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

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BACKGROUND

The Compact Edition of the Oxford English Dictionary, Oxford University Press, 1971, defines *Posse Comitatus* in the following manner: "L. force of the county. The body of men above the age of fifteen in a county (exclusive of peers, clergymen, and infirm persons), whom the sheriff may summon or 'raise' to repress a riot or for other purposes; also a body of men actually so raised and commanded by the sheriff." The first quotation of use is dated 1285.

In the new United States, often written in lower case letters in the early days, the first constitutional document was the Articles of Confederation, agreed to by Congress, 15 November 1777; ratified and in force 1 Mary 1781. The confederated states (spelling and formats of the names taken from the Articles) were Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia. Reference to military forces and war were contained in a number of articles.

> Article III: "The said states…enter into a firm league…with each other, for their common defence…, binding themselves to assist each other against all force offered to or attacks made upon them…"
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> Article VI: "…No vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the united states…, for the defence of such state…nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the united states…, shall be deemed requisite to garrison the forts necessary for the defence of such state; but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use…a due amount of field pieces and

> tents, and a proper quantity of arms, ammunition and camp equipage…No state shall engage in any war without the consent of the united states…unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as to not admit of a delay, till the united states…can be consulted; nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the united states…unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the united states…shall determine otherwise."
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> Article IX: "The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article…— to build and equip a navy —to agree upon the number of land forces and to make requisitions from each state for its quota…which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men and cloathe, arm and equip them in a soldier like manner, at the expence of the united states…" [The last part of Article IX, as quoted, seems to conflict with Article VI.]
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> Articles VII and VIII refer to the procedures for appointing officers in forces raised for the common defense and the allocation of expenses incurred in support of the common defense, respectively (Commager, pp.111-113). No mention was made of military forces in any law enforcement role.

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

There was considerable ill-will in the states of the new confederation regarding use of military force in enforcement of civil law. The attitude was steeped in American tradition which derived from British precedents and the American revolution experience. "A standing army…could be the instrument only of a monarchy, not of a democratic state" (Coakley, p. 4).

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

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

There was little debate on the issue of the right of the general (i.e., federal) government to use force in domestic disorders. It was acknowledged that the new government must possess coercive power that the Confederation lacked and that it needed ways to exercise the power without relying on state governments. There were three main issues:

1. Providing assurance that no state could defy the authority of the union operating in its own sphere;

2. Enforcement of the 'laws of the union' against combinations of individuals when civil law fails; and

3. Protection of the states against internal violence, rebellion and insurrection (assuring them 'a republican form of government').

The emphasis was on the use of militia, not on a standing army. "That no power to use regular forces in domestic disorders was explicitly granted to either the president or Congress was testimony to the fear of standing armies that pervaded the meeting" (Coakley, p. 14).

> "…the Constitution as finally engrossed and referred to the Continental Congress for submission to the states on 17 September 1787 clearly contained provisions authorizing the use of military force in the enforcement of federal law, in the suppression of insurrections against the federal government, and in control of uprisings and domestic violence within the states themselves when their properly constituted authorities should ask for it" (Coakley, p. 13).

The Constitutional Ratification debates resulted in 17 state conventions.

Hamilton (*Federalist Paper No. 29*) made a cogent argument that federal government could use civil power to enforce laws. "The same persons who tell us in one breath, that the powers of the federal government will be despotic and unlimited, inform us in the next, that it has not authority sufficient even to call out the POSSE COMITATUS. The latter, fortunately, is as much short of the truth as the former exceeds it. It would be…absurd to doubt, that a right to pass all laws *necessary and proper* to execute its declared powers would include that of requiring the assistance of the citizens to the officers who may be intrusted with the execution of those laws…What reason could there be to infer, that force was intended to be the sole instruments of authority, merely because there is power to make use of it when necessary?" (Coakley, p. 18).

"What emerged [from the ratification debates] was, in effect, a consensus that the militia would be used by the federal government in only those instances where civil law should completely fail and that, at all odds, the creation and use of a standing army to control the people was the greatest danger to be avoided...The language of the Constitution was broad, general, and in some cases a little ambiguous—a product of the necessity for compromise and consensus. It remained for future Congresses, presidents, and federal courts to determine what it would mean in practice" (Coakley, p. 19).

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

> Article I, Section 8. "The Congress shall have Power…To raise and support Armies…; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrection and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States…The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it…"
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> Article II, Section 2. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States…"
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> Article IV, Section 4. "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence" (Commager, pp. 138-144).

[Side-bar: There is another part of the Constitution that is important to recall when considering the role of *posse comitatus* in the enforcement of the Fugitive Slave Law and subsequently in the post-Civil War Reconstruction, which represent two conflicting applications of the concept of *posse comitatus*. The relevant part of the Constitution is Article IV, Section 2, reading in part: "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due…"]

IMPLEMENTING LEGISLATION

As noted, the Constitution is broad, general, and even ambiguous. A primary function of the congress is to enact legislation that provides the 'operational' basis for implementing the policies outlined by the Constitution. In the arena of military support to the executive in carrying out his responsibilities as the senior law enforcement official of the government, the congress brought forth the First Enabling Act. It was passed by the Second Congress and was signed into law 2 May 1792. [Statutes at Large 264. An Act to provide for calling forth the

militia, to execute the laws of the Union, to suppress insurrections and repel invasions.] The legislation was a companion piece to the Uniform Militia Act of 8 May 1792, which dealt with the responsibility of Congress to provide for 'organizing, arming and disciplining the militia.' The Militia Act established a militia system which endured for 111 years.

There is no record of the original form of the bill submitted by Rep. Alexander White (VA) on 16 April 1792 or of debate which followed—congress did not start the recording of congressional debates until 1794.

The Calling Forth Act read in part: "That whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state or states, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasions, and to issue orders for that purpose, to such officer or officers of the militia as he shall think proper. And in the case of insurrection in any state, against the government thereof, it shall be lawful for the President of the United States, on the application of the legislature of such state, or the Executive (whenever the legislature cannot be convened) to call forth such number of militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection" (Coakley, pp. 19-20). It is important to note that the Act contained no provision for suppression of insurrections against the national government but only those against the states. The word 'insurrection' was not in consonance with Article IV, Section 4 of the Constitution where the reference there is to 'domestic violence.'

The Act authorized the president to call up militia of other states, but not of the state in which the insurrection occurs. It is possible that congress assumed that militia of that state would already be employed in suppressing the insurrection—or be involved in it (as, for example, in Shays' Rebellion). According to Coakley: "If the clause were followed literally it would mean that there could be no unified federal control of all militia elements involved in suppressing an insurrection in a state. These matters seem to have passed unnoticed at the time, and subsequent revisions of the law were to leave this particular clause practically unaltered to the present day" (Coakley, p. 20).

"Title 10, Section 331, of the *Revised U.S. Code* has practically the same phraseology except that it permits the president to use the 'armed forces.' The President's Commission on Civil Disorders noted the difficulties in the wording of this section in 1968 and recommended that the word 'insurrection' be changed to 'domestic violence'; and that the president be expressly authorized to call the militia of the state in which violence occurred as well as that of other states…The explanation for the word 'insurrection' appears to be that Congress was enacting a law primarily designed to provide for calling forth the militia under Article I, Section 8, to repel invasions and suppress insurrections while at the same time incorporating the provisions of Article IV, Section 4. The term 'domestic violence' in the later article was simply equated to 'insurrection'" (Coakley, p. 20).

The second section of the Act dealt with calling for the militia to 'execute the laws of the Union'—involving no state: "That whenever the laws of the United States shall be opposed, or the execution there of obstructed, in any state, by combinations too powerful to be suppressed by ordinary course of judicial proceedings, or the powers vested in the marshals by this act, the same being notified to the President by an associate justice, or the district judge, it shall be lawful for the President of the United States to call forth the militia of such

state to suppress such combinations, and to cause the laws to be duly executed. And if the militia of the state, where such combinations may happen, shall refuse or be insufficient to suppress the same, it shall be lawful for the President if the legislature of the United States be not in session, to call forth and employ such numbers of the militia of any state or states most convenient thereto, as may be necessary, and the use of the militia, so to be called forth, may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session" (Coakley, p. 20).

Section 3 read, in part: "That whenever it may be necessary in the judgement of the President to use the militia force hereby directed to be called forth, the President shall forthwith and previous to, by proclamation, command such insurgents to disperse and retire peaceably to their respective homes, within a limited time" (Coakley, p. 22). This section is important to recall, as it remains requirement even today, although often violated or ignored.

Section 9 (referring to US marshals) read: "That the marshals of the several districts, and their deputies, shall have the same powers, in executing the laws of the United States, as sheriffs, and their deputies, in the several states have by law in executing the laws of their respective states" (Coakley, p. 21).

Other parts of the Act covered: Governance of militia when called to federal service; penalties for those who did not obey the call; limited service to three months in any one year for an individual militiaman; called for the same pay and allowances to activated militiamen as to regulars; subjected militiamen to the Articles of War but required that any courts-martial called to deal with militiamen to be composed of militia officers only; and specified that the penalty for failing to report was not more than one year's pay or imprisonment for one month for each $5 of unpaid fine.

The Act was due to expire at the end of first session of Congress after two years.

"On the one hand, the Congress prescribed that the militia was the only force that could be used in domestic emergencies, and on the other, it shaped a militia system that could hardly guarantee that any president could, in such emergencies, fully rely on it" (Coakley, p. 23).

President George Washington had the first experience in applying the Calling Forth Law when the Whiskey Rebellion broke out in 1794. Washington's Proclamation on the Whiskey Rebellion, 7 August 1794, reads in part: "…Whereas by a law of the United States entitled 'An act to provide for calling forth of the militia to execute the laws of the Union, suppress insurrections, and repel invasions,' it is enacted 'that whenever the laws of the United States shall be opposed or the execution thereof obstructed by any State by combinations too powerful to be suppressed by the ordinary course of judicial proceedings…it shall be lawful for the President of the United States to call forth the militia of such State to suppress such combinations and to cause the laws to be duly executed. And if the militia of a State where such combinations may happen shall refuse or be insufficient to suppress the same, it shall be lawful for the President, if the Legislature of the United States shall not be in session, to call forth and employ such numbers of the militia of any other State or States most convenient thereto as may be necessary….*Provided always*, that whenever it may be necessary in the judgment of the President to use the military force hereby directed to be called forth, the President shall forthwith, and previous thereto, by proclamation, command such insurgents to

disperse and retire peaceably to their respective abodes within a limited time" (Commager, p. 164).

Washington was aware of the weaknesses in the 1792 law and told Congress, 19 November 1794: "In the arrangement, to which the possibility of a similar contingency will not usually draw your attention, it ought not to be forgotten, that the militia laws have exhibited such striking defects, as could not have been supplied but by the zeal of our citizens. Besides the extraordinary expense and waste, which are not the least of the defects, every appeal to those laws is attended with a doubt of success" (Coakley, p. 67).

Congress re-enacted the Calling Forth Act of 1792, making it permanent legislation with revisions to enhance the president's power. The new act, 28 February 1795, removed the need for the president to get judicial certification before using militia to deal with combinations against the law "too powerful to be suppressed by the ordinary course of judicial proceedings" and also removed the provision that the president could only act when Congress was not in session (Coakley, p. 67).

"The Whiskey Rebellion thus resulted in the establishment of both a permanent law and a precedent for all future use of federal military force in domestic disorders" (Coakley, p. 68). Another precedent was the Neutrality Proclamation, 22 April 1793, which was issued relevant to the war between France and England, 1793.

Through a series of acts in 1798 and early 1799, congress established a provisional army for the duration of troubles with France (an undeclared war). The acts authorized the president to temporarily expand the Regular Army by 24 regiments (only four were in existence at the time) and accept into federal service organized companies of volunteers equipped at their own expense (the acts may well be the precedents for Civil War and Spanish American War volunteer units). The act of 2 March 1799 allowed the president to use volunteers in any of the cases in which he could use the militia under the Act of 1795 (militia were not required to serve outside their own states for more than three months; the limitation caused much difficulty during the War of 1812) (Coakley, p. 72).

LAWS OF 1807 AND 1808

On 27 November 1806, President Thomas Jefferson "issued a proclamation [responding to Aaron Burr's actions regarding planned expeditions against Spanish domains; such adventuring in foreign territories not at war with the US was called 'filibustering'; Secretary of State James Madison was asked to look into laws regarding the use of military force against insurrections] citing information that 'sundry persons' were fitting out an expedition in the absence of a declaration of war and 'deceiving and seducing honest & well meaning citizens under various pretences to engage in their criminal enterprises'; he enjoined all concerned to cease further proceedings or 'incur prosecution with all rigors of the law.' The proclamation continued: 'And I hereby enjoin and require all officers civil and military, of the U.S. or of any of the states or territories, & especially all governors, & other executive authorities, all judges, justices, & other officers of the peace, all military officers of the army or navy of the U.S., & officers of the militia, to be vigilant, each within his respective department according to his functions in searching out and bringing to condign punishment all persons engaged or concerned in such enterprise and in seizing & detaining subject to the

dispositions, of the law of all vessels, arms, military stores, or other means provided for the same, & in general in preventing the carrying on such expeditions or enterprises by all the lawful means within their power'" (Coakley, p. 79).

Madison opined that only militia could be used against domestic insurrection under the 1795 law, but both militia and regulars could be used to enforce the 1794 neutrality legislation. The Jefferson proclamation was shaped in terms of the 1794 law and envisaged use of militia and regulars as a sort of grand *posse comitatus* to enforce that law (Coakley, p. 80).

An important result of the Burr conspiracy and Jefferson's reaction was the passage of a law, signed by Jefferson on 8 March 1807, authorizing use of regulars as well as militia in domestic violence and insurrections. The law read in part: "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 insurrections 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 and naval force of the United States as shall be judged necessary, having first observed all the prerequisites of the law in that respect." There is no record of debate in Congress and it is clear that Jefferson drafted the law (Coakley, p. 83).

For more than 20 years after the expiration of the embargo act in 1809, there was no significant use of troops under federal control, either militia or regulars, in suppression of civil unrest or enforcement of federal law (Coakley, p. 91). A law of 1808 covered requisitions by state authorities for military equipment for the militia. The 'Buckshot War' (1838) resulted in War Department rulings regarding the authority of local commanders when assistance was requested by state officials. Secretary of War Poinsett said: "'In doubtful cases, similar orders must be transmitted by direction of the President of the United States; and in all cases where the seat of government is near the theater of the disturbance, the necessity must be very urgent and palpable to justify an officer commanding a detached post in marching his forces to repress an insurrection without authority to do so from this department. Under the law of 1808, the States are not entitled to receive any munitions of war, other than arms and equipment; and no issue even of these ought to be made by an officer in charge of military stores, but on order of the Department'…None of this policy was enshrined in any general order or regulation, but most officers who had to confront situations like those in Missouri and Pennsylvania after 1838 seem to have been well aware of the necessity of getting War Department approval before they could take any action" (Coakley, p. 109).

DORR REBELLION, 1842

"President John Tyler thought the Dorr Rebellion in Rhode Island to be the 'first occasion so far as the government of a State and its people are concerned in which it became necessary to consider the propriety' of federal military intervention under the constitutional guarantee of a republican form of government and protection against domestic disorder." In fact, it was not the first. President Andrew Jackson responded to a state request in the Williamsport affair, 1834, and President Martin Van Buren had 'considered propriety' of responding in the Buckshot War, PA, 1838. The Dorr situation was conflict over outmoded system of

government in Rhode Island. The state was still governed by the charter of 1663 and no state constitution had been written. The conflict eventually resulted in two concurrent state governments, with the general government faced with determining which state government it should recognize. The matter eventually got to the US Supreme Court through a round-about route dealing with a case of trespass. Chief Justice Roger Taney, writing the majority decision, argued that in a question of which was a legitimate government that it was up to the Congress to decide legitimacy.

The Congressional decision would be binding on other branches of federal government and could not to be questioned by the judiciary. But, by the act of 28 February 1795 (revision of the original calling forth act), which delegated to the president power to fulfill the other constitutional guarantee to protect the states against domestic violence on application of legislature or executive, the President must decide whether the exigency was such that 'upon which the Government of the United States is bound to interfere.' The President must therefore determine which body constitutes the legislature and who the governor is, before he can act, which seems to conflict with the Court's decision that the responsibility lies with the Congress. "'If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must of necessity, decide which is the government and which is unlawfully arrayed against it before he can perform the duty imposed on him by act of Congress.

'It is true that in this case the militia was not called out by the President. But upon the application of the governor under the charter government the President recognized him as the executive power of the state and took measures to call out the militia to support his authority if it should be found necessary for the General Government to interfere; and it is admitted in the argument that it was the knowledge of this decision that put an end to the armed opposition to the charter government and prevented any further effort to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was equally as effectual as if the militia had been assembled under his order; and it should be equally authoritative, for certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government, or in treating as wrong doers or insurgents the officers of the government which the President had recognized and was prepared to support by armed force...When citizens of the same state are in arms against each other and the constitutional authorities unable to execute the laws, the interposition of the United States must be prompt or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and the laws of the United States, and must, therefore, be respected in its judicial tribunals'" (Coakley, pp. 119-126).

FUGITIVE SLAVE LAW

The Fugitive Slave Law of 1850 (part of the Compromise of 1850) fulfilled a constitutional provision (Article IV, Section 2, Clause 3, to wit and as noted earlier: "No person held to

Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."). To carry out the provisions of the Fugitive Slave Law, a commission was appointed (within each US circuit court district) with the power to issue certificates for the return of slaves. US marshals were then bound to see that the fugitives were returned. Commissioners and judges were authorized to appoint special officers and call out *posse comitatus* to assist as needed.

The execution of warrants for the return of escaped slaves was resisted in Pennsylvania. A *posse* was summoned to aid the commissioners but the *posse* refused to act. A federal judge asked President Millard Fillmore if he (the judge) could call for US troops as might be available. The president held two cabinet meetings to discuss the problem; there was unanimous agreement among the cabinet members that it should be done (that is, military force should be called out to help civil officers execute the Fugitive Slave Law). There was, however, disagreement on how the military should be called out. The president thought he had authority to call on troops without issuing a cease and desist order (as called for in the 1807 act). Some cabinet members disagreed; some felt that marshals might themselves call on members of Army as citizens to form part of *posse comitatus*. The cabinet decided on a mixture: give authority to US marshals and deputies to call for troops when a district judge or justice of Supreme Court "should certify that in his opinion it was necessary" (Coakley, p. 128).

There was next a major crisis in Boston in 1851. The Secretary of War, C. M. Conrad, on 17 February, issued instructions to the commander of troops in Boston Harbor: 'It is possible that the civil authorities may find it necessary to call in military force to aid in the execution of the law. If such should be the case, and the marshal or any of his deputies shall exhibit to you the certificates of the circuit or district judge of the US in the State of Massachusetts, stating that in his opinion the aid of a military force is necessary to insure the due execution of the laws, and shall require your aid and that of the troops under your command as part of the *posse comitatus*, you will place under the control of the marshal yourself and such portion of your command as may be deemed adequate to the purpose. If neither the circuit or district judge shall be in the city of Boston when the exigency above referred to shall occur, the written certificate of the marshal alone will be deemed sufficient authority for you to afford the requisite aid.'

President Fillmore, in responding to queries from the Senate, also asked if additional legislation was needed. Fillmore told the Senate of his proclamation and orders to military commander in Boston. He elaborated by discussing a wide range of topics:

1. The inherent power of the president to use regular troops to enforce laws;

2. The fundamental legal difference between powers to use regulars and militia in such circumstances—Army and Navy constitutionally placed under control of Executive but the calling forth of militia governed by the 1795 law—which required a preliminary proclamation (cease and desist order); and,

3. The relevancy of the 1807 laws (requiring use of regulars under same provisions as for militia) as 'ought not to be construed as evincing any

> disposition in Congress to limit or restrain this constitutional authority' of president to use Army and Navy to enforce laws.

In addition President Fillmore asked the Senate for clarification by explicit acceptance of his doctrine and suggested that the president be relieved of the need to issue a cease and desist proclamation before using militia to enforce federal law. Fillmore stated: 'It is supposed not to be doubtful that all citizens, whether enrolled in the militia or not, may be summoned as members of a *posse comitatus*, either by the marshal or a commission according to law…But perhaps it might be doubted whether the marshal or commissioner can summon as the *posse comitatus* an organized militia force, acting under its own appropriate officers, without the consent of such officers' (Coakley, pp. 129-130).

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

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

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

> "…And if Fillmore's doctine would permit the use of troops by the president to enforce the law without regard to congressional restrictions, the Cushing Doctrine would allow a U.S. marshal to call on federal military forces in his district without any reference to the president whatsoever. That this seemed to encourage widespread use of the Army and Navy as police forces passed with little notice at the time and indeed the doctrine was to be little honored in practice until after the Civil War. But it did leave the question of legality and procedure in the use of troops in civil disorders in a state of uncertainty until the passage of the Posse Comitatus Act in 1878. It is one of the ironies of history that these quite loose doctrines about the legality of troop use were formulated to serve Southern interest in enforcing the Fugitive Slave Law; they would in the end be challenged by Southerners because of their wide spread use in the post-Reconstruction epoch" (Coakley, p. 132).

During the actions of the San Francisco vigilantes in 1851, designed to deal with lawlessness, the Franklin Pierce administration made it clear that *posse comitatus* doctrine (the Cushing doctrine) did not apply where state and not federal law was involved (Coakley, p. 137).

The Army played a major role in dealing with pre-Civil War conflict, particularly in what has been referred to as the Kansas troubles during the period 1854-1857. Most of the deployments, including those in the *posse comitatus* role, were carried out with presidential knowledge or with the support of presidentially appointed territorial governors. For example, for the election in the fall of 1857, "…detachments [sent] to…suspected trouble spots throughout the northeastern part of the territory [Kansas] to guard the polls, each contingent…acting as a *posse comitatus* in support of United States marshals or territorial sheriffs at the polling places" (Coakley, p. 179).

UTAH EXPEDITION

On 29 June 1857 the Commanding General of the Army, Winfield Scott, sent a directive to BG William S. Harney, commander in Kansas, (the directive was signed by aide-de-camp COL George W. Lay but prepared 'in concert with the War Department and sanctioned by its authority wherever required'). The directive stated:

> "If the governor of the territory [Utah], finding the ordinary course of judicial proceedings, and the power vested in the United States marshals and other proper officers, inadequate for the preservation of the public peace and due execution of the laws, should make requisition upon you for a military force to aid him as a *posse comitatus* in the performance of that official duty, you are hereby directed to employ for that purpose the whole or such part of your command as may be required; or should the governor, the judges, or marshals of the Territory find it necessary directly to summon a part of your troops to aid either in the performance of his duties, you will take care that the summons be promptly obeyed; and in no case will you, your officers or men, attack any body of citizens whatever, except as requisition or summons, or in sheer self defense."
>
> "In executing this delicate function of the military power of the United States, the civil responsibility will be upon the governor, the judges, and marshals of the Territory. While you are not to be, and cannot be, subjected to the orders, strictly speaking, of the governor, you will be responsible for a zealous, harmonious, and thorough cooperation with him, on frequent and full consultation, and will conform your action to his request and views in all cases where your military judgment and prudence do not forbid, nor compel you to modify, in execution, the movements he may suggest…" (Coakley, p. 198).
>
> "The directive charged that 'the community and, in part, the civil government of Utah Territory' were 'in a state of substantial rebellion,' but the instructions hardly read like those given a commander going forth to put down a rebellion. They were in fact closely patterned on those Harney was already taking action

on in Kansas, except that they did not go nearly so far in entrusting to the governor authority over the troops" (Coakley, p. 198).

"In reality the law of 1807 had not been followed very closely in Utah. The president issued no preliminary proclamation before sending troops to Utah, and the proclamation he finally put out in April 1858 was hardly of the prescribed nature. In retrospect, it seems a fair conclusion that Buchanan, although he never made it explicit, employed the troops in Utah on the basis of his constitutional mandate to see that the laws were faithfully executed rather than under the law of 1807. This was the power that Fillmore had claimed at the opening of the decade of the fifties.

"The concept of the employment of troops in Utah, as it had been in Kansas, was that of the *posse comitatus*, under the control of the governor or the civil officials. The difference between the two was that in Kansas the War Department authorized the use of troops only on requisition of the governor, whereas in Utah, until June 1859, judges and marshals were also empowered to requisition them. And in contrast to Kansas, where governors and troops commanders worked together very closely, in Utah Governor Cummings and General Johnston were at odds almost from the start" (Coakley, p. 225).

ROLE OF MILITARY FORCE IN AN EARLY TERRORIST OPERATION

Late in the evening of 16 October 1859 a terrorist attack took place at Harpers Ferry, then in Virginia close to the Maryland border and the junction of the Potomac and Shenandoah? Rivers. The operation was intended to foment a slave uprising. The terrorist band of 19 men seized the federal arsenal and armory buildings and Hall's Rifle Works just outside the town. A few hostages were taken (among them a grand nephew of George Washington) and a small number of slaves joined the terrorist force. At about 01.30, 17 October, a train en route from Wheeling to Baltimore was stopped and delayed by the terrorists; during the stoppage a freed black man (a porter on the train) was accidentally killed by the terrorists. When permitted to leave, the train stopped at the next station and the conductor wired Baltimore, informing railroad officials of the raid. The Conductor reported that the attacking force consisted of 250 white men plus some Negroes. The president of the Baltimore and Ohio Railroad, John W. Garett, telegraphed the Secretary of War, John B. Floyd, asking: 'Can you authorize the Government officers and military force from Washington to go on our train at three twenty this afternoon to the scene or send us full authority for volunteers from Baltimore to act? We will take them on afternoon express if necessary. Please advise us immediately what the government will do. Our operations as road being meantime suspended.'

Secretary Floyd ordered troops out from Fort Monroe, which was the nearest location with units of the regular Army. By 12.00, 17 October, three companies of Coast Artillery troops, commanded by CPT Edward O. C. Ord (later a Major General during reconstruction as commander of the 4th district consisting of Arkansas and Mississippi; Fort Ord in California was named for General Ord), were on the way to Baltimore for the train to Harpers Ferry. In addition, Secretary Floyd authorized the use of Baltimore volunteers.

During the morning of 17 October (while a federal force being mustered) companies of citizen militia (volunteers) from the immediate area of Harpers Ferry and other militia companies from Charlestown and Martinsburg arrived at Harpers Ferry. Additional militia units came from Winchester and Frederick; the force was more a mob than an organized and disciplined military force. However, the force was sufficient to drive the terrorist band from the arsenal and Hall's Rifle Works. All but the terrorist leader and six of the band plus 13 hostages were killed or captured. The remainder of the band and the hostages were located in the engine house, a brick structure near the railroad bridge. The terrorists killed three of the counter-force and wounded others. Subsequent firing through the day resulted in one more of the terrorist band killed and a son of the band's leader mortally wounded. Only the leader and four of his force remained uninjured.

Secretary Floyd decided to place COL Robert E. Lee, then on leave at his home in Arlington, VA, in charge of the military response team. The Secretary's Aide, while taking the order to Lee met 1st LT James Elwell Brown Stuart, also on leave, who replaced the aide delivering the order. Upon delivery of the order, Stuart asked for and received permission from Lee to accompany him on the operation as an aide. President Buchanon signed a 'hastily drawn proclamation,' responding to the cease and desist order required by law.

It became apparent that it would take considerable time for Ord's command to get to the site of the terrorist incident. Secretary of War Floyd asked the Secretary of the Navy for assistance. The Navy Secretary agreed that marines stationed at the Navy Yard in Washington could be used as the needed federal force. At 15.30 hours 86 marines, with two 3-inch howitzers, under command of LT Israel Greene, entrained from Washington to Relay House Station near Baltimore to change to a train for Harpers Ferry. Greene's orders were to place his command under COL Lee on arrival at Harpers Ferry, making the operation joint.

Lee received his orders and the Presidential proclamation in the early afternoon and, dressed in civilian clothes, went to Washington, presumably to Union station, accompanied by Stuart. He missed the train transporting the marines. Lee caught the Baltimore express at 17.30 (two hours behind the marines) and was too late at Relay House as well. Railroad President Garett provided a special locomotive and Lee telegraphed the station master at Sandy Hook, the last stop before Harpers Ferry, to hold the marines as well as Baltimore volunteers also enroute, at Sandy Hook. At 23.00 Lee arrived at Sandy Hook and married up with his military force.

Receiving additional information on the militia-mob actions at Harpers Ferry during the day, thus getting a better appreciation of the situation, Lee wired instructions to hold the troops from Fort Monroe at Baltimore. He also held the Baltimore volunteers on Maryland side of the river, away from Harpers Ferry. Lee deployed the marines to cover the engine house.

Through the night, Lee planned an assault for early on 18 October. The plan called for LT Stuart to carry a note to the terrorist leader (now rumored to be John Brown, of Kansas fame). If the terrorist or insurgents refused to surrender, Stuart was to step back and signal to launch assault. The assault force was ordered to use bayonets and avoid shooting to lessen the danger to the hostages.

COL Lee offered the honor of the assault to the Maryland and Virginia militias, but neither commander accepted. The Maryland commander reminded Lee that professional

soldiers were paid for this sort of work. LT Greene accepted mission for the marines. A team of 12 marines was selected to lead the assault, keeping 12 men in reserve. Three other marines were assigned to batter door of the engine house with sledge hammers.

After a discussion (07.00) with Brown, Stuart waved his hat and the assault started. The sledge hammers were not able to break open the door. Greene spotted a ladder which used as battering ram. Greene led the attack. Two marines were struck by gunfire; one of the two was fatally wounded. The marines took down the raiders and saved all 13 hostages. The leader, Brown, was wounded by Greene; the son, Oliver Brown, was already mortally wounded. Two additional members of the terrorist force were killed by marines and the last two surrendered. Out of the original 19 raiders, 12 were killed, one (John E. Cook) escaped. Of the six prisoners (including Brown) only two escaped wounding. The assault took only five minutes. When it was over, Lee discovered the president's proclamation still in his pocket; the cease and desist order was never issued.

Lee's message to the War Department, send in mid-morning after the assault, characterized Brown's men as 'rioters' not 'insurrectionists.' The prisoners were turned over to state authorities in Charlestown. Lee, Stuart and the marines returned to Washington on same early morning train to Baltimore that Brown had halted two days earlier.

"The raid holds a less important place in the history of federal military interventions in domestic disorders than it does in the general history of the United States. This intervention was, as in the case of Nat Turner's Rebellion, an emergency measure undertaken without the usual formalities. And like Turner's Rebellion and most of the other riots of the antebellum period, it was the militia acting under state and local control that brought the raiders to bay even though in this case it did require a well-disciplined federal force to finish them off. The affair at Harpers Ferry has the distinction of being one of the few cases in which federal troops actually inflicted and suffered casualties during a domestic disturbance. In retrospect, the tactics of John Brown bear a close resemblance to those of terrorists of the second half of the twentieth century. Viewed in this light, Lee's method of dealing with the situation deserves some notice" (Coakley, p. 193).

THE CIVIL WAR

> "…one [measure] that has frequently escaped attention, on 29 July 1861 Congress again revised the basic laws of 1795 and 1807 dealing with the use of military force in civil disorders. It left intact the section dealing with action on state requests, but vastly strengthened the president's authority to use both militia and regulars to suppress insurrections and execute the laws of the Union. The pertinent section read: 'That whenever, by reason of unlawful obstructions, combinations or assemblages of person, or rebellion against the authority of the government of the United States, it shall become impracticable, in the judgment of the President…to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any state or territory…it shall be lawful for the President…to call forth the militia of any or all of the states of the Union, and to employ such part of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws…or to suppress such rebellion in whatever state

> or territory thereof the laws…may be forcibly opposed or the execution thereof forcibly obstructed'" (Coakley, p. 228).

The revised law added 'rebellion' specifically to the obstructions and combinations that could be acted against under the 1795 law, entrusted decision to use military force to 'judgment of the President' whenever he deemed it 'impracticable' to enforce the law by ordinary means (the 1795 law merely made it lawful for him to do so) and omitted any reference specifically to powers of the federal marshals under the act as a means of enforcement short of the use of military force. Incidentally, it incorporated provisions of the 1807 act authorizing use of regular forces as well as militia and extended presidential authority to territories as well as states.

The 1861 statute was not the basis for Lincoln's conduct of the Civil War. On 16 August 1861 president formally proclaimed inhabitants of seceded states to be 'in a state of insurrection against the United States.' Until 20 August 1866 (when Johnson declared all insurrection at an end) the Civil War was 'conducted between contending parties with all the rights of war recognized by the law of nations.' Lincoln and the Congress tacitly recognize that they were dealing with a war and not an insurrection. "Rather than a basis for conduct of war, the law of 29 July 1861 was to become a permanent part of the statutory basis for federal troop intervention in lesser disturbances and it has remained the basic statute authorizing the president to employ troops to enforce federal law that was to be used in such instances as Little Rock, Arkansas, and Oxford, Mississippi, in the twentieth century. In this manner, the Civil War led to a great enhancement of the president's power to use military force in domestic disorders…the Army was given a role in law enforcement during the conflict [the Civil War] that was quite different from any that it had exercised before.

Military commanders sometimes supplanted civil authority and exercised both police and judicial functions on the own…Lincoln suspended the write of *habeas corpus* in certain specified areas in 1861 and on 24 September 1862 issued a proclamation suspending it for the duration of the 'insurrection' for all rebels, insurgents, and person, wherever found, who discouraged enlistment, resisted the draft, or were guilty of disloyalty. He thus resorted to arbitrary arrests on executive authority and in some cases trial by military commission. Secretary of State William H. Seward was a first entrusted with administration of this arbitrary arrest program, but in February 1862 Lincoln transferred responsibility to the War Department, where it was carried out normally under departmental commanders. Although Congress only partially ratified this arrangement in the Habeas Corpus Act of March 1863, its restrictions were largely ineffectual, and Lincoln's policy remained in effect to the end of the war" (Coakley, p. 228-229).

> "…it did mean that military commanders were involved, throughout the war, in the unfamiliar business of law enforcement" (Coakley, p. 229).

RECONSTRUCTION

> "…the Army played an abnormal role in civil government. Never before or after, within the continental boundaries of the United States, did it exercise police and judicial functions, oversee local governments, or deal with

domestic violence on the scale it did in the eleven ex-Confederate states from 1865 to 1877" (Coakley, p. 268).

Reconstruction is seen as being comprised of three periods:

1. Surrender at Appomattax, 9 April 1865 until First Reconstruction Act, 2 March 1867 (the Army had a fairly limited role; President Johnson was following Lincoln's plan; and a radical Congress was just beginning to flex its power).

2. Outright military rule, under the Radical Republican Congress; each state had to ratify the Fourteenth Amendment and ratify a new state constitution creating 'loyal republican governments.'

3. From the time powers were restored to local and state civil authorities to the final removal of Army from occupation in 1877.

It is important to keep in mind that the Civil War began as a conflict of views on the question of the permanency of the Union under the Constitution. Simply stated, the position of the Confederate States of America was that states had joined the Union voluntarily and hence could opt out of the Union if they so desired. The position of General Government or the remainder of the United States of America was the opposite; individual states, once in the Union, had no right to leave the Union. Since the United States was victorious in the War, one might think that the view of Lincoln and others, which was no state had seceded from the Union since that was not legally possible, would be reflected in the post-war period. However, the Radical Republicans who came to power in the Congress, reversed the argument. Reconstruction was predicated on requiring major reforms before the states that comprised the CSA could be re-admitted to the Union; that is, the rebellious states had, in fact, left the Union—the very matter that the War was fought over!

During Reconstruction "…the Army was by far the most important instrument of federal authority in the South…and it was the only enforcer of national reconstruction policy, regardless of whether that policy was under executive leadership or congressional. It was this role as the 'enforcer of national reconstruction policy' that shaped the Army's rules of engagement, so to speak, in handling civil disorders. And they were likely to vary with the locality, depending on what the national Reconstruction policy was at the moment, whether Congress or the president was directing it, and the inclination of individual commanders. Suffice it to say here that, even after the readmission of the ex-Confederate states, the old pre-Civil War rules did not apply. Only with the passage of the Posse Comitatus Act in 1878 did the situation once again become one in which the troops could be used in civil disorders only at the express direction of the president after all the legally prescribed formalities had been observed" (Coakley, p. 268).

A tradition had existed from colonial days. "Before the Civil War, in both North and South, militia under state control, not federal troops, were almost always used to control local disorders where military intervention was necessary. But during Reconstruction in the South, even after the ex-Confederate states were 'reconstructed,' there was no reliable militia available to either state or federal authorities. A Radical Congress in 1867 disbanded all the old white militia in the South, viewing it as a reestablishment of the Confederate Army. Reconstruction governments under Republican control created black militia units, but neither

these governments nor the federal commanders ever really used them to confront ex-Confederates. Federal military force was the sole expedient to be relied upon either to protect the freedmen in their rights or to deal with disturbances when the civil authorities were either unable or unwilling to do so" (Coakley, p. 269).

Acts of congress providing the legal basis for the federal government (and hence the Army) actions during reconstruction included the Freedman's Bureau Act of 6 February 1866 (vetoed by the president but a revised version was passed over a second veto in July) and the Civil Rights Act, April 1866, which prohibited discrimination by either state or local law with enforcement assigned to federal courts and marshals (Coakley, p.271).

The Civil Rights Act specified that: "United States marshals, deputy marshals and persons appointed by them were empowered to 'summon and call to their aid the bystanders or *posse comitatus* of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged.' Also, the act made it lawful for the president to use the same force to enforce the act…The Fourteenth Amendment aside, the Civil Rights and Freedmen's Bureau Acts clearly imposed direct obligations on the Army in the South to protect freedmen against any discrimination on the part of the Johnson provisional governments" (Coakley, p. 272).

> "Commanding General of the Army Ulysses S. Grant…convinced that Army Commanders in the South need some specific authorization for military intervention to protect the freedmen, without waiting for a request from civil officials, on 6 July 1866…issued General Order No. 44…" G.O. 44 stated, in part: "'Department, District, and Post Commanders in the states lately in rebellion are hereby directed to arrest all persons…charged with…crimes and offenses against officers, agents, citizens and inhabitants of the United States, irrespective of color, in cases where the civil authorities had failed, neglected, or are unable to arrest and bring such parties to trial, and to detain them in a military confinement until such time as a proper judicial tribunal may be ready and willing to try them. A strict and prompt enforcement of the order is required'" (Coakley, p. 279).

> "In an opinion rendered on 12 June 1867, Johnson attorney general, Henry Stanberry, cautioned these commanders [MG John M. Schofield, 1st district (Virginia), Daniel E. Sickles, 2nd (North and South Carolina), John Pope, 3rd (Georgia, Alabama and Florida), Edward O. C. Ord, 4th (Arkansas and Mississippi), and Philip A. Sheridan, 5th (Louisiana and Texas)] to exercise their powers with restraint, especially taking care not replace civil authorities except when absolutely necessary to prevent crime and preserve peace and order. To counter this opinion, Congress on 19 July passed a Third Reconstruction Act spelling out specifically the military commander's power to remove officials and to determine who could and could not vote. The military commanders then no longer had to wait for a request from civil authorities in order to use troops to suppress disturbances or even in normal law enforcement. They could now do so on their own initiative. And they could remove any civil officials whom they found uncooperative" (Coakley, p. 288).

> "By mid-1868 the conventions had been held, the constitutions approved, and the Fourteenth Amendment ratified in seven of the ten states placed under military rule in March 1867. Alabama, Arkansas, Florida, Georgia, Louisiana, and North and South Carolina were all readmitted to the Union at that time, although military rule was to be restored for a time in Georgia the following year. Mississippi, Texas, and Virginia did not complete the Reconstruction process until 1870. With its completion in all eleven states of the former Confederacy, Reconstruction entered a new period during which the Army would play a different, but not necessarily a less significant role" (Coakely, p. 290).

"…Attorney General William W. Evarts came up with a method for providing troop aid in response to specific requests from federal and state law enforcement officials without any of the formalities attending a request of the president. The U.S. marshal for the Northern District of Florida, in some desperation, wrote Evarts on 12 August 1868 seeking guidance on how to obtain military aid in apprehending law breakers and keeping the peace. In response, Evarts cited the Cushing *posse comitatus* doctrine, that had really lain almost dormant since it had been first announced in 1854. This doctrine, it may be recalled, gave U.S. marshals and county sheriffs the right to 'command all necessary assistance' within their respective districts, drawing on both military and civilians alike to serve on the *posse comitatus* to execute legal process. Evarts carefully distinguished this power from that of the president to protect the states against domestic violence or to employ military force in subduing combinations in resistance to the laws. And he held that the drafting of federal military personnel into a *posse* should be limited to 'rare cases of necessity' where state militia and local citizens proved inadequate or unwilling to form one suitable to help the marshal or sheriff enforce the law. But clearly it would permit at least limited use of troops against the Klan without the invocation of presidential authority. And although Evarts did not realize it at the time, his espousal of the Cushing Doctrine was to open a Pandora's box of innumerable requests by U.S. marshals and county sheriffs, both in the South and West, for troops assistance in law enforcement. And they were to equate necessity with convenience—and law and order with the protection of local political, social, or economic interests (See, particularly, Coakley, pp. 300-301, and chapters 13, 14, and 15).

"The War Department dutifully communicated the Evarts opinion to the division and department commanders, adding: 'The obligation of the military individual officers and soldiers in common with all citizens, to obey the summons of a marshal or sheriff must be held subordinate to the paramount duty as members of a permanent military body. Hence the troops can act only in their proper organized capacity, under their own officers, and in obedience to the immediate orders of those officers' (Coakley, p. 301).

"The commanding officer summoned to *posse* duty would have to judge for himself the necessity and legality of the call and limit his actions absolutely to 'proper aid in the execution of the lawful precept exhibited to him by the marshal or sheriff.' If time would permit, indeed, every demand from a civil officer for military aid should be referred to the president and 'in all cases the highest commander whose orders can be given in time to meet the emergency will along assume responsibility for the action.' And commanders were admonished to make timely disposition of their forces to anticipate trouble and preserve the peace, instead of relying on commitment under the *posse comitatus* doctrine (Coakley, p. 301).

The War Department's instructions to its commanders in the South in mid-1868 seemed to say the: Pre-position troops in incipient trouble spots to the extent possible and use them under the *posse comitatus* doctrine to deal with Klan depredations at your discretion; in the case of large disturbances intervention can only be by order of the president in response to a request from state officials" (Coakley, p. 300).

"…Meanwhile, Evarts had issued his opinion and the War Department relayed it to Buchanan [Gen. Buchanan, now commanding a newly created Department of Louisiana] on 25 August. Buchanan promptly promulgated the doctrine to his post and detachment commanders. 'In such cases the military commander will be required to render the assistance called for; provided that, in the exercise of sound discretion, he is satisfied that the necessity for such service exists. But should he not be thoroughly satisfied of this, he will decline to act until he can make a report to, and receive specific instructions from these headquarters, in each case' (Coakley, p. 303).

Secretary of War Schofield broadened Buchanan's authority somewhat on 14 September. 'The peculiar condition of the southern states at this time,' he wrote Buchanan, 'renders it necessary for the army to do all that the laws allow for the preservation of the peace…It is the wish of the President that you exercise within the limits of your lawful authority full discretion in your action, to the end that in any event peace may be preserved'" (Coakley, p. 303).

In support of Fifteenth Amendment (dealing with voting rights), 31 May 1870, Congress provided the Enforcement Act which made it a crime to assemble to coerce or prevent citizens from exercising their franchise under the Fifteenth Amendment. On 28 February 1871 Congress passed the Second Enforcement Act which authorized federal courts to appoint supervisors of elections and making interference with their duties a federal offense. The act also authorized federal marshals and deputies to summon bystanders as *posse comitatus* of the county 'or such portion of land or naval forces, or militia as may be necessary to the performance of the duty to which they are charged' If those approaches failed, the president authorized to use military units under military command; the law also authorized the Army to police elections. Policing elections became a major facet during Reconstruction and subsequently was important in the debate that led to 1878 Posse Comitatus Act (Coakley, p. 308).

On 20 April 1871, the third and most significant of the Enforcement Acts came into being. It was titled "An act to enforce the provisions of the fourteenth amendment…and for other purposes" and "…gave the president powers in the South that had not been invoked since the military occupation in 1865. "Section 3 of the act, which was to become part of the permanent law of the United States governing military intervention to enforce the laws of the union read as follows, 'That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any state shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such state of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act, and the constituted authorities of such state shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such state of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States, or the due execution thereof, or impede or obstruct the due

course of justice under the same, it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or the land and naval force of the United States, or either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under this and the preceding sections shall be delivered to the marshal of the proper district, to be dealt with according to the law" (Coakley, pp. 309-310).

On 3 May 1871, Grant, now president, "…issued the preliminary proclamation required by the law ordering 'combinations of lawless and disaffected persons in the late theater of insurrections and military conflict' to cease violating the civil rights of individuals under the Fourteenth Amendment." In support of the president's proclamation, the War Department issued General Orders, stating in part: "that 'the regular forces of the United States stationed in the vicinity of any locality where offenses described by the…act may be committed, shall…be employed by their commanding officers in assisting the authorized civil authorities of the United States in making arrests of persons accused under the said act; in preventing the rescue of persons arrested for such cause; in breaking up and dispersing bands of disguised marauders, and of armed organizations, against the peace and quiet or the lawful pursuits of the citizens in any state.' Under these instructions, commanders could rely on some authority other than the *posse comitatus* doctrine in fighting the Klan" (Coakley, p. 310).

On 13 January 1875, responding to request for information from Senate, President Grant stated: "…the task assumed by the troops [referring to the Louisiana situation] is not a pleasant one to them; that the Army is not composed of lawyers capable of judging at a moment's notice just how far they can go in the maintenance of law and order; and that it is impossible to give specific instructions providing for all possible contingencies that might arise" (Coakley, p. 329).

Coakley points out in a footnote that "The laws of the United States were brought together in a single body for the first time in 1874 in the *Revised Statutes of the United States* with suitable combinations and minor changes in language. For instance, the laws of 1795 and 1807 were combined in Section 5297, while Lincoln's law of 1861 permitting the use of military force to deal with combinations too powerful to be overcome by the ordinary course of judicial proceedings became Section 5298. Section 2 of the Ku Klux Klan was codified as Section 5299 of the *Revised Statutes*. Section 5300 stated the requirement for a proclamation under the other three titles" (Coakley, p. 343).

Grant, responding to request from House of Representatives for all orders or directions relating to use of troops in Virginia, Louisiana, Florida, and South Carolina since 1 August 1876, state: "I have not employed troops on slight occasions nor in any case where it has not been necessary to the enforcement of the laws of the United States. In this I have been guided by the Constitution and the laws which have been enacted and the precedents which have been formed under it." Regarding the fact that he had issued no proclamations when authorizing troops to protect elections, he said: "In case of insurrection against a state government or against the Government of the United States at an election…no such call from the State or proclamation by the President is prescribed by statute or required by precedent. It is noteworthy that Grant did not, at any point, cite the *posse comitatus* doctrine as authority for actions taken by troops in the South" (Coakley pp. 342-343).

THE *POSSE COMITATUS* ACT

Members of Congress began to raise questions about the use of military forces as *posses*. "Noting that command of Army forces fell into the hands of marshals and sheriffs without any approval of the commander in chief" (Coakley, p. 343). As noted earlier in this paper, it was ironic that it was Southern Democrats who raised questions about Cushings' *posse comitatus* doctrine. Recall that Cushing dredged the doctrine up (as an opinion by the Attorney General) in 1854 out of British law to serve Southern interests in enforcing the Fugitive Slave Act. Now that the doctrine had been turned against white Southerners, they now could see how it could be used to enforce unpopular laws or sustain unwanted regimes.

Finally, during the 34th Congress, with a number of Southern Democrats now in office, there was movement to curtail the somewhat casual use of military forces in local law enforcement. On 27 May 1878. Rep. J. Proctor Knott (KY) introduced an amendment as rider to the Army appropriations bill. The rider read: "From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding ten thousand dollars or imprisonment not exceeding two years, or by both such fine and imprisonment" (Coakley, p. 343).

The Knott amendment—which became known as the Posse Comitatus Act—was approved by both houses of Congress, and signed into law as part of Army Appropriations Act, 18 June 1878. It now exists as Section 1385, Title 18, *U.S. Code*.

> "It is noteworthy that the Posse Comitatus Act contained no restrictions on the use of federalized militia as it did on the Regular Army. This retreat from the original conception of the founders was to be reflected in future uses of military forces in domestic disorders" (Coakley, p. 347).
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> "Some of those who opposed it [Posse Comitatus Act] in the Congress charged that was taking away from the president entirely the power to use troops to repress internal disorders except on request of a state governor or legislature, that President Washington could not even have dealt with the Whiskey Rebellion under its terms. This interpretation of the Posse Comitatus Act has often been raised by those protesting against federal troops intervention in the many instances it has occurred since 1878. And indeed the question of what the real meaning of the Posse Comitatus Act was has been the subject of some dispute ever since its passage…however…all that it really did was to repeal a doctrine whose only substantial foundation was an opinion by an attorney general, and one that had never been tested in the courts. The president's powers to use both regular and militia remained undisturbed by the Posse Comitatus Act, and by the law of 1861 and the Ku Klux Klan Act they had in fact been substantially strengthened during the Civil War and Reconstruction Era. But the Posse Comitatus Act did mean that troops could

> not be used on any lesser authority than that of the president and that he must issue a 'cease and desist proclamation before he did so. Commanders in the field would no longer have any discretion, but must wait for orders from Washington. In all fairness, this seems to have been the intention of the founders, whose fears of the use of military enforcement of the law sprang from the tradition of the American Revolution. It seems highly unlikely that they ever would have approved of a doctrine based on British law and a British experience that included the use of Red Coats to enforce the unpopular measures of a British Parliament" (Coakely p. 344).

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

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

POST-RECONSTRUCTION TO THE 20TH CENTURY

Throughout the latter part of the 19th Century and the early part of the 20th Century, the Army and the Marine Corps were deployed on many occasions to deal with disturbances related to labor conflicts, racial incidents and riots, disaster relief, and other domestic civil unrest situations. I have identified at least 80 such deployments during the period 1866 to 1914; I am sure that I have not unearthed all operations.

"…Although martial law was declared on a few occasions during the Civil War and Reconstruction, its first post-Reconstruction mention in Army regulations is in AR 500-50, 17 July 1945. Wood [In 1919, MG Leonard Wood declared martial law in Gary, IN during labor strikes, 1919.] clearly exceeded his authority in Gary and directly violated the legal doctrine set forth in *Ex Parte Milligan* in 1866…The applicable regulation during the Gary intervention was *Regulations for the Army of the United States, 1913* (corrected to 27 November 1917), art. 47. See also AR 500-50, 6 Jun 23; AR 500-50, 17 July 45, sec. 4, par. 9, for the first discussion of martial law in regulations (Laurie and Cole, p. 269 fn). For the full text of *Ex Parte Milligan*, see Commager, document 256.

> "The War Department War Plans Division carefully delineated the types of emergencies to be considered and the mission of the Army should these

> situations develop. 'There are two classes of emergencies,' a departmental directive stated, 'in which the Federal Government may be required to act: (a) Minor Emergencies, or localized disturbances, in which the Federal Government may be called upon for assistance by competent state authorities' and '(b) Major Emergencies, or general disturbances developing from a series of minor emergencies in which interstate commerce, mails, or functions of government are interfered with. In such cases direct action by the Federal Government will be required.' Although these instructions appeared to cover only situations that allowed federal intervention after a request by state or local authorities, the memorandum from the chief of staff of 24 May 1920 foresaw the wider use of troops under all applicable articles of 'the Constitution and the Revised Statutes, especially Sections 5297, 5298, and 5299, as published in Article 47, Army Regulations.' Under these statutes, the president was legally authorized to intervene to enforce federal laws in a state or locality without its request. Army planners, however, could not realistically conceive of any situation during this tense period [inter-war contingency planning; 'Red scare'] when the states would not be willing to initiate action against domestic revolutionaries" (Laurie and Cole, p. 332).
>
> "The definition of a clear American doctrine [to deal with civil disorders] actually emerged from the work of other Army agencies. In 1922-1923, the U.S. Army Command and General Staff School at Fort Leavenworth, Kansas, issued a manual by Maj. Cassius M. Dowell, an infantry officer then assigned to the Judge Advocate General's Department. Dowell's manual was a remarkable document, which became the core of future texts for senior officers at the school, as did its subsequent confidential supplement. The manual dealt with all the same technical and tactical issues covered by earlier works, but in a more comprehensive manner. It emphasized similarly 'the ultra-radical element' as the primary cause for American domestic disorders, which was characteristics for manuals of the period."
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> "In 1925, after Dowell re-wrote and revised this work, the Army published its more general and innocuous part, with little mention of ultra-radicalism. This new work, which included an appendix of sample civil disorder documents, was essentially a legal treatise entitled *Military Aid to the Civil Power*. At the same time it was published, however, the remaining parts of Dowell's endeavor, which the Army thought too sensitive for the general public, were collected as a *Confidential Supplement to Military Aid to the Civil Power*. The initial book contains no references indicating the existence of the *Confidential Supplement*, although the Army considered both to be parts of the same document" (Laurie and Cole, pp. 354-355).

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

> "Maj. George S. Patton, Jr. wrote a paper in November 1932 after the dispersal of the Bonus Marchers that represented the older attitudes. Entitled 'Federal Troops in Domestic Disturbances,' Patton's paper was similar in tone

and substance to Dowell's manuals of the 1920s and reminiscent of late nineteenth century military works on civil disturbances. 'A savage document' in the opinion of Patton's biographer, the paper argued that, if gas was ineffective against a mob, the troops should open fire and from nearby buildings sharpshooters should pick off mob leaders. 'Always fire for effect,' urged the future Third US Army commander. 'If you must fire do a good job—a few casualties become martyrs, a large number an object lesson.' Even Patton, however, believed that breaking up the mob was the main Army objective: 'When a mob starts to move keep it on the run, but always leave it a line of retreat—a cornered rat will fight desperately,' he warned. But if any rioters resist, 'they must be killed.' Troops guarding buildings were urged to establish a deadline beyond which rioters would be shot. 'Be sure to kill the first one who tries,' Patton wrote, 'and leave him there to discourage the others.' Concerning legalities, Patton believed that 'an armed mob resisting federal troops is an armed enemy. To aid it is treason. This may not be law, but it is fact. When blood starts running law stops, because, by the fact of bloodshed, it has demonstrated its futility.'

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

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

"The 1935 version of the Army's *Basic Field Manual* was available to the public through the Superintendent of Documents and aroused a storm of controversy and criticism, especially among liberals, civil libertarians, labor

> groups, and critics of the military. The manual and the attitude and philosophy behind Army civil disturbance doctrine that it conveyed were denounced as reactionary, anti-democratic, anti-labor, and fascist. Although the manual contained little that had not been printed in earlier manuals and civil disturbance literature, it was the first such official Army document regarding civil disorders available for purchase by the general public" (Laurie and Cole, pp. 363-364).

The public outrage over the manual's contents gave a clear signal to many Army leaders that opinion on the proper role of federal troops in civil affairs, and especially on the use of lethal force and 'shoot to kill orders' that allegedly allowed federal troops to shed blood with impunity, had changed dramatically since the Bonus March of 1932 and the advent of the New Deal. Groups and ideologies that had previously been considered serious threats to the nation's security and existence were now accepted entities. Army Chief of Staff General Malin Craig was forced to defend publicly the contents and working of the document against press attacks in the *New York Post, New York World-Telegram,* the *Nation*, the *New Republic*, and *Women Today* and stated that 'while some of the instructions…may seem over-drastic…it must be remembered that the regular Army is called on to suppress a riot only when police and national guardsmen have been unable to control it.' Although Craig was supposedly more liberal than many of his Army colleagues, the chief of staff indicated that the Army had 'no intention of remanding MacArthur's instructions' as outlined in FM 27-15" (Laurie and Cole, p. 363).

IN CONCLUSION

Use of federal military force in domestic disorders fall into two main categories:

1. Enforcement of federal laws or authority against 'combinations too powerful to be overcome by the ordinary course of judicial proceedings'

2. Constitutional guarantee of 'a Republican form of government' to the states.

In the first instance, the president can act on his own initiative. In the second instance, the president can act only on receipt of an application from the legislature of a state or the governor if the legislature is not in session or cannot be convened. In both cases, the use of military force is discretionary by the president (Coakley, p. 345).

"The sections of US Army regulations issued in 1945 dealing with 'Employment of Troops in Aid of Civil Authorities' stated that a military commander involved in a civil disorder 'will bear in mind that the suppression of violence without bloodshed or undue violence is a worthy military achievement.' Commanders were advised that they should employ only such force as is necessary to accomplish their mission of restoring order and maintaining lawful authority. This philosophy is the governing one at present. The citation is drawn from The Regulations of the Army of the United States, 17 July 1945, AR 500-50, Section IV, para. 8.

> "In spite of flexible enabling legislation governing the use of troops in aiding civil authorities, it was often difficult for state and federal authorities to

> determine quickly which statute applied in the many unusual circumstances in which federal military assistance was requested. In numerous cases between 1877 and 1945, presidents dispatched troops to the proximity of a disturbance without seeking any specific state request or statutory justification for doing so. All civil authorities clearly understood that the mere threat of federal military intervention, or the presence of regular troops in a disturbed area, often restored order without those same authorities having to undertake the slow formal process that allowed direct federal military intervention" (Laurie and Cole, pp. 18-21).

The final word is best drawn from Laurie and Cole:

> "The mission of maintaining domestic tranquility fell to the Army by default and was not a task of its own choosing. Yet the federal military was the only major armed force of order available to the federal executive in a disordered era—the only organization of sufficient size, power, and reliability capable of aiding civil authorities in times of crisis" (Laurie and Cole, p. 421).

APPENDIX

The first and fundamental law governing the use of military forces in domestic situations was the 1792 Calling Forth Act to support the Constitution: 'to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions' (Article I, Section 8, Constitution). The Calling Forth Act gave no rights to call on regular military forces, but only militia. The Calling Forth Act was replaced by the 1795 law which was somewhat less restrictive, but still provided no authority to use regulars. The Neutrality Act of 1794 permitted the use of either regulars or militia to prevent filibustering expeditions against powers with whom US was at peace. And, the 1807 law permitted the president to use regular military forces for same purposes that the law of 1795 permitted the use of militia.

The following is a summary of the codification of federal law in 1874 as the *Revised Statutes* covering federal aid to civil authorities and insurrections against state or federal authority.

> RS 5297 reflected the laws of 1795 and 1807 regarding state requests for assistance. 'In case of an insurrection in any state against the government thereof it shall be lawful for the President, on an application of the legislature of such state, or of the executive when the legislature cannot be convened, to call forth such members of the militia of any state or states, which may be applied for as he deems sufficient to suppress such insurrection, or, on like application, to employ for the same purposes, such part of the land or naval forces of the United States, as he deems necessary.' The state has to first attempt to deal with disturbance using police or militia.
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> RS 5298 was also derived from the 1795 and 1807 laws, as revised by the Lincoln Law of 1861. According to Coakley, most pre-Civil War federal interventions had been initiated under the predecessors of RS 5298.

> 'Whenever, by reason of unlawful obstructions, combinations or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President, to enforce by the ordinary course of proceedings the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or of all the States, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States or to suppress such rebellion in whatever State or Territory thereof of the laws of the United States may be forcibly opposed or the execution thereof forcibly obstructed.' RS 5298 was similar to RS 5297 (upholding civil government and combat forces opposing federal authority) but applied to the defying of federal authority, breaking of federal laws, or destruction or threatening of federal property. It was used to allow military intervention when federal court writs could not be served by federal marshals or when federal court orders and injunctions were ignored.
>
> RS 5299 was passed in 1872 as part of the Ku Klux Act, one of the civil rights enforcement acts. 'Whenever conspiracies in any State so obstruct or hinder the execution of the laws thereof and of the United States as to deprive any portion or class of the people of such state of any of the rights, privileges, or immunities of the protection named in the Constitution and secured by the laws for the protection of such rights, privileges, or immunities and the constitutional authorities of such state are unable to protect or from any cause fail or refuse protection of the people in such rights, such facts shall be deemed a denial by such state of the equal protection of the laws to which they are entitled by the Constitution of the United states, and in all such cases, whenever any such insurrection, violence, unlawful combinations or conspiracy opposes or impedes or obstructs the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia or the land and naval forces of the United states, or of either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations.' RS 5299 was and is applied in cases where minority or immigrant groups encountered hostile racist sentiment or were subject to racial attacks that denied them civil or legal rights guaranteed by the federal government. The law could be invoked by the federal executive without a state's request or approval, if its civil and military authorities were unable or unwilling to act on their own, or they opposed the execution of federal laws or acted to repress civil rights of individuals.

Other laws allowing commitment of troops by the president under the authority of RS 5298 and 5299 include:

> An act of 2 July 1890 to 'protect trade and commerce against unlawful restraints and monopolies' and the Railway Acts of 1 July 1862, 2 July 1864, and 27 July 1866, which assure federal aid to ensure safe, unhindered operation of major transcontinental railroad routes by declaring them to be 'military roads' and 'post routes' vital to national security.

> RS 5300 was derived from the 1792 Calling Forth Act: 'Whenever in the judgment of the President, it becomes necessary to use the military forces under this title, the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes, within a limited time.' The intent was to inform lawless elements of federal intervention and the impending arrival of troops and to allow sufficient time for lawless elements to disperse before the government took stringent steps to restore order.
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> RS 5301 supplemented RS 5300. If a lawless element failed to disperse under the first proclamation (RS 5300), 5301 allowed for second proclamation. Whenever 'the inhabitants of a state, or a portion of a state are in a state of insurrection; and thereafter, while the condition of insurgency continue, all commercial intercourse directed to or from the designated territory is unlawful.' The second proclamation was not to be issued until after troops deployed and attempted to quell the disturbance.

Other laws allowing commitment of federal troops (but rarely used) include: RS 5296, the Neutrality Act of 1837 and revisions RS 5286 and 5287; RS 1984, 1989 and 1991, all of which refer to enforcement of civil rights legislation; RS 2147, 2150, 2151, and 2152, which cover enforcement of laws concerning American Indians, Indian lands and federal reservations; RS 2460, referring to the protection of public lands; RS 4792, relating to public health; and RS 5275, which covers protection of foreign prisoners bound over to the US as a result of extradition to or from foreign nations.

Again, reminding of the character of the 'Posse Comitatus' Act, 18 June 1878. The Act, "…passed at the insistence of Southern congressmen disturbed by the widespread and relatively uncontrolled use of regulars during Reconstruction, prohibited the employment of federal troops as posses to enforce laws at the request of local and state officials or federal marshals without the prior, explicit approval of the president. Even then, the chief executive could act only after all civil authorities had completed the legal process outlined by the Constitution and by Congress in RS 5297, 5298, 5299, and 5300. The ramifications of the Posse Comitatus Act were extensive. The act did not, however, prohibit the use of federal troops under any of the legal provisions cited above if executive approval was received prior to the commitment of regulars, and if the necessary proclamation was made as required by RS 5300" (Laurie and Cole, pp. 20-21).

The Army Regulation of 1881, Section 823 concerns 'cases of sudden and unexpected…insurrection, or riot'; the AR is the codification of General Order 71, issued in 1878.

"…General Order 15 of 12 May 1894 [prohibited] the command of federal troops by any state or local civil official. Included in paragraph 490 of *Army Regulations of 1895*, Schofield's views had become official doctrine. Although General Order 15 set official Army policy over command and control of troops in a civil disturbance situation, knowledge of it and its implications spread very slowly through the officer corps…The order had existed for five years, but many officers, apparently including Merriam, were unfamiliar with its content, practical application, and in some cases its very existence" (Laurie and Cole, p. 168). The Army Regulation of 1895 incorporated General Order 15 *verbatim* in paragraph 490, article 52.

Army Regulations of 1904 "was a restatement of Section 568 of *Army Regulations of 1901*, and Section 491, *Army Regulations of 1895*, both *verbatim* repeats of General Order 23 of 9 July 1894" (Laurie and Cole, p. 196).

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