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The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law

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Summary

The Posse Comitatus Act outlaws willful use of any part of the Army or Air Force to execute the law unless expressly authorized by the Constitution or an Act of Congress. History supplies the grist for an argument that the Constitution prohibits military involvement in civilian affairs subject to only limited alterations by Congress or the President, but the courts do not appear to have ever accepted the argument unless violation of more explicit constitutional command could also be shown. The provision for express constitutional authorization when in fact the Constitution contains no such express authorizations has been explained alternatively as a meaningless political face saving device or as an unartful reference to the President's constitutional powers. The express statutory exceptions include the legislation which allows the President to use military force to suppression insurrection, 10 U.S.C. 331-335, and sections which permit the Department of Defense to provide federal, state and local police with information and equipment, 10 U.S.C. 371-381.

Existing case law indicates that "execution of the law" in violation of the Posse Comitatus Act occurs (a) when the armed forces perform tasks which are assigned not to them but to an organ of civil government, or (b) when the armed forces perform tasks assigned to them solely for purposes of civilian government. Questions arise most often in the context of assistance to civilian police. At least in this context, the courts have held that, absent a recognized exception, the Posse Comitatus Act is violated, (1) when civilian law enforcement officials make "direct active use" of military investigators; or (2) when the use of the military "pervades the activities" of the civilian officials; or (3) when the military is used so as to subject "citizens to the exercise of military power which was regulatory, prescriptive, or compulsory in nature." The Act is not violated when the armed forces conduct activities for a military purpose which have incidental benefits for civilian law enforcement officials.

The language of the Act mentions only the Army and the Air Force, but it is applicable to the Navy and Marines by virtue of administrative action and commands of other laws. The law enforcement functions of the Coast Guard have been expressly authorized by act of Congress and consequently cannot be said to be contrary to the Act. The Act has been applied to the National Guard when it is in federal service, to civilian employees of the armed forces, and to off-duty military personnel.

The Act is probably only applicable within the geographical confines of the United States, but the supplemental provisions of 10 U.S.C. 371-381 appear to apply world-wide. Finally, the Act is a criminal statute under which there has never been a prosecution. Although violations will on rare occasions result in the exclusion of evidence, the dismissal of criminal charges, or a civil cause of action, as a practical matter compliance is ordinarily the result of military self-restraint.This report appears in abridged form as CRS Report RS20590, *The Posse Comitatus Act: A Sketch*.

Contents

The Posse Comitatus Act and Other Considerations: Use of the Military to Enforce Civilian Law

> 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. 18 U.S.C. 1385.

Introduction

Americans have a tradition, born in England and developed in the early years of our nation, that rebels against military involvement in civilian affairs. It finds its most tangible expression in the nineteenth century Posse Comitatus Act, 18 U.S.C. 1385. The Act forbids use of the Army and Air Force to execute civil law except where expressly authorized.

The exception documents a contrary component of the tradition. It accepts the use of the armed forces in extraordinary circumstances if expressly approved by Congress. Striking the balance between rule and exception has never been easy, but failure to do so has often proven unfortunate. When the rule is too unforgiving, a Shays's Rebellion may go unchecked. When exceptions are too generously granted, a Boston Massacre or Kent State tragedy may follow.

Several times in the recent past, concerns that civil authorities may be overwhelmed by threats of natural disasters, civil disturbances, drug trafficking, and terrorism have produced calls for more generous exceptions to the rule. Some of those calls have been answered, others have not. This is an effort to sketch the current state of the law.

Background

The Magna Carta gives us the first recorded acknowledgment of the origins of the Anglo-American tradition against military involvement in civilian affairs with its declaration that "no free man shall be . . . imprisoned . . . or in any other way

destroyed . . . except by the legal judgment of his peers or by the law of the land."[1] Subsequent legislation in the reign of Edward III explained that this precluded punishment by the King except "in due Manner . . . or by Process made by Writ. . . [or] by Course of the Law,"[2] or as later more simply stated, except "by due Process of the Law."[3] Three hundred years after the passage of the Edwardian statutes, Lord Coke and other members of Parliament read these due process and law of the land requirements to include a broad prohibition against the use of martial law in peacetime, an interpretation they compelled King Charles I to acknowledge.[4]

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[1] Magna Carta, ch. 39 (1225)[ch.29 in the Charter of King John (1215)], reprinted in SWINDLER, MAGNA CARTA: LEGEND AND LEGACY 315-16 (1965)("No freeman shall be taken, or imprisoned, or be disseised *of any freehold, or liberties, or free customs*, or outlawed, or banished, or in any *other* way destroyed, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land" (language added to ch.29 of the Charter of King John in the reissuance by King Henry III appears in italics). Although the Magna Carta in the modified version of King Henry remains in effect, the language quoted above is generally cited as "chapter 29," see e.g., THOMPSON, MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION 1300-1629 68 (1948); HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 49 (1716 ed.); I COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45 (1797 ed.); I BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 400 (1765 ed.).

[2] 25 Ed.III. Stat.5, ch.4 (1352), reprinted in, 1 STATUTES OF THE REALM, 1231-1377 321 (1993)("Whereas it is contained in the Great Charter of the Franchises of England, that none shall be imprisoned nor put out of his Freehold, nor of his Franchises nor free Custom, unless it be by the Law of the Land; It is accorded assented, and established, That from henceforth none shall be taken by Petition or Suggestion made to our Lord the King, or to his Council, unless it be by Indictment or Presentment of good and lawful People of the same neighbourhood where such Deeds be done, in due Manner, or by Process made by Writ original at the Common Law; nor that none be out of his Franchises, nor of his freeholds, unless he be duly brought into answer, and forejudged of the same by the Course of the Law; and if any thing be done against the same, it shall be redressed and holden for none").

[3] 28 Ed.III. chs. 1, 3 (1354), reprinted in 1 STATUTES OF THE REALM, 1231-1377 345 (1993)("the Great Charter . . . [shall] be kept and maintained in all Points. . . . No Man of what[ever] Estate or Condition that he be, shall be put out of land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law").

[4] See, THOMPSON, MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300-1629, 347-50 (1948); Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders* 51 IOWA LAW REVIEW 1 (1971).

Coke's Institutes make the same point; proceedings under martial law are not proceedings under the "law of the land" (lex terrae), I COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 ("And so if two English men doe goe into a foreine kingdome, and fight there, and the one murder the other, *lex terrae* extendeth not hereunto, but this offense shall be heard, and determined before the constable, and marshall [i.e. at martial law], and such proceedings shall be there, by attaching of the body, and otherwise, as the law, and custom of that court have been allowed by the lawes of the realme, [13 H.IV. ch.5 (1412)]").

King Charles I, preparing for a military expedition in France, had quartered his troops in homes along the southern English coastline.[5] Rioting resulted, and the participants, both military and civilian, were tried and punished by commissioners operating under the authority of martial law. Offended by this peacetime exercise of military judicial authority over civilians, Parliament sought and was granted the Petition of Right of 1628 which outlawed both quartering and martial law commissions.[6]

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[5] For a more expansive examination, see Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders* 51 IOWA LAW REVIEW 1 (1971).

[6] "And whereas also by the statute called `The Greater Charter of the liberties of England,'[the Magna Carta] it is declared and enacted, that no freeman may be taken or imprisoned or be disseised of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land. And in the eight-and-twentieth year of the reign of King Edward III, it was declared and enacted by authority of parliament, that no man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death without being brought to answer by due process of law. . . . [N]everthess of late time divers commissions under your Majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law, against such soldiers or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the law martial . . . . They do therefore humbly pray your most excellent Majesty . . . that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burdened in time to come; and that the aforesaid commissions, for proceeding by martial law, may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land. Petition of Right, 3 Car.I, c.1, §§3, 4, 7, 10, reprinted in STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST 515-17 (8th ed. 1895); and in 5 STATUTES OF THE REALM 23, 24 (1993).

See also, HALE, HISTORY OF THE COMMON LAW OF ENGLAND 39-40 (2d ed. 1716)("But touching the business of martial law, these things are to be observed, *First*, That in truth and reality it is not a law, but something indulged rather than allowed as a law; the necessity of government, order and discipline in an army, is that only which can give those laws a countenance. *Secondly*, This indulged law was only to extend to members of the army, or to those of the opposite army, and never was so much indulged as intended to be (executed or) exercised upon others; for others were not listed under the army, had no colour of reason to be bound by military constitutions, applicable only to the army; whereof they were not parts, but they were to be ordered and governed according to the laws to which they were subject, though it were a time of war. *Thirdly*, That the exercise of martial law, whereby any person should lose his life or member, or liberty, may not be permitted in time of peace, when the King's courts are open for all persons to receive justice, according to the laws of the land. This is the substance declared by Petition of Right, 3 Car. I. whereby such commissions and martial law were repealed and declared to be contrary to law"); I BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 400 (1765)("For martial law, which is build upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir

When, in the following century, the British responded to colonial unrest by quartering troops in Boston, the colonists saw it as a breach of this fundamental promise of English law. Their circumstances, however, were not exactly identical to those surrounding the Petition of Right. First, the question arose in the colonies. England had stationed troops in the colonies to protect them against the French and Indians and had opted for military governorships in other territories. Second, there was no military usurpation of judicial functions. The colonists remained subject to civil rather than military justice, and soldiers who employed more force than civilian law permitted were themselves subject to civilian justice as the trials of the soldiers involved in the Boston Massacre demonstrates.

On the other hand, the troops involved in the Boston Massacre were stationed in Massachusetts not for protection against a marauding invader as they had been in the French and Indian Wars, not to accomplish the transition between civil governments within a conquered territory as they had been after the French lost Canada to the British as a consequence of those conflicts, but as an independent military force quartered among a disgruntled civilian population to police it.[7]

Matthew Hale observes, in truth and reality no law, but something indulged, rather than allowed as a law; the necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land. . . . And it is laid down, that if a lieutenant, or other, that hath commission of martial authority, doth in time of peace hang or otherwise execute any one by colour of martial law, this is murder; for it is against the magna carta. And the petition of right enacts, that no soldier shall be quartered on the subject without his own consent; and that no commission shall issue to proceed within this land according to martial law. And whereas, after the restoration, king Charles the second kept up about five thousand regular troops, by his own authority, for guards and garrisons; which king James the second by degrees increased to no less than thirty thousand, all paid from his own civil list; it was made one of the articles of the bill of rights, that the raising or keeping of a standing army within the kingdom in time of peace, unless it be with the consent of the parliament, is against the law").

[7] ZOBEL, THE BOSTON MASSACRE 135 (1987) ("The soldiers, one ought always to remember, went into Boston not as an occupying army but rather as a force of uniformed peace-keepers, or policemen. Their role as even the radicals conceived it was to assist the executive and if necessary the courts to maintain order"); Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA LAW REVIEW 1,24-5 (1971) ("The last die was cast when two regiments of troops were quartered in Boston at the end of the decade. Boston was a hotbed of colonial discontent. The assemblage of military troops for control of possible disorders aggravated the discontent, not only because it affronted the English tradition against domestic use of military troops, but also because it was without warrant in the charter of Massachusetts Bay. The unwelcome troops were frequently taunted and vilified, and the ultimate and inevitable outrage soon occurred. A crowd of angry Bostonians . . . blocked the path of a detachment of soldiers marching to their post. The soldiers made ready to force their passage, but were ordered back to the main guard. . . . The crowd approached the main guard with angry and opprobrious taunts. A sentinel struck one particularly bothersome boy with the butt of his musket, and quickly a crowd converged on that spot throwing snowballs and rocks at the sentinel along with verbal threats on his life. The sentinel loaded his musket and waved it at the mob, a squad of soldiers were sent to his aid. The soldiers, soon joined by a colonel, loaded their muskets as the crowd hooted and jeered and berated them and dared them to shoot. They kept the crowd back a time with bayonets, but then suddenly fired. It was never

In any event, the experience was sufficiently vexing that the Declaration of Independence listed among our grievances against Great Britain that the King had "kept among us, in times of peace, Standing Armies without the consent of our legislatures," had "affected to render the Military independent of and superior to the civil power," and had "quarter[ed] large bodies of armed troops among us . . . protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States."[8]

The Articles of Confederation addressed the threat of military intrusion into civilian affairs by demanding that the armed forces assembled during peacetime be no more numerous than absolutely necessary for the common defense, by entrusting control to civil authorities within the states, and by a preference for the farmer in arms as a member of the militia over the standing professional army.[9]

The Constitution continued these themes albeit with greater authority vested in the federal government. It provided that a civilian, the President, should be the Commander in Chief of the Army and Navy of the United States and that civilian authorities, the Congress, should be solely empowered to raise and support Armies, provide and maintain a Navy, and make rules for their government and regulation.[10] The Bill of Rights limited the quartering of troops in private homes, U.S.Const.

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made clear -- it never is --whether they had fired on their officer's order, or upon their own compulsion. In any event, five Americans lay dead and several others seriously wounded. . . . Members of a distrusted standing army, whose quartering was in violation of the Petition of Right, and whose preparation to militarily suppress possible civil disorder was inconsistent with the oldest of England's own traditions, had slain English civilians in a time of peace").

[8] This last charge presumably refers to the results of the murder trials of the officer and soldiers involved in the Boston Massacre. Two of the soldiers were convicted of manslaughter, branded on the hand and released; the officer and the other soldiers were acquitted. ZOBEL, THE BOSTON MASSACRE 241-94 (1987).

[9] E.g., "No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for public use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage . . . . When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment. . . . The United States in Congress assembled shall never . . . appoint a commander in chief of the army or navy, unless nine States assent to the same. . . ." Arts. of Conf. VI, VII, & IX.

[10] U.S.Const. Art.II, §2; Art.I, §8, cls.12, 13, 14. The Constitution treats the militia similarly. The President is the Commander in Chief of the militia while it is in federal service, and Congress is empowered to approve its organization, arms and discipline, U.S.Const. Art.II, §2; Art.I, §8, cl.15.

Amend. III, and noted that "a well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed," U.S.Const. Amend. II. The Constitution, on the other hand, explicitly permitted the Congress to provide for calling out the militia to execute the laws, suppress insurrection, and repel invasion, U.S.Const. Art.I, §8, cl.16.

Soon after Congress was first assembled under the Constitution, it authorized the President to call out the militia, initially to protect the frontier against "hostile incursions of the Indians," and subsequently in cases of invasion, insurrection, or obstruction of the laws.[11]

Washington used this authority to put down the Whiskey Rebellion in Western Pennsylvania[12] and subsequent Presidents have relied upon it with some frequency for riot control or when in extreme cases they felt it necessary to ensure the execution of federal law.[13]

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[11] 1 Stat. 96 (1789); 1 Stat. 264 (1792). The Constitutional and statutory authority to use military force in case on insurrection seems to have been in direct response to a perceived weakness in government under the Articles of Confederation. In 1787, a group farmers in western Massachusetts, lead by a Revolutionary War veteran named Daniel Shays and feeling oppressed by tax and creditor protection policies within the Commonwealth, had harassed the state courts and constabulary, and had attempted to storm the federal arsenal at Springfield before being repulsed by the militia. Some saw in the insurrection evidence of the need for a stronger central government and implicitly that domestic tranquility might be more readily ensured if backed by centralized military capable. I MORISON, COMMAGER, & LEUCHTENBURG, THE GROWTH OF THE AMERICAN REPUBLIC 242 (7th ed. 1980)("Nevertheless, Shays's Rebellion had a great influence on public opinion. . . . When Massachusetts appealed to the Confederation for help, Congress was unable to do a thing. That was the final argument to sway many Americans in favor of a stronger federal government"); COLLIER & COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787 13 (1986)("To men like Madison and Washington, Shays's Rebellion was an imperative. It hung like a shadow over the old Congress, and gave both impetus and urgency to the Constitutional Convention. It was the final, irrefutable piece of evidence that something had good badly wrong. For some time these men had known that the deficiencies of the American government must be remedied. Shays' Rebellion made it clear to them that it must be done now"). BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787 10 (1966) ("Shays's Rebellion had been in the public mind when Congress, after debating the Annapolis report, had voted in favor of a convention in Philadelphia").

[12] See Presidential Proclamations of Aug. 7, 1794 and Sept. 25, 1794, I RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 158-62 (1896); SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION (1986); BOYD, THE WHISKEY REBELLION: PAST AND PRESENT PERSPECTIVES (1985).

[13] Eighteenth and nineteenth century instances are collected, along with related proclamations and other documentation, in *Federal Aid in Domestic Disturbances: 1787-1903*, S.DOC.NO. 209, 57th Cong., 2d Sess. (1903); for a more selective treatment but one which extends well into this century, see, RICH, PRESIDENTS AND CIVIL DISORDER (1941).

The President's authority to call upon the state militia to aid in putting down insurrections is reminiscent of the authority enjoyed by the sheriff at common law to call upon the posse comitatus.[14] In the beginning the two were comparable but unrelated. Even though Congress empowered the President to call out the militia to overcome obstructions to law enforcement, it continued to vest the federal equivalent of the sheriff, the federal marshal, with the power to call forth the posse comitatus in performance of his duties.[15]

In some cases when it passed a particular statute Congress specifically authorized recourse to the posse comitatus for its enforcement. Under the Fugitive Slave Act, for instance, owners whose slaves had escaped to another state were entitled to an arrest warrant for the slaves and to have the warrant executed by the federal marshals. The marshals in turn might "summon and call to their aid the bystanders, or *posse comitatus* of the proper county . . . [and] all good citizens [were] commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required, as aforesaid, for that purpose," 9 Stat. 462, 463 (1850).

In June of 1851, a federal marshal in Chicago arrested a fugitive slave on a warrant issued under the Act. He called for the assistance of members of the police force and of the state militia to prevent abolitionists from rescuing the prisoner before he could be returned to his owner. The marshal subsequently filed a claim with the Treasury of the United States for reimbursement of the funds he had paid the members of the police force and the militia who responded to his call. Attorney General Caleb Cushing was asked whether the United States was obligated to honor the claim.

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[14] At common law, the sheriff of every county was obligated "to defend his county against any of the king's enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is call the posse comitatus, or power of the county; which summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning, under pain of fine and imprisonment." I BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 332 (1765).

The Latin phrase literally means attendants with the capacity to act from the words *comes* and *posse* meaning companions or attendants (*comes*) and to be able or capable (*posse*). Among the Romans comitatus referred to one who accompanied the proconsul to his province. Later, comes (sometimes referred to as comites or counts) meant the king's companions or his most trusted attendants and comitatus came to refer to the districts or counties entrusted to their care. BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 529, 2635 (1914).

[15] E.g., 1 Stat. 87 (1789)("a marshal shall be appointed in and for each district . . . whose duty it shall be . . . to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have the power to command all necessary assistance in the execution of his duty. . . ."); 1 Stat. 265 (1792)("the marshals of the several districts and their deputies shall have the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states").

Cushing's response went well beyond the question of whether the "bystanders" contemplated by the Fugitive Slave Act might included members of a state militia when not in federal service, and announced a broader principle -- members of the military by virtue of their duties as citizens were part of the posse comitatus. He declared:

> "The 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 the sheriff or marshal. The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the posse comitatus. (xxi Parl. Hist., p.672, 688, per Lord Mansfield)." 6 Op.Att'y Gen. 466, 473 (1854).[16]

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[16] Cushing's citation to Lord Mansfield is apparently a reference to the remarks of the English Chief Justice during debate in the House of Lords concerning the validity of use troops to quell rioters in London: "The Duke of Richmond began with observing, that he was much pleased with the speech he heard that day from the throne. . . . He hoped, before he should agree to the Address, that ministers would give him satisfaction in another point: he meant in the continuing on foot of a military government. . . . Lord Mansfield for some time argued [several points]. . . after which his lordship went on: `. . . .[I]t appears most clearly to me, that every man may legally interfere to suppress a riot, much more to prevent acts of felony, treason, and rebellion, in his private capacity, but he is bound to do it as an act of duty; and if called upon by a magistrate, is punishable in case of refusal. . . . A private man, if he sees a person committing an unlawful act, more particularly an act amounting to a violent breach of the peace, felony, or treason, may apprehend the offender, and in his attempt to apprehend him may use force to compel him, not to submit to him, but to the law. What a private man may do, a magistrate or peace officer may clearly undertake; and according to the necessity of the case, arising from the danger to be apprehended, any number of men assembled or called together for the purpose are justified to perform. This doctrine I take to be clear and indisputable, with all the possible consequences which can flow from it, and to be the true foundation for calling in of the military power to assist in quelling the late riots.

"The persons who assisted in the suppression of those riots and tumults, in contemplation of law, are to be considered as mere private individuals, acting according to law, and upon any abuse of the legal power with which they are invested, are amendable to the laws of their country. For instance, supposing a soldier, or any other military person, who acted in the course of the late riots, had exceeded the powers with which he was invested, I have not a single doubt but he is liable to be tried and punished, not by martial law, but by the common and statute law of the realm; consequently, the false idea that we are living under a military government or that the military have any more power or other power, since the commencement of the riots, is the point which I rose to refute, and on that ground to remove those idle and ill-founded apprehensions, that any part of the laws or the constitution are either suspended or have been dispensed with. . . . On the whole, my lords, while I deprecate and sincerely lament the cause which rendered it indispensably necessary to call out the military to assist in the suppression of the late disturbances, I am clearly of the opinion, that no steps have been taken which were not strictly legal, as well as fully justifiable in point of policy. . . . The military have been called in, and very wisely called in, not as soldiers, but as citizens: no matter whether their coats be red or brown, they have been called in aid of the laws, not to subvert them, or overturn the constitution, but to preserve both." XXI HANSARD, THE PARLIAMENTARY HISTORY OF ENGLAND FROM THE

Two years later, Cushing's opinion supplied the justification for the use of federal troops at the call of civil law enforcement authorities in what some saw as partisan involvement in the conflict between pro and anti-slavery forces in Kansas. Congress reacted with a rider to an Army appropriations bill forbidding the use of any "part of the military forces of the United States to enforce territorial law in Kansas."[17] After some discussion of whether the amendment was germane, it was defeated.

Following the Civil War, the use of federal troops to execute the laws, particularly in the states that had been part of the Confederacy, continued even after all other political restrictions had been lifted. By 1877, there was evidence that Republican state governments in more than one southern state owed their continued political existence to the presence of the military and that the activities of federal troops may have influenced the outcome of the Hayes-Tilden presidential election.[18]

EARLIEST PERIOD TO THE YEAR 1803, 690-98 (June 19, 1780).

Cushing seemed to turn Lord Mansfield's point on its head when he wrote that, "the fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character." English law prohibited martial law, the use of military force domestically, in peacetime England. Lord Mansfield justified an apparent breach of the martial law proscription by asserting that the soldiers had acted as individuals called, commanded, and governed exclusively by the dictates of law applicable to civilians. Civilians are not organized as military units and are not subject to the command of military officers. Military law governs such matters. Lord Mansfield's justification could only hold as long as the soldiers were not organized as military bodies and were not acting under the command of their officers. The fact that they were organized as military bodies, under the immediate command of their own officers, would determine their legal character; it was in fact the critical determinant of their legal character.

[17] "But Congress hereby disapproving the code of alleged laws officially communicated to them by the President, and which are represented to have been enacted by a body claiming to be the Territorial Legislature of Kansas; and also disapproving of the manner in which said alleged laws have been enforced by the authorities of said Territory, expressly declare that, until those alleged laws shall have been affirmed by the Senate and House of Representatives as having been enacted by a legal Legislature, chosen in conformity with the organic law, by the people of Kansas, no part of the military force of the United States shall be employed in aid of their enforcement, nor shall any citizen of Kansas be required, under those provisions to act as a part of the posse comitatus of any officer acting as a marshal or sheriff in said Territory." *Cong.Globe* 34th Cong., 1st & 2d Sess. 1813 (1856).

[18] Members of the two political parties understandably disagreed as to whether the presence of federal troops in the South tainted or insured the integrity of the political process; compare, "[O]ur Army, degraded from its high position of the defenders of the country from foreign and domestic foes, has been used as a police; has taken possession of polls and controlled elections; has been sent with fixed bayonets into the halls of State Legislatures in time of peace and under the pretense of threatened outbreak; has been placed under the control of subordinate State officials, and, under the instructions of the Attorney General, has been notified to obey the orders of deputy United States marshals, `general and special,' appointed in swarms to do dirty work in a presidential campaign," 5 *Cong.Rec.* 2117 (remarks of Rep. Banning), with, "Nor do I think, sir, that the use of troops in the States recently in rebellion was uncalled for or inconsistent with the spirit of republican liberty. If they were recalled before every man, white and black, was safe -- safe and truly free, with all his civil rights in their fullest extent -- they were recalled too soon." 7 *Cong.Rec.* 3616

The House of Representatives, controlled by a Democratic majority, passed an Army appropriation bill which expressly prohibited use of the Army to shore up Republican state governments in the South, or more precisely, to shore up either side of the political dispute in Louisiana or anywhere else.[19] The Senate, controlled by a Republican majority, refused to accept the provision. No compromise could be reached, and the session ended without passage of an Army appropriation bill. Money to pay the Army was subsequently appropriated in a special session,[20] without reference to restrictions on use of the Army.[21] But when the issue of Army appropriations next arose, the House included a posse comitatus section.[22] The Senate accepted the House version with minor amendments.[23]

(remarks of Rep. Philips).

[19] Section 5 of H.R. 4691, as passed by the House, provided, "That no part of the money appropriated by this act, nor any money heretofore appropriated, shall be applied to the pay, subsistence, or transportation of troops used, employed, or to be used or employed, in support of the claim of Francis T. Nicholls or S.B. Packard to be governor the State of Louisiana. Nor shall any of said money be applied in support of the claim of the two bodies claiming to be the Legislature of said State, presided over respectively by L.A. Wiltz and Louis Bush; nor of the two bodies claiming to be the Legislature of said State, presided over respectively by C.C. Antonie and Michael Hahn; nor in support of the claim of Thomas C. Manning and associates to be the supreme court of said State; nor in support of the claim of John T. Ludeling and associates to the supreme court of said State; nor in the aid of the execution of any process in the hands of the United States marshal in said State issued in aid of and for the support of any such claims. Nor shall the Army, or any portion of it, be used in support of the claims, or pretended claim or claims, of any State government, or officer thereof, in any State, until the same shall have been duly recognized by Congress. Any person offending against any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned at hard labor for not less than five years or more than ten years," 5 *Cong.Rec.* 2119 (1877).

[20] See Presidential Proclamation of May 5, 1877, 20 Stat. 803 (1877), calling Congress into session.

[21] The bill contained no posse comitatus provisions because the President had withdrawn federal troops from Louisiana and South Carolina and because of concern over disturbances on the Mexican border and over Indian uprisings, 6 *Cong.Rec.* 287 (remarks of Rep. Atkins) (1877).

[22] "From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States as a *posse comitatus* or otherwise under the pretext or for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said forces may be expressly authorized 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 violating the provisions of the this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $10,000 or imprisonment not exceeding two years, or both such fine and imprisonment," 7 *Cong.Rec.* 3845 (1878).

[23] The "pretext" language was stricken because it was thought to be "in the nature of a reflection upon the past administration of the Government," 7 *Cong.Rec.* 4648 (remarks of Sen. Sargent); instances of express Constitutional authority were added to the statutory exception, although then as now the precise effect of this change was a matter of dispute; the penalty was applicable only to willful violations although a Senate requirement that the penalty be restricted to willful and knowing violations was not accepted. *Id.*

The Posse Comitatus Act has remained essentially unchanged ever since,[24] although Congress has authorized a substantial number of exceptions and has buttressed the Act with an additional proscription against use of the armed forces to make arrests or conduct searches and seizures.[25]

Constitutional Considerations

The Posse Comitatus Act raises at least three constitutional questions. (1) To what extent does the Posse Comitatus Act track constitutional requirements, beyond the power of the President or Congress to adjust or ignore? (2) To what extent do the powers which the Constitution vests in the President limit the power of Congress to enact the Posse Comitatus Act or any other provision restricting the President's discretion to involve the armed forces in civilian affairs? (3) What specifically are the military law enforcement activities "expressly authorized in the Constitution" for purposes of the Act?

Constitutional Origins

Lord Coke and his colleagues, in crafting the Petition of Right of 1628, found within that chapter of the Magna Carta and subsequent explanatory statutes which are

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[24] For some time the Act was contained in title 10 of the United States Code and Alaska, while a territory was exempted, 10 U.S.C. 15 (1940 ed.). When title 10 was recodified and the section transferred tot title 18, the Air Force which had been covered while it was part of the Army was expressly added to the Act, 70A Stat. 626 (1956).

Over the years, Congress has adjusted the impact of the Posse Comitatus Act by enlarging the number of statutes which expressly authorize the use of the Army or Air Force to execute the law. These are sometimes referred to as "amendments" to the Posse Comitatus Act. Since they do not change language of the Act itself, it seems to more accurate to characterize them as expansions of authority under the statutory exception to the Posse Comitatus Act rather than as amendments or changes in the Act itself.

[25] "The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter [10 U.S.C. 371-381] does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law." 10 U.S.C. 375.

Soon after the enactment of section 375, the Secretary of Defense promulgated such regulations which, subject to designated exceptions, prohibited: "(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." 32 CFR 213(10)(a)(3), 47 *Fed.Reg.* 14899, 14902 (April 7, 1982). Some years later the regulations were removed, 53 *Fed.Reg.* 23776 (April 28, 1993) ("The Department of Defense hereby removes 32 CFR part 213 concerning DoD Cooperation with Civil and Law Enforcement Officials, part 372a . . . and part 390a . . . . These parts have served the purpose for which they were intended and are no longer valid").

Department of Defense Directive 5525.5, however, which with its enclosures replicates much of former 32 CFR part 213, remains in effect.

the antecedents of our constitutional due process clauses a prohibition against martial law -- a proscription which in times of peace would not abide either the quartering of troops among civilians or any form of martial law, be it imposed by tribunal or more summarily dispatched by soldiers controlling or punishing civilians.

The Declaration of Independence lists the imposition of martial law upon us among those affronts to fundamental liberties which irrevocably ruptured our political ties to Great Britain.

Finally, it possible to see in the Second, Third, and Fifth Amendments, with their promises of a civilian militia, of freedom from the quartering of troops among us, and of the benefits of due process, the visible protrusions of a larger, submerged constitutional principle which bars the use of the armed forces to solve civilian inconveniences.

This view is not without judicial support. The courts have demonstrated a rather long standing reluctance to recognize the authority of military tribunals over civilians.[26] And members of the Supreme Court seem to acknowledge possible components of a larger principle in both *Youngstown Sheet and Tube Co. v. Sawyer*,

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[26] *Ex parte Milligan*, 71 U.S. (4 Wall.) 3, 123-25 (1866); *Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy V. Guagliardo*, 361 U.S. 281 (1960); *O'Callahan v. Parker*, 395 U.S. 258 (1969); but see, *Solorio v. United States*, 483 U.S. 435 (1987), holding that the jurisdiction of military tribunals depends upon whether the accused was a member of the armed forces at the time of alleged misconduct and contrary to *O'Callahan* not whether the crime was "service connected."

343 U.S. 579 (1952)[27] and *Laird v. Tatum*, 408 U.S. 1 (1972).[28]

But if a larger anti-martial law principle lies beneath constitutional sands, visible only in these amendments and the spirit of the Posse Comitatus Act, it has remained remarkably dormant. Those regions from which it might have been expected to emerge have been characterized most by inactivity. The boundaries of the Third Amendment are virtually uncharted.[29] The outreaches of the Second Amendment are

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[27] "Article II, Section 2 make the Chief Executive the Commander in Chief of the Army and Navy. But our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs," 343 U.S. at 632 (Douglas, J., concurring).

"Time out of mind, and even now in many parts of the world, a military commander can seize private housing to shelter his troops. Not so, however, in the United States, for the Third Amendment says, `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.' Thus, even in war time, his seizure of needed military housing must be authorized by Congress. It also was expressly left to Congress to `provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions . . . ." Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy. Congress, fulfilling that function, has authorized the President to use the army to enforce certain civil rights. On the other hand, Congress has forbidden him to use the army for the purpose executing general laws except when *expressly* authorized by the Constitution or Act of Congress," 343 U.S. at 644-45 (Jackson, J., concurring)(emphasis in the original).

In *Youngstown*, the Court held that, when Congress had specifically refused to grant such authority by statute, the President's constitutional and statutory powers as President and Commander in Chief were not sufficient to support an executive order authorizing the Secretary of Commerce use the resources of the federal government, including its armed forces, to seize and operate the country's steel mills which were then threaten by a nation-wide strike.

[28] "The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveillance activities -- and indeed the claims alleged in the complaint -- reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime," 408 U.S. at 15-6.

In *Laird v. Tatum*, the Court refused to order the military to stop collecting information about civilians unless the civilians could show how they had been hurt by the what the military was doing. (More precisely the Court held that, in the absence of any showing of specific harm or the realistic threat of specific harm, a claim, that the data gathering activities of the military services had been conduct so as to chill the First Amendment rights of the targets of those intelligence collection efforts, was nonjusticiable).

[29] See, Bell, *The Third Amendment, Forgotten But Not Gone*, 2 WILLIAM & MARY BILL OF RIGHTS JOURNAL 117 (1993); Fields & Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 AMERICAN JOURNAL OF LEGAL HISTORY 393 (1991); Fields, *The Third Amendment: Constitutional Protection From the Involuntary Quartering of Soldiers*, 124 MILITARY LAW REVIEW 195 (1989). In one of the

only slightly more visible.[30] Even in the inviting context of the Posse Comitatus Act, the courts have generally avoided excursions into areas of its possible constitutional underpinnings.[31]

Without more judicial guidance, it would appear that traditional reservations about military involvement in the execution of civilian law can only clearly be said to rise to the level of constitutional imperative when they take a form which offends some more explicit constitutional prohibition or guarantee such as the right to jury trial, to grand jury indictment, or to freedom from unreasonable searches and seizures.[32] Consequently, beyond those specific constitutional provisions, Congress' constitutional authority to enact and adjust the provisions of the Posse Comitatus Act is largely a matter of the coordination of Congressional and Presidential powers.

Presidential v. Congressional Powers

The case of conflicting Congressional and Presidential powers is easily stated if not easily resolved. On one hand, the Constitution requires the President to take care to see that the laws are faithfully executed, and designates him as Chief Executive and Commander in Chief of the armed forces.[33] In this dual capacity, the Presidency is the repository of both extensive responsibilities and broad prerogatives,

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few reported Third Amendment cases, striking state correctional officers brought a civil rights action against state authorities who had used the officers' prison facility resident quarters to house replacement national guard troops. The district court dismissed, *Engblom v. Carey*, 522 F.Supp. 57 (S.D.N.Y. 1981), the Court of Appeals reversed on the ground that it could not hold as a matter of law that the officers had no Third Amendment possession interest in the resident quarters, 677 F.2d 957 (2d Cir. 1982). On remand the district court dismissed based on the qualified immunity of the defendant state officials in light of the uncertainty of the light with respect to Third Amendment questions, 572 F.Supp. 44 (S.D.N.Y. 1983), aff'd, 724 F.2d 28 (2d Cir. 1983). The implications of the case prior to remand are discussed in *The Third Amendment's Protection Against Unwanted Military Intrusion*, 49 BROOKLYN LAW REVIEW 857 (1983).

[30] *United States v. Miller*, 307 U.S. 174 (1939). The academic commentary is considerably more extensive and reflects a considerably greater divergence of views than is the case of the Third Amendment, see Van Alstyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE LAW JOURNAL 1236 (1994); Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 BOSTON UNIVERSITY LAW REVIEW 57 (1995) and the sources cited therein.

[31] E.g., *United States v. Walden*, 490 F.2d 372, 376 (4th Cir. 1974)("we do not find it necessary to interpret relatively unexplored sections of the Constitution in order to determine whether there might be constitutional objection to the use of the military to enforce civilian laws").

[32] See, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 AMERICAN CRIMINAL LAW REVIEW 703, 712-13 (1976).

[33] U.S. Const. Art.II, §1 ("[t]he executive Power shall be vested in a President of the United States of America. . .), §2 ("[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States. . .), §3 (". . . he [(the President)] shall take Care that the Laws be faithfully executed . . . ").

not the least of which flow from Article IV, section 4 of the Constitution which guarantees the states a republican form of government and protection against invasion and domestic violence.[34]

The Supreme Court has made it clear that the President is not dependent upon express Constitutional or statutory authorization for the exercise of his powers. Thus, he may meet an emergency by appointing a marshal to protect a threatened Supreme Court justice, although no statute expressly authorized appointment for such purposes, *In re Neagle*, 135 U.S. 1, 62-4 (1890). He must resist invasion by an enemy with force though Congress has yet to declare war, *The Prize Cases*, 67 U.S.(2 Black) 635, 668 (1863). And when an emergency arises threatening the freedom of interstate commerce, transportation of the mails, or some other responsibility entrusted to the federal government, he may call upon "the army of the Nation, and all its militia . . . to brush away the obstructions," *In re Debs*, 158 U.S. 364, 381 (1895).

Some commentators feel that this implied or incidental constitutional authority to use the armed forces not only exists in the absence of Congressional direction, but is immune from Congressional direction or limitation.[35]

On the other hand, Congress shares constitutional power over the laws and armed forces with the President. The Constitution gives Congress the power to make the laws whose faithful execution the President must take care to observe and which carry into execution Congress' own powers and those of the President, U.S.Const. Art.I, §8, cl.18; it likewise vests Congress with the power to establish, maintain and regulate the armed forces, U.S.Const. Art.I, §8, cls.12, 13, & 14; and with the power to describe the circumstances under which the militia may be called into federal service, U.S. Const. Art.I, §8, cls.15 & 16.

The Supreme Court has shed some light on the coordination of Presidential and Congressional powers concerning use of the military to enforce civilian law. The Court has pointed out that the President's power under the guarantee clause of Article IV, section 4, which guarantees the states protection against domestic violence, is only provisionally effective until such time as Congress acts, *Texas v. White*, 74 U.S.(7 Wall.) 700 (1869). And the President may not always use the armed forces to met a domestic emergency when Congress has previously resisted an invitation to sanction their employment.[36] Finally, even when Congress has disclaimed any intent

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[34] "The United States shall guarantee to every State in this Union, a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence," U.S. Const. Art.IV, §4.

[35] E.g., Lorence, *The Constitutionality of the Posse Comitatus Act*, 8 UNIVERSITY OF KANSAS CITY LAW REVIEW 164, 185-91 (1940); Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MILITARY LAW REVIEW 85, 91-2 (1960); CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984, 152-61 (5th ed. 1984).

[36] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In *Youngstown* President Truman attempted to invoke his powers as Commander in Chief and Chief Executive to seize and operate most of the Nation's steel mills during the Korean conflict

to limit the exercise of the President's constitutional powers, the President's inherent and incidental powers will not always trump conflicting, constitutionally grounded claims.[37]

When the Act Does Not Apply

There is no violation of the Posse Comitatus Act when (1) the Constitution expressly authorizes use of part of the Army or Air Force as a posse comitatus or otherwise to execute the law; (2) when an act of Congress expressly authorizes use of part of the Army or Air Force as a posse comitatus or otherwise to execute the law; (3) when the activity in question does not involve use of part of the armed forces covered by the proscription; and (4) when the activity in question is does not constitute "execution of the law."

Constitutional Exceptions

The Posse Comitatus Act does not apply "in cases and under circumstances expressly authorized by the Constitution," 18 U.S.C. 1385.[38] It has been said that the Constitution contains no provision expressly authorizing the use of the military to

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when it appeared they might be shut down by a labor dispute. Congress had earlier specifically refused to grant the President such power legislatively.

[37] *United States v. United States District Court*, 407 U.S. 297 (1972). Congress had established a warrant procedure to be used by law enforcement officials to permit wiretapping in criminal cases. In doing so, it expressly disclaimed any intent to "limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities [or] to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any clear and present danger to the structure or existence of the Government," 18 U.S.C. 2511(3)(1970 ed.). Even in the absence of Congressionally asserted counter authority, a unanimous Court declined to accept the argument that President's inherent and incidental constitutional powers permitted a failure to comply with the Fourth Amendment's warrant requirements when gathering intelligence concerning purely domestic threats to national security.

[38] 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. 18 U.S.C. 1385 (emphasis added).

execute the law,[39] that it was included as part of a face-saving compromise, and that consequently it should be ignored.[40]

When the phrase was added originally those who opposed the Posse Comitatus Act believed that the Constitution vested implied and/or inherent powers upon the President to use the armed forces to execute the laws; those who urged its passage believed the President possessed no such powers. As initially passed by the House, the bill contained no constitutional exception.[41] The Senate version contained an exception for instances authorized by the Constitution whether expressed or otherwise.[42] The managers of each House described the compromise reached at

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[39] H.R.Rep.No.97-71, at 6 n.3, reprinted 1981 UNITED STATES CODE, CONGRESSIONAL AND ADMINISTRATIVE NEWS at 1789 n.3 ("The statute permits Constitutional exceptions. However, there are none"); LIEBER, THE USE OF THE ARMY IN AID OF THE CIVIL POWER 17 (1898); *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush of the Constitution?* 75 GEORGETOWN LAW JOURNAL 1947, 1951 (1987); *Don't Call Out the Marines: An Assessment of the Posse Comitatus Act*, 13 TEXAS TECH LAW REVIEW 1467, 1486 (1982); *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 AMERICAN CRIMINAL LAW REVIEW 703, 712 (1976).

The Constitution does empower Congress "to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions," U.S.Const. Art.I, §8, cl.16; but since this express grant of authority can only be activated by an Act of Congress it adds nothing to the "act of Congress" exception also included within the Posse Comitatus Act.

[40] "The Act also provides that the Army and Air Force can be used on the basis of an *express constitutional* authorization. This language reflects a compromise reached in the debate over the Act. It is a meaningless proviso since the Constitution does not expressly authorize such a use of troops.

"In any event, if the Constitution provided the President with authority over a purely executive function, Congress could not disable the President from acting on the basis of it, whether the authorization was express or implied. But since the Constitution provides Congress with the power to control military intervention in domestic affairs, the President's actions can be limited to the express terms of a statutory authorization," *Honored in the Breech: Presidential Authority to Execute the Laws with Military Force*, 83 YALE LAW JOURNAL 130, 143-44 (1973); see also, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 AMERICAN CRIMINAL LAW REVIEW 703, 712-13 (1976).

[41] "From and after the passage of this act it shall not be lawful to employ any part of the army of the United Sates as a *posse comitatus* or otherwise under the pretext or for the purpose of executing the laws, *except in such cases and under such circumstances as such employment of said force may be expressly authorized 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 violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not exceeding $10,000 or imprisoned not exceeding two years, or by both such fine and imprisonment," 7 *Cong.Rec.* 3877 (1878)(emphasis added).

[42] "From and after the passage of this act it shall not be lawful to employ any part of the army of the United Sates as a *posse comitatus* or otherwise for the purpose of executing the laws, *except in such cases and under such circumstances as such employment of said force may be 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," 7 *Cong.Rec.* 4303-304 (1878)(emphasis added).

conference and subsequently enacted as upholding the position of their respective bodies on the issue.[43]

The older commentaries suggest that the word "expressly" must be ignored, for otherwise in their view the Posse Comitatus Act is a constitutionally impermissible effort to limit the powers of the President.[44] The regulations covering the use of the

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[43] "But these [compromises on other differences in the Army appropriation bill] are all minor points and insignificant questions compared with the great principle which was incorporated by the House in the bill in reference to the use of the Army in time of peace. The Senate had already conceded what they called and what we might accept as principle; but they had stricken out the penalty and had stricken out the word `expressly,' so that the Army might be used in all cases where implied authority might be inferred. The House committee planted themselves firmly upon the doctrine that rather than yield this fundamental principle, for which for three years this House had struggled, they would all the bill to fail -- notwithstanding the reforms which we had secured; regarding these reforms as of but little consequence alongside the great principle in all its length and breadth, including the penalty which the Senate had stricken out. We bring you back, therefore, a report with the alteration of a single word, which the lawyers assure me is proper to be made, restoring to this bill the principle for which we have contended so long, and which is so vital to secure the rights and liberties of the people," 7 *Cong.Rec*. 4686 (1878 (remarks of Rep. Hewitt).

"With reference to the provisions of the bill inserted by the House prohibiting the use of the Army, which is section 29, Senators will remember that it was amended in the senate so as to strike out in lines 3 and 4 the words `under the pretext or,' in the sixth line the word `expressly' was stricken out, and in the seventh line the words `the Constitution or by' were inserted, so as to read `by the Constitution or by act of congress,' and the penalty was stricken form the bill. We found considerable difficult in agreeing upon this section, but the modification which the Senate had made in it made it possible to come to an understanding. I should like to say here that it is my firm judgment, after the experience of the last forty-eight hours, that unless the senate had made the duty easy for the committee by the modification which it made in that section, it would have been impossible to have come to any agreement on the Army bill with the original House section in controversy. I am satisfied it never would have been stricken from the bill. As it now stands, the House yielded that the words `under the pretext of' should go out, which we contended were in the autre of a reflection upon the past administration of the government, and we could not consent that anything in the nature of a reflection, and which was entirely useless for any practical purpose, should remain in the bill. We satisfied them, by our argument that ought to be done, and it was stricken out.

"With reference to the word `expressly.' we restored it and allowed it to go in, so that now the employment of such force must be expressly authorized by the Constitution or by act of Congress, they assenting that the words `the Constitution or by' before the words `act of Congress' might remain in, so that if the power arises under either the constitution or the laws it may be exercised and the Executive would not be embarrassed by the prohibition of Congress so to act where the Constitution requires him to act; and the embarrassments would not have the effect of retraining the action of an upright and energetic Executive, but still might raise a question which he would desire to avoid if possible. The penalty remains in the section as agreed upon, except that we procured that the word `willfully' should be put in before the word `violating;' so that it reads: `And any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor," 7 *Cong.Rec.* 4648 (1878) (remarks of Sen.Sargent).

[44] LIEBER, THE USE OF THE ARMY IN AID OF THE CIVIL POWER, 14-5 (1898)("The debate [on the Posse Comitatus section] was an interesting one, but too long to follow in detail. An

armed forces during civil disturbances do not go quite that far, but they do assert two constitutionally based exceptions -- sudden emergencies and protection of federal property.[45]

The question of whether the constitutional exception includes instances where the President is acting under implied or inherent constitutional powers or whether it

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attempt was made to strike out the word "expressly," but that failed. But, manifestly, the clause, as enacted, recognizes the Constitution as a direct source of authority for the employment of the Army. This is a very important consideration in the construction of the legislation. And another matter of great importance is also to be observed with reference to it. The enactment prescribes that it shall be unlawful to employ any part of the Army as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except when it is *expressly* authorized by the Constitution or by act of Congress. Now, it is evident that the word `expressly' can not be construed as placing a restriction on any constitutional power. If authority so to use the Army is included in a constitutional power, although it be not expressly named, it can not, of course, be taken away by legislation"); Lorence, *The Constitutionality of the Posse Comitatus Act*, 8 UNIVERSITY OF KANSAS CITY LAW REVIEW 154, 185-86 (1940)("But it is evident that the word *expressly* in the Posse Comitatus Act cannot be construed as placing a restriction on the constitutional Power of the President, because even though not expressly named, such constitutional power cannot be taken away by legislation. . . . Thus, the Posse Comitatus Act appears to be a rather singular statute to pass, saying that the Army of the United States shall not be used for the purpose of executing the laws, in view of the fact that the Constitution expressly makes the President the Commander-in-Chief of the Army and Navy, and expressly makes it his duty to take care that the laws are faithfully executed").

[45] "(b) Aside from the constitutional limitations of the power of the Federal Government at the local level, there are additional legal limits upon the use of military forces within the United States. The most important of these from a civil disturbance standpoint is the Posse Comitatus Act (18 U.S.C. 1385), which prohibits the use of any part of the Army or the Air Force to execute or enforce the laws, except as authorized by the Constitution or Act of Congress.

"(c) The Constitution and Acts of Congress establish six exceptions generally applicable within the entire territory of the United States, to which the Posse Comitatus Act prohibition does not apply.

"(1) The constitutional exceptions are two in number and are based upon the inherent legal right of the U.S. Government -- a sovereign national entity under the Federal Constitution -- to insure the preservation of public order and the carrying out of governmental operations within its territorial limits, by force if necessary.

"(i) The emergency authority. Authori[z]ies prompt and vigorous Federal action, including use of military force to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situation.

"(ii) Protection of Federal property and functions. Authorizes Federal action, including the use of military forces, to protect Federal property and Federal governmental functions when the need for protection exists and duly constituted local authorities are unable or decline to provide adequate protection." 32 CFR 215.4(b),(c)(1).

For a discussion of instances when the emergency, "immediate response authority" has been used see, Winthorp, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MAC)*, ARMY LAWYER 3 (July, 1997).

was merely a face saving device is a question that may turn on whether Congress may constitutionally restrict the President's powers, if any, in the area -- a question the courts have yet to answer.

Statutory Exceptions

Generally

The Posse Comitatus Act does not apply where Congress has expressly authorized use of the military to execute the law.[46] Congress has done so in three ways, by giving a branch of the armed forces civilian law enforcement authority, by establishing general rules for certain types of assistance, and by addressing individual cases and circumstances with more narrowly crafted legislation. Thus it has vested the Coast Guard, a branch of the armed forces, with broad law enforcement responsibilities.[47] Second, over time it has enacted a fairly extensive array of particularized statutes, like those authorizing the President to call out the armed

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[46] 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. 18 U.S.C. 1385 (emphasis added).

[47] "The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United states; shall engage in maritime air surveillance or interdiction to enforce or assist in the enforcement of the laws of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain and operate with due regard to the requirements of national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall, pursuant to international agreements, develop, establish, maintain, and operate icebreaking facilities on, under, and over the waters other than the high seas and waters subject to the jurisdiction of the Untied States; shall engage in oceanographic research on the high seas and in waters subject to the jurisdiction of the United Stats; and shall maintain a state of readiness to function as a specialized service in the Navy in time of war, including the fulfillment of Maritime Defense Zone command responsibilities, 14 U.S.C. 2.

Coast Guard personnel are also considered customs officers for purpose of custom law enforcement, 19 U.S.C. 1401(i)("When used in this subtitle [relating to administrative provisions concerning customs duties] or in part I of subtitle II of this chapter [relating to the miscellaneous provisions of the Tariff Act of 1930] . . . (i) The terms `officer of the customs' and `customs officer' mean . . . any commissioned, warrant, or petty officer of the Coast Guard. . .").

See generally, *The United States Coast Guard's Law Enforcement Authority Under 14 U.S.C. §89: Smugglers' Blues or Boaters' Nightmare?* 34 WILLIAM & MARY LAW REVIEW 933 (1993); *Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy, and Federal Law Enforcement at Sea*, 31 WILLIAM & MARY LAW REVIEW 445 (1990).

forces in times of insurrection and domestic violence, 10 U.S.C. 331-335.[48] Finally,

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[48] *5 U.S.C. App. (Inspector General Act of 1978) 8(g)* (Department of Defense Inspector General is not limited by the Posse Comitatus Act (18 U.S.C. 1385) in carrying out audits and investigations under the Act);
10 U.S.C. 331-335 (President may use the militia and armed forces to suppress insurrection and enforce federal authority in the face of rebellion or other forms of domestic violence);
10 U.S.C. 374 note (§1004 of the National Defense Authorization Act for 1991, as amended) (during fiscal years 1991 through 2002, the Secretary of Defense may provide counter-drug activity assistance upon request of federal or state law enforcement agencies);
10 U.S.C. 382 (the Secretary of Defense may provide assistance to the Department of Justice in emergency situations involving chemical or biological weapons of mass destruction);
10 U.S.C. 382 note (§1023 of the National Defense Authorization Act for Fiscal Year 2000) (during fiscal years 2000 through 2004, the Secretary of Defense may provide assistance to federal and state law enforcement agencies to respond to terrorism or threats of terrorism);
16 U.S.C. 23 (Secretary of the Army may detail troops to protect Yellowstone National Park upon the request of the Secretary of the Interior);
16 U.S.C. 78 (Secretary of the Army may detail troops to protect Sequoia and Yosemite National Parks upon the request of the Secretary of the Interior);
16 U.S.C. 593 (President may use the land and naval forces of the United States to prevent destruction of federal timber in Florida);
16 U.S.C. 1861(a) (Secretary of Transportation (or the Secretary of the Navy in time of war) may entering into agreements for the use of personnel and resources of other federal or state agencies -- including those of the Department of Defense -- for the enforcement of the Magnuson Fishery Conservation and Management Act);
18 U.S.C. 112, 1116 (Attorney General may request the assistance of federal or state agencies -- including the Army, Navy and Air Force -- to protect foreign dignitaries from assault, manslaughter and murder);
18 U.S.C. 351 (FBI may request the assistance of any federal or state agency -- including the Army, Navy and Air Force -- in its investigations of the assassination, kidnapping or assault of a Member of Congress);
18 U.S.C. 831 (Attorney General may request assistance from the Secretary of Defense for enforcement of the proscriptions against criminal transactions in nuclear materials)(18 U.S.C. 175a, 229E, and 2332e cross reference to the Attorney General's authority under 10 U.S.C. 381 to request assistance from the Secretary in an emergency involving biological weapons, chemical weapons, and weapons of mass destruction respective);
18 U.S.C. 1751 (FBI may request the assistance of any federal or state agency -- including the Army, Navy and Air Force -- in its investigations of the assassination, kidnapping or assault of the President);
18 U.S.C. 3056 (Director of the Secret Service may request assistance from the Department of Defense and other federal agencies to protect the President);
22 U.S.C. 408 (President may use the land and naval forces of the United States to enforce Title IV of the Espionage Act of 1917 (22 U.S.C. 401-408));
22 U.S.C. 461 (President may use the land and naval forces and militia of the United States to seize or detain ships used in violation of the Neutrality Act);
22 U.S.C. 462 (President may use the land and naval forces and militia of the United States to detain or compel departure of foreign ships under the provisions of the Neutrality Act);
25 U.S.C. 180 (President may use military force to remove trespassers from Indian treaty lands); *42 U.S.C. 98* (Secretary of the Navy at the request of the Public Health Service may make vessels or hulks available to quarantine authority at various U.S. ports);
42 U.S.C. 1989 (magistrates issuing arrest warrants for civil rights violations may authorize those serving the warrants to call for assistance from bystanders, the posse comitatus, or the land or naval forces or militia of the United States;
42 U.S.C. 5170b (Governor of state in which a major disaster has occurred may request the

it has passed general legislation permitting the armed forces to share information and equipment with civilian law enforcement agencies, 10 U.S.C. 371-381.

How explicit must a statutory exception be? If one believes the word "expressly" should be ignored with respect to the constitutionally based exception, consistency might suggest no more is required than that Congress authorize a thing to be done. To those so inclined, the position is further fortified when the statute authorizes executive branch action and the President's faithful execution responsibility[49] and the administrative housekeeping statute[50] can be called into play. In this rarely espoused view if an agency has statutory authority to perform a task, the military may be asked to help.

Others maintain that statutes which authorize assistance from federal agencies and departments generally in order to accomplish a particular task qualify as exceptions even if they do not mention the Department of Defense or any part of the military establishment by name.[51] On the one hand, such legislation has ordinarily come into being after the Posse Comitatus Act and thus would ordinarily be thought to amend any conflicting earlier law. On the other hand, the use of military force in civilian affairs is such an extraordinary thing that perhaps it ought not be presumed and only found were Congress has so stated in hoc verba.

President to direct the Secretary of Defense to permit the use of DoD personnel for emergency work necessary for the preservation of life and property);
43 U.S.C. 1065 (President may use military force to remove unlawful enclosures from the public lands);
48 U.S.C. 1418 (President may use the land and naval forces of the United States to protect the rights of owners in guano islands);
48 U.S.C. 1422 (Governor of Guam may request assistance of senior military or naval commander of the armed forces of the United States in cases of disaster, invasion, insurrection, rebellion or imminent danger thereof, or of lawless violence);
48 U.S.C. 1591 (Governor of the Virgin Islands may request assistance of senior military or naval commander of the armed forces of the United States in the Virgin Islands or Puerto Rico in cases of disaster, invasion, insurrection, rebellion or imminent danger thereof, or of lawless violence); *50 U.S.C. 220* (President may use the Army, Navy or militia to prevent the unlawful removal of vessels or cargoes from customs areas during times of insurrection).

[49] U.S.Const. Art.II, §3, cl.3 ("he [the President] shall take care that the laws be faithfully executed."

[50] 5 U.S.C. 301 ("The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. . . .")

[51] E.g., 21 U.S.C. 873(b)("[w]hen requested by the Attorney General, it shall be the duty of any agency or instrumentality of the Federal Government to furnish assistance, including technical advice, to him for carrying out his functions under this subchapter; except that no such agency or instrumentality shall be required to furnish the name of, or other identifying information about, a patient or research subject whose identity it has undertaken to keep confidential").

The final and more commonly accepted proposition is that the phrase "in cases and under circumstances expressly authorized by . . . Act of Congress" demands statutory exception specifically refer to some form of military assistance.[52]

Information and Equipment

In 1981, Congress enacted general law enforcement exceptions to the Posse Comitatus Act prohibitions in order to resolve questions raised by the so-called Wounded Knee cases.[53] The cases grew out of events beginning late in February of 1973, when an armed crowd broke into and looted a trading post in the village of Wounded Knee on the Pine Ridge Reservation in South Dakota. FBI agents, U.S. marshals, and Bureau of Indian Affairs police surrounded the village and besieged the group almost immediately. The take-over and events which occurred during the siege led to four cases[54] involving a series of federal criminal charges including obstructing a law enforcement officer in the lawful performance of his duties during the course of a civil disturbance.[55] Military assistance provided federal authorities at Wounded Knee undermined the prospects of a conviction under 18 U.S.C. 231(a)(3).[56]

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[52] The Department of Defense Directive, for example, lists only the military-aid-specific statutes in its inventory of statutory exceptions, DoD Dir.No. 5525.5 (Encl.4) A.2.e.

[53] H.R.Rep.No. 97-71, pt.2, 5-6, reprinted in 1981 UNITED STATES CODE, CONGRESSIONAL AND ADMINISTRATIVE NEWS 1785, 1788 ("Although the military activities challenged in each case were identical, the courts in *Banks* and *Jaramillo* found those activities to be in violation of the [Posse Comitatus] Act, while the lower court in *Red Feather* found those activities to be permissible").

[54] *United States v. Jaramillo*, 380 F.Supp. 1375 (D.Neb. 1974), app.dism'd, 510 F.2d 808 (8th Cir. 1975); *United States v. Banks*, 383 F.Supp. 368 (D.S.D. 1974); *United States v. Red Feather*, 381 F.Supp. 916 (D.S.D. 1975); *United States v. McArthur*, 419 F.Supp. 186 (D.N.D. 1976), aff'd sub nom., *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976).

[55] 18 U.S.C. 231(a)(3)(1970 ed.)("Whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function -- shall be fined not more than $10,000 or imprisoned not more than five years, or both").

[56] "The evidence of military involvement contained in the transcripts [of the Wounded Knee trial cases], in essence, falls into the following categories: use by federal civil law enforcement officers of material and equipment furnished by the United States Army and the South Dakota National Guard; the presence of United States Army personnel who were ordered to Wounded Knee to observe and report to the President through the Department of Defense the necessity of calling in federal troops; the drafting by military personnel of contingency plans to be used by the United States Army in the event that federal military intervention was ordered by the President; aerial photographic reconnaissance service provided by the United States Air Force and the Nebraska National Guard; the advice, urging and counsel given by the United States Army personnel to Department of Justice personnel on the subjects of negotiations, logistics and rules of engagement; and the maintenance of military vehicles performed by members of the Nebraska National Guard," *United States v. McArthur*, 419 F.Supp. at 193 n.3.

The 1981 legislation contains both explicit grants of authority and restrictions on the use of that authority for military assistance to the police -- federal, state and local -- particularly in the form of information and equipment, 10 U.S.C. 371-381.

Information: Spies, Advisers, and Undercover Agents. The Wounded Knee cases spawned uncertainty as to the extent to which military authorities might share technical advice, the results of reconnaissance flights or any other forms of information with civilian law enforcement authorities. Section 371 specifically permits the armed forces to share information acquired during military operations and in fact encourages the armed forces to plan their activities with an eye to the production of incidental civilian benefits.[57] The section allows the use of military undercover agents and the collection of intelligence concerning civilian activities only where there is a nexus to an underlying military purpose.[58]

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[57] "(a) The Secretary of Defense may in accordance with other applicable law, provide to Federal, State or local civilian law enforcement officials any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials.

"(b) The needs of civilian law enforcement officials for information shall, to the maximum extent practicable, be taken into account in the planning and execution of military training or operations.

"(c) The Secretary of Defense shall ensure, to the extent consistent with national security, that intelligence information held by the Department of Defense and relevant to drug interdiction or other civilian law enforcement matters is provided promptly to appropriate civilian law enforcement officials," 10 U.S.C. 371.

"The phrase `in accordance with other applicable law' as used in section 371 is meant to continue the application of the Privacy Act to this type of intelligence sharing. . . . [Congress did] not intend the military to engage in the routine collection of intelligence information about United States residents. . . [and] noting in this section [was] intended to modify in any way existing law with respect to the military's authority (or lack thereof) to collect and disseminate intelligence information about American citizens and residents here and abroad. *See e.g.*, Executive Order 12036," H.R.Rep.No.97-71 pt.2, 8, reprinted in 1981 UNITED STATES CODE, CONGRESSIONAL AND ADMINISTRATIVE NEWS 1785, 1791.

[58] "The Committee adopted the view of the Department of Justice that the weight of authority on the Posse Comitatus Act `prohibits the use of miliary personnel as informants, undercover agents, or non-custodial interrogators in a civilian criminal investigation that does not involve potential military defendants or is not intended to lead to any official action by the armed forces.' . . . [W]hen military personnel become aware of violations of civilian laws as an incidental result of other military operations, such information may be voluntarily disclosed.

"Examples of this type of information sharing include situations such as investigations of military and non-military coconspirators and the observation by military personnel of illegal conduct during a routine military mission or training operation.

"The Committee anticipates, however, that an increased sensitivity to the needs of civilian law enforcement officials, particularly in drug enforcement, will permit more compatible mission planning and execution. For example, the scheduling of routine training missions can easily accommodate the need for improved intelligence information concerning drug trafficking in the Caribbean. The committee does not intend the military to engage in the routine collection of intelligence information about United States residents. Thus, the legislation creates no risk that the military will return to the abuses exposed in previous Congressional hearings. *See* Hearings on *Federal Data Banks, Computers and the Bill of Rights* before the Committee on Constitutional Rights, Committee on the Judiciary, United

Section 373 permits military personnel to train civilian police on "the operation and maintenance of equipment" and to provide them with "expert advice."[59] The section was originally limited to equipment provided by the armed forces,[60] but was expanded in 1988 to include training on any equipment regardless of its origin.[61]

States Senate, 92nd Cong., 1st sess." H.R.Rep.No. 91-71, 8 & 8 n.1.

The staff report following the *Federal Data Banks* hearings noted that, "the U.S. Army had for several years maintained a close and pervasive watch over most civilian protest activity throughout the United States. At its height during the lat 1960's, the monitoring drew upon the part-time services of at least 1,500 plainclothes agents of the Army Intelligence Command, and an unspecified number of agents from the Continental Army Command. Their reports, which described the nonviolent political activities of thousands of individuals and organizations unaffiliated with the armed forces were amassed in scores of data centers. . . . The picture is that of a runaway intelligence bureaucracy unwatched by its civilian superiors, eagerly grasping for information about political dissenters of all kinds and totally oblivious to the impact its spying could have on the constitutional liberties it had sworn to defend." *Military Surveillance of Civilian Politics: A Report of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 93d Cong., 1st Sess. 10 (1973)(Comm.Print).

For a more contemporary examination of the issues associated with military surveillance of off-base political protests see, Peterson, *Civilian Demonstrations Near the Military Installation: Restraints on Military Surveillance and Other Activities*, 140 MILITARY LAW REVIEW 113 (Spring, 1993).

[59] "The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available -- (1) to train Federal, State, and local civilian law enforcement officials in the operation and maintenance of equipment, including equipment made available under section 372 of this title; and (2) to provide such law enforcement officials with expert advice relevant to the purposes of this chapter," 10 U.S.C. 373.

[60] "Nothing in this section contemplates the creation of large scale or elaborate training programs . . . . [This section would not authorize the routine use of a Green Beret training course for urban SWAT teams.] . . . Rather this section anticipates the continuing need for the military to train civilians in the operation and maintenance of the equipment lent under proposed section 372," H.R.Rep.No. 97-71, at 10, reprinted in 1981 UNITED STATES CODE, CONGRESSIONAL AND ADMINISTRATIVE NEWS 1785, 1792-793 (footnote 2 of the report in brackets).

[61] "Paragraph (1) clarifies current law to provide that the Secretary of Defense, in accordance with applicable law, may make Department of Defense personnel available to train Federal, State, and local civilian law enforcement officials in the operation of maintenance of equipment, including equipment made available under section 372," H.R.Rep.No. 100-989, 451, reprinted in 1988 *United States Code Congressional and Administrative News* 2503, 2579. See also, DoD Dir.No. 5525.5 (Encl.4) A.4., "a. The Military Departments and Defense Agencies may provide training to Federal, State, and local civilian law enforcement officials, Such assistance may including training in the operation and maintenance of equipment made available under section A. of enclosure 3. This does not permit large scale or elaborate training, and does not permit regular or direct involvement of military personnel in activities that are fundamentally civilian law enforcement operations, except as other wise authorized in this enclosure.

"b. Training of Federal, State, and local civilian law enforcement officials shall be provided under the following guidance:

"(1) This assistance shall be limited to situations when the use of non-DoD personnel would be unfeasible or impractical form a cost or time perspective and would not otherwise

The explanation of what might constitute "expert advice" is limited, but Congress clearly did not use the phrase as a euphemism for active military participation in civilian police activity.[62]

Equipment and Facilities. Abstractly it might seem that even civilian use -- against Americans within the United States -- of tanks, missiles, fighter planes, aircraft carriers and other implements of war offends the Posse Comitatus Act even if use can be accomplished without the direct involvement of military personnel. The arsenal of American military weapons and equipment are "part of the Army and Air Force" even when turned over to civilian authorities before use for civilian purposes. Even if the Posse Comitatus Act were read to apply only to the use of personnel, would the use of military personnel to maintain equipment loaned to civilian authorities violate the Act's proscription? The Wounded Knee cases provided conflicting answers.

The 1981 provisions make it clear that the Defense Department may provide civilian police with military equipment[63] and under some circumstances, particularly

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compromise national security or military preparedness concerns.

"(2) Such assistance may not involve DoD personnel in a direct role in a law enforcement operation, except as otherwise authorized by law.

"(3) Except as otherwise authorized by law, the performance of such assistance by DoD personnel shall be at a location where there is not a reasonable likelihood of a law enforcement confrontation."

[62] "Neither does the authority to provide expert advice create a loophole to allow regular or direct involvement of military personnel in what are fundamentally civilian law enforcement operations," H.R.Rep.No. 97-71, at 10, reprinted in 1981 UNITED STATES CODE, CONGRESSIONAL AND ADMINISTRATIVE NEWS 1785, 1792.

"Paragraph (2) restates current law permitting advice. Such training and expert advice may extend to instruction in the operation of equipment, scientific analysis, translations, and assistance in strategic planning, but may not extend to direct, active involvement in specific law enforcement operations," H.R.Rep.No. 100-989, 451, reprinted in 1988 *United States Code Congressional and Administrative News* 2503, 2579. See also, DoD Dir.No. 5525.5 (Encl.4) A.5., "Military Departments and Defense Agencies may provide expert advice to Federal, State, or local law enforcement in accordance with 10 U.S.C. §§371-378 (reference (d)). This does not permit regular or direct involvement of military personnel in activities that are fundamentally civilian law enforcement operations, except as otherwise authorized in this enclosure."

[63] "The Secretary of Defense may, in accordance with other applicable law, make available any equipment (including associated supplies or spare parts), base facility, or research facility of the Department of Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes," 10 U.S.C. 372.

See also 10 U.S.C. 381:

"(a) The Secretary of Defense, in cooperation with the Attorney General, shall conduct an annual briefing of law enforcement personnel of each State (including law enforcement personnel of the political subdivisions of each State) regarding information, training, technical support, and equipment and facilities available to civilian law enforcement personnel from the Department of Defense.

"(b) Each briefing conducted under subsection (a) shall include the following: (1) An explanation of the procedures for civilian law enforcement officials -- (A) to obtain information, equipment, training, expert advice, and other personnel support under this

in drug cases, may also supply military personnel to operate and maintain such

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chapter; and (B) to obtain surplus military equipment. (2) A description of the types of information, equipment and facilities, and training and advice available to civilian law enforcement officials from the Department of Defense. (3) A current, comprehensive list of military equipment which is suitable for law enforcement officials form the Department of Defense and available as surplus property from the Administrator of General Services.

"(c) The Attorney General and the Administrator of General Services shall -- (1) establish or designate an appropriate office or offices to maintain the list described in subsection (b)(3) and to furnish information to civilian law enforcement officials on the availability of surplus military equipment; and (2) make available to civilian law enforcement personnel nationwide, tollfree telephone communication with such office or offices."

equipment.[64] The provisions also include extraordinary authority to use Navy ships

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[64] "(a) The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available for the maintenance of equipment for Federal, State, and local civilian law enforcement officials, including equipment made available under section 372 of this title.

"(b)(1) Subject to paragraph (2) and in accordance with other applicable law, the Secretary of Defense may, upon request from the head of a Federal law enforcement agency, make Department of Defense personnel available to operate equipment (including equipment made available under section 372 of this title) with respect to -- (A) a criminal violation of a provision of law specified in paragraph (4)(A); or (B) assistance that such agency is authorized to furnish to a State, local, or foreign government which is involved in the enforcement of similar laws. (2) Department of Defense personnel made available to a civilian law enforcement agency under this subsection may operate equipment for the following purposes:

"(A) Detection, monitoring, and communication of the movement of air and sea traffic.

"(B) Detection, monitoring, an communication of the movement of surface traffic outside the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside the boundary.

"(C) Aerial reconnaissance.

"(D) Interception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with such vessel and aircraft to direct such vessels and aircraft to go to a location designated by appropriate civilian officials.

"(E) Operation of equipment to facilitate communications in connection with law enforcement programs specified in paragraph (4)(A).

"(F) Subject to joint approval by the Secretary of Defense and the Attorney General (and the Secretary of State in the case of a law enforcement operation outside the land area of the United States) -- (i) the transportation of civilian law enforcement personnel; and (ii) the operation of a base of operations for civilian law enforcement personnel.

"(3) Department of Defense personnel made available to operate equipment for the purpose stated in paragraph (2)(D) may continue to operate such equipment into the land area of the United States in cases involving the pursuit of vessels or aircraft where the detection began outside such land area.

"(4) In this subsection: (A) The term `Federal law enforcement agency' means an agency with jurisdiction to enforce any of the following: (i) The Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.). (ii) Any of sections 274 through 278 of the Immigration and Nationality Act (8 U.S.C. 1324-1328). (iii) A law relating to the arrival or departure of merchandise (as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401) into or out of the customs territory of the United states (as defined in general note 2 of the Harmonized Tariff Schedules of the United States) or any other territory or possession of the United States. (iv) The Maritime Drug Law Enforcement Act (46 U.S.C. 1001 et seq.).

"(B) The term `land area of the United States' includes the land area of any territory, commonwealth, or possession of the United States.

"(c) The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available to any Federal, State, or local civilian law enforcement agency to operate equipment for purposes other than described in subsection (b)(2) only to the extent that such support does not involve direct participation by such personnel in a civilian law enforcement operation unless such direct participation is otherwise authorized by law," 10 U.S.C. 374.

"(a) Procedures. (1) The Secretary of Defense shall establish procedures in accordance with this subsection under which States and units of local government may purchase law enforcement equipment suitable for counter-drug activities through the Department of Defense. The procedures shall require the following: (A) Each State desiring to participate

to support Coast Guard drug interdiction on the high seas.[65]

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in a procurement of equipment suitable for counter-drug activities through the Department of Defense shall submit to the Department, in such form and manner and at such times as the Secretary prescribes, the following: (i) a request for law enforcement equipment. (ii) Advance payment for such equipment, in an amount determined by the Secretary based on estimated or actual costs of the equipment and administrative costs incurred by the Department. (B) A State may include in a request submitted under subparagraph (A) only the type of equipment listed in the catalog produced under subsection (c). (C) A request for law enforcement equipment shall consist of an enumeration of the law enforcement equipment that is desired by the State and units of local government within the State. The Governor of a State may establish such procedures as the Governor considers appropriate for administering and coordinating requests for law enforcement equipment from units of local government within the State. (D) A State requesting law enforcement equipment shall be responsible for arranging and paying for shipment of the equipment to the State and localities within the State. (2) In establishing the procedures, the Secretary of Defense shall coordinate with the General Services Administration and other Federal agencies for purposes of avoiding duplication of effort.

"(b) Reimbursement of Administrative Costs. -- In the case of any purchase made by a State or unit of local government under the procedures established under subsection (a), the Secretary of Defense shall require the State or unit of local government to reimburse the Department of Defense for the administrative costs to the Department of such purchase.

"(c) GSA Catalog. -- The Administrator of General Services, in coordination with the Secretary of Defense shall produce and maintain a catalog of law enforcement equipment suitable e for counter-drug activities for purchase by States and units of local government under the procedures established by the Secretary under this section.

"(d) Definitions. -- In this section: (1) The term `State' includes the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and any territory or possession of the United States. (2) The term `unit of local government' means any city, county, township, town, borough, parish, village, or other general purpose political subdivision of a State; an Indian tribe which performs law enforcement functions as determined by the Secretary of the Interior; or any agency of the District of Columbia government or the United States Government performing law enforcement functions in and for the District of Columbia or the Trust Territory of the Pacific Islands. (3) The term `law enforcement equipment suitable for counter-drug activities' has the meaning given such term in regulations prescribed by the Secretary of Defense. In prescribing the meaning of the term, the Secretary may not include any equipment that the Department of Defense does not procure for its own purposes," 10 U.S.C. 381.

[65] "(a) The Secretary of Defense and the Secretary of Transportation shall provide that there be assigned on board every appropriate surface naval vessel at sea in a drug-interdiction area members of the Coast Guard who are trained in law enforcement and have powers of the Coast Guard under title 14, including the power to make arrests and to carry out searches and seizures.

"(b) Members of the Coast Guard assigned to duty on board naval vessels under this section shall perform such law enforcement functions (including drug-interdiction functions) -- (1) as may be agreed upon by the Secretary of Defense and the Secretary of Transportation; and (2) as are otherwise within the jurisdiction of the Coast Guard.

"(c) No fewer than 500 active duty personnel of the Coast Guard shall be assigned each fiscal year to duty under this section. However, if at any time the Secretary of Transportation, after consultation with the Secretary of Defense, determines that there are insufficient naval vessels available for purposes of this section, such personnel may be assigned other duty involving enforcement of laws listed in section 374(b)(4)(A) of this title.

Limitations: Military Preparedness, Reimbursement, and Direct Use. The authority granted in sections 371-381 is subject to three general caveats. It may not be used to undermine the military capability of the United States.[66] The civilian beneficiaries of military aid must pay for the assistance.[67] And the Secretary of Defense must issue regulations to ensure that the authority of sections 371 to 381 does not result in use of the armed forces to make arrests or conduct searches and seizures solely for the benefit of civilian law enforcement.[68]

For several years, the regulations called for by section 375 appeared in parallel form in the Code of Federal Regulations[69] and in a Defense Department Directive.[70] The heart of the regulations appeared in subsection 213.10(a)(3), "Except as otherwise provided in this enclosure, the prohibition on use of military personnel `as a posse comitatus or otherwise to execute the laws' 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,

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"(d) In this section, the term `drug-interdiction area' means an area outside the land area of the United States (as defined in section 374(b)(4)(B) of this title) in which the Secretary of Defense (in consultation with the Attorney General) determines that activities involving smuggling of drugs into the United States are ongoing," 10 U.S.C. 379.

[66] "Support (including the provision of any equipment or facility or the assignment or detail of any personnel) may not be provided to any civilian law enforcement official under this chapter if the provision of such support will adversely affect the military preparedness of the United States. The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that the provision of any such support does not adversely affect the military preparedness of the United States," 10 U.S.C. 376.

[67] "(a) To the extent otherwise required by section 1535 of title 31 (popularly known as the `Economy Act') or other applicable law the Secretary of Defense shall require a civilian law enforcement agency to which support is provided under this chapter to reimburse the Department of Defense for that support.

"(b) An agency to which support is provided under this chapter is not required to reimburse the Department of Defense for such support if such support -- (1) is provided in the normal course of military training or operations; or (2) results in a benefit to the element of the Department of Defense providing the support that is substantially equivalent to that which would otherwise be obtained from military operations or training," 10 U.S.C. 377.

[68] "Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law," 10 U.S.C. 375.

[69] 47 *Fed.Reg*. 14899 (April 7, 1982), codified at, 32 CFR pt.213, removed, 58 *Fed.Reg.* 25776 (April 28, 1993).

[70] Department of Defense Directive No. 5525.5 (January 15, 1986), as amended December 12, 1989, hereafter referred to as DoD Dir.No. 5525.5. Prior to enactment of 10 U.S.C. 371-381, the Navy had operated under a Navy Department Instruction of similar import, SECNAVINST 5400.12 (January 17, 1969), see *United States v. Walden*, 490 F.2d 372, 373-74 (4th Cir. 1974).

undercover agents, investigators, or interrogators," 32 CFR §213.10(a)(3)(July 1, 1992). Although the provisions have been removed from the CFR, the Directive remains in effect.[71]

Military Purpose

The armed forces, when in performance of their military responsibilities, are beyond the reach of the Posse Comitatus Act and its statutory and regulatory supplements. Analysis of constitutional or statutory exceptions is unnecessary in such cases. The original debates make it clear that the Act was designed to prevent use of the armed forces to execute *civilian* law. Congress did not intend to limit the authority of the Army to perform its military duties. The legislative history, however, does not resolve the question of whether the Act prohibits the Army from performing its military duties in a manner which affords incidental benefits to civilian law enforcement officers.

The courts and commentators believe that it does not.[72] As long as the primary purpose of an activity is to address a military purpose, the activity need not be abandoned simply because it also assists civilian law enforcement efforts. Courts appear to view the location of the activity as particular indicative of primary purpose; as one court noted, "the power to maintain order, security, and discipline on a military facility is necessary for military operations."[73]

The courts have concluded that, consistent with this legitimate military purpose to maintain order on military installations, military personnel may, without violating the Posse Comitatus Act, may turn over to civilian law enforcement authorities armed felons arrested when they flee onto a military base, *Harker v. State*, 663 P.2d

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[71] The provision in DoD Dir. No. 5525.5 (Encl.4) reads, "Except as otherwise provided in this enclosure, the prohibition on the use of military personnel `as a posse comitatus or otherwise to execute the laws' prohibits the following forms of direct assistance: a. Interdiction of a vehicle, vessel, aircraft, or other similar activity. b. A search or seizure. c. An arrest, apprehension, stop and frisk, or similar activity. d. Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators," DoD Dir. No. 5525.5 (Encl.4) §A.3.

[72] Logic might suggest that the military purpose doctrine is simply the largest of the statutory exceptions, that is, that the doctrine merely encompasses the military authority vested in the armed forces under the Code of Military Justice and the other statutes which grant them military authority. Neither the commentators nor the courts have ordinarily clearly limit their analyses in such terms, see e.g., Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MILITARY LAW REVIEW 83, 124-26 (Fall, 1975); Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MILITARY LAW REVIEW 109, 128-35 (Spring, 1984); *Hayes v. Hawes*, 921 F.2d 100, 103 (7th Cir. 1990); *Taylor v. State*, 640 So.2d 1127, 1136 (Fla.App. 1994); *State v. Pattioay*, 78 Haw. 455, 459-62, 896 P.2d 911, 915-18 (1995).

[73] *Eggleston v. Dept. of Revenue*, 895 P.2d 1169, 1170 (Colo.App. 1995), citing *Cafeteria & Restaurant Workers Union Local v. McElroy*, 367 U.S. 886 (1961).

932, 936 (Alaska 1983), or drunk drivers arrested on a military base,[74] or firearms stolen from a military installation, *United States v. Griley*, 814 F.2d 967, 976 (4th Cir. 1987). The courts have likewise found no violation of the Act when military personnel arrest civilians on military facilities for crimes committed there, *United States v. Banks*, 539 F.2d 14, 16 (9th Cir. 1976), or when military authorities assist a civilian police investigation conducted on a military facility.[75] The military purpose doctrine likewise permits military law enforcement personnel to investigate the off-base conduct of military personnel.[76] The DoD Directive evidences a comparable understanding.[77]

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[74] *Eggleston v. Dept. of Revenue*, 895 P.2d 1169 (Colo.App. 1995)(military police also administered breath test and provided local law enforcement officers with the results); *McNeil v. State*, 787 P.2d 1036, 1037 (Alaska App. 1990); *Anchorage v. King*, 754 P.2d 283, 286 (Alaska App. 1988).

[75] *People v. Caviano*, 148 Misc.2d 426, 560 N.Y.S.2d 932, 936-37 (N.Y.S.Ct. 1990)(Navy personnel made a sailor available for questioning at naval station facilities; the interrogation was conducted by civilian police who subsequently arrested the sailor for an out of state robbery); *United States v. Hartley*, 678 F.2d 961, 978 (11th Cir. 1982)(military inspectors who discovered evidence of fraudulent conduct by defense contractors "aided the civilian employee in charge of the investigation only to the extent of activities normally performed in the ordinary course of their [military] duties"); *State v. Trueblood*, 265 S.E.2d 662, 664 (N.C.App. 1980)(military search (with consent) of on-base quarters in connection with a civilian investigation of off-base drug dealing by military personnel); *State v. Nelson*, 298 N.C. 573, 260 S.E.2d 629 (1979)(military inventory of personal effects of AWOL soldier were conducted primarily for a military purpose pursuant to a regulation designed to safeguard private property and protect service against claims); *Commonwealth v. Shadron*, 370 A.2d 697, 699 (Pa. 1977)(military police acting within the scope their authority did not violate the Act by making a soldier available, at the Air Force base where he was stationed, to civilian investigators for interrogation by the civilian officers and by permitted the civilians to search the defendant's possessions with his consent).

[76] *United States v. Griley*, 814 F.2d 967, 976 (4th Cir. 1987)(off-base military investigation of concerning property stolen on-base by military personnel); *Applewhite v. United States*, 995 F.2d 997, 1001 (10th Cir. 1993)(military police off-base drug sting targeting military personnel); *State v. Hayes*, 102 N.C.App. 777, 404 S.E.2d 12 (1991)(off-base purchase of drugs by a military undercover agent from an AWOL soldier); *State v. Poe*, 755 S.W.2d 41 (Tenn. 1988)(military investigation of the off-base murder of a soldier by other soldiers).

[77] 2. Permissible direct assistance. The following activities are not restricted by reference (v) [the Posse Comitatus Act, 18 U.S.C. 1385].

a. Actions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities. This provisions must be used with caution, and does not include actions taken for the primary purpose of aiding civilian law enforcement officials or otherwise serving as a subterfuge to avoid the restrictions of reference (v). Actions under this provision may include the following, depending on the nature of the DoD interest and the authority governing the specific action in question:

(1) Investigations and other actions related to enforcement of the Uniform Code of Military Justice (UCMJ)(reference (d)).

(2) Investigations and other actions that are likely to result in administrative proceedings by the Department of Defense, regardless of whether there is a related civil or criminal proceeding. See DoD Directive 5525.7 (reference (w)) with respect to matters in which the Departments of Defense and Justice both have an interest.

Cases called to apply the military purpose doctrine in cooperative police activities occurring off-base are the most difficult to reconcile. Some seem to require no more than a logical military nexus,[78] others demand a very clear, specific military

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(3) Investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility.

(4) Protection of classified military information or equipment.

(5) Protection of DoD personnel, DoD equipment, and official guests of the Department of Defense.

(6) Such other actions that are undertaken primarily for a military or foreign affairs purpose, DoD Dir.No. 5525.5 (Encl. 4) A.2.a. (32 CFR §213.10(2)(i)(July 1, 1992) was identical except for styles used to designate subsections, paragraphs and subparagraphs and that the CFR contained no cross reference citations except to the Code of Military Justice).

[78] *State v. Sanders*, 303 N.C. 608, 613, 281 S.E.2d 7, 10 (1981)("military policeman Lambert's duty [during joint patrol with civilian police off-base] was not to execute civilian law but to assist the police department in returning apprehended military personnel to Fort Bragg"); *State v. Short*, 113 Wash.2d 35, 36-7 & 39, 775 P.2d 458, 458-59 & 460 (1989)("the Naval Investigative Services (NIS) instigated a joint drug operation with local law enforcement agencies . . . . NIS brought in Agent Jerry Kramer, a civilian Navy employee, to work undercover. . . . Kramer became employed as a bouncer at Noodles, a local restaurant where drug contacts were made. In this position, Kramer checked the ID of persons entering the bar and determine that about 80 percent of those entering Noodles were military personnel. While employed at Noodles Kramer met James Corso and, later, the defendant Larry K. Short. . . . Corso indicated that Kramer could buy more cocaine through Short. Kramer and Corso waited at Noodles until Short arrived. After a brief discussion, Kramer gave Short $250 to get some cocaine. Corso and Short left Noodles together and returned an hour later. Corso entered the bar and delivered a foil package to Kramer. Kramer delivered the alleged cocaine along with information about Corso and Short, to his immediate supervisor, Agent Kocina. A Washington State Patrol Crime Laboratory analysis revealed that the substance was not cocaine. . . . Kramer still undercover complained to Short about the counterfeit and demanded reimbursement. Short promised to replace the fake cocaine with real cocaine [but did not]. Short was arrest later by local authorities and convicted . . . for selling a substitute substance in lieu of a controlled substance [to Kramer]. . . . Case law discloses that the use of equipment, personnel, and information is generally not considered direct participation under 10 U.S.C. §371 or under the posse comitatus act. . . . Here, Kramer did not arrest Short, and any personnel, equipment, and information provided to local law enforcement did not constitute direct participation"); *People v. Wells*,175 Cal. 876, 878, 221 Cal.Rptr. 273, 273-74 (1985)("with the goal of taking illegal drug dealers off the streets of the City of Oceanside and thus minimizing the flow of drugs into nearby Camp Pendleton, the Naval Investigative Service (N.I.S.) initiated what N.I.S. calls an Initiative Criminal Investigative Operation by soliciting the assistance of the Oceanside Police Department (O.P.D.). . . . The operational plan called for the N.I.S. agents, all military policemen, to be used as confidential informants immediately under the supervision and surveillance of a particular O.P.D. officer. Solicitation for drugs was to be done by N.I.S. agents. Any detention or arrest of a suspect was to be handled by an O.P.D. officer. The N.I.S. agent always was accompanied within a matter of feet or yards by an O.P.D. officer. On most occasions, the N.I.S. agent was equipped with a concealed transmitter. O.P.D. furnished prerecorded money to N.I.S. agents to make drug purchases and, once a purchase was completed by an N.I.S. agent, the suspected drugs were turned over to an O.P.D. officer to be impounded and analyzed. O.P.D. paid nothing to N.I.S. for its assistance. Several operations were carried out according to the plan. . . . In light of the language, background and apparent purposes of the

connection before they will concede the presence of a military purpose,[79] and still others seem to seek a middle ground.[80]

Posse Comitatus Act to stop state use of the federal militia, particularly in policing state elections and to prevent the subjugation of citizens to the exercise of military power of a regulatory, prescriptive or compulsory nature, we find no violation of the act in the facts of this case").

[79] In *Walden*, for example, where a Treasury agent was found to have used Marines as undercover agents to secure evidence against civilian firearms offenders, the court found a breach of the Posse Comitatus requirements without even acknowledging the government's military purpose argument, *United States v. Walden*, 490 F.2d 372 (4th Cir. 1974); Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MILITARY LAW REVIEW 83, 115 (Fall, 1975)("the Government argued [in *Walden*] that the Act had not been violated because the investigation was `related directly to the maintenance of order and security` on the base and that such undercover assistance to civilian authorities does not constitute `execution of the law'"); Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MILITARY LAW REVIEW 109, 129 (Spring, 1984)("[i]f the court considered the government's argument that the activities of the Marines were related to the maintenance, order and security of the base, it had rejected it. However, the sale of the weapons occurred immediately off the base in the town of Quantico. If the base authorities were aware of this fact and that the illegally sold weapons were being purchased by Marines and being brought on the base, then what may they do to insure order and discipline? Clearly, they can notify local authorities. But would the purchase in question by an undercover Marine be for the primary purpose of furthering a military function? Order, discipline, and security of a base is a military function"); *State v. Pattioay*, 78 Haw. 455, 464-65, 896 P.2d 911, 920-21 (1995)("[w]here the target of a military investigation is a civilian and there is no verified connection to military personnel, the PCA prohibits military participation in activities designed to execute civilian laws. *People v. Tyler (Tyler I)*, 854 P.2d 1366 (Colo.App. 1993), *rev'd on other grounds*, 874 P.2d 1037 (Colo. 1994) (*Tyler II*). . . . In fact, the apparent justification for the military involvement in the instant case was to facilitate the enforcement of civilian laws. In *Tyler I*, the Colorado Court of Appeals stated: `*before* the military may directly participate in an undercover investigation of these civilians and their off-base activities, the state carries the burden of demonstrating that there exists a *nexus between drug sales off base by civilians to military personnel and the military base at which the purchasers are stationed*. . . . Hence, the prosecution has the duty to present evidence to show that, when a military investigation was undertaken, the targeted drug transactions involved military personnel or were connected to sales conducted on a military installation.' 854 P.2d at 1369 [emphasis of the *Pattioay* court]; see also *Moon [v. State*, 785 P.2d 45,] 46-47 [(Alaska App. 1991),]. Furthermore, we agree with the observation in Chief Justice Rabinowitz's dissent in *Kim v. State, supra* [817 P.2d 467 (Alaska 1991)]; he observed that an independent military interest in the health and safety of its personnel does not establish a `military function' or `primary [military] purpose' under 32 CFR §213.10(a)(2)(1). 817 P.2d at 471 & 471 n.10. That the military has a valid interest in ferreting out those who supply drugs to military personnel, does not automatically qualify its aid to civilian drug law enforcement as having the `primary purpose of furthering a military . . . function'").

[80] *Moon v. State*, 785 P.2d 45, 48 (Alaska App. 1990)("[I]t seems to us that the army had a valid military purpose in preventing illicit drug transactions involving active duty personnel even if the transaction took place off base. The investigation was not begun until the military was satisfied that drug dealers at the Palace Hotel had targeted military personnel as a market. It was also reasonable to infer that a substantial quantity of illicit drugs was finding its way onto the base"); *State v. Maxwell*, 328 S.E.2d 507, 509 (W.Va.

Willfully Execute the Laws

Willful

The Act is limited to "willful" misuse of the Army or Air Force.[81] The Senate version of the original Act would have limited proscription to "willful and knowing" violations, 7 *Cong.Rec.* 4302 (1878); the House version had no limitation, 7 *Cong.Rec.* 4181 (1878). The compromise which emerged from conference opted to forbid only willful violations but neither the statements of the managers nor statements elsewhere in the debate explain what the limitation means. And the scattered statements found in the case law under the Act are somewhat conflicting and not particularly helpful,[82] although it seems unlikely that a court would convict for anything less than a deliberate disregard of the law's requirements.

1985)(same); *State v. Presgraves*, 328 S.E.2d (W.Va. 1985)(same); *Hayes v. Hawes*, 921 F.2d 100, 103-104 (7th Cir. 1990)(no violation where Navy undercover agent, who had "received information" a that a sailor had purchased drugs at an off-base arcade, with several other military agents joined local police for surveillance of the arcade, made a drug buy in cooperation with local police who made the arrest and conducted the search of civilian).

[81] 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. 18 U.S.C. 1385 (emphasis added).

[82] *United States v. Walden*, 490 F.2d 372, 276 (4th Cir. 1974)("there is totally lacking any evidence that there was a conscious, deliberate or willful intent on the part of the Marines or the . . . Special Investigator to violate the Instruction or the spirit of the Posse Comitatus Act. From all that appears, the Special Investigator acted innocently albeit ill-advisedly"); *State v. Danko*, 219 Kan. 490, 548 P.2d 819, 822 (1976)("the statute is limited to deliberate use of armed force for the primary purpose of executing civilian laws")(quoting Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MILITARY LAW REVIEW 85, 128 (1960)); *Kim v. State*, 817 P.2d 467, 469 n.2 (Alaska, 1991)(Rabinowitz, J. dissenting)("A will to violate the Act is not required, but only the wilful use of military personnel").

In other instances, Congress has used the term "willful" in a number of different ways and the term "has been construed by the courts in a variety of ways, often inconsistent and contradictory. The courts have defined a `willful' act as an act done voluntarily as distinguished from accidentally, an act doe with specific intent to violate the law, an act done with bad purpose, an act done without justifiable excuse, an act done stubbornly, an act done without grounds for believing it is lawful, and an act done with careless disregard whether or not one has the right so to act," S.Rep.No. 307, 97th Cong., 1st Sess. 64 (1981).

Recent Supreme Court cases seem to caution against a broad interpretation of the term "willful" or any of the other state-of-mind elements in federal criminal statute, *Bryan v. United States*, 524 U.S. 184, 191-92 (1998)("The word willfully is sometimes said to be a word of many meanings whose construction is often dependent on the context in which it appears. . . . As a general matter, when used in the criminal context, a willful act is one undertaken with a bad purpose. In other words, in order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful")(citing *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994)).

Execute the Law

When has the Army or Air Force been used "to execute the laws"? The language of the Act by itself seems very sweeping.[83] It is comparable to the instruction of the Constitution that the President "take care that the laws are faithfully executed," U.S. Const. Art.II, §3. Without more, it would seem to prohibit the use of the Army or the Air Force to implement the command or authorization of all state or federal law. It might apply with equal force to delivering the mail or making an arrest.

Existing case law and commentary indicate that "execution of the law" in violation of the Posse Comitatus Act occurs (a) when the armed forces perform tasks ordinarily assigned not to them but to an organ of civil government, or (b) when the armed forces perform tasks assigned to them solely for purposes of civilian government.

While inquiries may surface in other contexts such as the use of the armed forces to fight forest fires or to provide assistance in the case of other natural disasters,[84] Posse Comitatus Act questions arise most often when the armed forces assist civilian police. This is perhaps not surprising since it is the use that stimulated

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[83] 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. 18 U.S.C. 1385 (emphasis added).

[84] See e.g., Copeland & Lamb, *Disaster Law and Hurricane Andrew: Government Lawyers Leading the Way to Recovery*, 27 URBAN LAWYER 1 (1995); Delzompo, *Warriors on the Fire Line: The Deployment of Service Members to Fight Fire in the United States*, 1995 ARMY LAWYER 51 (April, 1995); *Federal Disaster Assistance: Report of the Senate Task Force on Funding Disaster Relief*, SEN. DOC.104-4 (1995).

Congress has recently established provisions which at first glance might appear to be a blanket statutory exception of military assistance to civil authorities for any purpose other than police activities ("[t]he Secretary of Defense shall establish a program to be known as the `Civil-Military Cooperative Action Program.' Under the program, the Secretary may, in accordance with other applicable law, use the skills, capabilities, and resources of the armed forces to assist civilian efforts to meet the domestic needs of the United States," 10 U.S.C. 410(a)). Upon closer examination, however, it becomes clear that legislation seeks to encourage activity that would not previously have violated the Posse Comitatus Act or its supplementary statutory and regulatory provisions ("The programs shall have the following objectives: (1) To enhance individual and unit training and morale in the armed forces through meaningful community involvement of the armed forces. (2) To encourage cooperation between civilian and military sectors of society in addressing domestic needs. (3) To advance equal opportunity. (4) To enrich the civilian economy of the United states through education, training, and transfer of technological advances. (5) To improve the environment and economic and social conditions. (6) To provide opportunities for disadvantaged citizens of the United States. . . . Nothing in this section shall be construed as authorizing -- (1) the use of the armed forces for civilian law enforcement purposes; or (2) the use of Department of Defense personnel or resources for any program, project, or activity that is prohibited by law," 10 U.S.C. 410(b),(e)); S.Rep.No. 102-352, 278-82 (1992); H.R.Rep.No. 102-966, 762, reprinted in 1992 UNITED STATES CODE, CONGRESSIONAL AND ADMINISTRATIVE NEWS 1769, 1853.

passage of the Act. During the debate, Members complained of various ways in which the Army had been used, essentially as a police force, to break up labor disputes, to collect taxes, to execute search and arrest warrants, and to maintain order at the polls and during state legislative sessions.[85]

At least when suggested that the armed forces have been improperly used as a police force, the tests used by most contemporary courts to determine whether such military activity violates the Posse Comitatus Act were developed out of disturbances at Wounded Knee on the Pine Ridge Indian Reservation in South Dakota and inquiry:

> (1) whether civilian law enforcement officials made a "direct active use" of military investigators to "execute the law";
>
> (2) whether the use of the military "pervaded the activities" of the civilian officials; or
>
> (3) whether the military was used so as to subject "citizens to the exercise of military power which was regulatory, prescriptive, or compulsory in nature." *Taylor v. State*, 640 So.2d 1127, 1136 (Fla.App. 1994).[86]

The vast majority of cases called upon to apply these tests have found that the assistance provided civilian law enforcement did not constitute "execution of the law" in violation of Posse Comitatus Act requirements.[87] Those most likely to fail

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[85] 5 *Cong.Rec.* 2113 (1877); 6 *Cong.Rec.* 294-307, 322; 7 *Cong.Rec.* 3538, 3581-582, 3850, 4245 (1878).

[86] See also, *United States v. Kahn*, 35 F.3d 426, 431 (9th Cir. 1994); *United States v. Yunis*, 924 F.2d 1086, 1094 (D.C.Cir. 1991); *Hayes v. Hawes*, 921 F.2d 100, 104 (7th Cir. 1990); *United States v. Gerena*, 649 F.Supp. 1179, 1182 (D.Conn. 1986); *United States v. Hartley*, 678 F.2d 961, 978 n.24 (8th Cir. 1982); note the similarity to the tests used in the Wounded Knee Cases, *United States v. Jaramillo*, 380 F.Supp. 1375, 1379-380 (D.Neb. 1974), appeal dismissed, 510 F.2d 808 (8th Cir. 1975)(whether the use of military personnel affected or materially contributed to the activities of civilian law enforcement officials); *United States v. Banks*, 383 F.Supp. 368, 375 (D.S.D. 1974)(whether there was active participation of military personnel in civilian law enforcement activities); *United States v. Red Feather*, 392 F.Supp. 916, 921 (D.S.D. 1975)(whether there was direct active use of military personnel by civilian law enforcement officers); *United States v. McArthur*, 419 F.Supp. 186 (D.N.D. 1976), aff'd sub nom., *United States v. Casper*, 541 F.2d 1275, 1278 (8th Cir. 1976)(whether "Army or Air Force personnel [were] used by the civilian law enforcement officers in such manner that the military personnel subjected the citizens to the exercise of military power which was regulatory, prescriptive, or compulsory in nature, either presently or prospectively").

[87] *United States v. Yunis*, 924 F.2d 1086, 1094 (D.C.Cir. 1991)(Navy transportation of prisoner in the custody the FBI); *Hall v. State*, 557 N.E.2d 3, 4-5 (Ind.App. 1990)(the [Air Force] Office of Special Investigations (OSI) asked Arthur Biles and Darryl Ivery, Air Force personnel, if they would be undercover agents to assist the Kokomo Police Department in drug investigations. . . . Biles and Ivery met with an OSI agent and Kokomo police officers to prepare for a controlled buy of cocaine. The police placed a body transmitter on Biles . . .. Hall met Biles and told him he could get him anything he wanted. . . . Biles gave [Hall sixty dollars ($60.00) to purchase one-half gram of cocaine. Hall walked to his sister's car

the tests seem to be those where the activities appear to have a colorable military purpose but the government fails to make a convincing showing.[88]

. . . and returned with the cocaine. Biles negotiated to buy two more bags of cocaine for one-hundred ten dollars. [Biles and Ivery testified at Hall's subsequent trial for dealing cocaine.] . . . Adopting the standard in *[United States v.] McArthur*, [419 F.Supp. 186 (D.N.D. 1975), *aff'd*, 541 F.2d 1275 (8th Cir. 1976)], we do not find that the acts of Biles and Ivery display the unauthorized exercise of military power that is `regulatory, prescriptive, or compulsory in nature); *United States v. Bacon*, 851 F.2d 1312 (11th Cir. 1988)("an active-duty army investigator assumed an undercover role in working jointly with the . . . Sheriff's Department to ferret out a source of some of the cocaine being supplied to [the area for] both civilians and army personnel. . . . Army funds were used for some of the undercover drug `buys.' State and local funds were used for others. All drugs and other evidence gathered by Army Investigator Perkins were turned over to the state and local investigators for evidence in the prosecution of drug distributor Joe Bacon. . . . There was no `military permeation of civilian law enforcement.' In this case the limited military participation was nothing more than a case of assistance to civilian law enforcement efforts by military personnel and resources. This does not violate the statutory prohibition of the Posse Comitatus Act")[note that the courts do not seem to have accepted the proposition that military undercover participation without a primary military purpose is a per se violation of the Posse Comitatus Act or at least of DoD Dir. No. 5525.5 (Encl.4) A.3. ("except as otherwise provided in this enclosure, [e.g., when done primarily for a military purpose], the prohibition on the use of military personnel `as a posse comitatus or otherwise to execute the laws prohibits . . . d. Use of military personnel for surveillance. . . or as undercover agents. . . ."]);*United States v. Hartley*, 796 F.2d 112, 115 (5th Cir. 1986)(Air Force assistance to a customs agent tracking an aircraft suspected of smuggling marijuana into the United States);*United States v. Gerena*, 649 F.Supp. 1179, 1182 (D.Conn. 1986)(military transport of prisoner in the custody of the Marshals Service);*Airway Heights v. Dilley*, 45 Wash.App. 87, 92, 724 P.2d 407, 410 (1986)(use of Air Force technician and equipment to administer breathalyzer test).

[88] E.g., *Accord, Taylor v. State*, 645 P.2d 522, 525 (Okla.Crim.[App.] 1982). See also, *United States v. Walden*, 490 F.2d 372 (4th Cir. 1974); *Taylor v. State*, 640 So.2d 1127, 1136 (Fla.App. 1994)("[m]ilitary participation in civilian law enforcement activities is restricted by the Federal Posse Comitatus Act, 18 U.S.C. 1385, and by 10 U.S.C. §375. Cases addressing this issue have ruled that where military involvement is limited and there is an independent military purpose, `the coordination of military police efforts with those of civilian law enforcement officials does not violate either [section 1385 or section 375].' *Hayes v. Hawes*, 921 F.2d 100, 103 (7th Cir. 1990). . . . In this case, the activities of the NIS [Naval Investigative Service] agents permeated the initial stages of the homicide investigation. Upon ascertaining that appellant [a sailor subsequently convicted in state court on two counts of first degree murder] purchased a one-way ticket to Virginia, the NIS agents obtained authorization form his commanding officer enabling them to arrest appellant on grounds of desertion for unauthorized absence. They agents traveled to Virginia, where they interviewed appellant's family members and kept them under surveillance. When appellant was found and taken into custody, the NIS agents questioned him about the homicides, obtained oral and written statements from him, and seized his clothing and other personal effects. The NIS agents then transported appellant to Jacksonville, where they turned him over to the civilian authorities. . . . [T]he NIS agent stated candidly that his primary purpose in traveling to Virginia was to question appellant about the homicides. We conclude the nature of the military involvement in the investigation may have constituted a violation of the federal Act. . .").

Military Coverage

Navy & Marines

The Posse Comitatus Act proscribes use of the Army or the Air Force to execute the law.[89] It says nothing about the Navy, the Marine Corps, the Coast Guard, or the National Guard. The amendment first offered to the Army appropriation bill in 1878 to enact the Posse Comitatus provisions would have prohibited use of "any part of the land or naval forces of the United States" to execute the law, 7 *Cong.Rec.* 3586 (1878). Some commentators believe that sponsors subsequently limited the posse comitatus amendment to the Army appropriation bill in order to avoid challenges on grounds of germaneness.[90] The courts have generally held that the Posse Comitatus Act by itself does not apply to the Navy or the Marine Corps.[91] They maintain, however, that those forces are covered by similarly confining administrative and

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[89] 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. 18 U.S.C. 1385 (emphasis added).

[90] *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush of the Constitution?* 75 GEORGETOWN LAW JOURNAL 1947, 1955 (1987); Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MILITARY LAW REVIEW 83, 101 (Fall, 1975). Under long standing rules of the House, an amendment that deals with a subject different from those contained in the bill which it seeks to amend is nongermane and subject to challenge. If the posse comitatus amendment sponsors adjusted their amendment solely for reasons of germaneness, one would expect to find a comparable amendment in the Navy appropriation bill before the Congress at the same time. So such amendment was offered to the Navy bill, 46 Stat. 48 (1878).

[91] *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1477 (11th Cir. 1992); *United States v. Yunis*, 924 F.2d 1086, 1093 (D.C.Cir. 1991); *State v. Short*, 113 Wash.2d 35, 38, 775 P.2d 458, 459 (1989); *United States v. Ahumedo-Avendano*, 872 F.2d 367, 372 n.6 (11th Cir. 1989); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1339-340 (9th Cir. 1987); *United States v. Roberts*, 779 F.2d 565, 567 (9th Cir. 1986); *United States v. Walden*, 490 F.2d 372, 374 (4th Cir. 1974).

legislative supplements,[92] the most currently applicable of which appear in the DoD Directive.[93]

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[92] *United States v. Kahn*, 35 F.3d 426, 431 (9th Cir. 1994)("[t]hus the Posse Comitatus Act applies to the Navy through section 375 [of title 10 of the United States Code] and 32 C.F.R. §213.10"); *Taylor v. State*, 640 So.2d 1127, 1136 (Fla.App. 1994)("[m]ilitary participation in civilian law enforcement activities is restricted by the federal Posse Comitatus Act, 18 U.S.C. §1385, and by 10 U.S.C. §375"); *United States v. Yunis*, 924 F.2d 1086, 1094 (D.C.Cir. 1991)) ("[r]egulations issued under 10 U.S.C. §375 require Navy compliance with the restrictions of the Posse Comitatus Act. . ."); *Hayes v. Hawes*, 921 F.2d 100, 102-103 (7th Cir. 1990)(". . .10 U.S.C. §375 and the regulations promulgated thereunder at 32 C.F.R. §§213.1-213.11 make the proscriptions of [18 U.S.C.] §1385 applicable to the Navy and serve to limit its involvement with civilian law enforcement officials"); *State v. Short*, 113 Wash.2d 35, 39, 775 P.2d 458, 460 (1989)("[b]ecause the limitations on the use of the armed services contained in 10 U.S.C. §375 correspond closely with those in the posse comitatus act, the same analysis should apply"); *United States v. Ahumedo-Avendano*, 872 F.2d 367, 372 n.6 (11th Cir. 1989)("[t]he Posse Comitatus Act does not expressly regulate the use of naval forces as a posse comitatus; the courts of appeal that have considered this question, however, have concluded that the prohibition embodied in the Act applies to naval forces, either by implication or by virtue of executive act"); *United States v. Roberts*, 779 F.2d 565, 568 (9th Cir. 1986)(" . . .the Posse Comitatus Act and sections 371-378 of Title 10 embody similar proscriptions against military involvement in civil law enforcement. . . "); *United States v. Del Prado-Montero*, 740 F.2d 113, 116 (1st Cir. 1984)("18 U.S.C. 1385 prohibits the use of the Army and the Air Force to enforce the laws of the United States, a proscription that has been extended by executive act to the Navy"); *United States v. Chaparro-Almeida*, 679 F.2d 423, 425 (5th Cir. 1982)(dicta in case involving the Coast Guard); *United States v. Walden*, 490 F.2d 372, 373-74 (4th Cir. 1974)("[t]he use of Marines as undercover investigators by the Treasury Department is counter to a Navy military regulation proscribing the use of military personnel to enforce civilian laws. . . . Thus, though by its terms the Posse Comitatus Act does not make criminal the use of Marines to enforce federal laws, the Navy has adopted the restriction by self-imposed administrative regulation").

As an examination of the cases listed above and in the previous footnote demonstrate, although in basic agreement subsequent courts have sometime described their views as in conflict. In fact, one camp will cite *Walden* for the proposition that the Posse Comitatus Act does not apply to the Navy or Marines although its requirements have been adopted by administrative and/or legislative supplements, while the other camp will cite *Walden* for the assertedly contrary proposition that the Posse Comitatus Act requirements apply to the Navy and Marines by way of regulation and/or legislative supplement. A third group takes an abbreviate route to the same destination by simply citing *Walden* for the principle that the Posse Comitatus Act applies to Navy and the Marines, see e.g., *People v. Caviano*, 148 Misc.2d 426, 560 N.Y.S.2d 932, 936 n.1 (1990); *State v. Presgraves*, 328 S.E.2d 699, 701 n.3 (W.,Va. 1985); *State v. Maxwell*, 328 S.E.2d 506, 509 n.4 (W.Va. 1985); *People v. Wells*, 175 Cal.App.3d 876, 879, 221 Cal.Rprt. 273, 275 (1985); *People v. Blend*, 121 Cal.App.3d 215, 222, 175 Cal.Rprt. 263, 267 (1981).

[93] "A. REISSUANCE AND PURPOSE

This Directive reissues reference (a) [DoD Directive No. 5525.5 (March 22, 1982)] to update uniform DoD policies and procedures to be followed with respect to support provided to Federal, State, and local civilian law enforcement efforts. . . .

"APPLICABILITY AND SCOPE

1. This Directive applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Organization of the Joint Chiefs of Staff (OJS), the Unified and Specified

Coast Guard

The Posse Comitatus Act likewise says nothing about the Coast Guard. The Coast Guard was formed by merging two civilian agencies, the revenue cutter service and the lifesaving service. Although created and used for law enforcement purposes, the cutter service had already been used as part of the military forces of the United States by the time the Posse Comitatus Act was enacted.[94]

The Coast Guard is now a branch of the armed forces, located within the Department of Transportation, 14 U.S.C. 1, but relocated within the Navy in time of war or upon the order of the President, 14 U.S.C. 3. The Act does apply to the Coast Guard while it remains part of the Department of Transportation.[95] While part of the Navy, it is subject to the orders of the Secretary of the Navy, 14 U.S.C. 3, and consequently to any generally applicable directives or instructions issued under the Department of Defense or the Navy.

As a practical matter, however, the Coast Guard is statutorily authorized to perform law enforcement functions, 14 U.S.C. 2. Even while part of the Navy its law enforcement activities would come within the statutory exception to the posse comitatus restrictions, and the restrictions applicable to components of the Department of Defense would only apply to activities beyond those authorized.

National Guard

The Act is silent as to what constitutes "part" of the Army or Air Force for purposes of proscription. There is little commentary or case law to resolve questions concerning the coverage of the National Guard, the Civil Air Patrol, civilian employees of the armed forces, or regular members of the armed forces while off duty.

Strictly speaking, the Posse Comitatus Act predates the National Guard only in name for the Guard "is the modern Militia reserved to the States by Art.I, §8, cls.15, 16, of the Constitution" which has become "an organized force, capable of being assimilated with ease into the regular military establishment of the United States," *Maryland v. United States*, 381 U.S. 41, 46 (1965). There seems every reason to consider the National Guard part of the Army or Air Force, for purposes of the Posse Comitatus Act, when in federal service.[96] When not in federal service, historical

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Commands, and the Defense Agencies (hereafter referred to collectively as DoD Components). The term `Military Service,' as used herein, refers to the Army, Navy, Air Force, and Marine Corps."

[94] See 46 Stat. 316 (1878), directing the Secretary of the Treasury to issue three months extra pay to those who had engaged in the military service of the United States during the war with Mexico and listing the cutter service as one source of possibly qualifying service.

[95] *United States v. Chaparro-Almedia*, 679 F.2d 423, 425 (5th Cir. 1982); *Jackson v. State*, 572 P.2d 87, 93 (Alaska, 1977).

[96] Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MILITARY LAW REVIEW 83, 96-9 (Fall, 1975); Furman, *Restrictions Upon*

reflection might suggest that it is likewise covered. Recall that it was the state militia, called to the aid of the marshal enforcing the Fugitive Slave Act, which triggered Attorney General Cushing's famous opinion. And that the Posse Comitatus Act's reference to "posse comitatus or otherwise" is a "they-are-covered-no-matter-what-you-call-them" response to the assertion derived from Cushing's opinion that troops could be used to execute the law as long as they were acting as citizens and not soldiers when they did so.

On the other hand, the National Guard is creature of both state and federal law, a condition which as the militia it has enjoyed since the days of the Articles of Confederation.[97] And the courts have said that members of the National Guard when not in federal service are not covered by the Posse Comitatus Act.[98] Similarly, the

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Use of the Army Imposed by the Posse Comitatus Act, 7 MILITARY LAW REVIEW 85, 101 (January, 1960).

[97] The status of the District of Columbia National Guard is somewhat different since it is a creature entirely of federal creation. This being the case it might be thought that the D.C. National Guard should be considered perpetually "in federal service" or that the Posse Comitatus Act would apply to it at all times even though the treatment of the National Guard in the various states might be different. This, however, is not the view of the Department of Justice which has concluded the Posse Comitatus Act applies to the D.C. National Guard only when it is called into federal service as a state National Guard might be. The Department has also determined that even if this were not the case the Posse Comitatus Act permits the D.C. National Guard to "to support the drug law enforcement efforts" of the D.C. police because of the authority granted by Congress in D.C. Code 39-104 (declaring that the D.C. National Guard shall not be subject to any duty except when called into federal service or to "aid civil authorities in the execution of the laws or suppression of riots"[D.C.Code §39-603 authorizes D.C. officials, in times of tumult, riot, or mob violence, to request the President to call out the D.C. National Guard to aid "in suppressing such violence and enforcing the laws"]) and D.C.Code §39-602 (authorizing the Commanding General of the D.C.National Guard to order "such drills, inspections, parades, escort, *or other duties*, as he may deem proper")(emphasis added), *Use of the National Guard to Support Drug Interdiction Efforts in the District of Columbia*, 13 OP.OFF. LEGAL COUNSEL 110 (1989).

[98] *Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999); *United States v. Hutchings*, 127 F.3d 1255, 1258 (10th Cir. 1997); *United States v. Benish*, 5 F.3d 20, 25-6 (3d Cir. 1993); *United States v. Kyllo*, 809 F.Supp. 787, 792-93 (D.Ore. 1992); *Wallace v. State*, 933 P.2d 1157, 1160 (Alaska App. 1997); *accord*, Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and the Posse Comitatus Act: The Meaning and Implications of `In Federal Service'*, 1994 ARMY LAWYER 35, 42-3 (June, 1994); but in two Wounded Knee cases, in which National Guard involvement in the civilian law enforcement efforts helped doom federal prosecution, the courts made no effort to determine whether the Guard had been called into federal service, suggesting to some that the Guard was covered in any event. *United States v. Banks*, 383 F.Supp. 368, 376 (D.S.D. 1974); *United States v. Jaramillo*, 380 F.Supp. 1375, 1380-381 (D.Neb. 1974); see also, *United States v. McArthur*, 419 F.Supp. 186, 193 n.3 (D.N.D. 1976)(a third Wounded Knee case listing "use by federal civil law enforcement officers of material and equipment furnished by . . . the South Dakota National Guard. . . aerial photographic reconnaissance provided by . . . the Nebraska National Guard . . . and the maintenance of military vehicles performed by members of the Nebraska National Guard" as "evidence of military involvement"); Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MILITARY

DoD directive is only applicable to members of the National Guard when they are in federal service.[99]

Off Duty, Acting as Citizens & Civilian Employees

The historical perspective fares little better on the question of whether the Posse Comitatus Act extends to soldiers who assist civilian law enforcement officials in a manner which any other citizen would be permitted to provide assistance, particularly if they do so while off duty.

Congress passed the Act in response to cases where members of the military had been used based on their civic obligations to respond to the call as the posse comitatus. The debate in the Senate, however, suggests that the Act was not intended to strip members of the military of all civilian rights and obligations.[100]

Some of the cases, particularly the earlier ones, occasionally citing debate in the Senate, held that a soldier who does no more than any other citizen might do to assist civilian law enforcement has not been used in violation of the Posse Comitatus Act.[101] The more recent decisions under similar facts, with the endorsement of the

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LAW REVIEW 83, 96-8 (Fall, 1975).

Kyllo suggests that 32 U.S.C. §112 (which permits the Secretary of Defense to provide funds for the drug interdiction activities conducted by various state National Guards when not in federal service) authorizes such Guards to assist in civilian law enforcement efforts, 809 F.Supp. at 793.

The legislative history of earlier efforts to involve the National Guard (while in state service) in drug interdiction indicates that the Congress believed that "[w]hen not in federal service, the National Guard is not subject to the Posse Comitatus Act," H.R.Rep.No.100-989, 455, reprinted in 1988 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 2503, 2583.

[99] "The restrictions of section A. above [the Directive's posse comitatus proscriptions], do not apply to the following persons . . . . 2. A member of the National Guard when not in Federal Service," DoD Directive No. 5525.5.b.2.

[100] "If a soldier sees a man assaulting me with a view to take my life, he is not going to stand by and see him do it, he comes to my relief not as a soldier, but as a human being, a man with a soul in his body, and as a citizen. . . . The soldier standing by would have interposed if he had been a man, but not as a soldier. He could not have gone down in pursuance of an order form a colonel or a captain, but he would have done it as a man." 7 *Cong.Rec.* 4245 (1878)(remarks of Sen. Merriman).

The weight afforded remarks in the Senate should perhaps reflect the fact that the Act was the work of a Democratic House, forced upon a reluctant Republican Senate.

[101] *People v. Taliferro*, 116 Ill.App.3d 861, 520 N.E.2d 1047, 1051 (1988)(an airman acted as an undercover agent for local drug enforcement officers; "Ferguson participated in a controlled drug purchase in exactly the same manner as any other citizen would participate in such transaction"); *Burkhart v. State*, 727 P.2d 971, 972 (Okla.Crim.App. 1986)(military undercover agent investigating drugs sold to military personnel purchased some from the defendant and testified against him; "the agent `did not assume any greater authority than that of a private citizen in purchasing the marijuana'"); *People v. Burden*, 411 Mich. 56, 303 N.W.2d 444, 446-47 (1981)(airman agreed to serve undercover after being charged with drug sales by civilian authorities; "[i]n cooperating with and assisting the civilian police

commentators,[102] have focused on the nature of the assistance provided and whether the assistance is incidental to action taken primarily for a military purpose.[103]

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agency, Hall was not acting as a member of the military. He was acting only as a civilian. His military status was merely incidental to and not essential to his involvement with the civilian authorities. He was not in military uniform. He was not acting under military orders. He did not exercise either explicitly or implicitly any military authority. Moreover, Hall was not a regular law enforcement agent of the military, * * * nor does the record suggest that Hall's usefulness to civilian authorities was in any way enhanced by virtue of his being a military man. . . . [T]he assistance rendered by Hall was in no way different from the cooperation which would have been given by a private citizen offered the same opportunity to avoid criminal prosecution"); *People v. Blend*, 121 Cal.App.3d 215, 227, 175 Cal.Rptr. 263, 270 (1981)(a Navy wave caught by civilian authorities in violating the drug laws, agreed to serve undercover for the civilian police; "the [posse comitatus] act does not apply to military personnel who are acting clearly on their own initiative as private citizens"); *Lee v. State*, 513 P.2d 125, 126 (Okla.Crim.App. 1973)(military undercover agent in cooperation with local police purchases drugs off-base from a civilian; "agent Smith did not assume any greater authority than that of a private citizen in purchasing the marijuana in the instant case"); *Hildebrandt v. State*, 507 P.2d 1323, 1325 (Okla.Crim.App. 1973)(military undercover investigators traced the source of drugs sold to military personnel to the defendant; the "soldier led the agents to a location outside the scope of their military jurisdiction, at which time the agents assumed no greater authority than that of a private citizen"); *Hubert v. State*, 504 P.2d 1245, 1246-247 (Okla.Crim.App. 1972)(same).

[102] Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MILITARY LAW REVIEW 83, 126-27 (Fall, 1975) ("Military personnel are all private citizens as well as members of the federal military. The prohibitions of the Posse Comitatus Act do not apply to military personnel who are performing the normal duties of a citizen such as reporting crimes and suspicious activities, making citizens' arrests where allowed by local law and otherwise cooperating with civil police. It is not sufficient for military personnel to be `volunteers,' they must clearly be acting on their own initiative and in a purely unofficial and individual capacity. Commanders must be careful to insure that activities which are in violation of the act are not being carried on under the labels of `individual' or `unofficial' assistance. Some factors which may signal a violation of the Act include aid given during duty hours, aid prompted or suggested by a military superior or aid given with the knowledge or acquiescence of a military superior. Other considerations include the manner in which the civil authorities contacted the military person, whether that person regularly performs military law enforcement functions, and whether or not the individual's usefulness to civil authorities is related to his military status"); Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 194 MILITARY LAW REVIEW 109, 128-33 (Spring, 1984)(also noting that the catalyst for some the difficult stemmed from the holding in *O'Callahan v. Parker*, 395 U.S. 258 (1969)(since overturned) limiting military jurisdiction over crimes committed by military personnel to those which were service connected).

[103] *Fox v. State*, 908 P.2d 1053, 1057 (Alaska App. 1995)("In civilian prosecutions stemming from joint military-civilian investigations into off-base drug sales, courts have interpreted these regulations to require the government to demonstrate a military purpose – that is a nexus between the targeted off-base sales and military personnel; this purpose must be shown to have been the primary purpose of the m ilitary's participation. In the absence of a nexus between the targeted off-base drug sales and military personnel, courts have condemned joint investigations as violations of the Posse Comitatus Act "); *State v. Gunter*, 902 S.W.2d 172, 175 (Tex.App. 1995)(after quoting the private citizen language in *Burkhardt*, *supra*, the court declared, "[a] majority of courts have also noted that where

Some have questioned whether civilian employees of the armed forces should come within the proscription of the Act,[104] but most, frequently without comment, seem to consider them "part" of the armed forces for purposes of the Posse Comitatus Act.[105] The current Defense Department Directive expressly includes civilian employees "under the direct command and control of a military officer" within its Posse Comitatus Act policy restrictions.[106]

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military involvement is limited and where there is an independent military purpose of preventing illicit drug transactions to support the military involvement, the coordination of military police efforts with those of civilian law enforcement does not violate the Act. Where the military participation in an investigation odes not pervade the activities of civilian officials, and does not subject the citizenry to the regulatory exercise of military power, it doe snot violate the Act"); *State v. Pattioay*, 78 Haw. 455, 466, 896 P.2d 911, 922 (1995)("Absent evidence to support the prosecution's claim of a primary military purpose, we must uphold the circuit court's conclusion that the joint civilian-military [undercover drug] investigation violated the PCA, 10 U.S.C. §375, and relevant federal regulations"); *Taylor v. State*, 640 So.2d 1127, 1136 (Fla.App. 1994) ("[m]ilitary participation in civilian law enforcement activities is restricted by the federal Posse Comitatus Act and by 10 U.S.C. §375. Cases addressing this issue have ruled that where military involvement is limited and there is an independent military purpose, `the coordination of military police efforts with those of civilian law enforcement officials does not violate either section 1385 or section 375.' *Hayes v. Hawes*, 921 F.2d 100, 103 (7th Cir. 1990). The test for violation of the federal law is (1) whether civilian law enforcement officials made a direct active use of military investigators to execute the laws; (2) whether the use of the military pervaded the activities of the civilian officials; or (3) whether the military was used so as to subject citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature").

[104] *State v. Short*, 113 Wash.2d 35, 39-40, 775 P.2d 458, 460 (1989); *State v. Morris*, 522 A.2d 220, 221 (R.I. 1987); *People v. Hayes*, 144 Ill.App. 3d 696, 494 N.E.2d 1238, 1240 (1986); see also, Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MILITARY LAW REVIEW 85, 101 (1960).

[105] See e.g., *Hayes v. Hawes*, 921 F.2d 100 (7th Cir. 1990); *People v. Wells*, 175 Cal.App.3d 878, 221 Cal.Rprt. 273 (1988); *State v. Maxwell*, 328 S.E.2d 506 (W.Va. 1985); *State v. Presgraves*, 328 S.E.2d 699 (W.Va. 1985); *United States v. Hartley*, 486 F.Supp. 1348 (M.D.Fla. 1980), aff'd, 678 F.2d 961 (11th Cir. 1982); Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MILITARY LAW REVIEW 83 (Fall, 1975)("civilian investigators operate under the immediate supervision of military officers who are prohibited by the Act from aiding local authorities. Holding that the civilian subordinates are not also prohibited allows a principal to accomplish things through his agent that he could not otherwise lawfully do himself. It is foolhardy to assume that it is only the sight of the man in military uniform aiding the sheriff that tends to offend the civilian community").

[106] DoD Dir. No. 5525.5 (Encl.4) §B.3, a comparable provision appeared in 32 CFR §213.10(b)(3)(July 1, 1992 ed.).

Geographical Application

It seems unlikely that the Posse Comitatus Act, by itself, applies beyond the confines of the United States, its territories and possessions.[107] As a general rule, Acts of Congress are presumed to apply only within the United States, its territories and possessions unless Congress has provided otherwise or unless the purpose of Congress in enacting the legislation evidences an intent that the legislation enjoy extraterritorial application.[108]

The Posse Comitatus Act contains no expression of extraterritorial application. Congress enacted it in response to problems occurring within the United States and its territories, problems associated with the American political process and military usurpation of civilian law enforcement responsibilities over Americans. It seems unlikely that its extraterritorial application was either anticipated or intended.

The first court to consider the question agreed, but it arose in occupied territory overseas in which an American military government had temporarily displaced civil authorities, *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948). For some time subsequent decisions either declined to resolve the issue or ignored it.[109]

Congress does appear to have intended the authority and restrictions contained in 10 U.S.C. 371-381 to apply both in the United States and beyond its borders. Certainly, the provisions directing the placement of members of the Coast Guard on Navy ships for drug interdiction purposes, 10 U.S.C. 379, evidence an understanding that the Posse Comitatus Act's statutory shadow, 10 U.S.C. 375, applies at least on the high seas.[110] In fact, in some instances it initially contemplated that various provisions would only apply overseas.[111]

The regulations implementing 10 U.S.C. 375 address only assistance to law enforcement officials of the several states, the United States, or its territories or

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[107] *Extraterritorial Effect of the Posse Comitatus Act*, 13 OP. OFF. LEGAL COUNSEL 387 (1989); Siemer & Effron, *Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act*, 54 ST.JOHN'S LAW REVIEW 1 (1979).

[108] *United States v. Bowman*, 260 U.S. 94, 98 (1922); *Blackmer v. United States*, 284 U.S. 421 (1932); *United States v. Yunis*, 924 F.2d 1086, 1090-91 (D.C.Cir. 1991).

[109] *Gillars v. United States*, 182 F.2d 962, 973 (D.C.Cir. 1950); *D'Aquino v. United States*, 192 F.2d 338, 351 (9th Cir. 1951); *United States v. Cotton*, 471 F.2d 744, 748-49 (9th Cir. 1973).

[110] *Cf., United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1259 (9th Cir. 1998); *United Sstates v. Khan*, 35 F.3d 426, 431-32 (9th Cir. 1994)(both determining that the particular activities of Navy personnel on the high seas in aid of law enforcement officials did not violate 10 U.S.C. 375).

[111] "The Committee considered and narrowly rejected a suggestion that the assistance permitted by this section be made available only outside the United States," H.R.Rep.No. 97-71, pt.2, 12 n.3, reprinted in 1981 UNITED STATES CODE, CONGRESSIONAL AND ADMINISTRATIVE NEWS 1785, 1795.

possessions, DoD Dir. No. 5525.5, §3, without any explicit declaration that the ban applies only within this country. In the case of assistance provided overseas to foreign law enforcement officials, the so-called Mansfield Amendment, 22 U.S.C. 2291(c), creates something of an overseas version of the Posse Comitatus Act, at least for drug enforcement purposes.[112]

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[112] "**(c) Participation in foreign police actions**

"**(1) Prohibition on effecting an arrest**

"No officer or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, notwithstanding any other provisions of law.

"**(2) Participation in arrest actions**

"Paragraph (1) does not prohibit an officer or employee of the United States, with the approval of the United States chief of mission, from being present when foreign officers are effecting an arrest or from assisting foreign officers who are effecting an arrest.

"**(3) Exception for exigent, threatening circumstances**

"Paragraph (1) does not prohibit an officer or employee from taking direct action to protect life or safety if exigent circumstances arise which are unanticipated and which pose an immediate threat to United States officers or employees, officers or employees of a foreign government, or members of the public.

"**(4) Exception for maritime law enforcement**

"With the agreement of a foreign country, paragraph (1) does not apply with respect to maritime law enforcement operations in the territorial sea or archipelagic waters of that country.

"**(5) Interrogations**

"No officer or employee of the United States may interrogate or be present during the interrogation of any United States person arrested in any foreign country with respect to narcotics control efforts without the written consent of such person.

"**(6) Exception for status of forces arrangements**

"This subsection does not apply to the activities of the United States Armed Forces in carrying out their responsibilities under applicable Status of Forces arrangements." 22 U.S.C. 2291(c).

In the course of its opinion concerning the extraterritorial application of the Posse Comitatus Act, the Office of Legal Counsel characterized an earlier version of the Mansfield Amendment as applicable only in the case of American involvement "in the internal enforcement activities of foreign countries" and not applicable to the overseas enforcement of American law, *Extraterritorial Effect of the Posse Comitatus Act*, 13 OP. OFF. LEGAL COUNSEL 387, 410-11 n.16 (1989)(citing dicta in *United States v. Green*, 671 F.2d 46, 53 n.9 (1st Cir. 1982), for the proposition that the Mansfield Amendment "was only intended to `insure that U.S. personnel do not become involved in sensitive, internal law enforcement operations which could adversely affect U.S. relations with that country'" and inferring that U.S. enforcement of its laws within the territory of another nation for misconduct within that nation would not similarly adversely affect relations and was intended to be covered). However tenable that position may once have been, it seems to have been undermined by the inclusion of subparagraph (4) making the Amendment inapplicable in cases where the foreign country has agreed to the application of American drug laws within its territorial waters.

Consequences of Violation

Prosecution

The Posse Comitatus Act is a criminal statute under which there has apparently never been a prosecution.[113] It has been invoked with varying degrees of success, however, to challenge the jurisdiction of the courts, as a defense in criminal prosecutions for other offenses, as a ground for the suppression of evidence, as the grounds for, or a defense against, civil liability, and as an impediment to proposed actions by the armed forces.

Exclusion of Evidence

Allegations that the Posse Comitatus Act has been violated are made most often by defendants seeking to exclude related testimony or physical evidence. The case law begins with *United States v. Walden*, 490 F.2d 372 (4th Cir. 1974), where the court found that the Treasury Department's use of three Marines as undercover agents in an investigation of firearms offenses violated Navy regulations which made the Act applicable to use of the Marines, but declined to order the exclusion of evidence obtained by the Marines.

The court found no "conscious, deliberate or willful intent on the part of the Marines or the Treasury Department's Special Investigator to violate" the regulation or the Act, 490 F.2d at 376. It also noted that the regulation contained no enforcement mechanism and the Posse Comitatus Act provided only for criminal prosecution, and that case before lacked the elements which had lead to the adoption of the Fourth Amendment exclusionary rule. Finally, the court felt the use of the Marines had been aberrational, that subsequent similar transgressions were unlikely, and that the regulation would be amended to provide an enforcement component. But the court warned, "should there be evidence of widespread or repeated violations in any future case, or ineffectiveness of enforcement by the military, we will consider ourselves free to consider whether adoption of an exclusionary rile is required as a future deterrent," 490 F.2d at 377.

Later defendants have focused upon the warning; later courts upon the refusal to adopt an exclusionary rule. Most cases note the absence of an exclusionary rule either to avoid unnecessary posse comitatus act analysis or as the final step in the analysis.[114] Three states cases, two of them recent, have required the suppression of

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[113] Gilligan, *Opening the Gate? An Analysis of Military Law Enforcement Authority Over Civilian Lawbreakers On and Off the Federal Installation*, 161 MILITARY LAW REVIEW 1, 11 (1999); *State v. Pattioay*, 78 Haw. 455, 467, 896 P.2d 911, 923 (1995); *Moon v. State*, 785 P.2d 45, 48 (Alaska App. 1990).

[114] E.g., *United States v. Wolffs*, 594 F.2d 77, 85 (5th Cir. 1979)("We pretermit discussion of whether there was a violation of the statute or regulation. We need not decide that complex and difficult issue because assuming without deciding that there was a violation

evidence resulting from the use of military undercover agents to target civilian drug dealing without establishing any connection to activities on a military installation or sales to military personnel other than the undercover agents.[115]

Jurisdiction & Criminal Defenses

The first criminal defendants to seek refuge in the Posse Comitatus Act claimed unsuccessfully that use of the military to transport them back to the United States for trial violated the Posse Comitatus Act and vitiated the jurisdiction of American courts to try them. Ordinarily, criminal trials are not barred simply because the defendant was unlawfully seized and carried into the jurisdiction of the trial court.[116] There are indications that the same rule applies when the defendant challenges the court's jurisdiction on the grounds of Posse Comitatus Act violations. In the early posse comitatus cases, the defendants' arguments were further undermined by the fact that the countries from which they were returned, Germany and Japan, were under American military rule at the time.[117] In later cases some of which began beyond the territorial confines of the United States although none in occupied territory, the courts

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application of an exclusionary rule is not warranted"); *People v. Hayes*, 144 Ill.App.3d 696, 494 N.E.2d 1238, 1240 (1986)("numerous decisions with facts similar to those presented here have found that no violation of the Act occurs if the aid is not characterized as military and the investigation merely coordinates with civilian police. More importantly, with few exceptions, the courts have uniformly held that the exclusionary rule does not apply to evidence seized in violation the Posse Comitatus Act"); other cases include, *United States v. Mullin*, 178 F.3d 334, 342-43 (5th Cir. 1999); *United States v. Al-Talib*, 55 F.3d 923 (4th Cir. 1995); *State v. Gunter*, 902 S.W.2d 172 (Tex.App. 1995); *Taylor v. State*, 640 So.2d 1127 (Fla.App. 1994)(finding a violation but declining to exclude evidence); *State v. Valdobinos*, 122 Wash.2d 270, 858 P.2d 199 (1993); *United States v. Mendoza-Cecelia*, 963 F.2d 1467 (11th Cir. 1992); *McPherson v. State* 800 P.2d 928 (Alaska App. 1990); *People v. Caviano*, 148 Misc.2d 426, 560 N.Y.S.2d 932 (N.Y.S.Ct. 1990); *Moon v. State*, 785 P.2d 45 (Alaska App. 1990); *Badoino v. State*, 785 P.2d 39 (Alaska App. 1990); *Hayes v. Hawes*, 921 F.2d 100 (7th Cir. 1990); *State v. Short*, 113 Wash.2d 35, 775 P.2d 458 (1989); *State v. Poe*, 755 S.W.2d 41 (Tenn. 1988); *United States v. Bacon*, 851 F.2d 1312 (11th Cir. 1988); *United States v. Griley*, 814 F.2d 967 (4th Cir. 1987); *State v. Morris*, 522 A.2d 220 (R.I. 1987); *United States v. Hartley*, 796 F.2d 112 (5th Cir. 1986); *United States v. Roberts*, 779 F.2d 565 (9th Cir. 1986) (found violation but declined to find application of the exclusionary rule appropriate); *Burkhart v. State*, 727 P.2d 971 (Okla.Crim.App. 1986); *People v. Wells*, 175 Cal.App.3d 876, 221 Cal.Rptr. 273 (1985); *State v. Maxwell*, 328 S.E.2d 506 (W.Va. 1985); *Unites States v. Chaparro-Almeida*, 679 F.2d 423 (5th Cir. 1982); *People v. Burden*, 411 Mich.56, 303 N.W.2d 444 (1981); *State v. Sanders*, 303 N.C. 608, 281 S.E.2d 7 (N.C. 1981); *State v. Trueblood*, 46 N.C.App. 541, 265 S.E.2d 662 (N.C.App. 1980); *State v. Nelson*, 298 N.C. 573, 260 S.E.2d 629 (1979); *State v. Danko*, 219 Kan. 490, 548 P.2d 819 (9176); *Hubert v. State*, 504 P.2d 1245 (Okla.Crim.App. 1972).

[115] *State v. Pattioay*, 78 Haw. 455, 896 P.2d 911 (1995); *People v. Tyler*, 854 P.2d 1366 (Colo.App. 1993), rev'd on other grounds, 874 P.2d 1037 (Colo. 1994); *Taylor v. State*, 645 P.2d 522 (Okla.Crim.App. 1982).

[116] *Ker v. Illinois* 119 U.S. 436 (1886); *Frisbie v. Collins*,342 U.S. 519 (1952); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

[117] *Chandler v. United States* 171 F.2d 921 (1st Cir. 1949); *Gillars v. United States*, 182 F.2d 962 (D.C.Cir. 1950); *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951).

noted that dismissal would not be an appropriate remedy for a posse comitatus violation.[118]

Defendants have found the Act more helpful in prosecutions where the government must establish the lawfulness of its conduct as one of the elements of the offense charged. Thus, several defendants at Wounded Knee were able to persuade the court that evidence of possible Posse Comitatus Act violations precluded their convictions for obstructing law enforcement officials "lawfully engaged" in the performance of their duties.[119]

Civil Liability

Almost a decade ago, the Eighth Circuit found that a violation of the Act might constitute an unreasonable search and seizure for purposes of the Fourth Amendment thereby giving rise to a *Bivens* cause of action against offending federal officers or employees.[120] A Posse Comitatus Act violation, however, also provides the government with a defense to a claim under the Federal Tort Claims Act since the government is not liable under that Act for injuries inflicted by federal officers or employees acting outside the scope of their authority.[121] On balance, however, the Posse Comitatus Act is only rarely placed in issue in civil cases.

Compliance

The most significant impact of the Posse Comitatus Act is attributable to compliance by the armed forces. As administrative adoption of the Act for the Navy and Marines demonstrates, the military has a long standing practice of avoiding involvement in civilian affairs which it believes are contrary to the Act.[122]

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[118] *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1478 n.9 (11th Cir. 1992); *United States v. Yunis*, 924 F.2d 1086, 1093-94 (D.C.Cir. 1991); *State v. Morris*, 522 A.2d 220, 221 (R.I. 1987); *United States v. Roberts*, 779 F.2d 565, 568 (9th Cir. 1986); United *States v. Cotton*, 471 F.2d 744, 749 (9th Cir. 1973).

[119] *United States v. Banks*, 383 F.Supp. 368, 374-77 (D.S.D. 1974); *United States v. Jaramillo*, 380 F.Supp. 1375, 1378-381 (D.Neb. 1974).

[120] *Bissonette v. Haig*, 800 F.2d 812 (8th Cir. 1986), aff'd as if by an equally divided court for want of a quorum , 485 U.S. 264 (1988); see also, *Applewhite v. United States*, 995 F.2d 997 (10th Cir. 1993).

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), recognized a private cause of action in tort for injuries suffered as a result of a constitutional violation.

[121] *Wrynn v. United States*, 200 F.Supp. 457 (E.D.N.Y. 1961); Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MILITARY LAW REVIEW 109, 115 (Spring, 1984).

[122] Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MILITARY LAW REVIEW 85, 85-86 (January, 1960); Meeks, *Illegal law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MILITARY LAW REVIEW 83 (Fall, 1975)(both citing extensively to internal instructions, directives and opinions advising members of the military to refrain from conduct understood to be contrary to the Posse Comitatus Act); Peterson, *Civilian Demonstrations Near the Military Installation:*

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