

The Posse Comitatus Act, The Constitution, and Military Enforcement of Drug Laws

by Stephen P. Halbrook¹

Armed Forces and National Guard Enforcement Activities

In July of 1983, a Navy destroyer spotted a freighter in international waters north of San Juan, Puerto Rico. The destroyer gave chase after the freighter, known as the Ranger and registered in Honduras, refused to stop. At dawn, the destroyer fired on the Ranger, hitting its stern and ending its flight. A Coast Guard enforcement team boarded the vessel and soon discovered its cargo of 881 bales of marijuana.

At trial in the U.S. District Court for Puerto Rico, defendants moved for dismissal of the indictments on the ground that the Navy gunners committed an illegal military arrest under the Posse Comitatus Act, 18 U.S.C. § 1385. The U.S. Court of Appeals for the First Circuit upheld the action with no discussion of the severe constitutional implications of allowing the army or navy to enforce civilian laws. *United States v. del Prado-Montero*, 740 F.2d 113 (1st Cir. 1984)(citing 32 C.F.R. §213.10 (c)). The regulation requires that the Navy be given permission to assist the Coast Guard in its law enforcement activities, implying that lack of such permission would have invalidated the search. But see *United States v. Roberts*, 779 F.2d 565 (9th Cir. 1986), *cert. denied* 107 S. Ct. 142

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(permission not given, yet no suppression evidence absent a pattern of abuse under the Posse Comitatus Act).

Military involvement in the interdiction of drug importation was initiated in 1981. Under the above scenario, a Coast Guard law enforcement team, which can make a lawful arrest, travels aboard a Navy ship in search of smugglers. Since Navy personnel cannot make lawful arrests, the Coast Guard flag replaces the Navy flag when pursuing suspected smugglers. Air Force Airborne Warning and control Systems (AWACS) plane, Cobra helicopters, and similar military hardware are being used to support federal law enforcement efforts. Equipment and personnel of the four military branches are prominent tools in the National Narcotics Border Interdiction System. *See Stopping Smugglers: The U.S. Military Joins the Battle*, 6 Nat. L.J. 1 (Feb. 13, 1984).

On the domestic level, the militarization of drug enforcement is being promoted by use of the National Guard in the Domestic Marijuana Eradication Program of the U.S. Drug Enforcement Administration. Several states use the Guard for marijuana eradication. Some State governors have called out the Guard in its state militia status, allowing conditions approaching martial law. Troop-lift helicopters have been used in marijuana eradication raids in California after the governor activated the Guard unit by declaring that California's marijuana production constituted a state of emergency. Such direct assistance has also been provided in Hawaii pursuant to the Governor's declaration of an emergency. Hundreds of thousands of pounds of marijuana have been eradicated by Guard efforts.

Most state have entered into agreements with national Guard units to participate in law enforcement. The Supreme Court decision in *Oliver v. United States*, 466 U.S. 170 (1984), giving law enforcement authority to trespass, has resulted in Guard troops being flown to rural areas dropped from helicopters, setting up roadblocks, and searching suspected growing areas. Several

state supreme courts have rejected *Oliver* and found that under a state bill of rights guarantee, trespass is an illegal search.² Guard trespass in such states would be illegal unless the Guard unit is federalized.

Statutory and Constitutional Restraints

The recent initiation of military enforcement of the civil laws is unprecedented in American history. The Posse Comitatus Act of 1878, 18 U.S.C. § 1385, as amended, provides: “Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined no more than \$10,000.00 or imprisoned not more than two years, or both.” The Constitution nowhere expressly authorizes use of the army to execute the laws. Until 1981, the only acts of Congress which authorized use of the armed forces to execute the laws concerned the suppression of insurrection (10 U.S.C. §§ 331 et seq.) And some other very narrow exceptions. See House Judiciary Comm., H.R. Rep. No. 97-71 [to accompany H.R. 3519] 6-7 (June 12, 1981).

The 1981 Amendment to the Posse Comitatus Act

The 1981 amendment to the Posse Comitatus Act, 10 U.S.C. §§ 371 et seq., authorized the Secretary of Defense to provide information and make available any equipment and training to federal, state, or local civilian law enforcement officers. Further, the Secretary is authorized to assign personnel to operate and maintain equipment for civilian law officers engaged in the enforcement of

² *E.g.*, *People v. Scott*, 1992 N.Y. Lexis 40 (N.Y. 1992); *State v. Myrick*, 102 Wash. 2d 506, 688 P.2d 151 (1984); *State v. Dixson*, 307 Or. 195, 766 P.2d 1015 (1988); *State v. Kirchoff*, 156 Vt. 1, 587 A.2d 988 (1991), companion case *State v. Chester*, 587 A.2d 1008 (Vt. 1991).

the Controlled Substances Act, 21 U.S.C. §§801 *et seq.*, or the Controlled Substances Import and Export Act, 21 U.S.C. §§ 951 *et seq.*, as well as certain immigration and customs laws. However, the section allowing assistance to civilians in drug enforcement (*i.e.*, 10 U.S.C. § 374) “is to be construed narrowly.” See House Report, *supra* at 12. In addition to the resources of the armed forces provided in the amendment, under Executive Order 12333 of Dec. 4, 1981, the intelligence community (CIA, FBI, National Security Agency, Defense Intelligence Agency, etc.) is authorized to assist civilian authorities in drug law enforcement. 1981 U.S. Code Cong. & Ad. News B102, B113.

The broad uses to which personnel may be assigned to operate equipment inheres in the fact that the controlled substances acts referred to constitute the primary federal drug control laws. Personnel may also be assigned for enforcement of immigration and tariff acts. The Controlled Substance Act, 21 U.S.C. § 841, prohibits manufacture, distribution or dispensation of controlled substances, from marijuana to codeine. § 844 is the misdemeanor provision under which simple drug possession charges are prosecuted. Most provisions of 21 U.S.C. §801 *et seq.*, however, are concerned with pharmacies and the regulation of prescription drugs. The Controlled Substances Import and Export Act, 21 U.S.C. § 951, concerns both legal and illegal international commerce in drugs.

The amendment, which was broadened in 1989, provides that the Secretary of Defense shall issue regulations “to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search or seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise

authorized by law.” 10 U.S.C. § 375. The 1989 provision deleted the prior restriction on “an interdiction of a vessel or aircraft.” However, the regulations issued pursuant to § 375, while acknowledging “the historic tradition of limiting direct military involvement in civilian law enforcement activities,” lack concrete guidance to prohibit direct military participation in search, seizure, and arrest. See 32 C.F.R. § 213.4.

Although the ultimate issue is whether routine civil law enforcement by the military is constitutional, the courts prefer deciding cases on narrow statutory grounds where possible. Thus, the initial query in pretrial motions (Brady or otherwise) and motions to dismiss will be discovery of documents and information and corresponding argument to the court on whether the military involvement in question conformed to the amendment to the Posse Comitatus Act. The following should be considered:

- (1) Is the activity “expressly authorized” by the amendment? 18 U.S.C. § 1385.
 - (2) For information and equipment provided under 10 U.S.C. §§ 371 and 372, what does “other applicable law” provide?
 - (3) Under §§ 371, was the information collected “during the normal course of military training or operations”?
 - (4) Under the provisions of §§ 373 and 374, were the members of the armed forces properly assigned?
 - (5) Was the military equipment operated only to monitor and communicate movement of air and sea traffic, for aerial reconnaissance, for interception of vessels or aircraft outside the land area of the U.S. for communication purposes only, or for the other purposes listed therein? See § 374
- (b)(2).

(6) Did the activity involve “direct participation . . . in a search or seizure, arrest, or other similar activity”? § 375. Under 32 C.F.R part 213, was the assistance a “subterfuge” (§ 213.10 [a][2][i]), were informants or undercover agents used (213.10[a][3][iv]), or was any other regulation violated?

(7) Would the assistance “adversely affect the military preparedness of the United States”? 10 U.S.C. § 376.

Judicial Interpretation of the Act

Will the amendment emasculate the Posse Comitatus Act and, more broadly, the overall constitutional scheme of separation of civilian and military powers? In *Laird v. Tatum*, 408 U.S. 1, 15-16 (1972), Chief Justice Burger referred to “a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment’s explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military.”

The nature of the posse comitatus was mentioned in passing several nineteenth century cases. At the direction of President Thomas Jefferson, James Madison – the “father of the Constitution” – wrote a routine directive to a federal marshal which stated: “Should any aid be necessary you will call for the assistance of the good citizens of the district as the *posse comitatus* or civil power of the territory.” *Livingston v. Dorgenois*, 11 U.S. 577, 579 (1813). *Luther v. Borden*, 48 U.S. 1, 76 (1849) emphasized the need to suppress domestic violence by use of the militia and the posse comitatus, and not by use of martial law.

At common law, the duty of the sheriff was to pursue and take murderers and other felons.

“For these purposes he may command the posse comitatus or power of the country; and this summons, everyone over the age of fifteen years, is bound to obey. . . “ *South v. Maryland*, 59 U.S. 396, 402 (1856). “It is the right, as well as the duty of every citizen, when called upon by the proper officer, to act as part of the posse comitatus in upholding the laws of his country.” In *re Quarles*, 158 U.S. 532, 535 (1895).

The historic democratic purpose of relying on the people is clear: to promote popular participation in law enforcement, and to prevent authoritarian rule by use of the military to enforce the law. While no one was ever prosecuted under the Posse Comitatus Act, “this obscure and all-but-forgotten statute” was first raised in an unsuccessful attempt to challenge jurisdiction where defendant was arrested by Army personnel. *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948), *cert. Denied*, 336 U.S. 918 (1949). By contrast, the next court to mention the act stated: “The statute is not an anachronistic relic of an historical period the experience of which is irrelevant to the present. It is not improper to regard it, as it is said to have been regard in 1878 by the Democrats who sponsored it, as expressing ‘the inherited antipathy of the American to the use of troops for civil purposes.’” *Wrynn v. United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961) (Air Force participation in execution of law wrongful, but not cause of injury under Federal Tort Claims Act).

United States v. Walden, 490 F.wd 372, 377 (4th Cir. 1974), *cert denied*, 416 U.S. 983, *reh. Denied*, 417 U.S. 977 (1974), found a violation of the Act where Marines were impermissibly involved in a BATF investigation of illegal firearms sales, but declined to exclude the evidence at trial “at this time” in the absence of “widespread or repeated violations. . . .” *Accord, United States v. Wolff’s*, 594 F.2d 77 (5th Cir. 1979).

Military involvement prompted motions to dismiss indictments in the Wounded Knee

occupation cases. Two courts held that unlawful military participation precluded indictments of interfering with a law enforcement officer in the *lawful* performance of his duties. *United States v. Banks*, 383 F. Supp. (D.S.D 1974); *United States v. Jaramillo*, 380 F. Supp. 1375 (D. Neb. 1974), *appeal denied*, 510 F. 2d 808 (8th Cir. 1975). A third Court found military assistance insufficient to dismiss the indictments. *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975), *aff'd sub nom. United States v. Casper*, 541 F. 2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977).

In a civil spinoff of the Wounded Knee litigation, *Lamont v. Haig*, 539 F. Supp. 552, 559-60 (D.S.D. 1982), rejected a personally enforceable due process right against military execution of the laws, while upholding more traditional constitutional torts.

While basing their claim on the tradition against military enforcement of the laws dating as far back as the Magna Charta, the *Lamont* court pointed out, “plaintiffs can point to remarkably little legal precedent in support of their claims.” *Id.* At 559. This is not surprising in view of the fact that this ancient Anglo-Saxon constitutional precept has been so largely unquestioned until recent times.

On appeal, this decision was reversed. *Bissonette v. Haig*, 776 F.2d 1384, 1385 (8th Cir. 1985), *adhered to on rehearing*, 788 F.2d 494 (1987), *aff'd Haig v. Bissonette*, 485 U.S. 264 (1988), held:

The use of federal military force, plaintiffs argue, without lawful authority and in violation of the Posse Comitatus Act, 18 U.S.C. § 1385, was an “unreasonable” seizure of their persons within the meaning of the Fourth Amendment. We hold that the complaint states a claim upon which relief may be granted.

Referring to “the special threats to constitutional government inherent in military enforcement of civilian law,” the Court explained:

Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.

Military force must be used in order to violate the Posse Comitatus Act. Thus, participation of a member of the Judge Advocate Corps in a fraud prosecution related to government procurement was held not to violate the Act. *United States v. Allred*, 867 F. 2d 856, 870-71 (5th Cir. 1989) (noting that the Act's "purpose springs from an attempt to end the use of federal troops to police state elections in ex-Confederate states."); *United States v. Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988)(mere use of an army special agent in local sheriff's drug investigation not a violation, "in that the military participation in this case did not pervade the activities of civilian officials, and did not subject the citizenry to the regulatory exercises of military power.").

Does the Constitution Authorize Military Execution of Laws?

With the 1981 amendment to the Posse Comitatus Act, and talk of its repeal altogether, the statutory safeguard has been seriously eroded. It is also being bypassed through use of the National Guard in the eradication of domestic marijuana production.

The National Guard is subject to the Posse Comitatus Act when "federalized" into the military service, because then it is part of the Armed Forces and has no state militia character. *Perpich v. Department of Defense*, 110 S. Ct. 2418, 2424-25 (1990) (also finding that the reserve militia includes all citizens). But the Act does not restrict use of the Guard for law enforcement when in state militia status. And yet federal dominance over the Guard (see 10 U.S.C. § 101(10) & (11);

§§332 & 333; and Title 32) and its select character, in contrast to the unorganized militia of all able-bodied males (10 U.S.C. § 311 and most state codes), undermines its claim to be the militia envisioned by the framers of the U.S. Constitution Disorder,” in *The Military and American Society* 241, 245 (1972); *United States v. Miller*, 307 U.S. 174, 179 (1939) (“the Militia comprised all males physically capable of acting in concert for the common defense These men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time”).

There must be constitutional limits to the use of military force to enforce civil law. The remarks of Professor Christopher Pyle at the hearings on the amendment to the act are worth repeating: “The Posse Comitatus Act expresses this traditional antipathy of our forefathers for standing armies, the quartering of troops against smuggling. . . . The act is not an isolated relic of a melancholy past. It is the heart of a body of organic law which defines the proper role of the military in our society.” *Hearings Before the Subcomm. On Crime, Comm. On the Judiciary, 97th Cong., 1st Sess, on H.R. 3519 (Posse Comitatus Act), Serial No. 61, at 43 (June 3, 1981).*

The above volume includes reprints of law review articles on the subject of the act, including its legislative history and judicial construction. *See also* R. Hohnsbeen, *Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 *Geo. Washington L. Rev.* 404 (1986). Yet the more fundamental issue is whether the Constitution itself (of which the Act is only an expression) prohibits military enforcement of civilian law.

United States v. Walden, *supra*, repeats Blackstone’s definition of “posse comitatus” as the power or force of the country. The entire population above the age of 15, which a sheriff may summon to his assistance in certain cases; as to aid him in keeping the peace, in pursuing and arresting, felons, etc.” 490 F.2d at 374 n.2. The court went on to point out: “The policy that military

involvement in civilian law enforcement should be carefully restricted has deep roots in American history. Whether there should even be a standing army was a question fiercely debated among the framers of the Constitution. In the Congressional debate on the Posse Comitatus Act, several senators expressed the opinion that *the Act was no more than an expression of constitutional limitations on the use of the military to enforce civil laws.*” *Id.* at 375 (emphasis added).

Since military participation in the BATF investigation was illegal under both the act and Navy regulations, Walden found it unnecessary “to interpret relatively unexplored sections of the Constitution in order to determine whether there might be constitutional objection to the use of the military to enforce civilian laws. Nonetheless, our interpretation of the scope and importance of the letter and spirit of the Posse Comitatus Act and the Navy regulation as standards governing primary behavior is influenced by the traditional American insistence on exclusion of the military from civilian law enforcement, which some have suggested is lodged in the Constitution.” *See, e.g.,* Article I, Section 8; Article IV, Section 4; Third Amendment.” *Id.* At n.7.

Nonetheless, Walden briefly quotes from the first two cited provisions to allow that “the Constitution recognizes that in certain circumstances, military preservation and enforcement of civilian law is appropriate. . . .” Yet a close reading of the relevant provisions indicates that the militia, not the regular standing army (including the federalized National Guard), and then in only limited circumstances, may aid civilian law enforcement. Further, many of the *state* constitutions contain provisions mandating strict subordination of the military to civil power such as would preclude state militia assistance to routine state or local law enforcement. Under Article I, § 8, clause 11-13 of the Constitution, congress has power “to declare war . . . to raise and support armies . . . to provide and maintain a navy. . . .” The evident purpose of the land and naval forces was war, or,

as James Madison averred in *The Federalist* No. 41, for “security against foreign danger.” By contrast, clause 15 empowered Congress “to provide for calling forth *the militia* to execute the laws of the union, suppress insurrections and repel invasions. . . .” (Emphasis added.) Further, Article IV, §4 only authorizes the use of military force to protect the states “against invasion” or (by state request) “against domestic violence.” Again, the purpose and composition of a “a well regulated Militia” are mandated respectively by the Second Amendment as “the security of a free State” and as “the people,” whose right “to keep and bear Arms, shall not be infringed.” This guarantees, inter alia, “a decentralized militia.” Justice Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L.R. 181, 184 (1962). Under the above provisions, the regular military forces may be employed only to repel invasion or, in very limited circumstances, to suppress insurrection. Only the constitutional militia (which is not equivalent to the centralized National Guard, *see* S. Ambrose, *supra*) may be called up “to execute the laws of the union.”

The framers of the Posse Comitatus Act were aware of the above distinctions. In their experience, both regular army forces and select militias (which had already begun to use the term “National Guard”) had broken strikes, swayed elections, raided whiskey distilleries, and generally ruled by the bayonet. Most importantly, they saw themselves as providing criminal penalties for military activity already prohibited by the Constitution.

Origins of the Posse Comitatus Act, 1877-1878

A review of congressional debates leading to passage of the Posse Comitatus Act in the years 1877-1878 reveal the extent to which the 1981 amendment to the act is incompatible with the Constitution. These debates have far more significance than routine legislative history. Their compelling logic, the fact that less than a century separated them from the original framing of the

Constitution, and their intimate knowledge of the actual thought of the Founding Fathers give the opinions of the congressmen who passed the Posse Comitatus Act great weight. Judicial consideration of the constitutionality of current military enforcement of drug laws would be incomplete without due attention to the legislative history of the act.

“American Soldiers Policemen!”

The act originated in Army appropriation bills as an attempt to restrict military interference in elections. Representative John D. Atkins (D., Tenn.) Raised the issue by advocating reduction of the standing army because “the Army as an adjunct of civil government is wholly unnecessary and actually hurtful.” In Europe, large armies are kept up “to overawe the people” and “to keep their people in subjection to hated forms of government. . . .” “Even the police duty of those countries is performed by detachments from the army, while in this country, . . . the regulation of public order is left to home government or local authority, all based on the consent of the people.” Detailing military interference in southern elections, Representative Atkins implored: “American soldiers policemen! Insult if true, and slander if pretended to cover up the tyrannical and unconstitutional use of the army. . . .” 5 Cong. Rec. 2112, 44th Cong., 2d Sess., pt. 1 (Mar. 2, 1877). He recalled (*id.* At 2117) the words of the Chief Justice in *United States v. Cruikshank*, 92 U.S. 542, 556 (1876): “Certainly it will not be claimed that the United States have power or are required to do mere police duty in the States.”

The appropriation bill did not pass that session, but was reintroduced in the next session. Expounding on the narrow role of the Army under the Constitution, Atkins asked: “If the ordinary constabulary force in a State cannot preserve peace and protect life and property, and military

organizations must be invoked, why not encourage the States to organize, discipline, and arm and equip their militia organizations?” 6 Cong. Rec. 287, 45th Cong., 1st Sess., pt. 1 (Nov. 8, 1877). “We have a right under the Constitution, and it is our duty, to repel foreign invasion,” Representative Singleton pointed out, finding no such right for troops to “put down insurrection.” *Id.* At 294. Congressman Schleicher objected to use of the army as “a standing police force.” *Id.* at 295.

In reply, Representative Calkins advocated an increase in the size of the Army in order to suppress riots. “Does my friend propose to maintain a standing army for the purpose of suppressing the rights of laboring men?” queried Representative Luttrell. *Id.* at 296. Representative Atkins deemed it “an insult to the American soldier to make a policeman of him. The idea that we are to have a large standing army to preserve order and the peace of the country is total suppression of the theory of our republican form of government.” *Id.* at 297. Speaker after speaker proceeded to denounce use of the Army to suppress strikes. Representative Pridemore averred that “the only danger that threatens this Government is the growing strength and ultimate power of the Army to control the citizens.” *Id.* At 298.

Debate continued the next day with Congressman Baker of Indiana opposing maintenance of “a standing army for the purpose of acting as a local police. . . .” *Id.* At 307 (Nov. 9, 1877). Representative Hewitt opined that federal troops must not be used to suppress riots, a “high duty which, under the Constitution, is committed to the people of the sovereign States.” *Id.* Several speakers agreed that state militias, not federal troops, should suppress riots, for, in the words of Representative Townsend of Illinois, “it was the real design of those who framed our Constitution that the Federal Army should never be used for any purpose but to repel invasion and to suppress insurrection when it became too formidable for the State to suppress it.” *Id.* At 322.

Intent of Constitution's Framers

The single most important discussion leading to the passage of the Posse Comitatus Act was the hour long speech of Representative William Kimmel of Maryland in connection with the Army appropriation bill of 1878. The significance of this speech arises out of its detailed use of quotations from the framers of the U.S. Constitution. As the U.S. Supreme Court would state almost a decade after Kimmel's oration: "It is never to be forgotten that, in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed the instrument." *Ex parte Bain*, 121 U.S. 1, 12 (1887).

Kimmel began by tracing the sources of the Founding Fathers' distrust of standing armies from ancient Rome through English history. Quoting the charge in the Declaration of Independence that George III "has kept among us in time of peace standing armies," Kimmel stated: "This dread and detestation of standing armies appears on every page of their progress toward independence and the establishment of the Constitution of 1787." 7 Cong. Rec. 3579, 45th Cong., 2d Sess. (May 20, 1878). At least eight of the original state constitutions included prohibitions on standing armies.

"In the debates in the conventions which adopted the Constitution of 1787 the spirit of resistance to standing armies is ever present," averred Kimmel, who quoted Patrick Henry, George Mason, James Madison ("the Father of the Constitution"), and William Grayson to prove it. The quotes are from debates in the Virginia convention. The standard source for convention debates today remains J. Elliot, *Debates in the Several State Conventions* (Philadelphia: 1836), and any scholar familiar with this source knows that anti-standing army sentiment was fairly unanimous. As quote by Kimmel, standing army sentiment was fairly unanimous. As quoted by Kimmel, standing armies were "to execute the execrable demands of tyranny" (Henry), make "the people lose their

liberty” (Mason), are “one of the greatest mischiefs” (Madison), and would “deprive us of our liberties” (Grayson). 7 Cong. Rec. at 3579. Kimmel also provided similar quotes from *The Federalist Papers* by Madison and Hamilton.

Kimmel went on to demonstrate, by reference to the same sources and to the Second Amendment, that the Constitution’s framers intended that a militia, composed of the armed citizens, “should be a substitute for a standing army.” *Id.* At 3579. “If insurrections should arise or invasion take place, *the people* ought unquestionably to be employed to suppress and repel them rather than a standing army,” said Madison. *Id.*

The remainder of the speech goes to great lengths to demonstrate the superiority of the militiaman, the armed citizen, over the professional soldier to preserve civil liberty. Kimmel argued that the *posse comitatus*, the people at large, could be summoned by the sheriff to preserve peace. Army intervention in civil affairs meant corruption, electoral fraud, suppression of workers, and extortion. Kimmel closed his speech by moving the adoption of a version of what became the Posse Comitatus Act. *Id.* At 3586. (For later versions, see *id.* At 3845, 4686).

Military Enforcement of Whiskey Laws

The most frequently heard objection to the bill’s prohibition on military enforcement of law where not expressly authorized by Congress was first stated by Representative Burchard: “In some of the interior districts of the United States – the mountain regions – there are men engaged in illicit distillation. I do not know that there is in our internal-revenue law a provision . . . which expressly declares that if there be resistance to an officer engaged in seizing an illicit distillery the soldiery of the United States may be used to assist the officers in the execution of the law.” *Id.* At 3848 (May 27, 1878).

Congressman Knott was unmoved: “The subordination of the military to the civil power ought to be sedulously maintained.” *Id.* At 3849. In reply, Representative Aldrich saw hidden interests behind the bill: “There is a class of men in Kentucky, who are sometimes called moonshiners,” who make whiskey and never pay the tax upon it when they sell it, and they will be pleased to hear of the adoption of such an amendment as this.” *Id.* Representative Southard offered the alternative of the posse comitatus: “Call upon the laboring-man to aid in the enforcement of the law and he will respond right manfully.” *Id.* at 3850.

In the Senate, discussion centered on the misuse of soldiers as posse comitatus. Senator Kernan stated: “I suppose no one claims that you can use the Army as a *posse comitatus* unless that use is authorized by the Constitution, which it clearly is not, or by act of Congress.” *Id.* At 4240 (June 7, 1878). If peace officers need assistance to quell disorders, he added, “they should summon the unorganized citizens and not summon the officers and men of the Army as a posse comitatus” *Id.*

As in the House, Senate opponents of the bill were alarmed that the Army could not be used to assist revenue officers seize illicit distilleries. *Id.* At 4242 (Senator Edmunds). Senator Merrimon replied as follows: “Suppose that a collector of internal revenue shall be about to seize an illicit distillery, and he is resisted, where is the force to come from to aid him in the execution of that law in that behalf? . . . It is not to apply for the Army; . . . but it is to call in the aid of the posse comitatus, the people around him, every citizen, everybody liable to do public duty at all.” *Id.* At 4243.

Opponents of the bill were quick to recognize the citizenry would not help enforce unpopular restrictions on whiskey. Senator Blaine recalled an old Attorney General opinion that soldiers could be used where the posse comitatus refused to assist the sheriff arrest a fugitive slave. Blaine

continued: “If you attempt to seize an illicit distillery, and all the surrounding population feel in regard to that illicit distillery— and there are some parts of this country where they do feel a good deal that way – just as the people of Boston did about the arrest of fugitive slaves, so that when you call the posse comitatus they are on the side of the illicit distiller, what will do you do then?” *Id.*

Supporters of the bill continued to view it as a needed statutory prohibition of what was already basic in the Constitution. In the words of Merrimon, “the Army has been used not once, but time and time again, in a way that not a court in this nation would sanction. The Army has not only been used in collection of the internal revenue in a way not authorized by law, but it has been used and prostituted to control elections repeatedly.” *Id.* At 4245. “It never was lawful, it never will be lawful, to employ the Army as a posse comitatus until you destroy the distinction between the civil power and the military power in this country,” added Senator Hill. *Id.* At 4246.

Enactment of the Posse Comitatus Act would put an end to use of the Army to raid illegal whiskey distilleries. The nature of military participation in support of the revenueurs, and its subsequent prohibition by the act, is exemplified in *Davis v. South Carolina*, 107 U.S. 597, 27 L. Ed. 574 (1883). In 1876, a guard of United States soldiers was detailed to aid a deputy marshal in arresting a distiller for violation of the internal revenue laws. One of the soldiers “accidentally” shot and killed the distiller as he tried to escape, and was indicted for murder and eventually convicted of manslaughter. Hearing the case years after passage of the Posse Comitatus Act, the Court pointed out that the defendant “was a non-commissioned officer in the army, detailed as a guard in aid of the marshal, and acting as one of his *posse comitatus*; but this was before such service became unlawful by the passage of the 15th section of the Army Appropriation Act of June 18, 1878. Supp. R.S., 361; 20 Stat. at L., 145.” 27 L.Ed. At 575.

Limits Under State Law to Law Enforcement by the National Guard

The framers of the Posse Comitatus Act were well aware of explicit prohibitions by the state constitutions of a militarized civil society. The following language of the Virginia Declaration of Rights of 1776, Article XVIII, came to be the prototype of other state bills of rights: “That a well regulated Militia, composed of the Body of the People, trained to Arms, is the proper, natural, and safe Defense of a free State; that standing Armies, in Time of Peace, should be avoided, as dangerous to Liberty; and that, in all Cases, the Military should be under strict Subordination to, and governed by, the civil Power.”

The Virginia declaration expressed the revulsion of the colonists to execution of the laws by select militias called out by royal governors as well as by the King’s standing army. E.g., R. Meade, Patrick Henry, 50-53 (1969). The Founding Fathers rejected a select or elite militia, in contrast with a general militia composed of the citizens at large, because the former resembled a standing army, and could advance the arbitrary designs of despots. See R.H. Lee, Additional Letters from the Federal Farmer 53, 169-70 (Philadelphia 1788). When the populace at large was ultimately responsible for law enforcement, their refusal to act in support of the sheriff or governor would signify their nonsupport of an unjust law.

The National Guard and Marijuana Eradication

Today, most state bills of rights still include language similar to that in the Virginia Declaration quote above. The original intent of these rarely litigated provisions was to avoid a military execution of the laws. Despite this tradition, the National Guard, a select militia according to the original usage, is currently being used in domestic marijuana eradication efforts.

Use of the National Guard and the Department of Defense to provide air support for state and local eradication activity is analyzed in *Law Enforcement Efforts to Control Domestically Grown Marijuana* (GAO/GOD-84-77, May 25, 1984). That report opines that the Guard is subject to the Posse Comitatus Act only when it is federalized by being called out to execute federal law. It then states: “The Guard also may be called into active service by a Governor in response to an emergency declared in accordance with state law. When this occurs, the Guard is considered part of the state militia and subject to state laws. . . . Activities conducted while in state active duty status must be funded by the state and may include search, seizure, transport of confiscated contraband.” *Id.* At 29.

While conceding that the state militia is subject to state law, the report fails to discuss possible constraints under state law similar to the federal Posse Comitatus Act. Arguably, the National Guard never loses its federal character, in part because “National Guard equipment is owned by DoD.” *Id.* Under many state constitutions, the Guard may be a select militia more akin to a standing army than a well regulated militia. Indeed, under the Federal Constitution “the ‘militia’ cannot be sent overseas to fight wars,” *Laird v. Tatum*, 408 U.S. 1, 16 (1972) (Douglas, J., dissenting), but the Guard can be so used. Certainly “the term ‘militia’ was not used as restricted to the National Guard.” *State v. Grayson*, 163 S.W.2d 335, 337 (Mo. 1943).

Use of the Guard for law enforcement would also appear to violate the imperative that the military must be strictly subordinate to the civil power. Further, it is questionable whether marijuana production constitutes a state of emergency such as would authorize the governor to call out the Guard to participate in eradication raids.

Calling out the Militia for Emergencies

Under state law, the governor typically is authorized to call out the militia in emergencies “to execute the laws, to suppress insurrection, and to repel invasion.” *Lewis v. Lewelling*, 53 Kan. 201, 36 P. 3561 352 (1894). Most cases construing this power we decided in the late nineteenth and early twentieth centuries, and concern riots, insurrections, or labor disorders. *E.g.*, *In re Boyle*, 6 Idaho 609, 57 P. 706, 707 (1899); *Exp parte McDonald*, 49 Mont. 454, 143 P. 947, 949 (1914); *Ex parte Dailey*, 93 Tex. Crim. 68, 246 S.W. 91, 92 (1923). *See State v. Morgan Superior Court*, 249 Ind. 220, 231 N.E. 2d 516, 518-19 (1967) (riots on election day). The power of a state to maintain a militia predated, and was not prohibited by, the Federal Constitution. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 16-17 (1820)(Story, J.) (Military power may be used when armed insurrection too strong to be controlled by civil authority).

Only serious emergencies justify the governor calling out the militia and, as is typical in affected areas, declaring martial law. “Its sole justification is the failure of the civil law fully to operate and function for the time being, by reason of the paralysis or overthrow of its agencies, in consequence of an insurrection, invasion, or other enterprise hostile to the state, and resulting in actual warfare.” *Ex parte Lavinder*, 88 W.Va. 713, 108 S.E. 428, 429 (1912). “Power in a chief magistrate, to effect such results under ordinary circumstances, would be suggestive of the despotism of unrestrained monarchical government. . . .” 108 S.E. at 430-31 (emphasis added).

Even where the civil authorities may call out armed people or the posse comitatus in response to a riotous assembly, it could not be concluded that “the active militia of the state, as a military organization, is thereby intended.” *Chapin v. Ferry*, 3 Wash. 386, 28 P. 754, 757 (1891). “The military, under our governmental system, in all ordinary cases is kept in strict subordination to the civil power. . . . Hence the highest executive of the civil power is invested with supreme command

of the army of the state, to be held by him as a reserve for use only when the civil power shall be about to fail without its assistance.” *Id.* at 757 (emphasis added).

Governor’s Discretion: Limited or Unlimited?

The courts have disagreed on the extent of the governor’s discretion in determining whether an emergency exists and whether martial law should be declared. The majority in *In re Moyer*, 35 Colo. 159, 85 P. 190, 192-93 (1904), determined that the militia could be called out when the civil and judicial authorities are unable to cope with an insurrection, and its powers would be like that of a sheriff, “aided by his deputies or posse comitatus in suppressing a riot.” Military arrests were held not to conflict with the Bill of Rights provision “that the military shall always be in strict subordination to the civil power” because the governor commands the militia as the chief civil magistrate of the state. *Id.* at 193.

The dissenting opinion in *Moyer* responded that the above reasoning “is simply annulling that section of the Bill of Rights.” Subordination of the military to the civil power “undoubtedly means that the civil owner shall control at all times, in war and in peace.” *Id.* At 207. Further, the governor does not have absolute discretion to declare an emergency: “if a strike which is not a rebellion must be so regarded because the Governor says it is, then any condition must be regarded as a rebellion which the Governor declares to be such; and if any condition must be regarded as rebellion because the Governor says so, then any county in the state may be declared to be in a state of rebellion, whether a rebellion exists or not, and every citizen subjected to arbitrary arrest and detention at the will and pleasure of the head of the executive department.” *Id.* At 195.

While upholding unrestrained power in the governor to call out the militia, *Franks v. Smith*, 142 Ky. 232, 134 S.W. 484, 488 (1911), explicitly rejected the *Moyer* majority’s holding that the civil

law may be suspended by military orders in certain emergencies. The *Franks* court held that a militiaman could be sued for an illegal arrest. Of the Bill of Rights mandate that the military be subordinate to the civil power, the court noted: The military cannot in any state of case take the initiative or assume to do anything independent of the civil authorities.” *Id.*

A federal district court construed the similar Texas Bill of Rights provision and determined that no evidence of insurrection or riot was shown, and thus that the governor acted without authority. *Sterling v. Constantin*, 287 U.S. 378, 392-95 (1932). The U.S. Supreme Court opined that the governor’s decision of whether military aid is warranted is “conclusive.” However, the power is not absolute, for the court added that “there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order. . . .” *Id.* At 399. Judicial intervention may at times be appropriate under the following reasoning: “It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every order to faction the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, to otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.” *Id.* At 400-01.

In litigation stemming from the National Guard Shooting at Kent State University in 1970, the U.S. Supreme Court held that continuing regulatory jurisdiction over the Guard by the court was nonjustifiable political question. However, the Court left open actions for damages or for “a restraining order against some specified and imminently threatened unlawful action.” *Gilligan v. Morgan*, 413 U.S. 1, 5 (1973). “We neither hold nor imply that the conduct of the National Guard

is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief.” *Id.* At 11-12. Accordingly, *Scheuer v. Rhodes*, 416 U.S. 232, 250 (1974), upheld a right of action for damages under 42 U.S.C. § 1983 against the governor, National Guard officials, and enlisted members where the complaint alleged in part that the governor exceeded his duties and acted outside the scope of his discretion in proclaiming an emergency.

The courts have been reluctant to question a governor’s declaration of a state of emergency even though they have been willing to provide remedies (habeas corpus and damages) for illegal militia activity. Yet the established meaning of “emergency” is a breakdown of law and order, such as a riot or insurrection. By contrast, National Guard activity in marijuana eradication has consisted largely in air transport of law officers and removal of plants to and from remote, inaccessible areas. GAO, *Law Enforcement Efforts to Control Domestically Grown Marijuana*, *supra*, at 18, 26-27. It is an open question whether a court would declare illegal or enjoin calling out the National Guard to suppress the “emergency” of marijuana plants growing in remote areas where no disorder or riot has occurred.

Civil Litigation Against Domestic Military Enforcement

Unlawful policies of California’s Campaign Against Marijuana Planting (CAMP) were enjoined in *National Organization for the reform of Marijuana Laws (NORMAL) v. Mullen*, 608 F. Supp. 945 (N.D. Ca. 1985), *aff’d* 796 F.2d 276 (9th Cir. 1985), related case 112 F.R.D. 120 (N.D.Ca. 1986) (appointment of special master to monitor government’s compliance with injunction), *aff’d* 828 F.2d 536 (9th Cir. 1987). CAMP teams used airplanes and helicopters at low altitudes, thereby invading privacy, disrupting schooling and work, and endangering the public. 608 F.Supp. At 950.

On the ground, CAMP officers ordered families out of houses, held persons at gunpoint, confiscated registered firearms, and otherwise frightened law-abiding citizens who had nothing to do with marijuana. *Id.* At 950-52. Roadblocks and detentions were commonplace. The Court concluded that “the policy, no matter how well-intentioned, gives CAMP personnel virtually unbridled discretion to enter and search private property anywhere in the vicinity of an eradication raid, and to seize personal property and detain innocent citizens without probable cause or even reasonable suspicion of any criminal activity.” *Id.* At 953.

In *William v. Garrett*, 722 F. Supp. 254 (W.D.Va. 1989), plaintiffs complained of civil rights violations arising out of Virginia’s Marijuana Eradication Program (MEP). Aerial and ground searches of the property revealed only roses and other houseplants, but one of the landowners was held at the point of an M-16 rifle. The court dismissed the action, finding that the state police and guardsmen defendants were entitled to qualified immunity.

California’s major eradication efforts spawned further litigation, and the court upheld a cause of action against constitutional rights violations in *Drug Policy Foundation v. Bennett*, U.S. Dist. Ct. – N.D. Ca., No. C-90-228 FMS, Order on Defendants’ Motions to Dismiss (Dec. 20, 1991). Defendant included both the U.S. military and the National Guard. Armed men pointed M-16 automatic rifles at several persons not suspected of any wrongdoing, including a 16-year-old girl and a 9-year-old boy. Slip Op. at 34-36. Some of these deadly force displays, the court found, deprived plaintiffs of liberty without due process of law. Fourth Amendment violations were also found. The court held that a private right of damages exists for violation of the Defense Authorization Act, *i.e.*, the amendment to the Posse Comitatus Act. *Id.* At 38-47. The use of the military in civilian law enforcement was unlawful, because regulations prohibit search, seizure, arrest, and similar activity.

Conclusion

The Posse Comitatus Act remained fairly undisturbed between the date of its passage in 1878 and the time of its “drug wars” amendment in 1981. Although Congress is free to amend or repeal its statutes, it cannot alter the basic framework mandated by the Constitution. The framers of the original act merely saw themselves as penalizing conduct already prohibited by the Constitution.

The U.S. Supreme Court has consistently recognized that the correct methodology of constitutional construction is to adopt the intent of the framers. *Cohens v. Virginia*, 19 U.S. 264, 418 (1821); *Malloy v. Hogan*, 378 U.S. 1, 5 (1964). The highest courts of the states also recognize the correctness of this methodology. Should this method be seriously followed by the state and federal courts in challenges to use of the military and the National Guard to suppress drug importation and domestic agriculture, the outcome would be predictable.

The most complete reproduction of the original sources and debates on the Constitution is currently being compiled and reprinted as *The Documentary History of the Ratification of the Constitution* (State Hist. Soc. Of Wis. 1976-). These documents consistently bear out the Founders’ disdain and abhorrence of a military execution of the laws.

Reported judicial decisions on the constitutionality of the amendment (10 U.S.C. §§ 371 *et seq.*) are not extensive, but are growing, as is a body of case law concerning state policies involving the National Guard. In the alternative, some courts may reaffirm our tradition against a military execution of the laws. As District Judge Michael noted in *Williams v. Garrett*, *supr*, 722 F. Supp. At 256:

In an effort to combat drug traffic more and more courts have performed a balancing

test, either explicitly or implicitly, and have decided that the perceived benefit to the fight against drugs of a restriction on rights outweighs the cost of such a restriction to civil liberties. . . . But this court is mindful of a warning by Thomas Jefferson – a man who was an integral part of both formation of this nation and of the constitution – “A society that will trade a little liberty for a little order will deserve neither and will lose both.”