

DOMESTIC MILITARY DEPLOYMENTS AFTER *TRUMP V.*
UNITED STATES

CHRIS MIRASOLA *

ABSTRACT

The current legal regime governing domestic military deployments was, largely, born of the Civil War. While conflict was ongoing, Congress enacted what are now a pair of statutes criminalizing military interference with federal elections. And as a coda to Reconstruction, Congress criminalized using the military as a civilian law enforcement force. Over the past 160 years, successive Congresses and Presidents have steadily chipped away at these crucial criminal-law protections. In 2024, the Supreme Court's decision in Trump v. United States further undermined the limitations that remained.

In Trump, the Supreme Court held that Presidents enjoy, at minimum, a presumption of immunity from criminal prosecution regarding their official acts. The majority construed "official acts" quite broadly, a move that is particularly consequential regarding the law of domestic military deployments given the plethora of statutes and the array of inherent constitutional powers Presidents have asserted authorizing such activities. Taken together, this

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amalgam of judicial intervention, statutory law, and executive practice yield a legal regime especially susceptible to abuse by a motivated President.

Equally as consequential is the shadow cast by the Trump majority's understanding of executive power over actions taken by subordinate officials to implement presidential orders. Although Trump did not address subordinate criminal immunity, its dicta contained sweeping endorsements of executive power. This Article demonstrates how the executive branch would likely assert that, at least insofar as military deployments are concerned, implementing actions by subordinate military officials also enjoy a presumption of criminal immunity under Trump's logic. It then presents two theories why such an argument would be incorrect—one rooted in the broader jurisprudence of subordinate immunity and another rooted in more particular jurisprudence concerning domestic military deployments.

Even without this trickle-down immunity, Trump places unsustainable burdens on military personnel. The military justice system's core tenants are largely incompatible with a world in which the President is immune from prosecution for issuing criminal orders while the military subordinates who receive those orders remain bound to refuse the same patently unlawful orders. In practical effect, military personnel will have every incentive to obey orders with a colorable basis in statutory or constitutional law, regardless of whether they run afoul of criminal prohibitions.

This is not to say that all was well regarding the law of domestic military deployments before Trump. Congresses of both parties have enacted an elaborate web of statutory law eroding this regime of criminal law. Add to this an array of implied presidential powers to deploy the military within the United States, and we had already inherited a deeply broken body of law.

While litigation can curb some of the dangers inherent to the law of domestic military deployments, Congress is the only branch capable of righting this ship. Whether by clawing back broad grants of power to the President or limiting domestic uses of the military through appropriations restrictions, what Congress began by enacting loopholes to this regime of criminal liability it must now reimagine to more fully protect our democratic institutions.

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INTRODUCTION

Consider two scenarios. First, President Trump’s decision to federalize members of the California National Guard and use military personnel to “temporarily protect ICE and other United States Government personnel who are performing Federal functions.”¹ These military personnel, acting under a theory of implied presidential authority,² guarded federal properties in Los Angeles, accompanied ICE agents on immigration raids (sometimes in locations distant from the protests that instigated the deployment), and temporarily detained civilians.³ Despite ongoing litigation and significant troop drawdowns, thousands of military personnel remain in Los Angeles as of this writing in August 2025.⁴

As a second example, consider a situation in which the President decides to deploy military personnel to stand watch at or near polling locations where supporters of the President’s opponent are expected to vote in large numbers. These military personnel might execute a range of state and federal law enforcement functions and generally deter voter turnout on election day. This is not a fanciful exercise in peering into the future. It is, in fact, a watered-down version of actions taken by the Lincoln administration in Kentucky, Maryland, and Delaware from 1861 to 1864.⁵ This Article weaves together, for the first time, the three criminal statutes that connect these stories. And it shows how tectonic changes in immunity doctrine and nearly 160 years of congressional and executive branch practice have thrown these laws into acute crisis.

1. *Department of Defense Security for the Protection of Department of Homeland Security Functions*, THE WHITE HOUSE (June 7, 2025), <https://www.whitehouse.gov/presidential-actions/2025/06/department-of-defense-security-for-the-protection-of-department-of-homeland-security-functions/> [https://perma.cc/ZS3H-JTKS].

2. For more on this theory of implied presidential power, see *infra* Part III.B and Chris Mirasola, *Unpacking the Protective Power*, LAWFARE (June 12, 2025, at 15:46 ET), <https://www.lawfaremedia.org/article/unpacking-the-protective-power> [https://perma.cc/3B77-HAYP].

3. Nicholas Slayton, *New Marines Arrive in Los Angeles as First Wave Heads Home*, TASK & PURPOSE (July 1, 2025, at 16:04 ET), <https://taskandpurpose.com/news/new-marines-rotating-into-la/> [https://perma.cc/P897-C6DB].

4. Shawn Hubler, *More than 1,000 Troops are Withdrawn from L.A.*, N.Y. TIMES (July 31, 2025), <https://www.nytimes.com/2025/07/31/us/troop-withdrawal-los-angeles.html> [https://perma.cc/6A42-S3NP].

5. See *infra* notes 62-70 and accompanying text.

The first, and most famous, of these criminal statutes is the Posse Comitatus Act (PCA). Broadly speaking, and subject to certain exceptions, the PCA criminalizes using the military for law enforcement actions. The other two, codified at 18 U.S.C. § 592 and § 593, criminalize deploying the military at polling locations and using the military to interfere in federal elections.⁶ These statutes were enacted, and subsequently revised, in the heat of the Civil War and Reconstruction.⁷ Over the ensuing 160 years, congressional enactments and executive branch practices have steadily stripped these laws of much of their practical significance.⁸ In *Trump v. United States*, the Supreme Court significantly undermined what restraining influence remained, at least as to a President motivated to use the military for a broad range of domestic activities.⁹

This Article proceeds on the belief that there is a proper, limited role for the military in domestic affairs: namely, to provide a force of last resort to enforce federal authority, protect the nation from military invasion, and respond to domestic unrest when law enforcement capabilities are overwhelmed. At the same time, a legal framework that too readily permits the military to assist or supplant nonmilitary organs of government runs the risk of degrading our republican form of government. This risk is particularly acute in the United States, where the President enjoys broad national security powers.¹⁰ The Constitution itself evidences the inherent difficulty in balancing federal government efficacy against the risk of military domination that lies at the heart of this body of law.¹¹

6. 18 U.S.C. §§ 592-593.

7. See STEPHEN YOUNG, *THE POSSE COMITATUS ACT OF 1878: A DOCUMENTARY HISTORY* xv-xvi (2003); Joseph Nunn, *The Insurrection Act Explained*, BRENNAN CTR. FOR JUST. (June 10, 2025), <https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained> [<https://perma.cc/97GK-K8B9>].

8. 18 U.S.C. §§ 592-593.

9. See 603 U.S. 593, 685 (2024) (Sotomayor, J., dissenting) (“The majority’s single-minded fixation on the President’s need for boldness and dispatch ignores the countervailing need for accountability and restraint.”).

10. See *infra* Part III.

11. Compare, e.g., U.S. CONST. amend. III (prohibiting the quartering of soldiers in private homes during peacetime), and U.S. CONST. art. I, § 8, cl. 12 (limiting appropriations “[t]o raise and support Armies” to two years), with U.S. CONST. art. IV, § 4 (providing that the federal government “shall” protect states from invasion and, when requested, from domestic violence), and U.S. CONST. art. I, § 8, cl. 15 (authorizing Congress to “call[] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”).

This Article proceeds as follows. First, Part I describes and presents the legislative history of these three criminal laws. This part lays bare the discomfiting marriage of partisan (largely racial) politics and high principle that motivated this body of criminal law. It also shows how, across decades, many Congresses acted on the assumption that it is constitutionally permissible to impose criminal penalties on certain presidential uses of the military.

Part II considers what remains of these statutes after *Trump v. United States*.¹² In *Trump*, the Supreme Court held that former Presidents “have some immunity from criminal prosecution for official acts during [their] tenure in office. At least with respect to the President’s exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity.”¹³

The *Trump* majority did not address domestic military deployments in its opinion. But applying its framework, on its own terms, suggests that we should expect that courts will find that former Presidents cannot be prosecuted for violating these three criminal statutes, *provided that they acted on otherwise lawful grounds*.¹⁴ As shown in Part III, there is no shortage of such legal authority (both statutory and that asserted by generations of executive branch lawyers). I demonstrate that there are ample reasons to contest this interpretation of *Trump*’s legal framework, especially if we take Congress’s power to regulate the Armed Forces seriously. Yet I remain skeptical of whether this Supreme Court would agree.

Arguably more concerning, the majority opinion’s dicta regarding executive power also provides ample opportunity for the Executive to argue that this presumptive criminal immunity applies also to military subordinates implementing a presidential order.¹⁵ There are at least two reasons to believe that such an extrapolation of *Trump*’s logic is incorrect.¹⁶ First, it is largely at odds with the jurisprudence regarding subordinate immunity on which the majority opinion relies. Second, it is incompatible with past, equally strong,

12. See 603 U.S. at 685.

13. *Id.* at 606.

14. See *id.*

15. See *id.*

16. See *id.*

statements from the Supreme Court regarding Americans' long-held resistance to domestic uses of the military during peacetime.¹⁷

Regardless of the relative merits of these approaches to subordinate immunity, this uncertainty, alone, places military personnel in an untenable position. Immunity from prosecution cannot make an unlawful order lawful. And yet, given the confusion introduced by *Trump*, every incentive exists for military personnel to implement an order that, until the summer of 2025, would have predictably led to prosecution under the Uniform Code of Military Justice (UCMJ).

Nevertheless, as Jack Goldsmith has cautioned, we should not overstate the practical effects wrought by *Trump*.¹⁸ In this vein, Part III demonstrates how congressional enactments and executive branch legal opinions opened the door to widespread uses of the military for domestic missions long before *Trump*. This Part identifies the most significant statutory and constitutional means by which they have done so. It also shows how the *Trump* majority's understanding of presidential power mirrors that of the most far-reaching executive branch legal opinions regarding the President's constitutional authority to use the military within the United States. At a time when the Trump administration acts on a variety of unprecedented arguments, many of them statutory, for using the military to deport migrants, this underlying reality is particularly important.¹⁹

Part IV synthesizes by considering two hypotheticals. It shows how the *Trump* decision undermines protections afforded by criminal law.²⁰ And it demonstrates the nearly complete degree to which Presidents can achieve the same substantive ends without needing to resort to this emerging doctrine of criminal immunity.

17. See, e.g., *Laird v. Tatum*, 408 U.S. 1, 15 (1972) (describing “a traditional and strong resistance of Americans to any military intrusion into civilian affairs”).

18. Jack Goldsmith, *The Presidency After Trump v. United States*, 2024 SUP. CT. REV. 2 (“[U]nfortunately, the bad-man President had many tools to skirt the criminal law before *Trump*, to which its uncertain immunity ruling added relatively little.”).

19. See Chris Mirasola, *An Emerging Road Map for Trump's Use of the Military to Combat Immigration*, LAWFARE (Jan. 22, 2025, at 12:00 ET), <https://www.lawfaremedia.org/article/an-emerging-roadmap-for-trump-s-use-of-the-military-to-combat-immigration> [https://perma.cc/8JAJ-PDNH]; see also, e.g., *Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua*, Proclamation No. 10903, 90 Fed. Reg. 13033 (Mar. 15, 2025) (invoking the Alien Enemies Act to direct the deportation of all Tren de Aragua members).

20. See 603 U.S. at 606.

Finally, Part V considers remedies. I am not sanguine about the prospects for statutory change, particularly at this political moment. The outlines of reform I contemplate are offered for what I hope is a more considered moment in the future. One in which we seriously re-engage with how to limit the military's role in our democratic politics. Since the first Trump administration, there have been many initiatives to reform one or another aspect of this statutory regime.²¹ None of these reforms, however, address the consequences of *Trump*.²² Nor have they specifically addressed military interference in elections. I argue that Congress is the only branch of government with the ability to meaningfully discipline the President's powers.

I ground these proposals in three foundational principles. First, that regular military involvement in core domestic-government functions degrades our republican form of government. Nevertheless, second, that we can reasonably expect periods of existential political crisis in response to which the federal government must rely on the Armed Forces. Furthermore, from time to time, discrete challenges in domestic governance will occur during which the military's proficiencies (in organization, personnel, and materiel) may be needed. Finally, however we limit military participation in civilian government, these limits should not apply to the military's internal organization or core national security functions.

Adjudicating how these principles translate into concrete action is a necessarily political process. This Part ends, therefore, by proposing the beginnings of a statutory solution that foregrounds interaction between Congress and the President, along the lines of what is required in the national-emergency context.

I. STATUTORY FRAMEWORK AND HISTORICAL BACKGROUND

Divining meaning from the legislative history of the PCA and 18 U.S.C. §§ 592 and 593 is a 160-year-old Rorschach test for one's opinion on the proper role of the military in domestic affairs.²³ This is primarily due to the uncomfortable marriage of partisan (and

21. *See infra* Part V.B.

22. *See infra* Part V.B.

23. *See* 18 U.S.C. §§ 592-593.

overtly racist) politics and high-minded principles that emerge from the congressional record. Moreover, the congressional record incontrovertibly shows that members of Congress shared a belief, across time, that criminal penalties could constitutionally be imposed on certain presidential uses of the military.

A. *The Posse Comitatus Act*

Whether viewed as a narrow response to Reconstruction-Era politics²⁴ or as reflecting more generalizable concerns about the military engaging in civilian law enforcement,²⁵ nearly everyone

24. See, for example, the statement of Rep. Charles E. Bennett, during debates on amending the PCA: “The Posse Comitatus Act was passed near the end of Reconstruction as an outgrowth of Southern resentment over the use of federal troops to support carpetbagger governments. Clearly, those circumstances of 1878 are no longer applicable today.” *Posse Comitatus Act: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 97th Cong. 3 (1981). Representative Bennett went on to say that the PCA “is not about some wonderful basic principle ... [p]eople have put that upon it, but it is not in the statute. It was not the purpose of the statute.” *Id.* at 4. Relatedly, Stephen Young has opined that, although it appears the PCA “embodies the principle of the separation of the military from civilian law enforcement ... [t]he Act has ... succeeded in putting forth an ideal, but has fallen short of creating a practical, legal impediment to the use of the military for civil law enforcement.” YOUNG, *supra* note 7, at xix; see also *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948) (identifying the “immediate objective” of the PCA as “put[ting] an end to the use of federal troops to police state elections in the ex-Confederate states where the civil power had been reestablished”); Andrew Buttarò, *The Posse Comitatus Act of 1878 and the End of Reconstruction*, 47 ST. MARY’S L.J. 135, 183, 185 (2015) (arguing that the PCA “was enacted almost wholly in response to the military’s central role in enforcing laws, especially election laws, across the postwar South,” though recognizing that “[e]ven if ... the invocations by the Act’s proponents of anti-militaristic traditions were largely propagandistic attempts to put a principled gloss on the sordid realpolitik of Reconstruction, the public marketing has inarguably been effective”).

25. For arguments that affirmed the view articulated in an August 6, 1979, report by the Departments of Defense and Justice during congressional proceedings, see the statements of William H. Taft IV, General Counsel of the Department of Defense, *Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 97th Cong. 16 (1981). See also Mil. Support of Customs and Border Prot. Along the S. Border Under the Posse Comitatus Act, 45 Op. O.L.C. (Jan. 19, 2021) (slip op. at 3) (“[T]he statute’s restrictions are not limited to that historical episode and instead reflect an American tradition of limiting direct military involvement in civilian law enforcement.”); Anthony Ghiotto, *Defending Against the Military: The Posse Comitatus Act’s Exclusionary Rule*, 11 HARV. NAT’L SEC. J. 359, 385 (2020) (“Although Congress passed the PCA in the context of Reconstruction and attempts by Southerners to maintain white supremacy, arguments for its adoption could easily have been made prior to the Civil War, when federal troops were used to enforce the Fugitive Slave Act.”).

agrees that the PCA is distinctly vague about what it prohibits.²⁶ Here, I briefly survey the PCA's enacting history. Many have written extensively and in depth about this history.²⁷ For present purposes, noting the more consequential details will suffice.

26. See, for example, majority report concerning the Department of Defense Authorization Act, 1982, which found that “[t]he Posse Comitatus Act ... is sufficiently ambiguous to cause some commanders to deny aid, even when such assistance would in fact be legally proper.” H.R. REP. NO. 97-71, pt. 2, at 3 (1982); see also Mark P. Nevitt, *Unintended Consequences: The Posse Comitatus Act in the Modern Era*, 36 CARDOZO L. REV. 119, 173-74 (2014) (recommending clarification concerning exceptions to the PCA, particularly in light of statutes promulgated during the 1980s); Linda J. Demaine & Brian Rosen, *Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 167, 170-71 (2005) (“[A]lmost every element of the PCA rules is riddled with uncertainty and complexity.”); Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 88 (2003) (arguing that the PCA has failed its original purposes and caused considerable confusion about the scope of permissible domestic military activities).

27. See generally, e.g., Walter E. Lorence, *The Constitutionality of the Posse Comitatus Act*, 8 UNIV. KANSAS CITY L. REV. 164 (1939) (arguing that the PCA unconstitutionally infringes on the President’s authority as Commander-in-Chief and Chief Executive); David Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 763-64 (2015) (noting connections between the traditional powers of a sheriff and the PCA’s prohibitions); Demaine & Rosen, *supra* note 26, at 200-01 (navigating the PCA’s restrictions in the early years of the War on Terror); Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 388-89 (2003) (tracing how the political branches have approached the PCA since its enactment); Candidus Dougherty, *“Necessity Hath No Law”: Executive Power and the Posse Comitatus Act*, 31 CAMPBELL L. REV. 1, 49 (2008) (arguing that the President retains an inherent emergency authority to protect the United States, notwithstanding the PCA’s prohibitions); Nevitt, *supra* note 26, at 172-75 (recommending amendments to the PCA in light of changes wrought by statutes enacted during the height of the war on drugs); Deanne C. Siemer & Andrew S. Effron, *Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act*, 54 ST. JOHN’S L. REV. 1, 54 (1979) (arguing that the PCA does not apply extraterritorially); H.W.C. Furman, *Restrictions upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85 (1960) (surveying treatment of the PCA as of 1960); JENNIFER ELSEA, CONG. RSCH. SERV., R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 21-70 (2018) (providing a general overview of the PCA’s history and treatment by the courts, Congress, and executive branch); Christopher Mirasola, *Sovereignty, Article II, and the Military During Domestic Unrest*, 15 HARV. NAT’L SEC. J. 199, 201 (2023) (critically examining two exceptions to the PCA posited by the executive branch on theories of inherent constitutional authority); Ghiotto, *supra* note 25, at 360 (arguing that the PCA is a subconstitutional safeguard against protecting Americans’ “right to be free from military control”); Andrew Buttarro, *The Posse Comitatus Act of 1878 and the End of Reconstruction*, 47 ST. MARY’S L.J. 135, 183 (2015) (“[T]he Posse Comitatus Act will probably continue to be revised according to its perceived deficiencies relative to the most recent crisis.”).

At common law, a sheriff was empowered to summon a posse comitatus, that is, a group of armed men composed of county residents over fifteen years old, to “defend [the] county against any of the king’s enemies” and to “keep[] the peace and pursu[e] felons.”²⁸ Sheriffs in the United States, whether by common law or statute, have enjoyed a similar authority since colonial times.²⁹ Importantly, sheriffs traditionally could not use military personnel, while they were in active service, as a posse.³⁰

In 1854, Attorney General Caleb Cushing did away with this traditional limit.³¹ At the time, there was widespread refusal in the North to enforcing the Fugitive Slave Act.³² Cushing, determined to break Northern recalcitrance, held that those granted the powers of a sheriff under the Fugitive Slave Act could summon military personnel to participate in a posse comitatus.³³ This ushered in a period

28. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (Garland Publishing 1978) (1783). The term entered English law in 1411 after Parliament passed the Riot Act, but its antecedents date back to the Assize of Arms of 1181. YOUNG, *supra* note 7, at xii.

29. Kopel, *supra* note 27, at 784-87 (tracing how the American colonies adopted, and even strengthened, the powers accorded to sheriffs under common law). By virtue of the Judiciary Act of 1789, U.S. Marshals have enjoyed the same authority from the earliest days of our Constitution. YOUNG, *supra* note 7, at xiv. See Judiciary Act of 1789, § 27, 1 Stat. 87 (1789) (“And be it further enacted, That a marshal shall be appointed in and for each district for the term of four years ... whose duty it shall be ... to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint as there shall be occasion, one or more deputies, who shall be removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either.”).

30. YOUNG, *supra* note 7, at xiii. This became an accepted principle of English law by the end of the seventeenth century. *Id.*

31. See Extradition of Fugitives from Serv., 6 Op. Att’y’s Gen. 466, 473 (1854).

32. Thomas Brown, *The Fugitive Slave Act in Emerson’s Boston*, 25 L. & SOC. INQUIRY 669, 669 (2000) (noting that the Fugitive Slave Act was designed to overcome Northern resistance to returning escaped enslaved persons and that “[n]o event of the antebellum period transformed the sectional conflict into a community crisis more directly than the passage of the Fugitive Slave Act of 1850”); see also, e.g., Mirasola, *supra* note 27, at 229-30 (discussing President Fillmore’s use of the military to support the apprehension and trial of an accused fugitive enslaved person due to widespread opposition to the PCA in Boston).

33. Extradition of Fugitives from Serv., 6 Op. Att’y’s Gen. at 473 (“[The] *posse comitatus* comprises every person in the district or county above the age of fifteen years ... whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a sheriff or marshal.”).

where federal law enforcement officials increasingly demanded that local military commanders render their soldiers to enforce any number of federal criminal laws.³⁴

This practice of using the military for domestic law enforcement strengthened during Reconstruction. In response to a rising tide of racial violence, Congress enacted several statutes authorizing the military to assist in federal law enforcement, as provided in the Fourteenth and Fifteenth Amendments.³⁵ With these statutes and Cushing's doctrine, the military played an active role in governing Southern states during Reconstruction.³⁶ One of the most striking examples occurred in Louisiana, where often violent confrontations between rival state governments persisted, almost continuously, from 1871 through 1877.³⁷ What began as a conflict between two Republican factions mushroomed into an all-out armed conflict after the election of 1872, when rival election commissions endorsed two separate slates of winners.³⁸ Federal troops stationed in New Orleans ultimately occupied the state house to support the faction favored by the Grant administration.³⁹ And for the next two years, both governments operated in New Orleans as an increasingly well-organized "White League" terrorized Black voters in rural portions of the state.⁴⁰ The federal military returned during the election of 1874, when they once again took control of the state house to oust the partisans of a white militia.⁴¹

The election of 1874 was something of a turning point at the federal level as well because, for the first time since the onset of the

34. Mirasola, *supra* note 27, at 231-32 (noting the multiplicity of legal theories under which Presidents and local commanders alike directed their forces to support law enforcement efforts).

35. *See, e.g.*, Enforcement Act of 1870, ch. 114, 16 Stat. 140 (authorizing election commissioners and the President to use the Armed Forces to assist in enforcing the Fifteenth Amendment); Enforcement Act of 1871, ch. 22, 17 Stat. 13 (authorizing the President to use the Armed Forces to suppress "insurrection, domestic violence, unlawful combinations, or conspiracies in any State" that subvert the equal protection of citizens under the law).

36. ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789-1878* at 315 (1988).

37. *Id.* at 316-17.

38. *Id.* at 317-23 (describing in detail the machinations of each rival faction in 1871 and documenting how this conflict metastasized with the election of 1872).

39. *Id.* at 322.

40. *Id.* at 323-25.

41. *Id.* at 327-29.

Civil War, the Democratic Party took back control of the House of Representatives.⁴² The Democratic Party's ascendance was complicated after the disputed presidential election of 1876, which saw Rutherford B. Hayes (the Republican candidate) elevated to the presidency.⁴³

These developments came to a crescendo the next year, when the Democratic-controlled House appended a rider to the annual Army appropriations bill restricting use of the Army "in the support of the claims ... of any State government ... until such government shall have been duly recognized by Congress."⁴⁴ The Republican-controlled Senate refused the bill, and the session ended without an Army appropriation.⁴⁵ President Hayes successfully called a special session to force a clean vote on the Army appropriation.⁴⁶ But, in 1878, House Democrats again introduced an Army appropriations rider and this time, after considerable debate, the Senate and President acceded.⁴⁷ As originally enacted, this rider, now known as the Posse Comitatus Act, 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, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said forces may be expressly authorized by the Constitution or by act of Congress.⁴⁸

Congressional debates reveal how little agreement there was about what this text meant. The Senate and House conferees disagreed as to whether there were any independent constitutional bases for Presidents to use the military for domestic law enforcement.⁴⁹ And colloquies between members of Congress reveal a range

42. JAMIE L. CARSON & JASON M. ROBERTS, *AMBITION, COMPETITION, AND ELECTORAL REFORM: THE POLITICS OF CONGRESSIONAL ELECTIONS ACROSS TIME 1* (2013).

43. Lorence, *supra* note 27, at 164.

44. Siemer & Efron, *supra* note 27, at 19 (quoting 5 CONG. REC. 2152 (1877)).

45. *Id.* at 20.

46. *Id.* at 20, 24.

47. *Id.* at 24-25.

48. An Act Making Appropriations for the Support of the Army for the Fiscal Year ending June 30, 1879, and for Other Purposes, ch. 263, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385).

49. Mirasola, *supra* note 27, at 239-41 (documenting the contrary positions staked out not

of purposes for enacting this statute, from concern about the military's role in domestic governance⁵⁰ to more specific repudiation of Reconstruction-era politics and policies.⁵¹ These disagreements, in turn, motivated diverging views of the PCA's impact on presidential powers. At least one major proponent of the PCA, for example, noted that the legislation was intended to reach from the Commander-in-Chief down to the lowest military officer.⁵²

Notwithstanding this lack of agreement on many of the most important aspects of the PCA, the text remains largely unchanged. Its prohibitions were extended to the Air Force in 1956⁵³ and then to the Navy, Marine Corps, and Space Force in 2021.⁵⁴ Repeated attempts to modernize the PCA have routinely failed.⁵⁵

B. Military Interference in Federal Elections

The criminal statutes limiting military involvement in the administration of elections were also borne of the Civil War and subsequently revised in the shadow of that conflict. 18 U.S.C. § 592 prohibits any “person in the civil, military, or naval service of the United States” from “order[ing], bring[ing], keep[ing], or ha[ving] under his authority or control any troops or armed men at any place

only during congressional debate, but also in the final conference reports issued by each house of Congress).

50. *See, e.g.*, 7 CONG. REC. 3579 (1878) (statement of Rep. William Kimmel) (“Let us see by the broad light of history how fatal standing armies have been to liberty, and profiting by these examples learn how well these justify the distrust of the fathers.”).

51. *See, e.g.*, 7 CONG. REC. 4297 (1878) (colloquy between Senators William Burnside, R-Rhode Island, and Francis Kernan, D-New York) (Burnside, arguing against the Act: “I am satisfied that the Senator from New York ... would not support this section if there had been a democratic President in the presidential chair; and if a republican had proposed this section in such a case he would not have voted for it.”).

52. Siemer & Effron, *supra* note 27, at 17 n.67 (citing 3 CONG. REC. 847 (1878)).

53. Use of Army and Air Force as Posse Comitatus, sec. 18, 70A Stat. 626 (1956) (codified as amended at 18 U.S.C. § 1385).

54. Prohibition on Use of Navy, Marine Corps, and Space Force as Posse Comitatus, Pub. L. No. 117-81, 135 Stat. 1904 (2021) (to be codified at 18 U.S.C. § 1385).

55. *See, e.g.*, Joseph Nunn, *The Posse Comitatus Act Explained*, BRENNAN CTR. FOR JUST. (June 11, 2025), <https://www.brennancenter.org/our-work/research-reports/posse-comitatus-act-explained> [<https://perma.cc/3TH2-H4HU>] (recommending three changes to the PCA); Ariela Rosenberg & Alex Tausanovitch, *How to Reform Domestic Deployment Authorities*, PROTECT DEMOCRACY (Sep. 10, 2024), <https://protectdemocracy.org/work/how-to-reform-domestic-deployment-authorities/> [<https://perma.cc/842U-KJ2M>] (advocating that the PCA should also incorporate an evidentiary exclusionary rule).

where a general or special election is held, unless such force be necessary to repel armed enemies of the United States.”⁵⁶ 18 U.S.C. § 593 expands on this prohibition by criminalizing five specific actions when taken by “officer[s] or member[s] of the Armed Forces of the United States”—prescribing voter qualifications; preventing voters from exercising their right to vote; compelling election officers to receive votes from unqualified voters; imposing regulations on elections different from those provided at law; and interfering with an election officer’s duties.⁵⁷

Senator Lazarus Powell, a Democrat from Kentucky, introduced the predecessor to these statutes in 1864⁵⁸ in response to widespread uses of the military to interfere with federal elections in Kentucky, Maryland, and Delaware.⁵⁹ Indeed, by the 1864 presidential election, a core tenet of the Democratic Party’s platform was criticizing the Lincoln administration for using the military to oversee these elections.⁶⁰ We see this in Senator Powell’s speech introducing these bills, in which he went so far as to “brush away the trash and come right to the Commander-in-Chief himself, and charge him, upon the most indubitable testimony, with trampling under foot the most inestimable right of free suffrage and free election.”⁶¹

What did this election interference look like? In Maryland, federal troops arrested thirty-one public officials and screened voters at polling locations to ensure a pro-Union slate of candidates won state and federal offices.⁶² In 1863, Lincoln endorsed more military activity,⁶³ this time over the governor’s explicit directions to state

56. 18 U.S.C. § 592.

57. *Id.* § 593.

58. CONG. GLOBE, 38th Cong., 1st Sess. 95 (1864).

59. *Id.* app. at 56 (statement of Sen. Lazarus Powell) (“From whence does [the President] derive this power to regulate elections and to appoint representatives of the people? for [sic] when stripped of its verbiage that is really what has been done in many parts of the [s]tates of Maryland, Missouri, Kentucky, and Delaware.”).

60. WILLIAM A. BLAIR, WITH MALICE TOWARD SOME: TREASON AND LOYALTY IN THE CIVIL WAR ERA 160-61 (Gary W. Gallagher & Michael Parrish eds., 2014).

61. CONG. GLOBE, 38th Cong., 1st Sess. app. at 62 (1864) (statement of Sen. Lazarus Powell).

62. This was after Lincoln ignored Chief Justice Taney’s ruling in *Ex parte Merryman* that the President did not have the power to unilaterally suspend the right of habeas corpus. BLAIR, *supra* note 60, at 170.

63. *Id.* at 182-83.

election officials.⁶⁴ At the time, ballots were color-coded by party affiliation and votes were rendered in public.⁶⁵ So it was without too much trouble that federal troops were able to eject voters expected to vote against the President's ticket.⁶⁶

A similar pattern emerged in Kentucky, where Brigadier General Jeremiah Boyle threatened to arrest any candidate for office who criticized the federal government.⁶⁷ General Ambrose Burnside ultimately placed Kentucky under martial law⁶⁸ and many candidates were arrested, with some placed in military confinement until after the election was over.⁶⁹ Much the same was true in Delaware, where federal troops guarded polls and rejected voters who held ballots for parties opposed to the Lincoln administration.⁷⁰

We cannot, of course, separate Democrats' critique of federal military action from their overt racism at the time. One of Senator Powell's chief concerns with a federal loyalty oath, for example, was the prospect of citizens swearing to uphold presidential proclamations which would support Black suffrage.⁷¹ And he explicitly condemned any attempts to orient the government towards interests other than those of the white population.⁷² These military actions

64. *Id.* at 183-85 (describing Governor Bradford's attempts, blocked by federal troops, to issue a proclamation denouncing the use of troops and directing election officials to report election law infractions to state prosecutors).

65. *Id.* at 170.

66. CONG. GLOBE, 38th Cong., 1st Sess. app. at 63 (1864) (statement of Sen. Lazarus Powell) (noting at least two examples in Maryland's eastern shore of military commanders systematically rejecting voters who attempted to vote for candidates opposed to President Lincoln).

67. BLAIR, *supra* note 60, at 172.

68. CONG. GLOBE, 38th Cong., 1st Sess. app. at 60 (1864) (statement of Sen. Lazarus Powell).

69. *Id.* at app. 59-60 (statement of Sen. Lazarus Powell) (noting at least two examples of candidates for congressional office who were arrested by the military, taken outside their voting district, and held until after the election had finished. In at least one instance, the candidate's name was also stricken from the ballot).

70. BLAIR, *supra* note 60, at 171, 181 (noting how Democrats in Delaware responded to the news that the military would be guarding polling locations by boycotting the election in 1863). Again, these actions were orchestrated at quite a high level. Senator Powell, for example, charged that Secretary of War Stanton personally handed out blank military commissions to be filled by Republican partisans to operate at the polls. CONG. GLOBE, 38th Cong., 1st Sess. app. at 65 (1864) (statement of Sen. Lazarus Powell).

71. *Id.* app. at 66 (statement of Sen. Lazarus Powell) ("I tell you, sir, an honest, conscientious man cannot take this oath. This proclamation and oath elevates the negro above the white man.")

72. *Id.* app. at 67 (statement of Sen. Lazarus Powell) ("I believe that this is a Government

were also based on the real fear, at the time, that many of these border states would secede from the Union.⁷³

Senator Powell's initial bill was broader than what was ultimately enacted in 1865. The bill prohibited keeping troops within one mile of a polling location and contained no exceptions for placing troops any closer.⁷⁴ The bill also carried criminal penalties far greater than those ultimately enacted into law.⁷⁵ Republicans lodged many complaints against the bill, including that Powell's original formulation would provide enemy forces a one-mile safe haven at polling locations across the country.⁷⁶ Yet even these opponents recognized Congress's power to impose such a limit on the military.⁷⁷ More particularly, they also recognized Congress's authority to impose a criminal penalty on *presidential* uses of the military.⁷⁸

Ultimately, the bill passed after the prohibition on troops at polls was amended to authorize using the military at polling locations

of white men. I believe it was made by white men and for the benefit of white men; and I still believe that a white man is better than a negro.”).

73. *Id.* app. at 93-94 (statement of Sen. Jacob Howard) (“[I]f there ever was a necessity for the vigorous interposition of military authority to guard the polls against the intrusion of rebels ... it was the case of Kentucky; and I undertake to say that without this interference, Kentucky, in all human probability, would to-day have been regularly installed as a member of the rebel confederation.”); *id.* app. at 96 (statement of Sen. Jacob Howard) (characterizing the Maryland Governor's proclamation opposed to the use of federal troops as “a threat to produce an insurrection, and to drive out the United States troops by force”).

74. *Id.* app. at 55 (statement of Sen. Lazarus Powell).

75. *Id.* (statement of Sen. Lazarus Powell) (requiring a fine between \$200 and \$20,000 and disqualification “from holding any office of honor, profit, or trust, under the Government of the United States”).

76. *Id.* app. at 85 (statement of Sen. Jacob Howard) (asking of Senator Powell, “[d]id he foresee that it might so happen in the operation and execution of such a provision, that a rebel army in full battle array might be within the circle of one mile around a poll at which a general or special election might be held in some one of the States ... and that the effect of the law ... would be to prohibit, absolutely, any attack being made upon that rebel force?”).

77. *Id.* app. at 86 (statement of Sen. Jacob Howard) (“I admit that, if Congress were so unwise, it might, by statute, direct the Commander-in-Chief of the armies not to employ the troops of the United States within any given place, whether that place be within a mile of a poll or elsewhere, because I hold that the warmaking, war-conducting power, in all its varying forms and phases, is lodged in Congress, and that they have a right, if they choose to do so, at all times to direct the movements of the Army.”); *id.* at 1259 (statement of Sen. Willard Saulsbury, Sr.) (“Congress have [sic] the constitutional power, I apprehend, to pass this bill, and the question recurs, ought it to be passed?”).

78. *Id.* at 3158 (statement of Sen. Jacob Howard) (“If this bill shall pass, it will be a penal offense for the President of the United States or any general in command of the Army to have a battle with the rebels at any place within the circle of one mile around the place of an election.”).

when “necessary to repel the armed enemies of the United States” or “to keep the peace at the polls.”⁷⁹ The first major reform to this criminal prohibition occurred nearly thirty years later. As part of a larger push to repeal many of the statutes enacted during Reconstruction to enfranchise Black voters, Democrats proposed eliminating the portion of the 1865 bill prohibiting troops at polls.⁸⁰ Curiously, this reform did not repeal the criminal sanctions that attended this prohibition and did not otherwise alter the remainder of the law (which, by that time, had been divided into other provisions of the Revised Statutes).⁸¹

The rationale for this change is confounding. Democrats framed the offending portion of the 1865 Act not as a limitation, but as an *authorization* to use troops at the polls which otherwise would not exist under the Constitution.⁸² Moreover, Democrats objected to the law because it did not adhere to the Guaranty Clause’s requirement that a state request assistance in suppressing an insurrection or invasion before federal military assistance is provided.⁸³ There is some indication that not all in Congress shared this understanding of the law’s import, though this too divided on partisan lines.⁸⁴

79. *Id.* at 3158-60 (introducing the armed enemies of the United States and keep peace at polls exception and noting House passage of the bill without further debate after a positive report from the Committee on the Judiciary).

80. 25 CONG. REC. 1803 (1893) (introducing the bill as “a repeal bill, proposing to repeal certain sections of the Revised Statutes which are collected in the report of the majority, providing for the appointment of supervisors and deputy marshals and prescribing the duties thereof”).

81. *Id.* at 1855 (statement of Rep. Thomas Lawson) (celebrating Democratic victories at the last election).

82. *Id.* at 1810 (statement of Rep. Henry Tucker) (“That act was passed in February, 1865. It was passed as a war measure. We have passed from that war now nearly thirty years.... It ought to be wiped out for this reason, that it gives to an officer of the Army the discretion of determining when troops should be called out.”); *id.* at 1898 (statement of Rep. John Black) (arguing that there is no constitutional authority for the President to use the military in the manner authorized under this act, and that, therefore, there is no authority for any subordinate officer to exercise the same power); *id.* at 2226 (statement of Rep. Elijah Brookshire) (“[G]entlemen on the other side tell us that we should not repeal section 2002, which provides for troops at the polls to intimidate and browbeat and make afraid the voter.”).

83. *Id.* at 1810 (statement of Rep. Henry Tucker) (arguing that the criminal prohibition “is ultra-constitutional in that it gives to an officer of the Army the discretion of determining when troops shall be used at the polls” when that process is already established under Article IV, section 4); *id.* at 1857 (statement of Rep. Thomas Lawson) (noting the many ways in which the criminal prohibition diverges from the processes required under the Guaranty Clause).

84. *Id.* at 2304 (statement of Rep. John Hull) (“Certainly, if necessary to ‘repel armed enemies of the United States’ every man would be in favor of using all the power of the

Moreover, there appears to be no recognition in the congressional record that, by allowing the criminal prohibition to remain, the prohibition on troops at polls would also stay on the books. Notwithstanding this legislative sausage making, the reform passed in 1894.⁸⁵

The next, and final, significant modification to these statutes occurred about fifteen years later, in 1909. The most important of these changes was to remove the exception that allowed troops to “keep the peace” at polls.⁸⁶ This followed a prior attempt to do so in 1879 (one year after the PCA was enacted).⁸⁷ There is little to explain this modification. The conference committee stated only that “the law is inoperative, and that no good purpose is served in keeping those words in existing law.”⁸⁸

* * *

The crosscurrents of racial politics and principled ideals that run through this legislative history can feed any number of interpretations about the proper scope of these criminal statutes. As I will show in Part III, this is particularly true of the PCA, where the executive branch has made a number of claims about its scope based in its purported history. Nevertheless, there is clear agreement that Congress had constitutional authority to limit, through criminal prohibitions, the President’s ability to deploy the military within the United States.

II. THE CONSEQUENCES OF *TRUMP V. UNITED STATES*

Trump significantly undermines the limitations afforded by these three criminal statutes. In this Part, I find that domestic military deployments almost certainly fall into the categories of official action afforded presumptive immunity under *Trump*.⁸⁹ I then

Government. If my Democratic friends are fearful of interference in ordinary times, why not repeal the last clause, ‘or to keep peace at the polls?’”.

85. 26 CONG. REC. 1999 (1894).

86. 43 CONG. REC. 3735 (1909).

87. *Line Item Veto: The President’s Constitutional Authority: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 103d Cong. 163 (1994).

88. 43 CONG. REC. 3736 (1909) (statement of Sen. George Sutherland).

89. 603 U.S. 593, 606 (2024).

explore the closer question of whether these three criminal statutes impermissibly restrict presidential power under the majority's framework. Taking Congress's role in governing the Armed Forces seriously suggests they would not. But I ultimately conclude that courts taking the *Trump* majority's view of executive power on its own terms are unlikely to come to the same conclusion. Thereafter, I assess whether *Trump* immunity would apply to implementing actions of the subordinate officers on which Presidents rely.⁹⁰ Although the majority does not explicitly address subordinate immunity, again taking its understanding of executive power at its word suggests that immunity would trickle down.⁹¹ This conclusion, however, is contradicted both by cases on which the majority relies and case law disfavoring broad understandings of authorities for domestic military deployments. This unsettled landscape is itself deeply problematic, because even a conclusion that presumptive immunity applies only to the President seriously challenges the military chain of command. Rank-and-file members of the military will bear the brunt of this doctrinal mess.

A. *The Contours of Presidential Immunity*

In this Section, I first summarize the Supreme Court's analysis in *Trump* and identify its normative underpinnings. I identify why taking Congress's power to regulate the Armed Forces likely seriously undermines claims of presumptive immunity. Ultimately, however, I demonstrate why, taking the majority's logic on its own terms, the legal bases for domestic deployments would likely be grounds for presumptive presidential immunity. My purpose here is not to uncover the many doctrinal and normative issues with the *Trump* majority's analysis, work which others have already ably embarked upon.⁹² It is instead to contemplate the more specific

90. *Id.*

91. See generally *id.* at 601-42.

92. See generally Cass R. Sunstein, *Presidential Immunity and Democratic Disorder*, SSRN (July 16, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4896559 [<https://perma.cc/C4U8-S5G6>]; Shalev G. Roisman, *Trump v. United States and the Separation of Powers*, 173 U. PA. L. REV. ONLINE 33 (2025); Keith E. Whittington, *Presidential Immunity*, 2023-2024 CATO SUP. CT. REV. 283 (2024); Joseph Scott Miller, *Perfecting Our Submission? Mann and Trump, Ruffin and Roberts*, 29 LEWIS & CLARK L. REV. 295 (2025); Jack Goldsmith, *Broad Reflections on Trump v. United States*, LAWFARE

complexities which arise when its logic is applied to the law of domestic military deployments.

1. *Understanding Trump v. United States*

The *Trump* majority sets out three sets of gating criteria to determine whether presidential action merits immunity from criminal prosecution. In this Section, I proceed through each and identify the norms motivating the Court's analysis.

First, the act must be official, not private, conduct. The majority writes that presidential acts are official "so long as they are 'not manifestly or palpably beyond [the President's] authority.'"⁹³ The majority does not demarcate the bounds of this authority but indicates that the category is meant to be broad. We are told, for example, that these acts "extend[] to the 'outer perimeter' of the President's official responsibilities"⁹⁴ and do not require an "obvious[] connect[ion] to a particular constitutional or statutory provision."⁹⁵ The President's motives, and whether the action violates generally applicable law, are irrelevant to determining whether an act is official.⁹⁶ Tom Schmidt has noted that this move, construing the scope of immunity to include acts with even a minimal connection to positive authority, is the essential doctrinal shift instigated by *Trump*.⁹⁷

The majority only gives one indication of what constitutes private acts—those where the President claims "authority to act but in fact

(July 2, 2024, at 18:53 ET), <https://www.lawfaremedia.org/article/broad-reflections-on-trump-v.-united-states> [<https://perma.cc/W6ER-CRAR>]; Goldsmith, *supra* note 18; Philip Bobbitt, *A Prudential Way Forward in Trump v. United States*, JUST SECURITY (July 29, 2024), <https://www.justsecurity.org/98205/prudential-trump-v-united-states/> [<https://perma.cc/G53G-36ZF>]; Richard Lempert, *Trump v. United States: Explaining the Outrage*, BROOKINGS (July 12, 2024), <https://www.brookings.edu/articles/trump-v-united-states-explaining-the-outrage/> [<https://perma.cc/8F8L-889X>].

93. *Trump*, 603 U.S. at 618 (quoting *Blassingame v. Trump*, 87 F.4th 1, 13 (D.C. Cir. 2023)).

94. *Id.*

95. *Id.*

96. *Id.*

97. Thomas P. Schmidt, *Presidential Immunity: Before and After Trump*, 79 VAND. L. REV. (forthcoming 2026) (manuscript at 5-6), https://papers.ssrn.com/so13/papers.cfm?abstract_id=5187348 [<https://perma.cc/AQ38-Y5RG>].

exercises ‘individual will’ and ‘authority without law.’”⁹⁸ This quote comes from the majority’s discussion of acts within the President’s “exclusive authority,” (i.e., the second set of gating criteria, more on which below) but I believe it can be understood only as part of our analysis regarding the scope of official acts more generally.⁹⁹ There is a significant doctrinal challenge in squaring this understanding of private acts with the majority’s far broader definition of official acts. The majority asserts, uncontroversially, that “the President’s authority to act necessarily ‘stem[s]’ either from an act of Congress or from the Constitution itself.”¹⁰⁰ And the Court goes on to say that judges “may say” when the President acts without a legal basis, which suggests that courts have authority to find that such acts are not entitled to immunity.¹⁰¹

But what to do with the fact that official acts need no “obvious[] connect[ion] to a particular constitutional or statutory provision[s]”?¹⁰² Perhaps the only way to reconcile these statements is to say that official conduct must have *some* constitutional or statutory basis, but that this connection can be quite weak. So, for example, we might say that the President’s public communications, which the majority recognizes as a “likely” official act,¹⁰³ are related to the President’s duty to “take care” that the laws be faithfully executed or the fact that Presidents are vested with the “executive power.”¹⁰⁴

98. *Trump*, 603 U.S. at 608 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952)).

99. *Id.*

100. *Id.* (quoting *Youngstown*, 343 U.S. at 585).

101. *Id.*

102. *Id.* at 618.

103. *Id.* at 629.

104. This, of course, implicates the wide-ranging debate about what, if any, powers are implied in these statements. See, e.g., Jack L. Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 (2016) (characterizing the Take Care Clause as one expressed in “simple but delphic terms”); Julian D. Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1269 (2019) (arguing that the Executive Vesting Clause grants the President authority only to “execute plans, instructions, and above all else the laws. They would have understood the power as an empty vessel whose authority in any particular case depended entirely on the substantive decisions of the entity ... which possessed the legislative power to direct executive action”); Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 BUFF. L. REV. 557, 557-68 (2018) (interpreting the word “prerogative” in the American context); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 104 (2020) (arguing for a thick version of Mortenson’s thesis); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 253 (2001) (arguing that the

This is consistent with how others have interpreted the *Trump* decision. John Dehn, for example, has argued that ultra vires action provides no public authority on which subordinate officers may rely.¹⁰⁵ But we must recognize that this is a far more minimal role for courts than the majority’s discussion of *Youngstown* would suggest.

Once we determine that an act is official, we must ascertain whether it is afforded absolute or only presumptive immunity. The majority confers acts within the scope of the President’s “exclusive sphere of constitutional authority” with absolute immunity¹⁰⁶ and all other “acts within the outer perimeter of his official responsibility” with presumptive immunity.¹⁰⁷ As Shalev Roisman has noted, this makes distinguishing between the President’s exclusive and concurrent authority crucial.¹⁰⁸ The majority provides three examples of what it asserts are exclusive powers—the pardon power,¹⁰⁹ the removal power,¹¹⁰ and recognition of foreign states, but otherwise provides no rule for distinguishing between these categories.¹¹¹ Justice Barrett argues in her concurring opinion that the President’s authority under the Take Care Clause is not an exclusive power.¹¹² But the majority opinion does not speak directly to this question. The majority instead roots its thinking about presidential power in Justice Jackson’s tripartite *Youngstown*

Executive Vesting Clause reserves all foreign affairs powers not allocated elsewhere in the Constitution to the President); Andrew Kent, Ethan J. Leib & Jed H. Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2117 (2019) (arguing that the Take Care Clause would have been understood at the Constitution’s ratification as a limitation on the President’s discretion); Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479, 1481 (2020) (taking issue with Kent, Leib, and Shugerman’s thesis).

105. John C. Dehn, *The Good Officer: President Trump, General Milley, and the “Necessity” of Constitutional Fidelity*, 90 BROOK. L. REV. 1, 7 (2024).

106. *Trump*, 603 U.S. at 609.

107. *Id.* at 614.

108. Roisman, *supra* note 92, at 34.

109. *Trump*, 603 U.S. at 678.

110. *Id.* at 608-09.

111. Roisman, *supra* note 92, at 36 (arguing that this is an inherent limitation of formalism’s ability to distinguish such powers, and advocating for a balancing approach to determining which acts are within the President’s “conclusive and preclusive” authority); Whittington, *supra* note 92, at 297 (acknowledging that distinguishing core from concurrent powers rests on your theory of presidential power, and that the majority does not provide guidance as to this question).

112. *Trump*, 603 U.S. at 651 n.1 (Barrett, J., concurring).

framework.¹¹³ Yet, as Jack Goldsmith has noted, the *Trump* majority's understanding of preclusive presidential authority is far more formalist than the nuanced balancing of constitutional powers which characterized Jackson's opinion.¹¹⁴

With this rather spare accounting of the second gating criteria, we move on to the final determination. Here, we are concerned only with official acts outside the President's exclusive authority (recall that for official acts within the President's exclusive authority there is absolute immunity from prosecution, and our analysis ends). For nonexclusive official acts, we ask whether criminal prohibitions "pose no 'danger[] of intrusion on the authority and functions of the Executive Branch.'"¹¹⁵ If a criminal prohibition poses no such danger, then there is no immunity from prosecution. If the prohibition does pose such a danger, then the President is at least presumptively (and possibly absolutely) immune.¹¹⁶ A lot, therefore, turns on one's tolerance for limiting the President's decision space. The majority opinion, in dicta, comes out strongly in favor of the President. First, the court emphasizes the need to protect a "vigorous" and "energetic" Executive.¹¹⁷ Diverting the President's attention through the specter of criminal prosecution, we are told, would inhibit the President's ability to act "fearlessly and impartially," thereby enfeebling the federal government.¹¹⁸ Second, and relatedly, the majority expresses concern that allowing one criminal prosecution would begin a cannibalizing cycle, "with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next."¹¹⁹

113. *Id.* at 607-08 (majority opinion). Justice Jackson wrote that Presidents acted at the zenith of their power when acting based on congressional authorization, in a "zone of twilight" in the absence of congressional action, and at their nadir when acting against Congress's will. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

114. Goldsmith, *supra* note 18, at 13.

115. *Trump*, 603 U.S. at 615 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)).

116. *Id.*

117. *Id.* at 610; *see also* Miller, *supra* note 92, at 18 (identifying "constitutional energy" and "vigor-protecting immunity" as the motivating values of the majority opinion).

118. *Trump*, 603 U.S. at 611.

119. *Id.* at 640. Cass Sunstein has connected this normative concern with a broader concern about instability wrought by democracy, and the need for the Supreme Court to intervene to forestall this instability. Sunstein, *supra* note 92, at 8.

How seriously should we take these normative commitments? Shalev Roisman and Albert Alschuler have noted that courts, including the Supreme Court, frequently construe categorical language from their own jurisprudence much less stringently than the text might suggest.¹²⁰ The majority opinion provides the seeds for such a narrowing of its dicta. The Court recognizes, for example, “a compelling ‘public interest in fair and effective law enforcement.’”¹²¹ And Justice Jackson’s *Youngstown* concurrence, on which the majority relies, clearly indicates the powers of Congress which must be equally protected in our scheme of separated powers.¹²² The best we can do at this juncture is divine meaning from contradictory tea leaves and contemplate the range of paths which will lay before us.

2. Trump *Immunity and Domestic Military Deployments*

Whether presidentially directed domestic military deployments merit immunity under *Trump* turns primarily on how stringently one reads the majority’s “no danger” test. In this Section, I first argue that, since domestic military deployments rest on an edifice of concurrent constitutional powers, presidential acts merit at most presumptive immunity. I then show why courts taking a literal reading of the majority’s dicta would likely find that criminal prosecution of presidential acts violating the PCA or election interference statutes impermissibly interfere with executive branch functions. Finally, I demonstrate why the Court’s reliance on history and tradition as a means of constitutional interpretation, in conjunction with Congress’s powers over the Armed Forces, undercuts this conclusion.

Presidential acts predicated on constitutional or statutory authority are certainly “official” for the purposes of the first gating criteria. As will be demonstrated in Part III, there are many such authorities, such as section 1059 of the National Defense

120. Roisman, *supra* note 92, at 52 (noting a similar pattern in the application of the Supreme Court’s decision in *U.S. v. Morrison*).

121. *Trump*, 603 U.S. at 614 (quoting *Trump v. Vance*, 591 U.S. 786, 808 (2020)).

122. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress.”).

Authorization Act (NDAA) for Fiscal Year 2016,¹²³ the Presidential Protection Assistance Act,¹²⁴ and 2 U.S.C. § 1970,¹²⁵ just to name a few.

As to the second gating criterion, presidential acts predicated on statutory authority necessarily fall outside those based exclusively in executive authority and therefore, would be afforded only presumptive immunity. But what of longstanding executive branch reliance on theories of implied constitutional authority for domestic military deployments? Continuing debate about the exclusivity of the President’s national security powers makes this analysis less certain.¹²⁶ But, as will be discussed in Part III, the theories of inherent presidential power to direct domestic military deployments are founded primarily in broad understandings of the Take Care Clause.¹²⁷ I have in prior work contested these theories as a matter of constitutional interpretation.¹²⁸ But even if one concedes their constitutionality, Justice Barrett, at least, would consider them outside the “core” of Article II power.¹²⁹ Ongoing litigation regarding the legality of President Trump’s decision to deploy the military to Los Angeles, may yield an opportunity to see how widely this view is shared by others in the *Trump* majority.¹³⁰

These questions, however, would ultimately matter little for a court taking the *Trump* majority’s normative framework at its word.

123. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (authorizing military deployments to the southern border to assist U.S. Customs and Border Protection).

124. Presidential Protection Assistance Act of 1976, Pub. L. No. 94-524, 90 Stat. 2475 (authorizing military assistance to the Secret Service to protect the President and certain other officials).

125. 2 U.S.C. § 1970 (authorizing military assistance to the U.S. Capitol Police).

126. See generally, e.g., Heidi Kitrosser, *National Security and the Article II Shell Game*, 26 CONST. COMMENT. 483 (2010) (identifying the political incentives that have underpinned a growing trend to assert exclusive presidential power over national security affairs); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) (arguing that an original understanding of constitutional structure indicates that the President does not have preclusive authority over warmaking).

127. See *supra* Part I.

128. Mirasola, *supra* note 27.

129. *Trump v. United States*, 603 U.S. 593, 651 n.1 (Barrett, J., concurring).

130. See Sonja Sharp, *Trump Can Command National Guard as California’s Legal Challenge Moves Forward, Appeals Court Says*, L.A. TIMES (June 20, 2025, at 14:38 ET), <https://www.latimes.com/california/story/2025-06-19/9th-circuit-court-of-appeals-rules-on-los-angeles-military-deployment> [<https://perma.cc/L5GG-VPYC>].

If you believe that powers based in the Take Care Clause are exclusive, then the President enjoys absolute immunity. If you believe that these powers are shared, then the analysis moves on to the third gating criterion. As a reminder, under the third gating criterion one considers whether criminal prohibitions limiting how the President may use the military within the United States pose any “danger[] of intrusion on the authority and functions of the Executive Branch.”¹³¹ Taking the majority’s dicta literally suggests that these prohibitions do so for at least two reasons.

First, the PCA and election interference statutes explicitly limit the tasks that the military can undertake. The fact that this limitation applies to presidentially directed missions is not accidental—the legislative debates show members of Congress explicitly aimed to limit the President’s discretion.¹³² Put another way, these prohibitions are not generally applicable criminal laws which only incidentally, or in particular circumstances, affect the executive branch. The restrictions limit how the federal military may be used and therefore can only be construed as a limit on the “authority and functions of the Executive Branch.”¹³³ In the words of the *Trump* majority, these statutes “criminalize the President’s conduct in carrying out the responsibilities of the Executive Branch under the Constitution.”¹³⁴ What was once a normative feature of these statutes, the *Trump* majority now sees as a fatal flaw.

Second, the *Trump* majority exhibits a special concern for the President’s military functions. In introducing the “unrivaled gravity and breadth” of the President’s duties, for example, the majority begins by noting the President’s authority as Commander-in-Chief.¹³⁵ And the majority notes that, at the founding, there was a desire to create an energetic Executive for “the protection of the community against foreign attacks.”¹³⁶ Given how prominently these examples figure in the majority’s analysis, it is difficult to imagine

131. *Trump*, 603 U.S. at 615 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)).

132. *See supra* Part I.

133. *Trump*, 603 U.S. at 613.

134. *Id.* at 642.

135. *Id.* at 607.

136. *Id.* at 610 (quoting *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 223-24 (2020)).

that criminal prohibitions specifically concerning the military would be seen as not touching the Executive's core functions.

Perhaps the most compelling reason why these criminal statutes *do not* intrude on the functions of the executive branch turns on Justice Jackson's discussion of the third zone of presidential action—those circumstances “[w]hen the President takes measures incompatible with the expressed or implied will of Congress.”¹³⁷ Here, Jackson tells us, the President's power “is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”¹³⁸ Congress enjoys significant express authority to regulate uses of the military, particularly within the United States. It enjoys the power to declare war,¹³⁹ to organize and fund the Armed Forces,¹⁴⁰ to regulate the Armed Forces,¹⁴¹ to determine when and how the militia may be used to execute federal law, suppress insurrections, and repel invasions,¹⁴² and to organize, arm, and discipline the militia when in federal service.¹⁴³ The Supreme Court has also determined that it is the organ through which the states are “guarantee[d] ... a republican form of government” through defense against invasion and domestic violence.¹⁴⁴ What is more, as noted above, there were no doubts in the minds of legislators in the nineteenth century that these criminal penalties could be imposed on the President.¹⁴⁵ As the Supreme Court has increasingly relied on history and tradition as a means of constitutional interpretation, these facts, and the fact

137. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (Jackson, J., concurring).

138. *Id.*

139. U.S. CONST. art. I, § 8, cl. 11.

140. *Id.* art. I, § 8, cl. 12 (“The Congress shall have Power ... To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”); *id.* art. I, § 8, cl. 13 (“The Congress shall have Power ... To provide and maintain a Navy.”).

141. *Id.* art. I, § 8, cl. 14 (“The Congress shall have Power ... To make Rules for the Government and Regulation of the land and naval Forces”).

142. *Id.* art. I, § 8, cl. 15 (“The Congress shall have Power ... To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”).

143. *Id.* art. I, § 8, cl. 16 (“The Congress shall have Power ... To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.”).

144. *Luther v. Borden*, 48 U.S. 1, 42-43 (1849).

145. *See supra* Part I.

that these criminal statutes have gone uncontested for over 160 years, ought to carry significant weight.¹⁴⁶

The Supreme Court, however, did little in *Trump* to guide how we should reconcile these competing normative frameworks. Certainly, there is little in the majority's reasoning to suggest that it considered much beyond the need for an energetic Executive. This suggests, I fear, that courts will emphasize the majority's strong endorsement of the unitary Executive in its dicta even in the context of domestic military deployments.

B. Trump Immunity and the Military Chain of Command

The *Trump* majority does not address whether presidential immunity from criminal prosecution would also apply to the subordinate officials on whom Presidents regularly rely on to execute their official duties.¹⁴⁷ In this Section, I argue that there are two approaches courts might take. First, and most literally applying the majority's logic, is to conclude that presidential immunity must extend to the implementing actions of subordinate officers. The second is to conclude that the presidency is unique in our constitutional scheme, and that the otherwise applicable scheme of criminal liability should apply to subordinate military officers. This approach finds support in precedents on which the majority relies and case law disdaining broad constructions of presidential power to use the military within the United States. Practically, however, this conclusion is little better than the first, as it places enormous burdens on military personnel to sort through this doctrinal mess and affords them few incentives to object to unlawful presidential orders.

146. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (finding that the right to abortion was not "deeply rooted in this Nation's history and tradition"); *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022) (finding that "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation").

147. *Trump v. United States*, 603 U.S. 593, 601-42 (2024).

1. *A Trickle-Down or Presidential Exceptionalism Theory of Subordinate Immunity?*

The *Trump* majority’s logic strongly suggests that presidential immunity would extend to executive branch officials whose actions are necessary to carry out otherwise lawful presidential directives. Most fundamentally, this is because the majority comes the closest it has ever been to a full-throated endorsement of a unitary theory of the Executive.¹⁴⁸ For example, the majority notes that the President is unique as “the only person who alone composes a branch of government.”¹⁴⁹ In arguing that the founders intended to imbue the presidency with “vigor,”¹⁵⁰ the majority also writes that the President has “supervisory and policy responsibilities of utmost discretion and sensitivity”¹⁵¹ and therefore must be afforded the “maximum ability to deal fearlessly and impartially with the duties of his office.”¹⁵² These all suggest both a recognition of reality—that the executive is composed of many officials—and an assertion of a totalizing authority.

Moreover, many of the presidential powers noted by the majority require implementation by others. Take, for example, the President’s authority to “command[] the Armed Forces,” to “mak[e] treaties, ... manag[e] matters related to terrorism, trade, and immigration,” and to “take Care that the Laws be faithfully executed.”¹⁵³ To not afford the same immunity from criminal prosecution for these subordinate officials would plausibly limit the President’s ability to act “fearlessly” and with “vigor.”¹⁵⁴

On the other hand, the majority opinion also provides support for distinguishing presidential action from the implementing activities of subordinates. The three “core” executive functions that the

148. Goldsmith, *supra* note 18, at 20. This trend has continued in the Court’s 2025 decisions, especially on the emergency docket. See, e.g., Michael C. Dorf, *SCOTUS Severely Undercuts Humphrey’s Executor, its Own Authority, and Constitutional Democracy*, DORFON LAW (May 26, 2025), <https://www.dorfonlaw.org/2025/05/scotus-severely-undercuts-humphreys.html> [<https://perma.cc/SMR9-P6JF>].

149. *Trump*, 603 U.S. at 610 (quoting *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020)).

150. *Id.* at 614.

151. *Id.* at 610-11 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982)).

152. *Id.* at 611.

153. *Id.* at 607.

154. *Id.* at 613-14.

majority identifies as meriting absolute immunity, for example, entail only action by the President personally—the pardon power,¹⁵⁵ removal,¹⁵⁶ and foreign state recognition.¹⁵⁷ Presidents require other executive branch officials to effectuate these presidential decisions, but their actions are largely administrative (for example, publishing the memorandum conveying the President’s decision).

Case law concerning immunity from civil liability on which the majority relies makes a similar distinction. Take, for example, *Nixon v. Fitzgerald*, a frequent citation in the majority’s opinion. In *Nixon*, the Supreme Court held that the President “is entitled to absolute immunity from damages liability predicated on his official acts” due to “the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.”¹⁵⁸ Among the reasons given for this unique regime of absolute immunity were the visibility of the office,¹⁵⁹ the need to protect the President from distraction,¹⁶⁰ and the existence of unique mechanisms for checking the President (for example, impeachment, media scrutiny, congressional oversight, and elections).¹⁶¹

The *Nixon* Court determined that these factors sufficiently distinguished the presidency so as to justify leaving untouched an earlier decision in *Butz v. Economou*, which found that cabinet officials only enjoyed qualified immunity from civil litigation regarding their official acts.¹⁶² Reinforcing this point, in *Harlow v. Fitzgerald* (a companion case to *Nixon*), the Court held that the White House staff who implemented presidential acts afforded absolute immunity under *Nixon* only enjoyed the qualified immunity established by *Butz*.¹⁶³ Speaking directly to our question, the Court found that “the importance to the President of loyal and efficient subordinates in executing his duties of office” was “insufficient to justify absolute immunity” for subordinate officials.¹⁶⁴ As

155. *Id.* at 608.

156. *Id.*

157. *Id.* at 609.

158. 457 U.S. 731, 749 (1982).

159. *Id.* at 753.

160. *Id.*

161. *Id.* at 757.

162. *Id.* at 747.

163. 457 U.S. 800, 809 (1982).

164. *Id.* at 808-09.

Zachary Price has noted, distinguishing the President from subordinate officers in this manner is consistent with a long tradition of Congress vesting particular executive functions in particular executive officeholders.¹⁶⁵ Even more germane to our analysis, it is also consistent with a pattern of congressional practice exerting considerable control over the particular duties of particular military officers.¹⁶⁶

The key issue for courts after *Trump*, however, is how to reconcile the logic which underpinned this line of cases with that of the *Trump* majority. The *Butz* Court, for example, identified two primary reasons for affording qualified immunity to subordinate officials. The first was specific to the case—that without express congressional direction, the Court found it untenable to distinguish state from federal malfeasance in the context of a § 1983 lawsuit.¹⁶⁷ Second, the *Butz* majority argued that “[e]xtensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.”¹⁶⁸ This normative concern resonates far more with the *Trump* dissent’s approach than that of the majority.¹⁶⁹

Further confounding the analysis, *Butz* and *Harlow* leave room for granting absolute immunity to subordinate officials in the national security context. The *Butz* Court, for example, preserved the possibility of absolute immunity for subordinate executive officials “where it is demonstrated that absolute immunity is essential for the conduct of the public business.”¹⁷⁰ The *Harlow* Court took this further, suggesting that “[f]or aides entrusted with discretionary authority in such sensitive areas as national security

165. Zachary S. Price, Notice & Comment, *Even if the President is Immune, His Subordinates are Not*, YALE J. REG. (July 11, 2024), <https://www.yalejreg.com/nc/even-if-the-president-is-immune-his-subordinates-are-not-by-zachary-s-price/> [<https://perma.cc/BN7N-EY8R>].

166. Zachary S. Price, *Congress’s Power over Military Offices*, 99 TEX. L. REV. 491, 519-45 (2021) (surveying such statutory directions from the founding through 2020).

167. *Butz v. Economou*, 438 U.S. 478, 504 (1978).

168. *Id.* at 506.

169. *See, e.g., Trump v. United States*, 603 U.S. 593, 668 (2024) (Sotomayor, J., dissenting) (arguing that the majority’s decision “place[s] former Presidents beyond the reach of the federal criminal laws for any abuse of official power”).

170. *Butz*, 438 U.S. at 507.

or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.¹⁷¹

The Court in *Mitchell v. Forsyth* later rejected this approach, finding that “the Attorney General is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions.”¹⁷² But the principal arguments underlying this holding are again in tension with that of the *Trump*. First, rejecting the *Harlow* Court’s dicta, the *Mitchell* majority found that national security functions are *less* deserving of absolute immunity because, unlike “quasi-judicial tasks,” they are less susceptible to litigation.¹⁷³ The *Trump* majority, on the other hand, clearly believes that the risk of litigation without absolute immunity, at least in a criminal context with respect to presidential acts, goes in the opposite direction.¹⁷⁴ Second, the *Mitchell* majority found persuasive that most officials entitled to absolute immunity are “subject to other checks,” such as standing for election.¹⁷⁵ The *Trump* majority, on the other hand, disregards the availability of other means for checking the President.¹⁷⁶

I cannot drive a straight line through this case law. Searching further afield for answers yields, if anything, more questions. On the one hand, we might look to the doctrine of quasi-judicial immunity. Quasi-judicial immunity derives from judicial immunity—the immunity judges enjoy “for acts committed within their judicial jurisdiction.”¹⁷⁷ In terms much like those used by the *Trump* majority, the Court has defended judicial immunity on the grounds that a “judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.”¹⁷⁸ This immunity extends startlingly far—the Supreme Court in *Mireles v. Waco*, for example, found that a judge enjoyed judicial immunity when ordering police

171. *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982).

172. 472 U.S. 511, 520 (1985).

173. *Id.* at 521-22.

174. *Trump*, 603 U.S. at 631-32.

175. *Mitchell*, 472 U.S. at 522-23.

176. *Trump*, 603 U.S. at 631-32.

177. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967).

178. *Bradley v. Fisher*, 80 U.S. 335, 347 (1871).

officers to “forcibly and with excessive force” seize defendants who had not appeared in court.¹⁷⁹

Over time, courts have found that an increasing number of individuals associated with a judge’s official functions enjoy a derivative of this absolute immunity.¹⁸⁰ For our purposes, the most important of these individuals are what the Third Circuit has called the “arms of the court,” those individuals who “fulfill[] a quasi-judicial role at the court’s request.”¹⁸¹ The Third Circuit is not the only to extend quasi-judicial immunity to those necessary to implementing a court order. Seena Forouzan has documented circuits that have taken a similar approach regarding court-appointed receivers of property, for example.¹⁸² To determine whether a subordinate officer is an “arm[] of the court,” the Third Circuit looks to the subordinate’s functions and evaluates whether litigation exposure would affect the exercise of a judge’s functions.¹⁸³ Taking a similar approach, one might conclude that a subordinate military official is an almost literal arm of the President. Military officers are bound to follow lawful military orders (more on this below), and objecting to a presidential order would entirely frustrate the President’s official acts.¹⁸⁴

While this approach to subordinate immunity resonates with the *Trump* majority’s dicta, it is in tension with Supreme Court case law regarding domestic military deployments specifically. In *Laird v. Tatum*, the Court spoke of “a traditional and strong resistance of Americans to any military intrusion into civilian affairs.”¹⁸⁵ This tradition, the Court said, “has deep roots in our history” and “their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime.”¹⁸⁶ Especially for a Court interested in arguments grounded in history and tradition,

179. 502 U.S. 9, 10 (1991).

180. For a deep treatment of this area of law, see generally Seena Forouzan, *The Officer Has No Robes: A Formalist Solution to the Expansion of Quasi-Judicial Immunity*, 66 EMORY L.J. 123 (2016).

181. *Hughes v. Long*, 242 F.3d 121, 126 (3d Cir. 2001).

182. Forouzan, *supra* note 180, at 143-44.

183. *Russell v. Richardson*, 905 F.3d 239, 247 (2018).

184. *See infra* Part II.B.2.

185. 408 U.S. 1, 15 (1972).

186. *Id.*

these normative claims would counsel against extending immunity to subordinate military officers.

While I am normatively partial to this line of argument, there are at least two challenges to adopting it. First, as a descriptive matter, the *Laird* Court overstates our historical aversion to domestic military operations, as Part III will demonstrate. Second, this historical approach is quite strikingly in tension with the *Trump* majority's understanding of the separation of powers. Inherent in the *Laird* Court's dicta is the belief that there are robust limits on how the President may use the military within the United States. Of course, the *Laird* Court did not address whether these limits may be imposed through criminal law. But the principles on which the *Laird* Court relies—that “there is nothing in our Nation's history or in this Court's decided cases ... that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied” by the courts¹⁸⁷—does not align with the *Trump* majority's preeminent concern for presidential “vigor.”¹⁸⁸

By failing to reconcile the precedents on which it relies with the broad assertion of executive power it articulates, the *Trump* majority gives little concrete guidance to how courts should treat action by subordinates.¹⁸⁹ Taking the *Trump* majority's dicta literally suggests that subordinate officials, and particularly subordinate military officials, would enjoy the same immunity from prosecution.¹⁹⁰ Yet the cases on which the *Trump* majority relies, and other case law concerning domestic military deployments, suggest the opposite.¹⁹¹ As will be discussed in the next section, this leaves military officers to shoulder the burden of what can only be described as a jurisprudential mess.

2. *Trump Immunity and Lawful Military Orders*

Central tenants of the military justice system implicitly presume a consistent regime of criminal law extending from the Commander-

187. *Id.* at 15.

188. *Trump v. United States*, 603 U.S. 593, 614 (2024).

189. *Id.* at 601-42.

190. *Id.* at 614, 639.

191. *Id.* at 611-15.

in-Chief to subordinates. First, the UCMJ adopts a strong presumption in favor of finding military orders lawful.¹⁹² Military courts also have a tradition of resolving separation-of-powers disputes in favor of the executive branch. Taken together, these doctrines instantiate a deference to the President which makes little sense if the President can, with few repercussions after *Trump*, issue unlawful orders.

Two provisions of the UCMJ are important to this discussion. First, under Article 90, it is a crime to disobey a “lawful command of that person’s superior commissioned officer.”¹⁹³ Unsurprisingly, given the need for military discipline, punishment for disobeying a lawful command can be severe. During wartime, for example, a court martial may impose punishments up to and including death.¹⁹⁴ Article 92 also criminalizes violating or failing to obey “any lawful general order or regulation.”¹⁹⁵ Those who “hav[e] knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, [and who] fails to obey the order” are subject to the same punishments as provided under Article 90.¹⁹⁶

A significant body of case law is dedicated to the contours of a “lawful order.” Anthony Ghiotto has written extensively about this body of law regarding the SEAL Team Six hypothetical raised by the *Trump* dissent.¹⁹⁷ Based on his excavation of the relevant history, Ghiotto concludes that the presumption of lawfulness and risk of court martial create powerful incentives for military personnel to follow presidential orders that would otherwise violate criminal law.¹⁹⁸ John Dehn has made the same observation, though he calls for subordinate officials to reject not only ultra vires actions, but also those that abuse “accepted constitutional powers or statutory authorities that are intended or virtually certain to result in a significant subversion of the Constitution.”¹⁹⁹

192. 10 U.S.C. § 892.

193. *Id.* § 890.

194. *Id.* § 890(1).

195. *Id.* § 892(1).

196. *Id.* § 892(2).

197. See Anthony Ghiotto, *(Un)Lawful Orders*, 27 N.Y.U. J. LEGIS. & PUB. POL’Y 283, 289-92 (2025).

198. *Id.*

199. Dehn, *supra* note 105, at 18.

A variety of federal materials reflect the high bar to contesting the legality of military orders. The 2024 edition of the *Manual for Courts-Martial*, for example, provides that “[a]n order requiring the performance of a military duty or act may be inferred to be lawful, and it is disobeyed at the peril of the subordinate.”²⁰⁰ “Military duty” is defined quite broadly as “all activities reasonably necessary to accomplish a military mission or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the Service.”²⁰¹ An order must also be “directed specifically to the subordinate”²⁰² and provide a “specific mandate to do or not do a specific act.”²⁰³ This statement of law builds on longstanding precedents in military courts.²⁰⁴ The U.S. Court of Appeals for the Armed Forces, for example, has written that “an order is presumed to be lawful, and a subordinate disobeys an order at his own peril.”²⁰⁵ And, in the context of departmental regulations, the Court of Appeals for the Armed Forces has also provided that such regulations are only facially unconstitutional “when the challenger convinces the Court that ‘no set of circumstances exists under which the [regulation] would be valid.’”²⁰⁶

The Manual takes a similar approach to a servicemember’s duty to follow a general order or regulation under Article 92, providing that they are “lawful unless ... contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason ... beyond the authority of the official issuing it.”²⁰⁷ However, the *Manual for Courts-Martial* also provides that “[t]his inference does not apply to a patently illegal order, such as one that directs the commission of a crime.”²⁰⁸ Case law provides a finer gloss on this

200. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16(c)(2)(a)(i) (2024) [hereinafter MCM] (providing executive branch regulatory guidance for prosecutions of military members under the UCMJ).

201. *Id.* pt. IV, ¶ 16(c)(2)(a)(iv).

202. *Id.* pt. IV, ¶ 16(c)(2)(b).

203. *Id.* pt. IV, ¶ 16(c)(2)(d).

204. *See, e.g., Lee v. Pearson*, 18 C.M.A. 545, 546 (1969) (“Fundamental to an effective armed force is the obligation of obedience to lawful orders.”) (quoting *United States v. Noyd*, 18 C.M.A. 483, 491 (1969)).

205. *United States v. Kisala*, 64 M.J. 50, 52 (C.M.A. 2006).

206. *United States v. Castillo*, 74 M.J. 160, 165 (C.M.A. 2015).

207. MCM, *supra* note 200, at ¶ 18(c).

208. *Id.* pt. IV, at ¶ 16(c)(2)(a)(i).

exception to the general rule provided by Articles 90 and 92. First, an order enjoys the presumption of legality and the defense has the burden of proving illegality unless the order is “palpably illegal on its face.”²⁰⁹ Second, military courts adhere to a political question doctrine by which judges will not second-guess the constitutional basis of a President’s decision to deploy the Armed Forces.²¹⁰ The D.C. Circuit has upheld this political question doctrine, arguing that “the military justice context compels a somewhat broader doctrine in light of the implications of any alternative view.”²¹¹ These implications include the potential that having military courts adjudicate separation-of-powers disputes would undermine the speed with which orders must be obeyed and risk “altering the traditional relationship between the armed forces and the civilian policymaking branches of government.”²¹²

Bringing this legal regime together with the consequences of *Trump* shows the untenable position in which the military justice system now finds itself. A presidential order for the active-duty military to protect federal workers at a polling location or to conduct law enforcement duties at the southern border are quite straightforwardly illegal under 18 U.S.C. § 592 and the PCA, respectively.²¹³ Yet, as discussed above, courts are unlikely to find that Presidents may be prosecuted for issuing those criminal orders.²¹⁴ At the same time, under the military justice system’s jurisprudence, these presidentially directed tasks enjoy a presumption of legality because they are entrusted by statute or the Constitution (respectively) to the Armed Forces.²¹⁵ Again, as discussed above, after *Trump*, it is at best uncertain whether a subordinate can be prosecuted for following this patently illegal order.²¹⁶ What is the military justice system, and the military personnel subject to its dictates, to do when faced by these contradictory impulses? I see at least three options.

209. *United States v. New*, 55 M.J. 95, 108 (C.M.A. 2001) (quoting *United States v. Kapla*, 22 C.M.R. 825, 827 (A.F.B.R. 1956)).

210. *Id.* at 109. The D.C. Circuit has affirmed this holding. *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 410 (D.C. Cir. 2006).

211. *Rumsfeld*, 448 F.3d at 411.

212. *Id.*

213. *See supra* Part I.

214. *See supra* Part I.

215. *See infra* Part III.

216. *See Trump v. United States*, 603 U.S. 593, 601-42 (2024).

First, the military justice system might soften its traditionally strong deference to executive branch opinions regarding separation-of-powers disputes to accommodate the fact that Presidents now have fewer incentives to abstain from issuing plainly criminal orders. The D.C. Circuit justified invoking the political question doctrine on two bases: to avoid giving sanction to “a self-help remedy of disobedience”²¹⁷ and to avoid making courts-martial “a vehicle for altering the traditional relationship between the armed forces and the civilian policymaking branches of government.”²¹⁸ Neither of these rationales cleanly apply to the scenario at hand, where soldiers would be refusing an unlawful order to uphold the plain letter of statutory law.

Second, military personnel might contest the President’s ability to issue these orders directly. Although the D.C. Circuit Court of Appeals upheld a military-specific political question doctrine in *New*, the doctrine has not been adjudicated by the Supreme Court.²¹⁹ Military personnel refusing an order that violates these three criminal statutes could do so by asserting that they are barred from following an unlawful order and arguing that *Trump* does not grant them immunity from subsequent criminal prosecution, adopting either of the two lines of argument discussed above.²²⁰ To return to the first option, these arguments could also be used to justify narrowing the scope of the D.C. Circuit’s political question doctrine, distinguishing *New* from the far more concerning assertion of Presidential power contemplated here.²²¹

Third, and relatedly, military personnel might add that their professional responsibilities require refusing the order. Joshua Braver has noted that Army doctrine has long understood military personnel to share a professional ethic extending beyond simple

217. United States *ex rel.* New v. Rumsfeld, 448 F.3d 403, 411 (D.C. Cir. 2006).

218. *Id.*

219. *Id.* (“Also supporting a broader sweep to the political question doctrine in military trials is the point made by Judge Effron in his concurring opinion—that the doctrine ‘ensur[es] that courts-martial do not become a vehicle for altering the traditional relationship between the armed forces and the civilian policymaking branches of government’ by adjudicating the legality of political decisions.” (quoting United States v. New, 55 M.J. 95, 110 (2001))).

220. See *supra* Part II.B.1.

221. *Cf. New*, 448 F.3d at 411 (“[W]e find no defect in the Court of Appeals’ application of the political question doctrine, even though that application might be highly contestable in another context.”).

compliance with the law.²²² Pertinent Army regulations, Braver explains, provide that soldiers “serve honorably—according to the Army ethic—under civilian authority while obeying the laws of the Nation and all legal orders; further, we reject and report illegal, unethical or immoral orders or actions.”²²³ There is, as Braver argues, always the possibility of unreconciled contradiction in this ethic, because to obey all lawful orders could plausibly require serving unethically or immorally.²²⁴ To reconcile this contradiction, Braver posits that officers “should disobey an order if it is ‘manifestly illegal or unethical’” and report such refusal to their superiors.²²⁵

The practical question remains whether the legal culture created by *Trump* and our current political climate incentivizes military personnel to follow any of these three paths. I am, sadly, skeptical. President Trump, in his first term, contemplated issuing preemptive pardons;²²⁶ a practice which now has precedent in the Biden administration.²²⁷ It would be unsurprising if he took up the pardon power again to assure subordinates that he would preemptively protect them from prosecution for following unlawful orders. What is more, the Trump administration has taken direct aim at the Department of Defense’s legal culture by firing the seniormost Judge Advocate General,²²⁸ among other efforts. Taken together

222. Joshua Braver, *Disobeying Lawful but Unethical Orders in the Army* 17, SSRN (June 10, 2025) (U. Wi. Legal Stud. Res. Paper Series, Paper No. 1846), <https://ssrn.com/abstract=5288109> [<https://perma.cc/89ZT-7U5U>].

223. See *id.* at 17 n.61 (citing HEADQUARTERS, DEP’T OF THE ARMY, ARMY LEADERSHIP AND THE PRO., ADP 6-22 at 1-9 (Nov. 25, 2019)).

224. *Id.* at 2 (discussing three hypotheticals which demonstrate this inherent tension).

225. *Id.* at 28.

226. Brian Naylor, *Talk of ‘Preemptive’ Pardons by Trump Raises Questions: What Can He Do?* NPR (Dec. 2, 2020, at 13:27 ET), <https://www.npr.org/2020/12/02/941290291/talk-of-preemptive-pardons-by-trump-raises-questions-what-can-he-do> [<https://perma.cc/46UD-4WMM>].

227. Bernd Debusmann Jr. & Vicky Wong, *Biden Issues Pre-emptive Pardons for Siblings, Fauci and Jan 6 Riot Panel*, BBC NEWS (Jan. 20, 2025), <https://www.bbc.com/news/articles/c8r5g5dezk4o> [<https://perma.cc/2Z6H-YS2N>].

228. Greg Jaffe, *In Pursuit of a ‘Warrior Ethos,’ Hegseth Targets Military’s Top Lawyers*, N.Y. TIMES (Feb. 22, 2025), <https://www.nytimes.com/2025/02/22/us/politics/hegseth-firings-military-lawyers-jag.html> [<https://perma.cc/XM2H-ZLQG>]; see also *All Things Considered: Understanding Defense Secretary Hegseth’s Contempt for Judge Advocate General Officers*, NPR (Mar. 6, 2025, at 17:42 ET) (discussing how Secretary Hegseth has denigrated the role of military lawyers); Sarah Elaine Harrison, *A ‘Sweeping Overhaul’ of the JAG Corps Poses Likely Dangers*, LAWFARE (Apr. 4, 2025, at 1:00 ET), <https://www.lawfaremedia.org/article/a--sweeping-overhaul--of-the-jag-corps-poses-likely-dangers> [<https://perma.cc/MXS9-ZNGJ>] (enumerating the likely consequences of the Secretary’s efforts).

with the significant deference afforded to the President under the military justice system and the doctrinal confusion caused by *Trump*, military personnel have significant incentives to follow an order which is manifestly illegal.

III. OVERSTATED LEGAL LIMITS ON DOMESTIC MILITARY DEPLOYMENTS

The implications of *Trump v. United States* are concerning for anyone who supports using the law to limit the President's ability to use the military within the United States. But this should not mask the substantial degree to which the President was *already* empowered to use the military for domestic deployments before *Trump*. There is a substantial body of statutory loopholes and executive branch practice on which Presidents can continue to rely on, without *Trump*, to avoid the PCA and election interference statutes. As will be discussed in the next Part, it is this continuing body of law and practice that makes legal reform such a pressing concern.

A. Legislative Loopholes

Wittingly or otherwise, Congress has exempted vast swaths of the military, and a laundry list of law enforcement actions, from our three criminal law prohibitions. Taken together, these statutory authorities provide Presidents a large array of tools for deploying the military within the United States.

1. "Other Duty" Under 32 U.S.C. § 502(f)

The most significant statutory workaround to the PCA and 18 U.S.C. § 592 and § 593 is provided in 32 U.S.C. § 502(f). Section 502(f) authorizes the President or Secretary of Defense to use members of the National Guard for federal military missions while those members remain part of their state militias.²²⁹ Because National Guardsmen remain part of their state militias, they are not subject to the PCA and at least one of the two election interference statutes.²³⁰ This is a significant loophole—there are more than

229. 32 U.S.C. § 502(f).

230. See 18 U.S.C. § 1385 (criminalizing the use of only the Army, Navy, Marine Corps, Air

431,000 members of the Army and Air National Guard.²³¹ In this Section, I trace how § 502(f) came to be, demonstrate why it allows Presidents to avoid these criminal prohibitions, and document how Presidents have increasingly relied upon § 502(f) for domestic deployments.

In 1990, Justice Stevens somewhat famously noted that members of the National Guard wear one of three “hats”—that of a civilian, a member of their state militia, and a member of the federal Army or Air Force.²³² Reality, however, is not so tidy. One of the ways in which it is untidy is due to § 502(f). As currently enacted § 502(f) authorizes the President or Secretary of Defense to call forth the National Guard to “perform training or other duty” in addition to the annual training for which all National Guard personnel are scheduled.²³³ 32 U.S.C. § 101(19) provides that National Guard personnel performing duty under § 502(f) do so “in the member’s status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia.”²³⁴ This means that National Guard personnel undertaking a federal mission at the request of the President or Secretary of Defense under § 502(f) do so not as members of the federal military, but as members of their respective state militias. Because state militias are distinguished from the “Armed Forces,”²³⁵ these personnel are

Force, or Space Force as a posse comitatus and not the National Guard); *id.* § 593 (criminalizing the use of only a member of the Armed Forces of the United States to interfere with voters in elections).

231. *Army National Guard*, NAT’L GUARD, <https://www.nationalguard.mil/about-the-guard/army-national-guard/> [<https://perma.cc/H72X-H9VL>]; *Air National Guard*, AIR FORCE, <https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104546/air-national-guard/> [<https://perma.cc/UX7W-45L7>]. For context, as of 2022 there were 1.3 million members of the active-duty federal military. 2022 *Demographics Profile: Active-Duty Members*, U.S. DEP’T OF DEF., <https://download.militaryonesource.mil/12038/MOS/Infographic/2022-demographics-active-duty-members.pdf> [<https://perma.cc/76R6-LGLA>].

232. *Perpich v. Dep’t of Def.*, 496 U.S. 334, 348 (1990).

233. 32 U.S.C. § 502(f)(1) (“Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may— (A) without his consent, but with the pay and allowances provided by law; or (B) with his consent, either with or without pay and allowances; be ordered to perform training or other duty in addition to that prescribed under subsection (a). (2) The training or duty ordered to be performed under paragraph (1) may include the following: (A) Support of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense.”).

234. *Id.* § 101(19).

235. The Armed Forces includes the “Army, Navy, Air Force, Marine Corps, and Coast

not prohibited from conducting law enforcement under the PCA as they are not technically part of the Army, Air Force, Navy, Marine Corps, or Space Force.²³⁶

Section 502(f) also provides the executive branch a way around the military election interference statutes. To begin, the five actions prohibited under 18 U.S.C. § 593 pertain only to an “officer or member of the Armed Forces of the United States.”²³⁷ Because National Guard personnel performing a federal mission under § 502(f) remain in their state militia status, they are not members of the Armed Forces of the United States.²³⁸ And, for this reason, they are beyond the reach of 18 U.S.C. § 593. This does not mean that there are no restraints on how the National Guard in a § 502(f) duty status may be used with respect to election administration. 18 U.S.C. § 594, for example, prohibits *anyone* from “intimidat[ing], threaten[ing], coerc[ing], or attempt[ing] to intimidate, threaten, or coerce” individuals with the intent to interfere with that

Guard.” 32 U.S.C. § 101(2). Nearly identical definitions, with the addition of Space Force, are provided in Title 10, the other portion of the U.S. Code that governs the military. 10 U.S.C. § 101(a)(4).

236. This conclusion has been widely recognized by the executive branch, *see, e.g.*, Use of the Nat’l Guard to Support Drug Interdiction Efforts in the District of Columbia, 13 Op. O.L.C. 91, 92 (1989) (concluding that the PCA applies only to the National Guard when federalized, and not when operating in a militia status); Mil. Support for Customs and Border Prot. Along the S. Border Under the Posse Comitatus Act, 45 Op. O.L.C. (Jan. 19, 2021) (slip op. at 6) (concluding the same); JOINT CHIEF OF STAFFS, JOINT PUBLICATION 3-28: Defense Support of Civil Authorities I-11 (2018) (“There are advantages associated with employment of the NG in either state active duty or Title 32, USC, status. Most notable is the ability to assist law enforcement as the Posse Comitatus Act (PCA) does not apply to Title 32, USC, or state active duty forces.”), Congress, *see, e.g.*, U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-356, SOUTHWEST BORDER SECURITY: ACTIONS ARE NEEDED TO ADDRESS THE COST AND READINESS IMPLICATIONS OF CONTINUED DOD SUPPORT TO U.S. CUSTOMS AND BORDER PROTECTION 14 (2021) (“Posse Comitatus Act restrictions do not apply to National Guard personnel who are operating in a title 32, U.S. Code, duty status, including National Guard personnel supporting DHS border operations.”), courts, *see, e.g.*, *Mueller v. City of Joliet*, 943 F.3d 834, 837 (7th Cir., 2019) (“The Posse Comitatus Act likewise only bars the Army and Air Force from domestic law enforcement, but does not apply to Title 32 National Guard duty.... Federal service for purposes of the Posse Comitatus Act refers to standing active duty forces organized under Title 10 of the U.S. Code. While the Army National Guard and the Air National Guard are reserve components of the Army and Air Force, respectively, the National Guards are covered by different statutes (i.e., Title 32) than those that apply to the active duty forces (i.e., Title 10).”), and commentators, *see, e.g.*, Ghiotto, *supra* note 25, at 369.

237. 18 U.S.C. § 593.

238. 32 U.S.C. § 101(19).

individual's right to vote.²³⁹ A similar prohibition is contained in 18 U.S.C. § 595.²⁴⁰ These more general prohibitions, nevertheless, do lose something for the lack of specificity contained in 18 U.S.C. § 593. One can easily prescribe voter qualifications, for example, without threatening any individual voter. Or threaten poll workers so that they throw out votes from qualified voters without ever interfacing with those voters. This loophole, therefore, remains quite meaningful.

Although the best reading of 18 U.S.C. § 592 is that it still applies to National Guard personnel in a § 502(f) duty status, the analysis is sufficiently contestable to leave more than enough room for a motivated Executive to avoid its prohibitions. To reiterate, 18 U.S.C. § 592 prohibits any individual in the civilian or military “service of the United States” from “order[ing], bring[ing], keep[ing], or ha[ving] under his authority or control” troops at a polling location.²⁴¹ It seems straightforwardly true that the Secretary of Defense and the President are equally in the “service of the United States.”²⁴² The President’s oath of office indicates as much by requiring that the President “execute the Office” of the presidency and “preserve, protect, and defend the Constitution.”²⁴³ Further, all organized members of the military, National Guard or otherwise, certainly qualify as “troops or armed men.”²⁴⁴

This leaves us to the decisive determination—whether the President can be considered to “order[], bring[], keep[], or ha[ve] under

239. 18 U.S.C. § 594.

240. *Id.* § 595 (“Whoever, being a person employed in any administrative position by the United States, or by any department or agency thereof, or by the District of Columbia or any agency or instrumentality thereof, or by any State, Territory, or Possession of the United States, or any political subdivision, municipality, or agency thereof, or agency of such political subdivision or municipality (including any corporation owned or controlled by any State, Territory, or Possession of the United States or by any such political subdivision, municipality, or agency), in connection with any activity which is financed in whole or in part by loans or grants made by the United States, or any department or agency thereof, uses his official authority for the purpose of interfering with, or affecting, the nomination or the election of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, shall be fined under this title or imprisoned not more than one year, or both.”).

241. *Id.* § 592.

242. *Id.*

243. U.S. CONST. art. II, § 1, cl. 8.

244. 18 U.S.C. § 592.

his authority or control” National Guard personnel conducting a federal mission in a § 502(f) duty status.²⁴⁵ As noted above, these National Guard personnel remain members of their state and territorial militias.²⁴⁶ This means that they remain accountable to state, not federal, authority for the duration of the federal mission and that their individual orders are transmitted through state, not federal, chains of command. Reflecting this lack of federal control, § 502(f) provides that the President or Secretary of Defense merely “request[s]” that the member’s unit support the federal mission.²⁴⁷

Notwithstanding this lack of direct control, the language of 18 U.S.C. § 592 is sufficiently capacious to cover National Guard personnel in a § 502(f) duty status. Federal officials certainly do not “order” or have direct “authority or control” over these National Guard personnel.²⁴⁸ But the federal request is sufficient to “bring” them to a polling location.²⁴⁹ Both in the nineteenth century and today, the ordinary meaning of “bring” has not required an authoritative, controlling relationship between commander and subordinate. Merriam-Webster, today, defines “bring” as “to cause to be, act, or move in a special way” and includes, as examples, both situations of compulsion and of persuasion.²⁵⁰ We see a similar understanding in the 1864 edition of Webster’s dictionary, which defined “bring” as “to make to come; to cause the accession or obtaining of; to procure; to draw in.”²⁵¹ The same understanding prevailed throughout the decades during which revisions to this prohibition were most frequently debated in Congress.²⁵²

245. *Id.*

246. *See* 32 U.S.C. §§ 101(19), 502(f).

247. 32 U.S.C. § 502(f).

248. 18 U.S.C. § 592.

249. *See id.*

250. *Bring*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/bring> [<https://perma.cc/3YPC-DBKY>].

251. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 165 (Chauncey A. Goodrich & Noah Porter eds., G&C Merriam 1864) [hereinafter 1864 DICTIONARY]. This is reinforced by the third order definition, which defines “bring” as “[t]o induce, to draw; to lead; to guide; to prevail on; to influence.” *Id.*

252. *See, e.g.*, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 165 (Chauncey A. Goodrich & Noah Porter eds., G&C Merriam 1890) (providing an identical definition as the 1864 dictionary) [hereinafter 1890 DICTIONARY]; NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 165 (JB Lippincott & Co. 1871) (same) [hereinafter 1871 DICTIONARY].

There is more room for interpretive disagreement about the meaning of “keep.” On the one hand, the statute’s principal preoccupation with the presence of troops at polls would suggest a broad definition, divorced of any connotation of command or control, as in to “stay or remain.”²⁵³ This definition accords with the word’s principal meaning, as defined in the 1864 edition of Webster’s dictionary— “[t]o cause to remain in a given position, as within one’s grasp or control.”²⁵⁴ This definition of “keep” is also consistent with the 1864 dictionary’s secondary definition— “[t]o cause to remain in a given situation or condition; to maintain unchanged; to hold or preserve in any state or tenor.”²⁵⁵ Neither of these definitions require a command relationship to “cause” the troops to remain at a polling location.²⁵⁶ But other definitions suggest a more controlling relationship. The first definition for “keep,” today, is “to retain in one’s possession or power.”²⁵⁷ This meaning accords with one of the versions of the principal definition of “keep” in 1864—that the object is within one’s “control.”²⁵⁸

One might reconcile this word salad in two ways. The first approach, as we might expect of an enterprising executive branch lawyer, would look to *ejusdem generis*.²⁵⁹ The theory here would be that a preponderance of the words in § 592, especially if we take a more control-oriented view of “keep,” require some manner of command relationship. For this reason, we should impute a similar type of relationship to “bring,” and therefore conclude that § 592 does not apply to National Guard personnel in a § 502(f) duty status. The second approach is to rely upon the rule against surplusage.²⁶⁰ An understanding of “bring” that requires a command

253. *Keep*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/keep> [<https://perma.cc/WS5R-6XVC>] (transitive verb definition six).

254. 1864 DICTIONARY, *supra* note 251, at 735.

255. *Id.* As was the case for “bring,” the definition of “keep” also did not change in the 1871 and 1890 editions of Webster’s dictionary. See 1871 DICTIONARY, *supra* note 252, at 735; 1890 DICTIONARY, *supra* note 252, at 735.

256. See 1864 DICTIONARY, *supra* note 251, at 735.

257. MERRIAM-WEBSTER, *supra* note 253.

258. See 1864 DICTIONARY, *supra* note 251, at 735.

259. *Ejusdem Generis*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.”).

260. *Surplusage Canon*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“The doctrine that, if possible, every word and every provision in a legal instrument is to be given effect.”).

relationship is indistinguishable from “order,” and as such renders a portion of § 592 extraneous. Because such a reading of statutory language is disfavored, we have yet more evidence to suggest that § 592 does apply to National Guard personnel whenever they are conducting a federal mission.

In the end, the very existence of a plausible, contrary interpretation is fatal to § 592. The executive branch routinely takes far greater liberties with statutory text (more on this below).²⁶¹ And although I have not found executive branch glosses on the scope of § 592, there is no reason to believe that even traditional executive branch lawyers would conclude that neither § 592 nor § 593 constrain the President’s use of the National Guard performing a federal mission in a § 502(f) duty status.

Legislative history suggests that Congress did not intend these outcomes when originally enacting the antecedent to § 502(f). After two failed attempts,²⁶² Congress enacted what is now § 502(f)(1) in 1964.²⁶³ This language resurrected a similar authority that Congress first provided in 1948,²⁶⁴ but had been lost in subsequent codification.²⁶⁵ The 1948 authorization was part of a broader modernization of pay and training for military reservists,²⁶⁶ and there is no indication in the congressional record of an intent to create a new operational duty status for the National Guard that would exempt

261. See *infra* Part III.B.

262. H.R. 4792, 87th Cong. (1961) (containing language identical to what was ultimately enacted in 1976); H.R. 2512, 88th Cong. (1963) (same).

263. Act of Oct. 3, 1964, Pub. L. No. 88-621, § 1, 78 Stat. 999, 999 (codified as amended at 32 U.S.C. § 502(f)(1)) (“Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—(1) without his consent, but with the pay and allowances provided by law; or (2) with his consent, either with or without pay and allowances; be ordered to perform training or other duty in addition to that prescribed under subsection (a). Duty without pay shall be considered for all purposes as if it were duty with pay.”).

264. S. 1174, 88th Cong. (1948) (enacted) (amending § 92 of the National Defense Act of 1916 to include the following: “members of the National Guard of the United States may be given additional training or other duty, either with or without pay, as may be authorized, with their consent, by direction of the Secretary of the Army”).

265. S. REP. NO. 88-1584, at 3 (1964) (“Since this language referred to the ‘National Guard of the United States’ rather than to the ‘National Guard,’ the provision was omitted in the codification of section 502 of title 32, United States Code.”).

266. See, e.g., 94 CONG. REC. 2416 (1948) (statement of Rep. Leo Allen, bill sponsor) (“[t]he purpose of this bill is to provide inactive duty training pay to Army reservists ... [and] to direct the attention of the Army to the potential strength of the Army reserve.”); 94 CONG. REC. 2417 (1948) (statement of Rep. Harry Towe) (reiterating the same).

them from the PCA.²⁶⁷ The 1960s congressional record yields the same conclusion. A 1961 House Armed Services Committee report, for example, indicated that “additional training or duty” under § 502(f) included:

inspection of units by commanders during times other than the drill periods scheduled for their headquarters units, command post exercises, assembly of units for additional needed instruction and cleaning of equipment, attendance by a few members at field training of units other than their own, for instruction or administration, and participation on courts and boards.²⁶⁸

Committee reports in 1963 and 1964 reflect a similar concern.²⁶⁹

The political branches, however, came to believe that the National Guard should take on domestic deployments in this hybrid duty status in the wake of the War on Drugs, the War on Terror, and Hurricane Katrina. As early as 1981, members of Congress began to push for significantly increased military involvement in counter-drug initiatives²⁷⁰ and saw the PCA in particular as an obstacle to that aim.²⁷¹ In addition to legislation authorizing military support

267. See generally 94 CONG. REC. 2416-33 (1948) (containing the entirety of House debate concerning Pub. L. No. 80-460, and nowhere mentioning the Posse Comitatus Act or anything other than training duty). The only detailed discussion of the National Guard in the House debate concerned whether increasing pay for Army reservists would negatively affect National Guard recruitment. 94 CONG. REC. 2422-24 (1948). Indeed, the War Department characterized this portion of the bill as one among “several incidental changes in the provisions of the National Defense Act pertaining to the Reserve components of the Army” and only intended to make provision for National Guard training accord with that for training of the other portions of the Army’s reserve components. H.R. REP. NO. 80-971, at 3 (1947).

268. H.R. REP. NO. 87-788, at 2 (1961). The Secretary of the Army used identical language to describe the intended additional training and duty in a letter to the House Armed Services Committee. *Id.* at 4. The Secretary of the Army used the same language once again in the second attempt to secure this legislative change, in 1963. H.R. REP. NO. 88-886, at 4.

269. H.R. REP. NO. 88-886, *supra* note 268, at 1-2 (noting the additional time Army Guard battalion commanders required to properly inspect their units and Air Guard Wing commanders needed to inspect their subordinate groups); S. REP. NO. 88-1584, *supra* note 265, at 2 (also noting the additional time needed for National Guard pilots to meet flight training requirements and vehicle drivers to receive specialized training).

270. See, e.g., Kealy, *supra* note 27, at 384 (arguing that the trend to increase the military’s role in law enforcement “was especially evident in the 1980s and 1990s when an influx of cocaine caused the federal government to declare a ‘war on drugs’”).

271. *Posse Comitatus Act: Hearing on H.R. 3519 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, *supra* note 24, at 2-4 (statement of Rep. Charles Bennet) (“Over the years, Congress has not hesitated to allow direct participation by the military in matters of

for domestic counterdrug efforts,²⁷² the National Defense Authorization Act for Fiscal Year 1989 provided funding and authorization for National Guard members, in a state status, to perform counterdrug missions approved by the Secretary of Defense.²⁷³ This elision of federal operations and state duty status went a step further after September 11, 2001, when the Bush Department of Defense placed National Guard members in a § 502(f) duty status to provide security at the nation's airports.²⁷⁴ This one-off practice became a pattern after President Bush deployed the National Guard in a § 502(f) status to the southern border²⁷⁵ and New Orleans (after Hurricane Katrina).²⁷⁶

A 2006 amendment explicitly providing that the President could use National Guard personnel in a § 502(f) duty status to perform federal military operations,²⁷⁷ therefore, merely codified what had become executive branch practice. The congressional record concerning the National Defense Authorization Act for Fiscal Year 2007, which contained this amendment, indicates that there was enthusiasm for this practice.²⁷⁸ Unsurprisingly, based on this evolution in

even lesser magnitude and importance [than drug interdiction].... The infestation of drugs into our society compels us to act again and this time in a major area of concern.... Today our ability to combat these massive smuggling operations is severely hampered by an 1878 statute known as posse comitatus which restricts military involvement in civilian law enforcement.”).

272. *See, e.g.*, 10 U.S.C. § 284.

273. RONALD FLYNN & LEONID KONDRATIUK, *THE NATIONAL GUARD DRUG INTERDICTION MISSION: A CIRCUMVENTION OF POSSE COMITATUS?* 4 (1990).

274. CONG. RSCH. SERV., RL33095, *HURRICANE KATRINA: DOD DISASTER RESPONSE 7* (2006) [hereinafter *KATRINA CRS REPORT*]. There are some indications that the Bush administration also wanted to, but ultimately did not, federalize the National Guard to patrol the border after September 11, 2001. Demaine & Rosen, *supra* note 26, at 178-79, 179 n.42.

275. Six thousand National Guard personnel were sent to the southern border during Operation Jump Start to assist the U.S. Border Patrol at the southern border from 2006 through 2008 in a “Title 32” duty status. MICHAEL DOUBLER, *OPERATION JUMP START: THE NATIONAL GUARD ON THE SOUTHERN BORDER, 2006-2008* 18-19 (2008).

276. *KATRINA CRS REPORT*, *supra* note 274, at 7 (noting that the Assistant Secretary of Defense for Homeland Defense retroactively authorized § 502(f) duty status for all National Guard deployed to New Orleans to assist with federal Hurricane Katrina response efforts).

277. This amendment provides that the “training or duty” authorized under § 502(f) “may include,” *inter alia*, “[s]upport of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense.” John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 525(c), 120 Stat. 2083, 2195 (2006) (codified as amended at 32 U.S.C. § 502(f)).

278. *Department of Defense Authorization for Appropriations for Fiscal Year 2007: Hearing on S. 2766 Before the S. Comm. on Armed Serv.*, 109th Cong. 267 (2006) (noting congressional intent to make the National Guard “more accessible than they have ever been in the past”);

congressional and executive attitudes, Presidents Obama and Trump also used § 502(f) to mobilize National Guard personnel for duty at the southern border.²⁷⁹

For this reason, President Trump’s National Guard deployments to Washington, D.C., also in a § 502(f) duty status, represented a difference in degree, not in kind. In response to Black Lives Matter protests, President Trump authorized thousands of National Guard personnel under § 502(f) to protect federal functions, persons, and property within the District of Columbia.²⁸⁰ In the days and months after the January 6, 2021, attack on the Capitol, over 20,000 National Guard deployed under § 502(f) to assist the U.S. Capitol Police in protecting the Capitol grounds.²⁸¹ And in what is almost certainly the longest and largest National Guard deployment in a § 502(f) duty status, from 2020 through 2022 as many as 40,000 National Guard personnel were deployed at a time to perform a

see also id. at 740-42 (expressing concern, shared by Senators Hillary Clinton and Mark Warner, about the limits imposed by the PCA and the need for greater authority for the military to assist in law enforcement efforts during a crisis); Dougherty, *supra* note 27, at 2 (noting significant debate after Hurricane Katrina about loosening or repealing the Posse Comitatus Act).

279. For more on President Obama’s National Guard border deployment (Operation Phalanx) from July 2010 through September 2011, also in a “Title 32” duty status, see U.S. GOV’T ACCOUNTABILITY OFF., GAO-12-657T, BORDER SECURITY: OBSERVATIONS ON COSTS, BENEFITS, AND CHALLENGES OF A DEPARTMENT OF DEFENSE ROLE IN HELPING TO SECURE THE SOUTHWEST LAND BORDER 2-3 (2012). For more on the border deployment during the Trump administration, starting in 2018, see U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-356, SOUTHWEST BORDER SECURITY: ACTIONS ARE NEEDED TO ADDRESS THE COST AND READINESS IMPLICATIONS OF CONTINUED DOD SUPPORT TO U.S. CUSTOMS AND BORDER PROTECTION 8 (2021).

280. *Department of Defense Authorities and Roles Related to Civilian Law Enforcement: Hearing Before the H. Comm. on Armed Servs.*, 116th Cong. app. at 51-52 (2021) (prepared statement for the record of Mark T. Esper, Sec. of Def.) (noting that 5,100 National Guard personnel from the District of Columbia and eleven other states were deployed at the height of the response to Black Lives Matter protests in Washington, D.C.); Letter from William P. Barr, U.S. Att’y Gen., to Muriel Bowser, Mayor of Washington, D.C., and Karl A. Racine, Att’y Gen. of Washington, D.C. (June 9, 2020), <https://www.justsecurity.org/wp-content/uploads/2025/06/AG-Barr-June-2020-Letter-to-Mayor-Bowser.pdf> [<https://perma.cc/H2HW-VJPV>].

281. Howard Altman & Associated Press, *Up to 21,000 National Guard Troops Now Authorized in DC for Biden Inauguration*, MILITARY TIMES (Jan. 14, 2021), <https://www.militarytimes.com/news/your-military/2021/01/14/national-guard-dc-presence-will-swell-to-26000-for-biden-inauguration/> [<https://perma.cc/EP7E-Z8D5>]; *see also* U.S. DEP’T OF DEF., OFF. OF INSPECTOR GEN., DODIG-2022-039, REVIEW OF THE DOD’S ROLE, RESPONSIBILITIES, AND ACTIONS TO PREPARE FOR AND RESPOND TO THE PROTEST AND ITS AFTERMATH AT THE U.S. CAPITOL CAMPUS ON JANUARY 6, 2021 37, 46 (2021) [hereinafter REVIEW OF THE DOD’S ROLE] (showing that the National Guard was serving under § 502(f)).

variety of administrative and medical duties in response to the COVID-19 pandemic.²⁸² This COVID-19 deployment continued well into the Biden administration.²⁸³

Starting at the nation's peripheries and ultimately reaching its political core, § 502(f) has facilitated a decades-long shift in how the federal government uses the National Guard. Attempts to claw back this practice have, thus far, failed.²⁸⁴ And, so, the greatest workaround to the legal regime founded on these three criminal statutes continues to be an obscure statutory provision originally designed to equalize benefits for over-taxed members of the National Guard.

2. *The Accretion of Statutory Exceptions to the Posse Comitatus Act*

To speak of “exceptions” to the PCA creates the impression that they are few or related to narrow factual circumstances. Neither is true. Congress first authorized the President to use the military to suppress domestic violence in 1792.²⁸⁵ Over the ensuing decades, it has scarcely stopped.

The Department of Defense has identified fourteen statutory exceptions to the PCA that are still on the books.²⁸⁶ The oldest dates back to 1795,²⁸⁷ and at least one additional exception was enacted in fifteen of the twenty-three decades that followed.²⁸⁸ Congress

282. *Transition of National Guard Activations for COVID-19 Response Activities*, FED. EMERGENCY MGMT. AGENCY (May 10, 2023), <https://www.fema.gov/fact-sheet/transition-national-guard-activations-covid-19-response-activities> [<https://perma.cc/8KKC-KCRJ>].

283. *Id.*

284. *See, e.g., Coalition Letter Urges Congressional Leadership to Retain Reforms to the National Guard and Posse Comitatus Act*, BRENNAN CTR. FOR JUST. (Dec. 6, 2021), <https://www.brennancenter.org/our-work/research-reports/coalition-letter-urges-congressional-leadership-retain-reforms-national> [<https://perma.cc/3EGM-SGZT>] (supporting amendments to the Posse Comitatus Act and § 502(f) that have not been enacted into law); *Letter in Support of National Guard Reforms on the FY2022 NDAA*, PROTECT DEMOCRACY (Aug. 31, 2021), <https://protectdemocracy.org/work/national-guard-reforms-fy2022-ndaa/> [<https://perma.cc/CC46-9UKF>] (same).

285. Act of May 2, 1792, ch. 28, §§ 1-2, 1 Stat. 264, 264.

286. DoD Instruction 3025.21, Defense Support of Civilian Law Enforcement Agencies 17-18 (2013).

287. Act of Feb. 28, 1795, ch. 36, §§ 1-2, 1 Stat. 424, 424.

288. *See infra* notes 293-98 (citing exceptions enacted in the 1800s, 1820s, 1830s, 1850s, 1860s, 1870s, 1880s, 1900s, 1910s, 1950s, 1960s, 1970s, 1980s, 1990s, and 2010s).

enacted just under half of the exceptions by the end of the nineteenth century. By 1810, Congress enacted the predecessor to the PCA in a provision of the Insurrection Act²⁸⁹ and a statute authorizing military personnel to enforce civilian public health quarantines at forts along the coast.²⁹⁰ In 1822, Congress authorized the President to use the military to “prevent the felling, cutting down, or other destruction of the timber of the United States in Florida.”²⁹¹ And the list goes on.²⁹²

The pace of congressional action concerning the PCA quickened during the twentieth century.²⁹³ Interestingly, a number of statutory

289. Insurrection Act of 1807, ch. 39, 2 Stat. 443 (codified as amended at 10 U.S.C. § 251).

290. Act of Feb. 25, 1799, ch. 12, § 1, 1 Stat. 619, 619 (codified at 42 U.S.C. § 97).

291. Act of Feb. 23, 1822, ch. 9, 3 Stat. 651 (codified at 16 U.S.C. § 593).

292. In 1834, Congress authorized the military to remove anyone who settled or attempted to survey Indian lands. Act of June 30, 1834, ch. 161, § 11, 4 Stat. 729, 730 (codified at 25 U.S.C. § 180). In 1856, Congress authorized the President to use the military “to protect the rights of the discoverer” of guano islands. Act of Aug. 18, 1856, ch. 164, § 5, 11 Stat. 119, 120 (codified at 48 U.S.C. § 1418). In 1861, Congress authorized the President to use the military to suppress subversion of federal authority, Act of July 29, 1861, ch. 25, § 1, 12 Stat. 281, 281 (codified as amended at 10 U.S.C. § 252), and assist customs officers block commerce during an insurrection, Act of July 13, 1861, ch. 3, § 3, 12 Stat. 255, 256; Act of Mar. 3, 1875, ch. 136, 18 Stat. 469 (codified at 50 U.S.C. §§ 219-20). In 1871, Congress authorized the President to use the military to ensure rights granted to citizens under the Fourteenth Amendment. Act of Apr. 20, 1871, ch. 22, § 3, 17 Stat. 13, 14 (codified as amended at 10 U.S.C. § 253). In the 1880s, Congress authorized the President to use the military to protect the “game or objects of curiosity” in national parks, Act of Mar. 3, 1883, ch. 143, 22 Stat. 603, 627 (codified as amended at 16 U.S.C. § 23), and to remove unlawful enclosures on public lands, Act of Feb. 25, 1885, ch. 149, § 5, 23 Stat. 321, 322 (codified as amended at 43 U.S.C. § 1065).

293. In 1900, Congress authorized the President to use the military to protect the Sequoia, Yosemite, and (the now defunct) Grant National Parks. Act of June 6, 1900, ch. 791, 31 Stat. 588, 618 (codified as amended at 16 U.S.C. § 78). In 1909, Congress authorized the President to use the military to enforce U.S. neutrality in international conflicts. Act of Mar. 4, 1909, ch. 321, §§ 14-15, 35 Stat. 1088, 1090-91 (codified as amended at 22 U.S.C. §§ 461-62). In 1917, Congress authorized the President to use the military to prevent the illegal export of war material. Espionage Act of 1917, ch. 30, § 8, 40 Stat. 217, 225 (codified as amended at 22 U.S.C. § 408). After a lull from the 1920s through the 1940s, Congress authorized the President to use the military to assist the governors of Guam in the 1950s, Act of Aug. 1, 1950, ch. 512, § 6(b), 64 Stat. 384, 386 (codified as amended at 48 U.S.C. § 1422), and the U.S. Virgin Islands, Act of July 22, 1954, ch. 558, § 11, 68 Stat. 497, 503 (codified as amended at 48 U.S.C. § 1591), respond to unrest. In 1965, Congress authorized the military to assist in investigations of presidential staff assassination, kidnapping, and assault. Act of Aug. 28, 1965, Pub. L. No. 89-141, 79 Stat. 580 (codified as amended at 18 U.S.C. § 1751). The 1970s were particularly busy. In the span of six years, Congress authorized using the military to assist in (1) investigations of individuals who assassinate, kidnap, or assault a member of Congress, the cabinet, or the Supreme Court, Act of Jan. 2, 1971, Pub. L. No. 91-644, sec. 15, § 351, 84 Stat. 1880, 1891 (codified as amended at 18 U.S.C. § 351), (2) enforcing criminal

authorities have been enacted within the last forty years. In 1982, for example, Congress authorized using the military to help the Department of Justice enforce prohibitions against unlawful transactions concerning nuclear materials.²⁹⁴ In 1996, Congress provided a similar authorization to assist the Department of Justice concerning weapons of mass destruction.²⁹⁵ Congress passed the latest exception in 2015, once again authorizing the military to assist the Department of Justice during bombings of public spaces, infrastructure, and government facilities.²⁹⁶

Taken together, this pattern undercuts the *Laird* Court's assertion of the "traditional and strong resistance of Americans to any military intrusion into civilian affairs."²⁹⁷ Many of these statutes provide the President significant discretion. There is no limit, for example, to the scope or duration of support that the military may provide in assisting investigations of congressional, cabinet, or Supreme Court assassinations, kidnappings, or assaults.²⁹⁸ The same is true for military officers enforcing civilian-imposed quarantines at military installations along the coast.²⁹⁹ Other statutes do provide more exacting standards, as can be seen in the multistep request processes required for the military to help the Department of Justice enforce laws concerning weapons of mass destruction,³⁰⁰ nuclear materials,³⁰¹ and bombings.³⁰² Other statutes,

prohibitions against assaulting or murdering foreign officials, Act of Oct. 8, 1976, Pub. L. No. 94-467, §§ 2, 5, §§ 1116, 112, 90 Stat. 1997, 1997, 1999 (codified as amended at 18 U.S.C. §§ 1116, 112), and (3) enforcing fisheries laws, Act of Apr. 13, 1976, Pub. L. No. 94-265, § 311, 90 Stat. 331, 358-59 (codified as amended at 16 U.S.C. § 1861).

294. Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, Pub. L. No. 97-351, sec. 2, § 831, 96 Stat. 1663, 1663-66 (codified as amended at 18 U.S.C. § 831).

295. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, sec. 1416, §§ 382, 175(a), 2332(d), 110 Stat. 2422, 2721-23 (codified as amended at 10 U.S.C. § 282).

296. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, sec. 1082, § 383, 129 Stat. 726, 1002 (2015) (codified as amended in 10 U.S.C. § 283).

297. *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

298. 18 U.S.C. § 351(g) ("Assistance may be requested from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.")

299. 42 U.S.C. § 97.

300. 10 U.S.C. § 282(a).

301. 18 U.S.C. § 831(f)(1).

302. 10 U.S.C. § 283.

most notably the provisions of the Insurrection Act,³⁰³ exist in a middle zone, providing the President significant discretion within a somewhat delimited framework.³⁰⁴ Taken together, there is no readily identifiable principle threading the statutes together—just the steady accretion of military authority whenever Congress has deemed civilian instrumentalities insufficient to the task of governance.

B. Erosion of the Posse Comitatus Act Through Executive Branch Lawyering

Executive branch practice has also undermined the PCA’s prohibitions. First, this has been achieved through legal opinions about the scope of the PCA’s statutory and constitutional exceptions. Second, the Department of Justice Office of Legal Counsel (OLC) has read an implied exception for military and foreign affairs activities into the PCA. In this Section, I demonstrate how these exceptions significantly circumscribe the PCA’s prohibitions. I also show how this executive branch practice aligns strongly with the approach taken by the Supreme Court in *Trump*.

1. Outer Boundary of Statutory and Constitutional Exceptions

In this Section, I first outline contradictions in the executive branch’s practice of assessing whether a statute is sufficiently “express” to constitute an exception to the PCA. I also identify how capaciously the executive branch has drawn the PCA’s constitutional exception.

The Department of Justice has long held that general authorizations for military support to law enforcement are insufficiently “express” to constitute an exception to the PCA. Attorney General Charles Devens established this approach months after the PCA was signed into law, finding that the Judiciary Act of 1789’s authorization for U.S. Marshals “to command all necessary assistance in the execution of [their] duty” was not an “express

303. *Id.* §§ 251-253.

304. Laura A. Dickinson, *Protecting the U.S. National Security State from a Rogue President*, 16 HARV. NAT’L SEC. J. 1, 10-11 (2025) (describing limits on the President’s discretion based in the text of the Insurrection Act).

authority” for marshals to “summon any military force of the United States.”³⁰⁵ Attorneys General affirmed this approach in 1881,³⁰⁶ 1889,³⁰⁷ 1890,³⁰⁸ and 1957.³⁰⁹ This approach is well reflected in the most recent OLC opinion regarding the PCA, focusing on military deployments in support of the Department of Homeland Security at the southern border.³¹⁰ In that opinion, the OLC provided that “it must be clear that Congress has approved that activity without regard to the restrictions on using the military ‘as a posse comitatus or otherwise to execute the laws.’”³¹¹

The executive branch, even in recent memory, has not always held firm to this understanding of the PCA. In 2002, for example, the Assistant Attorney General opined that the 2001 Authorization for the Use of Force (AUMF) concerning the September 11th attacks was sufficiently expressed because it “authorize[d] ‘the use of [the] Armed Forces against those responsible for the recent attacks launched against the United States’ ... [and] does not distinguish between deployment of the military either at home or abroad.”³¹² The OLC took the same view in an earlier, 2001 memorandum³¹³ that, in 2008, the OLC subsequently flagged for caution.³¹⁴ Although this 2008 memo did not reference the 2002 memorandum, it did reject the conclusion that the AUMF constituted a statutory exception to the PCA.³¹⁵

Current Department of Defense regulations also appear to run contrary to the longstanding, more exacting, OLC view. Among the

305. *Emp. of the Mil. as a Posse*, 16 Op. Att’y Gen. 162, 163 (1878).

306. *Suppression of Unlawful Orgs. in Arizona*, 17 Op. Att’y Gen. 242, 243 (1881).

307. *Marshal of Indian Territory*, 19 Op. Att’y Gen. 293, 295-96 (1889).

308. *Emp. of Troops in Enforcing the L.*, 19 Op. Att’y Gen. 570, 571 (1890).

309. *President’s Power to Use Fed. Troops to Suppress Resistance to Enf. of Fed. Ct. Ods.—Little Rock, Arkansas*, 41 Op. Att’y Gen. 313, 329-30 (1957).

310. *Mil. Support for Customs and Border Prot. Along the S. Border Under the Posse Comitatus Act*, 45 Op. O.L.C. (Jan. 19, 2021).

311. *Id.* at 10.

312. Memorandum from Jay S. Bybee, Assistant Att’y Gen., to the Att’y Gen. 9 (June 8, 2002) (on file with the OLC) [hereinafter 2002 OLC Memo].

313. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., and Robert J. Delahunty, Special Couns., to Alberto R. Gonzales, Couns. to the President, and William J. Haynes II, Dep’t of Def. Gen. Couns. 1-2 (Oct. 23, 2001) (on file with the OLC) [hereinafter 2001 OLC Memo].

314. Memorandum for the files from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen. 1 (Oct. 6, 2008) (on file with the OLC) [hereinafter 2008 OLC Rescission Memo].

315. *Id.* at 2.

statutory exceptions to the PCA listed by the Department is the Presidential Protection Assistance Act of 1976.³¹⁶ In relevant part, this statute provides that “Executive departments and Executive agencies shall assist the Secret Service in the performance of its duties.”³¹⁷ Without any specifics about how the military may be used in support of the Secret Service’s law enforcement and protection duties, it is hard to square its inclusion in this Department of Defense regulation with the OLC’s treatment of the Judiciary Act of 1789 and (post-2008) treatment of the 2001 AUMF.

At best, these discrepancies in the executive branch’s approach reflect the consequences of providing abstract legal advice in a time of crisis³¹⁸ or constitute bureaucratic errors. At worst, they represent an executive branch impulse to define into near-nothingness the meaning of “express,” thereby opening the PCA to far-reaching exceptions.³¹⁹ As will be discussed below, this impulse motivates the executive branch’s treatment of constitutional exceptions to the PCA—a tendency likely to be strengthened by *Trump*.

The executive branch has asserted constitutional exceptions to the PCA nearly from the moment of its enactment. In prior work I have investigated, and critiqued, two of these theories—the protective power and emergency authority.³²⁰ Here, it will suffice to

316. DoD Instruction 3025.21, *supra* note 286, at 18 (“Categories of active participation in direct law enforcement-type activities (e.g., search, seizure, and arrest) that are not restricted by law or DoD policy are: ... Actions taken under express statutory authority to assist officials in executing the laws, subject to applicable limitations. The laws that permit direct DoD participation in civilian law enforcement include: ... Protection of the President, Vice President, and other designated dignitaries in accordance with section 1751 of Reference (n) and Public Law 94-524 (Reference (x)).”).

317. 18 U.S.C. § 3056 note (Presidential Protection Assistance Act of 1976).

318. 2008 OLC Rescission Memo, *supra* note 314, at 1 (“It is important to understand the context of the 10/23/01 Memorandum. It was the product of an extraordinary—indeed, we hope, a unique—period in the history of the Nation: the immediate aftermath of the attacks of 9/11. Perhaps reflective of this context, the 10/23/01 Memorandum did not address specific and concrete policy proposals; rather it addressed in general terms the broad contours of hypothetical scenarios involving possible domestic military contingencies that senior policy-makers feared might become a reality in the uncertain wake of the catastrophic terrorist attacks of 9/11.”).

319. *See, e.g.*, 2 U.S.C. § 1970 (authorizing executive departments, including Department of Defense, to “assist” the U.S. Capitol Police by providing “services (including personnel), equipment, and facilities” to further “the performance of [Capitol Police] duties”); 10 U.S.C. § 284 note (National Defense Authorization Act for Fiscal Year 2016).

320. *See* Mirasola, *supra* note 27, at 245-50; *see generally* Dougherty, *supra* note 27, at 15 (“[e]nforcing a stricter PCA against the President would, in theory, be unconstitutional.”);

sketch the contours of these asserted authorities and place them within a broader context of how the executive branch has (inconsistently) thought about constitutional exceptions to the PCA. Here, unlike in the statutory context, the executive branch has adopted a robust understanding of presidential prerogative that resonates quite strongly with the *Trump* majority's opinion.

The OLC has defined the protective power as an inherent presidential authority "to use troops for the protection of federal property and federal functions" as well as for protecting federal personnel.³²¹ The protective power was first asserted in 1877³²² and was reaffirmed in a series of OLC opinions from the 1960s and 1970s.³²³ The executive branch has been inconsistent in the legal theory that justifies the protective power, ranging from asserting authority under the Take Care Clause to more inchoate theories about military necessity.³²⁴

The emergency authority is more of an enigma. It purports to authorize local military commanders to use their troops to "quell large-scale, unexpected civil disturbances" when communication with higher authority is impossible, local authorities are unable to adequately respond to the unrest, and the unrest is likely to result in "significant loss of life or wanton destruction of property."³²⁵ Like the protective power, the executive branch has also asserted the emergency authority existence for many years, in this case dating to a few months after the PCA was enacted.³²⁶ Unlike the protective power, however, the executive branch has been remarkably inconsistent in its understanding of the circumstances in which the emergency power might be invoked and its constitutional justification.³²⁷

H.W.C. Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 92, 105 (1960) ("Because the Posse Comitatus Act would be unconstitutional if applied to the Commander in Chief, it does not follow that this would be so with his subordinates."); Lorence, *supra* note 27 (providing the contrary view).

321. Auth. to Use Troops to Prevent Interference with Fed. Emp. by Mayday Demonstrations and Consequent Impairment of Gov't Functions, 1 Supp. Op. O.L.C. 343, 343 (1971).

322. Mirasola, *supra* note 27, at 232.

323. *Id.* at 219-22.

324. *Id.*

325. Department of Defense Instruction 3025.21, *supra* note 286, at 17.

326. Mirasola, *supra* note 27, at 223-24.

327. *Id.* at 234-38.

The executive branch has, in the past, asserted other constitutional exceptions to the PCA. Until 1945, for example, War Department regulations listed the Guaranty Clause of Article IV as such an exception.³²⁸ This practice continued for many years after the Supreme Court in *Luther v. Borden* found the Guaranty Clause to be a congressional, not executive, authority.³²⁹ Indeed, the executive branch has been unable to articulate, with any meaningful precision, its understanding of the standard for determining that a constitutional authority functions as an express exception to the PCA. The OLC came closest to such a statement in 2021, asserting that the constitutional exception “appl[ies] to ‘any use of the military for constitutional purposes,’ including the deployment of ‘troops pursuant to a plenary constitutional authority.’”³³⁰

The OLC took this robust assertion of presidential authority from the 2002 and 2001 OLC memoranda concerning post-9/11 domestic military deployments. The 2001 memorandum asserted that exercises of the President’s Commander-in-Chief and Chief Executive powers “in response to a direct attack on the United States” represented a plenary constitutional power and were therefore an exception to the PCA.³³¹ Similarly, the 2002 memorandum found that the President’s decision to use the military to detain suspected terrorists within the United States was pursuant to the chief executive and Commander-in-Chief authority “in response to a direct attack on the United States” and therefore was also excepted from the PCA’s prohibitions.³³²

Both memoranda relied on a 1957 OLC opinion that appears to be the first to directly interpret the scope of the PCA’s constitutional exception.³³³ In it, the OLC noted that it had “grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under

328. *Id.* at 233 n.151.

329. 48 U.S. (7 How.) 1, 42-43 (1849) (“[I]t rests with Congress to decide what government is the established one in a State ... [and to] determine upon the means proper to be adopted to fulfil this guarantee [of protection].”).

330. Mil. Support for Customs and Border Prot. Along the S. Border Under the Posse Comitatus Act, 45 Op. O.L.C. (Jan. 19, 2021) (slip op. at n.4).

331. 2001 OLC Memo, *supra* note 313, at 20.

332. 2002 OLC Memo, *supra* note 312, at 9.

333. President’s Power to Use Fed. Troops to Suppress Resistance to Enf’t of Fed. Ct. Ords.—Little Rock, Arkansas, 41 Op. Att’y’s Gen. 313, 329-31 (1957).

circumstances which he deems appropriate.”³³⁴ A similar concern about preserving the President’s constitutional powers underpinned OLC’s 1989 decision that the PCA did not have extraterritorial application.³³⁵

It is not at all surprising that the executive branch has struggled to identify with precision the outer bounds of the PCA’s constitutional exception. The Supreme Court removed from consideration the one constitutional provision that comes closest to constituting such an exception—the Guaranty Clause.³³⁶ And yet, it is striking that none of these executive branch opinions engage in the separation-of-powers balancing required by *Youngstown*.³³⁷ Instead, the executive branch has relied on dicta, contained in cases like *In re Neagle* and *In re Debs*, that reflect broad visions of executive authority rooted in the Take Care Clause.³³⁸

As noted above, this executive branch practice makes particularly salient Justice Barrett’s assertion, in her *Trump* concurrence, that the Take Care Clause does not represent a “core executive power.”³³⁹ In prior work, I have shown that Congress has enacted a wide range of legislation that occupies the fields covered by the emergency authority and protective power.³⁴⁰ If Justice Barrett’s assertion concerning the Take Care Clause is correct, as I believe it is,³⁴¹ then there is yet more authority to suggest that these two doctrines are based in shared, not exclusive, constitutional powers.

However, as discussed in Part II, the majority opinion contains sweeping assertions of presidential authority.³⁴² Jack Goldsmith has suggested that the most important implication of the Supreme Court’s analysis in *Trump* may be a doubling down on this more expansive approach to understanding presidential power within the

334. *Id.*

335. Extraterritorial Effect of the Posse Comitatus Act, 13 Op. O.L.C. 321, 321, 327 (1989) (noting that this conclusion was necessary to avoid “unwarranted restraints on the President’s constitutional powers ... as chief executive and commander in chief”).

336. *Luther v. Borden*, 48 U.S. (7 How.) 1, 42-43 (1849).

337. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1951) (Jackson, J., concurring) (delineating the tripartite framework Justice Jackson uses to determine the degree of deference presidential action is due).

338. Mirasola, *supra* note 27, at 213, 221-22.

339. *Trump v. United States*, 603 U.S. 593, 651 n.1 (2024) (Barrett, J., concurring in part).

340. Mirasola, *supra* note 27, at 242-43.

341. For reasons to support this conclusion from recent scholarship, see *id.* at 215-16.

342. See *supra* Part II.

executive branch.³⁴³ This seems correct. If the OLC has been willing to find the protective power on visions of Take Care Clause authority taken from dicta and to ignore the balancing required by *Youngstown*, there is little reason to believe that it will not do so again, this time drawing from *Trump*. Indeed, this same line of reasoning is already evident in some of the broadest articulations of presidential authority concerning the PCA. The OLC’s 2001 memorandum, for example, asserted that the “executive” power grants the President “the broad powers necessary to the proper functioning of the government and to the security of the nation.”³⁴⁴ This statement sits quite comfortably next to the *Trump* majority’s discussion of the presidency, and rests uncomfortably beside Justice Barrett’s more limited construction of the Take Care Clause.³⁴⁵

2. *The Military and Foreign Affairs Exceptions*

The executive branch has also limited the PCA’s scope by identifying military and foreign affairs exceptions evident nowhere in the PCA’s text. These exceptions account for military activities that are relatively distant from the civilian world. Yet the exceptions’ broad scope is of quite recent vintage and, much like the OLC’s most expansive interpretations of the PCA’s constitutional exception, contain the seeds of a far broader diminution of the PCA.

Department of Defense policy provides that the PCA does not restrict “[a]ctions taken for the primary purpose of furthering a Department of Defense or foreign affairs function of the United States, regardless of incidental benefits to civil authorities.”³⁴⁶ These regulations further provide that such actions “may include” prosecutions under the UCMJ, actions related to likely Department of Defense administrative proceedings, actions related to a commander’s authority to maintain order on a military facility, the protection of classified defense information, protection of

343. Jack Goldsmith, *The Relative Insignificance of the Immunity Holding in Trump v. United States (and What is Really Important in the Decision)*, LAWFARE (Sep. 23, 2024, at 12:52 ET), [https://www.lawfaremedia.org/article/the-relative-insignificance-of-the-immunity-holding-in-trump-v.-united-states-\(and-what-is-really-important-in-the-decision\)](https://www.lawfaremedia.org/article/the-relative-insignificance-of-the-immunity-holding-in-trump-v.-united-states-(and-what-is-really-important-in-the-decision)) [<https://perma.cc/XEX9-3PCB>].

344. 2001 OLC Memo, *supra* note 313, at 6.

345. *Trump v. United States*, 603 U.S. 593, 610-14, 651-52 (2024).

346. Department of Defense Instruction 3025.21, *supra* note 286, at 16.

Department of Defense personnel, equipment, and official guests, and “[s]uch other actions that are undertaken primarily for a [defense] purpose.”³⁴⁷ Elsewhere, the OLC has opined that the PCA does not apply to any military activities taken outside the United States.³⁴⁸

The OLC memoranda document the steady accumulation of this laundry list of implied exceptions. In 1977, for example, the OLC decided that the PCA “does not prohibit military personnel from acting upon [on-]base violations committed by civilians.”³⁴⁹ In support, the OLC argued that the Act’s purpose was “to prohibit use of Federal troops to support the enforcement of State or Federal laws in the civilian community.”³⁵⁰ This conclusion, the OLC argued, was a natural extension of the fact that the PCA does not prohibit using the military for law enforcement in areas under military control under the laws of war.³⁵¹ Similarly, in 1980, the OLC argued that the power to maintain law and order on a military installation “derives generally from the President’s constitutional power as Commander-in-Chief, as well as from statutes, and more particularly from regulations applicable to the respective military services.”³⁵² The OLC then noted a long history of executive branch lawyers recognizing this authority, both before and after Congress enacted the PCA.³⁵³

The OLC expanded the military exceptions in a pair of 1989 opinions.³⁵⁴ In the first, the OLC determined that the PCA was

347. *Id.* at 16-17.

348. Extraterritorial Effect of the Posse Comitatus Act, 13 Op. O.L.C. 321, 322-23 (1989).

349. Law Enforcement at San Onofre Nuclear Generation Plant, 1 Op. O.L.C. 204, 206-07 (1977).

350. *Id.* at 208-09.

351. *Id.* at 209. For further discussion of the OLC’s reasoning concerning why the military can take acts that otherwise might violate the PCA in response to on-base violations of criminal law, see *The Mariel Boatlift*, UNIV. OF MIAMI LIBRARIES, <https://guides.library.miami.edu/mariel> [<https://perma.cc/R5WK-XQMJ>] (documenting how 125,000 Cubans fled from Cuba to South Florida over the course of a few months in 1980).

352. Use of Military Personnel to Maintain Order Among Cuban Parolees on Military Bases, 4 Op. O.L.C. 643, 644 (1980).

353. *Id.* at 644-45 (citing Rights of Residents and Visitors at the Mil. Acad., 3 Op. Att’y Gen. 268 (1937); Subig Bay Naval Rsrv.—Jurisdiction of the Navy Dep’t, 26 Op. Att’y Gen. 91 (1906)). Notably, the OLC concluded that this military authority included the ability to “apprehend and restrain parolees for on-base violations of federal and state law which in the base commander’s view threaten the security and good order of the base.” *Id.* at 647.

354. See Use of the Nat’l Guard to Support Drug Interdiction Efforts in the District of

limited to domestic law enforcement.³⁵⁵ The PCA's prohibition against a military posse, the OLC argued, was necessarily domestic because the marshal's posse authority was domestic.³⁵⁶ The OLC then argued that this domestic scope also applied to the PCA's prohibition against "otherwise ... execut[ing] the laws" because the text "should be read in conjunction."³⁵⁷ This understanding of the PCA,³⁵⁸ interestingly, contradicted earlier War Department practice.³⁵⁹

In the second 1989 opinion, the OLC endorsed the contemporary military/foreign affairs exception. In reversing a 1986 opinion, the OLC held that the PCA "does not prohibit military involvement in actions that are primarily military or foreign affairs related, even if they have an incidental effect on law enforcement, provided that such actions are not undertaken for the purpose of executing the laws."³⁶⁰ The OLC provided no rationale for this conclusion, but did cite contemporary Department of Defense regulations.³⁶¹ The text of these regulations, however, appears to have been of quite recent vintage. The cited regulation was made a final rule in 1982 and appears to have been based on a then-prevailing internal Department of Defense policy.³⁶² However, Department of the Army regulations only a decade earlier do not contain this broad articulation of the exception.³⁶³

Columbia, 13 Op. O.L.C. 91, 92 (1989); Extraterritorial Effect of the Posse Comitatus Act, 13 Op. O.L.C. 321, 321 (1989).

355. Extraterritorial Effect of the Posse Comitatus Act, 13 Op. O.L.C. at 322.

356. *Id.*

357. *Id.* Indeed, the opinion states explicitly that it is applying the textual canon of *ejusdem generis* in coming to this conclusion about the PCA's import.

358. The opinion identified three purposes for the PCA based in legislative history—concern about the use of the military in election processes and electoral politics, labor unrest, and the enforcement of revenue laws. *Id.* at n.5.

359. Siemer & Effron, *supra* note 27, at 12.

360. Application of the Posse Comitatus Act to Assistance to the United States Nat'l Cen. Bureau, 13 Op. O.L.C. 195, 197 (1989).

361. *Id.* (citing 32 C.F.R. § 213.10(2)(i) (1989)).

362. DOD Cooperation with Civilian Law Enforcement Officials, 47 Fed. Reg. 14899-14900 (April 7, 1982). We can see from the 1986 Department of Defense directive that it replaced this 1982 version. DoD Directive 55525.2, DoD Cooperation with Civilian Law Enforcement Officials 1-2 (1986).

363. Dep't of the Army, *Emergency Employment of the Army and Other Resources: Civil Disturbances*, AR 500-50 (1972). We see the same in regulations from 1931, War Dep't, *Employment of Troops: Enforcement of the Laws*, AR 500-50 (1931), 1923, War Dep't, *Employment of Troops: Enforcement of the Laws*, AR 500-50 (1923), 1913, War Dep't,

This broad understanding of the military/foreign affairs exception was at the heart of the 2008 Department of Justice's concern with legal positions staked out by the OLC in 2001 and 2002. The 2001 OLC memorandum, for example, argued that "[b]ecause using military force to combat terrorist attacks would be for the purpose of protecting the nation's security, rather than executing the laws, domestic deployment in the current situation would not violate the PCA."³⁶⁴ Although the memorandum recognizes that distinguishing military function from law enforcement functions would be difficult, the OLC argued that "the courts will defer to the executive branch's representations that the deployment of the Armed Forces furthers military purposes."³⁶⁵ The 2002 OLC memorandum made the same argument.³⁶⁶ Although the OLC disclaimed this approach to the military/foreign affairs exception in 2008,³⁶⁷ it did not reject the exception itself or provide any further gloss on the exception's contours or rationale.³⁶⁸

To be sure, many of these asserted exceptions to the PCA are commonsensical. There is no indication that the PCA was designed to impede the military's enforcement of the UCMJ, for example. And

Regulations for the Army, Doc. No. 454, art. XLVII (1913), 1910, War Dep't, *Regulations for the Army*, Doc. No. 384, art. XLVIII (1910), 1908, War Dep't, *Regulations for the Army*, Doc. No. 317, art. XLVIII (1908), 1895, War Dep't, *Regulations for the Army*, Regulations for the Army, art. LII (1895), and 1878, General Order 37, Headquarters of the Army (June 19, 1878), enclosed in Index of General Orders, Adjutant General's Office 1878, General Orders, Circulars, and General Courts-Martial Orders 1860-1944, Records of the Judge Advocate General (Army), Record Group 153, National Archives Building, Washington, D.C.; General Order 49, Headquarters of the Army (July 7, 1878), enclosed in Index of General Orders, Adjutant General's Office 1878, General Orders, Circulars, and General Courts-Martial Orders 1860-1944, Records of the Judge Advocate General (Army), Record Group 153, National Archives Building, Washington, D.C.; General Order 71, Headquarters of the Army (Oct. 1, 1878), enclosed in Index of General Orders, Adjutant General's Office 1878, General Orders, Circulars, and General Courts-Martial Orders 1860-1944, Records of the Judge Advocate General (Army), Record Group 153, National Archives Building, Washington, D.C.

364. 2001 OLC Memo, *supra* note 313, at 17.

365. *Id.* at 19.

366. 2002 OLC Memo, *supra* note 312, at n.5 (using the exact same rationale—verbatim—as in the 2001 memo).

367. 2008 OLC Rescission Memo, *supra* note 314, at 2.

368. The only other OLC opinion to note the military/foreign affairs exception of which I am aware is a 1998 memorandum concerning military personnel details to the FBI, which did little more than note the exception's existence. Permissibility under Posse Comitatus Act of Detail of Def. Dep't Civilian Emp. to the Nat. Infrastructure Prot. Ctr., 22 Op. O.L.C. 103, 105-06 (1988).

Congress has, if anything, reinforced a military commander's responsibility to maintain good order on a military installation.³⁶⁹ Faced with the PCA's broad prohibitions and the practical requirements attendant to running a standing military, it is also unsurprising that executive branch memoranda engaged less in legal interpretation than in legal assertion. But this does not justify, or explain away, the open-ended nature of the military/foreign affairs exception. And it only further muddles the array of methodologies used by executive branch lawyers to define the PCA's prohibitions. Much like the *Trump* majority's normative concern with limiting the President's discretion, especially in the national security context, this presents an important way by which future Presidents may avoid the PCA's prohibitions.³⁷⁰

* * *

The PCA and criminal laws prohibiting military interference in elections were motivated both by partisan politics and principled objections to the role of the military in domestic governance. Both the executive branch and Congress have been active participants in a 160-year process of steadily chipping away at these safeguards. In the case of the PCA, that process began mere months after the law was enacted. But we would be wrong to distinguish the modern era as one less amenable to inviting the military into domestic governance. Indeed, within the last fifty years, the evolution of § 502(f) duty status has undermined the PCA's legal regime more than many executive branch practices and statutory enactments that have older roots. What remains is a legal regime riddled with exceptions and loopholes by which Presidents and Secretaries of Defense may use the military based on legal authorities which are opaque to the public. A President need not rely on *Trump* immunity for any number of quite startling domestic military deployments.

369. See 10 U.S.C. § 2672.

370. Mark Nevitt has demonstrated how the Trump administration has used this military affairs exception to justify conducting temporary searches and detention in national defense areas established at the southern border. Mark Nevitt, *The New "National Defense Area" at the Southern Border: What You Need to Know*, JUST SECURITY (Apr. 29, 2025), <https://www.justsecurity.org/111022/national-defense-area-southern-border/> [<https://perma.cc/9Z2R-FBUC>].

IV. EXAMPLES OF REGIME BREAKDOWN

This Part considers two hypotheticals to integrate the doctrinal arguments made in Parts II and III. First, it demonstrates the mischief posed by *Trump* on the criminal law regime limiting domestic military deployments.³⁷¹ It also demonstrates how even a President disinclined to violating criminal law after *Trump* can still, with only a few more procedural steps, find ways around the PCA and laws prohibiting military interference in elections.

A. Military Involvement in Immigration Enforcement at the Southern Border

Quite expansive statutory authority exists for the President to deploy the military to the southern border. Section 1059 of the National Defense Authorization Act for Fiscal Year 2016, for example, authorizes the Secretary of Defense to support U.S. Custom and Border Protection's (CBP) "ongoing efforts to secure the southern land border of the United States."³⁷² Section 1059 does not limit permissible forms of Department of Defense support. Instead, it provides that the assistance "may include" Armed Forces deployments to the southern border; deployment of manned and unmanned aircraft and ground-based surveillance; and intelligence analysis support.³⁷³ The OLC has determined that 10 U.S.C. § 1059 is not an express exception to the PCA,³⁷⁴ but we know that this is likely of limited relevance to a President immunized from prosecution under *Trump*.

371. For present purposes, I assume the existence of a President who is willing to disregard criminal sanctions based on the Supreme Court's determination that a President will be immune from subsequent prosecution. Based on public statements and past record alone, President Trump seems to comfortably fit this mold. See, e.g., David A. Graham, *The Cases Against Trump, a Guide*, THE ATLANTIC (Jan. 6, 2025), <https://www.theatlantic.com/ideas/archive/2024/11/donald-trump-legal-cases-charges/675531/> [<https://perma.cc/8DXE-9YFK>]. Whether this assumption will hold for future Presidents, I do not know. But a power, once unleashed, is difficult to rein back in.

372. 10 U.S.C. § 284.

373. *Id.*

374. Mil. Support for Customs and Border Prot. Along the S. Border Under the Posse Comitatus Act, 45 Op. O.L.C. (Jan. 19, 2021) (slip op. at 10).

Absence of a prohibition against conducting law enforcement duties is not the same, however, as a positive authorization to conduct such duties. But even this problem is easily overcome. Section 1059's language is sweeping, particularly regarding the duties that the military might conduct during a "[d]eployment ... to the southern land border."³⁷⁵ Furthermore, the Director of the U.S. Marshals Service may, after a determination by the Associate Attorney General, deputize these military personnel as Deputy U.S. Marshals.³⁷⁶ Deputy U.S. Marshals, just like regularly appointed U.S. Marshals, execute federal law and "may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof."³⁷⁷ Put together, these deputized military personnel deployed to the southern border could enforce federal immigration laws as well as any state laws regarding undocumented migrants, just like any other federal law enforcement agent deputized by the Marshals Service.

A President does not need the protections of *Trump*, however, to embark on a nearly identical military deployment. Because the OLC has determined that § 1059 is not an express exception to the PCA,³⁷⁸ the President could instead rely on National Guard personnel in a § 502(f) duty status. Once again deputized by the U.S. Marshals Service, these deputized National Guard personnel could enforce federal immigration laws as well as any state laws regarding undocumented migrants, just like any other federal law enforcement agent deputized by the U.S. Marshals Service.

Indeed, the only meaningful limitation in this scenario would be one of fiscal law. 10 U.S.C. § 277(c) provides that the Secretary of Defense may waive the requirement that a law enforcement agency reimburse the Department of Defense for support provided by the National Guard in a § 502(f) duty status if the support is provided "in the normal course of military training or operations" or if it "results in a benefit ... that is substantially equivalent to that which

375. 10 U.S.C. § 284, note (§ 1059(e)(1)).

376. 28 C.F.R. § 0.112 (d); 28 CFR § 0.19(a)(3).

377. 28 U.S.C. § 564 (2024) ("United States marshals, deputy marshals and such other officials of the Service as may be designated by the Director, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof.")

378. Mil. Support for Customs and Border Prot. Along the S. Border Under the Posse Comitatus Act, 45 Op. O.L.C. (Jan. 19, 2021) (slip op. at 10).

would otherwise be obtained from military operations or training.”³⁷⁹ In practice, however, this is something of a paper tiger. During the Trump administration, for example, the Secretary of Defense waived this requirement for all southern border deployments analyzed by the Government Accountability Office.³⁸⁰ The Secretary made the same determination for the many thousands of National Guard deployed to the Capitol after the January 6, 2021, attacks.³⁸¹ I have not found congressional objection to either of these determinations, suggesting that such these determinations are not out of the ordinary.

B. Military Interference in Federal Elections

As noted in Part III, the executive has long asserted the President’s right, under the Take Care Clause, to use the military to protect federal functions, persons, and property.³⁸² Under this theory, the President could order military personnel to “protect” mailboxes or federal office buildings at, or at least in the vicinity of, polling locations. There is little to stand in the way of this kind of action—the executive branch has never articulated an evidentiary minimum for the President to determine that military protection is necessary.

Indeed, such a direct violation of 18 U.S.C. § 592 might not even strictly be necessary to provide the chilling effect a President might desire. Take, for example, the fact that voter rolls are maintained in electronic databases, not physical sheets located at a polling location. Section 592 says nothing about whether the military may be used to secure the servers on which these voter rolls are maintained (servers that are almost certainly not at a polling location). Section 592 also says nothing about placing the federal military at locations where votes are tabulated, which may be distinct from the many polling locations that exist throughout a county.³⁸³ To be sure,

379. 10 U.S.C. § 277(c)(1), (2).

380. SOUTHWEST BORDER SECURITY, *supra* note 236, at 12-13, 16.

381. REVIEW OF THE DOD’S ROLE, *supra* note 281, at 70-71.

382. *See supra* notes 324-27 and accompanying text.

383. *See, e.g.,* Maria Mendez, *How Texas Counts Ballots and Keeps Elections Secure*, TEX. TRIB. (Sep. 19, 2024), <https://www.texastribune.org/2022/11/04/texas-ballot-counting-secure-elections/> [<https://perma.cc/LK2E-M3VV>] (indicating that the majority of Texas counties deliver voter information to vote-counting stations instead of keeping it at polling locations).

18 U.S.C. § 593 restricts the federal military from amending voter rolls or interfering with the tabulation of votes.³⁸⁴ But the presence of military personnel at a county tabulation center or Secretary of State's office or any other location associated with elections, particularly in a 24/7, social-media-driven environment, may do just as much to suppress voter turnout as the presence of a soldier at a polling location. Moreover, depending on the amount of deference one believes the *Trump* decisions gives to theories of inherent authority based in the Take Care Clause, a President who deploys the military under the protective power may well enjoy *Trump* immunity from prosecution.

The *Trump* decision only makes easier what is largely already possible. By once again using the National Guard in a § 502(f) duty status, in this case to undertake protective power duties, the Executive would have a colorable argument for avoiding the restrictions imposed by 18 U.S.C. § 592 and § 593. For the same reasons as articulated above, the only impediment to such a deployment—restrictions on reimbursement under 10 U.S.C. § 277(c)—is unlikely to serve as a significant deterrent.³⁸⁵

In fact, direct presidential action is not even strictly necessary. The Cybersecurity and Infrastructure Security Agency (CISA) provides free election systems security support to state and local governments.³⁸⁶ In turn, CISA might request, under the Economy Act,³⁸⁷ that the Department of Defense help provide state-requested support. The Secretary of Defense might then source the personnel to respond to CISA's request by asking that governors make available their National Guard personnel in a § 502(f) duty status. As CISA advertises, these missions may include a range of duties, including “in-person cybersecurity assessments of election offices.”³⁸⁸ It is worth repeating that because the National Guard, in both of these scenarios, would be operating in a § 502(f) duty status, the

384. 18 U.S.C. § 593.

385. See *supra* notes 383-85 and accompanying text.

386. *Election Security Services*, U.S. CYBERSECURITY & INFRASTRUCTURE AGENCY, <https://www.cisa.gov/topics/election-security/election-security-services> [https://perma.cc/X6YW-DBP4].

387. 31 U.S.C. § 1535 (providing a mechanism for executive branch agencies to request services from another executive branch agency, on a reimbursable basis and provided that certain requirements are met).

388. *Election Security Services*, *supra* note 386.

prohibitions of 18 U.S.C. § 593 do not apply. Also it is likely that the executive branch would determine that 18 U.S.C. § 592's prohibitions do not apply.³⁸⁹

* * *

As noted above, military officers will have every practical reason to accede to orders which, up to now, would have easily been characterized as unlawful. Taken with the hypotheticals presented in this Part, two critical failures in the existing legal regime that pre-dated *Trump* emerge. First, and most obviously, are the many statutory and constitutional bases for the military to conduct duties normally conceived as civilian and for avoiding the limitations on that conduct imposed by criminal law. Second is the extent to which the President or Secretary of Defense may authorize these law enforcement deployments without needing to provide any notice to the public. The provisions of the Insurrection Act have many failings,³⁹⁰ but the executive branch has acknowledged that the Act requires at least some evidentiary showings and require some public notice before the President can deploy the military.³⁹¹ There is little wonder, then, that the last time a President invoked the Insurrection Act to deploy military forces was over three decades ago.³⁹² With all this statutory law and constitutional theory, it is largely irrelevant.

V. THE PATH AHEAD

Congress can begin to reverse the process of chipping away at criminal law limits on the President's ability to direct domestic military deployments that Congress started over one-hundred years

389. See *supra* Part III.A.1.

390. Nunn, *supra* note 7.

391. See, e.g., Dickinson, *supra* note 304, at 10-11; 10 U.S.C. § 254 ("Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.").

392. Exec. Order No. 12,804, 57 Fed. Reg. 19361 (May 1, 1992); Proclamation No. 6427, 57 Fed. Reg. 19359 (May 1, 1992); see also President George H.W. Bush, Address to the Nation on Civil Disturbances in Los Angeles, California (May 1, 1992) (explaining President's decision to deploy 3,000 National Guardsmen to California in 1992).

ago. In this Part, I sketch out what can be done to reassert legal limitations on the President’s ability to use the military within the United States. I introduce existing reform efforts, note how they fail to completely account for the ills described above, demonstrate why pursuing reforms through executive branch or judicial action is insufficient, and outline principles on which fruitful legislative reforms may be based. This reform project is self-consciously oriented toward the future. I am not sanguine about the present prospects of the thoroughgoing reforms which are needed to reassert legal limits on the President’s ability to use the military within the United States.

A. Animated Citizenry as a Necessary Predicate for Legal Reform

A necessary precondition to any of these reforms is a citizenry which cares about, and is willing to impose political consequences for violating, the principles of civilian governance which once animated this legal regime. On February 1, 1962, Chief Justice Earl Warren gave the third James Madison lecture at New York University Law School.³⁹³ Chief Justice Warren’s lecture covered topics on the Bill of Rights and the military. Speaking against the backdrop of growing U.S. involvement in Vietnam’s civil war, Chief Justice Warren “s[aw] how limited is the role that the courts can truly play in protecting the heritage of our people against military supremacy.”³⁹⁴ This military supremacy, Chief Justice Warren argued, manifests not only in “deliberate destruction but also ... unwitting erosion.”³⁹⁵ Indeed, he went on to say that “the day-to-day job of upholding the Constitution ... rests, realistically, on the shoulders of every citizen.”³⁹⁶

Surveys conducted in 2020 indicate that the American public generally disfavors military intervention in domestic affairs in scenarios short of a significant threat.³⁹⁷ As noted in the introduction,

393. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 202 (1962).

394. *Id.*

395. *Id.* at 203.

396. *Id.* at 202.

397. Lindsay Cohn, *Domestic Policing Deployment and Public Trust in the Military*, LAWFARE (Oct. 10, 2024, at 10:53 ET), <https://www.lawfaremedia.org/article/domestic-policing-deployment-and-public-trust-in-the-military> [<https://perma.cc/J9G2-QLX>].

this reflects my own normative commitments and, as I will show, is broadly consistent with Congress's approach to crafting exceptions to the PCA over the last thirty years.

What I cannot discern, and what I imagine will not be discernable for quite some time, is whether these public perceptions began changing during the 2024 election cycle and whether they will be changed in the second Trump presidency.³⁹⁸ These uncertainties are related to another—whether there currently is, and whether there in the future will be, sufficient political momentum to enact the statutory reforms I believe to be necessary to protect against military intervention in domestic matters. Existing statutory law, executive branch practices, and judicial doctrine have interacted to produce a legal framework that enables domestic military deployments and thus legislative reform. Whether these reforms are achievable will largely depend on how the Trump administration wields the powers outlined in this Article and the public's reaction to those moves.

B. Existing Reform Efforts

Starting during the first Trump presidency, there have been a number of proposals to reform the law of domestic military deployments. These reforms generally fall into two buckets—amendments to the PCA and revisions to provisions of the Insurrection Act. I will start with the Insurrection Act before considering the PCA.

1. Insurrection Act Reform

Perhaps the most high-profile, recent call to revise the Insurrection Act was issued in April 2024 by a bipartisan panel convened by the American Law Institute (ALI).³⁹⁹ As a reminder, the Insurrection Act is comprised of many statutes, dating from the early

398. Public opinion polling soon after President Trump's deployment of the National Guard to Los Angeles shows that a plurality of Americans disapproved of the decision. April Rubin, *Nearly Half of U.S. Adults Disapprove of Trump's Handling of Protests: Poll*, AXIOS (June 10, 2025), <https://www.axios.com/2025/06/10/los-angeles-protest-national-guard-marine-trump-polling-disapprove-yougov> [<https://perma.cc/DX9U-TXEJ>].

399. *Guidance for Insurrection Act Reform Issued by Bipartisan Group*, AM L. INST. (Apr. 5, 2024), <https://www.ali.org/news/articles/guidance-insurrection-act-reform-issued-bipartisan-group/> [<https://perma.cc/5928-MWVW>].

eighteenth century through Reconstruction, which authorize the President to use the military to respond to domestic unrest and ensure enforcement of federal laws and rights.⁴⁰⁰ As Laura Dickinson has noted, executive branch practice recognizes a number of criteria that must be met for the President to avail himself of these authorities.⁴⁰¹ Nevertheless, as she⁴⁰² and others⁴⁰³ have pointed out, the President enjoys relatively broad discretion in deciding when and where to avail himself of these authorities. Dickinson provides a comprehensive overview of reform proposals from the ALI and others.⁴⁰⁴ Here, I note some of the highlights.

First, the ALI urged a modernization and tightening of the language concerning both the types of domestic unrest to which the President may respond and the standards for determining that a military response is necessary.⁴⁰⁵ Second, the ALI argued for a number of measures to ensure greater transparency in the process of deciding whether to deploy the military, with respect to Congress, the states, and the general public. The ALI panel urged, for example, requiring consultation with state governors before deployment and providing a finding of fact to Congress twenty-four hours before any Insurrection Act deployment.⁴⁰⁶ The panel also recommended limiting the duration of any Insurrection Act deployment and making extensions of this initial deployment subject to congressional approval.⁴⁰⁷

The ALI panel's view is, in many ways, consistent with a 2022 proposal from the Brennan Center.⁴⁰⁸ The Brennan Center's

400. See 10 U.S.C. § 251-255.

401. Laura Dickinson, *How the Insurrection Act (Properly Understood) Limits Domestic Deployments of the U.S. Military*, LAWFARE (Sep. 12, 2024, at 13:01 ET), [https://www.lawfaremedia.org/article/how-the-insurrection-act-\(properly-understood\)-limits-domestic-deployments-of-the-u.s.-military](https://www.lawfaremedia.org/article/how-the-insurrection-act-(properly-understood)-limits-domestic-deployments-of-the-u.s.-military) [<https://perma.cc/QSQ8-VQA5>].

402. Dickinson, *supra* note 304, at 7-8 (noting the various means by which a rogue President could take advantage of the text's broad language).

403. AM. L. INST., PRINCIPLES FOR INSURRECTION ACT REFORM 2 (2024), <https://www.ali.org/sites/default/files/2025-04/principles-insurrection-act-reform.pdf> [<https://perma.cc/2LY5-Q5WD>]; Nunn, *supra* note 7.

404. Dickinson, *supra* note 304, at 8-11.

405. PRINCIPLES FOR INSURRECTION ACT REFORM, *supra* note 403, at 2-3.

406. *Id.* at 3.

407. *Id.* at 3-4.

408. Compare *id.* (advocating for reforming the Insurrection Act to include time limits and reporting and consultation requirements), with Elizabeth Goitein & Joseph Nunn, *Statement to the January 6th Committee on Reforming the Insurrection Act*, BRENNAN CTR. FOR JUST.

proposal parts ways with the ALI's, however, by detailing the specific actions Presidents should not be authorized to take under the Insurrection Act (for example, imposing martial law and relying on constitutional authority for domestic military law enforcement).⁴⁰⁹ The Brennan Center also recommended using this reform effort to address the loopholes created by § 502(f) and to provide a federal cause of action for individuals to protest presidential invocations of the Insurrection Act that deviate from the law's substantive requirements.⁴¹⁰ These recommendations built on earlier proposals for reform from scholars like Mark Nevitt⁴¹¹ and Kelly Magsamen.⁴¹²

While I agree with many of these reforms, this Article shows that Insurrection Act reform is insufficient to reign in Presidential domestic military deployments for at least two reasons. First, the combination of § 502(f) duty status, the many statutes authorizing military support to law enforcement, and constitutional theories undergirding the emergency authority and protective power provide more than enough room for Presidents to entirely avoid statutory restrictions on presidential power even with a modernized Insurrection Act. The Brennan Center's proposal gets at this issue by introducing reforms which are, in effect, amendments to the PCA. While I am partial to eliminating the constitutional exception to the PCA, as I have argued previously,⁴¹³ a more substantive exchange of views between the political branches is likely needed to understand what lacunae would remain. Without this more detailed

(Sep. 20, 2022), <https://www.brennancenter.org/our-work/research-reports/statement-january-6th-committee-reforming-insurrection-act> [https://perma.cc/P6RF-PSW5] (advocating for reforming the Insurrection Act to include specific triggering events that justify the presidential domestic military deployments, among other changes).

409. Goiten & Nunn, *supra* note 408, at 28-29.

410. *Id.* at 31, 36. The ALI panel specifically rejects this latter proposal, arguing that there are sufficient protections under the right of habeas corpus and arguing that such a cause of action is likely to have limited force, given the Supreme Court's traditional deference to the Executive in this field. See PRINCIPLES FOR INSURRECTION ACT REFORM, *supra* note 403, at 4.

411. See Mark Nevitt, *Domestic Military Operations—Reforming the Insurrection Act*, JUST SEC. (Oct. 20, 2020), <https://www.justsecurity.org/72959/good-governance-paper-no-6-part-one-domestic-military-operations-reforming-the-insurrection-act/> [https://perma.cc/TG3J-45FB].

412. See Kelly Magsamen, *4 Ways Congress Can Amend the Insurrection Act*, CTR. FOR AM. PROGRESS (June 12, 2020), <https://www.americanprogress.org/article/4-ways-congress-can-amend-insurrection-act/> [https://perma.cc/G7SV-KVGG].

413. Mirasola, *supra* note 27, at 255.

consultation, there is a significant risk of the executive branch simply asserting that the PCA does not, and cannot, touch constitutional authorities (as the OLC has already asserted).

2. *PCA Reform*

There have been relatively more attempts to reform the PCA in recent years. Some of these efforts have been introduced in Congress. In 2020, for example, Adam Schiff introduced a bill that would apply the PCA's prohibitions on domestic military deployments to all branches of the Armed Forces to prevent the President from using § 502(f) to sidestep the PCA and that would prohibit using any evidence obtained in contravention of the PCA in any legal proceedings.⁴¹⁴ The Brennan Center, in October 2024, supported this exclusionary rule and reiterated its support for closing the § 502(f) loophole.⁴¹⁵ Protect Democracy has supported the same reforms.⁴¹⁶ Thus far, however, the only proposal to make it into law is an expansion of the PCA to all components of the Armed Forces.⁴¹⁷ Importantly, none of these reforms address the legal uncertainties introduced by *Trump*.

Finally, and strikingly, there have been, to my knowledge, no efforts to modernize 18 U.S.C. § 592 and § 593 or account for the effect of *Trump* immunity or the existence of § 502(f) duty status on these statutes.

C. *A Different Approach*

Over the past 160 years, executive branch practices, legislative enactments, and judicial decisions have created innumerable routes for Presidents to use the military within the United States. More than anything, what unifies this ecosystem of law is a preponderant concern for maximizing presidential discretion. In this Section, I explain why legislative action is the only vehicle for addressing the

414. Strengthening the Posse Comitatus Act of 2020, H.R. 7297, 116th Cong. (2020).

415. Joseph Nunn, *Why the Posse Comitatus Act Must Be Reformed*, BRENNAN CTR. FOR JUST. (Oct. 3, 2024), <https://www.brennancenter.org/our-work/research-reports/why-posse-comitatus-act-must-be-reformed> [<https://perma.cc/9ZT5-AUN2>].

416. See, e.g., Rosenberg & Tausanovitch, *supra* note 55.

417. See *supra* notes 53-54 and accompanying text.

deep issues we confront here. I then consider principles that might guide such a reform effort.

1. *The Need for a Legislative Solution*

While a prudent Executive and well-postured litigation might curb some abuses of this legal regime, they will be insufficient to address its systemic issues.⁴¹⁸ First, the executive branch has no incentive to claw back the authorities it has asserted over more than one-hundred years and across party lines. Again, as Jack Goldsmith has noted, the most meaningful consequence of *Trump* may be the strengthening, not the diminution, of executive branch opinions about the scope of executive power.⁴¹⁹ What is more, as documented in the history of conflicted OLC memoranda concerning constitutional exceptions to the PCA,⁴²⁰ there is little reason to believe that any moderating executive branch action undertaken now will not be undone by a later President.

Asserting a more minimalist understanding of subordinate immunity under *Trump* in litigation faces a different set of challenges. Again, no military member has an incentive to reject an order one can reasonably expect they will be afforded deference in the military justice system. Even if military personnel were to risk this likelihood, and even if they were to succeed under the theories proposed in Part II, this would not address the many other pathways that exist for Presidents to use the National Guard in a § 502(f) duty status.⁴²¹ Joseph Nunn has argued for a more limited understanding of what Presidents and Secretaries of Defense may

418. Take, for example, ongoing litigation arguing that President Trump's deployments in Los Angeles are ultra vires. As noted above, given prevailing deference to the Executive, the National Guard and Marines remain deployed many weeks after the most pointed protests ended.

419. Goldsmith, *supra* note 343. Although I cannot draw a causal link, executive branch memoranda concerning enforcement of the TikTok ban show how the executive branch has only expanded its understanding of executive prerogative. Alan Z. Rozenshtein, *The Government's Astonishing Constitutional Claims on TikTok*, LAWFARE (July 3, 2025, at 18:25 ET), <https://www.lawfaremedia.org/article/the-government-s-astonishing-constitutional-claims-on-tiktok> [<https://perma.cc/6RTF-CSF6>] (noting the Department of Justice's view that it can immunize noncompliance with explicit statutory prohibitions based on the President's foreign affairs powers).

420. *See supra* Part III.B.1.

421. *See supra* Part III.A.1.

achieve with the National Guard in a § 502(f) duty status.⁴²² But even these limits would only apply when a governor objects to a federal deployment, and it seems unlikely that courts will subvert what has become a decades-long pattern of empowering the Executive under § 502(f) with the seeming acquiescence of Congress.

Perhaps most practically, litigation will almost always be incomplete. Given the web of statutes, constitutional theories, case law, and executive practices at issue, it is impossible for any individual case to address the totality of issues that plague this area of law. Even a court finding that *Trump* immunity does not apply to the three statutes considered in this Article, for example, will do nothing to address the issues that predated July 1, 2024.⁴²³

More fundamentally, relying on litigation is insufficient because it will almost inevitably be too late. The ill of domestic military deployments is only in part the actual harm which may be done by military personnel. Far more inheres in the very fact of the deployment. Troops marching down the streets to undertake some duty usually conducted by civilian organs of government, even if they go no further, have done something to our polity and politics. Only so much can be cured through litigation.

The most powerful remedy, then, is legislation. We also should not overstate what Congress can achieve. It is reasonable to believe that a President willing to avail himself of *Trump* immunity and act contrary to criminal law is equally willing to breeze past other limits imposed by statutory law. Curbing these impulses will require Congress to engage more meaningfully in constitutional hardball.⁴²⁴ This could include, perhaps most importantly, more aggressive uses of its powers of the purse to limit the funds available to Presidents for domestic military deployments.⁴²⁵

422. Joseph Nunn, *Section 502(f) Is Not a Blank Check*, LAWFARE (Oct. 17, 2024, at 09:37 ET), [https://www.lawfaremedia.org/article/section-502\(f\)-is-not-a-blank-check](https://www.lawfaremedia.org/article/section-502(f)-is-not-a-blank-check) [<https://perma.cc/7VST-PVM5>] (arguing that the consent of the governor of a state where military activities will take place is necessary for deployments in a § 502(f) duty status).

423. See *supra* Parts II-III.

424. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) (describing constitutional hardball as “political claims and practices ... that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings.”).

425. See generally Chris Mirasola, *Appropriations Law and the Statutory Foreign Affairs Presidency*, 172 U. PENN. L. REV. ONLINE 105 (2024) (noting the flexible constitutional legal framework that has developed around Congress’s power of the purse in the national security

Further, a legislative solution has the potential to yield a regime that is (at least marginally more) internally coherent and sensitive to nuance. For as much as can be gleaned from publicly available regulations, Department of Justice opinions, historical practice, archival materials, statutory law, legislative history, and documents obtained under the Freedom of Information Act, it is impossible to be certain that this Article has entirely pieced together the various legal theories that have grown around the PCA and election interference statutes.

As an initial matter, Congress would do well to take a page from the process which ultimately culminated in the National Emergencies Act.⁴²⁶ The National Emergencies Act is a framework statute, which provides a process for Presidents to invoke a number of emergency authorities in the event of a national crisis. It was the product of a years-long legislative process. Starting in 1973, the Senate Special Committee on the Termination of the National Emergency comprehensively surveyed the statutes, judicial decisions, and executive branch practice concerning presidential emergency powers.⁴²⁷ After two years of investigation and hearings, the National Emergencies Act was introduced in 1975 and enacted in 1976.⁴²⁸ This process did not yield a perfect statutory solution. In recent years, members of Congress and commentators have identified continuing infirmities in Congress's ability to constrain presidential emergency powers.⁴²⁹ But the public is undoubtedly

context); Chris Mirasola, *Domestic Military Deployments and the Limitations of Appropriations Law*, LAWFARE (Sep. 19, 2024, at 13:00 ET), <https://www.lawfaremedia.org/article/domestic-military-deployments-and-the-limitations-of-appropriations-law> [<https://perma.cc/DAF8-LC67>] (describing the mechanisms available to Congress to limit the purposes for which the President might use funds appropriated to the Department of Defense). In addition to the reform efforts discussed here, legislative change could include implementing the PCA and election interference prohibitions as appropriations limitations, which would make it easier to bring ultra vires claims (a necessarily limited strategy, though a step away from the worst of the confusion caused by *Trump*).

426. National Emergencies Act, Pub. L. 94-412, 90 Stat. 1255 (codified at 50 U.S.C. § 1601-1651 (1976)).

427. STAFF OF S. HIST. OFF., 117TH CONG., SENATE STORIES: RESTORING CHECKS AND BALANCES: THE NATIONAL EMERGENCIES ACT OF 1976 (2021).

428. Pub. L. No. 94-412, 90 Stat. 1255 (codified as amended at 50 U.S.C. §§ 1601 to 1651); see STAFF OF S. HIST. OFF., 117TH CONG., *supra* note 427 (documenting the committee's two years of investigation).

429. See, e.g., *Restoring Congressional Oversight over Emergency Powers: Exploring Options to Reform the National Emergencies Act: Hearing Before the S. Comm. on Homeland Sec. and*

better positioned to understand the scope of the issue we confront in the national emergencies context simply because the political branches have been forced to directly contest their competing understandings of statutory and constitutional law. The same is not true for domestic military deployments. As mentioned above, it is not clear when, or if, the Congress may be poised to undertake this kind of legislative reform effort. But as will be shown below, Congress has in the past been willing to take a nuanced approach to regulating the President's ability to use the military in emergency circumstances within the United States. This provides at least some indication that it is, institutionally, capable of doing the same again.

2. Toward a Legislative Reform Effort

A legislative reform effort must, first, recognize that successive Congresses and Presidents have spent much of the last 160 years limiting the scope of the strong initial prohibitions against domestic military deployments embodied in the PCA and election interference statutes. These efforts broadly reflect three sets of concerns. First, the concern that prohibitions on military deployments will hamstring the government's ability to confront existential political violence. From the perspective of statutory law, this includes the provisions of the Insurrection Act, more recent enactments authorizing support to the Department of Justice regarding the illicit use of various weapons of mass destruction, statutes regarding enforcement of trade restrictions associated with domestic or international armed conflict, and enforcement of neutrality.⁴³⁰ I would include here also the evolving exceptions contained in the text of the prohibition of placing troops at polls.⁴³¹ Also relevant are the purported constitutional exceptions to the PCA, designed to protect the functioning of the federal government and suppress unrest when all civilian instrumentalities fail.⁴³²

The second set of concerns reflect evolving understandings of areas where civilian instrumentalities require military support due to shortfalls in capacity. These capacity shortfalls are significant,

Gov't Affs., 118th Cong 1-8 (2024) (opening statements).

430. *See supra* notes 296-98 and accompanying text.

431. *See supra* note 79 and accompanying text.

432. *See supra* note 296.

but do not represent the existential threat of domestic violence that characterizes the first set of concerns. Paradigmatic examples here are the laundry list of exceptions to the PCA enacted to address immediate crises, such as the statutes authorizing support for the protection of national parks, the protection of guano islands, investigations of political violence, and enforcement of quarantines.⁴³³ Also relevant here are statutes authorizing support to civilian law enforcement agencies that fall short of constituting exceptions to the PCA, such as § 1059 of the National Defense Authorization Act for Fiscal Year 2016 (authorizing support at the southern border) and support to the U.S. Capitol Police.⁴³⁴ Indeed, I would also include contemporary uses of § 502(f) duty status for National Guard personnel in this group, motivated (as it was) about increasing the federal government's ability to flexibly respond to domestic crises like hurricane response and the war on drugs.⁴³⁵

The third, and final, set of concerns revolve around a worry that overbroad application of these criminal prohibitions will inhibit the military's ability to fulfill its national security functions. Most relevant here are the evolving set of functions which the executive branch has considered to constitute a foreign affairs "exception" to the PCA.⁴³⁶ And this concern is reflected in the various judicial attempts to define the scope of impermissible law enforcement functions under the PCA.

Taken together, these concerns reflect a commonsensical view of the proper role of the military in domestic affairs. First, regular military involvement in core domestic government functions degrades our republican form of government. Second, we can nevertheless reasonably expect, in the course of democratic governance, periods of existential political crisis in response to which the federal government must rely on the Armed Forces. Third, from time to time discrete challenges in domestic governance will occur during which the military's proficiencies (in organization, personnel, and materiel) may be needed. And, finally, however we limit how the military functions as a part of our civilian government, these limits

433. *See supra* notes 296-98 and accompanying text.

434. *See supra* notes 123, 125 and accompanying text.

435. *See supra* notes 273-79 and accompanying text.

436. *See supra* Part III.B.2.

should not apply to the military's internal organization or core national security functions.

From this body of law, we can also identify two more specific policy concerns important to guarding against a creeping role of the military in day-to-day governance. First, and perhaps most important, is the need for transparency with the public. Before the President may exercise any of the authorities in the Insurrection Act, for example, Presidents must first issue a proclamation to disperse.⁴³⁷ It has also been executive branch practice to issue an executive order by which the President invokes the Insurrection Act, noting the particular domestic unrest that the military is being directed towards.⁴³⁸ The more contemporary statutes authorizing military support to the Department of Justice reflect a similar concern with public notice over the scope of domestic military action. Both 18 U.S.C. § 282 and § 283, for example, require that the Secretary of Defense and Attorney General “jointly prescribe regulations concerning the types of assistance that may be provided” and “describe the actions that Department of Defense personnel may take in circumstances incident to the provision of assistance.”⁴³⁹ Implementation is always a concern—neither set of regulations appear to have ever been promulgated. But, taken together, these statutes point towards the importance of the public having a clear understanding of when the military is deployed and what activities they may undertake during these deployments.

Second, this body of statutory law also suggests a more nuanced way in which we can think about crafting practical limitations around the scope of authorized military activities. The statutes governing support to the Department of Justice arguably take the most balanced approach. 10 U.S.C. § 282 and § 283, for example, provide, as a baseline, that military support may include law enforcement functions only when “necessary for the immediate protection of human life, and civilian law enforcement officials are

437. 10 U.S.C. § 254 (“Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.”).

438. See, e.g., Joseph Nunn & Elizabeth Goitein, *Guide to Invocations of the Insurrection Act*, BRENNAN CTR. FOR JUST. (Apr. 25, 2022), <https://www.brennancenter.org/our-work/research-reports/guide-invocations-insurrection-act> [<https://perma.cc/QKC2-EUL6>].

439. 10 U.S.C. §§ 282(d), 283(c).

not capable of taking the action.”⁴⁴⁰ 18 U.S.C. § 831, regarding military support to the Department of Justice concerning nuclear threats, takes a similar approach. Here, military support may only be provided if an “emergency situation” exists (more on this below) and providing support “will not adversely affect the military preparedness of the United States.”⁴⁴¹ The statute goes on to define emergency situations as any that “pose[] a serious threat to the interests of the United States” and in which “enforcement of the law would be seriously impaired if the assistance were not provided” and civilian law enforcement “are not capable of enforcing the law.”⁴⁴²

Line drawing is inherently fraught. Restrict statutory authorizations too much, and the executive branch will find recourse in theories of inherent Article II authority. One can, for example, trace the executive branch’s first articulation of the emergency authority to the belief that faithfully enforcing the PCA immediately after it was enacted in the western territories would lead to widespread lawlessness due to insufficient federal law enforcement capacity.⁴⁴³

A similar practical concern underpins many of the OLC opinions that culminate in the present-day foreign military affairs exception to the PCA.⁴⁴⁴ Overly restrictive statutes also run the risk of making the provision of assistance too tardy, requiring later a more robust military response than would have been required if military support had come sooner. Such “failures” can have significant consequences. For example, it was after many in Congress perceived the military to have failed in its response to Hurricane Katrina that § 502(f) was updated to reinforce the growing executive branch theory that the statute authorized operational deployments.⁴⁴⁵

Statutes that are too permissive, on the other hand, insufficiently protect the interest in domestic civilian governance at the heart of

440. *Id.* §§ 282(d)(2)(B)(i), 283 (c)(2)(B)(i). Both statutes also allow military personnel to conduct law enforcement functions when they are otherwise authorized under 10 U.S.C. § 272. *See id.* §§ 282(d), 283(c).

441. 18 U.S.C. § 831(f)(1)(A)-(B).

442. *Id.* § 831(f)(2).

443. CLAYTON D. LAURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS: 1877-1945* 58-59 (1997).

444. *See supra* Part III.B.2 (noting concern about discipline on military installations, and ability to act unimpeded and consistent with international law during international armed conflict).

445. *See supra* notes 280-82 and accompanying text.

this body of law. This, at base, sums up many of the concerns that have been recently articulated regarding both the Insurrection Act and the PCA. Broad delegations of authority to the President in this area are undoubtedly easier to craft. They also rely on a shared normative commitment, across political branches, partisan lines, and time, to a restrained use of the military. If we have learned anything over the past decade, it is that this shared normative commitment is fraying, if it is not entirely gone.

In the course of this more thoroughgoing reform effort, at least two more concrete items are critical. First, assuming that the *Trump* approach to presidential criminal liability is here to stay, reformed versions of the PCA and military election interference statutes must rely on more than criminal prohibitions. This could be done, for example, by imposing these restrictions as limitations on appropriations, returning to the PCA's doctrinal roots. Second, as others have argued, we need to clean up the laundry list of statutory exceptions to the PCA.⁴⁴⁶ Many are irrelevant, and few strike the nuanced balance that have come to typify more recent exceptions to the PCA.

CONCLUSION

This Article has documented the once-great promise, and increasing failure, of criminal law to constrain how the President may use the military within the United States. The *Trump* majority significantly eroded what remained of this broken legal regime. What lies before all of us is to reimagine how this area of law can be reformed to truly support the ideals of democratic, civilian governance.

446. See Nunn, *supra* note 415.