the Supreme Court in *Sanchez-Llamas* did not explicitly hold that statutory violations could never trigger the exclusionary rule as a remedy, it did suggest that only statutory violations with Fourth and Fifth Amendment implications would trigger the exclusionary rule.[350]

The Ninth Circuit, sitting *en banc,* interpreted *Sanchez-Llamas* in the context of the PCA in *United States v. Dreyer*.[351] In that case, agents of the Naval Criminal Investigative Service ("NCIS") initiated an investigation into the distribution of child pornography on the internet.[352] In the course of this investigation, one of the agents detected an IP address that had shared several files identified as child pornography.[353] The agent identified the owner of the IP address as Michael Dreyer and, upon confirming that Dreyer had no military connection, turned the case over to local police.[354] The court held that a statutory violation had occurred and then considered whether the exclusionary rule could be applied.[355] Although acknowledging that "the Supreme Court has, in recent years, made more stringent the test for invoking the exclusionary rule,"[356] and "approved of using the rule to remedy statutory violations only in rare circumstances,"[357] the Ninth Circuit did not apply a bright-line rule precluding consideration of the exclusionary rule as a remedy to the PCA and similar restrictions. Instead, it relied on *Sanchez-Llamas* to posit that the "exclusionary rule is applied '*primarily* to deter constitutional violations' and violations of statutes that enforce constitutional norms."[358] Applying this rationale, the court noted that "[t]he PCA does have constitutional underpinnings, however, and we know of no controlling precedent precluding application of the exclusionary rule for a violation of the PCA."[359] In its reasoning, the Ninth Circuit rooted the PCA's constitutional implications to the "traditional and strong resistance of Americans to any military intrusion into civilian affairs,"[360]

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[350] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 348–49 (2006).
[351] 804 F.3d 1266 (9th Cir. 2015) (en banc).
[352] *Id.* at 1270.
[353] *Id.*
[354] *Id.* at 1270–71.
[355] *Id.* at 1277–78. Although NCIS, as a part of the Navy, is not directly regulated by the PCA, the court found that it was still constrained by "PCA-like restrictions proscribing direct assistance to civilian law enforcement." *Id.* at 1274.
[356] *Id.* at 1278.
[357] *Id.* (citing Miller v. United States, 357 U.S. 301, 313–14 (1958); McNabb v. United States, 318 U.S. 332, 344–45 (1943)).
[358] *See id.*
[359] *Id.* at 1279.
[360] *Id.* at 1279 n.7 (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)).

and in the PCA's legislative history, which suggested that the "[PCA] was no more than an expression of constitutional limitations on the use of the military to enforce civil laws."[361] Therefore, the Ninth Circuit explicitly provided that even under the restrictive interpretation of statutory violations established by the Supreme Court, the PCA had sufficient constitutional implications to trigger the availability of the exclusionary rule as a remedy. Having established that a violation of the PCA could trigger the exclusionary rule, the court considered whether the military involvement at issue was sufficiently widespread and repeated to demonstrate a need for deterrence.[362] Applying this standard, the court declined to apply the exclusionary rule as a remedy because the violation was a result of "institutional confusion" as opposed to a widespread and repeated disregard of the law, and therefore the need to deter future violations through the suppression of evidence was minimal.[363]

The Ninth Circuit's holding in *Dreyer* suggests that violations of the PCA could have sufficient constitutional implications to trigger the exclusionary rule under *Sanchez-Llamas*. However, one could also interpret *Sanchez-Llamas* more restrictively than the Ninth Circuit, requiring that the exclusionary rule can only be applied to remedy statutory violations that specifically implicate Fourth and Fifth Amendment interests, rather than constitutional interests generally.[364] Even under this more restrictive reading of *Sanchez-Llamas*, violations of the PCA should still trigger the exclusionary rule because the PCA speaks to Fourth and Fifth Amendment interests. For example, the Eighth Circuit suggested that there is a potential nexus between the PCA and the Fourth Amendment when it stated that the use of military force to secure an armed perimeter around the protesters at Wounded Knee could constitute an unreasonable seizure under the Fourth Amendment and therefore give rise to an action for damages.[365] The potential nexus between the PCA and the Fourth Amendment means that evidence obtained in violation of the PCA could implicate Fourth Amendment interests and therefore warrant the use of the exclusionary rule.

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[361] *Id.* (quoting United States v. Walden, 490 F.2d 372, 375 (4th Cir. 1974)).
[362] *See id.* at 1279–80.
[363] *Id.* at 1280. It is worth noting that the Ninth Circuit found that the NCIS agent's statutory violation "was not an isolated incident." *Id.* at 1276. However, what seemed to matter to the court was not the number of violations that had occurred, but the motivation behind them. *See id.* at 1280 ("The facts of this case are troubling and unprecedented in our case law, but they also point to institutional confusion and show that NCIS misunderstood the scope of its authority."). Having established that the military had not flaunted the PCA or otherwise acted maliciously, the court held that "the Government should have the opportunity to self-correct before we resort to the exclusionary rule, particularly because it has already acknowledged the need to do so." *Id.* In so holding, the court acknowledged that it was treating the government more leniently than if the violation at issue had been of the Fourth or Fifth Amendment. *See id.* at 1281 ("In the more common Fourth or Fifth Amendment context, institutional confusion or ignorance is not ground for refusing to exclude evidence.").
[364] *See* Sanchez-Llamas v. Oregon, 54 U.S. 331, 348 (2006).
[365] *See generally* Bissonette v. Haig, 776 F.2d 1384, 1392 (8th Cir. 1985).

The reality remains, however, that no federal court has applied the exclusionary rule to PCA violations.[366] Even when finding PCA violations, courts have repeatedly held that these violations were not sufficiently widespread and repeated to demonstrate a need for deterrence.[367] Some courts have even taken a more hardline approach, rejecting the application of the exclusionary rule to remedy PCA violations regardless of how widespread or repeated such violations were and the effectiveness of the exclusionary rule as a deterrent. For instance, the D.C. Circuit determined that a PCA violation would not "amount to a constitutional violation, making application of an exclusionary rule or similar prophylactic measures inappropriate."[368] Other courts have turned to the language of the statute itself to reject the triggering of the exclusionary rule, noting that, "[u]nder the PCA, the exclusive remedies for a violation are a fine, a maximum of two years imprisonment, or both, not suppression of evidence."[369] Given the repeated refusal of federal courts to apply the exclusionary rule to PCA violations and the high bar they have set for when violations may trigger the rule, it must be wondered whether the federal courts have rendered the PCA completely ineffectual as a sub-constitutional check protecting the right to be from military control. An examination of state court cases presents alternative approaches that may lower that bar to allow for the increased consideration of the exclusionary rule as a remedy.

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[366] *See* Walsh & Sullivan, *supra* note 174, at 34. The one exception to this rule is that a three-judge panel on the Ninth Circuit held that the evidence obtained as a result of the NCIS investigation described above should be suppressed, see United States v. Dreyer, 767 F.3d 826 (9th Cir. 2014), but that panel's holding was subsequently overturned by the Ninth Circuit sitting *en banc*, see United States v. Dreyer, 804 F.3d 1266 (9th Cir. 2015).

[367] *See, e.g.*, United States v. Johnson, 410 F.3d 137, 149 (4th Cir. 2005) (refusing to invoke the exclusionary rule because "the record in this case contains no evidence that the alleged violation is widespread or has occurred repeatedly"); Hayes v. Hawes, 921 F.2d 100, 104 (7th Cir. 1990) ("[W]e note that a majority of the courts which have addressed the issue presented in this case have steadfastly refused to apply the exclusionary rule to evidence seized in violation of the statute . . . absent widespread and repeated violations, neither alleged nor present in this case."); United States v. Hartley, 796 F.2d 112, 115 (5th Cir. 1986) ("This case fails to present any widespread or direct participation of the military in the interdiction of a vessel or aircraft, or in any search, seizure or arrest. . . . Thus, this case wholly fails to present a situation which might require considering the creation or application of the exclusionary rule."); United States v. Walden, 490 F.2d 372, 377 (4th Cir. 1974) (refusing to consider the exclusionary rule because "this case is the first instance to our knowledge in which military personnel have been used as the principal investigators of civilian crimes in violation of [Navy Instruction 5400.12, imposing the policy of the PCA on the Navy]").

[368] *See* United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (citing United States v. Caceres, 440 U.S. 741, 754–55 (1979)). *Cf. Dreyer*, 804 F.3d at 1285 (en banc) (Owens, J., concurring) ("I would follow *Hudson* and *Sanchez-Llamas* to hold that PCA violations can never warrant suppression. The PCA's abstract constitutional foundation does not bear the extreme weight that the suppression remedy requires—far more is needed before we elevate the PCA to the same status as the Fourth and Fifth Amendments.").

[369] *See* United States v. Vick, 842 F. Supp. 2d 891, 894 (E.D. Va. 2012); *see also* State v. Valdobinos, 858 P.2d 199 (Wash. 1993) (refusing to apply the exclusionary rule to a PCA violation in part because "the statute itself identifies the potential consequences of a violation: a fine or imprisonment or both").

2. States' Approaches to PCA Violations

While some state courts share the federal courts' emphasis on widespread and repeated abuses,[370] some state courts adopted the "free-form" approach to when PCA violations can trigger the exclusionary rule. In *People v. Burden*,[371] the Michigan Court of Appeals found the use of an Air Force member as an undercover agent to be a violation of the PCA.[372] The court gave no consideration to whether the violation was widespread and repeated, or whether suppression would deter similar misconduct in the future.[373] Instead, relying on *Lee v. Florida*, which applied the exclusionary rule to a statutory violation without considering whether the violation was widespread or would deter similar misconduct in the future,[374] it held that the exclusionary rule was applicable to the PCA violation.[375] By eliminating the requirement that a PCA violation must be reflective of widespread and repeated violations, this approach lowers the standard for when a PCA violation could trigger the exclusionary rule. Quite simply, it allows for the application of the exclusionary rule after a single PCA violation, without consideration of whether the suppression of the evidence would deter similar misconduct in the future.

Other courts have framed the triggering of the exclusionary rule in constitutional terms. In *State v. Pattioay*,[376] the Supreme Court of Hawaii noted that some cases from the "deterrence and erosion" era held that, "where a violation of the [PCA] is found or suspected, courts have generally found that creation or application of an exclusionary rule is not warranted."[377] The court also found that, although some federal circuits had acknowledged that the exclusionary rule might be an acceptable remedy if PCA violations were sufficiently widespread to warrant deterrence, the military's involvement in the case at hand did not exhibit a pattern

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[370] *See, e.g.*, Taylor v. State, 640 So. 2d 1127, 1136–37 (Fla. Dist. Ct. App. 1994) (declining to apply the exclusionary rule because "[a] majority of the courts addressing the issue have refused to apply the exclusionary rule to evidence obtained in violation of the statute and regulations, in the absence of evidence of widespread and repeated violations," and the court found that "[s]uch widespread, repeated violations have not been alleged or shown to exist in this case"); State v. Roberts, 786 P.2d 630, 635 (Kan. Ct. App. 1990) ("We are not persuaded that, even if a PCA violation had occurred in this case, this single instance evidences widespread and repeated PCA violations or ineffectiveness of military enforcement of the PCA of a magnitude that requires [triggering the exclusionary rule]."); State v. Cooper, 976 P.2d 1, 5–6 (N.M. Ct. App. 1998) (finding no PCA violation and noting that "courts have uniformly held that the exclusionary rule still does not apply unless it can be shown that, based on widespread and repeated violations of the act, the evidence should be suppressed for deterrent purposes").

[371] 288 N.W.2d 392 (Mich. Ct. App. 1979), *rev'd* 303 N.W.2d 444 (Mich. 1981).

[372] *Id.* at 393. Both the trial court and the Court of Appeals found the use of an Air Force member as an undercover agent to be a violation of the PCA. The Michigan Supreme Court overturned on these grounds and did not discuss whether the application of the exclusionary rule would have been appropriate if there had been a violation.

[373] *See generally id.*

[374] *See* Lee v. Florida, 392 U.S. 378, 385–87 (1968).

[375] *See Burden*, 288 N.W.2d at 216.

[376] 896 P.2d 911 (Haw. 1995).

[377] *Id.* at 922–23 (alteration in original) (quoting United States v. Hartley, 796 F.2d 112, 115 (5th Cir. 1986)).

of abuse.[378] Nonetheless, the court applied the exclusionary rule, relying on the discussions in *Mapp* and *Lee* about the "imperative of judicial integrity," and that "it cannot be lawful to authorize [through judicial sanction] what is an illegal act."[379] Both *Burden* and *Pattioay* used lower thresholds for when a PCA violation triggers the exclusionary rule; rather than asking whether the military involvement was sufficiently widespread and repeated to warrant deterrence through the suppression of evidence, these cases relied upon the principle of judicial integrity to allow for the application of the exclusionary rule of a single PCA violation, regardless of the deterrent effect.

Other state courts have held that PCA violations do not automatically trigger application of the exclusionary rule, but have recognized the constitutional underpinnings of the PCA and established tests that are less demanding than the "widespread or repeated" requirement of federal courts. For example, Colorado courts have looked at the specific law enforcement act performed by the military and asked "whether the illegal conduct rises to a level necessitating an exclusion of the tainted arrest."[380] Under this approach, the court will suppress the evidence unless the "actions of the military personnel in acquiring the evidence . . . [are] consistent with a military purpose in conformity with the PCA."[381] Similarly, Oklahoma courts provided that they are "compelled to examine each case involving a violation of the Posse Comitatus Act and determine whether the illegal conduct by the law enforcement personnel rises to an intolerable level as to necessitate an exclusion of the evidence resulting from the tainted arrest."[382] Again, by not requiring the violation to be widespread and repeated, these states allow for a single violation of the PCA to trigger the availability of the exclusionary rule as a remedy.[383]

These state court cases present an alternative to the federal courts' approach to applying the exclusionary rule to PCA violations. By not requiring a showing

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[378] *See id.* at 923.

[379] *Id.* at 923–24 (quoting *Lee*, 392 U.S. at 385–86 & n.9) (citing Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960)).

[380] People v. Tyler, 854 P.2d 1366, 1370 (Colo. App. 1993) (applying the exclusionary rule to suppress evidence obtained as result of the military's involvement with an undercover drug deal), *rev'd on other grounds*, 874 P.2d 1037 (Colo. 1994).

[381] *Id.* at 1370.

[382] Taylor v. State, 645 P.2d 522, 524–25 (Okla. Crim. App. 1982) ("Under the present facts we hold that the military intervention was excessive and cannot be condoned by this Court. Here, Mainard, a military police officer, actively participated in an undercover drug purchase.").

[383] *Cf.* Kim v. State, 817 P.2d 467, 472 (Alaska 1991) (Rabinowitz, J., dissenting). In *Kim*, the Alaska Supreme Court refused to hear an appeal of a holding by the Court of Appeals of Alaska that "a joint military and civilian investigation of local drug dealers" did not violate the PCA, *see* Moon v. State, 785 P.2d 45 (Alaska Ct. App. 1990). PCA. Dissenting from the Supreme Court's order, Judge Rabinowitz framed compliance with the PCA in terms of judicial integrity, providing that "no exception to the Posse Comitatus Act is appropriate, and the exclusionary rule should apply 'to remove incentives for governmental intrusions into protected areas,' if not also 'to breathe life' into the federal constitutional guarantees which underly [sic] the Act . . . ." (citations omitted). *Kim*, 817 P.2d at 472. Judge Rabinowitz also stated that the determination of when to apply the exclusionary rule to PCA violations should be made on a case-by-case basis, as opposed to automatically. *See id.*

that the PCA violation in question is "widespread or repetitive," these state court cases increase the probability that the exclusionary rule will apply to PCA violations because a single instance of the military participating in civilian law enforcement would trigger its availability. To these state courts, a showing of deterrence becomes secondary, as "[p]ermitting only the statutory remedy expressly contemplated under the PCA would obviate the court's necessary role in supervising state criminal prosecutions and would also amount to judicial sanction of federal law violations by federal military personnel."[384] Thus, the states suggest an approach consistent with the PCA's constitutional underpinnings—to serve as a subconstitutional check for the right to be free from military control—by allowing the exclusionary rule for any PCA violation, even if not widespread or repeated.

C. *Applying the Exclusionary Rule to PCA Violations*

Under older Supreme Court precedent, evidence would be suppressed if it would not have been obtained "but for" a constitutional violation committed by the government.[385] Subsequently, the Supreme Court altered the application of the exclusionary rule, holding that courts must balance the social cost of excluding the evidence against the need for deterrence.[386] As courts struggle with determining both when an act violates the PCA and when that violation triggers the exclusionary rule, the result is that in only a few cases have courts applied the exclusionary rule to exclude evidence as a result of a PCA violation. Consequently, there is not much caselaw to suggest what test the courts will use in applying the exclusionary rule for PCA violations once triggered; specifically, will courts apply the earlier "but-for" test, or will they apply the more recently stated balancing test in determining whether evidence should be suppressed?

The only federal court to exclude evidence as a result of a PCA violation was the Ninth Circuit panel in *Dreyer*.[387] Once the panel determined the PCA violation triggered the exclusionary rule, they appeared to apply the "but-for" test and did not consider whether the need to deter similar misconduct in the future outweighed the social cost of letting the defendant go free.[388] But, the Ninth Circuit *en banc* overruled the panel in part because they found the PCA violation was not sufficiently widespread and repeated to demonstrate a need to deter future violations.[389] The state court cases that have applied the exclusionary rule appear to disregard the deterrence balancing test in favor of the "but-for" test,[390] but these

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[384] *See Pattioay*, 896 P.2d at 926.
[385] *See generally* Mapp v. Ohio, 367 U.S. 643 (1961).
[386] *See* Hudson v. Michigan, 547 U.S. 586, 591 (citing Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357, 363–65 (1998)).
[387] *See* United States v. Dreyer, 767 F.3d 826, 836–37 (9th Cir. 2014), *rev'd*, 804 F.3d 1266 (9th Cir. 2015) (en banc).
[388] *See id.*
[389] *See* United States v. Dreyer, 804 F.3d 1266, 1279–280 (9th Cir. 2015) (en banc).
[390] *See, e.g.*, People v. Tyler, 854 P.2d 1366 (Colo. App. 1993); State v. Pattioay, 896 P.2d 911 (Haw. 1995); People v. Burden, 288 N.W.2d 392 (Mich. Ct. App. 1979), *rev'd* 303 N.W.2d 444 (Mich. 1981); Taylor v. State, 645 P.2d 522 (Okla. Crim. App. 1982).

cases were all decided prior to the Supreme Court's establishment of the deterrence-based balancing test. The scarcity of cases where courts have applied the exclusionary rule to PCA violations and the timing of these cases leave open the question of what test courts will use in applying the exclusionary rule when triggered. This question becomes especially relevant should courts alter their approaches and allow for more violations of the PCA to trigger the exclusionary rule as a potential remedy.

V. Fashioning the Posse Comitatus Act's Exclusionary Rule

The argument made in this Article is fairly straightforward: (1) there is a constitutional right to be free from military control; (2) Congress passed the PCA as a subconstitutional check to protect that right; (3) the current criminal enforcement mechanisms for the PCA are insufficient, considering that there have never been any criminal prosecutions under the PCA; and (4) applying the exclusionary rule to PCA violations will provide another layer of protection to the constitutional right to be free from military power.

As straightforward as the argument appears, its application is more problematic. The primary problem is the current iteration of the exclusionary rule. Critics of applying the exclusionary rule to PCA violations are correct in noting that "the Supreme Court has, since the 1970s, 'imposed a more rigorous weighing of [the exclusionary rule's] costs and deterrence benefits.'"[391] They are also correct in noting that "[e]xclusion of evidence to remedy a statutory violation is extremely rare" and has "applie[d] 'primarily to deter constitutional violations.'"[392] Consequently, no federal court and only a handful of state courts have definitively suppressed evidence obtained as a result of PCA violations.[393] However, both federal and state courts have recognized that, even in the context of the exclusionary rule's more limited scope under the Supreme Court's current construction, a violation of the PCA *can* trigger the rule as a remedy to PCA violations.[394] Moreover, given that the primary enforcement mechanism of the PCA—criminal prosecution—has failed, there is a need for a new remedy for when the military enforces civilian law and asserts control over civilians.

This Part begins with a normative component, arguing that federal and state courts should invoke the exclusionary rule with increased regularity for two reasons. First, it will deter even isolated instances of the military exerting unlawful control over individuals through the enforcement of civilian law. Second, it will establish a culture of respect and compliance with the PCA, returning it to its intended purpose as a subconstitutional check protecting the right to be free from

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[391] *See Dreyer*, 767 F.3d at 839 (O'Scannlain, J., concurring in part and dissenting in part) (quoting Davis v. United States, 564 U.S. 229, 238 (2011)), *rev'd*, 804 F.3d 1266 (9th Cir. 2015) (en banc).
[392] *See Dreyer*, 804 F.3d at 1284 (en banc) (Owens, J., concurring) (quoting Sanchez-Llamas v. Oregon, 548 U.S. 331, 348 (2006)).
[393] *See supra* Section IV.B.
[394] *See supra* Section IV.B.

military control. The Part then shifts to establishing a Posse Comitatus Act exclusionary rule, untethered from the Fourth Amendment exclusionary rule, which would allow courts to more appropriately and more frequently suppress evidence obtained through a PCA violation.

A. *Courts Should Apply the Exclusionary Rule to Posse Comitatus Act Violations*

There is a strong normative component to this Article: courts not only can but should apply the exclusionary rule to PCA violations. To a certain degree, the current Supreme Court has justified its continued erosion of the Fourth Amendment exclusionary rule by arguing that it has worked so well at deterring police misconduct that it is no longer necessary.[395] If that is true, courts should extend it to apply to other constitutional protections as well, rather than limit it solely to the Fourth Amendment context. The exclusionary rule is well-suited for the PCA because it would achieve the same goals as the Fourth Amendment exclusionary rule: deterring similar misconduct and maintaining respect for constitutional rights.

1. The Posse Comitatus Act and the Need for Deterrence

The repeatedly stated purpose of the Fourth Amendment exclusionary rule is to deter police misconduct.[396] Most federal courts have imported this same purpose—to deter widespread and repeated military involvement in civilian law enforcement—into their analyses of whether a PCA violation triggers the exclusionary rule as a remedy.[397] These cases recognize that military encroachment into civilian affairs, especially in exercising law enforcement power, poses a threat to the right to be free from military control.[398] They claim, though, that the exclusionary rule is unnecessary as a deterrent because, unlike Fourth Amendment violations, PCA violations are few and far between.

However, this logic is circular, as some courts have refused to acknowledge whether a PCA violation has occurred because they have held that the exclusionary rule is not applicable to the PCA.[399] And since there was no remedy available, the

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[395] *See* Hudson v. Michigan, 547 U.S. 586, 597 (2006) ("We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.").

[396] *See, e.g.*, Herring v. United States, 555 U.S. 135, 143–45 (2009).

[397] *See supra* Section IV.B.1.

[398] *See* United States v. Dreyer, 804 F.3d 1266, 1272 (9th Cir. 2015) (en banc).

[399] *See, e.g.*, United States v. Mullin, 178 F.3d 334, 342 (5th Cir. 1999) ("We need not address whether the Act was violated. 'Even where a violation of the Posse Comitatus Act is found or suspected, courts have generally found that creation or application of an exclusionary rule is not warranted.'" (quoting United States v. Hartley, 796 F.2d 112, 115 (5th Cir. 1986))); United States v. Wolffs, 594 F.2d 77, 85 (5th Cir. 1979) ("We need not decide that complex and difficult issue [potential PCA violation] because, assuming without deciding that there was a violation, application of an exclusionary rule is not warranted."); Aviles v. U.S. Dep't of the Army, 666 F. Supp 2d 224, 233 (D.P.R. 2009).

courts held they did not have to decide whether a PCA violation occurred.[400] Other courts have contributed to the idea that PCA violations may be few and far between by making it increasingly difficult to classify military acts as violative of the PCA. In defining what constitutes a PCA violation, the courts could have established a wide-reaching, bright-line rule—for example, any participation of military members in civilian law enforcement would violate the PCA. Instead, the courts require that one or all of three tests be met: that the military pervade the activities of civilian law enforcement;[401] that the military provide direct active assistance to civilian law enforcement;[402] or that military personnel be used by civilian law enforcement officers "in such manner that the military personnel subject[] the citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature."[403] All tests have narrowed the number of PCA violations, excluding from its scope passive participation and violations from which the citizen was not knowingly, personally, and directly under the thumb of military control.[404]

Lastly, even acknowledging that the number of PCA violations will always be significantly lower than Fourth Amendment violations, the severity of the violations outweighs their infrequency. As the Supreme Court has held, gradual encroachments of military power into the civilian sphere represent a threat to our basic concepts of liberty.[405] Although some of these encroachments may be benevolent in nature, "only in a free society would men recognize their inherent weaknesses and seek to compensate for them by means of a Constitution."[406] However, there is currently no effective remedy to protect citizens' right to be free from military control; there have been no prosecutions under the PCA, no federal examples of evidence being suppressed, and the only deterrent appears to be internal military discipline. Leaving the military to police itself violates the Madisonian principle of checking power with power and also violates the spirit of the PCA.[407] The suppression of evidence obtained as a result of PCA violations will offer a visible, immediate, and credible deterrent to individuals contemplating the use of the military to enforce civilian laws.[408] The Constitution ensures the right to be free from military control, and gradual encroachment—even if benevolent,

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[400] *Mullin*, 178 F.3d at 342.
[401] *See* United States v. Jaramillo, 380 F. Supp. 1375, 1379 (D. Neb. 1974).
[402] *See* United States v. Red Feather, 392 F. Supp. 916, 921–22 (D.S.D. 1975).
[403] *See* United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1975).
[404] *See, e.g.*, Kealy, *supra* note 42, at 403–04.
[405] *Cf.* Laird v. Tatum, 408 U.S. 1, 15–16 (1972).
[406] *See* Furman v. Georgia, 408 U.S. 238, 345 (1972) (Marshall, J., concurring).
[407] *Cf.* THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.").
[408] *Cf.* Lee v. Florida, 392 U.S. 378, 385–86 (1968); People v. Burden, 288 N.W.2d 392, 395 (Mich. Ct. App. 1979), *rev'd* 303 N.W.2d 444 (Mich. 1981).

isolated, or limited in scope—into civilian law enforcement violates that right. Deterring such conduct justifies the application of the exclusionary rule.

2. Using the Exclusionary Rule to Create a Culture of Compliance and Respect for the PCA

Despite the Supreme Court's recent reliance on deterrence as the sole justification for the exclusionary rule, the Court has recognized an additional purpose for the exclusionary rule: maintaining respect for law and preserving the judicial process from contamination. The cases invoking the exclusionary rule in the "free-form era" often cited to Justice Brandeis's dissent in *Olmstead v. United States* that "[o]ur Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[409] This principle of judicial integrity recognized that "[a] ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur."[410] Hence, when courts admit evidence obtained unlawfully, they send a message that the violated law is unimportant or inconsequential. By contrast, the suppression of that evidence reinforces the importance of that law and fosters respect and compliance of it.

The role of the courts in maintaining respect for and compliance with the law through the application of the exclusionary rule remains a consideration in today's Roberts Court. In *Herring*, Justice Ginsburg, writing in dissent, recognized the deterrence purpose behind the exclusionary rule, but also noted that it "enabl[es] the judiciary to avoid the taint of partnership in official lawlessness," and it "assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[411] The fact that Justice Ginsburg's opinion was joined by three other justices shows that the idea that the judiciary should not sanction unlawful government activities, both for the purposes of deterrence and the higher calling of judicial integrity, has not been consigned to the dustbin of history.

Applying the exclusionary rule to PCA violations will encourage respect and compliance for the PCA and its underlying role as a subconstitutional check protecting the right to be free from military control. As the Hawaii Supreme Court noted, "it cannot be lawful to authorize [through judicial sanction] what is an illegal

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[409] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); *see also* Mapp v. Ohio, 367 U.S. 643, 659 (1961) (emphasizing the role of judicial integrity in devising the exclusionary rule and extending its applicability to the states, providing that "'there is another consideration—the imperative of judicial integrity.' The criminal goes free, if he must, but it is the law that sets him free" (quoting Elkins v. United States, 364 U.S. 206, 222 (1960))).

[410] Terry v. Ohio, 392 U.S. 1, 13 (1968).

[411] Herring v. United States, 555 U.S. 135, 152 (Ginsburg, J., dissenting) (alterations in original) (quoting United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)).

act."[412] A court that suppresses evidence obtained in violation of the PCA sends an important message that the PCA has important constitutional implications that require compliance.[413] The inverse is also true—the continued refusal of courts to suppress evidence obtained as a result of a PCA violation renders the court complicit in the continued encroachment of the military into the civilian sphere. It also sends that messages that the PCA does not have any constitutional implications and is merely a relic of Reconstruction that can be easily discarded.[414] It is especially problematic for courts to allow PCA violations to go uncontested because the right the PCA is protecting—the right to be free from military control—is constitutionalized in the separation of powers, and the courts have a special and elevated role in protecting the Madisonian system.[415]

B. *How Courts Should Apply the Posse Comitatus Act Exclusionary Rule*

As has been shown, federal and state courts can and should apply the exclusionary rule to PCA violations. But how should they do so? Although some state courts have done so any time there is a PCA violation, federal courts should hesitate before adopting the same method. Beyond being contrary to much of the current Supreme Court precedent, it also fails to consider at all the social costs of excluding the evidence: mainly, whether a guilty person may go free as a result. The failure of the federal and state courts to adopt the Fourth Amendment exclusionary rule to the PCA context necessitates a new approach to the exclusionary rule—the Posse Comitatus Act exclusionary rule—that provides courts a realistic test to determine when PCA violations trigger the exclusionary and how to then apply the test. Only by doing so will the PCA deter future instances of the military enforcing civilian law and establish a culture of compliance and respect for the PCA and its role as a subconstitutional check protecting the right to be free from military control.

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[412] State v. Pattioay, 896 P.2d 911, 924 (Haw. 1995) (alteration in original) (quoting Lee v. Florida, 392 U.S. 378, 385 n.9 (1968)).

[413] *Cf.* United States v. Jaramillo, 380 F. Supp. 1375, 1381 (D. Neb. 1974) (acquitting an individual based on a PCA violation, the court noted that it took no joy in the acquittal, but that the law required it and the court was bound to follow the law); United States v. Dreyer, 767 F. 3d 826, 838 (9th Cir. 2014) (Kleinfeld, J., concurring) ("True, the practical effect of the decision may be to let a criminal go. . . . Letting a criminal go free to deter national military investigation of civilians is worth it."), *rev'd* 804 F.3d 1266 (9th Cir. 2015) (en banc).

[414] *Cf.* Kim v. State, 817 P.2d 467, 472 (Alaska 1991) (Rabinowitz, J., dissenting) ("[N]o exception to the Posse Comitatus Act is appropriate, and the exclusionary rule should apply 'to remove incentives for governmental intrusions into protected areas,' if not also 'to breath life' into the federal constitutional guarantees which underly [sic] the Act . . . ." (citations omitted)).

[415] *See, e.g.*, Dunlap, *supra* note 26, at 368–70; Turley, *supra* note 74, at 58–59 ("The independent judiciary acts as a check on abuses by both political branches, particularly in the protection of individual rights and the prevention of any usurpation or concentration of power by one branch.").

1. Untethering the Posse Comitatus Act Exclusionary Rule from the Fourth Amendment Exclusionary Rule

The first step in establishing a more functional exclusionary rule for the PCA is untethering it from the Fourth Amendment's exclusionary rule, especially the latter's emphasis on deterrence. Deterrence has always been a goal of the exclusionary rule, but it was not until the "deterrence and erosion" era that the Court predicated the triggering and application of the exclusionary rule on its deterrent effects.[416] This reliance upon deterrence has allowed the Supreme Court to limit the Fourth Amendment exclusionary rule exclusively to situations where deterring future instances of similar government misconduct will outweigh the social costs of letting a guilty person go free.[417] The federal courts have followed suit when considering the exclusionary rule for PCA violations, requiring widespread and repeated violations that manifest a need for deterrence before allowing the exclusionary rule as a remedy. However, this approach fails to consider that the PCA's deterrence goal is different from the Fourth Amendment's deterrence goal. Whereas the Fourth Amendment serves to protect individuals from *unreasonable* searches and seizures, the PCA serves to prevent even a *gradual* encroachment of the military into the civilian sphere. By requiring a showing that PCA violations are widespread and repeated, the federal courts only protect against such incursions *after* there has been substantial encroachment by the military and it has already intruded pervasively into the civilian sphere. Instead, the goal should be to deter *any* encroachment of the military into the civilian to protect against the risks associated with such gradual encroachment. Federal and state courts can achieve this deterrence goal by disregarding an inquiry into whether the violations were so widespread and repeated as to demonstrate a need for deterrence, and instead find that a PCA violation alone triggers the availability of the exclusionary rule as a potential remedy.

2. A Posse Comitatus Act Exclusionary Rule Built Upon Due Process

The second step in establishing a Posse Comitatus Act exclusionary rule is to consider how courts will apply it once its availability as a remedy has been triggered by a PCA violation. Since application of the Fourth Amendment exclusionary rule relies on a deterrence-based analysis, similar application of the Posse Comitatus Act exclusionary rule is not likely to be very useful. Further, the few courts that have applied the exclusionary rule to PCA violations have done so

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[416] *See* United States v. Leon, 468 U.S. 897, 938–39 (1984) (Brennan, J., dissenting) ("[T]he question whether the exclusion of evidence would deter future police misconduct was never considered a relevant concern in the early cases . . . . In those formative decisions, the Court plainly understood that the exclusion of illegally obtained evidence was compelled not by judicially fashioned remedial purpose, but rather by a direct constitutional command.").

[417] *See* Hudson v. Michigan, 547 U.S. 586, 591 (2006); *see also* Herring v. United States, 555 U.S. 135, 141 (2009) ("[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." (alterations in original) (quoting Illinois v. Krull, 480 U.S. 340, 352–53 (1987))).

through the "but-for" test, which fails to consider at all the social costs of letting a guilty person go free.[418]

A better approach may be to look at the exclusionary rule through the lens of due process.[419] Professor Richard Re argues that the exclusionary rule should be applied under the Due Process Clause because it prohibits convictions through illegal processes.[420] This approach makes sense in the PCA context—if the military breaks the law (the PCA) in obtaining the evidence, they have done so through an illegal process and the fruits of that illegal process should be suppressed.[421]

By moving the Posse Comitatus Act exclusionary rule away from the Fourth Amendment exclusionary rule and towards the Due Process exclusionary rule, the courts also could fashion a test for application that considers the fairness of the process and the potential social costs of applying the exclusionary rule—potentially letting a guilty person go free. The *Mathews v. Eldridge* test provides a solid starting point in devising a new test for applying the Posse Comitatus Act exclusionary rule. Under that test for due process procedural adequacy, courts could consider: (1) the importance of the interest at stake—here, the interest in being free from military control; (2) the risk of erroneous deprivation of the interest because of the procedures used, and the probable value of additional procedural safeguards—here, whether the military's involvement erroneously deprived the individual of that right; and, (3) the government's interest—here, the social cost of excluding the evidence.[422] When balancing these interests, the courts then could exclude evidence when the first two factors outweigh the third.

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[418] *See supra* Section IV.B.2.

[419] *See generally* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."). *Mathews* considered what due process was required before the government could deprive an individual of his disability benefits. However, the Supreme Court has strongly suggested a more robust use of the *Mathews v. Eldridge* test beyond the disability benefits context. Specifically, it utilized the same test to assess what level of due process the United States must afforded to American citizens detained in the course of the War in Afghanistan. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 528–29 (2004) ("The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,' is that test that was articulated in *Mathews v. Eldridge*.").

[420] *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1912–13 (2014) ("When the police unconstitutionally search a suspect, his Fourth Amendment rights are infringed. And if a court later relies on the fruits of the illegal search to impose a conviction, then the defendant would thereby suffer a deprivation of liberty without due process. This simple idea is the basis of the due process exclusionary rule.").

[421] *Cf. id.* at 1890 ("When a criminal defendant is convicted based on unconstitutionally obtained evidence, that defendant's 'liberty' has been 'deprived' without 'due process of law.' To avert that unconstitutional deprivation, the unlawfully obtained evidence should not be admitted in the first place.").

[422] *See generally Mathews*, 424 U.S. at 332–48.

Conclusion

In their current iterations, it is easy to dismiss both the PCA and the exclusionary rule as relics of previous legal eras. The PCA can easily be viewed as a vestige of white supremacy and the exclusionary rule as an artifact of the Warren Court's liberalness. To a certain degree, the law reflects the potential irrelevancy of both these doctrines; courts are hesitant to find PCA violations and the Supreme Court has severely limited the applicability of the exclusionary rule as a viable remedy. But the fact is that these two doctrines have fallen out of favor by courts and some scholars should not render them to the dustbin of legal history.

Instead, they both require a revitalization to return them to legal relevancy. The right to be free from military control is more than a principle or a tradition; it is a constitutional right embedded throughout the Constitution. Congress enacted the PCA to safeguard this right. The need to safeguard a constitutional right is especially relevant in times of constitutional dysfunction. We are arguably already in a state of constitutional dysfunction regarding the use of military power. Congress and the courts have largely abdicated their roles in governing the military. As a result, the Executive Branch exercises most authority over military matters.[423] This current administration has shown no hesitancy in using military power to achieve its political objectives.[424]

For the PCA to serve its purpose and protect the constitutional right to civilian control of the military, there must be an effective enforcement mechanism. The exclusionary rule provides that enforcement mechanism. While it appears the Supreme Court has cabined the exclusionary rule, especially when it comes to statutory violations, there is hope. The Court has left open the possibility that statutes with constitutional underpinnings can trigger the exclusionary rule, and the most recent cases limiting the exclusionary rule have been decided with only slim

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[423] *See generally* Katyal, *supra* note 158, at 2348–49.

[424] *See, e.g.*, Jay Croft & Barbara Starr, *Military Bases Could House up to 20,000 Undocumented Immigrant Children*, CNN (Jun. 22, 2018, 11:45 AM), https://www.cnn.com/2018/06/22/politics/military-bases-undocumented-immigrant-children/index.html [https://perma.cc/8PUM-YHVR] ("The Department of Health and Human Services has assessed three bases in Texas . . . . The bases could be used as housing within a month if the pace of border crossings continues and no other solution is found . . . ."); Philip Elliott & W.J. Hennigan, *Exclusive: Navy Document Shows Plan to Erect 'Austere' Detention Camps*, TIME (Jun. 22, 2018), http://time.com/5319334/navy-detainment-centers-zerol-tolerance-immigration-family-separation-policy [https://perma.cc/QW3H-5XYX] ("The U.S. Navy is preparing plans to construct sprawling detention centers for tens of thousands of immigrants on remote bases in California, Alabama and Arizona, escalating the military's task in implementing President Donald Trump's 'zero tolerance' policy for people caught crossing the Southern border . . . ."); W.J. Hennigan & Philip Elliott, *Two Military Bases in Texas Set to House Thousands of Migrants*, TIME (Jun. 25, 2018), http://time.com/5321083/military-bases-house-migrants [https://perma.cc/K2LS-7S23] ("The Defense Department has been directed to build short-term detention camps on two U.S. military bases in Texas . . . .").

majorities, suggesting that a small change in the composition of the Supreme Court may lead to a revitalization of the exclusionary rule.

In many ways, this Article breaks new ground by returning to old grounds. The PCA and the exclusionary rule are not relics of the past; they both exist because they are both necessary. The times may have changed around them, but their basic premises remain the same: there exists a constitutional right to be free from military control, and evidence obtained in violation of a person's rights should not be admitted at trial. A reexamination of these two principles, grounded in the reality of today, may not only save them from the dustbin of obsolete legal principles but may also revitalize them. The development of a Posse Comitatus Act exclusionary rule, viewed through the lens of procedural due process, could not only renew these principles but also prevent the further encroachment of the military into the civil sphere.