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Posse Comitatus: Preparing for the Hearings

Michael Noone*

“The threat of catastrophic terrorism
requires a thorough review of the
laws permitting the military to act
within the United States”

National Strategy for Homeland Security (July 2002)¹

This Essay is intended for Congressional committee staff—whether employed by the committee or by members assigned to the committee—if they are called to review an administration legislative proposal to amend or repeal The Posse Comitatus Act (“The Act”).² It will be in two parts: background (to ensure that you and your members understand the statute’s origins and implications); and separate Sections on expected issues and positions that will be asserted, or should be explored, as you prepare for testimony by supporters and opponents of the Bill.

I. BACKGROUND

Blackstone, in his *Commentaries*,³ describes *posse comitatus* (power of the community or county) as that portion of the (male) population above the age of fifteen which a sheriff could summon to his assistance in order to keep the peace. The term had its common law origins in the Middle Ages. Although the composition of the posse makes no class distinctions, it was, by virtue of the fact that members had to supply their own arms and armor,⁴ limited to members of

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¹ Office of Homeland Security, *National Strategy for Homeland Security* 48 (July 2002).

² The Act which prohibits, “except in cases and under circumstances expressly authorized by the Constitution or Act of Congress,” the Army’s use as a *posse comitatus* to enforce the law is codified at 18 USC § 1385 (2000). Related statutory provisions are codified at 10 USC §§ 331–35 (2000) (Insurrection); 10 USC §§ 371–82 (2000) (Military Support for Civilian Law Enforcement Agencies).

³ William M. Blackstone, 1 *Commentaries* * 343 (Cavendish 2001).

⁴ Charles M. Clode, 1 *The Military Forces of the Crown: Their Administration and Government* 31 (John Murray 1869).

the propertied class. It was from this pool that the militia was formed. Most, but not all, of the American colonies maintained a militia not only for defense from external threats but also to suppress domestic threats.⁵ It was in this context that Arthur St. Clair, Governor of the Northwest Territory, told Secretary of State Thomas Jefferson in June 1791, “every necessary aid either in suppressing tumults, apprehending offenders or safely keeping them after they are apprehended, to which of the Power of the County may be inadequate, will be cheerfully rendered by the military.”⁶

Early in the nineteenth century the doctrine regulating the domestic use of the armed forces achieved its present contours. If the President called on the state militia or the army for law enforcement purposes, they would be utilized either to ensure the constitutional guarantee of a republican form of government to the states, or, as The Calling Forth Act of 1792 provided, to enforce federal law against “combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals.”⁷ The Act provided, however, that “... whenever it may be necessary, in the judgment of the President, to use the militia force ... [he] shall forthwith, and previous thereto, by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time.”⁸

In 1849, the Supreme Court clarified the President’s constitutional authority to act in support of state governments in *Luther v. Borden*.⁹ Five years later, US Attorney General Caleb Cushing concluded that US Marshals could, without presidential authority, call forth the militia and army to enforce federal law:

A Marshall 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.¹⁰

Cushing’s definition overturned the traditional distinction between the military and the posse/militia, lumping the former with the latter, and including

⁵ Lawrence Delbert Cress, *Citizens in Arms: the Army and the Militia in American Society to the War of 1812* 7 (North Carolina 1982).

⁶ Quoted in Clayton D. Laurie, *Filling the Breach: Military Aid to the Civil Power in the Trans-Mississippi West*, 25 W Historical Q 149, 152 (1994).

⁷ The Calling Forth Act, ch 28, § 2, 1 Stat 264, 264 (1792).

⁸ Id at ch 28, § 3. Nearly the same language can be found in current Code provisions relating to insurrection, particularly 10 USC § 331 and those provisions which regulate the use of the military to enforce federal authority (10 USC § 332) or federal or state laws (10 USC § 333).

⁹ 48 US 1, 43 (1849).

¹⁰ 6 Op Atty Gen 466 (1854).

as well “bystanders and other citizens generally.”¹¹ The Cushing Doctrine, based on British precedent and utilized briefly to enforce the Fugitive Slave Laws, lay dormant until 1868 when Attorney General William W. Evarts extended it to permit local authorities in the former Confederacy to seek military assistance to suppress domestic violence.¹²

In 1878, Representative Knott of Kentucky proposed an amendment to the Army Appropriations Act which rejected the Cushing Doctrine; this amendment came to be known as the Posse Comitatus Act. It provided that

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.¹³

The Act barred any use of funds to pay expenses undertaken in violation of the Section, and declared that a willful violation would constitute a crime.¹⁴ Revised and extended, it remains in effect today.¹⁵ It applies directly to the Army and Air Force,¹⁶ to the National Guard when called into federal service,¹⁷ and, by Executive Branch policy, to the Navy and Marine Corps.¹⁸

Although the Act has been law for a century and a quarter, it has had no immediate legal consequences. For example, there is no record of any prosecutions for its violation. Nor, as will be seen in the next section, have alleged violations served to bar criminal prosecutions of persons apprehended on the basis of evidence gathered with military aid. In fact, according to the author of the US Army’s history of the period prior to the Posse Comitatus Act:

To judge by its wording . . . as well as the speech of Representative Knott in introducing the measure, all that [the Posse Comitatus Act] really did was to repeal a doctrine whose only substantial foundation was an opinion by an

¹¹ Id.

¹² Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789–1878* (Center of Military History, US Army 1988) (especially Chapter 7, “Fugitive Slaves and Vigilantes: The Army as *Posse Comitatus*,” and Chapter 14, “Keeping Order in the Readmitted States: 1867–1872”). William Winthrop, writing a century earlier, mistakenly accepted Cushing’s view (which he attributed to Evarts) that provisions of the Judiciary Act of 1789 permitted marshals to call on the army as a *posse comitatus*. William Winthrop, 2 *Military Law and Precedents* 1352–53 (Little, Brown 2d ed 1896).

¹³ The Posse Comitatus Act, ch 263, § 15, 20 Stat 145, 152 (1878).

¹⁴ Id.

¹⁵ See 18 USC § 1385.

¹⁶ Id.

¹⁷ Roger Blake Hohnsbeen, Note, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 Geo Wash L Rev 404, 407 (1986), citing 10 USC §§ 3078, 8078 (1982).

¹⁸ See *United States v Walden*, 490 F2d 372, 373 (4th Cir 1974) (holding that the exclusion of the Navy and Marine Corps from the Posse Comitatus Act did not imply that Congress approved of using naval personnel in civilian law enforcement).

attorney general, and one that had never been tested in the courts. The president's powers to use both regulars and militia remained undisturbed But the ... Act did mean that troops could not be used on any lesser authority than that of the president and that he must issue a "cease and desist" proclamation before he did so.¹⁹

As the next Section will demonstrate, the President's constitutional authority to employ military forces to preserve the states' republican form of government and to respond to foreign attacks, will not be foreseeably affected by retaining, eliminating, or amending the Act. If the Act has any consequences, it would be for what the Defense Department describes as "Support for Domestic Counterterrorism Operations."²⁰ Since there is no available public information which suggests that the Act has impeded the war on terrorism, it can be expected that witnesses on both sides will resort to general statements in order to describe the benign or malignant consequences of any legislative change. In the second Section of this Essay, I suggest topics that should be explored during their testimony.

II. EXPECTED TESTIMONY

By the time hearings are scheduled you will have had an opportunity to evaluate the Administration's letter of transmittal accompanying the legislative proposal and, possibly, floor speeches on the topic. These will indicate in general terms the tack the executive will take. Committee members will probably have already decided—for reasons of party loyalty, constituent interest, or personal inclination—whether to support the legislation or to oppose it. Even so, the hearings will provide an opportunity for members to justify their positions, or for committee staff to establish that collectively the committee has met its legislative responsibilities. Since hearings are intended to generate sound bites, the topics which follow are intended to emphasize crude distinctions, based on opinions expressed on Washington talk shows or in public fora²¹ by supporters or opponents who would be qualified to testify before a Congressional committee. Expect that responses to questions requiring nuanced answers will be submitted for the record, after the hearings have concluded and public interest has waned.

¹⁹ Coakley, *The Role of Federal Military Forces* at 344 (cited in note 12).

²⁰ Department of Defense, Directive 3025.15, *Military Assistance to Civil Authorities* ¶ 4.7.5 (Feb 18, 1997) (requiring that employment of military forces to combat domestic terrorism must be requested and authorized by the President).

²¹ *The Diane Rehm Show: Military and Police Powers*, WAMU radio broadcast (July 29, 2002) (audiotape on file with CJIL); *The Posse Comitatus Act: Venerable Safeguard—or Old Hat*, Cato Institute videotape (Oct 16, 2002), available online at <<http://www.cato.org/events/021016pf.html>> (visited Mar 3, 2003) (copy also on file with author).

A. TESTIMONY SUPPORTING REPEAL OR AMENDMENT OF THE ACT

It is possible that the executive branch study “of the laws permitting the military to act within the United States”²² may lead to proposals to repeal or amend the various laws that now permit military commanders to aid in federal law enforcement. Because these laws²³ permit military intervention, and the apparent thrust of the Department of Homeland Security study is to identify restraints on the use of the military, you can assume that any legislative proposals would be intended to liberalize the criteria for intervention. Since liberalization would also be the goal of administration proposals affecting the Act, the same arguments will likely be advanced in either case. Witnesses supporting the proposal will fall into two categories: those presently in government (primarily from within the executive branch) who will rely on current experiences to justify their position, and those public witnesses who, by virtue of academic or practical experience, claim that they are qualified to speak on the topic. The focus should be on present officials, given that academics and other self-appointed experts should be viewed with some skepticism.

The administration’s choice of its lead witness will define the terms of the proposal. Neither the Secretary of Defense, nor the Chairman of the Joint Chiefs of Staff, nor the Director of Homeland Security expressed any dissatisfaction with the statutory framework then in place in the months following the release of the administration proposal. If one of these functionaries or a subordinate is designated the lead witness, they should be asked to explain their agency’s silence. Since the proposal affects law enforcement and interpretation of the Act, the administration will probably rely on the Department of Justice to justify the change.²⁴ In that case, the witness should be asked whether the agencies primarily affected, the Departments of Homeland Security and Defense, support the proposal and, if they do, why they did not publicly do so in the months following September 11.

The administration will probably argue that there are several reasons why the Act should be amended or repealed: it inhibits prompt responses to terrorist

²² Office of Homeland Security, *National Strategy* at 48 (cited in note 1).

²³ A partial list of fourteen laws is found in Department of Defense, Directive 5525.5, *DoD Cooperation With Civilian Law Enforcement Officials* ¶ E4.1.2.5 (Dec 20, 1989) (originally issued Jan 15, 1986). Since that time, Congress has extended similar authority to cover emergencies involving chemical and biological agents and expanded DoD authority to aid in the enforcement of drug laws. See 10 USC §§ 371–82.

²⁴ Department of Defense, Directive 2000.12, *DoD Antiterrorism/Force Protection (AT/FP) Program* ¶ 2.4 (Apr 13, 1999) (“The employment of U.S. military forces in response to acts or threats of domestic terrorism must be requested by the Attorney General and authorized by the President. All requests for assistance in responding to acts or threats of terrorism must be approved by the Secretary of Defense.”).

threats; violations of its provisions may impair criminal prosecutions; and violations of its provisions may impose tort liability on the United States. Although each of the reasons will be considered separately, your enquiry should begin by ensuring that government witnesses are familiar with the Cushing Doctrine. Do they seek to return to the practice of permitting subordinate federal officials to authorize military responses to state and local requests for assistance in enforcing local laws? If so, are there deficiencies in the present system which inhibit responses? The Department of Defense and the National Security Council have apparently pre-approved the use of military forces under some circumstances.²⁵ On October 15, 2002, Secretary of Defense Rumsfeld authorized the use of the Army's RC-7 Airborne Reconnaissance Low aircraft, aircrew, support staff, and facilities in the search for the Washington sniper who had, in violation of state laws, killed nine people and wounded two since October 2.²⁶ Similarly, National Imagery and Mapping Agency ("NIMA") assets were used to collect information after the Murrah Building (Oklahoma City) bombing and World Trade Center attacks. You should ask whether these actions were in response to state requests or were initiated by the executive branch. If initiated by the executive branch, what was the agency's rationale? Was presidential approval required or did the actions fall within the scope of "Permissible Direct Assistance" authorized by the Department?²⁷ You will discover that the list of permissible acts under the Department of Defense Directives has and can be used to justify nearly all forms of military assistance.²⁸ Request a list of failed or inhibited counter-terror operations in which the threat of prosecution affected agency action.

Since, to my knowledge, no federal official has ever been prosecuted for violating the statute, the Department of Justice may base its objections on the fact that terrorist defendants could rely on alleged violations of the statute to justify exclusion of the evidence gained. However, the exclusionary argument has been advanced many times²⁹ but only rarely accepted. The witness should therefore be asked: if the fear of exclusion motivates the Administration's proposal, why wasn't it made a generation ago, after the Wounded Knee

²⁵ See Department of Defense, Directive 3025.15 at ¶¶ 4.1–4.12 (cited in note 20) (referring to military responses in accordance with Presidential Decision Directives).

²⁶ Steve Vogel, *Military Aircraft With Detection Gear to Augment Police*, Wash Post A1, A15 (Oct 16, 2002).

²⁷ Department of Defense, Directive 5525.5 at ¶ E4.1.2 (cited in note 23).

²⁸ See, for example, US General Accounting Office, *Report to the Secretary of Defense, the Attorney General, and the Secretary of the Treasury: Department of Defense, Military Assistance Provided at Branch Davidian Incident 12* (GAO 1999) (describing how statutes allowing military assistance in law enforcement counter drug operations were used to justify military support of the actions against the Branch Davidians).

²⁹ See annotations to 18 USCA § 1385.

prosecutions³⁰ when the issue was hotly contested? Finally, the Department of Justice may express concern that violations of the Act could give rise to the civil liability of government officials or the United States. While the leading cases involving suits against officers who had authorized use of the military in a domestic law enforcement role³¹ were decided years ago, no change in the law was requested at that time. In addition, the United States would face no liability under the Federal Tort Claims Act since a claim must allege liability according to state law.³² A violation of Federal law—the Act—would not impose liability on the US.

B. TESTIMONY OPPOSING REPEAL OR AMENDMENT OF THE ACT

Witnesses will likely rely on three arguments against repeal or amendment of the Act: (1) facilitating military law enforcement would be contrary to fundamental American values; (2) the military, when used in a law enforcement role, uses excessive deadly force; and (3) reliance on the armed forces would chill the exercise of First Amendment rights. Although these arguments are typically combined, they will be analyzed separately. In response to the first argument, ask witnesses if the assertion of “un-Americanism” is based on their understanding of the Constitution or on their reading of current societal norms. Constitutional arguments will emphasize that the drafters opposed standing armies, particularly in a law enforcement role, and that the Constitution favored the militia. In that case, ask witnesses why use of the National Guard under state control should be constitutionally preferred and whether they deny the President’s power as Commander-in-Chief to use the armed forces against domestic threats. With regard to societal norms, ask whether there has been, historically or currently, any palpable public complaint regarding use of the armed forces to protect citizens from domestic threats. The witnesses will likely shift from an argument based on principles to arguments based on examples, comparing our civil-military relations with those of Latin American junta governments. If those examples fail, they will turn to domestic history.

Witnesses may argue that because the military are trained to kill, their use in law enforcement increases the probability that deadly force will be used unnecessarily. Witnesses may seek to validate their argument by relying on some typical examples: the Kent State shootings, the death of a young Mexican-

³⁰ See *United States v Banks*, 383 F Supp 368 (D SD 1974); *United States v Jaramillo*, 380 F Supp 1375 (D Neb 1974); *United States v McArthur*, 419 F Supp 186 (D ND 1976); *United States v Red Feather*, 392 F Supp 916 (D SD 1975).

³¹ *Laird v Tatum*, 408 US 1 (1972); *Bissonette v Haig*, 776 F2d 1384 (8th Cir 1985); *Berlin Democratic Club v Rumsfeld*, 410 F Supp 144 (D DC 1976).

³² 28 USC §§ 1346(b), 2674 (2000).

American shepherd at the hands of US Marines on a drug patrol,³³ and the presence of Delta Force advisors during the fatal attack on the Waco Branch Davidian compound. In response to the first example, it should be noted that the National Guard at Kent State was not under federal authority so the Act did not apply; as to the others, the Act did apply and was not apparently violated. Point out to the witnesses that their objections don't relate to the law but to specific incidents only. Remind them also that perhaps the most serious abuse of deadly force occurred in 1985 when the Philadelphia police bombed a private home, killed eleven persons and destroyed sixty homes.³⁴

Finally, they will argue that military surveillance capabilities, used on behalf of law enforcement, will have a chilling effect on First Amendment Rights, and will offer examples from the 1970s.³⁵ None of these cases were treated as violations of the Act. As a result, there may be little merit to the argument that elimination or liberalization of the Act will have adverse consequences.

Although briefing papers require no conclusion, I hope you see that, unless the government can show that its antiterrorism campaign has been hampered by the Act—and there is no evidence of that fact—neither side has a persuasive argument. However, you will have the opportunity for a rousing debate without concerning yourself that the fabric of the law will be damaged.

³³ Douglas Holt, *DA Questions Military Account of Border Slaying: Drug Unit Spokeswoman Calls Remarks Surprising*, Dallas Morn News 1A (June 4, 1997).

³⁴ William H. Brown III, *Foreword to the Report of the Philadelphia Special Investigation Commission*, 59 Temple L Q 267 (1986).

³⁵ *Laird*, 408 US 1; *Bissonette*, 776 F2d 1384; *Berlin Democratic Club*, 410 F Supp 144.