

COMMENTS

THE DOMESTIC ROLE OF THE MILITARY IN AMERICA: WHY MODIFYING OR REPEALING THE POSSE COMITATUS ACT WOULD BE A MISTAKE

By
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Since the attacks of September 11th, 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. Now, in the wake of the devastating flooding of New Orleans brought about by Hurricane Katrina, an important bulwark of liberty has been called into question. The Posse Comitatus Act, a 19th Century law that limits the manner in which the United States military can be deployed and used domestically, has come under assault. Ostensibly because the Posse Comitatus Act unnecessarily limited the federal government's options in the aftermath of Hurricane Katrina, there have been calls to examine and revise or eliminate the Act. Further, President Bush has suggested the possibility that the role of the military will need to be modified in order to combat the threat of an avian flu epidemic. This Comment argues that such a revision is not necessary to ensure federal flexibility in the event of a disaster, and that the Act promotes important values and provides essential protections, and thus should be left unmodified.

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I. INTRODUCTION

September 11th, Hurricane Katrina, and the possibility of a bird flu pandemic are among the threats to the safety of Americans that have gripped the nation and dominated the headlines in recent years. Americans have greeted these events with an understandable level of trepidation and fear. Justified though that fear may be, however, it provides no reason to undermine an important bulwark of liberty.

The Posse Comitatus Act may be a flawed law. Its origins are, at best, less noble than many of our important early laws and founding documents. However, neither the age of the document, its outmoded wording, or the circumstances of its passage detract from what it has come to represent: the idea that there is ultimate civilian control of the military, which shall not be deployed within this country to enforce its laws. Further, the supposed evils of the Act in the context of disaster relief turn out, upon examination, to be ephemeral.

A. *Hurricane Katrina*

Hurricane Katrina slammed into New Orleans on Monday, August 29, 2005. The following day many observers let out sighs of relief, believing that the city had been spared from the worst possible devastation. The following day, their relief proved premature as water flooded through breaches in the protective levees that surrounded the city.¹ Thousands of refugees, many of whom were too poor or infirm to heed earlier calls to flee inland, began to arrive at the designated evacuation site, the New Orleans Superdome football stadium.²

The federal government’s relief effort was viewed by many as unacceptably slow and poorly coordinated. In one startling exchange, the head of the Department of Homeland Security, Michael Chertoff, appeared only to learn of thousands of people trapped at the New Orleans convention center

¹ Joseph B. Treaster & N.R. Kleinfeld, *New Orleans Is Inundated as 2 Levees Fail; Much of Gulf Coast Is Crippled; Toll Rises*, N.Y. TIMES, Aug. 31, 2005, at A1.

² *Id.*

when he was informed, live and on the air, by a National Public Radio host.³ After he was told by host Robert Siegel that thousands of people were trapped at the convention center and had received neither food nor water, the following exchange took place:

[Chertoff]: As I say, I'm telling you that we are getting food and water to areas where people are staging. And, you know, the one thing about an episode like this is if you talk to someone and you get a rumor or you get someone's anecdotal version of something, I think it's dangerous to extrapolate it all over the place. The limitation here on getting food and water to people is the condition on the ground. And as soon as we can physically move through the ground with these assets, we're going to do that. So. . .

[Siegel]: But, Mr. Secretary, when you say that there is—we shouldn't listen to rumors, these are things coming from reporters who have not only covered many, many other hurricanes; they've covered wars and refugee camps. These aren't rumors. They're seeing thousands of people there.

[Chertoff]: Well, I would be—actually I have not heard a report of thousands of people in the convention center who don't have food and water.⁴

Reaction to the federal government's response was swift, decidedly negative, and bipartisan. Shortly after the Hurricane landed, lawmakers from both parties wasted no time in attacking the response. U.S. Representative Roy Blunt, then the third ranking Republican in the House, said: "Hard lessons have been learned; tragic lessons have been learned. . . . We have to respond more quickly; we have to respond in the right ways and be sure our priorities are right."⁵ Diane Watson, a Democratic Representative was even more emphatic: "Shame, shame on America. . . . We were put to the test, and we have failed."⁶

Republican Senator John Warner, chairman of the Senate Armed Services Committee, had a different response. On September 14, 2005, Senator Warner sent a letter to Secretary of Defense Donald Rumsfeld, in which he urged Rumsfeld to "conduct a thorough review of the entire legal framework governing a President's power to use the regular armed forces to restore public order," including the "1878 Posse Comitatus Act [that] generally prohibits the use of the armed forces to enforce civilian law, unless Congress specifically authorizes it."⁷ It is clear from the context of this letter, and from past actions by Senator Warner, that he believes the limits placed on the abilities of the military to act domestically should be lessened.

³ *All Things Considered: Michael Chertoff Discusses US Aid Effort Being Criticized in New Orleans* (NPR radio broadcast Sept. 1, 2005).

⁴ *Id.*

⁵ Carl Hulse, *Lawmakers Criticize U.S. Response*, N.Y. TIMES, Sept. 3, 2005, at A14.

⁶ *Id.*

⁷ Letter from Sen. John Warner to Donald Rumsfeld, Sec'y of Defense (Sept. 14, 2005), *available at* <http://blogs.washingtonpost.com/earlywarning/files/WarnerPosseComitatus14Sep05.pdf>.

B. Avian Flu

Contemporaneously with the disaster in New Orleans, increasing news attention began to be paid to the possible danger of an outbreak of “bird flu,” an influenza that can be transmitted from birds to humans. The disease, which has killed dozens of people in the developing world (two-thirds of them in Vietnam), “could develop into a more contagious form and spark a pandemic,” warn scientists.⁸

World health officials have indicated that, in the event of a mutation that allows spreading of the disease between humans, a swift response would be necessary, and that they “would have only days to quarantine the infected area and administer antiviral drugs.”⁹ When asked about the possibility of an avian flu outbreak, President Bush recently said:

... The policy decisions for a President in dealing with an avian flu outbreak are difficult. One example: If we had an outbreak somewhere in the United States, do we not then quarantine that part of the country, and how do you then enforce a quarantine? When—it’s one thing to shut down airplanes; it’s another thing to prevent people from coming in to get exposed to the avian flu. And who best to be able to effect a quarantine? *One option is the use of a military that’s able to plan and move.* And so that’s why I put it on the table. I think it’s an important debate for Congress to have . . .¹⁰

Indeed, the Homeland Security Council’s *National Strategy for Pandemic Influenza* calls on the government to “[d]etermine the spectrum of public health, medical and veterinary surge capacity activities that the U.S. military and other government entities may be able to support during a pandemic, contingent upon primary mission requirements, and develop mechanisms to activate them.”¹¹ The same document calls for a determination of “the spectrum of infrastructure-sustainment activities that the U.S. military and other government entities may be able to support during a pandemic, contingent upon primary mission requirements, and develop mechanisms to activate them.”¹²

The use of the military in some capacity in the event of a major health crisis or natural disaster may not seem to be a radical proposition. Indeed, the Posse Comitatus Act, which limits the use of the military and prevents them from acting as domestic law enforcement officers, contains exceptions and subtleties that would allow the military to perform life saving functions. President George W. Bush, however, has indicated that he believes the repeal

⁸ Edward Cody, *China Confirms 2 Bird Flu Cases; Farmer Dies in Region of Diseased Fowl*, WASH. POST, Nov. 17, 2005, at A20.

⁹ *Id.*

¹⁰ President George W. Bush, Press Conference (Oct. 4, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/10/20051004-1.html>) (emphasis added).

¹¹ HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA (2005), available at <http://www.whitehouse.gov/homeland/nspi.pdf>.

¹² *Id.*

of the Posse Comitatus Act should be considered.¹³ There is no legitimate reason to do so.

This Comment will first discuss the Posse Comitatus Act: its text, purpose, meaning, and history. Next, it will discuss the importance of maintaining the strong, historic distinction between the civilian and military spheres in this country. This will include discussing concerns fundamental to the construction of our democracy and the fact that members of the armed forces are unsuitable for use as general law enforcement. Ultimately, the Comment argues that weakening or repealing the Act is unnecessary for several reasons. First, the Act is not archaic or an outmoded artifact as some have argued. Further, the Act will not prevent the Federal Government from responding effectively to a disaster, as there are numerous statutory and constitutional exceptions that will allow a suitable response in case of a major emergency. Finally, the Comment suggests that despite the existence of the Act the federal government will be free to take whatever steps are necessary to restore order in the event of a major national disaster.

II. THE POSSE COMITATUS ACT

This section discusses the Posse Comitatus Act itself. First, the text of the Act is reproduced. Next is a discussion of the meaning and purpose of the Act, including a definition of the term “posse comitatus,” which is not related to anti-government fringe groups who have adopted the term in recent years. Finally, this section presents a brief history of the act, including its origin near the tail end of the post-Civil War Reconstruction Era.

A. *The Text of the Act*

The Posse Comitatus Act (“the PCA”) states, in full:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the

¹³ See Scott McClellan, White House Press Sec’y, White House Press Briefing (Sept. 16, 2005) (transcript available online at <http://www.whitehouse.gov/news/releases/2005/09/20050916-6.html>), in which the following exchange took place:

Q[:] Follow-up on that. Would the President favor repealing the Posse Comitatus Act, which prohibits the use of active duty forces—

MR. McCLELLAN: I mean, that’s—that’s an issue that you raise, which prohibits the military from engaging in law enforcement actions. And that’s an issue that—when you’re talking about the response that’s needed for a storm of this magnitude and this scope, *it’s certainly something that came into play during all the discussions* when you’re looking at the response from the federal government.

And when the state and local people are overwhelmed in many ways, yet they’re the ones tasked with the responsibility for being the first responders, then what do you do? And so that’s an issue that needs to be looked at. That’s one of the issues that comes within that context. (emphasis added).

laws shall be fined under this title or imprisoned not more than two years, or both.¹⁴

B. The Purpose of the Act

The PCA makes it a criminal act to authorize the Army or Air Force to act as a “posse comitatus.”¹⁵ What is a “posse comitatus?” The term is defined simply to mean “[a] group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations.—Often shortened to posse.”¹⁶ Although the term has been used in recent years to refer to a “a radical anti-federal-government movement” which “believe[s], among other things, that the Federal Reserve is in the pockets of a cabal of Jewish international bankers and that all constitutional amendments other than the first 10—the ones written by and for white Christians—are suspect,”¹⁷ the PCA has nothing to do with this organization.

The PCA limits the “direct active use of federal troops by civil law enforcement officers.” Direct use means “arrest; seizure of evidence; search of a person; search of a building; investigation of crime; interviewing witnesses; pursuit of an escaped civilian prisoner; search of an area for a suspect and other like activities,” and “use of federal military troops to ‘execute the laws,’ or . . . in ‘an active role of direct law enforcement’, is unlawful under 18 U.S.C. § 1385.”¹⁸ These types of activities are contrasted with “passive” law enforcement activities, such as aerial photography, preparation of contingency plans, advice or recommendations given to civilian law enforcement agencies as to military tactics, delivery of supplies to law enforcement agencies, and others.¹⁹ “Such passive involvement of federal military troops which might indirectly aid civilian law enforcement is not made unlawful under [the PCA].”²⁰ The majority of disaster relief activities the military might be called upon to perform would have the character of the latter category, such as delivery of emergency supplies, communication, and coordination, rather than the prohibited “active” law enforcement activities.

¹⁴ 18 U.S.C. § 1385 (2000).

¹⁵ Although the PCA only makes explicit reference to the Army and the Air Force, the Act has been construed to apply to all branches of the armed forces. *See United States v. Walden*, 490 F.2d 372, 375 (4th Cir. 1974). On the other hand, the PCA has been held not to apply to the Coast Guard. *See Jackson v. State*, 572 P.2d 87, 93 (Alaska, 1977) (holding that the status of the Coast Guard as under the control of both the Department of Defense as well as the Department of Transportation as well as the legislative history of the PCA led to the conclusion that the PCA should not be construed to include the Coast Guard. Further, the court found that Congress had provided several explicit law-enforcement tasks for the Coast Guard and, thus, “the law enforcement role established for the Coast Guard by Congress indicates that Congress did not intend to make the Posse Comitatus Act applicable to the United States Coast Guard.”).

¹⁶ BLACK’S LAW DICTIONARY 1200 (8th ed. 2004).

¹⁷ Paul Glastris, *Patriot Games*, WASH. MONTHLY, June 1995, at 23.

¹⁸ *United States v. Red Feather*, 392 F. Supp. 916, 925 (D.S.D. 1975).

¹⁹ *Id.*

²⁰ *Id.*

The decision in *United States v. Red Feather*, quoted above, was in response to the government's motion in limine in a criminal case arising out of the clash at the town of Wounded Knee. The state attempted to exclude evidence that might be offered by criminal defendants, who were charged with obstructing a law enforcement officer during a civil disorder. One element that the state needed to prove was "[t]hat one or more law enforcement officers were lawfully engaged in the lawful performance of their official duties incident to and during the commission of such civil disorder."²¹ The government asserted that the defendants would seek to introduce evidence that the Armed Forces were illegally used to act in a law enforcement capacity, and that the government officers' conduct was thus not "lawful." The court allowed the admittance of any evidence of active law enforcement activities on the grounds that such would be "unlawful" under the PCA, and thus disprove that element in the criminal offense.²²

In short, the PCA explicitly prohibits the use of Army and Air Force personnel as "active" domestic law enforcement officers, and the prohibition has been extended to Navy personnel by case law. The prohibition does not apply to indirect law enforcement activity,²³ nor to the Coast Guard because the legislative history of the PCA has been construed to exclude that organization, as well as the quasi-law enforcement nature of the Coast Guard.²⁴

C. *The History of the Act*

The limits on the use of federal troops as domestic law enforcement officers do not date back to the revolutionary period, as some might imagine. Indeed, Alexander Hamilton argued that such a use of the armed forces was explicitly authorized under the Necessary and Proper Clause of the Constitution, writing:

[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.²⁵

Instead, the PCA arose in the aftermath of an ugly, Reconstruction-era political battle. Specifically, the PCA was drafted and passed in the aftermath of suspicion that federal troops had improperly influenced the southern vote in the presidential election of 1876.²⁶ The 1876 election was in many ways a prequel to the struggle between Al Gore and George W. Bush over a century later. Tilden won the popular vote, but the results in certain states were disputed, and thus the electoral college failed to produce a winner, handing the

²¹ *Id.* at 918–19 (quoting 18 U.S.C. § 231(a)(3)).

²² *Id.* at 925.

²³ *Id.*

²⁴ *Jackson v. State*, 572 P.2d 87, 93 (Alaska 1977).

²⁵ THE FEDERALIST NO. 29, at 284 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁶ *Jackson*, 572 P.2d at 90 n.10.

selection of the president to the Congress.²⁷ Rutherford B. Hayes, a Republican, was declared the winner, but agreed to several concessions, including the withdrawal of federal troops from the South, ending Reconstruction²⁸ and leading to the passage of the PCA to prevent further “excessive use of federal machinery under the Federal Election Laws [as] in the presidential election of 1876.”²⁹

Citing this historical context, and the fact that it was used by Southern Dixiecrats to deny federal troops the power to ensure that blacks could exercise the right to vote, it has been argued that the PCA is a “hate law” that has been “transformed . . . into the respected shorthand for the general principle that Americans do not want a military national police force.”³⁰ However, some have seen a nobler origin, including one court which said that “[i]t is not improper to regard it, as it is said to have been regarded in 1878 by the Democrats who sponsored it, as expressing ‘the inherited antipathy of the American to the use of troops for civil purposes.’”³¹ Indeed, support for the position that strong civilian control of the military was a concern in early America can be found in the Declaration of Independence’s list of grievances against the King of England, in which Thomas Jefferson laments that the King “has affected to render the Military independent of and superior to the Civil Power.”³² Further, Alexander Hamilton, while arguing for an expansive federal military power in Federalist No. 29, suggested that it would at all times be under the control of the civil government, writing “it is a full answer to those who require a more peremptory provision against military establishments in time of peace to say that the whole power of the proposed government is to be in the hands of the representatives of the people.”³³

The history of the PCA may not be as ideal as supporters would wish. However, even if it arose out of ignoble goals, the law has come to stand for an important proposition: that the United States Military should not be deployed against this nation’s own people.

III. THE IMPORTANCE OF PRESERVING THE CIVIL / MILITARY DISTINCTION

This section argues the distinction between the civilian government and the military is important and grounded in history, and that loosening that

²⁷ Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 394 (2003).

²⁸ *Id.*

²⁹ Walter E. Lorence, *The Constitutionality of the Posse Comitatus Act*, 8 U. KAN. CITY L. REV. 164, 164 (1940).

³⁰ Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting The Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 90 (2003).

³¹ *Wrynn v. United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961).

³² THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776)

³³ THE FEDERALIST NO. 28, at 179–80 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

distinction is repugnant to American democracy. Further, it argues that aside from the important structural concerns, the military is unsuited for law enforcement activities, and that forcing it to take part in such activities takes valuable time away from training and carrying out its main purpose: combat readiness.

A. *Structural Concerns*

Why, it may be asked, should we be concerned with the domestic use of the military? There are several reasons. First, in any democracy there is the very real, if remote, danger that the military will seek to gain supremacy over the civilian institutions of government. An increased military presence in everyday life blurs the distinction between these two very different groups, and this is a dangerous path. One military scholar sees increasing domestic use of the military as a trend that could lay the groundwork for a military takeover of the United States, imagining that more and more law enforcement work could lead to a “militarization” of our society.³⁴ One commentator even states that Congress passed the PCA out of concern that “long-term use of the Army to enforce civilian laws pose[s] a potential danger to the military’s subordination to civilian control.”³⁵

There have been several disturbing cases of improper use of federal troops throughout this nation’s history. For instance, in 1851, several hundred federal soldiers detained, transported, and returned a young escaped slave named Thomas Sims to the south under the Fugitive Slave Laws. At the same time, federal troops frequently dispersed gatherings of protesting abolitionists.³⁶

The federal government has also used troops to crack down on labor activists, including the suppression of a miners’ strike in Coeur d’Alene, Idaho, in which Army soldiers went so far as to search from house to house and “assisted in more than a thousand arrests. Troops arrested every adult male in the area and jailed the men without charges for weeks, imposing martial law.”³⁷ Also, during World War I, “the War Department quashed strikes and destroyed the International Workers of the World Union” and harassed and arrested countless union leaders.³⁸

The Supreme Court has recognized that such a use of federal troops is inherently antithetical to the values of this nation, stating that “our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs” in the influential case of *Youngstown Sheet &*

³⁴ Charles J. Dunlap Jr., *The Origins of the American Military Coup of 2012*, PARAMETERS, Winter 1992, at 2, available at <http://carlisle-www.army.mil/usawc/Parameters/1992/dunlap.htm>.

³⁵ CRAIG T. TREBILCOCK, CTR. FOR STRATEGIC & INT’L STUDIES, POSSE COMITATUS—HAS THE POSSE OUTLIVED ITS PURPOSE? (2000), available at <http://www.csis.org/media/csis/pubs/trebilcock.pdf>.

³⁶ Gene Healy, *Deployed in the U.S.A.: The Creeping Militarization of the Home Front*, 503 CATO POLICY ANALYSIS 3 (2003), available at <http://www.cato.org/pubs/pas/pa503.pdf>.

³⁷ *Id.* at 3–4.

³⁸ *Id.* at 4.

Tube Co. v. Sawyer.³⁹ There have, of course, been cases of positive federal intervention, such as the forcible desegregation of southern schools in the wake of the decision in *Brown v. Board of Education*. That use of troops was considered to be authorized by 10 U.S.C. § 332, which allows for the use of the armed forces when “the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings.”⁴⁰ Even in light of such positive use, the remaining examples above should give pause to anyone who advocates the ability of federal soldiers to be used as domestic law enforcement agents.

Another concern about blurring the line between the realms of the military and the civilian government that controls it is the need to maintain a universal trust in the military as a non-political body. While 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.⁴¹ If the military were seen to be doing the bidding of Congress in the domestic arena, 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.

Finally, there is something inherently repugnant to most Americans at the thought of the military patrolling the streets of our cities and towns. One commentator imagines a future where the PCA has been repealed, and envisions “[g]ray armored vehicles staffed by officers in black SWAT uniforms” patrolling neighborhoods and carelessly opening fire on peaceful protestors.⁴² An inarguably chilling image that should cause PCA opponents to hesitate.

B. *Unsuitability of Troops for General Law Enforcement*

Even if it were not for the concerns noted above, there is no reason to assume that the military is often, or even ever, suited to tasks of domestic law enforcement. As Lawrence Korb, the former Assistant Secretary of Defense put

³⁹ 343 U.S. 579, 632 (1952).

⁴⁰ 10 U.S.C. § 332 (2000). *See also* Kealy, *supra* note 27, at 397 n.94 (“[T]roops and federalized National Guardsmen were used to enforce the desegregation of schools during the late 1950s and early 1960s. 10 U.S.C. § 332 authorizes the President to use members of the armed forces or federalized National Guard troops to suppress any insurrection that makes it ‘impracticable to enforce the laws of the United States. . . by the ordinary course of judicial proceedings.’ President Eisenhower invoked this exception to the PCA in 1957 when he federalized the Arkansas National Guard to desegregate Little Rock’s Central High School. Likewise, President Kennedy federalized the Mississippi National Guard in 1962 in another desegregation battle.”).

⁴¹ Andrew J. Bacevich et al., *Forum: American Coup D’etat: Military Thinkers Discuss the Unthinkable*, HARPER’S MAG., Apr. 2006, at 47.

⁴² Kealy, *supra* note 27, at 383.

it, the armed forces are “trained to vaporize, not *Mirandize*.”⁴³ The tools the military possesses, such as fighter jets, tanks, heavy weaponry, and battleships, are simply not appropriate for law enforcement or disaster relief purposes. Those tools that are appropriate for use, such as communications devices, are unlikely to be put to any use that qualifies as “active” law enforcement, which is what the PCA prohibits.

Further, the time that the military spends either undertaking these law enforcement activities or training to undertake them is time spent away from its primary mission, defense. 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.⁴⁴ 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.”⁴⁵ Such non-combat uses of military forces can cause their skills to “atrophy” and may render them unable to perform combat activities without a lengthy retraining period of as much as six months.⁴⁶

Serving as domestic law enforcement officers detracts from the primary mission of the United States military. The purpose of the armed forces is not to handle such operations, but rather to train for, fight in, and win wars. Non-combat missions represent “time away from training and exposure to circumstances that resemble combat as closely as possible.”⁴⁷ Such time away represents a distraction for the armed forces, and undermines their ability to carry out their primary function in the same manner as extended periods of peacekeeping operations in foreign nations can dull their combat effectiveness.⁴⁸

IV. MODIFYING OR REPEALING THE POSSE COMITATUS ACT IS NOT NECESSARY

This section rebuts some of the most common arguments against the PCA. First, some critics have contended that the act is archaic, outmoded, or no longer necessary. However, the very issues anticipated by the PCA have come up and been addressed by modern courts, who dispute any contention that the act is a useless relic. Further, while the act suffers from somewhat confusing language, this is quickly remedied and presents no serious bar to its usefulness.

Next, this section responds to the specific concerns that the PCA will limit

⁴³ Healy, *supra* note 36, at 7.

⁴⁴ See Michael T. Cunningham, *The Military’s Involvement in Law Enforcement: The Threat Is Not What You Think*, 26 SEATTLE U. L. REV. 699, 711 (2003).

⁴⁵ U.S. GEN. ACCOUNTING OFFICE, PEACE OPERATIONS: EFFECT OF TRAINING, EQUIPMENT, AND OTHER FACTORS ON UNIT CAPABILITY 2–3 (1995) [hereinafter GAO REPORT].

⁴⁶ *Id.* at 5.

⁴⁷ Cunningham, *supra* note 44, at 715.

⁴⁸ GAO REPORT, *supra* note 45, at 31 (“Traditional peacekeeping operations . . . involve significantly different operating conditions than can be expected in war, and many combat skills cannot be exercised.”).

the ability of the federal government to respond effectively to disasters. By the plain text of the statute, as well as the constitutional and statutory exceptions, this is not a serious concern. The PCA prevents federal troops being used for law enforcement purposes, not for disaster response purposes.

Finally, this section argues that, in the event of a major disaster, the executive would maintain the power to use the military domestically and accept the consequence for doing so. This being the case, it would be imprudent to allow fear of repercussions to undermine the traditional role of the military in America, or to create yet more exceptions to the PCA when those currently in existence are more than sufficient.

All of this is not to say, however, that the Act has no utility. Although there are numerous limitations to the PCA, its importance is in preventing the use of the military as law enforcement in everyday life. When a disaster such as a flu pandemic or a massive hurricane devastates an entire American city, the statutory and constitutional exceptions to the PCA allow the armed forces to respond to the disaster. When the disaster has been contained, however, the PCA mandates that the extraordinary use of the military be stopped and civilian institutions resume their role.

A. *The Act Is Not “Archaic,” Nor Is It a Useless Historical Artifact*

Some critics of the PCA have sought to characterize it as archaic, arguing, in essence, that since the Act is over 100 years old, it can not possibly be applicable in this modern world. In a recent article, an 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.⁴⁹

The PCA, however, is not archaic. There is no question that the PCA is old, and maybe it can even be accurately described as obscure.⁵⁰ However, as one court stated, the “statute is not an anachronistic relic of an historical period the experience of which is irrelevant to the present.”⁵¹

Although the PCA may be old, it is hard to imagine a reasonable argument that it is difficult to understand or uses unclear language. The body of the Act contains only fifty-one words, and aside from the term “posse comitatus” itself, it contains no uncommon words. “Posse comitatus” can be easily defined by resort to a legal dictionary or case law. The effect of the Act, a limitation on the use of the armed services as “active” law enforcement agents, is straightforward. It is hard to see grounds on which the above “senior Pentagon official” could reasonably characterize the PCA as archaic.

⁴⁹ 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 6A.

⁵⁰ Indeed, one commentator notes that, when he raised the PCA in a court filing, the courtroom staff called him in order to verify the correct spelling of “posse comitatus.” Charles Bloeser, *A Statute in Need of Teeth: Revisiting the Posse Comitatus Act After 9/11*, FED. LAW., May 2003, at 24.

⁵¹ *Wrynn v. United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961).

Even accepting for the sake of argument that the PCA is a very old law that creates certain inefficiencies in the way the government carries on its business, this is no reason to cast it aside. Many constitutional structures are in place in order to create *intentional* inefficiencies in order to better protect liberty.⁵² Is the Constitution, then, hopelessly archaic?

B. The Act Does Not Prevent the President or Federal Government from Responding Effectively to a Disaster

The most significant challenge to the PCA is that it unnecessarily ties the hands of the Executive and prevents it from utilizing the full array of resources that the federal government possesses in response to a natural or man-made disaster. This is the argument implicitly offered by President Bush and Senator Warner above—that an old law such as the PCA should not prevent the military from responding in a dire emergency. This argument does not hold water.

The flexibility to respond to a disaster exists in the current statutory and regulatory scheme in a number of ways. Most importantly, the United States Constitution provides two exceptions to the limitations of the PCA. The constitutional exceptions to the PCA are described in the Code of Federal Regulations, which states that they “are based upon the inherent legal right of the U.S. Government—a sovereign national entity under the Federal Constitution—to insure the preservation of public order and the carrying out of governmental operations within its territorial limits.”⁵³ The validity of these exceptions is buttressed by the text of the Act itself, which explicitly provides for them, by excepting from coverage acts “expressly authorized by the *Constitution or Act of Congress*.”⁵⁴

The first of the two constitutional exceptions listed in the federal regulations allows the use of the armed forces

to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, *disasters, or calamities* seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situations.⁵⁵

The inherent constitutional authority of the president to use the armed forces in

⁵² See, e.g., Edward Susolik, *Separation of Powers and Liberty: The Appointments Clause*, Morrison v. Olson, and Rule Of Law, 63 S. CAL. L. REV. 1515, 1558 (1990) (“The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.”) (quoting INS v. Chadha, 462 U.S. 919, 959 (1983)).

⁵³ 32 C.F.R. § 215.4(c)(1) (2005).

⁵⁴ Posse Comitatus Act, 18 U.S.C. § 1385 (2000) (emphasis added).

⁵⁵ 32 C.F.R. § 215.4(c)(1)(i) (2005) (emphasis added). The C.F.R. does not state an explicit basis for this language, but rather says that it derives from “inherent legal right of the U.S. Government . . . to insure the preservation of public order . . .” *Id.*

the event of a disaster or insurrection is widely accepted.⁵⁶

Even with no further exceptions or discussion, the above would allow the needed amount of flexibility in dealing with sudden, large scale disasters such as Hurricane Katrina or an outbreak of bird flu. Indeed, not only is such an exception well grounded in the Constitution and the Federal Regulations, it is also nearly a logical imperative. No serious advocate of protecting the PCA is arguing that the military can have no role in responding to epic calamities. As former U.S. Senator Gary Hart writes, “[c]learly, in a time of great national emergency our nation will call upon all its resources to protect itself and respond in every conceivable way to the demands of that emergency.”⁵⁷ Senator Hart goes on to describe the capabilities of the military—their possession of systems for health, communications, and transportation—and makes the common sense point that “[n]o abstract theory should dictate that these systems and capabilities not be deployed domestically. But that is not the issue.”⁵⁸ It is interesting to note that Senator Hart’s article, written in 2003, makes reference to a call by Senator John Warner urging “reconsideration of the [PCA] in order to permit a greater role for the standing military in defense of the U.S. homeland.”⁵⁹ A cynic might imagine that his more recent call for reconsideration of the PCA in the wake of Hurricane Katrina⁶⁰ had less to do with concern over that particular incident, and more to do with a longstanding disdain for the PCA.⁶¹

It is hard to imagine how the PCA can prevent effective use of federal resources in an emergency given the constitutional exception described above, but even if a case could be made that the PCA remains too restrictive, there are more exceptions. The second constitutional exception is still relevant, although it is more limited. It “[a]uthorizes Federal action, including the use of military forces, 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.”⁶² Although not as comprehensive,

⁵⁶ See, e.g., *Monarch Ins. Co. of Ohio v. Dist. of Columbia*, 353 F. Supp. 1249, 1254–255 (D.D.C. 1973) (“[I]t is clear from the constitutional and statutory framework . . . that the decision whether to use troops or the militia (National Guard) in quelling a civil disorder is exclusively within the province of the President”).

⁵⁷ Gary Hart, *A Well-Regulated Militia: The National Guard, Not the Military, Should Protect the Homeland*, AM. PROSPECT, Nov. 2003, at 52.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Letter from Sen. John Warner to Donald Rumsfeld, *supra* note 7.

⁶¹ For one such view, see William M. Arkin, *Rumsfeld to Katrina: “Thanks”*, WASHINGTONPOST.COM, Sept. 20, 2005, http://blogs.washingtonpost.com/earlywarning/2005/09/rumsfeld_to_katrina_thanks.html. Arkin argues that Warner “is either confusing the President’s inadequate response with legal handcuffs that don’t actually exist, or he’s playing the oldest Washington game in the book: asking the Defense Department to do something it already wants to do. I’m betting the latter,” and that “Warner, of all people, should be well aware that long before Katrina, the military began rewriting its policies, manuals, and war plans associated with what it now calls ‘defense support of civil authorities.’” *Id.*

⁶² 32 C.F.R. § 215.4(c)(1)(ii) (2006).

the ability to use the military to “protect . . . Federal governmental functions” could be broadly interpreted in times of crisis to allow significant flexibility to a domestic military deployment.⁶³

Further, there are statutory exceptions⁶⁴ that bear on the use of the military

⁶³ *Id.*

⁶⁴ Discussed above are some of the broadly applicable statutory exceptions. In fact, there are many more specific exceptions:

5 U.S.C. App. (Inspector General Act of 1978) 8(g) (Department of Defense Inspector General is not limited by the Posse Comitatus Act (18 U.S.C. § 1385) in carrying out audits and investigations under the Act);

. . .

10 U.S.C. [§] 382 (the Secretary of Defense may provide assistance to the Department of Justice in emergency situations involving chemical or biological weapons of mass destruction);

10 U.S.C. [§] 382 note . . . (. . . the Secretary of Defense may provide assistance to federal and state law enforcement agencies to respond to terrorism or threats of terrorism);

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

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

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

16 U.S.C. [§] 1861(a) (Secretary of Transportation (or the Secretary of the Navy in time of war) may entering [sic] into agreements for the use of personnel and resources of other federal or state agencies—including those of the Department of Defense—for the enforcement of the Magnuson Fishery Conservation and Management Act);

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

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

18 U.S.C. [§] 831 (Attorney General may request assistance from the Secretary of Defense for enforcement of the proscriptions against criminal transactions in nuclear materials) (18 U.S.C. [§§] 175a, 229E, and 2332e cross reference to the Attorney General’s authority under 10 U.S.C. [§] 381 to request assistance from the Secretary in an emergency involving biological weapons, chemical weapons, and weapons of mass destruction respective);

18 U.S.C. [§] 1751 (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 the President);

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

22 U.S.C. [§] 408 (President may use the land and naval forces of the United States to enforce Title IV of the Espionage Act of 1917 (22 U.S.C. [§§] 401–408));

22 U.S.C. [§] 461 (President may use the land and naval forces and militia of the United States to seize or detain ships used in violation of the Neutrality Act);

22 U.S.C. [§] 462 (President may use the land and naval forces and militia of the United States to detain or compel departure of foreign ships under the provisions of the Neutrality Act);

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

domestically. The president is authorized to use the militia (that is, the National Guard) or the military to suppress “any insurrection, domestic violence, unlawful combination, or conspiracy” if such violence so hinders the enforcement of state or federal law to the extent that the state’s citizens are deprived of their federally protected rights, and that the state authorities are unable or unwilling to protect those rights.⁶⁵ If the reports of violence and lawlessness in New Orleans were accurate,⁶⁶ then Section 333 would give the

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

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

42 U.S.C. [§] 5170b (Governor of state in which a major disaster has occurred may request the President to direct the Secretary of Defense to permit the use of DoD personnel for emergency work necessary for the preservation of life and property);

43 U.S.C. [§] 1065 (President may use military force to remove unlawful enclosures from the public lands);

48 U.S.C. [§] 1418 (President may use the land and naval forces of the United States to protect the rights of owners in guano islands);

48 U.S.C. [§] 1422 (Governor of Guam may request assistance of senior military or naval commander of the armed forces of the United States in cases of disaster, invasion, insurrection, rebellion or imminent danger thereof, or of lawless violence);

48 U.S.C. [§] 1591 (Governor of the Virgin Islands may request assistance of senior military or naval commander of the armed forces of the United States in the Virgin Islands or Puerto Rico in cases of disaster, invasion, insurrection, rebellion or imminent danger thereof, or of lawless violence);

50 U.S.C. [§] 220 (President may use the Army, Navy or militia to prevent the unlawful removal of vessels or cargoes from customs areas during times of insurrection).

CHARLES DOYLE, CONG. RESEARCH SERV., *THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW* 21–22 n.48 (2000), available at <http://www.fas.org/sgp/crs/natsec/95-964.pdf> (emphasis omitted).

⁶⁵ 10 U.S.C. § 333 (2000). The full text of the section reads:

§ 333. Interference with State and Federal law

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

⁶⁶ In assessing the need to remove the safeguards of the PCA, it is important to note that the level of violence and lawlessness in the aftermath of Katrina is far from a settled question. The New York Times observed that “a review of the available evidence now shows that some, though not all, of the most alarming stories that coursed through the city appear to be little more than figments of frightened imaginations” and that “reports that people were shooting at [rescue] helicopters turned out to be mistaken”—although scattered incidents of violence were verified. Jim Dwyer & Christopher Drew, *Fear Exceeded Crime’s Reality in New Orleans*, N.Y. TIMES, Sept. 29, 2005, at A1.

president the authority to mobilize the armed forces in order to defend a federally protected right. This section does not require any authorization or request to be made by state authorities—the federal government can, of its own volition, mobilize troops in order to see that citizens’ rights are protected. Even in the absence of a violation of federal rights, the armed forces may be sent pursuant to Article IV of the Constitution in the event of “domestic violence” if the state government requests help.⁶⁷

The exceptions described above allow precisely those actions which would be necessary in the event of another Katrina-scale disaster. What is important, however, is that the exceptions apply in the case of a disaster, not all of the time. Once the disaster has passed, the military no longer has a place undertaking the roles that civilian law enforcement agencies exist to provide.

C. In the Event of a Major National Emergency, the Executive Could Always Take the Steps Necessary to Restore Order and Accept the Consequences

Supporters of eliminating or modifying the Act paint an unlikely picture, that the very existence of the Act will lead to a scenario in which the military has its hands tied and cannot intervene to prevent lawlessness or the loss of life in the event of a catastrophic emergency inside the United States. This scenario is far fetched. Even setting aside the statutory and constitutional exceptions described above, there is no reason to think that the executive branch will be so paralyzed—it would always have the power to order the use of the military in order to contain a disaster and accept the consequences later.

In the event of a catastrophic emergency, the political reality will likely be that the President will take the steps he perceives as necessary to ensure that order is restored. Further, the PCA is, on its face, a backwards-looking statute. It does not proscribe the use of the military as domestic law enforcement agents, but rather sets out after-the-fact criminal penalties for those who do so, and only if they do so not pursuant to a constitutional or statutory exception.⁶⁸ Indeed, the fact that the law exists does not mean a president could not choose to violate the law in times of great national peril. As Thomas Jefferson wrote, in discussing the Louisiana Purchase (which he believed to be unconstitutional), “laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation [than strictly following the law].”⁶⁹ The President does not have the power to change or set aside the law, but if a situation of extreme danger arises, he may choose to break it and accept the consequences of doing so.⁷⁰ If, when the dust has settled after such a

⁶⁷ U.S. CONST. art. IV, § 4.

⁶⁸ 18 U.S.C. § 1385 (2000).

⁶⁹ Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1844 (2005).

⁷⁰ I do not accept the view that the president’s inherent power under the constitution renders the Posse Comitatus Act unconstitutional, or that he has the *legal* authority to set it aside. A view that may or may not be that of the Attorney General of the United States, as he refused to clarify in a recent senate hearing:

catastrophe, the use of the military is viewed as wise and moderate, then it is likely the consequences would be non-existent. If the use, on the other hand, is seen as a needless violation of the law or a power grab by the executive, then the PCA remains as a viable criminal statute and could constitute the grounds of an impeachment.

It is important to note that if the President were to order the use of the military to respond to a domestic emergency and one or more individual soldiers went beyond their mandate and engaged in forbidden law enforcement activities, this would not translate into a violation of the Act by the President as the text of the statute clearly requires the official actively *order* such a violation.⁷¹ If such a violation were committed this would have no effect on the validity of the underlying mission of disaster relief, as long as that was the true reason for mobilizing the military. If the President were to determine that a situation were so dire as to require the military to intervene, it could do so as long as it was not tasked with acting as law enforcement officers. That is to say, there would be no violation of the PCA if the soldiers remained focused on such tasks as search and rescue, distribution of vital supplies, and logistical support, even in the absence of one of the exceptions discussed above.

It is also important to realize that if a decision to use the armed forces were questioned as to its compliance with the PCA, such a determination would not be made in a vacuum. A court may be particularly lenient towards an executive official who made such a decision in the aftermath of a September 11th-style attack. If the PCA is weakened, however, this protection will be gone even in times when there is no dire threat—there will be no limit on any domestic, law enforcement use of the military even outside a national emergency.

Finally, if the Chair of the Senate Armed Services Committee, the President of the United States, or anyone else remains worried that the PCA will prevent effective use of federal resources in the event of an emergency, 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.⁷² Concerns that the PCA may be used to severely limit the ability of the government to operate do not hold up in light of the fact that no

[SEN.] FEINSTEIN: Can the president suspend the application of the Posse Comitatus Act legally?

[ATTY GEN.] GONZALES: Well, of course, Senator, that is not what is at issue here.

[SEN.] FEINSTEIN: I understand that.

[ATTY GEN.] GONZALES: This is not about law enforcement; it's about foreign intelligence.

[SEN.] FEINSTEIN: I'm asking a question. You choose not to answer it?

[ATTY GEN.] GONZALES: Yes, ma'am.

Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Judiciary Comm., 109th Cong. (2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/06/AR2006020601001.html>.

⁷¹ 18 U.S.C. § 1385 (2000) (“Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, *willfully uses* any part of the Army or the Air Force . . .”) (emphasis added).

⁷² *State v. Pattioay*, 896 P.2d 911, 929 (Haw. 1995) (Ramil, J., concurring).

one has ever been prosecuted for its violation. Rather, the PCA is important as a 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.”⁷³

V. CONCLUSION

The PCA is a crucial bulwark for liberty. The military is not trained for domestic law enforcement operations, and they should not be placed in a position of trying to enforce laws in conformity with the principles of civil liberty when that is not their mission. The PCA is not an archaic relic, nor does it hamper the ability of the federal government to keep its people safe when disaster strikes.

The Posse Comitatus Act embodies a principle that many people erroneously believe lies in the constitution itself: that the military has no place becoming involved in domestic law enforcement, and that such an involvement is a slippery slope. That belief is reasonable, as the idea of domestic law enforcement activities at the hands of our military forces is repugnant to the nature of our society. Modern Americans would no more appreciate the sight of the Army or Marines patrolling our streets than did the colonists appreciate redcoats marching through the streets of Boston just prior to the Revolution.

Even if there were no such concerns, the military is a singularly inappropriate entity to undertake the role of a domestic law enforcement body. Its training is wrong for such a task, it has the wrong equipment for such a task, and time spent enforcing the laws is time not spent training for its primary mission: the protection of this nation in combat. The military should not be taken away from that mission and placed into one for which it was not designed.

The PCA does not prohibit disaster relief efforts. In considering the wisdom of modifying or eliminating the PCA, it is important to be forthright about what the Act does and does not prohibit. The PCA’s prohibitions target *law enforcement*, not disaster relief. There is nothing in the text or interpretation of the PCA that can be read to rule out the option of the military pitching in with its unique talents and capabilities in the event of a disastrous, Katrina-style incident. Instead, the PCA prohibits only active, law enforcement activity, and even that prohibition does not apply during a disaster due to the exceptions. The PCA prevents the nation’s armed forces from arresting its citizens, or searching their homes. It prevents the armed forces from spying on Americans on American soil.⁷⁴ The PCA does not, however, prevent the armed

⁷³ *Homeland Defense and Civil Support Budget: Hearing of the Emerging Threats and Capabilities Subcomm. of the S. Armed Servs. Comm.*, 109th Cong. (2006) (statement of Paul McHale, Asst. Sec’y for Homeland Def.).

⁷⁴ The PCA may be relevant to the NSA domestic spying scandal as the activities alleged would seem likely to be “active” law enforcement. *See id.* (“[T]here are issues, legal issues, associated with any observation of citizens by military platforms for purposes of

forces from delivering food and water to a hurricane ravaged community, and it does not prevent them from restoring order when order has been destroyed. Even if restoring order involved active law enforcement responsibilities this would be acceptable under the constitutional and statutory exceptions of the PCA. The key distinction is that these law enforcement functions can only be undertaken when there is a pressing disaster, at any other time the PCA prevents this role. Anyone who argues that the Act must be eliminated to allow the armed forces to serve these vital functions in the case of an unpredictable emergency is either ignorant of the law or arguing disingenuously.

Many Americans would be shocked to learn that what they consider a fundamental principle of our democratic system, that the military cannot operate domestically, is enshrined only in a statute. For better or worse, however, the PCA is the only source for that principle in American law. If anything, the discussion should be whether the PCA should be strengthened⁷⁵ or perhaps even enshrined as a constitutional amendment. Regardless, the PCA continues to serve an important purpose and it must be kept intact. Modifying, weakening, or doing away with the Posse Comitatus Act is as unwise as it is unnecessary, and is not an idea that should be seriously maintained.

collecting information on the citizens for later criminal prosecution. We can't do that. That violates Posse Comitatus." *Id.*

⁷⁵ An argument which has been made recently. *See* Bloeser, *supra* note 50.