

To: New Jersey Law Revision Commission
From: Samuel M. Silver
Re: The use of the word “posse” in N.J.S. 53:2-1
Date: April 06, 2020

“Summon me, then, [...] I will be the posse comitatus, and I will take the prisoners to jail.”
- Samuel Chase¹

MEMORANDUM

Executive Summary

In New Jersey, the State Police may be used as a posse.² The governing body of a municipality may ask the Governor to authorize the use of the State Police within its borders.³

A brief examination of the New Jersey Statutes confirmed that the term “posse” is used only once in the body of New Jersey’s statutory law, and seems to complicate the statute in which it appears.

Relevant Statutes

N.J.S. 53:2-1 Powers and duties in general; co-operation with other authorities

The members of the State Police shall be subject to the call of the Governor. They shall be peace officers of the State, shall primarily be employed in furnishing adequate police protection to the inhabitants of rural sections, shall give first aid to the injured and succor the helpless, and shall have in general the same powers and authority as are conferred by law upon police officers and constables.

* * *

... the State Police shall not be used as a **posse** in any municipality except upon order of the Governor when requested by the governing body of such municipality... [Emphasis added].

Background

- *Historical overview*

¹ RICHARD HILDRETH, HISTORY OF THE UNITED STATES OF AMERICA, FROM THE ADOPTION OF THE FEDERAL CONSTITUTION TO THE END OF THE SIXTEENTH CONGRESS 571-572 (1851).

² N.J.S. 53:2-1. This statute is commonly referred to as the “cooperation statute.” See *infra* discussion of *Tull v. State*, 125 N.J. Super. 272 (App. Div. 1973).

³ *Id.*

Dating back to the reign of Alfred the Great in ninth century England, sheriffs and other officials possessed the ability to summon armed citizens to assist them in keeping the peace.⁴ The active participation of the people was seen as a necessary element to keep “the King’s peace.”⁵ With some frequency, individuals would be called upon to defend the authority of the government against violent crime, riots, insurrections and even invasion.⁶ The legal power vested in these governmental actors is commonly referred to as *posse comitatus*.⁷ To a prominent Founding Father, the “office of the sheriff” was “the most important of all the executive officers of the country.”⁸ The *posse comitatus* power was therefore originally created for the sheriff.⁹

• *Posse Comitatus in New Jersey*

In 1795 the Supreme Court of Judicature of New Jersey heard the matter of *Patten v. Halsted*.¹⁰ The Plaintiff brought a civil action against three individuals who subsequently failed to appear to answer the complaint.¹¹ On March 10, 1791, the sheriff arrested one of the three individuals, named Freeman, and successfully returned him to the jurisdiction of the court.¹² The plaintiff successfully recovered a judgment against Freeman, who thereafter escaped from the custody of the sheriff.¹³

The Plaintiff then brought an action against the sheriff for the escape of an individual committed to his custody.¹⁴ The sheriff proffered that he had been diligent in securing the defendant, indicating that, “every precaution consistent with humanity, and sometimes even bordering on rigor, had been adopted with regard to Freeman.”¹⁵ On the count of negligent escape, the trial court observed, “every escape not happening by the act of God, or the public enemies, was, in the eyes of the law, considered a negligent escape.”¹⁶ The Court went on to state that, “if the prisoner is rescued by a mob, whose power the sheriff is unable to withstand, even with the aid of his *posse comitatus*...he is answerable for an escape....”¹⁷ The decision of the jury was affirmed

⁴ David B. Kopel, *The Posse Comitatus And The Office Of Sheriff: Armed Citizens Summoned To The Aid Of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761 (2015). (Alfred the Great ruled from A.D. 871-899).

⁵ *Id.* at 764.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* See Letter from Thomas Jefferson to Samuel Kercheval (Jul. 12, 1816), in 12 THE WORKS OF THOMAS JEFFERSON 3, 6 (Paul Leicester Ford ed., 1905).

⁹ *Id.* at 761.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* A writ of *capias ad respondendum* had originally be sworn out against three individuals. A *nol. pros.*, however, was subsequently entered against two of the three individuals leaving only the individual named Freeman in this action.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 279.

¹⁶ *Id.* at 280.

¹⁷ *Id.* Emphasis added. This reference to *posse comitatus* marks the first reference to this term in a published, New Jersey court opinion.

on appeal.¹⁸

Before 1850, *posse comitatus* thrived as a well-developed and popular institution for local law enforcement.¹⁹ These early posses were thought to have two benefits.²⁰ “[T]he same ties of property, of family of love of country and of liberty” make possemen “effective instruments for the suppression of disorder....”²¹ In addition, these very characteristics make the members of a posse “unfit to promote any scheme of usurpation.”²² Much like jury service, posse service was frequently viewed as a mandatory duty of a citizen.²³ Service in a posse was thought to be part of a free citizen’s rights and duties in a self-governing republic.²⁴ Although sheriffs were the most frequent users of this power, it did not belong exclusively to them.²⁵

• *The New Jersey State Police*

In the early part of the twentieth century New Jersey made an effort to provide police protection for its rural inhabitants.²⁶ This effort was entirely dependent upon the county sheriff and his constables.²⁷ The demands for a well-trained rural police force increased in direct proportion to the increasing population and crime rate.²⁸ On March 29, 1921, the New Jersey Legislature approved the creation of the New Jersey State Police.²⁹

In 1940, the State Police were primarily employed in furnishing adequate police protection to the inhabitants of rural sections of the state.³⁰ In addition, the Legislature mandated that the State Police provide “first aid to the injured and succor the helpless.”³¹ In order to effectuate this statutory mandate, they were given “the same powers and authorities as [were] conferred by law upon police officers and constables.”³² The Office of the Governor was vested with the authority to call upon the services of the State Police.³³ By statutory mandate, the members of the State Police were now “subject to the call of the Governor.”³⁴ Municipal governments in need of a posse

¹⁸ *Id.* at 282-283.

¹⁹ David B. Kopel, *The Posse Comitatus And The Office Of Sheriff: Armed Citizens Summoned To The Aid Of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY at 795.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 796.

²⁴ *Id.*

²⁵ *Id.* See n. 4. David B, Kopel provides a thoughtful historical treatment posse comitatus and Colorado’s contemporary use of this doctrine in the twenty-first century.

²⁶ New Jersey State Police, *The History of the New Jersey State Police from 1921 to the Present*, <https://www.njsp.org/about/history/1920s.shtml> (last visited Feb. 10, 2020).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See N.J.S. 53:2-1.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ See N.J.S. 53:2-1.

were not free to demand the assistance of the State Police. A municipal government could, however, ask the Governor for police assistance. In response, the Governor was, and still is, free to use the State Police as a “*posse*” and deploy them to the requesting municipality.³⁵

• *A Twentieth Century Mention of Posse Comitatus*

On July 7, 1970, Harold Tull was shot by an unidentified member of the New Jersey State Police.³⁶ The State Police had been summoned to Asbury Park to assist the city in maintaining order during a civil disturbance.³⁷ As a result of the injuries that he sustained, Mr. Tull sued the State of New Jersey, the Attorney General, the State Police, Asbury Park, the Police Chief and the City Manager.³⁸

In *Tull v. State*, the Appellate Division was asked to consider whether the State was liable for the Plaintiff’s injuries under the doctrine of *respondeat superior*.³⁹ The Court noted that the Legislature granted the State Police the authority to “co-operate with any other State department, or any State or local authority in detecting crime, apprehending criminals and preserving law and order.”⁴⁰ The Court continued, however, that “[t]he interests of the state would be ill-served and the cooperation statute, N.J.S. [] 52:2-1, possibly thwarted if the State police, viewed as agents of the summoning municipality, were subject to its every order only because – the necessary authority to respond having been given – they answered the call.”⁴¹

In New Jersey, the authority to summon a posse is mentioned only once in the statutes and is vested with the chief executive.⁴² “Posse” is not, however, defined in the New Jersey statutes, and the role and authority of a posse are not established in either the statutes or the case law. There is no indication of the Governor’s role with regard to the posse, and the statute is also silent regarding the length of time that the State Police may be impressed into such service.

Conclusion

Staff seeks authorization to conduct additional research and outreach to ascertain whether it would be appropriate to modify N.J.S. 53:2-1 to remove the term “posse”.

³⁵ *Id.* By 1941 the New Jersey Guard was exempt from *posse comitatus* by statute - L. 1941, c. 109, p.249 §16. It should be noted that this exemption was subsequently repealed in 1963 as part of a general revision to the militia statutes.

³⁶ *Tull v. State*, 125 N.J. Super. 272, 274 (App. Div. 1973).

³⁷ *Id.*

³⁸ *Id.* at 274-275.

³⁹ *Id.*

⁴⁰ See N.J.S. 53:2-1, para. 3.

⁴¹ *Tull v. State*, 125 N.J. Super. at 278.

⁴² See N.J.S. 53:2-1, para. 3.