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THE POSSE COMITATUS ACT AND HOMELAND SECURITY
By John R. Brinkerhoff, February 2002

As acting associate director for national preparedness of the Federal Emergency Management Agency (FEMA) from 1981 to 1983, Colonel John R. Brinkerhoff, U.S. Army Retired, was responsible for policy formulation and

program oversight of the Civil Defense Program, National Mobilization Preparedness Program, Continuity of Government, and the National Defense Stockpile. During that time the United States had a program to Defend America against a massive nuclear attack as well as attacks by communist agents and Special Forces troops. Colonel Brinkerhoff was also deputy executive secretary of the Emergency Mobilization Preparedness Board (EMPB), the senior level inter-agency forum to coordinate all aspects of national preparedness. The EMPB was chaired by the National Security Advisor and consisted of the deputy secretaries of the departments and the heads of several independent agencies. During the EMPB era, a national plan was prepared and approved by President Reagan, and actions were taken to implement it.
Prior to joining FEMA, Colonel Brinkerhoff was a career senior executive in the Office of the Secretary of Defense. His last position before leaving OSD to joint FEMA was as acting deputy assistant secretary for reserve affairs. He was also director of manpower programming, director of intergovernmental affairs, and special assistant to the deputy assistant secretary of defense for reserve affairs. Before joining the civil service, Mr. Brinkerhoff was an Army officer for 24 years. He retired in 1974 after 24 years of active commissioned service in a variety of troop assignments in Korea, Germany, Vietnam, and the United States. While on active duty he served two tours on the Army Staff and two tours in OSD. For the past seven years he has been an adjunct research staff member of the Institute for Defense Analyses working on a variety of issues including Homeland Defense.

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.

-***Title 18, U.S. Code, Section 1385***

The quotation above is the much-discussed Posse Comitatus Act in its entirety. That is it! That is all there is to it. Seldom has so much been derived from so little. Few articles written about the act and its implications cite the law as it is written, leading one to believe that the authors have never taken the trouble to go to the U.S. Code and see for themselves or to look up the legislative history of the act or to read the exceptions in the law. As a result, much of what has been said and written about the Posse Comitatus Act is just plain nonsense.

The Posse Comitatus Act is often cited as a major constraint on the use of the military services to participate in homeland security, counterterrorism, civil disturbances, and similar domestic duties. It is widely believed that this law prohibits the Army, Navy, Air Force, and Marine Corps from performing any kind of police work or assisting law enforcement agencies to enforce the law. This belief, however, is not exactly correct.

What is correct is that new rules are needed to clearly set forth the boundaries for the use of federal military forces for homeland security. The Posse Comitatus Act is inappropriate for modern times and needs to be replaced by a completely new law.

The law was enacted originally on 18 June 1878. It was amended in 1959 to make it applicable to Alaska. It was amended in 1994 to remove an upper limit of $10,000 on the fine that was in the original act. As shall be noted later, in recent years Congress has enacted other laws that specify when the Posse Comitatus Act does not apply.

The biggest error is the common assertion that the Posses Comitatus Act was enacted to prevent the military services (Army, Navy, Air Force, and Marine Corps) from acting as a national police force. Colonel Richard Hart Sinnreich, in an otherwise admirable piece, opined thusly in an article in the 12 December 2001 Washington Post: *The American aversion to a military gendarmerie was formalized after Reconstruction in the Posse Comitatus Act of 1878, which severely restricts the use of active military forces in domestic law enforcement.*

Reconstruction was the 12 years from 1865 to 1877 when the U.S. Army occupied the defeated Southern states. Major Craig T. Trebilcock, U.S. Army Reserve, in his Journal of Homeland Security article õThe Myth of Posse Comitatus,ö does a good job at pointing out that the use of military personnel to enforce the law is in fact allowable, but makes a mistake when he says: *The Posse Comitatus Act was passed to remove the Army from civilian law enforcement and to return it to its role of defending the borders of the United States.*

Another gross misinterpretation of the Posse Comitatus Act was made on 13 December 2001 in the Washington Times, which reported that Provost Marshal William J. Bolduc of the Walter Reed Army Medical Center reduced the police powers of the civilian police force at that facility because they were bound by the Posse Comitatus Act. The story said: *The Posse Comitatus Act of 1878 prohibits members of the U.S. armed forces or employees of the U.S. military from enforcing laws on civilians [emphasis added].*

Sinnreich, Trebilcock, Bolduc, and most commentators who opine on this law are wrong. The Posse Comitatus Act was not, as they assert and as most people believe, enacted to prevent members of military services from acting as a national police force. It was enacted to prevent the Army from being abused by having its soldiers pressed into service as police officers (a posse) by local law enforcement officials in the post-Reconstruction South.

The Story of the Posse Comitatus Act

The law was enacted as a result of the election of 1876, which was the event that ended the period of Reconstruction after the Civil War. The law was enacted to overturn an 1854 opinion of the attorney general. The story is bound up with the conflict within the United States about slavery and the Union.

The posse comitatus doctrine comes from English common law. Posse comitatus means, literally, the õforce of the countyö; the posse comitatus is that body of men above the age of 15 whom the sheriff may summon or raise to repress a riot or for other purposes. [1]

In 1854, Caleb Cushing, attorney general for President Franklin Pierce, blessed the posse comitatus doctrine and opined that marshals could summon a posse comitatus and that both militia and regulars in organized bodies could be members of such a posse. [2] This was done to improve the enforcement of the Fugitive Slave Act of 1850. Among other things, this meant that the United States was responsible for expenses incurred by U.S. marshals in employing local police, state militia, or others in apprehending and safeguarding fugitive slaves. The Cushing Doctrine meant that even though the armed forces might be organized as military bodies under the command of their officers, they could still be pressed into service by U.S. marshals or local sheriffs as a posse comitatus without the assent of the president. This doctrine was merely the opinion of the attorney general and was not subjected to judicial or legislative review prior to its enunciation. The Cushing Doctrine encouraged the use of the Army and Navy as police forces, and it was used widely in the West, where the Army was the only armed force available to assist local officials to enforce the law along the turbulent frontier. It had little effect in the South during the period before the Civil War and came into prominence there only during Reconstruction.

During Reconstruction, the Army exercised police and judicial functions, oversaw the local governments, and dealt with domestic violence. In effect, the Army governed the 11 defeated Confederate States and was the enforcer of national reconstruction policy during all or part of the period. Before the Civil War, the militia under state control was used to control local disorders throughout the United States, but during Reconstruction, there was no effective militia in the defeated states, so the Army protected the people (especially the newly emancipated slaves) and dealt with disturbances. [3] This use of the Army was validated by the Civil Rights Act of 1866, which empowered U.S. marshals to summon and call to their aid the posse comitatus of the counties, or portions of the land or naval forces of the United States, or of the militia. As the former Confederate States were readmitted to the Union, the status of the Army changed, but its role remained much the same.

After 1868, when all but three of the Southern states had reentered the union, the problem became one of how to obtain assistance from the Army to enforce the law. [4] In response to a desperate plea from a U.S. marshal in Florida, the Attorney General of the United States, William M. Evarts, cited the posse comitatus doctrine that gave U.S. marshals and county sheriffs the right to command all necessary assistance from within their districts, including military personnel and civilians, to serve on the posse comitatus to execute legal process. [5] Evarts' decision led to numerous requests by marshals and county sheriffs for troops to use in enforcing the law, all without

presidential approval. This met with some resistance from the Army, and the War Department said that the obligation of individual officers and soldiers to obey the summons of a marshal or sheriff must be held subordinate to the paramount duty as members of a permanent military body. The troops were to act only in organized units under their own officers and would obey the orders of those officers. [6]

In 1871, President U. S. Grant sought to provide a basis for the use of troops other than posse comitatus. In accordance with Grant's policy, the War Department issued general orders saying that the forces of the United States may be committed and shall be employed to assist the civil authorities in making arrests of persons accused of crime, preventing the rescue of arrested persons, and dispersing marauders and armed organizations. [7] By the end of Grant's second term, the South was ready and able to end U.S. Government control over their states.

In the election of 1876, the Democratic candidate, Samuel J. Tilden, won a majority of the popular vote, but the Republican candidate, Rutherford B. Hayes, ended up with a majority of one vote in the Electoral College. The election was disputed and finally determined by a deal in which Tilden would concede the election if Hayes agreed to end Reconstruction. Accordingly, Reconstruction ended in 1877 with the inauguration of Hayes as the 19th president. Federal troops in the South were no longer used to enforce the law, and the Southerners became masters in their own states for the first time since the end of the Civil War.

Congress passed the Posse Comitatus Act in 1878 in a dispute over the use of federal troops by U.S. marshals in the South. Based on precedent, Attorney General Charles Devens took the position that the U.S. Judiciary Act of 1789 authorized U.S. marshals to raise a posse comitatus comprising every person in a district above 15 years of age, õincluding the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a Sheriff or Marshal.ö However, Congress had become disenchanted with the habit of U.S. marshals and sheriffs to press Army troops into their service without the approval of the commander in chief. The Southerners in particular questioned this policy. Ironically, the posse comitatus doctrine had been postulated in 1854 by Attorney General Cushing to help Southerners enforce the Fugitive Slave Act. Now it was being used to contest the Ku Klux Klan. On 27 May 1878, Representative J. Proctor Knott of Kentucky introduced an amendment to the Army appropriations bill; the amendment eventually became the Posse Comitatus Act. In passing the act, the Congress voted to restrict the ability of U.S. marshals and local sheriffs to conscript military personnel into their posses. They did not vote to preclude the use of troops if authorized by the president or Congress.

Somehow, in the past 125 years, the meaning of the Posse Comitatus Act has been stood on its head. Clearly the exposition above demonstrates that the intent of the act was not to preclude the Army from enforcing the law but instead was designed to allow the Army to do this only when directed to do so by the President or Congress. The official history of the use of the military services to enforce the laws says: *Some of those who opposed it [the Posse Comitatus Act] in the Congress charged that [it] was taking away from the President entirely the power to use troops to repress internal disorders except on request of a state governor or legislature, that President Washington could not even had dealt with the Whiskey Rebellion under its terms. This interpretation of the Posse Comitatus Act has often been raised by those protesting against federal troops intervention in the many instances it has occurred since 1878. And indeed the question of what the real meaning of the Posse Comitatus Act was has been the subject of some dispute ever since its passage ... however ... all that it really did was to repeal a doctrine whose only substantial foundation was an opinion by an attorney general, and one that had never been tested in the courts. The President's power to use both regular and military remained undisturbed by the Posse Comitatus Act, and by the law of 1861 and the Ku Klux Klan Act that had in fact been substantially strengthened during the Civil War and Reconstruction Era. But the posse Comitatus Act did mean that troops could not be used on any authority than that of the President and that he must issue a cease and desist proclamation before he did so. Commanders in the field would no longer have any discretion but must wait for orders from Washington.*

The immediate impact of the Posse Comitatus Act was not felt very much in the Southern states because President Hayes had withdrawn the troops that had been occupying them. However, there was great impact in the West, where the Cushing Doctrine had been used a great deal by marshals and local sheriffs to call on local military commanders for assistance. Having to wait for presidential approval before troops could be used was disadvantageous given the turbulence common on the frontier. [8]

The Effect of the Posse Comitatus Act

Before speculating on why this act is so misunderstood, it is useful to spell out exactly what the act as it is written does and does not do. The Posse Comitatus Actí .

- Applies only to the Army, and by extension the Air Force, which was formed out of the Army in 1947.

- Does not apply to the Navy and Marine Corps. However, the Department of Defense has consistently held that the Navy and Marine Corps should behave as if the act applied to them.
- Does not apply to the Coast Guard, which is part of the Department of Transportation and is both an armed force and a law enforcement agency with police powers.
- Does not apply to the National Guard in its role as state troops on state active duty under the command of the respective governors.
- May not apply to the National Guard (qua militia) even when it is called to federal active duty. The Posse Comitatus Act contains no restrictions on the use of the federalized militia as it did on the regular Army. [9] It is commonly believed, however, that National Guard units and personnel come under the Posse Comitatus Act when they are on federal active duty, and this interpretation is followed today.
- Does not apply to state guards or State Defense Forces under the command of the respective governors.
- Does not apply to military personnel assigned to military police, shore police, or security police duties. The military police have jurisdiction over military members subject to the Uniform Code of Military Justice. They also exercise police powers over military dependents and others on military installations. The history of the law makes it clear that it was not intended to prevent federal police (for example, marshals) from enforcing the law.
- Does not apply to civilian employees, including those who are sworn law enforcement officers. The origin and legislative history of the act make it clear that it applies only to military personnel. In those days, there were no civilian employees of the Army in the sense that there are today. In particular, no one envisioned that the Army would hire civilian police officers to enforce the laws at its facilities.
- Does not prevent the President from using federal troops in riots or civil disorders. Federal troops were used for domestic operations more than 200 times in the two centuries from 1795 to 1995. Most of these operations were to enforce the law, and many of them were to enforce state law rather than federal law. [10] Nor does it prevent the military services from supporting local or federal law enforcement officials as long as the troops are not used to arrest citizens or investigate crimes.

In recent years, several laws have been enacted that grant specific exceptions to the application of the Posse Comitatus Act.

Title 18 U.S. Code, Section 831, provides that if nuclear material is involved in an emergency, the Secretary of Defense may provide assistance to the Department of Justice, notwithstanding the Posse Comitatus Act.

Title 10 U.S. Code, Chapter 18, authorizes military support for civilian law enforcement agencies for counter-drug operations and in emergencies involving chemical or biological weapons of mass destruction. The Secretary of Defense may provide information, allow the use of military equipment and facilities, train law enforcement officials in the operation and maintenance of military equipment, and maintain such equipment. Support for law enforcement agencies may not impair military readiness, and military personnel shall not participate in searches, seizures, arrests, or similar activities unless such participation is otherwise authorized by law. (Military police personnel, for example, may enforce the law within their jurisdictions.)

If there were violations of the act, the culprits would not be members of the Army and Air Force who assisted local law enforcement agencies but rather the local law enforcement officials who required the troops to assist in the enforcement of laws or local military commanders who did so without obtaining Presidential authority. It is no wonder that there have never been any prosecutions under the law.

Why Is This Erroneous Interpretation Widely Believed?

It is worthwhile asking why the original meaning of the Posse Comitatus Act has been transformed into its almost exact opposite. It is not the purpose of this article to solve this mystery, but it is useful to speculate on some of the motives of the people who have been involved.

Some cynics believe that the Department of Defense and the military services support the erroneous application of posse comitatus because they do not want to get involved in domestic emergencies. This appears to be the position of many active-component officers. In an address to the Fletcher Conference on 15 November 2001, General William F. Kernan, Commander in Chief, Joint Forces Command, presumably referring to the Posse Comitatus Act, said that there were limitations on the active components that restricted them from õdoing those kinds of things, and rightfully so.ö [11] General Kernan went on to propose an order of response to domestic emergencies that starts with the first responders, then the National Guard, and finally the Reserves and active components. This may be a logical order, but it is based on a flawed understanding of history. The military services, and the Army in particular, have been used on numerous occasions to enforce the law, notably in federal efforts to desegregate public schools and quell riots. One recent example of this was the use of active-duty Army

troops, Marines, and federalized California National Guard troops to deal with the 1992 riots in Los Angeles prompted by the acquittal of police officers charged with assaulting Rodney King. Now that the Quadrennial Defense Review for 2001 has declared homeland security to be the primary mission of the Department of Defense, this aversion to the use of active components for domestic security may be weakened. In the meantime, however, some elements of the Department of Defense continue to hew to the line that it is improper for any element of the department, military or civilian, to enforce the laws in any fashion.

Americans have a general antipathy to the use of troops as police. This stems from British practice during Colonial times. There is a general feeling in the nation that policing is a local matter best done by police forces whose members are trained in law enforcement. Until recently there was also general opposition to a national police force as exists in most Western European nations. The Federal Bureau of Investigation (FBI) was until recently quite small and worked on cases that clearly were federal crimes. In recent years, the number of federal crimes has increased, particularly in the field of civil rights violations, and now the FBI seems to be involved in many cases that formerly would have been handled under state law by local law enforcement agencies. The threat of imminent terrorist attack can only reinforce the trend to more and more federal laws and more and more federal police officers and prosecutors to deal with them. Americans appear to accept the increase in FBI jurisdiction but are unsympathetic to the habitual use of military personnel as police officers. In support of this feeling, persons writing on the Posse Comitatus Act may have addressed it as a legal bar to an unpopular possibility.

The lawyers have had a hand in transforming the Posse Comitatus Act from its original intent to what it may or may not be today. A substantial body of case law and judicial decisions pertaining to the use of military personnel to enforce the laws has been created. A casual review of these cases reveals confusion, inconsistency, and downright perversion of the original intent of the law. Much of this litigation has been prompted by persons averse to any role for military forces in law enforcement. Moreover, a significant body of policy and regulation has been created extralegally in the form of Department of Defense directives and military service regulations. These attempts to clarify the situation only add to the confusion. Most of them are based on a presumption significantly at variance with the law itself.

Finally, another reason for the misunderstanding and misapplication of this law is simply sloppy scholarship. It is apparent that many of the numerous authors who have written about this matter did not read the U.S. Code, studied the legislative history of the act, or consulted the two official histories prepared by the Center of Military History before airing their erroneous opinions. This appears to be one of those academic chain letters in which one set of unfounded conclusions is used as a source for derivative sets, which are accepted and passed along containing the original errors. In effect, the misinterpretation of the Posse Comitatus Act has become an urban myth that is widely believed without substantiation. This need not be. The topic has been covered well in many of the standard U.S. history books, and people who want to pursue the historical record in enough detail to get to the real story can consult three sources:

- Robert W. Coakley, The Role of Federal Military Forces in Domestic Disorders 1789-1878, Center of Military History, U.S. Army, Washington, DC, 1988.
- Clayton D. Laurie and Ronald H. Cole, The Role of Federal Military Forces in Domestic Disorders 1877-1945, Center of Military History, U.S. Army, Washington, DC, 1997.
- Eugene P. Visco, More Than You Ever Wanted to Know About Posse Comitatus, unpublished, available by request from gvisco@bellatlantic.net

Summary and Recommendation

The Posse Comitatus Act is not a general and universal proscription of the use of federal military forces to enforce or execute the law. The military services may do so and have done so when ordered by the president and pursuant to the authorization of Congress. Although the current interpretation of the act is the opposite of its original intention, it does discourage the military services from being used as a national police force-something we have wisely avoided up to now. The Posse Comitatus Act does not prevent the military services from supporting the police, nor does it preclude them from enforcing the law when so ordered by the president. It does preclude them from being the police in normal times.

It is time to rescind the existing Posse Comitatus Act and replace it with a new law. The old law is widely misunderstood and unclear. It leaves plenty of room for people to do unwise and perhaps unlawful things while trying to comply with their particular version. It certainly does not provide a basis for defining a useful relationship of military forces and civil authority in a global war with terrorism. The Posse Comitatus Act is an artifact of a different conflict-between freedom and slavery or between North and South, if you prefer. Today's conflict is also

in a sense between freedom and slavery, but this time it is between civilization and terrorism. New problems often need new solutions, and a new set of rules is needed for this issue.

President Bush and Congress should initiate action to enact a new law that would set forth in clear terms a statement of the rules for using military forces for homeland security and for enforcing the laws of the United States. Things have changed a lot since 1878, and the Posse Comitatus Act is not only irrelevant but also downright dangerous to the proper and effective use of military forces for domestic duties.

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[1]. Compact Edition of the Oxford English Dictionary, Oxford University Press, 1971.

[2]. I am deeply indebted to my friend and colleague Eugene P. Visco for allowing me to rely greatly for this section on his excellent paper "More Than You Ever Wanted to Know About Posse Comitatus" (2001). Gene Visco is a master operations research analyst and a scholar who does good work.

[3]. The white militia units were disbanded in 1867, and black militia units formed under Reconstruction state governments were not used to confront ex-Confederates. Visco, op. cit., p. 18.

[4]. By 1870, all of the former Confederate States had completed the Reconstruction process and were readmitted to the United States.

[5]. Visco, op. cit., p. 18.

[6]. Visco, op. cit., p. 20.

[7]. Visco, op. cit., p. 21. The primary purpose was to protect the freedmen from the Ku Klux Klan.

[8]. Coakley, cited in Visco, op. cit., p. 24.

[9]. Coakley, cited in Visco, op. cit., p. 23.

[10].Courtesy of Gene Visco, who has done extensive research on this topic and teaches a course on military operations other than war at George Mason University.

[11].General William F. Kernan, address to the Fletcher Conference, "The Military's Role in Homeland Security," 15 November 2001, DefenseLink, Joint Forces Command website. When I was a kid, the term "federal offense" was a big deal and awed us by its implication of something really wicked. Today, it seems as if everything is a federal offense.