

**MILITARY
LAW
REVIEW**

HEADQUARTERS, DEPARTMENT OF THE ARMY

JANUARY 1960

PREFACE

This pamphlet is designed as a medium for the military lawyer, active and reserve, to share the product of his experience and research with fellow lawyers in the Department of the Army. At no time will this pamphlet purport to define Army policy or issue administrative directives. Rather, the *Military Law Review* is to be solely an outlet for the scholarship prevalent in the ranks of military legal practitioners. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

Articles, comments, and notes treating subjects of import to the military will be welcome and should be submitted in duplicate to the Editor, *Military Law Review*, The Judge Advocate General's School, **U.S.** Army, Charlottesville, Virginia. Footnotes should be set out on pages separate from the text, be carefully checked prior to submission for substantive and typographical accuracy, and follow the manner of citation in the *Harvard Blue Book* for civilian legal citations and *The Judge Advocate General's School Uniform System of Citation* for military citations. All cited cases, whether military or civilian, shall include the date of decision.

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RESTRICTIONS UPON USE OF THE ARMY IMPOSED BY THE POSSE COMITATUS ACT*

BY MAJOR H. W. C. FURMAN**

I. INTRODUCTION

A. *General*

As a result of a protracted struggle between a Republican President and a Democratic Congress over federal interference in elections in the South, the only legislation attempting to restrict the power of the President in the use of the national forces was passed.¹ Congress limited the employment of the Army as a means of law enforcement in the Army Appropriation Act for the fiscal year 1879, providing:

“Sec. 15. 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 circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment.”²

In 1956, incident to the enactment of title 10, United States Code, as positive law, the so-called “Posse Comitatus Act” was repealed and its substance reenacted as section 1385 of title 18, United States Code.

The enactment of the Posse Comitatus Act was the occasion for lively debate and much political wrangling but in the intervening years it has seldom been construed by the courts or the Attorney General. Nevertheless, it has produced many trouble-

* This article was adapted from a thesis presented to The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia, while the author was a member of the Seventh Advanced Class. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School nor any other governmental agency.

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¹ Corwin, *The President: Office and Powers, 1787-1957* 137 (1967).

² Sec. 15, Army Appropriation Act of Jun 18, 1878, 20 Stat. 152; codified until 1966, with amendments, as 10 U.S.C. 15.

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some questions to be resolved by The Judge Advocate General of the Army and the judge advocates of Army posts and units.³

As a means of protecting the nation from that hardy spectre "the evils of a large standing army"—as was claimed by some of its proponents—the act has been largely unnecessary and ineffectual. As a means of limiting the powers of the President to employ armed forces to execute the laws, the two exceptions contained in the statute have been its own undoing, though (in the author's opinion) it would have been unconstitutional otherwise.^{3a} The act has succeeded in preventing the misuse of troops by commanders who might have performed some law enforcement functions viewable as an unwarranted invasion of civilian affairs. It has sheltered the Army from odious duties foreign to its normal training or operational mission. Unfortunately, the act has inhibited commanding officers in their responsibility for maintaining favorable community relations and for taking all necessary measures for the welfare and discipline of the command. While no person appears to have been prosecuted for a violation of the Posse Comitatus Act, this should not be taken as evidence that the conduct which it prohibits is well defined or understood. The variety of interpretations it has received suggest that the act is so vague and indefinite that, as a criminal statute, it might be unconstitutional.

The Posse Comitatus Act, in its present form, provides:

"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 not more than \$10,000, or imprisoned not more than two years, or both. This section does not apply in Alaska." 4

Merely reading the statute serves to indicate some of the issues with which this thesis is concerned. What constitutes a "part of the Army or the Air Force"? Is it the individuals, the organizations, the reserve components, only the regulars? Why are naval forces omitted? To whom does "whoever" apply? How broad is the term "or otherwise" and what does it mean to "execute the laws"? Purportedly, the statute does not apply in Alaska but what is the impact of Alaskan statehood? Does it apply in Hawaii or the overseas commands? What are the exceptions

³ This thesis topic was suggested in letters to the Commandant, The Judge Advocate General's School, U. S. Army, from the Staff Judge Advocate, U. S. Army Engineer Center, Fort Belvoir, Virginia, 10 Jul 1958; The Staff Judge Advocate, Headquarters Third U. S. Army, Fort McPherson, Georgia, 15 Jul 1958; The Staff Judge Advocate, U. S. Army Signal Center, Fort Monmouth, New Jersey, 11 Aug 1968.

^{3a} Discussed in detail in fn 40a and Section V.

4 18 U.S.C. 1385 (1952Ed., Supp. V).

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“expressly authorized by the Constitution or Act of Congress”? Finally, can the requirement that the constitutional and statutory exceptions be express limit the power of the President in fulfilling his duties to “take care that the Laws be faithfully executed”?⁵

B. *Posse Comitatus Defined*

The *posse comitatus* derives its name from the entourage or retainers which accompanied early Rome’s proconsuls to their places of duty and from the *comte* or *counte* courts of England. It was a summons to every male in the country, over the age of fifteen, to be ready and appareled, to come to the aid of the sheriff for the purpose of preserving the public peace or for the pursuit of felons.⁶

In the United States, a sheriff may call on the posse for aid and those persons called are required to assist or be punished.’ Those states having statutes delineating the use of the *posse comitatus* have merely affirmed the common law.⁸

From section 27 of the Judiciary Act of 1789,⁹ the United States marshal derived implied authority to summon the military forces of the United States as a *posse comitatus*. Although sanctioned by long practice and thought to be fairly inferred from the provisions of the Judiciary Act, no such authority was expressly conferred by statute,¹⁰ and now such summons are forbidden by the Posse Comitatus Act.¹¹

C. *Chief Executives’ Use of Army in Enforcing Laws*

The President, as Chief Executive, swears that he will faithfully execute his office and that he will preserve, protect and defend the Constitution.¹² In executing his office he is required

⁵ U.S. Const. art. 11, sec. 3.

⁶ 15 C.J.S. 245 (1939); Black, *Law Dictionary*, 4th ed. 1324 (1951); Encyclopedia Britannica, 1957 ed., Vol. XVIII, 302. For details of the early English origin of the *posse comitatus* see Lorence, *The Constitutionality of the Posse Comitatus Act*, 8 Kansas City L. Rev. 164 (1940).

⁷ Coyles v. Hurtin, 10 Johns. 85 (N.Y. 1813); Sutton v. Allison, 47 N.C. 339 (1855); Worth v. Craven County, 118 N. C. 112, 24 S.E. 778 (1896); Commonwealth v. Martin, 7 Pa. Dist. 219 (1898); Person v. Northampton County, 19 Pa. Dist. 691 (1910); McCarthy v. Anaconda Copper Mining Co., 70 Mont. 309, 225 Pac. 391 (1924); 57 C.J. 773 (1932).

⁸ Commonwealth v. Martin, *supra* note 7.

⁹ Act. of Sep 24, 1789, sec. 27, 1 Stat. 73, 28 U.S.C. 647(b).

¹⁰ President Pierce’s Attorney General, Caleb Cushing, expressed an opinion that a Federal marshal’s authority to summon the *posse comitatus* included authority to summon officers, soldiers, sailors and marines. 6 Op. Atty. Gen. 466 (1854); 16 Op. Atty. Gen. 162 (1878).

¹¹ 17 Op. Atty. Gen. 71 (1881); 17 Op. Atty. Gen. 242 (1881).

¹² U. S. Const. art. II, sec. 1, cl. 8.

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to "take care that the laws be faithfully executed."¹³ Since the Debs decision,¹⁴ it is clear that it is the Chief Executive who must enforce the provisions of Article IV, section 4, of the Constitution, guaranteeing to the several states protection against "domestic violence."¹⁵

The Chief Executive's power to employ the Army in enforcing laws has evolved through a combination of statutory provisions, administrative and judicial determinations and vigorous action on the part of the office holder.

President Washington overcame an anti-Army Congress sufficiently to get legislation, in 1792, permitting him to call forth the militia¹⁶ "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 power vested in the marshals."¹⁷ The President had to be "notified" by an associate justice or district judge of the United States and he had to issue a proclamation to disperse, before using the troops.¹⁸

The Third Congress, by the Act of February 28, 1795,¹⁹ revised the earlier measures by eliminating the judicial notification and made the President "the sole and exclusive judge" of the facts.

The provisions of the Act of 1795 were extended to the national forces by a bill which provided ;

"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 force of the United States as shall be judged necessary, having first observed all the prerequisites of the law in that respect."²⁰

When called upon to issue a proclamation to insurgents who refused to obey certain Embargo Acts, President Jefferson ex-

¹³ U. S. Const. art. II, sec. 3.

¹⁴ *In re Debs*, 158 U.S. 564 (1895).

¹⁵ The so-called "guarantee clause."

¹⁶ Milton, *The Use of Presidential Power* 40 (1944).

¹⁷ Act of May 2, 1792, 1 Stat. 264.

¹⁸ Although this act referred to militia only, Corwin says that this is without interpretative significance because of the small Regular Army of that day. Corwin, *supra* note 1, at 131. Washington acted under the authority of this statute to personally put down the Whiskey Rebellion. See Findlay, *History of the Insurrection in the Four Western Counties of Pennsylvania* (1796); Brackenridge, *History of the Western Insurrection* (1859); Office of The Judge Advocate General, *Federal Aid in Domestic Disturbances*, S. Doc. Vol. 19, 67th Cong., 2d Sess. 26-34 (1922) (hereinafter cited as *Federal Aid*).

¹⁹ Act of Feb 28, 1795, 1 Stat. 424.

²⁰ Act of Mar 8, 1807, 2 Stat. 443.

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tended the Act of March 8, 1807, by ordering "all officers having authority, civil or military, and all other persons, civil or military, who shall be found in the vicinity" to aid and assist "by all means in their power" in putting down the insurrection.²¹ Such all encompassing language implies that the Chief Executive could and was calling on the entire populace to serve as a *posse comitatus*. This line of reasoning was affirmed by President Fillmore in 1851,²² Attorney General Gushing in 1854,²³ and President Pierce, when he permitted soldiers to aid the marshal during the Kansas disorders.²⁴

During Andrew Jackson's term as President, in 1832, South Carolina threatened to secede. Realizing that the Governor would not request Federal aid in this instance, Jackson prepared to seek legislation that would permit him to use force against the insurgent state. Until such legislation was forthcoming, he began to act on the *posse comitatus* theory, alerting military forces and sending warships to Charleston. "Old Hickory's" prompt, strong action temporarily preserved the Union.²⁵

Twenty-eight years later, when faced with a similar situation and armed with the same legislation ^{25a} plus Jackson's precedent, James Buchanan failed to exercise his powers. A weak President, attempting to play both sides against the middle in the impending rebellion, he took no effective step to nip it.²⁶

Although he acknowledged that the law permitted him to utilize militia or the Army whenever the laws "shall be opposed, or the execution thereof obstructed," he noted that the Federal judge, the United States District Attorney and the United States marshal in South Carolina had resigned. He reasoned, therefore, that there had not in fact been any opposition to the laws nor any obstruction to the execution thereof because there was no one present to execute the laws and therefore there could be no opposition to them.²⁷

²¹ *Federal Aid*, *supra*, note 18, at 41.

²² Richardson, *Messages and Papers of the Presidents*, 104-5 (1896) (hereinafter cited as Richardson).

²³ 6 Op. Atty. Gen. 466 (1854).

²⁴ 5 Richardson, *supra*, note 22, at 358. One writer says it is erroneous to class soldiers with civilians as *posse* members because the soldier has value only when armed and under his superior's orders. Birkhimer, *Military Government and Martial Law* (3rd. Ed.) 412 (1914). Present Army Regulations do not permit relinquishment of control to civilians when the Army is required to intervene in domestic disturbances. Army Regulations 500-50, 22 Mar 1956.

²⁵ Milton, *supra*, note 16, at 90-94.

^{25a} Act of Feb 28, 1795, 1 Stat. 424; Act of Mar 8, 1807, 2 Stat. 443.

²⁶ *Id.* at 102-106.

²⁷ Cong. Globe, 36th Cong., 2d Sess., app. 3 (1860).

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Lincoln took office from Buchanan with no greater authority but, as Chief of State, he did not hesitate to embrace the Jacksonian concept of his independent power and duty, under his oath, directly to represent and protect the people, irrespective of States, Congress or Courts.²⁸ He appealed for 75,000 volunteers to help put down the Southern insurrection. Congress ratified this posse-calling concept with the Act of July 29, 1861.²⁹ The Buchanan interpretation was no longer possible, for without the necessity of proclamations, the President was empowered to employ national military forces whenever he determined that unlawful obstructions, combinations and so forth made it impracticable "to enforce, by the ordinary course of judicial proceedings, the laws of the United States."³⁰

Although it had always been assumed that "United States" in the "guarantee clause" of the Constitution was referring to Congress,³¹ President Hayes laid the cornerstone for the concept that the Chief Executive was included in the term by furnishing arms and transferring troops to danger areas without prior congressional approval.³² Grover Cleveland, in 1894, overriding the objections of Governor Altgeld of Illinois, dispatched troops to Chicago to prevent rioting Pullman strikers from destroying Federal property and to "remove obstructions to the United States mails."³³ The Supreme Court approved of Cleveland's use of national troops without Congressional authority when they held in the *Debs* case:

"... the entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care."³⁴

Woodrow Wilson completely ignored the formalities required by Article IV, section 4 of the Constitution³⁵ by making troops

²⁸ Milton, *supra*, note 16, at 107.

²⁹ 12 Stat. 282; since reenacted at 10 U.S.C. 332 (1952 Ed., Supp V).

³⁰ Attorney General Cushing had already effectively evaded the proclamation requirement by holding that United States marshals could include militiamen and regular soldiers in their *posses*. 6 Op. Atty. Gen. 466 (1854).

³¹ A theory ratified by Chief Justice Taney in *Luther v. Borden*, 48 US (7 How.) 581 (1849).

³² '(The influence of their presence' contributed "to preserve the peace and restore order." *Federal Aid, supra* note 18, at 175. Corwin, *supra* note 1, at 134.

³³ *Federal Aid, supra* note 18, at 195-203; Wiener, *A Practical Manual of Martial Law* 54 (1940); McDowell, *Military Aid to the Civil Power* 193 (1925) (caveat: McDowell's book was rejected as a text for West Point because "some of its parts are unsound and misleading in important particulars." JAG 351.051, 15 Aug 1929).

³⁴ In re *Debs, supra* note 14.

³⁵ I.e., application of the Legislature, or of the Executive (when the Legislature cannot be convened),

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available for settling domestic disturbances directly on the requests by state authorities to local commanders.³⁶

The opening phrase of the Posse Comitatus Act permits an exception to its imposition "in cases and under circumstances expressly authorized by the Constitution or Act of Congress". (Emphasis supplied.) The events recited in the foregoing paragraphs establish that the President has, by implication, the power to guarantee every State protection from domestic violence. He has an implied duty to enforce not only those laws resulting from acts of Congress but those that are included in the so-called "law of the land." Treaties are in this category,³⁷ as are obligations inferred from the Constitution and those derived from the general code of duties of the President.³⁸ There are many other situations in which action is neither expressly authorized by the Constitution nor by any statute of Congress. It would be absurd to require express authority in case of sudden invasion, atomic attack, earthquake, fire, flood, or other public calamity before Federal forces could be employed.³⁹ It is clear that the word *expressly* cannot be construed as placing a restriction on the Constitutional power of the President, because even though not expressly named, such power cannot be taken away by legislation.⁴⁰ It is the author's opinion that the Posse Comitatus Act could not, and does not, limit the constitutional authority of the

³⁶ Troops were furnished on more than 30 occasions, between 1917 and 1922, when several of the States were stripped of their National Guard units as a result of World War I. Corwin, *supra* note 1, at 135-6.

³⁷ U. S. Const. art. VI, sec. 1, cl. 2.

³⁸ *In re Neagle*, 135 U. S. 1 (1890); *Logan v. United States*, 144 U. S. 263 (1891).

³⁹ The Department of the Army recognizes the absurdity of a prohibition against use of troops to execute the laws in such an emergency situation. Army Regulations 500-50, *supra* note 24.

⁴⁰ An opinion shared by President Taft who said:

"The President is made Commander-in-Chief of the Army and Navy by the Constitution evidently for the purpose of enabling him to defend the country against invasion, to suppress insurrection and to take care that the laws be faithfully executed. If Congress were to attempt to prevent his use of the Army for any of these purposes, the action would be void . . . he is to maintain peace of the United States. I think he would have this power under the Constitution even if Congress had not given him express authority to this end. . . ." Taft, *Our Chief Magistrate and His Bowers* 128-9 (1916).

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Chief Executive, whether that authority is expressed or is implied.^{40a}

Because the Posse Comitatus Act would be unconstitutional if applied to the Commander in Chief, it does not follow that this would be so with his subordinates. There is little doubt that the statute restricts everyone else.^{40b} It is important that the legal advisors to troop commanders be thoroughly familiar with the history, terms and interpretations accorded the Act by The Judge Advocate General of the Army, the Attorney General and the Federal Courts.

II. EVENTS LEADING TO ENACTMENT OF THE POSSE COMITATUS ACT

A. *Use of the Army, 1789-1879*

The United States Army was reluctantly sanctioned by a populace overly familiar with despotism and thoroughly afraid of "standing armies."⁴¹ Congress preferred to rely on an independ-

^{40a} In one recent study of Presidential powers the statute does not appear to be mentioned at all. See, Schaffter and Mathews, *The Powers of the President as Commander in Chief of the Army and Navy of the United States*, H. Doc. No. 443, 84th Cong., 2d Sess. (1956). Still more recently, it was (in the language of the Posse Comitatus Act itself) "under circumstances expressly authorized . . . Act of Congress" that Federal military forces were used to enforce a Federal court decree relating to desegregating public schools in Little Rock, Arkansas. 41 Op. Atty. Gen. No. 67 (7 Nov 1957), p. 20; Scheppe, *Enforcement of Federal Court Decrees; A "Recurrence to Fundamental Principles,"* 44 A.B.A.J. 113, 190-191 (1958). Scheppe is rebutted and the author's proposition supported by Prof. Daniel H. Pollitt of the University of North Carolina. See Pollitt, *A Dissenting View: The Executive Enforcement of Judicial Decrees*, 45 A.B.A.J. 600, 606 (1959).

^{40b} Colonel William Winthrop succinctly set forth the restrictions:

"Except as and when employed and ordered under the statutes and authority above specified, the U.S. military are not empowered to intervene or act *as such* on any occasion of violation of local law or civil disorder, or in the arrest of civil criminals. While officers or soldiers of the Army may individually, in their capacity of citizens, use force to prevent a breach of the peace or the commission of a crime in their presence, they cannot, (except as above), legally take part in their military capacity, in the administration of civil justice or law." Winthrop, *Military Law and Precedents* (2d Ed., 1920 Reprint), p. 877.

⁴¹ The Declaration of Independence protested that the King had "kept among us in times of peace standing armies." Most of the Constitutions of the original colonies say that standing armies are dangerous and ought not be kept up and the question of a regular army was hotly debated at the Constitutional Convention. When the Posse Comitatus Act was being debated, Hon. William Kimmel (Maryland), a supporter of the Act, attacked the standing army and eloquently traced the familiar story of America's traditional opposition to such armies, for the record. 7 Cong. Rec. 3579 (1878).

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able militia system,'? not recognizing the Army until 1789, when they authorized it a force of 700 men and two companies of artillery. Indeed, until recent years, the Army remained small and weak.⁴³ Surprisingly, it was required to take part in some seventy wars and campaigns between 1775 and September 1878,⁴⁴ and it was involved in an additional seventy domestic disturbances ~ including labor disputes, racial disorders, lynchings, natural disasters and reconstruction elections.⁴⁶

B. Incidents That Led to Proposal of the Act

Probably no two incidents directly influenced the passage of the Posse Comitatus Act as much as did the "Kansas disorders" and the supervision of post civil war elections in the South. Kansas was split on the question of slavery and its first election as a new territory resulted in the seating of a pro-slavery legislature with an appointed anti-slavery governor. By August, 1855, the anti-slavers were demanding statehood and pro-slavers had taken up small arms and artillery. Federal troops were instrumental in restoring order, acting as a *posse comitatus* in aid of the civil authorities, until Kansas was admitted to the Union.⁴⁷

When the War Between the States had been concluded and the southern states sought reentry into the Union, they were sub-

⁴² Riker, *Soldiers of the States*, 21 (1957); Wiener, *The Militia Clause of the Constitution*, 54 Harvard Law Review 181-220 (1940).

⁴³ Legislation authorized, but the Army did not have, 886 officers and men in 1789; 1,273 in 1790; 2,232 in 1791. By 1796 it was authorized and had 5,414 but was reduced to 3,359. Threats of war with France created a paper army of 52,000 but no one enlisted and it was reduced to 3,287 by 1802 but increased to 10,000 in 1808. *Federal Aid*, *supra* note 18, at 40.

⁴⁴ *The Army Almanac* 409-10 (1950). Tabulated are eighty-two campaigns, but twelve should be treated as domestic disturbances.

⁴⁵ See Appendix A for chronology of events. (This appendix was contained in the original thesis but has not been reproduced in this article.) A table of incidents by basic causes is set forth in Wagner, John H., Lt. Col. USA, *Martial Law—Its Use in Case of Atomic Attack*, a term paper presented to the Industrial College of the Armed Forces, 1956, citing Reichley, *Federal Military Intervention in Civil Disturbances* 196 (1939). The Confederate States had a constitutional government in the South from 15 Apr 1861 until 26 May 1865. Because of the common origin, heritage and training of both aides engaged in the War Between the States, it is interesting to note that the Confederate marshal had the power to call the *posse comitatus*. Confederate soldiers were ordered by President Jefferson Davis to keep order in Norfolk, and Richmond, when Grant's forces were threatening those cities. Robinson, *Justice in Grey*, 65, 383-419 (1941).

⁴⁶ Congressman Knott, supporting the Posse Comitatus Act noted that it was "designed to put a atop to the practice, which has become fearfully common, of military officers of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws." 7 Cong. Rec. 3849 (1878).

⁴⁷ *Federal Aid*, *supra* note 18, at 66-71.

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jected to an humiliating period of reconstruction. During this period they were divided into military districts under the command of general officers of the Army whose duties including registering the voters, supervising the election of delegates to constitutional conventions, supervising the conventions and supervising the ratification of the Fourteenth Amendment to the Constitution.⁴⁸

After the ex-Confederate states had submitted to ratification of the Fourteenth as the price for readmission, Congress continued to interfere with their internal affairs. Into the race-conscious districts came "carpet-baggers" in the highest governmental positions and "scalawags" and negroes in the lower.⁴⁹ Not until the General Amnesty Act of 1872 were the ablest southern citizens permitted to take part in politics,⁵⁰ and, with no relief expected from Congress and the Supreme Court, the aristocracy was forced to form secret societies, and to terrorize and coerce their oppressors, to free themselves.⁵¹ Drastic legislation, enforced with Army troops, repressed the whites and secured civil rights for the freedmen.⁵² The passage of the General Amnesty Act permitted a Democratic recovery in the South. Republicans lost nationally despite reconstruction laws, amendments to the Constitution, federal election laws and party patronage. By 1874 Democrats had control of the House.⁵³

Despite a "deal" made between the managers of Republican Presidential candidate Hayes and southern Democrats,⁵⁴ the election of 1876 was an exciting race with Hayes' victory depending, finally, on the single vote of a pro-Republican Justice of the Supreme Court.⁵⁵ The outcome was so unsure that 4,863 supervisors and 11,610 deputy-marshals were appointed to oversee the race⁵⁶ and troops were ordered into Florida, South Carolina and Louisiana, to guard the canvassers and prevent fraud.⁵⁷ This

⁴⁸ *Federal Aid*, *supra* note 18, at 90.

⁴⁹ Schlesinger, *Political and Social History of the United States* 244, 248 (1926).

⁵⁰ *Id.* at 262; General Amnesty Act of 1872, Act of May 22, 1872, c. 193, 17 Stat. 142.

⁵¹ *Id.* at 248.

⁵² Sparks, *National Development, 1877-1885*, 23 *The American Nation* 120 (1907).

⁵³ *Id.* at 119.

⁵⁴ Milton, *supra* note 16, at 161.

⁵⁵ For a detailed account of the electoral vote dispute settlement, see Schlesinger, *supra* note 49, at 301.

⁵⁶ 7,000 of the deputies were stationed at polls in the South. Sparks, *supra* note 62, at 124.

⁵⁷ President Grant ordered the soldiers to the polls. 7 Richardson, *supra* note 22, at 422-24.

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outrageous meddling in elections was the moving cause of the Posse Comitatus Act's proposal and passage.

C. *Legislative History of the Act*

Democrats were so exasperated with the machinations of the Republicans and with Grant's use of troops in the Hayes election that the House of Representatives sought a detailed report from the President of Army activities in the three southern states where the "crime of 76" took place. Grant denied that soldiers were made available as a *posse* except where it was necessary to preserve peace and prevent intimidation of voters.⁵⁸

The President contended that soldiers were utilized only sparingly, but the Democrats ignored him and debated ways and means of preventing further abuses.⁵⁹ Their attempts to reduce the strength of the standing army by adding restrictive "riders" to the annual appropriation bill were not acceptable to the Republican Senate.⁶⁰ The resulting stalemate left the Army temporarily without any appropriation.⁶¹

When the annual "Army Bill" ⁶² came up for consideration by the 45th Congress, Honorable William Kimmel (Maryland) sought to amend it, providing:

"That from and after the passage of this act it shall not be lawful 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 case as may be expressly authorized by act of Congress." ⁶³

An amendment offered by Honorable J. Proctor Knott (Kentucky) was the first to have a punitive clause and it referred to

⁵⁸ Grant, *Use of the Army in Certain of the Southern States*, H.R. Exec. Doc. No. 30, 44th Cong., 1st Sess. (1877).

⁵⁹ 5 Cong. Rec. 2111-20,2151-2. (1877).

⁶⁰ *Id.* at 2161-2, 2166-62, 2171, 2213, 2215, 2217, 2241, 2247-50. Justice David Dudley Field, in letters to the Editor, was critical of the 44th Cong. for its handling of the "Army Bill." It is of interest to note that he declared the President to be only an executing arm of Congress. 16 Albany Law Journal 181 (1877). *Zbid.*, 198.

⁶¹ 5 Cong. Rec. 225163 (1877). Hayes had to call a special Congressional session to get salaries for soldiers who had gone unpaid since the previous June. On Nov 21, the Democrats, having flexed their muscles, bowed to necessity and passed an appropriation bill with no reduction in force or *posse comitatus* rider. Sparks, *supra* note 51, at 125-6.

⁶² H.R. 4867, 45th Cong. (1878).

⁶³ Note the reference to "naval" forces, even though the proposed amendment was to an army appropriation. 7 Cong. Rec. 3586 (1878). During the Kansas disorders, Republicans attempted to amend the Army Appropriation Act to prevent the use of any "part of the military force of the United States" as a *posse comitatus*. Cong. Globe, 34th Cong., 2d Sess. 59 (1856).

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the "Army of the United States" instead of "land or naval forces":⁶⁴

"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 under the pretext or 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 act of Congress; and no money appropriated by this shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section; and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding \$10,000. or imprisonment not exceeding two years, or by both such fine and imprisonment."

Changes were made by the Senate but, after a joint committee conference, a version suitable to both parties was evolved⁶⁵ and passed. The Posse Comitatus Act was approved by the President on 18 June 1878.⁶⁶

The Posse Comitatus Act has been amended twice. The first expressly provided that the act shall not be construed to apply to **Alaska**.⁶⁷ The second occurred when the Army Air Corps was granted autonomy and became the United States Air Force.⁶⁸ The laws pertaining to the Army and suitable to the new service were made applicable to the Air Force *en masse* at the time of the transfer of appropriate functions, powers, duties, personnel, property and records.⁶⁹ The Air Force was included within the prohibitions of the Posse Comitatus Act when the statute was reenacted in 1956.⁷⁰

D. Using the Army in Law Enforcement Since 1878

Before the Posse Comitatus Act was finally passed, the Senate inserted the "exception" phrase, thus opening a way to keep the

⁶⁴ 7 Cong. Rec. 3845 (1878). There is no clue in the record as to why there was a provision for such an enormous fine. (The Vice-president's salary that year was only \$8,000.).

⁶⁵ *Id.* at 4239, 4248, 4295-4307, 4358, 4647-48, 4685-86, 4719.

⁶⁶ *Id.* at 4876.

⁶⁷ Act of Jun 6, 1900, c. 786, sec. 29, 31 Stat. 330. An attempt was made, prior to its original passage, to except the application of the act "on the Mexican border or in the execution of the neutrality laws elsewhere on the national boundary line." Hon. Gustave Schleicher (Tex) had rustler trouble in his district and he also worried over the ability to maintain neutrality laws on the Canadian border (England and Russia were at war with each other). 7 Cong. Rec. 3848 (1878). The Alaskan exception is included in the Code of Criminal Procedure for Alaska, sec. 66-22-46 Alaska Compiled Laws Annotated 1949 (formerly Charlton Code 363 or Carter Code, sec. 363).

⁶⁸ The National Security Act of 1947, sec. 207-208, 61 Stat. 502.

⁶⁹ S. Rep. No. 2484, 84th Cong. 2d Sess. 1151-1156, FN 5 (1966); *Id.* sec. 305 (a).

⁷⁰ Act. of Aug 10, 1956, sec. 18, 70A Stat. 626, 18 U.S.C. 1385 (1952 ed., supp. V).

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Chief Executive from becoming embarrassed by the Act's prohibition. This phrase has never been needed by a strong Executive, in the opinion of the author, an opinion evidently concurred in by one of the Senators, who said that the bill "contains nothing but truisms."⁷² Certainly, vigorous Presidents and others (presumably acting under the "exception" phrase also) have employed the Army on numerous occasions to execute the laws.⁷³ President Hayes considered the Posse Comitatus Act to be little more than a restraint on the power of the United States marshals and not applicable to the Chief Executive, because less than four months after he had signed the bill he sent the Army to enforce judicial process in New Mexico.⁷⁴ Subsequently, troops have been used in dozens of labor disorders; to keep order after the San Francisco earthquake; to guard Federal property, and to protect dignitaries. Because the passage of the Posse Comitatus Act did not halt all operations of the Army in law enforcement, but merely erected a maze to be threaded by each Commander at each request for troops, it behooves his legal counsel to become familiar with its ins and outs.

111. INTERPRETATION OF THE POSSE COMITATUS ACT

A. General

Analysis of the Posse Comitatus Act involves the same five elements employed by newspapermen and military message writers. *Who* is precluded from using the Army (or Air Force) to execute the laws? *What* part of the Army (or Air Force) may not be so used? *When* does the Act apply—in all cases, or are there emergency exceptions? *Where* does the Act apply (i.e., is it extraterritorial)? Do the reasons *why* such restrictions were imposed indicate how the Act should be construed?

B. To Whom Does The Act Apply?

When Congressman Knott argued in support of the Posse Comitatus Act, he made it clear that he intended that the word "whoever" include everyone who successfully ordered the Army to execute the laws. He said that the Act's restrictions reach

⁷¹ 7 Cong. Rec. 4648 (1878).

⁷² *Id.* at 4296.

⁷³ See Appendix B. (This appendix was contained in the original thesis but has not been reproduced in this article.) Corwin suggests that the existence of prohibitions such as those contained in the Posse Comitatus Act simply tends to encourage resort to martial law when employment of military force to aid civilian authorities is desired. Corwin, *supra* note 1, at 169. As evidenced by the incidents herein listed, this proposition has not yet proved correct.

⁷⁴ 7 Richardson, *supra* note 22 at 489.

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“from the Commander-in-Chief down to the lowest officer in the Army who may presume to take upon himself to decide when he shall use the military force in violation of the law of the land.”⁷⁵ In the author’s opinion, this is not accurate, for the Act cannot restrict the President’s Constitutional powers and, as to others, it need not be confined to members of the military. Certainly, if a marshal or other civilian willfully took command of troops in the execution of the laws, he could be punished. A very real problem occurs when an apparently responsible civilian requests military aid and the senior military commander orders the troops to execute laws. Who has “used” the military force? Probably both parties. The civilian has initiated the action and the soldier has carried it out. While the defense of “superior orders”⁷⁶ would prevent prosecutions of all the subordinate commanders, the senior officer would have to rely on “military necessity”⁷⁷ as a defense.

C. What *DO* “Army” And “Air Force” Mean?

The Posse Comitatus Act imposes no restrictions on the Navy, the Marine Corps or the Coast Guard.⁷⁸ Basically, this is because the Act was proposed as a result of misuse of the Army and as an amendment to an Army Appropriation Act.⁷⁹ The Air Force has subsequently been included.⁸⁰

⁷⁵ 7 Cong. Rec. 3847 (1878).

⁷⁶ “The defense of ‘superior orders’ is ordinarily available to all military personnel who act under the order of a military superior. Under emergent circumstances, the military commander cooperates with the civil authorities, but is subject to no authority but that of his military superiors. The defense of superior orders is absolute, unless an order is so obviously illegal that any person of ordinary understanding would instantly perceive it to be so. If the commands are illegal, but not obviously so to the ordinary understanding, the inferior will not be held liable if he obeys.” Par. 506.14 b, Air Force Manual 110-3, 1 Jul 1955. Also see ch. 3, par. 24, FM 19-15, Civil Disturbances and Disasters, 8 Sep 1958.

⁷⁷ “The emergency gives the right, and if hindsight rather than foresight shows that better methods available to the officer would have sufficed, nonetheless the officer will still be held innocent of legal responsibility.” *Id.* at par. 506.14a.

⁷⁸ The Judge Advocate General of the Navy has expressed the opinion that the Posse Comitatus Act does not restrict Marines from associating themselves with civilian police reserves, “as the act is relative to the Army” and “does not apply to Naval personnel.” JAGN 1954/213, 6 Apr 1954, 4 Dig. Ops., LOD, sec. 15.1. The same result might have been reached (and to soldiers or airmen, too) on the ground that the Act doesn’t apply to off-duty employment. See FN 248, *infra*.

⁷⁹ Note 63, *supra*. A unique theory has been advanced that “actually the force and effect of the act ceased with the exhaustion of the supplies that it appropriated.” If this theory ever had any validity, it has lost it now that the reenactment of the Posse Comitatus Act reaffirms the Congressional intention that it is still effective. See Corwin, *supra* note 1, at 138.

⁸⁰ Note 70, *supra*.

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The following table sets forth the components⁸¹ of the affected services and notes whether the Act is applicable :

Army	Air Force	Applies?
1. Regular Army* Active Retired	Regular Air Force Active Retired	Yes No**
2. Army Reserve Active Duty Not on Active Duty	Air Force Reserve Active Duty Not on Active Duty	Yes No
3. Militia*** National Guard Unorganized Militia State Guards	Militia Air National Guard	No No No
4. Army National Guard In Federal Service In State Service	Air National Guard In Federal Service In State Service	Yes No
5. Army National Guard of U. S. Active Duty Not on Active Duty	Air National Guard of U. S. Active Duty Not on Active Duty	Yes NO
6. Army of U.S.without Component Active Duty Not on Active Duty	Air Force of U.S. without Component Active Duty Not on Active Duty	Yes No
7. Others**** Cadets, U.S.M.A. Cadets, R.O.T.C. Auxiliary Military Police	Others Cadets, U.S.A.F. Cadets, Air R.O.T.C.	Yes NO No
8. Civilian Employees	Civilian Employees	No

* Includes Philippine Scouts.

** Except retired officers called to active duty.

*** Not applicable to Naval Militia.

****No attempt is made to determine applicability to such outdated military or quasi-military organizations as WAAC, CYTC, CCC, or ASTP.

The Army consists of the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserve; and all persons appointed or enlisted in, or conscripted into, the Army without component.⁸²

The Regular Army consists of persons whose continuous service on active duty in both peace and war is contemplated by

⁸¹ For a chart depicting the composition of the Army, see Appendix C. (This appendix was contained in the original thesis but has not been reproduced in this article.)

⁸² 10 U.S.C. 3062 (1952 Ed., Supp. V). An almost identically worded section substitutes "Air Force" for "Army" in 10 U.S.C. 8062 (1952 Ed., Supp. V).

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law, and of retired members of the Regular Army. It includes the professors and cadets of the United States Military Academy,⁸³ the Women's Army Corps of the Regular Army,⁸⁴ and those Phillipine Scouts still remaining in service.⁸⁵ In the original words of the Posse Comitatus Act it was not lawful to "employ any part of the Army of the United States, as a *posse*,"⁸⁶ a phrase that would appear to refer to all members of the Regular Army, active or retired. Considering the statute as a whole, it is seen that the appropriation forfeiture clause referred to the "employment of any troops" in violation of the Act.⁸⁷ Strictly construing this criminal statute, it is clear that the prohibitions were meant to apply only to those individuals who use troops on active duty for the purpose of executing the laws.⁸⁸ Buttressing this interpretation are the debates of the House of Representatives at the time the bill was presented.⁸⁹ Retired Regular Army personnel not on active duty appear to be exempt.

Regular Army officers may be detailed as Chiefs of Staff of National Guard Divisions⁹⁰ and are authorized to accept commissions in the Guard without prejudicing their commissions as Regulars.⁹¹ If the National Guard unit is ordered out on strike duty, for instance, it may not be accompanied by the Regular Army instructors assigned to it,⁹² but a Regular, commissioned in the Guard,⁹³ is considered to be a Guardsman, his Regular status being held in abeyance for the time being, so that he is not within the statutory restriction.⁹⁴

⁸³ *Ibid.*

⁸⁴ 10 U.S.C. 3071 (1952 Ed., Supp. V). As to Air Force see 10 U.S.C. 8071 (1952 Ed., Supp. V).

⁸⁵ JAGA 1955/4781, 31 May 1955.

⁸⁶ Note 63, *supra*.

⁸⁷ *Ibid.*

⁸⁸ Such a conclusion was reached by the Judge Advocate General of the Army in opinions to the effect that there is no objection to retired Regular Army enlisted men taking municipal law enforcement jobs. JAGA 194717744, 6 Oct 1947; *id.* 1947/8393, 21 Nov 1947. This was a reversal of an earlier opinion which had advised a retired Regular Army major that he should invite the attention of a sheriff to the Posse Comitatus Act in order to avoid being deputized to climb mountains as a member of a *posse* aiding in the location of illicit whiskey stills. JAG 210.851, 11 Oct 1926, Dig. Op. JAG 1912-40, sec. 480. (The major had been retired for a heart ailment.)

⁸⁹ See Appendix D.

⁹⁰ 32 U.S.C. 104 (1952 Ed., Supp V).

⁹¹ 32 U.S.C. 315 (1952 Ed., Supp V).

⁹² Dig. Op. JAG 1912-30, sec. 21.

⁹³ 32 U.S.C. 315 (1952 Ed., Supp V).

⁹⁴ Dig. Op. JAG 1912-30, sec. 21.

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Members of the Army Reserve;⁹⁵ those persons in the Army of the United States without component;⁹⁶ the Army National Guard of the United States;⁹⁷ and the Army National Guard⁹⁸ are all subject to the same tests applied to retired Regular Army personnel. In other words, they are not to be considered as “troops” unless they are on active duty in the service of the United States. Consequently, they are not a part of the Army for purposes of the Posse Comitatus Act.⁹⁹

When the Army National Guard is in the service of the United States it is a component of the Army.¹⁰⁰ At other times, it is a part of the militia,¹⁰¹ subject to the commands of the Governor and the normal law enforcement agency for quelling domestic disturbances. When serving as a state force, it is not a part of the Army and is not within the purview of the Posse Comitatus Act.¹⁰²

From time to time, States have been permitted to keep troops, for internal security, when their National Guards were in active

⁹⁵ The Army Reserve includes all Reserves of the Army who are not members of the Army National Guard of the United States. 10 U.S.C. 3076 (1952 Ed., Supp. V). As to Air Force, see 10 U.S.C. 8076 (1952 Ed., Supp. V).

⁹⁶ War time enlistees and draftees are in this category. 10 U.S.C. 3062 (1952 Ed., Supp. V). As to Air Force, see 10 U.S.C. 8076 (1952 Ed., Supp. V).

⁹⁷ The reserve component of the Army consisting of Federally recognized units and organizations of the Army National Guard and members of the Army National Guard who are also Reserves of the Army. 10 U.S.C. 3077 (1952 Ed., Supp. V). As to Air Force, see 10 U.S.C. 8077 (1952 Ed., Supp. V).

⁹⁸ The Army National Guard is a component of the Army while in the service of the United States. 10 U.S.C. 3078 (1952 Ed., Supp. V). As to Air Force, see 10 U.S.C. 8078 (1952 Ed., Supp. V).

⁹⁹ The same conclusion applies to the Air Force components. Caveat: “Active duty” includes “active duty for training.” 10 U.S.C. 101 (22); S. Rept. 2484, *supra* note 69 at 34; *cf.* 37 Comp. Gen. 264 (1957); as amplified by 38 Comp. Gen. 251 (1958). Accordingly, the Posse Comitatus Act would apply to units and individuals of the USAR during such periods as the two-week annual ACDUTRA in which they customarily engage. On the other hand, units of the National Guard usually train in their status as State forces (rather than as NGUS or Federalized NG). See ch. 5, Title 32, U.S.C. At such times, they are considered to be performing service in a Federal status only for the purpose of certain laws providing benefits for members, and their dependents and beneficiaries. 10 U.S.C. 3686.

¹⁰⁰ Note 98, *supra*.

¹⁰¹ 10 U.S.C. 311 (1952 Ed., Supp. V). The militia consists of the National Guard, the Naval Militia and the unorganized militia, consisting of the members of the militia who are not in the National Guard or Naval Militia. (These are the able-bodied males of at least 17 years of age, under 45 years of age and who are, or who have made a declaration of intention to become, citizens of the United States.)

¹⁰² Exempt from militia duty are Members of the armed forces, except members who are not on active duty. 10 U.S.C. 312 (1952 Ed., Supp. V).

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Federal service. These State forces cannot as such be called into Federal service and are not a part of the **Army**.¹⁰³

Cadets of the United States Military Academy or of the United States Air Force Academy are members of their respective Regular services and are affected by the Posse Comitatus Act.¹⁰⁴ Reserve Officers Training Corps cadets, on the other hand, are not yet a part of the Army or Air Force and the Act does not apply to them.¹⁰⁵

During World War II, industrial plants were protected by privately employed Auxiliary Military Police. In many cases they were armed and uniformed with Army equipment. Early opinions regarded these men as persons serving with the Army in the field,¹⁰⁶ but the Attorney General has subsequently denied them this status.¹⁰⁷

Until recently, it has not been clear as to whether the civilian employees of the Army are subject to the Posse Comitatus Act. In both war and peace, the Army has had "civilian guards," some of whom have been legally authorized to carry guns.¹⁰⁸ When the legality of having these guards direct traffic on an off-post public roadway arose, the question was apparently settled. The Judge Advocate General of the Army noted that the original version of the Act had referred to the "Army of the United States" and then turned to the Revised Statutes for the precise technical definition given that term. The definition referred only to various

¹⁰³ A typical authority for a state guard was 32 U.S.C. 194 which authorized any State to maintain military forces other than units of the National Guard, until Sep 27, 1952, while that State's National Guard was in Federal service. It is now executed, of course.

¹⁰⁴ Note 83, *supra*.

¹⁰⁵ JAGA 1956/8555, 26 Nov 1956. Cadets from Culver Academy (it is immaterial whether they were in the R.O.T.C. or merely in a private military organization) were used as guards by the Governor of Indiana when Terre Haute and other cities were flooded, New York Times, Mar 25-6, 1913, p. 1. Nor are members of the Civil Air Patrol a part of the United States Air Force. A letter of instructions subject: "Civil Air Patrol Participation in Law Enforcement" dated 15 July 1954, citing CAP Reg. 900-3, and stating that formal participation in law enforcement by CAP or its members is a direct violation of the Posse Comitatus Act is erroneous. Op. JAGAF 10240.1, 5 Aug 1954.

¹⁰⁶ SPJGA 1942/6113, 24 Dec 1942 citing Circular 52, Headquarters Services of Supply, 28 Aug 1942; SPJGA 1943/6489, 25 May 1943.

¹⁰⁷ Had these men been in the Army but accepting industry's pay, the receipt of the salary would have been illegal. See JAGA 1957/7037, 30 Aug 1957. A bill was introduced in the 76th Cong. to amend the Nat. Def. Act to provide for a National Industrial Defense Corps, a limited service component with the mission of guarding industrial plants. JAG 381, 20 Jun 1940.

¹⁰⁸ JAGA 1956/2356, 13 Mar 1956; CSJAGA 1950/1375, 7 Feb 1950. But their authority-to arrest civilians who live on post is no greater than any other citizen's. JAGA 1952/8326, 3 Dec 1952. And they had less authority than military pickets. SPJGA 1945/7167, 25 Aug 1945.

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classes of military personnel, leading to a conclusion that civilian employees are not a part of the Army.¹⁰⁹

D. *When Does The Posse Comitatus Act Apply?*

The Posse Comitatus Act is applicable whenever anyone, unless he be within a Constitutional or statutory exception, uses "any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws." What is the meaning of "part"? What does "otherwise" connote? Of what does "execute the laws" consist? Are there never any times of emergency that permit exception to the Act?

There are a number of statutory exceptions to the Posse Comitatus Act, but the most important ones are designed to supplement the President's constitutional powers. He may use the armed forces to suppress insurrections when requested to do so by the legislature of a State (or the governor, if the legislature cannot be convened).¹¹⁰ He may suppress rebellions and enforce Federal laws when unlawful obstructions, combinations, or assemblages, or rebellion make it impractical to do so by ordinary course of judicial proceedings.¹¹¹ He can prevent civil rights from being denied the people by insurrection, domestic violence, unlawful combination, or conspiracy when the State is unable, fails or refuses to do so.¹¹²

Other statutory exceptions include such diverse objects as ousting unauthorized persons from Indian lands; preservation of natural curiosities in certain national parks; enforcement of customs and quarantine laws; and protecting the rights of discoverers of guano islands.¹¹³

Any "part" of the Army means not only that the entire Army or Air Force may not be used for the prohibited purpose but also

¹⁰⁹ JAGA 1956/6462, 11 Sep 1956. The opinion notes, however, that the Army's civilian guards directing traffic outside the post would have no greater powers of arrest than an ordinary citizen. It appears that the guards could be deputized, however. See Op JAGAF 14-5L.3. 29 Dec 1958 (AFAG Bul No. 209, 12 Jan 1959) citing a construction (by the Civil Service Commission) of sec. 5.103 (m), part 5, ch. ZI-236.01 Federal Personnel Manual, as authorizing Federal employees to accept appointments or commissions as deputy sheriffs if such service did not interfere with their Federal duties.

¹¹⁰ 10 U.S.C. 331 (1952Ed., Supp. V).

¹¹¹ 10 U.S.C. 332 (1952Ed., Supp. V). This was the express authority used by President Eisenhower to remove the obstructions of justice in the State of Arkansas with respect to matters relating to enrollment and attendance at public schools in the Little Rock (Ark) School District. Ex. Ord. No. 10730, Sep 24, 1957, 22 F.R. 7628; 41 Op. Atty. Gen. No. 67, Nov 7, 1957, released Dec 29, 1958; 27 U.S.L. Week 1117 (1959).

¹¹² 10 U.S.C. 333 (1952Ed., Supp. V).

¹¹³ AR 500-50, 22 Mar 1956; Military Laws of the United States, sec. 480-505 (1949).

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that specific organizations, such as regiments, battalions, companies and individual members, such as individual military policemen may not so used.¹¹⁴ The Washington Herald Post of 7 May 1930 reported a probable violation in an account concerning 100 mounted troops and 2 officers from Fort Myer, Virginia, who aided civil authorities in a fruitless search for a murder suspect reported to be in the vicinity of Arlington and defying arrest.¹¹⁵

While the above mentioned incident would fall into the classical concept of the *posse*, and it is clear that the Army and its members may not be considered a part of the emergency power of the community in the ordinary signification of that phrase, the Act goes further. "Or otherwise" signifies that the Army and its members may not be considered a part of the ordinary law enforcement apparatus of the community either.¹¹⁶ The prohibition extends to assisting the police in investigating a crime committed by a civilian, notwithstanding the fact that any resulting arrests would be made by civilian police accompanying the military.¹¹⁷

In practice, "to execute the laws" has been construed to mean the execution of the civil laws, that is, the laws enacted by the Federal, State, or local governments for the governments of the community as a whole, without regard to the military or civilian status of the individual members thereof. This principle has been sometimes stated in terms of enforcement of the laws against civilians. This is believed to be inaccurate, however; the Act makes no mention of the persons against whom the laws are executed but merely prohibits the employment of the Army to execute the laws. Thus it is the character of the laws executed and not the person against whom they are enforced which is important.¹¹⁸ The Uniform Code of Military Justice¹¹⁹ is a statutory exception to the Posse Comitatus Act, making possible the enforcement by military personnel of the laws required for discipline.

In the event of national calamity or extreme emergency—such as an A-bomb attack, invasion, insurrection, earthquake, a fire, or flood, the interruption of the U.S. mail, or any calamity disrupting the normal process of Government—which is so imminent as to render dangerous the awaiting of instructions

¹¹⁴ JAGA 1956/8555, 26 Nov 1956.

¹¹⁵ TJAG declined to render an opinion as to the legality of such use on only the newspaper's statement of facts. JAG 370.6, 17 May 1930.

¹¹⁶ JAGA 1956/8555, 26 Nov 1956.

¹¹⁷ JAG 370.6, 8 May 1930, 2 Dig. Op. Army sec. 81.5; *id.* 370.6, 15 Jun 1926.

¹¹⁸ JAGA 1956/8555, 26 Nov 1956. See Section IV and fn 230, *infra*.

¹¹⁹ 10 U.S.C. 801-940 (1952 Ed., Supp. V).

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from the proper military Department, an officer may take whatever action the circumstances reasonably justify.¹²⁰

The best example of prompt action and good judgment is the universally commended activity of Federal troops in the San Francisco earthquake and fire in April, 1906.¹²¹ Soldiers moved promptly and captured President McKinley's assassin in 1901,¹²² and, in 1920, the commanding officer of Governor's Island rushed a battalion of infantry to the scene of the Wall Street bombing.¹²³ On Sunday, March 18, 1928, 150 Chinese, detained by immigration authorities on Angel Island in San Francisco Bay, assaulted a matron and started a mutiny. The commanding officer of nearby Fort McDowell properly sent troops and restored order.¹²⁴

While the Angel Island incident may be justified on an emergency basis it could have been sustained as an action necessary to protect government property. The right of the United States to protect its property by intervention with Federal troops is an accepted principle of our Government. The exercise of this right is an executive function and extends to all Government property of whatever nature and wherever located, including premises possessed, though not necessarily owned, by the Federal Government. Intervention is warranted where the need for protection of Federal property exists and the local authorities cannot or will not give adequate protection.¹²⁵

¹²⁰ AR 500-50, 22 Mar 1956; 24 Op. Atty. Gen. 549 (1902); 33 Op. Atty. Gen. 662 (1923); par. 50609, AFM 110-3, 1 Jul 1955. The Air Force sponsored National Search and Rescue plan completed 129 rescue, relief and disaster missions between 1 Jun 1957 and 14 Aug 1957. New York Times, 15 Aug 1967, p. 21. For a partial list of Army aid in disasters see Appendix B. As a general rule, if a calamity is designated as a "national disaster" the Army will have tendered aid. Although AR 500-50 permits emergency use of troops when the "circumstances reasonably justify", a sounder test is that of "necessity." (Currently the doctrine taught at the Judge Advocate General's School, U. S. Army, this concept is based on the forerunner of AR 500-50, General Order Number 26, Headquarters, Army, 1894, as cited in Winthrop, *Military Law and Precedents* 868 (2 Ed, 1920 Reprint). Certainly it would be much safer to use "necessity" as criteria because there is danger of having to justify past actions in order to avoid criminal or civil liability.

¹²¹ "In a desperate situation Gen. Funston saw clearly the *thing* that was necessary to be done and did it." Rept. of Sec. War, 19 (1906), cited in *Federal Aid*, *supra* note 18 at 309-10. Wiener, *supra* note 33 at 52.

¹²² New York Times, Sep. 7, 1901, p. 1.

¹²³ Dupuy, *Governor's Island, Its History and Development, 1637-1937*, 36 (1937), cited in Wiener, *supra* note 33, at 65-6. The troops were accompanied by the Staff Judge Advocate, Major Allen W. Gullian, who later became The Judge Advocate General of the Army.

¹²⁴ JAG 370.6, 13 Apr. 1928; Dig. Op. JAG 1912-30, par. 13; Wiener, *supra* note 33 at 66; par. 506.09, AFM 110-3, 1 Jul. 1956.

¹²⁵ AR 500-50, 22 Mar 1966.

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Intervention must be restricted to temporary needs and should not be on a permanent basis. Thus, in 1933, there was no objection to furnishing troops to guard the United States mint as a matter of emergency but their permanent assignment for that purpose was deemed to be inadvisable and contrary to the established policy of the Government.¹²⁶ This rule has now been extended to prohibit detailing Army personnel to answer emergency calls to various Government buildings in the District of Columbia.**“ Because the need was temporary, soldiers have been properly furnished to guard the residence and office of the United States High Commissioner to the Philippine Islands;¹²⁸ to protect the last resting place of the late President Franklin D. Roosevelt;¹²⁹ to protect funds used to pay Chanute Field soldiers while such monies were in Post Office Department hands between the train and the bank;¹³⁰ and to guard gold in transit if on an emergency basis.¹³¹

By Executive Order 8972, 12 December 1941, the President directed the Secretary of War to maintain military guards and to take other appropriate measures to protect from injury national defense material, premises, and utilities. While this au-

¹²⁶ JAG 370.61, 27 Dec 1933.

¹²⁷ JAGA 1955/5613, 15 Jun 1965.

¹²⁸ The Commanding General of the Philippine Islands Department determined that the number of civilian guards was inadequate to protect public property due to unusual conditions and that the need was temporary. JAG 093.7, 21 May 1940. The provisions of the Posse Comitatus Act were applicable to the Philippine Islands at that time. JAG 370.6, 15 Jan 1924; *id.* 13 May 1931; *id.* 321.4, 11 Jun 1923.

¹²⁹ The Hyde Park, N.Y., gravesite had been presented to the United States, and the Department of Interior had had no chance to arrange for permanent protection. SPJGA 1945/10728, 19 Oct 1946, citing *opns.* JAG 093.7, 21 May 1940; *id.* 370.61, 19 Jan 1934; *id.* 370.61, 27 Dec 1933; *id.* 370.6, 14 Sep 1926.

¹³⁰ JAG 370.6, 28 Jun 1924.

¹³¹ JAG 370.61, 19 Jan 1924; but see JAG 370.6, 14 Sep 1926, where a permanent detail of three soldiers was requested to guard shipments of money, by registered mail, through uninhabited New Mexican country. There being no actual or threatened robbery, the request was denied. The Army's position was set out in 1926, in a letter to the Provost Marshal General:

“The dictum of Justice Miller in the case of *In re Neagle*, 136 U.S. 66, declaring the power of the President to provide a sufficient guard of soldiers to insure the protection of the mail, has not been overlooked . . . such authority . . . does not extend to the general policing of all mail trains by United States troops, but only to the protection of the mail following advice to the Federal authorities of a particular and imminent danger. . .”

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thority is still cited in Army Regulations, it is doubtful if its validity can be extended into periods of **peace**.¹³²

The Posse Comitatus Act, it may be concluded, is normally applicable to military organizations or individuals operating as a part of the emergency power of the community or of the ordinary law enforcement facilities executing any laws against anyone (unless excepted by statute or the Constitution). Nevertheless, emergency circumstances may justify the employment of troops even though not normally permitted.

E. Act Limited To Certain Geographical Locations

So far as territoriality is concerned, the Posse Comitatus Act applies in the continental United States, its territories and its possessions (subject to express exceptions discussed below). It does not apply in foreign countries, where military forces of the United States are frequently stationed.

Until a Federal court decided to the contrary in *Chandler v. United States*,¹³³ The Judge Advocate General of the Army was of the opinion that the Act did restrict Army activities in foreign countries.¹³⁴ Accordingly, he disapproved requests that the Army hold a civilian prisoner pending trial before the United States Court in China at **Tientsin**¹³⁵ and to transport to the United States, in Army vessels, those Americans whom the court convicted.¹³⁶ Troops were not permitted to execute the laws in the

JAG 370.6, 1B Oct 1926; 6 Comp Gen. 741 (1927).

¹³² AR 500-50, 22 Mar 1956. President Roosevelt promulgated his Executive Order 5 days after the bombing of Pearl Harbor and under the authority of the Act of 20 Apr 1918, 40 Stat. 533, (now 18 U.S.C. 2155), the World War I anti-sabotage act. The President relied on this Act to permit him to post guards on private property, during war time, when civilians were unable to guard the property themselves. In the author's opinion, the normal peacetime situation would not justify such intervention, but the authority is tacitly still there. A more thorough discussion of this point is beyond the scope of this thesis.

¹³³ 171 F. 2d 921 (1948), cert. denied 336 U. S. 918 (1949), reh. denied 336 U.S. 947 (1949).

¹³⁴ Some of these earlier opinions were cited to sustain an opinion that the Posse Comitatus Act forbade use of military police in regulating traffic in the Territory of Hawaii. JAGA 1956/1192, 16 Jan 1956. The same conclusion might well have been reached without resorting to authorities which have been so definitely weakened. See fn 139, *infra*.

¹³⁵ In two cases the Consul General asked and was refused anything more than a cell in the guardhouse or some other secure room for the prisoner. He was told that he would have to have the marshal or such other civilian guard as the Court might designate retain custody of the prisoners. JAG 014.5, 27 Oct 1923; *id.* 014.5, 20 Dec 1923.

¹³⁶ JAG 541.1, 5 Mar 1924.

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Philippine Islands¹³⁷ and they were restricted in the field of law enforcement in Puerto Rico.¹³⁸

The *Chandler* case arose shortly after World War II had ended when Chandler, an American citizen, was charged with treason and arrested in Germany by Army authorities acting for the Department of Justice. Presented with the issue of applicability of the Posse Comitatus Act, the court said:

“... this is the type of criminal statute which is properly presumed to have no extra-territorial application in the absence of statutory language indicating a contrary intent. * * * Particularly, it would be unwarranted to assume such a statute was intended to be applicable to occupied enemy territory, where the military power is in control and Congress has not set up a civil regime.”¹³⁹

Accordingly, it seems reasonably well-established that the Posse Comitatus Act imposes no restriction on employing the military services to enforce the law in foreign nations. In recent years the Army has been requested to (and The Judge Advocate General of the Army has approved) take such actions in overseas areas as making identification of persons suspected of committing, in the United States, certain civil offenses, giving lie detector examinations and interviewing suspects.¹⁴⁰

¹³⁷ Despite the provisions of Sec. 5 of the Act of Aug 29, 1916, Philippine Organic Act, (39 Stat. 545) that the statutory laws of the United States should not apply to the Philippine Islands except when they specifically so provide. The Governor General was denied 500 Philippine Scouts (a part of the United States Army) needed to enforce quarantine regulations. The opinion differentiated between land and ship quarantine (the latter is expressly provided for by Congress). JAG 370.6, 16 Jan 1924.

¹³⁸ The Army considered borrowing convict labor, to be guarded by soldiers, in Puerto Rico to fill holes on the rifle range. The Posse Comitatus Act problem was never fully resolved (although it was recognized), because the land was to be soon transferred and the opinion suggested waiting on the transfer. JAG 684, 1 Apr 1925.

¹³⁹ *Chandler v. United States*, *supra* note 133 at 936. In similar cases, convictions of “Axis Sally” and “Tokyo Rose” were sustained. See *Gillars v. United States*, 182 F. 2d 962 at 972, 973 (D.C. Cir., 1950), and *Iva Ikuko Toguri D’Aquino v. United States*, 192 F. 2d 338 at 350 (9th Cir., 1951), cert. denied 343 U.S. 936 (1952), reh. denied 343 U.S. 958 (1952). Using the *Chandler* case as authority, Army guards and military transportation were approved for deporting an undesirable alien, provided that agents of the Naturalization and Immigration Service retained custody until the ship left the territorial limits of the United States. JAGA 1952/9649, 5 Feb 1953. Land or naval forces may be employed for the safekeeping and protection of an accused extradicted from a foreign country to the United States. 18 U.S.C. 3192.

¹⁴⁰ JAG 014.13, 1 Apr 1919 (comparison of photo of forgery suspect with a soldier in France) ; JAGA 1954/5140, 10 Jun 1954 (identification of soldier stationed in Korea) ; *id.* 1954/6516, 29 Jul 1954 (performing lie detector test on soldier stationed in Europe and accused of violation of a State law) ; *id.* 1957/2176, 6 Mar 1957 (taking statement of soldier stationed in Germany for State police).

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The applicability of the Posse Comitatus Act in Territories must be differentiated from that in foreign areas. A number of earlier opinions of The Judge Advocate General of the Army to the effect that the Posse Comitatus Act applies in United States Territories and Possessions are based on the overruled concept that the Act was applicable worldwide.¹⁴¹ There is abundant authority for the proposition, though it would be difficult to attempt to generalize as to all of the areas concerned. With the exception of the Alaskan exclusion, the Posse Comitatus Act is not restrictive within its own terms. In the *Chandler* case there is dicta that the Act should apply in those areas where the military power is not in control or where Congress has set up a civil regime,¹⁴² and there is an implication of applicability in certain Federal legislation.

Such legislation permits the Governors of Hawaii, the Virgin Islands and Guam to receive aid from the military or naval forces of the United States to prevent or suppress lawless violence, invasion, insurrection, or rebellion.¹⁴³ Formerly, the Governor of the Canal Zone was responsible for control there¹⁴⁴ and permitted to call on the military for aid similar to that accorded

¹⁴¹ JAGA 1956/1192, 16 Jan 1966; *id.* 1956/5291, 5 Jul 1956 (Army traffic patrols on off-post highways are forbidden); JAG 370.16, 24 Feb 1921 (an inference that it was unlawful for soldiers to have gone aboard a Russian ship (quarantined in Honolulu harbor) to quell a mutiny among Chinese passengers. No protest was made by Russia or China so the incident was considered closed without directly answering the question). One opinion expressed the view that Army personnel should be used to aid the Department of Justice in determining the whereabouts of a fugitive believed to be in Puerto Rico. The decision was based on comity rather than inapplicability of the Act. JAG 370.6, 16 Jun 1926. Subsequent opinions overrule, by implication, any conception that the Act is not applicable. JAG 370.6, 8 May 1930; JAGA 1952/4810, 26 May 1952; *id.* 1953/6465, 25 Aug 1953; *id.* 1956/6723, 27 Aug 1956. But as recently as 1956, The Judge Advocate General of the Air Force apparently overlooked the Chandler case and sustained the opinion of a subordinate SJA to the effect that it would be a violation of the Posse Comitatus Act to serve an out of state notice of citation in a divorce suit against an airman stationed in the Ryukyus Islands. Op. JAGAF 57-3.5, 27 Aug 1956.

¹⁴² *Supra* note 139.

¹⁴³ Act of Apr 30, 1900, sec. 67, 31 Stat. 153, 48 U.S.C. 532 (Hawaii); Act of Jun 22, 1936, sec. 20, as amended, 49 Stat. 1812, 48 U.S.C. 1405s (Virgin Islands); Act of Aug 1, 1950, c. 512, sec. 6, 64 Stat. 386, 48 U.S.C. 1422 (b) (Guam). The Judge Advocate General of the Air Force is of the opinion that the Posse Comitatus Act was applicable to Guam, thus preventing the OSI from conducting an investigation (with a view toward civilian prosecution) into an allegation that two Guam policemen wrongfully assaulted an airman stationed there. The opinion notes that should a legitimate military purpose be served by the investigation there would be no objection even though civilian law enforcement agencies derived an incidental benefit. Op. JAGAF 6-81.1, 16 Dec 1955. This is also the Army view. See fn 164, *infra*.

¹⁴⁴ 2 Canal Zone Code, 5, 7, 8.

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those governors mentioned above.¹⁴⁵ Now, because of a proclamation of national emergency,¹⁴⁶ the Commander-in-Chief, Caribbean is superior to the Governor and charged with protection of the canal and enforcement of the laws.¹⁴⁷ Statutes which specifically approved the use of military forces in aid to civil authorities in Puerto Rico were repealed as of the date the Constitution of the Commonwealth of Puerto Rico became effective. Puerto Rico comes within the purview of the Act and military commanders should be guided by the same policies governing intervention with Federal troops as are applicable within the States and Territories of the United States.¹⁴⁸ American Samoa was governed, under the President, by the Navy until 1951¹⁴⁹ when the Chief Executive transferred this responsibility to the Department of the Interior.¹⁵⁰ Neither the Constitution nor the laws of the United States applied when the Naval "Commandant-Governor" was in power¹⁵¹ and the Posse Comitatus Act was inapplicable. The transfer from one executive branch to another should cause no change. The Pacific Trust Territories are governed by the Navy and the Posse Comitatus Act is inapplicable.¹⁵²

At the time of writing, legislation has been enacted to make States of two former territories. One, Hawaii, has already been mentioned as being one of those places where the governor, in some instances, could apply directly to the military commander for aid. Nevertheless, Hawaii is also a place where the Posse Comitatus Act was made expressly applicable by legislation.¹⁵³ Certainly the Act will continue to apply when Hawaii is a State.

The only state where the Posse Comitatus Act does not apply is Alaska. In the gold rush days of the then "District of Alaska" a statute was needed to strengthen the authority of the law enforcement officials and to protect them from mobs. Such authority was granted in a bill that exempted them from punishment if a rioter was killed and made all of the rioters equally guilty if one of them killed or wounded any magistrate, officer

¹⁴⁵ E.O. 2382, May 17, 1916.

¹⁴⁶ Proc. 2914, Dec 16, 1950, 64 Stat. A 454.

¹⁴⁷ E.O. 10398, 17 Fed. Reg. 8647, Sep 30, 1952.

¹⁴⁸ AR 500-50, 22 Mar 1956; JAG 684, 1 Apr 1925.

¹⁴⁹ 48 U.S.C. 1431a.

¹⁵⁰ E.O. 10264, Jun 29, 1951, 16 Fed. Reg. 6419.

¹⁵¹ Reid, *Overseas America* 54 (1942); Emerson *et al.*, *America's Pacific Dependencies* 95, 127 (1949).

¹⁵² Emerson *et al.*, note 151 *supra* at 109.

¹⁵³ The Act was made applicable to Hawaii by subsection 5 (a), Act of Apr 30, 1900, Hawaiian Organic Act, 31 Stat. 141, 48 U.S.C. 495 which provided that the Constitution and all laws of the United States not locally inapplicable shall have the same force and effect in the Territory as they have elsewhere in the United States.

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or persons who were acting in their aid.¹⁵⁴ An act was passed in 1900 to permit easier enforcement of the anti-riot statute by making the Posse Comitatus Act inapplicable.¹⁵⁵ The admission of Alaska to the Union has not, in the author's opinion, changed the law.¹⁵⁶ The pertinent provisions of the Act permitting Alaska to become the forty-ninth state are as follows:

"... All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. * * * and the term 'laws of the United States' includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not 'Territorial laws' as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act."¹⁵⁷

In drafting the Alaskan Statehood Act,¹⁵⁸ the framers realized that some provision would have to be made to preserve all laws in effect that were applicable to the territory of Alaska. The abovequoted provision was included to prevent legal chaos and was expressly included in the act in order that all laws applicable to Alaska would be continued in effect until such time as they should be changed by Congressional enactment. That this was the intent of Congress is apparent from the statement in the Committee report¹⁵⁹ that:

"Subsection 8(d) is an amendment providing for the continuation of laws which are in effect at the date of admission."

The Departments of the Army, Justice, Interior and the Comptroller concur in the author's view that all laws (and regulations implementing these laws) that were applicable to Alaska at the time of the passage of the Alaskan Statehood Act, will continue to be applied in the same manner that they had been applied previously. This situation has to do, primarily, with those laws (and regulations) which are applied according to the definition of Alaska as being included in or excluded from the United States. Alaska should be considered to be within or without the United States depending on how it was considered in the application of

¹⁵⁴ Act of Mar 3, 1899, c. 429, sec. 363, 30 Stat. 1325.

¹⁵⁵ Act of Jun 6, 1900, c. 786, sec. 29, 31 Stat. 330, The anti-riot act is to be found in Sec. 66-22-46, Alaska Compiled Laws Annotated 1949. Even though the Posse Comitatus Act was clearly made inapplicable to Alaska, an inquiry was made as to the propriety of using troops to protect the Alaskan Railway (then wholly owned by the United States) during strikes. The opinion approved the use of troops, not on a basis of suppressing a disorder but because they would be guarding Federal property, for which no further proclamation or special formality would be required. JAG 370.61, 5 Nov 1924.

¹⁵⁶ The reason "continental United States" was used in the opening sentence of this section.

¹⁵⁷ Alaskan Statehood Act, Act of Jul 7, 1958, sec. 8(d), 72 Stat. 339.

¹⁵⁸ *Ibid.*

¹⁵⁹ JAGA 1959/1338, 21 Jan 1959.

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the statute in question before the passage of the Alaskan Statehood Act. Consequently, the Posse Comitatus Act continues to have no application in Alaska.¹⁶⁰

IV. APPLICATION OF THE POSSE COMITATUS ACT

A. General

Some aspects of the application of the Posse Comitatus Act have already been discussed but the day to day problems can be more easily anticipated or solved by comparing cases, their functions, and the reasons why the restrictions were imposed. Most problems arise because of the "or otherwise execute the laws" clause and not the "*posse*" provision of the Act. Consequently, this chapter will be devoted to exploring such issues as Army criminal detection, guarding of criminals, service of process, and the private employment of soldiers in law enforcement positions.

B. Criminal Investigations

Congress has enacted a set of military disciplinary laws—obviously best administered by military personnel¹⁶¹—and it has expressly consented to enforcing civil law to the extent of assisting in the criminal investigation and apprehension of military personnel who are offenders.¹⁶²

The modern military post is populated by both soldiers and civilians and entertains many civilian visitors, all of whom pose a potential regulatory problem to a commander charged with security, safety, public health and crime prevention or detection.¹⁶³ How far can he go in investigating crimes, without violating the Posse Comitatus Act, where civilians are involved?

¹⁶⁰ *Ibid.* See also 38 Comp. Gen. 447 (1958); JAGA 1959/1200, 22 Jan 1959; 38 Comp. Gen. 468 (1958); contra, 38 Comp. Gen. 261 (1958).

¹⁶¹ Uniform Code of Military Justice, 10 U.S.C. 801-940 (1952 Ed., Supp. V). Military criminal investigators may instigate valid searches by state or civilian officials of the off-base dwelling of a person subject to the Uniform Code of Military Justice. They may participate in the searches, when requested, and may request assistance from civilian law enforcement agencies in obtaining evidence or information from civilian sources. Op. JAGAF 1957/11, 7 Feb 1957.

¹⁶² *Id.*, at sec. 814 (Art. 14, UCMJ). The Air Force expressed a willingness to cooperate, where so requested, in matters relating to violations, by airmen, of state liquor laws, "subject to limitations of the Posse Comitatus Act." Op. JAGAF 57-81.4, 20 Apr 1954.

¹⁶³ For a full discussion of the subject see, Oliver, *The Administration of Military Installations: Some Aspects of the Commander's Regulatory Authority With Regard to the Conduct and Property of Civilians and Military Personnel* (unpublished thesis, TJAGSA, Charlottesville, Va., 1958).

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The criteria is whether the circumstances surrounding the crime are such as to cause an investigation of the offense to be made by the military authorities for military purposes. For instance, if military personnel are under suspicion, the employment of a lie detector on military or civilian witnesses, for the purpose of determining the proper disposition as to the military personnel involved, would not constitute a violation of the *Posse Comitatus Act*.¹⁶⁴

Military police may interrogate civilians, subject to their consent, when investigating unlawful acts committed by members of the Army,¹⁶⁵ and they may give oaths to the civilians in connection with the interrogation.¹⁶⁶ A military purpose is served in investigating selective service registrants¹⁶⁷ and Department of Defense employees who are not normally subject to military jurisdiction.¹⁶⁸ Soldiers were not permitted to assist the Department of Justice in investigating charges of bribery against exchange employees¹⁶⁹ but, if a more recent opinion¹⁷⁰ is correct, a military purpose should have been found to permit the assistance. The Judge Advocate General has expressed the view that it would be permissible to give a blood alcohol test to a consenting civilian suspected of intoxication arising on a military reservation even though the sole purpose was in connection with investigations prior to bringing charges in a civilian court. The rationale is that since any such intoxication is intimately connected with good order and discipline, the investigation is in fact in connection with a military purpose and not precluded by the

The *Posse Comitatus Act* prohibitions extend to assisting the civilian police in investigating a crime committed by a civilian, notwithstanding the fact that any resulting arrests would be made by civilian police accompanying the military.¹⁷² Thus, there

¹⁶⁴ JAGA 1953/6465, 25 Aug 53. And "the Provost Marshal will inform the appropriate civilian police agency, if in the course of a criminal investigation it is determined that persons not subject to the Uniform Code of Military Justice are involved . . .," Par. 9, AR 195-10, 19 Nov 1957.

¹⁶⁵ JAGA 1955/7606, 20 Sep 1955; *id.* 1952/4810, 26 May 1952.

¹⁶⁶ JAGA 1953/8153, 28 Oct 1953. See also, UCMJ, Art. 136.

¹⁶⁷ JAGA 1956/1517, 28 Feb 1956.

¹⁶⁸ JAGA 1950/3770, 19 Jun 1950.

¹⁶⁹ JAGA 1956/6723, 27 Aug 1956.

¹⁷⁰ JAGA 1959/1745, 16 Feb 1959.

¹⁷¹ *Zbid.* But the practice of military medical personnel drawing blood samples from members of the military establishment suspected of off-post drunk driving is condemned when the sole purpose of the extraction is to furnish blood for use in civil courts in prosecuting violations of state statutes. JAGA 1959/4534, 5 Jun 1959.

¹⁷² JAG 370.6, 8 May 1930; *id.* 370.6, 15 Jun 1926.

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would be no violation of the Act to lend an army mine detector to a civilian law enforcement agency to aid them in searching for a criminal's gun but not proper if the detector operator were also furnished.¹⁷³

When imaginative prohibition agents sought the use of an Army observation plane and pilot to fly over Maryland woods, to make a trial survey as to the feasibility of detecting illicit whiskey stills from the air, the request was denied. The Air Corps (so named as a part of the Army at that time) was considered to be so efficient that stills would be found, the prohibition laws would be executed and there would be a violation of the Posse Comitatus Act.¹⁷⁴ In the narcotics field, the law is no less relaxed. Military police may interrogate, investigate and aid civilians only when investigating the suspected narcotics violations of military personnel.¹⁷⁵

Congress has passed legislation intended to combat prostitution near military posts¹⁷⁶ but in doing so they made clear that the investigation and execution of the anti-vice laws were to be left to the civil authorities:

"Nothing . . . shall be construed as conferring on the personnel of the War or Navy Departments . . . any authority to make criminal investiga-

¹⁷³ JAGA 1957/5586, 26 Jun 1967. But as to the legality of lending military property, see FN 238, *infra*.

¹⁷⁴ JAG 370.6, 8 May 1930; *id.* 370.6, 28 Apr 1930, noted that while it may be possible for Air Corps officers to gain information of assistance to the "border patrol" in the performance of their military duties, and it no doubt would be their duty to give information respecting the location of offenders to the law enforcement officers in situations where Air Corps officers observe palpable violations of the laws of the United States, existing law does not expressly authorize or permit the use of the Air Corps, or any other part of the Army in assisting the border patrol. A suggestion to use the Air Corps as the enforcement agency of a proposed "United States Aerial Police" was negated because of possible conflict with the Posse Comitatus Act. JAG 370.6, 26 Apr 1934.

¹⁷⁵ JAGA 1952/4810, 26 May 1962.

¹⁷⁶ The May Act of Jul 11, 1941, 18 U.S.C. 1384. One provost marshal failed to head May's intent that the Army not investigate vice, writing as follows: "Where local officials are unwilling to take the lead in eliminating vice conditions, the commanding officer, acting through his Provost Marshal and the Military Police, must take the initiative. . . . Military Police have no power of arrest. . . . However, they assist the Provost Marshal of the post and interested social groups in the procurement of evidence. The evidence is turned over to the local authorities, who are requested to take action."

Dillon, *Military Police Functions*, 33 J. Crim. L., C. and P. S. 372 (1943). It is the author's opinion that this procurement of evidence would violate both the May Act and the Posse Comitatus Act. In the same article, Colonel Dillon, described a May Act raid in the vicinity of Camp Forrest, Tennessee, where:

"A squad of 158 F.B.I. agents went in to work with the local officials and the *Military Police* (emphasis supplied)."

The raid is mentioned in SPJGC 1942/1863, 7 May 1942.

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tions, searches, seizures, or arrests of civilians charged with violation of the law.”

There would be a military purpose in aiding in vice investigation but Congressman May pointed out that he did not intend for the Army to enforce the bill: ¹⁷⁷

“It is obviously contrary to our best traditions that military and naval personnel should be endowed with such authority.” ¹⁷⁸

C. Arrest and Apprehension

An individual soldier or military policeman has no more power to arrest than a peace officer,¹⁷⁹ but persons belonging to the military service are not, by reason of their military character, relieved of their duties and liabilities or deprived of their rights as citizens.¹⁸⁰ Consequently, soldiers may make the so-called citizen's arrests.¹⁸¹

The normal operational agent in military law enforcement is the military policeman. In 1919, regulations of the Army provided :

“A military policeman, as such, has no authority to arrest a civilian outside the boundary of a place subject to military jurisdiction for the commission of a non-military offense, except when called upon to do so by officers or agents of the Department of Justice, in aid of the Federal civil power.” ¹⁸²

This infers, improperly, that a military policeman has unlimited authority to arrest civilians for non-military offenses committed within the boundaries of a place subject to military jurisdiction.¹⁸³ Of course, they have the same rights and duties as any other soldier or civilian to assist in the maintenance of peace ¹⁸⁴ and they may eject offenders from military reservations, reporting the incident to the local United States Attorney.¹⁸⁵ In those rare situations where apprehension and detention become necessary, the offender may be detained only long enough to effect

¹⁷⁷ Discussed in JAGA 1942/1132, 27 Mar 1942. Also, see 87 Cong. Rec. 3207 (1941).

¹⁷⁸ H.R. 399, 77th Congress (1941).

¹⁷⁹ SPJGA 1945/7167, 25 Aug 1945, citing *Hawley v. Butler*, 54 Barb. (N.Y.) 490 (1868).

¹⁸⁰ JAGA 1953/8132, 20 Oct 1953, citing *Allen v. Gardner*, 182 N.C. 426, 109 S.E. 260 (1921); 6 C.J.S. 419; 36 Am. Jur. 265. See also JAG 004.6, 1 May 1941; JAGA 1950/6252, 31 Oct 1950; *id.* 1945/7167, 25 Aug 1945.

¹⁸¹ Note 108, *supra*.

¹⁸² Par. 485, Army Regulations as cited in JAG 370.093, 25 Mar 1919.

¹⁸³ JAG 014.13, 7 Apr 1919 announces the Army stand that military police, as such have no authority over civilians and that it is unlawful, with exceptions, to permit them to assist the civil authorities, Federal or State, in the execution of the laws.

¹⁸⁴ Par. 5a, AR 600-320, 17 May 1951; JAG 014.14, 3 Sep 1919.

¹⁸⁵ Par. 5c, AR 600-320, 17 May 1951.

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his delivery to the appropriate civil authorities or to dispose of his case before the United States Commissioner as prescribed in applicable Federal statutes.¹⁸⁶ This must be done immediately.¹⁸⁷ Civilians may not be detained in the stockade or other detention facility, even if awaiting trial.¹⁸⁸

National security is weakened by the Posse Comitatus Act for military guards are not justified in using force to prevent a civilian from photographing military equipment, either on or off a military reservation¹⁸⁹ though they would be permitted to arrest for the offense if it were forbidden by competent authority.¹⁹⁰ The restrictions impede the imposition of anti-sabotage laws,¹⁹¹ as it would be improper for Army military police to form water patrols for the apprehension of persons not subject to military jurisdiction.¹⁹²

It is illogical, perhaps, that one part of the federal authority should not be permitted to come to the aid of another, but almost from the passage of the Posse Comitatus Act this has been the interpretation. The Attorney General, in 1881, ruled that troops could not be sent to aid the United States marshal in arresting certain persons charged with robbing an officer of the Federal government, the clerk of the engineer officer superintending the government works on the Tennessee river.¹⁹³ Soldiers could not be used to apprehend the "Cow Boys", a group of Arizona badmen,¹⁹⁴ nor could they aid the Indian Territory marshals in arresting bandits whose depredations were so extensive as to cause

¹⁸⁶ 18 U.S.C.1, 3401, 3402.

¹⁸⁷ Par. 5b, AR 600-320, 17 May 1951.

¹⁸⁸ JAGA 1953/8634, 12 Nov 1953.

¹⁸⁹ JAGA 1954/3685, 26 Apr 1954; *id.* 1953/7830, 21 Oct 1953. But see Op. JAGAF 58-11.1, 7 Dec 1951, citing 18 U.S.C. 795 as giving the power of censorship to the commanding officer of military and Naval aircraft and citing 18 U.S.C. 793(e) as authorizing the confiscation of photo negatives by the officer in charge of the aircraft and making it a felony for a person to refuse to surrender them. As a citizen, the demanding officer could make an arrest for such refusal but he could not be ordered to make the arrest as his right of arrest is not connected with his military status.

¹⁹⁰ JAGA 1954/9901, 6 Jan 1955, confirming the right to make citizen's arrests. Post regulations are not competent authority but the various security and anti-sabotage statutes would be.

¹⁹¹ Act of Sep 23, 1950, Internal Security Act of 1950, sec. 21, 64 Stat. 1005, 50 U.S. C. 797.

¹⁹² JAGA 195416902, 20 Aug 1954.

¹⁹³ 17 Op. Atty. Gen. 71, (1881), citing 16 Op. Atty. Gen. 162, (1878) denying aid to a collector of Internal Revenue who was faced with armed resistance in Arkansas.

¹⁹⁴ 17 Op. Atty. Gen. 242, (1881).

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express companies to cease shipping on the Missouri Pacific Rail Road.¹⁹⁵

An Army or Air Force commander, responsible for the conduct, morals and morale of his soldiers, or airmen is limited by the Posse Comitatus Act, and is prevented from making prophylactic arrests or in assisting civil authorities in so doing, although there would be an indirect benefit to the military. During World War I, troops could not be utilized to suppress vice and bootlegging in the Federally established five mile prostitution and liquor control zone which surrounded training camps.¹⁹⁶ Naturally, they could not be employed in towns beyond the zone either independently or in aid of civil authorities, in apprehending prostitutes, whiskey sellers or proprietors of bawdy houses,¹⁹⁷ nor could military police search automobiles for liquor when the cars were outside the territory within their jurisdiction and control.¹⁹⁸

The Army policeman cannot "get their man" until after his induction because military jurisdiction (exempt from the limitations of the Act) begins only then. As a consequence, soldiers were condemned by the Attorney General for their participation in "slacker raids" in New York City and elsewhere in 1918. Wholesale arrests of suspected draft dodgers were made by civil and military police without Presidential authority and were termed "unlawful" and "ill-judged."¹⁹⁹ Military police do not have extra-ordinary authority over selectees when they are en route from the draft board assembly point to the induction

¹⁹⁵ 21 Op. Atty. Gen. 72, (1894); 19 Op. Atty. Gen. 293, (1889). Even prior to the passage of the Posse Comitatus Act, the Attorney General had decided that a military officer, unless he was an Indian agent, or had been called upon to act by such an agent, had no power to arrest a fugitive from justice who had escaped from a state into Indiana territory. (The Texas Attorney General had requested Gen. Sheridan's aid in capturing a fugitive who was hiding in the Indian territory near Fort Sill). 15 Op. Atty. Gen. 601, (1877). The President could call on troops to suppress unlawful organizations under Sec. 202, 204 of Title 50 (War), United States Code (now 10 U.S.C. 331, 333 (1952 Ed., Supp. V)) 16 Op. Atty. Gen. 162, (1878); 17 Op. Atty. Gen. 242, (1881); 17 Op. Atty. Gen. 333, (1882). He could send soldiers 60 U.S.C. 202 (now 10 U.S.C. 331 (1952 Ed. Supp. V)) to aid the marshals in Indian territory; but the marshals couldn't summon troops themselves. 19 Op. Atty. Gen. 293, (1889).

¹⁹⁶ Letter from TJAG to JA, 88th Div., Camp Dodge, Iowa, dated 21 Mar 1918, Dig. Op. JAG, 1912-30, par. 14. McKinley v. United States, 249 U.S. 397 (1919).

¹⁹⁷ JAG 370.093, 26 Mar 1918.

¹⁹⁸ JAG 260.1, 5 Jul 1918. When two soldiers, on M.P. duty, fired on and killed an occupant of an auto whom they believed was violating certain liquor laws, they could be tried for the killing. Dig. Op. JAG, 1919, p. 160; Castle v. Lewis, 264 Fed. 917 (1918).

¹⁹⁹ New York Times, 6 and 12 Sep 1918.

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center,²⁰⁰ and they cannot detain civilians in uniform, even **until** they can be surrendered to civil authorities.²⁰¹

More than once, Army aid in apprehending civilian law violators has been sought. Police in North Carolina wanted to empower the military police at a certain airfield to arrest civilians.²⁰² Because of the Posse Comitatus Act, they were turned down. A deputy marshal in Brooklyn asked the Army to arrest and confine several civilians indicted for receiving stolen government property. He, too, was necessarily **disappointed**.²⁰³ Also more than once, seemingly, the Posse Comitatus Act has been violated. Now and then a service news journal points with apparent pride to occasions such as the chase of escaped civilian convicts by an Army officer dispatched in a **helicopter**,²⁰⁴ or the use of a bomb disposal squad to help civilian police search for a hidden **weapon**.²⁰⁵

There is, of course, an understandable temptation to help the local authorities, born of morality and the desire for good public relations, but temptation may lead to subterfuge. Troops are, and ought to be, trained in small unit tactics—marching in a

²⁰⁰ SPJGA 1942/5148, 4 Nov 1942. But they do have, the opinion says, when they are en route from the induction center to the reception center. Once inducted, the individual is more amenable to criminal action through the military service. Thus, the Army was sustained in transferring a soldier from Florida to New York so that he would be found by agents of the Department of Justice in the place where he was “first brought” from overseas into the United States. The soldier (already convicted and punished for stealing an airplane to go absent without leave) was wanted for having made treasonable radio broadcasts for Germany during World War II. The court refused to set aside the defendant’s sentence, affirming that the move was for the inherent good of the service. *United States v. Monti*, 168 F. Supp. 671 (E.D.N.Y. 1968).

²⁰¹ SPJGA 1943/17080, 29 Nov 1943. (Even though it is unlawful for persons other than members of the Army to wear the Army uniform. For opinions dealing with the soldier, ex-soldier or civilian in uniform and participating in strikes, picketing, riots or other disorders see JAGA 1949/3576, 20 May 1949; *id.* 1948/4131, 20 May 1948; SPJGA 1945/7167, 25 Aug 1946; JAG 680.2, 5 Sep 1941. In the author’s opinion, it is better policy to leave the arrest of these persons to civil authorities.

²⁰² JAG 680.2, 5 Sep 1941. A proposed Air Force Regulation permitting enforcement of state game laws by Air Police was deemed legally objectionable. *Op. JAGAF 75-25.5*, 8 Nov 1950.

²⁰³ JAG 370.6, 30 Dec 1924.

²⁰⁴ JAGA 1957/1209, 8 Jan 1957 quoting *Army Times*, 6 Jan 1957:

“* * * The trooper flying with Adams spotted the automobile passing another at a high rate of speed along Lock C. Road toward Highway 79. Adams immediately buzzed the automobile repeatedly, flying to within five to 10 feet above it to force it to a halt, and rising again so that state troopers giving chase in automobiles could not the car’s position. * * * Lautenschlager and Moore surrendered at the road block.”

²⁰⁵ *Army Times*, 7 Mar 1969. A photo and feature story depicted disposal experts from Fort Devens’ 55th Ordnance Det. helping civilian police of Nashua, N. H. search for a weapon believed hidden under ice and snow.

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skirmish line, etc. Accordingly, what does it matter that the site chosen for the exercise is a woods nearby the post, where a suspected criminal is believed to hide? Especially, if the civilian police have promised to be there to make the actual arrest if he is flushed? Such subterfuge must be condemned as violative of both the letter and the spirit of the law.²⁰⁶

D. Service of Process and Commissioner's Proceedings

Although United States Commissioners have jurisdiction to try civilians for certain offenses committed on military reservations and military police may issue traffic violation reports, they are not permitted to serve process for the Commissioners.²⁰⁷ The service of "bench warrants" or process is not only not a function of the military authorities²⁰⁸ but it would also be an execution of the laws, in violation of the Posse Comitatus Act.

Authority was granted in 1941 to permit Army officers to conduct proceedings (as prosecutors) before United States Commissioners for petty offenses committed on military reservations.²⁰⁹ While never tested, such assistance appears to the author, to be as much in conflict with the Posse Comitatus Act as is the service of process.²¹⁰

E. Guarding Civilian Prisoners

The prohibitions against using military personnel of the Army

²⁰⁶ Dig. Op. JAG 1912-30, sec. 14. In the author's opinion, there would be no legal objection to an Army commander who might have Navy or Marine forces assigned to his command using them as a posse. It would not be advisable, as a matter of policy, however. For instructions on joint operations in domestic emergencies see FM 110-5, c. 4, sec. 6, Joint Action Armed Forces, 1 May 1954.

²⁰⁷ JAGA 1955/8172, 24 Oct 1955; *id.* 1955/5523, 30 Jun 1955 (which also said that a violation of a post traffic regulation by a civilian would not be in contravention of a Federal statute so as to make him triable by a Commissioner.)

²⁰⁸ JAGA 1955/2305, 25 Feb 1955; Op. JAGAF 57-3.5, 1 May 1956.

²⁰⁹ JAG 000.51, 8 Nov 1941. Currently authorized in AR 632-380, 15 Mar 1955.

²¹⁰ This suggestion has been made. See JAGA 1955/8172 (FN 207, *supra*), which was *contra* to JAGA 1955/5523 (FN 207, *supra*). The opinion sustained the restriction on process serving by contending that merely because the practice of conducting proceedings had never been condemned it didn't mean that the practice was legitimate. The author believes that there should be consistency on this point and that the better policy would be to cease both practices, particularly in view of a recent resolution of the Committee on Military Justice of the American Bar Assn. (44 ABA J. 1120-21 (1958)), that process issued in courts-martial cases to compel witnesses to appear and testify be served only by a United States marshal or deputy marshal (instead of by military personnel). Service of Courts-Martial process, presently, "will ordinarily be made by persons subject to military law" (par. 115d, MCM, 1961).

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or Air Force in guarding civilians prior to trial and conviction have already been mentioned.²¹¹ Would it be executing the law to permit soldiers or airmen to guard or supervise the labor of convicts? The cases conflict, but as a general matter, to do so would be in violation of the Posse Comitatus Act.

There would be an illegal transfer of the duty of one governmental branch to another to permit soldiers permanently to guard civil prisoners who are serving sentences to confinement under the supervision and in the custody of civil authorities.²¹² To do so would be an unlawful supplementation of the appropriations of the civil authorities,²¹³ violate the Posse Comitatus Act,²¹⁴ and be against policy:²¹⁵

“To withdraw permanently Army personnel from strictly military duties and to impose upon them the work of a civilian watchman is contrary to the spirit and intent, if not the letter, of numerous statutes with reference to the Army.”

Temporary guarding has been distinguished when on a basis of unforeseeable or unusual necessity²¹⁶ and, in a doubtful decision,²¹⁷ tentative approval was given to the use of convict labor in Puerto Rico, where custody of the prisoners was to remain in the Insular authorities but soldiers were to do the guarding. Army authorities sought to borrow Federal prisoners from Leavenworth prison to build roads at Fort Leavenworth. It was thought that such use would be legal if the work was temporary and the military had exclusive control over them.²¹⁸ The request was debated over a five year period but never solved because of a reluctance of the Department of Justice to give up supervision and custody.²¹⁹

The Department of Justice was refused the privilege of putting Federal prisoners in the Disciplinary Barracks at Fort Leavenworth.²²⁰ In the opinion of the Judge Advocate General military guards could supervise only those prisoners serving sentences under military authority. Another reason for the disapproval was that the Disciplinary Barracks was a rehabilitation center rather than a penitentiary. The fact that some of the Federal

²¹¹ Note 139, *supra*, guarding deportee; note 136, *supra*, guarding prisoners in China; note 188, *supra*, guarding civilians held for Commissioner's court; note 201, *supra*, guarding persons caught wearing uniform.

²¹² JAG 093.7, 21 May 1940.

²¹³ 33 Op. Atty. Gen. 662, (1923).

²¹⁴ JAG 014.5, 27 Oct 1923; *id.* 20 Dec 1923; *id.* 641.1, 5 Mar 1924.

²¹⁵ JAG 093.7, 21 May 1940.

²¹⁶ Angel Island uprising, note 124, *supra*.

²¹⁷ JAG 684, 1 Apr 1926.

²¹⁸ JAG 253.5, 14 Jun 1922.

²¹⁹ JAG 263.6, 4 Jun 1927.

²²⁰ JAG 253, 15 Aug 1929.

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penitentiary prisoners previously had been military persons was immaterial, In an opinion that is hard to justify, however, no objection was made to allowing the United States marshal to either deputize soldiers or designate them as "guards" in order to utilize Army personnel, who were moving Army prisoners from San Antonio to Leavenworth, in shipping civilian prisoners to the Federal penitentiary in the same location.²²¹

The pendulum swung back in an opinion, based on the Posse Comitatus Act, advising against permitting soldiers to guard prisoners in the Illinois State penitentiary.²²² Statutes of the state of Illinois would have clothed the soldiers with civil authority and the prisoners were to be restricted to a group of volunteers who had agreed to participate in a research program sponsored by The Surgeon General of the Army.

It is apparent, to the author, that the vacillation in this area is a result of policy, rather than law.

F. Traffic Law Enforcement, Parades, Control Of Crowds

The operation of military vehicles on the public highways is regulated by military regulations as well as civil traffic laws, Military police may enforce military regulations governing their operation but may only enforce civil traffic laws when violations of such laws constitute a violation of military laws and regulations. Of course, the military police are authorized to apprehend, if necessary, any person subject to the Uniform Code of Military Justice²²³ who has committed any offense (including certain traffic violations) if the offense reflects discredit upon the service. The cases are so proportionately few in which violations of civil traffic laws actually constitute offenses under the Uniform Code of Military Justice, that such cases could not be relied upon as an authorization to establish military police traffic patrols in off-post civilian areas.²²⁴

Off-post traffic regulation became a problem as soon as the automobile became popular²²⁵ and it is particularly vexing on such installations as White Sands Proving Grounds where a state highway bisects the reservation and where safety demands that

²²¹ JAG 253, 21 Jun 1923. The Posse Comitatus Act was not mentioned.

²²² JAGA 1953/8755, 12 Nov 1953.

²²³ Uniform Code of Military Justice, Articles 7(1) & 134.

²²⁴ JAGA 1956/5291, 5 Jul 1956; *id.* 1956/8555, 26 Nov 1956. But the First Army Commander put 11 safety vehicles on the highways of his area to "cooperate on law enforcement and highway safety." New York Times, 20 Aug 1955, p. 18.

²²⁵ Soldiers were not permitted to patrol the roads near Arlington cemetery, on the outskirts of Washington, D.C., JAG 687.5, 7 Jun 1924.

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traffic be halted when guided missiles are **fired**.²²⁶ Rush hour driving makes life nightmarish at posts located near metropolitan **areas**,²²⁷ but an enterprising commander in one congested zone has partially solved his dilemma by detailing Department of the Army civilians to aid the civilian police in giving traffic directions at the main gate of his installation.²²⁸

The problem is more acute when there is a civil defense emergency but, when civilian governmental authorities are able to maintain effective order, Army or Air Force personnel may not be used for general traffic control.²²⁹ When there is no emergency it would even be objectionable to permit them to patrol jointly with civilian police for traffic control purposes²³⁰ although a number of administrative procedures might be ordered to insure that only military offenders would be **apprehended**.²³¹

The prohibitions of the Posse Comitatus Act have provided an escape from traffic and crowd control problems arising from fairs, carnivals, rodeos and other civic events, but they have prevented the Army and Air Force from enhancing their public relations when their missions would have otherwise permitted assistance. The direction of traffic, parking of cars, or control of spectators necessarily involves the enforcement of law, despite the fact that no arrests would be **made**.²³² Thus, troops could not be used at fairs and rodeos in several western **communities**,²³³ nor could they be used to supplement city police in controlling

²²⁶ JAGA 1955/8171, 27 Oct 1955.

²²⁷ Fort Meade, Md., JAGA 1955/5523, 30 Jun 1955, note 207, *supra*. Fort Monmouth, N.J. The SJA there particularly mentioned the regulation of traffic when he suggested this thesis topic, note 3, *supra*.

²²⁸ Note a violation of the Posse Comitatus Act, JAGA 1956/6462, 11 Sep 1956, note 109, *supra*.

²²⁹ JAGA 1955/9192, 1 Dec 1955.

²³⁰ JAGA 1956/1192, 16 Jan 1956. The Posse Comitatus Act prohibits execution of laws, with certain exceptions. Thus, it is the character of the laws executed and not the type person (civilian or military) against whom they are enforced which is important. Thus, a joint traffic patrol to execute civilian traffic laws would violate the Act while a joint patrol, to enforce military discipline among military personnel would not. Air Force concurs. See Op. JAGAF 26-27.9, 24 Jan 1956.

²³¹ JAGA 1956/5291, 5 Jul 1956. Suggested was the affixing of a post decal on civilian vehicles. The decal cannot be presumed to reflect the status or identity of the operator and to halt it would involve the exercising of "police powers" which the military policeman would not have unless the operator was a member of the military service and committing an offense punishable under the UCMJ. From a claims and public relations standpoint the proposed plan was condemned.

²³² JAGA 1956/8555, 26 Nov 1956; AR 190-8, 12 Jun 1958.

²³³ JAGA 1956/7271, 20 Sep 1956,

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crowds at a convention parade of a prominent veterans'

Shortly after a comprehensive opinion on the subject of the Posse Comitatus Act was published,²³⁵ a policy reversal was announced in carefully couched language which permits mature military policemen to accompany civilian police patrols for the sole purpose of enforcement of military discipline among military personnel.²³⁶ While this represents a major change, the problem of off-post traffic is still primarily a civilian one.²³⁷

G. The Use of Military Property and Facilities to Execute Laws

A person may violate the Posse Comitatus Act only through the use of troops in executing the laws and not because he has made military property or facilities available to law enforcement agencies. This does not mean that he has *carte blanche* to lend government equipment for there are other restrictions normally prohibiting such gestures.²³⁸ Nevertheless, requests have been

²³⁴ JAGA 1954/6426, 16 Jul 1954. But the President can use soldiers to augment the Capitol Guard on ceremonial occasions such as when he or a similar dignitary appears before Congress. Soldiers were used on 8 such occasions between Jan 1951 and Jun 1952. JAG 1952/5400, 26 Jun 1952.

²³⁵ JAGA 1956/8555, 26 Nov 1956, citing the draft of a letter from the Provost Marshal General acknowledging that military police have frequently been used in handling traffic on specific occasions and another letter from the Fourth Army Provost Marshal complaining of restrictions against aiding at air shows, parades, joint patrols and peak traffic regulation.

²³⁶ JAGA 1956/8430, 3 Dec 1956. The draft of a proposed joint regulation implementing the new policy was in JAGA 1957/6568, 14 Aug 1957. Military Police receive special instructions on this ticklish topic. See Lesson Plan MP 3406, Posse Comitatus Act, Course MPA: NCOR, The Provost Marshal General's School (Military Police Dept, Patrol Section) Fort Gordon, Ga., Oct 1958.

²³⁷ JAGA 1957/7227, 9 Sep 1957. Some states use National Guardsmen to supplement State Police on weekend highway patrols. Such use does not violate the Posse Comitatus Act. See note 99, *supra*. As to traffic direction within a Girl Scout Camp Area, see fn 238, *infra*.

²³⁸ The use of government property is governed by a number of statutes and regulations. See 36 Comp. Gen. 561, 563-564 (1957); JAGT 1957/9185, 13 Jan 1958, 8 Dig. Op. (No. 1), Supplies, sec. 93.2; AR 360-55, 23 Jan 1957; JAGA 1954/8381, 20 Oct 1954; AR 500-60, 1 Oct 1952; AR 735-5, 20 Dec 1954. As to the propriety of lending uniforms see JAGA 1958/4361, 9 Jun 1958 which cites 10 U.S.C. 771 (1952 Ed., Supp. V) and 18 U.S.C. 702 (1962 Ed., Supp. V) as prohibiting unauthorized wearing of uniforms, even by civilian law enforcement agencies. Congress has recently authorized the lending of military equipment to the Girl Scouts of the United States of America for use at their 1959 Senior Roundup Encampment (PL 85-543, 72 Stat. 399) and The Judge Advocate General of the Army has given his opinion that there would be no legal objection to furnishing Military Police for safeguarding the property, directing traffic within the encampment and patrolling the camp perimeter, provided such duties will in no way involve civilian law enforcement duties properly the function of the state and local governments. JAGA 1959/3861, 12 May 1959.

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made and opinions rendered in a variety of instances such as the incident resulting in approval of the assignment of space on a military transport to deport an undesirable alien²³⁹ and of the lending of a building to the United States marshal in China, knowing that he would convert it into a prison.²⁴⁰ A common request is for such a peculiarly military item as a mine detector²⁴¹ (for searching for criminal guns) and occasionally there are requests for weapons. When such requests are approved, it should be with a proper explanation that in no case may the personnel to operate the equipment be furnished. One such request resulted in the lending of a tank to a Texas sheriff who needed it to shield him from the rifle fire of an insane killer while he rescued a fatally wounded deputy. Delivery of the tank was made by a sergeant who had specific instructions from the Staff Judge Advocate to the effect that he was not permitted to operate the tank. He disobeyed when he found that (quite naturally) no one in the sheriff's posse knew how to operate the behemoth. The tank operator attempted to legitimize his act by removing his chevron-bearing jacket and declaring that he was "acting in his citizen's capacity."²⁴² There has been no recorded criticism of his emergency-prompted legal reasoning.

Army laboratories are maintained in support of Military Police criminal investigation operations,²⁴³ a purpose which has been cited to discourage the lending of such facilities to civilian law enforcers.²⁴⁴ This purpose has no bearing on the application of the Posse Comitatus Act and is a policy matter only. From a practical view, however, laboratory facilities and lie detectors require trained technicians for proper utilization and if personnel become involved there may be a conflict with the Act. To determine the legality of using the facility and the technician it is necessary to determine if the use is an execution of the laws and if so, does the military have a legitimate and substantial interest in the matter. For instance, a polygraph could be legally employed to determine if an employee of the Veterans' Administration was telling the truth concerning alleged improper treatment of patients if the investigation was to decide if he should be discharged. There would be no "execution of the laws" in a purely administrative matter of this kind. If a crime has been committed in a nearby community, the polygraph and operator

²³⁹ JAGA 1952/9649, 5 Feb 1953, note 139, *supra*.

²⁴⁰ JAG 014.5, 20 Dec 1923, note 135, *supra*.

²⁴¹ JAGA 1957/5586, 25 Jun 1957, note 173, *supra*.

²⁴² Related to author by the officer who recommended approval of lending the tank but not the operator.

²⁴³ Par. 19, AR 195-10, 19 Nov 1957 (formerly par. 17, SR 190-30-1).

²⁴⁴ JAGA 1953/6465, 25 Aug 1953.

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could be utilized to weed out suspects if the circumstances of the crime are such as to cause an investigation of the offense to be made by the military authorities for military purposes, i.e., should military personnel be under suspicion. If a soldier is taken into custody by civil authorities on suspicion of having murdered his wife in off-post quarters, the Army would have sufficient interest to permit use of laboratory facilities and polygraph as the situation potentially involves an offense against the Uniform Code of Military Justice. Were the facts reversed, with the wife charged with killing her husband, it would be a violation of the Posse Comitatus Act to make the assistance available.²⁴⁵

A retired member of the Regular Army could operate the equipment for civilian police, although the Army had no legitimate interest in the investigation. Despite an earlier opinion to the contrary,²⁴⁶ and acknowledging that retired persons (officers or enlisted men) are still a part of the Army of the United States, the Act means only those "troops" on active duty. More recent opinions perceive no illegality in retired enlisted men taking employment as police officers.²⁴⁷

This realistic reasoning has been extended to sanction the off-duty employment of an enlisted military police lie-detector examiner in voluntarily operating a civilian-owned polygraph in his individual and wholly unofficial capacity for a State or municipal law enforcement agency.²⁴⁸

H. *Miscellaneous Situations*

Attempts have been made to secure the assistance of the Army on a grand scale and for noteworthy purposes, including occasions when the benefits would outweigh any disadvantages, but the Posse Comitatus Act has prevented them. The question of guarding the southern border of the United States against infiltrating Mexicans provoked a difference of opinion between The Judge Advocate General of the Army and the Attorney General of the United States. It was the Army's contention that there

²⁴⁵ *Ibid.* But see note 170, *supra*.

²⁴⁶ JAG 210.851, 11 Oct 1926, note 88, *supra*.

²⁴⁷ SPJGA 1947/7744, 6 Oct 1947; JAGA 194718393, 21 Nov 1947, note 88, *supra*. Retired members of the army generally are not exempt from jury duty by reason of their military status. JAGA 196016715, 26 Sep 1950. Whether military personnel are exempt from jury duty depends upon the laws of the particular jurisdiction. SPJGA 194211793, 4 May 1942; JAGA 1959/1941, 24 Feb 1969. In the author's opinion, the Posse Comitatus Act would not prohibit jury duty for retired military personnel.

²⁴⁸ JAGA 1957/6608, 9 Sep 1957. But there are some other prohibitions against off-duty employment of military personnel. See, for example, 10 U.S.C. 3544, 3635 (1952 Ed., Supp. V).

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was no authority for border guarding by troops²⁴⁹ but the Attorney General's office contended that the President's broad Constitutional powers were sufficient to override the Posse Comitatus Act.²⁵⁰ Another broad area received Congressional blessings in the specific authorization of assistance in enforcing quarantines.²⁵¹ "Quarantines", though, has twice been narrowly interpreted to apply only to ships and not to quarantines on land.²⁵²

President Cleveland may not have hesitated to send troops to settle strikes but, today, soldiers may be employed in labor disputes only to stop imminent damage or destruction of property unless the Secretary of the Army has given his approval.²⁵³ His authority would be needed for the proper maneuvering of soldiers in necessarily forcing a picket line even to get food through for Army maintenance.²⁵⁴

One isolated incident resulted in an implied disapproval when three soldiers assisted a local War Production Board official requisition property.²⁵⁵ While this was not a typical case, it is indicative of the variety of problems created by the Posse Comitatus Act and confronting the troop commander and his Staff Judge Advocate.

V. CONCLUSIONS AND RECOMMENDATIONS

The Posse Comitatus Act has been with us for over eighty years but there is a paucity of judicial decisions concerning it. Fortunately, the past forty years have produced sufficient administrative opinions, generally based on sound legal reasoning, to justify certain conclusions and to establish practical rules for interpretation.

Some of the conclusions are rather patent, but worth reiterating, if for no other reason than logical summarization. For instance, the Act prohibits the execution of laws through the use of the Army or Air Force or any part thereof, including organi-

²⁴⁹ JAGA 1953/5992, 15 Jul 1953.

²⁵⁰ JAGA 1953/6661, 2 Sep 1953.

²⁵¹ AR 500-50, 22 Mar 1956.

²⁵² JAG 370.6, 16 Jan 1924, where Philippine Scouts, part of the Army, were not permitted to enforce quarantine regulations for the Governor General. JAG 370.6, 18 Apr 1924, where Arizona sought to ease its hoof and mouth quarantine to permit Yuma Indians, whose reservation lay in California, but whose markets were in Arizona, to trade. Soldiers were not allowed to guard the reservation's western border.

²⁵³ SPJGA 1946/1932, 14 Feb 1946.

²⁵⁴ SPJGA 1946/1478, 25 Jan 1946. The decision to withhold troops and trucks requested for strikebound maritime personnel confined to a ship was approved. JAG 370.61, 21 Jul 1939.

²⁵⁵ SPJGA 1942/2673, 24 Jun 1942.

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zations or individuals, but always pertaining to “troops”, a term connoting certain service members on active duty. The drafters of the Act wished to prevent abuse of the populace by misuse of the soldiery and did not intend, in the author’s opinion, to limit the personal activities of the individual soldiers or airmen, active or retired.

When the serviceman acts on his own initiative, as an individual, in an unofficial capacity, with or without remuneration, he is beyond the restrictions of the Act. Hence, he could be employed as a desk sergeant or guard; as an instructor in a police school; as a polygraph operator; or in purely clerical police duties.

The Army may be used to execute the laws in many ways despite the provisions of the Posse Comitatus Act. It may be summoned by the Governors (through the President) or it may be sent into a State without summons when necessity demands. Statutory authority has been provided to permit the employment of troops in quelling disturbances and in upholding the laws but strong Presidents, realizing that Congress is powerless to abridge their Constitutional rights,²⁵⁶ would consider themselves excepted from the Act even without this express authority. Troops may be dispatched to protect Federal property, to respond to disasters, and to execute the laws when they are incidental to one of the military’s own functions.

²⁵⁶ Ex-Attorney General Miller never did think it would be a hindrance to the President. In a letter dated 11 Jul 1895 to Attorney General Olney (cited in JAGA 1952/9649, 5 Feb 1953) he said,

“I have always been of the opinion, and so advised President Harrison, that the *posse comitatus* statute, in so far as it attempted to restrict the President in using the Army for the enforcement of the laws, was invalid, because beyond the power of Congress; that it was no more competent by a statute to limit the power of the President, as Commander-in-Chief, to use the Army for the enforcement of the laws than it is competent to limit by statute the exercise of the pardoning or appointing power.”

Professor Crowin contends that the effect of the prohibition was largely nullified by a ruling of the Attorney General (16 Op. Atty. Gen. 162 (1878)) that “by R.S. 5298 and 5300, the military forces, under the direction of the President, could be used to assist a marshal.” Crowin, *Constitution of the United States of America*, S. Doc. No. 170, 82d Cong., 2d Sess. (1952) 483, a conclusion sustained by the Little Rock incident. Note 111, *supra*. The Constitutional question is discussed in Crowin, *supra* note 1, at 130–139; Pollitt, *Presidential Use of Troops to Execute the Laws: A Brief History*, 36 N.C.L. Rev. 117, 131–135 (1958); Lorence, *supra* note 6, at 169–179. Arguments of the opponents of the use of Federal troops in Little Rock run counter to the author’s opinions regarding the constitutionality of Congressional attempts to limit the President’s power to employ the armed forces. See Schweppe, *supra* note 40a at 190–191. In support of the author, see Pollitt, *supra* note 40a at 606.

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It is in this latter area that the impact of the Posse Comitatus Act is more likely to be felt by the commander of troops and his Staff Judge Advocate. The pattern of interpretation of the Act has, in the author's opinion, been unnecessarily restrictive. By using the Act as an excuse, the Army has succeeded in avoiding many time-, man- and equipment-consuming tasks. Doubtless, some of the proposed missions would have greatly detracted from the mission of national defense but they should have been rejected as a matter of policy and not of law, for many of the negative answers to queries on the use of the Army are legally unsound. On the other hand, the officials charged with the administration of a statute will not generally argue that it is unconstitutional and The Judge Advocate General (like other lawyers) will only as a last resort advise his client to pursue a course of conduct which may run afoul of criminal statutes. In this there is a further lesson, the greater the advantage to be achieved, the narrower becomes the lawyer's construction of the statute. This will probably be true of the Supreme Court, too, if and when it has the opportunity to review a conviction of violating 18 U.S.C. 1385.²⁵⁷ Nevertheless, it is refreshing to see a trend toward more liberal construction. The sanctioning of joint traffic patrols is a beginning step.

When the Army is utilized for authorized purposes, there may be some incidental assistance given to civil law enforcement agencies. Cases in this area must be treated on an *ad hoc* basis, with an attitude of practicality tempered by a concern for good public relations. From a strictly legal viewpoint, it is the author's conclusion that the statute is limited to deliberate use of armed force for the primary purpose of executing civilian laws more effectively than possible through civilian law enforcement channels, and that those situations where an act performed primarily for the purpose of insuring the accomplishment of the mission of the armed forces incidentally enhances the enforcement of civilian law do not violate the statute.

Many requests for troops are of such a nature that time is not of the essence in rendering a decision as to legality or policy. In those cases it is recommended that correspondence be initiated to the next higher command and eventually to the Judge Advocate General, if necessary, for a rendition of the current policy. In emergency situations it would be tragic not to take immediate action and concurrently notify higher authorities. It is advisable, in any case, for the commander to keep a detailed log or

²⁵⁷ Even though there were some obvious violations of the Posse Comitatus Act, the author could find no record of prosecutions, indictments or punishments.

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record of events, maintained on an incident by incident basis, with the Provost Marshal, the Staff Judge Advocate and those persons of his intelligence staff who are skilled in this form of operation, working on it as a joint venture. Such a record will permit a full explanation of his actions and will substantiate the need for any operation in which the troops are involved. It would be particularly valuable if the commander has to take steps that are unpopular and subject to later criticism.

In some respects the Act is archaic and a hindrance to a commander who wishes to control the off-post conduct of his soldiers; to safeguard their entrance and egress to and from his post; to promote good public relations in the communities and to respond to the inner urgings of the good citizen in putting down or preventing crime. The military community is now more closely tied to the civilian community and a high crime rate in one has a direct impact on the crime rate of the other but the possibility of repealing the statute is remote. When Regular Army paratroopers were sent to Little Rock [*supra*. note 111] the action was condemned by a number of Representatives, Senators and Governors and the Florida Legislature resolved to urge that there be additional legislation withholding the pay of troops sent into a state without the Governor's request.²⁵⁸

The Posse Comitatus Act does not restrict the use of troops in those desperate situations when necessity requires it but it does act as a deterrent to prevent an irresponsible commander from misusing his soldiers and it prevents similar abuses by civilians. It should not be raised as a shield from noxious assignment. These should be refused on a policy basis and not by a distortion of the law.²⁵⁹

²⁵⁸ *New York Times*, Oct 2, 1957, p. 16. Two bills have been proposed: H.R. 416, 86th *Cong.*, a bill "To amend section 332 of title 10 of the United States Code to limit the use of the Armed Forces to enforce Federal laws or the orders of Federal Courts," and H.R. 1204, 86th Cong., a bill "To amend title 10 of the United *States* Code to prohibit the calling of the National Guard into Federal service except in time of war or invasion or upon the request of a *State*." The Department of Defense has been requested to *state* its opinion on the effect of this proposed legislation. JAGA 1959/1999, 20 Feb 1959.

²⁵⁹ Though it must be admitted that as a practical standpoint it *may* be difficult, at times, to maintain the best public relations on a negative "policy" rather than "legal" (however distorted) approach.