

**THE POSSE COMITATUS ACT: SETTING THE RECORD
STRAIGHT ON 124 YEARS OF MISCHIEF AND MISUNDER-
STANDING BEFORE ANY MORE DAMAGE IS DONE**

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*Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.*³

I. Introduction

The United States is currently conducting a major reorganization of its civil and military agencies to enhance homeland security.⁴ The new

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3. Posse Comitatus Act, 18 U.S.C. § 1835 (2000).

military command, the Northern Command (NORTHCOM), will be responsible for all Department of Defense (DOD) participation in Homeland Security. In announcing the new military organization, Secretary Rumsfeld declared, “[T]he highest priority of our military is to defend the United States.”⁵

One might, therefore, reasonably believe that the world’s premier military force is, and will be, fully engaged in protecting the United States homeland from approaching foreign terrorist threats. This may not always be the case, however, since a significant part of the homeland security mission is considered a “law enforcement” function, especially as threats get closer to America’s shores and borders. Our enemies, of course, do not recognize the artificial construct between law enforcement and national defense. The artificial distinction nonetheless remains important due to the widespread belief that a nineteenth century law called the Posse Comitatus Act⁶ strictly limits most DOD participation in the “law enforcement” function.⁷ The Act, unfortunately, is widely misunderstood.⁸ So while national debate about changing the Act is growing,⁹ many of the perceived problems are based upon a profound misunderstanding of this law. Policymakers must understand the Act before they can “fix” it.

This article seeks to set the record straight on the Posse Comitatus Act. To do so, the article distinguishes clearly between the Act and (1) other laws and constitutional provisions that keep the military from being

4. See, e.g., OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY (2002); Tom Bowman & Karen Hosler, *President Keeps His Focus on Security; Bush Urges Congress to Carry Out His Plans for New Cabinet Department*, BALT. SUN, June 8, 2002, at 1A; Michael Kilian, *Pentagon Creates a Homeland Unit; Command Will Operate in U.S. to Guard Shores*, CHI. TRIB., Apr. 18, 2002, at 9; Esther Schrader, *U.S. to Get Single Military Umbrella*, L.A. TIMES, Apr. 18, 2002, pt. A1, at 15.

5. Kilian, *supra* note 4, at 9.

6. See 18 U.S.C. § 1385. The Posse Comitatus Act became law on 18 June 1878. See Act of June 18, 1878, 20 Stat. 152.

7. U.S. DEP’T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS encl. 4 (15 Jan. 1986) (incorporating C1, 20 Dec. 1989) [hereinafter DOD DIR. 5525.5]; OFFICE OF HOMELAND SECURITY, *supra* note 4, at 48 (referring to the Posse Comitatus Act as “federal law” that “prohibits military personnel from enforcing the law within the United States except as expressly authorized by the Constitution or Act of Congress”); Schrader, *supra* note 4, at 15.

used as a national police force; and (2) the internal policies that, in the name of the Act, sometimes lead to bizarre results.¹⁰ After providing an overview of the current confusion surrounding the Act, this article follows a chronological approach that carefully deconstructs the many layers of intertwined confusion and outright deception surrounding the Act. The authors match words with deeds to determine how the originators viewed the law. The article carefully traces Congress's haphazard actions over many decades to increase military participation in civil law enforcement along with the more recent DOD counter-reaction to congressional efforts to increase DOD support to law enforcement agencies that enforce narcotics laws. After accurately describing the Act's limited meaning, this article then places the Act in context with the more robust laws that prevent the misuse of the military as a national police force, but do not interfere with appropriate national security activities.

II. Overview of the Current State of Confusion

In many respects, the confusion surrounding the Posse Comitatus Act is completely understandable. This nineteenth century remnant from the Reconstruction period has been mischaracterized from its very beginnings, at times deliberately. One initial deception was to hide the Act's racist origins by linking the Act with the principles surrounding the founding of the

8. See John R. Brinkerhoff, *The Posse Comitatus Act and Homeland Security*, J. OF HOMELAND SECURITY (Feb. 2002), at <http://www.homelandsecurity.org/journal/articles>. After quoting the Posse Comitatus Act in full, Brinkerhoff states:

Th[is] quotation . . . is the much-discussed Posse Comitatus Act in its entirety. That is it! That is all there is to it. Seldom has so much been derived from so little. Few articles written about the act and its implications cite the law as it is written, leading one to believe that the authors have never taken the trouble to go to the U.S. Code and see for themselves or to look up the legislative history of the act or to read the exceptions in the law. As a result, much of what has been said and written about the Posse Comitatus Act is just plain nonsense.

Id.

9. See Eric Schmitt, *Wider Military Role in U.S. Is Urged*, N.Y. TIMES, July 21, 2002, at 16; Joyce Howard Price, *Biden Backs Letting Soldiers Arrest Civilians*, WASH. TIMES, July 22, 2002, at 1.

United States, without accounting for the passage of the Constitution or the Civil War.¹¹ To compound matters, the Act's most vocal nineteenth century supporters incorporated by reference the controversial, yet somewhat contrived, arguments against a standing U.S. army from the revolutionary period.¹² The Act's supporters also hid their unsavory agenda behind patriotic phrases and ideas of the Anti-Federalists that the founders them-

10. See *infra* note 21. As of June 2002, the blanket deployment order, discussed *infra* note 21, had not been issued. A Navy ship Captain who deployed a CG LEDET to board a suspected foreign terrorist vessel approaching the United States was, therefore, prohibited from providing any "direct" relief or assistance to the LEDET. The Navy and DOD maintain that this prohibition is statutory, however. See *infra* sections VIII-IX (showing how this limitation is actually administrative). If the same LEDET boards a U.S. fishing vessel to enforce routine fisheries regulations, however, then DOD personnel and equipment may be fully involved in all aspects of the law enforcement boarding, including the arrest of U.S. citizens. See 16 U.S.C. § 1861 (2000); *infra* section V.F. Obviously, the threat of a maritime equivalent to the 11 September 2001 attacks by foreign vessels is of far greater concern.

Another bizarre result from the current policies is that internal policy does not prohibit the U.S. Navy from stopping and boarding foreign vessels off the coast of Pakistan or in the Mediterranean Sea to locate terrorists and Taliban personnel. In fact, this traditional naval mission is known as "maritime interception operations." The mission "involves the boarding and search or inspection of suspect vessels and taking custody of vessels that are carrying out activities in support of terrorist organizations." State Department Briefing, FED. NEWS SERV., June 3, 2002 (remarks of Mr. Reeker). In a January 2002 example of the mission, Navy personnel boarded and searched a Syrian merchant vessel, the *Hajji Rahmeh*, in the Mediterranean Sea. See Vernon Loeb, *Fighting Terror on the High Seas: European Command's Overshadowed—but Key—Role in War*, WASH. POST, June 11, 2002, at A15. If the *Hajji Rahmeh* had evaded the Navy vessels and arrived off the coast of New York City, however, the Navy is supposedly prohibited from taking any similar action or even directly supporting the Coast Guard boarding team since this is now a civilian law enforcement mission.

A final nonsensical example is that the Posse Comitatus Act supposedly prohibited National Guard troops deployed on the Canadian border after September 11, presumably to stop terrorists, from conducting surveillance from the helicopters that flew them to their assignments. See Schmitt, *supra* note 9, at 16.

11. See *infra* notes 118-23, 148-49 and accompanying text (describing Congressman Kimmel's characterization of the Act as an attempt to curb abuses by the regular army; and describing the purported rationale of Congressman Knott—who introduced the bill which ultimately passed in the House—that he designed his amendment to prevent the ability of every marshal and deputy marshal to call out the army to aid in the enforcement of the laws).

selves had not put into practice.¹³ In short, the Act was carefully disguised in two levels of deliberate misinformation.

The effort to disguise the Act's true origins in Reconstruction bitterness and racial hatred was overwhelmingly successful. The language of misdirection grew over the years by frequent repetition that eventually transformed a hate law into the respected shorthand for the general principle that Americans do not want a military national police force. Additionally, just about everyone examining the law focused on the false historical arguments instead of carefully analyzing the law's actual text and historical context. Therefore, they missed, or ignored, the key fact that the original Posse Comitatus Act was at least one-third pure fiscal law: Congress

12. See *infra* note 118 and accompanying text. As Alexander Hamilton pointed out in *Federalist Nos. 24-26*, the controversy about a standing army under the new federal Constitution seems to have been more of a political maneuver by the Anti-Federalists than a serious objection. See generally *THE FEDERALIST NOS. 24-26* (Alexander Hamilton). At the time of the ratification debates, the Articles of Confederation did not prohibit the general government from keeping or raising a standing army, although it did attempt to limit state authority to maintain any body of forces without permission of the federal Congress. See *ARTS. OF CONFED.* art. VI.

In any event, Massachusetts had arguably ignored the provision and raised a force without obtaining congressional approval to put down Shay's rebellion. Additionally, none of the thirteen state constitutions actually prohibited the state government from raising or keeping a standing army in peacetime. Instead, the Bill of Rights in four states said that standing armies *ought not to be raised or kept up without the consent of the legislature*, while the constitutions of two states, Pennsylvania and North Carolina, said that standing armies *ought not to be kept up in peacetime*. The remaining state constitutions were silent on the issue. See *THE FEDERALIST* No. 24, at 127; No. 25, at 134-35; No. 26, at 136 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Since the new federal Constitution required Congress to discuss and authorize the army every two years, only two out of thirteen state constitutions had even the semblance of a conflict with the proposed federal plan.

Moreover, as Hamilton pointed out in *Federalist Nos. 24* and *26*, the "ought not" language in the Pennsylvania and North Carolina constitutions was more of a caution than a prohibition reflecting the "conflict between jealousy and conviction; between the desire of excluding such establishments at all events and the persuasion that an absolute exclusion would be unwise and unsafe." *THE FEDERALIST* No. 24, at 127; No. 26, at 139. Additionally, in *Federalist No. 25*, Hamilton notes that Pennsylvania had resolved to raise a body of troops in peacetime to put down partial disorders in one or two counties notwithstanding the "ought not" language in the Pennsylvania constitution. *THE FEDERALIST* No. 25, at 134; see also *THE FEDERALIST* No. 38, at 206-07 (James Madison) (Clinton Rossiter ed., 1999) (writing that Congress, unchecked by any other branch of the federal government, and soon to be flush with cash from the western territory, could raise an indefinite number of troops for an indefinite period of time under the Articles of Confederation).

13. See *infra* section III.A.

prohibited the expenditure of funds to use troops as “a posse comitatus or otherwise to execute the laws.”¹⁴ This funding limit expired at the end of the fiscal year along with a decisive, but temporary, exercise of congressional power under the Constitution.¹⁵

After expiration of the fiscal law section, only the criminal law portions of the Posse Comitatus Act remained effective. The criminal offense had several elements. Almost 100 years later, however, the first courts exploring the Act inadvertently focused almost all the subsequent litigation and commentary on just two of the elements: (1) which armed forces must comply with the Act, and more importantly, (2) how to define the phrase “to execute the laws.” The meaning of the Act’s other elements remains largely unaddressed, even though Congress considered, but rejected, attempts to remove them from the law.¹⁶

Many of the courts analyzing the Act also wrote about the law as if it was the only law or principle that limited the use of the armed forces in a law enforcement role. Some, therefore, have claimed to discern a broader policy or “spirit” behind the Act that is not supported by the historical record or the statute’s text.¹⁷ While these wider policies are sound, they are embodied in federalism, the law concerning federal arrest authority, election law, and especially fiscal law. The portion of the Posse Comitatus Act that survived the nineteenth century doesn’t have to do all the work, a view that even the Act’s original proponents appeared to recognize.¹⁸ Trying to force-fit all these other principles into the surviving part of the Act has only created a need to “discover” a number of implied exceptions and has sowed a great deal of confusion.

Further muddying the waters, much of the commentary about this topic has been infected with a now thoroughly discredited, and racist, his-

14. Act of June 18, 1878, 20 Stat. 152. See *infra* notes 129-30 and accompanying text.

15. See *infra* note 130 and accompanying text & note 440.

16. See *infra* notes 128-29 and accompanying text.

17. See *infra* notes 307-10 and accompanying text.

18. A significant component of the two-year struggle to pass the Act involved fiscal law. For example, proponents blocked passage of an Army appropriation until resolution of the dispute over the Act, resulting in unpaid Army troops for several months. See *infra* notes 115-16 and accompanying text. Additionally, proponents of the Act emphasized the congressional power of the purse, and the final version of the Act contained an explicit fiscal law prohibition. See 5 CONG. REC. 2113 (1877) (Mr. Atkins discussing the bill’s fiscal section and emphasizing the congressional power of the purse); *infra* note 130.

torical analysis of the Reconstruction period.¹⁹ Other commentators, and courts, have simply avoided or minimized the Act's brutal racist origins. Moreover, congressional efforts in the 1980s designed to expand military participation in law enforcement contain language that, when read in isolation, actually appears to increase legal restrictions on the military.²⁰

The DOD inherited, and built upon, this confusion in a system of administrative regulations in the 1980s. The regulations adopted a very expansive interpretation of the Act's prohibitions, particularly regarding the activities of the U.S. Navy and Marine Corps,²¹ but then identified several implied exceptions to the greatly expanded rules. Moreover, the regulations have remained mostly frozen in time despite two subsequent changes in the law designed to further increase military support to civilian

19. See *infra* note 88 (discussing the Dunning school of thought).

20. See 10 U.S.C. § 375 (2000).

21. See *infra* note 338 and accompanying text. The following is a recent example of the impact of this expansive interpretation of the Act. In the Winter of 2001-2002, Navy ships carrying Coast Guard Law Enforcement Detachments (LEDETs) were deployed off major U.S. ports to query and board high-interest inbound merchant ships. These mostly foreign-flagged vessels are very large and presented a potential threat of being used as a weapon. The major purpose of the Coast Guard boarding was to verify that the vessel was under the control of the ship's master and did not actually present a threat. Because these vessels are normally several hundred feet long, a LEDET of four to six members was, in some cases, not large enough to ensure everyone's safety. This temporarily led to the use of Navy personnel as backup security for the LEDET. See Joint Media Release, U.S. Coast Guard / U.S. Navy, Navy, Coast Guard Join Forces for Homeland Security (Nov 5, 2001), http://www.uscg.mil/overview/article_jointrelease.htm; United States Coast Guard, Maritime Law Enforcement, *Homeland Security*, para. 2, at <http://www.uscg.mil/lantarea/aole/text/mhls.htm> (last visited Mar. 8, 2003).

A 7 February 2002 Opinion of the Deputy Judge Advocate General of the Navy, however, concluded that such "direct" assistance from the Navy was prohibited by DOD/Navy policy interpreting the Act and by 10 U.S.C. § 375, absent very high-level approvals. This interpretation of the statutes and DOD/Navy policy initially put Navy ship captains in a tough situation since the only apparent options were either to not board a suspicious vessel or to send the small LEDET and hope for the best. Larger LEDETs were not an option in most instances since the Navy ships used in this operation did not have enough space. See Letter from Deputy Judge Advocate General to Commander in Chief, U.S. Atlantic Fleet (Feb. 7, 2002) (partially classified document; this article discusses only unclassified portions). The Navy JAG opinion goes on to recommend that the Navy operational commander seek the necessary approvals to support the Coast Guard LEDETs with homeland security boardings. This would be accomplished by requesting that the Secretary of Defense issue a blanket deployment order. See *id.*

law enforcement. One law neglected by the DOD increased its authority to assist civilian agencies that fight terrorism.²²

This confusing legal quagmire might best be left alone if the status quo actually did anything useful, such as protecting American civil rights or limiting abuses of executive power. As shown in section IV of this article, however, the Posse Comitatus Act has proven to be a very poor guardian of the line between civil and military affairs. Potentially more effective legal controls on the military remain untapped due to the excessive focus on the Act.

III. Ignoble Origins of the Posse Comitatus Act

A. The Act Is Not from the Revolutionary Period

While the nation's founders were deeply concerned with the abuses of the British Army during the colonial period and military interference in civil affairs,²³ the majority was even more concerned about a weak national government incapable of securing life, liberty, and property.²⁴

22. See *infra* note 372 and accompanying text.

23. The Declaration of Independence stated of King George: "He has kept among us, in times of peace, Standing Armies, without the consent of our legislatures. He has affected to render the Military independent of and superior to the Civil power." DECLARATION OF INDEPENDENCE paras. 13-14. The Declaration also condemns King George for "quartering large bodies of armed troops among us." *Id.* para. 16. Jefferson's initial draft, however, complained of both standing armies and ships of war. PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 107, 146 (1997). Also, the basis for the charges regarding standing armies was that King George II had asked Parliament's permission before bringing Hanoverian troops into England. Jefferson's argument was that King George III was similarly bound to get the colonial legislature's permission before sending troops into the colonies. *Id.* at 114; see also U.S. CONST. amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."); see also Christopher A. Abel, Note, *Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy, and Federal Law Enforcement at Sea*, 31 WM. & MARY L. REV. 445, 449-50 (1990); Clarence I. Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 86-87 (1975).

24. See ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDER 1789-1878, at 4-7 (U.S. Army Center of Military History 1988) (discussing Shays' Rebellion and quoting a 1786 letter from George Washington to James Madison); see also THE FEDERALIST NO. 21, at 107-08 (Alexander Hamilton) (Clinton Rossiter ed., 1999), No. 23, at 121 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("The principal purposes to be answered by union are these—the common defense of the members; the preservation of the public peace, as well against internal convulsions as external attacks . . .").

Some vocal patriots sought to avoid a standing army and any federal control over the state militias; however, in the end, theirs was the minority view.²⁵ The new Constitution did not contain the explicit limits and outright bans desired by some.²⁶

Instead, the framers eventually counted on the now-familiar system of checks and balances to prevent abuses.²⁷ The President, charged with the faithful execution of the laws of the United States, is also Commander in Chief of the Army, Navy, and state militias called to federal service.²⁸ The Constitution contains no explicit limits on the President's use of the armed forces to carry out the executive function beyond those contained in the

25. Actually, the concept of a standing army was not seriously debated during the Constitutional Convention; what little debate there was revolved around the size of the standing army. George Washington is believed to have ended the debate when he wondered if potential enemies could also be counted on to limit the size of their armies. COAKLEY, *supra* note 24, at 12; DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 140 (1990). The Anti-Federalists made the argument against any standing army during the state ratification debates; however, the focus was on the danger of centralized power. FARBER & SHERRY, *supra*, at 180-81; *see also supra* note 12 (discussing *The Federalist No. 38*).

26. One can argue that the give and take of the political process leading to the Constitution resulted in an implied limit on the use of the regular army, and perhaps the federalized militia, to quell domestic disorders. *See* John P. Coffey, Note, *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?*, 75 *Geo. L.J.* 1947, 1951-52 (1987); COAKLEY, *supra* note 24, at 11. The Constitutional Convention and ratification debates make it clear that some wished to impose more stringent limits on the central government's ability to use force internally. The standing army argument, however, was raised and soundly rejected in both the congressional debates over the Bill of Rights. FARBER & SHERRY, *supra* note 25, at 242; *see also supra* notes 12, 25 and accompanying text.

27. *See* THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1999) (The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments). The constitutional ratification debates from 1787-1788 show how deeply the Anti-Federalists feared central government power and demonstrate the political maneuvering and calculation of the day. For example, the Federalist emphasis on the militia as the principal military arm of the central government helped diffuse concern over the congressional power to raise a standing army. This also left the Anti-Federalists in the position of having to argue that any federal authority over the militia was, by itself, dangerous to liberty. *See* COAKLEY, *supra* note 24, at 15-19; THE FEDERALIST NO. 29, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("By a curious refinement upon the spirit of republican jealousy we are even taught to apprehend danger from the militia itself in the hands of the federal government.").

28. U.S. CONST. art. II, §§ 2-3.

Bill of Rights.²⁹ Congress retains the power of the purse over the armed forces, but is prohibited from appropriating Army funds for more than two years to ensure each session reexamines the issue of a standing army.³⁰ Many prominent Federalists considered this congressional power over Army funding to be the most significant check upon its misuse.³¹ No similar control was placed upon congressional funding for the Navy.³²

The framers clearly were aware of the posse comitatus and the use of the military in some forms of law enforcement, yet they did not prohibit the practice. The sheriff's power to call upon the assistance of able-bodied men to form a posse was an established feature of the common law.³³ Moreover, naval forces of the time were traditionally used to enforce var-

29. See Abel, *supra* note 23, at 450 n.35. Taken together, articles II, III, and IV of the Constitution may authorize the President to use the armed forces in whatever manner he deems reasonably necessary to carry out his chief executive function. See also THE FEDERALIST No. 28, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("That there may happen cases in which the national government may be necessitated to resort to force cannot be denied The means to be employed must be proportioned to the extent of the mischief."); No. 69, at 385-86 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (stating that the President has supreme command and direction of the military and naval forces, as first general and admiral of the nation). But see Coffey, *supra* note 26, at 1951-52 (arguing that the Constitution's reservation of power to Congress to call forth the militia to execute the laws of the Union, combined with the lack of any explicit grant of similar authority to the "army," indicates an intent to deny the army authority to execute the law).

30. U.S. CONST. art. I, § 8. In *Federalist No. 26*, Hamilton wrote of this provision:

The legislature of the United States will be *obliged* by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter by a formal vote in the face of their constituents.

THE FEDERALIST No. 26, at 139 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

31. See, e.g., THE FEDERALIST No. 41, at 227 (James Madison) (Clinton Rossiter ed., 1999). "Next to the effectual establishment of the Union, the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support. This precaution the Constitution has prudently added."

Id.

32. See U.S. CONST. art. I, § 8.

33. See Abel, *supra* note 23, at 460. *Black's Law Dictionary* defines *posse comitatus* as "[t]he entire population of a county above the age of 15, which a sheriff may summon to his assistance in certain cases, as to aid him in keeping the peace, in pursuing and arresting felons." DELUXE BLACK'S LAW DICTIONARY 1162 (6th ed. 1990).

ious laws.³⁴ Finally, the federal government's power to call out the posse comitatus under the new Constitution was an issue actively discussed during the ratification debates and in the federalist papers.³⁵

A key feature of the traditional posse comitatus was the sheriff's power to *require* able-bodied men to lend assistance.³⁶ Given the framers' obvious concerns about the army, the absence of any explicit limit on the power of the local sheriff to call-out troops as members of a posse comitatus is difficult to explain unless one concludes that this was not perceived as a major problem. This apparent lack of concern, however, might be explained by the fact that a common law posse comitatus followed the direction of the local sheriff, while the framers were far more concerned about centralized power, especially the power of Congress.³⁷ Moreover,

34. See Abel, *supra* note 23, at 457. The need to create and maintain naval forces was not a controversial matter. See THE FEDERALIST NO. 41, at 228 ("The palpable necessity of the power to provide and maintain a navy has protected that part of the Constitution against a spirit of censure which has spared few other parts.").

35. See THE FEDERALIST NO. 29, at 151-52 (Alexander Hamilton) (Clinton Rossiter ed., 1999). The Anti-Federalists had argued that the new federal government didn't have the power to call out the posse comitatus, which would lead to the use of troops to execute the laws of the Union. Hamilton dismissed the claim that the federal government could not require participation in the posse comitatus, stating:

There is a striking incoherence in the objections which have appeared, and sometimes even from the same quarter, not much calculated to inspire a very favorable opinion of the sincerity or fair dealing of their authors. The same persons who tell us in one breath that the powers of the federal government will be despotic and unlimited inform us in the next that it has not authority sufficient even to call out the POSSE COMITATUS. The latter, fortunately, is as much short of the truth as the former exceeds it.

Id. at 151-52.

36. *Id.*; Roger B. Hohsbeen, Note, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 GEO. WASH. L. REV. 404, 406 (1986); Abel, *supra* note 23, at 457.

37. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 266-70 (1985) (stating that some delegates to the Constitutional Convention and opponents to the proposed Constitution considered congressional authority to regulate the militias a risk to liberty).

the army was extremely small at this time, constituting less than one percent of the nation's total military force.³⁸

The failure of the framers to prohibit military participation in civil affairs and preserving domestic order explicitly also cannot be a result of a lack of knowledge. The Army's role under the new Constitution was a significant issue. In *Federalist No. 8*, Hamilton argued that the Union would result in a smaller standing army. Of this smaller standing army (a necessary evil) he said: "The army under such circumstances may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection . . ." ³⁹ Moreover, in denying charges that the federal government intended to use military force to enforce the law, Hamilton never claimed that the Constitution would prohibit such action. Instead he wrote in *Federalist No. 29*: "What reason could there be to infer that force was intended to be the sole instrument of authority, merely because there is a power to make use of it when necessary?" ⁴⁰ Clearly, the Posse Comitatus Act did not originate from the Revolutionary Period.

B. Evolution of the Cushing Doctrine

Legislative and executive action in the early days of the American republic confirm that the use of federal troops or federalized militia to preserve domestic order, either as part of a posse comitatus or otherwise, was an accepted feature of American life under the new Constitution.⁴¹ The

38. See COAKLEY, *supra* note 24, at 23. In 1792, the Army's authorized strength (not actual or effective strength, which was almost certainly lower) was around 2000 troops, so the failure to specifically mention the regular troops may have been due to their small numbers in relation to the state militias, which consisted of every free white able-bodied male between eighteen and forty-five. See *id.*; 7 CONG. REC. 3580 (1878) (remarks of Mr. Potter). By comparison, in 1780-1781, the Commonwealth of Virginia had nearly 50,000 men in the state militia. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 89 (W.W. Norton & Co. 1972) (1787). In *Federalist No. 46*, Madison estimated the combined state militias at 500,000 men. THE FEDERALIST No. 46, at 267 (James Madison) (Clinton Rossiter ed., 1999).

39. THE FEDERALIST No. 8, at 37 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

40. THE FEDERALIST No. 29, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Also, in *Federalist No. 28*, Hamilton stated: "That there may happen cases in which the national government may be necessitated to resort to force cannot be denied . . . The means to be employed must be proportioned to the extent of the mischief." THE FEDERALIST No. 28, at 146 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

41. See Abel, *supra* note 23, at 451-52, 460 and accompanying notes. The Judiciary Act of 1789 continued the practice of calling out a posse comitatus and using U.S. soldiers and sailors as members, making it a common feature in early U.S. history. *Id.* at 460.

Judiciary Act of 1789 gave federal marshals the power to call out the posse comitatus, and a 1792 amendment made the implied power to call on the military explicit.⁴² In 1794, President Washington led a large force of federal troops into western Pennsylvania because farmers refused to pay a whiskey excise tax and treated the U.S. revenue officers much as they had the earlier British tax collectors.⁴³ Later, President Jefferson issued a broad proclamation that relied upon the Chief Executive's authority to call on the entire populace, military and civilian, to serve as a grand posse comitatus to counter Aaron Burr's planned expedition against Spanish terri-

42. See Meeks, *supra* note 23, at 88; Abel, *supra* note 23, at 460. The 1792 amendment actually authorized the use of a militia to assist the marshal's posse. The provision, however, gave rise to the practice of using both regulars and militia members as part of a posse. See Meeks, *supra* note 23, at 88. The failure of the law to mention the regular troops specifically may have been due to their small numbers in relation to the state militias. See *supra* note 38. In any event, it soon became an accepted practice for the marshal to call out both the militia and regular troops to serve in the posse. An 1878 Attorney General opinion stated:

It has been the practice of the Government since its organization (so far as has been known to me) to permit the military forces of the United States to be used in subordination to the marshal of the United States when it was deemed necessary that he should have their aid in order to the enforcement of his process [sic]. This practice was deemed to be well sustained under the twenty-seventh section of the judiciary act of 1789, which gave to the marshal power "to command all necessary assistance in the execution of his duty" and was sanctioned not only by the custom of the Government but by several opinions of my predecessors.

16 Op. Att'y Gen. 162, 163 (1878).

43. See ALAN BRINKLEY, *AMERICAN HISTORY: A SURVEY* 174 (9th ed. 1995); Abel, *supra* note 23, at 451 & n.36. The First Congress had passed the Calling Forth Act for the Militia in 1792, delegating to the President the power to call a state militia into federal service to enforce the laws of the union. In each case, the President was required to issue a "cease and desist" proclamation to the rioters before acting. President Washington used this authority to raise troops to counter the Whiskey Rebellion. CLAYTON D. LAURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1877-1945*, at 18 (U.S. Army Center of Military History 1997); H.W.C. Furman, *Restrictions upon the Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 88 & n.20 (1960). In 1807, the President was permitted to use regular troops under the same restrictions. See Act of Mar. 8, 1807, 2 Stat. 443.

tory.⁴⁴ In 1832, President Andrew Jackson initially sent military forces toward South Carolina under a Jefferson-like posse comitatus theory to prevent secession.⁴⁵ In an 1851 report to the Senate, President Fillmore stated that the President had the inherent power to use regular troops to enforce the laws and that all citizens could be called into a posse by the marshal.⁴⁶

The Senate Judiciary Committee, with only one dissenting voice, agreed that the marshals could summon both the militia and regular troops to serve in a posse comitatus.⁴⁷ In 1854, Attorney General Cushing formally documented the doctrine, concluding:

[T]he posse comitatus comprises every person in the district or county above the age of fifteen years whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines. All of whom are alike bound to obey the commands of a sheriff or marshal.⁴⁸

Initially, the Cushing Doctrine, as the long-standing policy became known, was used to help the U.S. marshals enforce the Fugitive Slave Act in Northern states.⁴⁹ As such, the doctrine was undoubtedly popular with Southern slaveholders. Southern support for the doctrine, however,

44. See Furman, *supra* note 43, at 89; COAKLEY, *supra* note 24, at 79-80. When called upon to issue a proclamation responding to Aaron Burr's actions to organize insurgents against Spanish territory in 1806, Jefferson ordered "all officers having authority, civil or military, and all other persons, civil or military, who shall be found in the vicinity" to aid and assist "by all means in their power" to search for and bring to justice Burr's supporters. Furman, *supra* note 43, at 89. Jefferson later called this "an instantaneous levee en masse." MERRILL PETERSON, THOMAS JEFFERSON AND THE NEW NATION 851 (Oxford Univ. Press 1975).

45. Furman, *supra* note 43, at 89. President Jackson was awaiting federal legislation that would permit him to use force against the insurgent state since the South Carolina governor was certainly not going to request federal assistance. *Id.*

46. COAKLEY, *supra* note 24, at 130.

47. *Id.* at 130-31.

48. See 6 Op. Att'y Gen. 466, 473 (1854) (internal citation omitted). This opinion is known as the Cushing Doctrine. The Posse Comitatus Act was specifically designed to overturn it. 7 CONG. REC. 4241-47 (1878); Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Benjamin Forman, Assistant General Counsel (International Affairs), Department of Defense, subject: Legality of deputizing military personnel assigned to the Department of Transportation (Sept. 30, 1970).

49. See 6 Op. Att'y Gen. 466 (1854).

severely waned during the Civil War and Reconstruction periods as federal troops began to enforce civil rights laws and protect the freedmen.⁵⁰

C. The Act's True Roots in the Civil War and Reconstruction Periods

The arrival of federal troops in the Southern states during the Civil War had quickly undermined the slaveholders' authority, even before the Emancipation Proclamation formally announced the beginning of the end of the "peculiar institution."⁵¹ As the war ended, much of the former Confederacy was occupied by victorious federal troops, including some of the 134,000 blacks in the federal Army.⁵² For some Southerners, the military occupation was worse than the battlefield defeat.⁵³ The presence of victorious Union troops, including former slaves, humiliated many former Confederates.⁵⁴ Throughout the war, black Union troops flaunted their contempt for the symbols of slavery and relished the opportunity to exert authority over, and in some cases torment, Southern whites.⁵⁵ Black soldiers acted, according to one New York newspaper, as "apostles of black

50. 5 CONG. REC. 2117 (1877) (Mr. Banning calling the Cushing Doctrine "an opinion questionable at best, but strangely perverted by the Attorney-General"); 7 CONG. REC. 3582 (1878); *see infra* section III.C.

51. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 4, 8-10 (1988). The Emancipation Proclamation was signed on 1 January 1863. Notably, while the plantation owners dominated the antebellum South, many independent white yeoman farmers owned few, if any, slaves and were politically and socially distinct from the planter class. These self-sufficient "upcountry" farmers led western Virginia to secede from Virginia and engaged in armed resistance against the Confederacy in eastern Tennessee. Union societies flourished in other parts of the South, and thousands of Southern men joined the Union Army outright or resisted Confederate authority. One historian has described this as a civil war within the Civil War. *See id.* at 11-17. Not surprisingly, many of these southern Unionists became prominent white Republican leaders of Reconstruction. They were called "scalawags" by the temporarily displaced planter class. *See id.* at 17; BRINKLEY, *supra* note 43, at 421-22.

52. *See* JOHN H. FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 23, 35 (1961); FONER, *supra* note 51, at 8 (stating 180,000 blacks had served in the Union Army).

53. *See* FRANKLIN, *supra* note 52, at 35.

54. *See id.*; FONER, *supra* note 51, at 9. Former slave owners were very easy to humiliate by modern standards and reportedly became quite indignant if not treated to the same deference that they were entitled to under slavery. For example, one North Carolina planter complained bitterly to the Union commander that a black soldier had bowed and greeted the white planter without first being invited to speak to a white man. *See* FONER, *supra* note 51, at 120. An Alabama newspaper complained that literate blacks might read a competing black newspaper, become "pugnacious," and no longer exhibit proper respect for their former owners. *Id.* at 117.

55. *See* FONER, *supra* note 51, at 9.

equality,” spreading radical ideas about black civil and political rights, which in turn inspired constant complaints from Southern whites.⁵⁶ Black Union soldiers rode the streetcars, spoke to whites without permission, and helped organize black schools.⁵⁷ Perhaps even worse in Southern eyes, black troops intervened in plantation disputes and sometimes exerted control and authority over whites on behalf of the Army.⁵⁸

The Army also became associated with the rise of black political power and organization.⁵⁹ The spring and summer of 1865 saw an extensive mobilization of black political activity, at least in areas that had been occupied by Union Troops during the war.⁶⁰ Union Leagues and other groups openly sought black equality under the protection of the Army and Freedmen’s Bureau.⁶¹ While the federal Army quickly demobilized after the war,⁶² it remained a powerful symbol of the destruction of the South’s antebellum way of life.⁶³ Army activity to protect blacks or assist institu-

56. *See id.* at 80.

57. *Id.*

58. *Id.* “It is very hard,” wrote a Confederate veteran, “to see a white man taken under guard by one of those black scoundrels.” *Id.* Southern whites were also indignant at being made to answer charges made by blacks before Freedmen’s Bureau courts. One Georgian considered it “outrageous that blacks had white men arrested and carried to the Freedmen’s court . . . where their testimony is taken as equal to a white man’s.” *Id.* at 151. Of the Freedmen’s Bureau judge, a Mississippian complained: “He listened to the slightest complaint of the Negroes, and dragged prominent white citizens before his court upon the mere accusation of a dissatisfied negro.” *Id.* at 150.

59. *See id.* at 43 (describing the situation in Tennessee), 110-11 (describing early black political activity in Norfolk, Virginia).

60. *See id.* at 110.

61. *Id.* at 110-11. The Freedman’s Bureau, formally known as the Bureau of Refugees, Freedmen, and Abandoned Lands, was created on 3 March 1865. *See id.* at 68-70, 142-70; FRANKLIN, *supra* note 52, at 36, 228. The Bureau had the almost impossible mission to introduce a system of free labor in the South, establish schools for the freedmen, provide aid to the sick and disabled, adjudicate disputes between the races, and secure equal justice for blacks and white Unionists from state and local courts and government. This led many Southerners to consider the Bureau an important part of a foreign government forced upon them and supported by an army of occupation. *See* FRANKLIN, *supra* note 52, at 36-39. President Johnson and many Northern Democrats also opposed the Bureau. Like the Army, the Bureau’s perceived influence greatly exceeded reality. At its peak, the Bureau had no more than 900 agents in the entire South. FONER, *supra* note 51, at 143. Moreover, part of the Bureau’s agenda was to get blacks back to work as free labor, which, in many cases, involved pressuring blacks to go back to work on the plantations. *Id.* at 143-44.

62. The number of Army troops dropped quickly from 1 million to 152,000 by the end of 1865. By the fall of 1866, total Army strength stood at only 38,000 men, with most stationed on the Western frontier. *See* FONER, *supra* note 51, at 148; FRANKLIN, *supra* note 52, at 119-20.

tions such as the Freedmen's Bureau, no matter how limited, kept the wounds open and raw.⁶⁴

One prominent Tennessee planter perhaps summarized the Southern perspective on the Bureau and the Army best when he wrote:

The Agent of the Bureau . . . *requires* citizens (former owners) to make and enter into *written contracts* for the hire of their *own* Negroes. . . . When a Negro is not *properly* paid or fairly dealt with and *reports* the facts, then a squad of Negro soldiers is sent after the *offender*, who is *escorted* to town to be dealt with as per the Negro testimony. In the name of God how long is such things to last [sic]?⁶⁵

Politically, the period immediately following the war was much more benign for the former leaders of the South. Under the generous terms of Presidential Reconstruction,⁶⁶ state governments were in place throughout the South by the end of 1865.⁶⁷ Not surprisingly, these state governments

63. FONER, *supra* note 51, at 154. While Southern whites generally resented the presence of Union Soldiers, in some locations shortly after the war Army troops actually helped control the freedmen and force them back into plantation labor. *Id.* at 154-55.

64. See FRANKLIN, *supra* note 52, at 36; see also FONER, *supra* note 51 (illustrations following page 194) (two images of the Freedmen's Bureau). Initially, the Bureau had no separate appropriation, so it drew personnel and resources from the Army. FONER, *supra* note 51, at 143. One of the Bureau's most important missions was the creation of schools for black children. By 1869, the Bureau oversaw about 3000 schools serving 150,000 students. *Id.* at 144. While hated by white Southerners, this activity eventually helped lay the groundwork for a public education system in the South. *Id.*

65. FONER, *supra* note 51, at 168.

66. Presidential Reconstruction consisted of President Lincoln's Reconstruction Plan and President Johnson's "Restoration" Plan. The Lincoln Plan, announced in December 1863, offered a general amnesty to all white Southerners, except high Confederate officials, who pledged loyalty to the Union and accepted the end of slavery. Loyal voters could set up a state government once ten percent of the number of voters in 1860 took the oath. Three occupied Southern states, Louisiana, Arkansas, and Tennessee, were readmitted under this plan in 1864. President Johnson's Restoration Plan, implemented in the summer of 1865, incorporated some of the more restrictive provisions from the vetoed Wade-Davis bill; however, it was also designed to quickly readmit the former Confederate states into the Union. See *id.* at 35-37, 60-61 (describing the Wade-Davis bill), 176-84; BRINKLEY, *supra* note 43, at 416-17; FRANKLIN, *supra* note 52, at 23-29.

67. See PHILIP JENKINS, A HISTORY OF THE UNITED STATES 148 (1997); BRINKLEY, *supra* note 43, at 417.

contained many familiar Confederate faces⁶⁸ and moved quickly to assert white domination over blacks via a series of laws known as the “Black Codes.”⁶⁹ These laws, while varying from state to state, consigned blacks to a hopelessly inferior status slightly better than serfdom.⁷⁰ For example, some codes forbade blacks from taking any jobs other than as plantation workers or domestic servants.⁷¹ Unemployed blacks could be arrested for vagrancy by local officials, fined by the courts, and then hired out to private employers to satisfy the fine.⁷² Mississippi even required blacks to possess written proof, each January, of employment for the upcoming year.⁷³ Many states also established an “apprentice” system for black minors that, in practice, provided free plantation labor indistinguishable from slavery.⁷⁴ As one Southern Governor stated, the newly reconstructed governments were a white man’s government and intended for white men

68. Georgia selected the former Confederate vice president, Alexander H. Stevens, as a U.S. Senator. *See* BRINKLEY, *supra* note 43, at 417; FRANKLIN, *supra* note 52, at 43. The reconstructed Southern governments also contained former Confederate cabinet officers and senior military officers, many un-pardoned or otherwise ineligible to vote. FRANKLIN, *supra* note 52, at 43. Pro-Confederates were also appointed to a large number of local patronage jobs, in some cases because there simply were not enough unconditional Union men available or to build political bridges to the old power class. After all, seventy-five percent of white males between eighteen and forty-five had served in the Confederate Army at some point, and many white Republican politicians realized that they could not stay in power without some additional white support. FONER, *supra* note 51, at 185, 188, 197.

69. *See* FONER, *supra* note 51, at 199. The North Carolina provisional governor listed unqualified opposition to black voting rights as a central part of Southern Unionism. The Florida governor insisted that emancipation did not imply civil equality or the vote. Instead, he advised the freedmen to return to the plantation, work hard, and obey their old Masters. *Id.* at 189.

70. *See id.* at 198-204; FRANKLIN, *supra* note 52, at 49. The basic idea was to return matters to as near as slavery as possible. FONER, *supra* note 51, at 199 (citing the remarks of Radical Benjamin Flanders describing the situation in the South).

71. *See* BRINKLEY, *supra* note 43, at 417-18.

72. *See id.* at 418. Note, however, that these vagrancy laws were not unlike those in the North. *See* FRANKLIN, *supra* note 52, at 50. In the South, however, normally only blacks were forced to work. In Florida, blacks who broke labor contracts could be whipped, placed in the pillory, or sold for up to one year of labor, while whites faced only the threat of civil lawsuits. *See* FONER, *supra* note 51, at 200.

73. FONER, *supra* note 51, at 198.

74. *Id.* at 201. The laws generally allowed judges to bind black orphans and children from impoverished families to white employers. The former owner usually had first preference, and consent of the child’s parents was not required. Moreover, the definition of “minors” was quite flexible for the time, allowing whites to “employ” a sixteen year-old “apprentice” with a wife and child. *Id.*

only.⁷⁵ The same could be said for the courts.⁷⁶ Georgia went so far as to expel the modest number of black citizens elected to the state legislature.⁷⁷

The “reconstructed” state governments also did very little to protect blacks against what was, unfortunately, just the beginning of widespread racial terrorism.⁷⁸ In many areas, the violence raged unchecked. For example, Texas records from the Freedmen’s Bureau recorded the murder of 1000 blacks by whites from 1865-1868.⁷⁹ The stated “reasons” for the murders include: “One victim ‘did not remove his hat;’ another ‘wouldn’t give up his whiskey flask;’ a white man ‘wanted to thin out the niggers a little;’ another wanted ‘to see a d—d nigger kick.’”⁸⁰

At this point, efforts by the freedmen to assert even a modicum of their freedom probably led to the largest number of attacks. Freedmen were beaten and murdered for not acting like slaves. “Offenses” included

75. See FRANKLIN, *supra* note 52, at 51 (describing the remarks of the South Carolina Provisional Governor B.F. Perry). Some of the most flagrant provisions of the Black Codes were never enforced due to the action of Army commanders. The laws were mostly replaced, however, with racially neutral laws that, in practice, only applied to blacks. FONER, *supra* note 51, at 208-09. The idea of a “white man’s government” remained a central part of the Democratic Party platform in the 1868 presidential election. The Democratic candidate for Vice President, Frank Blair, wrote that a Democratic President could restore whites to power in the South by using the Army. In campaign speeches, he also excoriated Republicans for placing the South under the rule of “semi-barbarous blacks” who “longed to subject white women to their unbridled lust.” *Id.* at 339-40.

76. FONER, *supra* note 51, at 150. The basic problem was that Southern whites could not conceive that the freedmen had any rights at all. The primary objective of Southern courts during Presidential Reconstruction was to control and discipline the black population and force it to labor for whites. *Id.* at 204-05.

77. See FRANKLIN, *supra* note 52, at 131. The extent of white intolerance can be illustrated by the fact that at no point did blacks dominate the Southern governments. In other words, “black rule” was a myth. See FONER, *supra* note 51, at 353; *infra* note 88.

78. See FONER, *supra* note 51, at 119-23; FRANKLIN, *supra* note 52, at 51. The North also had its own racial problems both before and during the war. In the 1840s and 1850s, white supremacy was a central platform of the Northern Democratic Party, and four states, Iowa, Illinois, Indiana, and Oregon, refused to admit blacks into the state. In 1860, free blacks made up less than two percent of the North’s population, but faced almost universal discrimination in voting, schooling, employment, and housing. See FONER, *supra* note 51, at 25-26. The 1863 draft riots in New York City degenerated into brutal attacks on black citizens. Only the arrival of federal troops fresh from the Gettysburg battlefield restored order. See *id.* at 32-33. Unlike the South, however, New York launched some reforms, and cooler heads looked on the racial brutality as a problem to be addressed vice an acceptable social practice. *Id.* at 33.

79. FONER, *supra* note 51, at 120.

80. *Id.* Texas courts indicted some 500 whites for the murder of blacks in 1865-1866, but not one conviction was obtained. *Id.* at 204.

attempting to leave a plantation, disputing contract payments, attempting to buy land, and refusing to be whipped.⁸¹

Newspaper stories about the Black Codes and abuse of the former slaves enraged Northerners, and the Republican Congress opposed President Johnson's lenient Reconstruction plan. The Southern actions united Republicans behind a more radical agenda since there was a broad consensus that the freedmen's personal liberty and ability to compete as free laborers had to be guaranteed to give meaning to emancipation.⁸² After more than a year of congressional investigations, preliminary steps, and additional Southern resistance,⁸³ Congressional (or "radical") Reconstruction became entirely dominant in early 1867.⁸⁴ Under Congressional Reconstruction, the existing state governments were dissolved, direct military rule was introduced, and specific measures were taken to encourage black voting.⁸⁵ Moreover, "radical" leaders insisted on building a political establishment that would permanently secure full civil rights for the freedmen.⁸⁶

Not surprisingly, neither military rule by federal troops⁸⁷ nor the subsequent mixed-race Republican state governments were popular with the white oligarchy that had dominated the South before the war. From their perspective, Congressional Reconstruction imposed corrupt and inept for-

81. *Id.* at 121.

82. *Id.* at 225.

83. This included an 1866 pogrom against blacks in New Orleans that was halted with the intervention of the U.S. Army, and the Memphis race riots in which angry whites rampaged through black neighborhoods for three days burning homes, schools, and churches. See *id.* at 261-64; BRINKLEY, *supra* note 43, at 419; FRANKLIN, *supra* note 52, at 62-63.

84. FONER, *supra* note 51, at 276. Tennessee was readmitted, but the other ten Southern states were divided into five military districts under the control of a military commander. Only adult black males and white males who had not participated in the rebellion could register to vote. These voters would elect a convention to prepare a new state constitution acceptable to the U.S. Congress. Once the state constitution was ratified, voters could select officials who must then ratify the Fourteenth Amendment to the Constitution. See BRINKLEY, *supra* note 43, at 419; FONER, *supra* note 51, at 276-77; FRANKLIN, *supra* note 52, at 70-73. By 1868, there were about 700,000 black voters and 625,000 white voters in the South. See JENKINS, *supra* note 67, at 150; FRANKLIN, *supra* note 52, at 86.

85. See FRANKLIN, *supra* note 52, at 70; JENKINS, *supra* note 67, at 150. Ironically, many Northern states did not allow blacks to vote. See FONER, *supra* note 51, at 222-23; FRANKLIN, *supra* note 52, at 62.

86. See JENKINS, *supra* note 67, at 148-49. As politicians, the Republican senators and representatives also undoubtedly realized that the newly freed slaves would vote Republican.

eign governments propped up by an occupying army.⁸⁸ Accordingly, Southern Democrats did everything possible to undermine rapidly the Republican mixed-race state governments. In some areas, expanded voting rights for former Confederates gradually created white Democratic voting majorities, while economic pressure induced blacks to avoid political activity.⁸⁹ In other areas, however, more direct action to limit black Republican voting was required to return the white planter class to power. Terrorist organizations such as the Ku Klux Klan, the Knights of the White Camellia, and the Knights of the Rising Sun served as the unofficial, and highly decentralized, Southern white army in the war against Northern rule.⁹⁰ For this “army,” no act of intimidation or violence was too vile, so long as it was directed against blacks and their white political allies.⁹¹

While the Republican state governments resisted this “counter-reconstruction,” their efforts to combat the Klan were ineffective, and state officials appealed for federal help.⁹² Some federal interventions resulted, including the 1871 Federal Ku Klux Act that gave the President the power

87. The Army was used in a role analogous to the modern mission of “Peace Enforcement Operations.” Peace Enforcement Operations (PEO) are the application of military force or the threats of its use to coerce or compel compliance with resolutions or sanctions. The PEO forces strive to be impartial and limit actual use of force. The primary goal, however, is to apply coercion in a way that makes the parties embrace the political solution over continued conflict. See JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.3, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR PEACE OPERATIONS ch. III (12 Feb. 1999). The mission is known as “Peacekeeping” if all sides to the conflict consent to the participation of the U.S. troops. *Id.* at I-10. Most Reconstruction Army commanders were extremely reluctant to participate in this mission and tried to keep out of civil matters. Some even opposed radical Reconstruction. See FONER, *supra* note 51, at 307-08.

88. See FRANKLIN, *supra* note 52, at 39. Other Southern complaints concerned exploitation by Northern “carpetbaggers” and betrayal by Southern white Republican “scalawags.” See BRINKLEY, *supra* note 43, at 421-22; JENKINS, *supra* note 67, at 150. This “traditional” view of Reconstruction described the period as “bayonet rule.” BRINKLEY, *supra* note 43, at 432. This now discredited view of Reconstruction is reflected in the work of William A. Dunning during the early 1900s. Dunning and his followers portrayed Congressional Reconstruction as a sordid attempt by Northern Republicans to take revenge on Southern rebels and assure Republican domination of state and national government. Ignorant blacks were pushed into positions of power (black or Negro rule), while plundering carpetbaggers, working with local white scalawags, fleeced the public. After a heroic struggle, the Democratic white community overthrew these governments and restored “home rule” (white supremacy). See *id.* at 432-33; FONER, *supra* note 51, at xix-xx; see also FONER, *supra* note 51, at 294-307 (dispelling many myths about carpetbaggers and scalawags), 353 (giving a relatively short list of significant state offices held by black officials during Reconstruction).

89. See BRINKLEY, *supra* note 43, at 421; FRANKLIN, *supra* note 52, at 172-73.

90. See FONER, *supra* note 51, at 342-45, 425-44.

to suspend habeas corpus and proclaim martial law when necessary.⁹³ President Grant used the relatively few federal troops remaining in South Carolina and other states to make arrests and enforce the anti-Klan law.⁹⁴ The Act, however, expired in 1872, and any temporary benefits quickly faded along with the already waning Northern will to enforce Reconstruction.⁹⁵ With a few exceptions, Southern Republicans were left to fend for themselves. As one prominent historian has noted: “Negroes could hardly be expected to continue to vote when it cost them not only their jobs but their lives. In one state after another, the Negro electorate declined steadily

91. See BRINKLEY, *supra* note 43, at 430; FRANKLIN, *supra* note 52, at 155.

It involved the murder of respectable Negroes by roving gangs of terrorists, the murder of Negro renters of land, the looting of stores whose owners were sometimes killed, and the murder of peaceable white citizens. On one occasion in Mississippi a member of a local gang, “Heggie’s Scouts,” claimed that his group killed 116 Negroes and threw their bodies into the Tallahatchie River. It was reported that in North Carolina the Klan was responsible for 260 outrages, including seven murders and the whipping of 72 whites and 141 Negroes. Meanwhile, the personal indignities inflicted upon individual whites and Negroes were so varied and so numerous as to defy classification or enumeration. There were the public whippings, the maiming, the mutilations, and other almost inconceivable forms of intimidations.

FRANKLIN, *supra* note 52, at 157

92. FONER, *supra* note 51, at 438-44. Many states passed anti-Ku Klux Klan laws, appointed special constables, declared martial law, and offered rewards. State militias, many composed of black troops, were deployed to keep the peace and arrested some suspects. It did not work, however, as white Democrats lashed back with even more determination, and the Republican administrations refused to respond with similar levels of force. *See id.* at 436-42; FRANKLIN, *supra* note 52, at 162-63.

93. FONER, *supra* note 51, at 454-55. The federal Ku Klux Klan Act and Enforcement Acts dramatically increased federal participation in criminal law, as the federal government no longer depended upon local law enforcement officials to protect the freedmen. Instead, the full authority and resources of the national government could be used, for a short time, to protect civil and political rights. *Id.* at 455-56.

94. *See id.* at 457-58; FRANKLIN, *supra* note 52, at 168.

95. A severe economic depression caused by the “Panic of 1873” also sapped available state and federal resources and led to significant Republican political losses as voters blamed the party in power during the 1874 congressional elections. *See FONER, supra* note 51, at 512-24, 535.

as the full force of the Klan came forward to supervise elections that federal troops failed to supervise.”⁹⁶

One by one, the small clique of white landowners who had dominated the South before the war replaced the mixed-race Republican governments.⁹⁷ Two states, Alabama and North Carolina, faced a period of political stalemate beginning in 1870. In both, Republicans could claim that they remained the majority party in peaceful elections.⁹⁸ While the potential for federal intervention induced some restraint, the “redeemed” state governments moved forward under Democratic leadership to exert white supremacy and control of the labor force.⁹⁹ Schools for blacks and poor whites closed, segregation was required, and black voting power strictly limited.¹⁰⁰ By 1876, the only survivors of the Reconstruction regime were in Louisiana, Florida, and South Carolina. Without federal troops, however, it was clear that the last of the Republican governments would fall.¹⁰¹

These last vestiges of occupying federal troops were used to supervise polling places in Louisiana, Florida, and South Carolina during the controversial presidential election of 1876.¹⁰² The need to prevent fraud and voter intimidation was clear enough. In South Carolina, for example, the “Plan of Campaign” called upon each Democrat to “control the vote of at

96. See FRANKLIN, *supra* note 52, at 172.

97. See BRINKLEY, *supra* note 43, at 429-30. Southern Democrats looked upon this as a joyous event and called it “redemption” or the return of home rule. *Id.* Many other factors besides direct violence contributed to the downfall of the Southern Republican governments, including economic pressure from white Democrats, internal Republican feuds, white Republican racism, corruption, the economic depression, the severe problems facing state and local governments in the South, and the sheer number of white Democrats once voting restrictions on former rebels were lifted. FONER, *supra* note 51, at 346-49. Additionally, the national Republican Party became much more conservative during the Depression and moved away from the free labor ideology. *Id.* at 525. The campaign of violence by Southern white Democrats and loss of Northern will, however, were the decisive factors in redemption. *Id.* at 603.

98. FONER, *supra* note 51, at 444.

99. See *id.* at 421. This activity began in border states and the upper South. *Id.*

100. See *id.* at 422-23. When Georgia was “redeemed” in 1870-1871, a poll tax combined with new residency and registration requirements quickly reduced the number of black voters, and a shift from ward to citywide elections eliminated Republicans from Atlanta’s city council. Moreover, a black legislator from a remaining Republican enclave was expelled from the state legislature and jailed on trumped-up charges. *Id.* at 423.

101. Furman, *supra* note 43, at 90-91.

102. *Id.* During the election of 1876, over 7000 deputy marshals were used to supervise the election, and President Grant ordered federal troops to the polling places in Louisiana, Florida, and South Carolina to prevent fraud and voter intimidation. *Id.*

least one Negro by intimidation, purchase, keeping him away or as each individual may determine.”¹⁰³ Some Democrats planned to carry the election “if we have to wade in blood knee-deep.”¹⁰⁴

The subsequent political battles over the contested election results led to the effective withdrawal of federal troops from the South in early 1877 as part of a deal to resolve which candidate would assume the Presidency.¹⁰⁵ The state Republican governments collapsed, and the traditional white ruling class resumed power.¹⁰⁶ In the words of W.E.B. DuBois, “The slave went free; stood a brief moment in the sun; then moved back again toward slavery.”¹⁰⁷

D. Legislative Action to Prevent Another Reconstruction Period

Initial congressional action to maintain this movement began shortly after the 1876 election, at the peak of Southern resentment over military intervention to protect black voting rights in Louisiana, Florida, and South Carolina. At the time, the entire body of federal law had been codified in the 1874 Revised Statutes (RS).¹⁰⁸ Five of these laws, RS 1989, 5297, 5298, 5299, and 5300, addressed the use of the Army and Navy in the execution of the laws and to suppress insurrections, domestic violence, or unlawful combinations or conspiracies against either state or federal authority. Revised Statutes 5297 and 5298 were the direct descendants of the Calling Forth Act of 1795 and the 1807 amendments permitting the use of regular troops upon request of a state government. Revised Statute 5298 allowed the President to employ the land and naval forces of the United States to combat forces opposing federal authority without an invitation from a state government. Revised Statutes 5299 and 1989, passed as part of the Ku Klux Klan Act, permitted the President to employ the land and naval forces to enforce civil rights. In all cases of a planned intervention

103. FONER, *supra* note 51, at 570.

104. *Id.* at 574.

105. In a nutshell, Democrats, whose candidate had won the popular vote and perhaps the electoral vote, dropped opposition to the selection of Republican Rutherford B. Hayes in exchange for the withdrawal of most federal troops from the South, a non-interference policy, and certain other concessions. See BRINKLEY, *supra* note 43, at 430-31; JENKINS, *supra* note 67, at 151-52; FONER, *supra* note 51, at 582; see also GORE VIDAL, 1876 (1976) (historically accurate fictionalized account of the election).

106. FONER, *supra* note 51, at 582.

107. *Id.* at 602.

108. REVISED STATUTES OF THE UNITED STATES (2d ed. 1878) [hereinafter REVISED STATUTES] (passed at the first session of the Forty-Third Congress, 1873-1874).

under RS 5297-5299, however, RS 5300 required the President to issue a proclamation commanding the insurgents to disperse and retire peaceably to their respective homes before employing the military forces.¹⁰⁹

Other laws, RS 2002-2003 and the related criminal provisions at RS 5528-5532, limited the use of military or naval forces at polling places and in elections.¹¹⁰ Most significantly, these election laws prohibited placement of military and naval forces at polling places unless necessary to repel armed enemies of the United States *or to keep peace at the polls*.¹¹¹

The President's actions to supervise polling places during the 1876 election were harshly criticized by many members of the democratically controlled House in early 1877.¹¹² Ironically, this use of Army troops to keep the peace at polling places was specifically contemplated by RS 2002 and 5528.¹¹³ Nonetheless, according to one member, Congressman Atkins, military supervision of polling places was a tyrannical and unconstitutional use of the Army to protect and keep in power unelected tyrants.¹¹⁴ In other words, the lawful use of the Army gave three Southern Republican state governments a chance to survive, primarily by keeping the Ku Klux Klan from intimidating Republican voters.

In response to these concerns, Congressman Atkins offered a rider to the Army appropriations bill prohibiting the use of the Army "in support of the claims, or pretended claim or claims, of any State government, or officer therefore, in any State, until such government shall have been duly

109. See LAURIE, *supra* note 43, at 18-21; REVISED STATUTES, *supra* note 108, at 348, 1029-30.

110. Revised Statute 2002 prohibited any person in the military, naval, or civil service of the United States from bringing troops or armed men to the place of an election in any state unless necessary to repel the armed enemies of the United States, or keep peace at the polls. Revised Statute 5528 imposed criminal sanctions of up to five years' imprisonment at hard labor for violations. Revised Statute 2003 prohibited Army and Navy officers from interfering with elections. Revised Statutes 5530 through 5532 contained the related criminal provisions. See REVISED STATUTES, *supra* note 108, at 352, 1071, §§ 2002-2003, 5528, 5530-5532 (codified as amended at 42 U.S.C. § 1972, 18 U.S.C. §§ 592-593). The exception that permitted the use of troops at polls to keep the peace, however, is no longer in the law. See *infra* note 455 and accompanying text.

111. REVISED STATUTES, *supra* note 108, at 352, 1071.

112. See 5 CONG. REC. 2112-17 (1877).

113. See REVISED STATUTES, *supra* note 108, §§ 2002, 5528.

114. See 5 CONG. REC. at 2112 (remarks of Congressman Atkins).

recognized by Congress.”¹¹⁵ The Senate deleted the rider, and the forty-fourth Congress adjourned without passing an Army appropriations provision. Since Congress did not pass what is today known as a continuing resolution, Army troops were not paid for several months.¹¹⁶

The House renewed the debate in the forty-fifth Congress with an amendment to the Army appropriations bill providing: “It shall not be lawful to use any part of the *land or naval forces* of the United States to execute the laws either as a posse comitatus or otherwise, except in such cases as may be expressly authorized by act of Congress.”¹¹⁷ The sponsoring Democratic Congressman, Mr. Kimmel, roundly denounced regular troops as bloodthirsty brutes, questioned the constitutionality of a standing army, and vigorously restated the colonial debates about the danger of a standing army.¹¹⁸ He referred to President Hayes as an unelected monarch who preferred bullets to ballots.¹¹⁹ He also claimed that the Army shielded the tyrants who had reconstructed state governments, imposed state constitutions on unwilling people, obstructed the ballot, and excluded the represen-

115. *Id.* at 2119. The bill also sought to reduce the Army’s size by thirty-eight percent. For Congressman Atkins, at least, this bill, along with the subsequent bill that eventually led to the Act, might be more accurately described as the Ku Klux Klan Protection Act. Of course, many others had more honorable reasons to support the bill, and unsuccessful efforts had been made to limit the use of the Army as a posse comitatus in 1856. See Abel, *supra* note 23, at 460-61 & n.100; *supra* notes 23, 26-27 and accompanying text. The Democratic Party also tapped into widespread resentment over the use of federal troops during the war to quell strikes at a New York arms factory, to prohibit worker organization in St. Louis war-production industries, and to suppress strikes in the Pennsylvania coal country under the guise of quelling resistance to the draft. See FONER, *supra* note 51, at 31. The Democrats used these incidents, in part, to position the Democratic Party as the home of the working man, while painting the Republican Party as an agent of the rich. *Id.*

Another potentially motivating event was President Hayes’s use of federal troops to suppress violence associated with the great railway strike in July 1877. Ironically, many of these troop deployments were made under the authority of the existing statutes concerning the domestic deployment of the Army and did not rely upon the Cushing Doctrine or a posse comitatus theory. See LAURIE, *supra* note 43, at 33, 36, 41 (stating that the President issued proclamations required by RS 5300).

116. LAURIE, *supra* note 43, at 32; COAKLEY, *supra* note 24, at 343; Furman, *supra* note 43, at 95 & n.61.

117. 7 CONG. REC. 3586 (1878) (emphasis added). The wording of this initial bill concerning the “land and naval forces of the United States” is identical to that in the primary federal statutes of the time (RS 5297 through 5300 and RS 1989) that specifically authorized Army and Navy intervention in domestic matters. Compare *id.* with REVISED STATUTES, *supra* note 108, §§ 1989, 5296-5300. See *supra* notes 108-09 and accompanying text.

tatives of the people from state government—often at the behest of minor federal officials.¹²⁰

According to Mr. Kimmel, the nation had lived under absolute military despotism ever since it became accepted that members of the Army could be called as a *posse comitatus*.¹²¹ On the other hand, Congressman Kimmel was quite sanguine about Southern home rule, noting the Southern side’s “good faith” acceptance of defeat, honorable obedience to court authority, and the resulting racial harmony.¹²² Given the historical context and explicit references to Reconstruction “tyrants” and racial harmony, it is difficult to dispute the bill’s reflection of lingering Reconstruction bitterness or the sponsor’s agenda.¹²³

The substitute bill that passed the House, introduced by Congressman Knott, omitted the restriction on the use of naval forces and added a criminal penalty.¹²⁴ While the debate on the substitute bill was more temperate, at least one Southern representative got “heartily tired” of repeatedly hearing about the use of federal troops in the 1876 election.¹²⁵ The debate’s significant focus on the “unlawful” use of Army troops to supervise poll-

118. 7 CONG. REC. at 3579-80, 3583-84. Of a member of the Regular Army, Mr. Kimmel said:

He lives by blood! His is a business apart from the people. . . . [H]is habits unfit him for the relations of civil life He sacks, desecrates, indulges when and where he dares. He serves, obeys, destroys, kills, suffers[,] and dies for pay. He is a mercenary whom sloth, luxury[,] and cowardice hires to protect its ease, enjoyment, and life.

Id. at 3584.

119. *Id.* at 3586.

120. *Id.* at 3579-86 (remarks of Congressman Kimmel.) Kimmel also argued that the power for the marshals, the lowest officers of the United States courts, to call out the Army as a *posse comitatus* never existed. He cited the use of the Army by “all sorts of people” to suppress labor unrest, enforce revenue laws, and execute local law. Congressman Knott, who introduced the bill that ultimately passed the House, stated that he designed his amendment to stop the fearfully common practice in which every marshal and deputy marshal could call out the military to aid in the enforcement of the laws. *Id.* at 3849.

121. *Id.* at 3582. This period of military despotism described by Mr. Kimmel would have started at least as early as 1807 under President Jefferson. *See supra* note 44 and accompanying text.

122. 7 CONG. REC. at 3582, 3586.

123. *See supra* section III.C.

124. *See* 7 CONG. REC. at 3845.

125. *Id.* at 3847 (remarks of Congressman Pridemore).

ing places, with no acknowledgement that federal laws clearly permitted the action, may be one reason why the Act is so misunderstood.¹²⁶ It also suggests a high level of political posturing and misdirection by some of the bill's proponents since the House bill did not change the existing laws that permitted troops to keep the peace at polling places.

The Senate added language to account for any constitutional authority for use of the Army as a posse comitatus, or otherwise, to execute the laws. Senator Kernan sponsored the Senate amendment. His remarks focused on the actions of peace officers and other low officials to call out the Army and order it about the polls of an election.¹²⁷ The Senate also considered an amendment by Senator Hill, a supporter of the bill, to change the Act to read: "From and after the passage of this act it shall not be lawful to employ any part of *the Army* of the United States *for the purpose of executing the laws* except in such cases as may be expressly authorized by the Constitution or by act of Congress."¹²⁸

This amendment, and others designed to clarify the bill's meaning, were defeated, and the Act became law on 18 June 1878 as part of the Army appropriations bill.¹²⁹ It stated:

It shall not be lawful to employ any part of *the Army* of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases as may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section. And any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor¹³⁰

126. See *supra* notes 108-11 and accompanying text.

127. 7 CONG. REC. at 4240. Senator Kernan said: "Hence I think Congress should say that there shall be *no right* to use the Army as a posse comitatus by the peace officers of the State or the General Government . . ." *Id.* (emphasis added). Senator Beck agreed and indicated that the whole object of this section was to limit the marshals who called out the Army. *Id.* at 4241.

128. *Id.* at 4248 (emphasis added).

129. See Act of June 18, 1878, 20 Stat. 152.

130. Posse Comitatus Act of 1878, 20 Stat. 145, 152 (emphasis added); REVISED STATUTES, *supra* note 108, at 190 (2d ed. Supp. 1891). The limits on spending money under this appropriation expired at the end of the period for the appropriation act.

IV. The Act's Meaning in the Late Nineteenth and Early Twentieth Century

As with many controversial laws, the full extent of the Posse Comitatus Act was not clear to all the congressional and executive participants.¹³¹ Some believed, or hoped at least, that the law limited the President's ability to use Army troops domestically to those few instances specifically enumerated in other statutes.¹³² This interpretation relied upon two implicit beliefs: (1) the Constitution provided no authority for presidential use of the Army to execute the law; and (2) the language proposed by Senator Hill, but not adopted, was the law.¹³³ It also tended to focus on the rhetoric of some of the bill's strongest Southern supporters as opposed to the law's actual text.

Others involved in the debate thought, or hoped, that the law merely restated the obvious.¹³⁴ After all, federal law authorized President Grant's use of troops to keep the peace at polling places during the 1876 election.¹³⁵ Moreover, the Cushing Doctrine simply articulated long-standing

131. See 7 CONG. REC. 4299 (1878). As Senator Howe noted:

For all these reasons I should be opposed to this section if it were to be constructed precisely as the Senator from Delaware construes it. But is that the true construction? I will not say that it is not. I only say that Senators differ as to what the construction is and it seems to me hardly worthwhile to put a savage provision into the statute, the limitations of which are disputed about by even the warmest friends of the provision.

Id. See also *id.* at 4296 (remarks of Senator Kirkwood, describing the Act as a self-evident proposition; however, the discussion shows that the Senators differed widely over the lawful uses of the Army).

132. See, e.g., *id.* at 4247 (remarks of Senator Hill). Senator Hill articulated a theory whereby the Army was never used to execute the law. According to Senator Hill, the sheriff and his posse execute the law. Any effective opposition is considered an insurrection or domestic violence. At this point, the Army is used to quell the insurrection or domestic violence. The sheriff returns to execute the law once order is restored. *Id.* In support of this theory, Senator Hill offered an unsuccessful amendment to change the Act to read, "From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States for the purpose of executing the laws." *Id.* at 4248. See also *supra* notes 107-09 and accompanying text (describing the laws that specifically authorized federal military intervention in domestic matters).

133. 7 CONG. REC. at 4247-48; see *supra* note 128 and accompanying text (discussing the proposed Hill amendment).

134. 7 CONG. REC. 4296 (remarks of Senator Bayard), 4297 (remarks of Senator Burnside).

135. See *supra* note 110 and accompanying text (discussing RS 2003 and RS 5528).

practice that had been ratified by at least three Presidents and the Senate Judiciary Committee.¹³⁶ This interpretation, however, minimized the multi-year effort of Southern Democrats to pass the Act. They certainly didn't think that the Act simply restated the obvious.

To the extent that agreement can be discerned from the contentious and deliberately misleading legislative history, most participants appeared to agree that the marshals, and other low-ranking federal officials, could no longer order Army troops to join the posse comitatus in subordination and obedience to the marshal.¹³⁷ In other words, the Act clearly undid the Jefferson-Jackson-Fillmore doctrine articulated by Attorney General Cushing in 1854.¹³⁸

At least one of the key disputes over the statute's additional meaning, if any, implicitly centered on the interpretation of the words "as a posse comitatus or otherwise."¹³⁹ While no court during the era of its passage interpreted the statute, under an established cardinal rule of statutory construction in 1879, the words must have some meaning.¹⁴⁰ The words cannot just be ignored, especially since Congress had an opportunity to remove them, but left the words in the law.¹⁴¹

While history can help define a nineteenth century "posse comitatus," one must use other tools to interpret the words "or otherwise." Two

136. See *supra* section III.B.

137. See 7 CONG. REC. 4296 (remarks of Mr. Teller); 16 Op. Att'y Gen. 162 (1878); 41 Op. Att'y Gen. 313, 1957 U.S. AG LEXIS 2, at *34-35 (Nov. 7, 1957) (citing President Hayes's diary of 30 July 1878); COAKLEY, *supra* note 24, at 344; Furman, *supra* note 43, at 97.

138. See *supra* section III.B.

139. See *supra* notes 128-29 and accompanying text (discussing one unsuccessful amendment to remove the words from the Act).

140. See *Market Co. v Hoffman*, 101 U.S. 112, 115-16 (1879). This opinion states:

We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so constructed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times.

Id.

141. See *supra* note 128 and accompanying text (discussing the proposed Hill amendment).

Supreme Court cases from the early 1900s indicate that *ejusdem generis*¹⁴² was also a familiar rule of statutory construction at the time of the Act's passage. Under this doctrine, as articulated in the early twentieth century, the general words "or otherwise" to execute the laws prohibit actions of the same general class as placing Army troops into a posse comitatus at the order of the local marshal. The general words "or otherwise" must have some meaning and, of course, the ultimate goal is to determine the "true" congressional intent from the many conflicting statements and actions.¹⁴³ Realistically, the best that can be said with any level of confidence is that while the words "or otherwise" did more than just limit the Army's involuntary inclusion in a posse comitatus by the marshals, it also did something significantly less than prohibit the use of the Army in all forms of domestic law enforcement.¹⁴⁴ Since the two primary "evils" addressed during the debates were the Cushing Doctrine and Army troops supervising polling places,¹⁴⁵ one reasonable interpretation is that the words "or otherwise" sought to limit any implied authority of the marshals to order Army troops to supervise the polls.

One item not in dispute was the Act's inapplicability to the U.S. Navy.¹⁴⁶ The House Bill introduced in the forty-fifth Congress proposed

142. Of the same kind, class, or nature. "A canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed." BLACK'S LAW DICTIONARY 535 (7th ed. 1999). The rule, however, does not necessarily require limiting the scope of the general provision to the identical things specifically named. Nor does it apply when the context manifests a contrary intention. *Id.*

143. See *United States v. Mescall*, 215 U.S. 26, 31-32 (1909); *United States v. Bitty*, 208 U.S. 393, 401-02 (1908).

144. The Senate debate between Senators Blaine, Merrimon, and Windom also suggested some type of emergency exception to the Act whereby soldiers would respond as human beings or citizens, rather than as soldiers, under the "law of nature." 7 CONG. REC. 4245-46 (1878). Of course, the theory of soldiers acting as normal citizens was the foundation of the Cushing Doctrine, so this exchange does little to clarify the Act's meaning.

145. See *supra* notes 125-27 and accompanying text.

146. See *Furman*, *supra* note 43, at 97-102 (discussing a total focus on the Army); *Abel*, *supra* note 23, at 456-58 & n.76 (stating that the Framers did not consider a standing Navy as a potential menace to liberty, so the applicable constitutional provisions were not controversial); *Meeks*, *supra* note 23, at 101 (discussing shifting Navy opinion on the Act's applicability to the Navy and Marine Corps from 1954, when it was held to have no application, to 1973, when Navy policy changed to general compliance with the Act). One off-handed assumption is that the Navy was deleted from the initial bill because it was part of an Army appropriation bill. *Meeks*, *supra* note 23, at 101. Congress repeated this unsupported assumption in House Report 97-71; however, the House Report goes on to state that the Posse Comitatus Act does not apply to the Navy. *Id.* at 1787 (construing H.R. No. 97-71, at 1786 (1981)).

a limit on all land and naval forces; however, the Knott amendment changed the bill to cover only the Army.¹⁴⁷ Moreover, the extensive debate is clearly focused on the Army; the intensely focused surrounding discussion about the Army drowns out the few passing references to the Navy

147. See *supra* note 124 and accompanying text.

148. *United States v. Walden*, 490 F.2d 372, 373 (4th Cir. 1974), contains a frequently cited mischaracterization of the debate. In *Walden*, the court quoted one small section of the debate to prove that the Act applied to all the armed forces: “But this amendment is designed to put a stop to the practice, which had become fearfully common of *military officers* of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws.” *Id.* at 375 (quoting 7 CONG. REC. at 3849 (statement of Congressman Knott)) (emphasis added).

Placing these remarks in context, however, reveals a very different meaning:

[Mr. Knott:] The gentleman from New York expressed some surprise at the language I employed in this amendment. Had he observed it a little more minutely he would have found there was nothing furtive in it. It provided that it shall be unlawful to employ any part of *the Army* under the pretext or for the purpose of enforcing the law except in cases and under circumstances where such employment is authorized by express congressional enactment.

[Interruption from the chair and a question as to what class of cases the amendment is intended to meet.]

[Mr. Knott:] . . . gentleman from New York could be surprised at the language I employed in this amendment what must be the surprise of every intelligent lawyer on this floor at the announcement of the astounding proposition that the President of the United States, who is to enforce the law, can himself rise above the law and do with *the Army* what the law does not authorize him to do. If that principle is true, our pretext that we have a republican form of Government is a sham and a fraud; we are under a complete, absolute, unlimited, unrestrained, military despotism. Whatever the President of the United States may in his own discretion claim to be lawful he can do and there is no remedy for it.

Now, my friend from Indiana [Mr. Hanna] asked what particular class of cases this amendment applies to. It applies to *every employee of the Army or any part of the Army of the United States* in cases for which there is no congressional authority upon our statute book. I repeat for his edification what I said a while ago that the gentleman from Maryland [Mr. Kimmel] no longer ago than last Monday called the attention of this House to official proof that the *Army of the United States* had been used in hundreds of cases without authority of law, to assist marshals. . . .

or the military.¹⁴⁸ Additionally, at the time, the term “military” was often synonymous with “army.”¹⁴⁹

148. (continued)

There are, as I have already mentioned, particular cases in which Congress has provided that *the Army* may be used, which this bill does not militate against, such as the case of the enforcement of the neutrality laws, the enforcement of the collection of custom duties and of the civil-rights bill, and one or two other instances. But this amendment is designed to put a stop to the practice, which had become fearfully common of *military officers* of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws. The Constitution, sir, guarantees to every State a republican form of government and protection from domestic violence The amendment proposed does not conflict with that and it is surprising to me that the gentleman should be so sensitive when an attempt is made here to prescribe the limits and bounds beyond which the *Army of the United States* cannot go.

The *Army* was made, sir, as the servant of the people. It was not made to override or trample in the dust their rights. Civil law is made for the protection of the people and is paramount to any officer of any grade *in the Army*, from a corporal up to the Commander-in-Chief. The subordination of the military to the civil power ought to be sedulously maintained.

7 CONG. REC. at 3849 (statement of Congressman Knott) (emphasis added). Even more revealing is the fact that Congressman Knott’s amendment deleted the Navy from an earlier version of the bill. *See supra* note 124 and accompanying text.

149. At least some members of Congress considered these terms synonymous. *See id.* at 4297 (“May I ask my honorable friend, is there any citizen of the United States, whether in the naval or military branch of the service or in civil life who does not commit any act at the peril of it being lawful or not?”) (remarks of Sen. Bayard in favor of the bill) (emphasis added). A related 1865 law keeping military or naval officers away from polling places also used the word “military” to denote “army.” *See* REVISED STATUTES, *supra* note 108, § 2002, at 352 (“[n]o military or naval officer, or other person engaged in the civil, military, or naval service of the United States, shall”); *see also* THE FEDERALIST NO. 69, at 386 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (the President has “supreme command and direction of the military and naval forces,” as first general and admiral of the nation), No. 74 (Alexander Hamilton) (entitled “The Command of the Military and Naval Forces . . .”) (emphasis added). *But see* REVISED STATUTES, *supra* note 108, §§ 5297-5300. While RS 5297 though RS 5299 use the phrase “land and naval forces of the United States,” RS 5300 uses the phrase “military forces” in a way that includes both the Army and Navy. *See id.*

While the Act itself did not apply to the Navy, in October 1878, the Attorney General appeared to repudiate the Cushing Doctrine formally, accepting the broader argument that the marshals' implied authority to call out any part of the armed forces as a posse comitatus did not exist.¹⁵⁰ In other words, the marshal was only prohibited under pain of criminal penalty from ordering out the Army as a posse comitatus; however, he had no legal authority to order out sailors and marines into the posse.

President Hayes concurred that the Act limited the marshal's authority over the Army, but he did not believe that the law applied to the President.¹⁵¹ A few months after signing the bill into law, he signed a broad proclamation concerning the generally lawless situation in the New Mexico Territory.¹⁵² He then deployed troops in a seventeen-month military intervention to enforce judicial process and enforce the law.¹⁵³ A great deal can be learned about the Act from this troop deployment since it occurred while the law's limit on the expenditure of federal funds was in place and the authors were still in Congress.

Except for the initial presidential proclamation and the location of the disturbances, it is difficult to distinguish significantly the long-term use of troops in the New Mexico territory from the earlier actions taken in the South during the Reconstruction period. The level of violence and general lawlessness in New Mexico, while directed at whites, was really no worse than in many parts of the former Confederacy. Yet Congress did not object, showing that the Act's primary purpose was to limit the authority of local army commanders to cooperate directly with the marshals and other local law enforcement officials. Presidential involvement with the decision to use troops in a law enforcement role appeared to be the only real limit imposed by the Act.¹⁵⁴

Skeptical that such a contentious law accomplished so little, President Chester Arthur initially felt that the Act severely restrained his ability to respond to a similar lawless situation in the Arizona territory a few years

150. See 16 Op. Att'y Gen. 162 (1878). *But see supra* note 149 (indicating the possibility that the use of the term "military" in this opinion was synonymous with the term "army").

151. 41 Op. Att'y Gen. 313, 1957 US AG LEXIS 2, at *34-35 (Nov. 7, 1957) (citing President Hayes's diary of 30 July 1878); 16 Op. Att'y Gen. 162 (1878); Furman, *supra* note 43, at 97.

152. LAURIE, *supra* note 43, at 68. As some members suggested during the debates, the Act was a significant blow to good order in the sparsely populated West. See 7 CONG. REC. 4303 (1878) (remarks of Mr. Hoar); LAURIE, *supra* note 43, at 66.

later. He, therefore, requested that Congress amend the Act in December 1881 and again in April 1882.¹⁵⁵ In reply to the second request, a unanimous 1882 Senate Judiciary Committee report confirmed that the primary evil addressed by the Posse Comitatus Act was the marshal's power to call out and control the Army.

The posse comitatus clause referred to arose out of an implied authority to the marshals and their subordinates executing the laws to call upon the Army just as they would upon bystanders who, if the Army responded, would have command of the Army or so much of it as they had, just as they would of the bystanders, and would direct them what to do.¹⁵⁶

With respect to the lawless situation in the Arizona territory and the President's request for relief from the limitations imposed by the Act, the

153. See LAURIE, *supra* note 43, at 59-73 (describing the situation in Lincoln County, New Mexico, from 1878-1879); Furman, *supra* note 43, at 97. This period is known as the Lincoln County War. The disorder began early in 1878 when two ranchers, John Chisum and John Turnstall, challenged a rival faction that controlled the region's economy. The Turnstall side included the infamous William H. Bonney, known as Billy the Kid. Initially, the local Army commanders used their troops as a posse comitatus to help keep the peace. Upon learning of the Act via General Order No. 49, however, the local commander was ordered to cease further support of civil authorities without permission from higher authority. The situation deteriorated rapidly as the rival factions and unassociated criminal gangs learned of the Army's impotence. LAURIE, *supra* note 43, at 59-66. One observer wrote that the factional conflict descended into "depredations and murder by a band of miscreants who have probably been attracted from all parts of the country by the knowledge of the inability of the authorities, civil or military, to afford protection." *Id.* at 66 (quoting the Army surgeon stationed at Fort Stanton).

At the request of the regional military commander, the President issued a proclamation that unlawful obstructions, combinations, or assemblages of person against the authority of the United States made it impracticable to enforce the law. The President then authorized the use of federal troops to ensure the faithful execution of the law. For the next seventeen months, the Army acted against the various bandits, gangs, and outlaws to enforce the law. *Id.* at 67-68.

Before the President issued the proclamation, Secretary of War McCrary articulated an emergency exception to the Act in a written order (General Order No. 71). If time did not permit for an application to the President, then troops could be used in cases of sudden and unexpected insurrection or riot endangering public property of the United States, when the U.S. mails might be interrupted or robbed, or in other equal emergencies. The acting commander, however, had to make a post-event report to the Adjutant General. *Id.* at 66.

154. How the proclamation requirement imposed a significant legal, as opposed to political, limit on the President's domestic use of troops is difficult to envision.

155. LAURIE, *supra* note 43, at 75.

same Senate Judiciary Committee said:

In all these cases the President of the United States having the power of employing any part of the Army from three soldiers to three thousand to assist in the execution of the laws in the Territory of Arizona, retains the dominion over this Army himself and the soldiers under command of their own officers to aid the civil authority, instead of being under the command of the marshal of the Territory. . . . The technical posse comitatus which is not expressly authorized by law can be dispensed with, the President, as is perhaps best in these far-off places, retaining the command of the troops by his own officers, who are perhaps quite as safe a depository of such power as the marshal himself. He directs them to resist all this unlawfulness, merely first giving notice to these people that there is not going to be any more of it allowed. So we think that the President is armed with ample power for this emergency already, and that it is not necessary that legislation should be had.¹⁵⁷

The Act clearly did not end Army involvement in domestic legal affairs.¹⁵⁸ Initially, the key difference from the Reconstruction period was that the President approved or ratified most actions;¹⁵⁹ some sort of proclamation complying with RS 5300 was normally, but not always, issued

156. 13 CONG. REC. 3458 (1882) (remarks of Sen. Edmunds on behalf of the Judiciary Committee). The Senate was responding to a presidential request that Congress amend the Act to permit Army assistance to law enforcement in the Arizona territory. *See id.* Accord 7 CONG. REC. 3849 (1878) (remarks of Congressman Knott) (“But this amendment is designed to put a stop to the practice, which has become fearfully common, of military officers of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws.”).

157. 13 CONG. REC. at 3458. The notice mentioned by Senator Edmunds is the presidential proclamation described under RS 5300. *See also* 17 Op. Att’y Gen. 333 (1882); 17 Op. Att’y Gen. 242 (1881).

158. The Army intervened in domestic affairs 125 times from 1877-1945. LAURIE, *supra* note 43, at 421. In addition to the Lincoln County War, described previously in note 153, in April 1878 troops were used in Hastings, Nebraska, as a show of force to prevent a potential jailbreak. The local Army commander initiated action on his own authority under the “emergency” authority of General Order No. 71. *See id.* at 72-74; *supra* note 153 (discussing General Order No. 71). Additional interventions occurred in Arizona territory (1881-1882), Utah (1885), Wyoming (1892 and 1895), Washington territory (1885-1886), and Oklahoma (1894). *See* LAURIE, *supra* note 43, at 73-113.

159. There were, however, some very significant exceptions to the general rule of direct presidential involvement under the “Direct Access Policy” from 1917-1921. LAURIE, *supra* note 43, at 230-32, 259; *see infra* notes 185-89 and accompanying text.

before troops intervened,¹⁶⁰ and the Army stayed out of the South.¹⁶¹ The federal response to the Chicago Pullman strikes in 1894,¹⁶² however, highlighted the Act's negligible impact on the almost unchecked scope of presidential authority as Commander in Chief.

At the time of the strike, the U.S. Attorney General, Richard Olney, was on the payroll of a major railroad, and he moved aggressively to involve the federal government in the dispute.¹⁶³ His actions included ordering the U.S. Marshal to deputize some 3000 representatives of the railroad companies, including a large number of unemployed thugs and drunks, to increase tensions.¹⁶⁴ Acting largely on a pretext, Olney then convinced President Cleveland on 3 July 1894 to dispatch federal troops to Illinois over the strong objection of the governor and before the city's mayor had even asked for state assistance.¹⁶⁵

Initially, the troops were broken into small detachments assigned to assist police squads and marshals' posses throughout the city.¹⁶⁶ Placing

160. *See supra* notes 108-09 and accompanying text (discussing RS 5300 and other related statutes). The requirement to issue a proclamation became, in many cases, more of a formality than a genuine legal hurdle. For example, during a 1892 Army intervention to quell labor unrest in Idaho, the presidential proclamation neglected to issue a formal cease and desist order as required by law. *See LAURIE, supra* note 43, at 155-57. Four days after the intervention began, the Secretary of War directed the local Army commander to issue the appropriate proclamation on 17 July. *Id.* at 159. Although subsequent use of the troops in Idaho as a posse comitatus exceeded the scope of their earlier orders, the President ratified these actions on 2 August. *See id.* at 160.

161. *See supra* note 158.

162. Responding to labor unrest, George Pullman closed his manufacturing plant in May 1894. The resulting strike involved the plant workers and the Railway Union. A key tactic of the striking railway workers was to not handle any Pullman cars on any train. The railroads, acting through its group, the General Manager's Association, sought to provoke federal intervention. They did so by placing Pullman cars on as many trains as possible and avoiding calling on municipal authorities or the state militia between 26 June and 2 July. *LAURIE, supra* note 43, at 134.

163. *Id.* at 134, 137. Attorney General Olney reportedly received \$10,000 per year from the railroad, while his federal salary was \$8000 per year. *Id.* at 134-35.

164. *Id.* at 136.

165. *Id.* at 138, 144. Over 4700 state National Guard troops were available to assist. At the peak of the riot, about 4000 were involved in quelling the disorder. *Id.* at 145. This is not the only time that the Cleveland administration used a pretext to justify federal intervention in labor disputes. Army troops occupied Coeur d'Alene, Idaho, from July to September 1894 to protect unthreatened railroads and monitor tranquility. Earlier violence had subsided before the regulars arrived without even the call-up of state troops. Local officials pressured the governor to request federal troops, and keep them in place, to break the union. *See id.* at 163-65.

small detachments of troops under the ostensible command of local civilians to help enforce the law was essentially using the Army as a posse comitatus, albeit upon the general order of the President instead of the command of the local marshal. The governor complained bitterly about the unilateral federal action and pointed out that the President had neglected to issue the necessary cease and desist proclamation required under RS 5300.¹⁶⁷ In the end, however, the federal troops were a valuable asset in suppressing the riots, and there was no congressional outrage about the arguable violation of the Act and the role of the administration in creating the crisis.¹⁶⁸ It appeared that the Act did not, at least in cases involving interstate commerce, limit the President's authority to use and deploy troops domestically as he saw fit.¹⁶⁹

The only domestic use of troops that provoked even a partial congressional response concerned President McKinley's deployment of 500 troops to Coeur d'Alene, Idaho, from May 1899 to April 1901 at the governor's request. The situation leading up to this deployment was similar to the radical Reconstruction period in the South in several respects. The underlying tension was about political and social power as the miners

166. *Id.* at 140-41.

167. *Id.* at 144 & n.28. The proclamation was issued on 9 July. *Id.*

168. A similar set of facts developed in Hammond, Indiana. Attorney General Olney urged the governor to request Army assistance to protect against domestic violence. When the governor declined, the Secretary of War ordered troops into the area to remove obstructions to the mail and interstate commerce on 8 July 1894, one day before the President issued his proclamation. Late in the afternoon of 8 July, federal troops, under the command of Captain W.T. Hartz, fired indiscriminately into a crowd attempting to overturn a rail car. The shots wounded over a dozen individuals and killed an innocent bystander. The mayor protested the dispatch of federal troops to the town, and the local magistrate swore out arrest warrants for the troops involved in the shooting. Neither military nor civil officials, however, pressed the case. *Id.* at 149-50 & nn.28, 41, 43.

169. Furman, *supra* note 43, at 90. The prosecution of the labor leaders led to *In re Debs*, 158 U.S. 564 (1895). While the defense never raised the issue of the Posse Comitatus Act in *Debs*, the Court approved the President's use of troops without congressional authority in sweeping language, stating:

The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

Id. at 582.

struggled with the entrenched power structure represented by the anti-labor mining companies and state government. At the local level, miners put men into office sympathetic to the labor union. Either as result of the citizens' natural sympathies with the labor unions, or threats from a "secret clan," local efforts to prosecute violence by elements of the labor movement had met with little success over the years.¹⁷⁰

Matters came to a head in April 1899 when a large mining operation, in apparent violation of state law, announced that it would fire all union members and refused to arbitrate the dispute.¹⁷¹ A large piece of company equipment was blown up, and two employees were killed during a gunfight with company guards.¹⁷² President McKinley sent in regular troops at the request of the governor to restore order. Either unaware or unconcerned about the statutory requirements, the President failed to issue the proclamation required by RS 5300.¹⁷³ Without a proclamation, the subsequent Army actions were legally indistinguishable from many uses of troops during the radical Reconstruction period.

Violence subsided before the federal troops arrived because the perpetrators fled from the region. The troops, therefore, were used as part of a law enforcement dragnet to apprehend "suspects" identified by state officials.¹⁷⁴ In one instance, about 150 Army troops accompanied by four state deputies arrested the entire male population of one town, around 300 men in all.¹⁷⁵ In total, the Army helped state officials arrest and detain, without legal process, over 1000 union members and sympathizers, and it placed many under Army guard for up to four months.¹⁷⁶ The overall mil-

170. COEUR D'ALENE LABOR TROUBLES, H.R. REP. NO. 1999, at 28 (1900), *microformed on* CIS No. 4027, Fiche 8-9 (Cong. Info. Serv.).

171. *Id.* at 130-31.

172. LAURIE, *supra* note 43, at 166.

173. *Id.*; *see also supra* text accompanying notes 108-09. Revised Statute 5300 stated: "Whenever, in the judgment of the President, it becomes necessary to use military forces under this Title, the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes, within a limited time." REVISED STATUTES, *supra* note 108, at 1030. The Title referred to by RS 5300 is the law concerning insurrections, such as RS 5297-5299. *See id.*

174. H.R. REP. NO. 1999, at 8, 10, 126; LAURIE, *supra* note 43, at 171.

175. H.R. REP. NO. 1999, at 127. The Democrats questioned the legal status of the "so-called" state deputies due to the irregular nature of their appointments and the questionable authority of the person who made them. *Id.*; *see, e.g., id.* at 129-30 (legal status of Bartlett Sinclair). The Democrats also noted that federal troops must have made all arrests during a mission to pursue suspects into Montana since the Idaho state deputies had no authority to make arrests outside of Idaho. *Id.* at 128.

itary commander also helped the state government and mining companies illegally break the unions by instituting a system of “yellow dog” labor contracts that made workers promise not to join a union as a condition of employment.¹⁷⁷

In late 1899, the House Committee on Military Affairs investigated the legality of the Army’s actions. The June 1900 report split along party lines, with the Republican majority finding no fault with the Republican President or the actions of the Army commander.¹⁷⁸ In a bold display of misdirection, the majority brushed aside the President’s failure to issue a proclamation under RS 5300 by reinventing the statute’s text. According to the majority, the RS 5300 proclamation was only necessary when the President imposed martial law.¹⁷⁹ The troop deployment was, therefore, perfectly legal under the anti-insurrection laws at RS 5297-5298.¹⁸⁰

While sharply critical, the Democratic minority agreed that the initial deployment was lawful.¹⁸¹ The Democrats branded subsequent actions by the troops and President, however, as “reprehensible, violative of the liberty of the citizen, and totally unwarranted by the laws and Constitution of the United States.”¹⁸² Surprisingly, the Democrats made absolutely no mention of the Posse Comitatus Act. Either Congress had already forgotten about it entirely, or Congress agreed that the Act only undid the Cushing Doctrine. Clearly, Congress did not see the Act as imposing any meaningful legal limit on the Commander in Chief’s domestic use of the armed forces.

Subsequent Presidents of the early twentieth century generally complied with the various statutes regarding domestic employment of military

176. LAURIE, *supra* note 43, at 170-71, 75. Only fourteen ever went to trial; eleven were convicted. *Id.* at 175.

177. *Id.* at 173. The administration eventually rebuked the military commander for this action. *Id.*

178. H.R. REP. NO. 1999, at 124-25; LAURIE, *supra* note 43, at 176.

179. H.R. REP. NO. 1999, at 1, 11. This mischaracterization of RS 5300 was probably deliberate since the majority report mentions the correct use of the proclamation in accordance with RS 5300 when describing a 1892 intervention in the same area. *See id.* at 62; *see also supra* text accompanying notes 108-09 (describing RS 5300, which has nothing to do with a declaration of martial law).

180. H.R. REP. NO. 1999, at 10-11; *see supra* notes 108-09 and accompanying text (explaining the legal regime then in place concerning domestic employment of land and naval forces to suppress insurrections and enforce the laws).

181. H.R. REP. NO. 1999, at 131-32.

182. *Id.* at 132.

force.¹⁸³ Presidents Theodore Roosevelt and Taft closely adhered to the statutory requirements, issued the necessary proclamations required by RS 5300, and kept the Army neutral in what were mostly labor disputes. President Wilson began his administration in a similar manner.¹⁸⁴

In May 1917, however, Secretary of War Newton Baker unilaterally instituted a “Direct Access Policy” that suspended application of the Posse Comitatus Act and all other statutes governing the domestic employment of troops.¹⁸⁵ Under this policy, local and state officials could request and receive troops directly from regional Army commanders without any higher-level approvals or issuance of a presidential cease and desist proclamation.¹⁸⁶ Additionally, Secretary Baker instructed the regional Army commanders to allow their subordinates to respond directly to requests for federal military aid, and troops were authorized to make arrests.¹⁸⁷ In essence, Secretary Baker reestablished key parts of the Cushing Doctrine for nearly four and a half years.¹⁸⁸

Acting under the Direct Access Policy, Army troops intervened in twenty-nine domestic disorders between July 1917 and September 1921. The President issued the required proclamation in only one instance. Employers and local politicians used Army troops, although officially neutral, to break strikes; disperse crowds and demonstrations; prevent labor meetings; stifle political dissent; and arrest, detain, and imprison workers without the right of habeas corpus.¹⁸⁹

While labor leaders and union members certainly objected to these uses of federal troops, the Congress and general public appeared to accept the Direct Access Policy as a necessary national security measure. Presi-

183. LAURIE, *supra* note 43, at 179-92.

184. *Id.* at 203, 221.

185. *Id.* at 230. The Direct Access Policy was designed to solve the problem in many states in which the National Guard had been federalized and sent out-of-state in support of World War I. *Id.* at 229-30.

186. *Id.* at 230.

187. *Id.* at 231.

188. *Id.* at 252; *see supra* section III.B. The Army Judge Advocate General articulated that the Posse Comitatus Act did not intend to limit the employment of the military forces of the nation in meeting an attack on the very nation itself—a duty that rests primarily on the military rather than on civil power. LAURIE, *supra* note 43, at 231 (quoting Glasser Report, Lumber, at 7e-7f; Memorandum, The Judge Advocate General, to Attorney General, subject: Opinion on Legal Theory on Use of Troops in Civil Areas During War (12 Mar. 1917)).

189. LAURIE, *supra* note 43, at 232, 253.

dent Harding finally ended the Direct Access Policy in September 1921.¹⁹⁰ He did not do so, however, under any particular congressional pressure or concern that military officers were going to be prosecuted for violating the Posse Comitatus Act. The administration's move back to "normalcy" was internally driven.¹⁹¹ Yet again, it appeared that the Posse Comitatus Act imposed no serious legal limit upon the President's, or his administration's, authority to use Army troops internally, at least during or near a period of national emergency or conflict.

In addition to these presidential actions, Congress also moved decisively to increase the military's direct role in certain types of law enforcement.

V. Congress Steadily Increases the Military's Role in Law Enforcement¹⁹²

Within a generation of the Act's passage, Congress began a general trend to increase military participation in domestic law enforcement. It did so, however, without articulating an overall plan, theory, or theme concerning when increased military involvement in civil affairs was desirable. Moreover, for the first eighty-seven years, Congress did not discuss the

190. *Id.* at 232.

191. *Id.* at 231-32, 253, 259.

192. This section covers only a sample of the many instances where Congress provided explicit domestic law enforcement authority to the DOD armed forces. The cited laws are some of the most relevant to the current debate over the military's role in homeland security. Moreover, the DOD does not currently recognize the authority contained in most of these laws. See DOD DIR. 5525.5, *supra* note 7.

In a few instances, Congress also took away some authority. See *infra* note 454 and accompanying text (discussing a 1909 congressional effort to decrease the role of the armed forces in a civil law enforcement role). Additionally, part of the 1957 Civil Rights Act repealed the President's authority to use the land or naval forces to aid in the enforcement of an 1866 civil rights law (RS 1989). See Act of Sept. 9, 1957, Pub. L. No. 85-315, pt. III, § 122, reprinted in 1957 U.S.C.C.A.N. 707. The legislative history does not discuss this change; however, the 1957 Civil Rights Act contained four major provisions to expand the role of the federal government in civil rights. Namely, the law created a Commission on Civil Rights, established a Civil Rights Division in the Department of Justice, provided civil remedies against conspiracies depriving a person of civil rights, and provided a civil remedy for the Attorney General's use in protecting voting rights. *Id.* pts. I-IV, reprinted in 1957 U.S.C.C.A.N. 703-08; H.R. REP. No. 291, at 1966-76. It may be, therefore, that military involvement was no longer considered necessary due to the increased role of federal civil authorities. Opponents may also have quietly inserted the provision to undercut the law's practical impact.

Act. This leaves a disconnected series of apparently ad hoc policy decisions that are, nonetheless, important to an understanding of the law concerning the domestic employment of DOD forces.

A. Rivers and Harbors Act of 1894 (33 U.S.C. § 1)

In the late nineteenth century, Congress began to increase the Army's direct role in regulating civilian behavior and enforcing its new regulations. Section 4 of the Rivers and Harbors Act of 1894 vested in the Secretary of War the authority "to prescribe such rules and regulations for the use, administration, and navigation of any or all canals and similar works of navigation that now are, or that hereafter may be, owned, operated, or maintained by the United States as in his judgment the public necessity may require."¹⁹³ This gave the Secretary of War the authority to control and supervise the navigable waters of the United States.¹⁹⁴ Initially, the federal government opined that enforcement of this authority would be through injunctions if the unlawful action had not already occurred, or through criminal proceedings if the unlawful activity had occurred.¹⁹⁵ In 1902, however, the "power and authority to swear out process, and arrest and take into custody" was given to, among others, "assistant engineers and inspectors employed under them by authority of the Secretary of War."¹⁹⁶

The Army implemented part of this regulatory authority by establishing permanent exclusion zones ("restricted areas") around many military facilities.¹⁹⁷ Restricted areas generally provide security for government property, protect the public from risks arising from the government's use of a water area, or both.¹⁹⁸ Typically, the military official responsible for the facility has primary responsibility for enforcement of the regulation.¹⁹⁹

193. See Act of Aug. 17, 1894, ch. 299, § 4, 28 Stat. 362 (codified as amended at 33 U.S.C. § 1 (2000)).

194. See *Dams Across the Rio Grande*, 21 Op. Att'y Gen. 518 (1897).

195. See *id.*

196. Rivers and Harbors Act of 1899, ch. 425, § 17, 30 Stat. 1153 (codified as amended at 33 U.S.C. § 413). This enforcement system was made applicable to the authority in the Rivers and Harbors Act of 1894 by the Rivers and Harbors Act of 1902, ch. 1079, § 6, 32 Stat. 331. *But see* 33 U.S.C. § 413 (does not list 33 U.S.C. § 1 as a statute coming under 33 U.S.C. § 413's enforcement mechanism).

197. 33 C.F.R. pt. 334 (LEXIS 2003).

198. *Id.* § 334.2(b).

199. See, e.g., *id.* §§ 334.275 (Air Force enforcement), 334.280 (Army enforcement), 334.290 (Navy enforcement).

B. Espionage Act of 1917

During World War I, Congress expressly authorized the President to use all land or naval forces to take direct law enforcement actions in support of new authority granted to the Coast Guard under the Espionage Act of 1917.²⁰⁰ One purpose of the Espionage Act was to protect merchant shipping from sabotage.²⁰¹ The Espionage Act authorized the Secretary of the Treasury,²⁰² or the Secretary of the Navy when the Coast Guard is operating as part of the Navy,²⁰³ subject to approval by the President, to issue regulations:

govern[ing] the anchorage and movement of any . . . vessel[, foreign or domestic,] in the territorial waters of the United States, to inspect such vessel at any time, to place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, [to] take[, by and with the consent of the President,] for such purposes full possession and control of such vessel and remove therefrom the officers and crew thereof, and all other persons not specially authorized by him to go or remain on board thereof[.]²⁰⁴

The triggering event for the Espionage Act is a proclamation or Executive Order declaring that “a national emergency [exists] by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States.”²⁰⁵ Congress has explicitly stated that “[t]he President may employ such departments, agencies, officers, or instrumentalities of the United States as he may deem necessary to carry out the purpose of this title.”²⁰⁶ The issu-

200. Act of June 15, 1917, Pub. L. No. 65-24, tit. II, ch. 30, 40 Stat. 217-31 (codified as amended at 50 U.S.C. § 191 (2000)).

201. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE, CIVIL LIBERTIES IN WARTIME* 173 (1998).

202. The Espionage Act initially authorized the Secretary of the Treasury to issue regulations. When the Coast Guard was transferred to the Department of Transportation, the authority to issue regulations was transferred to the Secretary of Transportation. See Department of Transportation Act, Pub. L. No. 89-670, § 6(b)(1), 80 Stat. 931, 938 (1966).

203. See 50 U.S.C. § 191a.

204. *Id.* § 191 (first paragraph).

205. *Id.* A 1996 Amendment permits Espionage Act actions upon the Attorney General’s determination of an actual or anticipated mass migration requiring a federal response. See Pub. L. No. 104-208, § 649, 110 Stat. 3009-711 (1996).

ance of a presidential proclamation or Executive Order invoking the Espionage Act has the effect of transferring all authorities to regulate the anchorage and movement of vessels, except the authorities codified in 33 U.S.C. § 3 and 14 U.S.C. § 91, to the Secretary of the department in which the Coast Guard is operating.²⁰⁷ Therefore, upon the invocation of the Espionage Act, all branches of the U.S. armed forces can enforce Espionage Act regulations and all regulations pertaining to vessel operations.

The potential scope of this military law enforcement role is very broad. The Espionage Act was the primary authority used to control the movement and anchorage of vessels during World War II. Several regulations were issued during World War II under the authority of the Espionage Act.²⁰⁸ Following the presidential proclamation of a national emergency on 27 June 1940, the Secretary of the Treasury first issued regulations implementing the Espionage Act on 2 July 1940.²⁰⁹ Subsequent to this, the

206. 50 U.S.C. § 194.

207. See *Movement of Vessels in St. Mary's River*, 33 Op. Att'y Gen. 203 (1922). The basis of this opinion was that when the Espionage Act is invoked, its regulatory authority supercedes other authorities. 33 U.S.C. § 3, however, was enacted during World War I after President Wilson had invoked the provisions of the Espionage Act. See Act of July 9, 1918, ch. 143, subch. XIX, §§ 1-4, 40 Stat. 892, 893. Thus, Congress could not have intended that invocation of the Espionage Act would supercede the authority to regulate vessels in the area around ranges. In addition, the authority to issue regulations around ranges was not viewed as being constrained to the territorial waters. See *Movement of Vessels in St. Mary's River*, 33 Op. Att'y Gen. at 203. The then Secretary of War's (now Secretary of the Army's) authority to issue regulations for ranges, see 33 U.S.C. § 3 (2000), was viewed as a wholly separate authority not overtaken by the Secretary of the Treasury upon invocation of the Espionage Act. See Letter from Coast Guard Headquarters to District Coast Guard Officer, 13th Naval District, Seattle, Washington (July 14, 1943), excerpted in U.S. COAST GUARD, LAW BULL. No. 86, at 3 (1943). Similarly, 14 U.S.C. § 91 was enacted shortly before World War II, see Act of Nov. 15, 1941, ch. 471, § 1, 55 Stat. 763, after the President had already invoked the Espionage Act. Following the same logic, the authority in 14 U.S.C. § 91 is not overtaken upon the invocation of Espionage Act authority. See *infra* notes 233-34 and accompanying text.

208. See, e.g., Security of Ports and the Control of Vessels in the Navigable Waters of the United States, 7 Fed. Reg. 8026 (Oct. 10, 1942) (to be codified at 33 C.F.R. pt. 6) (amending, consolidating, and reissuing 33 C.F.R. pts. 6-7, 9 into a new 33 C.F.R. pt. 6) (these regulations were also issued under the authority of 50 U.S.C. § 191c (Act of Nov. 15, 1941)); see also U.S. DEP'T OF TREASURY, *Rules Are Adopted Governing the Anchorage and Movements of Vessels—To Be Enforced by Captains of the Port*, 1 COAST GUARD BULL. No. 18, at 141 (1940) [hereinafter CG BULL. I-18]; U.S. DEP'T OF TREASURY, *Coast Guard Begins Enforcement of New Regulations Governing Vessel Movement in American Ports*, 1 COAST GUARD BULL. No. 29, at 227-28 (1941) [hereinafter CG BULL. I-29].

209. See Regulations for the Control of Vessels in the Territorial Waters of the United States, 5 Fed. Reg. 2442 (July 2, 1940).

Coast Guard issued regulations amending and expanding these regulations.²¹⁰

The Coast Guard regulations issued in October 1942 took the form of rules regarding: boarding and searching of vessels;²¹¹ possession and control of foreign or domestic vessels;²¹² movement of vessels, including, supervision of vessels, identification requirements, departure licenses, special rules of local waters, individual licenses, general licenses, departure permits, crew lists, and “restricted areas” around bridges;²¹³ anchorage conditions and areas;²¹⁴ anchorage of vessels carrying explosives;²¹⁵ loading, unloading, and movement of explosives and inflammable material;²¹⁶ use and navigation of waters emptying into the Gulf of Mexico by vessels having explosives or other dangerous articles on board;²¹⁷ specific anchorage areas;²¹⁸ and general licenses.²¹⁹

The most recent use of Espionage Act authority followed the shooting down of two Brothers to the Rescue aircraft by Cuban armed forces. The presidential proclamation of a national emergency addressed the distur-

210. *See* Anchorage and Movements of Vessels and the Lading and Discharging of Explosive or Inflammable Material or Other Dangerous Cargo, 5 Fed. Reg. 4401 (Nov. 7, 1940) (codified at 33 C.F.R. pt. 7); Regulations for the Control of Vessels in the Territorial Waters of the United States, 6 Fed. Reg. 5221 (Oct. 14, 1941) (amending 33 C.F.R. pt. 6); Anchorage and Movements of Vessels and the Lading and Discharging of Explosive or Inflammable Material or Other Dangerous Cargo, 6 Fed. Reg. 5255 (Oct. 15, 1941) (amending 33 C.F.R. pt. 7); General License for Movements of Vessels Within, or Departure from, Territorial Waters, 6 Fed. Reg. 5342 (Oct. 21, 1941) (codified at 33 C.F.R. pt. 9) (establishing general licenses); General Licenses for Movements of Vessels Within, or Departure from, Territorial Waters, 7 Fed. Reg. 43 (Jan. 1, 1942) (revoking the general license for the waters of the West Passage of Narragansett Bay and the Sakonnet River); General Licenses for Movements of Vessels Within, or Departure from, Territorial Waters, 7 Fed. Reg. 4343 (June 9, 1942) (establishing general license number 2); Regulations for the Security of Ports and the Control of Vessels in the Navigable Waters of the United States, 7 Fed. Reg. 8564 (Oct. 23, 1942) (amending 33 C.F.R. pt. 6).

211. *See* 33 C.F.R. § 6.6 (1942); Security of Ports and the Control of Vessels in the Navigable Waters of the United States, 7 Fed. Reg. 8026 (Oct. 10, 1942).

212. *See* 33 C.F.R. § 6.7.

213. *Id.* §§ 6.13-.21.

214. *See id.* §§ 6.25-.37.

215. *See id.* §§ 6.50-.56.

216. *See id.* §§ 6.75-.85.

217. *See id.* pt. 6, subpt. B.

218. *See id.* pt. 6, subpt. C.

219. *See id.* pt. 6, subpt. D (based on regulations adopted on 10 October 1942, *see* Regulations for Security of Ports and the Control of Vessels in the Navigable Waters of the United States, 7 Fed. Reg. 8065 (Oct. 10, 1942)).

bances or threatened disturbances of U.S. international relations, and it authorized the regulation of the anchorage and movement of domestic and foreign vessels.²²⁰ These regulations took the form of a security zone²²¹ requiring certain size vessels to obtain permission from the Coast Guard Captain of the Port (COTP) before departing the zone with the intent to enter Cuban territorial waters.²²² These regulations gave the COTP the power to exercise all Espionage Act authority, including: issuing orders to control the launching, anchorage, docking, mooring, operation, and movement of vessels; removing people from vessels; placing guards on vessels; and taking partial or full control of a vessel.²²³ As previously noted, all branches of the U.S. armed forces may assist the COTP in enforcement of this regulation. As with other regulations issued under the Espionage Act, a violation of the regulations is a federal felony punishable by ten years in jail, a \$250,000 fine, and vessel seizure and forfeiture.²²⁴

C. 33 U.S.C. § 3 (Gunnery Ranges)

During World War I, Congress passed what is now 33 U.S.C. § 3, which granted the Army Corps of Engineers the authority to issue regulations to prevent injuries from target practice at gunnery ranges.²²⁵ Because this authority was passed while the Espionage Act was in effect, the Espi-

220. Proclamation No. 6867, 61 Fed. Reg. 8843 (Mar. 5, 1996). President Bush continued this authority on 26 February 2002. *See* 67 Fed. Reg. 9387 (Feb. 28, 2002).

221. A security zone is a designated area of land, water, or land and water from which persons and vessels are either prohibited or subject to various operating restrictions. *See* 33 C.F.R. §§ 6.01-5, 6.04-6, 165.30, 165.33 (LEXIS 2003). While the concept of a security zone can be traced back to the original Espionage Act, the first recorded use of the term “security zone” was in the 1965 amendments to the Magnuson Act regulations at 33 C.F.R. part 6. *See* Exec. Order No. 11,249, Amending Regulations Relating to the Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities of the United States, 30 Fed. Reg. 13,001 (Oct. 13, 1965); *see also supra* section III.B.

222. *See* 33 C.F.R. § 165.T07-013 (1998) The zone was narrowly tailored with respect to vessels of certain sizes and geographic scope. *See id.*

223. *See* 50 U.S.C. § 191 (2000); 33 C.F.R. § 165.T07-013 (discussing the COTP’s authority).

224. 18 U.S.C. § 3571 (2000); 50 U.S.C. § 192.

225. *See* Act of July 19, 1918, ch. 143, subch. XIX, §§ 1-4, 40 Stat. 892 (presently codified at 33 U.S.C. § 3 (2000)).

onage Act does not supercede this statute.²²⁶ The enforcement authority here is very clear as well. The Act explicitly states:

To enforce the regulations prescribed pursuant to this section, the Secretary of the Army may detail any public vessel in the service of the Department of the Army, or upon the request of the Secretary of the Army, the head of any other department may enforce, and the head of any such department is authorized to enforce, such regulations by means of any public vessel of such department.²²⁷

The plain language of the statute indicates Congress's intent to use the Army and any other department that has public vessels to enforce regulations issued under this authority.

One notable use of this authority is the "danger zone" established as part of the bombing and gunnery range on the eastern portion of Vieques Island, Puerto Rico.²²⁸ Persons and vessels are prohibited from the waters off Vieques during firing exercises.²²⁹ Violators are subject to arrest and imprisonment for up to six months.²³⁰ They may also be prosecuted for violating the federal trespass statute at 18 U.S.C. § 1382.²³¹ The Navy is primarily responsible for enforcing the danger zone regulations.²³²

D. Act of 15 November 1941 (14 U.S.C. § 91)

On the eve of World War II, Congress granted the Navy additional authority to enforce a new national security law in conjunction with the Coast Guard. The new authority was initially redundant since the President invoked the provisions of the Espionage Act for the "Control of Vessels in Territorial Waters of the United States" on 27 June 1940.²³³ As in World War I, once the President invoked the Espionage Act, only the

226. *See supra* note 207.

227. 33 U.S.C. § 3.

228. 33 C.F.R. § 334.1470 (LEXIS 2003). A danger zone is a water area used for target practice or other especially hazardous operations for the armed forces. *Id.* § 334.2(a).

229. *Id.* § 334.1470(b).

230. *See* 33 U.S.C. § 3 (third paragraph).

231. *See* United States v. Zenon-Rodriguez, No. 02-1207, 2002 U.S. App. LEXIS 7718, at *4-5 (1st Cir. Apr. 29, 2002); United States v. Ayala, No. 01-2148, U.S. App. LEXIS 7716, at *11 (1st Cir. Apr. 29, 2002).

232. 33 C.F.R. § 334.1470(b)(2).

authority in 33 U.S.C. § 3 to issue regulations to prevent injury from gunnery ranges remained an independent authority to govern the anchorage and movement of vessels.²³⁴

Congress probably believed that another, more specific, independent authority was needed as it tasked the Coast Guard to control the anchorage and movement of vessels to ensure the safety of U.S. naval vessels on 15 November 1941.²³⁵ Unlike the Espionage Act, the authority granted the Coast Guard in the Act of 15 November 1941 was not limited to periods of national emergency. Thus, the Coast Guard's (and Navy's) permanent authority to protect naval vessels was authority separate and apart from the Espionage Act.²³⁶

The Act of 15 November 1941²³⁷ stated:

The captain of the port, Coast Guard district commander, or other officer of the Coast Guard designated by the Commandant thereof, or the Governor of the Panama Canal in the case of the territory and waters of the Canal Zone, shall so control the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, as to insure the safety or security of such United States naval vessels as may be present in his jurisdiction. In territorial waters of the United States where immediate action is required, or where representatives of the Coast Guard are not present, or not present in sufficient force to exercise effective control of shipping as provided herein, the

233. Proclamation No. 2412, 3 C.F.R. § 164 (1938-1943). During World War II, the Espionage Act was the primary statutory basis of the regulations for the control of vessels in U.S. waters. *See, e.g.*, Security of Ports and the Control of Vessels in the Navigable Waters of the United States, 7 Fed. Reg. 8026 (Oct. 10, 1942); CG BULL. I-18, *supra* note 208; CG BULL. I-29, *supra* note 208. *Cf.* Movement of Vessels in St. Mary's River, 33 Op. Att'y Gen. 203 (1922) (concluding that upon invocation of the Espionage Act, the Espionage Act supercedes the various authorities over the anchorage and movement of vessels transferred to the Secretary of the Treasury (now Secretary of Transportation) for the duration of the emergency, with the exception of regulations for ranges).

234. *See supra* notes 226-27 and accompanying text.

235. *See* Act of Nov. 15, 1941, ch. 471, § 1, 55 Stat. 763 (current version at 14 U.S.C. § 91 (2000)). The entire Coast Guard was moved under the control of the Navy on 1 November 1941. *See* Exec. Order No. 8929, 6 Fed. Reg. 5581 (Nov. 4, 1941). Earlier Executive Orders had moved specific portions of the Coast Guard to the Navy. *See, e.g.*, Exec. Order No. 8767, 6 Fed. Reg. 2743 (June 6, 1941); Exec. Order No. 8895, 6 Fed. Reg. 4723 (Sept. 16, 1941); Exec. Order No. 8851, 6 Fed. Reg. 4179 (Aug. 20, 1941); Exec. Order No. 8852, 6 Fed. Reg. 4180 (Aug. 20, 1941).

senior naval officer present in command of any naval force may control the anchorage or movement of any vessel, foreign or domestic, to the extent deemed necessary to insure the safety and security of his command.²³⁸

The Act of November 15 was viewed as a broad grant of authority to monitor and control vessel operations and, therefore, was used as authority to issue regulations during World War II.²³⁹ For example, the regulations regarding the “Security of Ports and the Control of Vessels in the Naviga-

236. This argument is based on: (1) the plain language of the Espionage Act and the Act of 15 November 1941; and (2) historical context. The plain language of the Espionage Act focuses on controlling vessels and controlling access to vessels to “secure such vessels from damage or injury, prevent damage or injury to any harbor or waters of the United States, or to secure the rights or obligations of the United States.” 50 U.S.C. § 191 (2000). Nothing in the plain language specifically identifies naval vessels as a protected entity. The Act of 15 November 1941 was enacted after the presidential proclamation of an emergency; therefore, the Coast Guard already had the authority to control the anchorage and movement of vessels under Espionage Act authority. Consequently, unless Congress was concerned that the Espionage Act did not cover naval vessels, the Act of 15 November 1941 would have been unnecessary. *Cf. supra* text accompanying note 226 (making the same argument for why the Navy has authority to regulate the areas around ranges even after the invocation of the Espionage Act).

The legislative history is sparse in this area. During World War II, however, the Coast Guard concluded that local officials could issue regulations under either the Espionage Act or the Act of 15 November 1941 to protect a submarine net tender. *See* Letter from Coast Guard Headquarters to District Coast Guard Officer, 3d Naval District (Jan. 13, 1943), *excerpted in* U.S. COAST GUARD, LAW BULL. No. 80, at 5 (1943).

237. Act of Nov. 15, 1941, ch. 471, § 1, 55 Stat. 763 (originally codified at 50 U.S.C. § 191c). Note that this is a separate statute and not a subpart of 50 U.S.C. § 191. Section 2 of the Act was codified as 50 U.S.C. § 191a (declaring that the powers vested in the Secretary of the Treasury by the Espionage Act will transfer to the Secretary of the Navy when the Coast Guard operates as part of the Navy); Section 3 of the Act amended 50 U.S.C. § 192 (deleting a reference to the Secretary of the Treasury and Governor of the Panama Canal); and Section 4 of the Act was codified as 50 U.S.C. § 191b (stating that nothing in the Act affects the power of the Governor of the Panama Canal). The Act of 15 November 1941 was also codified, for a time, in 14 U.S.C. § 48a. With the recodification of Title 14 in 1949, after the Coast Guard returned to the Department of the Treasury, 50 U.S.C. § 191c was deleted, but the authority was retained and transferred to 14 U.S.C. § 91. The reason the recodification removed the authority from its previous location in Title 50 where it was with the Espionage Act statutes is unknown. While the text of the Act of 4 August 1949 does not explain why this statute was moved, the purpose of the Act was to “revise, codify, and enact into law, Title 14 of the United States Code, entitled ‘Coast Guard.’” Act of Aug. 4, 1949, 63 Stat. 495.

238. Act of Nov. 15, 1941, ch. 471, § 1.

239. *See, e.g.*, Security of Ports and the Control of Vessels in the Navigable Waters of the United States, 7 Fed. Reg. 8026 (Oct. 10, 1942).

ble Waters of the United States,” issued on 10 October 1942, were issued, in part, under the authority of the Act of 15 November 1941.²⁴⁰ The regulations specifically authorized the senior naval officer present in command of any naval force to “control the anchorage or movement of any vessel . . . to the extent he deems necessary to insure the safety and security of his command.”²⁴¹ The triggering events for this power were the need for immediate action and that representatives of the Coast Guard were “not present, or not present in sufficient force to exercise effective control of shipping.”²⁴²

Following the expiration of Espionage Act authority after the war, the basis for creating protective zones surrounding Navy vessels moored at Navy installations reverted to peacetime authorities under 33 U.S.C. §§ 1 and 471.²⁴³ The statutory provisions currently located at 14 U.S.C. § 91, however, remained a basis to create protective zones around Navy vessels away from Navy installations.²⁴⁴

On 15 June 2002, the Coast Guard issued regulations implementing 14 U.S.C. § 91.²⁴⁵ The regulations establish permanent exclusion zones around naval vessels within the navigable waters of the United States and implement other security measures. A violation of the regulations is a Class D felony.²⁴⁶ When necessary, the senior naval officer present in command has full authority to enforce the regulation and may directly assist Coast Guard enforcement personnel. The senior naval officer present in command may also designate an “official patrol” to help keep vessels out of the exclusion area and take other enforcement actions.²⁴⁷

E. Magnuson Act (9 August 1950)

At the beginning of the Cold War, Congress expressly authorized the President to use all of the military services to take direct law enforcement actions in support of new authority granted to the Coast Guard in the Magnuson Act. The Magnuson Act authorizes the President to issue regulations:

(a) to govern the anchorage and movement of any foreign-flag vessels in the territorial waters of the United States, to inspect

240. *See id.* For an overview of these regulations, see *supra* notes 211-19 and accompanying text.

241. 33 C.F.R. § 6.4 (1942).

242. *Id.*

243. *See* Letter to Commander, 3d District (Nov. 30, 1948), *excerpted in* U.S. COAST GUARD, LAW BULL. No. 151, at 3 (1948).

such vessels at any time, to place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage

244. *See* 14 U.S.C. § 91 (2000). The current version of 14 U.S.C. § 91 reflects various “technical” changes made in 1986. The specific references to the Coast Guard and the grant of power to COTPs and District Commanders were removed, substituting “the Secretary” in their place. *See id.* Additionally, the original Act of 15 November 1941 stated that it “shall be the duty” of the Coast Guard to provide for the protection of naval vessels. Act of Nov. 15, 1941, ch. 471, § 1. The technical corrections, however, revised the statute to state that the “Secretary *may* control the anchorage and movement . . .” 14 U.S.C. § 91 (emphasis added). This indicates the discretionary nature of this authority. In addition, the term “territorial waters” was changed to “navigable waters.” *See id.* Further, the statute initially permitted the “senior naval officer present in command of any naval force” to control the anchorage and movement of vessels under certain circumstances. Act of Nov. 15, 1941, ch. 471, § 1. The technical amendment, however, permits the “senior naval officer present in command” to control the anchorage and movement of vessels under certain circumstances. 14 U.S.C. § 91.

The technical amendment also changed the language relating to the Navy’s authority to act. The statute, as enacted, permitted the senior naval officer present in command of any naval force to act when “immediate action is required, *or* where representatives of the Coast Guard are not present, *or* not present in sufficient force . . .” Act of Nov. 15, 1941, ch. 471, § 1 (emphasis added). The technical amendments changed the language to “If the Secretary does not exercise the authority in subsection (a) of this section *and* immediate action is required.” 14 U.S.C. § 91 (emphasis added). While the substitution of “and” for “or” appears to be a substantive change, the fact that the regulations issued under the Act of 15 November 1941 during World War II also used “and” between “immediate action being necessary” and “lack of Coast Guard presence” lessens the practical impact. In other words, the original regulatory interpretation of the statute is consistent with the current statutory language.

The real import of the term “technical correction” is the indication that one should use the initial statutory language to define what constitutes “if the Secretary does not exercise the authority” to control the anchorage and movement of vessels. *See* 14 U.S.C. § 91. Because the 1986 change is a technical amendment, the language “if the Secretary does not exercise the authority,” *id.*, should be interpreted consistently with the original statutory language to mean “representatives of the Coast Guard are not present, or not present in sufficient force to exercise effective control of shipping,” Act of Nov. 15, 1941, ch. 471, § 1.

Therefore, 14 U.S.C. § 91 permits the senior naval officer present in command to take certain actions under certain circumstances. The senior naval officer present in command is able to control the anchorage and movement of vessels in the vicinity of a naval vessel to ensure the safety and security of that naval vessel. Under this authority, the senior naval officer present in command can grant or deny vessels permission to enter the regulated zone, issue orders to specific vessels within the regulated zone, and take law enforcement action against violators. This authority comes into existence when immediate action is necessary, and the Coast Guard is not present or not present in sufficient force.

245. 67 Fed. Reg. 31,958-61 (May 13, 2002) (Atlantic Area); *id.* at 38,386 (June 4, 2002) (Pacific Area).

or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of rights and obligations of the United States, may take for such purposes full possession and control of such vessels and remove therefrom the officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof;

(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States and all territory and water, continental or insular, subject to the jurisdiction of the United States.²⁴⁸

The triggering event for the Magnuson Act is a presidential finding that the “security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States.”²⁴⁹

The Magnuson Act also uses language that permits regulations governing the anchorage and movement of vessels; however, the Magnuson Act takes a slightly different format than the Espionage Act and the Act of 15 November 1941. Like the Espionage Act, the Magnuson Act authorizes regulations governing the anchorage and movement of vessels, the inspection of vessels, placing guards on vessels, and taking full possession and control of vessels, including the removal of officers and crew.²⁵⁰ The Magnuson Act also gives the President the authority to regulate “to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and

246. *Id.* at 7994 (Feb. 21, 2002). A Class D felony carries a potential punishment of six years’ imprisonment and a \$250,000 fine. *Id.*

247. *Id.* at 7993.

248. 50 U.S.C. § 191 (2000) (the Magnuson Act was codified in 50 U.S.C. § 191 with the pre-existing Espionage Act). Notably, subparagraph (b) applies to both foreign and U.S. flagged vessels. *See id.* § 191(b).

249. *Id.*

250. *See id.*

waterfront facilities.”²⁵¹ The general provisions of the Magnuson Act regulations²⁵² are contained in 33 C.F.R. part 6.²⁵³

In October 1950, three months after the enactment of the Magnuson Act, President Truman issued the Executive Order required to permit reg-

251. *Id.*

252. For specific Magnuson Act security zones, see 33 C.F.R. pt. 165 (LEXIS 2003).

253. *See id.* pt. 6. While the preamble of the Executive Order suggests that the regulations issued in 33 C.F.R. part 6 are “to safeguard . . . vessels, harbors, ports, and waterfront facilities,” Exec. Order No. 10,173, Regulations Pertaining to the Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities of the United States, 3 C.F.R. 356 (1949-1953), the structure and content of the regulations indicate that the President issued regulations to “govern the anchorage and movement” of foreign flag vessels and “to safeguard . . . vessels, harbors, ports, and waterfront facilities.” 50 U.S.C. § 191(a)-(b).

The legislative history is clear that the Magnuson Act, unlike the Espionage Act, permits the United States to institute measures to control vessel movement without requiring a declaration of a national emergency. *See* S. REP. NO. 81-2118, at 1 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2954, 2954. The legislative history of the Magnuson Act indicates that the intent of enacting subparagraphs (a) and (b) was not to create two sources of authority that could be enacted independently; instead, the Senate Report suggests that the purpose of having separate subparagraphs was to set out two separate grants of power, both of which would become activated upon the finding that the security of the United States was endangered. *See* S. REP. NO. 81-2118, at 1 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2954, 2954-55. Senate Report 81-2118, in discussing the purpose of the Bill, states:

The bill would authorize the President to institute such measures and issue such regulations to control the anchorage and the movement of foreign-flag vessels in the waters of the United States when the national security is endangered.

It also gives the President the power to safeguard against destruction, loss, or injury from sabotage or other subversive acts to vessels, harbors, ports, and other water-front [sic] facilities. It will permit the United States to put in such protective measures short of a declaration of a national emergency.

Id.

A Letter from the Deputy Attorney General to the Senate Committee Chairman in favor of the legislation supports this position. The letter states that the difference between the two Acts is that the Espionage Act requires a declaration of a national emergency and has no express provision for the protection of harbors, ports, and waterfront facilities, while the Magnuson Act does not require a declaration of national emergency and expressly provides for the protection of harbors, ports, and waterfront facilities. *See* Letter from Peyton Ford, Deputy Attorney General, to Honorable Edwin C. Johnson, Chairman, Committee on Interstate and Foreign Commerce, United States Senate (July 17, 1950), *reprinted in* 1950 U.S.C.C.A.N. 2954, 2955.

ulations implementing the law. Executive Order 10,173 states that “the security of the United States is endangered by reason of subversive activity.”²⁵⁴ Based on this finding, the President issued regulations “relating to the safeguarding against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, of vessels, harbors, ports, and waterfront territory and water, continental or insular, subject to the jurisdiction of the United States.”²⁵⁵

The Magnuson Act contains the same broad enforcement authority as the Espionage Act; Congress has given the President the authority to use “such departments, agencies, officers, or instrumentalities of the United States as he may deem necessary to carry out the purpose of this title.”²⁵⁶ The President has exercised this authority and issued regulations stating that the Coast Guard may enlist the aid of all federal agencies in the enforcement of regulations issued pursuant to the Magnuson Act.²⁵⁷

Taken together, this is a clear statement of authority to use any branch of the armed forces to enforce regulations issued under the Magnuson Act,²⁵⁸ including the authority to govern the anchorage and movement of vessels, inspect vessels, place guards on vessels, and take full possession and control of vessels, to include the removal of officers and crew.²⁵⁹ It also includes the authority to enforce the many exclusion areas (security zones) established under authority of the Magnuson Act.²⁶⁰ A violation of

254. See Exec. Order No. 10,173, Regulations Pertaining to the Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities of the United States, 3 C.F.R. 357 (1949-1953). On 21 August 2002, President Bush signed an amendment to reflect the newly emphasized terrorist threat and modify the regulations at 33 C.F.R. pt. 6. See Executive Order: Further Amending Executive Order 10,173, as Amended, Prescribing Regulations Relating to the Safeguarding of Vessels, Harbors, Ports, and Waterfront Facilities of the United States (Aug. 21, 2002) (amending 33 C.F.R. pt. 6).

255. *Id.* This language closely mirrors 50 U.S.C. § 191(b), which states that that the President is authorized to issue rules and regulations “to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States and all territory and water, continental or insular, subject to the jurisdiction of the United States.” 50 U.S.C. § 191(b) (2000).

256. *Id.* § 194.

257. See 33 C.F.R. § 6.04-11 (LEXIS 2003).

258. From 1950 until the enactment of the Ports and Waterways Safety Act (PWSA) in 1972, the Coast Guard used its authority under the Magnuson Act to carry out its port safety program. See S. REP. NO. 92-724 (1972), reprinted in 1972 U.S.C.C.A.N. 2766, 2767. Congress viewed the PWSA as a “broader, permanent statutory basis for the exercise of authority for non-defense aspects of port safety.” *Id.*

259. See 50 U.S.C. § 191; 33 C.F.R. pt. 6.

the Magnuson Act regulations is a federal felony punishable by ten years in jail, a \$250,000 fine, and vessel seizure and forfeiture.²⁶¹

F. Fisheries and Conservation Management Act of 1976

Congress passed the Magnuson Fisheries Conservation and Management Act of 1976 (MFCMA)²⁶² to “provide for the protection, conservation, and enhancement of the fisheries resources of the United States.”²⁶³ This comprehensive act addresses the authority of the United States to manage fisheries, foreign fishing, and international relations, and established a national fisheries management program.²⁶⁴ The MFCMA provides for civil penalties,²⁶⁵ criminal offenses,²⁶⁶ and civil forfeitures.²⁶⁷ The enforcement provisions are particularly relevant to the present discussion.

Section 311 of the MFCMA establishes who can enforce the Act and their powers.²⁶⁸ The Secretary of Commerce and the Secretary of the department in which the Coast Guard is operating²⁶⁹ are charged with the responsibility to enforce the Act.²⁷⁰ In addition, Congress explicitly stated that the Secretaries may, by agreement, use DOD “personnel, services, equipment (including aircraft and vessels), and facilities.”²⁷¹ When there is an agreement, the officers enforcing the fisheries laws have the authority to: arrest; board, search, and inspect fishing vessels; seize fishing vessels; seize the catch; seize evidence; and execute warrants.²⁷² The legislative history makes Congress’s intent unambiguous: DOD personnel may have

260. See 33 C.F.R. § 165.30, .33, .100 (listing specific security zones throughout the United States).

261. 18 U.S.C. § 3571 (2000); 50 U.S.C. § 192.

262. Fisheries Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801-1883 (2000)).

263. H.R. REP. NO. 94-445, at 21 (1976), reprinted in 1976 U.S.C.C.A.N. 593, 593.

264. See generally Fisheries Conservation and Management Act of 1976, Pub. L. No. 94-265.

265. *Id.* § 308, 16 U.S.C. § 1858.

266. *Id.* § 309, 16 U.S.C. § 1859.

267. *Id.* § 310, 16 U.S.C. § 1860.

268. *Id.* § 311, 16 U.S.C. § 1861.

269. The Coast Guard operates as part of the Department of Transportation, except “upon declaration of war or when the President directs, the Coast Guard shall operate as a service in the Navy.” 14 U.S.C. § 3 (2000).

270. See Fisheries Conservation and Management Act of 1976, § 311(a), 16 U.S.C. § 1861(a).

271. *Id.*

law enforcement authority to carry out the fisheries laws of the United States.²⁷³

G. 49 U.S.C. § 324 (12 January 1983)

The Secretary of Transportation has the specific authority to provide for participation of military personnel in carrying out duties and powers related to the regulation and protection of air traffic and other duties and powers given to the Secretary of Transportation.²⁷⁴ The authority to use military members to carry out the duties related to the regulation and protection of air traffic originated in the Federal Aviation Act of 1958.²⁷⁵ Section 9(c) of the Department of Transportation Act of 1966 authorizes the Secretary of Transportation “to provide for participation of military personnel in carrying out the functions of the Department.”²⁷⁶ The plain language of these authorities is clear: DOD personnel can be detailed to the Secretary of Transportation to carry out functions of the Department of Transportation, which include regulatory and law enforcement functions.

The legislative history of these Acts support their plain meaning. The legislative history of the Federal Aviation Act of 1958 makes it clear that the intent of the provision permitting the detail of military members to carry out duties related to the regulation and protection of air traffic is to ensure that national security and defense considerations are taken into account, and to improve government economy by using DOD personnel with knowledge and experience of military air traffic control and military use of air space.²⁷⁷ The Federal Aviation Act includes specific provisions stating that the Secretaries of military departments will not have control

272. *See id.* § 311(b), 16 U.S.C. § 1861(b).

273. *See* H.R. REP. NO. 94-445, at 75 (1976), *reprinted in* 1976 U.S.C.C.A.N. 593, 645 (stating that “the Secretary [of Commerce] and the Secretary of the Department in which the Coast Guard is operating would be authorized to utilize by agreement . . . the personnel, services, and facilities of any other Federal Agency”); S. CONF. REP. NO. 94-711, at 57-58 (1976), *reprinted in* 1976 U.S.C.C.A.N. 660, 681 (stating that “[t]he conference substitute specifically provides that the utilizable equipment of other agencies includes aircraft and vessels and that the Federal agencies required to cooperate in such enforcement include all elements of the Department of Defense”).

274. *See* 49 U.S.C. § 324(a)(1)-(2).

275. *See* Federal Aviation Act of 1958, § 302(c), Pub. L. No. 85-726, 72 Stat. 739.

276. Department of Transportation Act of 1966, § 9(c), 49 U.S.C. § 324(a)(2).

277. *See* H.R. REP. NO. 85-2360 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3741, 3748-49.

over the duties and powers of military members detailed to the Department of Transportation.²⁷⁸ This is to ensure that military members bring their skills, but are not influenced by the military so that their loyalty is to the civilian agency.²⁷⁹ The legislative history of the Department of Transportation Act expresses Congress's intent to have DOD personnel detailed to the Department of Transportation to foster close consultation and cooperation between the departments.²⁸⁰

The longstanding policy of the federal government is that the Posse Comitatus Act does not cover DOD military personnel detailed to civilian agencies. The rationale behind this determination is that the military personnel detailed to the civilian agency are under the control of and subject to orders of the head of the civilian agency and are not considered part of the military for purposes of the Posse Comitatus Act.²⁸¹

VI. Subsequent Amendments to the Posse Comitatus Act

While Congress was busy expanding military law enforcement authority, the actual Posse Comitatus Act remained remarkably stable once

278. See 49 U.S.C. § 324(d).

279. See H.R. REP. NO. 85-2360, reprinted in 1958 U.S.C.C.A.N. 3741, 3749.

280. See H.R. REP. NO. 89-1701 (1966), reprinted in 1966 U.S.C.C.A.N. 3362, 3370.

281. See Effect of Posse Comitatus Act on Proposed Detail of Civilian Employees to the National Infrastructure Protection Center, 1998 OLC LEXIS 2 (Op. Off. Legal Counsel May 26, 1998). The Office of Legal Counsel opinion states:

Earlier opinions of this Office concluded that military personnel who are detailed to a civilian agency are not covered by the PCA because they are employees of the civilian agency for the duration of their detail, "subject to the exclusive orders" of the head of the civilian agency, and therefore "are not 'any part'" of the military for purposes of the PCA. Memorandum for Benjamin Forman, Assistant General Counsel, Department of Defense, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: Legality of deputizing military personnel assigned to the Department of Transportation (Sept. 30, 1970) ("Transportation Opinion") (military personnel detailed to the Department of Transportation to serve as security guards on civilian aircraft); see Assignment of Army Lawyers to the Department of Justice, 10 Op. O.L.C. 115, 121 (1986) (PCA "would not be implicated if [Army] lawyers were detailed on a full-time basis in an entirely civilian capacity under the supervision of civilian personnel").

Effect of Posse Comitatus Act, 1998 OLC LEXIS 2.

the fiscal law portion expired in 1879. The Act was considered “obscure and all-but-forgotten” in 1948²⁸² and had no significant legal relevance until 1961.²⁸³ In 1956, the Act was moved to 18 U.S.C. § 1385 and amended to include the Air Force, which had split-off from the Army. It read:

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 comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both. This section does not apply in Alaska.²⁸⁴

The penalty was later increased, and the last sentence making the law inapplicable in Alaska was removed in 1959.²⁸⁵ An attempt was made to subject the Navy to the Act in 1975; however, the bill died in committee.²⁸⁶

VII. The Confusion over the Posse Comitatus Act Begins in Earnest During the 1970s

In the early 1970s, the Posse Comitatus Act emerged from obscurity as creative defense counsel attempted to develop new exclusionary rules based on the Act. While this effort was unsuccessful, the early cases marked the complete triumph of the deceptive nineteenth century politi-

282. *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948).

283. *See* Abel, *supra* note 23, at 462-63 (discussing *Wrynn v. United States*, 200 F. Supp. 457 (E.D.N.Y. 1961) (holding that an Air Force helicopter pilot searching for an escaped civilian prisoner was acting outside the scope of his duties, therefore, a bystander injured when the helicopter struck a tree could not recover under the Federal Tort Claims Act). The next case concerning the Act was not until 1974. *Id.*

284. Posse Comitatus Act, 70A Stat. 626 (1956).

285. *See* Pub. L. No. 86-70, § 17, *reprinted in* 1959 U.S.C.C.A.N. 157.

286. *See* Omnibus Crime Act, § 1, 94th Cong., tit. II, pt. G (1975). Section 1 of the Omnibus Crime Act proposed a modified Posse Comitatus Act that read:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, knowingly uses any part of the Army, Navy, or Air Force as a posse comitatus or otherwise to execute the laws is guilty of a Class A misdemeanor. Nothing in this section shall be construed to affect the law enforcement of the United States Coast Guard.

Id., *cited in* *Jackson v. Alaska*, 572 P.2d 87, 91 (Alaska 1977).

cians who cloaked the Act in patriotic rhetoric and references to the American Revolution. While perhaps done inadvertently, some modern courts appeared to brush aside the Act without discussion, focusing on broad and respected principles that had little, if anything, to do with the Act.

A. The Wounded Knee Cases (Army)

On the evening of 27 February 1973, at least one hundred armed persons occupied a portion of the village of Wounded Knee on the Pine Ridge Reservation in South Dakota, looted a trading post, and briefly held a few hostages.²⁸⁷ The Federal Bureau of Investigation (FBI), Marshal Service, and Bureau of Indian Affairs police responded, resulting in a tense standoff and a blockade. During the two-month standoff, a few members of the U.S. Army provided and maintained equipment used by the law enforcement officials and offered tactical advice to FBI officials on their use of force policy, negotiations, and other issues. A number of individuals were apprehended trying to enter the town to lend support to the militant protestors. The blockade-runners were prosecuted, in part, for interfering with the law enforcement officials surrounding the town. Several defendants asserted that the civilian law enforcement officers were not lawfully engaged in the performance of their official duties because they had received Army assistance in violation of the Posse Comitatus Act.²⁸⁸

A confusing patchwork of decisions resulted from these cases.²⁸⁹ The courts, however, did attempt to define when someone “executes” the law by distinguishing between active or pervasive participation by Army troops in law enforcement (a violation), and passive assistance to law enforcement officials (permitted). *United States v. McArthur*,²⁹⁰ the last case in the series, discusses the other cases and was upheld by the Eighth Circuit in *United States v. Casper*.²⁹¹ *McArthur*, therefore, had the most subsequent influence.²⁹² Like the other Wounded Knee cases, *McArthur*

287. See generally *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976); *United States v. Jaramillo*, 380 F. Supp. 1375 (D. Neb. 1974) (both providing detailed recitation of the facts surrounding this incident).

288. *Casper*, 541 F.2d at 1276; *United States v. McArthur*, 419 F. Supp. 186, 190 (N.D. 1975); *United States v. Red Feather*, 392 F. Supp. 916, 919-21 (S.D. 1975); *Jaramillo*, 380 F. Supp. at 1379; *United States v. Banks*, 383 F. Supp. 368, 374-75 (S.D. 1974).

289. Hohnsbeen, *supra* note 36, at 412.

290. 419 F. Supp. at 186.

291. 541 F.2d at 1275.

focuses entirely upon determining the correct test for when Army assistance rises to the level of executing the law.²⁹³ After reviewing the tests used in the other Wounded Knee cases, the judge posed the following determinative question: “Were Army or Air Force personnel used by the civilian law enforcement officers at Wounded Knee in such a manner that the military personnel subjected the citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature, either presently or prospectively?”²⁹⁴ Using this standard, he concluded that the Army support did not violate the Act.²⁹⁵

The court, unfortunately, did little to connect this test to the Posse Comitatus Act. The opinion omits any discussion of the Act’s extensive history beyond a sentence noting that Americans have historically been suspicious of military authority as a tool of dictatorial power.²⁹⁶ Furthermore, *McArthur* contains no analysis of the actual wording of the Act; it merely provides a short conclusion that military personnel are not trained in constitutional freedoms and that the Act was intended to meet this danger.²⁹⁷

The court’s limited discussion of the Act and total focus on defining “execution of the law” obscures the Act’s other elements. As previously discussed, once the fiscal law section expired, the Posse Comitatus Act prohibited “the use of the Army or Air Force *as a posse comitatus or otherwise for the purpose of executing the laws.*”²⁹⁸ As the bill that eventually became the Act moved through Congress in 1878, the Senate considered changing it to simply prohibit the Army from executing the law. The proposed amendment failed, however, and the limiting words “as a posse comitatus or otherwise” remained.²⁹⁹ By focusing on the “executing the law” language without explicitly noting that the court skipped over “as a posse comitatus or otherwise,” *McArthur* appears to adopt the language rejected by the Senate in 1878.³⁰⁰ This approach would render meaningless, without discussion, words deliberately left in the law by Congress,

292. The standard articulated by the court is incorporated into the current DOD regulation concerning the Act. See DOD DIR. 5525.5, *supra* note 7; see also Abel, *supra* note 23, at 464.

293. *McArthur*, 419 F. Supp. at 193-94.

294. *Id.* at 194.

295. *Id.* at 194-95.

296. *Id.* at 193.

297. *Id.* at 193-94.

298. Act of June 18, 1878, 20 Stat. 152.

299. See 7 CONG. REC. 4247 (1878); *supra* notes 132-33 and accompanying text.

thus ignoring a major rule of statutory construction. The court, therefore, must have resolved the case on the basis of one unmet element concerning the execution of the law. Once the court determined that the Army troops had not executed the law, the wider analysis was simply unnecessary.

A full statement of the law following the Wounded Knee cases should have said:

The Posse Comitatus Act prohibits:

- (1) Willful
- (2) use of the Army or Air Force
- (3) as a posse comitatus or otherwise
- (4) in such a manner that U.S. citizens are subjected to the exercise of military power which is regulatory, proscriptive, or compulsory in nature, either presently or prospectively (that is, for the purpose of executing the law)
- (5) unless otherwise authorized by the Constitution or an act of Congress.

The *McArthur* court only addressed element four. Subsequent litigation, commentary, and regulatory action also focused almost entirely on this element.³⁰¹ The other elements, including the limiting words “as a posse comitatus or otherwise,” were simply ignored.³⁰² Some interpreted the case as establishing a test for all five elements.³⁰³

300. See 7 CONG. REC. 4247; *supra* notes 132-33 and accompanying text. The other cases from the Wounded Knee incident had the same focus on defining when the Army executes the law.

301. See, e.g., *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976). In *Casper*, a consolidated appeal of several Wounded Knee cases, the Eighth Circuit affirmed all convictions based on the *McArthur* test for when the law had been executed (element four of the analysis). See *id.* at 1278.

302. In *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991), the court denied a defense request to dismiss the indictment because the government seized him in violation of the Act. In doing so, however, the court articulated that the Act established criminal penalties “for willful use of any part of the Army or Air Force in law enforcement, unless expressly authorized by law.” *Id.* at 1093. The court also approved the following three tests for when Army or Air Force officials execute the law via “active” participation: (1) The *McArthur* test that defined “active” participation as that which subjected U.S. citizens to military power that was regulatory, proscriptive, or compulsory in nature; (2) Direct active involvement in the execution of the laws; and (3) Participation when the military role pervaded the activities of civilian law enforcement authorities. *Id.* at 1094.

B. *United States v. Walden* (Navy 1974)

William and Ruby Walden were convicted of illegal firearm sales based, in large part, on the testimony of three U.S. Marines working undercover for the Treasury Department.³⁰⁴ The defendants unsuccessfully sought to exclude this evidence at trial based on a violation of the Posse Comitatus Act or, at a minimum, internal Navy regulations that applied the general policy behind the Act to Navy and Marine Corps personnel absent approval from high-level officials.³⁰⁵

On appeal, the Fourth Circuit held that the Act did not apply to the Navy.³⁰⁶ It also declined to apply an exclusionary rule for the violation of the Navy's internal administrative regulations. In doing so, however, the court articulated a broader "spirit" of the Act, opining that the legislative history showed congressional intent to apply the Act's policy to all armed services.³⁰⁷ In support, the court cited a small portion of the remarks of Congressman Knott who had introduced the amendment that eventually became the Act.³⁰⁸ Unfortunately, the court took these remarks out of con-

303. See 32 C.F.R. § 213.10a(7)(ii) (cancelled regulation) (stating that indirect assistance is not restricted by the Posse Comitatus Act provided that the assistance does not subject civilians to use of military power that is regulatory, proscriptive, or compulsory); DOD DIR. 5525.5, *supra* note 7, para. E4.1.7 (stating that indirect assistance is not restricted by the Posse Comitatus Act provided the assistance does not subject civilians to use of military power that is regulatory, proscriptive, or compulsory).

304. *United States v. Walden*, 490 F.2d 372, 373 (4th Cir. 1974).

305. See *id.* at 377. Navy Instruction 5400.12 provided that

[T]hroughout the United States, it is a fundamental policy to use civilian, rather than military, officials and personnel to the maximum extent possible in preserving law and order. In the Federal Government this policy is reflected by the Posse Comitatus Act (18 U.S.C. § 1385) which prohibits the use of any part of the Army or Air Force to enforce local, state, or federal law except as Congress may authorize. Although not expressly applicable to the Navy and Marine Corps, the act is regarded as a statement of Federal policy which is closely followed by the Department of Navy.

SEC'Y OF NAVY, INSTR. 5400.12 (17 Jan. 1969), *cited in Walden*, 490 F.2d at 372.

306. *Walden*, 490 F.2d at 372; *accord* *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1477 (11th Cir. 1992); *Yunis*, 924 F.2d at 1093 ("We cannot agree that Congress' words admit of any ambiguity. By its terms, 18 U.S.C. § 1385 places no restrictions on naval participation in law enforcement operations. . . . Nothing in this history suggests that we should defy the express language of the Posse Comitatus Act by extending it to the Navy and we decline to do so.").

307. *Walden*, 490 F.2d at 375-76.

text,³⁰⁹ missing the fact that the Knott amendment actually deleted the Navy from an earlier version of the bill.³¹⁰

The court's reliance upon Knott's remarks to discern a legislative intent to apply the Act's policy to the Navy was clearly misplaced. In the end, *Walden* stands for the more limited proposition that while the Posse Comitatus Act does not apply to the Navy, the Navy may voluntarily impose more stringent limits upon itself. A violation of these internal administrative policies, however, does not mandate an exclusionary rule, although courts might, at some point, impose one for systemic intentional violations. Over time, however, some within the DOD saw the case as justification for more restrictive internal policies and, perhaps, as a tool to avoid expending scarce resources on a new congressional mandate to help law enforcement agencies control the flow of illegal drugs into America.³¹¹

VIII. Congressional Action to Further Increase Military Involvement in Civilian Law Enforcement (Round 1)

A. The 1981 Act (10 U.S.C. §§ 371-378)

By the late 1970s, the federal government formally acknowledged that it was easy to smuggle illegal drugs into the United States and distribute them to eager buyers.³¹² Marijuana from Colombia arrived by the ton load, while hundreds of pounds of cocaine flew in daily. The situation in

308. *Id.* at 375 (quoting 7 CONG. REC. 3849 (1878) (testimony of Congressman Knott)).

309. *See supra* note 148.

310. *See supra* note 124 and accompanying text; *see also supra* note 149 (equating "military" to "army").

311. *See infra* section VIII.B. Other courts have relied upon *Walden's* misreading of the legislative history of the Act and cited the case, without analysis, as authority for the proposition that the Act applies to all branches of the armed services. *See, e.g.,* United States v. Chaparro-Almeida 679 F.2d 423, 425 & n.6 (5th Cir. 1982) (denying an appeal to exclude evidence obtained by a Coast Guard boarding team; first applying the Act to all armed forces, including the Coast Guard, but then citing the Coast Guard's law enforcement authority as an express statutory exception to the Act).

312. *See* GOV'T ACCOUNTING OFFICE, GAINS MADE IN CONTROLLING ILLEGAL DRUGS, YET THE DRUG TRADE FLOURISHES, REPORT NO. GAO/GGD-80-4, at 66-67 (1979) [hereinafter GAO/GGD-80-4]; *see also* Attorney General John Ascroft, Remarks at Organized Crime and Drug Enforcement Task Force (OCDEF) Twentieth Anniversary Conference (July 30, 2002).

south Florida, “a drug disaster area,” was out of control³¹³ and about to get even worse. In 1979, Miami was “Dodge City all over again,” “a replay of Chicago in the 1920s,” and a boomtown with cocaine as its currency.³¹⁴ Highly publicized shoot-outs between rival drug gangs introduced the term “cocaine cowboys” into the national press and reinforced the nation’s Wild West image of Miami.³¹⁵

Against this backdrop, but with little DOD support, Congress moved in 1981 to increase the amount of cooperation between the military and civilian law enforcement authorities as part of the 1982 DOD Authorization Act.³¹⁶ Three out of the four provisions concerning assistance, however, only ratified the existing DOD practice of providing information, equipment and facilities, and training to civilian authorities.³¹⁷ The only real change permitted DOD personnel to operate equipment on loan to civilian drug enforcement agencies under certain limited circumstances.³¹⁸ As a check on the possible misuse of the authority to operate equipment, Section 375 required regulations to limit direct military involvement in specified law enforcement activities while operating the equipment.³¹⁹ The House Bill also allowed military personnel to assist in drug arrests and seizures outside the land area of the United States, but the conference committee deleted this provision.³²⁰ Despite the disagreement over arrest authority, the law’s ultimate purpose was to increase military participation

313. GAO/GGD-80-4, *supra* note 312, at 70, 76; *Hearing Before the Subcomm. on Crime, House Comm. on the Judiciary on Narcotics Enforcement Policy*, 97th Cong. 3 (1981) (statement of Ronald F. Lauve, Senior Associate Director, General Government Division). *See generally* GUY GUGLIOTTA & JEFF LEEN, *KINGS OF COCAINE* (1989).

314. GUGLIOTTA, *supra* note 313, at 12 (quoting an unnamed federal prosecutor and county coroner).

315. *Id.* at 15.

316. *See* Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, 95 Stat. 1099 (codified at 10 U.S.C. §§ 371-378 (2000)). There are many references to the lack of DOD support for the various bills during the debates. *See, e.g.*, 127 CONG. REC. 15,685 (1981) (remarks of Mr. Hughes concerning arrest authority) (“The reason we are here today is because the Secretary of Defense does not want this authority anyway. He does not want to cooperate.”).

317. *See* H.R. REP. NO. 97-71, pt. II, at 3 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1785. “Current interpretation of the Posse Comitatus Act already permits all of the activity addressed by these four sections.” *Id.* at 1790. According to the House Judiciary Committee, some military commanders were denying aid that was permitted by law, perhaps in response to “ambiguous” court decisions. *Id.* (overview of H.R. 3519, § 908), *reprinted in* 1981 U.S.C.C.A.N. 1790; *see supra* section VII.

in law enforcement. Congress made the point explicit in Section 378 of the

318. See H.R. REP. NO. 97-71, § 375, *reprinted in* 1981 U.S.C.C.A.N. 1790. The applicable sections of Public Law 97-86 were codified as 10 U.S.C. §§ 371-378.

(1) Section 371, Use of information collected during military operations, permitted DOD to share information collected in the course of normal operations with law enforcement officials.

(2) Section 372, Use of military equipment and facilities, permitted DOD to make equipment, bases, or facilities available to civilian law enforcement officials.

(3) Section 373, Training and advising civilian law enforcement officials, permitted DOD to train civilian officials on any equipment made available to them under section 372.

(4) Section 374, Assistance by Department of Defense personnel, permitted DOD personnel to operate and maintain any equipment made available under section 372, but only to agencies that enforce federal drug, immigration, or customs law and subject to other specific restrictions such as high-level requests and “emergency” conditions.

(5) Section 375, Restriction on direct participation by military personnel, required the Secretary of Defense to issue regulations so that any assistance provided under the authority of this law did not permit direct participation in specified law enforcement activities.

(6) Section 376, Assistance not to affect adversely military preparedness, prohibited assistance given under authority of this law that would adversely affect military preparedness.

(7) Section 377, Reimbursement, directed the Secretary of Defense to develop regulations for reimbursement by civilian agencies.

(8) Section 378, Nonpreemption of other law, indicated that nothing in this law limited the executive’s use of military in law enforcement beyond that provided by the law existing prior to the 1982 Authorization Act.

95 Stat. 1116.

319. See *id.*; H.R. CONF. REP. NO. 97-311, at 121 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1853-63. With respect to Section 375, the report states: “The limitation imposed by this section is only with respect to assistance authorized under any part of this chapter.” *Id.* at 121. The other types of assistance discussed in this chapter (beyond operating loaned equipment) are the provision of information, lending equipment, and providing training. See *id.*

320. *Id.*; H.R. REP. NO. 97-71, at 11, *reprinted in* 1981 U.S.C.C.A.N. 1793. Much of the House debate on the issue centered on the concern that the government would lose smuggling prosecutions if untrained Navy personnel were directly involved in the cases. 127 CONG. REC. 14,976-88, 15,659-88 (1981); Abel, *supra* note 23, at 469-70. The provision also prompted an unlikely alliance between federal drug enforcement officials, who feared DOD dominance over a high-profile mission; DOD officials, who feared a resource drain away from the Department’s primary mission; and civil libertarians, who feared an eventual military state. See Abel, *supra* note 23, at 470 & n.155; Hohnsbeen, *supra* note 36, at 420-21.

Act and the following House Conference Report statement:

Section 378 clarifies the intent of the conferees that the restrictions on the assistance authorized by the new chapter in title 10 apply only to the authority granted under that chapter. Nothing in this chapter should be construed to expand or amend the Posse Comitatus Act. In particular, because that statute, on its face, includes the Army and Air Force, and not the Navy and Marine Corps, the conferees wanted to ensure that the conference report would not be interpreted to limit the authority of the Secretary of Defense to provide Navy and Marine Corps assistance under, for example, 21 USC 873(b)³²¹

The 1982 Defense Authorization Act, therefore, established some explicit “safe harbors” of permissible activity. In some cases, these safe harbors came with conditions. Any conditions on the use of the safe harbor provisions, however, were limited to the safe harbors. The Authorization Act did not change the Posse Comitatus Act or impose any limitations beyond those in the Posse Comitatus Act itself.³²²

Section 375 of the 1982 DOD Authorization Act required the Secretary of Defense to issue regulations to ensure that any assistance provided under the authority of the law’s safe harbor provisions did not permit direct DOD participation in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity unless otherwise authorized by law. The House Conference Report on Section 375 stated: “The limitation

321. H.R. CONF. REP. NO. 97-311, at 122, *reprinted in* 1981 U.S.C.C.A.N. 1863. The report also states that the law does not rescind or direct the rescission of any current regulations that apply the policy and terms of the Act to the Navy or Marines. *Id.*

322. *See id.* Unfortunately, despite the explicit language of the conference report, many refer to the 1982 Defense Authorization Act as a change to the Posse Comitatus Act. *See, e.g.,* Abel, *supra* note 23, at 470; Hohnsbeen, *supra* note 36, at 419; GOV’T ACCOUNTING OFFICE, STATEMENT OF CHARLES A. BOWSER, COMPTROLLER OF THE UNITED STATES, BEFORE THE SENATE COMMITTEE ON ARMED SERVICES, REPORT NO. GAO/T-GGD-88-38 (1988) [hereinafter GAO/T-GGD-88-38]. Also, a number of courts have taken Section 375’s safe harbor limitation on military activities while operating equipment to support law enforcement as a blanket prohibition on direct participation by military personnel in civilian search, arrest, seizure, or other similar activity. *See* United States v. Khan 35 F.3d 426, 431 (9th Cir. 1994) (stating that Section 375 and the DOD regulations have applied the Posse Comitatus Act to the Navy); United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991). This interpretation of the 1982 Authorization Act contradicts the explicit language of Section 378 and the associated legislative history. It also frustrates the entire purpose of the Authorization Act to increase military-civilian cooperation in law enforcement.

posed by this section is only with respect to assistance authorized under any part of this chapter.”³²³ Section 378 made it clear that the Authorization Act’s purpose was to increase military-civilian cooperation and that the Act did not impose any new limits on the use of military personnel in law enforcement. Taken together, these provisions required regulations to implement the new safe harbor provisions and suggested the need for rules to implement the Posse Comitatus Act.³²⁴

B. DOD Implementing Regulations

On 7 April 1982, the DOD published regulations at 32 C.F.R. part 213 implementing 10 U.S.C. §§ 371-378.³²⁵ While many parts of the regulation initially appear consistent with the authorizing statute, the regulation defeated the 1982 Authorization Act’s stated purpose to increase cooperation between the military and civilian law enforcement in several important ways. Taken together, the overly restrictive regulatory provisions appeared to reflect the DOD’s lack of support for the law and the congressional intent behind it.³²⁶ Also, since the DOD purported to base its regulations upon the Posse Comitatus Act, the regulations added to the confusion over the Act’s modern understanding.

First, the regulations adopted an extremely broad interpretation of the Posse Comitatus Act based upon the one element analyzed in the Wounded Knee cases. According to the regulations, the Act prohibits all “direct” DOD participation in law enforcement; civilians should not be subject to military power that is regulatory, proscriptive, or compulsory in nature. This administrative sleight-of-hand transformed the three primary tests for when one “executes” the law³²⁷ into the entire definition of the Act. In taking this action, the DOD instituted a version of the Act explicitly rejected

323. H.R. CONF. REP. NO. 97-311, at 121, *reprinted in* 1981 U.S.C.C.A.N. 1853, 1862.

324. *See* 13 Op. Off. Legal Counsel 321, 345 (1989).

325. *See* 47 Fed. Reg. 14,899 (Apr. 7, 1982) (adding a new pt. 213 to ch. I, 32 C.F.R.). Department of Defense Directive 5525.5, dated 15 January 1986, provided internal guidance consistent with the published regulations. *See* DOD DIR. 5525.5, *supra* note 7. On 28 April 1993, the DOD cancelled the published regulations and indicated that DOD Directive 5525.5 replaced 32 C.F.R. part 213. *See* 58 Fed. Reg. 25,776 (Apr. 28, 1983).

326. *See supra* notes 320, 324. One could fairly argue that the DOD regulations were, at least, partially designed out of concerns about a new resource-draining mission. *See supra* notes 320, 324; *infra* note 358 and accompanying text.

327. *See supra* section VII.A. Note that the *McArthur* test only applied to U.S. citizens. *See United States v. McArthur*, 419 F. Supp. 186 (N.D. 1975).

by the Senate in 1878 and rendered meaningless words deliberately left in the law by Congress.³²⁸ The DOD regulations also administratively extended the Act's coverage outside of the United States.³²⁹

The regulations also turned Section 375 of the Authorization Act, which places narrow limits on abuse of the safe harbor provisions, into a blanket prohibition against all direct involvement in interdiction, search and seizure, and arrest.³³⁰ By doing so, the regulations appeared to ignore Section 378 entirely and key words in Section 375.³³¹ This turned a law designed to increase military-civilian law enforcement cooperation on its head. To compound matters, the regulations expanded the specific list of prohibited activities beyond those listed in the statute.³³²

After significantly expanding the scope of the Act, the regulations articulated a number of implied exceptions to the (now expanded) Act.

328. See *supra* notes 128-29 and accompanying text.

329. Before the DOD and Navy regulations, courts held that the Act had no extraterritorial application. See *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948); 13 Op. Off. Legal Counsel 321 (1989); Abel, *supra* note 23, at 468; Furman, *supra* note 43, at 107. While denying any relief based upon the Posse Comitatus Act, the *Chandler* court complimented the defense counsel for turning up "this obscure and all-but-forgotten statute." *Chandler*, 171 F.2d at 936.

330. See 32 C.F.R. § 213.10 (LEXIS 2003) (restrictions on participation of DOD personnel in civilian law enforcement activities). Separate sections of the regulation deal with the use of military equipment and facilities, *id.* § 213.9, and information sharing, *id.* § 213.8. If the regulation had followed the law, the restrictions section would have been more clearly linked to the specific sections implementing the new safe harbors. See *supra* note 321 and accompanying text.

331. 10 U.S.C. § 375 stated: "The Secretary of Defense shall issue such regulations as may be necessary to insure that *the provision of any assistance* (including the provision of any equipment or facility or the assignment of any personnel) to any civilian law enforcement official *under this chapter* does not include or permit direct participation . . ." 10 U.S.C. § 375 (1982) (emphasis added to highlight the words implicitly omitted by the DOD regulations). The DOD regulations also made no mention of Section 378.

332. See 32 C.F.R. § 213.10(a)(3). This provision states:

[T]he prohibition on use of military personnel as a posse comitatus or otherwise to execute the law prohibits the following forms of direct assistance: (i) Interdiction of a vehicle, vessel, aircraft, or other similar activity; (ii) A search or seizure; (iii) An arrest, stop and frisk, or similar activity; (iv) Use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators.

Id.

The bases of these non-express exceptions are not clear,³³³ however, they include: protection of DOD personnel, equipment, official guests, and classified information; actions leading to a DOD administrative proceeding; and actions related to the commander's "inherent" authority to maintain law and order on a military installation.³³⁴ Other DOD actions undertaken primarily for a military or foreign affairs purpose, responses to unexpected emergencies, and protection of federal property and functions are similarly permitted.³³⁵ Each of these implied "exceptions" permits DOD military personnel to participate in search, seizure, interdiction, surveillance, pursuit, and other direct law enforcement activities. A separate section of the regulation lists express statutory authorities that permit direct military assistance in law enforcement.³³⁶ Unfortunately, the list missed several important express authorities, including the Espionage Act, Magnuson Act, and Rivers and Harbors Act.³³⁷

The published regulations also applied the overly restrictive DOD interpretation of the Posse Comitatus Act, and the implied exceptions, to the Navy and Marine Corps as a matter of DOD policy.³³⁸ While the regulations gave the Secretary of the Navy some authority to deviate from the policy on a case-by-case basis, this authority was extremely limited. Advance approval of the Secretary of Defense was required for any activity likely to involve an interdiction of a vessel or aircraft, a search or seizure, an arrest, or other activity likely to subject any civilian to military power that was regulatory, proscriptive, or compulsory in nature.³³⁹ More-

333. The regulation first emphasizes that express statutory or constitutional exceptions to the Posse Comitatus Act are required. It then provides an incomplete list of statutory exceptions, leaving the implication that the remaining exceptions are, at least, a partial list of constitutional exceptions to the Act. *Compare id.* § 213.10(a), *with id.* § 213(a)(2)(iv).

334. *See id.* § 213.10(a)(2)(i).

335. *Id.* § 213.10.(a)(2)(ii). The "emergency" exception to the Act was first articulated in 1878. *See supra* notes 144, 153.

336. 32 C.F.R. § 213(a)(2)(iv).

337. *See id.*; *supra* section V.

338. *See* 32 C.F.R. §§ 213.2 ("The term, 'Military Service,' as used herein, refers to the Army, Navy, Air Force, and Marine Corps."), 213.10(c). The regulations also classified any agency outside of the DOD as a civilian agency. *See id.* § 213.3. This included the Coast Guard, which, by law, is a military service, and a branch of the armed forces of the United States at all times. *See* 14 U.S.C. § 1 (2000).

over, the Secretary of Defense required various certifications from the head of the civilian agency requesting the assistance.³⁴⁰

Finally, as in several other areas, the DOD regulations adopted an overly restrictive interpretation of the law with respect to reimbursement from civilian law enforcement agencies. While the plain language of the Authorization Act and legislative history clearly gave the Secretary of Defense discretion to waive reimbursement, the DOD regulations claimed that the law required it.³⁴¹ An Office of Legal Counsel review concluded that the DOD's position conflicted with the plain language of the statute and was not even supported by statements in the legislative history the DOD cited to overcome the statute's plain language.³⁴² Taken together, the DOD regulations only compounded the layers of misinformation surrounding the Act and further confused some courts.

C. The Overly Restrictive DOD Regulations Begin to Merge with the Act

Despite the overly restrictive regulations, some increased DOD participation in law enforcement resulted from the 1982 Authorization Act. One prominent example involved the placement of Coast Guard Law Enforcement Detachments (LEDETS) on Navy ships scheduled to operate in areas of maritime smuggling activity. If a suspicious vessel was sighted,

339. 32 C.F.R. § 213.10(c)(2). Ironically, a provision allowing the President, or his designee, to approve direct military involvement in law enforcement activities is consistent with the historical implementation of the Posse Comitatus Act as applied to the Army. *See supra* section IV. The DOD regulations, therefore, could be conformed to the Act by deleting all mention of the Navy and applying the current authority for the Secretary of Defense, or appropriate Service Secretary, to permit direct involvement in law enforcement by Army and Air Force personnel.

340. 32 C.F.R. § 213.10(c)(2).

341. *Compare* 10 U.S.C. § 377 (1982) ("The Secretary of Defense shall issue regulations providing that reimbursement *may be* a condition of assistance to a civilian law enforcement official under this chapter." (emphasis added)), *with* 32 C.F.R. § 213.11(b) ("As a general matter, reimbursement *is required* when equipment or services are provided to agencies outside the Department of Defense. The primary source of law for reimbursement requirements is the Economy Act." (emphasis added)). Thus, the DOD claimed that the Economy Act required reimbursement, even though Section 377 of the DOD Authorization Act made reimbursement optional.

342. 6 Op. Off. Legal Counsel 464 (1982). The DOD reluctantly adopted the OLC position, but did not change the regulations. *See infra* note 358. The reimbursement provision, 10 U.S.C. § 377, was amended by Congress in 1988 to link the issue with the Economy Act more clearly and provide express exceptions to reimbursement under some circumstances. *See* Pub. L. No. 100-456, div. A, tit. XI, § 1104(a), 102 Stat. 2045 (1988).

tactical control of the Navy vessel would shift to the Coast Guard,³⁴³ and a Coast Guard team would board the vessel and take any subsequent law enforcement action.³⁴⁴ For the most part, Navy personnel served in a support or backup role for the Coast Guard law enforcement team.

These programs had some success in apprehending maritime drug smugglers, and a few defendants subsequently claimed that the Navy support to the Coast Guard violated the Posse Comitatus Act. The two circuit courts examining the issue agreed that the Act did not apply to the Navy.³⁴⁵ Both courts, however, while denying any relief to the defendants, held that the executive branch had extended the Act to the Navy via internal Navy

343. The practice of placing Navy vessels under temporary Coast Guard control, to the extent it was seen as a way to get around the Act, shows how far the current interpretations have strayed from the original Posse Comitatus Act. As discussed in section III, *supra*, the marshals taking control over military forces was one of the primary “evils” the Act sought to address. The DOD regulations and some courts, however, claimed the Act prohibited all direct DOD involvement in law enforcement actions.

To escape the extreme results from such a broad interpretation, a number of “exceptions” to the expanded Act have been developed. One theory is that military personnel detailed to a civilian agency are not covered by the Act because they are employees of the civilian agency for the duration of the detail. In other words, they are not any part of the Army, Air Force, or Navy for purposes of the Act (and DOD regulations) while detailed to a civilian law enforcement agency. See Effect of Posse Comitatus Act on Proposed Detail of Civilian Employees to the National Infrastructure Protection Center, 1998 OLC LEXIS 2 (Op. Off. Legal Counsel May 26, 1998); 10 Op. Off. Legal Counsel 115, 121 (1986) (Act not implicated if Army lawyers are detailed to DOJ as special assistant U.S. Attorneys); Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Benjamin Forman, Assistant General Counsel (International Affairs), Department of Defense, subject: Legality of deputizing military personnel assigned to the Department of Transportation (Sept. 30, 1970). Thus, the executive branch can avoid the Act’s proscriptions by embracing the very “evil” that motivated the Act.

344. See *United States v. Roberts*, 779 F.2d 565, 566 (9th Cir. 1986); *United States v. Del Prado-Montero*, 740 F.2d 113, 114-15 (1st Cir. 1984); GOV’T ACCOUNTING OFFICE, DRUG CONTROL ISSUES SURROUNDING INCREASED USE OF THE MILITARY IN DRUG INTERDICTION, REPORT NO. GAO/NSIAD-88-156, at 28, 33 (1988) [hereinafter GAO/NSIAD-88-156] (describing the LEDET program in fiscal year 1987).

345. *Roberts*, 779 F.2d at 567 (“18 USC 1385. By its express terms, this act prohibits only the use of the Army and the Air Force in civilian law enforcement. We decline to defy its plain language by extending it to prohibit use of the Navy.”); *Del Prado-Montero*, 740 F.2d at 116. Note that the *Roberts* court implicitly adopted the compressed analysis from *Walden* and ignored the limiting words “as a posse comitatus or otherwise” which Congress intentionally left in the law. See *supra* notes 128-29 and accompanying text.

regulations from the mid-1970s.³⁴⁶ The courts then examined the facts to determine if the Navy had violated its internal regulations.³⁴⁷

The Ninth Circuit went on to hold that the 1981 congressional efforts to increase military cooperation with civilian law enforcement had the opposite effect by codifying the Navy regulations existing on 1 December 1981.³⁴⁸ In other words, the court held that Congress imposed a new limit by not directing the Navy to rescind any regulations that administratively applied the Act to the Navy and Marine Corps on 1 December 1981.³⁴⁹ Even assuming that this is a constitutional way to legislate, it is almost impossible to harmonize the Ninth Circuit's interpretation with the plain language of the 1982 Authorization Act and legislative history.³⁵⁰ In this particular case, however, the appeal was denied, even though the court found that the Navy had violated its old regulations.³⁵¹

The more lasting legacy from this period may be the affirmation of the three *Walden* principles:³⁵² The Posse Comitatus Act does not apply to the Navy; the DOD may, nonetheless voluntarily impose more stringent limits upon itself. A violation of these more restrictive internal administrative policies, however, does not mandate an exclusionary rule.³⁵³

Even more importantly, the mid-1980s cases effectively fused any discussion of the Posse Comitatus Act with the contents of the confusing and misleading DOD regulations implementing the 1982 DOD Authorization Act.³⁵⁴ If the Secretary of Defense said the Act applied outside the United States or to the Navy, then many courts would defer to this executive extension of the Act.³⁵⁵ If the DOD said that congressional efforts to

346. See *Roberts*, 779 F.2d at 567-68; *Del Prado-Montero*, 740 F.2d at 116.

347. Only the *Del Prado-Montero* court discussed the new DOD regulations implementing 10 U.S.C. §§ 371-378. See *Del Prado-Montero*, 740 F.2d at 116.

348. *Roberts*, 779 F.2d at 567. The court then determined that the Navy had violated the cancelled regulations, but then declined to exclude the evidence obtained by the Coast Guard boarding team. *Id.*

349. See *supra* note 321.

350. See *supra* note 322 and accompanying text. The *Roberts* court also does not discuss the DOD regulations to implement the 1982 DOD Authorization Act.

351. See *Roberts*, 779 F.2d at 569.

352. See *supra* section VIII.B.

353. *United States v. Clark* 31 F.3d 831, 837 (9th Cir. 1994); *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1477 & n.9 (11th Cir. 1992); *Hayes v. Hawes*, 921 F.2d 100, 104 (7th Cir. 1990) (citing *Roberts* as one of several cases declining to impose an exclusionary rule for a violation of 10 U.S.C. § 375 or the related regulations); *United States v. Hartley* 796 F.2d 112, 115 (5th Cir. 1986).

increase military-civilian cooperation somehow increased the limits on DOD forces, many courts would simply hold the DOD to its overly restrictive regulations.³⁵⁶ Many courts, especially the Ninth Circuit, gave little effort to distinguish between the DOD regulations and the Act.³⁵⁷ The deeply flawed DOD regulations ultimately controlled any discussion of the law.

354. See 1998 OLC LEXIS 2 (Op. Off. Legal Counsel May 26, 1998). “Unless we indicate otherwise by use of a more specific reference or citation, we use the term PCA to refer to the original statute itself, the related statutes, and the implementing Directive of the Department of Defense.” *Id.* at *4.

355. See *United States v. Khan*, 35 F.3d 426, 431 & n.6 (9th Cir. 1994) (DOD regulations apply the Act to the Navy and outside of the United States); *Hawes*, 921 F.2d at 102-03 (no need to determine if the Act applies to the Navy since the regulations implementing 10 U.S.C. § 375 apply the Act to the Navy; therefore, the cases interpreting the Act also interpret 10 U.S.C. § 375 and limit Navy involvement with civilian law enforcement officials); *United States v. Ahumado-Avendano*, 872 F.2d 367, 372-73 (11th Cir. 1989) (Act applies to the Navy by either implication or virtue of executive act). Despite this apparent expansion of the Act, no relief was granted to any defendant in any of these cases. In fact, the motion to either exclude evidence or dismiss an indictment based on an alleged violation of the Act or the DOD regulations is rarely successful. See Brian L. Porto, Annotation, Construction and Application of Posse Comitatus Act (18 USCA § 1385), and Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Execute Laws, 141 A.L.R. Fed. 271 (2001) (listing three cases in which some relief was granted as opposed to over fifty cases in which the defense was unsuccessful).

356. See *supra* note 355. *But see Mendoza-Cecelia*, 963 F.2d at 1477-78. According to *Mendoza-Cecelia*, the Act doesn’t apply to the Navy. Even if it did, 10 U.S.C. § 379 creates an exception that permits Navy ships to employ Coast Guard LEDETS. Any violation of the Navy implementing regulations or 10 U.S.C. §§ 371-378 does not warrant an exclusionary rule.

357. See, e.g., *United States v. Hitchcock*, 2002 U.S. App. LEXIS 4513, at *12-17 (9th Cir. Mar. 21, 2002). *But see United States v. Yunis*, 924 F.2d 1086, 1093-94 (D.C. Cir. 1991) (discussing the Act distinctly from the DOD regulations, concluding that the Navy violated neither when it assisted the Federal Bureau of Investigation in an overseas arrest and interrogation).

IX. Congressional Action to Further Increase Military Involvement in Civilian Law Enforcement (Round 2, The 1988 Amendments to the 1981 DOD Authorization Act (10 U.S.C. §§ 371-378))

By 1986, even prominent civil libertarians began to question the DOD's reluctance to participate in protecting the border from foreign threats,³⁵⁸ noting how easily terrorists could exploit this weakness.³⁵⁹ As *New York Times* columnist William Safire wrote:

The day can easily be foreseen when one of our cities is held hostage by a terrorist group or a terrorist state; the stuff of novels can quickly become reality. At that point, we would be asking: how did they get the bomb into our country? Whose job was it to stop the incoming weapon at our border? Why have we spent trillions on defense when any maniac can fly in a bomb that can destroy a city?³⁶⁰

Despite wide public perception that the United States had lost control of its borders, defense and law enforcement officials continued to oppose an increased DOD role in securing them.³⁶¹ In September 1988, however, Congress enacted a program to increase significantly the role of the armed forces in drug interdiction as part of the Defense Authorization Act for 1989.³⁶² The conference committee bill established a requirement for the DOD "to plan and budget for the effective detection and monitoring of *all* potential aerial and maritime threats to the national security."³⁶³ It also designated the DOD as the lead federal agency for the detection and monitoring of aerial and maritime transit of illegal drugs into the country.³⁶⁴

358. For example, the DOD complained in a 1988 GAO report that the use of 0.02% of its budget to assist law enforcement efforts (\$75 million out of \$274 billion) was a financial problem. See GAO/NSIAD-88-156, *supra* note 344, at 25-26. Thus, while the DOD never changed its regulation mandating reimbursement in all cases as a matter of law, it did implement the DOJ position that reimbursement was discretionary. See *supra* notes 341-42 and accompanying text.

359. See 132 CONG. REC. E1331 (1986) (remarks of Mr. Rangel of New York).

360. William Safire, *Thataway, Posse Comitatus*, N.Y. TIMES, Feb. 28, 1986, at A31, quoted in 132 CONG. REC. E1331.

361. See GAO/NSIAD-88-156, *supra* note 344, ch. 3; GAO/T-GGD-88-38, *supra* note 322, at 9-13; H.R. CONF. REP. NO. 100-989, at 453 (1988), reprinted in 1988 U.S.C.C.A.N. 2581 (remarks of Secretary of Defense Carlucci).

362. H.R. CONF. REP. NO. 100-989, at 447, reprinted in 1988 U.S.C.C.A.N. 2575.

363. *Id.* (emphasis added).

These two statements turned what some in the DOD may have seen as an undesirable collateral duty into “a major new military requirement.”³⁶⁵

The 1989 Defense Authorization Act also amended 10 U.S.C. §§ 371-378 to expand military assistance to civilian law enforcement while preserving military readiness and the civilian lead in direct law enforcement.³⁶⁶ The Secretary of Defense was required to consider the needs of civilian law enforcement when planning and executing military training or operations and to inform law enforcement officials promptly about drug-related intelligence.³⁶⁷ Department of Defense personnel and equipment could now be used to intercept vessels and aircraft detected outside of the United States and direct them to a location designated by civilian law enforcement officials.³⁶⁸ The 1988 Act also deleted the prohibition in 10 U.S.C. § 375 against participation in an interdiction.³⁶⁹ The limits on search, seizure, and arrest were re-ratified, as was the nonpreemption provision of 10 U.S.C. § 378.³⁷⁰ The 1988 Act also eliminated the requirement that the Attorney General and Secretary of Defense determine that an emergency existed before military assistance could be provided.³⁷¹ While concerns about direct law enforcement actions remained, the 1988 Act was clearly intended to further increase DOD participation in indirect law enforcement.

In 1998, Congress expanded the list of civilian agencies covered by the safe harbor provisions contained in 10 U.S.C. § 374 (operation of loaned equipment) to include those fighting terrorism.³⁷² The list of agen-

364. *Id.* The language in the legislative history is broader than in the actual law. The legislative history effectively tasks the DOD to detect and monitor all potential air or sea threats to national security and lists drug interdiction as one “aspect” of the larger mission. *Id.* Section 1102 of the statute, however, only lists the DOD as the single lead agency of the federal government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States. See Pub. L. No. 100-456, 102 Stat. 2042 (1989).

365. H.R. CONF. REP. NO. 100-989, at 448, *reprinted in* 1988 U.S.C.C.A.N. 2576.

366. *Id.* at 450, *reprinted in* 1988 U.S.C.C.A.N. 2578.

367. *Id.*; 10 U.S.C.A. § 371(b)-(c) (West 1989).

368. H.R. CONF. REP. NO. 100-989, at 451, *reprinted in* 1988 U.S.C.C.A.N. 2579.

369. *Id.* at 452, *reprinted in* 1988 U.S.C.C.A.N. 2580. The prohibitions only applied to assistance provided under the rest of the Authorization Act’s safe harbor provisions. See *supra* section VII.A.

370. 10 U.S.C. § 379 assigned the search, seizure, and arrest function to 500 active duty Coast Guard law enforcement personnel placed on appropriate navy vessels. H.R. CONF. REP. NO. 100-989, at 454-55, *reprinted in* 1988 U.S.C.C.A.N. 2582-83; see 10 U.S.C.A. § 379 (West 2001).

371. See 10 U.S.C.A. § 374(b)(2)(E).

372. Pub. L. No. 105-277, § 201, 112 Stat. 2681-567 (1988).

cies that can receive enhanced assistance under 10 U.S.C. § 374 now includes those enforcing customs, drugs, immigration, and terrorism laws.³⁷³

Despite these changes in the law, the DOD regulations concerning assistance to law enforcement remained unchanged. There was no move to implement the expanded safe harbors,³⁷⁴ improve cooperation in counterterrorism, or implement the mandate “to plan and budget for the effective detection and monitoring of all potential aerial and maritime threats to the national security.”³⁷⁵ The original overbroad provisions concerning reimbursement remain in place. If anything, the DOD implementing regulations became more restrictive as the Department’s policy shifted from cooperation with law enforcement to the “maximum extent practicable” in 1982 to the current policy of cooperation “to the extent practical.”³⁷⁶

The DOD regulations and court cases based upon them therefore make an extremely poor legal foundation upon which to build the new Homeland Security Strategy or define the scope of the Posse Comitatus Act. Other, legally sound, theories that both permit necessary military participation and check executive and military power, however, are available.

X. The Act’s Meaning in the Twenty-First Century; Just One Part of a System of Laws and Regulations That Limit Military Interference in Civil Affairs

A. The Posse Comitatus Act

373. See 10 U.S.C.A. § 374(b)(1).

374. Department of Defense Directive 5525.5 provided internal guidance consistent with the published regulations at 32 C.F.R. part 213. See DOD DIR. 5525.5, *supra* note 7 (discussed *supra* note 325). The Navy issued SECNAVINST 5820.7B on 28 March 1988 to implement DOD Directive 5525.5. See SEC’Y OF NAVY, INSTR. 5820.7B (28 Mar. 1988) [hereinafter SECNAVINST 5820.7B]. Both remain effective as of May 2002. The only change has been a December 1989 amendment to DOD Directive 5525.5 permitting the Secretary of Defense to limit the extraterritorial effect of the DOD regulations. See DOD DIR. 5525.5, *supra* note 7, at 6. The public regulations at 32 C.F.R. part 213, on the other hand, were cancelled on 28 April 1993. See 58 Fed. Reg. 25,776 (Apr. 28, 1993).

375. H.R. CONF. REP. NO. 100-989, at 447, *reprinted in* 1988 U.S.C.C.A.N. 2575.

376. Compare 32 C.F.R. § 213.4, with DOD DIR. 5525.5, *supra* note 7, at 2, para. 4. *But see* SECNAVINST 5820.7B, *supra* note 374, para. 6 (cooperation to the maximum extent practicable).

While no one has ever been convicted of violating the Act,³⁷⁷ and probably never will, the Act's surviving portion³⁷⁸ remains a criminal law. Therefore, discussing the Act element-by-element, like any other criminal law, is useful. In 2003, the Act states:

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 comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.³⁷⁹

The term "willfully" generally means that the defendant knowingly performed an act, deliberately and intentionally, as contrasted with accidentally, carelessly, or unintentionally.³⁸⁰ In this context, willfully may also mean that the accused had "an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was generally unlawful."³⁸¹ If the proscribed conduct could subjectively and honestly be considered innocent, then a willful mens rea may require the defendant to have more specific knowledge of the law being violated.³⁸² Given the frequent misinterpretation of the Act, the technical nature of the words "as a posse comitatus or otherwise," and the exceptions language at the beginning of the statute, the higher standard for willfulness should probably apply. This

377. See H.R. REP. NO. 97-71, pt. I (1981), reprinted in 1981 U.S.C.C.A.N. 1787 ("According to a spokesman for the Department of Justice, no one has been charged or prosecuted under the Posse Comitatus Act since its enactment. Testimony of Edward S.G. Dennis Jr. on behalf of the Department of Justice . . .").

378. A significant portion of the original Act limited the executive branch's authority to spend appropriated funds to pay the expenses incurred in employing troops as a posse comitatus. See *supra* note 130 and accompanying text.

379. 18 U.S.C.A. § 1385 (West 2001).

380. FEDERAL JURY PRACTICE AND INSTRUCTIONS, CIVIL AND CRIMINAL § 17.05 (5th ed. 2001).

381. *Sillasse Bryan v. United States*, 524 U.S. 184, 193-94 (1998).

382. *Id.*; *Ratzlaf v. United States*, 510 U.S. 135, 136-37, 138 (1994). This is a rare exception to the principle that ignorance of the law is not a defense to a criminal charge, an exception currently limited to highly technical statutes such as tax and financial laws. *Bryan*, 524 U.S. at 194-95.

could be one reason no one has ever been successfully prosecuted for violating the Act.

With the definition of willfulness in place and the historical record in mind, the Act can be restated as:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress,

- (1) intentionally and with a bad purpose to either disobey or disregard the law
- (2) uses any part of the Army or Air Force
- (3) within the United States
- (4) upon the demand of, and in subordination to, the sheriff, U.S. marshal, or other law enforcement official
- (5) to directly enforce civilian law in a way that U.S. citizens are subject to the exercise of military power which is regulatory, proscriptive, or compulsory in nature, or at a polling place
- (6) without first obtaining permission of the President to do so shall be fined under this title or imprisoned not more than two years, or both.

This more focused and historically accurate interpretation offers several advantages over many others:

- (1) It applies a “cardinal” rule of statutory construction to interpret the words “as a posse comitatus or otherwise,” which Congress deliberately left in the law, rather than ignoring these words;
- (2) It applies a historically accurate definition of *posse comitatus* to interpret the law as written and accounts for the Cushing Doctrine’s central role in motivating the Act;
- (3) It applies another recognized rule of statutory construction, *eiusdem generis*, to define the words “or otherwise” in context; and
- (4) Unlike almost all others, this interpretation accounts for the fact that a significant portion of the Act expired in the nineteenth century.

This more focused approach also accounts for the many domestic uses of troops by various Presidents that the broader interpretation of the Act implemented by the DOD and some courts would deem unlawful. The

restatement even takes into consideration the Direct Access Policy of 1917-1921, assuming that the Secretary of War asserted presidential authority as part of the National Command Authority.³⁸³

By interpreting all the words in the statute, accounting for those that Congress permitted to expire, and applying the correct historical context, articulating a large body of “exceptions” to the Act is unnecessary. The Act’s important, focused role is to counter the primary evil of 1878: the loss of control over army troops via the Cushing Doctrine. Other laws and constitutional provisions further limit the military, keep it away from polling places during elections, and capture the broader policies against military involvement in domestic affairs. The Act is an important, but partially redundant, component of a statutory and constitutional system that limits military involvement in civil affairs.

B. The Rest of the System That Limits Military Involvement in Civil Affairs

1. *Federalism Prevents State Law Enforcement from Commanding Federal Military Assets*

The Constitution establishes a system of dual sovereignty in which both the federal and state governments have authority to act, within their

383. Constitutionally, the ultimate authority and responsibility for the national defense rests with the President. Under current law and doctrine:

The *National Command Authorities* (NCA) are the President *and* Secretary of Defense or persons acting lawfully in their stead. The term NCA is used to signify constitutional authority to direct the Armed Forces in their execution of military action. Both movement of troops and execution of military action must be directed by the NCA; by law, no one else in the chain of command has the authority to take such action except in self-defense.

NATIONAL DEFENSE UNIVERSITY, JOINT FORCES STAFF COLLEGE, JFSC PUB. 1, JOINT STAFF OFFICER’S GUIDE § 102 (2000). The current administration is doing away with the term “National Command Authority”; however, the change has not yet been formalized.

proper spheres of authority, directly on the people. In *Lane County v. Oregon*,³⁸⁴ the Court stated:

The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.³⁸⁵

The control of the U.S. military is one area in which federal power is supreme. In *Federalist No. 23*, Alexander Hamilton stated that once it is determined that the federal government is to be entrusted with providing for the common defense, then “there can be no limitation of that authority which is to provide for the defense and protection of the community in any manner essential to its efficacy—that is, in any manner essential to the formation, direction, or support of the National Forces.”³⁸⁶

The Supreme Court addressed the relationship between federal and state power over the military in *United States v. Tarble*.³⁸⁷ In that case, the Court held:

Now, among the powers assigned to the National government, is the power “to raise and support armies,” and the power “to provide for the government and regulation of the land and naval forces.” The execution of these powers falls within the line of its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power to the National government in the formation, organization, and government of its armies by any State officials

384. 74 U.S. (7 Wall.) 71 (1869).

385. *Id.* at 75-76.

386. THE FEDERALIST NO. 23, at 121-22 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

387. 80 U.S. (13 Wall.) 397 (1872).

could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.³⁸⁸

The Supreme Court recently affirmed its holding of the supremacy of the federal government with regard to control of the military in *Perpich v. Department of Defense*.³⁸⁹ In that case, the Court, explicitly approving *United States v. Tarble*, held that the federal government may order the National Guard to active duty for training outside the United States without the consent of the state or a presidential proclamation.³⁹⁰

From these cases, the supremacy of federal control over the military is clear. In this regard, the Posse Comitatus Act can be viewed as Congress's expression of constitutional law regarding federalism.

2. DOD Military Personnel Have Limited Arrest and Investigative Authority³⁹¹

Unlike their state and local counterparts, federal officials, including designated law enforcement officers, have no general arrest authority. Instead, federal agents have only whatever limited arrest powers are granted to them via specific federal statutes. The Constitution creates this distinction by granting the central government limited powers and reserving the general police power to the States.³⁹² Accordingly, “[n]o act of Congress lays down a general federal rule for arrest without a warrant for federal offenses”³⁹³ and “when Congress want[s] to grant the power to make arrests without a warrant, it [does] so expressly.”³⁹⁴

Absent a specific grant of authority, therefore, active duty Army, Navy, Air Force, and Marine personnel do not have federal arrest authority over civilians.³⁹⁵ There may be some limited exceptions to this general rule for violations committed on a military base or when DOD military personnel pursue a suspect fleeing from a military installation.³⁹⁶ In the vast majority of cases, however, DOD military personnel have no formal arrest authority over civilians.³⁹⁷ They cannot function as a national law enforcement agency. No other law, including the Posse Comitatus Act or

388. *Id.* at 408.

389. 496 U.S. 334 (1990).

390. *See id.* at 353-54.

391. Lieutenant Brad Kieserman assisted with this section.

392. *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000).

393. *United States v. Di Re*, 332 U.S. 581, 591 (1948).

10 U.S.C. § 374, is necessary to reach this conclusion. The regulatory prohibition against DOD personnel making civilian arrests repeats the point that most military personnel have no arrest authority.³⁹⁸

Additionally, the vast majority of DOD military personnel do not have authority to even investigate suspected violations of criminal laws. While Congress gave most Coast Guard personnel explicit authority to conduct certain law enforcement inquiries, examinations, inspections, and searches,³⁹⁹ the DOD armed forces received no similar authority. Instead, the authority of DOD personnel to conduct criminal investigations is lim-

394. *Ward v. United States*, 316 F.2d 113 (9th Cir. 1963); *United States v. Moderacki*, 280 F. Supp. 633, 637 (D. Del. 1968); *United States v. Helbock*, 76 F. Supp. 985 (D. Ore. 1948) (all three cases analyzing 39 U.S.C. § 3523(a)(2)(K), which provided *inter alia* that United States Postal Inspectors could, in any criminal investigation, “apprehend and effect . . . arrests of postal offenders”). Notwithstanding the apparently plain language of the statute authorizing postal inspectors to effect arrests, the reasoning of the *Moderacki* court is illustrative of the analysis conducted by several federal courts that concluded Congress did not intend for postal inspectors to have arrest authority:

An argument can be made that “apprehends and effects arrests” means “to make arrests.” If this were what was intended, why the curious language, “apprehends and effects arrests”? There is the connotation here that the duty of the inspector is to locate the offender, detain him when necessary and summon someone to arrest him. By contrast, officers of the Federal Bureau of Investigation, the Secret Service and the United States Customs Service are granted the power to arrest in no uncertain terms.

Moderacki, 280 F. Supp. at 637. Another court analyzed the legislative history of the provision and concluded that the purpose of the statute was to establish postal salary levels by job descriptions rather than by job title, thereby classifying existing duties and not creating “new authority.” *Alexander v. United States*, 390 F.2d 101, 103-04 (5th Cir. 1968).

The Postal Service responded to these rulings by obtaining a legislative change to clarify the arrest authority of postal inspectors. *See* 18 U.S.C. § 3061 (2000). Section 3061 is illustrative of the limited arrest authority of many federal agents because it creates a framework that permits warrantless arrests for any federal felony committed in the officer’s presence or for which the officer has reasonable grounds to believe that the person to be arrested committed a federal felony; however, the officer may only exercise this authority when engaged in the enforcement of laws related to the limited function of his federal agency. *Id.* *See also* 8 U.S.C. § 1357 (2000) (Immigration and Naturalization Service); 18 U.S.C. §§ 3052 (FBI), 3056 (Secret Service), 3061 (Postal Inspectors); 19 U.S.C. §§ 1581, 1589a (2000) (Customs); 21 U.S.C. § 878 (2000) (Drug Enforcement Agency); 26 U.S.C. § 7608 (2000) (Internal Revenue Service agents); 49 U.S.C. § 114(q) (2000) (designated Transportation Security Administration employees). These statutes expressly confer warrantless arrest and weapons carriage authority for many federal agencies.

ited to internal matters such as on-base crime, suspected violations by military personnel, and crimes committed by civilian employees in the course of their official duties.⁴⁰⁰ While a lack of authority to conduct criminal investigations is a more subtle form of control over the DOD military

395. Pursuant to Rule for Courts-Martial 302, MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 302 (2002), and article 7 of the Uniform Code of Military Justice (UCMJ), UCMJ art. 7 (2002), various military officials, including authorized criminal investigators, may “apprehend” any person subject to the UCMJ, regardless of location, if there is probable cause to believe that the person has committed a criminal offense. *See id.* art. 2. Normally, persons on active duty constitute the largest block of persons subject to the UCMJ.

Members of the U.S. Coast Guard have even broader arrest authority under 14 U.S.C. § 89(a), which states:

The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. . . . When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore

14 U.S.C. § 89(a) (2000).

396. Major Matthew J. Gilligan, *Opening the Gate?: An Analysis of Military Law Enforcement Authority over Civilian Lawbreakers on and off the Federal Installation*, 161 MIL. L. REV. 1, 27-33 (1999).

397. *Id.* at 6-7.

398. Civilian special agents of the Defense Criminal Investigative Service have express authority to execute warrants and make arrests without a warrant. They may also carry firearms in the performance of their duties. *See* 10 U.S.C. § 1585-1585a (2000).

399. 14 U.S.C. § 89 (discussed *supra* note 395). The Coast Guard is the fifth military service in the armed forces of the United States. *Id.* §1.

400. Gilligan, *supra* note 396, at 27-33; *see also* U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES § 3.1 (1995). The Army has investigative authority whenever an Army interest exists and investigative authority has not been reserved to another agency such as the DOJ. Army interest exists whenever (1) the crime is committed on a military installation; (2) the suspect is believed to be subject to the UCMJ; (3) the suspect is a DOD civilian employee who committed an offense in connection with his official duties; (4) the Army is the victim of the crime; and (5) in situations where off-base criminal activities have a direct adverse effect on the effective operation of a military facility (introduction of illegal drugs). *Id.*; *see also* U.S. DEP’T OF DEFENSE, DIR. 5210.56, USE OF DEADLY FORCE AND THE CARRYING OF FIREARMS BY DOD PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES (25 Feb. 1992) (with C1, 10 Nov. 1997) (giving a similar list of investigations and permitting DOD personnel to carry weapons when so engaged); Major Steven Nypaver, *CID and the Judge Advocate in the Field—A Primer*, ARMY LAW., Sept. 1990, at 7-8.

branches, it is a powerful legal impediment when combined with the standards of conduct and fiscal law. For example, in 1979, the Department of Justice maintained that a lack of explicit authority for the FBI to investigate narcotics violations limited the Bureau's role to support of the Drug Enforcement Agency.⁴⁰¹

3. *Fiscal Law*

Congress's "power of the purse" is perhaps the single most important check in the Constitution on presidential power,⁴⁰² especially with respect to potential misuse of the military.⁴⁰³ It is up to Congress to decide whether to provide funds for a particular program or activity.⁴⁰⁴ Abuses, however, were common through the post-Civil War years. The permanent funding statutes in Title 31 have evolved over two centuries to combat these abuses and check executive power.⁴⁰⁵ Even a basic review of the fiscal law framework shows the importance of the (now expired) fiscal law portion of the Posse Comitatus Act.

a. *Fiscal Law Framework*

The General Accounting Office has established a three-part test to determine whether it is legal to obligate or expend funds: "(1) The purpose of the obligation or expenditure must be authorized; (2) The obligation must occur within the time limits applicable to the appropriation; and (3)

401. See GAO/GGD-80-4, *supra* note 312, at 189 (appendix IX containing the DOJ's response to the GAO report).

402. 1 GEN'L ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-3 (2d ed. 1991) [hereinafter GAO RED BOOK].

403. See *Federalist No. 23*, in which Hamilton wrote about the benefit of the Constitution's two-year limit on congressional appropriations for the Army combined with two-year terms for members of the House of Representatives:

Schemes to subvert the liberties of a great community *require time* to mature them for execution. An army, so large as seriously to menace those liberties, could only be formed by progressive augmentations; which would suppose not merely a temporary combination between the legislature and executive, but a continued conspiracy for a series of time.

THE FEDERALIST NO. 23, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

404. GAO RED BOOK, *supra* note 402, at 1-4.

405. *Id.* at 1-6.

The obligation and expenditure must be within the amounts Congress has established.”⁴⁰⁶ These elements are often referred to, respectively, as purpose, time, and amount.

The purpose statute is codified at 31 U.S.C. § 1301(a). It states: “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”⁴⁰⁷ The GAO has succinctly stated the constitutional principle as follows: “Since money cannot be paid from the Treasury except under an appropriation . . . , and since an appropriation must be derived from an act of Congress, it is for Congress to determine the purposes for which an appropriation may be used.”⁴⁰⁸ The Supreme Court has held that “the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”⁴⁰⁹

Congress authorizes funds to be spent for specific purposes in organic legislation, authorization acts, and appropriation acts.⁴¹⁰ Organic legislation is used to create agencies, programs, or functions and often does not provide any funds. Appropriation authorization legislation permits the appropriation of funds to carry out organic legislation.⁴¹¹ Authorization acts may be contained in organic legislation, or they may be separate legislative actions.⁴¹² An authorization act does not appropriate funds; rather, it “contemplates subsequent legislation by the Congress actually appropriating the funds.”⁴¹³ An appropriation act provides the budget authority.

To determine how a federal agency may lawfully spend its funds, locating and examining the legislation authorizing the function is necessary. This authority may be located in organic legislation, authorization acts, or appropriation acts, along with the appropriate legislative history.⁴¹⁴ This statutory authority, by implication, confers with it both the express authority of the statute and the authority to incur expenses that are neces-

406. *Id.* at 4-2.

407. 31 U.S.C. § 1301(a) (2000).

408. GAO RED BOOK, *supra* note 402, at 4-2 (citing U.S. CONST. art. I, § 9, cl. 7).

409. *United States v. MacCollum*, 429 U.S. 317, 321 (1976) (citing *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850)).

410. *See generally* GAO RED BOOK, *supra* note 402, ch. 2.

411. *See id.* at 2-33.

412. *See id.* at 2-35.

413. *Id.* at 2-34 (citing 35 Comp. Gen. 306 (1955); 27 Comp. Gen. 923 (1921)).

414. *See id.* at 4-5.

sary or proper or incident to the purpose of the statute.⁴¹⁵ This is known as the necessary expense doctrine.

The Comptroller General's modern version of the necessary expense doctrine is set out in volume I, chapter 4 of the *GAO Red Book*. It states:

For an expenditure to be justified under the necessary expense theory, three tests must be met:

- (1) The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.
- (2) The expenditure must not be prohibited by law.
- (3) The expenditure must not be otherwise provided for, that is, it must be an item that falls within the scope of some other appropriation or statutory funding scheme.⁴¹⁶

The determination of whether an expenditure is logically related to an appropriation is made by the agency.⁴¹⁷ The *GAO Red Book* states that “[a] decision on a ‘necessary expense’ question therefore involves (1) analyzing the agency’s appropriations and other statutory authority to determine whether the purpose is authorized, and (2) evaluating the adequacy of the administrative justification, to decide whether the agency has properly exercised, or exceeded, its discretion.”⁴¹⁸ The GAO will defer to the agency when reviewing an agency determination.⁴¹⁹

There are several possible consequences for violations of the purpose statute. The Comptroller General may disallow an expenditure,⁴²⁰ admonish an agency,⁴²¹ adjust accounts,⁴²² or take exception to an account.⁴²³ In addition, a violation of the purpose statute may lead to an Anti-Deficiency

415. 6 Comp. Gen. 619 (1927).

416. GAO RED BOOK, *supra* note 402, at 4-16.

417. *See id.* at 4-17.

418. *Id.*

419. *See id.*

420. *See* Hon. Bill Alexander, B-213137, 1984 U.S. Comp. Gen. LEXIS 972, at *4 (June 22, 1984) (citing 32 Comp. Gen. 71 (1952)).

421. *See id.* (citing 17 Comp. Gen. 1020 (1938)).

422. *See id.* (citing 14 Comp. Gen. 103 (1934)).

423. *See id.* (citing 17 Comp. Gen. 748 (1938)).

Act violation. The Anti-Deficiency Act prohibits expending or obligating funds in excess of an appropriation or in advance of an appropriation.⁴²⁴ Therefore, if funds were not authorized for a purpose, or if the wrong appropriation was charged and the adjustment of accounts caused the agency to exceed the appropriated funds, then both the purpose statute and the Anti-Deficiency Act have been violated.⁴²⁵ A violation of the Anti-Deficiency Act may lead to adverse personnel actions, including suspension without pay or removal,⁴²⁶ or criminal penalties.⁴²⁷

b. Application to the DOD Armed Forces

A detailed discussion of the fiscal law limits on the domestic law enforcement role of the U.S. military is beyond the scope of this article; however, a preliminary examination of this framework shows that fiscal law could be a very powerful control. On the one hand, the basic purpose of the Army and Air Force listed in 10 U.S.C. is to: (1) preserve the peace and security, and provide for the defense of the United States, the Territories, Commonwealths and possessions, and any areas occupied by the United States; (2) support national policies; (3) implement national objectives; and (4) overcome any nations responsible for aggressive acts that imperil the peace and security of the United States.⁴²⁸ The plain language of the statute is clear: the Army and Air Force have some domestic purposes.

Moreover, Congress has given the military various direct domestic law enforcement authorities.⁴²⁹ 10 U.S.C. §§ 331 to 335 gives the President broad authority to use the military to enforce federal authority.⁴³⁰ 14 U.S.C. § 91 permits Navy enforcement of a statute providing for the safety and security of U.S. naval vessels.⁴³¹ 16 U.S.C. § 1861 provides explicit authority for DOD personnel to arrest individuals; board, search, and inspect fishing vessels; seize vessels; seize catch; seize evidence; and exe-

424. See 31 U.S.C. § 1341(a) (2000).

425. See *Hon. Bill Alexander*, 1984 U.S. Comp. Gen. LEXIS 972, at *4.

426. See 31 U.S.C. § 1349.

427. See *id.* § 1350.

428. See 10 U.S.C. §§ 3062, 8062 (2000). The Navy portion of 10 U.S.C. does not contain a similar provision.

429. See DOD DIR. 5525.5, *supra* note 7, encl. 4, sec. E4.1.2.5 (listing many other express law enforcement authorities).

430. See *supra* section III.B.

431. See 14 U.S.C. § 91 (2000); *supra* section V.D.

cute warrants.⁴³² 33 U.S.C. §§ 1 and 3 have been used in conjunction with the trespass statute to permit the military to enforce restricted areas around military installations and danger zones around ranges.⁴³³ 49 U.S.C. § 324 permits the detailing of military members to the Department of Transportation for any duty.⁴³⁴ 50 U.S.C. § 194 gives the President the authority, which the President has exercised,⁴³⁵ to use the military to enforce both the Espionage Act and Magnuson Act.⁴³⁶ Congress has also established a system for the DOD military services to support civilian law enforcement efforts within certain limits.⁴³⁷

On the other hand, Congress has not given the DOD military services arrest authority or authority to conduct criminal investigations.⁴³⁸ Congress also limits the intelligence element of the military from gathering information on U.S. persons.⁴³⁹ While the list of laws that DOD forces may enforce is extensive, the most significant involve national security and self-protection. The authorized enforcement actions do not even imply a general police or investigation power. If a law is not on the list, then fiscal law principles bar DOD military forces from taking enforcement action unless the activity is otherwise authorized. Moreover, the continuing impact of laws such as the Posse Comitatus Act that prohibit certain activities may also have fiscal law implications.⁴⁴⁰

4. *Standards of Ethical Conduct*

While not currently used in this manner, the Standards of Ethical Conduct provide an additional conceptual framework to limit DOD law enforcement actions. The Standards of Conduct, in its broadest sense, consist of a recently created system of Executive Orders,⁴⁴¹ published Office of Government Ethics (OGE) regulations,⁴⁴² and internal DOD regulations.⁴⁴³ These orders and regulations limit the use of DOD personnel or

432. See 16 U.S.C. § 1861 (2000); *supra* section V.F.

433. See 33 U.S.C. §§ 1, 3 (2000); *supra* sections V.A, V.C.

434. See 49 U.S.C. § 324 (2000); *supra* section V.G.

435. See 33 C.F.R. pt. 6 (LEXIS 2003).

436. See 50 U.S.C. §§ 191, 194 (2000); *supra* sections V.B, V.E.

437. See *supra* section VII.

438. See *supra* section X.B(2).

439. A very large body of law governs the conduct of intelligence agencies, including military intelligence; however, the President has issued a succinct summary of primary protections for U.S. persons in Executive Order 12,333. See generally Exec. Order No. 12,333, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. § 401 (2000).

property to authorized activities only. Government property, moreover, is defined broadly, extending to any property right or interest purchased with government funds. It includes vehicles, office supplies, communications

440. Once it is determined that the expenditure bears a logical relationship to an authorized function, it is necessary to determine whether the expenditure is prohibited by law. The Posse Comitatus Act, when enacted as part of the Army Appropriation Act of 1878, contained three provisions: the first established the criminal provision; the second was a prohibition on expending funds to employ troops as a posse comitatus; and the third established the criminal penalty. The criminal provision begins with the phrase, "From and after the passage of this act it shall not be lawful . . ." Act of June 18, 1878, 20 Stat. 152. This language expresses a clear intent of futurity and the permanence of the provision. The prohibition on expending funds, on the other hand, has clear language indicating that the provision applied only to the funds appropriated by that Act. The plain language of the statute suggests that the prohibition on expending funds expired at the end of the fiscal year. *See id.* One could argue, however, that to read the provision as such would lead to absurd results. In other words, it is illegal for Army troops to be part of the marshal's posse comitatus, however, there is no permanent fiscal law prohibition against the practice.

There is a line of Comptroller General Decisions that stand for the proposition that absent a clear statement of futurity a provision may be considered permanent if not doing so would render the provision meaningless or produce an absurd result. *See* Federal Judges IV—Reexamination of Appropriations Rider Limitation on Pay Increases, 65 Comp. Gen. 352 (1986) (finding that a provision is permanent otherwise it would be stripped of any legal effect); Federal Judges—Applicability of October 1982 Pay Increase, 62 Comp. Gen. 54 (1982) (same); Hon. Will R. Wood, 9 Comp. Gen. 248 (1929) (finding that a provision in an Army Appropriation was permanent even though it did not contain any words of futurity because an alternate construction would mean that the proviso was effective for only one day).

In the case of the Posse Comitatus Act, however, the general rule should apply. The plain language of the Act is clear that the prohibition on expending funds applied only for that fiscal year. Furthermore, interpreting the proviso consistent with the plain language will not render the provision meaningless or provide an absurd result. The plain language makes the fiscal prohibition effective for the fiscal year intended; this is not a situation in which the statute would be wholly ineffective if not permanent. The criminal provision, which does indicate futurity, creates an express exception to the prohibition when authorized by Congress. One can view this language as an express indication that monies may be expended in the future when Congress provides authorization.

441. Exec. Order No. 12,674, pt. I, § 101(i), 54 Fed. Reg. 15,159 (Apr. 14, 1989) (as modified by Exec. Order No. 12,731, 55 Fed. Reg. 42,547 (Oct. 19, 1990)).

442. 5 C.F.R. § 2635.704-.705 (LEXIS 2003).

443. U.S. DEP'T OF DEFENSE, DIR. 5500.7, STANDARDS OF CONDUCT (30 Aug. 1993) [hereinafter DOD DIR. 5500.7]; U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION §§ 2-100, 2-301 (30 Aug. 1993) [hereinafter JER]. While the Office of Government Ethics (OGE) regulations at 5 C.F.R. part 2635 are only directly applicable to military officers, *see* 5 C.F.R. § 2635.103, these DOD directives apply the OGE regulations to all service members, including enlisted personnel. *See* DOD DIR. 5500.7, *supra*; JER, *supra*.

equipment, and the services of government contractors.⁴⁴⁴ The default rule is, therefore, that every proposed use of DOD property or personnel requires affirmative authority. Moreover, this authority may only come from a law or regulation.⁴⁴⁵ A military commander has no inherent authority to authorize the use of government property for any purpose.⁴⁴⁶ So while it would be a significant mitigating factor, a superior's permission of an activity does not entirely insulate subordinates from potential responsibility for the misuse of equipment. Potential sanctions for the use of DOD property or personnel to conduct unauthorized activities include criminal prosecution of military personnel.⁴⁴⁷ Civilian employees face a full range of negative job actions, including termination for cause.⁴⁴⁸

The Standards of Conduct capture the spirit of the purpose statute by limiting executive agency activities to those authorized by law or regulation.⁴⁴⁹ This principle could be applied to DOD law enforcement actions. The list of authorized DOD law enforcement activities, while extensive,⁴⁵⁰ does not include a general domestic police power or even arrest authority. Any use of DOD equipment or personnel along these lines, therefore, is prohibited.

In many ways, the controls imposed by the Standards of Conduct resemble those incorrectly attributed to the Posse Comitatus Act. The Standards of Conduct directives, however, do so within a legally supportable framework that has a robust enforcement program. While published enforcement actions under the Standards of Conduct appear focused on instances in which individuals misuse government resources for personal gain, this need not be the case. A Standards of Conduct violation could be used to sanction DOD military personnel who engage in unauthorized law enforcement activities. In fact, it would be far easier to prosecute a service

444. 5 C.F.R. § 2635.704(b)(1).

445. *Id.* § 2635.704(b)(2), .705 (b).

446. *Id.* § 2635.704. The OGE explicitly rejected changing the definition of authorized purposes, to include any purpose authorized by an employee's supervisor. *Id.*

447. DOD DIR. 5500.7, *supra* note 443, at B.2. This directive makes portions of the JER a lawful general order. Military personnel may be prosecuted for violating a lawful general order without having to prove actual knowledge of the order. *See* UCMJ art. 92 (2002). Other provisions of the JER, including the OGE regulations incorporated at section 2-100, *see* JER, *supra* note 443, § 2-100, may be prosecuted as a dereliction of duty under article 92, UCMJ. *See* UCMJ art. 92.

448. DOD DIR. 5500.7, *supra* note 443, at B.2.

449. *See supra* notes 408-09 and accompanying text.

450. *See supra* section V.

member for violating the Standards of Conduct than for violating the Posse Comitatus Act as the Act is currently interpreted.⁴⁵¹

5. Federal Election Law

A number of federal election laws, the weakened descendants of an 1865 civil rights law and the 1870 enforcement act, strictly limit actions by all military personnel near polling places and in elections. Originally, RS 2002 prohibited any person in the military, naval, or civil service of the United States from bringing troops or armed men to the place of an election in any state.⁴⁵² Revised Statute 5528 imposed criminal sanctions of up to five years' imprisonment at hard labor for violations.⁴⁵³ Both laws, however, contained exceptions that permitted troops or naval forces at polling places if necessary to repel armed enemies of the United States or to keep the peace at the polls. Ironically, some of the most passionate debate in support of the Posse Comitatus Act centered on President Grant's use of troops at some Southern polling places to prevent voter intimidation and fraud during the 1876 election.⁴⁵⁴ The practice, however, was not actually prohibited until thirty-one years after passage of the Act, when a 1909 revision of the penal code removed the exception from RS 2002 and 5528 permitting the use of the military or naval forces to keep the peace at polling places.⁴⁵⁵

This twentieth century prohibition, along with related laws from the Civil War era that prohibit Army and Navy officers from interfering with elections, remains in place today.⁴⁵⁶ While these laws have been virtually invisible,⁴⁵⁷ they prohibit one of the primary "evils" cited by supporters of the Posse Comitatus Act: keeping the armed forces out of the electoral process. This is probably the most significant statutory restriction imposed

451. It is also possible for the DOD to prosecute a Standards of Conduct violation under the theory that DOD Directive 5525.5, *supra* note 7, prohibits the activity. Department of Defense Directive 5525.5, however, is deeply entwined with the Act, making it potentially quite difficult to prove a violation beyond a reasonable doubt without having to litigate the Act itself. Moreover, no part of DOD Directive 5525.5 is a general order. *See id.*; *see also supra* note 447 (discussing the implication of a general order).

452. REVISED STATUTES, *supra* note 108, at 352.

453. *Id.* at 1071.

454. *See supra* notes 125-26 and accompanying text.

455. XXXV STATUTES AT LARGE OF THE UNITED STATES OF AMERICA FROM DECEMBER 1907 TO MARCH 1909, pt. 1, at xix, 1088.

456. *See* 18 U.S.C. §§ 592-593 (2000); 42 U.S.C. § 1972 (2000).

by Congress since it enhances civilian control over the armed forces. Alexander Hamilton said it best when he wrote:

Independent of all other reasonings upon the subject, it is a full answer to those who require a more peremptory provision against military establishments in time of peace to say that the whole power of the proposed government is to be in the hands of the representatives of the people. This is the essential, and after all, the only efficacious security for the rights and privileges of the people which is attainable in civil society.⁴⁵⁸

The Cushing Doctrine violated this important principle by permitting minor, unelected civilian officials to control parts of the standing army and spend federal funds contrary to congressional instructions without even the elected Commander in Chief's knowledge. The revocation of the Cushing Doctrine via passage of the Posse Comitatus Act reinvigorated elected civilian control over the armed forces. Federal election law keeps the armed forces from turning civilian control into a mere formality.

XI. Conclusion

*Unless we act to prevent it, a new wave of terrorism, potentially involving the world's most destructive weapons, looms in America's future. It is a challenge as formidable as any ever faced by our nation. . . . Today's terrorists can strike at any place, at any time, and with virtually any weapon. Securing the American homeland is a challenge of monumental scale and complexity. But the U.S. government has no more important mission.*⁴⁵⁹

457. Much like the Posse Comitatus Act, it does not appear that anyone has ever been prosecuted for violating these laws. Delaware attempted to prosecute some deputy U.S. marshals under a similar provision related to the marshals in 1881; however, the defendants removed the case to federal court as permitted by law, and the State declined to participate in that forum. *See Delaware v. Emerson*, 8 F. 411 (D. Del. 1881). No one appears to have written about 18 U.S.C. §§ 592 or 593 except to note that a violation disqualifies one from ever holding a position with the United States in addition to the criminal penalties. *See* 2000 OLC LEXIS 11 (Aug. 18, 2000).

458. THE FEDERALIST No. 28, at 147-48 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

459. OFFICE OF HOMELAND SECURITY, *supra* note 4, at 1.

Unfortunately, the current interpretation of the Posse Comitatus Act, namely, a set of overbroad limits that bear little resemblance to the actual law combined with a bewildering patchwork of “practical” exceptions, both impedes this important mission and does little to protect civil liberties. Sustained congressional action to increase DOD participation in domestic law enforcement with no overarching policy framework has only compounded the problem.⁴⁶⁰ In many cases, the actual application of the Act rests largely on ad hoc decisions and, hopefully, good judgment.

Hope, however, is not a sound basis for a Homeland Security strategy. In many critical situations, such as responding to nuclear terrorism, the current interpretation of the Act may create “a convoluted command and control structure, decreased response time, and continuity-of-operations problems; it also leaves the federal response vulnerable to exploitation by the adversary.”⁴⁶¹ It also creates bizarre situations in which the U.S. Navy perceives itself to have less authority to conduct some national defense missions as threats get closer to America’s shores.⁴⁶²

The current misinterpretation of the Posse Comitatus Act is also infecting NORTHCOM when this important new military organization is barely out of the gate.⁴⁶³ NORTHCOM’s mission is to “conduct operations to deter, prevent, and defeat threats and aggression aimed at the United States . . . and as directed by the President or Secretary of Defense, provide military assistance to civil authorities.”⁴⁶⁴ Despite this broadly worded purpose, NORTHCOM specifies that its Homeland Security mission is limited to Homeland Defense and civil support. The distinction being that Homeland Defense is “the protection of U.S. territory, domestic population and critical infrastructure against military attacks emanating from outside the United States,” whereas Homeland Security is “the prevention, preemption, and deterrence of, and defense against, aggression targeted at U.S. territory, sovereignty, domestic population, and infrastruc-

460. *See supra* section V.

461. Chris Quillen, *Posse Comitatus and Nuclear Terrorism*, PARAMETERS, Spring 2002, at 71.

462. *See supra* note 10 (discussing the boarding of the *Hajji Rahmeh*).

463. *See generally* U.S. Northern Command, *Who We Are—Mission*, at <http://www.northcom.mil/index.cfm?fuseaction=s.whoweare§ion=3> (last visited Mar. 2, 2003).

464. *Id.* *See also* Message, R 011337Z Oct 2002, Sec’y of Defense, Washington, D.C., OASD-PA, subject: Public Affairs Guidance (PAG)—Initial Operating Capability (IOC) of United States Northern Command (USNORTCOM) [hereinafter NORTHCOM Message].

ture as well as the management of the consequences of such aggression and other domestic emergencies.”⁴⁶⁵ The stated requirement for this distinction between “military attacks” and terrorist “aggression” is the Posse Comitatus Act.⁴⁶⁶

NORTHCOM’s distinction between Homeland Security and Homeland Defense, therefore, has the same inherent conflicts and inconsistencies as the DOD’s current interpretation of the Posse Comitatus Act.⁴⁶⁷ Both appear to be based on the logic that the Posse Comitatus Act prohibits the DOD from performing any activities related to law enforcement, such as “interdicting vehicles, vessels and aircraft; conducting surveillance, searches, pursuit and seizures; or making arrests on behalf of civilian law enforcement authorities.”⁴⁶⁸ Therefore, those activities must be Homeland Security, not Homeland Defense; the DOD can only engage in Homeland Defense.

The DOD further states that terrorist attacks against the United States are fundamentally a matter of Homeland Security to be addressed by law enforcement and that the President or Secretary of Defense will direct NORTHCOM’s role in relation to Homeland Security.⁴⁶⁹ In other words, the world’s premier military organization is distancing itself from the “concerted national effort to prevent terrorist attacks within the United States”⁴⁷⁰ until the President or Secretary of Defense directs such participation. While requiring the President or Secretary of Defense to approve all DOD participation in Homeland Security may be a sound policy decision, the Posse Comitatus Act does not require this result.

In addition to potentially impeding national security, this misapplication of the Act is dangerous to American civil liberties and erodes respect for the rule of law. It holds up the Act as a strict legal and quasi-constitutional limit, yet one that is easy to discard or ignore when practical necessity appears to require it.⁴⁷¹ The current DOD doctrine on the Act is rife with implied exceptions for “inherent” military authority.⁴⁷² In the end, the

465. U.S. Northern Command, *Homeland Defense*, at <http://www.northcom.mil/index.cfm?fuseaction=s.homeland> (last visited Mar. 2, 2003).

466. *Id.*

467. See *supra* sections VIII.B-VIII.C.

468. U.S. Northern Command, *Who We Are—Operating Within the Law*, at <http://www.northcom.mil/index.cfm?fuseaction=s.whoware§ion=10> (last visited Mar. 2, 2003).

469. See NORTHCOM Message, *supra* note 464.

470. OFFICE OF HOMELAND SECURITY, *supra* note 4, at 2.

law becomes in some military eyes a “procedural formality,” used to ward off undesired and potentially resource-depleting missions while not imposing any real controls.⁴⁷³ As shown in section IV, this lack of genuine control has frequently left American citizens at the mercy of the military’s and executive branch’s good judgment with respect to civil liberties.

This, of course, need not be the case. A key first step in resolving the current confusion is to distinguish consistently between the Posse Comitatus Act and the general principle of limiting military involvement in civil affairs. The Posse Comitatus Act has long been misconstrued as embodying respected constitutional principles. The actual Act, however, is mostly a remnant of Reconstruction bitterness.

Once the Act is accurately viewed in its true historical background and distinguished from other principles, its current role can be determined through the normal tools of statutory interpretation. This article’s thorough analysis addresses several important issues: (1) the actual wording of the entire Act as passed in 1878; (2) Congress’s rejection of language applying the Act to the naval forces; (3) Congress’s rejection of language that would have simply made it illegal to use the Army to execute the laws which retained limiting words that must be given meaning; (4) the contemporaneous congressional and presidential interpretations of the Act and associated actions; (5) that a significant portion of the Act expired in the nineteenth century; and (6) Congress’s steady increase of the military’s role in regulatory action and law enforcement since 1878.

With the Posse Comitatus Act accurately defined, the DOD should revise its overly restrictive regulations that purport to be based on the Act. Revised DOD regulations should address fiscal law and the Standards of Conduct, reinvigorating these other long-neglected controls. These “other” legal theories will likely prove far more effective in protecting civil liberties, while clearly permitting legitimate national security missions such as near-shore Maritime Interception Operations.⁴⁷⁴ Congress, of

471. Quillen, *supra* note 461, at 62; *see also* OFFICE OF HOMELAND SECURITY, *supra* note 4, at 13, 48 (stating that the law prohibits military personnel from enforcing the law within the United States, but listing a series of broadly defined domestic military and defensive missions difficult to distinguish from law enforcement); NORTHCOM Message, *supra* note 464; text accompanying note 469.

472. *See supra* notes 333-35 and accompanying text.

473. Quillen, *supra* note 461, at 62-63.

474. *See supra* note 10.

course, retains the power to regulate how the executive branch spends appropriated funds to deploy the armed services domestically.

Congress should further empower the DOD to enforce select national security laws fully, perhaps in the areas of nuclear, chemical, and biological terrorism, and create a comprehensive statutory framework addressing the military's role in domestic affairs. The Magnuson Fisheries and Conservation Management Act of 1976, while perhaps not fitting with such a carefully thought-out framework, provides the best model statute for granting DOD law enforcement authority in situations where it makes sense. For example, this approach could resolve significant issues concerning the military's role, via NORTHCOM, in responding to domestic nuclear terrorism.⁴⁷⁵

Once a Department of Homeland Security (HLS) is established,⁴⁷⁶ Congress should also empower the Secretary of HLS to use DOD personnel temporarily detailed to the Department of Homeland Security in any role. This authority should be similar to that granted to the Department of Transportation in 49 U.S.C. § 324.⁴⁷⁷

The President recently stated in his Homeland Security Strategy that “the threat of catastrophic terrorism requires a thorough review of the laws permitting the military to act within the United States in order to determine whether domestic preparedness and response efforts would benefit from greater involvement of military personnel and, if so, how.”⁴⁷⁸ The nation has a unique opportunity to clear up the current legal quagmire, set the record straight on the Posse Comitatus Act, and build a solid legal foundation for the new Northern Command that both enhances Homeland Security and protects civil liberties. Let's roll.

475. Quillen, *supra* note 461, at 71-72.

476. President Bush signed the Homeland Security Act of 2002 into law on 25 November 2002. *See* Pub. L. No. 107-296, 116 Stat. 2135 (2002). In addition to creating the new Department, the Homeland Security Act of 2002 contains a section titled “Sense of Congress Reaffirming the Continued Importance and Applicability of the Posse Comitatus Act.” *Id.* § 886. Unfortunately, Section 886 is a mixed bag of positive steps forward alongside a number of errors and partially correct statements that may add yet another layer of confusion to the Posse Comitatus Act.

For example, Section 886(a)(1) states: “Section 1385 of title 18, United States Code (commonly known as the ‘Posse Comitatus Act’), prohibits the use of the Armed Forces as a posse comitatus to execute the laws except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.” *Id.* § 886(a)(1). As discussed *supra*

476. (continued)

section IV of this article, the focus on law enforcement as part of a traditional posse comitatus is correct. The Act was designed, in large measure, to overturn the Cushing Doctrine. *See supra* section III.C. The Posse Comitatus Act, however, has never applied, as a matter of law, to the Navy, Marines, or Coast Guard. Thus, the statements throughout Section 886 linking the Act's prohibitions to the "Armed Forces" are incorrect.

Section 886(a)(2) correctly notes that the Act "was expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing federal law." Pub. L. No. 107-296, § 886(a)(2). Section 886(a)(2) would be more accurate, however, if it noted that the Act was intended to prevent the U.S. Marshals from *requiring* the Army to render assistance, using Army funds, under the command of the marshals. *See supra* notes 48, 137 and accompanying text. Also, traditionally the local sheriff also had the power to call upon the Army to form a posse. *See supra* note 36 and accompanying text.

Section 886(a)(3) states that the Act has served the nation well in limiting the use of the armed forces in enforcing federal law. Pub. L. No. 107-296, § 886(a)(3). As was shown *supra* section IV, however, historically the Act has not been an impediment to direct Army participation in law enforcement or the administration's domestic use of the Army. The Secretary of Defense may even have authority to suspend application of the Act and reestablish the Cushing Doctrine. *See supra* notes 185-88 and accompanying text. Section 886(a)(4) appears to acknowledge this almost unlimited presidential authority to use the armed forces domestically to meet his constitutional obligations.

In the end, Section 886 sheds little actual light upon the Act since Section 886 explicitly preserves the status quo; it does not alter the Posse Comitatus Act. *See id.* § 886(b); Statement of President Bush Concerning the Homeland Security Act of 2002 (Nov. 25, 2002), <http://www.fas.org/sgp/news/2002/11/wh112502.html>. Thus, few of the many problems discussed in this article have been addressed. The nation still needs a comprehensive framework or unifying policy theme addressing the military's role in domestic affairs. Reliance upon many unconnected laws, a general sense that the United States does not want a military national police force, and a distinction between "military" and "terrorist" activities supposedly mandated by the Posse Comitatus Act is potentially dangerous. *See supra* note 463 and accompanying text; *see also* Pub. L. No. 107-296, § 876 (Department of HLS not given authority to engage in "military" defense or activities).

477. *See supra* section V.G. Section 875(b) of the Homeland Security Act of 2002 provides the Secretary of HLS identical authority to that currently held by the Secretary of Transportation under 49 U.S.C. § 324. *Compare* Pub. L. No. 107-296, § 875(b), with 49 U.S.C. § 324 (2000).

478. OFFICE OF HOMELAND SECURITY, *supra* note 4, at 48.