MILITARY SPYING IN THE UNITED STATES: WHEN IT IS NOT YOUR NEIGHBOR KNOCKING AT YOUR DOOR, WHERE DO YOU TURN?

> If Congress had passed a law authorizing the armed services to establish surveillance over the civilian population, a most serious constitutional problem would be presented. There is, however, no law authorizing surveillance over civilians. . . . The question is whether such authority may be implied. One can search the Constitution in vain for any such authority.
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> —Supreme Court Justice William O. Douglas[1]

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INTRODUCTION

It was a typical law school conference, hosting the usual suspects: students, reputable speakers, and, of course, the army.[3] Recently, two Army Intelligence officers infiltrated a University of Texas Law School conference covering the role of women in Islamic law.[4] However, unlike the other attendees, the officers did not focus on the speakers but rather on the students gathered.[5] In fact, the officers were so attentive that the students left feeling "intimidated."[6] According to the officers, they were merely gathering information in response to reports of "suspicious" Middle Eastern men who allegedly approached two army attorneys attending the conference.[7] In spite of their claimed objective, the officers' re-

1 Laird v. Tatum, 408 U.S. 1, 17 (1972) (Brennan, J., dissenting).

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3 *See* A.J. Bauer, *Army Agent Questions Students*, DAILY TEXAN ONLINE, Feb. 12, 2004, *available at* http://www.dailytexanonline.com/news/2004/02/12/University/Army-Agent.Questions.Law.Students-605345.shtml.

4 *See id.*

5 *See id.* The officers called the student organizers after the conference asking many questions. None centered on the speakers or the topic of the conference. Instead, the officers asked for a list of the students who attended.

6 *See id.* Statement of Liz Stephenson, law student.

7 *See id.*

quest for information included the entire roster of attendees and a video recording of the event suggesting an alternative motive to their inquiry.[8]

The University of Texas event is significant in light of current law that precludes federal agencies, including the army, from collecting information without stating the purpose of the investigation and the proposed use of the information.[9] Although the army soon after apologized for its intrusion,[10] the issue was not over. In Fiscal Year 2005, the Senate Intelligence Committee reported a provision to the Intelligence Authorization Act[11] that would amend the Privacy Act and would allow the military to engage in such activities in the future and, more impressively, entitle the military to conduct surveillance within the United States despite tradition and policy to

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8 *See Students Protest Army Probe Into Campus Islam Conference,* ASSOCIATED PRESS, Feb. 2, 2004, *available at* http:www.firstamendmentcenter.org/news.aspx?id=12686 (questioning the purpose of army attorneys attendance at a student conference. One student suggested that the army interference was more related to the student's ethnicity than any legitimate security reason).

9 Privacy Act, 5 U.S.C. § 552(a) (2004). There are a number exemptions, however, for agencies involved in legitimate civilian law enforcement such as the FBI. *See infra* note 121.

10 *See* Michael Isikoff, *Intelligence: The Pentagon Spying in America?*, NEWSWEEK, June 21, 2004, *available at* http://msnbc.com/id/5197014/site/newsweek/ (noting the military's apology after students at the University of Texas held a press conference questioning the military's investigation).

11 Intelligence Authorization Act for Fiscal Year 2005, S. 2386, 108th Cong. § 502 (2004), *available at* thomas.loc.gov/cgi-bin/query/C?c108:./temp/~c1088kfyOs. The bill's official title is "An original bill to authorize appropriations for fiscal year 2005 for intelligence and intelligence-related activities of the U.S. Government, the Intelligence Community Management Account, and the Central Intelligence Agency Retirement and Disability System, and for other purposes." This Note will address section 502 of the bill which exempts the military from some of the requirements of the Privacy Act. Section 502 provides that section 552(a)(e)(3) of the Privacy Act "shall not apply with respect to the collection of information by intelligence personnel of the Department of Defense who are authorized by the Secretary of Defense to collect intelligence from human sources." *See id.* That exemption applies to the following provision of the Privacy Act, 5 U.S.C. § 552(a)(e)(3) which requires that:

> [E]ach agency [including the military] that maintains a system of records to inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual, of: (A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether the disclosure of such information is mandatory or voluntary; (B) the principal purpose or purposes for which the information is intended to be used; (C) the routine uses which may be made of the information * * *; and (D) the effects on the [individual], if any, of not providing all or any part of the requested information.

Id.

the contrary.[12] The Bill with this provision remained under Senate consideration for over six months for further debate and action.[13]

In addition to giving the military more investigative authority, the provision's adoption would substantially alter the traditional role that the military plays in American civilian life.[14] Since 1878, the Posse Comitatus Act has prevented the military from engaging in law enforcement within the United States.[15] This Note will argue that the amendment to the Privacy Act would inevitably expand the power of the military and potentially lead to the repeal of the Posse Comitatus Act. Read together, the Posse Comitatus Act and the Privacy Act create an expectation that the army will not engage in civil law enforcement, especially the surveillance of U.S. civilians. Toying with these safeguards will compromise the constitutional rights that Congress intended to protect in drafting these laws. With the recent creation of Northern Command

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[12] The bill's intent is to assist the intelligence personnel of the Department of Defense ("DoD") in recruiting sources which necessitates providing them the authority not to disclose their affiliation with the military or the U.S. Government similar to the exemptions provided to the CIA. *See* S. REP. NO. 108-258 (2004). DoD assumes the right to engage in domestic intelligence and thus reasons that section 552(a)(e)(3) could damage operational relationships, compromise the safety of intelligence officers, and inhibit the retention of intelligence sources. *See id*.

[13] Originally, House Bill 4548 was introduced into the House without the exemption for the military from the Privacy Act. However, during consideration of the Bill by the Senate Select Committee on Intelligence, the provision was added, adopted as part of the overall measure and reported to the full Senate on May 5, 2004. Chairman of the Committee on Armed Services, Senator John Warner, then requested the Bill to be re-referred to the Committee on Armed Services. *See* Bill Summary & Status for the 108th Congress *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN02386:@@@L&summ2=m&#major%20actions (last visited Feb. 5, 2005). *See infra* notes 144, 146 and related text for the current status of the Bill and exemption for the military. Because the main difference between the House and Senate Bill is the exemption for the military from the Privacy Act, it can be argued that it is this provision that is causing friction over the Bill and the resulting pattern of committee referrals. Although appropriation bills inherently create friction among legislators as the government is effectively prioritizing different issues through the allocation of money, the amendment seems to be the focus of the debate. Clearly the legislators recognize the impact of the Bill as they consistently seek referral to their committees in order to debate its details. I would also argue that an appropriations bill is not how this sort of exception should be presented to Congress. When the rest of the Bill is about funding to the CIA and the military, it seems as though the exception is intentionally being hidden in order to avoid discussion. *See* S. 2386. This subtlety may be the reason for the minimal discussion and media coverage about the amendment. The lack of attention is not because the amendment will lack consequences.

[14] *See supra* note 11 (detailing the current legal restrictions on the military).

[15] 18 U.S.C.A. § 1385 (2005) (distinguishing between civil and military authorities thus prohibiting the military from action within the United States unless authorized by an act of Congress or the President).

("NORTHCOM"),[16] a military command structure within the United States whose coverage includes Mexico, the United States, and Canada – the potential for military intelligence activity within the Unites States becomes even more pronounced, threatening constitutional violations.

The danger of eroding civil liberties must be viewed against the backdrop of today's national security interests in the aftermath of September 11, which pose an unforeseen challenge to U.S. defense systems. As opposed to exempting the military entirely from the Act, which would defeat judicial challenges to violations of the Privacy Act, the military should still be subject to oversight in order to preserve privacy interests. However, the courts are not necessarily the most appropriate forum to weigh national security and national intelligence objectives against privacy interests, due to their lack of expertise in these areas. This Note will propose that an alternative forum, which includes representatives from groups with expertise in military matters and privacy interests, might be the best venue to decide whether the military should be excepted, in the specific case, from the Privacy Act.

This Note will describe the role of the military in the United States and its relationship to privacy rights. Part I of this Note will describe the historical underpinnings that led to a limited role for the military within the United States territory, beyond defending against attack. Part II will describe the expectations by the courts and legislature for the military. In addition, it will illustrate instances where the military, along with numerous federal agencies, overstepped its traditional, constitutional and legal bounds. Part III will offer the legislature's response to, and its subsequent regulation of, the military and other federal agencies, as well as its recognition of privacy rights. Part IV will describe the changing role of the military in light of September 11 and subsequent legislation. Ultimately, this Note will argue that if the military is granted more authority to act within the United States, while legislation concurrently eliminates the opportunity for citizens to enforce their privacy rights, an alternative forum must be created to balance national security concerns with privacy rights.

16 Office of Homeland Security, National Strategy for Homeland Security, *available at* http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf (last visited Feb. 5, 2005).

I. Background: Posse Comitatus Act Confirmed the Founders' Intent to Limit the Military's Role Within the Confines of the United States

The concept of restraining the military from acting within the United States began with the founding of the nation.[17] In drafting the Constitution, the Framers' disagreement over whether to create a standing army or state militias demonstrated their fear of the consequences of giving the military too great a role in civilian life.[18] James Madison stated in Federalist No. 41 that "America united, with a handful of troops, or without a single soldier, exhibits a more forbidding posture to the foreign ambition than America disunited, with a hundred thousand veterans ready for combat."[19] In response to the fear of the military, the Constitution demonstrates a cautious attitude toward the use of the military in civilian life by distributing power over the military among the three branches.[20]

Despite these constitutional underpinnings separating civil and military law enforcement, the military became increasingly involved in civilian life after the founding of the Nation.[21] During the Reconstruction Era, the military was the predominant force in upholding civil laws in the South.[22] More strikingly, the military was also used to help Rutherford B. Hayes win the 1876 election against Samuel J. Tilden by preventing Southerners from voting

17 *See generally* Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 Yale L. & Pol'y Rev. 383 (2003) (detailing the long history of the Posse Comitatus Act and arguing for a statute reaffirming the supremacy of civil law enforcement because the military cannot concurrently meet international and domestic security demands nor does it have adequate training in criminal law enforcement).

18 The Federalist No. 41 (James Madison), *available at* http://thomas.loc.gov/home/hisox/fedex_41.html (decrying the establishment of a standing army as a symbol of England and a threat to liberties).

19 *Id.*

20 *E.g., Laird*, 408 U.S. at 17 (discussing the Third Amendment's prohibition of unconsented quartering of troops); *Id.* (Brennan, J., dissenting) (referring to the right to bear arms and right to be free from unreasonable searches and seizures in the Bill of Rights); Reid v. Covert, 354 U.S. 1, 7 (1957) (interpreting the combination of section two of Article III, the Fifth Amendment, and the Sixth Amendment to provide an indefinite right to a jury trial with the narrow exception of military matters. The Court held that the right to try military officers in a military tribunal, as opposed to a trial by jury, did not extend to a spouse of a military officer demonstrating the subordination of the military to inherent constitutional rights). *Compare* U.S. Const. art. II, § 2 (making the President commander in chief of the army), *with* U.S. Const. art. I, § 8 (endowing Congress with the sole power to declare war).

21 *See generally* Kealy, *supra* note 17.

22 *See* Kealy, *supra* note 17, at 393 (detailing the role of the military as the primary law enforcement in the South after the Civil War).

while supervising polling places throughout the South.[23] Just as there is currently much public debate about the intrusion of the courts into elections, the military's involvement at that time produced a similar effect.[24]

In response to this flagrantly partisan military involvement, Congress passed the Posse Comitatus Act[25].[26] Although written in response to the 1876 election, the Act also reflected the Founders' distaste for empowering the military to use its weapons and authority to affect the lives, property or freedom of civilians.[27] Posse Comitatus is Latin for "power of the county" or the tradition at common law where individuals organized a posse for defense purposes, which included both civilian and military members.[28]

The roots of the Posse Comitatus Act go back as far as the Magna Carta, whose signing in 1215 led to the separation of military and militia from civil law enforcement and prohibited imprisonment by any authority other than civilian authorities.[29] The current law reads: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse

23 Roger Blake Hohnsbeen, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 GEO. WASH. L. REV. 404, 408 (1986) [hereinafter *PCA Restrictions*]; Kealy, *supra* note 17, at 393 (indicating that Hayes removed federal troops once declared winner in order to appease southern Congressmen). In addition to this electoral involvement, the military engaged in civil law enforcement by suppressing illegal whiskey production and enforcing revenue laws. See statements by Paul Schott Stevens at *The Posse Comitatus Act: Venerable Safeguard-Or Old Hat?,* The Federalist Society and Cato Institute Policy Forum, Oct. 16, 2002 [hereinafter *PCA: Safeguard or Old Hat*], *available at* http://www.fedsoc.org/Publications/Transcripts/posse.pdf.

24 Everyone remembers the debate over the use of the Court to determine the winner in the 2000 presidential election. Granted, elections are not necessarily decided by the popular vote due to our system's reliance on an electoral college, but it is too far a stretch to suggest that the Court and military are the voice of the people. For further discussion on the 2000 election, see PAUL R. ABRAMSON, JOHN H. ALDRICH, & DAVID. W. ROHDE, CHANGE AND CONTINUITY IN THE 2000 AND 2002 ELECTIONS (CQ Press 2004).

25 18 U.S.C.A § 1385 (2005). The original version was slightly different. *See* Army Appropriations Act, ch. 263 § 15, 20 Stat. 145, 152 (1878). Although the Act does not explicitly mention the Navy or the Marine Corps, the Act has been applied to them. *See* DoD Directive 5525.5 (1986).

26 *See* Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1949) (attributing the Posse Comitatus Act as a reaction to the use of troops in the 1876 election and observing that the Act only restricted the military in domestic affairs but did not impact its foreign role).

27 *Laird*, 408 U.S. at 16 (describing the role of the courts to provide a remedy when the military infringes upon the civilian domain).

28 Stephen Young, *The Posse Comitatus Act: A Resource Guide,* Feb. 17, 2003, *at* http://www.llrx.com/features/posse.htm.

29 *Id.*

comitatus or otherwise to execute the law shall be fined not more than $10,000 or imprisoned not more than two years, or both."[30]

The law evinced a clear intent to clarify the role of the military in the United States. By instituting a fine and/or imprisonment for a violation of the Act, Congress created a remedy that suggested its unambiguous intention to sequester the military from acting within the United States.[31] Furthermore, the Act originally seemed to create personal liability for a violation which would likely facilitate successful suits due to the difficulty of imposing liability on the government.[32]

II. Military Integration into Civil Law Enforcement and Possible Violations of Posse Comitatus

Despite the clear language of the Posse Comitatus Act, the military does not have a clean record of remaining outside of civil law enforcement.[33] And yet, in instances in which the federal courts have examined unconventional military activity, they rarely find violations.[34] Even when the courts identify a violation, they

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[30] 18 U.S.C.A § 1385. Although the military did not have the same weaponry and intelligence resources as it does today, the law's prohibition against executing the law still serves the same purpose, only now it covers more areas.

[31] It should be noted however that although the Court created a remedy for a violation of the Posse Comitatus Act, it later refused to apply the exclusionary rule to evidence obtained in violation thus lessening the deterrent effect of the Act. *See generally* Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985). Even without this deterrent however, the Act should still function as a limitation on the military since it authorizes criminal prosecution as opposed to a less severe civil remedy.

[32] *Cf.* St. Louis v. Praprotnik, 485 U.S. 112, 125 (1988) (adopting a strict standard to determine if a city should be liable for actions taken by its agents by demanding that the action be guided by state law). This demonstrates how difficult it is to challenge "official" action thus highlighting the uniqueness of Posse Comitatus Act. It is unclear what a violation of the Posse Comitatus Act would entail today because there has yet to be a positive prosecution.

[33] *See generally* Brian L. Porto, Annotation, *Construction and Application of Posse Comitatus Act (18 U.S.C.A. § 1385), and Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Execute the Laws,* 141 A.L.R. Fed. 271 (2004) (detailing the military's integration into domestic affairs and the courts' analysis and construction of the limits of the Posse Comitatus Act).

[34] *Compare* United States v. Yunis, 681 F. Supp. 891, 895 (D.D.C. 1998) (holding that indirect aid by the Navy by providing military materials to FBI did not violate Posse Comitatus Act), *with Bissonette,* 776 F.2d at 1398 (holding that military assistance in the form roadblocks and armed patrols constituted a violation of the Posse Comitatus Act and reaffirming that civilian rule is basic to our system of government); *see also* United States v. Al-Talib, 55 F.3d 923, 930 (4th Cir. 1995) (refusing to find a violation of the Posse Comitatus Act where the Air Force only

do not apply the exclusionary rule,[35] frustrating an actual criminal prosecution under the Act.[36] In fact, there have been no successful prosecutions to date.[37]

In 1973, for example, the Supreme Court addressed whether the military's provision of materials and aerial reconnaissance to civil law enforcement in quelling riots in Wounded Knee, South Dakota constituted a violation of the Posse Comitatus Act.[38] In a series of cases stemming from the event, the riot instigators challenged the legality of their convictions due to the military's assistance to local law officials and Federal Bureau Investigators.[39] Ultimately, the courts did not find any violations of the Posse Comitatus Act by creating a high standard to evaluate the extent of military involvement that served to minimize the military's activity.[40]

Despite the courts' failure to penalize military involvement, loyalty to the spirit of the Posse Comitatus Act was still present in

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provided preliminary assistance to a drug sting operation performed by the Drug Enforcement Agency).

35 *Contra* Mapp v. Ohio, 367 U.S. 643, 656 (1961) (excluding evidence that is taken in violation of the constitution in order to deter authorities from evading constitutional rules in pursuit of evidentiary ends); *see also* Weeks v. United States, 232 U.S. 383, 393 (1914) ("If 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 declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.").

36 United States v. Walden, 490 F.2d 372, 377 (4th Cir. 1974) (distinguishing violations of the Posse Comitatus Act from violations of the Fourth Amendment by describing the Posse Comitatus Act as a less well known area of the law in contrast to criminal law enforcement. Consequently, the exclusionary rule would not have the desired effect).

37 See argument by Stephen Halbrook, *PCA: Safeguard or Old Hat*, *supra* note 23, at 27-28, analogizing violations of the Fourth Amendment to violations of the Privacy Act and hypothesizing that the lack of criminal prosecutions in both areas are due to the government's unwillingness to prosecute law enforcement officials because they are on their "team." Arguably, by not applying the exclusionary rule to the military, the court decreases the military's impetus to confine its activity to the role prescribed in the Act.

38 Kealy, *supra* note 17, at 401 (emphasizing the courts' acceptance of military activity due to their minimization of the activity as merely passive).

39 *See, e.g.,* United States v. McArthur, 419 F. Supp. 186 (D.C.N.D. 1976); United States v. Red Feather, 392 F. Supp. 922 (D.S.D 1975); United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974).

40 *Compare McArthur*, 419 F. Supp. at 194 (requiring that the military activity be regulatory, proscriptive, and compulsory to constitute a violation of the Posse Comitatus Act), *with Red Feather*, 392 F. Supp. at 923 (D.S.D. 1975) (demanding that there be a direct active use of the military as opposed to passive), *and Jaramillo*, 380 F. Supp. at 1379 (D. Neb. 1974) (circumscribing that a violation of the Posse Comitatus Act occurs when the military activity pervades the activities of civil law enforcement).

these decisions, albeit from a limited number of justices or in dissent.[41] In *Bissonette*, the dissent stated:

> 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.[42]

The military's involvement in civil law enforcement has increased since the Wounded Knee incident.[43] Even so, courts have gone to great lengths to evade identifying any friction with the Posse Comitatus Act.[44] By interpreting the facts of each case, courts managed to avoid identifying military activity as domestic law.[45] Courts have described such activity either as "incidental to military duties"[46] or, alternatively, instances where military agents have not been acting under the color of military authority but

41 *See* People v. Burden, 303 N.W.2d 444, 447 (Mich. 1981) (Kavanaugh, J., dissenting) (supporting the decision below, People v. Burden, 288 N.W.2d 392, 394 (Mich. Ct. App. 1979), where the court stated that "[i]t matters not whether the victim even knows that the undercover agent is in the military. As long as the victim is subjected to *civilian* power or authority by the use of military personnel, the act is violated.") (emphasis added).

42 *Bissonette*, 776 F.2d at 1387 (Phillips, J., dissenting).

43 *See infra* notes 43-45 and accompanying text.

44 *See, e.g.,* United States v. Torres, No. 93-40003-01-SAC, 1993 U.S. Dist. LEXIS 15920, at *17 (D. Kan. Oct 8, 1993) (minimizing participation of an undercover military agent in a cocaine sting because the agent ultimately returned all evidence to the law enforcement for its investigation); United States v. Hartley, 486 F. Supp. 1348, 1357 (M.D. Fla. 1980) (reconciling the military's assistance in a criminal investigation with the Posse Comitatus Act's limitations by identifying its involvement as a mere execution of duties that would be performed regardless of the investigation and noting that the investigation was under the direction of the DoD); State v. Nelson, 260 S.E.2d 629, 639 (N.C. 1979) (finding no violation although military officers searched soldiers' billets after reading a newspaper article regarding the theft of jewelry and upon finding the evidence, contacting law enforcement officials. The court reasoned that the military began its search with the military purpose of taking inventory and only incidentally furthered a crime investigation); *Burden*, 303 N.W.2d at 447 (converting the conduct of an Air Force member to merely civilian activity by identifying a personal motivation and therefore relieving him of the burdens of the Posse Comitatus Act). *Cf.* Chandler v. United States, 171 F.2d 921 (1st Cir. 1948) (refusing to discuss a violation of the Posse Comitatus Act when military abroad).

45 *See supra* note 44.

46 *Hartley*, 486 F. Supp. at 1357 (categorizing a military officer's inspection of food crates en route to military personnel as routine although law enforcement had begun investigating the theft of food crates and the information provided by the military was essential to the investigation).

rather as civilians.[47] These characterizations demonstrate the courts' resistance to applying the Posse Comitatus Act and to analyzing the legitimacy of military conduct.

In addition to the courts, other branches of government have given the military latitude to operate in the civilian sphere, though only in narrow circumstances.[48] The President, through congressional legislation, has the power to call state militias into federal service in the case of an insurrection against a State.[49] A notable example was the federalization of troops in order to ensure the desegregation of public schools in Little Rock, Arkansas.[50] In addition, the President has authorized the use of the military during natural disasters.[51]

Congress has used its legislative powers to grant the military discretion to act. In an effort to further the "War Against Drugs," Congress passed the Military Cooperation with Law Enforcement Officials Act that allows the military to assist local law enforcement in preventing drugs from entering the United States.[52] Con-

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47 *Burden*, 303 N.W.2d at 447 (reasoning that an Air Force member assisting in a drug sting was acting in civilian capacity as opposed to military capacity when his intent was to reduce his jail sentence and, therefore, finding no conflict with the Posse Comitatus Act).

48 *See generally* Kealy, *supra* note 17 (observing that congressional legislation and presidential decree have resulted in greater military activity in domestic affairs and concluding that the Posse Comitatus Act's mutability requires that it be replaced by more stringent legislation).

49 10 U.S.C.A § 331 (allowing the President to call state militias into federal service to suppress an insurrection upon a request by the state legislature).

50 Compare statement by David Kopel, Associate Policy Analyst at the Cato Institute, *PCA Safeguard or Old Hat*, *supra* note 23, at 53, equating the Governor of Arkansas' refusal to carry out the lawful order of a U.S. Supreme Court, with statement by Paul Schott Stevens, *id.* at 53, that the use of military troops was not an exception or even a violation of the Posse Comitatus Act because the Act does not explicitly apply to the National Guard.

51 *See infra* note 131 and accompanying text. Most recently, the military was utilized to assist in the recovery from Hurricane Katrina and Hurricane Rita. The military provided buses and helicopter to evacuate endangered inhabitants and delivered supplies and medical staff. *See Pentagon Gets Involved Early in Relief Effort,* ASSOCIATED PRESS, Sept. 24, 2005. This supportive activity does not violate the Posse Comitatus Act as the military did not assist in local law enforcement.

52 Pub. L. No. 97-86, § 905, 95. Stat. 1115 (codified as amended at 10 U.S.C. §§ 371-78 (1998)) (providing exceptions to the Posse Comitatus Act to allow the military to assist law enforcement, but highlighting that the military's presence and authority must remain inferior to that of local law enforcement); *see also* Sue Anne Presley, *Waco Siege Ends in Dozens of Deaths as Cult Site Burns After FBI Assault: Davidians Set Blaze, Officials Say*, WASH. POST, Apr. 20, 1993, at A01 (mentioning the use of Army tanks and materials to quell the rebellion in Waco, Texas when religious cult followers of David Koresh attacked agents of the FBI and the Bureau of Alcohol, Tobacco and Firearms ("ATF")); *see also* statement by Stephen Halbrook, *PCA: Safeguard or Old Hat*, *supra note* 23, at 16 (criticizing the illegitimate use of the military at Waco when ATF agents made fraudulent statements about the existence of a methamphetamine laboratory on the facility in order to get access to military equipment); *see generally* INVESTIGATION

sequently, military agents are often seen at airports and other public spaces to prevent drug trafficking.[53] Similarly, military agents are used to monitor immigration at borders,[54] which involves them in another civilian policy issue, albeit one closer to security concerns. Such action suggests that the military is moving from a position of national defense to one of domestic control.

These instances of military assistance are not inexpensive or casual; they require significant congressional funding and planning. For example, members of Congress are required to consider such military appropriations in the context of law enforcement as opposed to the typical national defense analysis.[55] The consequence of these exceptions is that, in addition to changing the military, they force legislators and society to accept a military role evolving beyond the one envisioned by the Constitution and the Posse Comitatus Act. Furthermore, these exceptions to the Posse Comitatus Act have the potential to generate an expectation on the public's part that various societal problems, such as drugs, should be dealt with by the military.

A. Debate Over The Posse Comitatus Act

There is a current debate over whether the Posse Comitatus Act should be repealed in light of its various exceptions, and in

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INTO THE ACTIVITIES OF FEDERAL LAW ENFORCEMENT AGENCIES TOWARD THE BRANCH DAVIDIANS, H.R REP. NO. 104-749 (1996). The military has also provided sophisticated weapons and assistance to Colombia in its efforts to eradicate its economy of a drug trade. *See generally* International Crisis Group ("ICG"), *Colombia's Borders: The Weak Leak in Uribe's Security Policy*, *available at* http://www.icg.org//library/documents/latin_america/09___colombia_s_borders.pdf (Sep. 23, 2004). The provision of weapons has been a very "hot" issue in that the U.S. government may be putting weapons in the hands of an untrained and corrupt Colombian army. However, even with the weapons by the military, years of congressional hearings evaluating effective policy, and internal governmental and security shifts in Colombia, significant reductions in drugs reaching the United States have not occurred, nor does the internal conflict appear closer to resolution. *See id.*; International Crisis Group ("ICG"), *War and Drugs in Colombia*, *available at* http://www.icg.org//library/documents/latin_america/11_war_and_drugs_in_colombia.pdf (Jan. 27, 2005).

53 *See* Kealy, *supra* note 17, at 387.

54 *See id*. at 384.

55 *Compare* 10 U.S.C.A § 331 (military exception from Posse Comitatus Act), *with* H.R Res. 4613, 109th Cong. (2005), *available at* http://thomas.loc.gov/cgi-bin/query/C?c108:./temp/~c108pRnugQ (defense appropriations for military personnel and operations).

light of the national security demands triggered by September 11.[56] In a recent debate at the Cato Institute, moderated by then Congressman Bob Barr, national security experts debated whether the Act should be repealed, or at least clarified.[57] Congressman Barr, a Republican from Georgia, began the debate by stating, "when we cede power to the government, when we allow government to take power from us, which of course as everybody here knows in our system of government is the only place from which government can take power, then we don't get it back . . . ever."[58]

The debate over the repeal of the Posse Comitatus Act is often a constitutional argument involving legislative intent.[59] The separation of powers doctrine provides a framework that could be viewed as limiting the intended scope of the Posse Comitatus Act. Paul Schott Stevens, former Special Assistant to President Ronald Reagan for National Security Affairs, argues that, although the Act requires that the military remain inferior to civilian authority, the Act does not preclude the use of the military in civil law enforcement.[60] Stevens argues that the Act cannot be seen as an infringement on the President's power as commander in chief or on the President's duty to take care that the laws are lawfully executed.[61] He asserts that Congress cannot, nor did it intend to, eliminate this constitutional authority by way of statute, as such action would violate the separation of powers.[62] Lastly, he argues that the Act

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56 *See, e.g., PCA: Safeguard or Old Hat, supra* note 23. The debate was moderated by Congressman Bob Barr and included participants knowledgeable in the area of security policy and the military.

57 *See id.* (addressing the FBI's request for military equipment from the Pentagon in order to conduct aerial surveillance to facilitate finding the "sniper," thus implicating the Posse Comitatus Act). The sniper episode was a devastating series of attacks on random individuals in the District of Columbia and surrounding areas. The sniper was eventually caught, turning out to be two individuals, John Allen Muhammed and Lee Boyd Malvo. *See* Simon Duffy, *Closing the Net: How They Cracked the Case*, *available at* http://archives.cnn.com/2002/US/South/10/24/sniper.case.cracked/index.html (Oct. 25, 2002).

58 *See PCA: Safeguard or Old Hat, supra note* 23, at 5. His statement and political affiliation are reminders that the issue of military involvement in law enforcement is not a traditionally partisan issue. In fact, the Congressman is an advisor to the ACLU regarding civil liberties.

59 This is no wonder since the Act has only two exemptions subject to interpretation. The first is an exemption created by congressional authorization, such as in cases of insurrection. *See* 10 U.S.C § 331. The second is an exemption as expressly authorized by the Constitution. *See id.* Because the Constitution does not have an explicit reference to the use of the military in civil law enforcement, one must look to the implied powers to find an exemption.

60 *PCA: Safeguard or Old Hat, supra* note 23, at 15.

61 U.S. CONST. art. II, § 3; *see id.* at 16 (reasoning that the statute does not and cannot impede the President's inherent power to declare a state of national emergency and to use the military, as that would require a constitutional amendment).

62 *See PCA: Safeguard or Old Hat, supra* note 23.

merely limits the military in enforcing the law within the United States; it has no bearing on other activities, such as providing assistance in the form of military supplies.[63] Rather than arguing for a repeal of the Act, Stevens asserts that the Act is extremely narrow in scope and poses fewer limitations on the use of the military as is otherwise suggested.[64]

The Privacy Act also implicates the principle of federalism. Stephen Halbrook, attorney for Sheriff Printz, in *Printz v. United States*[65] recognizes that the Framers were also concerned with the interplay of power between federal and state government in addition to the federal separation of powers.[66] The Posse Comitatus Act can be seen as limiting the federal government's ability to interfere with the states and its capacity to enforce the law.[67]

Pragmatist thinkers, on the other hand, argue that the Act's exceptions should be amended in order to refute the argument that its various loopholes have ultimately swallowed the Act itself, thus rendering it moot.[68] Furthermore, they argue that some of the exceptions themselves are no longer needed.[69] Proponents of this approach have urged Congress to clarify the Act's language and reaffirm the Act's focus of civilian control over the military. This

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63 *See id.* at 17.

64 Compare these statements by Paul Schott Stevens, *PCA: Safeguard or Old Hat, supra* note 23, at 16, with statements by Stephen Halbrook, *PCA: Safeguard or Old Hat, supra* note 23, at 43 reasoning that the lack of an explicit provision in the Constitution that empowers the President to use the military to enforce domestic law demonstrates that it can only be done in exceptional circumstances where local law enforcement proves incapable.

65 521 U.S. 898, 935 (1997) (holding that a provision in the Brady Handgun Violence Prevention Act was unconstitutional in requiring that local law officers conduct background checks because it violated state sovereign immunity by demanding that state officers enforce federal law).

66 *See PCA: Safeguard or Old Hat, supra* note 23, at 26.

67 *See PCA: Safeguard or Old Hat, supra note* 23, at 24, 28 (encouraging the government to "take a look at how citizens can be involved in their defense instead of demeaning them and basically reducing them in the airport security context or elsewhere, to mere sheep."). It is interesting that the federalism argument conflicts with a separation of powers argument even though both refer to the Constitution and the intent of the Framers. These contrasting perspectives reflect how framing the issue can be decisive when interpreting the Constitution.

68 *See* statements by David Kopel, Associate Policy Analyst at the Cato Institute, *PCA: Safeguard or Old Hat, supra* note 23, at 30, 34 (highlighting the use of the military in local law enforcement under the guise of an exception to the Posse Comitatus Act. For example, the military, acting under the insurrection exception to the Posse Comitatus Act, was used after WWI to break up labor strikes when labor organizations were still considered a conspiracy). When labor strikes become equated with insurrection in order to justify the use of the military as opposed to local law enforcement, it can be argued that the exception ceases to have meaning.

69 *See, e.g.,* Fishery, Conservation, and Management Act of 1976, 16 U.S.C. § 1801-1882 (2005) (providing an exemption to the Posse Comitatus Act).

view is also supported by the traditionally different goals and methods embraced by the military and local law enforcement.[70]

The debate over the Posse Comitatus Act has also been triggered recently when Hurricane Katrina devastated a number of states. Although the military provided much provisional assistance after Hurricane Katrina, and in anticipation of Hurricane Rita, it did not assist local law enforcement in responding to the looting and violence in the hurricane's aftermath. President George W. Bush recently indicated his desire to replace state and local efforts with the military as the primary source for disaster relief.[71] There are two conflicting perspectives regarding the role of the military in the face of such natural disasters. First, it is argued that the Posse Comitatus Act needs to be repealed in order to free the military from the Act's prohibition regarding law enforcement.[72] Second, it is suggested that the Posse Comitatus Act does not need to be repealed in order to prevent the gross examples of violence in looting. This argument relies on the fact that there are alternative resources, such as the National Guard, that are free to assist in local law enforcement.[73] This event demonstrates how the debate

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70 *See generally* Kealy, *supra* note 17, at 387 (noting that the military is not trained in the same way as civil law enforcement). The military provides a sense of national security and safety, capable of fighting large scale wars and killing upon command, which certainly conflicts with the concept of local law enforcement whose jobs range from criminal law enforcement to resolving disputes over stolen property.

71 In a nationally televised speech from New Orleans, a site demolished by Hurricane Katrina, President Bush called for "a broader role for the armed forces, the institution of our government most capable of massive logistical operations on a moment's notice." *See* Tom Bowman and Siobhan Gorman, *Increasing Military's Role Raises Questions*, BALT. SUN, Sept. 20, 2005, at 6A.

72 "A natural disaster is like a war: People are killed, property is destroyed – and the nation is, in effect, under attack. So why shouldn't the Department of Defense be involved?" James Pinkerton, *Send in the Troops*, USA TODAY, Oct. 10, 2005, at 12A (the author is a Fellow at the New America Foundation). The proposal would create a unit of the military devoted to assisting the National Guard and would include communications technicians, logistics specialists, medical staff and infantry. *See* Eric Schmitt and Thom Shanker, *Storm and Crisis: Armed Services; Military May Propose an Active-Duty Force For Relief Effort*, N.Y. TIMES, Oct. 11, 2005, at A15.

73 The National Guard is not subject to the Posse Comitatus Act, nor the Coast Guard or the Air National Guard. Currently, there are 320,000 National Guard troops with only 75,000 deployed overseas leaving 245,000 available to assist in necessary law enforcement under state command. *See* Tom Bowman, *National Guard to Double Relief Forces Maryland Among States Sending Soldiers to Areas Devastated by Hurricane Katrina,* BALT. SUN, Sept. 1, 2005, at 5A. It is also argued that the military and local law enforcement have inconsistent tenets. Gene Healy of the Cato Insitute stated that "[W]hen it comes to domestic policing, the military should be the last resort, not a first responder." Ken Herman, *Let GIs Run Storm Relief? Bush Critics Say Military Role Must be Limited*, ATLANTA J. AND CONST., Sept. 26, 2005, at A1. Furthermore, the President is still free to declare a state of national emergency which entitles him to waive the Act and employ the military. *See id.* Arguably, changing the law is also a way to avoid acknowl-

regarding the Posse Comitatus Act is current in a variety of contexts and needs to be addressed.

B. Military Surveillance of U.S. Civilians During The Civil Rights Movement and Other Moments That "Threatened" the Public Order

Regardless of the modern debate over the Posse Comitatus Act, neither these debates nor the limitations imposed by the Act were at the forefront of political thought in the middle of the twentieth century. The consequences of increasingly relaxed application of the Posse Comitatus Act came to a head in the context of the Cold War, when the U.S. government's fear of insurgents and conspirators resulted in the employment of nearly every powerful institution to quash any "anti-American" activity.[74] The military, alongside local law enforcement, the CIA, and the FBI, assumed an unforeseen role by engaging in the surveillance of U.S. civilians.[75] From the 1950's until the 1970's, the military assisted in collecting information about political activity of civilian groups that were considered "threats."[76] The surveillance included planting undercover agents and utilizing informants to penetrate civilian organizations.[77] Although the military activity began under the cloak of legitimacy by assisting law enforcement to quell insurrections in accord with presidential directives,[78] it ended in a series of invasive

edging failures that occurred in other federal institutions who were expected to lead the relief effort such as the Federal Emergency Management Agency ("FEMA") and the Dept. of Homeland Security.

[74] *See generally* SENATOR FRANK CHURCH, SUPPLEMENTARY DETAILED STAFF REPORTS ON THE INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755 (2d Sess. 1976) [hereinafter CHURCH COMMITTEE REPORTS] (exposing the military, CIA, and FBI's unconstitutional surveillance activities which were used to identify suspected communist influence on the Peace and Civil Rights Movement).

[75] *See e.g.,* Christopher H. Pyle, *CONUS Intelligence: The Army Watches Civilian Politics*, WASH. MONTHLY I, Jan. 1970, at 4, *reprinted in* 91 CONG. REC. 2227-2231 (1968). Christopher H. Pyle was a former intelligence officer.

[76] "Threats" typically meant any opposition to the social and political order. *See* CHURCH COMMITTEE REPORTS, *supra* note 74, at 790. Groups ranged from the suspected Communist members and suspected Socialists, to the civil rights activists. *Id.* at 4.

[77] *See id.* at 790, 796 (culminating in a massive covert intelligence operation to investigate and defeat the "March on the Pentagon" demonstration in 1967).

[78] *See* 10 U.S.C.A § 331-334 (2004) (creating exemptions to the Posse Comitatus Act to allow the military to assist local law enforcement in specific circumstances, such as when insurrection is threatened and assuming authorization by Congress or the President).

information gathering campaigns that lacked any explicit direction or authorization[79].

Because of the flagrant use of the military and the deplorable procedures employed by the CIA and FBI, Congress ultimately decided to investigate the institutions themselves in the 1970's.[80] Under the direction of Senator Frank Church and Senator Sam Ervin, Congress conducted a series of hearings to unveil military, FBI and CIA's surveillance and related activities that was likely intended to stifle the exercise of constitutional rights such as the freedom of political expression.[81] As a result of years of hearings and media attention, the public learned of the surveillance and other intrusions by the military and similar governmental agencies into their lives. Americans were shocked.[82]

The military's surveillance tactics included posing as newsmen in order to photograph participants at political rallies as well as disguising themselves as reporters to tape interviews and speeches by demonstration leaders.[83] These speeches and photographs were archived, in some instances by computers, and ultimately shared with FBI and CIA agencies.[84] In addition to its surveillance activities, there were allegations that the military provided financial support and weapons to organizers who opposed leftist groups.[85] Members of the military also admitted that they sought to frustrate the efforts of activists by destroying notices about demonstrations and conducting other similar tactics.[86]

Much like the military's unconventional activity, the FBI did not respect its mandate for domestic law enforcement capabilities.[87] It established a highly secret program called COINTEL-

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79 *Cf.* CHURCH COMMITTEE REPORTS, *supra* note 74, at 791 (describing DOD Directive 5200.27 issued in 1971, which prevented the military from further collecting information on unaffiliated persons unless there was an independent military purpose).

80 *See generally* CHURCH COMMITTEE REPORTS, *supra* note 74.

81 *See id.*

82 See *supra* note 74 (public exposure of federal agency surveillance activity through congressional hearings).

83 Military agents also posed as students at demonstrations. CHURCH COMMITTEE REPORTS, *supra* note 74, at 801.

84 *Id.*

85 Terrorist members testified as such at hearings contributing to the Church Committee Reports. *Id.* at 803.

86 *Id.* at 802.

87 The FBI is given the principle responsibility of law enforcement, precisely what the military is not permitted to do. *See* FBI, Frequently Asked Questions, *at* http://www.fbi.gov/aboutus/faqs/faqsone.htm (last visited Feb. 12, 2005); *see also infra* note 121. This trust of local law enforcement and the FBI in investigating U.S. civilians is seen both in statute, such as the Posse Comitatus Act, and by executive orders. President Ronald Reagan issued an executive

PRO[88] which not only collected information about domestic groups, but more importantly, actively sought to undermine their efforts.[89] The purpose of the program was to "[maintain] the existing social and political order by 'disrupting' and 'neutralizing' groups and individuals perceived as threats."[90] Targets included suspected Communist activists, "Campus Dissidents", the "Black Panthers" and alleged "leftists" such as Martin Luther King.[91] The program was in effect from 1956 through 1971 when the press exposed COINTELPRO for the first time by publishing leaked FBI documents.[92]

The CIA's activity is limited to the international arena, much like the military's.[93] However, during this era commanded by suspicion and clandestine activity, it too acted outside of its prescribed boundaries.[94] In collecting information on American students,[95] the CIA alleged a foreign intelligence purpose by hypothesizing

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order that gave the FBI almost exclusive authority to conduct searches and seizures within the United States as well as other intelligence activities thus depriving other agencies of such capacities. Exec. Order No. 12,333, 46 Fed. Reg. 59, 941 (1981). *See also* President Gerald Ford's executive order, Exec. Order No. 11,905, 41 Fed. Reg. 7707 (1976) and President Jimmy Carter's executive order, Exec. Order No. 12,036, 43 Fed. Reg. 3674 (1978). All of these orders sought to minimize the collection of intelligence of U.S. civilians by creating stringent requirements on the agencies engaged in surveillance and delineating the intelligence authority of each agency. By limiting surveillance capacity to one agency, primarily the FBI, there is greater accountability and potential for oversight. For further discussion on the effect of various presidential administrations on the development of intelligence systems see Seth F. Kreimer, *Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror*, 7 U. PA. J. CONST. L. 133, n. 96 (2004) and also see Exec. Order No. 12,333, 46 Fed. Reg. 59, 941 (1981) which barred the CIA from conducting electronic surveillance in the United States. Despite its specific mandate to enforce the law, the FBI must still act within constitutional parameters. The FBI clearly lost sight of this priority during the Civil Rights Movement.

[88] COINTELPRO is an acronym for "counterintelligence program" that gathered information for security reasons. However, the Church Committee found that a more appropriate title would have been "Covert Action" as the underlying intent was to replace unconventional values with more "accepted" social and political systems. CHURCH COMMITTEE REPORTS, *supra* note 74, at 4.

[89] *Id.* at 3.

[90] *Id.* at 5.

[91] *Id.* at 4, 179, 187.

[92] *Id.* at 3.

[93] The CIA is allowed to engage in foreign intelligence collection. Although this may allow it to engage in surveillance within the confines of the United States on occasion, its targets were historically limited to foreign sources. *See* Central Intelligence Agency (CIA), About the CIA, *at* http://www.cia.gov/cia/information/info.html (last visited Feb. 12, 2005); s*ee also infra* note 121.

[94] *See* Central Intelligence Agency (CIA), About the CIA, *at* http://www.cia.gov/cia/information/info.html (last visited Feb. 12, 2005) (defining the CIA's domain).

[95] CHURCH COMMITTEE REPORTS at 681 (condemning the thousands of files kept on Americans).

about international support.[96] Furthermore, the CIA, in conjunction with the FBI, participated in mail opening programs in order to collect foreign intelligence.[97] Ultimately, the CIA acknowledged that the programs failed to produce much, if any, information on foreign intelligence.[98] The consequence of these actions was that nearly a quarter of a million Americans had their mail read by government officials.[99]

These examples of intrusions by the FBI, CIA, and military represent not only violations of their prescribed mandates of activity, but also represent absolute violations of privacy and the exercise of First Amendment rights to free speech.[100]

III. The Privacy Act: A Remedy for the Unbridled Use of the Military and Other Government Institutions

Congress enacted the Privacy Act of 1974[101] to respond to the military's and other federal agencies' clear abuse of constitutional rights during the previous two decades.[102] The Act was just one of

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96 The CIA created a program called CHAOS whose purpose was to identify foreign support of dissident groups and movements in the United States. *Id.* at 681. Although the goal of CHAOS was permissible as it involved foreign intelligence, it was merely a façade for the CIA's real intention to engage in security and intelligence within the United States. *See* Grant T. Harris, *The CIA Mandate and the War on Terror*, 23 Yale L. & Pol'y Rev. 529, 537-38 (2005) (describing instances where the CIA violated its mandate).

97 The military intercepted mail and photographed its contents. *Id*. at 561. "Gentleman do not read each other's mail." Statement by Henry L. Stimson, Secretary of State, explaining the reason for closing the "Black Chamber", a code breaking office, in 1929. Henry L. Stimson & McGeorge Bundy, On Active Service in Peace & War, 188 (Octagon Books 1948).

98 It was found that many CIA agents who chose which mail to investigate were untrained, resulting in overly extensive invasion of privacy. Church Committee Reports, *supra* note 74, at 561. U.S. Senators, journalists, and even a Presidential candidate had their mail opened. *Id.* at 561.

99 *Id*. at 565.

100 *See supra* notes 87, 93; *see infra* note 121.

101 5 U.S.C. § 552(a) (2004).

102 The Act was the product of two distinct bills, one in the House and one in the Senate. In an effort to quickly produce a piece of legislation because of the controversy surrounding the Watergate scandal and to honor Senator Sam Ervin, the author of the legislation, a compromised bill was decided on without a customary conference committee report. *See* CRS Report for Congress, *The Privacy Act: Emerging Issue and Related Legislation, Congressional Research Service*, *available at* http://www.fas.org/irp/crs/RL30824.pdf (last updated Fed. 26, 2002). The most significant compromises included 1) the replacement of the Senate's Privacy Protection Commission with a study commission, 2) the relaxation of the Senate's rule-making procedures, 3) the downgrade of the House's standard for damage recovery from proving that the agency action

the remedies that Congress elected to cure the country of illegitimate tactics employed by revered and unregulated institutions.[103] The breadth of the Act demonstrates Congress's suspicion of government when it goes unchecked.[104]

There are various factors that led to the Privacy Act. The military surveillance within the United States, described in the Church Committee Reports, is one of the major reasons, along with the clandestine information gathering programs by the FBI and CIA.[105] Another driving force included the Watergate investigations, which produced evidence of the improper retention of personal information by government agencies.[106] The collection of tax information by the IRS, which was ultimately disseminated to political camps for ammunition, was another impetus for the Act.[107]

All of these factors were compounded by the development of technology, most significantly the use of computers.[108] Computers created an unforeseen potential to collect, and more importantly, an almost unlimited capacity to retain information.[109] As a result, the surveillance of individuals was no longer an isolated event; individuals could now be subjected to governmental review for years in the form of easily accessible and transmittable data records. The specific purpose of the Act was to:

> [P]romote governmental respect for the privacy of citizens by requiring all departments and agencies of the executive branch and their employees to observe certain constitutional rules in the computerization, collection, management, use and disclosure of personal information about individuals . . . It is designed to prevent the kind of illegal, unwise, overbroad, investigation and

was arbitrary, willful or capricious, to proving that the action was "willful or intentional" and, 4) the House's data standards were raised. *See* Arthur A. Bushkin & Samuel I. Schaen, *The Privacy Act of 1974 A Reference Manual for Compliance*, *available at* http://www/cavebear.com/nsf-dns/pa_history.htm (last visited Feb. 6, 2005). It has since been amended six times to provide further details to the reporting and dissemination requirements. *See, e.g.,* 96 Stat. 1819, at 1821-22 (modifying the Privacy Act's reporting requirements and the criteria for the publication of agencies' records systems).

103 *See, e.g.,* Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2004).

104 Instead of simply imposing liability on individual government officials who acted outside the law ex post facto, the Congress addressed government as well to prevent such occurrences in the future.

105 *See* Steven W. Becker, *Maintaining Secret Government Dossiers on the First Amendment Activities of American Citizens: The Law Enforcement Activity Exception to the Privacy Act*, 50 DePaul L. Rev. 675, 683 (2000).

106 *See id.* at 680.

107 *See id.* at 682.

108 *See id.* at 678.

109 *See id.*

> record surveillance of law-abiding citizens produced in recent years from actions of some over-zealous investigators, and the curiosity of some government administrators . . . It is to prevent the secret gathering of information on people or the creation of secret information systems or data banks on Americans.[110]

The major and immediate objectives of the Act were first, to require that the agencies give a detailed notice of the nature and use of their personal data bank and information systems;[111] second, to require that all agencies protect the privacy and due process rights of individuals by requiring that information is given with consent and knowledge; third, individuals must have access to their own information; and fourth, the retention and dissemination of information must follow strict guidelines.[112]

Significantly, the Privacy Act empowers individuals to enforce violations of the Act against the government in the courts.[113] They can either challenge the government for failing to provide access to their information or enjoin violations and potential violations of the Act.[114] Although this encourages a broad range of suits, courts have complicated Privacy Act challenges by interpreting the jurisdictional requirements of the Act strictly thus making it difficult for cases to be heard.[115] However, the fact that there are enforcea-

110 S. REP. NO. 93-1183, at 6916-17 (1974). Prior to passing the Act, the Committee on Government Operations was referred the bill for final alterations. The bill became the Public Law 93-579 which is currently the Privacy Act.

111 *Id.* at 6917.

112 *See id.* (describing the major goals of the Act).

113 *See id.* at 6918.

114 Today, lawsuits are brought to enforce the Privacy Act in a number of ways. Frequently, citizens challenge the government's dissemination of information to other sources. *See, e.g.,* Covert v. Harrington, 876 F.2d 751, 755 (9th Cir. 1989) (advancing an employee's right to prevent the Department of Energy from disclosing his personnel security files to the Department of Justice when the employee had been told that the file would only be used for security purposes thus violating the Privacy Act's requirement that an individual be informed of the purpose of the information request). In addition, individuals sue to gain access to personnel files held by a government agency. *But see* Sculembrine v. Reno, 158 F. Supp. 26, 27 (D.C. Cir. 2001) (withholding employee's access to personal files held by the White House by reasoning that although the Act applies to all "agencies," including the Executive Department, Congress did not intend to include the Office of the President).

115 Section 552(g) requires that individuals asserting a violation of the Act show that there was willful violation of the Act, an adverse effect on the individual and a causal connection between the violation and the effect. Privacy Act, 5 U.S.C § 552(g) (2004). *See, e.g.,* Cardamone v. Cohen, 241 F.3d 520, 529 (6th Cir. 2001) (refusing to find a violation of section 552(a)(e)(3) because the individual was unable to show that the individual's emotional distress was causally related to the government's information request); Albright v. United States, 631 F.2d 915, 921 (D.C. Cir. 1980) (doubting the existence of a willful and intentional violation of the Act when a federal agent argued that he videotaped federal employees during a meeting regard-

ble civil remedies demonstrates that the Act was not merely a response to angry public outcries after the revelation of governmental abuse, nor a mere punishment of government for privacy violations but also was an effort to offer real protection to people and their privacy by giving them enforceable rights and ownership of their private information.[116]

The Act applied to all federal agencies with limited exceptions.[117] The law enforcement activity exception allows agencies that engage in the enforcement of criminal laws to be exempt from various provisions within the Privacy Act.[118] One such provision is section 552(a)(e)(3), which is now referred to as the "sunshine provision." The sunshine provision requires that:

> [E]ach agency [including the military] that maintains a system of records to inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual, of: (A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether the disclosure of such information is mandatory or voluntary; (B) the principal purpose or purposes for which the information is intended to be used; (C) the routine uses which may be made of the information * * *; and (D) the effects on the [individual], if any, of not providing all or any part of the requested information.[119]

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ing the denial of promotions in order to show employees who were not able to attend). *Cf. Sculembrine*, 158 F. Supp. at 27 (excluding the Office of the President from the requirements of the Privacy Act by narrowly defining the term "agency" and thus nullifying a judicial challenge).

116 Civil remedies could be something as easy as sending an employee the information that they provided to the government in an interview or application or preventing agencies from sharing information about its employees over email without permission. *See supra* note 114 regarding the many ways to challenge a violation of the Act. These civil remedies are accessible and feasible demonstrating that the government can both function while at the same time afford privacy protection.

117 *See, e.g.,* 5 U.S.C. § 552(a)(e)(7) (conceding that there is a law enforcement activity exception which allows agencies to maintain records on how individuals exercise their First Amendment rights if it is pertinent to and within the scope of an authorized law enforcement activity). *Cf.* Becker, *supra* note 105, at 739. The author argued that a lenient construction of the law enforcement exception will cause people to:

> [C]ease to express their views in public for fear of government scrutiny and persecution. Lawful dissent will be forced underground, and two societies will develop. One will be the artificial society controlled by the state and enforced by its police. The second will percolate under the oppression of the former and will embody the genuine, but unspoken, feelings of a populace that is forced to meet in secret and converse warily on subject forbidden by legislative fiat.

Id.

118 *Id.* at § 552(a)(j). Examples include police, the FBI and CIA.

119 *Id.* at § 552(a)(e)(3).

It is for this portion of the Privacy Act that Congress recently considered an exemption for the military.[120] The CIA and FBI were immediately exempted from the Act because their respective mandates made compliance with the Act nearly impossible.[121] If adopted, the consequences of the recent exemption would inherently change the character of the military and its role in the United States. The military would no longer have to explain the source of its authority to seek personal information. Because this information would no longer be required, it is doubtful that it would ever be revealed. It is hard to imagine that a civilian, approached by a military agent in uniform would actually halt the conversation to demand the source of the military agent's authority. Uniforms, however, would become scarce. The exemption would allow military agents to spy on Americans on American soil. The intent of the exemption is to assist the intelligence personnel of the Department of Defense ("DoD") in "recruiting sources which necessitates

[120] *See* Intelligence Authorization Act for Fiscal Year 2005, S. 2386, 108th Cong. § 502 (2004) (exempting the military from the Privacy Act in order to allow them to engage in surveillance in the United States). The bill ultimately passed without the amendment to the Privacy Act but there are indications that the objectives will be pursued without congressional authorization. *See infra* notes 144, 146, and accompanying text. Furthermore, an almost identical bill has been reintroduced into the Senate for Fiscal Year 2006. *See* Intelligence Authorization Act for Fiscal Year 2006, S. 1803, 109th 'Cong. § 431 (2005) (providing the same exemption for the military as the bill in the previous year). The intelligence objective, in addition to the recent suggestion that the military become more involved in disaster relief, could ultimately usher the 2006 bill through Congress. Even if this bill does not pass, it is not unlikely to reemerge in the future is as evident but these previous attempts to include the exemption for the military.

[121] The FBI and law enforcement personnel are exempted from this portion of the Act, because otherwise they would be prevented from gathering and retaining information about individuals suspected of violating federal law which is the basis of their job. *See* 5 U.S.C. §552(a)(j)(2) (exemption). The FBI is charged with investigating all federal criminal violations. It is allowed to use informants and, because dissemination of personal information about ongoing criminal investigations may endanger individuals, as well as frustrate their ultimate law enforcement objective, the FBI is allowed to withhold information normally accessible via the Privacy Act. Its main limitation is that they only conduct their activities within the United States. *See* FBI, Frequently Asked Questions, http://www.fbi.gov/aboutus/faqs/faqsone.htm (last visited Feb. 12, 2005). The CIA, although it does not share the law enforcement function of the FBI, is similarly exempted from section 552(a)(e)(3). *See* 5 U.S.C. § 552(a)(j)(1). The CIA's charter authorizes it to conduct foreign intelligence which involves the collection and analysis of information in order to assist the President and policy makers making policy decisions. It can only pursue information about foreign countries and their citizens and is prohibited from collecting information on the domestic activities of U.S. civilians. *See* Central Intelligence Agency (CIA), About the CIA, http://www.cia.gov/cia/information/info.html (last visited Feb. 12, 2005). It is reasonable that certain CIA information, specifically that which relates to exchanges between foreign governments and potential foreign intelligence sources, should be exempted from parts of the Privacy Act as the dissemination could threaten national security and frustrate its objectives. *See* 5 U.S.C. § 552(a)(j)(1).

providing them the authority to not disclose their affiliation with the military."[122] And because military agents will no longer have to inform individuals of the purpose of their information request and what they intend to do with the information, individuals will be deprived any ownership over personal information, while at the same time their expectation of privacy will be contracted even further[123].[124]

A long-time proponent for the protection of First Amendment rights once said that "[r]elying on the Government to protect your privacy is like asking a peeping tom to install your window blinds."[125] One reason why this statement appears valid is that the government is in the position to protect your rights; however, it is also in the position to define those rights through legislation. Legislation is not immutable, as can be seen through the recent proposal to amend to the Privacy Act, making any law a dangerous vehicle to rely on completely for the preservation of rights. Thus, the attempted amendment demonstrates again why the preservation of rights has to be maintained by constitutional protections or by a vigilant legislature and civil society against overzealous government action.

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122 *See* S. REP. NO. 108-258 (2004).

123 Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., dissenting) (finding a search to be in violation of the Fourth Amendment where a person had an actual expectation of privacy and where society would reasonably recognize an expectation of privacy). The expectation of privacy, however, is a changing concept because as technology develops, the expectation that conduct is immune from governmental oversight lessens. *See, e.g.,* Florida v. Riley, 488 U.S. 445, 445-46 (1989) (characterizing helicopters as technology that is in routine use, and, therefore, it is not reasonable to have an expectation of privacy in a field that can be observed from 500 feet above by helicopter).

124 The threat articulated by the drafters of the proposed exemption is that the prohibitions delineated in section 552(a)(e)(3) could "damage operational relationships, compromise the safety of intelligence officers and inhibit the capture of intelligence sources." *See* S. REP. NO. 108-258. It should be noted that there is little information on the Congressional Record because it is an issue of national security and certain intelligence committee hearings and mark-up meetings are not public.

125 John Perry Barlow, former lyricist of the Greatful Dead and founder of the Electronic Frontier Foundation, http://www.faculty.rsu.edu/~felwell/HomePage/aphorisms.htm (last visited Dec. 1, 2004).

IV. Post September 11 Security Reforms and Possible Conflicts with Existing Laws

A. Changes in Traditional Law Enforcement: Department of Homeland Security and the Patriot Act

On September 11, the United States suffered one of most devastating attacks by a foreign power on American soil in the country's history. Subsequently, there were months of investigations to discover how the United States, often considered the strongest military and economic power in the world, could allow such an attack to occur. Ultimately, the lack of concerted intelligence among the FBI, CIA, and other federal agencies proved to be one of the major reasons for our security vulnerability.[126] In response, Congress created legislation to expand and strengthen the intelligence capacity of law enforcement officials. For example, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act")[127] provided for extensive foreign intelligence.[128] In addition, the government passed the Homeland Security Act[129] which created the Department of Homeland Security to coordinate federal, state, and local law enforcement agencies and to ensure that information is accessible and circulated throughout the entire Department.[130] Both laws have generated enormous controversy in large measure because of the possibility of infringing on the privacy of

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126 *See generally* Press Release, State Dep't., Mission of U.S. Intelligence Community is Diverse – 15 Agencies Share Intelligence Responsibilities, 2004 WL 88735325 (Dec. 17, 2004).

127 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act].

128 Previously local law enforcement and the FBI conducted foreign intelligence in accord with the Foreign Intelligence Surveillance Act (FISA) of 1977, 50 U.S.C. § 1801 (2000) (providing for covert surveillance of suspected terrorist activity within the United States and emphasizing that law enforcement could not engage in surveillance of United States citizens. There are, however, two significant exceptions highlighted: first, if an American was part of a "faction of foreign nation" or a "foreign based political organization" and second, if the American was an "agent of a foreign power.").

129 The National Homeland Security and Combating Terrorism Act of 2002 ("Homeland Security Act"), 6 U.S.C. § 101 (Supp. 2002).

130 *See id.*; *see also* S. Rep. No. 108-258, at 7 (2004), *available at* http://thomas.loc.gov/cgi-bin/cpquery/T?&report=sr258&dbname=cp108& ("[T]he agencies that comprise the intelligence collection and analysis branches of the U.S. Government must begin using information like a Community—not a loose affiliation of agencies.").

American citizens and fundamentally altering the balance of power among government and civil liberties.[131]

B. Changes in Military Might: Northern Command and Other More Secretive Endeavors

On October 1, 2002 President George W. Bush authorized the creation of the United States Northern Command ("NORTHCOM").[132] NORTHCOM is one of nine unified commands in various regions around the world whose mission is to assist in defense by providing organizational and strategic integration or coordination.[133] NORTHCOM is located in Colorado Springs, Colorado, and its areas of operation are the U.S. territory, air, and surrounding waters, including the Gulf of Mexico, Puerto Rico, and the Virgin Islands, as well as Canada and Mexico.[134] It is also significant because it is the first military command geared towards combating war on U.S. soil. NORTHCOM's mandate is to coordinate efforts of the DoD to achieve homeland defense and to assist civil authorities in cases of emergency as directed by the President and the Secretary of Defense.[135] Emergencies include domestic disasters such as hurricanes, floods, and earthquakes.[136] In addition, it operates with other agencies in counter-narcotic operations and has a primary responsibility for helping to prevent and to respond

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[131] *See, e.g.,* Rebecca A. Copeland, *War on Terrorism War on Constitutional Rights? Blurring the Lines of Intelligence Gathering in Post-September 11 America*, 35 TEX. TECH L. REV. 1, 29 (2004) (charging that the Patriot Act and the Homeland Security Act put too much discretion in the executive branch with little opportunity for review. Obtaining a judicial warrant for national security purposes under the Patriot Act is authorized under a less stringent standard than a warrant under FISA, thus limiting judicial oversight. In addition, the Homeland Security Act creates a council to guide the intelligence effort and whose members only include those within the executive branch).

[132] *See* Global Security website, http://www.globalsecurity.org/military/agency/dod/northcom.htm (last visited Feb. 10, 2005).

[133] *See* U.S. Northern Command: Who We Are, http://www.northcom.mil/index.cfm?fuseaction=s.who_unified (last visited Feb. 7, 2005).

[134] *See* U.S. Northern Command: Factsheet, http://www.northcom.mil/index.cfm?fuseaction=news.factsheets (last visited Feb. 7, 2005).

[135] *Id.*

[136] *Id.* Most recently, NORTHCOM was used to assist in the relief effort regarding Hurricane Katrina. Its assistance was limited to the provision of supplies and evacuation efforts. Consequently, the military did not conflict with the Posse Comitatus Act as it did not engage in local law enforcement. *See* Eric Schmitt & Thom Shanker, *Storm and Crisis: Armed Services; Military May Propose an Active-Duty Force For Relief Effort*, N.Y. TIMES, Oct. 11, 2005, at A15; *see also* notes 70-72 and accompanying text.

to terrorist attacks, including those involving weapons of mass destruction.[137] NORTHCOM asserts that it is not in violation of the Posse Comitatus Act, because it does not participate in local law enforcement, but rather only gives passive assistance when local law enforcement lacks the capability and resources to respond to emergencies.[138] Its awareness of the potential to violate the Posse Comitatus Act is demonstrated by a specific fact sheet on Posse Comitatus posted on the homepage of its website.[139] Arguably, however, the mere presence of the military within the confines of the United States, with a broad mandate and the capacity to conduct intelligence on an immense scale, presents a very real danger that the military may engage in conduct in direct violation of the Posse Comitatus Act. With its congressional authorization, diverse technological and human intelligence capacities, and specific mandate regarding drugs, weapons of mass destruction, and terrorism, it would not be unlikely for the military to reason that it is now entitled to undertake intelligence operations in furtherance of those authorities.[140]

Christopher Pyle, a former captain in Army Intelligence who unveiled the extent of Army's surveillance activities in the 1970s is extremely ambivalent about NORTHCOM.[141] Because of the large capacity of NORTHCOM as a highly equipped facility with some of the most well-trained personnel in the military, he doubts that its real mission is emergency response and insinuates that the military might assume a more proactive role on U.S. soil.[142]

NORTHCOM, like the provision to amend the Privacy Act, is another example of the growing presence of the military in Ameri-

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137 *Id.*

138 *Id.; see generally* United States v. Red Feather, 392 F. Supp. 922, 923 (D.C.S.D 1975) (distinguishing between passive and active military assistance of law enforcement objectives).

139 *See* NORTHCOM, Operating Within The Law, http://www.northcom.mil/index.cfm?fuse action-s.who_operatinglaw (last visited Feb. 13, 2005).

140 Space intelligence efforts are another interesting area that present potential conflicts with the Posse Comitatus Act. Traditionally, the military has employed space programs in order to investigate foreign threats which does not conflict with the requirement that it conduct its activities outside the United States. *See High Ground over the Homeland, Issue in Space Assets for Homeland Security*, http://www.airpower.maxwell.af.mil/airchronicles/api/apj03/spr03/kuo.html (March 3, 2004). As for those activities that are conducted within the United States, they are considered passive and, therefore, not a violation of the Posse Comitatus Act. *See id*; *see also Red Feather*, 392 F. Supp. at 923 (D.C.S.D. 1975) (demanding that there be a direct active use of the military as opposed to passive).

141 *See, e.g.,* Christopher H. Pyle, *Domestic Spying – Again?*, HARTFORD COURANT, Nov. 20, 2002, *available at* http://www.mtholyoke.edu/offices/comm/oped/spying2 /shtml.

142 *Id.* (warning that "[i]t's too early to tell how far the Army will actually go with its plans, but is not too early to start asking questions.").

can society.[143] Although the proposed amendment to the Privacy Act failed in this instance,[144] it illustrates legislation whose focus is to expand the authority of the military to act in the realm of national security, despite the fact that it may conflict with constitutional rights and traditional policies and ideals about the subordination of military to civilian authority.[145] Furthermore, the amendment is having a re-birth in the legislative process. The 109th Senate has included a nearly identical amendment in the 2006 Intelligence Authorization Act.[146]

Although the proposed amendment was not included in the final version of the intelligence appropriations legislation, it reflects a sentiment among our elected officials whose importance cannot be overlooked when it threatens constitutional traditions. A striking example of the military's changing presence in the United States is evidenced by the recent disclosure of a DoD secret unit called the Strategic Support Branch whose primary mission is to pursue human intelligence – essentially spying. This is in contrast to technological information collection which is separate from, and to some degree independent of, both the CIA and FBI.[147] According to press reports and congressional statements,

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143 *Compare* Intelligence Authorization Act for Fiscal Year 2005, S. 2386, 108th Cong. § 502 (2004), *available at* thomas.loc.gov/ cgi-bin/query/C?c108:./temp/~c1088kfyOs (last visited Feb. 7, 2005), *with* Northern Command: Who We Are, http://www.northcom.mil/index.cfm?fuseaction=s.who_unified (last visited Feb. 7, 2005).

144 On Dec. 23, 2004, the House version of the bill passed, which did not include the amendment, in contrast to the Senate version. Intelligence Authorization Act for Fiscal Year 2005, Pub. L. No. 108-487 (2004), *available at* http://thomas.loc.gov/cgi-bin/query/C?c108:./temp/~c1084Kxc8H. Section 302 of the Act states that "the authorization of appropriations by this Act shall not deemed to constitute authority for the conduct of any intelligence activity which is not otherwise authorized by the Constitution or the laws of the United States." *See id.*

145 *See, e.g.,* USA PATRIOT Act, *supra* note 127 (legislating an exemption for the constitutionally required warrant procedure).

146 *See* Intelligence Authorization Act for Fiscal Year 2006, S. 1803, 109th Cong. § 431 (2005), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN01803:@@@X (last visited Feb. 3, 2006). Currently, the bill is being referred to the Senate Armed Services Committee for review. *See id*. This amendment was not entirely unanticipated despite the failure of the previous amendment. In last year's Committee Comments by the Senate, it stressed the need for a gradual and continuous change that requires evolving legislation. *See* S. REP. NO. 108-258 (2004). "Congress must resist the impulse to make quick, politically expedient changes. Our actions should address identifiable problems and ensure that change is institutionalized as a continuous process in the Intelligence Community. . . . The Committee retains the option of seeking the enactment of reforms during the present session, either in this Act, as it works its way through the legislative process, or in a separate measure."). *Id.*

147 Barton Gellman, *Secret Unit Expands Rumsfeld's Domain, New Espionage Branch Delving Into CIA's Territory,* WASH. POST, Jan. 23, 2005, at A01 [hereinafter Gellman, *New Espionage Branch*] (disclosing the existence of the Strategic Support Branch within the Defense Intelligence Agency ("DIA") that has functioned undetected for the last two years and employs

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the unit has functioned without specific congressional approval or the public's awareness and sanction.[148] Most notably, the unit enables the military to engage in activities officially under the purview of the CIA, such as counterintelligence efforts in foreign countries where there is no threat of war.[149] Because the CIA and the military operate under different mandates, it is significant that the military is seemingly encroaching on the CIA's authority.[150] A Republican member of Congress involved in national security states that "it sounds like there's an angle here of 'let's get around having any oversight by having the military do something normally the [CIA] does, and not tell anybody.' That immediately raises all kinds of red flags for me. Why aren't they telling us?"[151]

In addition to altering the military's traditional position compared to other federal agencies that specialize in security and intelligence, the military is also assuming an unconventional presence in U.S. territory.[152] Recently, a group of secret commandos consisting of members of the military protected attendees of the presidential inauguration.[153] This will not be the sole emergence of the commandos on U.S. soil, because their broad mandate will inevitably re-authorize their activity.[154] The group's principal goal is to conduct counterterrorism efforts in an effort to assist civilian agencies within the United States.[155] It receives its orders from

military members of the Defense Human Intelligence Service. The mission of the unit is to find out possible terrorist threats whether or not there is a real possibility of war as well as other intelligence efforts); *see also* Eric Schmitt, *Pentagon Sends Its Spies to Join Fight on Terror*, N.Y. Times, Jan. 24, 2005, at A1 [hereinafter Schmitt, *Pentagon Spies*].

148 Congressmen, including members of the Intelligence Committee, indicated absolute surprise upon learning of the unit. Schmitt, *Pentagon Spies, supra* note 147. "[T]he creation of the espionage branch, the scope of its clandestine operations and the breadth of Rumsfeld's asserted legal authority have not been detailed publicly before." *See id.*

149 *Id.*

150 *See* Gellman, *New Espionage Branch, supra* note 147 (highlighting that the military is subject to less oversight when acting within its legal and legislative restrictions than the CIA).

151 *See id.* (the speaker of the statement did not want to be named). Even if the military does not assume the responsibilities of the CIA, but rather coordinates intelligence efforts, the military will not give the CIA as much power as in the past. The DoD issued guidelines indicating that it will continue to provide the CIA with notice of human intelligence efforts but will not await consent. *See id.* This statement also demonstrates that military and its historical and constitutional guidelines are not necessarily partisan issues.

152 *See supra* notes 87, 121 (regarding the FBI's authority to enforce the law in the United States).

153 Eric Schmitt, *Commandos Get Duty on U.S. Soil*, N.Y Times, Jan. 23, 2005, at A01 (disclosing the use of elite military forces in the United States to assist law enforcement despite legal restrictions such as the Posse Comitatus Act limiting such conduct).

154 *See id.*

155 *See id.*

the military's Special Operations Command and NORTHCOM.[156] The group's involvement with NORTHCOM indicates that NORTHCOM's strategic and functional capacity to activate the military in the United States is becoming a reality.

These two efforts are examples of the Bush Administration and the military evading congressional oversight.[157] Additionally, they demonstrate how Congress has sanctioned an evolving military presence in the United States. Because the Amendment is neither the first nor the last attempt to change the character of the military in the United States, the legislature and community must prepare itself for a system in which such legislation is likely to pass and anticipate the ensuing threats to privacy and other civil liberties.

V. Balancing of Interests: National Security and Privacy

A blanket exemption from the Privacy Act would defeat the opportunity for judicial challenges to violations of the Act.[158] In addition, the military would be free from another level of constraint and oversight. Arguably, the military should still be subject to some form of oversight. The courts, however, may not necessarily be the best forum to weigh national security interests against privacy interests, due to their lack of expertise in security issues. An alternative forum for dispute resolution would allow citizens' privacy interests to continue to be considered while at the same time show an awareness of the realities of our threatened security and the need for military defense, intelligence, and protection.

Congress has rejected the proposal to amend the Privacy Act to exempt the military completely from the Act. While the provi-

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[156] *See id.*

[157] Another example of the President acting below the radar of Congress is the discovery of the National Security Agency ("NSA") domestic surveillance program. From 2001 until 2005, the President has authorized the NSA to intercept communications of United States citizens who may be affiliated with Al Qaeda or may be connected to an organization that may be affiliated with Al Queda. The scope of this program is extremely extensive and, is arguably, in violation of current law. *See* Professor Laurence H. Tribe Letter to Congressman John Convers, Jr., *available at* http://www.house.gov/judiciary_democrats/letters/tribensaconyersltr10606.pdf (Jan. 6, 2006) (describing the constitutional implications of the program and its violation of FISA); *see also supra* note 176.

[158] *See, e.g.,* Covert v. Harrington, 876 F.2d 751, 755 (9th Cir. 1989) (voicing the right of an employee to challenge the government's dissemination of information in violation of the Privacy Act).

sion may be re-introduced, the Armed Forces have no guarantee that it will not be rejected again on the basis that the FBI can handle criminal law enforcement on U.S. soil. Thus, a proposal that allows the military, in exceptional circumstances and after independent scrutiny, to be exempted on a case-by case basis may be the best and most effective alternative. However, the military would have to accept a form of arbitration in which it is not guaranteed approval for surreptitious intelligence in the United States. This option would benefit the military because it would be given limited congressional authority to engage in surveillance in specific circumstances provided that the independent arbitration forum so recommended such surveillance. This would obviate the need for the military to engage secretly in such tactics as well as avoid harm to its reputation. At the same time, citizens would be given an opportunity for input into policy decisions that impact their privacy rights.

A. Military and the Capacity for Alternative Dispute Resolution

Although traditional perceptions of the military connote notions of conflict, winning battles is not the military's only function.[159] In fact, the military has a proven record of incorporating alternative dispute mechanisms and serving the purposes of alternative conflict resolution.[160] One example is that the military has been used to assist the government in applying pressure through its military deployment in an effort not to conduct but to prevent war.[161] In addition, the military uses alternative dispute resolution to settle conflicts as opposed to evaluating military success only by

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159 *See infra* notes 155-158 and accompanying text.

160 *See id.*

161 During the Cuban Missile Crisis, the United States deployed naval ships in order to put pressure on the Soviet Union to withdraw its nuclear missiles from Cuba and prevent it from further supplying Cuba. The decision by President John F. Kennedy to use naval ships was an effort to avoid direct military attack, and they were employed only after failed economic sanctions. Ultimately, President Kennedy's less hostile decision convinced the Soviet Union to remove its missiles. In return, the United States also withdrew its missiles from Turkey. *See* Department of the Navy, Naval Historical Center, *at* http://www.history.navy.mil/faqs/faq90-1.htm (last visited Feb. 9, 2005). This example demonstrates that use of the military is not always about winning and losing battles, but rather sometimes facilitates resolution of disputes where all parties participate and gain from the outcome.

victories at war.[162] For example, the military has engaged in negotiations with civilians and local military commanders and regimes in order to settle disputes.[163] Internally, the military uses arbitration procedures to settle employment grievances.[164] Another indication that alternative forms of dispute resolution are not antithetical to the military is through its involvement with international peacekeeping and international arbitration structures such as the United Nations.[165]

The military's internal incorporation of methods of alternative dispute resolution, as well as participation and encouragement of international conflict resolution, demonstrate the military's flexibility and capacity to assume roles not normally associated with the military.

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162 *See, e.g.,* Charles J. Dunlap & Paula B. McCarron, *Negotiation in the Trenches*, 10 No. 1 DISP. RESOL. MAG. 4, Fall 2003, at 5-7 (discussing how military attorneys use dispute resolution in settling disputes. For example, in order to obtain more materials in Iraq, military officers negotiated with local businessmen demonstrating an acuity in problem-solving with civilians. In addition, the military has negotiated with nongovernmental organizations ("NGO's"). When the Red Cross refused to transport its food and aid in military planes carrying armed officers, the military resolved the dispute by agreeing to the request while requiring that an armed military plane follow closely).

163 *See id.*

164 *See, e.g.,* Air Force Policy Directive (AFPD) 51-12, *Alternative Dispute Resolution, available at* http://www.adr.af.mil/afadr/AFACC-ADRPlan2004.pdf (last visited Feb. 9, 2005) (incorporating the Alternative Dispute Resolution Act of 1996 ("ADRA") into Air Force policy); *see also* AFI 51-1201 Implementing Guide, *Alternative Dispute Resolution in Workplace Disputes, available at* http://www.adr.af.mil/afadr/AFI511201ImplementationGuidance.pdf (June 28, 2004) (requiring all parts of the Air Force to plan and install alternative dispute mechanisms. These mechanisms are voluntary and address workplace disputes. Topics include unfair labor practices charges and equal employment opportunities); DoD Directive 5145.5, April 22, 1996 (requiring the DoD to instigate an ADR program for internal disputes). *But cf.* Air force Alternative Dispute Resolution Reference Book, *available at* http://www.adr.af.mil/acquisition/choosing_arbitration.html (last visited Feb. 9, 2005) (emphasizing that an arbitrator's decision is not binding on DoD personnel unless the Armed Services Board Contract of Appeals ("ASBCA") is involved).

165 The United States has employed military troops to participate in United Nations peacekeeping efforts and to establish and monitor a ceasefire in a number of countries. In deploying troops, the United States is assisting in the effort to encourage governments and dissidents to avoid conflict and reach peaceful resolutions. A good example of this is the collaboration of the United States and the United Nations to negotiate an agreement in Guatemala in the 1990's between the government and guerillas and, thus, end a historic civil conflict. More recently, the United States has engaged in efforts in Sudan and Congo. The deployment and promised deployment of troops in these scenarios are designed to advance the goal of peaceful dispute resolution that is not obstructed by eruptions of armed conflicts. These examples portray a military that can harness its military powers in order to allow the goals of alternative dispute resolution to be realized.

B. An Alternative Forum to Balance the Need for Domestic Military Intelligence and the Possible Impact on Citizen's Privacy Rights

Should an amendment like the one previously proposed to the Privacy Act pass, the military would be given freedom to conduct intelligence operations in the United States despite constitutional, legislative, and traditional barriers. Because of current threats to national security, the likelihood that the military will be given even greater latitude in intelligence efforts is a very real possibility.[166]

One possible way to maintain military oversight and recognize privacy interests would be simply to remove cases involving the military and the Privacy Act from civil courts and place them into military tribunals. The Court has already addressed the possibility of subjecting civilians to military tribunals in *Reid v. Covert.*[167] In *Reid*, the Court juxtaposed the need for an adjudicative forum specific to military officers with the fundamental right of civilians to have proceedings with a jury trial and a civilian judge.[168] In identifying a fundamental right to having a civilian judge as opposed to a military judge for civilian matters, the Court highlighted the distinction between military and civil matters.[169]

Because the military court is limited to members of the military, critics have argued it is a forum without enough experience

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166 Gellman, *New Espionage Branch, supra* note 147 (unveiling the existence of a special espionage and intelligence unit).

167 *Reid*, 354 U.S. at 21 (debating whether a woman, who was not in the military, should be tried for a crime in a military court solely because she was the spouse of a member of the military).

168 *Id*. at 6, 7 (combining Article III, the Fifth Amendment and the Sixth Amendment to provide an indefinite right to a jury trial with a civilian judge with the narrow exception of military matters. The Court held that a woman who was married to a military officer stationed abroad and who was charged with murder could not be denied a criminal trial with a jury. "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."). The adjudicative forum specific to the military was in an effort to accommodate the military's need for efficiency and order.

169 *See id*. at 39.

> [I]t still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials in federal courts. In part this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on security and order of the group rather than on the value and integrity of the individual.

Id.

settling constitutional issues such privacy rights.[170] Furthermore, because civilians and civil attorneys are not accustomed to the distinct procedural rules of the military justice system, it would place civilian attorneys at an unfair disadvantage.[171]

Another option could be to emulate the existing Foreign Intelligence Surveillance Court ("FISC") or, in the alternative, extend its jurisdiction to the military and controversies over the Privacy Act.[172] FISC was created as a vehicle to implement the Foreign Intelligence Surveillance Act ("FISA") which authorizes the FBI and law enforcement to engage in electronic surveillance of possible international terrorists within the United States.[173] What is unique about FISA is that it allows the President, in limited instances, to authorize surveillance without a court ordered warrant.[174] In the case that a court order is required, however, government officials do not have to pursue traditional channels involving a Magistrate. Instead, the Act creates the Foreign Intelligence Surveillance Court ("FISC") which decides whether to issue a warrant for electronic surveillance or secret searches.[175] Because

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170 *See* James E. Pfander, *Article 1 Tribunals, Article III Courts, and the Judicial Power of the United States*, 188 HARV. L. REV. 643, 754-57 (2004) (contrasting military and civilian courts and noting the independence of the military court when dealing with military members and issues. Decisions are only reviewed within the chain-of-command and, ultimately, by the United States Court of Appeals for the Armed Forces. However, when the military court supersedes its jurisdiction by adjudicating a civilian matter or a constitutional issue, parties may oppose jurisdiction and remove the proceeding to a civilian court).

171 *See id.* at 716 (emphasizing that military judges are still subject to the chain-of-command in contrast to civilian judges who are insulated from external pressures because of their life tenure). Consequently, military judges have a different expertise and focus than civilian judges complicating attorneys' preparation for trial. *See id.*

172 50 U.S.C. § 1803(a) (2001). By emulate, I mean create another court similar to FISC but that focuses on the military as opposed to the FBI.

173 50 U.S.C. § 1801 (2001) (providing a national security exception to the Fourth Amendment requirement that searches be preceded by a court ordered warrant. The Act narrowly applies to foreign intelligence and does not entitle the government to spy on U.S. citizens). *See also* Interview with Burton Wides, Chief of Staff, Congressman John Conyers, Jr., (Jan. 29, 2005) (Burton Wides helped to write the original FISA).

174 A court order is not required if the Attorney General certifies that there is no substantial likelihood that surveillance will acquire the contents of any communication by a United States citizen and that minimization procedures limiting the scope of the surveillance are in place. *See* 50 U.S.C. §§ 1802(a)(1)(B)-(C), 1801(h); Alison A. Bradley, *Extremism in the Defense of Liberty?; The Foreign Intelligence Surveillance Act and the Significance of the USA Patriot Act*, 77 TUL. L. REV. 465, 474 (2002) (detailing the FISA warrant process); *see also* Copeland, *supra* note 126, at 19-20 (bolstering the argument against FISA by emphasizing its relationship to the Patriot Act, which expands the authority to conduct surveillance in the United States, it creates more lenient warrant procedures and has greater potential to submit U.S. civilians to surveillance by being in the "wrong place at the wrong time.").

175 *See id.* at 14.

the purpose of the court is to guard national security issues, its proceedings are entirely secret.[176]

Although FISC deals with the same issues as those triggered by an exemption to the Privacy Act, namely national security and the constitutional safeguard of privacy interests, FISC's jurisdiction should not be extended to determine whether there should be an exemption to the Privacy Act for the military. Because FISC conducts itself entirely in secret, the lack of public access provides little opportunity to hold the government or judges accountable.[177] This is particularly dangerous because there is no precedent authorizing direct military involvement in the United States, which means that the military works off of a clean slate without any historical or judicial limitations. Furthermore, FISC only makes appeals available to the government for a denial of a warrant, thus evading any constitutional challenges by those who are subject to surveillance.[178] This one-sided approach conflicts with the mutual relationship that the military and U.S. civilians historically and currently maintain.[179] Another reason to question the FISC's appropriateness is that currently, the court only denies one out of seven

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[176] *See id.* at 14-16 (describing the process for a court ordered warrant, which requires that there be probable cause to suspect international terrorist activity). FISA has recently come into public attention because of the recent revelation that President George W. Bush has evaded FISA electronic surveillance requirements. For the past four years since 2001, the President, through the National Surveillance Agency ("NSA"), has engaged in the electronic surveillance of United States citizens without pursuing a court order for authorization. The President argues that his power to conduct such surveillance is implicit in his executive powers and was, in fact, authorized by Congress. The President proposes that the Authorization to Use Military Force (AUMF) entitles the President to conduct such warrantless surveillance. However, the AUMF deals specifically with military force on the battlefield and does not seem to contemplate domestic electronic surveillance. Furthermore, FISA clearly indicates that it is the *exclusive* source of authority to conduct domestic electronic surveillance. 50 U.S.C. §§ 1811, 1809; 18 U.S.C. § 2511(2)(f) (2005). Consequently, the President seems to be acting in direct contravention of FISA and without any legitimate authorization. *See* Professor Laurence H. Tribe Letter to Congressman John Conyers, Jr., *available at* http://www.house.gov/judiciary_democrats/letters/tribensaconyersltr10606.pdf (Jan. 6, 2006) ("The presidential power at issue in this case is therefore subject to the control of Congress. And that Congress has indeed forbidden this exercise of power is clear.").

[177] *See id.* at 16 (stressing that the only opportunity for review of the Court's decisions is if the Court denies an application for a warrant in which case the government can appeal to a reviewing court. Should it affirm the FISC decision to deny a warrant, Supreme Court review is available by writ of certiorari.).

[178] *See id.* at 16.

[179] The military is an institution that invokes patriotism and conveys images of trust and safety. As opposed to local law enforcement, the military is not seen on a daily basis by the average citizen. Because of its distance geographically and its entirely united, expansive and patriotic effort, it creates the greatest sense of grandeur and magnitude. *See also supra* notes 33, 35, 39, 43 (referring to instances where military activity has been questioned by U.S. civilians in

thousand FISA warrants.[180] Unless a blanket exemption to the Privacy Act is given to the military for surveillance purposes, FISC's deference to the government indicates that it is not an adequate forum to decide whether to exempt the military in specific and singular instances.

An alternative forum may be the most appropriate venue to address the competing issues that will be implicated should the military be given an exemption from the Privacy Act. Because alternative dispute resolution avoids the all or nothing approach of court adjudication, both the military's national security interests and individuals' privacy interests may be reconciled and produce a compromise.[181] In a world where terrorism threats are translated into daily color codes[182] and communication systems transferring personal information have become more sophisticated, both interests have clearly become more pronounced and relevant, thus heightening the need for their recognition and consideration.

Furthermore, an alternative forum would allow for representatives from both sides to participate, perhaps in the form of a panel.[183] On one side, the panel could include military specialists such as retired commanders or retired intelligence strategists. In addition, experts in domestic intelligence, such as retired FBI di-

court thus demonstrating their equal footing in the judicial system); *cf. PCA: Safeguard or Old Hat, supra* note 23, at 50 (statement of Congressman Barr).

> I don't think our armed forces enjoy being the center of the kind of controversy and debate that we're having right here. They are one of the most respected institutions in our country, and rightly so. They are extraordinarily self-sacrificing, and patriotic, and devoted. And they would prefer to be entrusted with mission that everyone can get behind, rather than one that create divisions.

Id.

180 *See* Copeland, *supra* note 131.

181 *See* Nancy A. Walsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 129-132, Spring 2004 (describing the courts' acceptance and encouragement of alternative dispute resolution because it is an efficient and fair way to reconcile divergent interests); Eric Montalvo, *Operational Encroachment: Woodpeckers and their Congressman*, 20 TEMP. ENVTL. L. & TECH. J. 219, 224-226, 240 (supporting the use of ADR in disputes regarding military initiatives and environmental concerns. Explaining that citizen suit provisions in environmental statutes providing citizens redress in court were simply not successful when their opponent was the federal government with a national security agenda. "Neither American fighting sons or daughters, nor the environment should have their fate hang in the balance of frivolous litigation.").

182 *See* Department of Homeland Security website with constantly updated terrorism threat levels, *at* http://www.dhs.gov/dhspublic/display?theme=29 (last visited Feb. 11 2005).

183 *See, e.g.,* Equal Opportunity Employment Commission, Federal Sector Alternative Dispute Resolution Fact Sheet, *at* http://www.eeoc.gov/federal/adr/facts.html (last modified April 17, 2002) (granting each federal agency the opportunity to create its own ADR mechanism tailored to that agency's interests).

rectors could provide technical and operational knowledge, as well as experience.[184] On the other side, civil liberties academics could detail the privacy rights at issue.[185] In addition, former Assistant Attorney Generals in the Civil Rights Division could provide the real-life consequences of intelligence practices.[186] Another option would be to include a retired head of the ACLU, who could provide a non-partisan analysis of the civil liberties issues.[187] Equal representation of both privacy and military interests is an important factor because individuals accustomed to having the safeguard of the Privacy Act, and its citizen suit provision enabling them to enforce the Act, will now lose this power. By creating an alternative forum where both privacy and national security interests have equal force, individuals will not think that their constitutional rights, which previously have received protection from the legislature, are being cast aside in order to pursue a current policy agenda.

In addition to arming civilians with the weapons to enforce their constitutional rights, the forum will also benefit the military by promoting public acceptance of a national security agenda. By making itself accessible to the public, showing a willingness to compromise, and agreeing to a binding arbitration decision,[188] the public is less likely to look at the military's increasing role in the United States as militaristic or authoritarian. Recent news articles regarding the military's increasing presence, and its assumption of

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184 *See supra* notes 87, 121 (relating to the FBI's mandate to enforce the law in the United States).

185 It would be very difficult to select members of civil liberties groups to be on the panel because of the variety of different angles that civil rights proponents can assert. *Compare* http://www.animalconcerns.org (asserting animal rights and related causes), *with* American Civil Liberties Union ("ACLU"), *at* http://www.aclu.org (promoting the exercise of individual civil liberties). Furthermore, it is doubtful that active members of organizations could be seen as neutral decision-makers.

186 *See* Civil Rights Division Activities and Programs, *at* http://www.usdoj.gov/crt/activity.html#crm (last visited Feb. 12, 2006) (describing a broad array of cases assumed by the division).

187 *See* About the ACLU, *at* http://www.aclu.org/about/aboutmain.cfm (last visited Feb. 12, 2006) (describing the ACLU as a non-profit and nonpartisan organization whose priority is the preservation of constitutional guarantees).

188 Arbitration is a binding process which provides finality to adjudication and denies the opportunity to court appeal except in special circumstances. *See* Arbitration Defined, JAMS, *at* http://jamsadr.com/arbitration/defined.asp (last visited Feb. 12, 2006); *see also* Wilko v. Swann, 346 U.S. 427, 436 (1953) (vacating arbitration awards when there is a "manifest disregard" of the law); Federal Arbitration Act (FAA), 9 U.S.C. § 10 (2004) (limiting the courts' vacation of an arbitration award to instances where there was evidence of misconduct that prejudiced the parties).

responsibilities traditionally devoted to other agencies, make it clear that the military's changing role in the United States has not gone unrecognized.[189] The goodwill shown to the public by accepting an ADR forum for conflict resolution will allow the military to take the national security precautions it deems necessary while at the same time offer some satisfaction to individuals who would no longer be able to rely on the Privacy Act for absolute privacy protection. Another advantage for the military is that arbitration proceedings could be done entirely in private in order to protect issues of national security and to achieve intelligence objectives.

The most important benefit of alternative dispute resolution is that decisions are made on a case-by-case basis and the resolutions do not set precedent for future cases.[190] Each decision will reflect a consideration of the existing circumstances. Instead of a blanket authorization for surveillance, the military will have to explain why it is necessary for it to engage in surveillance or undercover procedures before a neutral arbitration panel. In the case of the incident at the University of Texas, the military would have had to present why it was necessary for it to attend, undercover, a law school meeting about Islam and the Law, what national security interests existed, and why the military, as opposed to more traditional agencies, needed to conduct the surveillance.[191] Considering that the military quickly apologized for its intrusion, without argument, it is not likely that these listed justifications existed, and, consequently, the military presence was an unnecessary and unfortunate event. Should an alternative dispute forum have existed at that time, the incident would not have likely occurred in the first place.

Although the Privacy Act may be vulnerable to amendment in the future, and although the military may be changing its role in the United States, there is no reason why these interests cannot all be recognized and prioritized depending upon the circumstance.

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189 *See, e.g.,* Gellman, *New Espionage Branch, supra* note 147 (alerting the public to secret military activity in the United States).

190 ADR looks at the facts of each individual case and is able to produce tailored decisions. Furthermore, arbitration clauses determining the rules of procedure and terms can be agreed on in advance to ensure that the process and form of arbitration is customized for the parties and the legal and factual issues involved. *See ,e.g.,* National Arbitration Forum, Drafting Mediation and Arbitration Clauses, *at* http://www.arb-forum.com/resources/white_papers/05clauses.pdf (Jan. 2005). This creativity and flexibility are particularly appropriate and appealing in the case of the alternative forum suggested in this Note, because no forum serving the purpose of military and privacy interests currently exists.

191 *See supra* notes 3-8, 10, and accompanying text.

An alternative forum would balance all of these important and legitimate interests while at the same maintaining our system of oversight and accountability and our constitutional liberties.

VI. Conclusion

The military should not be exempted entirely from the Privacy Act under the guise of national security interests. The Act has historical foundations in the Posse Comitatus Act which limits the role of the military within the confines of the United States. These historical underpinnings are essential elements of our democracy that guarantee our constitutional rights by providing local law enforcement the authority to police the state, while denying that power to the military. The military's inclusion in the Privacy Act also reflects the safeguards that the country and legislature thought necessary to protect our right to privacy. Although the Act is over two decades old, the intelligence capacity of the United States has only increased putting our privacy interests even more at peril. However, national security is a legitimate interest which must be protected. I propose that the military remain included in the Privacy Act but be allowed the opportunity to reason why it should be exempted on an exceptional and case-by-case bases. It is this reasoning in front of a neutral and knowledgeable forum, including representatives from the military and civil liberties interests, that avoids compromising security interests and affords protection to our right to privacy.