



The Posse Comitatus Act and the United States Army: A Historical Perspective

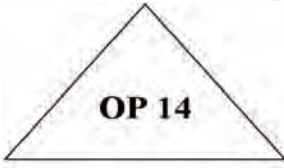
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by
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Foreword

Anytime the use of US Armed Forces in support of civil authorities is considered, government and military leaders, pundits, and citizens reflexively turn to the Posse Comitatus Act for guidance. Since 9/11, the US Armed Forces face an increased likelihood that they will be called on to participate in actions typically viewed as civil matters. Many have also called for an increased role for the US Armed Forces in responding to natural disasters. Though many constitutional provisions, laws, and legal rulings govern this question, in the minds of many, the Posse Comitatus Act has prominence. Most individuals think they know what the Posse Comitatus Act allows and disallows; most of them are wrong.

Before 1878, the use of the US Army in support of and at times instead of civil law enforcement was rare; however, it was not considered unlawful. The Civil War and Reconstruction forced a reexamination of those precedents and the legal principles behind them. After the passage of the Posse Comitatus Act in 1878, the Armed Forces have been called on much less frequently to conduct civil law enforcement duties. When employed, their use has been controversial, and the constitutional basis for their use has been challenged in the media, in politics, and in the courts.

In this monograph, Matt Matthews provides an insightful overview of the passage of the PCA during the Reconstruction era. He then reviews case studies in which the armed forces were called on to support civil authorities and examines how military leaders dealt with the provisions of the act. Finally, Mr. Matthews calls for a much-needed review of the act, now more than 125 years old. This monograph will be a useful read for military and civilian professionals alike who will likely be called on to make critical decisions regarding the use of US Armed Forces in support of civil authorities. *CSI—The Past is Prologue*.

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Introduction

. . . the Army is not composed of lawyers, capable of judging at a moment's notice of just how far they can go in the maintenance of law and order . . .

President Ulysses S. Grant, Letter
to Congress, 13 January 1875

Throughout much of this Nation's history, times of turmoil have called into play an obscure and often indefinable law known as the Posse Comitatus Act (PCA). From its inception in 1878, lawmakers have heralded the act as a safeguard for limiting military involvement in civil law enforcement operations. Nevertheless, history clearly demonstrates that the initial intent of the law has been misconstrued. In times of crisis, the unclear and misleading nuances inherent in the act have hampered the expediency of military involvement. In many if not most cases where civic need has resulted in military involvement, controversy followed.

In the wake of Hurricane Katrina, the Posse Comitatus Act is once again in the spotlight. Some military and political leaders credit the dilatory response to the catastrophe on the PCA, citing unclear perimeters for involvement. The highest level of government is currently debating this antiquated law with Senator John Warner, Chairman of the Senate Armed Forces Committee, pressing the Department of Defense for a complete review of the law. Newly appointed Chairman of the Joint Chiefs of Staff, General Peter Pace, has also recommended that political leaders consider modification to the PCA.¹

In 2002, the United States Northern Command (NORTHCOM) (a headquarters that has sole operational authority over homeland military operations) prompted inquiries from the media and civil libertarians concerned that it may be overstepping its legal authority. In an effort to clarify its function and address the principles governing its actions, the NORTHCOM website devotes two pages to the Posse Comitatus Act.²

This study, designed as a short, concise monograph, provides fundamental information for those who may find themselves involved in supporting domestic law enforcement actions. Chapter 1 provides a brief overview of the US Constitution as it relates to civilian rule over the military as well as a succinct examination of the use of the Army in civil law enforcement until the Civil War. Chapter 2 offers an overview of Reconstruction and investigates the true origins of the Posse Comitatus Act. Chapter 3 discusses the 1973 Wounded Knee incident and the resulting court cases related to the PCA, along with the

bewildering array of exceptions applied to the PCA in the war on drugs. Chapter 4 offers a historical vignette designed to demonstrate how the PCA created controversy during and following the 1992 Los Angeles riots, possibly slowing efforts to quell the uprising and permitting the violence to escalate and spread. Equally important, Chapter 5 examines the controversial 1993 Branch Davidian fiasco, which narrowly avoided a flagrant violation of the PCA. Finally, Chapter 6 examines the future of the Posse Comitatus Act and potential alternatives open to policy makers.

With its expanded role in homeland defense and the Global War on Terrorism (GWOT), the US Army will undoubtedly serve more often in a domestic law enforcement capacity. It is, therefore, incumbent on those responsible for public policy to examine the PCA, clarify its intent, and rectify misunderstandings that could hamper expedient military involvement in the Global War on Terrorism. While such examinations are ongoing, it would behoove every officer and noncommissioned officer to have a firm understanding of the history of the act and its use and misuse historically by the US Army.

Notes

1. Art Pine, “Should Congress Scrap Posse Comitatus?” *U.S. Naval Institute Proceedings, The Independent Forum on National Defense*, December 2005, 46–48.

2. US Northern Command, “Who We Are—Operating with the Law,” the Web page declares, “The PCA generally prohibits U.S. military personnel from direct participation in law enforcement activities. Some of those law enforcement activities would include interdicting vehicles, vessels, and aircraft; conducting surveillance, searches, pursuit and seizures; or making arrest on behalf of civilian law enforcement authorities. Prohibiting direct military involvement in law enforcement is in keeping with long-standing U.S. law and policy limiting the military’s role in domestic affairs.” [on-line]; available from http://www.northcom.mil/index.cfm?fuseaction=s.who_operatinglaw; Internet; accessed 9 January 2006.

Chapter 1

The Army as a Posse Comitatus from 1787 to 1865

A marshal of the United States, when opposed in the execution of his duty by unlawful combinations, has authority to summon the entire able-bodied force of his precinct as a posse comitatus. This authority comprehends, not only bystanders and other citizens generally, but any and all organized armed force, whether militia of the State, or officers, soldiers, sailors, and marines of the United States.

Attorney General Caleb Cushing, 27 May 1854

It is common today to find individuals from both ends of the political spectrum lecturing on the importance of the Posse Comitatus Act (PCA). Many pundits would have us believe the PCA is a pillar of freedom designed in complete accordance with the views expressed by the founding fathers.¹ Nothing, however, could be further from the truth. Contrary to popular opinion, the US Army throughout most of its history has played an important role in civil law enforcement. In fact, from 1807 to 1878 the United States government deemed the practice of using the Army and the federalized militia as a posse comitatus permissible.

The Constitution

Latin for “power of the county” or “the force of the county,” the posse comitatus in English law dates back to 1411. The regulation allowed local sheriffs to call on all citizens above the age of 15 to assist in maintaining order. By the late 18th century, the posse comitatus had become an acknowledged feature of one’s duty as a citizen.²

Without doubt, images of military dictator Oliver Cromwell usurping the power of Parliament or of British soldiers shooting down their own citizens during the Boston Massacre were seared into the memories of the delegates to the 1787 Constitutional Convention.³ By that time, the Declaration of Independence and the Articles of Confederation had already articulated the citizenry’s disdain for standing armies. While the specter of such an instrument rising up and crushing their new democratic experiment was ever present, the framers of the Constitution preferred not to regulate against it.⁴ In the end, the Constitution made the president the commander in chief of the military, to include the federalized state militia. As a counterweight, Congress would control the purse, reviewing Army appropriations every two years.⁵ Incidentally, the Constitution placed no

similar control measure on the Navy, simply mandating that Congress “provide and maintain a Navy.”⁶ “Next to the effectual establishment of the Union,” James Madison explained in *Federalist No. 41*, “the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support. This precaution the Constitution has prudently added.”⁷

What the Constitution did not add, however, were any provisions prohibiting the use of the Army or federalized militia as a posse comitatus. Although debated by the Federalists and anti-Federalists alike, in the end the framers chose to ignore the issue altogether, the majority agreeing with the views expressed by Alexander Hamilton. “The army,” he wrote in *Federalist No. 8*, “. . . may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection, [but] will be utterly incompetent to the purpose of enforcing encroachments against the united efforts of a great body of people.”⁸ Simply stated, the Army would never grow so large or become so powerful that it would menace the Republic; yet, it could be used to enforce the laws. Hamilton elaborated on this idea in *Federalist No. 28*:

That there may happen cases in which the National Government may be under the necessity of resorting to force, cannot be denied. Our own experience has corroborated the lessons taught by the examples of other nations; that seditions and insurrections are, unhappily, maladies as inseparable from the body politic, as tumors and eruptions from the natural body. . . . Should such emergencies at any time happen under the National Government, there could be no remedy but force. The means to be employed must be proportioned to the extent of the mischief.⁹

In *Federalist No. 29*, Hamilton argued for allowing the federal government to summon a highly trained militia in an emergency so that it could “better dispense with the employment of a different kind of force.”¹⁰ In other words, as long as the government maintains a professional militia, it can forgo the use of a standing army. Although the founders preferred to use the militia to “execute the laws of the Union, suppress insurrections and repel invasions,”¹¹ they failed to clearly bar the use of federal troops to enforce civil laws. In the end, the framers of the Constitution believed that military force used against citizens was a last resort, and the rule of law would always play a fundamental role in such an operation. As Richard H. Kohn so brilliantly states in his essay, “The Constitution and National Security: The Intent of the Framers,” “Defiance would be a confrontation between individuals and government, not member states and

a confederacy, and thus within the capacity of the courts, the marshals, the posse comitatus, the militia, or finally the regular army to combat.”¹²

The Judiciary Act and the Calling Forth Act

When Congress passed the Judiciary Act of 1789 establishing the judicial courts as well as the US marshal structure, it clearly granted the marshal the “power to command all necessary assistance in the execution of his duty.”¹³ Even though the law did not specifically mention the marshal’s use of the military as a posse comitatus, the words “all necessary assistance” would seem to indicate that using the army or militia is permissible. An 1878 opinion, issued by the attorney general, supports this fact:

It has been the practice of the Government since its organization (so far as known to me) to permit the military force of the United States to be used in subordination to the marshal of the United States when it was deemed necessary that he should have their aid. . . . This practice was deemed to be well sustained under the twenty-seventh section of the judiciary act of 1789, which gave to the marshal power “to command all necessary assistance in the execution of his duty” and was sanctioned not only by the custom of the Government but by several opinions of my predecessors.¹⁴

Congress more precisely defined its intent within three years of passing The Judiciary Act. On 2 May 1792, the Second Congress of the United States endorsed the Calling Forth Act. This law implied that a federal marshal could use the militia as part of a posse comitatus.¹⁵ The bill also authorized the president to call on the states’ militia forces (when Congress was out of session) to repel invasions from both foreign and domestic enemies, and to quell insurrections within the United States. More importantly, Section 2 of the act specifically spelled out the president’s authority in civil law enforcement matters:

That whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, the same being notified to the President of the United States, by an associate justice or district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed. And if the militia of a state, where such

combinations may happen, shall refuse, or be insufficient to suppress the same, it shall be lawful for the President, if the legislature of the United States be not in session, to call forth and employ such numbers of the militia of any other state or states most convenient thereto, as may be necessary, and the use of militia, so to be called forth, may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session.¹⁶

As a measure of last resort before calling on the militias, Congress required the president to first issue a public statement that would “command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time.”¹⁷

With the passage of the Calling Forth Act, the legal framework was in place for the president to muster the states’ militias to suppress rebellion and uphold the laws of the land. On a lesser scale, the act provided the federal marshal the power to use the militia as a posse comitatus. One area of ambiguity was the use of regular troops. Arguably, both the president and the federal marshal could call on regular troops and militia. Robert Coakley demonstrates in his work *The Role of Federal Military Forces in Domestic Disorders, 1789–1878* that while the framers of the Constitution didn’t legislate against it, they believed “the creation and use of a standing army to control the people was the greatest danger to be avoided.”¹⁸ Conversely, Coast Guard attorneys Commander Gary Felicetti and Lieutenant John Luce, in their skillfully constructed legal analysis of the PCA, maintain that, “The failure of the law to mention regular troops specifically may have been due to their small numbers in relation to the states militias.”¹⁹

US Marine Corps lawyer Major Clarence Meeks makes no such distinction in his legal appraisal, “Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act”:

The Act of 1792 . . . authorized the use of militia, not regulars, making an intentional distinction between the two components based on the constitutional provision which allowed the use of militia in executing the law. Unfortunately the passage of time eroded this distinction and regulars were called upon to serve in the marshal’s posse.”²⁰

While the use of the Regular Army by the federal marshal remains open to interpretation, former US Coast Guard attorney Christopher A. Abel is convinced that,

In spite of the framers' desire to hold the nation's military power in check, they did not prohibit the Army and Navy in enforcing the law of the land. Although the Constitution specifically gives responsibility for faithfully executing the laws of the United States to the commander in chief, it places no express limitation on his ability to employ the military in discharging his law enforcement obligation.²¹

In just over two years, the eruption of a tax revolt in western Pennsylvania tested the Constitution and the new laws on a grand scale.

The Whiskey Rebellion

When frontiersmen in western Pennsylvania rebelled against paying a federal excise tax on their whiskey and production facilities, President George Washington initially reacted with caution. However, in July 1794, after rebels burned the home of a federal tax collector, and several thousand insurrectionists gathered to challenge openly the authority of the federal government, it appeared that the Pennsylvania state authorities were unwilling or unable to restore order. In response, President Washington requested an opinion from Associate Supreme Court Justice James Wilson to determine whether the revolt was a "combination too powerful to be suppressed by the ordinary course of judicial proceedings" as the Calling Forth Act required. Within two days the judge responded, declaring "the laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of Judicial proceedings or by the powers vested in the Marshal of the district."²²

On 7 August 1794, the president, as required by law, issued a proclamation ordering the insurgents to disband:

Wherefore . . . I, George Washington, President of the United States, do hereby command all persons being insurgents as aforesaid, and all others who it may concern, on or before the first day of September next, to disperse and retire peaceably to their respective abodes. And I do moreover warn all persons whomsoever against aiding, abetting, or comforting the perpetrators of the aforesaid treasonable acts; and do require that all officers and other citizens, according to their respective duties and the laws of the land, to exert their utmost endeavors to prevent and suppress such dangerous proceedings.²³

Washington next sent commissioners into the western counties of Pennsylvania with the power to confer amnesty on those in revolt against the government, if they would agree to abide by the law. At the same time, the president requested the governors of several states to call out their militias. On 24 September, the peace commissioners reported that although they had made some progress, they felt they could not collect the excise tax in certain counties, and that they needed a more powerful force.

By October, Washington had federalized and assembled over 10,000 militiamen to put down the rebellion. Nevertheless, his greatest concern was that the newly assembled army would circumvent civilian authority, and he worked diligently to prevent such an occurrence. In a masterful operations order clearly delineating the role of federalized militia and civil authorities, Alexander Hamilton laid out the president's plan to the commanding general of the expedition:

The objects for which the militia have been called forth are:

1. To suppress the combinations which exist in some of the western counties of Pennsylvania in opposition to the laws laying duties upon spirits distilled within the United States and upon stills.

2. To cause the laws to be executed.

These objects are to be effected in two ways:

1. By military force.

2. By judiciary process and other civil proceedings.

The objects of military force are twofold:

1. To overcome any armed opposition which may exist.

2. To countenance and support the civil officers in the means of executing the laws.

With a view to the first of these two objects, you may proceed as speedily as may be, with the army under your command, into the insurgent counties to attack and, as far as shall be in your power, subdue all persons whom you may find in arms in opposition to the laws above mentioned. You will march your army in two columns from the places where they are now assembled, by the most convenient routes . . . bearing in mind that you ought to act, until the contrary shall be fully developed,

on the general principle of having to contend with the whole force of the counties of Fayette, Westmoreland, Washington, and Allegheny, and of that part of Bedford which lies westward of the town of Bedford, and that you are to put as little as possible to hazard. . . .

When arrived within the insurgent country, if an armed opposition appear, it may be proper to publish a proclamation inviting all good citizens, friends of the Constitution and laws, to join the United States. If no armed opposition exist, it may still be proper to publish a proclamation, exhorting to a peaceful and dutiful demeanor and giving assurances of performing, with good faith and liberality, whatsoever may have been promised by the commissioners to those who have complied with the conditions prescribed by them and who have not forfeited their title by subsequent misdemeanor.

Of these persons in arms, if any, whom you may make prisoners: Leaders, including all persons in command, are to be delivered to the civil magistrates; the rest to be disarmed, admonished, and sent home (except such as may have been particularly violent and also influential). . . .

With a view to the second point, namely, the countenance and support of the civil officers in the means of executing their laws, you will make such dispensations as shall appear proper to countenance and protect, and, if necessary and required by them, to support and aid the civil officers in the execution of their respective duties; for bringing offenders and delinquents to justice; for seizing the stills of delinquent distillers, as far as the same shall be deemed eligible by the supervisor of the revenue or chief officer of inspection; and also for conveying to places of safe custody such persons as may be apprehended and not admitted to bail.

The objects of judiciary process and other civil proceedings shall be:

1. To bring offenders to justice.
2. To enforce the penalties on delinquent distillers by suit.
3. To enforce the penalties of forfeiture on the same

persons by seizure of their stills and spirits.

The better to effect these purposes, the judge of the district, Richard Peters, esq., and the attorney of the district, William Rawl, esq., accompany the army.

You are aware that the judge can not be controlled in his functions, but I count on his disposition to cooperate in such a general plan as shall appear to you consistent with the policy of the case; but your method of giving direction to proceedings, according to your general plan, will be by instructions to the district attorney. . . .

When insurrection is subdued and requisite means have been put in execution to secure obedience to the laws, so as to render it proper for the army to retire (an event which you will accelerate as much as shall be consistent with the object) you will endeavor to make an arrangement for attaching such a force as you may deem adequate, to be stationed within the disaffected counties in such a manner as best to afford protection to well-disposed citizens and officers of the revenue and to suppress by their presence the spirit of riot and opposition to the laws.

But before you withdraw the army you shall promise on behalf of the President a general pardon to all such as shall not have been arrested, with such exceptions as you shall deem proper. The promise must be so guarded as not to affect pecuniary claims under the revenue law. . . .

You are to exert yourself by all possible means to preserve discipline amongst the troops, particularly a scrupulous regard to the rights of persons and property, and a respect for the authority of the civil magistrates, taking special care to inculcate and cause to be observed this principle, that the duties of the army are confined to attacking and subduing of armed opponents of the laws and to the supporting and aiding of civil officers in the executing of their functions.²⁴

In the end, the Whiskey Rebellion proved rather anticlimactic. With little bloodshed, Washington and his “Army of the Constitution” quickly restored order to the region. Hamilton’s instructions, skillfully written at the behest of the president, undoubtedly represent what the majority of America’s early lawmakers had envisioned. Knowing occasions would

exist when the military would be summoned to deal with internal problems, they nonetheless expected that instrument to remain under the control of civil authorities. It is possible that Hamilton's directive was the first and the last to define clearly the responsibilities of the military when called on to take part in civil operations. The Army's subsequent roles in civilian law enforcement have never again been defined so distinctly.

From Adams to Tyler

On 28 February 1795, Congress revamped the Calling Forth Act of 1792. Delighted by Washington's performance during the Whiskey Rebellion, Congress increased the president's power. The president no longer had to rely on a judge before calling out the militia. More importantly, he could call forth citizen soldiers to put down insurrections and uphold the laws even when Congress was in session.²⁵

In 1799, a minor tax rebellion in eastern Pennsylvania, eerily similar in some ways to the excise revolt faced by Washington in 1794, confronted President John Adams. Adams responded, to a great extent, in the same manner as Washington, albeit with one notable exception. Apparently unconcerned with any provisions in the Act of 1795, Secretary of War James McHenry called on both Regular Army units and militia forces to quell the insurrection. The great Federalist desire for a stronger central government and a more potent standing army surely played a role in this decision. The need for frugality, coupled with the need for expediency of action, prompted the employment of the Regular Army.²⁶

In 1806 when Aaron Burr threatened to launch a filibuster against Spanish-held territories in Florida and Mexico, President Thomas Jefferson issued an edict demanding that "all officers civil and military," along with "judges, justices, and other officers of the peace," help crush what he considered a domestic rebellion. Concerned about the legalities of using the Regular Army, Jefferson consulted James Madison for a legal opinion. Madison responded by informing the president, "it does not appear that regular troops can be employed under any legal provision against insurrections—but only against expeditions having foreign countries as the object."²⁷ Exasperated by this perceived limitation on the executive branch, Jefferson requested that Congress grant him the power to use the Regular Army in cases of insurrections. On 3 March 1807, Congress passed a new act allowing the president to call on all land and naval forces to uphold the nation's laws. Jefferson signed the bill into law five days later, significantly strengthening the president's authority in cases of civil unrest.²⁸

For the next 42 years, other presidents would use their enhanced power to face various challenges related to civil disorders. In 1849, the United States Supreme Court provided additional backing to the executive branch when it ruled in favor of President John Tyler, who had threatened to use military force against an armed uprising in Rhode Island during the Dorr Rebellion in 1842. In the case of *Luther v. Borden*, Chief Justice Roger B. Taney fully upheld the president's prerogative stating:

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals.²⁹

The Army and the Fugitive Slave Act

With the passage of the Fugitive Slave Act in 1850, the Army was plunged into a boiling political caldron kindled by pro-slavery and free-state zealots. The new law bolstered both the Constitution and the 1793 Fugitive Slave Law by making it the duty of US marshals and their deputies to apprehend escaped slaves anywhere in the United States or its territories when issued the proper documentation from federal authorities. The marshals were endowed with the power “to summon and call to their aid the bystanders, or posse comitatus of the proper county.” “All good citizens” were also “commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required.” When President Millard Fillmore signed the legislation into law on 18 September 1850, the ink had barely dried before outraged Northerners set out to forcibly scuttle the new act.³⁰

When a federal marshal called on citizens to help guard an escaped slave in Pennsylvania, the crowd not only refused to take part in his posse but also freed his captive. As a result, court officials requested the president send soldiers to support the marshal. After an intense discussion with his cabinet, President Fillmore concluded that he did have the power to use the military to assist law enforcement officials in their efforts to uphold the law. Fillmore immediately ordered the Philadelphia-based Marines to support federal law enforcement officials, if a federal judge sanctioned the official's request. The president was determined "to avoid the use of military force as far as possible"; however, he was just as resolute when he announced his willingness "to bring the whole force of the government to sustain the law."³¹

Soon violence erupted in Boston, Massachusetts, when free black men released a fugitive slave and facilitated his flight to Canada. With Southern politicians clamoring for a federal response and abolitionists in Boston determined to resist the law, Secretary of War C.M. Conrad sent explicit orders to the federal troops in Boston:

It is possible that the civil authorities may find it necessary to call in military force to aid in the execution of the law. If such should be the case, and the marshal or any of his deputies shall exhibit to you the certificate of the circuit or district judge of the United States in the State of Massachusetts, stating that in his opinion the aid of a military force is necessary to insure the due execution of the laws, and shall require your aid and that of the troops under your command as part of the posse comitatus, you will place under the control of the marshal yourself and such portion of your command as may be deemed adequate to the purpose. If neither the circuit or district judge shall be in the city of Boston when the exigency above referred to shall occur, the written certificate of the marshal alone will be deemed sufficient authority for you to afford the requisite aid.³²

In 1851, President Fillmore informed the United States Senate that it was his right to use the Army and the Navy to uphold the law. He also felt the Calling Forth Act of 1795 only required him to issue a public declaration to cease and desist, if he were calling out the militia, and did not apply to the president's use of the Regular Army. Fillmore did not consider the 1807 law, believing it violated the president's "constitutional authority." Surprisingly, for a man so well acquainted with the Constitution and

presidential prerogatives, Fillmore was uncertain whether federal enforcement agents could “summon as the posse comitatus an organized militia force, acting under its own appropriate officers, without the consent of such officers.”³³

In reviewing the matter, the Senate Judiciary Committee stood firmly with Fillmore, finding that a marshal could call on both the militia and the Regular Army as a posse comitatus.

The committee are not aware of any reason that exempts the citizens who constitute the military and naval forces of the United States from like liability to duty. Because men are soldiers or sailors, they cease not to be citizens; and while acting under the call and direction of the civil authority, they may act with more efficiency, and without objection, in an organized form, under appropriate subordinate command.

In the end, however, the Judiciary Committee opted to remain silent on Fillmore’s views of presidential power and the law of 1807.³⁴

By 1854, US marshals were turning more often to the military to assist in the return of fugitive slaves. Although these operations were never widespread or frequent, each one created a controversy. With the passage of the Kansas-Nebraska Act that same year, Northern outrage reached fever pitch and any small incident involving the return of escaped slaves only added to the conflagration. In May 1854, Boston once again became the scene of widespread chaos. In an effort to return a fugitive slave to Virginia, almost 1,600 military and police personnel formed what Robert W. Coakley describes as “the largest posse comitatus in the nation’s history.”³⁵ With President Franklin Pierce fully involved in coordinating the federal response to the mayhem in New England, his attorney general, Caleb Cushing, issued a legal opinion that clearly defined the responsibilities of the US marshal and the military:

A marshal of the United States, when opposed in the execution of his duty by unlawful combinations, has authority to summon the entire able-bodied force of his precinct as a posse comitatus. This authority comprehends, not only bystanders and other citizens generally, but any and all organized armed force, whether militia of the State or officers, soldiers, sailors, and marines of the United States.³⁶

During the turbulent years preceding the Civil War, the US Army became increasingly engaged in peace-keeping efforts in the Kansas Territory, often providing soldiers to combat outbreaks of violence between pro-slavery and free-state forces. In 1857, unrest within the Mormon community in the Utah Territory prompted President James Buchanan to send Army troops to the region. Although their use was not widespread in this particular campaign, they did function as part of a posse comitatus for US judges and federal marshals.

One of the most significant events before the Civil War occurred in Harpers Ferry, Virginia, in the autumn of 1859. Attempting to ferment a slave revolt, John Brown and 18 abolitionists seized government buildings and hostages in what could be termed America's first terrorist attack. The Secretary of War and President Buchanan acted swiftly to procure federal troops under the command of Colonel Robert E. Lee to crush the insurrection. The response of the US government to Brown's raid may serve as a precursor for future military operations on American soil when terrorist attacks threaten to overwhelm local law enforcement.³⁷

Concern over the military's involvement in civil law enforcement would soon fall by the wayside as the country moved rapidly toward civil war. In the Reconstruction period that followed, however, Southern states, which had once championed the use of the Army as a civil law enforcement tool, would discover to their consternation just how well the Army could perform this mission.

Notes

1. “Civil libertarian groups such as the ACLU have been concerned about the Bush administration possibly casting a critical eye on the Posse Comitatus Act, particularly as the United States carries out its war against terrorists and implements its homeland defense strategy.” Kevin Drew, “ACLU examines Pentagon role in sniper probe: Military law experts warn of ‘slippery slope,’” *CNN. Com/Law Center*, 17 October 2002 [on-line]; available from <http://archives.cnn.com/2002/LAW/10/16/sniper.military.libertarians/>, accessed 12 September 2005; “After repeatedly denying they plan to undermine or alter the Posse Comitatus Act of 1878, . . . Bush administration officials are starting to change their tune. . . . Unsatisfied with the broad authority federal statutes already provide it, the Bush administration seems to be looking at something closer to the normalization of military law enforcement. That is a dangerous idea . . .,” Gene Healy, “Misguided Mission for Military,” *Cato Institute*, 31 July 2002 [on-line]; available from <http://www.cato.org/research/articles/healy-020731.html>, accessed 12 September 2005.

2. *Black’s Law Dictionary* simply describes the term as “a group of citizens who are called together to assist the sheriff in keeping the peace.” Bryan A. Garner, ed., *Black’s Law Dictionary*, 7th ed., s.v. “posse comitatus”; *The Oxford Companion to Law* more specifically defines it as: “In early English law, the force of able-bodied citizens of the county summoned and commanded by the sheriff to assist in maintaining public order, to pursue felons, or to participate in the military defense of the country. Attendance was enforced by the penalty of culvertag or turntail, which implied forfeiture of property and perpetual servitude. As the sheriff’s authority declined, the posse became a purely civil body and in time, the authority to call out such assistance was entrusted to justices and magistrates.” *The Oxford Companion to Law* (1980), s.v. “posse comitatus,” by David M. Walker.

3. “An English-speaking person” declared Dave R. Palmer, “could hardly have grown to adulthood in the eighteenth century and not have heard the haunting story of Oliver Cromwell.” Dave R. Palmer, *1794 America, Its Army, and the Birth of a Nation* (Novato, CA: Presidio Press, 1994), 94–96; in his highly convincing work, *The Role of Federal Military Forces in Domestic Disorders, 1789–1878*, Robert Coakley notes, “The image of hated Redcoats shooting down innocent citizens in the Boston Massacre of 1771 was a vivid one, easily transferable to any soldier employed as an instrument of internal control by the central government.” Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789–1878*, Army Historical Series (Washington, DC: Center of Military History, US Army, 1988), 3.

4. The insurrection in western Massachusetts known as Shay’s Rebellion (1786–87) also played a major role in the final outcome of the Constitutional Convention. When irate farmers rose up against authorities in the state, the national government found itself powerless to intercede. George Washington and many other Federalist were shocked by the proceedings. In a letter to James Madison,

Washington wrote, “What stronger evidence can be given of the want of energy in our government than these disorders? If there exists not a power to check them, what security has a man for life, liberty, or property? Thirteen Sovereignities pulling against each other, and all tugging at the federal head will soon bring ruin to the whole. . . .”, Robert W. Coakley, *Role of Federal Forces*, 4–7.

5. US Constitution, art. II, sec. 2, “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States. . . .” US Constitution, art. I, sec. 8 [12] “To raise and support Armies, but no Appropriations of Money to that Use shall be for a longer Term than two Years.” [14] “To make Rules for the Government and Regulation of the land and naval Forces.” [15] “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” [16] “To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States. . . .” Laurence H. Tribe, *American Constitutional Law* (Mineola: The Foundation Press, Inc., 1978), lviii, lx.

6. US Constitution, art. I, sec. 8 [13].

7. Alexander Hamilton, James Madison, and John Jay, *The Federalist and Other Constitutional Papers*, ed. E.H. Scott (Chicago: Scott, Foresman & Co., 1898), 227.

8. *Ibid.*, 46.

9. *Ibid.*, 149–150.

10. *Ibid.*, 155.

11. US Constitution, art. I, sec. 8 [15].

12. Richard H. Kohn, “The Constitution and National Security: The Intent of the Framers,” *The United States Military Under the Constitution of the United States, 1789–1989* (New York: New York University Press, 1991), 67.

13. Act of 24 September 1789, chapter 20, 1 Stat. 73, sec. 27; http://www.constitution.org/USlaw/judiciary_1789.htm, accessed 24 August 2005.

14. Op. Att’y Gen. 162, 163 (1878), quoted in Commander Gary Felicetti and Lieutenant John Luce, “The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done,” *Military Law Review* 175 (March 2003): 98.

15. Commander Gary Felicetti and Lieutenant John Luce assert, “the 1792 amendment actually authorized the use of the militia to assist the marshal’s posse.” Felicetti and Luce, 98; Major Clarence I. Meeks also makes clear that the Act “authorized the use of the militia in various circumstances, for instance to assist the marshal’s posse in executing civil law.” Major Clarence I. Meeks III, “Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act,” *Military Law Review* 70 (Fall 1975): 88.

16. Act of 2 May 1792, chapter 28, Stat. I, sec. 2. *The Library of Congress, American Memory: A Century of Lawmaking For a New Nation, U.S. Congressional Documents and Debates, 1774–1875*, <http://memory.loc.gov/cgi-bin/ampage?collId=11s1&filename=001/11s1001.db&recNum=387>, accessed 24 August 2005.

17. *Ibid.*, sec. 3.

18. Coakley, *Role of Federal Forces*, 19.

19. Felicetti and Luce, “Setting the Record Straight,” 98.

20. Meeks, 88.

21. Christopher A. Abel, “Not Fit for Sea Duty: The Posse Comitatus Act, The United States Navy, and Federal Law Enforcement at Sea,” *William and Mary Law Review* 31 (1990): 445.

22. Coakley, *Role of Federal Forces*; Robert W. Coakley, “Federal Use of Militia and the National Guard in Civil Disturbances: The Whiskey Rebellion to Little Rock,” *Bayonets in the Streets: The Use of Troops in Civil Disturbances*, ed. Robin Higham (Lawrence: University Press of Kansas, 1969), 18–19; Leland D. Baldwin, *Whiskey Rebels: The Story of a Frontier Uprising* (Pittsburgh: The University of Pittsburgh Press, 1939), 184–185.

23. John C. Fitzpatrick, ed., *The Writing of George Washington from the Original Manuscript Sources, 1745–1799*, 33 (Washington, DC: US Government Printing Office, 1940), 460–461.

24. Harold C. Syrett, ed., *The Papers of Alexander Hamilton, Volume 17, August 1794–December 1794* (New York: Columbia University Press, 1972), 331–336.

25. “. . . And in the case of insurrection in any state, against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any state or states, as may be applied for, as he may judge sufficient to suppress such insurrection. . . . That whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the President of the United States, to call forth the militia of such states, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed; and the use of militia so called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the next session of Congress.” Act of 28 February 1795, Stat. II, chapter 36, sec. 1, 2. See *The Library of Congress, American Memory: A Century of Lawmaking For a New Nation*.

26. Coakley, *Role of Federal Forces*, 69–77; Interestingly, Alexander Hamilton was convinced the government “. . . ought to appear like Hercules and

inspire respect by the display of strength.” Ralph Adams Brown, *The Presidency of John Adams* (Lawrence: University Press of Kansas, 1975), 127–128.

27. Dumas Malone, *Jefferson the President: Second Term, 1805–1809* (Boston: Little, Brown and Company, 1974), 252–253.

28. “That in all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual State or Territory where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ for the same purposes, such part of the land or naval forces of the United States, as shall be judged necessary, having first observed all the pre-requisites of the law in that respect.” Public Acts of Congress, *An Act authorizing the employment of the land and naval forces of the United States, in cases of insurrections*, See *The Library of Congress, American Memory: A Century of Lawmaking For a New Nation, U.S. Congressional Documents and Debates, 1774–1875*. Annals of Congress, 9th Congress, 2d Session, 1285 [on-line]; available from <http://memory.loc.gov/cgi-bin/ampage>, accessed 7 September 2005.

29. *Luther v. Borden*, Supreme Court of the United States, 1849, 48 U.S. (7 How.) 1, 12 L.Ed. 581; available from http://www.cornellcollege.edu/politics/courses/Allin/365-366/documents/luther_v_borden.pdf, accessed 7 September 2005.

30. Art. IV, sec. 2, of the United States Constitution states: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.” Laurence H. Tribe, *American Constitutional Law*, lxi–lxii; The Fugitive Slave Law of 1793, art. 4, “For the better security of the peace and friendship now entered into by the contracting parties, against all infractions of the same, by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender, or offenders, by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be, to the laws, customs, and usage’s of the contracting parties, and natural justice: the mode of such trials to be hereafter fixed by the wise men of the United States, in congress assembled, with the assistance of such deputies of the Delaware nation, as may be appointed to act in concert with them in adjusting this matter to their mutual liking. And it is further agreed between the parties aforesaid, that neither shall entertain, or give countenance to, the enemies of the other, or protect, in their respective states, criminal fugitives, servants, or slaves, but the same to apprehend and secure, and deliver to the state or states, to which such enemies, criminals, servants, or slaves, respectively belong.” The University of Oklahoma Law Center, <http://www.law.ou.edu/hist/fugslave.html>, accessed 8 September 2005.

31. Robert J. Rayback, *Millard Fillmore: Biography of a President*

(Newtown: American Political Biography Press, 1959), 268–271.

32. Frederick T. Wilson, *Federal Aid in Domestic Disturbances, 1781–1903*, 67th Cong., 2d sess., S. Doc. No. 263; quoted in Coakley, *Role of Federal Forces*, 129.

33. Coakley, *Role of Federal Forces*, 129–130.

34. *Ibid.*, 130–131.

35. *Ibid.*, 137.

36. *Extradition of Fugitives from Service*, US Attorney General Opinion, Vol. 6, 466, 1854; quoted in Coakley, *Role of Federal Forces*, 132.

37. According to Ken Chowder, “The Oklahoma City bombing in 1995 was a frontal attack on a US government building, just like the Harpers Ferry raid. Antiabortion murders, government bombings, anarchist bombs in the mail—nearly every time political violence surfaces, it gets described in the press as a part of a long American tradition of terrorism, with John Brown as a precursor and hero, a founding father of principled violence.” Ken Chowder, “The Father of American Terrorism,” *American Heritage* (February/March 2000): 91; Coakley, *Role of Federal Forces*, 188–193; “The QRF troops are ‘not for the purposes of law enforcement but to engage in warfighting on our own soil, if the use of military power is essential to the defeat [of] terrorists attacking within our own country,’ Assistant Secretary of Defense for Homeland Defense Paul McHale said in a June 9 speech at the Heritage Foundation. ‘We have—and we want our adversaries to know we have—U.S. Army units [and] sometimes U.S. Marine Corps units on alert for ground deployment in the United States, if high-end military power is required to assure the safety of the American people within our own country in a warfighting role.’” Elaine M. Grossman, “DOD Urged to Ready Troops Against Larger Terrorist Force in US,” *Inside the Pentagon* (21 July 2005): 1, <http://ebird.afis.mil/e20050721380627.html>, accessed 21 July 2005.

Chapter 2

Reconstruction and the True Origins of the Posse Comitatus Act

So how did a racist law from the bitter Reconstruction period morph, in many minds, into shorthand for the respected principle that Americans do not want a military national police force?

Gary Felicetti and John Luce, *Parameters*

After four years of unprecedented bloodshed, the Civil War came to a tentative close at Appomattox Courthouse, Virginia, on 9 April 1865. With the assassination of President Abraham Lincoln less than a week later, Vice President Andrew Johnson found himself in the unenviable position of commander in chief at a time of national disunity and crisis. Johnson's challenge would be to bring together a deeply fractured nation, calm the masses, and restore stability. The new president was ill prepared for this task.

Presidential Reconstruction

Under Johnson's Reconstruction plan, or "restoration" as he equated it, the president sought to bring the errant Confederate states back into the Union. Although Johnson's approach required Southern states to ratify the 13th Amendment¹ to the Constitution and renounce their debt and ordinances of secession, his policy was, for the most part, extraordinarily charitable. Johnson was convinced "the only safety of the nation lies in a generous and expansive plan of conciliation, and the longer this is delayed, the more difficult will it be to bring the North and the South into harmony."² For the newly emancipated black population, however, there would be no conciliation, for in Johnson's view "white men alone must manage the South."³ Black suffrage was never high on the president's agenda, and according to Eric Foner in *Reconstruction: America's Unfinished Revolution, 1863–1877*, "Johnson never wavered from the conviction that the federal government lacked the authority to impose such a policy upon the states, and that the status of blacks must not become an obstacle to the speedy completion of Reconstruction."⁴ In the South, whites denounced the US Army occupation and were outraged that the initial occupation force consisted of more than 100,000 black federal soldiers.⁵

By the close of 1865, Johnson had appointed scores of pardoned ex-Confederates to preside over Southern state governments. Taking full advantage of Johnson's altruistic agenda, newly formed pro-Confederate

state administrations sprang up throughout the South. These traditionalist governments acted quickly to pass new laws, known as “Black Codes,” severely limiting the rights of blacks. Describing the Southern state leaders’ intent to keep the black population under the thumb of a white government, politician Benjamin F. Flanders stated, “Their [the South’s] whole thought and time will be given to plans for getting things back as near to slavery as possible.”⁶ One exasperated US Army colonel reported to his superior officer his impression of the Southern way of thinking:

Men, who are honorable in their dealings with their white neighbors, will cheat a negro without feeling a single twinge of their honor; to kill a negro they do not deem murder; to debauch a negro woman they do not think fornication; to take property away from a negro they do not deem robbery. . . . They still have the ingrained feeling that the black people at large belong to the whites at large.⁷

Johnson’s liberal approach to Reconstruction produced a resurgence of conservative state governments across the South that encouraged unimpeded racism and terror campaigns against the black population.

While the Army tried to maintain some semblance of order and justice using military commissions, provost courts, and courts established by the Freedman’s Bureau,⁸ President Johnson continually hampered their efforts. As Harold M. Hyman makes clear, “Many of the [Southern] officials who were responsible for law and order in their communities chose not to punish terrorism directed against blacks, white Unionist civilians, and bluecoats. Johnson was choosing increasingly to support the attackers, not the victims.”⁹

Congressional Reconstruction

Outraged by the atrocities occurring throughout the South, an invigorated and radicalized Congress struck back. In April 1866, after overriding President Johnson’s veto, Congress passed the Civil Rights Act, a direct assault on the Southern “Black Codes.” The new law made anyone born in the United States a citizen (with the exception of Native Americans) and greatly expanded the rights of blacks. Interestingly, the Civil Rights Act contained a posse comitatus clause almost identical to the one used in the Fugitive Slave Act of 1850:

And be it further enacted, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or

deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offense. And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued.¹⁰

Congress fired a second volley into President Johnson's policies on 13 June 1866 when it proposed the 14th Amendment to the US Constitution. Section 1 of this amendment proclaimed, in part, that no state can "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."¹¹ In July 1866, in support of Congress' efforts to protect black Southern citizens, General in Chief Ulysses S. Grant issued General Order No. 44 empowering US Army forces in the South to arrest anyone involved in crimes aimed at "citizens and inhabitants of the United States" when local law enforcement failed to do so.¹²

After making significant gains in the elections of 1866, radical Republicans in the 39th Congress passed the First Reconstruction Act on 2 March 1867,¹³ setting in motion a series of events that would result in US Army control of governments across the South. Claiming that "no legal State governments or adequate protection for life or property now exist in the rebel

States,” Congress declared the existing Southern governments merely provisional. A military commander who was empowered under ensuing acts to remove any official from office would now control the Southern states (except Tennessee, which had already rejoined the Union). The Army would enforce the rules, guaranteeing the protection of “all persons in their rights of person and property,” and “to suppress insurrections, disorders, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals.”¹⁴ More importantly, the Army would ensure black males were allowed to vote and that former Confederates were not. Under these new rules, the South held constitutional conventions and the voters approved new, more liberal state constitutions. Once a state ratified the 14th Amendment, it was reinstated to the Union and the Army’s protective presence was withdrawn. With the Army shielding black and white Republicans at the polls and former Confederates denied the right to vote, groundbreaking interracial Republican governments sprang up throughout the South. These radical administrations quickly ratified the 14th Amendment, and by 1870, the Union had readmitted all Southern states. Through it all the Army played a highly visible role. As Harold M. Hyman stated in his article on the Civil War reconstruction period, the Army’s responsibilities included:

. . . initiating and implementing state-making on the basis of biracial citizen participation. Protecting the personnel of the federal courts and Freedmen’s Bureau, shielding blacks and whites who collaborated in the new order of equality under state law from retaliations by indignant vigilante neighbors, and monitoring the quality of daily marketplace justice in ten thousand villages.¹⁵

As the Union readmitted the new Republican governments, the Army, which had helped place them in power, relinquished control.

Angered by Congress’ attempt to ensure equal rights for blacks and whites, the Southern white majority continued their terror campaign. By 1866, the Ku Klux Klan had gained influence among angry and disgruntled white Southerners. The Klan was responsible for an unparalleled wave of violence that included political assassinations, mass murder, arson, and other terrorist acts designed to intimidate supporters of the new Republican governments and their civil rights programs.¹⁶

In response to the escalating violence, the Republican governments of Alabama, Florida, Louisiana, and Tennessee immediately requested aid from the federal government to combat the Klan. As a rule, President Johnson remained detached from the situation, simply passing the states’

requests on to a bewildered War Department. Attorney General William W. Evarts finally formulated a plan to help the besieged states. In formulating his legal opinion, Evarts, referring to the Cushing Doctrine of 1854, concluded that federal marshals could request assistance from the Army and that soldiers serving in the posse comitatus must follow the orders of the marshal. "They should be used," Evarts stipulated, only in "rare cases of necessity." Evarts drew a distinct line between use of the Army to support civil law enforcement and the president's constitutional authority to use force.¹⁷ The War Department clarified Evarts opinion, finding that when the military is summoned to support civil law enforcement, the military chain of command remained intact and orders would pass through the military chain of command:

The obligation of the military individual officers and soldiers in common with all citizens, to obey the summons of a marshal or sheriff must be held subordinate to the paramount duty as members of a permanent military body. Hence the troops can act only in their proper organized capacity, under their own officers, and in obedience to the immediate orders of those officers.¹⁸

The War Department further clarified the process by naming the president as the final approving authority for the use of the military in support of civilian authorities:

If time will permit every demand from a civil officer for military aid, whether it be for the execution of a civil process or to suppress insurrection, should be forwarded to the President with all the material facts of the case, for his orders; and in all cases the highest commander whose orders can be given in time to meet the emergency will alone assume the responsibility of action.¹⁹

President U.S. Grant Strikes Back

Congress and the Army found a leader in Ulysses S. Grant, inaugurated 4 March 1869 as 18th President of the United States, with whom they could more easily work. As the Klan continued their intimidation tactics and murderous activities in the South, Grant and Congress were committed to crushing them.

After dismantling Georgia's state government for the second time, and passing two enforcement acts to deal with the Klan, Congress passed a third and more draconian measure known as the Ku Klux Klan Act on 20 April 1871. Sections 3 and 4 of the act articulate the extreme measures

Congress was prepared to take to curtail terrorist activities on American soil:

Section 3. That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the constitution of the United States: and in all such cases . . . it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppressions of such insurrection, domestic violence, or combinations. . . .

Section 4. That whenever in any State or part of a State the unlawful combinations named in the preceding section of this act shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such district impracticable, in every such case such combinations shall be deemed a rebellion against the government of the United States and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of habeas corpus, to the end that such rebellion may be overthrown: Provided, That all the provisions of

the second section of [the Habeas Corpus Act of 3 March 1863], which relate to the discharge of prisoners other than prisoners of war, and to the penalty for refusing to obey the order of the court, shall be in full force so far as the same are applicable to the provisions of this section: Provided further, That the President shall first have made proclamation, as now provided by law, commanding such insurgents to disperse: And provided also, That the provisions of this section shall not be in force after the end of the next regular session of Congress.²⁰

With only 6,000 troops available, the Army was spread too thin to support all the beleaguered Republican governments across the South. However, Attorney General Amos T. Akerman and Solicitor General Benjamin H. Bristow were determined to use the new laws to stamp out the Klan. In North Carolina, the Army, serving as a posse comitatus, assisted attorneys and federal marshals in rounding up hundreds of suspected Klansmen. Many of those arrested received lengthy prison terms. Mississippi alone handed down more than 700 indictments, and grand juries across the South imposed 3,000 indictments.²¹

On 30 March 1870, President Grant oversaw the ratification of the 15th Amendment to the Constitution²² and in May 1871, on the heels of the passage of the Ku Klux Klan Act, ordered the Army to:

. . . be employed by their commanding officers in assisting the authorized civil authorities of the United States in making arrest of persons accused under the said act; in preventing the rescue of persons arrested for such cause; in breaking up and dispersing bands of disguised marauders, and of armed organizations, against the peace and quiet or lawful pursuits of the citizens in any state.²³

In October 1871, Grant, after issuing two proclamations for the Klan to cease and desist, suspended the writ of habeas corpus in several northern counties of South Carolina. Under the control of a federal marshal, the Army conducted a coordinated sweep of the countryside, rounding up 600 men with ties to the Klan. Many were tried and sent to prison in Albany, New York, under the watchful eye of the US Army. By the fall of 1871, the Army had provided support for 200 posses in South Carolina alone.²⁴

The Ku Klux Klan Act and the power of the posse comitatus doctrine had enabled the president to utilize the Army to suppress some of the most heinous terrorist organizations in American history. By 1872, the Army was partially responsible for vanquishing the Klan from the South, greatly

reducing the amount of violence.²⁵ Despite the fact that the Army had dismantled the active terrorist cells, white Southerners were determined to carry on their battle through legitimate channels. Leaders in the Ku Klux Klan and the other terrorist organizations sought legitimate political means to regain power. Although the Army had thwarted their campaign of violence and quest for white supremacy, the Klan's desire to succeed had not diminished and the role the US Army played in their downfall would not be forgotten.²⁶

The End of Reconstruction and the Passage of the Posse Comitatus Act

With the passage of the Amnesty Act of 1872 (a bill authorizing nearly all ex-Confederates to once again hold office) and with Northern Republican support for Southern reconstruction rapidly fading, white Southerners began to gain political strength.²⁷ As the US Army gradually decreased its role in the South as a protector of the radical Republican regimes, white Democratic governments began to reestablish control. With the military presence not as visible in the South, rebel activists again terrorized black voters. As John Franklin points out, "Negroes could hardly be expected to continue to vote when it cost them not only their jobs but their lives. In one state after another, the Negro electorate declined steadily as the full force of the Klan came forward to supervise elections that federal troops failed to supervise."²⁸ By 1874, the Democratic Party had regained control of the House of Representatives, and by 1876, only Louisiana, Florida, and South Carolina remained under radical Republican control.

With the approach of the 1876 presidential election, white Democrats in Louisiana flogged blacks, harassed Republicans, and slaughtered elected officials. The actions of white Democrats "would have disgraced Turks in Bulgaria," reported *Harper's Weekly*.²⁹ In South Carolina, open warfare broke out between blacks and whites with Democrats proclaiming they would win the election "if we have to wade in blood knee-deep."³⁰

Alphonso B. Taft, Grant's new attorney general, responded to the escalating crisis by informing US marshals in the South they were responsible for maintaining order at the polling places. Taft advised the marshals that they had the power to call on the Army as a posse, and the War Department seconded the attorney general's orders by directing military officers to comply with the wishes of the marshals. Federal deputy marshals were immediately dispatched to supervise the election proceedings while Army commanders once again pre-positioned troops across the South, ready to respond to any chaos around the polls. As a result of the Army's visible presence, author Robert Coakley points out that "election day itself passed

without any major disturbance anywhere in the South, although certainly this peaceful result was in part due to the positioning of the troops.”³¹

The presidential race of 1876 between Republican Rutherford B. Hayes and his Democratic opponent Samuel J. Tilden was so close that a special commission, comprised of members of the House, the Senate, and the Supreme Court, was required to determine the winner. In return for a Democratic promise not to challenge the commission’s findings, President-elect Hayes, in what can only be described as a “back-room deal,” vowed to remove a large portion of the Army from the South.³² Furthermore, he assured Southerners that the federal government would no longer interfere in their internal affairs.³³ In this so called “Compromise of 1876,” black civil rights became the first casualty. The newspaper *The Nation* reported, “The negro will disappear from the field of national politics. Henceforth, the nation, as a nation, will have nothing more to do with him.”³⁴ W.E.B. DuBois affirmed the true meaning of the compromise when he wrote “The slave went free; stood a brief moment in the sun; then moved back again toward slavery.”³⁵

As large segments of the US Army pulled out of the South, white Democratic Southerners rejoiced. In his book *After Appomattox: How the South Won the War*, Stetson Kennedy proclaimed that:

Scenes enacted all across the South served to ease somewhat the bitterness that Appomattox had engendered in the hearts of Southern whites. The departing U.S. troops did not lay down their arms as the Confederates had been required to do at Appomattox, and Grant was not there to give Lee back his sword; but the final victory was nonetheless sweet.³⁶

However, several questions remained unanswered for Southern whites. How could they protect themselves from another Reconstruction procedure? How could they stop federal marshals from calling on the few remaining soldiers as a posse? “What good was home rule,” Stetson Kennedy wrote, “if there were going to be U.S. marshals all over the place?”³⁷

Shortly after the election, Democrats began to allege that Tilden would have been triumphant in Louisiana and South Carolina if federal troops protecting the polls had not frightened away white Democratic voters. The facts, however, would indicate that the Army had actually kept the Klan from menacing Republicans at the polls. Nonetheless, Democrats in the House of Representatives demanded answers from President Grant. Grant responded to the allegations by the Democrats that he had “been guided

by the Constitution and the laws which have been enacted and the precedents which have been formed under it.”³⁸ He informed Congress that he had acted under Article IV, Section 4, of the Constitution and under the Revised Statutes of 1874, specifically RS5297. As Congress codified all federal laws in 1874, RS5297 combined the Calling Forth Act of 1795 and the 1807 law, which enabled the president to use the Regular Army. Revised Statutes 2002 and 5528 also allowed the Army to “repel the armed enemies of the United States or to keep peace at the polls.”³⁹ In his report to Congress, Grant made no mention whatsoever of the posse comitatus doctrine and its frequent application during the Reconstruction period.⁴⁰

In 1877, with Democrats firmly in control of the House of Representatives, retribution for the Army’s role in the Reconstruction began. With one Southern congressional representative calling the acts of the Army “tyrannical and unconstitutional,” Democrats in the 44th Congress attempted to attach a rider to the Army’s appropriations bill that would prohibit the use of the Army in state political quarrels without the approval of Congress. The bill was defeated in the Senate, and Congress adjourned without an authorization to pay the Army’s bills, including the salaries of thousands of soldiers, for nearly a year.

By the time the 45th Congress met in November 1877, Southern Democrats had gained even more seats, and again declared vengeance on the Army. Maryland Democratic Congressman William Kimmel attempted to attach a new amendment to the Army appropriations bill that would make it unlawful “to use any part of the land or naval forces of the United States to execute the laws either as a posse comitatus or otherwise, except in such cases as may be expressly authorized by act of Congress.” In debating the matter, Kimmel revealed his disdain of soldiers in the Regular Army:

He lives by blood! His is a business apart from the people. . . . [H]is habits unfit him for the relations of civil life. . . . He sacks, desecrates, indulges when and where he dares. He serves, obeys, destroys, kills, suffers[,] and dies for pay. He is a mercenary whom sloth, luxury[,] and cowardice hires to protect its ease, enjoyment, and life.⁴¹

Ironically, Southerners once applauded the use of the Army to assist in the return of their fugitive slaves.

After much political wrangling, Kentucky Congressman J. Proctor Knott introduced the following amendment to the Army appropriations bill:

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; 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.⁴²

The Knott Amendment became known as the Posse Comitatus Act. This amendment passed the House and the Senate as part of the Army appropriations bill, and President Hayes signed it on 18 June 1878. Though a few congressional representatives from Northern and Western states voted for the amendment after witnessing the acts of the Army during labor disputes in 1877, the Southern Democrats carried the amendment through Congress.⁴³ Consequently, there can be little doubt that the Posse Comitatus Act was a direct result of the Army's involvement in Reconstruction and the military's involvement in Grant's campaign against the Klan. In fact, the act was almost certainly intended as one last bulwark against federal meddling in the internal affairs of the white supremacist South.⁴⁴ It is perhaps the ultimate irony that a nation conceived in liberty and dedicated to democratic ideals has until this time upheld the precepts of the Posse Comitatus Act, a law with origins in oppression and tyranny.

The *New York Times* responded unenthusiastically to the new law, proclaiming, "the move in Congress to restrict the use of the Army for checking great and dangerous domestic violence is, in short, a move against economy and efficiency, as well as against principle and precedent."⁴⁵ In what would prove a highly prophetic statement to Congress, Secretary of War George McCrary claimed that the Posse Comitatus Act should be "repealed, or that the number of cases in which the use of the Army shall be 'expressly authorized' be very much enlarged."⁴⁶

On 7 July 1878, the War Department issued orders to units in the field, describing the new law and how it limited their role and ability to respond in civil law enforcement situations. Nevertheless, in what would become a precedent of confusion and uncertainty in the interpretation of the Posse Comitatus Act, 12 days following the announcement Lieutenant Colonel Nathaniel A. Dudley responded to a request from a local sheriff and led a force of 50 Regular Army cavalry troops into Lincoln, New Mexico

territory. Dudley, an officer described as suffering from “muddled thought and bad judgment,” responded after the sheriff trapped a rival faction of gunmen in a house. After unlimbering a mountain howitzer and setting up a Gatling gun which they threatened to use, Dudley and his men provided covering fire for the sheriff’s squad and helped set fire to the house. The ensuing melee killed five men, while the legendary Billy the Kid and others managed to escape. As a result, a court of inquiry indicted Dudley for violating the Posse Comitatus Act. This incident was the first in a long line of incidents that would lead to confusion and misinterpretation and would stain the image of the Posse Comitatus Act for the next 128 years.⁴⁷

Notes

1. Amendment XIII [1865] Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have the power to enforce this article by appropriate legislation. Tribe, lxxv.
2. Howard K. Beale, *The Critical Year: A Study of Andrew Johnson and Reconstruction* (New York: Harcourt, Brace and Company, 1930), 27.
3. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper & Row, 1988), 180.
4. *Ibid.*, 180.
5. *Ibid.*, 8.
6. Benjamin F. Flanders to Henry C. Warmoth, 23 November 1865, Warmoth Papers; as quoted in Foner, 199.
7. Samuel Thomas to O.O. Howard, 6 September 1865, M-5 1865, Letters Received, Ser. 15, Washington Headquarters, RG 105, NA [FSSP A-9206]; as quoted in Foner, 150.
8. The Bureau of Refugees, Freedmen and Abandoned Lands or The Freedmen Bureau was established by Congress on 3 March 1865 and operated by the War Department. See *Freedmen's Bureau Online*; available from <http://freedmensbureau.com>, accessed 22 September 2005.
9. Harold M. Hyman, "Ulysses Grant I, Emperor of America?: Some Civil–Military Continuities and Strains of the Civil War and Reconstruction," *The United States Military Under the Constitution of the United States, 1789–1989*, ed. Richard H. Kohn (New York and London: New York University Press, 1991), 187.
10. See 1866 Civil Rights Act, 14 Stat. 27–30, 9 April 1866 A.D., Historical Documents and Speeches—Civil Rights Act (1866); available from <http://www.historicaldocuments.com/CivilRightsActof1866.htm>, accessed 22 September 2005.
11. Tribe, lxxv.
12. James E. Sefton, *The United States Army and Reconstruction, 1865–1877* (Baton Rouge: Louisiana State University Press, 1967), 73.
13. Robert W. Johannsen, *Reconstruction, 1865–1877* (New York: Free Press, 1970), 89–92.
14. *Ibid.*
15. Hyman, 186.
16. For a complete history of this terrorist organization during Reconstruction,

see Stanley F. Horn, *Invisible Empire, The Story of the Ku Klux Klan, 1866–1871* (Cos Cob: John E. Edwards, 1969).

17. Coakley, *Role of Federal Forces*, 300.

18. *Ibid.*, 301.

19. Sefton, 215.

20. *The Rise and Fall of Jim Crow, Historical Document, Enforcement Act of 1871 Passed by the 42nd Congress*; available from http://www.pbs.org/wnet/jim-crow/stories_events_enforce.html.

21. Foner, 457; Jean Edward Smith, *Grant* (New York: Simon & Schuster, 2001), 546–547.

22. Section 1: The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2: The Congress shall have the power to enforce this article by appropriate legislation. US Constitution, amend. 15, sec. 1 and 2.

23. Coakley, *Role of Federal Forces*, 310.

24. Sefton, 228; Coakley, *Role of Federal Forces*, 312.

25. Smith, 547; Robert Coakley writes that “after 1871, the Klan did disappear from the scene gradually, but the military offensive was only partially responsible for its decline. Political and economic factors intruded to do the job less dramatically.” Coakley, *Role of Federal Forces*, 313.

26. “To hasten withdrawal of federal troops,” Coakley points out, “Southerners progressively abandoned the clandestine tactics of the Klan for overt political action on behalf of the Democratic Party.” Coakley, *Role of Federal Forces*, 313.

27. Major H.W.C. Furman stated that “the passage of the General Amnesty Act permitted a Democratic recovery in the South.” Major H.W.C. Furman, “Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act,” *Military Law Review* 7 (1960): 94.

28. John Hope Franklin, *Reconstruction After the Civil War* (Chicago: University of Chicago Press, 1991), 172.

29. Foner, 570.

30. *Ibid.*, 574.

31. Coakley, *Role of Federal Forces*, 334.

32. “As one historian has written, the Hayes men ‘surrendered the Negro to the Southern ruling class, and abandoned the idealism of Reconstruction, in return for the peaceable inauguration of their President.’” Smith, 604.

33. Coakley writes that “in return for acquiescence by the Democrats to Hayes’ receiving the disputed electoral votes of Florida, Louisiana, and South

Carolina, and thus assuring his election to the presidency by one electoral vote, the President-elect agreed to recognize Democratic governments in Florida, Louisiana, and South Carolina and to end the Army's civil mission in the ex-Confederate states." Coakley, *Role of Federal Forces*, 337.

34. Foner, 582.

35. *Ibid.*, 602.

36. Kennedy Stetson, *After Appomattox: How the South Won the War* (Gainesville: University Press of Florida, 1995), 279.

37. *Ibid.*, 282.

38. Coakley, *Role of Federal Forces*, 342.

39. See *The Library of Congress, American Memory: A Century of Lawmaking For a New Nation, U.S. Congressional Documents and Debates, 1774–1875*, Statutes at Large, 43rd Cong., 1st sess. Vol. 18, Part I, image 1071; available from <http://memory.loc.gov>, accessed 9 October 2005.

40. Coakley, *Role of Federal Forces*, 342–343; Gary Felicetti and John Luce, "The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done," *Military Law Review* 175 (March 2003): 109–110.

41. Felicetti and Luce, "Setting the Record Straight," 112.

42. Coakley, *Role of Federal Forces*, 344.

43. *Ibid.*, 344. Coakley points out that it was in fact "Southern Democrats who took the lead in urging restrictions."

44. *Ibid.*, 343–344; "In response to Reconstruction, the South also swayed Congress to pass the Posse Comitatus Act, which prohibited federal military authorities from exercising localized civilian police powers. This was in direct response to President Grant's successful but short-lived use of the military in the South to suppress white supremacists' campaign of terror and intimidation against blacks and their Republican supporters."

45. "The Army and the Militia," *New York Times*, 11 June 1878, in Donald J. Currier, "The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?" *Carlisle Papers in Security Strategy* (Carlisle Barracks, PA: US Army War College, September 2003), 5–6.

46. US War Department, *Annual Report of the Secretary of War (1878)*, as quoted in Currier, 6.

47. Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877–1945*, Army Historical Series (Washington, DC: Center of Military History, US Army, 1997), 63–73.

Chapter 3

Posse Comitatus Act Causes Confusion

Not only is the law confusing to pundits and commentators, it is confusing to soldiers of all ranks, as well as political leaders in Congress and the executive branch. Even military lawyers, who have the luxury of spending time in academic settings studying the Act have found it to be confusing.

Donald J. Currier, *Carlisle Papers in Security Strategy*

Since its inception in the latter part of the 19th century, the Posse Comitatus Act has regulated military involvement in a multitude of national dilemmas. During the turbulent years of 1878 through 1892, the Army was actively engaged in helping maintain order in the Trans-Mississippi West. Lawmakers also called on military forces to help quell the anti-Chinese riots in the Washington and Wyoming Territories in 1885 and 1886. Perhaps an early precursor of difficulties to follow occurred when renowned Civil War veteran Brigadier General John Gibbon received a sharp rebuke from the War Department for violating the Posse Comitatus Act while intervening in the anti-Chinese riots in Seattle, Washington, in 1885. During the next ten years, concerns regarding violations of the act were again voiced when the actions of Army officers assisting with the Chicago Pullman Strike of 1894 were questioned. Before the end of the century, there were three more accusations of military violations of the PCA concerning the Army's efforts to maintain the peace between miners and corporate mine officials in Coeur d' Alene, Idaho. It was determined that in two of the three occasions the Army did commit serious violations of the PCA.¹

The onset of the 20th century and the advent of the world war era ushered in new challenges for those attempting to interpret and govern within the guidelines of the Posse Comitatus Act. During World War I, the act was "suspended" by Secretary of War Newton D. Baker, effectively "clearing the way for repeated violations in the years ahead."² Volatile race relations and labor disputes would call for military forces to assist with law enforcement actions throughout the 20th century. Civil rights demonstrations and antiwar protests required the military to assist in maintaining civil order in a variety of ways and with varying degrees of success.³ Nevertheless, no convictions of military commanders for violating the act ever resulted.⁴

In most of these law enforcement missions, the Army participated in accordance with executive directives under the authority vested in the president by the Constitution and the Revised Statutes of 1874. From 1956 on, Congress authorized the president to employ troops domestically under US Code, specifically, Title 10, Sections 331 through 334.

Title 10, Section 331 is a direct result of the 1795 and 1807 acts and Revised Code 5297. The law states:

Whenever there is an insurrections [*sic*] in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.⁵

Title 10, Section 332 allows the commander in chief to use the militia and armed forces to enforce federal authority:

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.⁶

Title 10, Section 333, a direct successor to the Ku Klux Klan Act of 1871 and Revised Statute 5299, states:

The President, by using the militia or the armed forces, or both, or by any other means, shall take measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

- (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or

immunity, or to give that protection; or

- (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.⁷

Title 10, Section 334 requires the president to issue the time-honored proclamation to disperse, which dates back to George Washington and the Whiskey Rebellion:

Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.⁸

It was not until 1956 that Congress saw fit to move the Posse Comitatus Act to Title 18, Section 1385 of the US Code. The amended PCA reflected the new status of the Air Force as a separate branch of service:

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 not more than \$10,000 or imprisoned not more than two years, or both. This section does not apply to Alaska.⁹

In 1959, Congress removed the section related to Alaska when that territory became a state.

By 1973, the Posse Comitatus Act was a relatively forgotten law, one that was comparatively unused, and seldom invoked. That same year, however, events at Wounded Knee, South Dakota, brought the Posse Comitatus Act to the attention of the American public. When radical members of the American Indian Movement (AIM) took over a small village on the Pine Ridge Indian Reservation on 27 February 1973, federal law enforcement personnel responded immediately. For two months, federal agents laid siege to the Native American community. During the siege, the US Army and the National Guard of several states supplied equipment and advice to the federal law enforcement agents. Recalling the notorious engagement with the Sioux at Wounded Knee in 1890, the Army was keen to avoid repeating the scenario. “The name of the game”

stated the director of military support “is not to kill or injure the Indians. Any Army involvement resulting in loss of life and injury would reflect badly upon the Army. Time is not of the essence. Federal forces should not be the aggressor. . . . The object of the exercise is not to create martyrs.”¹⁰ Dressed in civilian clothes, US Army officers on the scene worked inconspicuously with civil law enforcement in an effort to avoid casualties and the commitment of the Regular Army soldiers.¹¹

When the siege ended on 5 May 1973, law enforcement officials arrested many of the AIM activists. In spite of this, lawyers for the defense attempted to prove that the Army’s involvement in support of the federal agencies was a violation of the PCA. The Army’s minor involvement in the operation also generated a flurry of federal civil court cases. After years of litigation and conflicting court opinions, the South Dakota federal district court in the case of *United States v. Red Feather* clarified the Posse Comitatus Act, determining that military involvement in civil law enforcement operations is either active or passive. The court concluded:

The senators who drafted and debated the bill and President Hayes who signed the bill into law, were of the belief that 18 U.S.C. Sec. 1385 made unlawful the use of federal military troops in the active role of direct law enforcement or execution of process. Based upon the clear intent of Congress, this Court holds that the clause ‘to execute the laws,’ contained in 18 U.S.C. Sec. 1385, makes unlawful the use of federal military troops in an active role of direct law enforcement by civil law enforcement officers. Activities which constitute an active role in direct law enforcement are: *arrest; seizure of evidence; search of a person; search of a building; investigation of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect or other like activities. Such use of federal military troops to ‘execute the laws,’ or as the Court has defined the clause, in ‘an active role of direct law enforcement,’ is unlawful under 18 U.S.C. Sec.1385 . . . [emphasis added].*

Activities which constitute a passive role . . . *military personnel under orders to report on the necessity for military intervention; preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of military per-*

*sonnel to deliver military material, equipment or supplies, to train local law enforcement officials on the proper use and care of such material or equipment, and to maintain such material or equipment; aerial photographic reconnaissance flights and other like activities. Such passive involvement of federal military troops which might indirectly aid civilian law enforcement is not made unlawful under 18 U.S.C. Sec 1385 . . . [emphasis added].*¹²

Finally, the court had clearly spelled out what the Army could and could not do when executing civil law enforcement missions. The Army, which had long sought proper legal guidance for conducting these types of operations, gratefully accepted this ruling. The ruling also provided the Army with an additional layer of cover. Many officers considered domestic law enforcement missions unglamorous and fraught with potential career-ending pitfalls, and, from time to time, had used the PCA as a clever guise to avoid distasteful assignments. As one Department of Defense (DOD) official put it, “the PCA was not a barrier preventing a military response to a genuine threat, but rather a bureaucratic reason not to do something perceived as less than a genuine threat.”¹³

While *US v. Red Feather* provided some clarity to the armed forces, new federal laws would once again blur the lines between the military establishment and domestic law enforcement. Concerned with combating the growing drug problem in America, in 1981 Congress approved the Department of Defense Authorization Act of 1982. Attorneys Gary Felicetti and John Luce summarized the new laws as follows:

(1) Section 371, Use of information collected during military operations, permitted DOD to share information collected in the course of normal operations with law enforcement officials.

(2) Section 372, Use of military equipment and facilities, permitted DOD to make equipment, bases, or facilities available to civilian law enforcement officials.

(3) Section 373, Training and advising civilian law enforcement officials, permitted DOD to train civilian officials on any equipment made available to them under section 372.

(4) Section 374, Assistance by Department of Defense personnel, permitted DOD personnel to operate and maintain any equipment made available under section 372, but

only to agencies that enforce federal drug, immigration, or customs law and subject to other specific restrictions such as high-level request and “emergency” conditions.

(5) Section 375, Restriction on direct participation by military personnel, required the Secretary of Defense to issue regulations so that any assistance provided under the authority of this law did not permit direct participation in specified law enforcement activities.

(6) Section 376, Assistance not to affect adversely military preparedness, prohibited assistance given under authority of this law that would adversely affect military preparedness.

(7) Section 377, Reimbursement, directed the Secretary of Defense to develop regulations for reimbursement by civilian agencies.

(8) Section 378, Nonpreemption of other law, indicated that nothing in this law limited the executive’s use of military in law enforcement beyond that provided by the law existing prior to the 1982 Authorization Act.¹⁴

Some referred to the new US Code as “the Posse Comitatus Act Amendment of 1981.”¹⁵ In reality, the new laws were merely exceptions to the PCA, precisely the type the Secretary of War had predicted in 1878, when he told Congress that the Act should be “repealed, or that the number of cases in which the use of the Army shall be ‘expressly authorized’ be very much enlarged.”¹⁶

The Department of Defense regulations relating to US Code, Title 10, Sections 371 through 378, issued in April 1982, placed even more stringent conditions on the military by applying a broad interpretation of the new laws. According to Felicetti and Luce, the new regulations “extended the Act’s coverage outside the United States, ignored key sections of the 1982 law to reach conclusions that it actually increased restrictions on all DOD activity, and applied the overly restrictive DOD interpretation of the Posse Comitatus Act to the Navy and Marine Corps as a matter of DOD policy.”¹⁷

In 1986, the executive branch issued a Department of Defense Directive declaring the “war on drugs” a national security matter, and ordered the military to lend its tactical planning expertise to law enforcement both in the United States and around the world. In passing the 1989 Defense Authorization Act, Congress sought to increase the role of the armed

forces in domestic law enforcement by removing many of the restraints in US Code, Title 10, Sections 371 through 378.¹⁸

Consequently, the new laws resulted in a backlash not only in the media but also within the Department of Defense. While the military objected to being dragged into this new civil law enforcement realm, civil libertarians complained that the Army's involvement was unconstitutional. Senator Samuel A. Nunn of Georgia told a national television audience "that the nation now had several posse comitatus acts."¹⁹ But as political pundits and politicians debated and the military sought desperately to distance itself from additional civil law enforcement entanglements, racial issues smoldered in the second largest city in America. Three years later, these racial issues caused a raging fire.

Notes

1. By far the best account of these operations can be found in Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877–1945* (Washington, DC: Center of Military History, US Army, 1997), 57–178.

2. *Ibid.*, 230–231.

3. Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992* (Washington, DC: Center of Military History, US Army, 2005).

4. Commander Gary Felicetti and Lieutenant John Luce, “The Posse Comitatus Act: Liberation from the Lawyers,” *Parameters*, US Army War College Quarterly (Autumn 2004): 9.

5. GPO Access; <http://frwebgate1.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=5748508828+0+0+0>; accessed 15 October 2005.

6. *Ibid.*, 574818489759+0+0; accessed 15 October 2005.

7. *Ibid.*, 574633478759+0+0; accessed 15 October 2005.

8. *Ibid.*, 574658479096+0+0; accessed 15 October 2005.

9. Title 18, Sec. 1385, Added 10 August 1956, ch. 1041, Sec 18(a), 70A Stat. 626. US Code Online via GPO Access; <http://frwebgate1.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=574409487935+1+0>; accessed 15 October 2005.

10. James R. Gardner, “The Civil Disturbance Mission of the Department of the Army, 1963–1973: An Analysis of Perceptions, Policies and Programs” (Ph. D. diss., Princeton University, 1977), quoted in Scheips, 435.

11. Scheips, 435–437.

12. *US v. Red Feather*, 392 F. Supp 916 (D.C.S.D 1975).

13. Currier, 13; Gregory D. Grove, *The U.S. Military and Civil Infrastructure Protection: Restrictions and Discretion Under the Posse Comitatus Act* (Stanford: Center for International Security and Cooperation, October 1999), 23, as quoted in Currier, 13.

14. Felicetti and Luce, “Setting the Record Straight,” 151.

15. Scheips, 439.

16. US War Department, *Annual Report of the Secretary of War* (1878), quoted in Currier.

17. Felicetti and Luce, “Liberation from the Lawyers,” 8.

18. Felicetti and Luce, “Setting the Record Straight,” 161.

19. Scheips, 439–440.

Chapter 4

The 1992 Los Angeles Riots and the Posse Comitatus Act

I frankly did not know until several months after the riots that posse comitatus did not apply. Did MG Covault make the same assumption I did, did he make a mistake (or his JAGs), or was he given guidance?

Major General James D. Delk,
California Army National Guard

By late afternoon on 29 April 1992, after an all-white jury acquitted white police officers for beating black motorist Rodney King, the city of Los Angeles, California, exploded in an unparalleled wave of violence. Across the nation, television viewers watched in stunned disbelief as rioters pulled Reginald Denny from his truck and brutally beat him with a large piece of medical equipment, a claw hammer, and a huge piece of concrete, causing 91 fractures to his skull. As a final indignity, gang members pummeled the unconscious Denny with liquor bottles and danced over his nearly lifeless body.¹

Within hours, rioters started hundreds of fires and a murderous looting rampage began on a massive scale.² The Los Angeles Police Department (LAPD), instead of making a strong show of force, beat a hasty retreat. Their response served to embolden the rioters, laying the foundation for the violence and mayhem to escalate into one of the most disturbing civil uprisings in American history.³ The Los Angeles riots would become one of the “maladies” Alexander Hamilton had predicted, a situation in which “there could be no remedy but force.”⁴

By 2100 on 29 April 1992, it was clear to Los Angeles Mayor Tom Bradley that he would need additional support to combat the growing violence. Immediately, California Governor Pete Wilson called for the mobilization of 2,000 members of the California Army National Guard (CANG). At that time, CANG Adjutant General Major General Robert C. Thrasher began mobilizing major elements of the 40th Infantry Division (Mechanized) and the 49th Military Police Brigade. While citizen soldiers rushed to their armories, the rioting spread over 30 miles of south central Los Angeles. By 0400 on 30 April, Major General Daniel J. Hernandez, commander of the 40th Infantry Division (Mechanized), had assembled 2,000 guardsmen in their armories. By daybreak on 30 April, 10 people were dead, dozens injured, and 601 fires had been set.⁵

The 40th Infantry Division (Mechanized) headquarters in Los Alamitos assigned Major General James D. Delk, deputy adjutant general, as the overall military field commander of the operation, and Major General Hernandez and his staff to oversee the tactical operations.

The slow response of the National Guard, delayed by a lack of equipment and ammunition as well as with problems installing locking plates on their M16 rifles, essential to prevent troops from firing on full automatic, alarmed Governor Wilson. By 1400, the decision was made that the Los Angeles County Sheriff's Department's Emergency Operations Center (EOC) would coordinate all National Guard law enforcement missions. In a meeting at 1430 between senior law enforcement personnel and Delk, the California Highway Patrol was assigned the mission of protecting firefighters who were being continually fired on by the rioters. LAPD Chief Daryl F. Gates asked Delk if the Guard could "handle everything else." Delk assured him "that the National Guard was ready and prepared to do whatever was necessary throughout the duration of the civil disturbance." Five minutes later, the first National Guard military police companies arrived on the beleaguered streets of Los Angeles.⁶

While the National Guard operations cell and police commanders in the EOC attempted to identify and prioritize missions, enterprising brigade and battalion commanders sought out missions from their local police stations. Conscious of the need for expediency, division headquarters ordered units to report to senior law enforcement officers at various locations and perform whatever missions the police deemed necessary. Soon, battalion commanders and senior police officers were working in concert with each other. LAPD district commander Bayan Lewis recalled, "The first night the Guard deployed, I would turn to the battalion commander and say, 'I need you to take troops to this location, we need to seal this, we need a barricade on this road, we need so and so,' and they did it."⁷ According to Christopher M. Schnaubelt, an intelligence officer in the division's 2d Brigade, "This sort of direct coordination between mid-level law enforcement leaders and supporting military units greatly improved what was at best an ad hoc process for requesting and approving military support."⁸ By 2000, approximately 1,000 National Guard soldiers were on the streets with 1,000 more in reserve waiting for missions from the LAPD and county law enforcement officials.⁹ Even with 2,000 National Guard soldiers in place, it was becoming increasingly difficult for law enforcement to keep pace with the escalating violence. At 2356, both the LAPD and the Los Angeles Sheriff's Department urgently requested the mobilization of 2,000 more National Guard soldiers.¹⁰

Once deployed, the CANG immediately made their presence felt. When military police encountered a violent confrontation at the corner of Vernon and Figueroa streets, a butt stroke from a soldier's M16 to the head of an antagonistic gang member convinced fellow gang members and the surging crowd to disperse.¹¹ As CANG members set up security at various sites targeted by looters, others provided security for firefighters and established checkpoints. During the night, at least two dozen shots were fired at National Guard soldiers.

Although the situation on the streets of Los Angeles was slowly improving, some political leaders remained skeptical that the National Guard and local law enforcement could accomplish the mission. Warren Christopher, a Washington insider and at that time in private law practice in Los Angeles, convinced Mayor Bradley to request federal troops. Christopher suggested to Bradley that the Regular Army would be more effective than the National Guard. Christopher stated, "I felt things were out of control. The National Guard was very slow to move in and that's fairly typical too. The National Guard is not very effective in these situations."¹² Christopher began making inquiries in Washington, DC, as to how federal troops could be utilized in this situation. Before long, both Governor Wilson and Mayor Bradley were talking directly with President George H.W. Bush and General Colin Powell.¹³ By late evening on 30 April, Secretary of Defense Richard B. Cheney ordered the Secretary of the Army to place 4,000 soldiers on alert. Active Duty troops alerted for possible deployment to Los Angeles included 2,500 soldiers from the 7th Infantry Division (Light) at Fort Ord, California, and 1,500 Marines from Camp Pendleton, California.¹⁴

Although there were nearly 2,000 California Army National Guard soldiers either on the Los Angeles streets or in reserve, at 0100 on 1 May, Governor Wilson requested the standby federal troops from President Bush. The president was quick to respond. By 0515 on 1 May, the president ordered 4,000 Active Duty soldiers and Marines into Los Angeles. As required by Title 10, Section 334, President Bush issued proclamation 6427:

**Law and Order in the City and County of Los Angeles,
and Other Districts of California**

By the President of the United States of America

A Proclamation

WHEREAS, I have been informed by the Governor of California that conditions of domestic violence and

disorder exist in and about the City and County of Los Angeles, and other districts of California, endangering life and property and obstructing execution of the laws, and that the available law enforcement resources, including the National Guard, are unable to suppress such acts of violence and to restore law and order;

WHEREAS, such domestic violence and disorder are also obstructing the execution of the laws of the United States, in affected area; and

WHEREAS, the Governor of California has requested Federal assistance in suppressing the violence and restoring law and order in the effected area.

NOW, THEREFORE, I GEORGE BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, including Chapter 15 of Title 10 of the United States Code, do command all persons engaged in such acts of violence and disorder to cease and desist therefrom and to disperse and retire peaceably forthwith.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of May, in the year of our Lord nineteen hundred and ninety-two, and of the Independence of the United States of America the two hundred and sixteenth.¹⁵

After issuing his cease and desist proclamation as required by law, the president issued Executive Order 12804 based on Chapter 15 of Title 10, US Code, Sections 331 through 333:

Providing for the Restoration of Law and Order in the City and County of Los Angeles, and Other Districts of California

WHEREAS, I have today issued Proclamation No. 6427; and

WHEREAS, the condition of domestic violence and disorder described there-in continue, and the persons engaging in such acts of violence have not dispersed;

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States and Commander in Chief of the Armed Forces by the Constitution and the

laws of the United States, including Chapter 15 of Title 10 of the United States Code, it is hereby ordered as follows:

Section 1. Units and members of the Armed Forces of the United States and Federal law enforcement officers will be used to suppress the violence described in the proclamation and to restore law and order in and about the City and County of Los Angeles, and other districts of California.

Sec. 2. The Secretary of Defense is authorized to use such of the Armed Forces as may be necessary to carry out the provisions of section 1. To that end, he is authorized to call into the active military service of the United States units or members of the National Guard, as authorized by law, to serve in an active duty status for an indefinite period and until relieved by appropriate orders. Units or members may be relieved subject to recall at the discretion of the Secretary of Defense.

In carrying out the provisions of this order, the Secretary of Defense shall observe such law enforcement policies as the Attorney General may determine.

Sec. 3. Until such time as the Armed Forces shall have been withdrawn pursuant to section 4 of this order, the Attorney General is further authorized (1) to coordinate the activities of all Federal agencies assisting in the suppression of violence and in the administration of justice in and about the City and County of Los Angeles, and other districts of California, and (2) to coordinate the activities of all such agencies with those of State and local agencies similarly engaged.

Sec. 4. The Secretary of Defense is authorized to determine when Federal military forces shall be withdrawn from the disturbance area and when National Guard units and members called into active military service of the United States in accordance with section 2 of this order shall be released from such active service. Such determination shall be made in the light of the Attorney General's recommendations as to the ability of State and local authorities to resume full responsibility for the maintenance of law and order in the effected area.

Sec. 5. The Secretary of Defense and the Attorney General are authorized to delegate to subordinate officials of their respective Departments any of the authority conferred upon them by this order.

Sec. 6. Nothing contained in this order shall confer any substantive or procedural right or privilege on any person or organization, enforceable against the United States, its agencies or instrumentalities, its officers, or its employees.¹⁶

With this executive order, President Bush committed federal troops to the Los Angeles riots. While certainly not as detailed as President Washington's proclamation issued during the Whiskey Rebellion, President Bush's edict was, nonetheless, quite similar.

Bush was responding to the governor's request under Chapter 15 of Title 10, Section 331. The riots, however, were not an insurrection but a combination of unlawful obstructions, combinations, and assemblages, as well as a case of domestic violence, all covered under Sections 332 and 333. Therefore, in both his proclamation and his executive order, the president cites Chapter 15 of Title 10 in its entirety.¹⁷ Emphasizing his resolve to stop the violence, the president informed the Nation "that he would use whatever force was necessary to restore order."¹⁸ By the morning of 1 May, the riots had resulted in 31 deaths and over 1,000 injuries, while the total number of fire calls reached a staggering 3,244.¹⁹

Bush's executive order also federalized the California Army National Guard taking them out of state service and placing them under the command of the newly formed Joint Task Force—Los Angeles (JTF-LA). Under state control, the Posse Comitatus Act did not apply to the National Guard.²⁰ Similarly, the PCA did not apply to the Army, Marines, and federalized National Guard soldiers collected under JTF-LA because the president issued the executive order "under circumstances expressly authorized by the Constitution or Act of Congress."²¹ Unfortunately, the order from the president caused some confusion within JTF-LA, exacerbated by bewildered and perplexed military attorneys. To this day, many soldiers and policy makers remain in a quandary regarding the entire event, while the hostility between the CANG and the Active Duty component of JTF-LA continues.²²

The newly appointed JTF-LA commander, Major General Marvin L. Covault, landed at Los Alamitos at 1630 on 1 May. He was a seasoned combat veteran and the commanding general of the 7th Infantry Division

(Light). By the time he arrived, Covault's staff and assistant division commander were already on the ground and busily engaged in setting up the joint task force tactical operations center. Covault appointed Hernandez as the Army Forces (ARFOR) commander and Brigadier General Marvin T. Hopgood of the First Marine Expeditionary Force as the Marine Corps Forces (MARFOR) commander.²³ Although the command transition appeared to go smoothly, Hernandez recalled that there was "natural animosity between the Guard and the Regular Army."²⁴ At the time, Delk told Covault ". . . morale among National Guardsmen had plummeted when they heard that federal forces were being called in to 'save the situation' after they had brought order to the streets." However, he did inform Covault that the appointment of Hernandez as ARFOR commander would serve to bolster the Guard's morale.²⁵

From the beginning, it was clear Covault's mind-set was diametrically opposed to that of the commanders' of the California Army National Guard. While the CANG vigorously sought out law enforcement missions, Covault attempted to distance the new JTF-LA from any involvement in police duties. A brigade commander in the 7th Infantry Division (Light) put it plainly when he stated, "We weren't going to try to do police work."²⁶ Unfortunately, the "we" now included the California Army National Guard who had already been involved in such duties.

As the Regular Army and Marine forces began to move into Los Angeles, the CANG and local law enforcement were already making great strides in regaining control of the streets. By 0630 on 1 May, the CANG had 1,220 soldiers supporting the LAPD and 1,600 troops in place to aid the Los Angeles Sheriff's Department. Meanwhile, 2,700 additional soldiers waited in reserve for new missions.²⁷ Delk believed that by the time the Guard was federalized, the riots had actually ended and there were more than enough CANG troops available to confront looters and arsonists.²⁸

The CANG's tactical method was in evidence the very day Covault arrived in Los Angeles. On Long Beach Boulevard, rioters had set fires and were shooting their weapons randomly, while gang members set up barricades in an effort to keep the police and firefighters at bay. Other rioters continued their looting rampage, paying little attention to the small police force at the scene. The situation changed rapidly though, with the arrival of then Captain Donald J. Currier and the 270th Military Police Company. Currier was the deputy district attorney for Sacramento County, a former police officer, and a Desert Storm veteran. Many of his men were police officers in civilian life, and the entire company had served in Desert Storm. As the company's vehicles rolled onto Long Beach Boulevard, the

tumult and looting quickly ceased and the crowd began to disperse. In a short period of time, the military policemen apprehended arrant looters, set up three-man traffic control points, and cleared the streets for several miles.²⁹ These actions helped to further calm the city.

Throughout the riot-torn areas, the Guard provided all manner of assistance to civilian law enforcement. In her case study, “The Flawed Emergency Response to the 1992 Los Angeles Riots,” Susan Rosegrant identified some of the Guard’s missions in quelling the uprising. The missions included “managing traffic control points, patrolling shopping centers to prevent looting, riding along in police cars to provide extra law enforcement power, guarding emergency work crews, and protecting sensitive sites, such as utility buildings or fire departments.”³⁰ Bayan Lewis was convinced that the Guard gave the city “that psychological, mental impact that the army is in the streets, and government is back in control”³¹ By the end of 1 May, however, there had been a total of 43 people killed and 1,257 injured, while the total number of structure fires had climbed to 5,017.³²

According to Delk, on 1 May CANG’s mission changed. “All of our soldiers were now engaged in law enforcement missions, not riot control. In that regard, commanders were struck by the fact there were so many criminals obviously still in the street even though many thousands had already been arrested and remained incarcerated.”³³ Delk was correct in his assertions. The military had been minimally involved in what may be termed “riot control.” Instead, CANG’s efforts had focused on thwarting incidents of arson, looting, gang warfare, and all manner of criminal activity made possible by the prevailing chaos.

By 2200 on 1 May, Los Angeles Police Chief Gates and Sheriff Sherman Block were highly skeptical of the need for federal troops. They believed the riots were abating and they would only require the continued support of the CANG. However, if federal troops were brought in, Block and Gates hoped to use them in the same manner as they were using the National Guard. In their first meeting with Covault, both Block and Gates were surprised to learn the general had a far different plan. Covault told Block and Gates that the worst was over and JTF-LA, to include the federalized CANG, would not perform civil law enforcement duties. The Webster report concluded that Covault’s decision “had an immediate effect on the relationship between the LAPD and National Guard,” and left nearly 10,000 National Guard soldiers “with few actual assignments to perform.”³⁴ After the riots, a joint meeting of California law enforcement officers concluded: “The calling in of federal troops appears to have been

a mistake. This resulted in the National Guard becoming federalized which severely limited their flexibility and missions they were able to undertake.”³⁵

By the end of 2 May 47 people had been killed and 2,116 wounded (211 of those critically), while fire calls had risen to 5,534. These figures far surpassed any in the Nation’s history. Although 8,601 people had already been arrested, there remained much work to do.³⁶

By the time the California Army National Guard reverted to state status and federal forces withdrew on 9 May, the death toll for the Los Angeles riots had risen to 54, while the number of injured reached 2,328. Over 850 buildings were burned and \$900 million in property was destroyed.³⁷ Whether Covault’s decision to disengage his forces from law enforcement missions played a role in lengthening criminal activity associated with the riots is open to debate.

Until the morning of 2 May, the CANG operations cell had approved almost 100 percent of the law enforcement support missions requested. But with the new JTF-LA headquarters assuming command over the CANG as well as the incoming federal troops, the CANG’s ad hoc mission approval system came to a halt. Under the new system, JTF liaison teams attached to the LAPD operations bureaus and the Los Angeles emergency operations center managed law enforcement requests. JTF liaison personnel also turned the CANG operations center into a JTF liaison headquarters to collect all incoming requests and forward them to JTF-LA headquarters in Los Alamitos. Once a request arrived at Los Alamitos, it faced a rigorous review from Covault and his staff. The entire process took six to eight hours and sent the CANG’s 100-percent approval rate crashing to a mere 20 percent.³⁸ Judge William Webster, former Director of the Federal Bureau of Investigation, complained, “When missions were received by the U.S. military and requests for the California National Guard were made, the military commanders would consider whether the request was for a ‘law enforcement’ function or a ‘military’ function. If the request was for a law enforcement function, the request was uniformly denied.”³⁹ Brigadier General Louis Antonetti, who served as Deputy Plans, Operations, and Military Support Officer (POMSO) in the CANG during the riots, recalled that, “Only 16 of 162 requests were approved and executed once the rules changed.”⁴⁰ Currier, now a colonel in the CANG, remembered being “very frustrated by the order to stand down.”⁴¹

While the *raison d’être* remains murky, the available evidence would seem to suggest that JTF-LA either misunderstood the Posse Comitatus Act and the executive order or they did comprehend it and chose to use the

PCA as a clever stratagem to distance themselves from law enforcement duties. It is also possible that Covault knew the law, but decided JTF-LA would simply not perform civil law enforcement tasks. To this day, participants are divided as to what really transpired.

Months after the riots, Delk, who was writing a book on the subject, sent Covault a questionnaire to gather information. In his letter to Covault he states, "I frankly did not know until several months after the riots that posse comitatus did not apply." Delk wanted to find out if Covault had made "the same assumption . . . did he make a mistake (or his JAGs), or was he given guidance?" Covault, or his public affairs officer, responded in the following manner:

The impact of the Posse Comitatus Act on the operations of JTF-LA is a topic which has seen considerable comment, much of it is inaccurate. For example, the Report by the Special Advisor inaccurately concluded that the JTF-LA commander was 'apparently unfamiliar with the President's Proclamation and erroneously believed that federal troops were prohibited from becoming involved in law enforcement functions under the federal Posse Comitatus Act.'

a. It is true that federal military forces are normally precluded by the Posse Comitatus Act from engaging in law enforcement activities. However, the President's authority to order federal troops into use to quell a civil disturbance is specifically exempted from those restrictions. Accordingly, the JTF-LA Commander was free (subject to limitations that could have been set by the Attorney General) to use his force in any capacity, including typical law enforcement functions.

b. The fact of the matter is, that like many military operations, operational decisions at the JTF headquarters level were made consistent with the commander's intent and the capabilities of the available forces. The JTF-LA commander and his staff understood from the outset that the Posse Comitatus Act had no effect, and the Act in no way limited the decision-making process within the JTF headquarters. The issue in the overall Los Angeles crisis was one of ROLES AND MISSIONS. The military could (and was) best used to create a secure environment, provide widespread presence, and provide a sense of

confidence among the populace. It was not the military's mission to solve Los Angeles' crime problem, nor were we trained to do so. The military was there in support of local government and local law enforcement. The Webster Commissions' staff never understood that. They never looked beyond the legal issue.⁴²

Over the years, numerous authors have challenged the JTF-LA commander's perceptions. In his book *Official Negligence*, Lou Cannon noted that:

Covault had just enough legal knowledge to be dangerous. He knew that the Posse Comitatus Act ordinarily prevented the use of soldiers as police officers, but did not realize that the president's authority to use troops to quell domestic violence is exempt from restrictions of this law. Covault might have learned this by reading the proclamation, which specifically provided for soldiers to be used in a law enforcement capacity.⁴³

In his article, "Combat in Cities: The LA Riots and Operation Rio," written for the Foreign Military Studies Office at Fort Leavenworth, Kansas, William W. Mendel maintained, "Regular military officers were concerned with breaking the law by being involved in law enforcement activities (although they were under a Presidential Order to restore law and order)."⁴⁴ Donald Currier, in a critique of the Posse Comitatus Act for the Strategic Studies Institute, wrote that, "many observers have attributed misunderstanding of the Act to General Covault, particularly as to the confusion surrounding which missions were permissible and which missions were not."⁴⁵ Colonel (Retired) Thomas R. Lujan, former Staff Judge Advocate for the United States Special Operations Command and noted expert on the PCA, concluded:

The JTF commander [Covault] apparently believed that he and his troops were constrained by the Posse Comitatus Act, and therefore could not legally participate in law enforcement activities. He was mistaken. . . . The JTF commander may have had political, policy, or tactical reasons for refusing law-enforcement missions, but his asserted reliance on the proscription of Posse Comitatus was misplaced.⁴⁶

The harshest condemnation came from Judge William H. Webster and Hubert Williams in their report *The City in Crisis*, in which they asserted:

. . . there was a general misunderstanding on the part of the U.S. Military and the National Guard as to what role the military could fulfill in quelling a civil disturbance. Each of them mistakenly assumed that the federal troops and the federalized National Guard could not undertake missions that required them to perform the role of peace officers. By the time of federalization, the Armed Forces had set up a Joint Task Force, which had concluded that the military would take on non-confrontational functions, allowing the law enforcement officers the support to take on the more common law enforcement type operations. General Covault, who commanded the federal troops, including the National Guard after federalization, refused to accept certain missions because the Army was not trained to carry out such missions. Apparently, General Covault was unfamiliar with the President's Proclamation and erroneously believed that federal troops were prohibited from becoming involved in law enforcement functions under the federal Posse Comitatus Act.⁴⁷

At first glance, it would hardly seem possible that Covault and his staff misinterpreted the PCA and the presidential executive order. At 2100 on 1 May in Los Angeles, top officers from the military, federal law enforcement, and the Department of Justice met and signed a log stating they understood the presidential proclamation and executive order.⁴⁸ Furthermore, on 2 May a public affairs guidance update from the Secretary of Defense was faxed to JTF-LA from United States Army Forces Command (FORSCOM). The guidance clearly stated: "Although the statute known as the Posse Comitatus Act (18 U.S.C. 1385) normally prohibits use of the Army and the Air Force to enforce the law within the U.S., the Act's prohibition does not apply when use of the armed forces is specifically authorized by statute."⁴⁹

At JTF-LA headquarters in Los Alamitos, however, the situation was not so black and white. On 1 May, Colonel (Retired) Linda C. Harrel, a captain and a California Army National Guard lawyer at the time of the riots, recalled one of the Active Duty lawyers from JTF-LA advising "his commander, the Joint Forces Commander, to stand down as we had violated the posse comitatus act."⁵⁰ Major General (Retired) Thomas W. Eres, who served as the Staff Judge Advocate for the 40th Infantry Division (Mechanized) during the riots, remembered that there was "very much concern about legal ramifications," from the attorneys in JTF-LA. Eres stated: ". . . there were various opinions expressed among the active duty

JAGs,” and “lots of fog.” According to Eres, many of the lawyers were confused by the lack of a “legal annex” in the president’s executive order and by the fact that no one at headquarters was an expert on Chapter 15, Title 10, Sections 331 through 334.⁵¹ It would appear, at least in the initial stages of the JTF-LA operation, that military lawyers were confused about the PCA and provided Covault either incorrect or incoherent guidance.

While it is possible Covault understood the PCA, it appears both the CANG and Active Duty lawyers were confused regarding the implications of the law. In all likelihood, they may have given their commander the wrong information. To this day, some former CANG lawyers believe the PCA did apply.⁵² One senior CANG officer who participated in stopping the riots is convinced Covault fully understood the PCA, but used the law to distance JTF-LA from an undesirable assignment.⁵³ This argument is bolstered by Currier, who recalled, “Soldiers were often told by their leaders that the reason they were no longer authorized to assist law enforcement officers was that such conduct was prohibited under the Posse Comitatus Act.”⁵⁴ Even Delk was under the impression the Posse Comitatus Act applied.

Years after the end of this violent civil uprising, questions still linger. Did those in positions of authority, both military and civilian, understand the tenets of the act? Less than a year later, in Waco, Texas, the Posse Comitatus Act would once again take center stage as federal law enforcement agents sought assistance from the US Army in their standoff with David Koresh and his Branch Davidians.

Notes

1. Lou Cannon, *Official Negligence: How Rodney King and the Riots Changed Los Angeles and the LAPD* (New York: Times Books, 1997), 304–306.

2. Christopher M. Schnaubelt, “Lessons in Command and Control from the Los Angeles Riots,” *Parameters*, US Army War College Quarterly (Summer 1997), 2; available from http://www.au.af.mil/au/awc/awcgate/army-usawc/param_schnau97sum.htm, accessed 1 October 2005.

3. Scheips, 442–443.

4. Hamilton, Jay, and Madison, 2.

5. James D. Delk, *Fires & Furies: The L.A. Riots* (Palm Springs: ETC Publications, 1995), 46.

6. William H. Webster and Hubert Williams, *The City in Crisis: A Report by the Special Advisor to the Board of Police Commissioners on the Civil Disorders in Los Angeles* (n.p. 1992), 152; Schnaubelt, 2.

7. Susan Rosegrant, “The Flawed Emergency Response to the 1992 Los Angeles Riots,” *The Kennedy School of Government Case Program*, C16-00-1588.0 (Cambridge: Kennedy School of Government, 2000), 19.

8. Schnaubelt, 9.

9. *Ibid.*, 3.

10. Schnaubelt, 3.

11. Delk, 64.

12. Cannon, 342.

13. Delk, 98.

14. Scheips, 445.

15. Webster and Williams, 14.

16. *Ibid.*, 14.

17. Scheips, 445.

18. *Ibid.*, 446.

19. Delk, 95.

20. In his article “The Posse Comitatus Act and Homeland Security,” John R. Brinkerhoff points out that the PCA “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. 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.” John R. Brinkerhoff, “The Posse Comitatus Act and Homeland Security,” *Homeland Security Journal*; available from <http://www>.

homelandsecurity.org/journal/Articles/brinkerhoffpos, accessed 12 September 2005.

21. Rosegrant, 17; Schnaubelt, 10; Jennifer K. Elsea, “The Posse Comitatus Act and Related Matters: A Sketch,” *CRS Report for Congress*, Congressional Research Service, The Library of Congress, Updated 6 June 2005, CRS-3.

22. Telephonic interviews and e-mail correspondence conducted by the author, September–November 2005. Many of the respondents asked not to be quoted on this subject.

23. Delk, 113–114.

24. Major General (Retired) Daniel J. Hernandez, telephone interview with author, 16 November 2005.

25. Delk, 114.

26. Rosegrant, 17.

27. Schnaubelt, 3.

28. Delk, 306.

29. Delk, 109–110.

30. Rosegrant, 16.

31. *Ibid.*, 16.

32. Delk, 138.

33. Delk, 180–181.

34. Webster and Williams, 154.

35. Delk, 306.

36. Delk, 180–181.

37. Scheips, 448.

38. Schnaubelt, 10–11.

39. Webster and Williams, 154.

40. Brigadier General Louis Antonetti, Deputy Adjutant General for Joint Staff of the California Army National Guard, e-mail interview with author, 18 November 2005.

41. Colonel Donald J. Currier, e-mail interview with author, 13 October 2005.

42. Answers to questions regarding JTF-LA, Major General (Retired) Delk, e-mail to author, 7 October 2005; Major General James D. Delk, letter to 7th Infantry Division, 17 December 1992, copy in author’s file.

43. Cannon, 343.

44. William W. Mendel, “Combat in Cities: The LA Riot and Operation

Rio,” Foreign Military Studies Office (July 1996), 3; available from <http://fmso.leavenworth.army.mil/documents/rio.htm>.

45. Currier, “The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?,” 12.

46. Thomas R. Lujan, “Legal Aspects of Domestic Employment of the Army,” *Parameters*, US Army War College Quarterly (Autumn 1997), 7; available from <http://carlisle-www.army.mil/usawc/Parameters/97/autumn/lujan.htm>.

47. Webster and Williams, 153.

48. *Ibid.*, 153.

49. Msg, Secy of Defense to HQDA; 2 May 92, sub: Public Affairs Guidance Update, Joint Task Force/Los Angeles (JTF/LA), LA Riots file, Historian’s files, CMH, copy in author’s file.

50. Colonel (Retired) Linda C. Harrel, e-mail interview with author, 22 September 2005.

51. Major General (Retired) Thomas W. Eres, telephone interview with author, 15 November 2005.

52. Colonel (Retired) Linda C. Harrel, e-mail interview with author, 10 November 2005.

53. Colonel Donald J. Currier, e-mail interview with author, 13 October 2005.

54. Currier, “The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?,” 12.

Chapter 5

The Posse Comitatus Act and the Assault on the Branch Davidian Compound

No list of military support capabilities is ever all-inclusive. Innovative approaches to providing new and more effective support to law enforcement agencies are constantly sought, and legal and policy barriers to the application of military capabilities are gradually being eliminated.

JTF-6 Operational Support Planning Guide

The first tip about the Branch Davidian compound to the Bureau of Alcohol, Tobacco, and Firearms (BATF) came from Deputy Sheriff Daniel Weyenberg of the McLennan County, Texas, Sheriff's Department in May 1992. Weyenberg informed BATF officials in Austin, Texas, that an obscure religious group called the Branch Davidians, located outside Waco, Texas, were receiving large shipments of firearms and significant amounts of black powder. The leader of the religious sect, Vernon Wayne Howell, known to his followers as David Koresh, appeared to be building a military-type compound and stockpiling all manner of firearms. Suspicious of this unusual activity, Weyenberg encouraged the BATF to investigate the situation.¹

By November 1992, Assistant US Attorney Bill Johnston was convinced the BATF had gathered enough evidence on illegal weapons activity to obtain search warrants for the Davidian compound. Once given permission to proceed, the BATF wasted little time in planning for a tactical operation to serve what they considered "high risk" warrants against Koresh and his followers. Early in their investigation, the BATF recognized the need for their own highly trained special response team. They also concluded that the assignment would require assistance from the US military.²

The first known meeting on the subject of military involvement took place in early November. At that time, the BATF discussed with Lieutenant Colonel (LTC) Lon Walker, a Department of Defense representative within the BATF, the possible use of military assets in their upcoming enforcement action against the Davidian compound. Although there were no detailed notes taken at this meeting, LTC Walker did jot down one item in his "summary of events." Walker was certain he was "not told of any drug connection" in the Davidian investigation.³

On 4 December 1992, in Houston, Texas, the BATF held a large planning meeting to discuss “tactical options” for executing the warrants at the Davidian compound. LTC Walker was present at this meeting and informed the BATF “that the military probably could provide a great deal of support and [he] suggested things like aerial over flight thermal photography.” LTC Walker went on to explain, though, “that without a drug connection the military support would be on a reimbursable basis.” At this time BATF Special Agent Davy Aguilera told him that “there was no known drug nexus.”⁴

The reimbursement issue was a major problem for the BATF.⁵ The BATF believed their organization required military assistance, but they were not keen on paying for it. Federal law clearly stated, nonetheless, that unless a civilian law enforcement agency could prove a drug connection or drug nexus, they would be required to pay for the assistance.⁶

On 11 December 1992, an agent from the BATF convened a meeting with members of the Texas Governor’s Office and the National Guard Counterdrug Program to discuss the state support available to the BATF. At this meeting, state officials did not address “reimbursable” costs; they simply informed the BATF that to obtain National Guard Counterdrug Program support they would obviously need a drug connection.⁷ Staff officials recommended a coordinating agency known as Operation Alliance as a viable means for such an undertaking. As a coordinating agency for border control and drug enforcement, the alliance works with 17 federal agencies and numerous state and local law enforcement entities. Its mission is to synchronize counterdrug efforts in the Southwest. All requests for military support to federal law enforcement are channeled through Operation Alliance.⁸

Three days later, 14 December 1992, the BATF requested military support from the Texas Counterdrug Program, specifically, the Texas National Guard, to provide “aerial reconnaissance photography, interpretation and evaluation of photos, and transportation of BATF agents aboard aircraft during the reconnaissance.” Although there was no indication of a drug connection, the Texas Counterdrug Task Force commander signed off on the operation.⁹

On 16 December 1992, the BATF informed LTC Walker they now had evidence suggesting the possible presence of a methamphetamine laboratory on the Branch Davidian compound. The next day, LTC Walker told the BATF that with the “suspicion of drug activity,” it would be possible to use military equipment without reimbursing the government. It was recommended that the BATF pursue the drug connection.¹⁰

Starting the first week in January 1993, the Texas National Guard began flying missions over the Davidian compound. That same week, the BATF, circumventing Operation Alliance, applied directly to the Department of Defense Coordinator for Drug Enforcement Policy and Support for the use of office and stakeout equipment. Although the BATF provided no proof of a drug nexus, the Regional Logistics Support Office in El Paso, Texas, promptly supplied the requested equipment.¹¹

The following week, the BATF asked the Regional Logistics Support Office for the use of a military operations on urbanized terrain (MOUT) site to train its special response team. They also requested the use of seven Bradley fighting vehicles, maintenance support, drivers' training, and on-call support. The request was the largest in the history of the Regional Logistics Office, so large, in fact, that they handed the request over to the Texas National Guard.¹²

Operation Alliance formally requested assistance from Joint Task Force-6 (JTF-6) for the BATF on 2 February 1993. JTF-6, established in 1989 at Fort Bliss, Texas, was a direct result of President George H.W. Bush's war on drugs. Designed to support federal as well as local law enforcement and their counterdrug operations, JTF-6, unlike many military organizations, readily embraced their law enforcement support mission. Secretary of Defense Richard Cheney promoted their aggressive use asserting, "I believe that our military forces have the capability to make a substantial contribution toward drug interdiction, and I am instructing them to make the necessary preparations to carry out that responsibility"¹³

The Operation Alliance request for assistance to the BATF went directly to the Commander of JTF-6, Major General John M. Pickler. Specifically, the BATF wanted JTF-6 to supply them with US Army Special Forces Operational Detachment "Alpha" 381 (ODA 381), part of the Rapid Support Unit (RSU) allotted to JTF-6. Normally, these units serve a six-month tour with JTF-6.¹⁴

The BATF wanted the Special Forces soldiers to assist them with "medical treatment, communications procedures, operational plan development, review and approval, and 'room clearing discriminate fire operations' termed 'close-quarter combat' by the military." In a bold move, the BATF also asked for Special Forces medics and communications specialist to assist them in the assault on the Davidian compound.¹⁵

No one at JTF-6 seemed concerned about the BATF's questionable drug nexus nor did they voice any consternation over possible legal entanglements related to the use of the Special Forces soldiers. The JTF-6 staff promptly approved the mission.¹⁶ A congressional investigation would

later report that “while some senior military officers and DEA [Drug Enforcement Agency] officials had opportunities to voice concerns about the BATF’s alleged drug nexus, they chose not to exercise those opportunities.”¹⁷ It would appear that JTF-6 was fully committed to their counterdrug mission, and they were not about to let legal barriers become an obstacle to mission success.

Fortunately for the Army, when JTF-6 passed the assignment on to the Rapid Support Unit, a Special Forces officer placed a call to the US Army Special Forces Command Staff Judge Advocate at Fort Bragg, North Carolina, to voice his apprehension about the proposed mission. On hearing the complaint, Major Philip Lindley, Staff Judge Advocate for the US Army Special Forces Command, immediately placed a call to the commander of the Special Forces Rapid Support Unit.

After familiarizing himself with the BATF request, Major Lindley called JTF-6 to voice his concerns about the proposed Special Forces assignment. In his opinion, the building of the rehearsal site, review and endorsement of the BATF assault plan, and the request for on-site medical support during the raid all constituted “active” participation on the part of the Army. He believed if military medical personnel were near the compound during the raid, they could be forced to treat the injured children and to search arrested individuals. If, in fact, there was a methamphetamine lab on the Davidian compound and the soldiers’ uniforms became contaminated, they could become involved in the collection of evidence. Major Lindley considered this active or direct participation in civil law enforcement and a clear-cut violation of the Posse Comitatus Act.

When Major Lindley communicated his misgivings about the mission to JTF-6, he was told by a JTF-6 lawyer that he was a “toad in the road” and an “unwarranted obstacle to mission success.” The JTF-6 attorney also indicated that Major Lindley was trying to “undermine” and “undercut” JTF-6’s operation. Major Lindley responded, “that he tended to take comments such as that personally.” The senior officer replied that he [Major Lindley] could take it personally and promptly hung up the phone.¹⁸

Determined to stave off a potential disaster, Major Lindley began a memorandum for record and alerted his superiors to the potential crisis. It did not take long for Major Lindley’s complaint to reach the Office of the Secretary of Defense. At this juncture, JTF-6 deemed it advisable to conduct a more thorough legal review, and after requesting more information from federal law enforcement officials on the drug nexus, dramatically scaled back their proffered assistance to the BATF. The Special Forces assistance to the BATF would now fall within legal guidelines and include

only range safety, communications, and medical evacuation training. More importantly, however, no one from the Rapid Support Unit would accompany the BATF to help serve the warrants at the Davidian compound.¹⁹

On 28 February 1993, 76 BATF agents attempted to execute their search and arrest warrants on the Branch Davidian compound. As a result, a massive firefight occurred that killed four and wounded over 20 ATF agents, while six of Koresh's cult followers were fatally gunned down and another four wounded. The casualties sustained by the BATF were the largest in the history of the organization. On 19 April, after a 51-day siege, fire engulfed the compound resulting in the deaths of 74 Davidians, 21 of whom were under the age of 14.²⁰

Although the Texas National Guard provided myriad kinds of military machinery to federal law enforcement during the siege, and Active Duty soldiers assisted in maintaining the equipment, these activities all fell within the legal guidelines.²¹ Only by the slimmest of margins though, had the Army avoided direct participation in this major fiasco. While the commander of JTF-6 and the Assistant Secretary of Defense would later tell congressional investigators "the approval process worked as intended," the Reform and Oversight Committee saw matters differently. In their report, they concluded:

... that this was so only because Special Forces Command legal advisors at the U.S. Special Forces Command Headquarters, who were outside the normal approval process, but who had learned of ATF's request for assistance from Special Forces soldiers at Operation Alliance, strongly voiced objections to the Special Forces training mission of ATF as proposed by JTF-6. As a result of these concerns reaching extremely senior levels of command within the Department of Defense, the training missions were scaled back significantly and potential violations of the law were avoided.²²

Beyond violating the law, the US Army's image and reputation could have suffered a severe blow had Special Forces soldiers been directly involved in the Waco disaster. Colonel (Retired) Thomas R. Lujan, the Staff Judge Advocate for the United States Special Operations Command at the time of the incident, is convinced:

The specter of members of the Army's special operations forces accompanying BATF agents storming a religious compound, however misguided its leader, could have seriously compromised public support of the US Army.

Had the initial request been approved (it was) and acted upon (it wasn't), this could easily have been the single most debilitating event to occur within the Army since the tragedy at My Lai. In fact, this occurrence could have been even more egregious because it would have taken place on American soil, would have been a clear violation of the Posse Comitatus Act, and would have raised the issue of military involvement in a case of alleged religious freedom.²³

There can be little doubt that in their zeal to execute the mission, JTF-6 was willing to bend the rules. Their actions could have resulted in an angry outcry from the American public, branding the Army as a force opposed to civil liberties. Fortunately, a few intrepid officers risked military ire and challenged the chain of command and, in so doing, averted a violation of the Posse Comitatus Act. Their actions not only precluded the military's involvement in a questionable enterprise, but also almost certainly saved the Army a great deal of potential embarrassment, and perhaps even the lives of some soldiers.

Notes

1. *Report of the Department of the Treasury on the Bureau of Alcohol, Tobacco, and Firearms Investigation of Vernon Wayne Howell also known as David Koresh* (Washington, DC: Superintendent of Documents), September 1993, 17.

2. *Ibid.*, 37; Joint Task Force-6 Operational Support Planning Guide, Treasury Documents T08786, 08791, quoted in Report 104-749, House of Representatives, *Investigation into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians* (Washington, DC: US Government Printing Office), 2 August 1996, 35. Hereafter cited as House Investigation.

3. House Investigation, 35.

4. *Ibid.*, 36.

5. “The drug enforcement exception to the Posse Comitatus Act has been very effective at undermining the honesty of law enforcement personnel, who are encouraged to allege a drug nexus in many investigations for the purpose of getting, gratis, federal military assistance. The U.S. Marshals Service claimed a possible drug problem involved with the Randy Weaver family at Ruby Ridge, Idaho in order to get military reconnaissance flights over the cabin, which revealed no evidence of drugs.” David B. Kopel and Paul M. Blackman, “Can Soldiers Be Peace Officers? The Waco Disaster and the Militarization of American Law Enforcement,” 30 *Akron L. Rev.* 619 [online] (1997); available from <http://www-personal.umich.edu/~arafi/waco/soldierspeace.htm>, accessed 1 October 2005.

6. 10 U.S.C. Sec. 377; House Investigation, 32.

7. House Investigation, 36.

8. Operation Alliance, 1; available from <http://www.globalsecurity.org/military/ops/alliance.htm>, accessed 1 October 2005.

9. House Investigation, 36–37.

10. *Ibid.*, 37.

11. *Ibid.*, 37.

12. House Investigation, 37–38.

13. Joint Task Force North, 1; available from <http://www.jtfn.northcom.mil/subpages/history.html>, accessed 15 October 2005.

14. Lujan, 4; John C. Danforth, *Interim Report to the Deputy Attorney General Concerning the 1993 Confrontation at the MT. Carmel Complex, Waco, Texas*, Pursuant to Order No. 2256-99 of The Attorney General, 21 July 2000, 31.

15. Lujan, 4; House Investigation, 38.

16. Lujan, 4; House Investigation, 40.

17. House Investigation, 40; Thomas R. Lujan wrote that, “It became clear from the after-action reports and investigations that BATF’s primary interest

in this case stemmed from their conclusion that the Branch Davidians were stockpiling weapons in their compound. That conclusion perhaps could have been foreshadowed by a series of anomalies related to the BATF request for Special Forces support. They were the peripheral nature of the BATF in drug operations (usually spearheaded by the Drug Enforcement Agency at the federal level), the lack of involvement of the specialized drug laboratory reaction force, and the extensive nature of military support requested. All provided strong indications that further command inquiry was advisable. And although the commanding general of the JTF testified before Congress that he saw no reason to pierce the veil of the BATF request, the implications of this sequence of events should be understood by commanders and senior staff officers engaged in such operations in the future.” Lujan, 5.

18. Lujan, 5, 13; House Investigation, 42.

19. House Investigation, 40, 42; Lujan, 4.

20. Report of the Department of the Treasury, 1; Lujan, 4.

21. The House Investigation concluded, “1. The activities of active duty military personnel in training the ATF and in supporting the FBI’s activities during the standoff did not violate the Posse Comitatus Act because their actions did not constitute direct participation in the government’s law enforcement activities. 2. The activities of National Guard personnel in training the ATF, in participating in the ATF raid on the Davidian residence, and in supporting the FBI’s activities during the standoff did not violate the Posse Comitatus Act because the personnel were not subject to the prohibitions in the act.” House Investigation, 5.

22. House Investigation, 39.

23. Lujan, 5.

Chapter 6

Conclusions

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.

John R. Brinkerhoff, *Journal of Homeland Security*

The US military's engagement in the Global War on Terrorism (GWOT) presents several questions regarding the Posse Comitatus Act. Has the law, with its confusing array of exceptions, become so ambiguous that it is no longer applicable without extensive and protracted legal wrangling? Most importantly, does the PCA truly protect the American people, or does it, in fact, place them at greater risk in the GWOT?

The PCA, initially designed to assist in dismantling black freedoms, is now regarded as a protector of American freedoms. An example of this mindset is in a recent Air Force guidance document that underscores "adherence to the Act important . . . to protect our constitutional values."¹ The Constitution, though, makes no mention of military involvement in civil law enforcement one way or the other. It certainly places no restrictions on the use of the Army as a posse comitatus. A recent Congressional Research Service report clearly states, "The Constitution does not explicitly bar the use of military forces in civilian situations or in matters of law enforcement. . . ."²

Because the Constitution does not address the issue of military participation in civil law enforcement, it is possible the framers never envisioned or proposed military involvement in routine, day-to-day civilian police duty. In a recent report to Congress, Charles Doyle, a Senior Specialist in American Public Law, concluded that there was perhaps ". . . visible protrusions of a larger, submerged constitutional principle which bars the use of the armed forces to solve civilian inconveniences."³ Hamilton envisioned the Army assisting the magistrate in suppressing "a small faction, or an occasional mob or insurrection," to occur only in "emergencies."⁴ As an example, the Army's participation in the struggle against the Ku Klux Klan during Reconstruction would fall into the suppression of a "small faction" category, while the military's involvement in the 1992 Los Angeles riots would certainly constitute the suppression of a mob.

Perhaps a gray area for the military is its law enforcement function in the “war on drugs.” Minus the political rhetoric, it is arguable that this mission is an ordinary civil law enforcement responsibility, one that does not rise to the level of emergency as Hamilton envisioned. Notably, Congress enacted a multitude of exceptions to the Posse Comitatus Act to allow the military to assume the lead in drug interdiction. These exceptions, compounding those already in existence (see appendix), have added to the confusion surrounding the PCA. They have involved the military in questionable episodes, such as Waco, which may serve to distract from what should be the current major focus on the home front—the Global War on Terrorism.

In the Global War on Terrorism, the Army could find itself confronting a large faction of terrorists on US soil. Not surprisingly, planners are currently moving forward with stratagems to deal with such an eventuality, specifically an attack by 100 or more terrorists on an American town or city.⁵ The military must be able to react with utmost speed to a terrorist attack on American soil and not find its actions bogged down with legal uncertainties inherent in the PCA.

In this Global War on Terrorism era, when rapid response to a crisis is essential, military lawyers must thoroughly understand the PCA. Policy makers and military personnel need to be cognizant of the roles of both state and federal forces as prescribed in the act. As history has demonstrated, military officers cannot always rely on the veracity of intelligence supplied by federal law enforcement agencies. It is, therefore, incumbent on military personnel to verify all information to avoid violations of the PCA.

In determining the future of the PCA, the concerns brought forth in this paper may serve as a framework for consideration by military personnel and policy makers. Ambiguity and misunderstanding will hopefully give way to clarity and transformation, thereby maximizing the effectiveness of all involved. Whether new laws will be passed or the PCA will be scuttled or realigned is yet to be determined. However, when future events warrant the use of the military in a civil law enforcement role, it is imperative that impediments such as those encountered in the PCA will no longer thwart swift and decisive action.

Notes

1. Office of the General Counsel, *Air Force General Counsel Guidance Document: Posse Comitatus* (Washington, DC: Department of the Air Force), September 2003.
2. Jennifer K. Elsea, “The Use of Federal Troops for Disaster Assistance: Legal Issues,” *CRS Report for Congress*, Congressional Research Service, The Library of Congress, 16 September 2005, CRS-2.
3. Charles Doyle, “The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law,” *CRS Report for Congress*, Congressional Research Service, The Library of Congress, 1 June 2000, CRS-12.
4. Hamilton, Jay, and Madison, 149–150.
5. “A larger band of 100 or more terrorists ‘is a level of threat nobody is prepared to deal with,’ says James Carafano, a senior research fellow at the Heritage Foundation in Washington. In fact, Carafano told ITP this week he doubts U.S. troops are truly ready to handle even a platoon-sized terror threat in an American city or town. But U.S. Northern Command is moving to do just that, says one source. To meet DOD’s new strategy for homeland defense, the combatant headquarters charged with militarily protecting the United States against terrorist wants larger ground forces trained to a single standard and put on alert to respond to major incidents that surpass the response capabilities of state or local law enforcement.” Grossman, 1.

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Appendix

Statutory Exceptions to the Posse Comitatus Act*

- 5 USC App (Inspector General Act of 1978) 8(g)*: Department of Defense Inspector General is not limited by the Posse Comitatus Act (18 USC 1385) in carrying out audits and investigations under the Act.
- 10 USC 331–335*: President may use the militia and armed forces to suppress insurrection and enforce federal authority in the face of rebellion or other forms of domestic violence.
- 10 USC 374 note (§1004 of the National Defense Authorization Act for 1991, as amended)*: During fiscal years 1991 through 2002, the Secretary of Defense may provide counterdrug activity assistance on request of federal or state law enforcement agencies.
- 10 USC 382*: The Secretary of Defense may provide assistance to the Department of Justice in emergency situations involving chemical or biological weapons of mass destruction.
- 10 USC 382 note (§1023 of the National Defense Authorization Act for Fiscal Year 2000)*: During fiscal years 2000 through 2004, the Secretary of Defense may provide assistance to federal and state law enforcement agencies to respond to terrorism or threats of terrorism.
- 16 USC 23*: Secretary of the Army may detail troops to protect Yellowstone National Park on the request of the Secretary of the Interior.
- 16 USC 78*: Secretary of the Army may detail troops to protect Sequoia and Yosemite National Parks on the request of the Secretary of the Interior.
- 16 USC 593*: President may use the land and naval forces of the United States to prevent destruction of federal timber in Florida.
- 16 USC 1861(a)*: Secretary of Transportation (or the Secretary of the Navy in time of war) may enter into agreements for the use of personnel and resources of other federal or state agencies—including those of the Department of Defense—for the enforcement of the Magnuson Fishery Conservation and Management Act.

*Charles Doyle, “The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law,” *CRS Report for Congress*, Congressional Research Service, The Library of Congress, updated 1 June 2000.

- 18 USC 112, 1116:* Attorney General may request the assistance of federal or state agencies—including the Army, Navy, and Air Force—to protect foreign dignitaries from assault, manslaughter, and murder.
- 18 USC 351:* FBI may request the assistance of any federal or state agency—including the Army, Navy, and Air Force—in its investigations of the assassination, kidnapping, or assault of a member of Congress.
- 18 USC 831:* Attorney General may request assistance from the Secretary of Defense for enforcement of the proscriptions against criminal transactions in nuclear materials (18 USC 175a, 229E, and 2332e cross reference to the Attorney General’s authority under 10 USC 381 to request assistance from the Secretary in an emergency involving biological weapons, chemical weapons, and weapons of mass destruction, respectively).
- 18 USC 1751:* FBI may request the assistance of any federal or state agency—including the Army, Navy, and Air Force—in its investigations of the assassination, kidnapping, or assault of the President.
- 18 USC 3056:* Director of the Secret Service may request assistance from the Department of Defense and other federal agencies to protect the President.
- 22 USC 408:* President may use the land and naval forces of the United States to enforce Title IV of the Espionage Act of 1917 (22 USC 401–408).
- 22 USC 461:* President may use the land and naval forces and militia of the United States to seize or detain ships used in violation of the Neutrality Act.
- 22 USC 462:* President may use the land and naval forces and militia of the United States to detain or compel departure of foreign ships under the provisions of the Neutrality Act.
- 25 USC 180:* President may use military force to remove trespassers from Indian treaty lands.
- 42 USC 98:* Secretary of the Navy at the request of the Public Health Service may make vessels or hulks available to quarantine authority at various US ports.
- 42 USC 1989:* Magistrates issuing arrest warrants for civil rights violations may authorize those serving the warrants to call for assistance from bystanders, the posse comitatus, or the land or naval forces or militia of the United States.

- 42 *USC 5170b*: Governor of state in which a major disaster has occurred may request the President to direct the Secretary of Defense to permit the use of DOD personnel for emergency work necessary for the preservation of life and property.
- 43 *USC 1065*: President may use military force to remove unlawful enclosures from the public lands.
- 48 *USC 1418*: President may use the land and naval forces of the United States to protect the rights of owners in guano islands.
- 48 *USC 1422*: Governor of Guam may request assistance of senior military or naval commander of the armed forces of the United States in cases of disaster, invasion, insurrection, rebellion, or imminent danger thereof, or of lawless violence.
- 48 *USC 1591*: Governor of the Virgin Islands may request assistance of senior military or naval commander of the armed forces of the United States in the Virgin Islands or Puerto Rico in cases of disaster, invasion, insurrection, rebellion, or imminent danger thereof, or of lawless violence.
- 50 *USC 220*: President may use the Army, Navy, or militia to prevent the unlawful removal of vessels or cargoes from custom areas during times of insurrection.

About the Author

Matt M. Matthews joined the Combat Studies Institute in July 2005 after working for 16 years as a member of the World Class Opposing Force (OPFOR) for the Battle Command Training Program at Fort Leavenworth, Kansas. Mr. Matthews graduated from Kansas State University in 1986 with a B.S. in History. He served as an Infantry enlisted man in the Regular Army from 1977 to 1981; a Cavalry officer in the US Army Reserve from 1983 to 1986; and as an Armor officer in the Kansas Army National Guard from 1986 to 1991. Mr. Matthews has coauthored numerous scholarly articles on the Civil War in the Trans-Mississippi to include “Shot All To Pieces: The Battle of Lone Jack,” “To Play a Bold Game: The Battle of Honey Springs,” and “Better Off in Hell: The Evolution of the Kansas Red Legs”; he is a frequent speaker at Civil War Roundtables; and he recently appeared on the History Channel as a historian for Bill Kurtis’ *Investigating History*. Mr. Matthews was the mayor and city commissioner of Ottawa, Kansas, from 1993 to 1999.



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