

**Posse Comitatus: A Nineteenth Century Law Worthy of Review
For the Future?**

**A Monograph
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Regular Army**



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*Posse Comitatus: A Nineteenth Century Law Worthy of Review for the
Future?*

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ABSTRACT

POSSE COMITATUS: A NINETEENTH CENTURY LAW WORTHY OF REVIEW FOR THE FUTURE? by MAJ David W. Chase, USA, 60 pages.

The United States' traditional reluctance to have military involvement in civilian law enforcement, based on the experience of the Founding Fathers under British rule, and furthered by military involvement in the post-Civil War Reconstruction in the South, is as sound today as it was in the past. Military actions in the Reconstruction South, resulted in the establishment of the Posse Comitatus Act of 1878. The Act, a criminal statute, prohibits the use of the military to enforce civilian laws. Exceptions to their use is made by specific Congressional or Presidential authorizations.

The purpose of this paper is to examine the Posse Comitatus Act, its history and purpose, and the implications it has in 2001 for domestic military operations. At the same time, the author addresses whether the Act needs further changes in light of the military's role and mission in an ever-changing environment. This study reviews the operational relevance as well as potential obstacles the Posse Comitatus Act poses future military operations. In order to understand the rationale for the genesis of this legislation it is first necessary to look at the historical circumstances and environment leading up to the passage of the Act. The author then compares and contrasts this reasoning with the current environment found within the United States in order to determine whether or not the Act is an unnecessary relic of the past or an important consideration legal precedent for the future.

A change in the Posse Comitatus Act is not supported by any of the arguments outlined in this paper. Whether to increase or decrease U.S. military involvement in emergency management support, disaster relief response or combating potential terrorist activities are all questions of policy, not law. A change in the application of the military, to include contingency planning and mock disaster exercises is in the best interest of both our military and our nation.

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Chapter 1

Introduction

“Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.”¹

Title 18, US Code Section 1385

Despite the best intentions of the framers of the Constitution, the United States has maintained a large, standing, professional Army in a time of peace since the end of the Second World War. Prior to that, the American Army had been a small, socially and physically isolated military force which trained and prepared itself for wars on limited resources while predominantly performing as a general servant to the will of the Executive Branch of the government. The Army built roads, bridges, and frontier communities; it fought with Indians, outlaws, and terrorists; it kept the peace across enormous expanses of territory, settled labor disputes, and assisted civilians in the wake of natural disasters.

The enforcement of the nation’s laws in suppressing civil disturbances, fighting against the illegal importation of contraband materials, and apprehending violent outlaws and terrorists has recently been described by an observer as “a most elegant and appropriate use”² of

the Army in the post-Cold War era of American history. Despite the attractiveness of using the Army in this way, many believe this to be contrary to the American way of governing. A significant amount of Congressional actions and Supreme Court decisions have sought to separate the Army from use within the borders of our country. The desire to separate the military from policing activities within the U.S. can be traced to the very origins of the republic itself. The perception is that a standing military force attempting to enforce civil laws allows for despots to retain power by force of arms rather than by the consent of the governed.³

The idea and use of the Posse Comitatus came to the United States through the British heritage. Traditionally, military units could be designated as Posses, but while serving as such the soldiers must function as civilians, even though they kept their military cohesion.⁴ In this spirit, the Posse Comitatus Act of 1878 has served as the main statutory bastion against the use of federalized troops within the domestic law enforcement arena. Fears of governmental abuse using federalized troops used to suppress and possibly oppress civil liberties and personal freedom, led to the drafting of legislation in 1878 of a law, commonly known as the Posse Comitatus Act. This Act has changed very little since then and virtually remains the same as originally conceived nearly 125 years ago. In fact, since its inception, no individual has ever been charged with a violation of

the Act.⁵ The fact that “...this obscure and all-but-forgotten statute”⁶ still exists however, has served to constrain the activities of civilian authorities as well as military commanders and planners alike.

Throughout the past decade, there has been a tremendous increase in U.S. expenditures to fulfill the concerns of leaders about the threat of terrorist attacks on our population and infrastructure. Many supporters of these additional expenditures envision an increased use of the military aid to civilian agencies and law enforcement officials in an attempt to respond to future disasters such as the attacks witnessed at the Federal Building in Oklahoma City and the World Trade Center in New York City. Similar support to both federal and state/local law enforcement agencies has occurred over the past fifteen years in the ongoing “War on Drugs”.

The Army routinely supplies specialized equipment and maintenance as well as advice to lead law enforcement agencies conducting these operations largely through recent amendments to previous governmental legislation to include the Posse Comitatus Act. This issue is even more relevant today given the current security environment combined with the presence of a relatively large standing professional army replete with tremendous capabilities and perceived to be largely under-utilized.

Just what is prohibited by the Act in the way of support by the military to civilian law enforcement agencies continues to be the topic of

much debate. The simplistic answer is any direct involvement in enforcing civilian laws.⁷ To “execute” the law, there must be some form of authoritarian act.⁸ A passive role in supporting law enforcement is not viewed as unlawful.⁹ As one can see, these parameters provide more questions than answers when dealing with military support to civilian law enforcement agencies.

Recent amendments to the Posse Comitatus Act tend to clarify specific instances where military activity is permissible. However, given the absence of any prosecutions for violations of this act throughout its history, little legal precedence has been established. Rather than a full explanation of the “does and don’ts” of this Act, military and civilian planners alike are restricted to the narrow parameters set forth in these recent changes, contributing even greater to their confusion and frustrations. Only time will tell whether or not this indicates a trend. Given the concern over potential terrorist attacks against the U.S. at home and abroad, is it time to reconsider the current restrictions placed upon civilian-military law enforcement cooperation? Does the historic danger of military dominance over civil considerations of freedom and liberty outweigh the desire for a timely defense and response to these potential threats in the future? If so, the time is right for a revision to the Posse Comitatus Act that offers clear and specific guidance and parameters for both military and

civilian authorities. Changes that provide for better the protection of its citizens within the borders of the United States.

This study reviews the operational relevance as well as potential obstacles the Posse Comitatus Act poses future military operations. In order to understand the rationale for the passage of this legislation it is first necessary to look at the historical circumstances and environment leading up to the creation of the Act. The author then compares and contrasts this reasoning with the current environment found within the United States in order to determine whether or not the Act is an unnecessary relic of the past or an important legal consideration and precedent for the future.

Chapter 2

Historical Background

“That there may happen cases in which the national government may be necessitated to resort to force, cannot be denied...emergencies of this sort will sometimes arise in all societies, however constituted; that seditions and insurrections are, unhappily, maladies as inseparable for the body politic as tumors and eruptions from the natural body;...Should such emergencies at any time happen under the national government, there could be no remedy but force.”¹⁰

*Alexander Hamilton
Federalist Papers #28*

The framers of the U.S. Constitution were faced with a serious dilemma on the control of its military forces. The concept of a standing Army in times of peace was clearly in contrast to the ideals of those who had support the Revolutionary War. The Declaration of Independence had even pointed this out that King George, “...has kept among us in times of peace, Standing Armies without the consent of our legislatures. He has affected to render the military independent of and superior to the Civil Power.”¹¹

By 1787, delegates to the Constitutional Convention had divided control of military power between the Legislative and Executive Branches of government. Although serious consideration was given to the idea of not having an Army at all, the delegates eventually decided to make the

President the Commander-in-Chief of the American military¹². Congress was given the authority to raise and support this Army as well as to control the militias when called upon to act under federal service to the nation. Though Alexander Hamilton fervently disagreed, his arguments failed to sway delegates to specifically grant the President Constitutional power to use regular Army forces for purely domestic circumstances¹³.

Early opposition to federal authority in the form of poorly organized rebellions against federal taxation and revenue regulations forced the Congress to relinquish some of the coercive force that Hamilton envisioned to the President.¹⁴ It had become clearly evident that the Federal Government needed a reliable force that was sufficient to enforce the laws across a large territory only sparsely settled, to prevent or put down domestic violence or insurrection, and to force the settlement of quarrels between the states.¹⁵ Initially, it was restricted to the militias alone, but by 1807, it included both the militia and regular forces.

President Thomas Jefferson, eager to make economic sanctions effective against Great Britain, pushed through Congress, *An Act Authorizing the Employment of the Land and Naval Forces of the United States in Cases of Insurrection*, on 3 March 1807.¹⁶ The text of it read, "That in all cases of insurrection or obstruction of the laws, either of the United States or of any individual state or territory, where it is lawful for the

President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful to employ for the same purposes, such part of the land or naval forces of the United States as shall be judged necessary, having first observed the prerequisites of the law in that respect."¹⁷ With this statute, Jefferson permanently implicated the regular military service in the domestic use of force.¹⁸

By March 1833, President Andrew Jackson, opposing South Carolina's nullification of a federal tariff law, secured from Congress an act known as, *To Further Provide for the Collection of Duties on Imports*, which read, "...the President is authorized promptly to employ such means to suppress the same and to cause the said laws or process to be duly executed as are authorized by the Act of 28 February 1795, and also by the Act of 3 March 1807."¹⁹ The importance of this action is that the President need not wait for a call from state officials, which probably would never have come, but may move if federal judges advise him of the need. In addition is the issue of a proclamation to disperse before commencing any sort of military intervention.²⁰

During the 1830s and 1840s many Presidents turned down requests for federal aid because the requesting states had not done all in their power to subdue dissidents. Their rationale came from a time-honored

belief, that the maintenance of order within the nation belongs primarily to state and local authorities, and only ultimately to the central government.²¹ In contrast, Presidents Fillmore, Pierce, and Buchanan intervened firmly to enforce the Fugitive Slave Act of 1850.²² They believed that they had sufficient authority to employ all available military forces. The courts backed their actions.

Civil war in Kansas in the mid-1850s complicated both the military and the constitutional problems. President Buchanan believed that he could use troops to control internal disorder only if they formed parts of Poses Comitatus and since none of the parties were willing or able to act, he concluded that he could not send troops however much conflict was threatened.²³ In this instance, federal intervention was not acted upon. However, seven years later Buchanan did flex his federal military authority in the conflict known as the “Mormon War”. He began by sending personal emissaries to the area of conflict, to observe and report back with recommendations. The Constitution and the laws did not require this, but President Buchanan used these representatives very successfully during this crisis. His representatives, in spite of having to travel to Utah via Central America, were able to arrive in time to negotiate effectively with the Mormon elders, thereby preventing large-scale military operations.²⁴

The next notable revisions on civil-military cooperation occurred on 29 July 1861, when another act became law—*To Provide for the Suppression of Rebellion Against and Resistance to the Laws of the United States*. It included the following passage, "...Whenever by reason of unlawful obstructions, combinations, or assemblages of persons or rebellion against the authority of the Government of the United States, it shall become impracticable in the judgment of the President of the United States to enforce by the ordinary course of judicial proceedings the laws of the United States within any State or Territory of the United States, it shall be lawful for the President of the United States to call forth the militia of any or all states of the Union, and to employ such part of the land and naval forces of the United States as he may deem necessary."²⁵ The importance of this law is that the President could now intervene relying solely on his own judgment.

During the post-Civil War Reconstruction period, the 20,000 soldiers of the regular army could not begin to cope with the almost continuous violence.²⁶ In the attempt to do so however, two important documents governing the use of force in domestic affairs emerged. The first became law on 20 April 1871. It allowed for, "the President by using the militia or the armed forces or both, or by other means, shall take such measures as he considers necessary to suppress in any State, any insurrection,

domestic violence, unlawful combination or conspiracy....”²⁷ The purpose of the Act of 1871 was to carry out the provisions of the Fourteenth Amendment—“...nor shall any State deprive any person of life; liberty, or property, without due process of law...nor deny...the equal protection of the laws....”²⁸ It specifically permitted the President to employ all the military forces within any state, without the state's permission, to support the civil rights of its citizens as defined by the United States government. This Act would be cited as a basis of several actions during the turbulent Civil Rights movements of the 1950's and 1960's.

After numerous attempts to enforce the Fourteenth Amendment, Congress grew weary of sending federal troops to intervene in the civil affairs of the states of the late Confederacy.²⁹ The result was a law that went into effect 18 June 1878, and persists even today as Section 1385, Title 18, Chapter LXVII, of the Revised Statutes.³⁰ Referred to as the Posse Comitatus Act, it reads in part, "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a Posse Comitatus, or otherwise to execute the laws, shall be fined not more than \$10,000, or imprisoned not more than two years, or both."³¹ These penalties have never been levied on any person, however in 1986 Indian lawyers invoked them, charging that the Nixon administration violated it at

Wounded Knee in 1873. The case even today, still has not been decided.³²

With the introduction of the Industrial Revolution in the late 1800's, struggles between workers and their employers furthered the discussion of federal intervention. The Great Railroad Strike of 1877 was the first of many such conflicts that would involve the consideration of mobilizing federal troops in support of local law enforcement. Although the states employed thousands of militiamen, the federal government chose not to use federalized militia.³³ Instead, President Hayes sent troops from the regular army. During this strike the insurgents never chose to attack the regulars. Hayes invoked Section 4, Article IV, of the Constitution³⁴ in his proclamations to the strikers to disperse and retire peaceably to their respective abodes.³⁵ Violence was averted as was judgement on Hayes' decision to use federal troops in a civilian law enforcement mode.

An even more violent strike commenced at the Pullman Palace Car Works in 1894. The Governor of Illinois insisted that state and local power was adequate to control the outbreak, but President Cleveland chose to intervene despite this. At first he tried to use civilian agents, in the form of 5,000 U.S. Marshals, but finally chose to send 2,000 regular Army soldiers into Illinois.³⁶ However, unlike the earlier railroad strike, hordes of strikers and their supporters attacked the federal soldiers. President Cleveland

based his actions on his obligation to see that the laws were faithfully executed, in this case laws to keep the U.S. mail moving, commercial thoroughfares open, and public property from being destroyed.³⁷ Later in the same term, President Cleveland again sent federal troops into Oregon. This time they were dispatched to enforce a treaty with China, calling for the government to protect Chinese aliens working in the United States. In this instance, the Chinese laborers had to be protected from the American strikers because they refused to actively support or join in the strike.³⁸

During this era of worker-industry conflict (1877-1914), Secretary of War George W. McCrary said, "The Army is to the United States what a well-disciplined police force is to a city."³⁹ This was a deviation from the common constitutional understanding of the roles and responsibilities of the military. To strict Constitutionals, the Army existed to defend the nation against foreign aggressors. Industrialists, however, were not concerned with these basic assumptions; the Army as strikebreaker was popular with them.⁴⁰ In any event, the role as supporter and enforcer of civilian law, did not gain money or men for the Army. Instead, Congress was appropriating funds to expand the Navy.⁴¹

Two later Presidents, Theodore Roosevelt and Woodrow Wilson, further modified the government's position in labor disputes. They insisted, unlike their predecessors, that military forces be neutral between labor and

management conflicts. Much like former President Buchanan, they relied more on advance information from personal emissaries than had been common in the decades prior.⁴² Roosevelt insisted that the restraints on the use of force in domestic affairs imposed by the Acts of 1795, 1807 and 1861, be respected. "Better twenty-four hours of riot. . . " he said, "than the illegal use of troops."⁴³

President Wilson did however, act firmly in response to violent disputes in Colorado in 1914. First he demanded that the State-controlled National Guard leave the scene before he would send in the regulars. Next, he forbade the operators to import strike-breakers, and, under martial law declared by Colorado, closed saloons and gunshops, and outlawed the importation of weapons.⁴⁴ When the Governor of Colorado protested, the Attorney General sent the following message: "Under the Constitution, where domestic insurrection overthrows the power of the State, the President is required to interfere, if properly requested. When he interferes and sends in the national forces . . . he has full power and authority."⁴⁵

During World War I, while much of the States' National Guard were on active federal service, the administration often used detachments of regulars to curb disorders that the Guard would have controlled in peacetime under State command.⁴⁶ Following the war, during a period

known as the Great Red Scare, (November and December 1919), federal regular troops were sent into ten states in anticipation of disorder, which never took place.⁴⁷ The administrations made no effort to justify their actions with the either existing legislation or the Constitution.⁴⁸

The 1930's offered even more challenges to federal military restraint. In 1932, President Herbert Hoover reluctantly ordered the Army to clear the Bonus Marchers out of the Capitol. The Chief of Staff himself, General Douglas MacArthur, with 743 regular soldiers, carried out this order.⁴⁹ The next tests came when Hoover's successor, President Franklin D. Roosevelt, refused armed aid at the Scottsboro Trials in 1933, as well as the general strike in San Francisco in 1934, and the sit-down strikes in several automobile factories in 1937.⁵⁰ However, by 1941, he felt obliged to use 3,500 regulars at the North American Aviation Plant in 1941. Again in 1943, Roosevelt dispatched regular troops this time to a Detroit disturbance, but only after destruction of property and loss of life had been heavy.⁵¹ In these instances, the Attorney General said that the President's power in these interventions derived from "The Constitution and from the statutes", however, he failed to specify the clauses of the Constitution or the particular laws referred to.⁵²

With the Supreme Court's decisions in 1954 concerning racial segregation, the character and scope of the federal use of force in

domestic affairs changed dramatically. After Reconstruction, the federal government had interfered in racial strife only to suppress race riots, but, beginning in 1957, it employed military units of all sorts to enforce equal protection of the laws as defined by the courts of the United States.⁵³

Governor Faubus of Arkansas was responsible for the first federal intervention. Governor Faubus ignored the orders of a federal judge to permit blacks to enter Central High School in Little Rock. President Eisenhower reluctantly concluded that it was his duty to see that the court's orders were faithfully carried out. On 23 September 1957, he issued the necessary proclamation required by law, and the next day directed the Secretary of Defense to carry out the court's orders.⁵⁴ What followed made history in two ways:⁵⁵

- 1) The National Guard entered federal service to combat domestic disorder for the first time in ninety years

- 2) The Arkansas National Guard was called into federal service while already in active State service—something never done before

President Eisenhower called the entire Arkansas National Guard into federal control to lift it out of the Governor's control. The result was that one day the Guardsmen were following the orders of the State commander in chief to keep the students out of Central High, and the next day obeying the orders of the United States commander in chief to see that these same

students were being admitted. By all accounts, the Guardsmen made this traumatic shift without refusing to comply.⁵⁶ Shortly after, President Eisenhower sent regular Army troops into Little Rock, Arkansas citing as his constitutional basis for the employment of both National Guard and Regular Army troops, a law enacted in 1861, "...To provide for the suppression of rebellion against and resistance to the laws of the United States."⁵⁷ This intervention in Arkansas established the pattern that the government followed later in both Mississippi and Alabama.

When the officials of Mississippi and Alabama defied the orders of federal courts to admit black students into their schools, Presidents Kennedy and and later Johnson dispatched personal representatives. After these representatives had reported their recommendations, the Presidents issued the required proclamations to the lawbreakers to disperse. Their next move was to federalize the entire National Guards of both states, in order to lift them out of their Governor's control, and sent in Army regular forces. As in Arkansas, only a part of each Guard was directly involved. The difference between the three actions was that President Eisenhower had elected to not rely heavily on representatives, whereas both Kennedy and Johnson did; in part to maintain, at least, the fiction of civil control in handling domestic violence.⁵⁸

Federal military response was called upon again during the turbulent 1960 race riots. Although the one in Watts, a suburb of Los Angeles, California in 1965, was large and violent, the administration chose not to intervene with troops. It did so however, in 1967, in Detroit, but only after the Governor of Michigan, George Romney, applied in writing for help, and was forced to admit that the insurrection was too powerful for the State to suppress.⁵⁹ Since Governor Romney was a potential Republican candidate for President, there was some hint of politics in the delay of dispatching troops. President Johnson instead sent a high-ranking civilian and an Army general to represent him. When they had reported he issued the required proclamation to disperse, he dispatched two brigades of regulars Army troops, and federalized the entire Michigan National Guard.⁶⁰

In 1968, the Johnson administration pre-positioned regular Army units in an attempt to keep war protesters away from the national convention of the Democratic Party in Chicago.⁶¹ He relied on a joint resolution, passed by Congress for the occasion, for legal justification. This resolution directed all agencies of the government, if called on, to help the Secret Service in its traditional role of protecting important people. This same resolution justified the pre-positioning of troops to prevent disorder at the inauguration of Richard Nixon on 20 January 1969.⁶²

While President, Nixon called on the Army several times to keep traffic open into the Capitol. He also used Sailors and Marines, claiming that they were not covered by the Posse Comitatus Act. After the assassination of Martin Luther King on 4 April 1968, violence quickly passed beyond the power of local authorities to control it. President Nixon was obliged, as in the 1960s, to summon National Guardsmen into federal service in Delaware, the District of Columbia, Illinois, and Maryland.⁶³ Although college communities involved their police, counties their sheriffs and the states their highway patrols and National Guards, the United States did not send troops onto the campuses. All in all, the Nixon administration had shown the restraint that exemplifies the ideals of those who supported the Posse Comitatus Act.⁶⁴

The first substantive changes in the Act came as a result of the recent war on drugs. Although President Nixon had taken measures to increase U.S. efforts against drugs, it wasn't until the 1982 Department of Defense Authorization Act that the military played much of a role in this operation.⁶⁵ The relevant provisions of the 1982 Act have since been included as part of Title 10, United States Code.⁶⁶ Section 371 allows the military to share information concerning violations of the law with civilian law enforcement officials.⁶⁷ In addition, the statute provides for the consideration of the needs of civilian law enforcement officials when

planning military operations.⁶⁸ Further sections authorize DOD to:

- 1) Loan equipment and/or facilities to support civilian law enforcement to include associated supplies and spare parts (amended 1988)⁶⁹
- 2) Loan equipment and/or facilities in preparation for and response to a chemical or biological emergency (amended 1996)⁷⁰
- 3) Train civilian law enforcement personnel in the use of equipment⁷¹
- 4) Operate and maintain equipment in support of civilian law enforcement agencies for the detection, monitoring, and communications of air and sea traffic outside the U.S. borders and to continue interception/pursuit of vessels or vehicles begun outside the territory of the U.S. to within the borders⁷²
- 5) Transportation/basing support of civilian officials outside the U.S. borders⁷³

Noticeably absent from the allowances of these amendments and specifically addressed in Section 375, is the inability of military personnel to directly participate in searches, seizures, arrests, or other similar activities.⁷⁴

This legislation would come to fruition on the afternoon of 29 April 1992, when the worst civil unrest since the riots of the 1960's erupted in

the streets of Los Angeles. Forty-four people died, and hundreds of injuries occurred before order was finally restored. Property damage reached the billion-dollar mark because of rampaging looters and the thousands of fires they set.⁷⁵ What began as a relatively small disturbance in south central Los Angeles, quickly escalated and spread rapidly throughout the city and county. The violence overwhelmed law enforcement authorities initially, resulting in the burning of large areas of the city. The governor of California committed the state police and two thousand National Guard soldiers to assist in restoring law and order in the early morning hours of 30 April.⁷⁶ A National Guard military police company arrived in the area that afternoon and immediately began operations to support local police forces.

Joint Task Force Los Angeles (JTF-LA) was formed following a Presidential Executive Order on the evening of 1 May. The Executive Order federalized units of the California National Guard (CAARNG) and authorized the deployment of active duty military forces to assist in the restoration of law and order. JTF-LA formed and deployed within twenty-four hours, assembled from U.S. Army and Marine forces. It operated in a unique domestic disturbance environment, while working with city, county, state, federal agencies, and the CAARNG. The fact that most things went right, despite the speed at which the situation developed, tended to

validate the Department of Defense (DOD) Civil Disturbance Plan (known as Operation GARDEN PLOT).⁷⁷

The latest legislation in this arena is the National Defense Authorization Act of 1997. Citing a potential threat to national security from nuclear, radiological, chemical, or biological terrorism, this Act requires the Secretary of Defense to create a program that provides civilian agencies with the training and advice necessary to react to such an attack.⁷⁸ Once again however, this statute restrains the military from making arrests, directly participating in searches or seizures, or directly participating in the gathering of intelligence for law enforcement purposes, except when needed for the immediate protection of human life.⁷⁹

Clearly, the intentions of America's leaders and law makers from colonial times to the present, appears to have been to control domestic disorder without using military force. If armed power does become necessary, it should be applied at the local level by police, at the county level by sheriffs, and at the state level by the militia/National Guard. These instruments would be controlled by civil officers. Only as a last resort should the government of the United States be involved, first using marshals, (civil officers), next federalized militia, and finally, regular forces.⁸⁰ At whatever level, the minimum force needed to suppress the disorder is to be the force to use. It has not always been possible to live

up to these ideals. In many instances, law enforcement agencies below the level of the national government have proved unable to maintain the peace. In several cases, local and state officials have called for aid from the United States; and in others, the President has decided that the need for federal intervention existed, and under one constitutional authority or another, has injected federally controlled military power.⁸¹

Chapter 3

Discussion and Issues

“Protecting our territory, population, and infrastructure at home by deterring, defending against, and mitigating the effects of all threats to U.S. sovereignty; supporting civil authorities in crisis and consequence management; and helping to ensure the availability, integrity, survivability, and adequacy of critical national assets.”⁸²

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There are many examples of incidents that have caused people to call for a change in the Posse Comitatus Act. Some see the recent round of amendments as getting the military to involved with civilian law enforcement. Still others feel the military has not participated or planned enough for potential support operations in the future. Today's threat environment reflects the influences of a faster-paced and more interconnected world. Accordingly, policymakers must now focus as much on possibilities as on probabilities, as much on vulnerabilities as on threats. Moreover, international and domestic terrorists appear to have grown more radical in their aims and methods. During the Cold War, international terrorists typically executed limited attacks so as not to undermine external political and financial support for their causes.⁸³ Therefore, terrorist attacks in general have expanded in scale, as evidenced by the 1993 bombing of the World Trade Center, which was

expected to yield nearly 60,000 casualties.⁸⁴ Consequently, while the total number of terrorist incidents worldwide has declined over the past decade, intelligence estimates indicate that the overall likelihood of a terrorist attack in the United States involving a WMD has actually increased.

Those voicing the need for less military involvement in civilian-related operations usually fall into one of four categories:

- 1) Participation blurs the line between military and civilian roles/responsibilities
- 2) Participation undermines civilian control over the military
- 3) Participation in these types of operations damages military readiness
- 4) Military involvement may be inappropriate for the work requested

The argument seeking to support the position that military involvement causes a blurring-effect on military vs. civilian roles is that the civilian law enforcement role is usually a local one, performed by people trained for that mission and schooled on the importance of respecting individual rights.⁸⁵

On the other hand, the argument continues, the military is focused at the national level, and are therefore not trained to fulfill missions within our borders that require an ability to serve and recognize civilians' rights and concerns.⁸⁶ This argument is not persuasive when applied against the facts. U.S. soldiers have and continue to operate in environments where

they exhibit just these skills. Operations in Los Angeles during the recent riots as well as those in Bosnia and Kosovo illustrate the capabilities of U.S. Army personnel to interact on a personal basis with civilians while maintaining an appropriate level of understanding and awareness of civilian rights and concerns. In fact, every member of the U.S. Army is well schooled in and has had a true appreciation of an individual's rights taught to them at every level.⁸⁷

Equally unpersuasive is the argument concerning the loss of civilian control over the military. For such a loss to occur, the type of military support would have to "...endanger liberties or the democratic process."⁸⁸ As dictated by the current Act however, military members do not play a direct, active role in these types of operations should they likely have the possibility to have an impact on a civilian's liberties, let alone having a direct effect on the democratic process.

The concern over the damage to military readiness brought about by these types of missions is far more difficult to dismiss. In fact, the military has continually objected to any increased involvement in the ongoing drug interdiction missions.⁸⁹ Many leaders believe that involvement in these types of operations diverts personnel and resources in an already downsized military from traditional war-fighting missions and preparations. In some instances, equipment has required modification to support these

types of roles; modifications that would not have been required without these missions, and ones that may even detract from the normal use of this equipment.⁹⁰

Another concern in this area is that those people promoted and selected for leadership in these types of operations may not necessarily reflect the same characteristics as those chosen to lead in combat.⁹¹ After some reflection on this idea, there appears to be little-to-no differences in the characteristics of leadership within either environment. The leader is required to motivate his people and use the personnel and equipment at his disposal to accomplish the mission. These types of missions force leaders to make decisions in a timely manner based upon the information available. Many times in the domestic support role, leaders and their subordinates are faced with situations that test both their courage and ability to function in a crisis environment. There appears to be nothing incompatible with these leadership traits and those expected of our leaders in combat. The bottom line on the readiness debate: There appear to be some valid policy considerations that support a less active role in domestic support operations by the military, but they do not rise to the level which would call for a change in the current law.

The final argument used to support a reduction of military involvement in conjunction with domestic support operations if that is the

wrong tool for the job.⁹² In the past, the military has been used in a temporary role or at the least, ones of relatively short duration. However, the current utilization of military assets in the ongoing war on drugs appears to be a long-term effort with no immediate end in sight.⁹³ The length of the operation is not an appropriate factor when deciding whether or not it is a proper role for the military. Of relevance is the fact that it is more expensive to use military personnel for this type of mission than to use civilian counterparts.⁹⁴ Matthew Hammond indicates that a soldier costs the government \$82,000 per year for training and upkeep, while the use of civilian labor is thought to be much cheaper on average.⁹⁵ There may be some utility in this analysis, however, in the absence of greater numbers of civilians to take on these functions, the military will continue to be forced to respond to these types of calls. Those calling on the military to participate in greater levels of domestic support operations point to the Armed Forces as a vast pool of under-utilized personnel and equipment. They also argue that the military's function is to protect national interests and security, and that domestic support operations fit into this category. This may be so, but one cannot lose sight of the fact that the military's *raison d'être* is to fight our nation's wars and to prevent them by our presence and readiness to fight if called upon.

Chapter 4

Recommendations

“The end for which a soldier is recruited, clothed, armed, and trained...is simply that he should fight at the right place and the right time.”

On War
Carl von Clausewitz

Civilian authorities turn to the military for assistance and support for several reasons, among which the most obvious may be their physical assets. The military is often regarded as a cornucopia of assistance.⁹⁶ Among the most sought-after assets are transport (land, sea, and air); fuel; communications; commodities including food, building supplies and medicines; tools and equipment; manpower and technical assistance (especially logistics and communications) and facilities. Relief authorities know the military capability of providing these on request and in a resource-poor post-disaster environment, it is not unreasonable for authorities to request them.

The Army, as part of the Department of Defense (DOD) has specific responsibilities for the planning and preparation of Domestic Support operations. As described in the Stafford Act⁹⁷, DOD plays primarily a supporting role to other governmental and non-governmental agencies under specific restrictions and considerations. Most important of these

considerations are covered under DOD directives to include:⁹⁸

- 1) May provide emergency activities not to exceed ten days
- 2) Local/state governments exhausts all similar resources first
- 3) Operation must be essential to the protection of life and property

What is noticeably absent is the authority of the Armed Forces to provide law enforcement operations under federal control. While State militias (National Guard) do possess law enforcement authority under State control, this authority is also restricted upon Federalization of these forces. The Army Reserve on the other hand, is further restricted in both domestic support and law enforcement activities by the requirement of a formal declaration of a National Emergency.⁹⁹ This declaration allows for the call-up and activation of units for up to a one-year period as federalized military troops. However, a declaration of this type has not been issued for over fifty years and therefore renders the assets of the Army Reserve unusable for this type of support to local authorities, with the exception of their scheduled active duty training (AT) periods. This translates to roughly two days per month and one fourteen-day period per year. Given the tremendous availability of assets and manpower potential in the Army, Reserve, and National Guard, consideration must be given on how to better allow for their usage.

In the current global environment of state and non-state sponsored terrorism interposing itself into the domestic U.S., many leaders are contemplating the most effective and efficient utilization of Federal armed forces in homeland defense and support to law enforcement agencies. These threats to U.S. civilians range from terrorist bombing of public buildings and facilities to potential uses of biological and chemical attacks against our population. As the U.S. experienced in the bombings of the Federal Building in Oklahoma City and the World Trade Center in New York City, local and State emergency management and law enforcement agencies are woefully unprepared to unilaterally act/react to these types of terrorist activities. Current restrictions on Federal Armed Forces mandate the cessation of most intelligence and defense operations at the border of the U.S. While many informal systems have been employed to allow for the integration and passing of information and intelligence between Federal Armed Forces and civilian law enforcement agencies, they are at best ad-hoc work-arounds dependent upon the personalities and familiarity of the units and agencies involved. Is it time therefore, to review the restrictions on Federal Armed Forces in the homeland defense and support to law enforcement agencies, to provide for a more coherent policy? There are various legislative solutions to this situation being debated today, may offer some solutions to these threats.

Presidential Decision Directives (PDDs) enacted between 1995 and 1998 continue to reinforce the importance Federal authorities have placed on counter-terrorism, homeland defense, as well as the protection of vital public infrastructure against attack. Though not directly related to the Posse Comitatus question, there is debate on the issue of relieving some of the restrictions currently in place on the use of the Army Reserve during domestic support operations. The importance and availability of combat support and service support forces assigned to the Army Reserve may make them critical to the coordinated and effective response of Federal forces in any future domestic disaster or emergency. In addition, individual states have enacted lend-lease agreements between themselves that allows for the orderly and timely transfer of units and assets in the event of an emergency. This agreement however, is void upon the Federalization of any of these organizations.

A military response to the threat of a terrorist nuclear, biological, or chemical attack against the civilian population was begun in February 2000. With the initial fielding of Rapid Assessment Initial Detection (RAID) teams, the military attempted to offer limited response capability to a weapon of mass destruction (WMD) attack. These initial seven teams, since renamed Weapons of Mass Destruction Civil Support Teams (WMD-CST), were stood up in each of the existing seven Federal Emergency

Management Agency (FEMA) regions¹⁰⁰. The next phase envisions a total of seventeen WMD-CSTs located throughout the U.S. with the remainder of the States possessing WMD-CST “light” teams capable of providing limited support and training to civil authorities.¹⁰¹ At best, all of these teams are capable of providing relatively rapid response (four-to-twelve hours) to an emergency/disaster, in very limited numbers. Each of these “light” teams represents fewer than twenty personnel and are designed to assist and offer specialized training and advice to civilian leaders, HAZMAT response teams and other State and local organizations who might respond.¹⁰² Though a significant step towards providing Federal support in the event of a terrorist attack against the U.S. civilian population, this plan still represents a purely responsive solution to these types of threats.

Preventive activities the Army currently can be called upon to provide include intelligence collection, reconnaissance and surveillance, as well as equipment lend-lease support and maintenance. Present legislation assigns responsibility and authority of anti-terrorist operations to both the Federal Bureau of Investigation (FBI) in conjunction with the Federal Secret Service (FSS).¹⁰³ With the exception of providing some sorts of support (strategic air and ground lift; equipment lend-lease, maintenance, training, and operation), the Army is excluded from acting in

conjunction with or in any other support of these operations.¹⁰⁴ With the perception of increased terrorist threats against the population within the U.S., many observers doubt the abilities of either the FBI or FSS to continue providing the type of protection Americans have grown to expect, without a substantial expansion of their current organizations. The argument continues that this type of growth would most assuredly adversely affect the budget and therefore, the overall size of the active duty Army. In short, if the Army continues to be legally restricted in acting directly in these types of operations, the government will be forced to enhance the capabilities of other Federal organizations to mitigate these threats. This in-and-of itself, may not be a bad idea.

It may be logical to assume that some Federal organizations may be tasked to expand to meet these challenges. But if the Army relegates itself to supporting its future relevance, size, budget, and importance by accepting and/or assuming additional roles, it might possibly effect its' primary mission of fighting the Nation's wars or even worse, erode the delicate civil-military balance within our society. While a change in the restrictions imposed on the Army by the Posse Comitatus Act are debatable, a clear understanding of its meaning and implications by commanders and their planners should not be.

Currently, most decisions on the application of Army assets in these types of operations are based on past court decisions and the presumption of future legal ramifications rather than a clear and concise list of “does and don’ts” for the commander. Commanders should not be forced to make these types of decisions (that may result in personal fines or imprisonment) in the current environment of confusion and misunderstanding. The Posse Comitatus Act as it applies to the Army in the year 2001 is much more liberal than the one first enacted in 1878. However, due to the lack of judicial challenge or legislative review, it is still unknown as to how far a commander truly can go in support of civilian law enforcement operations. Rather than the incremental changes that have occurred during times of strife over the past 120 years, a legislative clarification based on the existing and projected requirements to provide assistance in the protection of the U.S. population is surely in order. It should not take an avoidable incident of terrorism or worse, the imprisonment of Army leadership to shed light on the confusion of today’s Posse Comitatus Act.

The Federal Response plan (Public Law 93-288), commonly referred to as The Stafford Act, establishes the basis for DOD assistance to a State and its affected local governments impacted by a catastrophic or significant disaster or emergency which results in a requirement for

Federal response assistance.¹⁰⁵ Any operation involving the use of military support or application of military assets or advice, is coordinated through the Department of Military Support (DOMS) at the national level, and a Defense Coordinating Officer (DCO) at the state level.¹⁰⁶ The DOMS and DCO serve as the points of contact between requesting civilian agencies and the military. This type of requested support generally falls into one of three categories:¹⁰⁷

- 1) Special functional skills or equipment
- 2) Communications and Command/Control functions
- 3) Organized forces or units providing general support

The first two categories of support to civilian agencies are already adequately accounted for and clearly delineated in existing amendments and legislation.¹⁰⁸ It is the third category that remains legally nebulous. At a minimum, planning or considering the implementation of Army forces and assets in these types of roles would allow for legal concerns and considerations to be reviewed prior to execution during a crisis. A 1993 RAND study articulates the importance of committing time, resources, and planning before a disaster or emergency response occurs to ensure effective and timely execution.¹⁰⁹ The fear of over-stepping Posse Comitatus restrictions have clearly led to Army avoidance of planning law enforcement support until actually called upon to conduct such

operations.¹¹⁰ This is a direct contradiction to the common practice of planning for, training, and rehearsing for potential actions seen throughout the Army major commands (MACOMs). A recommendation to at least acknowledge the possibility of participating in these types of operations, understanding the requirements necessary to conduct them, and to review the legal implications involved in direct action prior to an official request seems rational.

The United States Joint Forces Command (USJFCOM) appears to recognize this realization as it has established a subordinate command called the Joint Task Force-Civil Support (JTF-CS) to meet such challenges. JTF-CS, located at Fort Monroe, VA, began operations on 1 October, 1999.¹¹¹ The task force reports directly to the Secretary of Defense through the Commander-in-Chief of USJFCOM. The task force provides command and control over DOD assets in support of an identified lead federal agency for managing the consequences of a chemical, biological, radiological, nuclear, or high-yield explosive (CBRNE) incident in the United States, to include its territories and possessions.¹¹² The JTF ensures that DOD assets are prepared to respond to requests for support other agencies and civilian authorities in a time of national crisis following a CBRNE incident.

JTF-CS is commanded by a two-star general officer and currently consists of approximately eighty military and civilian personnel. The stated mission of the task force is to provide command and control for deploying DOD consequence management assets in order to reduce the effects of the incident, save and preserve lives, and to restore critical services.¹¹³ Their understanding of the myriad of legal restrictions relating to the use of certain types of military support is clearly evident in a statement published in a brochure of the JTF, “We support federal civilian agencies that in turn support first responders and civil authorities at the state and local level. These agencies will determine the nature and kinds of support they need from us. We will do our best within what is allowed by U.S. law to provide it.”¹¹⁴ Joint Task Force Civil Support’s operational plans and orders reflect their commitment to providing professional response in support of civilian agencies during a time of national crisis. While JTF-CS is a shining example of Department of Defense preparations and forward thinking in the domestic support field, very few subordinate Army major commands have taken similar attitudes to this type of operation. The same 1993 RAND study recommends designating civil disaster support as a fifth pillar of the National Military Strategy (along with strategic deterrence and defense, forward presence, crisis response, and reconstitution).¹¹⁵

Current amendments and legislation already allow for sufficient latitude for military support of equipment and personnel to civilian agencies in the event of a national disaster or emergency. One of these is the Insurrection Act. This Act authorizes the President to use federal troops (Regular Army or federalized National Guard) as he considers necessary to enforce civilian laws to preserve public order and security of the nation.¹¹⁶ He may do so "...when he considers [activities] unlawful obstruction, combinations, assemblages, or rebellions against the authority of the United States...."¹¹⁷ This Act requires the President to first issue a formal proclamation ordering the assembled citizens to disperse and retire peaceably to their homes within a designated period of time (as demonstrated by President Hayes' aforementioned actions in the 1877 Great Railroad Strike).¹¹⁸

In addition, the President also possesses authority to call upon and employ Federal troops in direct support of law enforcement operations in other cases. Similar to the requirements placed upon him by the Insurrection Act, the President must first issue a formal declaration. This declaration is the pronouncement of a National Emergency followed by further directives to the Secretary of Defense as to the specific federal military support required.¹¹⁹ These specific examples of the legal employment of federal military resources can accurately be described as

an unwieldy process requiring excessive amounts of time to complete.¹²⁰

However, this system attempts to ensure an appropriate balance between the operational necessity of committing Federal Army assets and the constitutionally-based restrictions on military actions within the United States.

While not participating directly in law enforcement activities, active duty military personnel at the scene of a natural disaster or emergency response operation are not expected to ignore acts of lawlessness that they may observe.¹²¹ They are expected to report such actions to the appropriate civilian authorities. Additionally, they are expected to act in accordance with very specific guidelines issued at the scene, including rules on the use of force, commonly referred to as Rules of Engagement (ROE). This ROE clearly outlines individual actions and responsibilities when faced with situations necessitating the use of force for self-protection or the protection of others. Active duty military responders at the site of an incident are thoroughly briefed of their duties and responsibilities in this regard.

Chapter 5

Conclusion

“Operational art includes recognizing inappropriate military objectives”¹²²

*What is Operational Art?
LTC Clayton R. Newell*

The task of supporting civil authorities in a time of crisis is not a new mission for the Department of Defense. The U.S. military has a long history of providing support and assistance to domestic the civilian community during emergencies and other instances of national concern. For example, the Army has assisted agencies during natural disasters such as hurricanes and earthquakes. Throughout any crisis or consequence management scenario, civilian authorities and law enforcement officials have remained in charge.

In over 225 years of faithful and loyal service to the nation, the military may have assured American leaders against the fear or threat of derisive or subversive actions directed against its population. However, the absence of military coups or armed oppression of Americans at the hands of the military throughout its history does not lessen the importance of the Posse Comitatus Act. There are still today, many good and valid reasons behind the Posse Comitatus Act.

It is understandable that, during peacetime, when there is no identifiable enemy or threat, citizens and governmental leaders alike will look to the military to solve many of the major problems facing our nation. The armed forces, after all, appear to have the very sorts of skills, manpower, and specialized equipment needed to solve pressing problems. Budgetary constraints and competing national priorities will limit expenditures and programs that are purely military, both sides will seek domestic missions for the Armed forces.

The Posse Comitatus Act in its present form primarily restricts the federal military from conducting direct law enforcement operations within the boundaries of the United States. These restrictions should not be lessened to allow for more expedient or easier release of these capabilities, lest we be willing to forego those time-honored freedoms and civil liberties expected and cherished by generations of Americans. There appears to be no compelling argument for conducting sweeping changes to the Posse Comitatus Act. Current legislation already authorizes the President to employ federal forces in this type of operation.

Our country's traditional reluctance to have military involvement in civilian law enforcement, based on the experience of the Founding Fathers under British rule, and furthered by military involvement in the post-Civil War Reconstruction in the South, is as sound today as it was in the past.

Incidents such as potential violations of American civilian liberties and freedoms will always generate calls for change. Such situations however, are not the result of flaws in the current law. Statutes permitting greater military involvement in certain aspects of law enforcement, brought about in large part because of the possibility of a mass disaster or terrorist attack against a civilian population, strike an appropriate balance between the civilian control of law enforcement with the assistance which the military is best suited to provide.

A change in the Posse Comitatus Act is not supported by any of the arguments discussed. Whether to increase or decrease our military involvement in emergency management support, disaster relief response or combating potential terrorist activities are all questions of policy, not law. A change in the application of the military, to include contingency planning and mock disaster exercises is in the best interest of both our military and our nation.

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