

# The Posse Comitatus Act: Liberation from the Lawyers

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“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.”

— Posse Comitatus Act<sup>1</sup>

Much has been written about the Posse Comitatus Act. As a few others have noted, much of this commentary is “just plain nonsense.”<sup>2</sup> The majority opinion, however, including that of the Department of Defense, maintains that this 19th-century law strictly limits almost all DOD participation in any activity related to “law enforcement” or “homeland security.”<sup>3</sup> This fundamental mischaracterization, while understandable, is potentially dangerous to national security and has done nothing to protect civil liberties.

So how did a racist law from the bitter Reconstruction period morph, in many minds, into shorthand for the respected principle that Americans do not want a military national police force? In a nutshell: deliberate mischaracterization by the original supporters who hid behind patriotic language to strip the freed slaves of their nascent civil and voting rights; excessive focus on the false historical arguments as opposed to the law’s actual text and ugly history; and some bad policy that misused a few key court decisions, and part of a statute, in a way that limited DOD efforts in the “war on drugs” at a time when Congress was pushing expanded participation.

This article introduces the actual history and meaning of the Posse Comitatus Act, distinguishing clearly between the law and a misleading DOD regulation that requires an army of lawyers to navigate. Despite what you’ve heard, the Posse Comitatus Act is not a significant impediment to DOD participation in law enforcement or homeland security.

## ***The Act's Uninspiring Pedigree***

### *General Acceptance of Army Participation in Law Enforcement (1787-1861)*

While the nation's founders were deeply concerned with the abuses of the British army during the colonial period and military interference in civil affairs, the majority was even more concerned about a weak national government incapable of securing life, liberty, and property. Some vocal patriots sought to avoid a standing army and any federal control over the state militias; however, in the end, theirs was the minority view. The new Constitution did not contain the explicit limits and outright bans desired by some, even though the pro-Constitution Federalists explicitly argued that the standing army could assist in law enforcement efforts.

The framers even debated the federal government's power to call out the posse comitatus (literally meaning the power or authority of the county) and did not prohibit this established feature of the common law. Clearly, the Posse Comitatus Act did not originate from the prevailing opinion during the revolutionary period.

Legislative and executive actions in the early days of the American republic confirm that the use of federal troops or federalized militia to preserve domestic order, either as part of a posse comitatus or otherwise, was an accepted feature of American life under the new Constitution. In 1794, President Washington led federal troops into western Pennsylvania because unruly farmers refused to pay a whiskey excise tax. President Jefferson issued a broad proclamation that relied upon the Chief Executive's authority to call on the entire populace, military and civilian, to serve as a grand posse comitatus to counter Aaron Burr's planned expedition against Spanish territory. In 1832, President Jackson initially sent military forces toward South Carolina under a Jefferson-like posse comitatus theory to prevent secession. In an 1851 report to the Senate, President Fillmore stated that he had the inherent power to use regular troops to enforce the laws and that all citizens could be called into a posse by the marshal. The Senate Judiciary Committee agreed that marshals could summon both the militia and regular troops to serve in a posse comitatus.

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In 1854, Attorney General Cushing formally documented the doctrine, concluding:

The posse comitatus comprises every person in the district or county above the age of fifteen years whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines. All of whom are alike bound to obey the commands of a sheriff or marshal.<sup>4</sup>

Ironically, the Cushing Doctrine, as the long-standing policy became known, was initially used as a basis for US marshals to enforce the Fugitive Slave Act in Northern states.

*The Act's True Roots in the Civil War  
and Reconstruction Bitterness*

The arrival of federal troops in the Southern states during the Civil War quickly undermined the slaveholders' authority, even before the Emancipation Proclamation. As the war ended, much of the former Confederacy was occupied by federal troops, including some of the 134,000 blacks in the federal Army. For some, the military occupation was worse than battlefield defeat. The presence of victorious Union troops, including former slaves, humiliated many former Confederates. Throughout the war, black Union troops flaunted their contempt for the symbols of slavery and relished the opportunity to exert authority over, and in some cases torment, Southern whites. Black soldiers acted, according to one New York newspaper, as "apostles of black equality," spreading radical ideas about black civil and political rights, which in turn inspired constant complaints from Southern whites.<sup>5</sup>

While the federal Army quickly demobilized after the war, it remained a powerful symbol of the destruction of the South's antebellum way of life. Army activity to protect blacks or assist institutions such as the Freedmen's Bureau, no matter how limited, kept the wounds open and raw. One prominent Tennessee planter perhaps summarized the Southern perspective on the Bureau and the Army best when he wrote:

The Agent of the Bureau . . . *requires* citizens (former owners) to make and enter into *written contracts* for the hire of their *own* Negroes. . . . When a Negro is not *properly* paid or fairly dealt with and *reports* the facts, then a squad of Negro soldiers is sent after the *offender*, who is *escorted* to town to be dealt with as per the Negro testimony. In the name of God how long is such things to last?<sup>6</sup>

Politically, the immediate postwar period was much more benign. Under the generous terms of Presidential Reconstruction, state governments were in place throughout the South by the end of 1865. Unfortunately, they moved quickly to assert white domination over blacks via a series of laws

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know as “Black Codes.” These laws, while varying from state to state, consigned blacks to a hopeless serfdom. As one Southern governor stated, the newly reconstructed governments were a white man’s government and intended for white men only.<sup>7</sup>

The reconstructed state governments also did little to protect blacks against what was, unfortunately, just the beginning of widespread racial terrorism. For example, Texas records from the Freedmen’s Bureau recorded the murder of 1,000 blacks by whites from 1865 to 1868. The stated “reasons” for the murders include: “One victim ‘did not remove his hat’; another ‘wouldn’t give up his whiskey flask’; a white man ‘wanted to thin out the niggers a little’; another wanted ‘to see a d—d nigger kick.’”<sup>8</sup>

Newspaper stories about the Black Codes and abuse of the former slaves enraged Northerners, and the Republican Congress imposed a more radical agenda. Under Congressional Reconstruction, the existing state governments were dissolved, direct military rule was introduced, and specific measures were taken to encourage black voting and secure full civil rights for the freedmen.

The nation wasn’t ready for a full civil rights movement. From the popular Southern perspective, Congressional Reconstruction imposed corrupt and inept foreign governments propped up by an occupying army. Accordingly, Southern Democrats did everything possible to undermine the Republican mixed-race state governments. In some areas, expanded voting rights for former Confederates gradually created white Democratic voting majorities, while economic pressure induced blacks to avoid political activity. In other areas, however, more direct action to limit Republican voting was taken. Terrorist organizations such as the Ku Klux Klan, the Knights of the White Camellia, and the Knights of the Rising Sun served as the unofficial Southern white army in the war against Northern rule. For this “army,” no act of intimidation or violence was too vile, so long as it was directed against blacks and their white political allies.

While the Republican state governments resisted this “counter-reconstruction,” their efforts to combat the Klan were ineffective, and state officials appealed for federal help. Some federal interventions resulted; how-

ever, any temporary benefits quickly faded, along with the waning Northern will to enforce Reconstruction. With a few exceptions, Southern Republicans were left to fend for themselves. As one prominent historian noted, “Negroes could hardly be expected to continue to vote when it cost them not only their jobs but their lives. In one state after another, the Negro electorate declined steadily as the full force of the Klan came forward to supervise elections that federal troops failed to supervise.”<sup>9</sup>

One by one, the mixed-race Republican governments fell. By 1876, the only survivors were in Louisiana, Florida, and South Carolina. The last vestiges of occupying federal troops were used to supervise polling places in these three states during the 1876 presidential election. The need to prevent voter intimidation was clear enough. In South Carolina, for example, the “Plan of Campaign” called upon each Democrat to “control the vote of at least one Negro by intimidation, purchase, keeping him away, or as each individual may determine.”<sup>10</sup> Some Democrats planned to carry the election “if we have to wade in blood knee-deep.”<sup>11</sup>

The subsequent bitter political battles over the contested election results led to the effective withdrawal of federal troops from the South in early 1877 as part of a deal to resolve which candidate would assume the presidency. The remaining state Republican governments collapsed, and the traditional white ruling class resumed power. In the words of W. E. B. DuBois, “The slave went free; stood a brief moment in the sun; then moved back again toward slavery.”<sup>12</sup>

#### *Legislative Action to Prevent Another Reconstruction Period*

Initial congressional action to maintain this movement began shortly after the 1876 election. Many members of the Democratically controlled House harshly criticized the President’s actions. Ironically, his use of troops to keep peace at polling places was specifically authorized by existing law. Nonetheless, according to some, military supervision of polling places to prevent violence was a tyrannical and unconstitutional use of the Army to protect and keep in power unelected tyrants<sup>13</sup>—primarily by keeping the KKK from intimidating voters.

Southern Democrats subsequently led a two-year effort to limit federal influence over the South. Eventually, the following amendment was introduced to an Army appropriations bill: “It shall not be lawful to use any part of the land or naval forces of the United States to execute the laws either as a posse comitatus or otherwise, except in such cases as may be expressly authorized by act of Congress.”<sup>14</sup>

The sponsoring Democratic Congressman, Mr. Kimmel, roundly denounced regular troops as bloodthirsty brutes, questioned the constitution-

ality of a standing army, and vigorously restated the colonial debates about the danger of a standing army. He referred to President Hayes as an unelected monarch. He also claimed that the Army shielded the tyrants who had reconstructed state governments, imposed state constitutions on unwilling people, obstructed the ballot, and excluded the representatives of the people from state government—often at the behest of minor federal officials.

The substitute bill that passed the House, introduced by Congressman Knott, omitted the restriction on the use of naval forces and added a criminal penalty.<sup>15</sup> The debate's significant focus on the "unlawful" use of Army troops to supervise polling places, without acknowledging that federal law (before and after the Posse Comitatus Act) clearly permitted the action, highlights the initial deception surrounding the Act.

The Senate added language to account for constitutional authority to use the Army as a posse comitatus, or otherwise, to execute the laws. The Senate also considered an amendment by a supporter of the bill to change part of the Act to 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 *for the purpose of executing the laws* except in such cases as may be expressly authorized by the Constitution or by act of Congress."<sup>16</sup> This key amendment was defeated, leaving words in the Act that must be given meaning.

#### *The Act's Meaning in the Late 19th Century*

As with many controversial laws, the full extent of the Posse Comitatus Act was not clear. To the extent that agreement can be discerned from the deliberately misleading debate, most appeared to agree that the marshals could no longer order Army troops to join the posse comitatus in subordination to the marshal. In other words, the Act clearly undid the Jefferson-Jackson-Fillmore doctrine articulated by Attorney General Cushing in 1854.

At least one of the key disputes over the statute's additional meaning, if any, implicitly centered on the interpretation of the words "as a posse comitatus or otherwise." Under a cardinal rule of statutory construction, the words must have some meaning. They cannot be ignored, especially since Congress had an opportunity to remove them, but declined. Moreover, the Act cannot be interpreted to adopt the very language rejected by Congress.

While history can help define a 19th-century "posse comitatus," other tools help interpret the words "or otherwise" which follow. Under another long-standing rule of statutory construction known as *ejusdem generis*,<sup>17</sup> the general words "or otherwise" prohibit actions of the same general class as placing Army troops into a posse comitatus at the order of the local marshal. Since the two primary "evils" addressed during the debates were the Cushing Doctrine and Army troops supervising polling places,

one reasonable interpretation is that the words “or otherwise” sought to limit any implied authority of the marshals to order Army troops to help supervise the polls.

Perhaps the only agreement was that the Posse Comitatus Act did not apply to the Navy.

President Hayes concurred that the Act limited a marshal’s authority over the Army but did not believe that the law, signed on 18 June 1878, applied to the President. A few months after signing the Act into law, he signed a broad proclamation concerning the lawless situation in the New Mexico Territory and deployed troops for 17 months to enforce the law. A great deal can be learned about the Act from this troop deployment since it occurred while the authors were still in Congress.

Except for the initial presidential proclamation and the location of the disturbances, it is difficult to distinguish significantly the long-term use of troops in the New Mexico territory from the Reconstruction period. The level of violence and general lawlessness in New Mexico, while directed at whites, was really no worse than in many parts of the former Confederacy. Presidential involvement with the decision to use troops in a law enforcement role appeared to be the only real, mostly political, limit imposed by the Act.

Skeptical that such a contentious law accomplished so little, President Chester Arthur asked Congress to amend the Act after similar trouble struck Arizona. In reply, an 1882 Senate Judiciary Committee report confirmed that the primary evil addressed by the Posse Comitatus Act was a marshal’s power to call out and control the Army. The President could, essentially, use troops in Arizona as he saw fit, provided that military officers maintained command over those forces.

The Act clearly did not end Army involvement in domestic legal affairs, with 125 interventions from 1877 to 1945.<sup>18</sup> Initially, the key difference from the Reconstruction period was that the President approved or ratified most actions; some sort of proclamation complying with another law was normally, but not always, issued before troops intervened; and the Army stayed out of the South.

The only domestic use of troops that provoked even a partial congressional response during that time concerned President McKinley’s deployment of 500 troops to Coeur d’Alene, Idaho, from May 1899 to April 1901. The situation leading up to this deployment was similar to the radical Reconstruction period. The underlying tension was about political and social power, as miners struggled with the entrenched power structure represented by the anti-labor mining companies and state government. Either as result of the citizens’ natural sympathies with the labor unions, or threats from a “se-



cret clan,” local efforts to prosecute violence by elements of the labor movement had met with little success.<sup>19</sup>

Unrest and violence flared in April 1899 when a mining operation announced it would fire all union members. President McKinley sent in regular troops to restore order but did not invoke another law that required him to first issue a cease and desist proclamation. Violence subsided before the troops arrived, so they were used in a dragnet to apprehend suspects identified by state officials. In one instance, about 150 Army troops accompanied by four semi-official state deputies arrested the entire male population of one town, around 300 men in all. In total, the Army helped arrest and detain, without legal process, over 1,000 union members and placed many under Army guard for up to four months.

In late 1899, the House Committee on Military Affairs investigated. The June 1900 report split along party lines, with the Republican majority finding no fault with the actions of the Republican administration. While sharply critical, the Democrats agreed the initial deployment was lawful. They branded subsequent actions by the troops and President, however, as “reprehensible, violative of the liberty of the citizen, and totally unwarranted by the laws and Constitution of the United States.”<sup>20</sup> The Democrats made absolutely no mention of the Posse Comitatus Act. Clearly, Congress did not see the Act as imposing any limit on the Commander in Chief’s domestic use of the armed forces.

### ***The Almost Invisible Law***

In many respects, the Posse Comitatus Act remained invisible for the first several decades of the 20th century. In May 1917, the Secretary of War unilaterally instituted a “Direct Access Policy” that essentially reinstated key parts of the Cushing Doctrine for over four years. On 29 occasions, local officials used Army troops to break strikes, prevent labor meetings, stifle political dissent, and arrest or detain workers without the right of habeas corpus. Few in power appeared to care.

Congress did move decisively to increase the military’s law enforcement role in a host of situations ranging from protecting waterfront facilities to enforcing routine fisheries regulations.<sup>21</sup> Yet, for the first 80-plus years, Congress did not even discuss the Act, leaving the impression that it wasn’t considered particularly relevant.

The Act was considered “obscure and all-but-forgotten” in 1948.<sup>22</sup> In 1956, however, the Act was moved to 18 U.S. Code, section 1385, and amended to include the Air Force, which had been separated from the Army. An attempt was made to subject the Navy to the Act in 1975; however, the bill died in committee.



### ***Resurrection of the Act During the 1970s***

In the early 1970s, the Posse Comitatus Act emerged from obscurity as creative defense lawyers attempted to develop new exclusionary rules based on the Act. A typical case involved a criminal defendant seeking acquittal because the arresting law enforcement official received assistance from a member of the DOD, allegedly in violation of the Act. While this effort was almost always unsuccessful, the cases in the 1970s marked the triumph of the deceptive 19th-century politicians who cloaked the Act in patriotic rhetoric.

A bit of legal background is required to understand these cases. As with most laws, the Posse Comitatus Act has several elements, or sub-parts. To violate the Act, someone must: (1) willfully (2) use the Army or Air Force (3) as a posse comitatus or otherwise (4) to execute the laws (5) in a way that is not authorized by the Constitution or an act of Congress.

Each of these elements must be satisfied. It's all or nothing. Under a cardinal rule of statutory construction, words cannot be ignored, especially since, in this case, Congress considered but rejected attempts to remove them from the Act. A case, therefore, can be resolved if the court finds that any single element is not satisfied.

This is precisely what occurred in the most important Army cases from the 1970s. The courts defined "to execute the laws," found this element unmet, and ruled against the defense. In doing so, however, the courts provided only a limited discussion of the Act and did not explicitly note the many other un-discussed elements.<sup>23</sup> This proved to be a significant source of future misunderstanding.

In another important case, a court held that the Act did not apply to the Navy and declined to apply an exclusionary rule for the violation of a similar internal administrative regulation. In doing so, however, this court articulated a broader "spirit" of the Act, opining that the legislative history showed congressional intent to apply the Act's policy to all armed services.<sup>24</sup> Unfortunately, the court took a few remarks from the 1878 congressional debate grossly out of context and missed that the speaker's amendment deleted the Navy from the bill. Over time, this court's sloppy work (totally unnecessary to resolve the case) became another source of misunderstanding.

### ***Congress Increases DOD Involvement in Law Enforcement***

*The 1981 Act (10 U.S. Code, Sections 371-378)*

By the late 1970s, the federal government formally acknowledged that it was easy to smuggle illegal drugs into the United States and distribute them to eager buyers. Marijuana from Colombia arrived by the ton-load while hundreds of pounds of cocaine were flown in daily. The situation in south

Florida, “a drug disaster area,” was out of control and about to get even worse.<sup>25</sup> Highly publicized shoot-outs between rival drug gangs introduced the term “cocaine cowboys” into the national press and reinforced the nation’s Wild West image of Miami.

Against this backdrop, Congress moved in 1981 to increase cooperation between DOD and civilian law enforcement authorities as part of the 1982 DOD Authorization Act.<sup>26</sup> Congress did so with little support from any federal agency. In fact, the effort prompted an unlikely alliance between federal drug enforcement officials, who feared DOD dominance over a high-profile mission; DOD officials, who feared a resource drain away from the department’s primary mission; and civil libertarians, who feared an eventual military state.<sup>27</sup>

Despite this opposition, a version of the bill became law. In a nutshell, the 1982 Defense Authorization Act established some explicit “safe harbors” of permissible DOD activity to assist law enforcement efforts. In one case, the safe harbor came with restrictions to prevent abuses. These restrictions, however, were limited to the safe harbor. The new law explicitly did not change the Posse Comitatus Act or impose any limitations beyond those in the Posse Comitatus Act itself. The entire point was to increase DOD-civilian cooperation in law enforcement.

#### *DOD Implementing Regulations*

On 7 April 1982, the Defense Department published administrative regulations implementing 10 U.S. Code, sections 371-378.<sup>28</sup> While many parts of the regulation initially appear consistent with the authorizing statute, the regulation defeated the law’s stated purpose to increase cooperation between the military and civilian law enforcement in several important ways.

The regulations invented an extremely broad definition of the Posse Comitatus Act based upon the one element analyzed in the 1970s court cases. This transformed the tests for when one “executes the law” into the entire definition of the Act. In taking this action, the DOD instituted a version of the Act explicitly rejected by lawmakers in 1878 and rendered meaningless words deliberately left in the law by Congress.

The regulations also extended the Act’s coverage outside the United States, ignored key sections of the 1982 law to reach a conclusion that it actually increased restrictions on all DOD activity, and applied the overly restrictive DOD interpretation of the Posse Comitatus Act to the Navy and Marine Corps as a matter of DOD policy.

Taken together, the overly restrictive regulatory provisions appeared to reflect the Defense Department’s lack of support for the congressional intent behind the 1981 law. The DOD, however, claimed to base its policy upon the Posse Comitatus Act.

After thus inventing a new Posse Comitatus Act, the regulations articulated several new implied exceptions to the Act in order to preserve many vital DOD activities such as protecting DOD personnel, equipment, and classified information. Of course, the need for implied exceptions was created by the DOD policy itself and had nothing to do with the actual Posse Comitatus Act.

#### *The Flawed DOD Policy Begins to Merge with the Act*

Despite the overly restrictive regulations, the Department of Defense did assist in some law enforcement actions. One prominent example involved the placement of Coast Guard Law Enforcement Detachments on some Navy ships. These programs had some success, and a few defendants subsequently claimed that the Navy support violated the Posse Comitatus Act.

While the claim was of little help to accused drug smugglers, several cases effectively fused discussion of the Posse Comitatus Act with the contents of the misleading DOD regulations.<sup>29</sup> Courts began to rely on the deeply flawed DOD regulations and, in some cases, gave little effort to distinguish between them and the actual Act. Prosecutors had no reason to appeal, since the courts did not grant any relief to the accused smugglers. The DOD regulations and internal policy began to control discussion of the Act.

#### *Congress Acts Again: Changes in 1988*

By 1986, even prominent civil libertarians began to question the DOD's reluctance to participate in protecting the border from foreign threats, noting how easily terrorists could exploit this weakness. As *New York Times* columnist William Safire wrote:

The day can easily be foreseen when one of our cities is held hostage by a terrorist group or a terrorist state; the stuff of novels can quickly become reality. . . . Why have we spent trillions on defense when any maniac can fly in a bomb that can destroy a city?<sup>30</sup>

Despite wide public perception that the United States had lost control of its borders, defense and law enforcement officials continued to oppose an increased DOD role in securing them. In September 1988, however, Congress enacted a program to increase significantly the role of the armed forces in drug interdiction as part of the Defense Authorization Act for 1989.<sup>31</sup> The conference committee bill established a requirement for the DOD "to plan and budget for the effective detection and monitoring of all potential aerial and maritime threats to the national security."<sup>32</sup> It also designated the Defense Department as the lead federal agency for the detection and monitoring of aerial and maritime transit of illegal drugs into the country.<sup>33</sup> While concerns about direct DOD law enforcement actions remained, the 1988 Act was

clearly intended to further increase Defense Department participation in indirect law enforcement.

Despite these changes in the law, the DOD regulations concerning assistance to law enforcement remained unchanged. If anything, DOD became more restrictive as the department's policy shifted from cooperation with law enforcement to the "maximum extent practicable" in 1982 to the current policy of cooperation "to the extent practical."<sup>34</sup>

### ***The Posse Comitatus Act's Meaning in the 21st Century***

While no one has ever been convicted of violating the Posse Comitatus Act, its surviving portion remains a criminal law. As with most criminal laws, the Act has several action elements and one element going to the defendant's mental state or *mens rea*. A defendant must act "willfully" or he did not violate the law.

Depending on many factors, "willfully" can mean that the defendant knowingly performed an act, deliberately and intentionally, or that the accused acted with knowledge that his conduct was generally unlawful. If the proscribed conduct could honestly be considered innocent, then a willful *mens rea* may require the defendant to have more specific knowledge of the law being violated. A higher standard for willfulness probably should apply to the Posse Comitatus Act, given that DOD's lead instruction on the topic significantly misstates the law.

With the definition of willfulness in place and the historical record in mind, the Posse Comitatus Act becomes:

- Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress,
- (1) intentionally and with a bad purpose to either disobey or disregard the law
  - (2) uses any part of the Army or Air Force
  - (3) within the United States
  - (4) upon the demand of, and in subordination to, the sheriff, US marshal, or other law enforcement official
  - (5) to directly enforce civilian law in a way that US citizens are subject to the exercise of military power which is regulatory, proscriptive, or compulsory in nature, or at a polling place
  - (6) without first obtaining permission of the President to do so, shall be fined under this title or imprisoned not more than two years, or both.

Unlike the DOD policy that purports to be based on the Posse Comitatus Act, this interpretation does not require one to ignore words Congress

deliberately left in the law, discard recognized rules of statutory construction, or reinvent history.

There is also no need to invent a large body of so-called exceptions to the Posse Comitatus Act under this reading. The Act's important role is to counter the loss of control over Army troops via the Cushing Doctrine. Other laws and constitutional provisions further limit the military, keep it away from polling places during elections, and capture the broader policies against military involvement in domestic affairs.<sup>35</sup> The Act is an important, but partially redundant, component of a statutory and constitutional system that limits military involvement in civil affairs. It doesn't have to do all the work.

### ***Conclusion***

The *National Strategy for Homeland Security* states:

Unless we act to prevent it, a new wave of terrorism, potentially involving the world's most destructive weapons, looms in America's future. It is a challenge as formidable as any ever faced by our nation. . . . Today's terrorists can strike at any place, at any time, and with virtually any weapon. Securing the American homeland is a challenge of monumental scale and complexity. But the US government has no more important mission.<sup>36</sup>

Unfortunately, current DOD policy on the Posse Comitatus Act—a set of overbroad limits that bear little resemblance to the actual law, combined with a bewildering patchwork of exceptions—impedes this important mission. It is a rotten legal foundation for US Northern Command and creates bizarre situations where the US Navy perceives itself to have less authority to conduct some national defense missions as threats get closer to America.<sup>37</sup>

In addition to potentially impeding national security, this misguided policy is dangerous to American civil liberties and erodes respect for the rule of law. It holds up the Posse Comitatus Act as a strict legal and quasi-constitutional limit that is easy to discard or ignore when practical necessity appears to require it. In the end, the law becomes in some military eyes a “procedural formality,” used to ward off undesired and potentially resource-depleting missions while not imposing any real controls.<sup>38</sup>

It's past time to acknowledge that DOD policy on the department's role in law enforcement and homeland security has almost nothing to do with the Posse Comitatus Act. Let's get the policy into the light of day, move the lawyers off center stage for a few minutes, and resolve the important issue of how to best secure the American homeland while protecting civil liberties.

#### **NOTES**

1. Posse Comitatus Act, 18 U.S.C. § 1835 (2000).

2. See John R Brinkerhoff, "The Posse Comitatus Act and Homeland Security," *Journal of Homeland Security* (February 2002), <http://www.homelandsecurity.org/journal/articles/displayArticle.asp?article=67>.
3. US Department of Defense, Directive 5525.5, *DOD Cooperation with Civilian Law Enforcement Officials*, encl. 4 (15 January 1986) (and Change 1, 20 December 1989); Gary Felicetti and John Luce, "The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done," *175 Military Law Review* 86, 153-156, 179-180 (March 2003), <http://www.jagcnet.army.mil/MilitaryLawReview>.
4. See 6 Op. Att'y Gen. 466, 473 (1854) (internal citation omitted). This opinion is known as the Cushing Doctrine. The Posse Comitatus Act was specifically designed to overturn it.
5. Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* (New York: Harper & Row, 1988), p. 80.
6. *Ibid.*, p. 168.
7. John H. Franklin, *Reconstruction: After the Civil War* (Chicago: Univ. of Chicago Press, 1961), p. 51 (describing the remarks of the South Carolina Provisional Governor B. F. Perry).
8. Foner, p. 120. Texas courts indicted some 500 whites for the murder of blacks in 1865-1866, but not one conviction was obtained (Foner, p. 204).
9. Franklin, p. 172.
10. Foner, p. 570.
11. *Ibid.*, p. 574.
12. *Ibid.*, p. 602.
13. See 5 Cong. Rec., p. 2112 (1877) (remarks of Congressman Atkins).
14. 7 Cong. Rec., p. 3586 (1878).
15. *Ibid.*, p. 3845.
16. *Ibid.*, p. 4248 (emphasis added).
17. Of the same kind, class, or nature. "A canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed." Black's Law Dictionary 535 (7th ed., 1999).
18. Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* (Washington: US Army Center of Military History, 1997), p. 421.
19. Coeur D'Alene Labor Troubles, H.R. Rep. No. 1999, p. 28 (1900), in microform on CIS No. 4027, Fiche 8-9 (Congressional Information Service).
20. *Ibid.*, p. 132.
21. Felicetti and Luce, pp. 127-43.
22. *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948).
23. Felicetti and Luce, pp. 145-47.
24. *United States v. Walden*, 490 F.2d 372, 375-76 (4th Cir. 1974).
25. US General Accounting Office, *Gains Made in Controlling Illegal Drugs, Yet the Drug Trade Flourishes*, Report No. GAO/GGD-80-4 (Washington: GAO, 1979), pp. 70, 76; US Congress, *Hearing Before the Subcommittee on Crime, House Committee on the Judiciary on Narcotics Enforcement Policy*, 97th Cong. 3 (1981) (statement of Ronald F. Lauve, Senior Associate Director, General Government Division).
26. Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, 95 Stat. 1099 (codified at 10 U.S.C. §§ 371-378 [2000]).
27. Christopher A. Abel, "Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy, and Federal Law Enforcement at Sea," 31 *Wm. & Mary L. Rev.* 445, 470, and note 155 (1990); Felicetti and Luce, note 316.
28. See 47 Fed. Reg. 14,899 (7 April 1982) (adding a new pt. 213 to Ch. I, 32 C.F.R.). Department of Defense Directive 5525.5, dated 15 January 1986, provided internal guidance consistent with the published regulations. See DOD Dir. 5525.5. On 28 April 1993, DOD canceled the published regulations and indicated that DOD Directive 5525.5 replaced 32 C.F.R. part 213. See 58 Fed. Reg. 25, 776 (28 April 1983).
29. Felicetti and Luce, notes 354-57 and accompanying text.
30. William Safire, "Thataway, Posse Comitatus," *The New York Times*, 28 February 1986, p. A31, quoted in 132 Cong. Rec., p. E1331.
31. H.R. Conf. Rep. No. 100-989, p. 447, rpt. in 1988 U.S.C.C.A.N. 2575.
32. *Ibid.*
33. H.R. Conf. Rep. No. 100-989, p. 448, rpt. in 1988 U.S.C.C.A.N. 2576.
34. Compare 32 C.F.R. § 213.4 with DOD Dir. 5525.5, p. 2, para. 4.
35. Felicetti and Luce, pp. 165-78.
36. US Office of Homeland Security, *National Strategy For Homeland Security* (Washington: Office of Homeland Security, 2002), p. 1.
37. Felicetti and Luce, notes 10, 21.
38. Chris Quillen, "Posse Comitatus and Nuclear Terrorism," *Parameters*, 32 (Spring 2002), 62-63.