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JURIST Guest Columnist **Kevin Govern** of the Ave Maria School of Law reveals the history behind recent changes to law and policy which will affect the involvement of military forces with civilian domestic law enforcement...

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Weeks prior to the devastating Boston Marathon **bombings**, and months after the disastrous effects of Hurricane Sandy, the US Department of Defense (DOD) issued an instruction clarifying the rules for the involvement of military forces in civilian law enforcement. The instruction establishes "DOD policy, assigns responsibilities, and provides procedures for DOD support to Federal, State, tribal, and local civilian law enforcement agencies, including responses to civil disturbances within the United States."

The DOD released **DOD Instruction 3025.21** [PDF], "Defense Support of Civilian Law Enforcement Agencies," on February 27, 2013, replacing several older directives on military assistance to civilian law enforcement and civil disturbances.

The instruction requires that senior DOD officials develop "procedures and issue appropriate direction as necessary for defense support of civilian law enforcement agencies in coordination with the General Counsel of the Department of Defense, and in consultation with the Attorney General of the United States," including "tasking the DOD Components to plan for and to commit DOD resources in response to requests from civil authorities for [civil disturbance operations]." Military officials are to coordinate with "civilian law enforcement agencies on policies to further DOD cooperation with civilian law enforcement agencies" and the heads of the combatant commands are instructed to issue procedures for "establishing local contact points in subordinate commands for purposes of coordination with Federal, State, tribal, and local civilian law enforcement officials."

These policy changes must be read in light of an evolution, rather than revolution, involving over a century of federal troop deployments and 200-plus years of legal precedent. The **Insurrection Act of 1807** [PDF] was one of the first and most important US laws on this subject, and was followed some 71 years later by the **Posse Comitatus Act of 1878**, which further limited executive authority to conduct military law enforcement on US soil. Each of those laws has evolved over time — consistent with the times and the popular will expressed through Congress.

Considering those two acts in chronological order, the Insurrection Act, (codified, as amended, at **10 USC §331–335**) has changed from its 1807 inception many times, with most notable alterations in the mid-twentieth century. It has consistently exempted federal (and federalized troops) from legal prohibitions on employment and deployment on US soil where troops provide federal aid for state governments (**§331**), are militia and armed forces enforcing federal authority (**§332**), are dealing with interference with state and federal law (**§333**), where there has been a proclamation to disperse in times

of civil disturbance (§334), including Guam and the US Virgin Islands (§335), and for a brief year, was expanded under the 2007 **John M. Warner Defense Authorization Act**, then brought back to longstanding language in the subsequent fiscal year.

The so-called Posse Comitatus Act, passed on June 18, 1878, prohibited federal troops from supervising confederate state elections in the latter portion of the Reconstruction Era. It originally applied only to the US Army, but was amended after the US Air Force was created to include those forces in 1956, then has applied by DOD regulation to include US Navy and US Marine Corps forces as well. The Posse Comitatus Act read then, and reads now, as follows:

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

The Posse Comitatus Act has prohibited troops under federal authority (that is **Title 10** Active Component troops and "federalized" **Title 32** National Guard troops) from generally conducting law enforcement duties on US soil absent congressionally legislated or constitutionally enumerated authority or exception. Several such federal troop use exceptions to the Insurrection Act and Posse Comitatus Act would be troop employment and deployment during a biological, radiological, or nuclear event under **18 USC §831**, or intelligence, military equipment, training, advice or facilities usage, amongst other matters, in support of civilian law enforcement under **10 USC §382**.

An armed force that is bound neither by the Insurrection Act nor by the Posse Comitatus Act is the US Coast Guard (USCG). Under **14 USC §1**, "[t]he Coast Guard as established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times." Created long after the Posse Comitatus Act and the Insurrection Acts, the USCG is now under the Department of Homeland Security (DHS), and acts in peacetime as a law enforcement agency that can conduct activities on US soil. The USCG takes on a unique naval force role, however, under **14 USC § 3**, as amended by section 211 of the **Coast Guard and Maritime Transportation Act of 2006**, upon declaration of war or when the president directs.

In their substance and spirit, neither the Insurrection Act of 1807 nor the Posse Comitatus Act of 1878 provide for the federal government to supersede the ordinary operation of US federal, state or territorial law, nor have either of the two acts ever proscribed federal troop employment and deployment during transitory crises, emergencies and disorders. Even prior to employment of assets and deployment of forces to assist in the fall 2012 **Hurricane Sandy** relief, or in April 2013 inter-agency support in the aftermath of the **Boston Marathon** bombings, there were many instances and exemptions whereby federal (or federalized) troops were called upon to conduct brief operations other than training on US soil in accordance with an Executive Order or Proclamation under the Insurrection Act or some other exemption to the Posse Comitatus Act.

In 1919, President Woodrow Wilson **called out** federal troops to quell race riots in 20 cities across the US. In 1932, President Herbert Hoover **called upon** General Douglas MacArthur, with the aid of his staff officers Majors George Patton and Dwight D. Eisenhower, to send US troops to displace and

disperse a group of 20,000 aggrieved WWI veterans (the so-called "Bonus Marchers") encamped on or near the Washington Mall. During 1946, President Harry S. Truman **sent out** federal troops against striking railroad workers. The year 1957 saw President Eisenhower **federalize** Arkansas National Guard troops and send federal troops to Arkansas to counter desegregation violence. In 1962, President John F. Kennedy **sent federal troops** to Mississippi and Alabama to counter racial violence. President Richard M. Nixon **sent federal troops** to Wounded Knee, SD in 1973 to counter racial violence. President George H.W. Bush **sent troops** to St. Croix, US Virgin Islands, in 1989 ostensibly at the request of the Territorial Governor to quell civil disturbance and provide disaster assistance after Hurricane Hugo, and in 1992 **sent federal troops** to Los Angeles to quell civil disturbance after a controversial court decision. Most recently, in 2005, President George W. Bush **sent federal troops** to the Gulf Coast to quell civil disturbance and provide disaster assistance in the wake of Hurricanes Katrina and Rita.

When employed or deployed after civil disturbances or natural disasters, federal troops from the DOD would and will receive direction from the Federal Emergency Management Agency (FEMA) in accordance with the **National Response Framework** (NRF) to work solo or in concert with other federal agencies to provide personnel, equipment, supplies, facilities, and managerial, technical, and advisory services. Support scenarios could include: a Presidential Declaration of a Major Disaster; an Order to Perform Emergency Work Essential for the Preservation of Life and Property; and, a Presidential Declaration of an Emergency.

In all but the instance of a Presidential Declaration of Emergency, the governor of an affected state or territory must request assistance regardless of any state or local capacity to render disaster assistance. The NRF allows DHS to coordinate federal agencies that work alongside state and local agencies. In the **words** of past DHS Secretary Michael Chertoff, these scenarios do not "supersede the state and local government," but "fit with the state and local government in a comprehensive response plan."

Past is certain to be prologue when it comes to both causes and effects of natural and man-made disasters, and politicians, academics, government officials, and all others likely to be affected would do well to study the 206-year history of the Insurrection Act and the 135-year-old Posse Comitatus Act as military forces play an ever-essential role in cooperating with civil authorities consistent with law and policy.

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**Suggested citation:** Kevin Govern, *Lawful Military Support To Civil Authorities In Times of Crisis*, JURIST - Forum, May 2, 2013, <http://jurist.org/forum/2013/05/kevin-govern-posse-comitatus.php>.

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