



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office Of The General Counsel

AIR FORCE GENERAL COUNSEL GUIDANCE DOCUMENT

POSSE COMITATUS

SEPTEMBER 2003

This guidance provides basic principles and resources for interpreting the Posse Comitatus Act (“the Act”),¹ particularly in light of emerging developments in the areas of homeland defense and homeland security.

Introduction

The Act sets forth limitations on the domestic use of the Army and the Air Force.² Originally enacted in 1878, the Act provides:

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

The Act has historically been interpreted to limit a variety of activities by the military, particularly its support to law enforcement entities. However, in light of the September 11, 2001 attacks on the United States, the roles of both the military and law enforcement in the defense of the American homeland have been reexamined. While Congress reaffirmed the intent of the Act in the Homeland Security Act of 2002,⁴ the Executive Branch has recently reasserted the President’s inherent constitutional powers as justifying certain exceptions to the Act. In this context, actions previously considered unworkable under the Act may now be possible with the appropriate level of advance approval.

Adherence to the Act is important both to protect our constitutional values and to allow the proper functioning of both civilian law enforcement and our nation’s military. Failure to follow the Act can trigger a variety of consequences, including inspector general or Congressional inquiries, administrative sanctions, or removal from command.⁵ Violations of the

¹ 18 U.S.C. § 1385. “Posse comitatus” is Latin for “the power or force of the county.”

² Although the Act does not address the Navy or the Marine Corps, DoD has issued regulations extending the principles espoused in the Act to these entities. DoDD Directive 5525.5, Enclosure 4, Section C; *DoD Cooperation with Civilian Law Enforcement Officials*, January 15, 1986.

³ 18 U.S.C. § 1385.

⁴ See Section 886 of Homeland Security Act of 2002.

⁵ The extensive Congressional hearings into the 1995 Waco incidents included issues of military involvement. *Investigation into the Activities of Federal Law Enforcement Agencies toward the Branch Davidians*, House Report No. 104-749, August 2, 1996.

Act may also trigger collateral consequences such as civil liability or invocation of the exclusionary rule in a criminal prosecution.⁶ When faced with a Posse Comitatus issue, an attorney should apply careful analysis to the surrounding facts and circumstances. Judge advocates are encouraged to seek higher headquarters (including HAF) involvement and consultation with the Office of the Deputy General Counsel for National Security and Military Affairs (SAF/GCM) when doubt exists as to the proper resolution of an issue. However, judge advocates should also bear in mind that in truly exigent circumstances, when civil authorities are unable to intervene, local commanders may authorize military involvement to prevent the imminent loss of life or wanton destruction of property.⁷

Finally, attorneys must bear in mind that in cases where military involvement (either personnel or equipment) is permissible, that involvement should, with few exceptions, be funded by the requesting agency or some other funding source outside of the Department of Defense. Any planning of Air Force assistance to civil authorities or civilian law enforcement must specify the funding source and procedures for reimbursing the Air Force for its expenses.

Principles of Analysis

An analysis of an action raising potential posse comitatus concerns can be broken into three steps: 1) whether the action meets the threshold requirements for applicability of the Act; 2) whether the action would use the Air Force “as a posse comitatus” or otherwise to execute the laws; and 3) whether the action falls under a constitutional or statutory exception to the Act.

1. Threshold Requirements

There are two threshold requirements for applicability of the Act to a particular action: the location of the action and the status of the actor. As to location, the Act is presumed to have no extraterritorial implications.⁸ As to the status of the actor, the Act applies to the following:

- Active-duty Air Force members (except when acting off-duty in a private capacity);
- Department of the Air Force civil servants under direct military supervision;
- Air National Guard members in federal status;
- Air Force Reserve members on active duty or active duty training; and
- Civil Air Patrol (CAP-USAF) members performing Air Force-directed missions.

⁶ See *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985), aff’d, 800 F.2d 812 (8th Cir. 1986) (en banc), aff’d, 485 U.S. 264 (1988) (“[i]f the use of military personnel is both unauthorized by any statute, and contrary to a specific criminal prohibition, and if citizens are seized or searched by military means in such a case, we have no hesitation in declaring that such searches and seizures are constitutionally “unreasonable.”) At least one court has found that violation of the Act prevents prosecution under an obstruction of justice charge. See *United States v. Jaramillo*, 380 F. Supp. 1375 (D.Neb. 1974) (Obstruction of justice charge fails because military involvement in law enforcement casts doubt on whether civilian officers were lawfully performing their duties).

⁷ Examples of these “immediate response” authorities are detailed in AFI 10-801, Appendix 3. Commanders are required to report such involvement as soon as possible.

⁸ *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948), cert. denied, 336 U.S. 918 (1949); see also Extraterritorial Effect of the Posse Comitatus Act - Memorandum from the Office of Legal Counsel to the Assistant to the President for National Security, 13 U.S. Off. Legal Counsel, November 3, 1989.

Conversely, the Act generally does not apply to the following:

- Department of the Air Force civil servants not under direct military supervision;
- Air National Guard members in state status (whether state-funded or federally funded);⁹
- Air Force Reserve members not on active duty or active duty training;
- Civil Air Patrol members performing non-Air Force-directed missions; and
- Air Force contractor employees not under direct military supervision.

Even though the Act may be generally inapplicable to a particular actor, the nature of the contemplated activity may nonetheless raise posse comitatus concerns. For example, the level of actual or perceived military control over an operation may be problematic, even if not from a legal perspective, from a policy or public relations perspective. Accordingly, absent truly exigent circumstances, each fact pattern should be carefully examined in light of DOD policy and precedent and referred to higher headquarters when doubt exists as to the propriety of the action.

2. Substantive Analysis

If an action satisfies the threshold prerequisites described above, the primary analytical issue is whether the action could be interpreted “as a posse comitatus” or an “execut[ion of] the laws.” A plain reading of the Act reveals that many actions, although undertaken by actors covered by the Act, do not fall within the prohibitions of the Act. For example, disaster relief efforts that rely on military equipment or personnel (e.g., stacking sandbags to prevent flooding) are neither a “posse comitatus” nor an execution of the laws. Other actions, however, require a substantive analysis to determine their legality under the Act. The analysis should address three factors: 1) whether the action violates established DOD guidelines; 2) whether the action makes indirect rather than direct use of actors covered by the Act; and 3) whether the action constitutes the exercise of regulatory, proscriptive, or compulsory power. While an action that falls within one of these descriptions may not be a *per se* violation of the Act, such an action warrants careful scrutiny.

a. DOD Guidelines

The Department of Defense has issued guidance on certain actions that, unless otherwise authorized, are *per se* prohibited as posse comitatus violations. These include:

- Interdiction of a vehicle, vessel, aircraft, or similar activity;
- Search or seizure;
- Arrest, apprehension, stop and frisk, or similar activity;
- Use of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators.¹⁰

⁹ *Gilbert v. United States*, 165 F.3d 470 (6th Cir. 1999).

¹⁰ DoDD 5525.5, Enclosure 4, section A.3; *see also* Letter from Mary Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, to Deanne Siemer, General Counsel Department of Defense (March 24, 1978).

An action taken by an actor covered by the Act that fits into one of the above categories is presumptively impermissible under the Act unless, as discussed below, there is a constitutional or statutory exception for that action.

b. Regulatory, Proscriptive, or Compulsory Power

Absent an exception, exercise of authority over civilians by an actor to whom the Act applies violates the Act if it is either presently or prospectively regulatory, proscriptive, or compulsory in nature.¹¹ Regulatory power has been described as “one which controls or directs;” proscriptive power is “one that prohibits or condemns;” and compulsory power is “one that exerts some coercive force.”¹²

Some courts have made a distinction between the “direct active use” of personnel covered by the Act and the indirect use of those personnel.¹³ Indirect use may include such activities as tactical advice, technical training, and even operation of unique equipment, and is more likely to be permissible under the Act.

3. Exceptions

An action taken by an actor covered by the Act that appears to involve one of the factors described above may nonetheless be permissible as an exception to the Act. The Act itself provides two explicit exceptions: 1) circumstances authorized by the Constitution; and 2) circumstances authorized by an Act of Congress.

a. Constitutional Exceptions

As interpreted by both the courts and the Department of Justice’s Office of Legal Counsel, the inherent powers of the President under Article I, Section 2 of the Constitution “expressly authorize” the President to take certain actions that would otherwise violate the Act. These powers include those exercised by the President under his authority as Commander-in-Chief, to preserve the public order, or to execute foreign affairs. Specifically, the President, acting through the Department of Defense, may:

- Enforce civilian laws on military installations;¹⁴
- Protect foreign property within the United States;¹⁵

¹¹ *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976) *cert denied* 430 U.S. 970 (1977) (“Were Army or Air Force personnel used by the civilian law enforcement officers at Wounded Knee in such a manner that the military personnel subjected the citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature, either presently or prospectively?”); *Bissonette v. Haig*, 776 F.2d 1384 (8th Cir. 1985) *aff’d* 485 U.S. 264 (1988) (“[m]ilitary involvement, even when not expressly authorized by the Constitution or a statute, does not violate the Posse Comitatus Act unless it actually regulates, forbids, or compels some conduct on the part of those claiming relief. A mere threat of some future injury would be insufficient...”).

¹² *United States v. McArthur*, 419 F.Supp. 186 (D.N.D. 1976); *United States v. Yunis*, 681 F.Supp. 891, 895 (D.D.C. 1988, *aff’d* 924 F.2d 1086 (D.C. Cir. 1991)).

¹³ *United States v. Khan*, 35 F.3d 426 (9th Cir. 1994); *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975)

¹⁴ These actions ostensibly stem from the President’s Commander-in-Chief authority. See *United States v. Banks*, 539 F.2d 14 (9th Cir. 1976). See also “Use of Military Personnel to Maintain Order Among Cuban Parolees on Military Bases,” 4 U.S. Op. O.L.C. 643, May 29, 1980.

- Protect federal property and federal functions;¹⁶
- Provide an immediate response to prevent the imminent loss of life or wanton destruction of property when duly constituted authorities are unable to control a situation;¹⁷ and
- Further a military purpose.¹⁸

b. Statutory Exceptions

In addition to the constitutional authority, Congress has created myriad exceptions to the Act. These statutory exceptions permit some actions that may otherwise be prohibited by the Act. For example:

- Military support for civilian law enforcement agencies (including information sharing, use of military equipment and facilities, and training of civilian law enforcement agents by military personnel, subject to certain limitations);¹⁹
- Counter-drug support (including aerial and ground reconnaissance, intelligence analysis, and training, subject to certain limitations);²⁰
- Quelling insurrections;²¹
- Disaster relief (Stafford Act);²² and
- Defense against weapons of mass destruction (including advice and training, use of equipment, and emergency response teams).²³

¹⁵ The President's foreign affairs powers have been relied on to justify protection of foreign embassies in the United States. See "Authority to Use Troops to Protect Federal Functions, Including the Safeguarding of Foreign Embassies in the United States," May 17, 1978.

¹⁶ See Authority to Use Troops to Prevent Interference with Federal Employees and Consequent Impairment of Government Functions, Department of Justice Memorandum for Acting General Counsel, Department of the Army, April 29, 1971; Use of Federal Troops to Protect Government Property and Functions at the Pentagon Against Anti-War Demonstrators, October 16, 1967; Approval of Use of District of Columbia National Guard to Support the United States Capital Police and Security Missions Around the Capital, Office of the Deputy Attorney General Letter to Secretary of the Army, November 6, 2001. See also Use of Defense Personnel in Protective Security Assignments, DOD/GC Memorandum for the Deputy Under Secretary of Defense for Policy Review, September 10, 1979.

¹⁷ See, e.g. Loan of Military Equipment for Local Law Enforcement Purposes During Emergencies, Memorandum from Acting Assistant Attorney General, Office of Legal Counsel for Attorney General, March 1, 1977.

¹⁸ DOD Directive 5525.5, Enclure 4, Section A.2., 15 January 1986.

¹⁹ 10 U.S.C. §§ 371-381. Section 375 excludes direct participation in a search, seizure, arrest, or other similar activity "unless such participation in such activity by such member is otherwise authorized by law." See *United States v. Casper* 541 F.2d 1275 (8th Cir. 1976) cert. denied, 430 U.S. 970 (1977).

²⁰ Public Law 107-107. Use of Air Force intelligence personnel to assist law enforcement requires approval by the General Counsel of the Air Force. DOD Directive 5240.1-R, *Procedures Governing the Activities of Intelligence Components that Affect United States Persons* (Procedure 12).

²¹ 10 U.S.C. Chapter 15 §§ 331-335. Section 334 requires the President to issue a proclamation prior to employing the use of military force under the authority of this chapter. This authority has been invoked on various occasions, including to deploy federal troops to enforce integration in public schools in 1957 (see President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders--Little Rock Arkansas, 41 U.S. Op. Atty. Gen. 313, November 7, 1957) and the use of troops to quell riots after Rodney King verdict in 1992 (Exec. Order No. 12,804, 57 Fed. Reg. 19,361 (1992)).

²² 42 U.S.C. §§ 5121-5204c. Requests for civil support in disaster relief should be channeled through the Joint Director of Military Support (JDOMS). See DOD Directive 3025.1, *Military Support to Civil Authorities (MSCA)* [currently under revision]. While disaster relief support does not necessarily implicate The Act, there is always the possibility that security at disaster sites may require military assistance.

²³ 50 U.S.C. §§ 2301-2367.

Application

The Department of Justice's Office of Legal Counsel has interpreted the constitutional and statutory exceptions to the Act to permit a variety of military support to civilian law enforcement officials. In addition to the opinions cited elsewhere in this guidance, the Department of Justice has found that the following do not violate the Act:

- “Sky Marshalls” under authority of Department of Transportation (1978);²⁴
- Translators in monitoring of court-authorized civilian wiretaps (1994);²⁵
- Investigators and prosecutors in procurement fraud (1978);²⁶
- Operation of military aircraft and airborne surveillance equipment in counter-terrorism investigation (2002);²⁷
- Use of infrared radar technology in law enforcement (1991);²⁸ and
- Use of drug detector dogs (1989).²⁹

Many of the statutory exceptions under which the above actions are justified caveat the scope of permissible action. In this regard, any reliance on a statutory exception should be predicated on the precise language of the statute and any implementing regulations.

Additional Resources

Attorneys in the field requiring assistance in resolving issues related to the Act should call their higher headquarters (including HAF) or the Office of the Deputy General Counsel for National Security and Military Affairs (SAF/GCM) at 703-693-9292, DSN 223-9292. After normal duty hours, judge advocates should call the Air Force Command Center at (703) 695-1343 or DSN: 225-1343. The following three appendices reference additional information:

Appendix A: Statutory Authority for the Use of Armed Forces

Appendix B: Opinions of the Office of Legal Counsel, Department of Justice

Appendix C: Additional Resources

²⁴ Legality of Deputizing Military Personnel Assigned to the Department of Transportation, Memorandum from the Office of Legal Counsel for the Assistant General Counsel (International Affairs), Department of Defense, September 30, 1978.

²⁵ Use of Military Personnel for Monitoring Electronic Surveillance, Memorandum from the Assistant Attorney General, Office of Legal Counsel for the Assistant Attorney General, Criminal Division, April 5, 1994.

²⁶ Use of Military Personnel to Investigate and Prosecute Frauds Committed by Contractors in the Course of Procurement by the Department of Defense, Letter from Deputy Assistant Attorney General, Office of Legal Counsel to General Counsel, Department of Defense, March 24, 1978.

²⁷ Department of Defense Assistance in a Federal Bureau of Investigation Domestic Terrorism Investigation, Memorandum from the Office of Legal Counsel for the Attorney General, November 5, 2002.

²⁸ Military Use of Infrared Radar Technology to Assist Civilian Law Enforcement Agencies, 15 U.S. Op.O.L.C. 36, February 19, 1991. But note *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L. Ed.. 2d 94 (2001) (Use of certain sense enhancing technologies may constitute an unconstitutional invasion of privacy).

²⁹ Use of Department of Defense Drug Detector Dogs to Aid in Civilian Law Enforcement, Memorandum for the Attorney General, July 3, 1989 (alternate finding that *Posse Comitatus* not applicable to Navy).

Appendix A – Statutory Authority On the Use of the Armed Forces

18 U.S.C § 1385, The Posse Comitatus Act

10 U.S.C. §§ 371 – 382, Military Support for Civilian Law Enforcement Agencies

10 U.S.C. §§ 331 – 335, Insurrection

10 U.S.C. § 2674, Operation and Control of Pentagon Reservation and Defense Facilities in National Capital Region. Secretary of Defense may appoint military or civilian personnel or contract personnel to perform law enforcement and security functions for property occupied or under the jurisdiction, custody, and control of the Department of Defense, and located in the National Capital Region.

Public Law 94-524, Presidential Protection Assistance Act of 1976, October 17, 1976. DOD may provide services, equipment and facilities to the Secret Service in performing its duties to protect the President.

P.L. 107-117 §§ 911 and 912, DOD Appropriations Act of 2002, January 17, 2002. Executive Departments may provide services (including personnel), equipment and facilities when requested by the Capitol Police Board . . . [to assist] the United States Capital Police in duties directly related to protection of members of Congress. In an emergency, the Chief of the Capital Police may enter into agreements with the District of Columbia to deputize members of the District of Columbia National Guard, who are qualified for law enforcement functions, for duty with the Capital Police for the purpose of policing the Capital grounds.

P.L. 107-40, Joint Resolution, Authorization for the Use of Military Force. Authorizing the President to use all necessary and appropriate force against nations, organization and persons associated with the attacks of September 11, 2001.

Homeland Security Act of 2002 § 886. Sense of Congress Reaffirming the Continuing Importance and Applicability of the Posse Comitatus Act.

16 U.S.C. § 23, Detail of troops for protection of park. Authorizing the Secretary of the Army to detail troops to protect Yellowstone National Park from trespassers and to remove intruders.

16 U.S.C. § 78, Detail of troops to Sequoia and Yosemite Parks. Authorizing the Secretary of the Army to detail troops to prevent trespassers and remove intruders.

16 U.S.C. § 593, Protection of timber in Florida. Authorizing the President to employ the land and naval forces to protect timber in Florida.

16 U.S.C. § 1861, Enforcement. Authorizing DOD to assist in the enforcement of the Fishery Conservation and Management Act of 1976.

18 U.S.C. § 112, Protection of foreign officials, official guests, and internationally protected persons. The Attorney General may request assistance of DOD in enforcing prohibitions on the assault of foreign officials, official guests of the United States, or other internationally protected persons.

18 U.S.C. § 175a, Requests for military assistance to enforce prohibitions with respect to biological weapons in certain emergencies. Authorizing the Attorney General to request the Secretary of Defense to provide assistance in support of DOJ activities to enforce prohibitions on the development, stockpiling, or transfer of any biological agent, toxin or delivery system for use as a weapon, in an emergency situation involving a biological weapon of mass destruction.

18 USC 2332e, Requests for military assistance to enforce prohibitions with respect to chemical weapons in certain emergencies. Authorizing the Attorney General to request the Secretary of Defense to provide assistance in support of DOJ activities to enforce prohibitions on the development, stockpiling, or transfer of any chemical for use as a weapon, in an emergency situation involving a chemical weapon of mass destruction.

18 U.S.C. § 351, Congressional, Cabinet, and Supreme Court assassination, kidnapping, and assault; penalties. FBI may request DOD assistance in investigating violations of the prohibitions on the assassination, kidnapping or assault of named officials.

18 U.S.C. § 831(e), Prohibited transactions involving nuclear materials. Two categories of DOD assistance to DOJ authorized as specific exceptions to the Posse Comitatus Act: (1) that provided for in Title 10, Chapter 18 and (2) in emergencies, the use of DOD personnel to arrest persons and conduct searches and seizures with respect to violations of prohibitions on certain transactions involving nuclear materials.

18 U.S.C. § 1116, Murder or manslaughter of foreign officials, official guests, or internationally protected persons. The Attorney General may request assistance of DOD in enforcing prohibitions on the murder or manslaughter of foreign officials, official guests of the United States, or other internationally protected persons.

18 U.S.C. § 1751, Presidential and Presidential staff assassination, kidnapping and assault penalties. FBI may request DOD assistance in investigating violations of the prohibitions on the assassination, kidnapping, or assault of named officials.

19 U.S.C. § 507, Officers to make character known; assistance for officers. Officers of the customs service have the authority to demand the assistance of any person in making arrests, searches, or seizures authorized by any law enforced or administered by the customs officers.

22 U.S.C. § 408, Use of land and naval forces to prevent exportation. The President may employ such part of the land and naval forces as he deems necessary to prevent the illegal exportation of war materials.

22 U.S.C. § 461, Enforcement by courts; employment of land or naval forces. The President may employ the land and naval forces to enforce court orders for the purpose of taking possession of vessels that have violated neutrality laws.

22 U.S.C. § 462, Compelling foreign vessels to depart. The President may employ the land or naval forces either to compel a foreign vessel to depart the U.S. or to prevent such departure.

25 U.S.C. § 180, Settling on or surveying lands belonging to Indians by treaty. The President may employ such military force as he deems necessary to remove persons unlawfully settling on or surveying Indian lands.

42 U.S.C. § 26, Isolation of civilians for protection of military, air and naval forces. The service secretaries are authorized to assist the states in caring for persons whose detention, isolation, quarantine or commitment to institutions may be necessary for the protection of service members against venereal diseases.

42 U.S.C. § 97, State health laws observed by United States officers. Military officers commanding any fort or station upon the seacoast must assist in the execution of state quarantines and other restraints with regard to vessels arriving in or bound for the U.S.

42 U.S.C. § 1989, United States magistrate judges; appointment of persons to execute warrants. Persons appointed by magistrate judges to execute warrants related to certain specified offenses have the authority to summon to their aid “. . . bystanders or posse comitatus of the proper county or such portion of the land or naval forces of the United States, or of the militia, as may be necessary . . .” to enforce those warrants.

43 U.S.C. § 1065, Summary removal of enclosures. The President is authorized to employ military force to remove and destroy any unlawful enclosure of any public lands.

48 U.S.C. § 1418, Employment of land and naval forces in protection of rights. The President may employ the land or naval forces to protect the rights of a discoverer of a guano island, or of his widow, heir, executor, administrator, or assigns.

48 U.S.C. § 1422, Governor and Lieutenant Governor; term of office; qualifications; powers and duties; annual report to Congress. The Governor of Guam, “whenever it becomes necessary, in case of disaster, invasion, insurrection, or rebellion, or imminent danger thereof, or to prevent or suppress lawless violence, . . . may summon the posse comitatus or call out the militia or request the assistance of the senior military or naval commander of the Armed Forces of the United States in Guam, which may be given at the discretion of such commander if not disruptive of, or inconsistent with, his Federal responsibilities.”

48 U.S.C. § 1591, Governor and Lieutenant Governor; term of office; qualifications; powers and duties; annual report to Congress. The Governor of the Virgin Islands, “whenever it becomes necessary, in case of disaster, invasion, insurrection, or rebellion, or imminent danger thereof, or to prevent or suppress lawless violence, . . . may summon the posse comitatus or call out the militia or request the assistance of the senior military or naval commander of the Armed Forces of the United States in the Virgin Islands or Puerto Rico, which may be given at the discretion of such commander if not disruptive of, or inconsistent with, his Federal responsibilities.”

49 U.S.C. § 324, Department of Transportation and Members of the Armed Forces.

Authorizing the Secretary of Transportation and the Secretary of a military department to make cooperative agreements, including agreements on reimbursement, as appropriate, under which a member of the armed forces may be appointed, detailed or assigned to the Department of Transportation.

49 U.S.C. § 44903, Air transportation security. The Administrator of the Federal Aviation Administration may authorize the operator of an airport to use, on a reimbursable basis, personnel employed . . . by another department of the Government to supplement State, local and private law enforcement personnel participating in air transport security programs.

50 U.S.C. § 220, Enforcement of section 219. In the event of an unlawful attempt to take vessels or cargo from customs officers, the President may employ the Army or Navy or militia, or “such force of citizen volunteers as may be necessary,” to prevent the unlawful removal and to protect the customs officers.

Appendix B: Department of Justice Opinions and Memoranda³⁰

(Materials are grouped according to general subject)

1. DETAILS OF PERSONNEL

Assignment of Army Lawyers to the Department of Justice, Memorandum Opinion from the Office of Legal Counsel for the Deputy Attorney General, August 22, 1986. (See also United States v. Allred, 867 F.2d 856 (5th Cir. 1989) and United States v. Silva-Rosa, 275 F.3d 18 (1st Cir. 2001). Concluding that the Posse Comitatus Act does not prohibit assignment of Judge Advocates as Special Assistant U.S. Attorneys or to the Department of Justice, although military lawyers performing prosecutorial functions in direct contact with civilians should operate under the supervision of Department of Justice personnel.

Effect of Posse Comitatus Act on Proposed Detail of Civilian Employee to the National Infrastructure Protection Center (NIPC), 1998 WL 1750858 (O.L.C.), May 26, 1998. Proposed detail of a DOD civilian employee to the NIPC, a component of the FBI, does not violate the Act.

Legality of Deputizing Military Personnel Assigned to the Department of Transportation, Memorandum from the Office of Legal Counsel for the Assistant General Counsel (International Affairs), Department of Defense, September 30, 1978. Military members assigned to and subject to the exclusive orders of the Secretary of Transportation are not “any part of the Army or the Air Force” within the meaning of the Act and thus may perform duties as “Sky Marshals.”

2. LAW ENFORCEMENT INVESTIGATIONS AND ACTIVITIES

Department of Defense Assistance in a Federal Bureau of Investigation Domestic Terrorism Investigation, Memorandum from the Office of Legal Counsel for the Attorney General, November 5, 2002. DOD has authority to assist the FBI in a domestic counter-terrorism investigation by operating military aircraft and certain airborne surveillance equipment.

Use of Military Personnel for Monitoring Electronic Surveillance, Memorandum from the Assistant Attorney General, Office of Legal Counsel for the Assistant Attorney General, Criminal Division, April 5, 1994. Provided that there is no contact with civilian targets and no military control over the actions of civilian officials, participation by military personnel (translators) in the monitoring of court-authorized civilian wiretaps would not violate posse comitatus.

Fourth Amendment Implications of Military Use of Forward Looking Infrared Technology to Assist Civilian Law Enforcement Agencies, Memorandum from the Office of Legal Counsel for the General Counsel, Department of Defense, March 4, 1992. Use of Forward Looking Infra-Red (FLIR) technology deemed not to constitute a Fourth Amendment search, thus use of FLIR to conduct aerial reconnaissance over structures located on private land would not be

³⁰ The digested opinions with citations are available through Westlaw or Lexis. Those without citations are available by contacting SAF/GCM.

objectionable unless the altitude to be flown by the aircraft carrying FLIR is extraordinary. *But see* Kyllo v. United States, 121 S.Ct. 2038, June 11, 2001, finding that thermal imaging of a home is a search requiring warrant, given the intrusive capability of the technology in question.

Military Use of Infrared Radars Technology to Assist Civilian Law Enforcement Agencies, 15 U.S. Op.O.L.C. 36, February 19, 1991. Use of FLIR technology deemed not to constitute a search, and thus not prohibited by 10 U.S.C. § 375. *But see* Kyllo v. United States, 121 S.Ct. 2038, June 11, 2001, finding that thermal imaging of a home is a search requiring warrant, given the intrusive capability of the technology in question.

Authority of DOD Criminal Investigative Personnel to Assist the United States Marshals Service in Federal Civilian Law Enforcement Activities, Letters, Department of Justice, United States Marshal's Service and DOD Inspector General, February 1990. DOD criminal investigative personnel authorized to assist the U.S. Marshals Service by transporting federal civilian criminal defendants from federal institutions to federal court; when such defendants are arrested off-post by the U.S. Marshals Service, transporting them to a U.S. magistrate; and when such defendants are arrested on-post by the DOD, transporting them to a U.S. magistrate, in cases in which the DOD officers are the investigating agents in the case.

Use of Navy Drug-Detecting Dogs by Civilian Postal Inspectors, 13 U.S. Op. O.L.C. 312, October 10, 1989. The Secretary of the Navy may authorize the use of Navy dogs and their handlers to assist the U.S. Postal Inspection Service in identifying postal packages containing illegal narcotics.

Use of Department of Defense Drug Detector Dogs to Aid in Civilian Law Enforcement, Memorandum for the Attorney General, July 3, 1989. DOD may lend drug detecting dogs to civilian law enforcement personnel and train such civilian personnel to handle the animals. Use of DOD personnel to search, but not seize materials is permissible in the absence of persons with whom a confrontation might arise. Finally, the restrictions of 10 U.S.C. § 375 are inapplicable to the Navy and Marine Corps and therefore, the use of dogs belonging to such services lies within the discretion of the Secretary of the Navy and the Secretary of Defense.

Application of the Posse Comitatus Act to Military Assistance to the United States National Central Bureau (USNCB), Memorandum for the Chief, INTERPOL-United States Central Bureau, 1989 O.L.C. LXIS 99, July 3, 1989. Permitting military agencies to assist the USNCB, both in investigations into violations of the Uniform Code of Military Justice and in other instances described in DOD regulations.

Use of Department of Defense Drug Detecting Dogs to Aid in Civilian Law Enforcement, Memorandum from the Office of Legal Counsel for the Attorney General, June 23, 1989. DOD drug detecting dogs may be loaned to civilian law enforcement authorities. DOD dog handlers may assist in searches, but not seizures, provided there is no confrontation with civilian subjects.

Special Deputations of Private Citizens Providing Security to a Former Cabinet Member, 7 U.S. Op. O.L.C. 67, March 18, 1983. Noting that the Attorney General has statutory authority to grant a special deputation as a U.S. Marshal to a private citizen, provided that such deputation would further a federal law enforcement function within the authority of the Marshals Service.

Reimbursement for Defense Department Assistance to Civilian Law Enforcement Officials, 6 U.S. Op. O.L.C., July 24, 1982. Chapter 18 of Title 10 authorizes, but does not require, the Secretary of Defense to waive reimbursement for support it provides under those provisions of law to a civilian law enforcement agency.

Use of Military Personnel to Investigate and Prosecute Frauds Committed by Contractors in the Course of Procurement by the Department of Defense, Letter, Deputy Assistant Attorney General, Office of Legal Counsel to The General Counsel, Department of Defense, 24 March 1978. Concluding that military personnel may participate in joint fraud investigations in which a lawful military purpose is served, provided there is no exercise of authority over civilians.

Loan of Military Equipment for Local Law Enforcement Purposes During Emergencies, Memorandum from Acting Assistant Attorney General, Office of Legal Counsel for The Attorney General, March 1, 1977. The Act is no bar to the loan of supplies or equipment from the military services to local law enforcement agencies in situations where personnel of the armed forces would not be used to enforce the civil law.

Authority of Military Investigators to Request Search Warrants Under Rule 41, 6 U.S. Op. O.L.C. 567. Military investigative agencies may be authorized to seek and execute search warrants to facilitate the enforcement of the Uniform Code of Military Justice.

Authority of Department of Defense Civilian Agents to Obtain Search Warrants, Memorandum from Deputy Assistant Attorney General, Office of Legal Counsel for Assistant Attorney General, Criminal Division, undated. Interposing no objection to designation of civilian agents of the Defense Investigative Service, Army Criminal Investigation Command, Naval Investigative Service, and Air Force Office of Special Investigations as persons empowered to obtain search warrants under Rule 41 of the Federal Rules of Criminal Procedures when they are “otherwise authorized to enforce laws of the United States” (*i.e.*, in cases pertaining to violations of the Uniform Code of Military Justice). Noting, however, that civilian agents subject to the control of a military officer are subject to the proscriptions of the Act.

Posse Comitatus, 17 U.S. Op Atty. Gen. 71, April 16 1881. The Act precludes employing troops as a posse comitatus to aid the U.S. Marshal in arresting persons in Kentucky charged with robbing an officer of the government.

Extradition of Fugitives From Service, 6 U.S. Op. Atty. Gen. 466, May 27, 1854. Pre-Posse Comitatus case authorizing U.S. Marshal to summon the posse comitatus, but noting that the expense of calling upon such to assist U.S. authorities in extraditing a fugitive from service are properly chargeable to the United States.

3. ACTIVITIES OUTSIDE THE UNITED STATES

Authority of the Federal Bureau of Investigation to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities, Memorandum from Assistant Attorney General, Office of Legal Counsel, for Attorney General, June 21, 1989. The FBI may use its broad statutory authority to investigate and arrest individuals for violations of U.S. law even if those investigations and arrests are not consistent with international law. The president,

Acting through the Attorney General, has inherent Constitutional authority to order the FBI to investigate and arrest individuals in a manner that departs from international law, whether such law be customary treaty law. An arrest departing from international law does not violate the Fourth Amendment nor does an arrest in violation of foreign law abridge the Fourth Amendment.

Extraterritorial Effect of the Posse Comitatus Act, Memorandum from the Office of Legal Counsel to the Assistant to the President for National Security, 13 U.S. Off. Legal Counsel 321, November 3, 1989. DOD Directives authorizing certain types of military support to civil law enforcement authorities do not impose limitations beyond that of the Act, which has no extraterritorial scope.

Application of the Mansfield Amendment to the Use of the United States Military Personnel and Equipment to Assist Foreign Governments in Drug Enforcement Activities, 10 U.S. Op. O.L.C. 122, September 18, 1986. Concluding that the Mansfield Amendment to the Foreign Assistance Act prohibits U.S. officers and employees from participating directly in narcotics control activities that would, under normal circumstances, be likely to lead to the arrest of foreign nationals, but analogizing to the Act, does not prohibit involvement of U.S. officers in activities that would not ordinarily involve arrests.

Consensual Monitoring of Oral Communications by Military Agents Overseas in Aid of Federal Narcotics Prosecution, Department of Justice Letter for Mr. David O. Cooke, 9 October 1975. The consensual monitoring of oral communications by military agents overseas in aid of a federal narcotics prosecution is not barred because the Act does not apply overseas.

Authority of President to Send Militia into a Foreign Country, 29 Op. Atty. Gen. 322; 1219 U.S.U.S. AG Lexis 58, February 17, 1912. The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the General Government except to suppress insurrections, repel invasions or to execute the laws of the Union. Accordingly, the President has no authority to call forth the organized militia of the States and send it into a foreign country with the regular Army as a part of an Army of occupation.

4. FEDERAL FUNCTIONS

Presidential Power to Expel Diplomatic Personnel from the United States, 4A U.S. Op. O.L.C. 207, April 4, 1980. The Act does not preclude the President from using military force to declare diplomats *persona non grata* and to expel them from the United States.

Authority to Use Troops to Protect Federal Functions, Including the Safeguarding of Foreign Embassies in the United States, May 17, 1978. The President has inherent authority to use troops when necessary to perform Federal functions. The protection of foreign embassies is a federal function and the Act is not applicable to the use of troops in this context.

Authority to Use Troops to Prevent Interference with Federal Employees and Consequent Impairment of Government Functions, Department of Justice Memorandum for Acting General Counsel, Department of the Army, April 29, 1971. The Act does not prevent the use of troops by

the President to protect the functioning of the government by assuring the availability of federal employees to carry out their assigned duties. Troops may therefore be used to prevent traffic obstructions designed to prevent access of employees to their agencies.

Use of Federal Troops to Protect Government Property and Functions at the Pentagon Against Anti-War Demonstrators, October 16, 1967. There are two possible grounds for the use of Federal troops to protect property and functions of the federal government from anti-War demonstrators who plan to appear at the Pentagon. The first is 10 U.S.C. § 332, which regulates the employment of the Armed Forces by the President to enforce Federal authority. The second, a non-statutory ground, is the inherent right of the Government to use military force, if necessary, to suppress unlawful force which threatens Federal property or functions.

5. MILITARY PURPOSE

Posting Guards on Military Aircraft Downed on Private Property, Opinion of The Judge Advocate General of the Army, Administrative Law Division December 7, 1982. In view of the inherent authority of the Federal Government to protect Federal property and perform Federal functions, Department of the Army personnel have the authority to enter private property, with or without the owner's consent, to examine, secure and remove downed military aircraft, injured or dead military personnel and accident debris. Noting that the extent to which military personnel can apply force to do so will be governed by local conditions and Army regulations.

Use of Military Personnel to Maintain Order Among Cuban Parolees on Military Bases, 4B U.S. Op. O.L.C. 643, May 29, 1980. The Act does not restrict the ability of an installation commander to maintain order among Cuban parolees housed on a military base, even though the control of such civilians is the ultimate responsibility of another Federal agency, in this case the Immigration and Naturalization Service.

Law Enforcement at San Onofre Nuclear Generation Plant, 1 U.S. Op. O.L.C. 204, September 22, 1977. The Act does not prevent military police from responding to actual or attempted sabotage of a private nuclear power plant located entirely within a military reservation.

6. INSURRECTION

Authority to Use Troops to Execute the Laws of the United States, March 27, 1970. There exists both legislative and inherent authority for the President to use troops in order to "take care that the laws be faithfully executed." While in most cases, this authority has been utilized in the context of enforcing laws against violent obstruction, it also encompasses the execution, completion, effectuation, and performance of the laws.

President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders - - Little Rock, Arkansas, 41 U.S. Op. Atty. Gen. 313, November 7, 1957. The Act does not impair the President's power, under the Constitution and laws of the United States, to call the National Guard into Federal service and to use those forces, together with such of the Armed Forces as he deems necessary to suppress domestic violence, obstruction and resistance to Federal law and Federal Court orders. The s is not impaired by the Act.

Employment of Troops in Enforcing the Laws , 19 Op. Atty. Gen. 570, June 6, 1890. The Act did not repeal the express statutory authorization for the President to use the land and naval forces to enforce the law as provided for in the predecessor statute to the present Insurrection Statutes.

Marshal of Indian Territory, 19 Op. Atty. Gen. 293, April 18, 1889. The Marshal may not call upon the Army as a posse comitatus; however, the President may direct the military to render such aid as may be necessary to enable the Marshal to maintain peace and enforce the laws of the United States in a Territory.

Suppression of Lawlessness in Arizona, 17 U.S. Op. Atty. Gen. 333, April 15, 1882. The Act does not preclude the President from invoking the powers granted under the Insurrection statutes in effect at the time.

Suppression of Unlawful Organizations in Arizona, 17 U.S. Op. Atty. Gen. 242, November 10 1881. The Act renders the Army unavailable to assist in suppressing “Cow Boys” unless other statutes expressly permit such assistance.

Employment of the Military as a Posse, 16 U.S. Op. Atty. Gen. 162, October 10, 1878. The Act precludes the U.S. Marshal in Baxter County, Arkansas from calling upon troops to deal with an “organized, armed and fortified resistance” to the collector of internal revenue. Noting that the President could invoke his statutory authority to use troops to suppress insurgents.

7. PROTECTIVE SERVICES AND SECURITY

Approval of Use of District of Columbia National Guard to Support the United States Capital Police in Police and Security Missions Around the Capital, Office of the Deputy Attorney General Letter to Secretary of the Army, November 6, 2001.

Use of Federal Employees for Olympic Security, Memorandum Opinion for the Deputy Attorney General, May 17, 1996. Under the provisions of 18 U.S.C. §§ 112(f), 1116(d) and 1201(f), authorized federal agencies, to include the DOD, may, upon request of the Attorney General, provide their employees to assist in security operations at the Atlanta Olympics. Such assistance is not restricted by the Act. The Attorney General may request such assistance even when a violation of the criminal statutes has yet occurred, but under circumstances in which there exists cause to believe that without appropriate security, “official guests” of the United States may be at risk.

Use of Defense Personnel in Protective Security Assignments, DoDGC Memorandum for the Deputy Under Secretary of Defense for Policy Review, September 10, 1979. Performance of protective security assignments for the Department of State by members of the armed forces or civilians subject to military control is consistent with the Act if such personnel are made available to the State Department by the Secret Service pursuant to 18 U.S.C. § 3056, which authorizes the Secret Service to protect the person of a visiting head of a foreign state or foreign government and, at the direction of the President, other distinguished visitors to the United States.

Provision of Protective Service Support to the State Department, Department of the Army Office of the General Counsel Memorandum for Record, July 17, 1979. Detailing three theories under which the Army can provide protective service support for foreign dignitaries visiting the United States.

8. NATIONAL GUARD IN A TITLE 32 STATUS

Use of the National Guard to Support Drug Interdiction in the District of Columbia, 1989, O.L.C. LEXIS 74, 13 Op. O.L.C. 91, April 4, 1989. The use of the District of Columbia National Guard to conduct drug interdiction activities does not violate the Act because the Act does not apply to the National Guard acting as a militia and such use has been authorized by an express act of Congress.

9. MISCELLANEOUS

Application of 18 U.S.C. § 592, to Federal Troops in the General Vicinity of Polling Places in South Florida During the Upcoming State Primary Election, Memorandum to Files from Principal Deputy Assistant Attorney General, September 8, 1992. Advising that the presence of Federal troops deployed by President Bush to South Florida to aid in the Hurricane Andrew relief efforts and housed near facilities that will be used as polling places on election day did not violate the law because the troops would not participate in any manner in the conduct of the election, would remain outside of the immediate polling areas, and would avoid any show of force or federal military authority while polling was taking place.

Review of Statutes and Regulations Governing Demonstrations at the Pentagon and at the Secretary's Residence, Memorandum for the General Counsel from the Senior Advisor to the General Counsel, November 23, 1976.

Appendix C: Additional Resources

1. DOD AND AIR FORCE REGULATIONS

DODD 3025.1, *Military Support to Civil Authorities*
 DODD 3025.12, *Military Assistance for Civil Disturbances (MACDIS)*
 DODD 3025.15, *Military Assistance to Civil Authorities*
 DODD 5200.8, *Security of DoD Installations and Resources*
 DODD 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*
 DODD 5030.46, *Assistance to the District of Columbia in Combating Crime*
 DODI 5525.10, *Using Military Working Dog Teams (MWDTs) to Support Law Enforcement Agencies in Counter-drug Missions*

AFPD 10-8, *Air Force Support to Civilian Authorities*
 AFI 10-801, *Assistance to Civilian Law Enforcement Agencies*
 AFI 10-802, *Military Support to Civil Authorities*
 AFI 31-202, *Military Working Dog Program*

2. ARTICLES

Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 Wash. U.J.L. & Policy 99 (2003) [Contains an excellent history of the development of the Act]

Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 Wake Forest L. Rev. 341 (Summer 1994)

Charles J. Dunlap, Jr., *Where Domestic Security and Civil Liberties Collide*, in "...to ensure domestic tranquility, provide for the common defense...", Papers from the Conference on Homeland Protection, ed. Max G. Manwaring (U.S. Army War College, Strategic Studies Institute, 2000)

H.W.C. Furman, *Restrictions on the Use of the Army Imposed by the Posse Comitatus Act*, 27 MIL. L. REV. 85 (January 1960)

Matthew C. Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 Wash. U.L.Q. 953 (1997)

Richard H. Kohn, *Posse Comitatus: Using the Military at Home: Yesterday, Today, and Tomorrow*, 4 Chi. J. Int'l L. 165 (Spring 2003)

Thomas R. Lujan, *Legal Aspects of Domestic Employment of the Army*, Parameters, U.S. Army War College Quarterly, Autumn 1997.

Chris Quillen, *Posse Comitatus and Nuclear Terrorism*, Parameters, U.S. Army War College Quarterly, Spring 2002.

Paul Jackson Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 MIL. L. Rev. 109 (Spring 1984)

Stevens, Paul Schott, *U.S. Armed Forces and Homeland Defense: The Legal Framework*, Center for Strategic and International Studies, Washington, D.C., October 2001

3. WEBSITES

- Air Force Judge Advocate General Corps Opinions:

https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/GENERAL_LAW/posse.htm

- Library Notes of Naval War College (with bibliography of references on posse comitatus):

<http://www.nwc.navy.mil/library/3Publications/NWCLibraryPublications/LibNotes/libpossecom.htm>