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UNDERSTANDING THE POSSE COMITATUS ACT AND THE INSURRECTION ACT¹

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Most Americans believe that the Posse Comitatus Act prohibits the use of federal troops to enforce the law in the United States. They also believe that the President has to wait until a governor asks for help before he can send federal troops to help and even only to quell an insurrection. These beliefs are erroneous. They are based on complete misunderstanding of the two major laws that pertain to this issue. This is important, for understanding the true status of the laws and authorities is essential if we are to provide for the security of the homeland in an age of terrorism and catastrophic natural disasters.

In this article, I will address both the Posse Comitatus Act and the Insurrection Act, using different approaches to help you understand what each really means. I will parse the Posse Comitatus Act to allow you to understand what it really means. I will tell the story of the Insurrection Act to allow you to understand how it came to be enacted.

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A lot of people are talking about the Posse Comitatus Act, and almost all of them get it wrong. Few, if any, of the media and academia pontificators have even read the law itself. Well, here it is—United States Code Title 18, Section 1385.

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 Forces 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.

In order to help the readers understand what this one-sentence law means, I am going to parse it. That is, I am going to examine its meaning by determining the parts of speech in the sentence. As older readers will remember, this is known as diagraming a sentence.

It should be noted at the outset that the law does not contain the word "prohibited." The law says nothing about the provision of relief or support from or by the federal government. It pertains to the use of the Army or Air Force to execute the laws as a member of a "posse comitatus" formed by a U.S. Attorney, U.S. marshal, a sheriff, law enforcement officer, or other public official or private citizen.

A sentence has to contain a subject, verb, and an object. The subject in this sentence is the word: "Whoever." The verb is "uses." The object is "part of the Army and Air Force." The rest of the sentence consists of clauses that modify the subject, the verb, or the object. Stripped of the modifiers, the sentence reads: Whoever uses part of the Army and Air Force.

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Next we will address the modifiers of the verb. The first modifier is the adverb "willfully." This means that the using is done on purpose and not accidentally. The second modifier explains the kind of the use to which the verb applies. In this law, this use is "as a posse comitatus or otherwise to execute the laws." The sentence now reads, "*whoever willfully uses any part of the Army and Air Force as a posse comitatus or otherwise to execute the laws.*"

Note that the offender under this law would not be the Army or Air Force, or members of the Army or Air Force but the person who uses them in violation of the law. This may explain why no person has been convicted of violating the Posse Comitatus Act since it was enacted in 1878.

I know you are waiting eagerly to find out what happens to those "whoever" that do this bad thing willfully, so we next add the consequences of such an action, and now the law reads as follows:

Whoever 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.

This is almost the complete law. If it were the complete law, the pontificators would be correct in asserting that the law prohibits the use of the Army and Air Force from enforcing the law in the United States. However, Congress included an important qualification in the sentence that is often overlooked by those who prefer an absolute prohibition. The important exception is the following clause that modifies the subject: Except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.

It is clear that Congress has someone in mind that could lawfully authorize the Army and Air Force to execute the laws. Who is this person or persons to whom Congress grants that authority?

Congress has on several occasions enacted laws that authorize one person-and one person only-to authorize the Army and Air Force to execute the laws. That person is the President of the United States. To make it clear what the sentence really says, I will substitute this meaning of the exception clause in the parsed version of the Posse Comitatus Act.

Whoever, except the Congress or the President of the United States, willfully uses any part of the Army or the Air Force as a posse comitatus of otherwise to execute the laws shall be fined under this title or imprisoned or both.

Restated even more clearly, the intent of this law reads as follows: *Only the Congress or the President of the United States may authorize the use of the Army and Air Force to execute the laws.*

That is what the Posse Comitatus Act means-or at least what it meant when it was enacted in 1878. Unfortunately for the Nation, the meaning of the law was completely revised by activist judges in the 1970s, so recent case law is the opposite of the law itself. That modern revised version of the Posse Comitatus Act is what most people are citing when they assert that federal troops are prohibited from enforcing the law in the United States. Fortunately, the Insurrection Act stands, and it permits the President to use federal troops to enforce the laws either at the request of a governor or on the initiative of the President.

The Insurrection Act consists of four statutes enacted at different times for different reasons that, when considered as a whole, provide the power that Presidents have used many times as the legal basis for using troops to enforce the law. The four sections of law are as follows.

Title 10, Section 334 was enacted in 1792 as the Calling Forth Act to give President George Washington authority to call forth the militia when in his judgment they were needed to repel invasions, suppress insurrections, or enforce the laws. To assure that this authority was not abused, a reluctant Congress specified that before using the troops, the President would have to issue a proclamation calling on the insurgents to disperse in a limited time.

Title 10, Section 331 is a combination of two laws. One was enacted in 1795 to correct weaknesses in the Calling Forth Act (1792) when it was used to suppress the Whisky Rebellion in 1793. This law gave the President specific authority to call forth the militia upon the request of a governor or state legislature, if the governor were unable to apply for the assistance. The second law was enacted in 1807 at the request of President Thomas Jefferson to extend Presidential authority to call forth the standing army as well as the militia. This section allows the President to use the armed forces to enforce the laws or suppress a rebellion whenever, in his opinion, unlawful obstructions, combinations, or assemblages or rebellion against the authority of the United States make it impractical to enforce the laws using the course of judicial proceedings.

Title 10, Section 332 was enacted in 1861 at the request of President Abraham Lincoln to increase Presidential authority to use the militia and the regular army to suppress insurrections and enforce the laws. This law was the legal basis for waging the Civil War. This law allows the President to use federal troops on his own initiative and act on his own judgment without waiting for a request from a governor.

Title 10, Section 333 was enacted in 1869 at the request of President U. S. Grant to empower him to use federal troops to suppress the Ku Klux Klan during Reconstruction. The original version of this law said that it was the duty of the President to use the armed forces or militia to respond to insurrection, domestic violence, unlawful combination, or conspiracies that deprive any portion or class of people their Constitutional rights and privileges when state authorities are unable or refuse to protect such people.

The Insurrection Act empowers the President, either upon his own initiative or at the request of a governor to use federal troops to address a variety of civil disturbances that could be provoked by a major terrorist attack. Sections 332 and 333 make it clear that it is up to the President to determine when and where to use federal troops to enforce the laws. The prudent reader should see for him or her self by going to the Internet and reading the statutes cited.

The truth of the matter is that the Posse Comitatus Act is irrelevant. It need not be changed. What needs to be changed is the prevalent misconception of its original intent. As the parsing exercise above shows, it was intended to allow the President and only the President to use federal troops to execute the laws. As the discussion of the Insurrection Act shows, the President has sufficient authority to do what needs to be done to use federal troops to maintain law and order. The people, the politicians, and the President all need to understand that.