

The Origins of the *Posse Comitatus*

by

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The original *Posse Comitatus* was a rider to an appropriations bill, Chapter 263, Section 15, approved on June 18, 1878.

Chapter 263, Section 15, Army as Posse Comitatus:

From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section, and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment.

The impetus for this bill came from two sources. The first was the end of the Civil War Reconstruction. From the beginning of the Republic until the enactment of *Posse Comitatus* it had been regular practice to station federal troops at polling places to prevent inebriates from voting, and to be certain that those entering the polls were entitled to do so in an era of limited suffrage. After the Civil War, the federal troops were stationed at polls to be sure that universal manhood suffrage was permitted, and that no former Confederate officers voted. All former Confederate officers had been stripped of the right to vote or hold office above the state level. The end of the Reconstruction period meant that enforcement of those strictures was no longer necessary.

The second impetus was conditions on the western frontier. Fort commanders were often the only law and order in a region, the only security for settlers moving west. Most of the frontier was still outside the US proper, and had not been admitted to statehood. Fort commanders had begun to exercise civilian law enforcement responsibilities, sometimes in an arbitrary way, to hunt down whomever they believed to be criminals or Indians who were threatening settlers. The argument was that criminality and Indian attacks happened quickly and needed quick action from whatever authority was on the spot. They were, after all, a long way out of communication with Washington, D.C. The results were sometimes violations of the Constitution and conditions otherwise untenable to elected civil officials.

President Rutherford B. Hayes registered his protest against Posse Comitatus by vetoing the Army Appropriations Act for 1880. His statement on why he did so included the following:

The bill provides in the usual form the appropriations required for the support of the Army during the next fiscal year. If it contained no other provisions, it would receive my prompt approval. It includes, however, further legislation, which, attached, as it is, to appropriations which are requisite for the efficient performance of some of the most necessary duties of the Government, involves questions of the gravest character. The sixth section of the bill is amendatory of the statute now in force in regard to the authority of persons in the civil, military, and naval service of the United States "at the place where any general or special election is held in any State."

The effect of the adoption of this amendment may be considered –

First. Upon the right of the United States Government to use military force to keep the peace at the elections for Members of Congress; and

Second. Upon the right of the Government, by civil authority, to protect these elections from violence and fraud.

This section is, however, not presented to me as a separate and independent measure, but is, as has been stated, attached to the bill making the usual annual appropriations for the support of the Army. It makes a vital change in the elections laws of the country, which is in no way connected to the use of the Army. It prohibits, under heavy penalties, any person engaged in the civil service of the United States from having any force at the place of any election, prepared to preserve order, to make arrests, to keep the

peace, or in any manner to enforce the laws. This is altogether foreign to the purpose of an 'Army appropriations bill.'¹

President B. Hayes's veto statement of the Army Appropriation Act for 1880. April 29, 1879.

President Hayes may have been mistaken on one point, however. The bill in question was only for the Army, that is, the Department of War. The Department of the Navy was still a separate entity at that time, and required entirely separate appropriations measures.

The act contains legal loopholes by exception, "except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress." These exceptions provided a loophole by which Posse Comitatus has been suspended several times in this century, including use of federal troops to end rioting in Chicago in 1919, against "Bonus Marchers" in Washington, D.C. in 1932, and under the Truman administration when a railroad workers' strike was ended by nationalizing the railroads and placing them temporarily under the Army Corps of Engineers. Recent debates have been over what authorities troops should have during Hurricane Andrew relief operations, and how, or whether, troops could be employed to support the Olympic Games in Atlanta.

The National Security Act of 1947 created the Department of Defense by combining the War Department and Department of the Navy. This new entity was defined by US Code Title 10. The existing Title 10 reference to Posse Comitatus is:

Sec. 375. Restriction on direct participation by military personnel. The Secretary of Defense shall prescribe such regulation as maybe necessary to ensure that any activity (including the provision of any equipment of facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

There is an exception in Title 10 which permits Special Operations Forces to train civilian law enforcement in counter-terrorism and anti-terrorism including counter-drug enforcement and against weapons of mass destruction. (See also Title 18, Section 831.)

The second definition of Posse Comitatus in the US Code is found in Title 18, Part I, Chapter 6, Section 1385:

Whoever, except in such 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.

To the Air Force this means that no search and rescue assets may be used to look for fugitives from the law such as prison escapees, or if weapons of mass destruction may be involved. It also means that no assets, including the Civil Air Patrol (CAP), may be used if there is reason to believe that an individual may be the victim of foul play. This may have particular importance for the CAP because the CAP sometimes employs cadets on search and rescue missions who may be as young as twelve years of age.

Since Posse Comitatus does not directly apply to National Guard units, which are under the control of state governors, National Guard units have been nationalized under particular circumstances to place them under federal control and legal constraints. Civil rights unrest during the 1950's and '60's, rioting during a Democratic Party National Convention, and riots in the Watts area of Los Angeles were all events that strained the concepts of strict separation of National Guard and federal forces. Recent events have pointed out serious misconceptions of the law.

Contrary to popular thought, the prohibitions against using regular troops or federalized National Guard units in law enforcement are not absolute. The exceptions and enabling structures are written into the language of the statutes. The Constitution has always required the President to be the keeper of public order. If the President receives a request from a state governor for assistance to quell public disorder, the President may issue a proclamation to the effect that order has broken down, and that those responsible must disperse. This proclamation is similar to the pre-1947 Riot Act. If order is not restored, the President may direct the Attorney General and the Secretary of Defense to apply whatever assets may be necessary to do so. Because of its plenary nature, this presidential authority is not subject to judicial review.

The misinterpretation of the law was evident during the riots in Los Angeles in April, 1992. Rioting broke out after the trial of Los Angeles Police Department (LAPD) officers for the beating of Rodney King. The Governor informed the President, and the President issued the required proclamation to disperse, and ordered the Secretary of Defense to employ assets of the DoD to restore order. This sequence of events nationalized the California National Guard and established a Joint Task Force (JTF) with members of the 7th ID and Marines from Camp Pendleton. The misinterpretation of the law was that active duty and guardsmen of the JTF were still under the Posse Comitatus, while the reality was that the Presidential Proclamation and subsequent order to the Secretary of Defense set aside Posse Comitatus. The JTF worked under rules of

engagement that were unnecessarily restrictive. The confusion over use and distribution of hardware such as night vision goggles, radios, and helicopters generated undue friction and ill feelings among active duty, National Guard, and LAPD members.

The current debate over whether or not to use Department of Defense assets in the "war on drugs" or border patrol duties is heated. One such exchange took place in the House of Representatives in October, 1998, during debate on the new appropriations bill. The principle speakers were Rep. Hector Reyes (D., Texas) against using regular military forces in such cases, and Rep. James Traficant (D., Ohio) in favor of using regular military troops. Representative Traficant had introduced a measure that would have required the use of DoD troops on borders and in counter-drug operations. Representative Reyes argued that such uses would be inviting disaster. He cited the incident in 1997 where a Marine Corps patrol had surprised a teen-aged boy near the Texas/Mexico border, had identified him as having a weapon, fired on him, and killed him. The Marines were doing what they had been trained to do, but the result was that the boy's family was awarded a \$2,000,000 wrongful death settlement out of court. Representative Reyes also spoke from his own experience of twenty years as a Border Patrol Agent. Representative Traficant's measure was defeated. Although the phrase "Posse Comitatus" did not arise during the debate, that was the foundation of the argument.

As a separate case, the US Coast Guard (USCG) is not subject to *Posse Comitatus*. Since the Coast Guard is by definition a law enforcement agency, it is exempt from such restrictions under Title 14 US Code. However, the Coast Guard is subject to Title 10 for all other matters including personnel, pay, and the Uniform Code of Military Justice. The USCG is under the Department of Transportation, but has assignments in coordination with the Department of the Treasury, the Department of Justice, the Department of the Interior, and the Department of Energy. Individual units of the USCG may be placed under the operational control of the US Navy in time of war, but never the USCG as a whole entity. However, even USCG units under operational control of the Navy are not subject to *Posse Comitatus*.

US Code Title 14, Section 89, and applicable international agreements grant the Coast Guard the right to stop and search any vessel of any flag on the high seas without it being construed as an act of war, as would be the case under the US Navy. Title 14, Section 89, was used extensively during Operation Earnest Will in reflagging ships in the Persian Gulf during the Iran/Iraq War, and again during Operation Desert Shield and Desert Storm. US Navy vessels carried Coast Guard boarding teams while flying Coast Guard pennants on the mast. With that pro forma observance of international law, Coast Guard teams could board and investigate any ship.

So, the debate continues. Discussions on the floor of the House of Representatives and the misunderstandings of the meaning of Posse Comitatus argue that DoD as well as civil authorities need to review and clarify an understanding of its applications. It is also hoped that such a study would be incorporated into doctrine for the Armed Forces and operating procedures for civilian police.

Note

1. (Richardson, ed. **Messages and Papers**, vol. VII, p. 523ff.) quoted in H. S. Commager, **Documents of American History**, (Englewood Cliffs, NJ: Prentice Hall, 1973), pp. 554-555.

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