Trading Police for Soldiers: Has the Posse Comitatus Act Helped Militarize Our Police and Set the Stage for More Fergusons?

Arthur Rizer, West Virginia University

Available at: https://works.bepress.com/arthur_rizer/3/
Trading Police for Soldiers: Has the Posse Comitatus Act Helped Militarize Our Police and Set the Stage for More Fergusons?

Arthur Rizer¹

I. Introduction

II. The Posse Comitatus Act
   A. The History of Posse Comitatus
      i. The Roots of the Act
      ii. The Forgotten Act
      iii. The Act is Reborn
      iv. The Modern Act
   B. Judicial Application of the Act

III. Exceptions and Variations to the Act
   A. Homeland Security Act of 2002
   B. Insurrection Act
   C. Military Support for Civilian Authorities "Act"
   D. The Stafford Act

IV. Save, Kill, or Modify
   A. Status Quo
      i. Blurring the Line Between Police and Soldiers
      ii. Liberty or Security
      iii. Just Not Very American
      iv. The Army Has a Job
      v. If it Isn't Broken - Don't Fix it.
   B. Repealing the Law: A Case for Killing the Posse Comitatus Act
      i. Archaic
      ii. Limiting the Greatest Resource When It is Needed Most
      iii. War has Come and the Military is Fighting it.
      iv. Trading Military Soldiers for Police Soldiers

V. Recommendations: Updating and Modifying the Law for Today's America
   A. Make it More Clear
   B. Lower the Echelon of Authority
   C. Rely on Timelines Rather Than Absolute Bans.
   D. Sometimes a Hammer is Needed

III. Conclusion

¹ Arthur Rizer is an Associate Professor of Law at the West Virginia University College of Law and a Visiting Professor of Law at Georgetown University Law Center. Rizer served in the U.S. Army for 20 years, retiring as a Lieutenant Colonel from a reserve component in 2014. Rizer is also a former criminal prosecutor with the U.S. Department of Justice, Criminal Division. Before his practice, Rizer served as a civilian police officer in Washington State. This article began as a paper for a course taken with Professor Cohen in 2008 at Georgetown University Law Center dealing with updating the Posse Comitatus Act for a post 9/11 world.

The author would like to thank his research assistants Berkeley Bentley, Vito Minutelli, and Cody Murphey for their help in the research and editing of this article and Instructor in Constitutional Law and Ph.D. candidate in Government at Georgetown University Joseph Hartman for his help to the author in drafting much of what became the introduction to this article and section IV.B.iv. The author would also like to thank the Hodges Faculty Research Grant for its support of this project. Lastly, the author would also like to thank {editor's name}, Editor for the {journal name} Law Review and his/her team for their work on this article.
I. 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 Ferguson, Missouri, Officer Darren Wilson 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 in Ferguson, Missouri—a city with a population of just over 20,000\(^5\)—have brought into national focus a problem that many citizens across the United States have felt growing for years.\(^6\) Much as the media


\(^6\) See Arthur Rizer & Joseph Hartman, How the War on Terror Has Militarized the Police, THE ATLANTIC, Nov. 7, 2011, available at http://www.theatlantic.com/national/archive/2011/11/how-the-war-on-terror-has-militarized-the-police/248047/. 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.
coverage of Selma brought the true plight of those fighting the Civil Rights Movement into the homes of all Americans and the newspapers of even more abroad, 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.

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. 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.

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

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 NEWS & REVIEWS (Aug. 19, 2014), http://www.itechsum.com/mashable/item/100106-has-the-media-become-a-third-force-in-ferguson ("[S]tunning photos and videos emerging from Ferguson have helped ignite debates about police brutality, the militarization of local authorities and a range of issues concerning race, class and the U.S. justice system.").
10. Id.
12. Id.
expected to act. 13 The actions of the “guards” quickly came to include enforcing authoritarian measures and conducting psychological torture. 14 That experiment, which was stopped early because of its shocking results, stands for the principle that roles can define behavior. 15 That principle translates to the idea, here, 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, prior, received little meaningful attention nationally; the attention it did receive before the events of 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, via 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 if it were an occupied territory in wartime. 18 It is hardly surprising that the community responded forcefully. That is especially unsurprising given the complicated and sensitive racial issues surrounding the killing of

---

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.
17 Id.
Michael Brown, with what appeared to be a wildly disproportionate police response followed by no repercussions for the officer only adding 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 machine guns mounted? 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 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. First, this article will examine the development of Posse Comitatus and its relationship to the historical backdrop of the American philosophy of limited government. This first Part will, in essence, explore where the Act came from and how it relates to the American experience. Next, this article will explain the legal succession of Posse Comitatus from a political philosophy to a codified law. This Part will also cover the “sister” laws and exceptions to the Posse Comitatus Act. The article will then turn 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, anyway, 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.

Ultimately, this article 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 US military personnel from US 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.

II. The Posse Comitatus Act

Our nation was born of a violent revolution against an oppressive regime and occupying power, and that left its imprint on American philosophy. It especially

---

19 See generally infra Part IV.A.i-ii.
impacted the way Americans, as a whole, distrust their government. 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”—so too does the legal concept behind Posse Comitatus.

September 11, 2001, changed the face of America, particularly the roles and responsibilities of our local police officers and the military. In addition, the aftermath of 9/11 and the government’s response to it 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. 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, rather from Mother Nature. Both 9/11 and Hurricane Katrina called into question the practicality and the wisdom of the Posse Comitatus Act. This is ostensibly because Posse Comitatus

20. See id.
21. See id.
22. 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 IV.A.i.
23. Dan Bennett, 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.” 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.
24. 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).
limited the federal government’s ability to use its full spectrum of power to respond to the catastrophes quickly and effectively.25

To understand where the country should go with regards to the Posse Comitatus Act, it is necessary to understand where the country has been. Thus, 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

i. The Roots of the Act

The Latin phrase, Posse Comitatus, literally translates to “power of the county” or county force.26 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.27 The phrase, in American law, simply refers to the principle that the federal military shall not be used in calling together a “posse.” The debate in this country over whether the military should be used in domestic law enforcement dates back to the revolutionary period.28 The argument during the founding of the country was not over whether we should allow Posse Comitatus or not, rather it was over whether we should maintain a standing army.29 “Anti-Federalists believed that granting a newly formed federal legislature the power to raise and support armies in peacetime and wartime could destroy the people's liberty. Consequently, there

---

25. See Bennett, supra note 23, at 935.
27. Id.
‘was a significant citizen sentiment against the mere presence of standing armies, particularly in peacetime.’” 30 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.”31

Many of the original states were gravely concerned that a standing army would pose a threat to their continued freedom, as evident in their respective state constitutions.32 For example, both North Carolina’s and Pennsylvania’s Constitutions decree, “standing armies in time of peace are dangerous to liberty, [and] ought not to be kept up.”33 The states of Delaware, Maryland, Massachusetts, and New Hampshire went further, declaring, “standing armies are dangerous to liberty, and ought not to be raised or kept up without the consent of the legislature.”34 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.”35

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.”36 Indeed, Alexander Hamilton, while arguing against the Anti-Federalist movement,

31. THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776).
32. Schmidt & Klinger, supra note 30, at 688.
33. Id. (citing THE FEDERALIST NO. 24 (Alexander Hamilton)).
34. Id.
35. Id. (“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.”).
36. Id. (citing 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, 179 (2003)).
proffered the position that the soon to be ratified Constitution supported the use of Posse Comitatus. Hamilton went on to sum up his opponents arguments as follows:

[i]t 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.

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 citizens [and] the officers entrusted with the execution of laws.” Interestingly, although Hamilton appears to advocate for citizen militia 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.” This would align with early American thought as the citizen militias were generally more trusted than a standing army for the reason discussed above—the citizenry feared the power of a standing army.

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. However, even when citizen soldiers were allowed to be

37. *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 nowhere 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. See id.

41. Id.

called to serve in the militia to help quell disorder, the standing federal army was
excluded from such practices.43

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
itself was “drafted and passed in the aftermath of suspicion that federal troops had
improperly influenced the southern vote in the presidential election of 1876.”44 In that
election, New York’s Democratic Governor Tilden won the popular vote, but ended up
losing because the Electoral College failed to indicate a clear winner, thus sending the
vote for the presidency to the Congress.45 The Republicans in Congress, who controlled
the Senate, declared Republican candidate Rutherford B. Hayes the nineteenth President
of the United States.46

As part of the deal stuck to make him President, Hayes agreed to numerous
concessions, most significantly the withdrawal of federal troops from the South, ending
Reconstruction.47 Thus, in order “to prevent further ‘excessive use of federal machinery
under the Federal Election Laws [as] in the presidential election of 1876,’” the forty-fifth
Congress passed the Posse Comitatus Act and President Hayes signed it.48

43. Id.
44. Bennett, supra note 23, at 941.
45. Id.
46. 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 (last visited
Feb. 22, 2015). Republicans controlled the Senate and Democrats controlled the House or 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.
47. Kealy, supra note 42, at 394.
ii. *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.\(^{49}\) Immediately after the Act was passed, there was disagreement concerning the extent the Act limited a president's power to use the military to enforce domestic law.\(^{50}\) 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.”\(^{51}\) 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 an exception made by Congress.\(^{52}\)

A larger problem than the misunderstanding of the Act after its enactment was that the Posse Comitatus Act was simply ignored. Indeed, the same year that President Hayes

\(^{49}\) Felicetti & Luce, *supra* note 36, 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.

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) Id.
signed the bill making Posse Comitatus federal law, he marched federal troops to New Mexico with the mission to quell the territory’s civil disorder.\textsuperscript{53} The deployment to New Mexico was set in motion by a presidential proclamation with no contribution or attempts at intervention by Congress, suggesting that the Act had a limited, if any, effect on presidential power from the start.\textsuperscript{54} President Hayes was not the only commander-in-chief to deploy soldiers to fight lawlessness or for other domestic law enforcement missions.\textsuperscript{55} In 1894, President Cleveland deployed federal troops to Illinois to help suppress rioting railroad strikers.\textsuperscript{56} Although Congress itself issued no objection and essentially remained silent at this deployment, the troops did deploy over the objection of the Illinois Governor.\textsuperscript{57}

In fact, the only domestic deployment of military troops that provoked a response from Congress came as a result of President McKinley's use of 500 troops in Coeur d'Alene, Idaho, from May 1899 to April 1901.\textsuperscript{58} The deployment was meant to help local law enforcement handle a growing number of disgruntled union miners in the area.\textsuperscript{59} Congress, through the House Committee on Military Affairs, investigated the legality of

\begin{itemize}
  \item \textsuperscript{53} 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. (citing See 10 U.S.C. §§ 331-334 (2006)).
  \item \textsuperscript{54} Id.
  \item \textsuperscript{55} Id.
  \item \textsuperscript{56} Felicetti & Luce, supra note 36, at 122.
  \item \textsuperscript{57} Id. Not only did the governor object, but the mayor had not even requested help from the state before the federal troops were deployed. Id.
  \item 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.
  \item Id. at n.165.
  \item \textsuperscript{58} Id. at 123.
  \item \textsuperscript{59} Id.
\end{itemize}
the President’s deployment in that instance. The report, however, that resulted from the investigation was partisan and split with McKinley’s Republican majority finding no fault with his or the military commander’s actions. In all, despite occasional rumblings from Congress regarding the Posse Comitatus Act, the law was largely forgotten until the 1970s.

iii. The Act is Reborn

On February 27, 1973, the radical Native American group, American Indian Movement, seized the town of Wounded Knee in the Pine Ridge Indian Reservation in order to protest a tribal chairman. This sparked a seventy-one day standoff against federal law enforcement officials. 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. Some individuals were arrested for trying to enter Wounded Knee and were charged with interfering with officials’ lawful performance of duties. At trial, the defendants proffered that, because of military involvement and the use of military

---

60. Id. at 124.
61. Id. at 125.
   In a bold display of misdirection, the majority brushed aside the President's failure to issue a proclamation under Revised Statute 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.

62. Longley, supra note 24, at 721.
64. Longley, supra note 24, at 721.
65. Id.
66. Id.
equipment, law enforcement officials acted outside their legal authority when they made their arrests. 67 Despite the fact that the courts that heard these cases ultimately ruled that the Act was not violated, the Posse Comitatus Act was now on the radar of American jurisprudence. 68

iv. 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.” 69 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.” 70 When the Air Force became its own branch and separated from the Army, Congress specifically provided that the Posse Comitatus Act continued to apply to the newly formed branch. 71 In 1956, the Posse Comitatus was amended with the words “or the Air Force” added immediately following the word “Army.” 72

67. Id.
68. Id.
69. See 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).
70. Id. at 374-375.
Unlike the Army, and later the distinct Air Force, the United States Navy and Marine Corps have never been included in the Posse Comitatus Act. This is not because Congress intended to exclude the Navy from the Act. Rather, it is simply because the original Posse Comitatus Act was passed as part of an Army Appropriations Bill. The Department of Defense, though, by an internal directive, extended the Posse Comitatus Act to include the Navy and the Marine Corps.

**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*, a 1972 case that involved a challenge to the Army’s domestic surveillance program. District courts, however, developed tests for applying the Act in their respective jurisdictions in response to the Wounded Knee litigation. North Dakota, South Dakota, and Nebraska courts developed three distinct tests, which define the level of military intervention in civilian law enforcement allowed before a

---

73. See U.S. v. Chon, 210 F.3d 990 (9th Cir. 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), cert. denied, 531 U.S. 910.

74. See United States v. Walden, 490 F.2d 372, 374 (4th Cir. 1974).

75. 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 Secretary, Dep’t of the Navy, Instruction No. 5820.7B, Cooperation with Civilian Law Enforcement Officials (Mar. 28, 1988); Dep’t of Defense, Directive No. 5525.5, DOD Cooperation with Civilian Law Enforcement Officials (Jan. 15, 1986) [hereinafter DOD 5525.5]; see also Mark P. Nevitt, U.S. Navy, 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, 489 (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).

76. 408 U.S. 1 (1972).

77. Longley, supra note 24, 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 (Douglas, J., dissenting) (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.; see Longley, supra note 24, at 722. 78. Id.
violation of Posse Comitatus occurs in those states. These tests developed at the district court level have “formed the foundation of [Posse Comitatus] jurisprudence over the last thirty years.” 79

The first test arose out of the District of North Dakota in the case, United States v. McArthur. 80 The McArthur test asks, “Are Citizens Being Subjected to Military Power that is Regulatory, Proscriptive, or Compulsory in Nature?” 81

In the District of Nebraska, the case that established the test was United States v. Jaramillo. 82 In Jaramillo, instead of focusing on how the military power affects the citizenry, the court focused on civilian law enforcement and asked, “Does the Use of the Military Pervade the Activities of Law Enforcement Officials?” 83

The last test came from the District of South Dakota in United States v. Red Feather. 84 The relevant question to the District Court, there, was whether “the Military

---

79. Id.
81. Longley, supra note 24, 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.” Id. Judge Van Sickle “dismissed four for insufficient evidence and found the remaining six defendants guilty as charged.” Id.
83. Longley, supra note 24, 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 has 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.
was used in a Direct and Active Role?" In essence, that court found that the Posse Comitatus Act had two separate elements. First, the court held, to violate the Act, the government must use the military directly, not merely in a supportive role and not merely by using military equipment. 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. According to [the court], providing military equipment, advice, maintenance assistance, and training . . . constitutes passive participation by the military. . .,” which the court found permissible.

Clearly, the “Wounded Knee” tests, though forming the basis of Posse Comitatus law for forty years, have failed to provide a uniform, clear, or predictable standard to civilian and military officials. Indeed, since the Wounded Knee decisions, courts have continued to place their emphasis on the Posse Comitatus Act’s “execute the laws” provision. In addition, because of the high level of military involvement that is needed before the courts are willing to call “foul,” there have been few violators, thus few occasions to bring controversies before a court and smooth out the very rough edges of Posse Comitatus jurisprudence. Rather, because the courts that have looked at the issue have not conducted constitutional analyses of the Act itself, focusing instead on the

85. Longley, supra note 24, at 724 (citing Red Feather, 392 F. Supp. at 925).
86. Id.
87. Id.
88. Id. at 725.
89. 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."). 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).
90. Id. at 726.
91. See id.
somewhat pedantic question of whether or not the military was executing laws in a given case, the jurisprudence is left only more confused and complex.\textsuperscript{92}

Recently, the United States Circuit Court of Appeals for the Ninth Circuit, in \textit{United States v. Dryer}, weighed in on Posse Comitatus in regard to the ever growing world of high-tech law enforcement.\textsuperscript{93} In Dryer, a special agent with the Navy Criminal Investigative Service (NCIS) investigated a civilian for online distribution and possession of child pornography.\textsuperscript{94} The court asserted that, because the Defendant was not connected with the military, the Posse Comitatus Act prevented the NCIS agent from giving that type of direct assistance to civilian law enforcement. Therefore, the court held, NCIS’s investigation violated the Act.\textsuperscript{95} The appeals court reversed the district court’s denial of the defendant’s suppression motion and remanded it for further proceedings.\textsuperscript{96}

\textbf{III. 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.”\textsuperscript{97} In addition, although the Act does not address how the National Guard is impacted by the Act, it is generally

\begin{itemize}
\item \textsuperscript{92} Id.
\item \textsuperscript{93} See United States v. Dreyer, 767 F.3d 826, 827-28 (9th Cir. 2014).
\item \textsuperscript{94} Id. at 827-28.
\item \textsuperscript{95} Id. at 831.
\item \textsuperscript{96} Id. at 837.
\item \textsuperscript{97} 14 U.S.C. § 2 (2000) (“The Coast Guard shall 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.”).}
\end{itemize}
understood that, when the National Guard is under federal control, the Act applies.98

However, when the Air or Army National Guard are under the command of a state
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.99 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.100 Some other exceptions, by either statute or other
rule making authority, specifically exempt federal troops from certain functions that are
within the purview of civilian law enforcement.101

---

   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. Perpich v. Dep't of Defense, 496 U.S.
334, 345 (1990) (“unless and until ordered to active duty in the Army, [Guardsmen]
retained their status as members of a separate State Guard unit”). 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.” United States v. Dern, 74 F.2d 485, 487
(D.C. Cir. 1934). “Guardsmen do not become part of the Army itself,” as pointed out
in United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997), “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.
100. See generally id. There are many minor statutory exceptions to the Posse Comitatus Act:
16 U.S.C. § 23 (2012) (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 (2012)
(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 (2012) (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 (2012) (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); 18 U.S.C. § 351 (2012) (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 (2012) (Director of the Secret Service may request
assistance from the Department of Defense and other federal agencies to protect the
A. Homeland Security Act of 2002

When the Posse Comitatus Act was enacted there was widespread debate concerning whether the Act applied to the President of the United States or only to civilian law enforcement.\textsuperscript{102} This debate was put to rest with the enactment of the Homeland Security Act of 2002 (HSA).\textsuperscript{103} 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.”\textsuperscript{104} Consequently, according to the HSA, soldiers can be used 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.\textsuperscript{105}

\textsuperscript{102} Pub. L. No. 107-296, 116 Stat. 2135 (codified in 6 U.S.C. §466). 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.

\textsuperscript{103} See 6 U.S.C. §466(a)(2) (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 to the Act. See id.

\textsuperscript{104} Id. § 466(a)(4).

\textsuperscript{105} See id.
B. Insurrection Act\textsuperscript{106}

Using federal troops to fight an insurrection is not a new concept introduced by the HSA. The Insurrection Act has been in existence since 1807 in one form or another.\textsuperscript{107} 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.’”\textsuperscript{108} 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.\textsuperscript{109} 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”;\textsuperscript{110} (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”;\textsuperscript{111} (3)

\textsuperscript{106} 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 III.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.

\textsuperscript{107} Longley, supra note 24, at 732.

\textsuperscript{108} Id. (citing Insurrection Act, ch. 28, 1 Stat. 264, 264 (1792) (repealed 1795)).


\textsuperscript{110} 10 U.S.C. § 331 (2012); see also JENNIFER K. ELSEA, CONG. RESEARCH SERV., RS22266, THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES 3 (2006) (“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 wide-spread looting was reported in St. Croix, Virgin Islands.”).

\textsuperscript{111} Id. § 332.
“suppress the rebellion”;112 and (4) “respond to failures by the states to guarantee the rights, privileges, and immunities guaranteed by the Constitution.”113

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.114 Each category is promulgated 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.115

Directive 3025.1, Military Support to Civil Authorities, issued on February 18, 1997, provides for a central system in which the various components of the DOD can plan and respond to requests for support from civil emergencies.116 The DOD is also charged to provide “assistance to civil authorities, including support in connection with incidents involving an act or threat of terrorism.”117 That Directive authorizes the DOD

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.
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 and only when there has not been a declaration of a national emergency by the
President, in which case some other authority to act is invoked (i.e., the Stafford Act).\textsuperscript{118}

The DOD Cooperation with Civilian Law Enforcement Officials, Directive
5525.5, was published on January 19, 1986, and updated on December 20, 1989.\textsuperscript{119} 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.”\textsuperscript{120} That policy objective is explicitly supported by Congress, which has
authorized the DOD to share information, equipment, and training with civilian law
enforcement agencies and to assist law enforcement agencies during a chemical,
biological, nuclear, or other weapon of mass destruction detonation.\textsuperscript{121} 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.”\textsuperscript{122}

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

\textsuperscript{118} Samek, \textit{supra} note 98, at 449-50. See \textit{infra} section III.D for discussion of the Stafford Act.
\textsuperscript{119} DEP’T OF DEF., \textit{DIRECTIVE 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS}
(JANUARY 19, 1986).
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} 10 U.S.C. §§ 371, 382 (2012).
\textsuperscript{122} 10 U.S.C.A. § 375 (2012).
Disturbances. Directive 3025.12 recognizes the power of the President to mobilize the military and use them in response to “insurrections, rebellions, and domestic violence,” and to maintain general law and order.

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

At the same time, this DOD support has accelerated, or at the very least supported, the growth of the apparatus that has contributed to the police militarization we

---

123 DEP’T OF DEF., DIRECTIVE NO. 3025.12, MILITARY ASSISTANCE FOR CIVILIAN DISTURBANCES, art. 4.1.1-3 (Feb. 4, 1994).
124 Id.
125 Longley, supra note 24, at 738.

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. at 738-39.
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.\(^{126}\) Yet, as seen across the nation and highlighted in Ferguson, the program has not led to community police forces handling matters themselves; rather we see multilayered responses by state and federal authorities whenever chaos erupts, as it did in Ferguson in response to the Ferguson Police Department’s excessive and provocative reaction to its citizens taking to the streets in protest.\(^{127}\)

In that case, it is no doubt true that the reaction was, in part, a result of the Ferguson Police Department’s early missteps in failing to deploy the military equipment it did have properly. It must be recognized that community peace officers are not soldiers, thus should have no soldiering equipment to misuse. This further 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) and those that simply do not (such as in cases

\(^{126}\) See e.g., MO. DEPT OF PUB. SAFETY, DEPARTMENT OF DEFENSE EXCESS PROPERTY PROGRAM (DOD 1033), available at http://www.dps.mo.gov/dir/programs/cjle/dod.asp (last visited Mar. 9, 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.

\(^{127}\) See MRAPs and Bayonets: What We Know About the Pentagon’s 1033 Program, NAT’L PUB. RADIO (Sep. 2, 2014, 6:09 PM) [hereinafter MRAPs and Bayonets], http://www.npr.org/2014/09/02/342494225/mraps-and-bayonets-what-we-know-about-the-pentagons-1033-program. “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.
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, a bit 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.\textsuperscript{128}

D. The Stafford Act

As mentioned above, Directive 3025.1 authorizes immediate action by the military when help is requested by civilian authorities and the President has not declared a disaster or an emergency.\textsuperscript{129} Once there has been a declaration (a Stafford declaration), the coordination of any military support shifts from the requesting local authority to the federal coordinating official.\textsuperscript{130}

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.\textsuperscript{131} Through the Stafford Act, Congress declared,

[B]ecause disasters often cause loss of life, human suffering, loss of income, and property loss and damage; and . . . 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

\textsuperscript{128} See \textit{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. \textit{Id.}

\textsuperscript{129} See supra Part III.C.

\textsuperscript{130} See DEP’T OF DEF., DIRECTIVE 3025.1, MILITARY SUPPORT FOR CIVIL AUTHORITIES (Jan. 15, 1993); DEP. OF DEF., DIRECTIVE 3025.1-M, MANUAL FOR CIVIL EMERGENCIES 1 (1994).

the rendering of aid, assistance, and emergency services, and the
reconstruction and rehabilitation of devastated areas, are necessary.\textsuperscript{132}

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 from such disasters . . .
.”\textsuperscript{133} 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.\textsuperscript{134}

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 . . .”\textsuperscript{135}

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.\textsuperscript{136} 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

\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} 42 U.S.C. §§ 5170, 5191 (2012). “[R]equests 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). “[R]equests 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 (2012).
\textsuperscript{135} Id. § 5170a (2012) (emphasis added).
\textsuperscript{136} Samek, supra note 98, at 459. Additionally, as discussed, the Posse Comitatus Act does not restrict the
President from deploying troops. See supra Part III.D.
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. Thus, notwithstanding the general principle
behind the Posse Comitatus Act, “under the guise of general federal assistance, the
President, or his or her designee, has the entire resources of . . . the military, with which
to support state and local assistance efforts.”

IV. Save, Kill, or Modify

A. Status Quo

i. Blurring the Line Between Police and Soldiers

Related to Posse Comitatus and the distinct roles that cops 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. This shift is memorialized in the White
House’s 2006 *National Strategy for Combating Terrorism*, in which the President
affirmed that the United States has “broken old orthodoxies that once confined our
counterterrorism efforts primarily to the criminal justice domain.” This shift in dogma
is easily executed outside the United States where the military has an almost plenary

---

137 Samek, *supra* note 98, at 459.
138 Samek, *supra* note 98, at 455.
presence in the counterterrorism world. 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.

Although it is the military that is equipped to fight a war such as our war on drugs and war against 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 terror and the war on drugs. While this phenomenon appears rational, the side effects of the militarization of American police forces is complicated. Specifically, equipping, training, and mentally preparing the individual officer/sometime soldier is a convoluted process.

Police departments have increased their use of military grade equipment to perform their duties, increasing their use rapidly following the declaration of the “war on drugs” and again accelerating after 9/11. If the military equipment helps the 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. By allowing civilian law enforcement to use military weapons and technology, it is argued,

the line between what makes a police officer and what makes a soldier is blurred. The mission and mentality of a police officer are very necessarily different from those of a soldier; blurring that distinction invites an identity crisis in those we want patrolling our neighborhoods, and the mere possibility of that raises red flags for many.

This alarm grows especially loud regarding military weapons coming into community police departments. In truth, much to the chagrin of civil liberty groups, police departments have been acquiring more military weapons for the patrolling of “Mayberry.” 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. Today, in many cities, officers walk the beat in battle uniforms with assault rifles. 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.

To assist them in deploying this new weaponry, police departments have also sought and received extensive military training and tactical instruction. Originally, the Special Weapons and Tactics (S.W.A.T.) teams were hallmarks of only the bigger cities and were called out when no other peaceful option was available—when a truly

147 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.
148 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).
150 See Harrold, surpa note 144, at 120; Rizer & Hartman, supra note 6.
militaristic response was necessary.\textsuperscript{151} 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.\textsuperscript{152} Furthermore, 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.\textsuperscript{153} In short, what was once “special” has quietly become “routine.”\textsuperscript{154}

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 from “peace officers to soldiers.”\textsuperscript{155} This development represents a fundamental change in the nature of law enforcement.\textsuperscript{156} The primary goal or mission of a cop is to keep the peace and enforce the law: those who an officer suspects has committed a crime should be treated as just that, suspects.\textsuperscript{157} Officers are duty bound to protect the rights of all civilians—even known criminals or those suspected of committing even violent crimes—because of the sacrosanct American mantra, innocent until proven guilty.\textsuperscript{158} Moreover, police officers operate among a largely friendly population and have traditionally been trained to solve

\begin{footnotesize}
\begin{itemize}
\item[152] See generally id.; Rizer & Hartman, supra note 6.
\item[153] Laugesen supra note 151; Rizer & Hartman, supra note 6.
\item[154] See Laugesen supra note 151; Rizer & Hartman, supra note 6.
\item[155] Rizer & Hartman, supra note 6.
\item[156] Id.
\item[157] See Joel Miller, Cops at War: The Drug War and the Militarization of Mayberry, OLDSPEAK (Dec. 30, 2002), https://www.rutherford.org/publications_resources/oldspeak/cops_at_war_the_drug_war_and_the_militarization_of_mayberry; see also MARILYN OLSER, STATE TROOPER: AMERICA’S 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.”); Rizer & Hartman, supra note 6.
\item[158] Miller, supra note 157; Rizer & Hartman, supra note 6.
\end{itemize}
\end{footnotesize}
problems using the legal system, reserving the deployment of lethal force as an absolute last resort.\textsuperscript{159}

Soldiers, by contrast, are told to label people as belonging to one of two groups, the enemy and the non-enemy.\textsuperscript{160} The mission for soldiers is simple: kill the enemy and try not to kill the non-enemy. They often reach this decision while surrounded by a population that considers the soldier an occupying force.\textsuperscript{161} 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.”\textsuperscript{162} This is a far cry from the peace officers’ creed “to protect and serve.”\textsuperscript{163}

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 them and innocent bystanders safer as they carry out their often challenging and dangerous duties.\textsuperscript{164} It is also not suggested that a police officer, once trained in military tactics, will seek to kill civilians.\textsuperscript{165} It is easy to second guess the way police officers perform their jobs when they are the ones in the streets waging what must, at times, feel like war.\textsuperscript{166} This article does not attempt to second-guess the actions of those in the media spotlight. Rather, the purpose is to use the events spotlighted so recently in the national media to identify that the nation should be mindful that when police dress like soldiers, carry soldiers’

\textsuperscript{159} Id.; Rizer & Hartman, supra note 6.
\textsuperscript{160} See Laugesen, supra note 151.
\textsuperscript{161} Id.; Rizer & Hartman, supra note 6.
\textsuperscript{163} Rizer & Hartman, supra note 6.
\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
weapons, and are trained like soldiers, they very well may begin to act like soldiers. And remember, reader, a soldier’s primary objective is to kill the enemy. 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, the “no military in domestic law enforcement” rule announced in the Posse Comitatus Act, by simply militarizing our police forces.

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?

ii. 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, “he who sacrifices freedom for security is neither free nor secure.”

The partition of civilian law enforcement from the military has a long and purposeful history in American democracy. As farfetched as it may seem to contemporary Americans, the notion that the military must be suppressed is an essential

---

167. Id.
168. See infra section IV.B.iv and accompanying notes.
170. Bennett, supra note 23, at 942-43.
doctrine for any democracy; indeed the survival of a nation depends upon it.\textsuperscript{171} “An increased military presence in everyday life blurs the distinction between these two very different groups, and this is a dangerous path.”\textsuperscript{172} 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.\textsuperscript{173} 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.\textsuperscript{174} As will be addressed, however, one could argue that the Posse Comitatus Act has simply encouraged the very thing it was trying to protect, and instead of potential usurpers wearing green uniforms, they now wear blue.

\textit{iii. 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.\textsuperscript{175} In Coeur d’Alene, soldiers went house to

\begin{footnotes}
\footnotetext[171]{See id. at 943.}
\footnotetext[172]{Id.}
\footnotetext[174]{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 Army to enforce civilian laws posed a potential danger to the military’s subordination to civilian control, passed the Act.” \textsc{Craig T. Trebilcock, Ctr. for Strategic & Int’l Studies, Posse Comitatus—Has the Posse Outlived Its Purpose?} 1 (2000), available at http://www.csis.org/media/csis/pubs/trebilcock.pdf.}
\footnotetext[175]{Felicetti & Luce, \textit{supra} note 36, at 122.}
\end{footnotes}
house and helped the local police arrest every adult male.\textsuperscript{176} These “prisoners” were held without charge for weeks.\textsuperscript{177} 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.\textsuperscript{178} There, the military used more than just “hard power,” it also used military intelligence operatives to harass and ultimately arrest union leaders.\textsuperscript{179} The army also suppressed union organized strikes in Gary, Indiana; Butte, Montana; and Seattle, Washington; and occupied copper mines in Arizona and Montana to ensure union activities were fully suppressed.\textsuperscript{180} 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 Firearms—that military style operation ended with 80 civilians dead, 27 of which were children.\textsuperscript{181}

Conversely, not all uses of the military to enforce civil law have been negative. Certainly President Eisenhower’s use of the Army’s 101\textsuperscript{st} Airborne Division to escort nine black children to attend a segregated school, commonly known as the Little Rock

\textsuperscript{177} Id. at 4.
\textsuperscript{178} Id. Also during the First World War, concerns about German saboteurs on the main land “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.” Id. In addition, “[t]he War Department relied heavily on a quasi-private volunteer organization called the American Protective League [APL]. 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.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
Nine, was a positive use of federal troops.\textsuperscript{182} The Little Rock Nine conflict started when the Arkansas National Guard, under the orders of the Governor, blocked the students from attending school.\textsuperscript{183} On September 25, 1957, soldiers from the 101\textsuperscript{st} Airborne Division, the Screaming Eagles, escorted the children to school and remained for the duration of the school year.\textsuperscript{184} The President cited that he had authority to use federal troops in that case under 10 U.S.C. § 332, 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


\textsuperscript{183} Id.

\textsuperscript{184} 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.

\textsuperscript{184} Id.

The 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 101\textsuperscript{st} 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.

\ldots

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.

\textsuperscript{Id.}
of the United States,” that is, under the Insurrection Act.\textsuperscript{185} Even with these effective and positive uses of the military to promote social justice while acting in a law enforcement capacity, many still argue that the nation should still question the wisdom of \textit{ever} using military troops as domestic law enforcement agents.\textsuperscript{186}

Another concern that arises when the roles of the military and law enforcement are confused is “the need to maintain a universal trust in the military as a non-political body . . . ”\textsuperscript{187} 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.”\textsuperscript{188}

Lastly, as one author eloquently stated the feeling, “there is something inherently repugnant to most Americans at the thought of the military patrolling the streets of our cities and towns . . . \textit{a}n inarguably chilling image that should cause \textit{Posse Comitatus Act} opponents to hesitate.”\textsuperscript{189}

\textit{iv. 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

\textsuperscript{186} Bennett, \textit{supra} note 23, at 949.
\textsuperscript{187} \textit{Id.} Although polls suggest that only 22\% of the American people trust Congress, and only 44\% trust the president, an impressive 74\% of people in this country trust the military. \textit{Id.}
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{Id.}
equipment, and 57,000 plus casualties from those two conflicts.\textsuperscript{190} 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.\textsuperscript{191} Moreover, some argue that 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.\textsuperscript{192}

\textit{v. 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.\textsuperscript{193} However, to counter such a charge, supporters of the Act argue, as discussed above, that there are numerous built in mechanisms that either act as an exception to the Act or where the Act simply does not apply.\textsuperscript{194} 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.\textsuperscript{195} The President always retains the power to use the armed forces to fulfill the obligations of his Office under the Constitution to respond promptly

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{190} Afghanistan Coalition Wounded Count, iCASUALITIES.ORG (Feb. 6, 2015), http://icasualties.org/OEF/USCasualtiesByState.aspx (the wounded in Afghanistan, as of February 6, 2015, numbered 17,674); Afghanistan Fatalities Count, iCASUALITIES.ORG (Feb. 6, 2015), http://icasualties.org/OEF/Index.aspx (the fatalities in Afghanistan, as of February 6, 2015, numbered 2,376); Iraq Coalition Wounded Count, iCASUALITIES.ORG (Feb. 6, 2015), http://icasualties.org/Iraq/USCasualtiesByState.aspx (the wounded in Iraq, as of February 6, 2015, numbered 32,223); Iraq Fatalities Count, iCASUALITIES.ORG (Feb. 6, 2015), http://icasualties.org/Iraq/ByYear.aspx (the fatalities in Iraq, as of February 6, 2015, numbered 4,807).
\item \textsuperscript{191} Bennett, \textit{supra} note 23, 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.’” \textit{Id.}
\item \textsuperscript{192} \textit{Id.}
\item \textsuperscript{193} \textit{Id.} at 947.
\item \textsuperscript{194} \textit{Id.}
\item \textsuperscript{195} See \textit{id.}
\end{itemize}
\end{footnotesize}
in time of war, insurrection, or other serious emergency.”  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.”  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.  Looking to the tragedy in New Orleans after Katrina, from which much of the recent criticism of the Posse Comitatus stems, the federal government had the authority to mobilize the military in order to protect the rights of life, liberty, and property.

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

i.  Archaic

The most obvious reason cited to repeal the Posse Comitatus Act is that it is archaic in its very nature.  Certainly a law written over 100 years ago out of the depths of the Civil War cannot be fully applicable in modern America.  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.  Is it not true that “[a] good tree cannot bring forth evil fruit, neither can a corrupt tree bring forth good fruit.”

198  Bennett, supra note 23, at 948-49.
199  Id. at 951.
200  See id. at 945.
201  Id. “[A]n unnamed ‘senior Pentagon official said [that] the military's response [to the Hurricane Katrina disaster] has been complicated by ‘archaic laws' that were ‘difficult to work through,” apparently referring to the PCA.”  Tom Bowman & Siobhan Gorman, Increasing Military's Role Raises Questions: Bush Disaster-Relief Plan Complicated by Law Against Using Active-Duty Troops for Law Enforcement, BALTIMORE SUN, Sept. 20, 2005, at A6.
202  See supra Part II.A.
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 there are a plethora of other laws that allow the government to deploy troops in virtually any capacity. 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.” 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.’” That argument falls on its own proverbial sword, however, 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?

This patchwork of laws—the Posse Comitatus Act banning the use of federal troops; then a series of laws, regulations, and interpretations that allow for the use of federal troops—seriously confuses the jurisprudence in this area and “impedes th[e]
important mission [of the military] and does little to protect civil liberties." 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; where the Act has decreased both military and civilian response times; 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. 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.

\[ii. \text{ Limiting the Greatest Resource When It is Needed Most}\]

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 beat patrolling. 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

\[208\text{ Felicetti & Luce, supra note 36, at 179.}\]

\[209\text{ Id. at 89 n.10, 179. That article discusses, in part, a situation where the Navy was prevented from supporting a Coast Guard Ship who was boarding “a suspected foreign terrorist vessel approaching the United States…. The Navy and DOD maintain that this prohibition is statutory, however.” Id. Because of an exception to the Posse Comitatus Act, however, the Navy is allowed to board a U.S. fishing vessel to enforce routine fisheries regulations. See 16 U.S.C. § 1861 (2000). Thus, the PCA may prevent the Navy from protecting the United States from possible foreign enemies while allowing it to regulate fishing.}\]

\[210\text{ Id. at 89 n.10.}\]
Veteran Affairs at 200,000. In addition to civilians, the DOD also has over 1,300,000 active duty uniformed service members with another million in the ready reserves. The DOD, as a whole, towers over the other departments by nearly a 14 to 1 ratio. What is impressive about these numbers is that the entire Department of Justice only has 103,479 employees and the FBI, the largest federal “police force,” has only 10,000 special agents. While not every service member has the same training as a 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 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 the military would play a constructive role in any response. Therefore, as one scholar noted, “if the question is simply whether the military would be helpful in the aftermath of [a major disaster,] the answer should be a resounding yes.”

---

212 This number includes the active Army, Navy, Air Force, and Marine Corps, along with the Army National Guard, Army Reserves, Air Force National Guard, Air Force Reserves, Navy Reserves, and Marine Corps Reserves. MILITARY ONE SOURCE, 2012 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY iii-vii (2012), available at http://www.militaryonesource.mil/12038/MOS/Reports/2012_Demographics_Report.pdf. This number specifically excludes the Coast Guard, who are statutorily exempt from the Posse Comitatus Act and thus irrelevant to this discussion.
215 Id.
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. 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.

iii. 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 something new, specifically, the military working domestically. 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.”

Hence, for the pragmatic reason of efficiency, because the US 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. If the military is tapped

---

217 See generally id.
218 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 214, at 231.
219 Ligatti, supra note 214, at 231.
for service, however, there would be no such wall because it is, essentially, one entity with communication lines running throughout to the command structure at the top.\textsuperscript{220}

Moreover, many Americans are and should be unconformable with their local police department becoming “SWATized,” because police cannot serve both roles well.\textsuperscript{221} Thus, an argument can be made that when it comes to combating terrorism—where a military “like” response is needed—the military should be the force that responds.

\textit{iv. 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 our answer. On the morning of May 5, 2011, a S.W.A.T. team from the Pima County, Arizona, Sheriff’s Department raided Guerena’s home, a former U.S. Marine and veteran of two tours of duty in Iraq, to serve a search warrant for narcotics.\textsuperscript{222} 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.\textsuperscript{223} The Pima County S.W.A.T., which supports a population of less than a million people, shot 71 rounds hitting Guerena 60 times.\textsuperscript{224} A subsequent investigation revealed that the initial shot that prompted the S.W.A.T. team barrage came

\begin{flushright}
\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{221} See supra Part IV.A.ii.
\item \textsuperscript{222} Jose Guerena’s Family Gets Settlement, But His Killers Still Wear Badges, POLICE STATE USA (Sept. 19, 2013), http://www.policestateusa.com/2013/jose-guerena-settlement/ [hereinafter POLICE STATE USA].
\item \textsuperscript{223} Id; Rizer & Hartman, supra note 6.
\item \textsuperscript{224} POLICE STATE USA, supra note 222; Rizer & Hartman, supra note 6; Pima County, Arizona, CITY-DATA.COM, http://www.city-data.com/county/Pima_County-AZ.html.
\end{enumerate}
\end{footnotesize}
\end{flushright}
from a S.W.A.T. team member’s gun, not Guerena’s. Guerena, reports later revealed, had no criminal record and no narcotics were found at his home; further, the safety on his weapon was on when he was shot.

The United States has witnessed a proliferation in incidents of excessive, military-style force by police S.W.A.T. teams, which often makes national headlines due to their sheer brutality. Indeed, the increase of S.W.A.T. raids and callouts from 1980 to 2000 could be as high as 1400 percent. Even with standard police equipment, officers can be brutal, but the availability of special equipment and training 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. The M4 is a carbine (shorter) version of the well-known M16 assault rifle. 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 it as their universal rifle.

---

225 POLICE STATE USA, supra note 222.
226 POLICE STATE USA, supra note 222.
228 Jacobson, supra note 227.
231 Id.
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. More relevant to the conversation about police weapons is the M4’s maximum lethal range of 3,600 meters (11,811 feet). Thus, if fired at a target and the target is missed, a bystander over a mile and a half away could be killed. 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, meaning that a single round can, and has, gone 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.

What do all of these numbers mean? First, they mean that the M4 is a very effective weapon for a soldier in combat to maim and kill as well as for certain, specialized missions within a police department. Second, they mean 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. To fully understand this, one has to keep in mind that a police officer, according to the Supreme Court’s 1985

233 Id.
234 Id.


_Tennessee v. Garner_ decision, 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.”

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.

The M4 assault rifle, by its very nature, is designed to engage and destroy the enemy at long range. It is a good offensive weapon, but a poor choice for crowd control because it is unwieldy, long-range, and carries the potential for over-penetration.

Another “tool”, the MRAP, is not technically a “tank,” but appears to be one to many civilians, therefore adding to the perception of a warlike atmosphere when deployed by local police departments for simple crowd control purposes. 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.

So why issue ordinary police officers M4 assault rifles in Ferguson, Missouri? That is simple: they look scary, and police—thanks to the 1033 Program—have them readily at hand. 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.

---

238. 471 U.S. 1, 7-22 (1985).
239. See id.
240. See ARMY STUDY GUIDE, supra note 232.
241. See supra notes 219-226 and accompanying text.
242. See supra notes 219-230 and accompanying text.
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 with even more violent dissent, of the type we saw in Ferguson, and, potentially, for the distrust of future generations with a learned, ingrained antipathy toward 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 just such 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.”244 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. Given the Ferguson Police Department’s obvious failures since the first night of protest, things spiraled so completely out of control that Governor Nixon requested the assistance of the Missouri State Highway Patrol and called in the Missouri National Guard, just as he later

244 The 1033 Program, ORIGINAL CONTENT BLOG (Dec. 4, 2014), https://ianpribanicjournalismportfolio.wordpress.com/2014/12/04/the-1033-program/.
did in the days leading up to the grand jury decision. President Obama detailed Attorney General Holder to meet with community leaders and attempt to ratchet down the tension, the Department of Justice has launched an investigation, and even the Pentagon is now reassessing the wisdom of the 1033 Program. In short, if the goal of the program was to equip local police forces to handle matters themselves, in this case and others, it has rather 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.

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: 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 it might temporarily disperse 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 time for a national

---

247 See MRAPs and Bayonets, supra note 119.  
248 See id.
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.”

V. 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.” President Lincoln echoed this notion with the opinion that “it is better to violate the Constitution than to allow the destruction of the nation.” Indeed, as one scholar noted “[b]oth 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.” 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. Knowing this history, it is important to strike a balance to ensure liberties are protected when we can; here, that means maintaining a distinction between the roles of the police and the military. With that said, the US military is the predominant player in the war on terror internationally.

250 Ligatti, supra note 214, at 232.
251 Id.
252 An example of this is the internment of Americans of Japanese descent during World War II.
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. When faced with a grave threat, a nation should use its resources most effectively, a nation 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 their life and her enemy had a knife but she carried both a knife and a gun, it is not reasonable to expect her to limit herself to using a knife based on principle. 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. Therefore, it can easily be changed. While it is impossible to know if more military involvement would make America safer, it is likely that the Posse Comitatus Act and the jurisprudence surrounding it is

253 Ligatti, supra note 214, 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” (citing Nathan Canestaro, Homeland Defense: Another Nail in the Coffin for Posse Comitatus, 12 WASH. U. J.L. & POL’Y 99, 136 (2003))).
254 Senator John Warner, on September 14, 2005, sent a letter to the Secretary of Defense, Donald Rumsfeld, requesting the Secretary 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.” Letter from Sen. John Warner to Donald Rumsfeld, Sec'y of Defense (Sept. 14,
not the epitome of what a law should be: something that enhances and protects American liberties and security.

The confusion surrounding the Posse Comitatus Act is, at least in part, due to the failure of the 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 to before the Supreme Court a handful of times and deliberated upon only once in a meaningful way.255 Instead, the courts have engaged in sidelong discussions about whether the military was enforcing criminal laws or not.256 In order to make sense of the Act, and without meaningful input from the courts, the DOD has promulgated internal regulations.257 What has resulted 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.258

Because of this, both the policy makers and the military do not clearly understand where the boundaries are, and as a result, the maximum effect of military resources cannot be utilized, therefore civil liberties cannot be maximally protected.259 At a bare minimum, then, the Posse Comitatus Act needs to be updated to eliminate the paralysis it causes though overlapping and contradictory laws and regulations. Indeed, even if no

---

2005), available at http://blogs.washingtonpost.com/earlywarning/files/ WarnerPosseComitatus14Sep05.pdf. Hence, this letter demonstrates that there is a possibility that the Posse Comitatus Act restricts the ability of the military to protect the United States. See id.

255 See supra Part II.B.

256 Id.

257 Id.; see supra Part III.C.

258 See supra Part IV.A.iv.

259 See supra Part IV.B.i.
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**

As discussed, the Homeland Security Act makes it clear that the Posse Comitatus Act does not apply to the President. 260 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 informed decisions quickly is hampered because of the complex statutory web. 261 One potential solution to this is to streamline the decision making process on when and how the military can be used in an emergency. 262 As noted 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

---

260 See supra Part III.A.
261 Tkacz, supra note 142, at 316.
262 Id. at 315-16.

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, has 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.*
decisions regarding the deployment and use of American military forces worldwide.”

While this benefit in wartime produces swift and decisive action because potential responses have already been considered and prepped, this model during domestic emergencies often produces different results because of the inevitable lag time from event to gathering information to response.

Therefore, it is proposed that local authorities are given more control over when the military should be used in a law enforcement capacity. Local mayors and police chiefs are much more in tune with the community’s needs during an emergency than the President of the United States. Moreover, when decisions are being made in the stratosphere of the national political arena, it is likely that politics will play a role in every aspect of the decision to deploy federal troops or not, as seen in Katrina.

It is acknowledged that a local mayor cannot and should not be given carte blanche authority over a military unit. It is further acknowledged that 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 national 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 lower in the command echelon, but subject to review. It is unreasonable that if local authorities need the military to serve in a law enforcement role, the President has to hear the request, gather the appropriate

---

263. *Id.* at 316-17

264. 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.*

265. *Id.* at 317. Another example of this was seen during the WTO riots in Seattle, Washington.
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 tendered here would be to increase the military’s ability to deploy domestically in a law enforcement capacity in order to increase security during a national emergency. 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 for a specified period of time only. 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. 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? It is not likely that a unit would be deployed into a disaster area and, then, automatically redeployed based on some arbitrary time frame. A bright line rule of, for example, 30 days, would be adequate for emergencies such as the WTO riots in Seattle. However, events such as 9/11 and Katrina would require significantly more support and, thus, time.

---

266 See, e.g., Joyce Howard Price, *Biden Backs Letting Soldiers Arrest Civilians*, WASH. TIMES, July 22, 2002, at A1 (discussing then-Senator Biden’s proposal of an amendment to allow soldiers to make criminal arrests.)

There are a number of ways to correct this problem. First, the time line could be a sliding scale where 30 days would be routinely approved, but there has to be approval at some level, probably with the President himself or his delegatee, for any increase above those 30 days. Another solution could be for Congress to affect the policy with their power of the purse.

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.

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 their ranks.\textsuperscript{268} 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.\textsuperscript{269}

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

\textsuperscript{268} See supra Part IV.A.i.
\textsuperscript{269} See supra Parts IV.A.i, IV.B.iv.
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 Guerena, poses very real consequences.\textsuperscript{270} 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 control.\textsuperscript{271}

However, this occurs along a continuum. As mentioned, 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 killed. 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, 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 police deploy for a military-type mission, they return to the streets as beat cops. Yet they carry the military training, mentality, and oftentimes

\textsuperscript{270} See supra Parts IV.A.i, IV.B.iv.
\textsuperscript{271} See supra Parts IV.A.i, IV.B.iv.
equipment with them after returning to the streets. That poses real dangers to the citizens of the communities those cops return to.

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 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.

V. Conclusion

The Revolutionary and Civil Wars have left their impressions on the American psyche. Americans are taught this history from young ages, so are taught from young ages 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 here and now much different than the history they grew up learning. The American view of the military’s role is changed. The Department of Homeland Security was created, in part, to draw disparate lines of communication between defense and intelligence agencies together. Where once, the FBI held its secrets

272 See supra Parts IV.A.i & IV.B.iv.
close to its chest from the other agencies, today those walls have been torn down and
information is hoped to flow freely. Today, it is easy to see why, because the military’s
resources are so great, those resources should be used most effectively where they will be
best utilized, across government agencies. Today, too, 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.273 Others argue that 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 where federal leaders were faulted both for their ineffective use of resources and
because they demonstrated that they simply didn’t 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 we
have seen in the work-arounds to the Posse 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

273 See supra Part IV.A.
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 rule 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 public belief that our system of laws and the Constitution is keeping the government from adequately protecting individuals and their families.”274

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 certainty we should be just as dedicated to ensuring the security of those people.275 Thus, a cost-benefit analysis must be applied in any security vs. freedom debate. We must weigh the liberties we hold dear against the safety of our people, our communities, and our nation.276 In striking that balance, it may be necessary to provide for a true hammer—the military—to be used 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.

274 Tkacz, supra note 142, at 233.
275 Id.
276 Id. at 234.