When Rotten Apples Return: How the Posse Comitatus Act of 1878 Can Deter Domestic Law Enforcement Authorities from Using Military Interrogation Techniques on Civilians

RAJ DHANASEKARAN[†]

I. INTRODUCTION

As Congress wrestles with how to end the United States' occupation of Iraq, American citizens will eventually have to brace for the return of military forces. While most of these troops are career soldiers, 135,000 of them are reservists.[1] Of these, some held careers in law enforcement before the war.[2] It is reasonable to assume that they will reinsert themselves back into domestic law enforcement jobs. When they do, their experience and training on the battlefields of Iraq will affect the manner in which they dole out justice to civilians. Specifically, Iraq War veterans who obtain jobs in domestic law enforcement pose the risk of using torture techniques learned in the military when they interrogate civilians: the transmogrification of the Iraq War to the home front.[3] Torture has migrated from the battlefield to U.S. soil before, and there is a high likelihood that it will do so again.[4]

It is undisputed that the primary U.S. objective in the Iraq War, in conjunction with the broader "War on Terror," has been obtaining intelligence.[5] This has emboldened the CIA to train military personnel on

---

[†] L.L.M., Northwestern University School of Law, 2006; Juris Doctor, University of Connecticut School of Law, 2004; B.S., University of Wisconsin-Madison, 2000. I wish to thank Professor Bernardine Dohrn for her many insightful comments and suggestions throughout the writing of this article. I also wish to thank my parents, Danny and Padmaja Dhanasekaran, for teaching me a love of history and a passion for advocacy. Finally, I would like to extend a special thanks to my wife, Dr. Raina Roy, for her love, patience, and joy.

[1] Eric Schmitt & David S. Cloud, *Part-Time Forces on Active Duty Decline Steeply*, N.Y. TIMES, July 11, 2005, at A1.

[2] *See generally* Liza Porteus, *Reserve Call-Up Drains Nation's First Responders*, FOX NEWS, Feb. 26, 2003, *available at* http://www.foxnews.com/story/0,2933,78982,00.html.

[3] While it would be inaccurate to suggest that every returning soldier poses such a risk, the overall threat is substantial enough to fashion an effective legal deterrent against harsh interrogation techniques being directed against domestic criminal defendants.

[4] *See infra* Part II.A.

[5] Andrew Krepinevich, a military analyst with the Center for Strategic and Budgetary Assessments stated, "[The Iraq War] is very much an intelligence war." John Diamond, *Attack Is Evidence Insurgents' Intel Is Better*, USA TODAY, Dec. 23, 2004, at 4A.

various modes of "coercive" interrogation techniques.[6] This administration's reliance on torture as a valid means of intelligence extraction was put on sharp display when Senator John McCain proposed his anti-torture amendment to the 2006 defense appropriations bill. As passed, the McCain amendment bans torture and "cruel, inhuman and degrading treatment," of individuals in U.S. custody.[7] The amendment seeks to achieve this result by requiring all interrogations to be pursuant to the Army Field Manual.[8] The amendment also contains two safe-haven measures. First, it makes available a "good faith defense," enabling CIA or military interrogators to defend themselves by claiming that it is reasonable for them to believe that they are obeying orders.[9] It also bars prosecution of military or CIA personnel if their interrogation techniques are pursuant to the Army Field Manual.[10] The White House responded by

---

[6] The CIA is documented to have trained military personnel in the Vietnam War as well. In fact, the CIA training manual from the Vietnam era prescribed "coercive interrogation" tactics. Doug Brugg, Letter to the Editor, *Torture Has Deep Roots in U.S.*, BOSTON GLOBE, June 20, 2004, at D12.

[7] Pub. L. No. 108-375 § 1091, 108 Stat. 1811.

[8] *Id.* Written by the Army Chief of Staff, this manual designed for military personnel details exactly how to perform military procedures, including how to conduct drills, interrogations, and aviation combat. *See* GlobalSecurity.org, Reliable Security Information, http://www.globalsecurity.org /military/library/policy/army/fm. The manual makes no distinctions between reservists and career soldiers. As noted in Newsweek, "[t]he military" in its entirety is bound by the directives of this manual. Evan Thomas, et al., *The Debate Over Torture*, NEWSWEEK, Nov. 21, 2005, *available at*: http://www.msnbc.msn.com/id/10020629/site/newsweek/. Moreover, platoons composed of reservists and career soldiers were instructed, at least as a matter of policy, to comply with the Army Field Manual in conducting interrogations. Tim Golden et al., *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1.

[9] Liz Sidoti, *Deal Struck on Torture Prohibition: CIA Gain Protection Guaranteed to Military*, ST. PAUL PIONEER PRESS (Minn.), Dec. 16, 2005, at A6.

[10] Senator John McCain's torture amendment to the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109–63, 119 Stat. 3136, is as follows:

> SEC. 1074. UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.
>
> (a) IN GENERAL-No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.
>
> (b) APPLICABILITY-Subsection (a) shall not apply to with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.
>
> (c) CONSTRUCTION-Nothing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States.
>
> SEC. 1075. PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT OF PERSONS UNDER CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT.
>
> (a) In General-No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.
>
> (b) Construction-Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.
>
> (c) Limitation on Supersedure-The provisions of this section shall not be

modifying the Army Field Manual—it added a ten-page addendum to the Army Field Manual, where it detailed new interrogation techniques.[11] Although the Pentagon claims these methods comport with the Geneva Convention, it stifled public scrutiny by classifying the addendum.[12] Thus, while publicly agreeing to sign Senator McCain's bill,[13] the White House effectively immunized all would-be perpetrators of violent interrogations from prosecution. This reflects the current administration's general dogma that violence in the interrogation room saves lives.[14]

But violence in the interrogation room may not necessarily result in "torture." Torture is defined by the Convention Against Torture (CAT) as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[15]

This definition is frequently too high a standard for many victims of

---

> superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.
>
> (d) Cruel, Inhuman, or Degrading Treatment or Punishment Defined-In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

151 CONG. REC. S12375, S12380 (daily ed. Nov. 4, 2005) (statement of Sen. McCain).

[11] Eric Schmitt, *New Army Rules May Snarl Talks with McCain on Detainee Issue*, N.Y. TIMES, Dec. 14, 2005, at A1.

[12] *Id.*

[13] William Douglas, *Bush Agrees To Support Torture Ban; Pact Reached with McCain on Terror Interrogations*, PHILA. INQUIRER, Dec. 16, 2005, at A1.

[14] Vice President Dick Cheney requested Congress to permit the CIA to conduct interrogation techniques that may not be "torture" but are "cruel, inhuman, and degrading treatment" under the Convention Against Torture (CAT). *See* Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. TIMES, Nov. 9, 2005, at A1. More recently, Condoleezza Rice defended use of torture by claiming that U.S. interrogations (that may involve torture as defined by CAT and conducted in secret CIA prisons) are saving European lives. *See* Joel Brinkley, *U.S. Interrogations Are Saving European Lives, Rice Says*, N.Y. TIMES, Dec. 6, 2005, at A3.

[15] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100–20 (1988), 1465 U.N.T.S. 85.

violent interrogation techniques to meet.[16] Torture cases ultimately turn on the civility of pain suffered by the victim.[17] Thus the U.S. torture statute, which exceeds the language of CAT by requiring specific intent,[18] is probably a poor choice of law with which to target and deter the coercive interrogation tactics. Moreover, on a practical level, it is questionable whether a jury would convict a police officer of a crime so fraught with imagery and medieval overtones as "torture." Perhaps it is for these reasons that no domestic law enforcement officer has ever been prosecuted for torture under this statute.[19]

Another promising, yet ultimately doomed, avenue of recourse is the procedural due process guarantee of the Fourteenth Amendment.[20] Unfortunately this clause has only been applied to interrogation techniques that originated in the domestic setting.[21] While it makes no difference to the immediate victim whether they were abused using military torture or not, the distinction is critical to the larger public. Just as a hate crime is loathsome not just for its underlying offense, but for its broader effect of instilling fear and insecurity on the greater public, so too are coercive interrogations all the more serious when they flow from the military. The underlying offense not only injures the victim, as in the classic Fourteenth Amendment scenario, but it also harms society by essentially using a

---

[16] One such example can be found in the case of Ireland v. The United Kingdom, 2 Eur. Ct. H.R. 25 (1978).

[17] It was for this reason that the ABA urged that 18 U.S.C. §§ 2340 and 2340A be amended to apply regardless of the accused's underlying motive or purpose. AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, Aug. 2004, http://www.abanet.org/humanrights/torture.pdf.

[18] 18 U.S.C. § 2340 (2005) provides in relevant part:

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
>
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from--
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to
>
> disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and
>
> (3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

[19] The one instance where the statute was used to make a finding that torture did occur was not done with respect to a law enforcement officer. In People v. Martinez, 23 Cal. Rptr. 3d 508 (Cal. Ct. App. 2005), the defendant was an irate boyfriend who repeatedly raped and physically abused his girlfriend.

[20] Brown v. Mississippi, 297 U.S. 278 (1936).

[21] *Id.*

military weapon on civilians. Such a harm functions to create a civilian underclass where law enforcement officials have rights superior to the rest of us. The only way to deter such conduct is to have a bright-line approach that categorizes and punishes each suspect interrogation technique.

The first step is to identify the interrogation techniques that should be banned. Since the Bush Administration publicly claims U.S. forces do not engage in torture[22] or "cruel, inhuman, or degrading treatment,"[23] the task will have to fall on Congress to investigate and identify the various methods of torture that have been applied against detainees at Guantanamo Bay, Iraq, Afghanistan, and other secret locations. Congress's task will be further complicated by the fact that torture does not necessarily require training. Torture can take place in the absence of military training, where a police officer randomly hits and hurts his suspects. Torture techniques of a military derivation can come about in one of two ways. The first is where the domestic law enforcement personnel received training from military personnel. The second is where the domestic law enforcement officer learned torture techniques from a prior career as a military officer or enlisted personnel. This article focuses on this last process, where trained war veterans obtain positions as civilian police or correctional officers.

This article makes the novel argument that the appropriate statutory tool to deter application of military torture techniques against American civilians is the Posse Comitatus Act of 1878. The Act outlaws the willful use of any part of the Army or Air Force to execute domestic law unless expressly authorized by the Constitution or an Act of Congress. A war veteran's conduct in a subsequent career as a domestic peace officer does not necessarily imply that the Armed forces are enforcing domestic law. However, there is the specter of similar evils. If direct military involvement in domestic law enforcement is prohibited because of the harshness of military tactics,[24] then the use of military tactics by ex-military officers is equally corrosive to a civil society. It follows that if the Posse Comitatus Act functions to prevent the former, then it should be

---

[22] Frank Rich, *'We Do Not Torture' and Other Funny Stories*, N.Y. TIMES, Nov. 13, 2005, at 4.

[23] Schmitt, *supra* note 11 (quoting a statement made by Condoleezza Rice in Kiev).

[24] No doubt, the primary consideration for enacting the Posse Comitatus Act was fear of military influence over civilian matters. This was enunciated best by President Eisenhower, warning of the "acquisition of unwarranted influence . . . by the military industrial complex." Jack H. McCall, Jr. & Brannon P. Denning, *Mission Im-Posse-ble: The Posse Comitatus Act and Use of the Military in Domestic Law Enforcement*, 39 TENN. B.J. 26, 27 (2003). But the conflicts of the twentieth century has produced the far more chilling specter of a civilian controlled military that deploys against select groups of the citizenry. Thus, in World War I over 2000 aliens were arrested by the Justice Department and interned by the military as "dangerous to the national security." PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 74 n.4 (1979). The military also directly censored newspapers, radio, and public speech. *Id.* Then in World War II, under the direction of President Franklin D. Roosevelt, the Army interned anyone resembling a Japanese American into concentration camps. MARTIN BLUMENSON ET AL., COMMAND DECISIONS 11 (Kent Roberts Greenfield ed., 1960).

engineered to prevent, or contain, the latter.

Part II of this article begins by showing that the methods of torture evidenced in Iraq did not materialize out of thin air, fully formed and functional like Athena from Zeus's head. Rather, they were the fruits of CIA labor that originated and matured in the battlefields of Vietnam and Latin America. The significant difference in Iraq is that the CIA lost all pretense of subterfuge and recruited U.S. military personnel, as opposed to indigenous mercenaries, to serve as their proxies. It is this innovation that threatens the safety and security of individuals living on American soil who may some day find their lives in the hands of these veterans. Part III of this article describes the genesis of the Posse Comitatus Act of 1878 and the firewall it erects between the military and domestic law enforcement. Part IV charts how Congressional amendments to the Posse Comitatus Act, during the Reagan Administration's War on Drugs, helped militarize domestic law enforcement. This provided the infrastructure for the current administration's surveillance initiatives in the War on Terror. The effect has been the dehumanization of individuals with suspect traits, such as affiliation with Islam. This, in turn, places such individuals in heightened danger of being tortured by returning war-veterans who obtain jobs in law enforcement. Part V recommends a series of amendments to the Posse Comitatus Act that could punish and deter the application of military interrogation techniques against Americans.

II. THE UNIQUELY AMERICAN EXPORT OF TORTURE

A. Lessons From the Vietnam War: From Dong Tam to Chicago

As James Burnham stated in his influential work from 1947, *The Struggle for the World,* the post-WWII era was one in which the United States was engaged in a "Third World War" against Communism.[25] With this premise, Burnham proceeded to supply the American conservative movement with the theoretical formulation for combating Communism for the next half-century.[26] Decrying President Truman's policy of containment as too defensive, Burnham argued that in order for Communism to be reduced to "impotence," the United States must pursue "the creation of [an] Empire."[27] This required an "offensive policy" that

---

[25] JAMES BURNHAM, THE STRUGGLE FOR THE WORLD 3 (1947).

[26] Richard Pipes, *James Burnham: Dissecting Modern Liberalism,* NAT'L REV., Dec. 19, 2005; Danielle Crittenden, *Miss Buckley's School,* N.Y. TIMES, Sept. 11, 2005, at 7-21. President Ronald Reagan eventually gave James Burnham the Presidential Medal of Freedom for his contributions against the Cold War in 1983. *See* http://www.medalofhonor.com/PresidentialMedalofFreedomReagan.htm.

[27] *See* BURNHAM, *supra* note 25, at 97.

dealt with Communism as a series of concentric rings.[28] At the inner circle stood the Soviet Union.[29] The first concentric ring contained Eastern Europe; the second included Korea, China, and the Middle East; the third housed Latin America; and the fourth contained the United States and the United Kingdom.[30] In less than a decade of Burnham's joining the CIA, the United States would step into the second ring, through Vietnam, and the third ring, through Latin America. Apart from failure, the one common thread running through both episodes of empire-building was the American export of torture. Although initially an export to Vietnam, the practice of torture eventually came back as an import.

One case of torture in Vietnam came in 1969 from Ms. Nguyen Thi Nhan.[31] South Vietnamese officials took her to a Saigon police room where, in the company of three U.S. soldiers, an iron rod was forced up her vagina and needles driven into her fingernails.[32] In that same year, Mrs. Nguyen Thi Bo was taken to a Danang police station, where a stick was forced up her vagina and her face was shoved down a filthy toilet bowl.[33] In these instances, the South Vietnamese acted as third-party proxies under CIA supervision.[34]

This would change in the Dong Tam Delta, where a U.S. facility held over 1500 Viet Cong POWs. The prison was presided over by the U.S. Ninth Military Police Company of the Ninth Infantry Division and torture was committed by U.S. military personnel.[35] A Ninth Infantry Military Policeman (MP) stated "[w]e would pretty much do anything as long as we didn't leave scars on the people."[36] This included so-called "Field Phone" (or "Tucker Telephone") interrogations, where an army field telephone was rigged to become a hand-cranked electrocution device.[37]

One noteworthy Ninth Infantry MP in 1969 was Jon Burge. Three years later he became Police Commander of Chicago's Area 2.[38] By mid-1972 Chicago's first allegations of torture started pouring in.[39] Remarkably, these complaints did not describe instances of ordinary police brutality, detailing stray punches or skin bruising choke-holds. Instead,

---

[28] *Id.* at 98.

[29] *Id.*

[30] *Id.*

[31] A.J. LANGGUTH, HIDDEN TERRORS 225 (1975).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] John Conroy, *Tools of Torture*, CHI. READER, Feb. 4, 2005, Cover Story, *available at* http://www.electrotherapymuseum.com/Articles/Torture/TOT1.htm.

[36] *Id.*

[37] *Id.*

[38] JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE 61 (Alfred A. Knopf 2000) (1990).

[39] *Police Torture in Chicago: A Brief Timeline*, E-mail from Bernadine Dohrn, Director, Children and Family Justice Center, Clinical Professor of Law, Northwestern University School of Law, to author (Sept. 22, 2005, 18:44:08 CDT).

they were of the type witnessed in Dong Tam. They were calculated techniques meant to create pain and shame, while at the same time leaving minimal scarring. The torture committed by Chicago Police included electrocution by way of the Tucker Telephone, suffocation using multiple plastic bags, and Russian roulette.[40] It was Dong Tam in Chicago.

What is most frightening about Jon Burge's abuses is how complicit local judges and prosecutors were in permitting them. Prosecutors used confessions they knew were products of torture and appellate court judges rendered decisions to exclude evidence of torture.[41] Victims would not obtain redress until almost twenty years later. Even then, only civil judgments were awarded to Burge's victims and none of the police officers who carried out the acts of torture have yet to be criminally prosecuted.[42] It is in lieu of these structural deficits that a federal criminal statute is required to deter domestic torture techniques.

B. The Dirty Wars of Central America: Torture by Proxy

The model for U.S. involvement in Iraq, as explained by Vice President Dick Cheney, was the Reagan Administration's operations in Central America to topple the Sandinista Government of Nicaragua.[43] This was the "War against Communism" rather than the "War against Terror," and the determinative frontier was Central America.[44] With the CIA as the designated architect in Latin American, rather than learning democracy as Dick Cheney implies in his irenic rendering of history, those nations quickly plunged into a mire of torture and death.

U.S. involvement in Guatemala dates back to 1954, when its reformist President, Colonel Jacobo Arbenz, started redistributing the European aristocracy's land to the Mayan peasantry.[45] Fearing the spread of Communism, the CIA instigated a coup against Arbenz, and sent Guatemala into a genocidal tailspin for the next forty years.[46] In the early

---

[40] CONROY, *supra* note 38, at 69–70.

[41] Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1331 (1999).

[42] *Id.* at 1289.

[43] During the 2004 Presidential election, in the October 5th, 2004 debate with John Edwards, Dick Cheney commented that the U.S. initiative to spread democracy in Iraq mirrored successful attempts by the Reagan Administration at fighting Communism and bringing democracy to El Salvador. Jason R. Rowe, *Some Forgotten Lessons: There Are Striking Parallels Between U.S. Actions in El Salvador and in Iraq*, AMERICA, Apr. 25, 2005.

[44] President Reagan told the Wall Street Journal that "the Soviet Union underlies all the unrest that is going on [in Central America]." WILLIAM M. LEOGRANDE, OUR OWN BACKYARD: THE UNITED STATES IN CENTRAL AMERICA, 1977-1992 53 (1998). This reflects the same provincialism of James Burnham, who believed that the Soviet Union was the head of a "world-wide conspiratorial movement" for "the conquest of the world." BURNHAM, *supra* note 25, at 59, 90.

[45] JENNIFER K. HARBURY, TRUTH, TORTURE, AND THE AMERICAN WAY: THE HISTORY AND CONSEQUENCES OF U.S. INVOLVEMENT IN TORTURE 32–33 (2005).

[46] *Id.* at 34.

1980s, fearing leftists might finally overthrow their oppressive governments, the Reagan administration began military support for those very regimes to a sum of $82.5 million per year.[47] This funded the massacre of over 660 Mayan villages and the "disappearance" of 200,000 people.[48]

Like a harmonic wave that peters out from the point at which a stone strikes a body of water, every death in every village could be traced back to an act of torture that yielded a name, an address, and a person. While torture survivors consistently fingered their tormentors to be fellow Guatemalans, they also recalled tall white individuals with American accents being in charge.[49] That they could only have been CIA or U.S. military personnel is apparent for the simple reason that the only other Americans in Guatemala at the time were missionaries and mercenaries—neither of whom would have had the authority to tell Guatemalan soldiers when and how to torture someone.[50] These allegations were corroborated more than twenty years later when White House staffer Richard Nuccio resigned and wrote of the CIA employing Guatemalan military officers who were responsible for numerous human rights abuses.[51]

U.S. involvement in El Salvador was even more substantial. El Salvador, like Guatemala, had a small ruling class presiding over an impoverished indigenous population.[52] When various indigenous guerilla groups united in 1980 to fight this oppression, the U.S.-funded Salvadoran National Guard slaughtered between 40,000 and 50,000 individuals.[53] The Salvadorans who comprised this unit were trained at the School of the Americas, where torture was taught out of manuals.[54] The director of the Salvadoran intelligence agency, Alberto Medrano, was trained by the CIA

---

[47] *Id.* at 37.

[48] *Id.* at 35 (citing GUATEMALAN COMMISSION FOR HISTORICAL CLARIFICATION, GUATEMALA MEMORY OF SILENCE ¶ 2, http://www.shr.aaas.org/Guatemala/ceh/report/English/conc1.html (last visited Mar. 27, 2006)); Commission for Historical Clarification, *"Guatemala: Memory of Silence,"* United Nations Truth Commission, 1999, http://shr.aaas.org/guatemala/ceh/report/english/toc.html.

[49] Gary Cohn & Ginger Thompson, *Unearthed: Fatal Secrets*, BALT. SUN, June 11-18, 1995, *available at*: http://www.baltimoresun.com/news/local/bal-negropolenta,0,3704648.story.

[50] Curiously, most torture survivors recalled a tall white American named "Mr. Mike," as the main culprit. HARBURY, *supra* note 45, at 53, 86, 87–90. In a cruel twist, an ex-Navy Seal named Michael J. Walsh published a book about his exploits in Central America and bragged about being referred to as "Mr. Mike" and detailed his disdain for Catholic missionaries, nuns and priests who supported the Leftists. Referring to their being labeled guerillas and exterminated along with the other rebels, he coined the phrase, "if you're going to play the game, wear the name." *Id.* at 89; LT. CMDR. MICHAEL J. WALSH & GREG WALKER, SEAL! FROM VIETNAM'S PHOENIX PROGRAM TO CENTRAL AMERICA'S DRUG WARS (1994).

[51] Editorial, Paul Mulshine, *Someone Deserves Capitol Punishment*, STAR LEDGER, Oct. 27, 2005, at 19.

[52] HARBURY, *supra* note 45, at 40.

[53] *Id.* at 44 (citing Kevin Murray & Tom Barry, INSIDE EL SALVADOR 59 (1995)).

[54] *Id.* (citing INSIDE SCHOOL OF THE ASSASSINS (1997)).

and the Green Berets.[55] Many of its suspects also "disappeared."

Finally, the CIA was given free reign to establish their main hub of operations in Honduras. Not coincidentally, this was also where the most carnage occurred. They planned on training Argentineans to oversee the daily operations of Honduran operatives, or the "Contras."[56] With a payment of $572 million, the CIA built its Latin American war facilities in Honduras from 1980 to 1985.[57] This guaranteed them access to Honduran military facilities like the infamous INDUMIL.[58] The CIA then trained Argentina's special Battalion 316 on U.S. soil for later deployment to Honduras.[59] Former Battalion 316 death squad members confirmed that CIA officers were often present during torture sessions but never intervened to stop the death or torture of suspects.[60] Instead, CIA officers helped Battalion 316 interrogators fashion more effective questions.[61]

Years later, CIA officials admitted that they failed to report human rights abuses in Honduras.[62] When U.S. Ambassador Jack R. Binns complained about torture to the Reagan Administration, he was promptly fired. His replacement, John Negroponte,[63] subsequently reported in the 1982 U.S. Human Rights Report on Honduras that no human rights abuses had taken place in that nation. Under his watchful eye, the proliferation of Honduran death squads, torture, and disappearances escalated.[64] During Mr. Negroponte's confirmation hearings for the post of National Intelligence Director in 2005, then-retired Ambassador Binns commented that Negroponte "was complicit in abuses . . . [and] tried to put a lid on reporting abuses and . . . was untruthful to Congress about those activities."[65]

The bloody history of these nations demonstrates two things. First, it shows how the CIA created a highly regimented and disciplined form of torture that it could apply against all enemies. Second, it firmly insulated the agency in a capsule of unaccountability. Even when its participation, training, and supervision resulted in the death of Americans, like Harvard-

---

[55] *Id.* at 46.

[56] HARBURY, *supra* note 45, at 52.

[57] *Id.* at 48.

[58] *See id.* at 53.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] Vernon Loeb, *The CIA Won't Name Hondurans Suspected of Executing Rebel*, WASH. POST, Nov. 4, 1998, at A2.

[63] Fittingly John Negroponte was the Bush Administration's choice of ambassador to Iraq in 2004. Today, as the Director of National Intelligence, the CIA falls under his control. John Diamond, *Intelligence Nominee Says He Won't Hesitate To Exercise Authority*, USA TODAY, Apr. 13, 2005, at A6.

[64] Sue Branford, *The Salvador Option*, 134 NEW STATESMAN 18, 18 (2005).

[65] Scott Shane, *Poker-Faced Diplomat, Negroponte Is Posed for Role as Spy Chief*, N.Y. TIMES, Mar. 29, 2005, at A14.

educated journalist Charles Horman in Chile, CIA operatives remained immune from prosecution.[66] In its congenital paranoia against Communism and its evanescent zeal against the Sandinistas, the CIA published "torture manuals" like the "Human Resources Exploitation Manual,"[67] and "murder manuals" like the "Psychological Operations in Guerilla Warfare."[68] Tellingly, these booklets possessed an eerie similarity to the CIA's "Vietnam War Guide."[69] Again, this hinted that torture was a disciplined and systematic component of interrogations for which the CIA expended vast sums of money.

C. Iraq and Afghanistan: Torture Direct

Today, it is under the supervision of Military Intelligence officers and the CIA that American soldiers deployed in Iraq learn how to interrogate prisoners and gather intelligence. As several servicemen stated, the job of finding and interrogating individuals was not something for which they received training prior to deployment.[70] When Military Intelligence and CIA personnel accompanied them on their missions, they were encouraged to "rough up" prisoners.[71] They were also reminded to avoid injury to the face since that would create difficulties in processing them.[72]

With instruction such as this, evidence of torture came swiftly. In the very first battle against Taliban forces, over two hundred POWs were captured and transported in sealed metal containers at the direction of the CIA.[73] Bereft of water and oxygen, hundreds of these POWs died in the hands of U.S. Special Forces, 595 A-Team.[74] Then there was the secret CIA interrogation center at Kabul, Afghanistan, referred to as "the Salt Pit."[75] It was here that a detainee was stripped naked, dragged across a concrete floor, and chained in a cell where he froze to death overnight and was buried in an unmarked grave without notification to his family.[76]

Subsequently, the CIA's torture practices reached their nadir in Iraq. Under the iconic image of a hooded prisoner, standing on a box, with cables snapped to his fingers, toes, and penis—which is curiously called

---

[66] Vernon Loeb, *CIA May Have Role in Journalist's Murder*, WASH. POST, Oct. 9, 1999 at A15.

[67] Gary Cohn et al., *Torture Was Taught by the CIA,* BALT. SUN, Jan. 27, 1997 at A1.

[68] Editorial, *The CIA's Murder Manual,"* WASH. POST, Oct. 21, 1984.

[69] Philip Taubman, *CIA Manual Is Linked to Vietnam War Guide*, N.Y. TIMES, Oct. 29, 1984, at A6.

[70] David S. Cloud, *Seal Officer's Trial Gives Glimpse of CIA Role in Abuse Scandal*, N.Y. TIMES, May 26, 2005, at A13.

[71] *Id.*

[72] *Id.*

[73] Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1.

[74] *Id.*

[75] Jeff Jacoby, *Where's the Outrage on Torture,* BOSTON GLOBE, Mar. 17, 2005, at A19.

[76] *Id.*

"the Vietnam"[77]—the world learned how America spreads democracy. That this could have been prevented, but was instead condoned, at least tacitly, is evidenced by the fact that months before the Abu Ghraib pictures flooded news shows, a confidential report warned Army generals in Iraq that CIA personnel were abusing detainees.[78] When low-level MPs were prosecuted, they uniformly responded that they merely took orders from CIA and higher-level military officials.[79] Yet prison logs failed to list the actual names of CIA officers; instead they found names such as "James Bond" or "John Doe."[80] That notwithstanding, the U.S. Military's own internal investigation, known as the "Fay Report," concluded that CIA practices contributed to the abuses.[81] In a similar vein, the Department of Defense investigatory panel led by James R. Schlesinger then concluded that intelligence officials directed the conduct of MPs.[82]

Added to this, came the ominous specter of "ghost prisoners." Sanctioned and signed off by Secretary of Defense Donald Rumsfeld himself, this was the practice of simply not keeping records of why a prisoner was taken, how he was treated, or if he was alive in prison logs. Intended to keep the Red Cross from monitoring the condition of "high-value" detainees, the softening up of these individuals often resulted in their deaths.[83] CIA officer Peter Probst argued that these secret detentions did not constitute kidnappings and that they "ha[d] been going on for decades."[84] Gen. Paul J. Kern testified to the Senate Armed Services Committee that the total number of ghost prisoners could be in the hundreds.[85]

Eventually, Iraqis began reproducing their teachers' proclivity for torture. By October of 2005, within two years of the U.S. occupation, it

---

[77] John Barry et al., *The Roots of Torture*, NEWSWEEK, May 21, 2004, at 27.

[78] *2003 Army Report Talked of Inmate Abuse*, ST. PETERSBURG TIMES, Dec. 1, 2004.

[79] Philip Shenon, *Officer Suggests Iraq Jail Abuses Were Encouraged*, N.Y. TIMES, May 22, 2004, at A1.

[80] Toni Loci, *Hidden Identities Hinder Probe,* USA TODAY, May 28-31, 2004, at A1.

[81] Douglas Jehl, *Some Abu Ghraib Abuses Are Traced to Afghanistan*, N.Y. TIMES, Aug. 26, 2004, at A11.

[82] Eric Schmitt, *Abuse Panel Says Rules on Inmates Need Overhaul*, N.Y. TIMES, Aug. 25, 2004, at A1.

[83] One notable case was the death of Manadel al-Jamadi on November 24, 2003, at Abu Ghraib prison. Initially beaten by Navy Seals and subsequently interrogated by CIA officers in a shower room, Mr. Jamadi died. Despite a coroner's report finding that Navy Seal and CIA abuse contributed to his death, otherwise tenacious Federal Prosecutors decided not to pursue the case. Douglas Jehl & Tim Golden, *C.I.A. Is Likely To Avoid Charges in Most Prisoner Deaths*, N.Y. TIMES, Oct. 23, 2005, at A16. Dr. Vincent Iacopino, director of research for Physicians for Human Rights, called the position in which Mr. Jamadi died, where the arms are hyper extended behind the back, "clear and simple torture." *Army Guards' Statements Back Allegation that CIA Tortured Iraqi*, ST. LOUIS POST-DISPATCH, Feb. 18, 2005, at A2.

[84] Dana Priest & Scott Higham, *At Guantanamo, a Prison Within a Prison*, WASH. POST, Dec. 17, 2004, at A1.

[85] Eric Schmitt & Douglas Jehl, *Army Says CIA Hid More Iraqis Than It Claimed*, N.Y. TIMES, Sept. 10, 2004, at A1.

was discovered that prisons under the control of the Iraqi Interior Ministry tortured up to 120 inmates.[86] These torture methods included the braking of bones, the pulling of fingernails, the stamping of cigarettes into skin, and electrocution.[87] While this does not necessarily prove that U.S. forces taught their Iraqi counterparts how to torture, it does suggest that U.S. forces established a new normative standard as to the treatment of suspects that their Iraqi pupils readily adopted.[88] This is the danger faced by America's police departments, many of which will be populated by these very American soldiers. Our law enforcement personnel may be all too eager to learn and adopt the norms and values of their fellow Iraq War Veteran colleagues, even if it means the use of torture.

III. THE POSSE COMITATUS ACT

A. *Historical Precursors to the Posse Comitatus Act: The Mansfield Doctrine*

The pejorative term "posse" is short for "posse comitatus" and refers to the ability of a county sheriff to requisition able-bodied men to help maintain law and order.[89] This practice traces back to 1181 when King Henry II instituted the Assize of Arms.[90] This decree required all non-slaves to keep arms and work as the "Jurata ad arma,"[91] a civilian military reserve at the King's disposal for the purpose of keeping the peace.[92] Eventually, the existence of these para-military forces conflicted with the separation of the military and the militia from civil law enforcement as enshrined in the Magna Carta (in 1225).[93]

---

[86] Edward Wong, *Iraq Prison Raid Finds a New Case of Mistreatment*, N.Y. TIMES, Dec. 12, 2005, at A1. Ellen Knickmeyer, *U.S. Envoy Calls Torture Severe and Extensive at Two Iraqi Prisons*, WASH. POST, Dec. 14, 2005, at A22.

[87] *Id.*

[88] It strains credulity to suggest that Iraqi forces "knew" how to torture as a result of whatever real or perceived barbarism Saddam Hussein's security might have engaged in. This is because the first thing L. Paul Bremer did upon occupying Iraq was to purge Iraq's civil service of Baathists and to exclude all prior military personnel from the class of citizens eligible to participate in Iraq's new security forces. Thus, until November 2005, Iraq's security forces concertedly excluded all individuals present in the prior regime. Edward Wong, *Iraq Asks Return of Some Officers of Hussein Army*, N.Y. TIMES, Nov. 3, 2005, at A1. Furthermore, history suggests that Americans' procedures for extracting intelligence are generally passed on to indigenous puppet governments during occupation. As explained above, this was evidenced in Vietnam and Central America. *Id.*

[89] Charles Doyle, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, *in* THE POSSE COMITATUS ACT AND RELATED MATTERS: CURRENT ISSUES AND BACKGROUND 4 (2004).

[90] *Id.*

[91] STEPHEN YOUNG, THE POSSE COMITATUS ACT OF 1878: A DOCUMENTARY HISTORY, at xii (2003).

[92] David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 4 (1971).

[93] *Id.*

Despite this, soldiers were often deployed against English civilians until the riot of 1780. It was at this time that the curious definition of a "posse comitatus" emerged. Chief Justice Lord Mansfield declared that all civil riots should be put down by civil authorities and the "posse comitatus"—not by the military.[94] Soldiers were permitted to comprise the posse comitatus, but when they did, they were subject to civilian laws because they were deemed to be acting in their civil capacity.[95] This schizophrenic policy of military officers possessing multiple personas, one as soldier and another as civilian, became known as the Mansfield Doctrine and became the controlling policy on the role of the military. The singular virtue of this doctrine was that it established civilian control over the soldiers—both in the soldiers' missions and in their punishments if they exceed the scope of their missions—when they exercised power over civilians.

The United States initially accepted the Mansfield Doctrine for the first seventy years of its existence.[96] Shortly after the ratification of the Federal Constitution, Congress limited presidential authority to use the military in domestic affairs to only those situations where state and local law enforcement personnel could not restore order.[97] But in 1850, U.S. Attorney General Caleb Cushing overruled the Mansfield Doctrine and declared that a posse comitatus could consist of soldiers acting in their *military* capacity.[98] The primary utility of this shift in policy was to enforce The Fugitive Slave Act by empowering U.S. Marshals to call upon entire units of the military to assist in capturing runaway slaves.[99] Ironically, this initially pro-South policy would ultimately enable Union Soldiers to legally act as a police force throughout the occupied South for the duration of the Civil War.

B. Enactment of the Posse Comitatus Act of 1878: Radical Reconstruction Redlined

During the Reconstruction Era, Union soldiers replaced the representative government of the South and became a police force with super-governmental powers. Beginning with the carnage of Sherman's March, to Union Generals summarily discharging Southern elected officials from their posts, to the concomitant cessation of the Thirteenth,

---

[94] Doyle, *supra* note 89, at 4.

[95] *Id.*

[96] YOUNG, *supra* note 91, at xiv.

[97] *See* Brian L. Porto, Annotation, *Construction and Application of Posse Comitatus Act (18 U.S.C.S. § 1385), and Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Execute Laws*, 141 A.L.R. FED. 271, 281 (1997).

[98] Doyle, *supra* note 89, at 4.

[99] *See* Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 960 (1997).

Fourteenth, and Fifteenth Amendments' guarantees for individuals below the Mason-Dixon Line, the South's grievances came to a tipping point in the disputed presidential election of 1876 between Rutherford B. Hayes and Samuel J. Tilden. More than a century before George W. Bush's electoral coup against Al Gore, Hayes won the electoral college even though Tilden won the popular vote.[100] Rather than being determined by a packed Supreme Court in 2004, for the first time the election was sent to Congress where Hayes emerged the winner.[101] In a conciliatory gesture, President Hayes removed Union soldiers from the South.[102]

This did nothing to mollify Southern allegations of Union soldiers engaging in voter fraud. In retaliation, the Democrat controlled House attached the Posse Comitatus Act as a rider to an army appropriations bill.[103] One Democratic Senator stated "[w]henever the idea obtains that you need a military power to govern the great body of the people of this country you have given up the fundamental theory of your system of government; it is gone."[104]

The credibility of the South in casting its struggle for the Posse Comitatus Act in democratic rhetoric was undermined by the Act's primary utility being for continuing slavery under various new banners. After all, in the immediate aftermath of the Civil War, Union soldiers left the South.[105] Under the generous terms of Johnson's Presidential Reconstruction, state governments were back in power throughout the South by 1865.[106] It was these state governments' subsequent conduct that compelled Union soldiers to intervene. From enacting the "Black Codes," to various ingenious modes of indentured servitude, and to torture and

---

[100] YOUNG, *supra* note 91, at xv.

[101] *Id.*

[102] Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward A Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383, 394 (2003).

[103] The posse comitatus section of the act was originally introduced as an amendment, commonly referred to as the "Knott Amendment" in recognition of the sponsor of the amendment, Representative Knott. The final form read as follows:

> 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 force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment.

Id.

[104] 7 CONG. REC. 4247 (1878) (statement of Sen. Hill).

[105] 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, 101 (2003).

[106] *Id.* at 102–03.

lynching, "the newly reconstructed governments were a white man's government and intended for white men only."[107] The South's legislators were particularly active, drafting freedmen offenses that included attempting to leave a plantation, disputing contract payments, attempting to buy land, and refusing to be whipped.[108] Newspaper accounts of such injustices enraged Northerners and united the Republican Party against President Johnson's reconstruction efforts.[109]

After more than a year of Congressional investigations and the Southern States' failure to ratify the Fourteenth Amendment in 1867, Congress enacted the "Reconstruction Act"[110] and the ("radical") reconstruction era began. Union soldiers poured into the South and dissolved state governments in place of direct military rule.[111] The military then carved the South into five military districts, wherein the Army was charged with the duty of exercising "entire control over the civil governments."[112]

The Democrats, however, had the last word with the passage of the Posse Comitatus Act. There were two exceptions: first, when expressly authorized by the Constitution; second, when Congress authorizes such an exception.[113] While perhaps true to our English law heritage, the immediate consequence of the Act's passage was the re-ascendance of the old white oligarchy to the South's corridors of power.

Today, the Act reads as follows:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.[114]

Although courts have been reluctant to extend the scope of the Act to include the other branches of the armed forces,[115] military regulations require the Navy and Marines to comply with the Posse Comitatus Act.[116] The Act is inapplicable to the Coast Guard or the National Guard, when in

---

[107] *Id.* at 103.
[108] *Id.* at 105.
[109] *Id.*
[110] Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.
[111] Felicetti & Luce, *supra* note 105, at 105.
[112] ALLEN R. MILLET & PETER MASLOWSKI, FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA 259 (The Free Press 1994) (1984).
[113] YOUNG, *supra* note 91, at xvii–xviii.
[114] 18 U.S.C. § 1385 (2000).
[115] United States v. Roberts, 779 F.2d 565, 567 (9th Cir. 1986).
[116] Dep't of Defense Directive 5525.5 Encl. 4.3 (1986) (extending the Posse Comitatus Act's application to the Navy and Marine Corps "as a matter of DoD policy").

state service, as the latter is considered to be the modern militia.[117]

C. *Conflicting Judicial Interpretations: Congressional Fix*

It is unclear why the Posse Comitatus Act created an exception for domestic military activities authorized under the Constitution when the Constitution is silent on this. This verbiage may have been a compromise, intended to appeal to Republicans and to ensure the Act's congressional approval. It has also been speculated that it is a reference to the President's powers as commander-in-chief in times of emergency.[118] Regardless, the clause remains unexplored and provides little guidance.

By contrast, the clause permitting Congress to craft exceptions has been scrutinized extensively, albeit only recently. In fact, until 1981 presidents freely used the military against the citizenry, especially in labor disputes, without challenges under the Posse Comitatus Act.[119] Presidents also used the military to provide relief efforts in response to natural disasters without any challenges under the Act.[120] But for all practical purposes, the Posse Comitatus Act lay dormant until the 1980s.[121]

The catalyst for change was the Wounded Knee standoff that began on February 27, 1973 at the Pine Ridge Indian reservation in South Dakota. Allegedly, members of the American Indian Movement looted stores,

---

[117] Hammond, *supra* note 99, at 963–64.

[118] YOUNG, *supra* note 91, at xviii.

[119] For instance, in 1863 the Army was used to combat draft rioters in New York and again to suppress the Pullman railroad strike of 1877. The results were 100 killed and many times that wounded. Then in 1894 the President ordered federal troops in into Illinois, over the Governor's objections, to quell another labor strike. In 1899, the miner's strike at Couer d'Alene, Idaho, was suppressed by use of the Army, where many were detained without charges. In World War I, the military broke up labor protests and spied on union leaders. *See* Richard Kohn, *Using the Military at Home: Yesterday, Today, and Tomorrow*, 4 CHI. J. INT'L L. 165, 166–72 (2003).

[120] But this was done under the auspices of the Stafford Act, which grants the President with the ability to assist in relief efforts. Under the Stafford Act, the President may use military troops to engage in activities "essential for the preservation of life and property." 42 U.S.C. § 5170b(c). However, the Stafford Act is not an exception to the Posse Comitatus Act as it does not permit law enforcement activities. In fact, in order for the military to act under the Stafford Act, there must exist a natural catastrophe or major disaster, a request from the state's governor to provide support, and a finding that the state needs additional help beyond what it is able to provide. *Id.* This Act enabled the military to capture President McKinley's assassin in 1901, to provide relief efforts in San Francisco after the earth quake of 1906, to replace 30,000 striking New York Postal Workers in 1970 under the direction of Richard Nixon, to replace striking air traffic controllers in 1981 under the direction of Ronald Reagan, to provide relief efforts during Hurricane Hugo in the 1990's, to suppress the Los Angeles riots in the wake of Rodney King beating, to investigate the bombing of the Alfred P. Murrah Building in Oklahoma City, and more recently, to aide in relief efforts after Hurricane Katrina. These emergencies differed in character from exceptions to the Posse Comitatus Act since they were by definition temporary and did not involve law enforcement as activities. *See* Commander Jim Winthorp, *Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., July 1997, at 3.

[121] However, the first congressionally crafted exceptions to the Posse Comitatus Act originated from the Whiskey Rebellion of 1792. Now codified in 10 U.S.C. §§ 331, 332 (2000), they provide that in cases of "insurrection in any State," the President may respond via the military.

occupied the Post Office, and took hostages.[122] After seventy-one days, the FBI, Bureau of Indian Affairs, and U.S. Marshals regained control of the town.[123] Although military officers played no direct role in the standoff, they provided strategic advice and equipment to domestic law enforcement officials. Federal authorities arrested and attempted to prosecute Red Feather, McArthur, and Jamarillo of violating 18 U.S.C. § 231(a)(3). But the courts handed down three varying interpretations of the Posse Comitatus Act in each man's prosecution.

In *United States v. Red Feather*,[124] the court held that military provision of advice and equipment does not result in a Posse Comitatus Act violation because the Act only prohibits "direct active use" of the military—not passive use of military advice or equipment.[125] The district court in *United States v. Jamarillo* framed the issue as whether the military's assistance "pervaded the activities" of civilian authorities.[126] The court found there was a Posse Comitatus Act violation and dismissed the federal indictment. Then, in *United States. v. McArthur*,[127] which was affirmed by the Eighth Circuit in *United States v. Casper*,[128] the district court asked whether "military personnel subjected . . . citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature."[129] No Posse Comitatus Act violation was found.[130]

Then in 1981, Congress sought to arm domestic law enforcement in their "Drug War" with a series of amendments (collectively referred to as the Military Cooperation with Law Enforcement Act)[131] to the Posse Comitatus Act. They allowed the government to provide military assistance to local authorities by providing equipment, supplies, technical

---

[122] United States v. Jamarillo, 380 F. Supp. 1375, 1376–77 (D. Neb. 1974).

[123] Melvin I. Urofsky, *The Supreme Court and Civil Rights Since 1940: Opportunities and Limitations*, 4 BARRY L. REV. 39, 66 (2003).

[124] 392 F. Supp. 916 (D.S.D. 1975).

[125] *Id.* at 922, 925.

[126] *Jamarillo*, 380 F. Supp. at 1379.

[127] 419 F. Supp. 186 (D.N.D. 1975).

[128] 541 F.2d 1275 (8th Cir. 1976).

[129] *McArthur*, 419 F. Supp. at 194–95.

[130] United States v. Casper, 541 F.2d 1275 (8th Cir. 1976).

[131] 10 U.S.C. § 371 (2000), which states:

> (a) The Secretary of Defense may, in accordance with other applicable law, provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials.
>
> (b) The needs of civilian law enforcement officials for information shall, to the maximum extent practicable, be taken into account in the planning and execution of military training or operations.
>
> (c) The Secretary of Defense shall ensure, to the extent consistent with national security, that intelligence information held by the Department of Defense and relevant to drug interdiction or other civilian law enforcement matters is provided promptly to appropriate civilian law enforcement officials.

assistance, intelligence, and training.[132] What Congress failed to do was explain the consequences for federal or state actors when they committed a Posse Comitatus Act violation.

It is no coincidence that although the Posse Comitatus Act is a criminal statute, no military or government official has ever been prosecuted under it. So wary are the courts of penalizing the armed forces that they consistently allow defendants to be prosecuted with evidence obtained through Posse Comitatus Act violations. For instance, in *United States v. Walden*,[133] after conceding a Posse Comitatus Act violation, the Fourth Circuit refrained from enforcing the exclusionary rule. Its rationale was that the Posse Comitatus Act "expresses a policy that is for the benefit of the people as a whole, but not one that may be fairly characterized as expressly designed to protect the personal rights" of individual citizens.[134] The court held that there should first "be evidence of widespread or repeated violations" before it would consider using the exclusionary rule as a deterrent.[135] The Fifth Circuit echoed this sentiment, stating that only if it is "confronted in the future with widespread and repeated violations of the Posse Comitatus Act . . . [would] . . . an exclusionary rule . . . be fashioned at that time."[136]

IV. MILITARIZATION OF DOMESTIC LAW ENFORCEMENT

A. Para-Militarization of Police Departments: A SWAT Team in Every Hamlet

The 1981 Posse Comitatus Act amendments along with judicial diffidence paved the way towards increased interaction between the military and police departments. The United States lives with the repercussions of this today as more and more police departments possess their own para-military units. Contrary to popular belief, these special units are not just limited to big cities like Los Angles, New York City, and Miami. For example, by 1997 SWAT teams could be found in ninety percent of cities with populations of 50,000 or above.[137] These military-trained and military-armed police officers ride in armored personnel carriers, shoot with M-16s, and keep grenade launchers handy. The resulting "warrior ethic" which presumes guilt and responds with

---

[132] Pub. L. No. 97–86, § 905, 95 Stat. 1115 (codified as amended at 10 U.S.C. §§ 371–78 (1998)).
[133] 490 F.2d 372, 377 (4th Cir. 1974).
[134] *Id.*
[135] *Id.*
[136] United States v. Wolffs, 594 F.2d 77, 85 (5th Cir. 1979).
[137] Diane Cecilia Weber, *Warrior Cops: The Ominous Growth of Paramilitarism in American Police Departments*, 50 CATO INSTITUTE BRIEFING PAPERS 5, 1 (1999), *available at* http://www.cato.org/pubs/briefs/bp50.pdf.

overwhelming force is routinely applied against Americans. This is diametrically opposed to the mission of a police officer, who should use minimal force and protect the constitutional rights of the accused.

Recent history provides the creation of JTF-6 as a prime example of the military operating under excessive force. George H.W. Bush created the Joint Task Force-Six (JTF-6) to combat the narcotics trade and ordered U.S. Marines to patrol the U.S.-Mexican border. They patrolled in the dark, in complete camouflage, and were stationed behind a Mexican-American goat-herder. The shepherd fired some wayward shots to scare his sheep, but his bullets had the ill-fated luck of startling the Marines who shot back and killed him.[138] In the ensuing public relations debacle, JTF-6 was called off of border control duty.

Contrast this with the role played by JTF-6 in the standoff against the Branch Davidian Compound near Waco, Texas in 1993. The Abrams Tank that rolled over the Davidian complex, actually fell within the rubric of the Posse Comitatus Act because the driver was not an Army officer, but rather a military-trained FBI official.[139] Despite Congressional investigations finding the civilian law enforcement should not use military tactics, in 1994 the Department of Justice and the Department of Defense signed a memorandum enabling the military to transfer technology to police departments and other law enforcement agencies.[140]

A more recent illustration from the War on Terror was the murder of Jean Charles de Menezes in the London subway.[141] Mr. Menezes was shot seven times in the head while seated in a British subway car because his Brazilian heritage made him resemble a suicide bomber.[142] Significantly, he was not murdered by British soldiers, but by London Police officers who were trained by Israeli soldiers.[143]

These examples illustrate the fact that when police units are trained by the military, they behave like the military, and this often leads to disastrous consequences in the civilian world. Specifically, when police departments

---

[138] *Border Killing Brings Criticism of Military Role*, CHI. TRIB., May 23, 1997, at 15 [hereinafter *Border Killing*].

[139] Kealy, *supra* note 102, at 419–20.

[140] U.S. Dep't of Justice & U.S. Dep't of Def., Department of Justice and Department of Defense Joint Technology Program: Second Anniversary Report, 8–18 (1997), *available at* http://www.ncjrs.org/pdffiles/164268.pdf.

[141] Elaine Sciolino, *Bombings in London: Scotland Yard; Regrets, but No Apology, in London Subway Shooting*, N.Y. TIMES, July 25, 2005, at A12.

[142] *Police Shooting—The Discrepancies,* BBC, Aug. 17, 2005, *available at* http://news.bbc.co.uk/1/hi/uk/4158832.stm; Shyam Bhatia, *Shot Dead Because of His Looks*, DECCAN HERALD, Aug. 19, 2005, *available at* http://www.deccanherald.com/deccanherald/Aug192005/panorama1555162005818.asp; Glenn Frankel & Tamara Jones, *In Britain, a Divide Over Racial Profiling*, WASH. POST, July 27, 2005, at A1; Mary Jordan, *London's Minority Communities Complain of Increased Police Scrutiny in Wake of Bombings*, WASH. POST, Aug. 26, 2005; Marie Woolf, *Anti-Terror Police Told To Target Asians*, INDEPENDENT (UK), Sept. 13, 2005.

[143] Sciolino, *supra* note 141, at A12.

engage in the calculus of when a suspect's constitutional rights trump the use of force, they err on the side of using force.[144] It is therefore entirely reasonable to conclude that if police officers are trained in military interrogation techniques, they may use them against civilian criminal suspects in a manner consistent with the interrogation of a foreign detainee.

B. The Domestic War on Terror: Spying and Rendition

The danger posed by Iraq War veterans is far greater. At the root of the problem is the Bush Administration's response to the 9/11 attacks, which was to cast the Department of Defense into the role of primary domestic protector. From the date of the 9/11 attacks to January 23, 2002, over $2.6 billion was spent by the military for the tax of mobilizing 71,386 soldiers into active duty.[145] On April 2002, President Bush created the U.S. Northern Command (NORTHCOM), which is responsible for homeland defense and for assisting civil authorities in the continental United States, Canada, Mexico, and up to 500 miles off U.S. shores.[146]

In concert with these legal innovations, lawmakers of every political stripe voiced their animosity towards anything that could hamper the Department of Defense's ability to use the military in the domestic sphere. Senator John Warner suggested that "the reasons for the Posse Comitatus Act have long given way to the changed lifestyle . . . [and] should . . . enable our active-duty military to more fully join other domestic assets in th[e] war against terrorism."[147] Senator Joseph R. Biden went so far as allowing soldiers to make arrests.[148] More recently, President George W. Bush stated the Posse Comitatus Act weakens our ability to fight terrorism or respond to natural disasters.[149]

Oddly enough, it was Homeland Defense Director Tom Ridge and Defense Secretary Donald Rumsfeld who rebuffed suggestions for weakening the Posse Comitatus Act. Their reluctance most likely stemmed from two considerations. First, there exists enough leeway within the Act's current structure to enable the military to do most things within the mandate of a domestic law enforcement agency. Second,

---

[144] U.S. experiences with JTF-6 and the London police killing of Mr. Menezes, as explained earlier, are demonstrative of this. Sciolino, *supra* note 141, at A12; *Border Killing*, *supra* note 138, at 15; Rowan Scarborough, *Dangerous Alliances*, INSIGHT ON THE NEWS, Oct. 25, 1999, at 30.

[145] Steven J. Tomisek, *Homeland Security: The New Role for Defense*, STRATEGIC FORUM NO. 189 (Feb. 2002), *available at* http://www.ndu.edu/inss/strforum/sf189/sf189.pdf.

[146] *See* http://www.northcom.mil./about_us/about_us.htm.

[147] Mary Leonard, *Officials Talk of Using Military at Home, Despite Doubts*, BOSTON GLOBE, Oct. 31, 2002, at A10.

[148] *War Prompts Debate on Military Law: Posse Comitatus Act of 1878 Bans Use of Troops for Many Actions on U.S. Soil*, HOUSTON CHRON., Nov. 11, 2001, at 39.

[149] Bush stated "I don't want to prejudge the Congress's discussion on this issue because it may require change of [the Posse Comitatus Act]." David E. Sanger, *Bush Calls for Discussion on Military's Disaster Role*, INT'L HERALD TRIB., Sept. 28, 2005, at 2.

calling upon the military to engage in direct domestic law enforcement would have been impracticable when the United States was already planning to wage two major land wars simultaneously. Instead, the Bush Administration has been content to give itself the option of using the military domestically by redefining the scope of the War on Terror.

As it stands, the necessary condition for military intervention into domestic law enforcement is an act (or potential act) of terrorism. Homeland Defense defines terrorism as "violence, or the threat of violence, calculated to create an atmosphere of fear and alarm."[150] It follows that the only condition for involving the military in domestic affairs is to characterize a domestic incident as being designed to create an atmosphere of fear. This alone provides the Department of Defense unparalleled discretion in deciding when and how to involve the military in domestic law enforcement.

Thus far, the Bush Administration has used this discretion to radically expand its domestic surveillance powers. The collection and analysis of Americans' phone and Internet traffic have been accomplished through the National Security Agency.[151] With the cooperation of American telecommunications companies, the NSA obtains "backdoor" access to streams of domestic communications.[152] While the NSA had traditionally conducted such surveillance only against communication between other countries, a 2002 executive order changed that.[153] Now the NSA can spy on Americans, on American soil, without warrants. This is alarming because the NSA functions as a "combat support agency of the Department of Defense"[154] and reports its findings directly to the "President of the

---

[150] *See* http://www.tkb.org/Glossary.jsp (last visited Nov. 3, 2005). The definition for "Terrorism" states:

> Terrorism is violence, or the threat of violence, calculated to create an atmosphere of fear and alarm. These acts are designed to coerce others into actions they would not otherwise undertake, or refrain from actions they desired to take. All terrorist acts are crimes. Many would also be violation of the rules of war if a state of war existed. This violence or threat of violence is generally directed against civilian targets. The motives of all terrorists are political, and terrorist actions are generally carried out in a way that will achieve maximum publicity. Unlike other criminal acts, terrorists often claim credit for their acts. Finally, terrorist acts are intended to produce effects beyond the immediate physical damage of the cause, having long-term psychological repercussions on a particular target audience. The fear created by terrorists may be intended to cause people to exaggerate the strengths of the terrorist and the importance of the cause, to provoke governmental overreaction, to discourage dissent, or simply to intimidate and thereby enforce compliance with their demands. *Id.*

[151] Eric Lichtblau & James Risen, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

[152] Eric Lichtblau & James Risen, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. TIMES, Dec. 24, 2005, at A1.

[153] *See id.*

[154] http://www.nsa.gov/about/about00022.cfm (last visited on 12/1/2005).

Pentagon."[155]

Information that cannot be gleaned from phone or internet records has been left for the FBI to collect. By issuing over 30,000 National Security Letters, which (1) requires recipients to disclose information they may have on other people and (2) forbids recipients from complaining to judges or attorneys, the FBI effectively functions as an auxiliary staff for the Department of Defense to gather information.[156] The paranoia that fuels this military-domestic axis of surveillance has led to the monitoring of ordinary Americans in such disparate categories as anti-war groups, the "Vegan Community Project," Greenpeace, the Catholic Worker's Group due to its "semi-communistic ideology," and the People for the Ethical Treatment of Animals.[157] Even more chilling has been the President's response, which has been to caution against publicly debating these operations.[158]

Finally, using the specter of dirty bombs, the Bush White House has resorted to spying on Muslim Americans' private residences, businesses, and mosques.[159] The FBI, in coordination with the Energy Department, the Justice Department, and the National Security Council, now conducts warrantless radiation searches in Chicago, Detroit, Las Vegas, New York, Seattle, and Washington, D.C.[160] But, unlike the NSA's electronic data mining operations or the National Security Letters, the hunt for radioactive emissions has emboldened government officials to physically access Muslims' private driveways and other accessible areas to meet their surveillance objectives.[161]

All of this indicates that racial and religious profiling are the new normative framework around which the nation's counter-terrorism policy is draped. This means that government officials must have come across some unseemly questions. For instance, who is a Muslim? Does wearing a turban do it?[162] No, turbans are worn by Sikhs (who are neither Arab nor Muslim). What about having a Muslim name? How do NSA technicians distinguish between a Muslim name and a Persian Zoroastrian name

---

[155] John Diamond, *NSA's Surveillance of Citizens Echoes 1970's Controversy*, USA TODAY, Dec. 19, 2005, at 6A.

[156] Barton Gellman & Dafna Linzer, *Pushing the Limits of Wartime Powers*, WASH. POST, Dec. 18, 2005, at A1.

[157] Eric Lichtblau, *F.B.I. Watched Activist Groups, New Files Show*, N.Y. TIMES, Dec. 20, 2005, at A1.

[158] President Bush stated, "[t]he fact that we're discussing [the NSA surveillance] program is helping the enemy." Todd J. Gillman, *Bush Assails Disclosure of Domestic Spying Program*, DALLAS MORNING NEWS, Dec. 19, 2005.

[159] *See* David E. Kaplan, *Nuclear Monitoring of Muslims Done Without Search Warrants*, U.S. NEWS & WORLD REP., Dec. 22, 2005.

[160] *Id.*

[161] *Id.*

[162] Five Sikh men were dragged off a New York City tour bus for looking suspicious. Joseph Dolman, *Cops: Build on Strengths To Beat Terrorism*, NEWSDAY, July 27, 2005, at A36.

which, while non-Islamic, is nevertheless Arabic? What about Hindu names that possess the same phonetic aspirations as some Muslim names?[163] And what is done when the first name is Muslim and the last name is Christian, as is the case with many African-Americans?[164] Do NSA and FBI analysts possess the training to make such distinctions? Most likely not. Maybe such questions are answered after gaining access to a target's phone and internet records. Visiting Al-jazeera.com might qualify as a red flag. Calling family in the Middle East, Pakistan, or India might be another. We can only speculate since their methodology is classified.[165]

The legal consequences of these bigoted investigations are in plain sight. In the immediate aftermath of 9/11, 762 Muslims were arrested, detained, and tortured.[166] Only now are some Muslims being compensated for torture and prolonged incarceration.[167] More recently, a Muslim graduate student was prosecuted as a terrorist for hyper-linking his webpage to a Hamas website.[168] Other Muslims were prosecuted for heading and participating in Palestinian-Rights think tanks in the United States.[169] In virtually every case, the prosecutions were based on nothing more than the defendants' religious affiliations.[170] Notwithstanding this pattern of behavior, the FBI breezily dismisses accusations of profiling.[171]

The harm caused by the CIA, when it uses racial profiling as its sole imprimatur of guilt, is more permanent. For instance, when Syrian-born Canadian citizen Maher Arar was returning to Canada after a family vacation in Tunis, he was seized by U.S. officials at Kennedy International Airport.[172] For the next ten months, the CIA had him tortured in a Syrian dungeon, where he was beaten with electrical cables and coerced into signing a confession.[173] The only justification for this treatment was that

---

[163] Opinion, *Return to Racism*, THE NATION (Pakistan), Aug. 17, 2005.

[164] *See* Karen Isaksen Leonard, *Introduction: Young American Muslim Identities*, 95 MUSLIM WORLD 473 (2005).

[165] Kaplan, *supra* note 159.

[166] Nina Bernstein, *U.S. Is Settling Detentions' Suit in 9/11 Sweep*, N.Y. TIMES, Feb. 28, 2006, at A1.

[167] *Id.*

[168] Luckily, a jury acquitted Sami Omar Al-Hussayen, a thirty-four-year-old University of Idaho graduate student. Harvey A. Silverglate, *Free Speech in an Age of Terror*, BOSTON GLOBE, June 28, 2004, at A11.

[169] University of South Florida Professor Sami al-Arian and his two co-defendants, Florida graduate student Sameeh Taha Hammoudeh and a Chicago dry cleaner Ghassan Zayad Ballut, were all acquitted of allegedly conspiring with leaders of Palestinian Islamic Jihad to raise money. Spencer S. Hsu & Dan Eggen, *Ex-Professor Acquitted in Case Seen as Patriot Act Test*, WASH. POST, Dec. 7, 2005, at A1.

[170] *See* Gellman & Linzer, *supra* note 156, at A1.

[171] *Id.*

[172] *See generally* Clifford Krauss, *Evidence Grows That Canada Aided in Having Terrorism Suspects Interrogated in Syria*, N.Y. TIMES, Nov. 17, 2005, at A7.

[173] *Id.*

U.S. officials believed there to be an al-Qaeda member named "Arar." The Federal Court for the Eastern District of New York blindly acquiesced to in dismissing Mr. Arar's civil suit against the U.S. government.[174]

The problem with using religion or ethnicity as a suspect trait is that it invariably produces false positives. Whereas the consequences of mistaken identity in the setting of surveillance and prosecution can be reversed with an acquittal, the consequences of torture are permanent. Interrogations involving torture, however, are exactly what seem to result when domestic surveillance agencies coordinate their information through the Department of Defense. Furthermore, by dehumanizing Arab Americans, South Asian Americans, and Muslims as potential terrorists, America's domestic War on Terror has firmly placed these individuals in danger of being maltreated by returning war veterans who join the ranks of domestic law enforcement officers.

V. AMENDING THE POSSE COMITATUS ACT TO PROHIBIT TORTURE OF CIVILIANS

It may be true that the Act's original purpose was not to prohibit torture; indeed it enabled an unfettered South to continue torturing black citizens in the form of southern Jim Crow laws and lynching campaigns. However, the principles underlying the Act transcend the circumstances surrounding its ignoble enactment. The Mansfield Doctrine's proscription against using the military on civilians is an important democratic value. It protects civilians against boorish military tactics from being deployed against them. This, in turn, preserves the superiority of civil society over a military society. Neither the Mansfield Doctrine nor the Posse Comitatus Act directly addresses the peculiar problem of prohibiting the application of previously learned military interrogation techniques against civilians. Despite this, the Posse Comitatus Act is the best suited weapon to prevent such abuses.

First, Congress should amend the Posse Comitatus Act with a list of "interrogation"[175] techniques that will heretofore be deemed to be of a "military" character for purposes of the Posse Comitatus Act. This list should include techniques already known to have been used by the CIA in Abu Ghraib, including the use of dogs, the "attention grab," "attention slap," "belly slap,"[176] "long time standing,"[177] "cold cell,"[178] and "water

---

[174] *Id.*; *see generally* Arar v. Ashcroft, 44 F. Supp. 2d 250 (E.D.N.Y. 2006).

[175] I stress the use of the word "interrogation" rather than "torture" in order to avoid definitional conflicts with what may or may not qualify as torture. Simply providing the victim with a cause of action due to brutality administered under a Posse Comitatus Act violation may be more politically expedient and lead to the same end.

[176] *CIA Interrogation Tactics 'Questionable,'* THE AUSTRALIAN, Nov. 19, 2005 *available at* http://www.theaustralian.news.com.au/common/story_page/0,5744,17297670%255E2703,00.html (last

boarding."[179] The Act could also include methods employed by the Navy and Marines in Gitmo, such as sleep deprivation, hunger, forced feeding, hooding, noxious noise, and sexual humiliation.[180]

Limiting the act to techniques known to have already been used by the U.S. military would not address possible cooperation between domestic law enforcement officials and the armed forces of foreign nations. After all, London police shot Mr. Menezes in the head, rather than in the body, due to training they received from Israel's military.[181] By addressing torture techniques of other nation's armed forces, the Act would memorialize the ideal that all military interrogation techniques are a basic violation of the separation between the military and civilian spheres. Therefore, the Act should also take into consideration torture methods previously employed by Israel's General Security Services (and subsequently repudiated by Israel's Supreme Court).[182] This would include stress positions like the painful stress position known as the *shabach*, confinement into tiny cubicles, beatings, violent "shaking," deprivation of sleep and food, exposure to extreme temperatures, sexual, psychological, or religious abuse, threats against the individual or family members, and inadequate provisions of clothing or hygiene.[183]

Second, the Posse Comitatus Act should provide for heightened civil and criminal remedies that take into account the hurdles faced by torture victims in the United States. The Chicago Police Department demonstrated that allegations of torture are simply ignored when handled by the very police departments that are accused of torture. This conflict could be avoided altogether by shifting the responsibility of investigating and prosecuting Posse Comitatus Act violations to the Department of Justice. But even a successful prosecution, under the Posse Comitatus Act as worded today, would only result in a "fine" or a two year prison term. Thus, it would make more sense if the financial penalty was compensatory and punitive damages. In order to have a truly deterrent effect, such

---

visited on Feb. 25, 2006) ("In the Belly Slap, interrogators deliver 'a hard open-handed slap to the stomach' intended to cause pain but not internal injury.").

[177] *Id.* In "long time standing," prisoners are forced to stand handcuffed and shackled for more than forty hours.

[178] *Id.* In "the cold cell," a prisoner is made to stand naked in a cell kept near ten degrees Celsius and is continually doused with cold water.

[179] *Id.* In "water boarding," "[a] prisoner is tied onto a board with his feet higher than his head, and his face is wrapped in cellophane. When water is poured over him, he begins to gag."

[180] Amy Davidson, *In Gitmo*, THE NEW YORKER (July 11, 2005), *available at* http://www.newyorker.com/online/content/articles/050711on_onlineonly01 (last visited on Feb. 25, 2006).

[181] Sciolino, *supra* note 141, at A12.

[182] In the *shabach* position, an individual is placed on a low chair angled towards the floor and his arms are tied behind the chair back so as to create extreme pain in the shoulders, back, and neck. CONROY, *supra* note 38, at 167.

[183] http://www.stoptorture.org.il/eng/background.asp?menu=3&submenu=1 (containing a complete list of Israel's torture methods).

monies should be paid to the victim by the domestic law enforcement agency in whose custody the abuses occurred. Also, the two-year incarceration period should be increased to match the severity of the harm caused to the victim. This means exposing violators to punishments that meet the severity of the crimes they committed, including lifetime prison terms without parole.

Finally, Congress should foreclose the misdirection and obfuscation afforded by the "few bad apples" defense. This has been the excuse of every police department when faced with accusations of police brutality. When NYPD officers sodomized Abner Louima, Police Commissioner Safir blamed the entire incident on a few "bad apples."[184] When Amadou Diallo was sprayed with forty-one bullets for pulling out a wallet, Mayor Giuliani exclaimed that the shooting was an isolated incident.[185] Police Chief Darryl Gates took a similar stance, in the wake of the Rodney King beating, calling the episode an "aberration."[186] Maryland's Prince George's County Executive Wayne K. Curry also relegated accusations of unwarranted shootings to the conduct of "a very few individuals who act[ed] outside of . . . [the] laws . . . ."[187] When Chicago's police oversight organization found that systemic problems contributed to Jon Burge's success in torturing so many individuals, Chicago Police Superintendent Leroy Martin declared that "to believe the [Chicago Police] department has a brutality problem is to smear the sacrifices of officers who have died in the line of duty."[188]

The "few bad apples" defense was also the tired refrain of Nazi genocidists, like Goering and Goebbels.[189] Today, it has found new life on the lips of Defense Secretary Donald Rumsfeld.[190] But decades of sociological research shows that Goebbels, Rumsfeld, and most police departments are wrong. As Princeton University Professor Susan T. Fiske opined in her recent article, *Why Ordinary People Torture Enemy Prisoners*, the cumulative forces of *conformity* and *obedience*, more than anything else, affect the conduct of individuals in charge of inflicting pain on others.[191]

---

[184] Bandes, *supra* note 41, at 1284–85.

[185] *See* Elisabeth Bumiller & Ginger Thompson, *Giuliani Cancels Trip Amid Protests Over Shooting*, N.Y. TIMES, Feb. 10, 1999, at A1.

[186] LOU CANNON, OFFICIAL NEGLIGENCE: HOW RODNEY KING AND THE RIOTS CHANGED LOS ANGELES AND THE LAPD 23 (1999).

[187] David S. Fallis & Paul Schwartzman, *Curry Wants New Police Procedures; Officers' Use of Deadly Force Would Get Public Scrutiny*, WASH. POST, July 7, 2001, at A1.

[188] Bandes, *supra* note 41, at 1301–02.

[189] Andrew Greeley, *Is U.S. Like Germany of the '30s?; Bush Is Not Another Hitler. Yet There Is a Certain Parallelism*, CHI. SUN TIMES, June 11, 2004, at 61.

[190] *See id.*

[191] Vicki Hyman, *Study Cites Triggers for Abuses at Abu Ghraib: Princeton Professors Point to Old Research*, NEWARK STAR-LEDGER, Nov. 26, 2004, at 10.

The Yale psychologist, Stanley Milgram, was the first to convincingly demonstrate this principle. He conducted experiments in which randomly selected individuals acted as teachers.[192] Pursuant to orders from a Yale researcher, the individuals playing the role of teachers punished individuals they believed were slow learners with what they thought were lethal doses of electric shocks.[193] These experiments captured the ease with which it was to maneuver ordinary people into inflicting extreme pain on others by merely placing them in a researcher-subject dynamic of authority and obedience.[194] It stands to reason that the same pressures, of authority and obedience, would be so much more onerous in a regimented and hierarchical law enforcement organization.[195]

This suggests that violence, whether it is found in the context of police brutality, prison guard abuse, or military torture, is likely a systemic problem, caused not by rogue individuals, but by norms and expectations established by the organization's leaders.[196] This leads to those at the bottom of the organizational structure—police officers or military personnel—to conform and reproduce the violence they believe is expected of them.[197] Therefore, while individual responsibility must be the cornerstone of liability under the Posse Comitatus Act, "people up [the] higher chain of command who knew or should have known that these kinds of circumstances lead to these kinds of abuses,"[198] should also face criminal liability. Consequently, the Posse Comitatus Act must enable criminal liability to flow up the chain of command where the absence of supervision of the consequence of poor supervision contributed to torture.

Concededly, there are some practical problems with the Posse Comitatus Act as thus envisioned. There will invariably be instances where police officers with no prior military experience or training use military interrogation techniques against a suspect by having learned them through the news or the internet. There may also be cases where domestic law enforcement personnel, who were trained in military interrogation techniques, use torture techniques that are not of a military derivation. Police officers may even attempt skirting around the amended Posse Comitatus Act by engaging in torture techniques that are similar, but not identical to, the ones proscribed by the Posse Comitatus Act.

---

[192] STANLEY MILGRAM, OBEDIENCE TO AUTHORITY; AN EXPERIMENTAL VIEW (1974).

[193] *See id.* at 18.

[194] *See id.* at 45–88.

[195] Barbara E. Armacost, *"Organizational Culture and Police Misconduct,"* 72 GEO. WASH. L. REV. 453, 498–511 (2004).

[196] Barbara Armacost labels this "organizational culture." *Id.* at 493–95.

[197] *Id.* at 508.

[198] Referring to Abu Ghraib, Princeton Professor Susan T. Fiske argued that individuals up the chain of command bear ultimate responsibility for the torture abuses committed by those of whom they are in charge. Hyman, *supra* note 191.

The majority of these outlier cases could be addressed by amending the Posse Comitatus Act to make it more inclusive. The Posse Comitatus Act could include a clause penalizing the use of interrogation techniques that are similar to the ones the Posse Comitatus Act already described. In addition to this, there could be a general catchall clause punishing interrogation techniques that subvert national goals of preventing abusive interrogation techniques that derive from the War in Iraq in particular. The remainder of the abuses that fall outside of the Posse Comitatus Act's coverage will have to be addressed through local channels of police oversight, such as state legislative forums.

VI. CONCLUSION

If the United States' fight against Communism was a "Third World War," then from the parochial perspective of James Burnham, the "War on Terror" is a "Fourth World War." Tragically, both wars follow the same perfunctory narrative. Both were wars against ideas and both purported to spread "democracy." That major combat operations in pursuit of these objectives utterly failed in either case is instructive. Occupation stokes nationalism. This pushes local inhabitants to resist using guerilla forces against the more heavily armed occupiers. Crushing guerilla forces requires intelligence, so the occupier uses torture. Until now, the dirty work of torture was largely left to local mercenaries, cleanly relegating the long-term effects of torture to the target nation. This dramatically changed in Iraq and Afghanistan, where U.S. military forces have been inculcated into the CIA's intelligence gathering apparatus. It is this change in policy that poses an entirely new danger for Americans on U.S. soil.

When these troops do pull out of Iraq, tens of thousands of them will take up jobs in domestic law enforcement. They will return to a homeland far different from the one they left. Unlike the War against Communism, the War against Terror was not conceptualized into concentric rings orbiting around a faraway nation. The Bush Administration has instead chosen to view every Muslim, Arab, or South-Asian as a venal threat. This has transformed America into something reminiscent of P.W. Botha's apartheid South Africa of 1978–1989, where warrantless searches are the norm, where racial or religious profiling is part of protocol, and where secret detentions are accepted.[199]

In this atmosphere of repression, where in the words of historian Dora Apel there is a "community sanction"[200] for the torture of Arabs, it will not

---

[199] *See* Arlene Getz, *Where's the Outrage*, NEWSWEEK, Dec. 21, 2005, http://www.msnbc.msn.com/id/10562528/site/newsweek/html.

[200] Dora Apel, *Torture Culture: Lynching Photographs and the Images of Abu Ghraib*, 64 ART. J. 88, 89 (2005).

take much encouragement for some of these veterans to apply their knowledge of torture against civilians, especially if they "look Muslim." The Posse Comitatus Act can be amended to deter and punish such abuses. Unfortunately, the politics of appearing patriotic will guarantee that the issue of war veterans abusing civilians in their capacity as police officers will remain out of Congress' agenda until the public makes it so. Much as it did with Jon Burge, allegations of torture from minorities will initially be dismissed as the last-minute histrionics of criminals or terrorists.

But the fact that such a large percentage of the troops in Iraq used to hold jobs as domestic law enforcement officers before the war, suggests that the scope of abuses in the aftermath of the Iraq War will be much broader than those that occurred in Chicago Police Department's Area 2 Violent Crimes Division. Hundreds of police departments across the country will be re-populated by thousands of Iraq War veterans. Those veterans who were placed in the position of guards or interrogators would have been trained in violent CIA and Military Intelligence interrogation techniques. Others may have learned from those who were trained and used these torture techniques for either relieving stress or recreation.[201] When many of these individuals carry out their duties as police officers or FBI agents, history suggests that there is a real probability that they will treat suspects they find on U.S. soil similarly. In the face of this inevitability, it is somewhat comforting to know that a potential federal remedy exists, just waiting for Congress—and the public—to act.

[201] Eric Schmitt, *3 in 82nd Airborne Say Beating Iraqi Prisoners Was Routine*, N.Y. TIMES, Sept. 24, 2005, at A1.