

TRADING POLICE FOR SOLDIERS: HAS THE POSSE COMITATUS ACT HELPED MILITARIZE OUR POLICE AND SET THE STAGE FOR MORE FERGUSONS?

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INTRODUCTION

On November 24, 2015, the St. Louis County Prosecutor, Robert McCulloch, announced that a grand jury did not return a true bill and issue an indictment against Officer Darren Wilson¹ for the fatal shooting of Michael Brown.² While the nation was holding its breath awaiting the grand jury's decision, law enforcement stood "deployed" around Ferguson. Missouri Governor Jay Nixon had declared a state of emergency, and Ferguson Mayor James Knowles warned authorities to "prepare for the worst."³ St. Louis Police Chief Sam Dotson stated before the announcement, "We've had three months to prepare. . . . Our intelligence is good. Our tactics are good,"⁴ a statement reminiscent of a general rallying his soldiers before the final push to engage and destroy the enemy. The events

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¹ Police officer for the Ferguson, Missouri police department. Eyder Peralta & Krishnadev Calamur, *Ferguson Documents: How the Grand Jury Reached a Decision*, NPR (Nov. 25, 2014, 6:41 AM), <http://www.npr.org/sections/thetwo-way/2014/11/25/366507379/ferguson-docs-how-the-grand-jury-reached-a-decision>.

² *Id.*

³ Jamelle Bouie, *Prepare for the Worst: Missouri's Governor Smears the Residents of Ferguson and Misunderstands the Cause of Last Summer's Chaos*, SLATE (Nov. 19, 2014, 10:56 AM), http://www.slate.com/articles/news_and_politics/politics/2014/11/ferguson_state_of_emergency_gov_jay_nixon_expects_unrest_and_chaos_after.html [https://perma.cc/GQD8-QK3H].

⁴ Evan Perez et al., *Grand Jury Decision on Ferguson Officer Darren Wilson Could Come Friday*, CNN (Nov. 19 2014, 8:21 PM), <http://www.cnn.com/2014/11/19/justice/ferguson-grand-jury-ruling> [https://perma.cc/Y3QL-27UA].

in Ferguson, Missouri—a city with a population of just over 20,000⁵—have brought into national focus a problem that many citizens across the United States have felt growing for years.⁶ Much as the media coverage of Selma brought the true plight of those fighting the Civil Rights Movement to the attention of the American and international public,⁷ the live coverage of the police response in Ferguson showed Americans and the world the extent of the militarization of state and local police departments in the United States.⁸

The central problem posed by this shift toward militarization stems from the distinction between the role and purpose of a police officer and the role and purpose of a soldier. Police officers swear “to protect and serve” the citizens of their communities; soldiers pledge to engage the enemy.⁹ No matter how well trained a police officer is to protect and serve, if the officer is “dressed like a soldier[], armed like [a] soldier[], and trained” in military tactics, there arises a very real concern that he or she will eventually begin to *act* like a soldier.¹⁰

In 1971, psychologist Philip Zimbardo conducted the Stanford prison experiment, in which he assigned subjects the role of either guard or prisoner.¹¹ He wanted to determine if there was a tendency to slip into predefined roles based on the students’ expectations for their roles.¹² Despite knowing that they were role-playing, almost all of the students began to act according to their prescribed

⁵ *Ferguson, Missouri*, CITY-DATA, <http://www.city-data.com/city/Ferguson-Missouri.html#b> [https://perma.cc/AP5M-V388] (last visited Nov. 23, 2015).

⁶ See Arthur Rizer & Joseph Hartman, *How the War on Terror Has Militarized the Police*, ATLANTIC (Nov. 7, 2011), <http://www.theatlantic.com/national/archive/2011/11/how-the-war-on-terror-has-militarized-the-police/248047> [https://perma.cc/A7TL-PHAQ]. This problem of militarization of the police has grown over time because of the link between 9/11, the wars on terror and drugs, and the rapid and substantial increase in military hardware and weaponry being placed in the hands of local police departments. See *id.*

⁷ See Jack Nelson, *The Civil Rights Movement: A Press Perspective*, 28 HUM. RTS. 3, 5 (2001) (“[T]he extensive coverage that national newspapers gave to Selma and Birmingham, combined with the increasingly powerful influence of television news, mobilized public opinion that pressured Congress to pass the landmark civil rights acts of 1964 and 1965.”).

⁸ See, e.g., *Has the Media Become a Third Force in Ferguson?*, TECHSUM (Aug. 19, 2014), <http://www.itechsum.com/mashable/item/100106-has-the-media-become-a-third-force-in-ferguson> [https://perma.cc/2FKM-FCQR] (“[S]tunning photos and videos emerging from Ferguson have helped to ignite debates about police brutality, the militarization of local authorities and a range of issues concerning race, class and the U.S. justice system.”).

⁹ See Rizer & Hartman, *supra* note 6.

¹⁰ *Id.*

¹¹ Martyn Shuttleworth, *Stanford Prison Experiment*, EXPLORABLE (June 22, 2008), <https://explorable.com/stanford-prison-experiment> [https://perma.cc/3B5P-PL3B].

¹² *Id.*

roles.¹³ The actions of the “guards” quickly came to include enforcing authoritarian measures and conducting psychological torture.¹⁴ The experiment was stopped early due to its shocking results and stands for the principle that roles can define behavior.¹⁵ Here, that principle translates to the idea that if you give a peace officer the dress of a soldier, the weapons of a soldier, the armored vehicles of a soldier, and the training of a soldier, then that peace officer may come to define his role not as the peace officer he was hired to be, but as a soldier at war in his own community.

The recent events in Ferguson have given prominence to a problem that has received little meaningful attention nationally. The attention police militarization did receive before Ferguson was characterized largely by local anecdote.¹⁶ Ferguson brought the rise in the militarization of American police forces to the forefront of the national conversation.¹⁷ The public witnessed the problem live on all the major news networks: a small, local police force, equipped with late generation, military-grade weaponry and training, treating the community it serves as an occupied territory in wartime.¹⁸ It is hardly surprising that the community responded forcefully. It is especially unsurprising given the complicated and sensitive racial issues surrounding the killing of Michael Brown, with what appeared to be a wildly disproportionate police response followed by no repercussions for the officer. These events only added fuel to the fire.

Would the nightly protests and riots that gripped the nation’s attention in Ferguson have escalated to such a crescendo had the initial police reaction not been so, well, militaristic? Would the protesters have reacted to “beat cops” they had seen walking their neighborhoods as they did to ranks of heavily-armed, flak-jacketed, camouflage-uniformed police standing atop and around armored personnel carriers with mounted machine guns? To land on the topic at hand, is the militarization of the police spotlighted in Ferguson a result of the Posse Comitatus Act’s ban on using soldiers in domestic operations? Or, in the alternative, has America’s law enforcement community simply sidestepped that Act by turning peace officers into soldiers? Should the Posse Comitatus Act be reevaluated and

¹³ *Id.* (“Zimbardo tried to show that prison guards and convicts would tend to slip into predefined roles, behaving in a way that they thought was required, rather than using their own judgment and morals. Zimbardo was trying to show what happened when all of the individuality and dignity was stripped away from a human, and their life was completely controlled. He wanted to show the dehumanization and loosening of social and moral values that can happen to guards immersed in such a situation.”).

¹⁴ *Id.* (“The prisoners began to suffer a wide array of humiliations and punishments at the hands of the guards, and many began to show signs of mental and emotional distress.”).

¹⁵ *Id.*

¹⁶ See RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* 241–60 (2013).

¹⁷ See Justin Glawe, *Michael Brown’s Hometown Is Under Occupation*, DAILY BEAST (Aug. 12, 2014, 8:35 PM), <http://www.thedailybeast.com/articles/2014/08/12/michael-brown-s-hometown-is-under-occupation.html> [<https://perma.cc/37TF-9YF6>].

¹⁸ *Id.*

rewritten to take into account these ground truths? Is the Act outdated, unnecessary, and merely a hindrance in America today? Did the response to Hurricane Katrina and, especially, the horrors of September 11th reveal that we do sometimes need soldiers on our streets?

This article will attempt to answer these questions. Part I will examine the development of Posse Comitatus and its relationship to the historical backdrop of the American philosophy of limited government. In essence, this part will explore where the Act came from and how it relates to the American experience. Part II of this article will explain the legal succession of Posse Comitatus from a political philosophy to a codified law. It will also cover the “sister” laws and exceptions to the Posse Comitatus Act. Part III will address the merits of keeping the Posse Comitatus Act, as well as exploring arguments to repeal the Act in its entirety. Part IV turns its attention to the Posse Comitatus Act itself, specifically addressing whether this nineteenth century law has a place among twenty-first century threats when officials are simply bypassing the spirit of the law by developing soldiering police forces. This Part will also examine these threats to security if the status quo is kept and compare this to the potential danger to personal freedoms if the law is repealed. In addition, Part IV will tender a hybrid approach to the “repeal or maintain” argument. Specifically, this article will argue that the Posse Comitatus Act, as drafted in 1878, is outdated and ill-equipped to address modern day threats and military capacities.

However, a case can always be made that we need to trade some freedoms for more security. Therefore, while the basic precept of separation of U.S. military personnel from U.S. civilians is still sound policy, it must be recognized that tough times call for tough solutions; thus, instead of repealing the Posse Comitatus Act, this Article proffers a redrafting of the Act. Moreover, the adage, “when all you have is a hammer, everything looks like a nail,” rings true with today’s police departments. We train and want our law enforcement officials to be “peace officers,” not soldiers, yet sometimes the mission requires the blunt force of the dispassionate hammer. This Article argues that when we need direct action forces to be that hammer, we should simply use the military to “hit” the nail rather than blurring the line between what it means to be a police officer and what it means to be a soldier.

I. THE POSSE COMITATUS ACT¹⁹

America was born of a violent revolution against an oppressive regime and occupying power, which left its enduring imprint on American philosophy.²⁰ The American Revolution especially impacted the way this country's citizens, as a whole, distrust their government.²¹ Indeed, the American gun culture, the "separate but equal" branches of government, and the loosely regulated business markets all have roots in our deep-seated suspicion of the "crown"²²—so too does the legal concept behind Posse Comitatus.

September 11, 2001, changed the face of America—particularly the roles and responsibilities of local police officers and the military.²³ The aftermath of 9/11 and the government's response to 9/11 caused many Americans to become nervous about the balance between the government's mission to protect the citizenry and the very essence of civil liberties.²⁴ Nearly four years after 9/11, on August 29, 2005, America again faced the dilemma of giving up freedoms for protection. This time, however, the protection being sought was not from a clandestine terrorist sect, but rather from Mother Nature. Both 9/11 and Hurricane

¹⁹ Use of Army and Air Force as Posse Comitatus, 18 U.S.C. § 1385 (2012). "Whoever . . . 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." *Id.* The Posse Comitatus Act (the "Act") originally prohibited the expenditure of federal monies to use troops as a posse comitatus to execute the laws. Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 90–91 (2003). By amendment, that funding limit was replaced by the criminal penalties of a fine and imprisonment. *Id.* at 91. Litigation involving the Act, however, has focused almost solely on which armed forces are covered under the Act's prohibition and how to define "execute the laws," leaving the Act's other elements largely unaddressed. *Id.* A 2010 New Mexico case held that a defendant charged with drug trafficking was not entitled to any relief even if the Air Force's investigation of him violated the Act. See *State v. Gonzales*, 247 P.3d 1111 (N.M. Ct. App., Sept. 28, 2010).

²⁰ See generally *infra* Part III.A.2.

²¹ See *id.*

²² See *id.*

²³ The United States Military is no longer America's primary means of defense; it is now a primary fighting force whose ranks are filled with battle-hardened warriors. So, too, has the mission of police officers changed: the friendly community peace officer is gone; he is replaced by para-military, SWAT-trained cops armed with assault rifles, night vision, and gas masks. See *infra* Part III.A.1.

²⁴ Dan Bennett, Comment, *The Domestic Role of the Military in America: Why Modifying or Repealing the Posse Comitatus Act Would Be a Mistake*, 10 LEWIS & CLARK L. REV. 935, 935 (2006) (stating that shortly after 9/11, "many long-held beliefs about the proper balance between civil liberties and the role of the government in protecting its citizens have been called into question."). Benjamin Franklin once said, "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety." Pennsylvania Assembly: Reply to the Governor (Nov. 11, 1755), in 6 THE PAPERS OF BENJAMIN FRANKLIN 238, 242 (Leonard W. Labaree ed., 1963). Fortunately for Revolution, Mr. Franklin made this statement in a time before briefcase bombs and planes flying into buildings. The truth is that we live in a world where we must balance the freedoms that make us who we are against the very survival of our people. After all, the exercise of our liberties depends upon us being alive to exercise them.

Katrina called into question the practicality and the wisdom of the Posse Comitatus Act.²⁵ This is ostensibly because Posse Comitatus limited the federal government's ability to use its full spectrum of power to respond to the catastrophes quickly and effectively.²⁶

To understand where the country should go with regards to the Posse Comitatus Act, it is necessary to understand where the country has been. This section will examine the history of Posse Comitatus, exploring its purpose and roots in American traditions. Next, this section will analyze the Posse Comitatus Act itself. Finally, this section will present the "sister" laws and the exceptions to Posse Comitatus and how the laws interact to make up the entire body of Posse Comitatus jurisprudence.

A. *The History of Posse Comitatus*

1. *The Roots of the Act*

The Latin phrase "Posse Comitatus" literally translates to "power of the county" or county force.²⁷ It represents the power of a sheriff to keep the peace by calling together a group of citizens to act in a law enforcement capacity.²⁸ In American law, the phrase simply refers to the principle that the federal military shall not be used in calling together a "posse."²⁹

The debate in this country over whether the military should be used in domestic law enforcement does not date back to the revolutionary period.³⁰ The argument during the founding of the country was not over whether posse comitatus would be allowed, but whether a standing army should be allowed.³¹ "Anti-Federalists believed granting a newly formed federal legislature power to raise and support armies in peacetime and wartime could destroy the people's liberty.

²⁵ John R. Longley III, *Military Purpose Act: An Alternative to the Posse Comitatus Act—Accomplishing Congress's Intent with Clear Statutory Language*, 49 ARIZ. L. REV. 717, 718 (2007) ("With the events of September 11, the continued threat of domestic terrorism, the national debate on border security, and the problem-plagued response to Hurricane Katrina, critics of the PCA [Posse Comitatus Act] argue that by failing to provide clear guidance for domestic military use the Act is detrimental to national security.").

²⁶ See Bennett, *supra* note 24.

²⁷ *Posse Comitatus*, BLACK'S LAW DICTIONARY 3869 (8th ed. 2004).

²⁸ *Id.*

²⁹ *Posse Comitatus*, BLACK'S LAW DICTIONARY 1183 (7th ed. 1999) (defining "posse comitatus" as "[a] group of citizens who are called together to assist the sheriff in keeping the peace.—Often shortened to *posse*"); *Laird v. Tatum*, 408 U.S. 1, 32 (1972) (Douglas, J., dissenting) (stating that the Posse Comitatus Act "forbids the use of military troops as a posse comitatus").

³⁰ Bennett, *supra* note 24, at 941.

³¹ Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457, 481 (2002). In fact, a sheriff's power to call up the "able-bodied men to form a posse was an established feature of the common law" at the time of the American Revolution. Felicetti & Luce, *supra* note 19, at 95. A common law posse comitatus, though, "followed the direction of the local sheriff," not a federal authority. *Id.* at 96.

Consequently, there ‘was a significant citizen sentiment against the mere presence of standing armies, particularly in peacetime.’³² Citizen sentiment was such that the Declaration of Independence specifically addressed the issue, declaring that the crown “has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.”³³

Many of the original states were gravely concerned that a standing army would pose a threat to their continued freedom, as evidenced in their respective state constitutions.³⁴ For example, both North Carolina’s and Pennsylvania’s constitutions decree that “standing armies in time of peace are dangerous to liberty, [and] they ought not to be kept up.”³⁵ The states of Delaware, Maryland, Massachusetts, and New Hampshire went further, declaring that “standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the legislature.”³⁶ At the national level, the Third Amendment’s “prohibition against compelled quartering of soldiers during peacetime stands as a monument to the fear of standing armies.”³⁷

While the fear of standing armies was widespread in the early days of the Union, “the use of a Posse Comitatus was not expressly disavowed in the founding era.”³⁸ Indeed, Alexander Hamilton, while arguing against the Anti-Federalist movement, proffered the position that the soon-to-be-ratified Constitution supported the use of Posse Comitatus.³⁹ Hamilton summarized his opponents’ arguments as follows:

It being therefore evident that the supposition of a want of power to require the aid of the POSSE COMITATUS is entirely destitute of color, it will follow that the conclusion which has been drawn from it, in its application to the authority of the federal government over the militia is as uncandid as it is illogical.⁴⁰

Hamilton based his argument on “the right of Congress to pass all laws necessary and proper to execute its declared powers [to] include the assistance of

³² Christopher J. Schmidt & David A. Klingler, *Altering the Posse Comitatus Act: Letting the Military Address Terrorist Attacks on U.S. Soil*, 39 CREIGHTON L. REV. 667, 688 (2006) (quoting Christopher J. Schmidt, *Could a CIA or FBI Agent Be Quartered in Your House During a War on Terrorism, Iraq or North Korea?*, 48 ST. LOUIS U. L.J. 587, 651 (2004) [hereinafter *Quartered in Your House*]).

³³ THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).

³⁴ Schmidt & Klingler, *supra* note 32, at 688.

³⁵ *Id.* (citing THE FEDERALIST NO. 24 (Alexander Hamilton)).

³⁶ *Id.*

³⁷ *Id.* (citing U.S. CONST. amend. XII (“No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”)).

³⁸ *Id.* (citing Felicetti & Luce, *supra* note 31, at 95).

³⁹ THE FEDERALIST NO. 29, at 182 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“In order to cast an odium upon the power of calling forth the militia to execute the Laws of the Union, it has been remarked that there is no where any provision in the proposed Constitution for calling out the POSSE COMITATUS, to assist the magistrate in the execution of his duty; whence it has been inferred that military force was intended to be his only auxiliary.”).

⁴⁰ *Id.* at 183.

citizens [and] the officers entrusted with the execution of laws.”⁴¹ Interestingly, although Hamilton appears to advocate for citizen militias having the ability to enforce domestic law, it is likely that he would “not have similarly argued for a large, professional standing army to act as a posse comitatus.”⁴² This aligns with early American thought as citizen militias were generally more trusted than a standing army because “the citizenry feared the power of a standing army.”⁴³

Soon after the Constitution was ratified, Congress enacted a law that permitted presidents to use the militia as backup to civilian law enforcement for the limited purpose of suppressing civil unrest.⁴⁴ However, even when citizen soldiers were allowed to be called to serve in the militia to help quell disorder, the standing federal army was excluded from such practices.⁴⁵

The roots of the debate concerning the law enforcement capabilities of the federal army may have started during the formation of the Nation, but it was during the Civil War and Reconstruction that the debate came to a head. Indeed, the Posse Comitatus Act “was drafted and passed in the aftermath of suspicion that federal troops had improperly influenced the southern vote in the presidential election of 1876.”⁴⁶ In that election, New York Governor Samuel J. Tilden, the Democratic nominee, won the popular vote, but ultimately lost the election; the Electoral College failed to indicate a clear winner, thus sending the vote for the presidency to the Congress.⁴⁷ The Republicans in Congress, who controlled the Senate, declared Republican candidate Rutherford B. Hayes the nineteenth President of the United States.⁴⁸

As part of the deal struck to make him president, Hayes agreed to numerous concessions, most significantly the withdrawal of federal troops from the South, ending Reconstruction.⁴⁹ Thus, in order “to prevent further ‘excessive use of federal machinery under the Federal Election Laws [as] in the presidential election

⁴¹ Schmidt & Klinger, *supra* note 32, at 688–89.

⁴² *Id.*

⁴³ *Id.* (citing *Quartered in Your House*, *supra* note 32).

⁴⁴ Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 392 (2003) (citing Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264).

⁴⁵ *Id.*

⁴⁶ Bennett, *supra* note 24, at 941.

⁴⁷ *Id.* at 941–42.

⁴⁸ See Robert McNamara, *The Election of 1876: Hayes Lost Popular Vote but Won White House*, ABOUT.COM, <http://history1800s.about.com/od/presidentialcampaigns/a/electionof1876.htm> [<https://perma.cc/2FY3-ULFG>] (last visited Nov. 23, 2015). Republicans controlled the Senate and Democrats controlled the House of Representatives when Congress agreed to form an Electoral Commission in order to resolve the election results. *Id.* That Commission had seven Democrats and seven Republicans from the Congress and a fifteenth member from the Supreme Court who was a Republican. *Id.* The Commission voted along party lines, giving the presidency to Hayes. *Id.*

⁴⁹ Kealy, *supra* note 44, at 394. Democrats dropped their opposition to Hayes’s selection for certain concessions, including the withdrawal of most federal troops from the South and a non-interference policy. Felicetti & Luce, *supra* note 19, at 109 n.105. The arrival of federal troops,

of 1876,'” the forty-fifth Congress passed the Posse Comitatus Act and President Hayes signed it into law.⁵⁰

2. *The Forgotten Act*

From conception, the extent that the Posse Comitatus Act limited military involvement in civil law enforcement was ill-defined and made for contentious debate.⁵¹ Immediately after the Act was passed, there was disagreement concerning the extent to which the Act limited a president’s power to use the military to enforce domestic law.⁵² Those who sided with the executive branch argued that the Act “had no effect on presidential power, viewing the act only as a direct repudiation of the Cushing Doctrine that allowed local sheriffs to call out the military to assist in law enforcement.”⁵³ Opponents of this view, already believing that a president was limited in his ability to use federal troops to execute domestic law, argued that the Posse Comitatus Act directly tapered the executive’s already-limited power to use the military to those situations explicitly enumerated by the Act.⁵⁴

A larger problem than these differing views as to the proper scope of its limitations was that the Posse Comitatus Act was simply ignored. Indeed, the

including black soldiers, had undermined the slaveholders’ authority even before the Emancipation Proclamation formally announced the end of slavery. *Id.* at 100. After the war was lost, the mere “presence of victorious Union troops, including former slaves, humiliated many former Confederates,” while enabling the safe rise of black political power and organization. *Id.* at 100–01. The deal struck to remove federal troops from the Southern states and end Reconstruction and was, therefore, a significant concession and a huge blow to white power in the South. *Id.* at 100–01.

⁵⁰ Bennett, *supra* note 24, at 942.

⁵¹ Felicetti & Luce, *supra* note 19, at 114–15.

As with many controversial laws, the full extent of the Posse Comitatus Act was not clear to all the congressional and executive participants. Some believed, or hoped at least, that the law limited the President’s ability to use Army troops domestically to those few instances specifically enumerated in other statutes. This interpretation relied upon two implicit beliefs: (1) the Constitution provided no authority for presidential use of the Army to execute the law; and (2) the language proposed by Senator Hill, but not adopted, was the law. It also tended to focus on the rhetoric of some of the bill’s strongest Southern supporters as opposed to the law’s actual text.

Others involved in the debate thought, or hoped, that the law merely restated the obvious. After all, federal law authorized President Grant’s use of troops to keep the peace at polling places during the 1876 election. Moreover, the Cushing Doctrine simply articulated long-standing practice that had been ratified by at least three Presidents and the Senate Judiciary Committee. This interpretation, however, minimized the multi-year effort of Southern Democrats to pass the Act. They certainly didn’t think that the Act simply restated the obvious.

Id.

⁵² Longley, *supra* note 25, at 720.

⁵³ *Id.*

⁵⁴ *Id.*

same year that President Hayes signed the Posse Comitatus bill, he marched federal troops to New Mexico in order to quell the territory's civil disorder.⁵⁵ The deployment was set in motion by a presidential proclamation with no contribution or attempts at intervention by Congress, suggesting that the Act had little or no effect on presidential power from the start.⁵⁶ President Hayes was not the only commander-in-chief to deploy soldiers to fight lawlessness or for other domestic law enforcement missions.⁵⁷ In 1894, President Grover Cleveland deployed federal troops to Illinois to help suppress rioting railroad strikers.⁵⁸ Congress itself issued no objection to and essentially remained silent towards this deployment, and the troops deployed over the strong objection of the Illinois Governor.⁵⁹

In fact, the only domestic deployment of military troops that provoked a response from Congress was President McKinley's use of 500 troops in Coeur d'Alene, Idaho, from May 1899 to April 1901.⁶⁰ The deployment was meant to help local law enforcement handle a growing number of disgruntled union miners in the area.⁶¹ Congress, through the House Committee on Military Affairs, investigated the legality of the President's deployment.⁶² The report that resulted from the investigation was partisan and split, however, with McKinley's Republican majority finding no fault with his or the military commander's actions.⁶³ In

⁵⁵ *Id.* "The deployment of troops to the New Mexico Territory was in response to what history has coined the Lincoln County War. Arguably, even under an expansive view of the PCA, the use of Federal Troops may have been allowed under the Insurrection Act." *Id.* at n.118 (citing Felicetti & Luce, *supra* note 19, at 119).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Felicetti & Luce, *supra* note 19, at 122.

⁵⁹ *Id.* Not only did the governor object, but the mayor had not even requested help from the state before federal troops were deployed. *Id.*

Over 4700 state National Guard troops were available to assist. At the peak of the riot, about 4000 were involved in quelling the disorder. This is not the only time that the Cleveland administration used a pretext to justify federal intervention in labor disputes. Army troops occupied Coeur d'Alene, Idaho, from July to September 1894 to protect unthreatened railroads and monitor tranquility. Earlier violence had subsided before the regulars arrived without even the call-up of state troops. Local officials pressured the governor to request federal troops, and keep them in place, to break the union.

Id. at 122 n.165 (citation omitted).

⁶⁰ *Id.* at 123.

⁶¹ *Id.* at 123–24.

⁶² *Id.* at 125.

⁶³ *Id.* at 125.

In a bold display of misdirection, the majority brushed aside the President's failure to issue a proclamation under R[evised] S[tatute] 5300 by reinventing the statute's text. According to the majority, the RS 5300 proclamation was only necessary when the President imposed martial law. The troop deployment was, therefore, perfectly legal under the anti-insurrection laws at RS 5297-5298.

... Surprisingly, the Democrats made absolutely no mention of the Posse Comitatus Act. Either Congress had already forgotten about it entirely, or Congress agreed that the Act only undid the Cushing Doctrine. Clearly, Congress did not see the Act as imposing any meaningful legal limit on the Commander in Chief's domestic use of the armed forces.

all, despite occasional rumblings from Congress, the Posse Comitatus Act was largely forgotten until the 1970s.⁶⁴

3. *The Act Is Reborn*

On February 27, 1973, the American Indian Movement, a radical Native American group, seized the town of Wounded Knee in the Pine Ridge Indian Reservation in order to protest a tribal chairman.⁶⁵ This sparked a seventy-one day standoff against federal law enforcement officials.⁶⁶ In order to help the civilian law enforcement, the Department of Defense sent a representative to give tactical advice and assess how the military could help.⁶⁷ Several individuals were arrested for trying to enter Wounded Knee and were charged with interfering with lawful performance of the officials' duties.⁶⁸ At trial, the defendants professed that law enforcement officials acted outside their legal authority when they made their arrests based on their use of military equipment and the military's involvement, generally.⁶⁹ The federal district courts in Nebraska, South Dakota, and North Dakota that heard these cases disagreed as to whether the Act had been violated, but each dealt in some detail with the Posse Comitatus Act, which was now on the radar of American jurisprudence.⁷⁰

4. *The Modern Act*

The original Posse Comitatus Act read, "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army 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."⁷¹ Thus, the 1878 Act only concerned the United States Army. Yet, the Act covered the Air Force from its conception "because the Air Force originated as a part of the Army and housekeeping legislation maintained the coverage of legislation formerly applicable only to the Army."⁷² When the Air Force became its

Id.

⁶⁴ Longley, *supra* note 25, at 721.

⁶⁵ Alysa Landry, *Native History: AIM Occupation of Wounded Knee Begins*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 27, 2014), <http://indiancountrytodaymedianetwork.com/2014/02/27/native-history-aim-occupation-wounded-knee-begins-153765> [https://perma.cc/6WQ5-GFHW]. Approximately "250 Sioux Indians led by members of the American Indian Movement converged on South Dakota's Pine Ridge Reservation, launching the famous 71-day occupation of Wounded Knee." *Id.*

⁶⁶ Longley, *supra* note 25, at 721.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 18 U.S.C. § 1385; *see also* United States v. Walden, 490 F.2d 372, 375 n.5 (4th Cir. 1974) (stating that, when the Act was amended in 1958, there was no substantive change except the addition of the words "Air Force" to the text).

⁷² *Id.* at 374-75.

own branch and separated from the Army, Congress specifically provided that the Posse Comitatus Act continued to apply to the newly formed branch.⁷³ In 1956, the Act was amended with the words “or the Air Force” added immediately following the word “Army.”⁷⁴

Unlike the Army, and later the Air Force, the Posse Comitatus Act has never included the United States Navy and Marine Corps.⁷⁵ This fact is not based on congressional intent to exclude these branches from the Act, but rather because the original Posse Comitatus Act was passed as part of an Army Appropriations Bill.⁷⁶ The Department of Defense, however, by an internal directive, extended the Posse Comitatus Act to include the Navy and the Marine Corps.⁷⁷

B. Judicial Application of the Act

The United States Supreme Court has only mentioned the Posse Comitatus Act in a single case, *Laird v. Tatum*,⁷⁸ a 1972 case that involved a challenge to the Army’s domestic surveillance program.⁷⁹ Lower courts, however, developed tests for applying the Act in their respective jurisdictions in response to the Wounded Knee litigation.⁸⁰ In each of those cases, the defendants were charged with either interfering with or obstructing law enforcement officers engaged in lawful performance of their duties, so in each case the Act was only raised by the

⁷³ *Id.* at 375; see National Security Act of 1947, 50 U.S.C.A. § 3004 (West 2012).

⁷⁴ *Walden*, 490 F.2d at 375 n.5; see also 18 U.S.C. § 1385 (2012) (originally enacted as Act of August 10, 1956, ch. 1041 § 18(a), 70A Stat. 626).

⁷⁵ See *United States v. Chon*, 210 F.3d 990, 993 (9th Cir. 2000), *cert. denied*, 531 U.S. 910 (2000) (stating that although the Posse Comitatus Act prohibits the Army and Air Force from participating in civilian law enforcement activities, it does not directly reference the Navy or Marine Corps, but noting that that omission does not constitute congressional approval for Navy involvement in enforcing civilian laws).

⁷⁶ See *Walden*, 490 F.2d at 374.

⁷⁷ The Navy and the Department of Defense have applied the Posse Comitatus Act to the Navy as a matter of executive policy. See OFFICE OF THE SEC’Y, DEP’T OF THE NAVY, INSTRUCTION NO. 5820.7B, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (1988); DEP’T OF DEFENSE, DIRECTIVE NO. 5525.5, DoD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (1986) [hereinafter DoDD 5525.5]; see also Mark P. Nevitt, *Unintended Consequences: The Posse Comitatus Act in the Modern Era*, 36 CARDOZO L. REV. 119, 122 (2014). “Nevertheless, neither institution has wavered from its longstanding view that the Act does not apply to any military service other than the Army and the Air Force.” 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, 467 (1990). In addition, the Ninth Circuit has applied the Posse Comitatus Act in full force against the Navy because of this DoD policy. See *United States v. Dreyer*, 767 F.3d 826, 830 (9th Cir. 2014).

⁷⁸ 408 U.S. 1, 32 (1972) (Douglas, J., dissenting).

⁷⁹ Longley, *supra* note 25, at 722. The Posse Comitatus Act was only cited in the appendix in Justice Douglas’s dissent and did not contain an in-depth analysis regarding how it should be applied. See *Laird*, 408 U.S. at 32 (stating that the Posse Comitatus Act “forbids the use of military troops as a posse comitatus”). Without fully explaining why, Justice Douglas stated that the Army’s domestic surveillance program violated the Posse Comitatus Act. *Id.* at 29, 32; see Longley, *supra* note 25, at 722.

⁸⁰ Longley, *supra* note 25, at 722.

defense to defeat the prosecution's argument that the arresting or investigating agents were engaged in the "lawful" performance of their duties.⁸¹ The North Dakota, South Dakota, and Nebraska federal courts developed three distinct tests, which define the level of military intervention in civilian law enforcement allowed under Posse Comitatus. These tests, which developed at the district court level, have "formed the foundation of [Posse Comitatus] jurisprudence over the last thirty years."⁸²

The first test arose out of the District of North Dakota in *United States v. McArthur*.⁸³ The *McArthur* test asks, "Are Citizens Being Subjected to Military Power that is Regulatory, Proscriptive, or Compulsory in Nature?"⁸⁴ In the District of Nebraska, *United States v. Jaramillo*⁸⁵ focused on civilian law enforcement instead of the citizenry and asked, "Does the Use of the Military Pervade the Activities of Law Enforcement Officials?"⁸⁶

The last test came from the District of South Dakota in *United States v. Red Feather*.⁸⁷ There, the court asked whether "the Military [was] Used in a Direct and Active Role?"⁸⁸ The court held that the Act had "two separate" elements.⁸⁹ First, to violate the Act, the government must use the military directly, not merely

⁸¹ See *United States v. McArthur*, 419 F. Supp. 186, 189, 192–94 (D.N.D. 1975); *United States v. Red Feather*, 392 F. Supp. 916, 918, 921–24 (D.S.D. 1975); *United States v. Jaramillo*, 380 F. Supp. 1375, 1376, 1378–81 (D. Neb. 1974).

⁸² Longley, *supra* note 25, at 722.

⁸³ 419 F. Supp. 186, 194 (D.N.D. 1975).

⁸⁴ Longley, *supra* note 25, at 722 (citing *McArthur*, 419 F. Supp. at 190–91). Here, Judge Van Sickle undertook the consolidated review of ten indictments resulting from the Wounded Knee standoff. The issue in the case was whether law enforcement officers lawfully performed their duties when they arrested the defendants. . . . Judge Van Sickle dismissed four for insufficient evidence and found the remaining six defendants guilty as charged.

Id.

⁸⁵ 380 F. Supp. 1375 (D. Neb. 1974).

⁸⁶ Longley, *supra* note 25, at 723 (citing *Jaramillo*, 380 F. Supp. at 1376). The Judge in *Jaramillo*, Judge Urbom held that the government did not establish that the overarching "law enforcement activities at Wounded Knee were lawful." *Id.* This is critical because, under 18 U.S.C. § 231(a)(3) (2012), the government has the burden to establish that the "law enforcement officials were lawfully performing their duties." *Id.* Hence, because the "government failed to show that the involvement of Colonel Warner and military maintenance personnel did not violate the [Posse Comitatus Act], and therefore failed to show that federal law enforcement officials lawfully performed their duties, Judge Urbom acquitted the defendants." *Id.* To determine if federal troops had indeed encroached on law enforcement functions, Judge Urbom asked if the military personnel had "pervaded the activities" of the civilian authorities. *Id.* However, the *Jaramillo* decision did not hold that "lending equipment between government agencies" violated the Posse Comitatus Act. *Id.* at 724. Lastly, Judge Urbom found that, "had the President ordered military use at Wounded Knee pursuant to his insurrection powers or had Congress specifically authorized military personnel to provide advice and maintenance assistance to civilian law enforcement, [military involvement] would have been lawful, even if it 'pervaded the activities' of law enforcement officials." *Id.*

⁸⁷ 392 F. Supp. 916 (D.S.D. 1975).

⁸⁸ Longley, *supra* note 25, at 721 (citing *Red Feather*, 392 F. Supp. at 921–22).

⁸⁹ *Id.*

in a supportive role and not merely by using military equipment.⁹⁰ Second, the court held that the Act “created a requirement that military personnel be *active* participants in law enforcement activities before the [Act] was implicated. . . . [P]roviding military equipment, advice, maintenance assistance, and training . . . constitutes passive participation by the military . . . ,” which the court found permissible.⁹¹

Clearly, the “Wounded Knee” tests have failed to provide a uniform, “clear,” or “predictable standard to civilian and military officials.”⁹² Indeed, since the Wounded Knee decision and its progeny, courts have continued to place emphasis on the Act’s “‘execute the laws’ provision.”⁹³ In addition, because of the high level of military involvement that is necessary before the courts are willing to call “foul,” there have seldom been even charges of violations of the Act, thus there have been few occasions to bring controversies before a court and smooth out the very rough edges of Posse Comitatus jurisprudence.⁹⁴ Rather, because the courts that have looked at the issue have not conducted constitutional analyses of the Act itself, focusing instead on the somewhat pedantic question of whether the military was executing laws in a given case, the jurisprudence is left only more confused and complex.⁹⁵

Recently, in *United States v. Dryer*, the Ninth Circuit weighed in on Posse Comitatus in regard to the ever growing world of high-tech law enforcement.⁹⁶ In *Dryer*, a special agent with the Navy Criminal Investigative Service (NCIS) investigated a civilian for online distribution and possession of child pornography.⁹⁷ The court asserted that because the Defendant was not associated with the military, the Posse Comitatus Act prevented the NCIS agent from giving that type of direct assistance to civilian law enforcement. Therefore, the Ninth Circuit held that the NCIS’s investigation violated the Act.⁹⁸ The court reversed the district court’s denial of the defendant’s suppression motion and remanded it for further proceedings.⁹⁹

⁹⁰ *Id.*

⁹¹ *Id.* at 725.

⁹² *Id.* (“The malleability and ambiguity of the PCA’s ‘execute the laws’ provision can be seen in the differing results of the Wounded Knee courts.”) *Id.* at n.70. Indeed, compare *McArthur*, 419 F. Supp. at 194 (no violation), *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976) (use of armed forces “was not material enough to taint the presumption that [the] officers were acting in performance of their duties”), and *Red Feather*, 392 F. Supp. at 924–25 (military involvement was passive, therefore no violation), with *Jaramillo*, 380 F. Supp. at 1379–81 (prosecution failed to show no Posse Comitatus Act violation).

⁹³ Longley, *supra* note 25, at 726.

⁹⁴ *See id.*

⁹⁵ *Id.*

⁹⁶ *United States v. Dreyer*, 767 F.3d 826, 827–28 (9th Cir. 2014).

⁹⁷ *Id.*

⁹⁸ *Id.* at 831–32, 835.

⁹⁹ *Id.* at 837.

II. EXCEPTIONS AND VARIATIONS TO THE ACT

Certain uniformed branches have been exempted from the Posse Comitatus Act by omission. The Coast Guard is a federal uniformed service, but is not mentioned in the Act. In fact, the Coast Guard is authorized to “assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters.”¹⁰⁰ In addition, although the Act does not address the National Guard, it is generally understood that when the National Guard is under federal control, the Act applies.¹⁰¹ However, when a state’s Air or Army National Guard is under the command of the respective state’s governor, rather than a federal official, those personnel are exempt from the Act—despite their status as soldiers or airmen and their dress in federal uniforms with “U.S. Army” or “U.S. Air Force” sewn on the chests.¹⁰² In addition to these exemptions by omission, the Posse Comitatus Act is not applicable when either Congress or the Constitution expressly authorizes “policing” by the military.¹⁰³ Some other exceptions, created by either statute or other rule making authority, specifically exempt federal troops from certain functions that are within the purview of civilian law enforcement.¹⁰⁴

¹⁰⁰ 14 U.S.C. § 2 (2012) (“The Coast Guard shall—(1) enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States.”).

¹⁰¹ Joshua M. Samek, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?*, 61 U. MIAMI L. REV. 441, 446 (2007).

¹⁰² *Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999).

The Act does not apply to members of the National Guard unless they have been called into “federal service.” Until called into such service, members of the National Guard remain state, rather than federal officers. Thus, “[e]xcept when employed in the service of the United States, officers of the National Guard continue to be officers of the state and not officers of the United States or of the Military Establishment of the United States.” “Guardsmen do not become part of the Army itself,” as pointed out in *United States v. Hutchings*, “until such time as they may be ordered into active federal duty by an official acting under a grant of statutory authority from Congress.” Only when “that triggering event occurs [does] a Guardsman become[] a part of the Army and lose[] his status as a state serviceman.”

Id. (citations omitted) (alteration in original) (quoting *Perpich v. Dep’t of Defense*, 496 U.S. 334, 345 (1990); then quoting *United States v. Dern*, 74 F.2d 485, 487 (D.C. Cir. 1934); then quoting *United States v. Hutchings*, 127 F.3d 1255, 1258 (10th Cir. 1997)).

¹⁰³ Samek, *supra* note 101.

¹⁰⁴ *See id.* at 446–47. There are many minor statutory exceptions to the Posse Comitatus Act:

16 U.S.C. § 23 (Secretary of the Army may detail troops to protect Yellowstone National Park upon the request of the Secretary of the Interior);

16 U.S.C. § 78 (Secretary of the Army may detail troops to protect Sequoia and Yosemite National Parks upon the request of the Secretary of the Interior);

16 U.S.C. § 593 (President may use the land and naval forces of the United States to prevent destruction of federal timber in Florida);

...;

18 U.S.C. §§ 112, 1116 (Attorney General may request the assistance of federal or state agencies—including the Army, Navy and Air Force—to protect foreign dignitaries from assault, manslaughter and murder);

A. *Homeland Security Act of 2002*

When Congress enacted the Posse Comitatus Act, there was widespread debate concerning whether the Act applied to the President of the United States, or only to U.S. Marshals and other civilian law enforcement, to preclude them from calling upon the military for domestic action.¹⁰⁵ The enactment of the Homeland Security Act of 2002 (HSA) put this debate to rest.¹⁰⁶ Specifically, section 466(a)(4) of the HSA excepts enforcement of the Posse Comitatus Act “when the use of the Armed Forces is authorized by [an] Act of Congress or the President determines that the use of the Armed Forces is required to fulfill the President’s obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency.”¹⁰⁷ Consequently, according to the HSA, the President may call out soldiers for a civilian law enforcement function so long as the President deems the deployment necessary to respond to insurrection, war, or some other major emergency.¹⁰⁸

18 U.S.C. § 351 (FBI may request the assistance of any federal or state agency—including the Army, Navy and Air Force—in its investigations of the assassination, kidnapping or assault of a Member of Congress);

...;

18 U.S.C. § 3056 (Director of the Secret Service may request assistance from the Department of Defense and other federal agencies to protect the President);

...;

25 U.S.C. § 180 (President may use military force to remove trespassers from Indian treaty lands);

42 U.S.C. § 98 (Secretary of the Navy at the request of the Public Health Service may make vessels or hulks available to quarantine authority at various U.S. ports);

42 U.S.C. § 1989 (magistrates issuing arrest warrants for civil rights violations may authorize those serving the warrants to call for assistance from bystanders, the posse comitatus, or the land or naval forces or militia of the United States).

Id. at 446 n.26 (quoting CHARLES DOYLE, CONG. RESEARCH SERV., CRS REP. 95-964 S, THE POSSE COMITATUS ACT & RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 21–22 n.48 (2000)).

¹⁰⁵ See Pub. L. No. 107-296, § 886, 116 Stat. 2135 (2002) (codified in 6 U.S.C. § 466); see also G. NORMAN LIEBER, THE USE OF THE ARMY IN AID OF THE CIVIL POWER 11–16 (1898). The act “was expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing Federal law.” 6 U.S.C. § 466(a)(2) (2012). Thus, before the HSA, the Act only applied to the Marshals and not to the President. See *id.*

¹⁰⁶ See 6 U.S.C. § 466 (2012). It should be noted that because the HSA states that the Posse Comitatus Act does not apply to the President when he is performing certain functions, the HSA is not technically an *exception* to the ban on Posse Comitatus, as this section suggests, but rather a clarification of the Act. See *id.*

¹⁰⁷ *Id.* § 466(a)(4).

¹⁰⁸ See *id.*

*B. Insurrection Act*¹⁰⁹

Using federal troops to fight an insurrection is not a new concept introduced by the HSA. The Insurrection Act has been in existence since 1792 “in one form or another.”¹¹⁰ In its original form, the Insurrection Act was passed pursuant to the Constitution’s Article I “calling forth” clause and “it limited the President to using militia in response to invasion, insurrection, or obstructions of laws ‘too powerful to be suppressed by the ordinary course of judicial proceedings.’”¹¹¹ In a later version, Congress expanded the Act in order to give the President the power to respond to hostilities with Spain and to take action against the Aaron Burr Conspiracy.¹¹² In the contemporary version of the Insurrection Act, Congress has given the President the power to (1) “use . . . the armed forces, as he considers necessary to suppress the insurrection”;¹¹³ (2) send federal troops when it is “impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings”;¹¹⁴ (3) “suppress the rebellion”;¹¹⁵ and (4) “respond to failures by the states to guarantee the rights, privileges, and immunities guaranteed by the Constitution.”¹¹⁶

C. Military Support for Civilian Authorities “Act”

The military, through the Department of Defense (DOD), partitions its support of civil law enforcement into three main categories: Military Support to Civil Authorities, DOD Cooperation with Civilian Law Enforcement Officials, and Military Assistance for Civil Disturbances.¹¹⁷ Each category is promulgated

¹⁰⁹ It is debatable whether the Insurrection Act is an exception to or expansion of the Posse Comitatus Act. Indeed, as discussed, there is a long-standing debate as to whether the President’s actions were ever even regulated by the Posse Comitatus Act. *See supra* Part II.A. As such, if the Posse Comitatus Act never applied to the President, then the Insurrection Act was never an exception to the Act. The HSA put this debate to rest, making it clear that it does not apply to the President. *See id.*

¹¹⁰ Longley, *supra* note 25, at 732.

¹¹¹ *Id.* (citing Insurrection Act, ch. 28, 1 Stat. 264, 264 (1792) (repealed 1795)).

¹¹² *Id.* (citing Act of March 3, 1807, ch. 39, 2 Stat. 443, 443 (current version at 10 U.S.C. §§ 331–335 (2012))). Former Vice President Aaron Burr (under Thomas Jefferson) planned an extensive scheme to become the leader of a new nation in the western part of the territories. SAMUEL E. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 367–69 (1965).

¹¹³ 10 U.S.C. § 331 (2012); *see also* JENNIFER K. ELSEA & R. CHUCK MASON, CONG. RESEARCH SERV., RS22266, *THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES* 2 (2012) (“The Insurrection Act has been used to send the armed forces to quell civil disturbances a number of times during U.S. history, most recently during the 1992 Los Angeles riots and during Hurricane Hugo in 1989, during which widespread looting was reported in St. Croix, Virgin Islands.”).

¹¹⁴ 10 U.S.C. § 332 (2012).

¹¹⁵ *Id.*; *see also* Stephen I. Vladeck, Note, Emergency Power and the Militia Acts, 114 *YALE L.J.* 149, 164–65 (2004) (tracing the origins of the Insurrection Act).

¹¹⁶ Longley, *supra* note 25, at 733 (citing 10 U.S.C. § 333 (2006)).

¹¹⁷ Samek, *supra* note 101, at 447 (citing DEP’T OF DEF., DIRECTIVE 3025.15, *MILITARY ASSISTANCE TO CIVIL AUTHORITIES* 17 (1997)).

by a detailed directive published by the DOD, which outlines the DOD's guidance to military and civilian law enforcement and the parameters of the authorization to use military personnel, training, and equipment in civilian missions.¹¹⁸

Directive 3025.1, Military Support to Civil Authorities, provides for a central system in which the various components of the DOD can plan and respond to requests for support from civil agencies for civil emergencies.¹¹⁹ The DOD also provides "assistance to civil authorities, including support in connection with incidents involving an act or threat of terrorism."¹²⁰ The directive authorizes the DOD to provide an immediate response during emergencies upon the request of civilian authorities in order "to save lives, prevent human suffering, or mitigate great property damage," but only when the President has *not* declared a national emergency, in which case some other authority to act is invoked.¹²¹

The DOD Cooperation with Civilian Law Enforcement Officials, Directive 5525.5, was published on January 15, 1986, and updated on December 20, 1989.¹²² This Directive's stated policy is "to cooperate with civilian law enforcement officials to the extent practical. The implementation of this policy shall be consistent with the needs of national security and military preparedness, the historic tradition of limiting direct military involvement in civilian law enforcement activities, and the requirements of applicable law."¹²³ Congress explicitly supported this policy objective by authorizing the DOD to share information, equipment, and training with civilian law enforcement agencies and by authorizing the DOD to assist law enforcement agencies after the detonation of a chemical, biological, or nuclear weapon.¹²⁴ However, despite this seemingly wide latitude of authority, Congress has specifically restricted "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law."¹²⁵

¹¹⁸ *Id.* at 447, 449.

¹¹⁹ *Id.* at 448.

¹²⁰ DEP'T OF DEF., DIRECTIVE 2000.12, DoD ANTITERRORISM/FORCE PROTECTION (AT/FP) PROGRAM 2-3 (1999) (describing the obligations of the military during a terrorist act under Directive 3025.15).

The employment of U.S. military forces in response to acts or threats of domestic terrorism must be requested by the Attorney General and authorized by the President. All requests for assistance in responding to acts or threats of terrorism must be approved by the Secretary of Defense. The Chairman of the Joint Chiefs of Staff shall assist the Secretary of Defense in implementing the DoD operational response to acts or threats of terrorism.

Id.

¹²¹ Samek, *supra* note 101, at 449-50. For example, the Stafford Act allows military assistance when civilian authorities request the intervention and the President has not yet declared a national emergency. *See infra* Part II.D.

¹²² DEP'T OF DEF., DIRECTIVE 5525.5, DoD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (1986).

¹²³ *Id.*

¹²⁴ 10 U.S.C. §§ 371, 382 (2012).

¹²⁵ 10 U.S.C. § 375 (2012).

The third main category of military support for civilian law enforcement, and which acts as an exception to the Posse Comitatus Act, is Military Assistance for Civilian Disturbances.¹²⁶ Directive 3025.12 recognizes the power of the President to mobilize the military and use it in response to “insurrections, rebellions, and domestic violence,” and to maintain general law and order.¹²⁷

Because the directives are drafted by the military, for the military, critics have always regarded the authority granted as overbroad.¹²⁸ Yet, in the wake of convoluted legal precedent, the DOD has been diligent in trying to provide much needed support through the guidance these directives offer.¹²⁹

At the same time, this DOD support has accelerated, or at the very least facilitated, the growth of the apparatus that has contributed to the police militarization we see today. Specifically, the Defense Excess Property Program (known colloquially as the DOD’s 1033 Program) was designed to better equip local communities to handle law enforcement matters themselves.¹³⁰ Yet, as seen

¹²⁶ DEP’T OF DEF., DIRECTIVE NO. 3025.12, MILITARY ASSISTANCE FOR CIVILIAN DISTURBANCES 3–4 (1994).

¹²⁷ *Id.*

¹²⁸ See, e.g., Tom Burghardt, *Militarizing the “Homeland” in Response to the Economic and Political Crisis*, GLOBAL RES. (Oct. 11, 2008), <http://www.globalresearch.ca/militarizing-the-homeland-in-response-to-the-economic-and-political-crisis/10534> [https://perma.cc/7Z8H-VCKY].

¹²⁹ Longley, *supra* note 25, at 738–39.

The DOD has not done as well in clarifying the scope of the PCA in terms of what activities constitute a law enforcement activity. DODD 5525.5 states that direct assistance to law enforcement by the military violates the PCA except as otherwise provided in the enclosure 4 of DODD 5525.5. And though DODD 5525.5 goes on to list many of the activities that have been identified by courts and Congress as being beyond the scope of the PCA’s “execute the laws” provision by virtue of their passivity, DODD 5525.5 itself fails to make the active/passive distinction. But even though the directive fails to explicitly state that assistance to law enforcement must be characterized as both *direct* and *active* to constitute a PCA violation, the actual effect of this shortcoming is minimal since the directive specifically authorizes those activities courts and Congress have found constitute passive assistance.

The DOD has also recognized that the PCA does not apply to non-law enforcement assistance to civilian authorities required during a disaster or emergency. In DOD Directive 3025.1 (“DODD 3025.1”), the military established guidelines that authorize the military, without any prior approval from the President, to assist civilian law enforcement during “[i]mminently serious conditions” when necessary to “save lives, prevent human suffering, or mitigate great property damage.” The types of assistance that the military is authorized to provide civil authorities include such things as evacuations, providing medical treatment, and clearing debris. The list does not include any law enforcement activities and thus properly recognizes the limited scope of the “execute the laws” provision of the PCA.

Therefore, despite the criticism that the PCA has been interpreted by the military too broadly, the military has, given the confusion surrounding the Act, done an excellent job of drafting directives to implement it. Yet this conclusion does not mean the PCA is a success, because in practice the military continues to apply the PCA too broadly. As long as the PCA’s restraints are applied too broadly in fact by the military, it is irrelevant how well the directives appear to encompass the PCA’s true character.

Id.

¹³⁰ See e.g., MO. DEP’T OF PUB. SAFETY, DEPARTMENT OF DEFENSE EXCESS PROPERTY PROGRAM (DOD 1033), <http://www.dps.mo.gov/dir/programs/cjle/dod.php> [https://perma.cc/7Z8H-VCKY].

across the nation and highlighted in Ferguson, the program has not led to community police forces handling matters independently; rather, we see multilayered responses by state and federal authorities whenever chaos erupts, such as it did in Ferguson in response to its Police Department's excessive and provocative reaction to its citizens.¹³¹

There, the reaction was, in part, a result of the Ferguson Police Department's early missteps in failing to properly deploy the military equipment it did have. It must be recognized that community peace officers are not soldiers and, therefore, should have no soldiering equipment to misuse. This suggests that local departments may lack the common-sense prudence to distinguish between circumstances that might merit the deployment of such weaponry (such as in cases involving the apprehension and arrest of violent suspects) against those that simply do not (such as in cases involving a community voicing its outrage over the violent death of an unarmed teenager at the hands of a government officer). It is, after all, shocking to see military grade assault rifles, mine resistant ambush protected vehicles (MRAPs), and grenade launchers aimed at U.S. citizens engaged in constitutionally protected protest in their own neighborhoods.¹³²

/5SJG-JJR6] (last visited Nov. 23, 2013). Started in 1997, that was originally a program that authorized the Department to transfer excess equipment to domestic law enforcement agencies; that included, but was not limited to, body armor, weapons, armored personnel carriers, aircraft, and even surveillance equipment. *Id.* In 2010 and 2011, over \$700 million worth of equipment was transferred to state and local law enforcement agencies. Madison Ruppert, *The Pentagon's 1033 Program: Giving Free Military Equipment to Police Departments Around the U.S.*, ACTIVIST POST (Dec. 6, 2011), <http://www.activistpost.com/2011/12/pentagons-1033-program-giving-free.html> [https://perma.cc/6ATY-JHR9].

¹³¹ See *MRAPs and Bayonets: What We Know About the Pentagon's 1033 Program*, NPR (Sept. 2, 2014, 6:09 PM), <http://www.npr.org/2014/09/02/342494225/mraps-and-bayonets-what-we-know-about-the-pentagons-1033-program> [hereinafter *MRAPS and Bayonets*]. "Congress authorized the 1033 program in 1989 to equip local, state and federal agencies in the war on drugs. In 1996, Congress widened the program's scope to include counterterrorism." *Id.* However, the report goes on to report that research is inconclusive if the original public safety goals are, in fact, driving decisions concerning the procurement and deployment of equipment: "Areas with large populations or high crime rates aren't necessarily receiving more or less than their share of the items. Nor is a greater amount of equipment being sent to areas along the U.S. borders or coasts, places more likely to be drug trafficking corridors or terrorist targets." *Id.*

¹³² See *id.* The program has delivered 79,288 assault rifles, 205 grenade launchers, 11,959 bayonets, 3,972 combat knives, night vision equipment worth \$124 million, 479 bomb detonator robots, 50 airplanes, 422 helicopters, and camouflage gear and other "deception equipment" worth over \$3.6 million. *Id.*

D. The Stafford Act

As mentioned above, Directive 3025.1 authorizes immediate action by the military when civilian authorities request help and the President has not yet declared a disaster or an emergency.¹³³ Once there has been a “Stafford declaration,” the coordination of any military support shifts from the requesting local authority to the federal coordinating official.¹³⁴

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the “Stafford Act”) is the chief weapon in the federal government’s arsenal when responding to a natural disaster within the borders of the United States.¹³⁵ Through the Stafford Act, Congress declared,

(1) [B]ecause disasters often cause loss of life, human suffering, loss of income, and property loss and damage; and (2) because disasters often disrupt the normal functioning of governments and communities, and adversely affect individuals and families with great severity; special measures, designed to assist the efforts of the affected States in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas, are necessary.¹³⁶

Congress passed the Stafford Act to “provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering . . . which result[s] from such disasters”¹³⁷ The primary tools used to realize that goal are the Stafford Act’s sections 401 and 501, which provide the President the authority to declare major disasters and national emergencies.¹³⁸

¹³³ See Samek, *supra* note 101, at 450.

¹³⁴ See DEP’T OF DEF., DIRECTIVE 3025.1, MILITARY SUPPORT FOR CIVIL AUTHORITIES (MSCA) (1993); DEP’T. OF DEF., DIRECTIVE 3025.1-M, MANUAL FOR CIVIL EMERGENCIES 1 (1994); see also JENNIFER K. ELSEA & R. CHUCK MASON, CONG. RESEARCH SERV., THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES 7 (2008) (discussing how, under the Stafford Act, “[p]ermitted operations include debris removal and road clearance, search and rescue, emergency medical care and shelter, provision of food, water, and other essential needs, dissemination of public information and assistance regarding health and safety measures, and the provision of technical advice to state and local governments on disaster management and control. . . . The Stafford Act does not authorize the use of federal military forces to maintain law and order. . . . Patrolling in civilian neighborhoods for the purpose of providing security from looting and other activities, would not be permissible, although patrolling for humanitarian relief missions . . . (which may have the incidental benefit of deterring crime) would not violate the [Posse Comitatus Act].”). *Id.* at 4.

¹³⁵ See Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 § 101, 42 U.S.C. § 5121 (1988).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ 42 U.S.C. §§ 5170, 5191 (2012).

All requests for a declaration by the President that a major *disaster* exists shall be made by the Governor of the affected State. Such a request shall be based on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State *Id.* § 5170 (emphasis added).

Upon a section 401 or 501 declaration, the President has extremely broad powers to

direct *any Federal agency* [including the DOD], . . . to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services) in support of State and local assistance response or recovery efforts, including precautionary evacuations.¹³⁹

The deployment of federal troops to support disaster relief is not an exception to the Posse Comitatus Act because, under the Stafford Act, the military is not permitted to engage in civilian law enforcement.¹⁴⁰ The military is permitted, however, to carry out valid military operations and any enforcement of criminal law that is incidental to those operations. Such valid military operations include establishing a traffic control point on a civilian highway to ensure the security of military supplies or routes and conducting search and rescue missions after a national disaster where the mere presence of the military deters other criminal activity.¹⁴¹ Thus, notwithstanding the general principle behind the Posse Comitatus Act, the President or his designee “under the guise of general federal assistance . . . has the entire resources of . . . *the military*, with which to support state and local assistance efforts.”¹⁴²

III. SAVE, KILL, OR MODIFY

A. *Status Quo*

1. *Blurring the Line Between Police and Soldiers*¹⁴³

Related to Posse Comitatus and the distinct roles that police and soldiers play is an important paradigm shift that has been ongoing since the United States first declared its war on drugs and, then, its war on terror. With regard to terrorism’s impact since 9/11, there has been a rapid transfer of power from law enforcement to the military, which is now seen as the primary player in this field.¹⁴⁴

All requests for a declaration by the President that an *emergency* exists shall be made by the Governor of the affected State. Such a request shall be based on a finding that the situation is of such severity and magnitude that effective response is beyond the capabilities of the State . . .

Id. § 5191 (emphasis added).

¹³⁹ *Id.* § 5170(a)(1) (emphasis added).

¹⁴⁰ Samek, *supra* note 101, at 459. Additionally, the Posse Comitatus Act does not restrict the President from deploying troops.

¹⁴¹ *Id.*

¹⁴² *Id.* at 455.

¹⁴³ Much of this section is adapted from Arthur Rizer & Joseph Hartman, *How the War on Terror Has Militarized the Police*, ATLANTIC (Nov. 7, 2011), <http://www.theatlantic.com/national/archive/2011/11/how-the-war-on-terror-has-militarized-the-police/248047> [<https://perma.cc/VYQ3-DHB5>].

¹⁴⁴ See generally Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335 (2005).

This shift is memorialized in the White House's 2006 *National Strategy for Combating Terrorism*, in which President George W. Bush affirmed that the United States has "broken old orthodoxies that once confined our counterterrorism efforts primarily to the criminal justice domain."¹⁴⁵ This shift in dogma is easily executed outside the United States, where the military has an almost plenary presence in the counterterrorism world.¹⁴⁶ However, the Posse Comitatus Act restricts military action inside the borders of the United States, thus leaving counterterrorism responsibilities primarily on the shoulders of local and federal law enforcement officials.¹⁴⁷

Although the military is equipped to fight the wars on drugs and terrorism, the Posse Comitatus Act prevents military involvement in the everyday police work so crucial to the success of these types of wars. As a result, police forces around the country have been militarizing in order to better wage the war on drugs and the war on terror.¹⁴⁸ While this phenomenon appears rational, the side effects of the militarization of American police forces are complicated. Specifically, equipping, training, and mentally preparing the individual police officer/sometime soldier is a convoluted process.

Police departments have increased their use of military grade equipment to perform their duties. This use rapidly increased following the declaration of the "war on drugs" and again has been accelerating after 9/11.¹⁴⁹ If military equipment helps police prevent more crime and catch more criminals, then it should be deemed a positive sharing of technology, right? Not necessarily. The acquisition of military equipment by local police forces is especially alarming to civil libertarians and legal professionals.¹⁵⁰ By allowing civilian law enforcement to use military weapons and technology, it is argued, the line between police officer and soldier is blurred. The mission and mentality of a police officer are necessarily different from those of a soldier; blurring that distinction invites an identity crisis in those patrolling our neighborhoods. The mere possibility of this raises red flags for many.

This alarm grows especially loud regarding military weapons coming into community police departments. In truth, police departments have been acquiring

¹⁴⁵ The White House, *National Strategy for Combating Terrorism*, U.S. DEP'T STATE, <http://2001-2009.state.gov/s/ct/rls/wh/71803.htm> [<https://perma.cc/X8MY-S5J8>] (last visited Nov. 26, 2015).

¹⁴⁶ See generally Ari D. MacKinnon, *Counterterrorism and Checks and Balances: The Spanish and American Examples*, 82 N.Y.U. L. REV. 602 (2007).

¹⁴⁷ See Scott R. Tkacz, *In Katrina's Wake: Rethinking the Military's Role in Domestic Emergencies*, 15 WM. & MARY BILL RTS. J. 301, 324-25 (2006).

¹⁴⁸ See Steven G. Brandl, *Back to the Future: The Implications of September 11, 2001 on Law Enforcement Practice and Policy*, 1 OHIO ST. J. CRIM. L. 133, 145-48 (2003) (discussing how the business of police work is being militarized).

¹⁴⁹ See Marc M. Harrold, *A New Kind of Traffic[king] Cop on the International "Beat" of Human Trafficking*, 1 CHARLESTON L. REV. 97, 119-20 (2006); Rizer & Hartman, *supra* note 6.

¹⁵⁰ See Donna Smith, Note, *Passenger Profiling: A Greater Terror than Terrorism Itself?*, 32 J. MARSHALL L. REV. 167, 190 n.175 (1998).

more military weapons for the patrolling of “Mayberry,” much to the chagrin of civil liberties groups.¹⁵¹ Before 9/11, the heavy weaponry of a small-town cop was the standard pump action shotgun; there may have been a high power rifle such as a surplus M-16 in the trunk of the supervising officer.¹⁵² Today, in small towns, every patrol car carries a trunkful of weaponry and gear; in many cities, officers walk the beat in battle uniforms with assault rifles.¹⁵³ The extent of this weapon inflation does not stop with high power rifles and body armor. Both big and small police departments have acquired armored vehicles (tank-like vehicles, in fact) and machine guns from the military for use in domestic police work.¹⁵⁴

“To assist them in deploying this new weaponry, police departments have also sought and received extensive military training and tactical instruction.”¹⁵⁵ Originally, the Special Weapons and Tactics (S.W.A.T.) teams were hallmarks of only bigger cities and were called out when no other peaceful option was available—when a truly militaristic response was necessary.¹⁵⁶ “Today, virtually every police department in the nation has one or more S.W.A.T. teams, the members of [which] are often trained by and with United States special operations commandos.”¹⁵⁷ Additionally, “with the safety of their officers in mind, these departments now habitually deploy their S.W.A.T. teams for such minor operations as serving warrants.”¹⁵⁸ In short, what was once “special” has quietly become “routine.”¹⁵⁹

“The most serious consequence of the rapid militarization of American police forces, however, is the subtle evolution in the mentality of the ‘men in blue’

¹⁵¹ Rizer & Hartman, *supra* note 6; see also Chuck Murphy & Sydney P. Freedberg, *Military Weapons Land in Hands of Local Cops with Little Oversight*, 26 IRE J., Nov.–Dec. 2003, at 36.

¹⁵² This Author worked as a police officer in the city of Cheney, Washington. In Cheney, each patrol car had a shotgun and the sergeant on duty would often have a high powered rifle.

¹⁵³ While on a business trip, this Author personally witnessed a patrolman in the Minneapolis, Minnesota, airport who was armed on what appeared to be a routine patrol with an M-4 (the more compact version of the better known M-16).

¹⁵⁴ Rizer & Hartman, *supra* note 6; see Paul Craig Roberts, *Your Local Police Force Has Been Militarized*, CREATORS.COM, <http://www.creators.com/opinion/paul-craig-roberts/your-local-police-force-has-been-militarized.html> [<https://perma.cc/QU4G-2CYH>] (last visited Nov. 25, 2015).

¹⁵⁵ Rizer & Hartman, *supra* note 6; see Harrold, *supra* note 148, at 120 (citing DIANE CECILIA WEBER, CATO INST., *WARRIOR COPS: THE OMINOUS GROWTH OF PARAMILITARISM IN AMERICAN POLICE DEPARTMENTS* (1999), <http://www.cato.org/pubs/briefs/bp50.pdf> [<https://perma.cc/GCB9-AYL7>]).

¹⁵⁶ Rizer & Hartman, *supra* note 6; see *With Article, McVeigh Describes Motivation for Bombing*, FOX NEWS (Apr. 27, 2001), <http://www.foxnews.com/story/2001/04/27/with-article-mcveigh-describes-motivation-for-bombing.html> [<https://perma.cc/SNA8-RYWS>] [hereinafter FOX NEWS].

¹⁵⁷ Rizer & Hartman, *supra* note 6. See generally FOX NEWS, *supra* note 155.

¹⁵⁸ Rizer & Hartman, *supra* note 6; FOX NEWS, *supra* note 155.

¹⁵⁹ Rizer & Hartman, *supra* note 6; see FOX NEWS, *supra* note 155.

from ‘peace officer[s]’ to soldier[s].”¹⁶⁰ This development “represents a fundamental change in the nature of law enforcement.”¹⁶¹ The primary goal or mission of an officer is to keep the peace and enforce the law; “[t]hose whom an officer suspects to have committed a crime are treated as just that—*suspects*.”¹⁶² Officers are duty-bound to protect the rights of all civilians—even known criminals or those suspected of committing violent crimes—because of the sacrosanct American mantra: innocent until proven guilty.¹⁶³ “Moreover, police officers operate among a largely friendly population and have traditionally been trained to solve problems using [the] legal system,” and reserving “the deployment of lethal violence [as] an absolute last resort.”¹⁶⁴

Soldiers, by contrast, are told to label people as “belonging to one of two groups: the enemy and the non-enemy.”¹⁶⁵ The mission for soldiers is to kill the enemy and try not to kill the non-enemy, and soldiers often reach this decision “while surrounded by a population that considers the soldier an occupying force.”¹⁶⁶ Indeed, part of the Soldier’s Creed reads, “I stand ready to deploy, engage, and destroy the enemies of the United States of America in close combat.”¹⁶⁷ This is a far cry from the peace officers’ creed “to protect and serve.”¹⁶⁸

“The point here is not to suggest that police officers in the field should not take advantage of every tactic or piece of equipment that makes” the officers and innocent bystanders as safe as possible as the officers carry out their challenging and dangerous duties.¹⁶⁹ It is also not suggested “that a police officer, once trained in military tactics, will now seek to kill civilians.”¹⁷⁰ It is easy to “second-guess the way police officers perform their jobs while they are out on the streets waging what must, at times, feel like war.”¹⁷¹ This Article does not attempt to second-guess the actions of those in the media spotlight. Rather, the purpose is to use the events highlighted recently in the national media to identify that the

¹⁶⁰ Rizer & Hartman, *supra* note 6.

¹⁶¹ *Id.*

¹⁶² *Id.*; see Joel Miller, *Cops At War: The Drug War and the Militarization of Mayberry*, RUTHERFORD INST.: OLDSPEAK (Dec. 30, 2002), https://www.rutherford.org/publications_resources/oldspeak/cops_at_war_the_drug_war_and_the_militarization_of_mayberry [<https://perma.cc/YCU4-AQUK>]; see also MARILYN OLSEN, STATE TROOPER: AMERICA’S STATE TROOPERS AND HIGHWAY PATROLMEN 17 (2001) (“The difference between the [military and the [police] is that the civil policeman should have no enemies. People may be criminals, they may be violent, but they are not enemies to be destroyed.”).

¹⁶³ Rizer & Hartman, *supra* note 6; accord Miller, *supra* note 161.

¹⁶⁴ Rizer & Hartman, *supra* note 6.

¹⁶⁵ *Id.*; see FOX NEWS, *supra* note 155, at 3.

¹⁶⁶ Rizer & Hartman, *supra* note 6.

¹⁶⁷ *Soldier’s Creed*, U.S. ARMY, <http://www.army.mil/values/soldiers.html> [<https://perma.cc/3VWC-7T5D>] (last visited Nov. 28, 2015); accord Rizer & Hartman, *supra* note 6.

¹⁶⁸ Rizer & Hartman, *supra* note 6.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

nation should be mindful that when police officers dress like soldiers, carry soldiers' weapons, and are trained like soldiers, they very well may begin to act like soldiers. Most importantly, a soldier's primary objective is to kill the enemy.¹⁷² With that in mind, it is easy to argue that the principles behind the Posse Comitatus Act are not only justifiable, but also prudent. Yet, as will be discussed *infra*, in many instances, the United States has skirted the "no standing army" principle our founders held so dear, specifically the "no military in domestic law enforcement" rule announced in the Posse Comitatus Act, by simply militarizing our police forces.¹⁷³

The need for a distinction between police and soldiers is key to the issue at hand. In some instances, the type of brutal violence that only the military can provide may be needed. But that is not to say that the overriding question behind the Posse Comitatus Act is not relevant. If the nation does not want its police to act, train, and deploy like soldiers, how will it respond when *actual* soldiers, with the above mentioned mentality, are deployed as law enforcement?

2. *Liberty or Security*

The balance between liberty and security has engaged American thought since the drafting of the Declaration of Independence. Indeed, Benjamin Franklin once famously said, "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."¹⁷⁴

The partition of civilian law enforcement from the military has a long and purposeful history in American democracy.¹⁷⁵ As farfetched as it may seem to contemporary Americans, the notion that the military must be suppressed is an essential doctrine for any democracy; indeed the survival of a nation depends upon it.¹⁷⁶ "An increased military presence in everyday life blurs the distinction between these two very different groups, and this is a dangerous path."¹⁷⁷ Some caution must be exercised against disregarding fears of those who "imagin[e] that more and more law enforcement work could lead to a 'militarization' of our society" because an increased military presence at home could lay the groundwork for a military coup.¹⁷⁸ Indeed, there is evidence that one of the very purposes of the Posse Comitatus Act was to prevent the military from ultimately usurping the civilian government.¹⁷⁹ However, one could argue that the Posse

¹⁷² *Id.*

¹⁷³ See *infra* Part III.B.4 and accompanying notes.

¹⁷⁴ Pennsylvania Assembly: Reply to the Governor (Nov. 11, 1755), *supra* note 24.

¹⁷⁵ See Bennett, *supra* note 24, at 941–42.

¹⁷⁶ See *id.* at 943–44.

¹⁷⁷ *Id.* at 943.

¹⁷⁸ *Id.* (citing Charles J. Dunlap Jr., *The Origins of the American Military Coup of 2012*, PARAMETERS, Winter 1992, at 2, http://scholarship.law.duke.edu/faculty_scholarship/2501 [<https://perma.cc/9CLW-HAB2>]).

¹⁷⁹ See *id.* "The Act was born out of the extensive use of federal troops for law enforcement in the South following the Civil War. Congress, recognizing that the long-term use of the

Comitatus Act has simply encouraged the very thing it was trying to protect, and instead of potential usurpers wearing green military uniforms, they now wear blue.

3. *Just Not Very American*

While the fear of a military takeover may be exaggerated, the fear that the military will be used in inappropriate ways is not. To be sure, there have been numerous examples of the improper use of armed soldiers throughout this nation's history. One such example, mentioned above, occurred from May 1899 to April 1901, when President McKinley deployed 500 troops to Coeur d'Alene at the request of the Governor of Idaho in order to contend with malcontent miners.¹⁸⁰ In Coeur d'Alene, soldiers went house to house and helped the local police arrest every adult male.¹⁸¹ These "prisoners" were held without charge for weeks.¹⁸² Another example took place during World War I, when the War Department (now the DOD) deployed troops to quash strikes that were being organized by the International Workers of the World Union.¹⁸³ There, the military used more than just "hard power"; it also used military intelligence operatives to harass and ultimately arrest union leaders.¹⁸⁴ The army was also used against union-organized strikes in Gary, Indiana; Butte, Montana; and Seattle, Washington; and to occupy copper mines in Arizona and Montana to ensure union activities were fully suppressed.¹⁸⁵ These abuses are not limited to times of war, or to very different historical circumstances for that matter. Indeed, during the 1993 standoff between David Koresh's Branch Davidians and federal agents in Waco, Texas, U.S. Army Special Operations, direct-action teams gave advice to and rehearsed the initial raid with agents from the Bureau of Alcohol, Tobacco, and

Army to enforce civilian laws posed a potential danger to the military's subordination to civilian control, passed the Act." CRAIG T. TREBILCOCK, CTR. FOR STRATEGIC & INT'L STUD., POSSE COMITATUS—HAS THE POSSE OUTLIVED ITS PURPOSE? 1 (2000), <http://www.csis.org/media/csis/pubs/trebilcock.pdf> [<https://perma.cc/VF6B-5SVQ>].

¹⁸⁰ Felicetti & Luce, *supra* note 19, at 123–24.

¹⁸¹ GENE HEALY, CATO INST., POLICY ANALYSIS No. 503, DEPLOYED IN THE U.S.A.: THE CREEPING MILITARIZATION OF THE HOME FRONT 3 (2003), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa503.pdf> [<https://perma.cc/HCG5-SS8S>].

¹⁸² *Id.* at 3–4.

¹⁸³ *Id.* at 4. Also during the First World War,

[c]oncerns about German saboteurs . . . led to unrestrained domestic spying by U.S. Army intelligence operatives. Civilian spies for the Army were given free rein to gather information on potential subversives and were often empowered to make arrests as special police officers. The War Department relied heavily on a quasi-private volunteer organization called the American Protective League. The APL was composed of self-styled "patriots" who agreed to inform on their fellow citizens. At the War Department's request, APL volunteers harassed and arrested opponents of the draft.

Id.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

Firearms—that military style operation ended with more than eighty civilians dead, twenty-seven of which were children.¹⁸⁶

Conversely, not all uses of the military to enforce civil law have been negative. Certainly President Eisenhower’s use of the Army’s 101st Airborne Division to escort nine black children to attend a segregated school, commonly known as the Little Rock Nine, was a positive use of federal troops.¹⁸⁷ The Little Rock Nine conflict started when the Arkansas National Guard, under the orders of the Governor, blocked the students from attending school.¹⁸⁸ On September 25, 1957, soldiers from the 101st Airborne Division, the Screaming Eagles, escorted the children to school and remained for the duration of the school year.¹⁸⁹ President Eisenhower cited that he had authority to use federal troops in that case under 10 U.S.C. § 332, the Insurrection Act, which allows the use of the military when the President believes that it is “impracticable to enforce the laws of the United States in any State [or Territory] by the ordinary course of judicial proceedings” because of the “unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States.”¹⁹⁰ Even with these effective and positive uses of the military to promote social justice while acting in a

¹⁸⁶ *Id.*

¹⁸⁷ See *Little Rock Nine*, ENCYCLOPEDIA ARK. HIST. AND CULTURE, <http://www.encyclopediainfoarkansas.net/encyclopedia/entry-detail.aspx?entryID=723> [https://perma.cc/5AT2-P323] (last updated Sept. 9, 2010).

¹⁸⁸ *Id.*

The Nine remained at home for more than two weeks, trying to keep up with their schoolwork as best they could. When the federal court ordered Gov. Faubus to stop interfering with the court’s order, Faubus removed the guardsmen from in front of the school. On September 23, the Nine entered the school for the first time. The crowd outside chanted, “Two, four, six, eight. . . . We ain’t gonna integrate!” and chased and beat black reporters who were covering the events. The Little Rock police, fearful that they could not control the increasingly unruly mob in front of the school, removed the Nine later that morning. They once again returned home and waited for further information on when they would be able to attend school.

Id.

¹⁸⁹ *Id.*

[T]he military assigned guards to escort [the children] to classes. The guards, however, could not go everywhere with the students, and harassment continued in places such as the restrooms and locker rooms. After the 101st Airborne soldiers returned to Ft. Campbell in November, leaving the National Guard troops in charge, segregationist students intensified their efforts to compel the Nine to leave Central. The Little Rock Nine did not have any classes together. They were not allowed to participate in extracurricular activities at Central. Nevertheless, they returned to school every day to persist in obtaining an equal education.

. . . .

. . . On May 27, 1958, Ernest Green became Central’s first black graduate. Dr. Martin Luther King Jr. attended his graduation ceremony. Green later told reporters, “It’s been an interesting year. I’ve had a course in human relations first hand.” The other eight, like their counterparts across the district, were forced to attend other schools or take correspondence classes the next year when voters opted to close all four of Little Rock’s high schools to prevent further desegregation efforts.

Id.

¹⁹⁰ 10 U.S.C. § 332 (2012); see Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957).

law enforcement capacity, many still argue that the nation should still question the wisdom of *ever* using military troops as domestic law enforcement agents.¹⁹¹

Another concern that arises when the roles of the military and law enforcement are blurred is “the need to maintain a universal trust in the military as a non-political body.”¹⁹² It may be true that if the military gained the reputation of being the lap dog of the executive or legislative branch, then “it is likely that Americans’ distrust of the government would lead to them, correctly or incorrectly, perceiving that the military was abandoning its crucial political neutrality. If the American people made that leap, institutional trust and confidence in the military would be undermined.”¹⁹³

Lastly, as one author eloquently stated, “[T]here is something inherently repugnant to most Americans at the thought of the military patrolling the streets of our cities and towns. . . . An inarguably chilling image that should cause [Posse Comitatus Act] opponents to hesitate.”¹⁹⁴

4. *The Army Has a Job*

Proponents of abandoning the Posse Comitatus Act and allowing the military to have a greater role in civilian law enforcement are not rooted in the belief that the Army and other branches are underutilized. Indeed, quite the opposite is true—the military is overburdened because of constant deployments to Iraq and Afghanistan, worn out equipment, and 57,000-plus casualties from those two conflicts.¹⁹⁵ Thus, any time or resources the military spends on missions that are chiefly civilian in nature is time or resources taken away from their principal mission to defend the nation from foreign enemies.¹⁹⁶ Moreover, some argue that

¹⁹¹ See Bennett, *supra* note 24, at 944.

¹⁹² *Id.* Although “polls suggest that only 22 [percent] of the American people trust Congress, and only 44 [percent] trust the president, an impressive 74 [percent] of people in this country trust the military.” *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Operation Enduring Freedom: U.S. Wounded Totals*, ICASUALTIES.ORG, <http://icasualties.org/OEF/USCasualtiesByState.aspx> [https://perma.cc/7DVW-JX2U] (last visited Nov. 28, 2015) (reporting the wounded in Afghanistan, as of September 2012, numbered 17,674); *Iraq Coalition Casualties: U.S. Wounded Totals*, ICASUALTIES.ORG, <http://icasualties.org/Iraq/USCasualtiesByState.aspx> [https://perma.cc/YK5C-NSXC] (last visited Nov. 28, 2015) (reporting the wounded in Iraq, as of November 2011, numbered 32,223); *Iraq Coalition Casualties: Fatalities By Year*, ICASUALTIES.ORG, <http://icasualties.org/Iraq/ByYear.aspx> [https://perma.cc/68Q4-DXAH] (last visited Nov. 28, 2015) (reporting the fatalities in Iraq, as of November 19, 2015, numbered 4,495).

¹⁹⁶ Bennett, *supra* note 24, at 945.

Although politicians often claim that military effectiveness will not be harmed by domestic, peacetime uses of combat soldiers, this is not borne out by the evidence. A GAO report, while acknowledging that peace operations can provide valuable experience, states that “such participation can also degrade a unit’s war-fighting capability.”

Id. (quoting U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-96-14, PEACE OPERATIONS: EFFECT OF TRAINING EQUIPMENT, AND OTHER FACTORS ON UNIT CAPABILITY 2–3 (1995)).

using military troops in non-combat roles can diminish the overall effectiveness of the armed forces due to “atrophy” of their skills, resulting in the need to retrain troops when they are needed for combat missions.¹⁹⁷

5. *If It Isn't Broken—Don't Fix It*

The most prevalent argument against the Posse Comitatus Act is that it prevents the federal government from effectively responding to a disaster.¹⁹⁸ However, supporters of the Act argue there are numerous built-in mechanisms that function as exceptions to the Act and other circumstances in which the Act simply does not apply.¹⁹⁹ Furthermore, these exceptions and omissions should be more than adequate to allow the government to respond to an emergency without weakening the line between police and soldiers.²⁰⁰ The President always retains the power to use the armed forces to fulfill the obligations of his Office under “the Constitution to respond promptly in time of war, insurrection, or other serious emergency.”²⁰¹ And military troops can be used “to protect Federal property and Federal governmental functions when the need for protection exists and duly constituted local authorities are unable or decline to provide adequate protection.”²⁰² Hence, the ability to use federal troops to secure government functions, although not comprehensive, is present, providing the President some flexibility to deploy the military in a domestic setting.²⁰³ Looking to the tragedy in New Orleans after Katrina, from which much of the recent criticism of the Posse Comitatus stems,²⁰⁴ the federal government had the authority to mobilize the military in order to protect the rights of life, liberty, and property.²⁰⁵

B. *Repealing the Law: A Case for Killing the Posse Comitatus Act*

1. *Archaic*

The most obvious reason cited to repeal the Posse Comitatus Act is that it is archaic in its very nature.²⁰⁶ Certainly a law written over 100 years ago out of the

¹⁹⁷ *Id.* (quoting U.S. GEN. ACCOUNTING OFFICE, *supra* note 195, at 5).

¹⁹⁸ *Id.* at 947.

¹⁹⁹ *See id.*

²⁰⁰ *See id.* at 951.

²⁰¹ 6 U.S.C. § 466(a)(4) (2012).

²⁰² 32 C.F.R. § 215.4(c)(1)(ii) (2015).

²⁰³ Bennett, *supra* note 24, at 948–49.

²⁰⁴ *See, e.g.,* Gene Healy, *What of 'Posse Comitatus'?*, CATO INST., <http://www.cato.org/publications/commentary/what-posse-comitatus> [<https://perma.cc/62KY-75GP>] (last visited Nov. 28, 2015).

²⁰⁵ Bennett, *supra* note 24, at 951.

²⁰⁶ *See id.* at 945.

depths of the Civil War cannot be fully applicable in modern America.²⁰⁷ Moreover, it seems disingenuous to treat the Posse Comitatus Act as a bastion of civil liberty when it was born out of political swindling and a possible stolen election.²⁰⁸ Is it not true that “[a] good tree cannot bring forth evil fruit, neither *can* a corrupt tree bring forth good fruit”?²⁰⁹ Thus, it could be argued that the Posse Comitatus Act, because it came forth from a “corrupt tree,” cannot be one of the vanguards of freedom and government restraint.

Another argument for repealing the Posse Comitatus Act comes from an unlikely source: its supporters. As seen above, proponents of the Act contend that, regardless of the Posse Comitatus Act, there are other laws that allow the government to deploy troops in virtually any capacity.²¹⁰ One supporter stated that if one is worried about the Posse Comitatus Act, “they can take solace in one fact: the Posse Comitatus Act is nearly one hundred and thirty years old, is a criminal statute, and no one has ever been charged or prosecuted under it.”²¹¹ Rather, it is argued that the Posse Comitatus Act represents an important and “clear delineation between the civil and military realm, and its greatest utility occurs when, in considering an unwise course of action, the military is forced to admit, ‘We can’t do that. That violates Posse Comitatus.’”²¹² However, that argument falls on its own proverbial sword because it begs the question, if other laws excuse the government to act with federal troops in almost any circumstance, what is the point of keeping the law on the books? Is it not, then, obsolete by definition?²¹³

This patchwork of laws—the Posse Comitatus Act banning the use of federal troops and the series of laws, regulations, and interpretations that allow for the use of federal troops—seriously confuses the jurisprudence in this area. This confusion thereby “impedes th[e] important mission [of the military] and does little to protect civil liberties.”²¹⁴ There are situations where the Posse Comitatus Act has created a tortuous command and control structure where there is serious confusion as to who is in charge when the military is called out under one of the exceptions;²¹⁵ where the Act has decreased both military and civilian response

²⁰⁷ *Id.*; see Tom Bowman & Siobhan Gorman, *Increasing Military’s Role Raises Questions*, BALT. SUN (Sept. 20, 2005), http://articles.baltimoresun.com/2005-09-20/news/0509200262_1_comitatus-posse-law-enforcement [<https://perma.cc/H2XV-MDHM>] (“A senior Pentagon official said the military’s response to Katrina has been complicated by ‘archaic laws’ that were ‘difficult to work through.’ The 1878 Posse Comitatus Act generally bars active-duty military from law-enforcement activities on U.S. soil.”).

²⁰⁸ See *supra* Part I.A.

²⁰⁹ *Matthew* 7:18 (King James).

²¹⁰ See, e.g., 10 U.S.C. § 332 (2012).

²¹¹ Bennett, *supra* note 24, at 952.

²¹² *Id.* at 953.

²¹³ See *id.*

²¹⁴ Felicetti & Luce, *supra* note 19, at 179.

²¹⁵ Peter Gosselin & Doyle McManus, *Wider Powers for U.S. Forces in Disasters Are Under Review*, L.A. TIMES (Sept. 11, 2005), <http://articles.latimes.com/2005/sep/11/nation/na-po-sse11> [<https://perma.cc/ZY58-2HM6>] (following Hurricane Katrina, stating that the White

times;²¹⁶ and where it has, at times, left the federal response vulnerable to exploitation by an adversary. The confusion goes as far as creating bizarre interpretations such as the United States Navy believing that it loses authority to conduct missions the closer it gets to the homeland.²¹⁷ Another nonsensical example appeared after the 9/11 attacks: National Guard soldiers, while in helicopters en route to their assignments along the Canadian border, were banned from conducting surveillance from the air.²¹⁸

2. *Limiting the Greatest Resource When It Is Needed Most*

There is a compelling argument that the Posse Comitatus Act limits the federal government from using its greatest resource during its greatest time of need. In reality, those who wish to abolish the Posse Comitatus Act do not argue that the military should be used for routine traffic stops and patrolling urban areas. Rather, the debate comes into play during national emergencies.

With just over 600,000 civilian employees, the DOD is by far the biggest federal department, three times bigger than the second largest department, the Department of Veteran Affairs at 200,000.²¹⁹ In addition to civilians, the DOD also has over 1,300,000 active duty uniformed service members with another million in the ready reserves.²²⁰ The DOD, as a whole, towers over each of the

House's "interest in expanding presidential powers to deploy the military on United States soil stems partly from its frustration over the inability to negotiate an agreement on chain of command with Louisiana's governor in the first days after Hurricane Katrina struck.")

²¹⁶ See, e.g., Chris Quillen, *Posse Comitatus and Nuclear Terrorism*, 32 *PARAMETERS*, Spring 2002, at 60, 71 ("Outdated and inflexible American legislation has produced a patchwork consisting of constitutional and statutory exceptions so that the realities of domestic operations can be performed. . . . The potential consequences of this approach include a convoluted command and control structure, decreased response time, and continuity-of-operations problems; it also leaves the federal response vulnerable to exploitation by the adversary." (quoting Sean M. Maloney, *Domestic Operations: The Canadian Approach*, 27 *PARAMETERS*, Autumn 1997, at 150)).

²¹⁷ Felicetti & Luce, *supra* note 19, at 179. That article discusses, in part, a situation where the Navy was prevented from supporting a Coast Guard Law Enforcement Detachment team that was boarding "a suspected foreign terrorist vessel approaching the United States The Navy and DOD maintain that this prohibition is statutory, however." *Id.* at 89 n.10. Because of an exception to the Posse Comitatus Act, however, the Navy is allowed to board a U.S. fishing vessel to enforce routine fisheries regulations. See 16 U.S.C. § 1861 (2012). Thus, the PCA may prevent the Navy from protecting the United States from possible foreign enemies while allowing it to regulate fishing.

²¹⁸ Felicetti & Luce, *supra* note 19, at 89 n.10.

²¹⁹ See Dennis V. Damp, *Largest Federal Departments*, MONSTER: GOVCENTRAL, <http://www.govcentral.com/careers/articles/402-largest-federal-departments> [<https://perma.cc/5SQH-PYUT>] (last visited Nov. 28, 2015).

²²⁰ See *United States of America Military Strength*, GLOBALFIREPOWER.COM, http://www.globalfirepower.com/country-military-strength-detail.asp?country_id=united-states-of-america [<https://perma.cc/62ET-439G>] (last updated Nov. 13, 2015); see also U.S. DEP'T OF DEF., 2012 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY, at iii, vii (2012), http://www.militaryonesource.mil/12038/MOS/Reports/2012_Demographics_Report.pdf [<https://perma.cc/F5XN-9JK4>]. This number includes the active Army, Navy, Air Force, and

other departments by nearly a fourteen to one ratio.²²¹ What is impressive about these numbers is that the entire Department of Justice has only 103,479 employees and the FBI, the largest federal “police force,” has less than 15,000 special agents.²²² While not every service member has the same training as an FBI Special Agent, almost every member of the military has basic weapons training, is in reasonable shape, and is organized in a unit where they are trained to deploy and follow the orders of their commanding officers.

With these numbers in mind, it makes perfect sense to use members of the military in a law enforcement capacity during an emergency. They are already trained, they have the ability to move to areas with great speed and efficiency, and they are already organized for command and control purposes. The resources and expertise of the military clearly indicate that it would play a constructive role in any response.²²³ Therefore, as one scholar noted, “[I]f the question is simply whether the military would be helpful in the aftermath of [a major disaster], the answer should be a resounding yes.”²²⁴

An analogy could be made to the use of United Nation soldiers. They have a mandate to “protect and serve” in a sense, yet they are soldiers first.²²⁵ In the United States military, service members are sent on special tours to the United Nations, and despite the fact that they are trained as soldiers, airmen, sailors, and marines, they perform their duties as peacekeepers competently—and often with merit—and return to their American units when their tours are over.²²⁶

3. *War Has Come and the Military Is Fighting It*

Some argue that while the Posse Comitatus Act had a place in America’s history, the new enemy (terrorists) are such that the old system must give way to

Marine Corps, along with the Army National Guard, Army Reserves, Air Force National Guard, Air Force Reserves, Navy Reserves, and Marine Corps Reserves. This number specifically excludes the Coast Guard, who are statutorily exempt from the Posse Comitatus Act and thus irrelevant to this discussion. *See id.*

²²¹ *See* Damp, *supra* note 218.

²²² *See* FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF DEF., TODAY’S FBI: FACTS & FIGURES 2013–2014, at 7–9 (2014); Damp, *supra* note 218.

²²³ Christopher Ligatti, Note, *The Legality of American Military Troops Engaging in Domestic Law Enforcement in the Event of a Major Terrorist Attack*, 41 NEW ENG. L. REV. 199, 231 (2006).

²²⁴ *Id.*

²²⁵ *See generally Peacekeeping Operations*, UNITED NATIONS PEACEKEEPING, <http://www.un.org/en/peacekeeping/operations> [<https://perma.cc/TL89-QMPT>] (last visited Nov. 28, 2015). “UN Peacekeepers provide security and the political and peacebuilding support to help countries make the difficult, early transition from conflict to peace. UN Peacekeeping is guided by three basic principles: Consent of the parties; Impartiality; [and] Non-use of force except in self-defence and defence of the mandate.” *What Is Peacekeeping?*, UNITED NATIONS PEACEKEEPING, <http://www.un.org/en/peacekeeping/operations/peacekeeping.shtml> [<https://perma.cc/XVT8-Z4HX>] (last visited Nov. 28, 2015).

²²⁶ *See generally About Us*, UNITED NATIONS PEACEKEEPING, <http://www.un.org/en/peacekeeping/about> [<https://perma.cc/F9LN-RNN9>] (last visited Nov. 28, 2015).

something new—specifically, the military working domestically.²²⁷ Furthermore, many believe that after 9/11, there is virtually universal agreement that separating the responsibilities for fighting this new kind of war between the numerous branches of government dedicated to protecting the citizens “has ill served the objective of preventing domestic terror.”²²⁸ Hence, for the pragmatic reason of efficiency, because the U.S. military already takes the lead in the war on terror internationally, its expertise and resources should be taken advantage of in our fight against terrorism domestically. After 9/11, both the CIA and the FBI were criticized because of the wall separating domestic and foreign intelligence, a natural byproduct of differentiated departments until that point.²²⁹ However, if the military is tapped for service, there would be no such wall, because it is, essentially, one entity with communication lines running throughout to the command structure at the top.

Moreover, many Americans are and should be uncomfortable with their local police department becoming “SWATized,” because police cannot serve both roles well.²³⁰ Thus, an argument can be made that when it comes to combatting terrorism—where a “military-like” response is needed—the military should be the force that responds.

4. *Trading Military Soldiers for Police Soldiers*

The phrase “police militarization” has gained significant attention in recent years. But what, really, is the risk of police donning military uniforms and equipping themselves with military grade weapons? We need only look at the case of Jose Guerena for the answer. On the morning of May 5, 2011, a S.W.A.T. team from the Pima County, Arizona, Sheriff’s Department raided a U.S. Marine veteran who served two tours of duty in Iraq, to serve a search warrant for narcotics.²³¹ When his wife woke him up saying she saw a man outside with a gun, Guerena grabbed his rifle and told his wife to hide in the closet with their four-year-old son as he went to reconnoiter and protect his home and family.²³² The

²²⁷ See Tom A. Gizzo & Tama S. Monoson, *A Call to Arms: The Posse Comitatus Act and the Use of the Military in the Struggle Against International Terrorism*, 15 PACE INT’L L. REV. 149, 162 (2003); Ligatti, *supra* note 222.

²²⁸ Ligatti, *supra* note 222 (quoting Feldman, *supra* note 31, at 482).

²²⁹ David Johnston, *9/11 Congressional Report Faults F.B.I.-C.I.A. Lapses*, N.Y. TIMES (July 24, 2003), <http://www.nytimes.com/2003/07/24/us/9-11-congressional-report-faults-fbi-cia-lapses.html>.

²³⁰ See Bennett, *supra* note 24, at 942–43.

²³¹ See *Jose Guerena’s Family Gets Settlement, But His Killers Still Wear Badges*, POLICE ST. USA (Sept. 19, 2013), <http://www.policestateusa.com/2013/jose-guerena-settlement> [<https://perma.cc/5SHX-MV3N>] [hereinafter POLICE ST. USA]; see also Rizer & Hartman, *supra* note 6.

²³² POLICE ST. USA, *supra* note 230; Rizer & Hartman, *supra* note 6.

Pima County S.W.A.T., which supports a population of less than a million people, shot seventy-one rounds, hitting Guereña sixty times.²³³ “A subsequent investigation revealed that the initial shot that prompted the S.W.A.T. team barrage came from a S.W.A.T. team gun, not Guereña’s.”²³⁴ Reports later revealed that Guereña had no criminal record, and no narcotics were found at his home; further, the safety on his weapon was on when he was shot.²³⁵

The United States has witnessed a “proliferation in incidents of excessive, military-style force by police S.W.A.T. teams, which often make national headlines due to their sheer brutality.”²³⁶ Indeed, the increase of S.W.A.T. raids and callouts from 1980 to 2000 could be as high as 1400 percent.²³⁷ Even with standard police equipment, the availability of special equipment and training to officers seems to exacerbate the problem. Thus, it is important to take a look at the weapons police officers are now using on the streets of American communities, including those America saw live on the streets of Ferguson.

It appears that law enforcement’s weapon of choice in Ferguson was the M4.²³⁸ The M4 is a carbine (shorter) version of the well-known M16 assault rifle.²³⁹ The weapon has a rate of fire of 700–950 rounds per minute and became popular in the military when the U.S. Special Operations Command adopted the weapon as its universal rifle.²⁴⁰ The maximum effective range of the M4 is around 500 meters (1,640 feet), meaning that a trained shooter could, without a scope, hit a human-sized target at that distance.²⁴¹ More relevant to the conversation about police weapons is the M4’s maximum lethal range of 3,600 meters

²³³ POLICE ST. USA, *supra* note 230; Rizer & Hartman, *supra* note 6; *Pima County, Arizona (AZ)*, CITY-DATA.COM, http://www.city-data.com/county/Pima_County-AZ.html [<https://perma.cc/ZPG9-PB5X>] (last visited Nov. 28, 2015).

²³⁴ Rizer & Hartman, *supra* note 6.

²³⁵ POLICE ST. USA, *supra* note 230.

²³⁶ Rizer & Hartman, *supra* note 6; Louis Jacobson, *In Segment on Ferguson, John Oliver Says SWAT Raids Are Up 1,400 Percent*, POLITIFACT: PUNDIT FACT (Aug. 18, 2014, 5:12 PM), <http://www.politifact.com/punditfact/statements/2014/aug/18/john-oliver/segment-ferguson-john-oliver-says-swat-raids-are-1> [<https://perma.cc/KZ73-YJDE>].

²³⁷ Jacobson, *supra* note 235.

²³⁸ See Niraj Chokshi, *Militarized Police in Ferguson Unsettles Some; Pentagon Gives Cities Equipment*, WASH. POST. (Aug. 14, 2014), http://www.washingtonpost.com/politics/militarized-police-in-ferguson-unsettles-some-pentagon-gives-cities-equipment/2014/08/14/4651f670-2401-11e4-86ca-6f03cbd15c1a_story.html [<https://perma.cc/ALE5-5RP6>] (stating that officers were deployed with M4 rifles like those used by forces in Iraq and Afghanistan); Richard Cosgrove, *Ferguson Shooting: Missouri SWAT Teams Armed with M4 Assault Rifles*, INT’L BUS. TIMES (Aug. 17, 2014, 4:59 PM), <http://www.ibtimes.co.uk/ferguson-shooting-missouri-swat-teams-armed-m4-assault-rifles-1461507> [<https://perma.cc/4URG-VB6J>].

²³⁹ See *Colt M4 and M4A1 Carbine/Assault Rifles (USA)*, WORLD GUNS, <http://world.guns.ru/assault/usa/m4-m4a1-e.html> [<https://perma.cc/89D8-9K5J>] (last visited Nov. 28, 2015).

²⁴⁰ *Id.*

²⁴¹ See *M4—5.56mm Semiautomatic Rifle*, ARMY STUDY GUIDE, http://www.armystudy-guide.com/content/army_board_study_guide_topics/m4/m4-study-guide.shtml [<https://perma.cc/J7RB-TS4U>] (last visited Nov. 28, 2015) [hereinafter ARMY STUDY GUIDE].

(11,811 feet).²⁴² Thus, if an officer fires at a target and misses, a bystander over a mile and a half away could be hit.²⁴³ In addition, with a muzzle velocity of 2,970 feet per second, the 5.56 mm round that is fired by the M4 has significant penetration power,²⁴⁴ meaning that a single round can go through—and, while I was in the Army, I heard stories of rounds going through—multiple people. This is not to mention the devastating effect of the 5.56 mm round itself, which is designed to tumble when it hits its target, leaving horrific internal wounds due to its relatively light weight and tendency to flip around and bounce off of bones.²⁴⁵

What do all of these numbers mean? First, they show that the M4 is a very effective weapon for a soldier in combat to maim and kill, a truth that applies equally to certain, specialized missions within a police department. Second, they reveal that the M4 is a particularly clumsy weapon for a police officer to use when surrounded by a mass of civilians who are frustrated at what they perceive as police abuse.²⁴⁶ To fully understand this, one has to keep in mind that a police officer is not permitted to use deadly force unless the “officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”²⁴⁷ Thus, an officer may use deadly force only in self-defense or in defense of others against a particular suspect in a particular set of circumstances.²⁴⁸ The M4 assault rifle, by its very nature, is designed to engage and destroy the enemy at long range.²⁴⁹ It is a good *offensive* weapon, but a poor choice for crowd control; it is unwieldy, long-range, and carries the potential for over-penetration.²⁵⁰

Another “tool,” the MRAP, is not a “tank,” but in the eyes of most civilians, it closely resembles one. This adds to the perception of a warlike atmosphere when local police departments deploy them for simple crowd control purposes.²⁵¹ Rather than calming emotions and helping protesters to engage in rational, constitutionally protected protest against perceived injustice, the MRAP instead simply heightens community members’ feelings that their neighborhood is being invaded and oppressed.

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ See *id.*; *Real World .223 Testing*, OLYMPIC ARMS, http://www.olyarms.com/index.php?option=com_content&view=article&id=15:223-penetration-testing&catid=13:technical-info [<https://perma.cc/T3QD-U2RF>] (last visited Nov. 28, 2015).

²⁴⁵ See R.K. Taubert, *About .223 Penetration*, OLYMPIC ARMS, http://www.olyarms.com/index.php?option=com_content&view=article&id=14:223-penetration-information&catid=13:technical-info [<https://perma.cc/ZF8Q-VL4D>] (last visited Nov. 28, 2015).

²⁴⁶ See Jamelle Bouie, *The Militarization of the Police: It’s Dangerous and Wrong to Treat Ferguson, Missouri, As a War Zone*, SLATE (Aug. 13, 2014, 1:15 PM), http://www.slate.com/articles/news_and_politics/politics/2014/08/police_in_ferguson_military_weapons_threaten_protesters.html [<https://perma.cc/CW7Y-768J>].

²⁴⁷ *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

²⁴⁸ See *id.* at 11–12, 17–19.

²⁴⁹ See ARMY STUDY GUIDE, *supra* note 240.

²⁵⁰ See *supra* notes 219–26 and accompanying text.

²⁵¹ See *supra* notes 219–30 and accompanying text.

So why do police departments issue ordinary police officers M4 assault rifles in cities like Ferguson, Missouri? That is simple: they look scary, and police—thanks to the 1033 Program—have them readily at hand.²⁵² It is likely the same reason that many of the officers we see in the pictures are wearing green fatigues (the same fatigues issued to United States Marines)—it makes them look like soldiers and, in the public's eyes, soldiers play by different rules. To make that intention more obvious, it should be noted that the color green does not provide particularly effective camouflage in an urban environment. Instead of assisting the main goal of crowd control—to calm a mob of angry people—this image is more likely to cause fear of and hostility toward the authorities. It might accomplish the immediate objective of dispersing a mob; or it could enrage a crowd into a violent frenzy; or, more likely, it could plant the seeds for discontent for future interactions. Such discontent would likely be sewn with even more violent dissent, of the type seen in Ferguson, and, potentially, may lead to the distrust of future generations with a learned antipathy for the police.

It is particularly ironic that the use of the very tools acquired from the DOD's 1033 Program, which were intended to equip local communities to handle their own problems without needing to call in the larger state or federal support, have frequently created situations demanding state and federal intervention. According to the DOD, the 1033 Program was intended to allow "all law enforcement agencies to acquire property for bona fide law enforcement purposes that assist in their arrest and apprehension mission."²⁵³ If Ferguson is any indication, however, local law enforcement agencies apparently cannot be trusted to distinguish between a dangerous "arrest and apprehension mission" and basic crowd control of a largely peaceful protest. Due to the Ferguson Police Department's obvious failures following the first night of protest, the situation spiraled completely out of control—Governor Jay Nixon requested the assistance of the Missouri State Highway Patrol and called in the Missouri National Guard, just as he later did in the days leading up to the grand jury decision.²⁵⁴ In response, Attorney General Holder went to meet with community leaders and attempt to ratchet down the tension and the Department of Justice launched an investigation into the police department's mishandling of events.²⁵⁵ Even the Pentagon is now reassessing the

²⁵² See *MRAPs and Bayonets*, *supra* note 131; see also Radley Balko, *Former Cops Speak Out About Police Militarization*, HUFFINGTON POST (Aug. 1, 2013, 2:25 PM), http://www.huffingtonpost.com/2013/08/01/cops-speak-out-on-police-_n_3688999.html [<https://perma.cc/F6VD-5LPL>].

²⁵³ *1033 Program FAQs*, DEF. LOGISTICS AGENCY, <http://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/ProgramFAQs.aspx> [<https://perma.cc/EZ5K-LAP6>] (last visited Nov. 28, 2015).

²⁵⁴ See *National Guard Called in Ahead of Ferguson Grand Jury Decision*, CBS NEWS (Nov. 17, 2014, 3:53 PM), <http://www.cbsnews.com/news/ferguson-national-guard-called-in-ahead-of-grand-jury-decision> [<https://perma.cc/244Q-GVTH>].

²⁵⁵ See, e.g., Stephanie Condon, *Eric Holder Heads to Ferguson with a Clear Message*, CBS NEWS (Aug. 20, 2014, 6:00 AM), <http://www.cbsnews.com/news/eric-holder-heads-to-ferguson-missouri-with-a-clear-message> [<https://perma.cc/2X6Z-35YC>]; Jonathan Topaz & Lucy McCalmont, *Obama Sending Eric Holder to Ferguson*, POLITICO (Aug. 19, 2014, 8:48 AM),

wisdom of the 1033 Program.²⁵⁶ In short, if the goal of the program was to equip local police forces to handle matters themselves, it has obviously backfired, raising again the question of what such hardware is doing in the hands of small-town, community police forces in the first place.²⁵⁷

The success or failure of a program such as this is judged by the total effect of its impact on society. By that standard, the 1033 program has failed in many respects: It has severely negative effects upon the police by creating and reinforcing an “us versus them” and “occupying soldier” mentality on either side; it often engenders hatred and fear within the portion of the population exposed to its weapons and corresponding tactics; and its main goal of quelling unrest is inverted, because, while temporarily dispersing a crowd, it sows the seeds for more and more violent clashes in the future. It is hard to see how this program is accomplishing anything of value in the quest to have a safe, contented, and peaceful populace. Given the events in Ferguson, it is well past the time for a national conversation on the problems associated with the militarization of American police departments.

The Posse Comitatus Act was designed to prevent use of the military for domestic law enforcement. Perhaps it has been too effective, for the loss of this capability and rising threats (real or perceived) has led to “innovative” programs and the twisting of peace officers into quasi-military units that perhaps make the “cure” worse than the “disease.”

IV. RECOMMENDATIONS: UPDATING AND MODIFYING THE LAW FOR TODAY’S AMERICA

The Supreme Court has said that “while the Constitution protects against invasions of individual rights, it is not a suicide pact.”²⁵⁸ President Lincoln echoed this notion with the opinion that “it is better to violate the Constitution than to allow the destruction of the nation.”²⁵⁹ Indeed, as one scholar noted, “Both contemporary and traditional teachings of democratic political theory emphasize that the abandonment of the processes of democracy is one of the first essential steps in responding to an emergency.”²⁶⁰

<http://www.politico.com/story/2014/08/ferguson-obama-eric-holder-110104> [<https://perma.cc/S3BT-FB5B>].

²⁵⁶ See Tim Cushing, *Administration’s Review of Pentagon’s 1033 Program Finds It Has No Rules, No Transparency and No Oversight*, TECHDIRT (Dec. 4, 2014, 12:52 AM), <https://www.techdirt.com/articles/20141203/11032829315/administrations-review-pentagons-1033-program-finds-it-has-no-rules-no-transparency-no-oversight.shtml> [<https://perma.cc/7W74-ZHCX>]; see also Megan Cloherty, *Military Equipment D.C. Acquired from Federal Program*, WTOP (Aug. 18, 2014, 3:57 PM), <http://wtop.com/news/2014/08/military-equipment-dc-acquired-from-federal-program> [<https://perma.cc/B3B9-DFGB>].

²⁵⁷ See *MRAPs and Bayonets*, *supra* note 131.

²⁵⁸ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

²⁵⁹ Ligatti, *supra* note 222, at 232.

²⁶⁰ *Id.*

The history of the United States is filled with collisions between liberty and security, and often, though not invariably, these collisions have resulted in the acquiescence to government intrusions for the cause of safety.²⁶¹ Knowing this history, it is important to strike a balance to ensure liberties are protected where possible; here, that means maintaining a distinction between the roles of the police and the military. With that said, the U.S. military is the predominant player in the war on terror internationally and has immense assets that can help during other domestic emergencies. Should it make a difference just where they are fighting the war? In England, for example, when a national security threat becomes domestic, it is the SAS (the Special Air Service—the British equivalent of America’s Delta Force), not Scotland Yard, that will in all likelihood respond.²⁶² When faced with a grave threat, a nation should use its resources most effectively and should use whatever it has to its greatest capability. In responding to terrorist threats, that is undoubtedly the military. If a victim of a crime was in the fight for her life and her assailant had a knife, but she carried both a knife and a gun, it would not be reasonable to expect her to limit herself to using a knife based on principle alone. The United States finds itself, domestically, in a fight for American lives, and it too should choose the gun over the knife when fighting terrorists.

This Article proffers three simple updates to the Posse Comitatus Act that would protect civil liberties and maintain the American tradition of harboring suspicions of our own government.

A. Make It More Clear

Despite what many believe, the American ban on Posse Comitatus is merely a law, not a constitutional construct or amendment.²⁶³ Therefore, it can easily be changed. While it is impossible to know if more military involvement would make America safer,²⁶⁴ it is likely that the Posse Comitatus Act and its underlying jurisprudence is not the epitome of what a law should be: something that enhances and protects American liberties and security.

²⁶¹ An example of this is the internment of Americans of Japanese descent during World War II. *See generally* Korematsu v. United States, 323 U.S. 214 (1944).

²⁶² *See* Jonathan Stevenson, *The Role of the Armed Forces of the United Kingdom in Securing the State Against Terrorism*, in *ARMIES IN HOMELAND SECURITY: AMERICAN AND EUROPEAN PERSPECTIVES* at 21, 28–30 (John L. Clarke ed., 2006).

²⁶³ Ligatti, *supra* note 222, at 240 (noting that some “view the PCA as a ‘quasi-constitutional’ limit that should not change with politics or the current of public opinion”).

²⁶⁴ Senator John Warner, on September 14, 2005, sent a letter to the Secretary of Defense, Donald Rumsfeld,

in which he urged Rumsfeld to “conduct a thorough review of the entire legal framework governing a President’s power to use the regular armed forces to restore public order,” including the “1878 Posse Comitatus Act [that] generally prohibits the use of the armed forces to enforce civilian law, unless Congress specifically authorizes it.”

Bennett, *supra* note 24, at 937 (quoting Letter from Sen. John Warner to Donald Rumsfeld, Sec’y of Defense (Sept. 14, 2005)). Hence, this letter demonstrates that there is a possibility

The confusion surrounding the Posse Comitatus Act is, at least in part, due to the failure of the Supreme Court to provide meaningful decisions and clarify the different points of law. It is amazing that a statute of such importance that has been on the books for 130 years has only been cited before the Supreme Court a handful of times and deliberated upon only once in a meaningful way.²⁶⁵ Instead, lower courts have engaged in sidelong discussions about whether the military was enforcing criminal laws or not.²⁶⁶ In order to make sense of the Act, and without meaningful input from the courts, the DOD has promulgated internal regulations.²⁶⁷ The result is a situation where the proponents of the Act argue that there are so many cross cutting laws that allow the government to deploy troops in almost any circumstance, that change is not needed. Yet, this hodgepodge approach denies the very thing that it admits—it is a confusing area of law that needs to be addressed and made clearer.²⁶⁸

Accordingly, both policy makers and the military do not clearly understand the Act's boundaries. In turn, the maximum effect of military resources cannot be utilized and civil liberties cannot be maximally protected.²⁶⁹ At a bare minimum, the Posse Comitatus Act needs to be updated to eliminate the paralysis it causes through overlapping and contradictory laws and regulations. Indeed, even if no provisions are changed, Congress should pass a comprehensive Posse Comitatus Act that, at a minimum, combines the current jurisprudence into a uniform, comprehensible statute.

B. Lower the Echelon of Authority

The Homeland Security Act makes it clear that the Posse Comitatus Act does not apply to the President in the sense that it does not prevent him from deploying troops in a domestic emergency.²⁷⁰ However, lesser officers—importantly, those that actually run the agencies charged with defending this nation—do not enjoy the authority to use the military, except as provided for by Congress in the exceptions and omissions discussed above.

“As interpretations of the Posse Comitatus Act currently stand, the President's ability to make rapid decisions is hampered [by] the complex statutory web”²⁷¹ One potential solution is to streamline the decision-making process regarding when and how the military can be used in an emergency.²⁷² As noted

that the Posse Comitatus Act restricts the ability of the military to protect the United States. *See id.*

²⁶⁵ *See supra* Part I.B.

²⁶⁶ *See supra* Part I.B.

²⁶⁷ *See supra* Parts I.B, II.C.

²⁶⁸ *See supra* Part III.A.4.

²⁶⁹ *See supra* Part III.B.1.

²⁷⁰ *See supra* Part II.A.

²⁷¹ Tkacz, *supra* note 146, at 316.

²⁷² *See id.* at 315–16.

on this subject, “The concept of a centralized chain of command with the President as commander-in-chief is the very structure utilized by the military . . . [and] allows one person to make and direct decisions regarding the deployment and use of American military forces worldwide.”²⁷³ This model is of great benefit during wartime, resulting in swift and decisive action due to the potential tactical responses that have already been considered and prepped.²⁷⁴ However, during domestic emergencies, this model often produces different results due to the inevitable lag time from event to gathering information to response.²⁷⁵

Therefore, local authorities should be given more control over the military when it is necessary and appropriate to use the military in a law enforcement capacity. Local mayors and police chiefs are much more attuned to the community’s needs during an emergency than the President of the United States. Moreover, when decisions are made in the stratosphere of the national political arena, it is likely that politics will play a role in every aspect of the decision on whether to deploy federal troops, as seen during Hurricane Katrina.²⁷⁶

Admittedly a local mayor cannot and should not be given *carte blanche* authority over a military unit; the President, as the Commander-in-Chief, has the ultimate authority over the armed forces and their deployment. However, for limited periods of time—during emergencies, for example—local authorities should have more of an ability to obtain and direct the assistance of military personnel and equipment in a law enforcement capacity. The ability to grant that request should be found somewhere lower in the command echelon than the level of the President, but remain subject to review. It is unreasonable that if local authorities

The American political structure is predicated on a series of checks and balances to prevent placing too much authority in the hands of one person. In this context, although “[t]he military is likewise subject to civilian control . . . its accountability is centralized through a command authority running to the President. The centralized national command authority is not as suited as local officials are to monitor law enforcement practices” However, the need for quick action in times of emergency dictates that the executive, as a unitary decision-maker, have broad discretion in deciding when and how to take appropriate action. Alexander Hamilton stated that “[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”

Id. (alterations in original) (footnotes omitted) (quoting William C. Banks, *The Normalization of Homeland Security After September 11: The Role of the Military in Counterterrorism Preparedness and Response*, 64 LA. L. REV. 735, 770 (2004); then quoting THE FEDERALIST NO. 70, at 424 (Alexander Hamilton)(Clinton Rossiter ed., 1961)).

²⁷³ *Id.* at 316–17.

²⁷⁴ *Id.* at 317.

²⁷⁵ See *id.* at 317. In the wake of Hurricane Katrina, “President [Bush] and Governor Blanco bickered over who should assume authority over the National Guard, and political and legal considerations prevented the President from making immediate moves to deploy active-duty military forces to secure New Orleans.” *Id.* (footnote omitted).

²⁷⁶ *Id.* at 317. Another example of this was seen during the WTO riots in Seattle, Washington. See *Seattle Municipal Archives: World Trade Organization Protests in Seattle*, SEATTLE.GOV [hereinafter Seattle Municipal Archives], <http://www.seattle.gov/cityarchives/exhibits-and-education/digital-document-libraries/world-trade-organization-protests-in-seattle> [https://perma.cc/Z45Y-949H] (last visited Nov. 28, 2015).

need the military to serve in a law enforcement role, the President has to hear the request, gather the appropriate information, and make a decision affecting local events far removed from the national and international scenes in which the President is generally active.

C. Rely on Timelines Rather than Absolute Bans

A key change to the Posse Comitatus Act should be to increase the military's ability to deploy domestically in a law enforcement capacity to increase security during an emergency.²⁷⁷ At the same time, in order to protect civil liberties and to limit the power of government, this new power should be time-restricted and subject to review.

This new law would streamline the speed with which units could deploy because they would not first have to ask to what extent they could help. Rather, they could simply act, but only for a specified period of time. This ability to have direct law enforcement authority would provide the country with the "best bang for its buck." For instance, the U.S. Army Military Police Corps has soldiers who are already trained as police officers.²⁷⁸ With that in mind, does it make sense that in emergencies, these military police officers cannot conduct law enforcement missions?

The obvious question that arises from this proposed approach is, How much time? A bright line rule of, for example, 30 days, would be adequate for emergencies such as the WTO riots in Seattle.²⁷⁹ However, events such as 9/11 and Katrina would require significantly more support and more time.

There are a number of ways to correct this problem. First, the timeline could be a sliding scale where thirty days would be routinely approved by a reviewing body, but where any increase beyond those thirty days would require approval at some level, probably with the President himself or his designee. Another solution could be for Congress to affect the policy with its power of the purse, by discontinuing funding for the deployment.

The fact that there will be challenges to this new approach does not mean that it should not be attempted. Indeed, this approach best suits the proponents of the Posse Comitatus Act by limiting the military's ability to act as police officers for a quantifiable period time, as well as placating the opponents of the Act by allowing the military to fully deploy without any confusion about their obligations or limitations.

²⁷⁷ See, e.g., Joyce Howard Price, *Biden Backs Letting Soldiers Arrest Civilians—But Ridge Says It's 'Unlikely,'* WASH. TIMES, July 22, 2002, at A1 (discussing then-Senator Biden's proposal of an amendment to allow soldiers to make criminal arrests).

²⁷⁸ *Military Police Corps Mission/Vision*, U.S. ARMY MIL. POLICE SCH., http://www.wood.army.mil/usamps/MissionVision/MP_Corps.html [<https://perma.cc/CU3N-HRBX>] (last visited Nov. 28, 2015).

²⁷⁹ See Seattle Municipal Archives, *supra* note 275.

D. Sometimes a Hammer Is Needed

In an effort to remedy their relative inadequacy in dealing with terrorism on U.S. soil and the ever-increasing violence posed by organized crime and drug trafficking, police forces throughout the country have obtained military equipment, adopted military training, and sought to inculcate a “soldier’s mentality” among its ranks.²⁸⁰ Though the reasons for this growth in the militarization of American police forces seem obvious, as discussed throughout this Article, the dangerous side effects are somewhat less apparent.²⁸¹

American police departments have substantially increased their use of military-grade equipment and weaponry because there is a real need in specific areas. The logic behind this is understandable. If superior, military-grade equipment helps the police avert or reduce the threat of a domestic terror attack and reduce crime, then some would argue that the ends justify the means. Yet, as discussed, blurring the line between cops and soldiers raises serious concerns and, as seen for people like Jose Guarena, poses very real consequences.²⁸² This is especially true in cases where police departments have employed their newly acquired military weaponry, not only to combat terrorism and heavily armed criminals, but also for everyday patrolling and controlling those they are charged to serve and protect.²⁸³

However, this reality unfolds along a continuum. The adage, “you give someone a hammer, and everything looks like a nail” brings into focus the danger of equipping police like soldiers. But that adage fails to contemplate the other end of the scale: sometimes there are nails in the world that need to be hit—and “neutralized.” On what should be those rare occasions when law enforcement needs a direct action response, there should be an exception to the Posse Comitatus Act to allow law enforcement authorities or the responsible executive official to call in military assistance to act as the proverbial “hammer.” The benefit of this approach is that a military unit, with its military “mindset,” can be deployed for a specific mission and for a specific amount of time, and then can be recalled to the base and barracks. This would honor our forebears design for a distinct separation of military and policing functions, while allowing the flexibility needed to effectively respond to emergencies too large for police forces to handle, even with the 1033 Program’s “help.”

Under the current model, because most members of S.W.A.T. teams are also “everyday” police officers, after the team members deploy for a military-type mission, they return to the streets as beat cops. Yet they return equipped their military training, mentality, and oftentimes weaponry.²⁸⁴ This poses real dangers to the citizens of the communities to which these cops return.

²⁸⁰ See *supra* Part III.A.1.

²⁸¹ See *supra* Parts III.A.1, III.B.4.

²⁸² See *supra* Parts III.A.1, III.B.4.

²⁸³ See *supra* Parts III.A.1, III.B.4.

²⁸⁴ See *supra* Parts III.A.1, III.B.4.

It is fully acknowledged that the solution proposed by this Article is not a perfect solution. Indeed, often police cannot wait for a military direct-action team from a remote base. Sometimes police need to act now and with force. In those cases, when there may not be time to call in military forces, a local S.W.A.T. team can be called in, again, to respond to a particular situation for the duration of the emergency. For less-localized or larger-scale emergencies, all police should not be turned into S.W.A.T. teams to calm the waters and respond—they simply are not equipped to be both police and soldier. Rather, a unit much better equipped to handle such situations should be called in and effectively used, then withdrawn, so the community police forces can retake control of their own streets.

CONCLUSION

The Revolutionary and Civil Wars have left their impressions on the American psyche. Americans are taught this history from young ages and are thus taught early on to at least appreciate that government can go too far, and that soldiers on our domestic soil are to be regarded with mistrust. After September 11, 2001, however, Americans were faced with a present reality much different than the history they grew up learning. The American view of the military's role has changed. The Department of Homeland Security was created, in part, to draw disparate lines of communication between defense and intelligence agencies together.²⁸⁵ Where once the FBI held its secrets close to its chest, today those walls have been torn down and information is shared freely.²⁸⁶ Today, it is easy to see why the military's ample and sophisticated resources should be used most effectively where they will be best utilized, across government agencies.

Nonetheless, many Americans have grown anxious about the balance between security and liberty. Some believe that the government is trespassing on sacred limitations, particularly with regard to the military's new role as a law enforcement agency.²⁸⁷ Others argue that the government is still not doing enough to protect lives and that the Posse Comitatus Act obstructs the government's ability to deploy its great resources in the most efficient and effective way. This argument was bolstered after the unimpressive (to say the least) response to Hurricane Katrina. Federal leaders were faulted both for their ineffective use of resources and because they demonstrated that they simply did not understand what limits the Posse Comitatus Act actually imposed on their ability to act. Furthermore, there is a real need for limited military tactics in the domestic sphere, and because of the mission creep seen in the work-arounds to the Posse

²⁸⁵ See *Information Sharing*, DEP'T HOMELAND SECURITY, <http://www.dhs.gov/topic/information-sharing> [<https://perma.cc/N3E3-C3SU>] (last visited Nov. 28, 2015).

²⁸⁶ See *id.*

²⁸⁷ See *supra* Part III.A.

Comitatus ban, police departments are encouraged to take up soldiering. In essence, this police militarization has made the Posse Comitatus, in every practical sense, irrelevant.

Because of these countervailing positions—maintain or repeal—a middle-ground approach may be the most realistic option. Not only is a middle ground likely the only feasible political option, such an approach will also improve the government's ability to respond. First, the Posse Comitatus Act should be amended to synthesize the mishmash of laws and regulations into one uniform policy that is clear and easily understood by both political and military leaders. Second, because the local authorities in an emergency will have the best understanding of the needs of the community, the ability to deploy troops for law enforcement purposes should not be limited to the President, who has a “top of the mountain” view of emergencies, when a “deep in the forest” view is what is truly necessary. Local authorities should have greater access to military help and lower echelon government leaders should have the authority to deploy troops for limited law enforcement missions. In addition, the Act should be amended to repeal the bright line rule that prevents the military from serving in a law enforcement capacity—after all, the line turns out to be not so bright upon inspection, as demonstrated by this Article. Instead, the primary limitation on military involvement should be based on the time such involvement is allowed. Further, that involvement should, of course, be subject to review by those who traditionally have authority over the use of the military. This would reduce fears of a “military coup” and the unease that Americans are taught to feel toward soldiers patrolling neighborhood streets. At the same time, it would allow the military to use its vast resources during a time of dire need. Lastly, in order to reduce police soldiering, we should allow military direct action in the rare and limited circumstances where the ground truth dictates that we require a fast and violent response—a hammer. In turn, this should reduce the need for police departments to train and equip their officers in military fashion, just in case that hammer stroke becomes required in their communities.

It has been argued that the greatest threat to our democracy may be the belief that our system of laws and the Constitution are keeping the U.S. government from adequately protecting its citizens.²⁸⁸

The stakes are more than individual preservation. If Americans believe that the “great experiment” of democracy is something worth fighting for, and if we are dedicated to the concepts that have historically defined who we are as a people—a free people—then certainly we should be just as dedicated to ensuring the security of those people.²⁸⁹ Thus, a cost-benefit analysis must be applied in any security versus freedom debate. We must weigh the liberties we hold dear against the safety of our people, our communities, and our nation. In striking that balance, it may be necessary to provide for a true hammer—the military—to be used

²⁸⁸ See Tkacz, *supra* note 146, at 332–33.

²⁸⁹ See *id.*

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in those cases that require such a response in order to protect against inappropriate or disproportionate means from being used too often by militarized police forces.

