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## Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act

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## MILITARY PARTICIPATION IN UNITED STATES LAW ENFORCEMENT ACTIVITIES OVERSEAS: THE EXTRATERRITORIAL EFFECT OF THE POSSE COMITATUS ACT

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## I. INTRODUCTION

The Posse Comitatus Act (the Act),<sup>1</sup> a Reconstruction Era statute that proscribes use of the armed forces "to execute the laws" except where expressly authorized by the Constitution or act of Congress, is the major legal constraint on use of the military for law enforcement purposes.<sup>2</sup> Although recent consideration of this statute has focused primarily on domestic application,<sup>3</sup> the question of extraterritorial effect also merits attention. As criminal activity takes on an increasingly multinational character, and as Congress considers legislation to extend the extraterritorial criminal jurisdiction of the federal courts,<sup>4</sup> the responsibility for enforcement of federal criminal laws overseas has become a matter of greater importance to the United States. Because the United States maintains a substantial military presence in other countries, questions are likely to arise with respect to the use of the armed forces to assist in the extraterritorial application of federal criminal laws. This Article examines the legal implications of such a use of the armed forces in light of the Act.

The first part of the Article sets forth the problem and outlines the manner in which it will be considered. Section II examines the language of the Act from the perspective of extraterritorial effect. In Section III, consideration is given to cases involving application of the Act outside the United States. Section IV reviews administrative interpretations of the Act. Sections II to IV demonstrate that an authoritative basis for resolving the question of extraterritoriality is not provided by the statute or by judicial or administrative interpretation. In order to provide a framework for the inquiry in the

<sup>1</sup> 18 U.S.C. § 1385 (1976).

<sup>2</sup> See commentators cited in note 23 *infra*.

<sup>3</sup> See cases cited in note 23 *infra*.

<sup>4</sup> S. 1437, 95th Cong., 2d Sess. (Jan. 30, 1978); see notes 183-196 and accompanying text *infra*.

remainder of the Article, the principles of statutory construction relevant to a determination of the extraterritorial application of the criminal laws are set forth in Section V. Section VI examines the legislative history of the Act at the time of its initial enactment, and Section VII considers subsequent congressional action. The conclusion applies the principles of statutory construction to the case law, administrative interpretations, and legislative history to determine whether there are any circumstances under which the Act should be given extraterritorial effect.

## II. STATUTORY LANGUAGE

The Posse Comitatus 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 not more than \$10,000 or imprisoned not more than two years, or both.<sup>5</sup>

The component phrases of the statute do not provide useful guidance for determining its extraterritorial applicability. The Act concerns the "use of the Army or Air Force."<sup>6</sup> Given the worldwide mission of the military establishment, this phrase suggests no territorial limitation. One activity prohibited by the statute involves use of the Army or the Air Force "as a posse comitatus." Traditionally, the posse comitatus "was a summons to every male in the county, over the age of fifteen, to be ready and appareled, to come to the aid of the sheriff for the purpose of preserving the public peace or for the pursuit of felons."<sup>7</sup> This aspect of the statute is purely domestic in orientation. The statute also prohibits, however, use of the Army or Air Force "otherwise to execute the laws," and the qualification "otherwise" is unlimited.<sup>8</sup> The power to "execute the laws" is derived from a constitutional provision<sup>9</sup> that serves as an impor-

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<sup>5</sup> 18 U.S.C. § 1385 (1976).

<sup>6</sup> Use of the Navy is discussed in note 122 *infra*.

<sup>7</sup> Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 87 (1960).

<sup>8</sup> See notes 162-163 and accompanying text *infra* (congressional rejection of an amendment to delete the phrase "or otherwise").

<sup>9</sup> Article II, § 3 of the Constitution provides that the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. This constitutional mandate is not limited to Acts of Congress or treaties of the United States. See *In re Neagle*, 135 U.S. 1, 64-68 (1889). This provision also imposes upon the President the duty to enforce the rights, duties, and obligations growing out of the Constitution, the international relations of the United States, and all the protection implied by the nature of our government under the

tant source of the President's authority to take actions overseas.<sup>10</sup> The exception for "cases and . . . circumstances expressly authorized by the Constitution or Act of Congress" is also unlimited on its face,<sup>11</sup> as is the provision for a criminal penalty. Because the words of the statute neither suggest nor deny extraterritoriality, alternative sources of information, such as case law, administrative practice, canons of interpretation, and legislative history must be examined.

### III. CASE LAW

#### A. *The Post-World War II Era*

The first federal court decision concerning the extraterritorial application of the Act, *Chandler v. United States*,<sup>12</sup> involved a prosecution for treason against the United States based upon Chandler's radio broadcasting activities within Germany during World War II. Chandler had been indicted by a federal grand jury in 1943. In May 1945, he was taken into custody by the United States Army in Bavaria, but was released in October. In March 1946, he was rearrested by the army in Bavaria. Then, in December 1946, while still in military custody, he was taken to the United States where he was released to civilian authorities and arraigned

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Constitution. U.S. CONST. art. II, § 3. Although these "inherent" powers of the President have been termed "broad," they are generally considered to be subject to reasonable limitation by the Congress. *Moyer v. Brownell*, 137 F. Supp. 594, 604 (E.D. Pa. 1956); see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 633 (1952) (Douglas, J., concurring); 19 Op. Att'y Gen. 685, 686-87 (1890); E. CORWIN, *THE CONSTITUTION* 149 (13th ed. 1973).

<sup>10</sup> See note 64 and accompanying text *infra*.

<sup>11</sup> In addition to the statutes that authorize the armed forces to perform functions that serve a military purpose, there are a number of statutes that authorize military participation in activities that potentially involve civilian law enforcement. *E.g.*, 10 U.S.C. §§ 331-334 (1976) (suppression of insurrections and other unlawful combinations under specified circumstances); 16 U.S.C. §§ 23, 78 (1976) (protection of federal parks); *id.* § 596 (protection of timber on federal lands in Florida); 18 U.S.C. §§ 112, 1116 (1976) (protection of foreign officials, official guests, and other internationally protected persons); *id.* § 351 (crimes against members of Congress); 22 U.S.C. §§ 408, 461-462 (1976) (enforcement of the neutrality laws); 25 U.S.C. § 180 (1976) (removal of persons engaged in unlawful activities on lands belonging to Indian tribes); 42 U.S.C. § 97 (1976) (execution of quarantine and health laws); *id.* § 1989 (execution of warrants relating to enforcement of certain civil rights laws); *id.* § 3756 (loan of services, equipment, personnel, and facilities to the Law Enforcement Assistance Administration); 43 U.S.C. § 1065 (1976) (removal of unlawful enclosures from public lands); 48 U.S.C. § 1418 (1976) (protection of the rights of the discoverer of a guano island); 50 U.S.C. § 220 (1976) (enforcement of the customs laws).

<sup>12</sup> 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949). In two earlier federal cases, *Davis v. South Carolina*, 107 U.S. (17 Otto) 597 (1882) and *Ex parte Mason*, 256 F. 384 (N.D.N.Y. 1882), the Act was discussed, although not in the context of extraterritoriality.

on the old indictment. Later in the month, a new indictment was returned, and the defendant was tried and convicted on that indictment.<sup>13</sup>

On appeal, Chandler contended that his arrest was improper because, *inter alia*, the use of Army personnel to make the arrest violated the Act.<sup>14</sup> The Court of Appeals for the First Circuit rejected this claim,<sup>15</sup> citing the presumption against extraterritoriality normally attributed to criminal statutes.<sup>16</sup> In the course of its discussion, the court determined that it would be "unwarranted" to assume that Congress intended the Act "to be applicable to occupied enemy territory, where the military power is in control and Congress has not set up a civil regime."<sup>17</sup>

The court's view that the Act is not applicable to the Army in its capacity as an occupying power rests on solid ground. The *Chandler* arrest was made by Army personnel under circumstances in which the armed forces of the United States invaded and occupied Germany, supplanted the German Reich, and assumed certain powers of sovereignty. The use of the armed forces for law enforcement purposes was in furtherance of an authorized military purpose in connection with the war in Europe.<sup>18</sup> Moreover, the military was acting in accordance with the unquestioned authority of an occupant under international law to exercise the powers of the sovereign necessary to maintain law and order.<sup>19</sup> The treaties that embody relevant doctrines of international law constitute the supreme law of the land.<sup>20</sup> In view of these treaties and the military purposes

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<sup>13</sup> 171 F.2d at 927-28.

<sup>14</sup> *Id.* at 933-36. Chandler also contested the extraterritorial effect of the treason statute, but the court concluded that the treason statute should be applied outside the United States after considering the language of the statute (proscribing actions "within the United States or elsewhere"), the development of the constitutional provision on treason, the legislative history of earlier versions of the treason statute, and Supreme Court cases on extraterritoriality. *Id.* at 929-31.

<sup>15</sup> 171 F.2d at 936.

<sup>16</sup> See section V *infra*.

<sup>17</sup> *Id.* (citing *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943); *MacCloed v. United States*, 229 U.S. 416 (1913); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 141, 142 (1866)).

<sup>18</sup> See 171 F.2d at 935. The type of military occupation in effect in Germany after World War II has been termed "hostile occupation." G. VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 27 (1957). It is defined as "the military occupation of the territory of a country which surrendered completely and no longer maintains armed forces in the field." *Id.* The use of the armed forces to further an authorized military function is not prohibited by the Act even if there is an incidental benefit to civilian law enforcement. See note 43 *infra*.

<sup>19</sup> See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, pt. III, § 3, 6 U.S.T. 3516, 3548-68, T.I.A.S. No. 3365.

<sup>20</sup> U.S. CONST. art. VI, cl. 2.

served by maintaining law and order in occupied territories, there was express authorization for the use of armed forces for law enforcement purposes in occupied territories, thereby removing such activities from the prohibitions of the Act. There also is strong evidence in the legislative history that Congress did not intend the Act to impair the exercise of Presidential powers necessarily related to the application of military force in time of war.<sup>21</sup> Therefore, even in the absence of such treaties, the Act would not apply to actions taken in accordance with the law of war where application of military force is otherwise authorized.

Although the Act does not apply to acts by an occupant performed in accordance with the law of war, it does not necessarily follow that the *Chandler* opinion is correct in asserting that the Act has no extraterritorial application whatsoever. Resolution of this issue requires consideration of the legislative history of the Act under the principles of statutory construction, which are set forth in the leading case on extraterritorial application of criminal statutes, *United States v. Bowman*.<sup>22</sup> As Section VI of this Article demonstrates, the *Chandler* court's characterization of the Act as a mere "backwash" of Reconstruction Era electoral politics fails to portray accurately the purposes of Congress in enacting this statute.<sup>23</sup> Ac-

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<sup>21</sup> See section VI *infra*.

<sup>22</sup> 260 U.S. 94 (1922).

<sup>23</sup> During the course of its discussion, the court summarized the legislative history of the Act as follows:

The [Posse Comitatus Act] was originally a section inserted into an Army Appropriation Act as a backwash of the Reconstruction period following the Civil War. Its legislative history as set forth in Lieber, *The Use of the Army in Aid of the Civil Power*, indicates that the immediate objective of the legislation was to put an end to the use of federal troops to police state elections in the ex-Confederate states where the civil power had been reestablished.

171 F.2d at 936 (citing Lieber, *The Use of the Army in Aid of the Civil Power*, OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. DEPARTMENT OF WAR, Doc. No. 64 (1898)). The court's discussion of the legislative history, however, is incomplete. Although the use of federal troops in the electoral process was a significant factor in the early stages of debate on the Act, the legislative history demonstrates Congressional opposition to the use of troops in non-electoral law enforcement activities outside the former Confederate States. See section VI *infra*. Moreover, had the *Chandler* court read Lieber's pamphlet more carefully, it would have noticed that he expressly declined to provide a comprehensive legislative history. See Lieber, *supra* at 14. Lieber was concerned primarily with demonstrating that the Act did not limit the constitutional power of the President to use whatever force might be necessary to overcome resistance to the execution of the laws. *Id.* at 55-56. He did not state that the Act was otherwise invalid, nor did he limit the effect of the Act to electoral matters:

The object of the legislation of 1878 was to place restrictions on the use of the Army in 'executing the laws,' but this had reference only to the ordinary civil and criminal

cordingly, *Chandler* does not provide a reliable basis for applying the presumption against extraterritoriality to the Act.

Two years after the *Chandler* case, similar issues were raised in *Gillars v. United States*.<sup>24</sup> Gillars was convicted of treason for participating in psychological warfare against the United States from 1941 to 1945 by making certain radio broadcasts and phonograph recordings within Germany. Although the circumstances of her arrest were not spelled out in the opinion, it appears that "she was brought against her will into the District of Columbia from Germany."<sup>25</sup> The court of appeals concluded that the district court "was not required to refuse to try her when she was brought here unlawfully."<sup>26</sup> In support of this conclusion, the court cited the *Chandler* case and legislative history of the Act as discussed in *Chandler*.<sup>27</sup> The *Gillars* court then endorsed the narrow holding of the first circuit in *Chandler* denying the applicability of the statute to acts performed by an occupant pursuant to the law of war. The court expressly declined, however, to endorse the broader dicta providing

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law of the land. It was not intended to place restrictions on its use for ordinary military purposes.

*Id.* at 34 n.1. Also problematical is the court's failure to consider construction of the Act by relevant agencies of the Executive Branch. See section IV *infra*. A further problem in applying *Chandler* today results from the court's characterization of the Posse Comitatus Act:

The turning up of this obscure and all-but-forgotten statute is a credit to the industry of counsel; but we know perfectly well that if members of the Armed Forces who took Chandler into custody were prosecuted for a criminal offense under [the Act], such prosecution would surely fail.

171 F.2d at 936. This characterization is no longer accurate in light of recent cases concerning the Act and renewed attention from commentators. *E.g.*, *United States v. Wolfs*, 594 F.2d 77, 84-85 (5th Cir. 1979); *Lamont v. Haig*, 590 F.2d 1124, 1126 (D.C. Cir. 1978); *United States v. Banks*, 539 F.2d 14, 15-16 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976); *United States v. Walden*, 490 F.2d 372, 373-76 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974); *United States v. McArthur*, 419 F. Supp. 186, 193-94 (D.N.D.), *aff'd sub nom.* *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977); *United States v. Red Feather*, 392 F. Supp. 916, 920-25 (D.S.D. 1975); *United States v. Banks*, 383 F. Supp. 368, 374-78 (D.S.D. 1974); *United States v. Jaramillo*, 380 F. Supp. 1375, 1378-82 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975); *Wrynn v. United States*, 200 F. Supp. 457 (E.D.N.Y. 1961); *Horbaly & Mullin, Extraterritorial Jurisdiction and Its Effect on the Administration of Military Criminal Justice Overseas*, 71 MIL. L. REV. 1, 82-92 (1976). See generally *Meeks, Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83 (1975); Note, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 AM. CRIM. L. REV. 703 (1976) [hereinafter cited as 1976 Note]; Note, *Honored in the Breach: Presidential Authority to Execute the Laws with Military Force*, 83 YALE L. REV. 130 (1973) [hereinafter cited as 1973 Note].

<sup>24</sup> 182 F. 2d 962 (D.C. Cir. 1950).

<sup>25</sup> *Id.* at 972.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*



a total exemption for acts performed extraterritorially.<sup>28</sup>

In another treason case based upon participation in enemy radio broadcasts, *D'Aquino v. United States*,<sup>29</sup> the defendant used the Act to challenge the court's jurisdiction. The defendant had been arrested in Tokyo in 1948 pursuant to a warrant issued by the Supreme Command for the Allied Power upon complaint of the Department of Justice.<sup>30</sup> The court simply cited *Chandler* and *Gillars*, concluding: "For the reasons stated in those cases, we hold this argument without merit."<sup>31</sup> Given the citation of *Gillars* and the circumstances of the case—an arrest ordered by a military authority in an occupied territory—the case does not provide authoritative guidance as to whether there is a blanket extraterritorial exemption in the Act.

### B. *The Vietnam Era*

The extraterritorial application of the Act was raised but not decided in *United States v. Cotten*.<sup>32</sup> In 1970, Cotten and a codefendant were convicted of conspiring to defraud the United States by knowingly converting money and other property of the United States Military Exchanges in Japan to their own use and the use of others. When the indictment was brought against them in the Northern District of California in 1970, both men, civilians, were in Vietnam.<sup>33</sup> Immediately after the indictment, the State Department instituted action to revoke their passports and arrange for their return to the United States. Cotten, in handcuffs and leg-irons belonging to the United States, was taken by the Vietnamese to Tan Son Nhut Airport in Saigon where an agent of the Naval Investigative Service (NIS) took his passport and made certain that he entered an American military aircraft. On the aircraft, still in irons, he was seated by two other NIS agents. When he protested that he was being kidnapped, he was struck in the back of the head, subdued, and secured to the deck with cargo chains. Upon arrival in Honolulu, he was turned over to the federal marshal. The co-

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<sup>28</sup> *Id.* at 973. The court reasoned that since the Act was "inapplicable in this case, it is unnecessary to determine whether the statute is extraterritorial in its scope." *Id.*

<sup>29</sup> 192 F.2d 338 (9th Cir. 1951).

<sup>30</sup> *Id.* at 349.

<sup>31</sup> *Id.* at 351.

<sup>32</sup> 471 F.2d 744 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973).

<sup>33</sup> 471 F.2d at 745.

conspirator was returned to the United States under similar circumstances.

On appeal, the defendants contended that their involuntary removal from Vietnam and the use of military personnel to transport them to the United States to face charges for civilian crimes constituted criminal acts on the part of the government, thereby requiring either a dismissal of charges or a finding of lack of jurisdiction. The court of appeals rejected this contention. Applying the principle enunciated by the Supreme Court in *Ker v. Illinois*,<sup>34</sup> the court concluded that, even if the defendants "were in fact kidnapped or forcibly removed without their consent to the territorial limits of the United States . . . under the order of government

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<sup>34</sup> 119 U.S. 436 (1886) (state court jurisdiction not defeated by forcible abduction and return of the defendant to the United States. The Ninth Circuit also cited *Frisbie v. Collins*, 342 U.S. 519 (1952), a case in which the Supreme Court held that a state court's jurisdiction was not defeated by bringing a defendant within the court's jurisdiction by means of forcible abduction even though a federal kidnapping law might have been violated in the process. *Id.* at 522-23. The Supreme Court has cited the *Ker-Frisbie* doctrine with approval in a case subsequent to *Cotten* not involving a forcible abduction. See *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (illegal arrest or detention does not void subsequent conviction).

In *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), the second circuit specifically criticized this aspect of the decision in *Cotton*, stating that in certain circumstances, any remedy other than an exclusionary rule (precluding jurisdiction) would be inadequate under the then-current Supreme Court doctrine. *Id.* at 276 & n.6. The *Toscanino* court ruled that participation by United States agents in the torture and forcible abduction of the defendant from Uruguay to the United States would, if proved, defeat jurisdiction. See *id.* at 275. On remand, the district court held a hearing and denied the jurisdictional motion on the grounds that there was no credible evidence of participation by officials of the United States. 398 F. Supp. 916 (E.D.N.Y. 1975) (mem.). The second circuit subsequently limited the sweep of the *Toscanino* holding:

[R]ecognizing that *Ker* and *Frisbie* no longer provide a carte blanche to government agents bringing defendants from abroad to the United States by the use of torture, brutality, and similar outrageous conduct, we did not intend to suggest that any irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court. In holding that *Ker* and *Frisbie* must yield to the extent they were inconsistent with the Supreme Court's more recent pronouncements, we scarcely could have meant to eviscerate the *Ker-Frisbie* rule, which the Supreme Court has never felt impelled to disavow . . . .

Lacking from Lujan's petition is any allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process.

*Lujan v. Gengler*, 510 F.2d 62, 65, 66 (2d Cir.), cert. denied, 421 U.S. 1001 (1975); accord, *United States v. Lira*, 515 F.2d 68 (2d Cir.), cert. denied, 423 U.S. 847 (1975). The other courts of appeals encountering similar questions have either declined to apply *Toscanino* or have found distinguishing factors. See, e.g., *United States v. Lopez*, 542 F.2d 283 (5th Cir. 1976) (per curiam); *United States v. Marzano*, 537 F.2d 257 (7th Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *United States v. Lovato*, 520 F.2d 1270 (9th Cir.) (per curiam), cert. denied, 423 U.S. 985 (1977).

personnel, that fact does not preclude assertion of jurisdiction."<sup>35</sup> Having concluded that a forcible abduction would not deprive the trial court of jurisdiction, the court of appeals applied the same reasoning in deciding that neither dismissal nor a finding of lack of jurisdiction would be an appropriate remedy for a violation of the *Posse Comitatus Act*.<sup>36</sup> Without specifying what alternative remedies might be available to the defendants, the court declared that "[t]he remedy for appellants is not a finding that their criminal activities go unpunished because the proper forum was razed by the conduct of law enforcement personnel."<sup>37</sup> Because the court held that no remedies would be available in the criminal proceeding, it did not determine whether the Act had been violated or whether the Act was subject to extraterritorial application.

The case law is sparse and inconclusive. Only four cases have dealt with the issue of extraterritorial application of the Act. Each arose under wartime conditions. Three were outside the Act's prohibitions because the armed forces at the time lawfully exercised the police authority of an occupying power. In the fourth case, the court avoided the question of the extraterritorial application of the Act, ruling only that a violation of the Act does not deprive a trial court of jurisdiction over substantive crimes. Because the case law does not resolve the question of extraterritoriality, it is necessary to turn to the views of the executive branch to determine whether the Act has been given an authoritative construction by the agencies involved in its administration.

#### IV. ADMINISTRATIVE INTERPRETATION

##### A. *Military Departments*

The military departments have been the primary source of interpretative practice under the Act.<sup>38</sup> The executive branch first had

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<sup>35</sup> 471 F.2d at 747.

<sup>36</sup> *Id.* at 749.

<sup>37</sup> *Id.* At an earlier point in the opinion, the court said: "Recent legislation and constitutional protections enunciated in the last decade provide viable alternative means of coping with undisciplined law enforcement activities." *Id.* at 748 n.11. In rejecting the defendants' jurisdictional contention, the court again referred to the possibility of a remedy, but did not provide any further guidance:

The remedy requested exceeds that required by the conduct. . . . The *Ker* principle controls and the rationale of the United States Supreme Court in *Frisbie*, denying that a bar to prosecution was imposed in similar circumstances by the Federal Kidnapping Act, applies equally to the *posse comitatus* statute.

*Id.*

<sup>38</sup> Courts often have given deference to the interpretation of a statute by executive

occasion to consider the extraterritorial application of the Act in 1923 when the Judge Advocate General of the Army issued several opinions that restricted Army activities in foreign countries.<sup>39</sup> In two

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agencies involved in the administration of programs affected by the legislation. *See, e.g.*, *Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239, 243 (1950); *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944).

<sup>39</sup> *See* Furman, *supra* note 7, at 107; Horbaly & Mullin, *supra* note 23, at 86 n.402. Initially, administrative interpretation of the Posse Comitatus Act focused on the various exceptions. On June 19, 1878, the day after the Army Appropriations Bill containing the Posse Comitatus Amendment was signed into law, the Bill was disseminated by the Army as a General Order. U.S. DEP'T OF WAR, GEN. ORDERS No. 37, reprinted in [1878] ADJUTANT GENERAL'S OFFICE, DEP'T OF WAR, INDEX OF GENERAL ORDERS [hereinafter cited as 1878 GEN. ORDERS]. Three weeks later, the Posse Comitatus Amendment was made the subject of another General Order setting forth the constitutional and statutory exceptions to the Act. *Id.* No. 49. The orders listed the following express exceptions to the Act: U.S. CONST. art. IV, § 4 (protection of the Nation against invasion and the states, upon application, against domestic violence); Revised Statutes (1873) §§ 1984, 1989, 1991 (protection of civil rights) (§ 1984 codified at 42 U.S.C. § 1989 (1976); § 1989 repealed 1957; § 1991 repealed 1933); *id.* § 2002 (protection of the polls (repealed 1909)); *id.* §§ 2150-2152 (apprehension of Indians, termination of hostilities between tribes, destruction of distilleries in Indian country, and other Indian related matters) (repealed 1934); *id.* § 2460 (protection of United States timber in Florida) (codified at 16 U.S.C. § 596 (1976)); *id.* §§ 5287-5288 (protection of neutrality laws) (current version at 22 U.S.C. §§ 461, 465 (1976)); *id.* §§ 5297-5299 (suppression of insurrections) (codified at 10 U.S.C. §§ 331-334 (1976)); *id.* § 5577 (protection of rights with respect to guano islands) (codified at 48 U.S.C. § 1418 (1976)). Because the statute concerning discovery of guano concerns islands "not within the lawful jurisdiction of any other government," *id.*, it could be contended that inclusion of this provision in the list represented recognition by the War Department that the Act might be given extraterritorial effect. Alternatively, the list might be viewed merely as a compilation of statutes authorizing employment of the Army without regard to territorial consequences or the effect of the Act.

General Order No. 49 also required all applications for use of the troops to be forwarded through channels "for the consideration and action of the President." *Id.* In October, the directive requiring Presidential approval was repeated with an amplification of authority to act when there existed an emergency affecting public property or an equivalent situation. *See* [1878] GEN. ORDERS, *supra*, No. 71. This order provided:

Officers of the Army will not permit the use of the troops under their command to aid the civil authorities as a posse comitatus or in execution of the laws, except as authorized in the foregoing enactments. If time will admit, the application for the use of troops for these purposes must be forwarded with a statement of all the material facts in the case, for the consideration and action of the President; but in cases of sudden and unexpected invasion, insurrection, or riot, and endangering the public property of the United States, or in cases of attempted or threatened robbery or interruption of the United States mails, or other equal emergency, officers of the Army may, if they think a necessity exists, take such action before the receipt of instructions from the seat of Government as the circumstances of the case and the law under which they are acting and the circumstances requiring it to the Adjutant General for the information of the President.

*Id.*

In an early Army Regulation, the exception for emergencies was modified to apply to an "emergency so imminent as to render it dangerous to await instructions requested through the speediest means of communication." U.S. DEP'T OF WAR, REGULATIONS ¶ 489 (1895). Neither the 1878 order nor the 1895 regulation describes the kind of emergency that would

instances, the Judge Advocate General ruled that the Act precluded the Army from holding civilian prisoners pending trial before the United States Court in China. A year later, he held that the Army could not transport persons convicted in that court to the United States.<sup>40</sup>

Subsequent to the *Chandler* decision in 1948, the executive branch has not been consistent on the question of the Act's extraterritorial application. In one case, the Judge Advocate General of the Army allowed military forces overseas to aid civilian authorities in the United States in such law enforcement functions as deportations, criminal identification, administration of lie-detector tests, and interviews of suspects.<sup>41</sup> In another case, however, the Judge Advocate General of the Air Force applied the Act overseas, holding that military officials were precluded from serving a state's notice of citation upon an airman stationed in the Ryukyus Islands.<sup>42</sup> It does not appear that the military services have applied the Act outside the United States or its territories in any circumstance that would impinge upon the foreign policy powers of the executive or otherwise frustrate a military purpose.<sup>43</sup> Because the Army's opinion

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permit the use of the Armed Forces as an exception to the Posse Comitatus Act; rather, each is discussed in the context of situations in which use of troops would be otherwise authorized. In an early statement of the property exception, the Judge Advocate General of the Army determined that use of force to remove trespassers from a military reservation did not violate the Act. The opinion was based on the theory that the action was not to execute the laws but merely to protect military property. See WINTHROP, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL 114 (1880). The development of the emergency and federal property exceptions is traced briefly in Furman, *supra* note 7, at 103-07, in Meeks, *supra* note 23, at 127-28, and in U.S. DEP'T OF ARMY, MILITARY ADMINISTRATIVE LAW HANDBOOK ¶¶ 7.8-.10 (Pam. No. 27-21 1973).

The emergency exception is now embodied in a Department of Defense Directive stating that the Act "does not apply if: (1) emergency action is needed to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when . . . local authorities are unable to control the situation;" or (2) federal action is needed "to protect Federal property and Federal governmental functions and . . . local authorities are unable or decline to provide adequate protection." U.S. DEP'T OF DEFENSE, DIRECTIVE No. 3025.12 (1971).

<sup>40</sup> See Furman, *supra* note 7, at 107; Horbaly & Mullin, *supra* note 23, at 86 n.402.

<sup>41</sup> See Furman, *supra* note 7, at 109 n.141. As late as 1971, however, the Judge Advocate General of the Army noted that, while the Act generally would not restrain the activities of military investigators overseas, there might be a violation of the Act if military criminal investigators overseas were used as a backup or in support of criminal law enforcement activities in the United States. See Horbaly & Mullin, *supra* note 23, at 88.

<sup>42</sup> See Horbaly & Mullin, *supra* note 23, at 88.

<sup>43</sup> Meeks summarizes the numerous administrative opinions covering the "military purpose" exception to the Posse Comitatus Act as follows:

Many law enforcement activities performed by military officials benefit the civilian community as well as the military command. This dual purpose "execution of the

is based upon citation of *Chandler* without further examination of the legislative history,<sup>44</sup> it does not provide a satisfactory basis for resolving the question of extraterritorial effect. Moreover, the inconsistent pattern of interpretation since *Chandler* undermines the authoritative nature of these decisions.

### B. *The Department of Justice*

The other significant source of administrative interpretation of the Act has been the Department of Justice.<sup>45</sup> Although the Attorney General has not issued a formal opinion on the extraterritorial effect of the Act, one opinion has suggested that a legislative intrusion upon implied executive powers might be unconstitutional.<sup>46</sup> The Office of Legal Counsel has opined that actions of the armed forces that serve a valid military purpose are not limited by the Act, even if there is an incidental benefit to law enforcement.<sup>47</sup> This

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law" can, and often does, violate the Act. Where the primary purpose of the action is to fulfill a legitimate military requirement, no violation of the Act occurs even though civil law enforcement is incidentally aided. However, where action by military officials is taken primarily in aid of civil authorities, the Act is violated even though the military command is aided incidentally.

Meeks, *supra* note 23, at 124-25.

<sup>44</sup> See section VI *infra*.

<sup>45</sup> *E.g.*, 41 Op. Att'y Gen. 313, 329-31 (1957) (use of federal troops to enforce court-ordered desegregation in Little Rock, Ark., was expressly authorized by 10 U.S.C. §§ 332, 333 under the circumstances); 21 Op. Att'y Gen. 72 (1894) (military troops cannot be used to enforce laws against "bandits" operating in Indian territory unless violation falls within express terms of statute authorizing use of troops against illegal intruders, section 2152 of the Revised Statutes (1873) (repealed 1934)); 19 Op. Att'y Gen. 570, 571 (1890) (Posse Comitatus Act did not abridge power to use military troops to enforce Civil Rights Acts expressly authorized by section 1989 of the Revised Statutes (1873) (repealed 1957)); 19 Op. Att'y Gen. 293, 296 (1889) (federal marshal was precluded by the Posse Comitatus Act from using military to enforce laws in the Indian Territory of Arkansas); 17 Op. Att'y Gen. 333, 335 (1882) (military troops could be used to suppress disorders in the Territory of Arizona under express authority of sections 5298 and 5300 of the Revised Statutes (1873) (current versions at 10 U.S.C. 331-34 (1976))); 17 Op. Att'y Gen. 242 (1881) (military forces cannot be used to suppress unlawful organizations unless such organizations fall within types of organizations contemplated in statutes expressly authorizing military troops); 17 Op. Att'y Gen. 71 (1881) (federal troops could not be used to aid civil authorities in arrest of persons charged with robbery of a federal facility); 16 Op. Att'y Gen. 162, 164 (1878) (Posse Comitatus Act precluded federal marshal from using federal troops to overcome armed resistance to collection of taxes); *cf.* 33 Op. Att'y Gen. 562 (1923) (in absence of emergency circumstances contemplated by section 5298 of the Revised Statutes (1873) (current version at 10 U.S.C. §§ 331-34 (1976)), President could not use Navy to enforce Prohibition Laws without express congressional authority).

<sup>46</sup> 41 Op. Att'y Gen. 313, 331 (1957).

<sup>47</sup> Letter from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Deanne C. Siemer, General Counsel, Department of Defense (Mar. 24, 1978). The letter concerns limitations on participation by military person-

doctrine, known as the military purpose exception, permits use of service members at home and abroad without regard to the Act if the primary purpose of the action serves an authorized function of the armed forces. In correspondence with the Department of Defense, the Criminal Division of the Department of Justice has stated that the Act has no application overseas.<sup>48</sup> The correspondence cites the *Chandler* case, but neither discusses the case nor provides any rationale for the conclusion on the issue of extra-territoriality. As previously noted,<sup>49</sup> the *Chandler* case does not provide authoritative resolution of the issue.

Neither the case law nor administrative interpretations provide a definite resolution of the issues involved in the question of extra-territoriality. In order to establish a framework for the remainder of the inquiry, the next Section examines relevant principles of statutory construction to assess possible limitations on the extraterritorial application of the Act.

#### V. PRINCIPLES OF STATUTORY CONSTRUCTION

The principle of statutory construction regarding the extraterritorial effect of United States statutes is summarized by the Restatement of Foreign Relations Law as follows:

Rules of United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute.<sup>50</sup>

In applying the Restatement standard to the Act, the dual nature of the statute should be considered. Not only is it a criminal statute, applicable to any person who violates its provisions, but it is also a limitation on the powers of the executive branch of the government. These considerations are treated separately in this section.

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nel in the investigation and prosecution of frauds committed by contractors in the course of procurement by the Department of Defense. In her letter, Ms. Lawton stated: "[W]hile Congress intended to keep military force out of civilian government there is no indication that it meant to affect the Army's internal administration of the performance of its proper functions." *Id.* See note 43 *supra*.

<sup>48</sup> *E.g.*, Letter from Henry E. Peterson, Assistant Attorney General, Criminal Division, Department of Justice, to J. Fred Buzhardt, General Counsel, Department of Defense (Dec. 4, 1972) (discussing reports of criminal violations and civil frauds outside the United States).

<sup>49</sup> See notes 12-23 and accompanying text *supra*.

<sup>50</sup> RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965) [hereinafter cited as RESTATEMENT].

### A. Extraterritoriality of Penal Statutes

Statutes defining criminal conduct may be given extraterritorial effect by Congress insofar as they apply to United States citizens abroad.<sup>51</sup> Analysis of the legislative intent with respect to extraterritorial effect requires application of the standard set forth in the leading case, *United States v. Bowman*.<sup>52</sup> *Bowman* involved a federal indictment for conspiracy to defraud a corporation in which the United States was a shareholder. The crimes were committed by three American citizens and a British subject outside the territorial jurisdiction of the United States.<sup>53</sup> The trial court sustained an objection to the indictment based upon the fact that the penal statute, which proscribed various frauds against the United States, did not expressly provide for extraterritorial application.<sup>54</sup> In reversing, the Supreme Court established a two-pronged test to determine whether a penal statute that is silent on the issue of extraterritoriality is intended by Congress to be applied extraterritorially. First, the government must have jurisdiction over the offense under international law.<sup>55</sup> Second, the extraterritorial application "depends upon the purpose of Congress as evinced by the description and nature of the crime . . . ."<sup>56</sup> With respect to the second part of the test, the Court declared that statutes defining crimes against private individuals or their property should not be given extraterritorial effect unless application outside the United States is authorized expressly in the statute. Different considerations apply, however, if a statute is enacted to protect the govern-

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<sup>51</sup> *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *accord*, *United States v. Cotten*, 471 F.2d 744, 749 (9th Cir. 1973), *cert. denied*, 411 U.S. 936 (1974); *see* RESTATEMENT, *supra* note 50, §§ 30-32. The *Blackmer* Court pointed out:

While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power.

284 U.S. at 437. With respect to conduct by citizens of other nations occurring outside the United States, the extraterritorial effect depends on whether the exercise of jurisdiction is necessary to deal with a potentially adverse effect upon the security or governmental functions of the United States. *E.g.*, *United States v. Pizzarusso*, 388 F.2d 8, 10-11 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968); *Rocha v. United States*, 288 F.2d 545 (9th Cir.), *cert. denied*, 366 U.S. 948 (1961).

<sup>52</sup> 260 U.S. 94 (1922).

<sup>53</sup> *Id.* at 95.

<sup>54</sup> *Id.* at 97.

<sup>55</sup> *Id.* Under settled principles of international law, the United States would have jurisdiction over actions engaged in or ordered by United States officials outside the United States. *See* RESTATEMENT, *supra* note 50, §§ 30-32.

<sup>56</sup> 260 U.S. at 97.



ment of the United States from criminal activity, "especially if committed by its own citizens, officers or agents."<sup>58</sup> The Court noted that such cases could be divided into two classes. In the first, extraterritorial application would not be appropriate "because of the local acts required to constitute" the offenses.<sup>59</sup> In the second class of statutes, however, the offenses "are such that to limit [their] *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for [crimes] as easily committed by citizens . . . in foreign countries as at home."<sup>60</sup> The Court concluded that "Congress has not thought it necessary to make specific provision in the law that the *locus shall* include . . . foreign countries, but allows it to be inferred from the nature of the offense."<sup>61</sup>

Application of the principles articulated by the *Bowman* Court does not resolve the question of extraterritorial application of the Act. A potential violation of the Act by conduct outside the United States would not entail a purely private matter; rather, it would involve an action by the government's own "officers or agents." Under *Bowman*, therefore, the issue is whether a violation of the Act is a crime that "can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute" the offense or whether limitation of the Act "to strictly territorial jurisdiction would . . . greatly . . . curtail the scope and

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<sup>57</sup> *Id.* at 98. The Court cited *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), wherein it had rejected extraterritorial application of the antitrust statutes in a civil suit. 260 U.S. at 98. The Court reasoned: "If punishment . . . is to be extended to include offenses committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." *Id.* In recent years, the courts have narrowed this exception when dealing with federally regulated matters by finding that the challenged overseas activities had "effects" within the United States. See Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1010-24 (1976) and cases cited therein.

<sup>58</sup> 260 U.S. at 98. The Court reasoned that

[t]he same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents.

*Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* The Court listed a number of crimes that would be given extraterritorial effect even though the underlying statutes were silent as to territoriality: certification of a false invoice by a consul; forging a ship's papers; enticing desertion from the Navy; bribery of a civil, military or naval officer; crimes dealing with property captured as a prize; stealing property furnished to the military. *Id.* at 99-100.

<sup>61</sup> *Id.* at 98.

usefulness of the statute and leave open a large immunity."<sup>62</sup> The Act falls between the two classes set forth in *Bowman*. The statute makes it unlawful to use the military as a "posse comitatus," a prohibition that is purely domestic in application.<sup>63</sup> The statute, however, qualifies the term "posse comitatus" with the phrase "or otherwise to execute the laws," which leaves open the possibility of extraterritoriality. Moreover, the phrase "to execute the laws," which is derived from the constitutional powers of the President,<sup>64</sup> reflects an important source of the President's authority to act overseas to protect American lives and property.<sup>65</sup> On the other hand, it is by no means clear from the nature of the offense prohibited by the statute that a strictly territorial interpretation would frustrate its scope and usefulness.

### B. *Limitations on Executive Authority*

The statutes described as having an extraterritorial effect in *Bowman* all operated as an aid to executive power by serving to punish acts traditionally considered to be illegal.<sup>66</sup> The Posse Comitatus Act, however, is a limitation on executive power.<sup>67</sup> It does not make the object of executive action illegal; rather, it is addressed solely to the use of an otherwise legitimate means of achieving that objective.

A congressional limitation on executive authority raises substantial constitutional questions.<sup>68</sup> The Supreme Court has recognized the constitutional authority of the President to act as the "sole organ of the federal government in the field of international relations."<sup>69</sup> Although this does not mean that Presidential power over

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<sup>62</sup> *Id.*

<sup>63</sup> See text accompanying note 7 *supra*.

<sup>64</sup> U.S. CONST. art. II, § 3, cl. 4.

<sup>65</sup> See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860).

<sup>66</sup> See note 60 *supra*.

<sup>67</sup> See 7 CONG. REC. 3847 (1878) (remarks of Rep. Knott). The fact that the language of the Act includes within its sanctions "[w]hoever . . . uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws," is some indication that the Act's restrictions reach "from the Commander-in-Chief down to the lowest officer in the Army who may presume to take upon himself to decide when he shall use the military force in violation of the law of the land." *Id.*

<sup>68</sup> See 41 Op. Att'y Gen. 313, 331 (1957); *Furman*, *supra* note 7, at 127 and authorities cited therein.

<sup>69</sup> *United States v. Pink*, 315 U.S. 203, 229 (1942) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)); *accord*, *United States v. Belmont*, 301 U.S. 324, 330 (1937). These cases did not involve a conflict between federal legislative and executive powers.

foreign affairs is exclusive,<sup>70</sup> the degree to which Congress can control Presidential actions is unclear.<sup>71</sup>

When the validity of an act of Congress is questioned, even when there is a serious doubt as to the constitutionality of the statute, "it is a cardinal principal that [the Supreme] Court will first ascertain whether a construction of the statute is possible by which the [constitutional] question may be avoided."<sup>72</sup> A statute should be construed, consistent with the will of Congress, to comport with constitutional limitations.<sup>73</sup> Executive power in the field of foreign relations is broader than executive power in the domestic sphere.<sup>74</sup> A statute such as the Act might represent a valid restraint on Presidential powers within the United States, but would raise more serious problems if it were interpreted as limiting Presidential authority abroad. Therefore, when the exercise of executive powers overseas is involved, the presumption against extraterritorial application of criminal statutes also provides a means of construing a statute in a manner that will avoid a difficult constitutional question. In the next section, the legislative history of the Act will be examined to determine whether such a reading of the statute is consistent with the intent of Congress.

## VI. LEGISLATIVE HISTORY

### A. *The Political Background*

The origin of the Posse Comitatus Act may be traced to hostility of the Democratic House of Representatives to the use of federal troops by President Grant, a Republican, for law enforcement pur-

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<sup>70</sup> See *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 182-83 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968); cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640-55 (1952) (Jackson, J., concurring) (that the President is the Commander-in-Chief of the armed forces does not give him exclusive power over them).

<sup>71</sup> See, e.g., Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME LAW. 187 (1975); Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1 (1975); King & Leavens, *Curbing the Dogs of War: The War Powers Resolution*, 18 HARV. INT. L.J. 55 (1977); Note, *1973 War Powers Legislation: Congress Re-Asserts Its Warmaking Power*, 5 LOY. CHI. L.J. 83 (1974). See generally G. SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* (1919); Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463 (1976).

<sup>72</sup> E.g., *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); see *Drinan v. Nixon*, 364 F. Supp. 854, 858 (D. Mass. 1973).

<sup>73</sup> *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 571 (1973).

<sup>74</sup> See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

poses in several southern states during the Reconstruction Era and during the disputed Presidential contest in 1876. Although Samuel J. Tilden, the Democratic candidate, obtained a plurality of both the popular and electoral votes, challenges to the certification of the electors from several southern states left Tilden one electoral vote short of victory, with nineteen votes in doubt. Congress, with a Republican majority in the Senate, and a Democratic majority in the House, was unable to resolve the matter, and turned the issue over to an electoral commission. The commission gave all disputed votes to the Republican candidate, Rutherford B. Hayes, providing him with a one-vote victory margin and the result was ratified by Congress. The willingness of Hayes to promise a withdrawal of federal troops from an active role in the South apparently proved to be an important factor in obtaining Democratic support for the final result, known as the "Compromise of 1877."<sup>76</sup>

When the first version of the Act was debated by the Forty-fourth Congress in 1877, there was a lame duck Republican President, a Democratic majority in the House, and a Republican majority in the Senate. This version was proposed by the House as a rider to an Army appropriations bill.<sup>77</sup> The rider, which was domestic in orientation and purpose, prohibited use of the Army to support claims of named individuals to hold office in various southern states, along with a general ban on use of the Army "in the support of the claims, or pretended claim or claims, of any State government, or officer thereof, in any State, until such government shall have been duly recognized by Congress."<sup>78</sup> This proposal reflected Democratic dissatisfaction with the continued presence of federal

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<sup>75</sup> President Grant ordered military troops to the polls in Florida, South Carolina and Louisiana to guard canvassers and to prevent fraud. Furman, *supra* note 7, at 94. For a general description of the events surrounding the passage of the Posse Comitatus Act, see J. HICKS, G. MOWRY & R. BURKE, *THE AMERICAN NATION* 44-48 (1971); Furman, *supra* note 7, at 92-97; Lorence, *The Constitutionality of the Posse Comitatus Act*, 8 U. KAN. CITY L. REV. 164, 169-74 (1940); Meeks, *supra* note 23, at 86-93.

<sup>76</sup> See Hicks, *supra* note 75, at 47-48.

<sup>77</sup> H.R. 4691, 44th Cong., 2d Sess. (1877). The primary feature of the appropriations bill was a reduction in the size of the Army.

<sup>78</sup> 5 CONG. REC. 2152 (1877). During the debate, Congressman Atkins spoke in general about the "danger" of using large standing armies "to secure the execution of the laws," and spoke specifically in opposition to the use of the soldiers as "policemen" in the resolution of disputed claims to office in the South. *Id.* at 2112 (1877). Congressman Banning criticized the use of the Army "as a police force" and denounced a statement by the Attorney General authorizing deputy United States Marshals to use military personnel as a posse comitatus during the 1876 election. *Id.* at 2117.

troops that supported the so-called "carpetbag" governments in southern states.<sup>79</sup>

The Senate Appropriations Committee reported a substitute bill, deleting the rider and troop reductions proposed by the House.<sup>80</sup> Senator Blaine, floor manager of the bill, described the House rider restricting use of troops as an unconstitutional infringement upon the powers of the President as commander-in-chief,<sup>81</sup> a view disputed by Senator Kernan.<sup>82</sup> Although there was no effort in the Senate to restore the House's limitation on use of the troops, the subject was discussed during debate on an amendment to reduce the size of the Army. Senator Bayard, who favored the reduction in the size of the Army, noted the relationship between use of the military "to enforce the laws" and Reconstruction Era legislation.<sup>83</sup> He added: "[T]he use of the military as an aid to civil power should be the very last resort in a government of laws, and . . . under our system, where the laws are to be enforced in aid of the State, the State militia, and not the Army of the United States, should be called upon."<sup>84</sup> At the conclusion of the Senate debate, the troop-cut amendment was defeated, and the substitute bill was approved.<sup>85</sup> When the House declined to recede from its position in support of the troop-cuts and the restrictive rider, the Forty-Fourth Congress ended without passage of the army appropriations bill.<sup>86</sup>

The failure to enact an appropriations bill when Congress adjourned in March 1877 left the Army without funds for several months. President Hayes, citing the absence of appropriations for the Army, called a special session of Congress to be convened on October 15, 1877.<sup>87</sup> Prior to the session, President Hayes had begun the withdrawal of federal troops from Louisiana and South Carolina and had undertaken other steps to terminate the federal role in governing the southern states.<sup>88</sup> As a result, the debate on the appropriations bill focused primarily on budgetary concerns and military

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<sup>79</sup> See Hicks, *supra* note 75, at 48.

<sup>80</sup> 6 CONG. REC. at 2157.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 2160-62.

<sup>83</sup> *Id.* at 2159-60.

<sup>84</sup> *Id.* at 2160.

<sup>85</sup> *Id.* at 2162.

<sup>86</sup> See *id.* at 2171, 2213, 2215, 2217, 2241, 2247-50, 2251-53.

<sup>87</sup> See 6 CONG. REC. 50 (1877).

<sup>88</sup> See Hicks, *supra* note 75, at 48. Without the protection of federal troops, the so-called "carpetbag" governments were quickly replaced by Democratic governments in South Carolina and Louisiana. See *id.*

matters such as protecting the Mexican border and dealing with Indians on the frontier.<sup>89</sup> At various points, however, members addressed themselves to the law enforcement role of the Army. Congressman Atkins, chairman of the House Appropriations Committee, noted that the withdrawal of troops obviated the need for immediate legislation,<sup>90</sup> but suggested that at a later time consideration be given to legislation regulating use of the Army with respect to state governments.<sup>91</sup> During consideration of an amendment to decrease the size of the Army and a separate amendment to increase funds for recruiting, the debate turned again to the merits of using the military as a police force. Congressman Schleicher, who offered the amendment to increase spending, stated that its purpose was to recruit troops to protect the Mexican border, adding, "I do not think that the business of the national Army is to police the States . . . ."<sup>92</sup> Taking the opposite point of view, Congressman Calkins endorsed a role for the Army in dealing with labor unrest.<sup>93</sup> Con-

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<sup>89</sup> Because of the President's action, the House Appropriations Committee did not include a rider limiting the use of the Army. H.R. 902, 45th Cong., 1st Sess. (1877) (enacted, as amended, Act of Nov. 21, 1877, ch. 1, 20 Stat. 1). See 6 CONG. REC. 287 (1877) (remarks of Rep. Atkins).

<sup>90</sup> 6 CONG. REC. at 288.

<sup>91</sup> *Id.* Congressman Atkins remarked:

I hope it will be the pleasure of this Congress before it adjourns its labours to mature and enact such legislation as will in the future be a guide to the Executive of this country in the use to which the Army of the United States is to be put, and that henceforth the Army shall never again be employed for such anti-republican and unconstitutional purposes as that of upholding or overthrowing State governments.

*Id.* Congressman Durham expressed the hope that such a bill would be forthcoming from the Judiciary Committee. *Id.* at 293. Congressman Singleton, while addressing similar matters, also raised broader concerns about the use of the Army for law enforcement purposes:

I am opposed to maintaining a standing Army for the purpose of putting down labor strikes in the States, at least until it shall be demonstrated to my mind that the State authorities are not able to put them down. If we are to deal with such disturbances, let it be done through the State Legislatures and through State militia, not through the Army of the United States.

We have had enough of United States troops stationed in the States to interfere in local affairs, intimidating citizens and to control elections. I believe, sir, the time has come when the country will no longer permit the Army to be used in any state for any such purpose.

*Id.* at 294.

<sup>92</sup> *Id.* at 295.

<sup>93</sup> *Id.* at 296. Congressman Calkins argued that [t]he recent riots in the States of the North have shown conclusively that for the protection of property and for the protection of life we must rely upon something besides the State militia.

. . . [T]he only security we had at that time was in the Army, as was shown by the calls for assistance made by the governors of the States upon the President. . . .

gressman Lutrell responded rhetorically: "Does my friend propose to maintain a standing army for the purpose of suppressing the rights of laboring men?"<sup>94</sup> His sentiments were echoed by other members as the debate increasingly focused on the use of the Army throughout the country in connection with labor strife.<sup>95</sup> Some members opposed the use of the Army as a police force, but emphasized the need for passage of the bill in order to provide compensation for members of the Army, whose pay had been withheld due to the failure of the previous appropriations bill.<sup>96</sup>

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*Id.* The economic collapse that followed the "Panic of 1873" resulted in frequent labor difficulties throughout the seventies. See Hicks, *supra* note 75, at 50-51.

<sup>94</sup> 6 CONG. REC. at 296.

<sup>95</sup> *E.g., id.* at 297 (remarks of Rep. Atkins); *id.* (remarks of Rep. Blackburn); *id.* (remarks of Rep. Crittenden). Congressman Wright declared:

There was . . . a strike among the laboring-men with regard to their rights to fix the amount of compensation they should receive. . . . No government has the power . . . to intervene between the workingmen of my District and any other persons.

*Id.* at 298. Congressman Pridemore stated that he would vote against the bill in its entirety in the absence of "a proviso that this Army is not to be used to crush the rights of the States or trample upon the rights of the citizens . . ." *Id.* He added:

[T]he only danger that threatens this Government is the growing strength and ultimate power of the Army to control the citizens. I do not want to see the Army of the United States ever able to control the labor of this country.

*Id.* Congressman Banks qualified his support for maintaining the Army "at the maximum number" by stating that the Army was not to be used "for the purpose of repressing any movement of the laboring classes of the country . . ." There are other and better methods of dealing with the interests of labor and maintaining the rights of industry and preserving the public peace." *Id.* at 301.

During the debates on the proposed bill and its amendments, the Democrats sought to portray the Republicans as favoring a large Army "to suppress labor strikes." *Id.* at 312 (remarks of Rep. Townsend). However, Congressman Baker, a Republican member of the Appropriations Committee, emphasized that the Republicans shared the Democrats opposition to the establishment of "a standing Army for the purpose of acting as a local police within the States or for the purpose of taking from the States the duty . . . of maintaining civil order within their borders, except where national aid is involved by the State governments in pursuance of the Constitution." *Id.* at 307.

Another Republican, Congressman Foster, added: "It is not the purpose of this side of the House . . . in advocating the retention of the present force to have them used as a mere police force of the states, but . . . what can the President of the United States do but respond to calls of the governors and legislatures of the States . . . ?" *Id.* He stated that, in his opinion, the restrictive proviso in the previous year's bill was "unconstitutional," but that he would be "willing perhaps to vote for some kind of proper and constitutional restriction as to the use of the Army by the Executive." *Id.*

<sup>96</sup> *E.g., id.* at 298, 307 (remarks of Rep. Hewitt). Congressman Clymer, a member of the committee, stated his opposition to the idea "that the Army shall be maintained for the purpose of preserving order within the States. That belongs legitimately to the States themselves." *Id.* at 299. He added, however, that he was willing to vote for the Committee bill and put aside for the moment his own "opinions as to numbers and restrictive provisions in order that the Army may promptly be paid." *Id.*

The amendment to decrease troop levels failed, while the amendment to increase funds for recruiting was approved.<sup>97</sup> Because much of the debate had centered around budgetary concerns, compensation for the troops, and strategic issues such as defense of the Mexican border, the outcome of these votes does not provide significant guidance on congressional intent regarding use of the Army for law enforcement purposes. The debate is important because it shows that members on both sides of the budgetary issues and from both parties expressed a critical view about the use of the Army for law enforcement purposes within the country.<sup>98</sup>

During the debate over subsequent amendments to the bill, the role of the Army was again discussed at various points.<sup>99</sup> One amendment that prompted substantial discussion was offered by Representative Hooker. The Hooker amendment prohibited use

of the military forces of the United States . . . in any States of the Union for the purpose of suppressing insurrection, maintaining order, or supporting any government or pretended government in such State, unless such forces shall have been first applied for by the Legislature of such State or by the executive thereof when the Legislature cannot be convened.<sup>100</sup>

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<sup>97</sup> *Id.* at 308.

<sup>98</sup> See notes 92-96 and accompanying text *supra*. Even Congressman Foster, a member of the House who defended the Army's law enforcement role, expressed his willingness to consider legislation limiting use of the Army by the Executive. *Id.* at 307.

<sup>99</sup> Congressman Henderson noted that, in several instances, the Army had been called into states to deal with labor strife, at the behest of Democratic governors; he added: "[T]his side of the House does believe in preserving law and order in the country at all times and under all circumstances, and . . . the Army has no higher duty to perform than to aid in accomplishing that object wherever a mob attempts to violate the law." *Id.* at 322. Congressman Townsend responded that "it is not the duty of the Federal Army in times of peace to act as a police force to preserve order in the States." *Id.* (remarks of Rep. Townsend). Although Congressman Giddings voiced support for additional troops to secure the Mexican border, he was quick to disassociate himself from those who supported a law enforcement role for the military: "We ask no Federal troops for police purposes either in our State or any other." *Id.* at 322. The debate then briefly returned to use of the troops during the elections. When Townsend defended the size of the Army as necessary to deal with problems on the Indian frontier, Congressman Harrison, a fellow Democrat, stated that "the Indians have been getting the better of us" because troops were being sent into the South "to prevent men from voting." *Id.* An amendment reflecting the previous year's concern about federal interference in state elections was offered by Congressman Walker. The amendment provided:

[N]o person engaged in the civil, military, or naval service of the United States shall . . . control any troops or armed men at or near the place where any . . . election is held in any state . . . unless it be necessary to repel the armed enemies of the United States . . . .

*Id.* at 331. The amendment was ruled out of order on the grounds that it changed existing law in an appropriations bill. *Id.*

<sup>100</sup> *Id.* at 334.



Hooker's fellow Democrats, while agreeing with the sentiments of the amendment, expressed opposition on the basis of several considerations: first, it basically restated the constitutional provision; second, President Hayes' withdrawal of troops from Louisiana and South Carolina rendered the amendment unnecessary; and third, it was feared that the issue might unnecessarily delay passage of the appropriations bill.<sup>101</sup> The amendment was defeated, reflecting the trend of the debate away from the passions of Reconstruction Era politics and towards a more general consideration of the propriety of using the military for law enforcement purposes.<sup>103</sup>

The Senate debate on the Army appropriations bill focused on the Indian Wars, defense of the Mexican border, and size and structure of the Army, with no attention to the law enforcement role of the military.<sup>104</sup> Subsequent consideration in the House centered on the question whether to accept the Senate's appropriation for a force level of 25,000 men (the authorized level) or insist on the House's ceiling of 20,000. By a margin of five votes, the Senate version was accepted without discussion of the Army's law enforcement role.<sup>105</sup>

### *B. Introduction of a Posse Comitatus Amendment*

During the following session of Congress, the Army appropriations bill, as introduced by the House Appropriations Committee, did not contain any restrictions on the use of the Army for law enforcement purposes.<sup>106</sup> On the second day of general debate on the

<sup>101</sup> *Id.* at 334-37 (remarks of Reps. Goode, Reagan, Ellis, and Young).

<sup>102</sup> *Id.* at 337. The amendment was defeated by a vote of 137 to 39. *Id.*

<sup>103</sup> *Id.* at 336. The trend is particularly evident in the remarks of Congressman Ellis: "[I]t would be well for a law coming from the proper committee at the proper time to define, to prescribe, and to limit the use of the Army of the United States. I would do this more as a warning and for an example and as a teaching to posterity than from any exigency which is upon us now."

*Id.* at 336.

<sup>104</sup> *Id.* at 412-23.

<sup>105</sup> *Id.* at 510-14.

<sup>106</sup> See 7 CONG. REC. 3554-55 (digest of the bill). During this session, Congress engaged in a major debate on the size and structure of the Army. Congressman Hewitt, introducing the bill drafted by the Appropriations Committee, H.R. 4867, 45th Cong., 2d Sess. (1878) (enacted, as amended, Act of June 18, 1878, ch. 263, 20 Stat. 152), primarily discussed reorganization of the Army, but also addressed the role of the military in law enforcement:

Now we are told that we ought to have a large Army and a very large Army, in order to put down impending strikes. I take issue with that proposition. It is not in accordance with the theory of this Government that the United States is to maintain an Army for the purpose of restraining any portion of its citizens in their just rights.

. . . I will be told that strikes result in disorder. So, unhappily, they have heretofore; so they will again. But it forms no part of the duty of the National

legislation, however, Congressman Kimmel proposed an amendment providing:

[I]t shall not be lawful to use any part of the land or naval forces of the United States to execute the laws either as a *posse comitatus* or otherwise, except in such cases as may be expressly authorized by act of Congress.<sup>107</sup>

In his introductory remarks, Congressman Kimmel expounded at length on the traditional fear of standing armies and preference for state militia. His concern was not with the use of federal troops against "external foes":

Throughout the entire discussion of the standing army [in the post-Revolutionary period], it is clear that the American spirit would not tolerate the possibility of employing the army for the execution of the laws. The opinion of the times was distinctly and unanimously against it. This opinion is embodied in the Constitution. It is evident in the grouping of the powers conferred on Congress. The war power is given in article 1, section 8, in clauses numbered 11, 12, 13 and 14 . . . .

In these four clauses is conferred the power to declare war and the power to obtain the means for carrying on the war.<sup>108</sup>

He contrasted the war powers with the "separate and distinct" provisions of clauses 15 and 16 of article I, section 8, the powers of the President with respect to the militia:

In these two clauses is conferred the power to execute the laws of the Union, suppress insurrections, and repel invasions, and the means for exercising this power. These two powers are as distinct as are the means to be employed for the exercise of them, *the Army*

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Government to repress or to check such disorders. In the first place it is the duty of the police, where there is one; where there is no police it is the duty of the sheriff; and where the sheriff is unable to check disorder it is the duty of the State to do it.

It was intended by the framers of the Constitution that the States should not only be sovereign within their own limits, but that they should maintain order within their own limits, and, if they fail to do so, that they should and must take the consequences. The provision of the Constitution which gives authority to the General Government to furnish troops and give assistance in case of insurrection was intended only as a last resort, where the State had done its full duty in maintaining a police and a citizen soldiery and had found itself overpowered.

*Id.* at 3538.

<sup>107</sup> *Id.* at 3586. The general debate extended over a 4-day period. *Id.* at 3534-55, 3578-89, 3631-46, 3669-84. Following the general debate, the bill was given a section-by-section reading for amendments. During the latter period, a somewhat different version of the amendment, offered by Congressman Knott, was offered, debated, amended and approved. The Knott amendment is discussed in notes 122-127 and accompanying text *infra*.

<sup>108</sup> *Id.* at 3581 (remarks of Rep. Kimmel). See also *id.* at 3579-81; 3583-84.

*for defense against external foes, the militia for the suppression of internal resistance, the Army to be created by Congress, because war is a subject of national jurisdiction only; the militia to be created jointly by Congress and the States, because the execution of the laws of the Union and the suppression of insurrections may involve questions of disputed jurisdiction.*<sup>109</sup>

Although Kimmel's view on the permissible use of the Army in the domestic sphere would be disputed in the subsequent debate, the foregoing passage is important because it demonstrates an intent by the framer of the Posse Comitatus amendment that it not be used to restrict employment of the Army pursuant to the war powers.<sup>110</sup>

Kimmel's proposal was not simply an attempt to define the appropriate roles of the state and federal governments; rather, he was concerned with the broader issue of the use of the military for essentially civilian purposes.<sup>111</sup> Reports from various military officers and the War Department were inserted in the record detailing military participation in law enforcement activities in the North as well as the South, including requests from military officers for a policy determination that they not be placed at the disposal of local law enforcement officials.<sup>112</sup> He placed blame for this practice upon a statement by the Attorney General to the effect that United States

<sup>109</sup> *Id.* at 3581 (emphasis added).

<sup>110</sup> *See also id.* at 3585.

In his introductory remarks, Congressman Kimmel said:

Notwithstanding this plain intent of the Constitution, the standing Army has been largely employed in all sorts of uses, at the request of all sorts of people, without regard even to such law as has been enacted for the direction of its employment in these unconstitutional uses. Generals commanding military departments, north, south, and east, report the employment, hundreds of times, of hundreds of detachments of the standing Army in the suppression of strikes, in the execution of the local laws, in the collection of the revenue, the arrest of offenders, &c., at the request of governors, sheriffs, and other local state civil authorities and United States attorneys, marshals, assistant marshals, and internal-revenue officers, in such open and flagrant violation of the law that these generals suggest the enactment of such laws as will define the duties of the soldiery . . . .

*Id.* at 3581.

<sup>112</sup> *Id.* at 3581-82. Congressman Kimmel emphasized that his concern extended beyond use of the Army in furtherance of Reconstruction Era policies in the South:

Governors, sheriffs, and other State and local civil officers, and the United States district attorneys, assistant marshals, marshals, collectors of revenue, and other revenue officers, requested these generals, and these generals at the request of these officers precipitated [sic] these troops upon the people . . . . The generals report these practices as occurring between 1870 and 1877, five years after the surrender and continuing until now. Moreover, some of them occurred in Michigan, some in New York; certainly these States never imperiled the life of the Republic.

*Id.* at 3582.

marshals could use the Army as a posse comitatus.<sup>113</sup> Of similar concern to Kimmel was a communication requesting an increase in the size of the Army in which the Secretary of War had stated: "Federal troops may be required not only for the protection of our frontiers, but also to preserve peace and order in our more populous interior . . . . *The Army is to the United States what a well-disciplined and trained police force is to a city.*"<sup>114</sup> Kimmel declared that the Secretary's proposal "is too defiant of the American spirit of public liberty to be permitted to pass unrebuked."<sup>115</sup>

In opposing "an increase in the standing Army to police the States," Kimmel made only passing reference to events in the South. Instead, he focused on the "crash of 1873" and the ensuing "hardship" in which the "masses became discontented and sought redress through strikes."<sup>116</sup> In describing the events that followed, he spoke almost exclusively of states in the North. Only near the end of his remarks did he refer specifically to the role of the Army during the disputed 1876 election and in the southern states during the Reconstruction period.<sup>117</sup> He then returned to his criticism of the Secretary of War for the proposal to use troops in the urban areas of the North.<sup>118</sup> As the speech drew to a close, it took on a bitterly partisan cast, describing President Hayes as the "usurper" and accusing the Republicans of raising false fears of civil disorder in order to promote an increase in the size of the Army.<sup>119</sup> He concluded:

I know we cannot hope to do more now than to assist at the reduction of the Army, and, at the passage of the amendment I offer, to restrain the Army so that it may not be used as a posse comitatus without even the color of law. I trust, however, at the next session we may obviate all necessity for any but a very small standing Army by the passage of a law to organize, arm, and disci-

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<sup>113</sup> *Id.* at 3582. Congressman Kimmel added:

If . . . the standing Army of the United States can be used as a *posse comitatus* for the execution of the laws, we are living under a military despotism unqualified and absolute, for what is military despotism but the use of troops against the people without due authority of law? It matters not how many the troops, nor by whom commanded, whether a platoon by a corporal or an army by a general, whether directed by a deputy collector of revenue or the President of the United States

*Id.*

<sup>114</sup> *Id.* (emphasis added) (quoting George McCrory, Sec'y of War, 1877).

<sup>115</sup> *Id.* at 3583.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

pline the militia to be used to execute the laws of the Union and suppress insurrection as was intended by "our fathers who framed the Constitution."<sup>120</sup>

In summary, Kimmel's introductory remarks in behalf of the amendment were woven from four strands: first, traditional distrust of a standing Army and the related preference for the militia and deference to states' rights; second, the role of the federal army in the South during the 1876 elections and during the Reconstruction period; third, the use of the Army for law enforcement purposes during contemporary labor strife; and fourth, the proposal from the Secretary of War for use of the Army for domestic purposes. While Reconstruction Era politics may have been the spark, Kimmel's remarks make it clear that a deep distrust of a military role in civil matters—drawn from both historical and contemporary sources outside the Reconstruction context—was a major consideration in the development of his amendment. At the same time, his express separation of the military's war powers function from law enforcement role suggests a strong intention not to interfere with external issues requiring the application of military force. Moreover, the strong preference for the role of the states in law enforcement underscores the absence of an express intention—at least on the part of the sponsor of this amendment—that the Act have extraterritorial application.<sup>121</sup>

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<sup>120</sup> *Id.*

<sup>121</sup> Although there was little discussion of Kimmel's amendment during the general debate, his remarks were echoed by other members. Many expressed opposition to the use of federal troops in lieu of state militia to deal with strikes and domestic law enforcement, particularly in the absence of a request from the states for federal aid. *E.g., id.* at 3634-35 (remarks of Rep. Butler); *id.* at 3676 (remarks of Rep. Bridges); *id.* at 3677 (remarks of Rep. Durham); *id.* at 3679 (remarks of Rep. Wright); *id.* at 3682 (remarks of Rep. Cobb); *id.* at 3683-84 (remarks of Rep. Cox); *id.* at 3717 (remarks of Rep. Harrison); *id.* (remarks of Rep. Clark); *id.* at 3718 (remarks of Rep. Ellis); *id.* at 3726-27 (remarks of Rep. Crittenden); *id.* at 3735 (remarks of Rep. Hardenbergh). Other statements echoed the previous year's concern over the use of federal troops in connection with the electoral process. *E.g., id.* at 3677 (remarks of Rep. Hewitt); *id.* at 3677 (remarks of Rep. Mills); *id.* at 3677-79 (remarks of Rep. Southard); *id.* at 3715-17 (remarks of Rep. Harrison); *id.* at 3718 (remarks of Rep. Ellis); *id.* at 3723 (remarks of Territorial Delegate McGinnis); *id.* at 3724 (remarks of Rep. Sparks).

A differing point of view was expressed by a number of members during both the general debate and during consideration of an amendment to restore the troop cut contained in the bill. The Republican leader, Congressman Garfield, addressed Hewitt's remarks about the size, organization, and deployment of the Army. *Id.* at 3635. Although he did not discuss the Posse Comitatus amendment, he defended President Hayes' use of federal troops in domestic strife as taken in accordance with the Constitution. *Id.* at 3637-38. Congressman Garfield entered into the Congressional Record communications from ten northern states requesting federal troops during the previous year. *Id.* Congressman Harrison responded by criticizing

### C. House Action on the Posse Comitatus Amendment

During the reading of the bill for amendment, Congressman Knott offered the following revision of Congressman Kimmel's Posse Comitatus amendment:

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use of the Army "to protect society against lawlessness." *Id.* at 3638.

Congressman Humphrey spoke at length on the advantages of the standing Army and the weaknesses of the militia. *Id.* at 3587. In an apparent reference to the Army's role in responding to labor disturbances, he noted that during "the difficulties of last summer, it was then clearly proven that regular troops were much more effectual, and their duties more respected, than the State militia." *Id.* He commented favorably on the "patriotism" of the troops who, even in the absence of an appropriation, "were called upon to travel from the Rocky Mountains to the cities of the East and the West to protect property and life from violence during the 'strikes.'" *Id.* at 3588. In contrast to Kimmel's emphasis on the role of the States, Representative Humphrey asserted that the federal government had proved more effective in protecting liberties, and that the States had actively sought the assistance of the Army "to restrain domestic violence." *Id.* at 3589. Congressman Humphrey's speech was directed primarily at Kimmel's statements about the size of the Army, and he did not address specifically the Posse Comitatus amendment. Similar remarks, defending the domestic use of federal troops without specific reference to the Posse Comitatus amendment, were expressed by Congressman Phillips. *Id.* at 3615-17. *See also id.* at 3618 (remarks of Rep. Caldwell).

Other members opposed Hewitt's views on the size of the Army but expressed some hesitation about an expanded domestic role for federal troops. Congressman Calkins used the occasion to note that although some newspapers had construed his remarks during the previous year's debate as advocating use of the Army to suppress strikes, he did not oppose strikes "by peaceable and lawful means;" rather: "[m]y idea then was and is now that we ought to have a standing army to suppress insurrections of all kinds where they threaten the public peace. But in no way do I believe that an Army should be kept as a menace to prevent that which is lawful." *Id.* at 3643. After discussing the size of the Army and the need for a force sufficient to deal with problems on the Mexican border and Indian frontier, he criticized Hewitt's proposed reliance on the militia. *Id.* at 3645. Although Calkins called for the Army to be available "to suppress these insurrections when they . . . pass beyond the control of a sheriff's *posse comitatus*," he did not advocate a direct military role in law enforcement:

[W]henver the governor of any State who is the magistrate and the executive, charged with the execution of the law of that particular State, sees danger imminent and believes it to be for the best interest of all that the military should interfere, he should have the power to call upon the President for such military force as is necessary to preserve peace and protect life and property.

*Id.* Sensitive to changes of federal interference in state affairs, he even suggested that the state governor should control the federal forces. *Id.* Congressman Schleicher, a Democrat, noting that other members had discussed the use of the Army "in the States as a police force," stated that it was the constitutional duty of the President to respond "when called upon under proper circumstances . . . to aid the authorities of a State in suppressing riots and domestic violence." *Id.* at 3669-70. Similarly, Congressman Cannon declared: "I do not want the Army to be used to police the States," but noted that the previous year's resort to troops had been "put in motion, as the Constitution provides." *Id.* at 3681. Congressman Cain noted that federal troops had been employed in his state "in pursuance of a call made by the executive of the State in pursuance of authority conferred by the Constitution." *Id.* at 3683. Use of the Army in the South to protect "citizens who desired to exercise the rights of citizenship and to speak and vote as they thought best" was defended by Congressman Henderson. *Id.* at 3717.

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 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 fine not exceeding \$10,000 or imprisonment not exceeding two years, or by both such fine and imprisonment.<sup>122</sup>

Congressman Knott was concerned with the use of the military to achieve objectives that were within the existing or potential capabilities of state and federal civilian authorities.<sup>123</sup> He commented favorably on the role of federal troops when acting under constitutional

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<sup>122</sup> *Id.* at 3845 (remarks of Rep. Knott). In contrast to the Kimmel proposal, *see* text accompanying note 107 *supra*, the Knott proposal specified criminal penalties for violations of the Act, deleted the reference to naval forces and made several other changes in phraseology not relevant here. One commentator has speculated that the reference to naval forces was deleted as not germane to an Army appropriations bill. Meeks, *supra* note 23, at 100-01.

The Republican leader, Congressman Garfield, raised a point of order against the amendment, contending that by imposing "a new penalty" and placing "the command of the Army into the hands of the Congress," the amendment violated a rule of the House against changing existing law through an appropriations bill except for purposes of "retrenchment." 7 CONG. REC. at 3845. Knott responded that the amendment was simply designed to enforce existing law: "[e]ven without this amendment it will be unlawful for an officer of the United States to use any portion of troops under the pretext of enforcing the law unless he is expressly authorized to do so by an act of Congress." *Id.* The point of order was overruled for substantially the same reason:

*The first portion of this section merely recites what is the existing law as appears from the face of the amendment, and it is therefore but a re-enactment of what the law now is, and the Chair is of the opinion that that portion of the section is clearly within the rules. As to the latter portion of the proposed section, the Chair is in some doubt as to whether it is within the rule; but as this kind of legislation in appropriations bills has been customary heretofore the Chair will not take the responsibility of ruling it out, but will submit the section to the committee.*

*Id.* at 3846. (emphasis added).

<sup>123</sup> *Id.* at 3846-47. When he introduced the amendment, Congressman Knott added:

[T]he Army of the United States has been used in a hundred instances under the pretext of enforcing the laws without one scintilla of authority to be found in any enactment of Congress . . . .

It occurred to me that now, when this country is in the enjoyment of profound peace, is a fitting time for us to say that this practice shall no longer continue; that the Army of the United States shall be amenable to the civil law; that it shall not be employed under the pretext of enforcing any law, unless authority is expressly conferred by statutory enactment.

*Id.*

authority in suppressing domestic violence, but condemned their role in routine law enforcement.<sup>124</sup> Although proponents of the amendment criticized use of the Army during the 1876 election,<sup>125</sup> Congressman Knott stated that the amendment would not preclude use of federal troops “to protect the elective franchise” or “enforcement of . . . the civil-rights bill” because Congress had provided express statutory authority to use the military in those circumstances.<sup>126</sup>

The extraterritorial effect of the Act was not addressed by Congressman Knott, and his remarks do not reflect any concern with limiting the use of the military in foreign affairs or in support of the war powers. In response to questions about the scope of the amendment, however, he used sweeping language:

It applies to every employment of the Army or any part of the Army of the United States in cases for which there is no congressional authority upon our statute book.<sup>127</sup>

Given the focus of the debate on domestic matters, this statement alone does not provide direct support for extraterritorial applicability. It does support the military purpose doctrine, which holds that actions in furtherance of an authorized military function do not violate the Act even if civilian law enforcement is an incidental beneficiary.

Foreign affairs implications were raised, however, in a proviso offered by Congressman Schleicher of Texas:

*Provided*, That this section shall not apply on the Mexican border or in the execution of the neutrality law elsewhere on the national boundary line.<sup>128</sup>

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<sup>124</sup> *Id.* at 3849. Congressman Knott added: “[T]his amendment is designed to put a stop to the practice, which has become fearfully common, of military officers of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws.” *Id.* Similar views were expressed by Rep. Hewitt. *Id.* Opposing views were expressed by Rep. Burchard, *id.* at 3848, and Rep. Aldrich, *id.* at 3849-50.

<sup>125</sup> *E.g.*, *id.* at 3848 (remarks of Rep. Hooker); *id.* at 3850-52 (remarks of Rep. Southard); *id.* at 3850-51 (remarks of Rep. Ellis); *id.* at 3852 (remarks of Rep. Robertson). *See also id.* at 3847 (remarks of Rep. Mayhan); *id.* at 3850-51 (remarks of Rep. Herbert). Opposing views were expressed by Rep. Hale, *id.* at 3847, and Rep. Dunnell, *id.* at 3851.

<sup>126</sup> *Id.* at 3849; *see* note 133 and accompanying text *infra*.

<sup>127</sup> *Id.* at 3849. His introductory remarks emphasized the limited nature of Presidential authority to use the Army. *Id.* at 3847. In addition, the debate makes it clear that the Amendment was seen as applicable to subordinates following an order to engage in unauthorized acts, as well as to superiors who issued the orders. *Id.* at 3847-48 (remarks of Reps. Pridemore, Knott, Elam, Mayhan, and Hooker); *id.* at 3849 (remarks of Rep. Mills); *id.* at 3851 (remarks of Rep. Herbert).

<sup>128</sup> *Id.* at 3848 (remarks of Rep. Schleicher). The neutrality laws prohibited, *inter alia*, a person within the United States from providing weapons or other assistance to private vessels



The main focus of Schleicher's remarks dealt with "the robbery of cattle" on the Mexican border,<sup>129</sup> but he also addressed external affairs.<sup>130</sup> Schleicher's proviso was rejected,<sup>131</sup> which provides some indication of congressional intent that the Posse Comitatus Act not be limited territorially. The debate on Schleicher's amendment, however, focused primarily on the Knott amendment in general rather than Schleicher's proviso.<sup>132</sup> The significance of Schleicher's amendment also is minimized somewhat as a result of Representative Knott's remarks on the provision in his amendment for exceptions based upon expressly authorized use of the Army:

There are, as I have already remarked, particular cases in which Congress has provided that the Army may be used, which this bill does not militate against, such as the case of the *enforcement of the neutrality laws*, the enforcement of the collection of customs duties and of the civil-rights bill, and one or two other instances.<sup>133</sup>

Moreover, the language of the proviso—"on the national boundary line"—suggests a domestic orientation to the proviso, and an implicit understanding that the Posse Comitatus amendment had no application across the border. Consequently, while some importance can be attached to the defeat of Schleicher's proviso, the express statutory authority for use of the troops to enforce the neutrality

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armed for a military expedition against a nation at war with another nation with whom the United States was at peace. See R.S. § 5258 (1873) (current version at 22 U.S.C. § 461 (1976)).

<sup>129</sup> *Id.* Congressman Schleicher's remarks suggest a contemporary understanding that the military did not have the authority to engage in routine law enforcement actions:

[O]ne of the great difficulties in the way of the efficient protection of the Mexican line and in the prevention of the robbery of cattle on that line is the absence of the power in the soldiers to inquire when they meet Mexicans driving cattle as to the business in which they are engaged.

Many of the owners of Texas cattle live in Mexico, and frequently men come over as employees of the Mexican owners. If they happen to meet a scout of soldiers, the soldiers are not bound to inquire whether they are robbers or employees. Consequently it has been the custom, as it was the only efficient mode of service to send some civilian along as deputy sheriff, who had the right to find out and if necessary to assist in making the arrest. That would be completely broken up unless this amendment is adopted.

*Id.*

<sup>130</sup> *Id.* Congressman Schleicher reasoned: "[T]here may be, in the case of war between England and Russia, a necessity for such provision on the Canadian frontier and elsewhere; that the execution of the neutrality laws will make it necessary for civil officers to accompany the military." *Id.*

<sup>131</sup> *Id.* at 3849.

<sup>132</sup> *Id.* at 3848-49.

<sup>133</sup> *Id.* (emphasis added). See note 39 *supra* (list of statutes in effect in 1878 but authorized use of the armed forces for law enforcement purposes).

acts makes it somewhat uncertain whether the House rejected the amendment in order to apply the Posse Comitatus amendment to foreign policy matters, or whether the Schleicher amendment was regarded as unnecessary.

Another source of congressional intent may be found in the debate over the amendment's requirement that use of the Army be "expressly authorized by act of Congress." In contrast to the legislation finally adopted, the Knott amendment made no exception for actions authorized by the Constitution. This led several members to oppose the amendment as an unwarranted restriction on the Presidential authority to act under article IV, section 4 of the Constitution to protect States, upon application, against "domestic violence."<sup>134</sup>

In response, several supporters of the Knott amendment asserted that the President could not act even under application from the States, without express authority from Congress.<sup>135</sup> Although he did not expressly reject this view, Congressman Knott endeavored to assure the House that the legislation was not designed to restrict use of the Army in furtherance of article IV, section 4 of the Constitution, which guarantees to the States a republican form of government.<sup>136</sup> Although article IV, section 4 does not mention the Army expressly, Congressman Knott's remarks should be viewed in the context of longstanding express statutory authority for the President to use military force under that provision of the Constitution.<sup>137</sup>

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<sup>134</sup> 7 CONG. REC. at 3846 (remarks of Rep. Banks); *id.* at 3847 (remarks of Rep. Hale); *id.* at 3848-49 (remarks of Rep. Lapham); *id.* at 3851 (remarks of Rep. Gardner). Article IV, section 4, of the Constitution does not expressly authorize the use of federal troops; rather, it provides:

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.

<sup>135</sup> *E.g.*, *id.* at 3845 (remarks of Rep. Hooker); *id.* at 3851 (remarks of Rep. Tucker).

<sup>136</sup> *Id.* at 3849. Congressman Knott stated:

The Constitution, sir, guarantees to every State a republican form of government and protection from domestic violence on the call of the governor of the State, when the Legislature cannot be convened, and that provision is enforced under a statute sufficiently comprehensive to embrace all possible causes that can arise under it. The amendment proposed does not conflict with that and it is surprising to me that gentlemen should be so sensitive when an attempt is made here to prescribe the limits and bounds beyond which the Army of the United States cannot go.

*Id.* at 3849. Knott and the leadership endeavored to assure the House that the amendment would not work a change in the legal bases for use of the Army. See note 122 and accompanying text *supra*.

<sup>137</sup> Authority for the President to mobilize state militia to combat domestic violence

As a result, Congressman Knott's remarks do not resolve the important question as to whether the House intended to require that the use of federal troops be mentioned expressly even when the federal executive is empowered to act, and the only effective manner of acting is through application of military force.

Because Congressman Knott did not discuss whether his amendment permitted the use of federal troops in furtherance of the President's constitutional powers alone, irrespective of whether Congress enacted legislation authorizing use of the Army, it can be argued that the amendment and his references to the enabling statutes suggest an intent that there be no use of the troops in the absence of such statutes. Under this interpretation, the Posse Comitatus amendment would preclude the President from fulfilling constitutional responsibilities even in circumstances where the only effective way to execute those responsibilities would be through the application of military force. Such an interpretation would raise a serious constitutional question by placing the Act squarely in conflict with executive powers arising under the Constitution.<sup>138</sup>

It is not necessary to adopt such a rigid interpretation of the requirement for express authorization in order to effectuate the primary purpose of the Act—to prevent the military from exercising those law enforcement responsibilities otherwise within the existing or potential capabilities of state forces and federal civilian officers. An alternative interpretation of the intent of the House is that the phrase “expressly authorized” refers primarily to the power of the United States to act, and that use of federal troops is permissible when the action called for necessarily requires the application of military force. This interpretation would square the numerous statements in opposition to the use of federal troops for law enforcement with the House's recognition that when civil authorities were unable to suppress domestic violence, military force would be needed. It would also be consistent with Congressman Kimmel's view of the predecessor amendment as inapplicable to the war powers. Moreover, this interpretation permits the statute to be read in a manner that avoids an irreconcilable conflict with Presidential authority. It reflects the concern expressed in the House that the

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dates from the Act of May 2, 1792, 1 Stat. 264. Use of federal troops for this purpose was first authorized in the Act of Feb. 28, 1795, 1 Stat. 424.

<sup>138</sup> See *In re Neagle*, 135 U.S. 1 (1890); cf. *In re Debs*, 158 U.S. 564 (1895) (Congress may authorize use of the military in conjunction with legislative powers under the interstate commerce clause). *But cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640-55 (1952) (Jackson, J., concurring) (limiting exercise of presidential power).

military not be used in lieu of civilian authorities if the matter could be dealt with without application of military force. In the context of an overseas application, this would support the use of military force only when such force would suffice as, in an Entebbe-style raid designed to save lives, but not necessarily where a routine law enforcement matter is involved, as in an investigation and arrest of a United States citizen who has committed a criminal act in the United States.<sup>139</sup>

Aside from the Schleicher amendment and the general discussion of constitutional powers, there were no other statements potentially touching upon territorial limitations. The Posse Comitatus amendment was approved by the House in the form introduced by Congressman Knott.<sup>140</sup>

#### D. Senate Modification of the Amendment

The Army appropriations bill reached the Senate floor with less than 2 weeks remaining in the session.<sup>141</sup> The Senate Appropriations Committee had deleted the Knott amendment,<sup>142</sup> and the main focus of debate in the Senate concerned the size of the Army.<sup>143</sup> While discussing this issue, several senators touched upon the law enforcement role of the Army.<sup>144</sup> Senator Bayard addressed the

<sup>139</sup> If the investigation and arrest took place overseas, absent foreign policy considerations, the extraterritoriality of the Act would be squarely presented without the complications of the war powers and foreign affairs responsibilities of the President.

<sup>140</sup> The unrecorded vote in the Committee of the Whole was 120 to 112. 7 CONG. REC. at 3852. The recorded vote in the House on this amendment was 130 to 117. *Id.* at 3877. The vote was split almost strictly along party lines. *Compare id.* at 3877 with 6 CONG. REC. 53 (1877) (party divisions in the Forty-fifth Congress shown in the vote for Speaker).

<sup>141</sup> 7 CONG. REC. 4181 (1878) (remarks of Sen. Blaine).

<sup>142</sup> *Id.* Senator Blaine, for the Appropriations Committee, explained the differences between the House bill and the version reported by the Senate Appropriations Committee. *Id.* at 4180-81. When he reached section 29 of the House bill, which contained the Knott amendment, he simply stated: "The Committee of Appropriations recommends that that be struck out." *Id.* at 4181. When questioned whether the Committee's position was unanimous in relation to section 29, he responded: "It is not." *Id.* (remarks of Sen. Blaine). The Senate agreed to limit debate under the 5-minute rule (per member) on all provisions except two, one of which was section 29. *Id.*

<sup>143</sup> *Id.* at 4181. The House had passed a bill reducing the force from 25,000 to 20,000 troops. The version proposed by the Senate Appropriations Committee did not follow the House in this respect. *Id.*

<sup>144</sup> Senator Sargent, who would subsequently play a prominent role in support of a Posse Comitatus amendment, asked the Senate to separate concern about misuse of the Army from the role of the Army on the frontier:

The Army is the police force on the frontier, throughout the Territories, in Arizona, the borders of Texas, the borders of the Indian Territory, up in Montana, and Idaho, and Colorado.

. . . .

Knott amendment directly, declaring that he wanted "to see, restored to the bill an amendment of the House of Representatives . . . that prevented the improper use, the unlawful use of the United States Army."<sup>145</sup>

In Senator Bayard's absence on the following day, Senator Kernan introduced the Bayard proposal.<sup>146</sup> The source of the immediate

We all have a common interest in the peace and prosperity of the Territories. For this reason, without any partisan feeling at all, without believing that the Army will ever be used for any purpose hereafter that all would not thoroughly approve of, I trust there will be no serious objection to [an Army of 25,000 soldiers].

*Id.* at 4583. Senator Maxey also indirectly referred to the issues raised in the House: A great deal in the way of arousing prejudice has been said upon this subject as to the mode and manner in which the Army has been used here. There is as much injustice in attempting to arouse prejudice against an army because they obey the lawful orders of those who are placed over them as there would be in attempting to arouse prejudice against a sheriff for obeying the proper judgments, orders, decrees, and sentences of a court of competent jurisdiction. It is a question, therefore, not of politics, but it is a question of the protection of those entitled to protection under the Constitution.

*Id.* at 4185. Senator Merrimon stated that while he did not favor using an appropriations bill as a vehicle for general legislation, he wanted to express his feelings about use of the Army:

This is no time for the purpose of keeping up the Army to control elections in the States and to terrorize over the people; and for one I will not consent to do it.

*Id.* Senator Merrimon spoke at greater length on the use of the Army during the elections during the subsequent debate on a Posse Comitatus amendment. *Id.* at 4245. Senator Butler agreed that the the troops had been "used improperly," but suggested it was not the fault of the Army. *Id.* at 4185-86.

<sup>145</sup> *Id.* at 4192.

<sup>146</sup> *Id.* at 4239-40. The amendment provided:

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] 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 THE CONSTITUTION or by act of Congress; and no money appropriated by this act of Congress 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 fine not exceeding \$10,000 or imprisonment not exceeding two years, or by both such fine and imprisonment.

*Id.* at 4240 (emphasis and brackets added; the brackets enclose material in the House bill deleted in the Bayard-Kernan amendment; the material in upper-case was added to the House bill in the Bayard-Kernan amendment).

When Bayard returned to the debate, he declared that his object in offering the amendment "was to obtain passage of the military appropriations bill at the earliest possible day." *Id.* at 4296. In an apparent reference to the effect of a similar measure in causing the failure of the House and Senate to pass the Army appropriations bill in the previous Congress, he expressed hope that the amendment would "prevent disagreement between the two Houses" and would enable the Senate "to unite with the House in a desire to enact this bill into a law." *Id.*

Bayard offered the following explanation of his changes in the House bill, suggesting a

grievance noted by Senator Kernan was a circular issued by the Attorney General during the 1876 election authorizing federal marshals to command military forces on the theory that all persons over the age of 15, including military personnel, comprised the posse comitatus available to law enforcement authorities.<sup>147</sup> Senator Beck added:

I understand the whole object of this section as amended is to limit the use by the marshals of the Army to cases where by law they are authorized to call for them, and not to assume that they are in any sense a posse comitatus to be called upon when there is no authority . . . .<sup>148</sup>

If this had been the extent of the debate, it would provide substantial evidence of Senate intent to limit narrowly the scope of the bill. The subsequent debate, however, indicates that the Senate was concerned with more than the traditional act of the sheriff or marshal in raising a posse comitatus. An opponent of the measure, Senator Windom noted:

[T]he discussion thus far has proceeded on the assumption that it was only when the Army was used as a *posse comitatus* that it

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bipartisan cast to the proposal:

Upon a friendly and personal consultation with gentlemen of both parties in this Chamber, I found the idea was acceptable to permit the section to stand as the House had sent it to us, with the evisceration of three or four words capable of an uncivil construction, and the insertion of one or two more that should have the effect to round off the proposition that the Army of the United States is the creature of the Constitution and the laws of the United States, and that in this land we know of no power that is not subordinate to law.

*Id.* He portrayed the amendment as nothing more than a description of the existing state of the law:

[I]n the present case the proposition was to recite that it was not lawful to employ the Army of the United States in violation of the law or the Constitution, but that the method of its appointment must simply be in accordance with the law of its creation and the powers whereby alone it must exist. In that it struck me as being nothing more than a truism.

*Id.*

<sup>147</sup> *Id.* Senator Beck, a supporter of the amendment, traced the 1876 circular to an Attorney General's opinion issued in 1854, which stated:

[T]he posse comitatus comprises every person in the district or county above the age of fifteen years . . . whatever may be his occupation, whether civilian or not, and including the military of all denominations . . . . The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any way affect their legal character. They are still the posse comitatus.

*Id.* (quoting 6 Op. Att'y Gen. 466, 473 (1854)). Senator Teller also indicated that his support for the amendment stemmed from a desire to reverse the opinion of the Attorney General and subsequent use of the Army of federal marshals. *Id.* at 4296.

<sup>148</sup> *Id.* at 4241.

was forbidden. But the section says "when used as a *posse comitatus* or otherwise;" whether used in that way, or as a portion of the Army, it is forbidden.<sup>149</sup>

Those opposing the amendment claimed that it would leave the United States without a mechanism to enforce the laws.<sup>150</sup> A more

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<sup>149</sup> *Id.* at 4241 (emphasis added). In response to Senator Windom's statement, Senator Sargent replied, "[Use of the Army] ought to be [forbidden] unless it is according to the Constitution and the laws." *Id.* Later in the debate, Senator Windom repeated his concern with the phrase "or otherwise":

I want to make only a single suggestion with reference to what I think to be a fair construction of this proposition as it now stands amended. It should be read as if the words "posse comitatus or otherwise" were omitted, because the words "or otherwise" cover everything, so that I will read it:

From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress.

*Id.* at 4245. Senator Edmunds was also troubled by the expansive implications of the phrase "or otherwise." *Id.*

Senator Hill, a supporter of the amendment, expressed a different view; he urged that the phrase "as a posse comitatus or otherwise" be struck in its entirety because it implied that previous use of the Army as a posse comitatus was lawful. *Id.* at 4246. Indeed, his entire concern was with the posse comitatus problem and did not even acknowledge that the military could ever be used to enforce the laws; instead, he contended that when properly summoned, the Army would merely suppress domestic violence, leaving execution of the laws to civil authorities. *Id.* at 4247. Although he proposed an amendment to delete the aforementioned phrase, *id.* at 4248, Hill later determined that the undesired implication was not present and he withdrew the amendment. *Id.* at 4295. Another supporter of the amendment, Senator Maxey, agreed that the military did not fall within the common-law posse comitatus available to the sheriff, but noted:

Section 29 . . . is simply in accord with the law which authorizes the military to be called out to aid in the execution of the laws in all cases where the Constitution of the United States and laws made in pursuance thereof justify it, and in no other case can they be called or ought they to be or can they be lawfully so called.

*Id.* at 4303.

<sup>150</sup> *E.g., id.* at 4241, 4243 (remarks of Sen. Blaine); *id.* at 4295-96 (remarks of Sen. Kirkwood). Senator Merrimon responded that the amendment simply placed the federal marshal on the same footing as the local sheriff; that is, he could call on the citizenry to act as a posse comitatus. If civil measures failed, then troops could be called in "after a proclamation was issued in pursuance of the laws of the United States." *Id.* at 4244-45. Similar views were expressed by Senator Hill. *Id.* at 4248.

Another objection to the amendment related to the implication that it contemplated criminal penalties for actions by the President, who, it was suggested, was subject only to impeachment. *Id.* at 4298 (remarks of Sen. Matthews). Senator Bayard responded: "I never heard before that the President of the United States or that any other officer of this government is less responsible to the laws of the land for his infraction of them than the humblest citizen." *Id.* at 4298. *See also id.* at 4302-03 (debate concerning application of the Posse Comitatus amendment to the Secretary of War and senior Army officers). An opponent also argued that the amendment would hinder the operations of the Army by permitting citizens to seek out indictments against individual officers. *Id.* at 4299 (remarks of Sen. McMillan).

serious question arose concerning whether the amendment prevented members of the military from acting if they were present during an emergency and possessed no "express" authority to act. Senator Merrimon, a supporter of the amendment, responded:

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 the order of his colonel or captain, but he would have done it as a man . . .*<sup>151</sup>

A contrasting view was presented by another supporter of the amendment, Senator Hill, who asserted that the amendment did not limit the ability of soldiers to act in response to orders directed at saving lives.<sup>152</sup> Although the matter was not conclusively resolved during the debate, Senator Hill's preference for an emergency exception permitting reliance on military orders is not inconsistent with the overall focus of the amendment on normal law enforcement functions.

As the debate progressed, the opponents agreed that the Army "ought not to be used for any purpose not authorized by the Constitution and laws," but contended that the failure to specify the proper uses of the Army rendered the amendment a dangerous limitation on executive power because it was too indefinite.<sup>153</sup>

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The proponents responded to the contention that law enforcement would be impeded, but largely ignored the other arguments.

<sup>151</sup> *Id.* at 4245 (emphasis added). In response to a similar question, Senator Merrimon added:

If the General of the Army had been there he could not have commanded them as soldiers, but every one of them would have been bound by the law of nature, by the common law of this country, by the common law of Mississippi, to interpose to prevent the wretches who were about to take the life of an innocent person.

*Id.* at 4246.

<sup>152</sup> *Id.* at 4247. Senator Hill commented:

Of course there are occasions in all countries where under the laws it is the duty of every man to save life, to save property, to suppress crime. I care not whether he is a soldier or whether he is a citizen, whether a man or a woman, I care not what he is, there are times when, in order to suppress violence, in order to suppress crimes, it is the duty of every man equally to act and to obey anybody's orders, or to obey anybody's information who gives notice of it.

*Id.* Senator Hill's views are consistent with present Department of Defense policy that permits military action in an emergency situation. U.S. DEP'T OF DEFENSE, DIRECTIVE No. 3025.12, ¶ V.C.1.a.(1971).

<sup>153</sup> *E.g.*, 7 CONG. REC. at 4296-97 (remarks of Sens. Kirkwood, Edmunds, and Burnside). Senator Conkling stated that he could vote for the measure in "an appropriate bill," but said he would oppose this measure because the timing made it appear as an unwarranted criticism of the administration. *Id.* at 4303-04. Several members expressed opposition on the grounds that it should not apply to subordinates, particularly without greater definition. *E.g.*, *id.* at 4241, 4299-301 (remarks of Sen. McMillan); *id.* at 4296 (remarks of Sen. Kirkwood); *id.* at



Senator Edmunds stated that the amendment would serve as an impediment to the lawful exercise of the President's implied powers.<sup>154</sup> The opposition was particularly concerned about the amendment's limitation to actions "expressly authorized."<sup>155</sup> In

4299 (remarks of Sen. Howe); *id.* at 4301 (remarks of Sen. Christiancy).

Senator Christiancy proposed an amendment to limit application to the "Secretary of War, the General or Lieutenant-General of the Army, or commander of any military department," *id.* at 4302, but the amendment was rejected, *id.* at 4303. Opponents of the Christiancy amendment generally countered that the Posse Comitatus amendment was consistent with the doctrine that subordinates are only required to obey "lawful orders." *E.g., id.* at 4298. Senator Bayard added that although ignorance of the law would not be a defense, a person could not be convicted unless the violation was "knowing and willful." *Id.* at 4300-01. An amendment to express that understanding was adopted. *Id.* at 4302.

<sup>154</sup> *Id.* at 4241. Senator Edmunds said:

[T]he Constitution says that the President of the United States shall be Commander-in-Chief of the Army and of the Navy; it says in the next place that he shall take care that the laws are faithfully executed; that is, all laws. Then the question at once arises whether under the Constitution of the United States, saying no more, it being the duty of the President to see that the laws are faithfully executed and he being Commander-in-Chief of the Army, the Constitution does not expressly authorize him to use the Army wherever power is lawfully to be required to execute the laws.

*Id.* He added that the amendment would leave the President without the power to use federal troops to enforce the internal revenue laws. *Id.* at 4242.

<sup>155</sup> Senator Blaine declared:

I think any officer would be loath to use that authority unless he had a case that fitted exactly and perfectly some statute made and provided, and it would effectually cripple and paralyze all possibility of a platoon of soldiers being used where there was a forcible resistance to the collection of the revenue, where there was a forcible combination to resist the execution of the revenue laws.

*Id.* at 4241. Addressing Senator Kernan, the sponsor of the amendment, Senator Hoar asked:

[D]oes the Senator from New York mean to enact that it shall be a penitentiary offense for the President of the United States or anybody under him to do an act which by fair implication from the Constitution of the United States it is his duty to do?

*Id.* at 4242. Senator Kernan responded:

I do not.

. . . .  
I will say but a word to explain what I mean by "express authority." Unless there is some law that says that if there shall be resistance to the collection of the revenue the marshal may call in the military as a posse, I deny the right to so use it, notwithstanding the opinion of any Attorney-General. Unless there be some express authority to do it, I am opposed to leaving it to any Attorney under the general authority of the President to see that the laws are executed, [or] that he can use the military against the citizen as a *posse comitatus* at all.

*Id.* Senator Hoar returned to his concern about implied powers:

[Y]ou have no right in dealing with your public officials, civil or military, to enact a law the fair implication of which requires a course of conduct from them, and then punish them as felons because they have done what they must have inferred fairly by just and inevitable implication from your own legislation it was their official duty to do.

*Id.* at 4243.

the following day's debate, Senator Edmunds stated that the requirement that the use of the troops be "expressly authorized" would preclude use of the military to defend Army property, other federal buildings, or "to protect [the] Commander-in-Chief in the possession of his own office."<sup>156</sup> He added that there were no statutes expressly authorizing use of the troops in such circumstances, but that such authority "depends upon the general duty of the President of the United States to execute the laws and to protect the public property."<sup>157</sup> Senator Teller sought to address this matter by deleting the word "expressly."<sup>158</sup> He added that his amendment would permit use of the Army "as provided for by law, either by direct enactment or by the authority that naturally flows from the constitutional provisions with reference to the Army."<sup>159</sup> The Teller amendment, deleting the word "expressly," was adopted in a voice vote with the concurrence of Senator Bayard, the original Senate sponsor of the Posse Comitatus amendment.<sup>160</sup> The debate surrounding this word goes directly to the basic issue: whether Congress intended to limit the manner in which the President exercises the inherent power to execute the laws. The Senate debate strongly suggests a common understanding by members on both sides of the issue that the word "expressly" provided such a limitation; on the basis of that understanding, the word was deleted from the Senate bill.<sup>161</sup> Senator Blaine offered

<sup>156</sup> *Id.* at 4295.

<sup>157</sup> *Id.* Similar views were expressed by Senator Matthews, who suggested that the word "expressly" rendered the statute an unconstitutional limitation on the powers of the President. *Id.* at 4297-98.

<sup>158</sup> *Id.* at 4296. Under Senator Teller's version, the exception would preclude employment of the army to execute the laws: "[e]xcept in such cases and under such circumstances as such employment of said force may be authorized by the Constitution or by act of Congress." *Id.*

<sup>159</sup> *Id.* (remarks of Sen. Teller).

<sup>160</sup> *Id.* at 4302. Senator Bayard, the original Senate sponsor of the amendment, indicated that he had not intended to limit the implied powers of the President:

I do not understand that there is a diminution of any power under the law or the Constitution by this proposed section; it stands just as it is today. The honorable Senator [Teller] from Colorado thinks that the word "expressly" is perhaps too strong an expression, and that if the Army were necessarily employed it would be a power lawfully exercised. I concur with him . . .

*Id.* at 4296. He then agreed to accept a clarifying amendment:

As to the word "expressly," if my friend from Colorado thinks that it in any way diminishes or restricts the just power of the President of the United States over the Army of the United States, I will not object to its omission.

*Id.*

<sup>161</sup> The Senate did not discuss extraterritorial application of the Act. The only discussion of foreign policy considerations occurred when Senator Hoar, an opponent of the measure, found it ironic that restrictions on the use of the Army were supported by Senator Maxey:

an amendment to limit the restrictions in the Act to use of the Army as a posse comitatus by deleting the phrase "or otherwise."<sup>162</sup> This was defeated by a vote of 25 to 21.<sup>163</sup> The vote suggests a clear congressional intent for the statute to apply to all unauthorized uses of the Army in execution of the law, not simply cases in which the Army is summoned by a marshal to act as a posse comitatus.

### E. *The Conference Report*

Two days after the Senate completed action on the bill, with adjournment rapidly approaching, the conference committee submitted its report on the legislation.<sup>164</sup> The House agreed to the Senate action in deleting the phrase "under the pretext" of enforcing the laws to remove the implication that the bill was "a reflection upon the past administration."<sup>165</sup> More significantly, the conferees retained the Senate's reference to the Constitution, but restored the House's requirement that exceptions be "expressly" authorized.<sup>166</sup>

The conference report simply listed the specific amendments, with no discussion of their substance. It is therefore necessary to turn to the floor statements of the conference managers to assess congressional intent. Speaking for the Senate managers, Senator Sargent explained the modifications made by the conferees.<sup>167</sup> He offered the following explanation of the conference committee's

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If those statements are true, the main effect of this section is to be to tie the hands of the military commanders who have been placed on the Texan and Mexican border in protecting citizens against wrongs or redressing them after they have been inflicted; but of course if the gentlemen representing that State do not object to it, it is not for our end of the Union to be specially interested on that subject.

*Id.* at 4303.

<sup>162</sup> *Id.* at 4304.

Another floor amendment adopted during the debate established a requirement that any act in violation of the statute be done "willfully and knowingly." As amended, the Bayard-Keran amendment survived Senator Blaine's motion to strike it from the bill by a vote of 29 to 21. *Id.* Senator Blaine's subsequent motion to strike the criminal penalties from the bill carried by a vote of 25 to 24. *Id.*

<sup>163</sup> *Id.* at 4305. The Army appropriations bill, as amended, was approved in the Senate by a vote of 42 to 9. *Id.* at 4307.

<sup>164</sup> *Id.* at 4647-48.

<sup>165</sup> *Id.* In addition, the conferees provided criminal penalties for willful violations. *Id.*

<sup>166</sup> *Id.* The final version of the amendment stated:

From and after 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, for the purpose of executing the laws, except in such cases and under circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding

action:

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 . . . 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 to act where the Constitution requires him to act; and the embarrassments would not have the effect of restraining the action of an upright and energetic Executive*, but still might raise a question which he would desire to avoid if possible.<sup>168</sup>

His statement reflects the Senate's concern with preserving executive powers. Thus, if the "power" in question "arises under" the Constitution, the requirement for express authority would be satisfied. No other member spoke on this matter, and the Senate adopted the conference report by a voice vote.<sup>169</sup>

In the House, Congressman Hewitt presented the conference report.<sup>170</sup> After noting that the House had receded on the size of the Army and had substantially receded on other matters, he declared:

But these 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 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 allow the bill to fail—notwithstanding the reforms which we had secured; regarding these reforms as of but little consequence alongside the great principle that the Army of the United States *in time of peace* should be under the control of Congress and obedient to its laws. After a long and protracted negotiation the Senate

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ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment.

*Id.*

<sup>167</sup> *Id.* at 4648. Senator Sargent noted that without the Posse Comitatus amendment, "it would have been impossible to come to any agreement on the Army bill." *Id.*

<sup>168</sup> *Id.* at 4648 (emphasis added).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 4684-86.

committee has conceded that principle in all its length and breadth, including the penalty which the Senate had stricken out.<sup>171</sup>

With one exception not relevant here,<sup>172</sup> no other member addressed this provision. The legislation was approved in the House by a vote of 154-58.<sup>173</sup>

Representative Hewitt's rejection of an exception based upon implied authority reflects the restrictive view of the House during the debate and raises the question whether it can be squared with Senator Sargent's expansive view. Several aspects of the remarks by the managers indicate that a common understanding can be derived. Hewitt's statement emphasizing application of the statute "in time of peace" is strongly suggestive of a congressional intent not to interfere with the war powers of the President. His caveat is similar to the position taken by the House sponsor of the original amendment, Congressman Kimmel, who suggested that the war powers were not within the scope of the amendment. This indicates that where there is a constitutional power to act, and circumstances under which the action would be taken can be dealt with only through the application of military force, then the requirement for express authority is satisfied.

From the Senate perspective, Senator Sargent's statement does not suggest a blanket authorization to use federal troops simply because a federal power "arises under . . . the Constitution." While acknowledging that the statute would not restrain an "energetic Executive," he added the important qualification that it "still might raise a question which he would desire to avoid if possible."<sup>174</sup> Under this view, if the Federal government has authority to act, and necessity requires the application of military force, then it could be used; otherwise, the use of military force should be avoided.

The context of the debate further underscores development of a common theme. Debate focused on opposition to use of the military in situations where the organized discipline and tactics of a military force were not required, as for example, in the collection of taxes, service of process, supervision of elections, and in response to labor strife when the task was within the existing or potential

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<sup>171</sup> *Id.* at 4686 (emphasis added).

<sup>172</sup> Rep. House asked whether the provision requiring a willful violation was in the original house bill. *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See text accompanying note 168 *supra*.

capability of state forces. None of the amendment's sponsors asserted that the requirement for express authority required specific statutory mention of the armed forces when execution of an authorized Presidential responsibility required the application of military force. With respect to extraterritoriality, Congress, in this debate, did not exhibit concern about use of the troops in terms of the President's war powers or otherwise in furtherance of American foreign policy.<sup>175</sup>

## VII. SUBSEQUENT LEGISLATIVE ACTION

### A. Amendments to the Act

Although the Act has not proved to be a major source of litigation, it has remained a constant feature of American military law. Congress has considered the implications of the Act on several occasions. In 1899, for example, Congress enacted a criminal code for the territory of Alaska that contained an anti-riot provision proscribing interference with law enforcement officials.<sup>176</sup> The following year, when Congress approved extensive legislation for the civil government of Alaska, the anti-riot statute was amended to provide Alaska with a blanket exemption from the Act.<sup>177</sup> Although the exemption was not specifically debated,<sup>178</sup> it appears to be related to the need for vigorous federal presence in view of mob violence during the Alaskan "gold rush."<sup>179</sup>

The Alaskan amendment is important in two respects. It shows that 22 years after the passage of the Act, when the passions of the Reconstruction Era had cooled, Congress viewed the Act as a viable inhibition on a military role in law enforcement requiring a specific exemption in circumstances where a military presence was considered desirable. The exemption also demonstrates that the Act is

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<sup>175</sup> A further measure of congressional intent may be inferred from examining existing executive practice. Prior to 1878, military forces had been used on dozens of occasions to protect the lives and property of American citizens overseas. See J. MOFFUT, *THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES* 9-64 (1928). In light of this consistent pattern, an implicit curtailment of the presidential power to provide such protection overseas should not be lightly inferred. The total absence of any discussion of these matters in the debate, the focus on domestic law enforcement, and the assurances of the sponsors that no change in law was intended by the amendment all lead to the conclusion that the Act was not intended to apply to the protection of American citizens and property overseas.

<sup>176</sup> Act of March 3, 1899, ch. 429, § 363, 30 Stat. 1325 (1899).

<sup>177</sup> Act of June 6, 1900, ch. 786, § 29, 31 Stat. 330 (1890).

<sup>178</sup> 33 CONG. REC. *passim* (1900) (debate on S. 3419, 56th Cong., 1st Sess. (1900)).

<sup>179</sup> See Furman, *supra* note 7, at 110-11.

more than an expression of the division of responsibilities between federal and state officials. Without the exemption, the Act would have applied to Alaska even though the entire area was under federal control.<sup>180</sup> When the military laws of the United States were codified and enacted into positive law in the mid-1950's, the Act was revised and moved to title 18 from its unofficial codification in title 10.<sup>181</sup> Following the grant of Alaskan statehood soon afterwards, the exception for Alaska was removed at the suggestion of the House Armed Services Committee.<sup>182</sup>

### B. Current Proposals

The latest congressional consideration of the Act has taken place during the legislative action on proposals to revise title 18 of the United States Code. During the Ninety-fifth Congress, the Senate approved the Criminal Code Act of 1978.<sup>183</sup> The Senate proposal returned the Act to title 10, declared a violation to be a misdemeanor, made the Act applicable expressly to the Navy, and codified the understanding that the Act does not apply to the law enforcement functions of the Coast Guard.<sup>184</sup>

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<sup>180</sup> See *id.* In contrast to the exemption for Alaska, the Posse Comitatus Act became applicable in the territory of Hawaii at the same time. See *id.*

<sup>181</sup> Act of Aug. 10, 1956, Pub. L. No. 84-1028, ch. 1041, § 18, 70A Stat. 626 (codified at 18 U.S.C. § 1385 (1976)). The relevant legislative history is contained in two sentences: "This section is revised to conform to the style and terminology used in title 18. It is not enacted as a part of title 10, United States Code [see 10 U.S.C. § 15 (1926)], since it is more properly allocated to title 18." H.R. REP. No. 970, 84th Cong., 1st Sess. 727 (1955); S. REP. No. 2484, 84th Cong., 2d Sess. 736 (1956).

<sup>182</sup> Alaska Omnibus Act, Pub. L. No. 86-70, § 17(d), 73 Stat. 144 (1959). The legislative history of this provision is brief. The report of the House Committee on Interior and Insular Affairs states that the measure "was added by the committee at the suggestion of the Committee on Armed Services to eliminate a provision in title 18, [U.S.C.] section 1385, which permits the use in Alaska, but not elsewhere in the United States, of members of the Army and Air Force as a Posse Comitatus." H.R. REP. No. 369, 86th Cong., 1st Sess. 9 (1959). The Senate Report stated: "At the present time no part of the U.S. Army or the Air Force may be used as a posse comitatus or otherwise to execute the laws, except in Alaska. The amendment would eliminate the exception for Alaska." S. REP. No. 331, 86th Cong., 1st Sess. 7, reprinted in [1959] U.S. CODE CONG. & AD. NEWS 1675, 1681.

<sup>183</sup> S. 1437, 95th Cong., 2d Sess. (1978). The House did not act on the proposal and the legislation died at the end of the 95th Congress. Senate action in the 96th Congress has been deferred pending House action on the proposal. At the time of publication of this Article, the House Judiciary Committee was engaged in drafting legislation, but no formal committee action had been taken. N.Y. Times, Dec. 12, 1979, § A, at 22, cols. 1-5.

<sup>184</sup> The proposed Posse Comitatus Act provides:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, knowingly uses any part of the Army, Navy, or Air Force as a posse comitatus or otherwise to execute the laws is guilty of a class A

A separate provision of the proposed Criminal Code Act, section 3003 of title 18, provided limited extraterritorial authority for the Armed Forces to engage in law enforcement activities in matters subject to the extraterritorial jurisdiction of the United States.<sup>185</sup> The committee report stated that the provision was necessary because of possible extraterritorial application of the Posse Comitatus Act.<sup>186</sup> The report did not refer to cases, administrative opinions, or legislative history in reaching this conclusion, however.<sup>187</sup> Instead, the report merely cited an article by Jan Horbaly and Miles Mullin which concluded that the Posse Comitatus Act would apply outside the United States under the new Criminal Code.<sup>188</sup> In reaching their conclusion, Horbaly and Mullin derived some support from past administrative practice, but relied primarily on the expansion of extraterritorial jurisdiction of the United States courts as proposed in the original draft of the legislation prepared by the

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misdemeanor. Nothing in this section shall be construed to affect the law enforcement functions of the United States Coast Guard.

S. 1437, *supra* note 183, § 301(a)(1). The committee report provides little additional information:

18 U.S.C. 1385 is reenacted and redesignated as 10 U.S.C. 127, . . . amended to conform the culpability language and to make the offense a Class A misdemeanor rather than a 2-year felony, [and] [a]mended to apply to all armed forces, at suggestion of the Department of the Air Force. The provision also makes clear that it is not intended to affect the law enforcement functions of the Coast Guard.

S. REP. No. 605, 95th Cong., 1st Sess., pt. 2, at 1234 (1977) [hereinafter cited as SENATE REPORT].

<sup>185</sup> S. 1437, *supra* note 183, § 101. The proposal provides that: "The armed forces of the United States may be used outside the United States to assist a law enforcement agency in the detection, investigation, and preparation for trial of and in the apprehension of offenders for, offenses subject to the extraterritorial jurisdiction of the United States." *Id.*

<sup>186</sup> SENATE REPORT, *supra* note 184, pt. 1 at 946-47 (citation omitted). The committee report provides the following explanation for the extraterritorial exception:

The Posse Comitatus statute contains a general prohibition on the use of the armed forces to execute the laws. Currently it is unclear whether the statute applies, or was intended to have application, outside the United States. Whatever the present state of the law, the Committee believes that it is appropriate to carve out an exception so as to permit the use of military authorities for law enforcement purposes in the case of crimes committed outside the United States over which extraterritorial jurisdiction is present.

*Id.*

<sup>187</sup> *Id.* at 947 n.11.

<sup>188</sup> *Id.* (citing Horbaly & Mullin, *supra* note 23, at 77-91). Horbaly and Mullin had suggested amending the proposed Code expressly to permit use of the military in law enforcement activities related to the extraterritorial jurisdiction of the United States, a suggestion substantially adopted by the Senate. Compare Horbaly & Mullin, *supra*, at 77-91 with SENATE REPORT, *supra* note 184, pt. 1 at 947.



National Commission on the Reform of the Federal Criminal Laws.<sup>189</sup>

Although there may be some doubt whether the jurisdictional provisions of the Senate bill compel the conclusion that the revised Posse Comitatus Act would be given extraterritorial effect,<sup>190</sup> the

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<sup>189</sup> Horbaly & Mullin, *supra* note 23, at 88-91. Horbaly and Mullin provided the following analysis:

The extraterritorial jurisdiction provision, section 204, states that an offense is committed within the extraterritorial jurisdiction of the United States unless the offense is committed within the general jurisdiction of the United States or unless a statute, treaty or international agreement provides otherwise. Additional jurisdictional prerequisites are set out in the section and at least one must be satisfied if extraterritorial jurisdiction is to attach. Each prerequisite is a separate ground upon which extraterritorial jurisdiction over the offense may be asserted and if one prerequisite is satisfied, extraterritorial jurisdiction will attach. Consequently, *it will no longer be necessary to look to the nature of the crime to determine whether it should be applied extraterritorially.*

This disunion is the result of a conscious effort to divorce questions of jurisdiction from the nature of the substantive criminal offense. The *Final Report* of the National Commission [on Reform of Federal Criminal Laws xii (1971)] specifically recommended that federal jurisdiction be determined without reference to the nature of the offense committed. By stating the jurisdictional base separately, this result is achieved. Thus, the rationale of the court in *Chandler*, based on an examination of the substantive offense itself, will no longer be appropriate.

*Id.* (footnotes omitted) (emphasis added).

<sup>190</sup> The conclusion that extraterritorial application of the Posse Comitatus Act is compelled by the jurisdictional provisions of the proposed Code is open to question in light of developments subsequent to publication of the Horbaly and Mullin article. The Senate Judiciary Committee, in its report on S. 1437, did not endorse completely the National Commission's position that jurisdiction would provide the only test of extraterritoriality; rather, with specific reference to *United States v. Bowman*, 260 U.S. 94 (1922), the Report stated that the legislation "is designed to provide additional clarity in this area and to obviate, *at least in large part*, the need for courts to consider the extraterritorial implications of legislation." SENATE REPORT, *supra* note 184, pt. 1 at 47 (emphasis added).

A strong argument can be made that the Posse Comitatus Act is outside the "large part" of federal law where mere assertion of jurisdiction should create an extraterritorial effect. The purpose of tying extraterritoriality to jurisdiction is to insure that conduct potentially harmful to the United States or its citizens will be punished regardless of where it may occur. *See id.* at 39. With respect to the Posse Comitatus Act, however, the underlying activity—law enforcement—normally is not considered harmful to the government or United States citizens; the determination whether military law enforcement activities overseas are harmful depends upon congressional intent as to the scope of the Act, a determination that requires use of the *Bowman* standards. *See* notes 52-61 and accompanying text *supra*. Moreover, because extraterritoriality of the Posse Comitatus Act not only involves *Bowman* issues, but also raises a potential conflict between executive and legislative powers, the mere fact that an incident involves a federal public servant overseas should not necessarily provide extraterritorial effect absent clear congressional intent.

Support for this position is suggested by § 201(b)(2)(C) of the proposed title 18, which states that the extraterritorial principles of § 204 do not apply when "the offense is described as a violation of, or involves conduct required by, a statute outside this title, or a regulation, rule, or order issued pursuant thereto, in which case there is federal jurisdiction over the

investigative authority provided by section 3003 of the Senate bill's proposed revision of title 18 of the United States Code moots the issue. Section 3003 would provide the armed forces with investigative authority outside the United States only with respect to "offenses subject to the extraterritorial jurisdiction of the United States."<sup>191</sup> By expressly providing only limited authority, the Senate created a strong implication that the Posse Comitatus Act would otherwise be given extraterritorial effect, thereby precluding overseas investigations by the armed forces except for cases falling within this provision or within another exception to the Posse Comitatus Act. The failure to extend investigative authority for the armed forces outside the United States to offenses subject to the general jurisdiction of the United States courts would mean that the armed forces could not be used to investigate such offenses.<sup>192</sup>

If the investigative authority passed by the Senate in the Ninety-fifth Congress is enacted into law, it would lead to anomalous results, which can be illustrated by two hypothetical cases. In the first case, assume that a federal public servant initiates a criminal act, such as a fraud against the United States, within the United States. During the course of the crime, the official is transferred to a foreign nation where the criminal act is completed. Under the Senate bill, extraterritorial jurisdiction would attach under either subsections (g) or (h) of section 204 of the proposed version of title 18.<sup>193</sup> The armed forces would therefore be permitted to investigate

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offense to the extent applicable under that statute." S. 1437, *supra* note 183, § 201(b)(3)(C). The proposed Code takes the Posse Comitatus Act out of title 18 and places it in title 10. It can be argued that placement outside title 18 means the Act should be interpreted by principles generally governing use of the armed forces. A full discussion of whether 201(b)(2)(C) would completely remove the Posse Comitatus Act from the principles of § 204 is beyond the scope of this Article.

<sup>191</sup> S. 1437, *supra* note 183, §101.

<sup>192</sup> See Horbaly & Mullin, *supra* note 23. Horbaly and Mullin, whose work was cited in the Senate Report as the basis for the investigative exception, suggest the exception in their analysis:

[I]f a government official in the United States requests or demands that the armed forces investigate a criminal offense overseas, . . . [t]hat official has used the military to execute the laws. Since the use was not authorized, the Posse Comitatus Act has been violated. And since the use of the military was by the official who was within the United States, the offense was committed within the general jurisdiction of the United States.

*Id.* at 91.

<sup>193</sup> See S. 1437 *supra* note 183, § 101. Subsections (g) and (h) of the proposed Code provide:

Except as otherwise expressly provided by statute, or by treaty or other international agreement, an offense is committed within the extraterritorial jurisdiction of

the crime overseas under the investigative jurisdiction provided by the limited exception to the Posse Comitatus Act under section 3003. For the second hypothetical, assume that the same person commits the same crime, but that it is completed within the United States. After completion of the crime, the individual is transferred overseas. Under the jurisdictional provisions of the Senate bill,<sup>194</sup> the crime would fall under the general or territorial jurisdiction of the United States, but not within its extraterritorial jurisdiction. Investigation by the armed forces overseas would not be authorized expressly because the offense would not come within the investigative authority provided by proposed section 3003.

This anomaly makes little sense in light of the Senate's purpose in creating section 3003. The Senate Judiciary Committee's report states that use of the armed forces under the exception not only provides a means for enforcing the bill's expanded extraterritorial jurisdiction, but also "is efficient in comparison to paying the bill for investigations to be conducted overseas by employees of law enforcement agencies normally stationed within the United States."<sup>195</sup> The report does not state why this reasoning should not apply with equal force to offenses committed within the general jurisdiction of the United States when investigation must take place overseas. In the absence of a civilian law enforcement capability overseas, it is difficult to argue that the purpose of the Posse Comitatus Act would be compromised by permitting military law enforcement activities overseas. Section 3003 should be amended to remove the limitation on investigative jurisdiction of the armed forces based upon extraterritorial jurisdiction.

Senate action with respect to section 3003 provides some indication that Congress may give extraterritorial effect to the Act. The Senate debate, however, provides little authority for the proposition

the United States if it is committed outside the . . . United States and:

(g) the offense is committed in whole or in part within the United States and the accused participates outside the United States, or the offense constitutes an attempt, conspiracy, or solicitation to commit an offense within the United States; [or]

(h) the offense is committed by a federal public servant, other than a member of the armed forces who is subject to court martial jurisdiction for the offense at the time he is charged with the offense, who is outside the United States because of his official duties . . . .

*Id.*

<sup>194</sup> S. 1437, *supra* note 183, § 101 (18 U.S.C. § 201-204, as proposed).

<sup>195</sup> SENATE REPORT, *supra* note 184, at 947.

that the Act as it presently stands should be given extraterritorial effect.<sup>196</sup>

### VIII. CONCLUSION

#### A. *Statutory language, judicial consideration, and administrative interpretation*

The text of the Posse Comitatus Act does not address the issue of extraterritorial application, and no federal court has resolved the issue in an authoritative manner. The military departments occasionally have given the Act extraterritorial effect, but the practice has been inconsistent. The Act has not been applied by the military departments to limit executive action where the primary purpose or effect was to further United States foreign policy or to protect American lives and property overseas. The Attorney General has not issued a formal opinion on this matter.

#### B. *Application of the principles of statutory construction and consideration of the legislative history*

There is a presumption against extraterritorial application of federal statutes absent a clear expression of congressional intent to the contrary. When construing a criminal statute governing the conduct of public officials, rebuttal of the presumption does not require express legislative consideration of extraterritoriality; rather, the test is whether the congressional purpose in enacting the statute will be frustrated by failure to give the statute extraterritorial effect. The doctrine of construing statutes to avoid constitutional questions also is relevant because there is a potential clash of executive and

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<sup>196</sup> Subsequent legislative statements concerning the enactment of an earlier statute are not part of the legislative history and do not provide conclusive evidence of the intent of the Congress that enacted the statute. *E.g.*, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). A legislature is not a static entity. Its make-up, views and objectives are in a constant state of flux and its posture on a particular issue at one point in time does not necessarily imply that this was always the case. Although subsequent statements by a later Congress are not conclusive on the intent of an earlier one, they may provide some probative value. *See, e.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). The weight is determined primarily from the elapsed time between the first enactment and the subsequent interpretative statements. Generally, interpretative statements promulgated years after the first enactment are not accorded substantial probative value. *See, e.g.*, *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). In view of the equivocal nature of the Senate Judiciary Committee's statement, *see* note 186 *supra*, and the fact that it comes a century after enactment of the Posse Comitatus Act, it should not be entitled to significant weight in providing evidence of Congressional intent when the Act was approved in 1878.

legislative powers over foreign affairs that might arise if the Act were applied outside the United States.

Congressional consideration of the Act in 1878 reflected a major national debate over whether the Army should be given an expanded role in the field of law enforcement. The Act represented a legislative rejection of the expanded role and a determination that the armed forces should not be used to supplant or supplement law enforcement actions within the capability of state officers or federal civilian officials.

Congressional intent as to the meaning of the statute may be summarized as follows:

—Congress intended that use of the troops in execution of the laws be undertaken only when the federal government was otherwise authorized to act;

—In matters normally within the province of state officials and federal civilian officers, Congress intended that the executive use the troops in execution of the laws only where use of the Army was expressly authorized; and

—In matters necessarily requiring the application of military force, Congress did not intend to establish a requirement for explicit mention of the Army when the federal government was otherwise authorized to act.

The first two conclusions emerge from the legislative history. Although the third conclusion is subject to some doubt,<sup>197</sup> it may be tested by proposing the opposite conclusion—that Congress intended to preclude the President from acting when executive action was authorized by the Constitution and the only feasible means of achieving the objective was through the application of military force. Such an interpretation would create a constitutional confrontation of the first magnitude. When dealing with a statute in which the entire focus of the debate was on law enforcement actions within the capability of state officers and federal civilian officials, the limiting principles applicable to constitutional litigation suggest rejection of a doctrine that would render the executive powerless to perform a constitutionally authorized duty.<sup>198</sup> Particularly with respect

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<sup>197</sup> Although several supporters of the amendment suggested that the President could not act absent specific statutory authority, even when the state militia proved insufficient, none of the sponsors expressly endorsed this view. See notes 134-139 and accompanying text *supra*.

<sup>198</sup> This view does not mean that Congress intended that the President be the sole judge of when permissible executive action necessarily requires the application of military force. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644-65 (1952) (Jackson, J., concurring) (citing the *Posse Comitatus Act* as an example of congressional limitation on the

to application of the military force pursuant to the President's war powers or otherwise for the primary purpose of implementing American foreign policy, the intention to undermine Presidential powers in the international sphere should not be inferred in the absence of legislative history directed towards this end.

We must next turn to the question of a blanket extraterritorial exemption. Even if the Act does not apply where military force is necessarily required, does it preclude the use of the armed forces with respect to American citizens overseas for the primary purpose of enforcing federal criminal law? During the course of the debate in 1878, there was no specific discussion of extraterritorial effect. The rejection of an amendment concerning border activities does not demonstrate congressional intent to give the Act extraterritorial effect. Under the *Bowman* standard, however, express intent contrary to a purely territorial application is not necessary if effectuation of the purposes of the statute would require extraterritorial effect under the circumstances. A significant aspect of congressional intent is illustrated by the remarks of Congressman Hewitt at the conclusion of the debate. He declared that the bill embodied "the great principle that the Army of the United States in time of peace would be under the control of Congress and obedient to its laws. . . . We bring you back . . . a report . . . restoring to this bill the principle for which we have contended too long, and which is so vital to secure the rights and liberties of the people."<sup>199</sup>

The rhetoric may be exaggerated, but the intent appears to be that in order to guard the rights and liberties of the American people against possible infringement by the Army, express authority for any use of the military for law enforcement purposes is required. This view would reflect traditional concern for civilian control of the military.<sup>200</sup> Under the *Bowman* principles of statutory construction, it could be argued that this creates a limitation upon government with no territorial dimension when applied to circumstances not directly related to foreign policy considerations, as for example, in an investigation and arrest of an American citizen abroad for viola-

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power of the President "to use the Army for the purpose of executing the general laws"). The extent to which congressional or judicial avenues would be available to review the validity of such a determination is beyond the scope of this Article.

<sup>199</sup> 7 CONG. REC. 4686 (1878). This statement is typical of remarks in the debate emphasizing the rights of the American people. There is no suggestion in the debate that the amendment would have any application to foreign nationals overseas. See section VI *supra*.

<sup>200</sup> See, e.g., *Laird v. Tatum*, 408 U.S. 1, 15 (1972); *Greer v. Spock*, 424 U.S. 828, 841-42 (Burger, C.J., concurring); *id.* at 845-46 (Powell, J., concurring).

tion of a penal statute having purely domestic consequences.

On the other hand, it could be argued that extraterritorial application is not necessary to insure compliance with the central purpose of the Act—precluding the military from supplanting or supplementing civilian authorities as the primary instruments of law enforcement. In contrast to domestic circumstances, there is no major law enforcement role for state officials or federal civilian officers outside the United States. Accordingly, there is no significant civilian function that would be usurped by the military should the troops overseas be used to aid law enforcement efforts. Under such circumstances, it is difficult to contend that rejection of extraterritorial effect of the Posse Comitatus Act “would . . . greatly curtail the scope and usefulness of the statute and leave open a large immunity.”<sup>201</sup> From this perspective, there is no requirement under the *Bowman* principles to give extraterritorial effect to the statute in order to insure that the purposes of the legislation are fulfilled.

### C. Summary

The purpose of the Posse Comitatus Act is to prohibit use of the armed forces in circumstances where executive action is within the authority and capability of state officials or federal civilian officers. The Act does not preclude resort to military personnel, regardless of territorial impact, in circumstances where: (1) the executive branch is authorized to act; (2) the requisite action is not reasonably within the capability of state officials or federal civilian officers; and (3) proper execution of such action necessarily requires the application of military force. With respect to actions by the executive branch where the primary purpose or effect is to further United States foreign policy or to protect American lives or property overseas, the Act should not be given extraterritorial effect. The use of military personnel outside the United States for purposes of assisting domestic law enforcement when there is no substantial foreign policy interest presents a more difficult question. Under present circumstances, however, in which no federal civilian agency has a major role in the enforcement of domestic laws overseas, neither the legislative history of the Act nor relevant principles of statutory construction require that the Act be given extraterritorial effect.

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<sup>201</sup> Text accompanying note 61 *supra* (quoting *United States v. Bowman*, 260 U.S. 94 (1932)).