THE GAVEL VS THE BADGE: CAN JUDGE ADVOCATES SERVE AS TEMPORARY IMMIGRATION JUDGES?

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INTRODUCTION

Recently, the Pentagon agreed to detail up to 600 military lawyers (known as "judge advocates") to the Department of Justice (DOJ) for six-month tours as temporary immigration judges (TIJs).[2] In that capacity, they will help relieve an unprecedented adjudicatory backlog, one that approaches nearly four million immigration cases.[3] However, this program has provoked strong pushback from immigration bar groups and members of Congress, who contend that it violates the Posse Comitatus Act (PCA).[4]

To address that objection, this Article reviews the posse comitatus power under common law, the Posse Comitatus Act, and then applies law to fact. Based on the PCA's text, context, and jurisprudence, this Article argues that the TIJ program does not violate the PCA because adjudicators do not execute law, and TIJs serve as civilians under civilian authority in black robes, not as military officers in uniform.

I. THE CONSTITUTIONAL FRAMEWORK FOR THE PCA

"Posse comitatus" is a Latin phrase that means "power of the country," and it refers to a sheriff's authority to summon able-bodied citizens to keep the peace.[5] Like a summons for jury duty, the call to serve as a posse comitatus came with serious penalties for those who refused to comply.[6] English common law began to codify the posse comitatus power in the Assize of Arms (1181), which required free men to be available for service in local levies,[7] and in the Statute of Winchester (1285), which

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2. Konstantin Toropin, *Pentagon Authorizes up to 600 Military Lawyers to be Temporary Immigration Judges*, AP NEWS (Sept. 25, 2025), https://apnews.com/article/pentagon-immigration-judges-trump-pete-hegseth-b07950833591270b926ad86ede8b961f.

3. *Id.*

4. Konstantin Toropin, *Senate Dems Raise Concerns Over Pentagon Plan for Immigration Judges*, MILITARY TIMES (Sept. 16, 2025), https://www.militarytimes.com/news/pentagon-congress/2025/09/16/senate-dems-raise-concerns-over-pentagon-plan-for-immigration-judges/.

5. United States v. Dreyer, 804 F.3d 1266, 1272 (9th Cir. 2015).

6. *Posse Comitatus*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/posse-comitatus (last visited Sept. 26, 2025) ("In early times, attendance at the posse comitatus was enforced by the penalty of culvertage, or turntail . . ..").

7. 27 Hen. 2, §§ 1–2 (1181).

required local communities to assist their sheriff if called upon.[8] And this power is no medieval relic. To this day, residents of California,[9] South Carolina,[10] Georgia,[11] Idaho,[12] and Louisiana[13] face criminal penalties for refusing the call to serve in a posse comitatus.

The Founders were aware of this posse comitatus power, and they extensively debated about the government's powers over the Militia, the Army, and military-civil relations.[14] For many questions of constitutional law, they found compromises that carefully and explicitly balanced the inherent tension between executive necessity and legislative oversight. This is why the Constitution divides military authority between the President and Congress as follows:

President	**Congress**
Commander in Chief: The President serves as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[15]	**Power to Declare War**[16]
Law Enforcement: The President shall "take Care that the Laws be faithfully executed."[17]	**Power to Raise and Fund the Army**[18]
	Power to Support the Militia: Congress shall "provide for

8. 13 Edw. St. 2 c. 6 (1285).
9. CAL. PENAL CODE §§ 142–181 (West 2024) (discussing the penalties for "[e]very able-bodied person above 18 years of age who neglects or refuses to join the posse comitatus or power of the county.").
10. S.C. CODE ANN. § 23-15-70 (2024) (authorizing sheriffs to summon the posse comitatus and classifying refusal to assist as a misdemeanor punishable with fines or imprisonment).
11. GA. CODE ANN. § 17-4-24 (2024) (permitting summoning of a posse comitatus).
12. IDAHO CODE § 18-707 (2024) (penalizing refusal to assist officers or join a posse comitatus).
13. LA. STAT. ANN. § 13:5541 (2024) (authorizing sheriffs to summon inhabitants as a posse comitatus and prohibiting refusal to assist).
14. Commander Gary Felicetti & Lieutenant 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, 95 (2003).
15. U.S. CONST. art. II, § 2, cl. 1.
16. U.S. CONST. art. I, § 8, cl. 11.
17. U.S. CONST. art. II, § 3.
18. U.S. CONST. art. I, § 8, cl. 12.

	organizing, arming, and disciplining, the Militia…"[19]
	Domestic Use of Militia: Congress shall provide the framework for how the President may "call forth the Militia to execute the Laws of the Union, suppress insurrections and repel Invasions.[20]

That division of authority provides Congress with posse comitatus authority over the Militia, by empowering Congress to decide how to federalize ("call forth") the National Guard and task them with executing domestic law. If they assist local police with enforcing state or local law, then they act as members of the sheriff's posse. If they enforce federal law instead, then they act as the U.S. attorney general's posse. But this power applies only to the Militia, leaving an important question unanswered: Which branch, if any, has posse comitatus authority over the Army?

II. THE HISTORICAL FRAMEWORK FOR THE PCA

After the Constitution's ratification, all three branches of government took a permissive stance on the President's ability to call forth the Army to execute the laws as a posse comitatus. In the Judiciary Act of 1789, Congress authorized federal marshals to command "all necessary assistance," in effect, a general posse comitatus.[21] Later jurists read this to include federal troops and federalized militias.[22] In 1792, the Militia Act provided President George Washington with congressional approval to enforce federal tax laws with military force by leading an army into western Pennsylvania and putting down the Whiskey Rebellion two years later.[23] Pursuant to the Northwest Ordinance (1787), he also deployed federal troops to the Northwest Territory, where they served both as soldiers on a military campaign and as local police forces.[24] Without

19. U.S. CONST. art. I, § 8, cl. 16.
20. U.S. CONST. art. I, § 8, cl. 15.
21. Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73 (1789); Clarence I. Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus A*ct, 70 MIL. L. REV. 83, 88 (1975).
22. A. Abel, *Note, Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy, and Federal Law Enforcement at Sea*, 31 WM. & MARY L. REV. 445, 460 (1990) (citing Attorney General Caleb Cushing's opinion in 16 Op. Att'y Gen. 162, 163 (1878)).
23. Militia Act of 1792, ch. 28, § 2, 1 Stat. 264 (1792).
24. A.A. Szarejko*, The Frontiers of American Grand Strategy: Settlers, Elites, and the Military in the Early Republic* 42–45 (Aug. 11, 2020) (Ph.D. dissertation, Georgetown University) (on file with DigitalGeorgetown) (noting that the military's attempts to keep the peace between settlers and natives included evicting squatters from tribal lands); *see also id.* 6-7 (stating that about fifty conflicts between the United States and native tribes between 1783 and 1890 were considered serious enough to be called

congressional authorization, President Washington occasionally used federal troops to enforce his 1793 Proclamation of Neutrality (1793), to ensure that Americans did not aid foreign powers like France.[25]

President Jefferson claimed that the President had the right to call up a posse comitatus from members of the public.[26] In 1832, President Andrew Jackson responded to South Carolina's self-proclaimed nullification of federal tariffs by sending the Army and Navy to Charleston.[27] As these armed forces approached, the threat of federal troops occupying the state capitol and executing federal law encouraged the parties to reach a compromise tariff.[28] In 1853, President Franklin Pierce insisted that pursuant to the President's constitutional requirement to faithfully execute the laws, U.S. marshals could summon federal troops into a posse comitatus if local civilians resisted federal law.[29]

In 1854, Attorney General Caleb Cushing formalized the federal government's posse comitatus philosophy in the Cushing Doctrine:

> *[T]he posse comitatus comprises every person in the district or county above the age of fifteen years whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines. All of whom are alike bound to obey the commands of a sheriff or [U.S.] marshal*.[30]

Initially, Southerners appreciated this doctrine, as the U.S. marshals relied on it to enforce the Fugitive Slave Act.[31] But this popularity quickly evaporated once the doctrine justified a large federal military presence to enforce civil rights across the South.[32] One Confederate veteran wrote, "It

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"wars," and noting that "Congress delegated relations with Native nations to the Department of War in 1789, which became a more formal arrangement when the Bureau of Indian Affairs (BIA) was created and placed in the same department in 1824.").

25. ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789–1878 26 (U.S. Army Ctr. of Mil. Hist., 1988), https://history.army.mil/Portals/143/Images/Publications/Publication%20By%20Title%20Images/R%20Pdf/role-federal-military-1.pdf.

26. H.W.C. Furman, *Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 89 (1960).

27. *Id.*

28. *Id.*

29. JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 358 (1897).

30. 6 Op. Att'y Gen. 466, 473 (1854) (internal citation omitted) (emphasis added); *see also* 16 Op. Att'y Gen. 162, 163 (1878) ("It has been the practice of the Government since its organization (so far has been known to me) to permit the military forces of the United States to be used in subordination to the marshal of the United States when it was deemed necessary . . ..This practice was deemed to be well sustained under the twenty-seventh section of the judiciary act of 1789 . . .").

31. MILTON MELTZER, SLAVERY: A WORLD HISTORY 225 (Da Capo Press, 1971).

32. *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* (Cong. Research Serv. Nov. 6, 2018) (describing the role of Cushing's doctrine as justification for Reconstruction troop deployments).

is very hard to see a white man taken under guard by one of those black scoundrels."[33] Another found it "outrageous that blacks had white men arrested and carried to the Freedmen's court…where their testimony is taken as equal to a white man's."[34]

The 1876 election provided Southern lawmakers with a rare opportunity to end that enforcement. Republican Rutherford B Hayes won 165 electoral votes, and Democrat Samuel J. Tilden won 184 electoral votes – just one vote short of a victory.[35] The remaining 20 electoral votes were under dispute, creating a constitutional crisis because the Constitution offers no instructions on how to resolve disputed electoral votes.[36] To resolve the crisis, Congress passed the Electoral Commission Act, creating a commission that consisted of five representatives selected by the House, five senators selected by the Senate, and four Supreme Court justices named in the Act, with a fifth justice to be selected by the other four.[37] In effect, that fifteenth person would single-handedly select the President of the United States. With seven Democrats and seven Republicans in the commission, the understanding was that the fifteenth member would be Justice David Davis, an independent with no known preference between Hayes and Tilden.[38]

Truly an undecided voter, Davis refused to join the commission.[39] The Supreme Court lacked any other independents, so the fifteenth seat went to a Republican justice, and the Republican-led commission went on to resolve each of the disputed electoral votes in Hayes' favor. Instead of refusing to certify the results, Democrats struck a backdoor deal, now known as the Compromise of 1877: they would certify the results, but only if Hayes would end Reconstruction.[40] One year later, President Hayes signed the PCA, thus fulfilling his end of that bargain by ending military involvement in Reconstruction.

III. WHAT THE PCA PROHIBITS (AND WHAT IT DOESN'T)

33. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 80 (Johns Hopkins Univ. Press, 1988).
34. *Id.* at 151.
35. *United States Presidential Election of 1876*, BRITANNICA, https://www.britannica.com/event/United-States-presidential-election-of-1876 (last visited Sept. 27, 2025).
36. The only such guidance comes from the Twelfth Amendment, which states in part: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." U.S. CONST. amend. XII. This offers no guidance for how to decide which votes to count when there are competing slates of electors.
37. Electoral Commission Act, ch. 37, 19 Stat. 227 (1877).
38. Ari Hoogenboom, *Rutherford B. Hayes: Campaigns and Elections*, MILLER CTR., UNIV. OF VA., https://millercenter.org/president/hayes/campaigns-and-elections (last visited Nov. 26, 2025).
39. ROY MORRIS, JR., FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN AND THE STOLEN ELECTION OF 1876 181–82 (Simon & Schuster, 2003).
40. *Id* (emphasis added).

Enacted in 1878, the Posse Comitatus Act states 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 as a posse comitatus or otherwise to execute the laws shall be fined or imprisoned*.[41]

Since then, Congress has repeatedly revisited the PCA, clarifying its terms and expanding its coverage to include the Air Force,[42] and then the Navy, Marines, and Space Force.[43] As amended, the PCA now states:

> *Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space 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*.[44]

Simply put, the PCA prohibits using federal armed forces (including a federalized National Guard) to execute domestic law unless authorized by the Constitution or Congress. As a result, if the President uses federal armed forces as temporary immigration judges, then the key PCA question is whether temporary immigration judges "execute the laws." PCA case law has never answered that question. In fact, no one has ever been criminally prosecuted for PCA violations, let alone convicted.[45] When the First Circuit reviewed the PCA in 1948, the court described it as an "obscure and all-but-forgotten" law.[46] That very obscurity underscores its purpose as a law that prohibits a rare and specific domestic use of military force, not every interaction between the armed forces and civilians.

While PCA case law does not definitively answer this question, it does offer a framework for an analysis that aligns with the statutory text and context. PCA case law comes not from prosecutions, but from defendants hoping to exclude evidence. This trend in litigation began with

41. 18 U.S.C. § 1385 (1956) (emphasis added).
42. *Id.*
43. 18 U.S.C. § 1385 (amended 2021). While the PCA itself did not explicitly include the Marines and Navy until 2021, Congress included these branches in the PCA's prohibition in 1981 by enacting 10 U.S.C. § 275 (1982), and these branches had long since voluntarily included themselves by regulation under the PCA's prohibitions.
44. *Id.* (emphasis added).
45. *See* H.R. REP. NO. 97-71, at pt. I (1981), *reprinted in* 1981 U.S.C.C.A.N. 1787, 1787 ("According to a spokesman for the Department of Justice, no one has been charged or prosecuted under the Posse Comitatus Act since its enactment. Testimony of Edward S.G. Dennis Jr. on behalf of the Department of Justice…").
46. Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948).

the Wounded Knee Cases. In February 1973, about 100 members of the Oglala Lakota tribe seized an area of the Wounded Knee village in South Dakota, took hostages, and demanded sovereignty.[47] Federal law enforcement from the FBI, Bureau of Indian Affairs, and Marshal Service surrounded the militants, resulting in a two-month standoff.[48] A handful of U.S. Army troops joined the standoff, providing equipment and tactical advice.[49]

When the militants were arrested and prosecuted, defense counsel argued that the Army's presence violated the PCA and rendered the arrests unlawful.[50] *United States v. McArthur*[51] disagreed, finding that the execution of law requires more than a soldier's mere presence.[52] The court considered what it means to execute the law "as a posse comitatus or otherwise," then ruled that a posse comitatus (as in, a sheriff's deputy) would execute law in a manner that "subject[s] the citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature, either presently or prospectively[.]"[53] This test forbids military forces from playing a direct, coercive role in civilian law enforcement, unless Congress or the Constitution permits it.[54]

The defense counsel in *McArthur* adopted a much broader reading, one that included all execution of law and ignored what it means to execute law as a posse comitatus or otherwise. Perhaps the phrase "or otherwise" suggests at first glance that the PCA intends to prohibit all execution of law, in any capacity. But as a principle of statutory interpretation, courts must avoid reading statutes in a way that renders words meaningless.[55] If federal troops cannot execute law in any capacity, then why bother specifying that they also cannot execute law as a posse comitatus?

If the presumption against meaninglessness needs any support in this case, it comes from legislative history: The Senate debated removing "as a posse comitatus or otherwise" and decided to keep it.[56] The phrase "or otherwise" clarifies that military forces cannot execute the law as a posse

47. *See generally* United States v. Casper, 541 F.2d 1275 (8th Cir. 1976); United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974).
48. *Id.*
49. *Id.*
50. *Id.*
51. 419 F. Supp. 186 (D.N.D. 1976).
52. *Id.* at 194.
53. *Id.*
54. *Id*.
55. *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute."); TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."); Market Co. v. Hoffman, 101 U.S. 112, 115–16 (1879) (providing an early articulation of this same "canon against surplusage.").
56. 7 CONG. REC. 4247 (1878) (statement of Sen. Hill).

comitatus or in any *likewise* capacity. "Or otherwise" focuses on policing means, not ends, by ensuring that this prohibition applies even if the troops execute law as a posse comitatus in all but name.

That is the late 1800s Reconstruction-era concern that the PCA addressed: putting federal troops in the streets to enforce domestic law. Naturally, then, the PCA takes no interest in the non-policing functions of legislating, adjudicating, equipping, transporting, storing, and advising, even if those functions enable or support domestic law enforcement. The PCA also takes no interest in using military force through the Coast Guard when it operates under the Department of Homeland Security (DHS), or in using military force through the National Guard under state orders.[57] The PCA instead leaves state governments free to use their state armed forces to execute state law.[58]

In 1976, the Eighth Circuit upheld *McArthur*'s reading of the PCA, and subsequent courts have followed suit.[59] For example, in *United States v. Dreyer*,[60] a member of the Navy's military law enforcement branch, the Naval Criminal Investigative Service (NCIS), used RoundUp, a law enforcement surveillance tool, to conduct a statewide audit of all computers engaged in file sharing.[61] He quickly stumbled upon evidence that the defendant, a civilian, was engaged in the distribution and possession of child pornography.[62] The NCIS officer then shared that information with civilian law enforcement, leading to the civilian's arrest and prosecution.[63] The Ninth Circuit found that the NCIS officer did more than merely share information; he took "direct active involvement in the execution of the laws," and his actions "pervade[d] the activities of civilian authorities."[64]

By contrast, the Fifth Circuit in *United States v. Hartley*[65] found that the Air Force did not violate PCA when it conveyed information about an unidentified aircraft to civilian authorities.[66] However, the key distinction between *Dreyer* and *Hartley* is that the military officer in *Hartley* passed along data that he had collected in the ordinary course of military business, while the NCIS officer in *Dreyer* went beyond the ordinary course of

57. Ryan M. Marquette, *The Citizen-Soldier: America's Second Responder*, SYRACUSE L. REV.: LEGAL PULSE ARTICLES (Jan. 29, 2021), https://lawreview.syr.edu/the-citizen-soldier-americas-second-responder/ ("The Coast Guard is excluded under the PCA because it serves as a law enforcement agency under the Department of Homeland Security…").
58. *Id.* ("Lastly, the PCA does not apply to National Guard service members operating under the command of the state Governor in a 'State Active Duty' or 'Title 32' status.").
59. U.S. v. Casper, 541 F.2d 1275 (8th Cir. 1976).
60. 804 F.3d 1266 (9th Cir. 2015) (*en banc*).
61. *Id.* at 1270.
62. *Id.* at 1275–76.
63. *Id.*
64. *Id.*
65. 796 F.2d 112 (5th Cir. 1986).
66. *Id.* at 115.

military business by investigating civilians, essentially acting as the local sheriff's posse in all but name.

Furthermore, in *United States v. Yunis*,[67] the D.C. Circuit found that it did not violate the PCA for the Navy to be passively involved in law enforcement activities by housing and transporting a suspect in FBI custody.[68] Similarly, the court in *United States v. Kahn*[69] found no PCA violation in using Navy ships and backup support.[70] The court in *United States v. Bacon*[71] ruled that participation by one Army officer in a drug investigation did not "pervade the activities of civilian officials" and thus did not violate PCA.[72]

PCA jurisprudence has drawn a functional line: military forces "execute the laws" when they engage in direct, coercive law enforcement activities, and they do not "execute the law" when they engage in passive or non-coercive law enforcement activities (such as providing transportation, housing, and technical support). Congress adopted that same functional line in 10 U.S.C. Chapter 15 (*Military Support for Civilian Law Enforcement Agencies*), which authorizes military forces to:

> (1) Share lawfully collected information with civilian law enforcement, if doing so helps enforce civilian laws;[73]
> (2) Provide equipment, facilities, training, and expert advice;[74] and
> (3) Operate and maintain certain equipment for civilian agencies, such as surveillance aircraft and sensors.[75]

10 U.S.C. Chapter 15 then clarifies what is prohibited, thus demarcating the boundary that Congress has drawn for the Posse Comitatus Act: "A search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law."[76] And over the years, those authorizations have grown to become extensive. In the years since enacting the PCA, Congress has repeatedly increased military participation in domestic law enforcement to include the Rivers and Harbors Act of 1894,[77] the Espionage Act of 1917,[78] the

67. 924 F.2d 1086 (D.C. Cir. 1991).
68. *Id.* at 1094.
69. 35 F.3d 426 (9th Cir. 1994).
70. *Id.* at 432.
71. 851 F.2d 1312 (11th Cir. 1988) (per curiam).
72. *Id.* at 1313.
73. 10 U.S.C. § 271 (2025).
74. 10 U.S.C. § 272 (2025).
75. 10 U.S.C. § 274 (2025).
76. 10 U.S.C. § 275 (2025).
77. 33 U.S.C. § 1 (giving the Secretary of War the authority to control and supervise the navigable waters of the U.S.).
78. Act of June 15, 1917, Pub. L. No. 65-24, tit. II, ch. 30, 40 Stat. 217-31 (2000) (codified as amended at 50 U.S.C. § 191) (empowering the military to investigate and suppress anti-war activism,

Act of 15 November 1941,[79] the Magnuson Act of 1950,[80] the Internal Security Act of 1950,[81] the Fisheries and Conservation Management Act of 1976,[82] 49 U.S.C. § 324 (12 January 1983),[83] and 28 U.S.C. § 543.[84] Congress has also authorized broad PCA exceptions for insurrections, rebellions, and domestic violence that render ordinary law enforcement insufficient;[85] lent military support to civilian agencies engaged in counterdrug trafficking operations[86] and disaster relief,[87] enforced federal quarantine laws,[88] and protected federal property and functions.[89]

Having clarified the boundaries of the Posse Comitatus Act, this Article now applies it to the issue of detailing judge advocates as temporary immigration judges (TIJs). The TIJ program offers a compelling case study for the PCA, as it involves federal authority, military personnel, and the adjudication of immigration law, with the key question being: Do judges execute the laws?

IV. DO JUDGES EXECUTE THE LAWS?

In the summer of 2014, the DOJ's Executive Office for Immigration Review (EOIR) created the TIJ program to help alleviate a severe and growing backlog of immigration cases.[90] Through this program, the Director of the EOIR (with approval from the Attorney General) may appoint attorneys to serve as TIJs for renewable terms of up to six months.[91] Aside from this six-month limit, TIJs are indistinguishable from regular immigration judges.[92]

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encouraging the use of military intelligence to monitor U.S. civilians, and involving troops in arrests, investigations, and censorship efforts).

79. 14 U.S.C. § 91 (expanding the Espionage Act by enlarging the Coast Guard's and Navy's authority to protect naval vessels).

80. Act of Aug. 9, 1950, ch. 656, 64 Stat. 427.

81. Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (expanding military-law enforcement coordination and allowing the President to declare an "internal security emergency," during which federal authorities (including military personnel) could detain individuals without trial).

82. Conservation Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801–1883 (2000)) (extending U.S. control over fisheries and tasking the Coast Guard and Navy with enforcing that control).

83. 49 U.S.C. § 324 (1983) (providing the Secretary of Transportation with the authority to involve military personnel in carrying out duties and powers related to the regulation and protection of air traffic).

84. 28 U.S.C. § 543 (authorizing judge advocates to serve in the DOJ as special assistant U.S. attorneys).

85. Insurrection Act, 10 U.S.C. §§ 251–255 (2024).

86. 10 U.S.C. §§ 371–382 (2024).

87. Robert T. Stafford Disaster Relief and Emergency Assistance (Stafford) Act, 42 U.S.C. §§ 5121–5208 (2024).

88. 42 U.S.C. § 97 (2024); 42 U.S.C. § 243 (2024).

89. 10 U.S.C. § 253 (2024).

90. 8 C.F.R. § 1003.10(e) (2024).

91. *Id.*

92. *Id.*

For those who are unfamiliar with immigration law, it may come as a shock to hear that immigration judges are DOJ employees.[93] That shock comes from a common misunderstanding about immigration law, which is that "immigration court" is an Article I court, alongside the U.S. Tax Court or U.S. bankruptcy courts. However, the immigration court is part of the Executive Branch.[94] Immigration judges (IJs) preside over immigration cases in executive tribunals as DOJ employees, much like administrative law judges (ALJs) preside over administrative hearings within executive agencies.[95]

Both adjudicators are part of the Executive Branch and adjudicate specialized legal matters, but IJs handle cases involving removal, asylum, and other immigration matters, while ALJs oversee disputes related to Social Security, labor and employment, patents, securities, and other agency-specific matters.[96] IJs and ALJs alike handle civil offenses, not criminal offenses.

Do such judges "execute law" for PCA purposes? In a September 15, 2025 letter, a group of senators made the case for a PCA violation on the following grounds:[97]

> (1) TIJs engage in the direct execution of civilian law enforcement by making final, binding decisions on a civilian's immigration status;
> (2) Judge advocates detailed into the TIJ role would serve under the Attorney General's (AG's) command and control, placing them into the law enforcement chain of command; and
> (3) This program blurs the line between military and civilian functions, violating the PCA's separation of powers between military power and domestic police power.

Like most questions in this "all-but-forgotten" area of law, these three points wade through untested waters. There is no definitive answer to these issues of first impression, but based on the PCA's text, case law, and legislative history, the federal judiciary is unlikely to share the senators' concerns for the following reasons.

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93. 8 U.S.C. § 1101(a)(47)(A).
94. *About the Office*, U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/about-office (last visited Sept. 27, 2025).
95. Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2018).
96. *Id.*
97. Letter from Sen. Mazie K. Hirono et al. to the Judge Advoc. Gen. of the U.S. Army, Navy, Air Force, and Marine Corps (Sept. 15, 2025) (on file at https://www.hirono.senate.gov/imo/media/doc/2025_hirono_letter_to_service_tjags_on_jag_immigration_judges.pdf).

A. Objection 1: Direct Execution of Civilian Law Enforcement

PCA case law may be sparse, but it is consistent on this point: the PCA prohibits direct, coercive law enforcement, such as "a search, seizure, arrest, or other similar activity."[98] By contrast, Congress has explicitly authorized non-coercive military support to civilian law enforcement, such as information sharing[99] and providing expert advice.[100] Judicial rulings do not effectuate any acts of law enforcement. This is especially true for IJs and ALJs, who exercise judicial functions but lack judicial powers.

These adjudicators carry out Judicial Branch functions when they preside over proceedings, manage evidentiary records, make credibility findings, and enter decisions under the Immigration and Nationality Act (INA) or Administrative Procedure Act, subject to review by the agency's internal appeals board and then by federal courts.[101] But these adjudicators are not Judicial Branch officers. They are Executive Branch officers, working for the President.[102] Like any Judicial Branch officer, these adjudicators do not carry out or participate in law enforcement investigations, searches, seizures, arrests, neighborhood patrols, or deportations.[103] But as Executive Branch officers, they lack the judicial power to issue binding, self-executing judgments under Article III of the Constitution.

The lack of judicial power is especially pronounced for IJs, who cannot even hold a person in contempt of court.[104] If an IJ issues a removal

98. Major Matthew S. Reynolds, *Practice Notes: A Modernizing Posse Comitatus Doctrine*, 4 THE ARMY LAW., https://tjaglcs.army.mil/Periodicals/The-Army-Lawyer/tal-2022-issue-4/Post/4260/Practice-Notes-A-Modernizing-Posse-Comitatus-Doctrine (last visited Oct. 20, 2025) (identifying two PCA categories of military assistance to civilian law enforcement personnel for judge advocates to be aware of, as enacted into law by Congress and implemented by DoDI 3025.21: direct assistance (such as searches, seizures, arrests, and use of force, all of which constitute "execution" of law) and indirect assistance (such as the provision of equipment, advice; or training, none of which "execute" the law)).

99. 10 U.S.C. § 271 (2025).

100. 10 U.S.C. § 272 (2025).

101. 5 U.S.C. § 557(b) (2025) (authorizing agencies to review ALJ decisions and issue final orders); 5 U.S.C. § 704 (2025) (providing for judicial review of final agency action under the APA); 8 C.F.R. § 1003.1(b) (2025) (establishing appellate jurisdiction of the Board of Immigration Appeals over specified immigration decisions); 8 U.S.C. § 1252(a)(1) (2025) (providing for judicial review of final orders of removal).

102. Matter of S-O-G- & F-D-B-, 27 I&N Dec. 462, 465 (A.G. 2018).

103. *The Removal System of the United States: An Overview: Fact Sheet*, AM. IMMIGR. COUNCIL (Aug. 9, 2022), https://www.americanimmigrationcouncil.org/fact-sheet/removal-system-united-states-overview (noting that while IJs issue removal orders, the execution of these orders depend on whether the government decides to execute said order).

104. Charles Stimson & GianCarlo Canaparo, *Authority Delayed Is Authority Denied: Giving Immigration Judges Contempt Authority*, THE HERITAGE FOUND. (Aug. 8, 2019), https://www.heritage.org/immigration/report/authority-delayed-authority-denied-giving-immigration-judges-contempt-authority.

order, DHS can still decline to deport the respondent.[105] The "removal order" does not remove the respondent; it only confirms that the removal would be lawful if it occurs.[106] And when DHS must comply with an IJ's ruling, for instance, if an IJ finds that a respondent's detention is unlawful, that ruling does not open the respondent's cell door. DHS must release the respondent. Through 8 U.S.C. § 1103, Congress makes it clear that the DOJ's role in immigration court is only to interpret the laws,[107] while DHS's role is to execute the laws.[108]

As a result, TIJs do not engage in the coercive, direct execution of civilian law. Their decisions are appealable to the Board of Immigration Appeals and then to the federal court system.[109] They have no operational control over immigration enforcement, so they cannot order law enforcement officers to conduct raids or arrest operations, nor can they direct law enforcement officers on how or where to apprehend people or seize evidence. Instead, they decide questions of fact and law, for instance:

(1) Has the respondent entered lawfully or unlawfully?
(2) Has the respondent overstayed their visa?
(3) Does the government's evidence meet its burden of proof?
(4) Does the respondent's criminal conviction make them removable?
(5) Is the respondent entitled to asylum or cancellation of removal?

B. Objection 2: TIJs Serve in the Law Enforcement Chain of Command

Detractors point out that when judge advocates serve as TIJs, they must answer not only to the AG but also to their military chain of command. While true, this overlooks three points. First, if TIJs do not execute law, then their chain of command is neither here nor there. After all, the PCA does not forbid belonging to a *posse comitatus*; it forbids executing the laws as a posse comitatus.

105. Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. L. J. 243, 243 (2010) (noting that in immigration court, DHS prosecutorial discretion extends to decisions about whether to initiate removal proceedings and whether to execute an IJ's removal order).
106. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482–92 (1999) (holding that § 1252(g) of the Immigration and Nationality Act bars courts from reviewing the discretionary decision or action to commence proceedings, adjudicate cases, or execute removal orders, because those three acts are discretionary enforcement decisions, not ministerial duties. As such, courts cannot compel DHS to carry out a removal.).
107. 8 U.S.C. § 1103(g).
108. 8 U.S.C. § 1103(a); *see also* AM. IMMIGR. COUNCIL, *supra* note 103 ("[A] DHS attorney must prosecute the case and the immigration judge must decide if the government has the legal authority to 'remove' the noncitizen in question.").
109. 8 C.F.R. § 1003.1(b) (2025) (establishing appellate jurisdiction of the Board of Immigration Appeals over specified immigration decisions); 8 U.S.C. § 1252(a)(1) (2025) (providing for judicial review of final orders of removal).

Second, the AG does not merely execute law. The AG also serves as the President's chief legal advisor.[110] The AG may be the federal government's highest-ranking law enforcement officer, but the AG is also typically the government's highest-ranking prosecutor.[111] In this dual-hatted role, the AG belongs to the chain of law enforcement but also acts as that chain's circuit breaker, by ensuring that those who execute the law do so lawfully. Moreover, the AG leads the executive department that Congress has tasked with adjudicating immigration cases.[112] It is appropriate for the President's chief legal advisor to manage the President's adjudicators, and in any event, it is the chief immigration judge who directly trains, supervises, and evaluates IJs and TIJs on a day-to-day basis.[113]

Third, while TIJs answer to the AG and to their military chain of command, they must also answer to an even higher authority: their attorney disciplinary authority. The attorney general and military commander can revoke their employment, but their disciplinary authority can revoke their license to practice law. These disciplinary authorities have no patience for the defense of "I was just following orders." Moreover, federal judges have the final say in all immigration cases.[114]

These safeguards ensure that immigrants receive due process, and they render the IJ's chain of command moot. These safeguards guarantee that IJs, even those serving on military orders, are not soldiers executing the laws as part of the Attorney General's *posse comitatus*. Instead, their acts are civilian acts, taken by people who serve in a functionally judicial capacity and who are ultimately subject to civilian accountability beyond their DOJ and DOD chains of command.[115] They wear black robes, not military uniforms, as a practical complement to the legal reality that they are functionally indistinguishable from federal judges.

That functional difference distinguishes the sheriff's badge and the soldier's rifle from the judge's gavel and the lawmaker's pen. The badge and the rifle are instruments of power, while the gavel and the pen are instruments of judgment. The person holding the gavel may be an Executive Branch officer, but they are executing judgments of law as an

110. 28 U.S.C. § 511 (2024).
111. While there is no statutory requirement for the attorney general to be an attorney, every attorney general has been a licensed attorney as of this writing.
112. 8 U.S.C. § 1103(g).
113. 8 C.F.R. § 1003.10(e) (2024).
114. *Id.*
115. With their power to suspend and even revoke the license to practice law, in the civilian and military worlds alike, a state's disciplinary authority and state supreme court would be a judge advocate's highest chain of command.

adjudicator, not executing the laws as a posse comitatus or otherwise. They do not execute law; they ensure that those who execute law do so lawfully.

C. Objection 3: This Program Violates the PCA's Separation of Powers Between Military Power and Domestic Police Power

Although judges ordinarily sit in the Judicial Branch, Congress often requires Executive Branch agencies to adjudicate disputes internally before judicial review is available. Just as Congress directs Executive Branch adjudicators to resolve disputes involving Social Security benefits and labor relations,[116] Congress has also, through the Immigration and Nationality Act (INA), charged the Attorney General with administering and adjudicating removal proceedings.[117] By law, federal courts can review those decisions only on appeal, and that review often applies the last-minute principles of *Chevron U.S.A. Inc. v. NRDC, Inc.*[118] deference to the Attorney General's determinations because "[t]he judiciary is not well positioned to shoulder primary responsibility for assessing" the foreign relations questions implicated by immigration disputes.[119]

In other words, the separation-of-powers objection assumes that these adjudicatory powers were judicial powers when, in fact, Congress designated them as executive powers. IJs and TIJs resolve disputes within the Executive Branch's enforcement system, subject to review from the federal judiciary.[120] As a result, this temporary IJ program is better understood as a question of staffing, not policing. Immigration adjudication is an executive function that Congress assigned to the DOJ.[121] With congressional approval through the INA, the Attorney General

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116. *See generally* P. R. Verkuil, *Presidential Appointment of ALJs and For-Cause Protection*, 72 ADMIN. L. REV. 469 (2020) (discussing ALJs, the APA, and the issues of judicial function, judicial powers, and adjudication within the Executive Branch).

117. Ins v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) ("[T]he INA provides that the United States Attorney General shall be charged with the administration and enforcement of the statute and that the determination and ruling by the Attorney General with respect to all questions shall be controlling . . ..").

118. 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

119.

> A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions. The Attorney General, while retaining ultimate authority, has vested the BIA with power to exercise the "discretion and authority conferred upon the Attorney General by law" in the course of "considering and determining cases before it." Based on this allocation of authority . . . the BIA should be accorded *Chevron* deference.

Ins, 526 U.S. at 424 (internal citations omitted).

120. Marcello v. Bonds, 349 U.S. 302, 309 (1955) (referring to deportation hearings as a "specialized administrative procedure"); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593 (1985).

121. Designation of Temporary Immigration Judges, 79 Fed. Reg. 39629, 39629 (July 11, 2014) ("The immigration judges are attorneys appointed by the Attorney General…subject to the supervision of the Attorney General . . ..").

enjoys broad discretion to appoint immigration judges, even on a temporary basis.[122] The federal detailing ecosystem—the Intergovernmental Personnel Act,[123] the Economy Act,[124] and a long tradition of interagency details[125]—assumes that federal expertise can be shared across organizational boundaries, so long as the receiving agency trains and supervises the agents. A DOD attorney serving as a DOJ attorney is an example of interagency staffing, not an example of the Attorney General deputizing nearby troops to execute law.

CONCLUSION

As the PCA's text, context, and jurisprudence indicate, the PCA forbids the direct, coercive execution of law from soldiers serving as sheriffs. Adjudication of law is therefore not the Reconstruction-era law enforcement conduct that concerned the PCA's lawmakers. Adjudicators do not execute law, any more than a football referee "plays" football. Instead of executing law, TIJs play a role that more closely resembles that of a legal advisor than a sheriff's posse, because their decisions do not effectuate the arrest, detention, release, or removal of any person.[126]

The PCA never intended to dictate nor disable mundane staffing decisions in the Executive Branch, nor should it create an atextual disability for a class of lawyers based solely on their veteran status. Instead, the PCA's goal is to preserve a clear line between the soldier's bayonet and the sheriff's badge, thus separating federal military force from local police force. By detailing judge advocates as adjudicators, the federal government does not blur that line but reinforces it, thus addressing a severe backlog of cases by leveraging the legal expertise of a vast number of lawyers who will serve under civilian control and remain accountable to civilians. In short, such a program does not put soldiers in the streets; it puts lawyers in the courtrooms.

122. *Immigration Judge & Appellate Immigration Judge Hiring Policy*, U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., https://www.justice.gov/eoir/JudgeHiringPolicy1 (last updated June 27, 2025) ("The Attorney General retains complete discretion over the selection and appointment of any applicant . . . [and] may choose to give a temporary, 24-month appointment . . ..").
123. 5 U.S.C. §§ 3371–3376.
124. 31 U.S.C. § 1535.
125. 10 U.S.C. § 716.
126. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482–92 (1999).