

**More Than You Ever  
Wanted to Know About  
*Posse Comitatus***

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Before launching into this most exciting subject—one you have been waiting ever so long for, I recognize a couple of people in the audience particularly because of the subject. John Brinkerhoff, distinguished Army officer, key figure in homeland security, esteemed operations analyst at IDA, long-standing member of The Military Conflict Institute, author, critic, colleague, and friend. John is responsible for whatever credit I get for knowing something about the subject of *posse comitatus*.

The other person is Robert Dausen, a political science major at Dickinson College, Carlisle, PA, who is doing his senior research thesis on the subject of *posse comitatus* and has honored me by coming this great distance to listen to my talk.

Let us have a pop quiz. Before the lecture, rather than after.

How many of you have heard the phrase *posse comitatus*?

How many of you know the literal translation of the Latin phrase?

How many of you have read the misnamed (showing my bias) *Posse Comitatus Act*?

## Title 18, U.S. Code, Section 1385

Whoever, **except in cases and under circumstances expressly authorized by the Constitution or Act of Congress**, willfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

This is the law, as it now appears in the US Code. Pretty much the same as it was in 1878 when it was first passed, not as an independent act but as an amendment to the Army Appropriations Bill of that year. A specification of the fine that might be levied has been removed from the 1878 version. Incidentally, the penalty for posting military personnel around polling places during US elections is more severe than that for violating *posse comitatus* law.

There are only 52 words in this law! Hard to understand how it can be misunderstood. Perhaps it ought to be read by more people before they establish positions on its implications or need for modification.

Now you have all you really need to know about *posse comitatus*. I have lots more time, so there is more that I am going to say—when have I ever forgone the chance to talk! By the way, the emphasis on the slide is added by me.

Also, note that the Navy, including the Marines, are not cited in the law. However, I believe that Naval authorities have agreed that the law does pertain to the naval service as well. I am not aware of any time in US history where naval units were called upon to form up as members of a *posse comitatus*. Marine elements have been called upon by federal marshals. For example: April, 1867, four companies of Marines (Brooklyn Navy Yard, NY) assisted revenue officers in raids on illegal distilleries in Brooklyn; March, 1868, Marines again seized and destroyed a number of illicit distilleries near the Navy Yard in Brooklyn. And Marines were called out to deal with domestic problems even after the enactment of the *Posse Comitatus Act*.

## An Alternative?

The President, by using the militia or the armed forces, or both, or by any other means, shall take such 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.

Seems to me that this is a far more forceful and comprehensive authority for the employment of federal military forces to deal with domestic situations. Why all the fuss about *posse comitatus*?

### TITLE 10--ARMED FORCES

#### Subtitle A--General Military Law

### PART I--ORGANIZATION AND GENERAL MILITARY POWERS

#### CHAPTER 15--INSURRECTION

#### Sec. 333. Interference with State and Federal law

The President, by using the militia or the armed forces, or both, or by any other means, shall take such 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.

## What I Might Cover

- Common law foundation
- 18<sup>th</sup> Century experience
- Early 19<sup>th</sup> Century experience
- Terrorist assault, October 1859
- Late 19<sup>th</sup> Century experience
- The Act (a misnomer?)
- 20<sup>th</sup> Century experience
- Present views

I say I might cover these topics. I'll make judgments as I go along; if a lot of you nod off, I'll cut the discussion short. Also, if you have questions and want to divert the discussion into other, more fruitful directions, I will be happy to do so. All this material should be available soon on the MORS web site. My windy paper is also available on call (electronic version). Maybe the full paper can be made available from the web site as well, although my fine colleague from George Mason University and the Cornwallis Group, Professor Dave Davis would like to see interested parties buy the proceedings of Cornwallis VI (from the Pearson Peacekeeping Centre, Nova Scotia, wherein the paper is published).

## Common Law

- First appearance of phrase: 1285 (source: OED)
- Definition: “L. force of the county. The body of men above the age of fifteen in a county (exclusive of peers, clergymen, and infirm persons), whom the sheriff may summon or ‘raise’ to repress a riot or for other purposes; also a body of men actually so raised and commanded by the sheriff.”

The Compact Edition of the Oxford English Dictionary, Oxford University Press, 1971, defines *Posse Comitatus* in the following manner: “L. force of the county. The body of men above the age of fifteen in a county (exclusive of peers, clergymen, and infirm persons), whom the sheriff may summon or ‘raise’ to repress a riot or for other purposes; also a body of men actually so raised and commanded by the sheriff.” The first quotation of use is dated 1285. An extensive history—over 700 years and only misunderstood for about the last 50 years!

Even the western films have done a good job of representing the common law practice: when the town bank is robbed and the sheriff dashes into the bar and announces he is forming a posse, everyone who can ride and tote a gun is expected to join up—and the posse races out of town chasing the villains! That is *posse comitatus*, US style.

The use of the word posse to mean a gang or group, such as used by city gangs or drug lords does not follow from the history of the phrase; it is an unauthorized and incorrect application. But such is the use of language: it does not follow logic or law.

## 18<sup>th</sup> Century Experience

- Colonial militia in law enforcement, from the beginning
- Articles of Confederation (1777; 1781)
- Shays' Rebellion (1786-87)
- Constitution of the United States (1787)
- Whiskey Rebellion (1794)
- Calling Forth Acts (1792; 1795; 1799; 1807)

Articles of Confederation provided for militia in every state. Only central authority was a congress, which was authorized to call upon militia to defend the united states (plural and often written with no initial capital letter). No mention of role of military in law enforcement.

[Side-bar. Article XI of the Articles of Confederation is curious and interesting. It reads: "Canada acceding to this confederation, and joining in the measures of the united states, shall be admitted into, and entitled to all the advantages of this union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine states."]

Experience with mustering and employing militia forces during Shays' Rebellion, 1786-1787 and the very specter of 'insurrection' as depicted by that rebellion were significant influences during the Constitutional Convention. For example, Washington writing to James Madison, 22 November 1786, said: "What stronger evidence can be given of the want of energy in our governments than these disorders? If there exists not a power to check them, what security has a man for life, liberty, or property?...Thirteen Sovereignties pulling against each other, and all tugging at the federal head will soon bring ruin on the whole; whereas a liberal, and energetic Constitution, well guarded and closely watched, to prevent encroachments, might restore to us that degree of respectability and consequence, to which we had a fair claim and the brightest prospect of attaining" (Coakley, p. 7).

Experience during the revolution and following demonstrated that the Articles of Confederation left much to be desired in a document intended to establish a functioning federation of states. The states agreed to meet in a Constitutional convention during the summer of 1787 to prepare an improved document for governance. The discussion during that summer, while covering a wide range of matters, recognized the need for force to support the 'laws of the union.' There was extensive experience in the use of militia (by colonial and state governments) in domestic situations. "It has been customary to think of the militia as a force employed only in fighting Indians or a foreign enemy; in truth it was, from its beginnings, also an instrument for the suppression of insurrection and rebellion, the enforcement of law, and the performance of a host of other services at the behest of both governors and local officials" (Coakley, p. 3).

## The Constitution

- Article I, Section 8 (powers of Congress): Deal with piracy, declare war, establish & maintain army & navy & militia with rules for each, calling forth of militia
- Article II (presidency): Preserve, protect & defend; CINC active & militia; see that Laws are faithfully executed
- Article IV: Republican form of government protected against invasion & domestic violence

The parts of the Constitution of the United States that are relevant to the discussion of the concept and history of *posse comitatus* are:

Article I, Section 8. "The Congress shall have Power...To raise and support Armies...; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrection and repel Invasions; 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...The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it..."

Article II, Section 1. "I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will to the best of my ability, preserve, protect and defend the constitution of the United States."

Section 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 the actual Service of the United States..."

Section 3. "...he shall take Care that the Laws be faithfully executed,...."

Article IV, Section 4. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence" (Commager, pp. 138-144).

[Side-bar: There is another part of the Constitution that is important to recall when considering the role of *posse comitatus* in the enforcement of the Fugitive Slave Law and subsequently in the post-Civil War Reconstruction, which represent two conflicting applications of the concept of *posse comitatus*. The relevant part of the Constitution is Article IV, Section 2, reading in part: "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..."

## Early to Mid 19<sup>th</sup> Century Experience

- Modest use of military force in domestic situations
- Civil unrest (tax revolts)
- Slave riots
- Firefighting
- First use of federal force in labor dispute

1794, 20 October: Western Pennsylvania (Whiskey Rebellion). US forces dispatched to Western Pennsylvania (civil unrest).

1799, 15 May: US forces dispatched to Bucks County, PA (civil unrest).

1811, January: A detachment of Marines from New Orleans deployed against "Negro insurgents."

1824, 12 March: Marines from the Boston Navy Yard subdued a riot at the Massachusetts State Prison in Boston, Massachusetts.

1831, President Jackson ordered the Headquarters battalion [Marines?] to riot duty in Washington when he feared a mob might attack some public buildings.

Summer: Southampton County, Virginia. Following Nat Turner's revolt, in which 55 whites were killed, soldiers from Fortress Monroe and Marines from USS *Warren* and USS *Natchez* in Hampton Roads marched to put down the revolt.

24 August: US forces dispatched to Suffolk, VA (civil unrest).

1833, 31 March: U.S. Treasury in Washington was set afire by an arsonist; men from the barracks at Eighth and Eye Streets helped to quell the flames and guard the funds.

1834, 29 January: First use of troops during a period of labor unrest.

1835, 19 July: Marines from the Brooklyn barracks aided fire fighting and protected property during a major fire in New York City.

1851, September: Marines from the Philadelphia Navy Yard assisted authorities in Christiana, PA, in apprehending people who committed murders during a riot in the town.

## Early to Mid 19<sup>th</sup> Century Experience (continued)

- Fugitive slave act, 1850
- Cushing Doctrine, 1854
- Terrorist assault, 1859
- Civil War an Insurrection

### **1854, 27 May: US forces dispatched to Boston, MA (civil unrest). Attorney General Caleb Cushing supports the use of federal troops as *posse comitatus*.**

President Franklin Pierce's attorney general, Caleb Cushing, blessed the *posse comitatus* doctrine enunciated by the Senate Judiciary committee (responding to Fillmore's queries), to wit: executive officers of government already had adequate power to enforce laws without further legislation; marshals could summon *posse comitatus* and both militia and regulars in organized bodies could be members of such a *posse*. The Cushing doctrine, as it became known, defined the right of the marshals to use organized bodies of militia or regulars as part of *posse comitatus*: 'A Marshal of the United States, when opposed in the execution of his duty, by unlawful combinations, has authority, to summon the entire ablebodied force of his precinct, as a *posse comitatus*. The authority comprehends, not only bystanders and other citizens generally, but any and all organized armed forces, whether militia of the state, or officers, soldiers, sailors, and marines of the United States.' The Cushing doctrine was first issued on 27 May 1854 (Coakley, p. 132).

Coakley says: "The fact that the latter [i.e., 'armed forces'] might be organized as military bodies, under the immediate command of their own officers, did not, he [Cushing] ruled, 'in any wise affect their legal character. They are still the *posse comitatus*."

Cushing derived his opinion from the doctrine of British Chief Justice William Mansfield from a case arising from the Lord Gordon Riots, 1780. Note that this all-important 'doctrine' was only an opinion by a cabinet official, the Attorney General of the United States and was not subjected to judicial or legislative review prior to enunciation, or following, for that matter.

1857, 28 May: US forces dispatched to Salt Lake City, UT (civil disorder).

1 June: Two companies of Marines restored order during rioting by "Plug Uglies" at election sites in Washington, D.C.

1858, 16 June: The Secretary of the Navy ordered 20 Marines to help restore order at the Washington, DC jail.

2 September: Marines from the New York Navy Yard Marine Barracks and from the steamer *Sabine* occupied government buildings (yellow fever isolation area) on Staten Island and protected them against mobs seeking to burn them.

**1859, 17-20 October: First Lieutenant Israel Greene and 56 Marines deployed from Washington, DC, to Harper's Ferry after John Brown had seized the Federal arsenal there. Under orders from the War Department's representative, Brevet Colonel Robert E. Lee, the Marines recaptured the arsenal.**

1861, [15 April: President A. Lincoln issues a call for the militia to suppress insurrection.]

1863, 13 July: US troops dispatched to New York, NY (civil unrest). [Possibly Cold Springs, NY, to end strike at gun works where workers wanted a wage increase; Zinn, p.230]

## Late 19<sup>th</sup> Century Experience

- Post Civil War: Reconstruction (radical Republican Congress): 3 phases
- Army occupied once-CSA states until reconstruction acts' requirements met
- Frontier Army forces: law enforcement, pioneering & surveying, protection of railroad construction & settlers, economic warfare
- Southern Democrats returned to Congress as former CSA states "returned" to the Union; increased political power by 1878
- Over 70 deployments of federal forces in domestic situations, unrelated to Reconstruction

"...the Army played an abnormal role in civil government. Never before or after, within the continental boundaries of the United States, did it exercise police and judicial functions, oversee local governments, or deal with domestic violence on the scale it did in the eleven ex-Confederate states from 1865 to 1877" (Coakley, p. 268).

Reconstruction is seen as being comprised of three periods:

1. Surrender at Appomattax, 9 April 1865 until First Reconstruction Act, 2 March 1867 (the Army had a fairly limited role; President Johnson was following Lincoln's plan; and a radical Congress was just beginning to flex its power);
2. Outright military rule, under the Radical Republican Congress; each state had to ratify the Fourteenth Amendment and ratify a new state constitution creating 'loyal republican governments';
3. From the time powers were restored to local and state civil authorities to the final removal of Army from occupation in 1877.

## Third Reconstruction Act

- 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, or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States, or the due execution thereof, or impede or obstruct the due course of justice under the same, 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 force of the United States, or either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under this and the preceding sections shall be delivered to the marshal of the proper district, to be dealt with according to the law.

On 20 April 1871, the third and most significant of the Enforcement Acts came into being. It was titled “An act to enforce the provisions of the fourteenth amendment...and for other purposes” and “...gave the president powers in the South that had not been invoked since the military occupation in 1865. “Section 3 of the act, which was to become part of the permanent law of the United States governing military intervention to enforce the laws of the union read as follows, ‘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, or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States, or the due execution thereof, or impede or obstruct the due course of justice under the same, 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 force of the United States, or either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under this and the preceding sections shall be delivered to the marshal of the proper district, to be dealt with according to the law” (Coakley, pp. 309-310).

Modified somewhat (see earlier slide), the law is now Section 333, Title 10, US Code

## The Act: A Misnomer?

- By 1877 radical Republican power reduced
- Compromises needed (disputed Hayes vs. Tilden election)
- Negotiations: Tilden conceded when Hayes agreed to end Reconstruction (Army occupation)
- Amendment to 1878 Army Appropriations bill
- 50 deployments after the Act

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

Many military deployments dealing with domestic disturbances after the Act; a goodly number were related to providing order during strikes by laborers.

By General Order 49, the War Department, on 7 July 1878, called attention to provisions of the *Posse Comitatus* Act. The General Order enumerated: "those provisions of the Constitution and acts of Congress understood as to be excepted from the operation of the above section, authorizing the employment of military forces for the purposes of executing the laws." The enumeration included: Article IV of the Constitution; Sections 5297-5299 of the *Revised Statutes* embracing the laws of 1795, 1807, 1861, and the Ku Klux Klan Act; the Civil Rights Act; and the Second Enforcement Act [later found (partially) unconstitutional by the Supreme Court, 1882].

"Oddly enough, the effect in the South, where the period of Reconstruction had really come to an end anyway with Hayes' withdrawal of the troops in 1877, was far less important than it was in the West where the Cushing Doctrine had enabled marshals and Sheriffs to call on local commanders to furnish this assistance at their discretion. Given the frontier conditions involved and the delays involved in getting presidential approval before troops could act in a local situation, this proved to be one of the less salutary effects of the *Posse Comitatus* Act" (Coakley, p. 345).

## 20<sup>th</sup> Century Experience

- Military deployments continued
- Army sees Red threat
- Policies and procedures
- Bonus Army & March

War Department War Plans Division: Two classes of emergencies envisioned, calling for Federal intervention:

- (1) Minor Emergencies, or localized disturbances, in which assistance may be called by state authorities
- (2) Major Emergencies, or general disturbances in which interstate commerce, mails, or functions of government are interfered with.

Direct Federal action required. Instructions appeared to cover only situations that allowed federal intervention after a request by state or local authorities. CofS, 24 May 1920, foresaw wider use of troops under all applicable articles of the Constitution and the Revised Statutes, especially Sections 5297, 5298, and 5299, as published in Article 47, Army Regulations. President legally authorized to intervene to enforce federal laws in a state or locality without its request. (from Laurie and Cole, p. 332).

Army doctrine to deal with civil disorders emerged from C&GS School, Fort Leavenworth, 1922-1923: a manual by Maj. Cassius M. Dowell, infantry officer assigned to JAG; remarkable document, became core of future texts for senior officers at the school, as did its subsequent confidential supplement. Manual dealt with same technical and tactical issues covered by earlier works, but more comprehensive. Emphasized 'the ultra-radical element' as primary cause for American domestic disorders, characteristic for manuals of the period.

## 20<sup>th</sup> Century Experience (continued)

- Army policy & procedures harsh (A note from G. S. Patton, Jr)
- Public awareness & reaction
- Army modified its policy & procedures but did not back off completely

In 1925, Dowell revised his work; Army published its more general and innocuous part, with little mention of ultra-radicalism. The new work, including appendix of sample civil disorder documents, was essentially a legal treatise entitled *Military Aid to the Civil Power*. At time of publication, remaining parts of Dowell's endeavor, which Army saw as too sensitive for general public, were collected as a *Confidential Supplement to Military Aid to the Civil Power*. The initial book contains no references to *Confidential Supplement*, although Army considered both to be parts of the same document (Laurie and Cole, pp. 354-355).

[A useful source covering the efforts of the Army to codify its policies and operations in domestic disturbance situations is George Seldes, *You Can't Do That: A Survey of the Forces Attempting, in the Name of Patriotism, To Make a Desert of the Bill of Rights*, NY, Modern Age, 1938 (cited by Laurie and Cole, p. 364 fn).]

Maj. George S. Patton, Jr. wrote paper, November 1932, after dispersal of Bonus Marchers, that represented the older attitudes. Entitled "Federal Troops in Domestic Disturbances," similar in tone and substance to Dowell's manuals of the 1920s; reminiscent of late 19th century military works on civil disturbance. Paper argued that, if gas was ineffective against a mob, the troops should open fire; from nearby buildings sharpshooters should pick off mob leaders. Quotes: 'Always fire for effect...If you must fire do a good job—a few casualties become martyrs, a large number an object lesson.' Patton also believed that breaking up the mob was the main Army objective: 'When a mob starts to move keep it on the run, but always leave it a line of retreat—a cornered rat will fight desperately.' If any rioters resist, 'they must be killed.' Troops guarding buildings were urged to establish a deadline beyond which rioters would be shot. 'Be sure to kill the first one who tries and leave him there to discourage the others.' Concerning legalities, Patton believed that 'an armed mob resisting federal troops is an armed enemy. To aid it is treason. This may not be law, but it is fact. When blood starts running law stops, because, by the fact of bloodshed, it has demonstrated its futility.'

## 20<sup>th</sup> Century Experience (continued)

- Civil rights laws enforcements
- Vietnam War protests
- MLK assassination riots
- Army confusion in LA

“Patton’s harsh opinions demonstrated the gap between trend of Army policy toward the use of more prudent and humane nonlethal tactics and hard, conservative opinions of many Army commanders. Such attitudes and opinions were still evident in official Army regulations, as indicated by the August 1935 *Basic Field Manual*, FM 27-15. Like 1917-1918 predecessor, *Military Protection, United States Guards*, manual was extremely harsh in tone and substance, reflecting the hard-line views of Chief of Staff Douglas MacArthur, who figured prominently in its creation. An entire section of FM 27-15 dealt solely with domestic disturbances. It clearly delineated the responsibility of civil authorities in civil disorder, constitutional and statutory provisions governing the use of federal troops, and the necessary procedures to be followed to apply for, and gain the aid of, federal troops in event of disorders beyond municipal and state control. Further sections addressed the legal and practical matters involved in the implementation and conduct of government by martial law and the civil liability of military personnel.

“...The implication that full combat force was sometimes suitable for use against civilian crowds was evident in the statement that ‘the equipment required by Federal troops...suppression of domestic disturbances will not differ materially from that required for ordinary occasions of field service.’ FM 27-15, like previous manuals, discussed the use of offensive combat weapons such as airplanes, armored cars, artillery, cavalry, hand grenades, machine guns, tanks, 37-mm guns, and three-inch mortars against civilians...Officers were instructed that ‘as a rule rifle fire should be used against a crowd only as a last resort.’ But information was still included on how to engage in offensive action against cities, how to occupy a center of domestic disturbance, how to use antimob tactical formations, and how best to attack or defend barricades and buildings” (Laurie and Cole, p. 363).

## 21<sup>st</sup> Century Situation

- Considerable confusion among military & civilian leadership & media
- Military deployments continue but not governed by *posse comitatus* concept
- Legal foundation for deployments to deal with domestic crises clear

“The 1935 version of the Army’s *Basic Field Manual* was available to the public through the Superintendent of Documents and aroused a storm of controversy and criticism, especially among liberals, civil libertarians, labor groups, and critics of the military. The manual and the attitude and philosophy behind Army civil disturbance doctrine that it conveyed were denounced as reactionary, anti-democratic, anti-labor, and fascist. Although the manual contained little that had not been printed in earlier manuals and civil disturbance literature, it was the first such official Army document regarding civil disorders available for purchase by the general public. The public outrage over the manual’s contents gave a clear signal to many Army leaders that opinion on the proper role of federal troops in civil affairs, and especially on the use of lethal force and ‘shoot to kill orders’ that allegedly allowed federal troops to shed blood with impunity, had changed dramatically since the Bonus March of 1932 and the advent of the New Deal. Groups and ideologies that had previously been considered serious threats to the nation’s security and existence were now accepted entities. Army Chief of Staff General Malin Craig was forced to defend publicly the contents and working of the document against press attacks in the *New York Post*, *New York World-Telegram*, the *Nation*, the *New Republic*, and *Women Today* and stated that ‘while some of the instructions...may seem over-drastring...it must be remembered that the regular Army is called on to suppress a riot only when police and national guardsmen have been unable to control it.’ Although Craig was supposedly more liberal than many of his Army colleagues, the chief of staff indicated that the Army had ‘no intention of remanding MacArthur’s instructions’ as outlined in FM 27-15” (Laurie and Cole, p. 363).

Post-World War I: perceived Red threat; Army reaction. Army policy documents; role of the Army in industrial strikes (started in early 19th century).

Bonus Army and March as example

World War II and immediate post-war experience (e.g., railroad operations)

## Remaining Issues & Thoughts

- Present Views
- Revised Statutes and Federal Code (wide range of laws governing military employment in domestic situations)
- Implications for homeland security and defense.
- Military tribunals dealing with foreign terrorists (linked with misunderstood concept of *Posse Comitatus*).

Civil rights laws enforcements (deployments); Vietnam War protests; MLK assassination riots

Army confusion in LA

Present Views

Legal position: Revised Statutes and Federal Code (what the laws actually state). Range of laws governing military employment in domestic situations.

Implications for homeland security and defense. Military tribunals dealing with foreign terrorists (maybe should not include but it has a linkage with the misunderstood concept of *Posse Comitatus*).

**Where are we: Widespread misunderstanding of the issue. *Posse Comitatus* has become short-hand for all manner of involvement of military forces in domestic situations. Law seems plain to me: under the Constitution and laws in accordance with it, military forces can be used in local law enforcement, under the direction of the President. Has little to do with *posse comitatus*.**

## Homilies

- I think the essential prerequisite of sound military advice is that the giver must convince himself that if he were responsible for action, he would himself act so.
- Gain a sound understanding of the operation, organization, phenomena you are about to analyze. Don't be misled by your training and your ego--if you don't know the system you are analyzing, whatever you do will be wrong.

The first comment is from P. M. S. Blackett, one of the founding fathers. C. P. Snow, I believe, repeated the comment in *Science and Government*, The Godkin Lectures at Harvard, 1960.

The second comment is mine!

Final Word of Advice

***Nullius in Verba***

The motto of the Royal Society, founded in the 17<sup>th</sup> century (Great Britain); published the *Phylosophical Transactions: giving some Accoumpt of the Present Undertakings, Studies, and Labours of the ingenious in many Considerable Parts of the World*

Royal Society's motto *Nullius in Verba*, best translated as: "Take nobody's word for it; see for yourself." Literally, the word is nothing.

## Sources

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