

Homeland Defense and *Posse Comitatus*: A Domestic Security Analysis

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A Domestic Security Analysis

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Homeland Defense and Posse Comitatus:

A Domestic Security Analysis

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Posse Comitatus (pahs-see coh-mitt-tah-tus) 1. n. Latin for "possible force," power of the sheriff to call upon able-bodied men to apprehend a criminal.¹ 2. (1878 law) denies search, seizure, or arrest powers to U.S. military personnel.²

¹ The People's Law Dictionary, s.v. "*Posse Comitatus*"

² Department of Defense Dictionary of Military Terms, s.v. "*Posse Comitatus*"

For the past twenty-five years, the *Posse Comitatus* Act has been gradually eroding, bringing us closer to overriding the law that precludes use of the military in domestic law enforcement. A recent surge in high-profile security events on U.S. soil, such as the attacks of 9/11, the Hurricane Katrina disaster, and the specter of a bird-flu pandemic, has hastened this legal erosion, encouraging some lawmakers to call for the revision or even elimination of *Posse Comitatus*. Unrestricted use of active duty forces in execution of the law threatens civil liberties, States' autonomy, and the military's readiness to defend the nation; consequently, *Posse Comitatus* must be strengthened and the National Guard must be empowered to halt this trend and ensure U.S. domestic security.

Background and Intent of Posse Comitatus

The law prohibiting Federal use of a *Posse Comitatus* was passed in 1878 at the end of Reconstruction after the Civil War.¹ From U.S. Code, Title 18, Part 1, Chapter 6, 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 Air Force as a Posse Comitatus or otherwise to execute the laws shall be fined...or imprisoned..., or both."

The intent of the Act was to prevent the military from becoming the strong-armed element of a police-state. Specifically, it was enacted to end the practice of stationing Federal soldiers at polling places during state elections and subsequently affecting the outcome of those elections.³ While *Posse Comitatus* seeks to prevent the use of the military in executing the law, reality is quite different.

Mission Creep: Proof of the Problem

Posse Comitatus is vague and numerous exceptions have been allowed to circumvent it. Of note, the military has been used repeatedly through the Insurrection Act⁴, which permits use of military force to make arrests and restore order during civil disturbances, such as the Los Angeles riots of 1992.⁵ The military has also been deployed under the Stafford Act⁶ upon request from a state governor in times of natural disaster, such as the 22,000 active duty troops sent to New Orleans after Hurricane Katrina. The courts have also deemed it permissible for the military to assist law enforcement with aerial photography and tracking, as was the case with the Army fixed-wing surveillance aircraft used to locate the so-called "D.C. Sniper" in 2002.⁷ From the War on Drugs to policing the Olympics, the Department of Defense (DOD)

³ Bonnie Baker, "The Origins of *Posse Comitatus*," *Air and Space Power Chronicles* (Nov 1999)

⁴ U.S. Code Title 10, Armed Forces, Chapter 15, Insurrection

⁵ Craig T. Trebilock, "The Myth of *Posse Comitatus*," *Journal of Homeland Security*, (Oct 2000)

⁶ U.S. Code Title 42, The Public Health and Welfare, Chapter 68, Disaster Relief

⁷ Eric V. Larson and John E. Peters, "Preparing the U.S. Army for Homeland Security" (Rand Corporation, 2001), Appendix D.

has had a significant role in domestic security since the early 1980s.⁸

Clearly, *Posse Comitatus* does not prevent the use of the military in domestic affairs. Rather, it serves as a reminder that the military is a warfighting force and as such, it should not be burdened with a host of additional domestic responsibilities. As the preceding exceptions to the law illustrate, this reminder is not sufficient to restrict the use of the military on U.S. soil. These exceptions were recently highlighted by the government's demand for competent disaster management. As former White House aide James Pinkerton cited, "Men and women in uniform are oriented toward getting things done. They are trained to complete their mission or die trying. And as Hurricane Katrina made clear, the rest of the government doesn't hold to such a high standard".⁹

The Department of Defense is well-regarded by the public as an agency that strives to complete any mission assigned. When a failure occurs in another branch of government, the solution has been to call in the military. This pattern has led to over-dependence on the active duty military as the lead agency for any problem requiring a rapid and robust response force capable of handling security, emergency logistics, and interagency communications during a disaster.

⁸ John A Tappan, "Military Involvement in the War on Drugs: "Just Say No", U.S. Army War College Quarterly, April 1998, pg 33.

⁹ James Pinkerton, "Send in the Troops," *USA Today*, 15 October 2005, pg A.12.

Government officials seem determined to continue this trend and have taken initial steps to remove the barriers preventing open-ended use of the military in domestic situations. Senate Armed Services Committee Chairman John Warner recently wrote a letter to the Defense Secretary requesting, "a thorough review of the entire legal framework governing a President's power to use the regular armed forces to restore public order...", and further that "this review should include the *Posse Comitatus* Act itself... [It] should also include large-scale public health emergencies, terrorist incidents and any other situation which could result in serious breakdown in public order".¹⁰

Shortly after the disaster in New Orleans, President Bush observed Hurricane Rita from U.S. Northern Command (USNORTHCOM) at Peterson Air Force Base, Colorado. Impressed by USNORTHCOM's command and control capabilities, the President subsequently urged Congress to study whether the Defense Department should take the lead in coordinating the nation's response to hurricanes and other domestic catastrophes.¹¹

Dangers in Revision or Elimination of the Act

Before Congress revises or repeals *Posse Comitatus*, it should consider the dangers in doing so.

¹⁰ Senator John Warner, letter to Secretary Donald Rumsfeld, 14 September 2005

¹¹ Tom Philpott, "Posse Comitatus," *Air Force Magazine*, November 2005, 28.

First, the civil liberties of American citizens must be considered. There is a significant difference between military force and civilian police. Civilian police focus on protection of Miranda rights, de-escalation of a situation whenever possible, and the use of lesser forms of force to subdue criminal suspects.¹² Military force centers on the decision of when to use lethal force, with de-escalation being an exception to stand-off situations, not the rule.

Second, the nation has a long history of leaving law enforcement to civilian authorities at the state level, as a direct result of their experience with the British military in the Colonies.¹³ The resulting concept of Federalism, separating state and federal power, is a cornerstone of the U.S. system of government. This principal will dissolve if governors do not retain their authority to handle issues in their state that are within their control.

Finally, the military's primary mission is national security. As such, any effort that does not focus on fighting and winning the nation's wars will only decrease military readiness. Loren Thompson, a defense analyst with the Lexington Institute notes, "The military needs to focus on its core competency--fighting wars. If we load the military with every mission other cabinet

¹² Matthew Carlton Hammond, "The *Posse Comitatus* Act: A Principle In Need of Renewal," *Washington University Law Quarterly* 75 no. 2 (Summer 1997): 2-3

¹³ William Banks, "Mold, Mildew and the Military Role in Disaster Response," *The Jurist Legal News and Research*, 17 October 2005.

agencies don't do well, then it won't be able to do its job well."¹⁴

It's clear that allowing continued erosion of *Posse Comitatus* will have unwanted consequences; the question remains what should be done to address shortfalls in the nation's disaster-response plan and clarify the military's role in the same. Several approaches to this problem are in public discussion.

Troubled Domestic Security Approaches

First, some insist that that the Act should not be altered. These "legal preservationists" cite the ability of the President and Congress to circumvent *Posse Comitatus* as legal flexibility and believe that the current use of the DOD works well.¹⁵ However, this view fails to recognize the danger in the erosion of *Posse Comitatus* and the lack of definition in the military's domestic role. Ultimately, the military must remain focused on national defense and the continued erosion of *Posse Comitatus* will only undermine that effort.

Another group has pushed for the creation of a new branch of the armed forces to handle domestic incidents and internal security. This is not an entirely new idea. In 2000, then-Presidential candidate Senator Lamar Alexander proposed the creation of a new branch of the military to replace the

¹⁴ Mark Sappenfield, "Military Wary of Disaster Role," *The Christian Science Monitor*, 29 September 2005, pg 1.

¹⁵ "Leave Posse Law Alone," *USA Today*, 10 October 2005

Immigration and Naturalization Service and the Border Patrol, ostensibly to protect the borders, but also to stop the flow of illegal drugs into the country.¹⁶ This plan, however, would heavily tax Federal resources and diminish States' autonomy to handle their own affairs.

The best solution is an approach that strengthens *Posse Comitatus* and empowers the National Guard to handle domestic events.

Strengthen Posse Comitatus

First, Congress must shore up holes in *Posse Comitatus* that are likely to load active duty forces with further domestic duties, to include manning and funding cabinet agencies that have peacetime security responsibilities. For example, the Drug Enforcement Agency must be capable of handling their mission. Drug interdiction does not equal quality combat training for the military; neither does policing the Olympics or quelling an urban riot. These are States' peacetime policing responsibilities.

Laws that have been passed to circumvent *Posse Comitatus*, such as the previously discussed Insurrection Act and the Stafford Act, must not be allowed to endanger the Nation's defense. These legal instruments must also reflect the States' roles and responsibilities in the employment of the National Guard.

¹⁶ Senator Lamar Alexander, Presidential Announcement Address in Nashville, TN, 9 March 1999.

The verbiage of the Act itself must reflect the nation's priorities and clearly state the role of all branches of the active duty military in domestic affairs. Lastly, the role of the National Guard must be clarified as the lead agency in responding to events on U.S. soil.

Empower the National Guard

The National Guard is the nation's key to a robust disaster-response capability. As Secretary Rumsfeld recently noted, some 300,000 Guard members remained available for duty during the peak of involvement in Hurricane Katrina recovery.¹⁷ As local citizens, Guard soldiers are seen as neighbors and are more readily accepted as law enforcers.

The monitoring and enforcement of Guard readiness and capabilities standards are critical to this plan's success, a task for which USNORTHCOM is well-positioned. Small, traveling inspection teams comprised of seasoned military experts must be organized and deployed from USNORTHCOM to conduct annual readiness inspections of States' Guard forces. States' performance during these inspections will receive a "readiness rating" based on their capability to respond to a situation. These ratings must be tied to the homeland defense funds provided to the states. States receiving certification will be given greater autonomy to control

¹⁷ Sappenfield, 2

expenditure of these funds, while those failing to achieve certification will have their expenditures guided by USNORTHCOM recommendations to better prepare their response capability.

Additionally, USNORTHCOM must have the capability to provide Guard units that fail to receive certification with further training in affected readiness areas, such as security, logistics, communications or field medicine.

With the National Guard's readiness standards monitored and assessed by the Federal government and security, logistics, communications, and medical guidance from USNORTHCOM, the Nation can be assured that Guard forces will be ready to respond to any emergency.

During a truly catastrophic disaster or attack--an event of massive destruction that is anticipated to occur no more than once or twice in a decade--USNORTHCOM will be able to provide limited assistance to the affected state. In such a scenario, a state governor would request the support of a small, rapid reaction force from USNORTHCOM, which would be on standby to deploy within 24 hours to a domestic emergency and assist Guard forces on scene. While the initial response will remain the States' responsibility, these active duty forces will augment the National Guard during a situation that overwhelms their ability to immediately respond. These active duty forces will include an appropriate mix of security personnel, logisticians, communicators, and medical

personnel and will remain available to bolster the National Guard's capabilities during the ensuing 14 days, a critical period in disaster management.

Conclusion

The *Posse Comitatus* Act serves a legitimate purpose, but it has been diluted to the point of ineffectiveness. Continued use of the active duty military as a domestic security force poses dangers to civil liberties, States' autonomy, and military readiness. While the military is a capable force for rapid response scenarios, States' Guard assets must be capable of handling their disaster relief and domestic security responsibilities. U.S. Northern Command is ideally suited for the task of certifying Guard readiness and their capability to complete these duties, while the mission remains under State control. *Posse Comitatus* and the National Guard must be strengthened. The Nation must do so to protect the life and liberty of its citizens.

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