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The Posse Comitatus Act and Related Matters: A Sketch

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Summary

The Posse Comitatus Act states that: *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 under this title or imprisoned not more than two years, or both.* 18 U.S.C. § 1385. It reflects an American tradition that bridles at military involvement in civilian affairs. Congress, however, has approved a number of instances where extraordinary circumstances warrant a departure from the general rule, particularly in cases where the armed forces provide civilian assistance without becoming directly involved in civilian law enforcement. This is an abridged version of *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, CRS Report 95-964 in which the authorities for the statements made here may be found. This report summarizes proposed bills that could result in increased interaction between military and civil authorities. (H.R. 1986, H.R. 1815, S. 1042, S. 1043).

The Posse Comitatus Act, 18 U.S.C. § 1385, is perhaps the most tangible expression of an American tradition , born in England and developed in the early years of our nation, that rebels against military involvement in civilian affairs. The Declaration of Independence listed among our grievances against Great Britain that the King had "kept among us, in times of peace, Standing Armies without the consent of our legislatures," had "affected to render the Military independent of and superior to the civil power." The Articles of Confederation addressed the threat of military intrusion into civilian affairs by demanding that the armed forces assembled during peacetime be no more numerous than absolutely necessary for the common defense, and by entrusting control to civil authorities within the states. The Constitution continued the theme. It provided that a civilian, the President, should be the Commander in Chief of the Army and Navy of the United States and that civilian authorities, the Congress, should be solely empowered to raise and support Armies, provide and maintain a Navy, and make rules for their government and regulation. The Bill of Rights limited the quartering of troops in private homes, U.S. Const. Amend. III, and noted that "a well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed," U.S.

Const. Amend. II. The Constitution, on the other hand, explicitly permitted the Congress to provide for calling out the militia to execute the laws, suppress insurrection, and repel invasion, U.S. Const. Art. I, § 8, cl.16. Soon after Congress was first assembled under the Constitution, it authorized the President to call out the militia, initially to protect the frontier against "hostile incursions of the Indians," and subsequently in cases of invasion, insurrection, or obstruction of the laws. The President's authority to call upon the state militia to aid in putting down insurrections is reminiscent of the authority enjoyed by the sheriff at common law to call upon the posse comitatus. In the beginning the two were comparable but unrelated. Even though Congress empowered the President to call out the militia to overcome obstructions to law enforcement, it continued to vest the federal equivalent of the sheriff, the federal marshal, with the power to call forth the posse comitatus in performance of his duties.

Congress in some cases specifically authorized recourse to the posse comitatus for the enforcement of particular statutes. Under the Fugitive Slave Act, for instance, owners whose slaves had escaped to another state were entitled to an arrest warrant for the slaves and to have the warrant executed by federal marshals. The marshals in turn might "summon and call to their aid the bystanders, or *posse comitatus* of the proper county . . . [and] all good citizens [were] commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required, as aforesaid, for that purpose," 9 Stat. 462, 463 (1850). Attorney General Caleb Cushing declared that the "bystanders" contemplated by the Fugitive Slave Act might include members of a state militia even when not in federal service, and in fact encompassed members of the armed forces by virtue of their duties as citizens as part of the posse comitatus.

Following the Civil War, the use of federal troops to execute the laws, particularly in the states that had been part of the Confederacy, continued even after all other political restrictions had been lifted. The Posse Comitatus Act was passed as part of an Army appropriations bill in response. With exception of a reference to the Air Force, it has remained essentially unchanged ever since, although Congress has authorized a substantial number of exceptions and has buttressed the Act with an additional proscription against use of the armed forces to make arrests or conduct searches and seizures. While the war against terrorism has led some to call for a reexamination of the role of the military in domestic law enforcement, Congress, in establishing the Department of Homeland Security, expressed its sense reaffirming the continued importance and applicability of the Posse Comitatus Act. 6 U.S.C. § 466.

When the Act Does Not Apply

Constitutional Exceptions: The Posse Comitatus Act does not apply "in cases and under circumstances expressly authorized by the Constitution," 18 U.S.C. § 1385. It has been observed that the Constitution contains no provision expressly authorizing the use of the military to execute the law, that the exception was included as part of a face-saving compromise, and that consequently it should be ignored. The older commentaries suggest that the word "expressly" must be ignored, for otherwise in their view the Posse Comitatus Act is a constitutionally impermissible effort to limit the powers of the President. The regulations covering the use of the armed forces during civil disturbances do not go quite that far, but they do assert two constitutionally based exceptions – sudden emergencies and protection of federal property. The question of whether the constitutional

exception includes instances where the President is acting under implied or inherent constitutional powers is one the courts have yet to answer.

Statutory Exceptions – Generally. The Posse Comitatus Act does not apply where Congress has expressly authorized use of the military to execute the law. Congress has done so in three ways, by giving a branch of the armed forces civilian law enforcement authority, by establishing general rules for certain types of assistance, and by addressing individual cases and circumstances with more narrowly crafted legislation. Thus it has vested the Coast Guard, a branch of the armed forces, with broad law enforcement responsibilities. Second, over the years it has passed a fairly extensive array of particularized statutes, like those permitting the President to call out the armed forces in times of insurrection and domestic violence, 10 U.S.C. §§ 331-335. Finally, it has enacted general legislation authorizing the armed forces to share information and equipment with civilian law enforcement agencies, 10 U.S.C. §§ 371-382.

These last general statutes were crafted to resolve questions raised by the so-called Wounded Knee cases (see below). The legislation contains both explicit grants of authority and restrictions on the use of that authority for military assistance to the police – federal, state and local – particularly in the form of information and equipment, 10 U.S.C. §§ 371-382. Section 371 specifically authorizes the armed forces to share information acquired during military operations and in fact encourages the armed forces to plan their activities with an eye to the production of incidental civilian benefits. The section allows the use of military undercover agents and the collection of intelligence concerning civilian activities only where there is a nexus to an underlying military purpose. Under sections 372 through 374, military equipment and facilities may be made available to civilian authorities; members of the armed forces may train civilian police on the operation and maintenance of equipment and may provide them with expert advice; and military personnel may be employed to maintain and operate the equipment supplied.

The authority granted in sections 371-382 is subject to three general caveats. It may not be used in any way that could undermine the military capability of the United States; the civilian beneficiaries of military aid must pay for the assistance; and the Secretary of Defense must issue regulations to ensure that the authority of sections 371 to 382 does not result in use of the armed forces to make arrests or conduct searches and seizures solely for the benefit of civilian law enforcement.

Military Purpose. The armed forces, when in performance of their military responsibilities, are beyond the reach of the Posse Comitatus Act and its statutory and regulatory supplements. Neither the Act nor its legislative history resolves the question of whether the Act prohibits the Army from performing its military duties in a manner which affords incidental benefits to civilian law enforcement officers. The courts and commentators believe that it does not. As long as the primary purpose of an activity is to address a military purpose, the activity need not be abandoned simply because it also assists civilian law enforcement efforts.

Willfully Execute the Laws. The Act is limited to "willful" misuse of the Army or Air Force. The Senate version of the original Act would have limited proscription to "willful and knowing" violations, 7 *Cong. Rec.* 4302 (1878); the House version had no limitation, 7 *Cong. Rec.* 4181 (1878). The compromise which emerged from conference opted to forbid only willful violations, but nothing in the legislative history explains what

the limitation means. It seems unlikely that a court would convict for anything less than a deliberate disregard of the law's requirements.

When has the Army or Air Force been used "to execute the laws"? Existing case law and commentary indicate that "execution of the law" in violation of the Posse Comitatus Act occurs (a) when the armed forces perform tasks ordinarily assigned not to them but to an organ of civil government, or (b) when the armed forces perform tasks assigned to them solely for purposes of civilian government. While inquiries may surface in other contexts, such as the use of the armed forces to fight forest fires or to provide assistance in the case of other natural disasters, Posse Comitatus Act questions arise most often when the armed forces assist civilian police.

The tests used by most contemporary courts to determine whether military forces have been used improperly as police forces in violation of the Posse Comitatus Act were developed out of disturbances in 1973 at Wounded Knee on the Pine Ridge Indian Reservation in South Dakota and inquire: (1) whether civilian law enforcement officials made a direct active use of military investigators to execute the law; (2) whether the use of the military pervaded the activities of the civilian officials; or (3) whether the military was used so as to subject citizens to the exercise of military power which was regulatory, prescriptive, or compulsory in nature.

Military Coverage

Navy and Marines. The Posse Comitatus Act proscribes use of the Army or the Air Force to execute the law. It says nothing about the Navy, the Marine Corps, the Coast Guard, or the National Guard. The courts have generally held that the Posse Comitatus Act by itself does not apply to the Navy or the Marine Corps. They maintain, however, that those forces are covered by similarly confining administrative and legislative supplements, which appear in the Department of Defense (DoD) Directive.

Coast Guard. The Posse Comitatus Act likewise says nothing about the Coast Guard. The Coast Guard is a branch of the armed forces, located within the Department of Homeland Security, 14 U.S.C. § 1 (as amended), but relocated within the Navy in time of war or upon the order of the President, 14 U.S.C. § 3. The Act will apply to the Coast Guard while it remains part of the Department of Homeland Security. While part of the Navy, it is subject to the orders of the Secretary of the Navy, 14 U.S.C. § 3, and consequently to any generally applicable directives or instructions issued under the Department of Defense or the Navy. As a practical matter, however, the Coast Guard is statutorily authorized to perform law enforcement functions, 14 U.S.C. § 2. Even while part of the Navy its law enforcement activities would come within the statutory exception to the posse comitatus restrictions, and the restrictions applicable to components of the Department of Defense would only apply to activities beyond those authorized.

National Guard. The Act is silent as to what constitutes "part" of the Army or Air Force for purposes of proscription. There is little commentary or case law to resolve questions concerning the coverage of the National Guard, the Civil Air Patrol, civilian employees of the armed forces, or regular members of the armed forces while off duty.

Strictly speaking, the Posse Comitatus Act predates the National Guard only in name for the Guard "is the modern Militia reserved to the States by Art. I, § 8, cls.15, 16, of the

Constitution" which has become "an organized force, capable of being assimilated with ease into the regular military establishment of the United States," *Maryland v. United States*, 381 U.S. 41, 46 (1965). There seems every reason to consider the National Guard part of the Army or Air Force, for purposes of the Posse Comitatus Act, when in federal service. When not in federal service, historical reflection might suggest that it is likewise covered. Recall that it was the state militia, called to the aid of the marshal enforcing the Fugitive Slave Act, which triggered Attorney General Cushing's famous opinion. The Posse Comitatus Act's reference to "posse comitatus or otherwise" is meant to abrogate the assertion derived from Cushing's opinion that troops could be used to execute the law as long as they were acting as citizens and not soldiers when they did so.

On the other hand, the National Guard is creature of both state and federal law, a condition which as the militia it has enjoyed since the days of the Articles of Confederation. Courts have held that members of the National Guard when not in federal service are not covered by the Posse Comitatus Act. Similarly, the DoD directive is only applicable to members of the National Guard when they are in federal service.

Off Duty, Acting as Citizens and Civilian Employees. The historical perspective fares little better on the question of whether the Posse Comitatus Act extends to soldiers who assist civilian law enforcement officials in a manner which any other citizen would be permitted to provide assistance, particularly if they do so while off duty. Congress passed the Act in response to cases where members of the military had been used based on their civic obligations to respond to the call as the posse comitatus. The debate in the Senate, however, suggests that the Act was not intended to strip service members of all civilian rights and obligations. The more recent decisions have focused on the nature of the assistance provided and whether it is incidental to action taken primarily for a military purpose.

Some have questioned whether civilian employees of the armed forces should come within the proscription of the Act, but most, frequently without comment, seem to consider them "part" of the armed forces for purposes of the Posse Comitatus Act. The current DoD directive expressly includes civilian employees "under the direct command and control of a military officer" within its Posse Comitatus Act policy restrictions.

Geographical Application

The Posse Comitatus Act contains no expression of extraterritorial application, but it seems unlikely that it was meant to apply beyond the confines of the United States, its territories and possessions. Congress enacted it in response to problems occurring within the United States and its territories, problems associated with the American political process and policies and actions that promoted military usurpation of civilian law enforcement responsibilities over Americans. Congress does appear to have intended the authority and restrictions contained in 10 U.S.C. §§ 371-382 to apply both in the United States and beyond its borders.

Consequences of Violation

Prosecution. The Posse Comitatus Act is a criminal statute under which there has apparently never been a prosecution. It has been invoked with varying degrees of success,

however, to challenge the jurisdiction of the courts, as a defense in criminal prosecutions for other offenses, as a ground for the suppression of evidence, as the grounds for, or a defense against, civil liability, and as a means to enjoin proposed actions by the military.

Exclusion of Evidence. Allegations that the Posse Comitatus Act has been violated are made most often by defendants seeking to exclude related testimony or physical evidence, but most cases note the absence of an exclusionary rule, often avoiding unnecessary analysis of the scope of the Act and whether a violation has occurred.

Jurisdiction and Criminal Defenses. Defendants have found the Act helpful in prosecutions where the government must establish the lawfulness of its conduct as one of the elements of the offense. Several defendants at Wounded Knee persuaded the court that evidence of possible violations precluded their convictions for obstructing law enforcement officials "lawfully engaged" in the performance of their duties.

Civil Liability. The Eighth Circuit has declared that a violation of the Act might constitute an unreasonable search and seizure for purposes of the Fourth Amendment, giving rise to a *Bivens* cause of action against offending federal officers or employees.

Compliance. The most significant impact of the Posse Comitatus Act is attributable to compliance by the armed forces. As administrative adoption of the Act for the Navy and Marines demonstrates, the military has a long standing practice of avoiding involvement in civilian affairs which it believes are contrary to the Act, and which date back to military acceptance of civilian authority since the founding of the Republic.

Proposed New Exceptions

H.R. 1986 would amend title 10 to allow the Secretary of Defense to provide military personnel to assist the Department of Homeland Security when necessary to respond to "a threat to national security posed by the entry into the United States of terrorists, drug traffickers, or illegal aliens." Specially trained service members could be assigned to assist the Bureau of Border Security and the U.S. Customs Service, but would not be authorized to carry out searches, seizures, or other similar law enforcement activities. The Secretary would be empowered to establish ongoing joint task forces to carry out these activities. Military members would first have to undergo training in issues related to law enforcement in border areas and would have to be accompanied by civilian law enforcement officers. H.R. 1986 passed the House as section 1035 of the National Defense Authorization Act for FY2006 (**H.R. 1815**), but without a limitation that would have ended the authority after September 30, 2007.

S. 1042 and S. 1043, the Senate Defense authorization bills, would add a new section 383 to title 10, which would authorize the Secretary of Defense to use unmanned aerial vehicles and DoD personnel to conduct aerial reconnaissance within U.S. Northern Command's area of responsibility, in order to monitor air and sea traffic along the border and coastline, and to communicate resulting information to the appropriate federal, state, and local law enforcement officials. The activity would be funded from counterdrug appropriations. The prohibitions against military personnel participating in searches, seizures, or arrests would apply.