

Posse Comitatus – Has the Posse outlived its purpose?

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The Posse Comitatus Act¹, has been a limitation on the use of military forces in civilian law enforcement operations since the Nineteenth Century. Today, where national defense may hinge on detecting smuggled biological or chemical weapons in small quantities, the continued relevance of this law is at issue.

The history of the Posse Comitatus Act (“the Act” or PCA) reflects a tension between preserving the national defense, while keeping the military from becoming entangled in day to day law enforcement. The name Posse Comitatus means, “the Power of the County”, bringing to mind colorful images of the old west county sheriff swearing in a posse to pursue fleeing criminals. The Act was born out of the extensive use of federal troops for law enforcement in the South following the Civil War. Congress, recognizing that the long-term use of the Army to enforce civilian laws posed a potential danger to the military’s subordination to civilian control, passed the Act. The 1878 Posse Comitatus Act made it a crime for anyone to use the Army to enforce federal, state, or local civil laws.²

In order to understand the current relevancy of the Act, one must first examine to whom it applies and under what circumstances. Through statute and regulation, the Posse Comitatus Act restricts the law enforcement activities of the active and reserve³ components of the Army, Air Force, Navy and Marines. It does not apply to the Coast Guard, whose peacetime mission specifically includes the enforcement of civilian maritime laws. As a federal statute, the Act also does not apply to the National Guard when the Guard is operating in Title 13, state-controlled status.⁴

The prohibitions of the Act are directed at preventing the military from becoming a national police force or *Guardia Civil*. Accordingly, the Act prohibits anyone from using the military to “execute the laws.” Execution of the laws includes the arrest or detention of criminal suspects⁵, search and seizure activities, restriction of civilian movement through the use of blockades or checkpoints, gathering of evidence, and certain uses of military personnel as undercover narcotics officers. In essence, the closer the role of the

¹ “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 under this title or imprisoned not more than two years, or both.” 18 U.S.C. 1385

² While the language of the statute today specifically addresses applicability to the Army and Air Force, the constraints of the Act have been apply to the Navy and Marine Corps through DOD Directive 5525.5. The Secretary of Defense or Secretary of the Navy are the approval authorities for action that would constitute law enforcement activities by the Navy or Marines.

³ Reservists on active duty, active duty for training, or inactive duty for training fall under the Act

⁴ If the Guard is federalized to serve in Title 10 status, the Posse Comitatus Act then applies.

⁵ The Uniform Code of Military Justice, UCMJ, is an exception to the Posse Comitatus Act, which gives the military the jurisdiction to enforce military and civilian laws against military personnel through courts-martial and other disciplinary means, in order to preserve good order and discipline within the military.

military personnel comes to that of a police officer on the beat, the greater the likelihood that the Act is being violated.

The federal courts have had several opportunities to define what behavior constitutes “execution of the laws” such as to violate the Act. The courts have consistently ruled that the Act does not prohibit military involvement in civilian law enforcement activities, as long as that involvement is in a “passive” or support role.⁶ Recognizing that the military possesses unique equipment and training that may be valuable to civilian police departments, the courts have held that many types of logistical support may be provided, without violating the central tenet that the military may not actually enforce civilian laws. Using a test based upon whether the military’s involvement is “passive” or “active”, the courts have held that providing supplies, equipment, training, facilities, and certain types of intelligence⁷ do not violate the Posse Comitatus Act.⁸ Military personnel may be involved in planning and supporting civilian law enforcement activities (an indirect or passive role), as long as they are not directly involved in the actual arrest or seizure of evidence.

While the Act may appear to be a substantial bar to military involvement in law enforcement activities, the reality in application is quite different. The trend during the 1990s, has been for the federal government to erode the prohibitions of the Posse Comitatus Act in order to meet a variety of modern law enforcement challenges. This erosion has increased since the end of the Cold War as a product of the misconception among some politicians that the United States has a military without a mission.

The frequency with which the military has become involved in civilian law matters has varied throughout our history, typically reaching high points during times of national emergency⁹. The difference in the 1990’s, however, has been to increase the routine use of the military in domestic law enforcement activities during a period of relative national calm and security. Statutes and regulations enacted in the past decade permit the use of military personnel in drug interdiction, and immigration enforcement.¹⁰ Although such involvement is supposed to be “indirect” under those statutes, the reality is that armed active duty military personnel are carrying out an enforcement activity that brings them into direct contact with criminal suspects.¹¹ The fact is that the political interest in

⁶ State v. Nelson, 298 NC 573, 260 SE2d 629, cert. den. 446 U.S. 929, 100 S. Ct. 1867, 64 L. Ed. 2d 282 (1980)

⁷ Information must be collected in the normal course of military operations and must comport with all other federal laws limiting the collection of information on U.S. citizens.

⁸ United States v. Red Feather, 392 F. Supp. 916 (DC SD 1975).

⁹ The Second World War, for example, was a period where the military was so involved in attempting to deter domestic sabotage that it was used to detain Japanese-American civilians. In the interest of national defense during wartime the Posse Comitatus Act was essentially ignored.

¹⁰ 10 U.S.C. sections 371-181.

¹¹ The tragic shooting of a shepherd in 1999 by Marine troops on a smuggling/illegal immigration interdiction mission in the Southwest reflects the thin distinction between “passive” and “active” law enforcement. When armed military personnel are placed in a position where they may need to defend themselves to carry out their “passive” mission, it is a semantic exercise to claim they are not acting in a law enforcement capacity. Although the shooting was ruled self-defense, after the sixteen year old

stopping drug and alien smuggling is currently greater than the concern as to whether the military is being injected into a traditional civilian law enforcement role contrary to the principles upon which the Posse Comitatus Act was founded.¹²

These early steps at injecting the military into domestic law enforcement were perhaps misguided, primarily due to the fact that they injected the military into missions that they are not trained to perform. They have a value, however, in creating a precedent for the use of the military in homeland defense. For decades the primary threat to U.S. security interests have been overseas, in Europe or the Middle East. With the dissolution of the Soviet Union and the increase in technological capabilities in hostile Third World nations, however, the focus on the threat of terrorism aimed at the U.S. has increased. The most effective use of military personnel in preserving domestic security and order in the next century is not as narcotics police or border patrol agents, but rather as defenders against terrorism and weapons of mass destruction.

The military possesses unique training and equipment advantages in this arena that cannot be duplicated by civilian law enforcement. The fact that the National Guard is not subject to the Posse Comitatus Act while in its state status also provides a great deal of flexibility to planners for homeland defense. National Guard troops may be actively employed in law enforcement activities in addition to their military specialty. While to the untrained eye the distinction between a BDU¹³ clad Army Reservist and a BDU clad National Guardsman may be nonexistent, the legal distinction between them is significant. During a natural disaster Army reservists or Guardsman may both provide logistical aid such as water purification, medical assistance, and communications.¹⁴ However, due to the Posse Comitatus Act, it is only the Guardsman in his/her State status that can take an active role in suppressing looting and in providing general security for an area that has lost effective law enforcement control.¹⁵

Planners for homeland defense may utilize National Guard troops in reacting to a chemical attack without concern as to whether their gathering of evidence may run afoul of the Posse Comitatus Act.¹⁶ In the chaotic atmosphere that would surely follow the use

shepherd fired his weapon in the direction of Marines, the fact that armed active duty forces were even placed in a position to trade gunfire with the boy reflects the significant erosion of the Posse Comitatus Act.

¹² As the Posse Comitatus Act is a statute and not a constitutional provision it can be circumvented by subsequent statutory provisions, which authorize the military's use in a law enforcement role. The language of the provisions of 10 U.S.C. 371-381, which involve the military in smuggling and immigration activities do not state that they are an exception to Posse Comitatus. In application, however, they are, as the placement of armed active duty troops on the border to interdict smuggling can not reasonably be considered passive or indirect in nature.

¹³ Battle Dress Uniform

¹⁴ The Stafford act, 42 U.S.C. 5121, et seq. permits the President to declare a disaster or emergency and introduce federal troops to preserve life and property. This does not provide authority for them to act in a general law enforcement role.

¹⁵ The Reservist may only act in such a capacity upon a presidential proclamation pursuant to the Civil Disturbance Statutes.

¹⁶ The Pentagon is in fact currently organizing 27 Weapons of Mass Destruction Civilian Support teams within the National Guard which will fall under the command of their respective State commands, but which will be assigned to zones established by the Federal Emergency Management Agency (FEMA).

of chemical or biological agents within the U.S., National Guard troops may also be employed to maintain security without the legal restrictions that accompany Army Reservists operating under Title 10, U.S.C.

The Posse Comitatus Act has never been an absolute prohibition on the military's involvement in maintaining domestic order.¹⁷ Even when originally enacted it was recognized that there were certain exceptions to its scope. The federal Government has an inherent right under the Constitution to preserve public order and carry on federal functions. The American Civil War was the most notable use of federal armed forces to preserve federal functions. This power continues today¹⁸, and with the evolution and growth of federal authority during the Twentieth Century, the scope of potential uses for federal troops in civilian law enforcement has grown as well.¹⁹

The current swing of the pendulum reflects a nation that is more than ready to embrace military involvement in homeland defense. Drug smuggling and illegal immigration were perceived by some as the national defense challenges for the nineties. Since the Gulf War the military has generally received high marks from the public as an organization that is trusted and admired. That support, coupled with the increasing recognition that a suitcase of chemical or biological agent smuggled across our borders could result in a crippling loss of life, is leading to an acceptance of an increased role for the military in homeland defense. With its unique detection and response capabilities to chemical/ biological attacks, the military must be heavily involved in any effective counter-terrorism response plan.²⁰

By virtue of the several statutory exceptions to the Posse Comitatus Act in the past decade, coupled with the general Constitutional authority of the President to preserve order, there are few areas of domestic law enforcement activity where the military is precluded from participating in times of national emergency or disaster. While the Posse Comitatus Act still serves a valuable function in deterring a lower level commander or politician from engaging in unauthorized "police" activity using military forces, the Act today provides little hindrance to the National Command Authority in executing civilian laws in times of emergency through military personnel. Through proper, legal declarations of Presidential emergency authority and/or through the use of National Guard assets in state status, it is increasingly likely that the military will play a significant enforcement role in response to domestic terrorism and other disasters for the foreseeable future.

¹⁷ The PCA does not apply to military operations or conduct overseas.

¹⁸ The Civil Disturbance Statutes, 10 U.S.C. 331-334 authorize the use of active duty military personnel, upon order of the President, to enforce civilian law where a state has requested assistance, the president deems it necessary to enforce federal laws, or to protect civil rights. This broad authority was employed to quell the Los Angeles riots in the early 1990s.

¹⁹ The preservation of interstate commerce and navigable waterways for example are purely federal functions where the use of federal military forces would be lawful if those federal functions were threatened.

²⁰ An unwise or overzealous employment of the military in civilian affairs could obviously cause public opinion and tolerance to swing the other way.

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