

Providing “Supplemental Security”* – The Insurrection Act and the Military Role in Responding to Domestic Crises

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It is well known that the American Revolution was spurred in large part by the colonists’ reaction to King George’s use of the military to enforce English laws in the colonies.¹ After the colonists had become sufficiently disgruntled by the increasingly martial measures imposed by the King, the drafters of the Declaration of Independence listed among its central complaints the tendencies of the English Crown “to render the Military independent of and superior to the Civil Power.”² Just as King Charles had been beheaded in 1649 for violating what became a fundamental Anglo-American value – that soldiers are respected for defeating enemies of the state but are never to be used against their civilian neighbors³ – King George lost the colonies when he employed troops to control disorderly civilians.⁴

Over time, the presence of the military in civil society in the United States has been limited by two interrelated traditions imbedded in policy and law. Because the military grew out of our nation’s revolutionary and constitutional heritage, its subordination to civilian control has been a central feature of our government from its beginning. The Constitution anticipates that military force may be required for domestic missions in extraordinary circumstances, including invasion, insurrection, and other forms of domestic violence.⁵ However, the mechanisms for the support by the military in civil settings anticipated by the Constitution are, for the most part, tightly controlled and are subject to civilian decisionmaking. Second, our federal system was designed to ensure that, in situations where a federal military force is required to respond to a domestic crisis, decisions about

* Debate Before the Convention of the Commonwealth of Virginia (June 14, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 425 (Jonathan Elliot ed., 2d ed. 1836) (statement of James Madison) (the Protection Clause of Article IV provides the states with a “supplemental security to suppress insurrections and domestic violence”).

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1. See David Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 22 (1971) [hereinafter Engdahl, *Troops in Civil Disorders*].

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

3. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 13-14.

4. *Id.* at 22.

5. See *infra* text accompanying notes 58 to 99.

the need for a federal force will, where possible, be made by state and local officials closest to where the troops are needed. If military personnel are required, state decisionmakers would deploy such personnel from within their own communities and thereby avoid the need for a federal force.⁶

Article IV, Section 4 of the Constitution obligates the federal government to guarantee a “Republican Form of Government” to each state (the Guarantee Clause), to protect the states against invasion (the Invasion Clause), and to protect them against “domestic Violence,” but only after a request from the governor or legislature (the Protection Clause).⁷ Which part of the government is entrusted to make the decision to deploy the federal military domestically? The Calling Forth Clause in Article I, Section 8 authorizes Congress “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions.”⁸ Note that no express mention is made in the Calling Forth Clause of an authority of the national government to respond to “domestic violence.” In addition, the “militia” referred to in Article I is not the same as the regular Army or the modern National Guard,⁹ and the Supreme Court has held that the Calling Forth Clause does not limit the domestic use of the armed forces, including the federalized National Guard.¹⁰ Nonetheless, the clause confirms that it is Congress, not the President, that authorizes the deployment of the military in responding to a domestic crisis.¹¹ In the view of the Framers, military force could be used to enforce federal law, but only when the threat to the nation is especially grave, such as acts of treason amounting to war.¹² The federal military force may not to be employed to suppress domestic violence (not involving opposition to federal law) within

6. See *infra* text accompanying notes 47 to 49.

7. U.S. CONST. art IV, §4 states: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”

8. U.S. CONST. art. I, §8, cl. 15.

9. See Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29, 142 n.621 (2005).

10. *Selective Draft Law Cases*, 245 U.S. 366 (1918); *Cox v. Wood*, 247 U.S. 3 (1918); *Perpich v. Department of Defense*, 496 U.S. 334 (1990); Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander-in-Chief*, 29 CARDOZO L. REV. 1091, 1094 (2008).

11. Vladeck, *supra* note 10, at 1092-1094 (explaining that the Calling Forth Clause remains a structural check on the President’s authority, but that its “substantive limits do not apply to federal regulars,” based on Supreme Court decisions that conclude that the “militia” does not reach the modern military); see also *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) (“ . . . Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.”).

12. See *infra* text accompanying notes 73 to 82.

a state without a request from that state.¹³

The Framers understood that the assurance of security in the states could require military force, but they intended that only extreme threats (invasions and insurrections against the national government or other direct threats to republican government) would justify a federal military role in the absence of a state’s request. Reading the Article I and Article IV clauses harmoniously, if an invasion or insurrection against the national government occurs – in modern settings, conceivably a major terrorist attack threatening the nation as well as one or more states – the Constitution requires that the federal government use military force to protect the state. In the event of an “insurrection” within a state that presents a direct threat to its republican form of government (an attack on the state qua state), the federal government is likewise obligated to use the military to defend the state. However, in the event of “domestic violence,” less dire sets of circumstances more likely to be the by-product of a natural disaster, a lesser terrorist attack, or a public health emergency created by one or the other of these events, the Constitution presumes that the states can meet the challenge with their own law enforcement resources, supplemented by local militia, or in modern times the state-deployed National Guard. The state legislature or governor must request federal military support before it is provided.¹⁴

The records of the 1787 Convention, state ratifying conventions, and the history of the early Congresses affirm that the federal government has the authority to deploy federal military forces to an incident in a state *only* if the crisis is especially grave. The Insurrection Act has since its enactment in 1792¹⁵ included provision for a unilateral presidential decision to deploy federal military forces in a state under the circumstances that were sanctioned in the Constitution – general insurrection or invasion – and to execute federal laws, subject to a number of pre-deployment conditions. In addition, under the early statutes the President was obligated to follow procedures that encouraged deliberation with state officials and required the issuance of a cease and desist order to the insurgents before the military force could be sent.

In the extreme circumstances of the Civil War and Reconstruction, Congress lost sight of its constitutional compass regarding the domestic role of the military, and the Insurrection Act authorities were expanded. In the 1871 Ku Klux Act,¹⁶ the Reconstruction Congress reacted to Ku Klux Klan violence and resultant state recalcitrance to enforce federal laws after the Civil War. The Ku Klux Act’s drafters mistakenly failed to distinguish the major events that historically were thought sufficient to trigger a

13. See *infra* text accompanying notes 79 to 82.

14. See *infra* text accompanying notes 79 to 82.

15. Act of May 2, 1792, ch. 28, 1 Stat. 264 (1792).

16. Ku Klux Act of April 20, 1871, ch. 22, §3, 17 Stat. 13, 14.

unilaterally declared federal military role – invasion or general insurrection tantamount to widespread treason or war – and extended the President’s discretion to federalize an incident in the states simply to enforce federal laws. It is likely that the drafters had in mind failure to follow federal law in the extreme, amounting to treason in the South, but they did not clarify the discretion that was granted.

Although Congress enacted the Posse Comitatus Act in 1878¹⁷ and restored a statutory presumption against federal military involvement in civilian law enforcement, the Insurrection Act overcame the statutory presumption. The 1871 law became part of the codified Insurrection Act,¹⁸ and its provisions were relied upon by nineteenth and twentieth century Presidents to deploy federal military forces in the states in various circumstances when the states had not requested federal help.

A growing national effort to plan for homeland security after September 11, 2001, brought new attention to the mechanisms that provide military support to a civilian response to a domestic emergency. After Hurricane Katrina devastated the Gulf Coast and revealed a delayed and fragmented response by federal, state, and local officials, President Bush talked openly about “greater Federal authority and a broader role for the Armed Forces”¹⁹ in responding to serious emergencies. U.S. Northern Command (NORTHCOM) commander Admiral Timothy Keating recommended that the Department of Defense be given “complete control” for responses to disasters like Hurricane Katrina: “We have to think the unthinkable may be possible, even probable.”²⁰

Nonetheless, instead of a new law placing federal military personnel at the forefront of emergency response, in 2006 the President advocated an apparently modest revision of the Insurrection Act to clarify its language and update its antiquated terminology.²¹ Congressional critics Senators Patrick Leahy and Christopher Bond complained that the proposal “undermines the optimal, well-proven approach for handling domestic emergencies,” which presumes that state and local elected officials decide when a federalized military response is required.²² Despite the fact that no hearings were held on the Administration’s proposal and the amendment

17. Act of June 18, 1878, ch. 263, §15, 20 Stat. 145, 152.

18. Codified as amended at 10 U.S.C. §333.

19. Address to the Nation on Hurricane Katrina Recovery from New Orleans, Louisiana, 40 WEEKLY COMP. PRES. DOC. 1405, 1408 (Sept. 15, 2005).

20. Ann Imse, *Proposal Would Use Military in Disasters*, ROCKY MTN. NEWS, Oct. 26, 2005, at 16A.

21. Jim VandeHei & Josh White, *Congress Asked To Consider Placing Pentagon in Charge of Disaster Response*, WASH. POST, Sept. 26, 2005, at A12.

22. Letter from Christopher Bond and Patrick Leahy to John Warner, Carl Levin, Duncan Hunter, and Ike Skelton (Sept. 6, 2006), available at <http://leahy.senate.gov/press/200609/090606b.html>.

was not debated in Congress, as enacted by Congress in October 2006,²³ the Insurrection Act expressly permits the President to use the armed forces, including the National Guard in federal service, to “restore public order and enforce the laws of the United States” when he determines that “as a result of a natural disaster, epidemic or other serious public health emergency, terrorist attack or incident, or other condition, domestic violence occurred to such an extent that the constituted authorities of the State . . . were incapable of maintaining public order.”²⁴

In essence, the amendment inserted a new set of conditions into the Insurrection Act that permit the President to deploy the federal military to a state without waiting for a request from the affected governor. The traditional presumption against the federal military presence in the states was replaced by a presumption in favor of the military role if certain conditions occur. The Act spells out the conditions that might give rise to the President’s decision, but at least some of these conditions fall short of the kinds of extreme circumstances that the Constitution contemplates could warrant an unsolicited federal military presence in domestic affairs. In addition, and ironically, the authority for a unilateral federal decision to intervene under the amended Act could come only *after* the crisis is fully upon the states,²⁵ so the revised mechanism would not respond adequately

23. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, §1076, 120 Stat. 2083, 2404 (2006), codified as amended at 10 U.S.C. §333, repealed, Pub. L. No. 110-181, §1068, 122 Stat. 3 (2008).

24. *Id.* The full text of the 2006 amendment follows:

“(a) Use of armed forces in major public emergencies. – (1) The President may employ the armed forces, including the National Guard in Federal service, to – (A) restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that – (i) domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order; and (ii) such violence results in a condition described in paragraph (2); or (B) suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if such insurrection, violation, combination, or conspiracy results in a condition described in paragraph (2). (2) A condition described in this paragraph is a condition that – (A) so hinders the execution of the laws of a State or possession, as applicable, and of the United States within that State or possession, 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 or possession are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (B) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. (3) In any situation covered by paragraph (1)(B), the State shall be considered to have denied the equal protection of the laws secured by the Constitution. (b) Notice to Congress. – The President shall notify Congress of the determination to exercise the authority in subsection (a)(1)(A) as soon as practicable after the determination and every 14 days thereafter during the duration of the exercise of that authority.”

25. *Id.* (the President may employ the armed forces when the authorities of a state “are

to fast-moving crises such as Hurricane Katrina or an anthrax attack in New York City.

Although the 2006 amendment included a required presidential finding setting out the justification for a decision to trigger these authorities,²⁶ notice and reports to Congress,²⁷ and the cease and desist proclamation that has long been part of the legislation,²⁸ the Act as amended unconstitutionally permitted the President to bypass state decisionmakers and extended federal authority beyond what the Article IV Protection Clause and Article I Calling Forth Clauses permit. Because the “domestic violence” trigger in the amended Act falls short of “insurrection” or “invasion” as those terms were used by the Framers and the early Congresses, the Act fails to meet the constitutional requirements of Article IV. Similarly, permitting the President to act unilaterally to enforce federal laws because of domestic violence exceeds the authority Congress could confer under the Calling Forth Clause.

All fifty governors publicly opposed the changes in the Act,²⁹ and after the 2006 elections, new Democratic committee chairs promised to revisit the Act in 2007. They did,³⁰ and the provision was eventually repealed in the 2008 Defense Authorization Act,³¹ signed by the President on January 28, 2008.

incapable of maintaining public order”).

26. 10 U.S.C. §333(a)(1)(A) (“The President may employ the armed forces, including the National Guard in Federal service, to . . . restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President *determines* that (i) domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order; and (ii) such violence results in a condition described in paragraph (2).”) (emphasis added).

27. 10 U.S.C. §333(b) (“The President shall notify Congress of the determination to exercise the authority in subsection (a)(1)(A) as soon as practicable after the determination and every 14 days thereafter during the duration of the exercise of that authority.”).

28. 10 U.S.C. §334 (“Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents or those obstructing the enforcement of the laws to disperse and retire peaceably to their abodes within a limited time.”).

29. *Governors Association Opposes Senate Authorization Measure*, INSIDE THE ARMY, Sept. 4, 2006, available at 2006 WLNR 15348717 (Westlaw); see also Press Release, Office of Governor Janet Napolitano, Napolitano Urges Removal of Provisions in Federal Legislation Usurping Governors’ Control of National Guard (Sept. 20, 2006), available at http://www.governor.state.az.us/dms/upload/NR_092006_National%20guard%20provisions.pdf.

30. *Senate Judiciary Holds Hearing on State Control of National Guard*, CONG. QTLY, Apr. 24, 2007, available at <http://www.ngaus.org/ngaus/files/ccLibraryFiles/Filename/00000002550/statecontrolhearing.doc>.

31. Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §1068, 122 Stat. 3 (2008).

The saga of the Insurrection Act amendment and repeal is, in practical terms, small-time political theater. Few paid attention to the legislative developments, and there were no hearings or recorded debate on the proposal. At the time of enactment, media attention was focused on the enactment of the Military Commissions Act,³² and members of Congress simply failed to react to the thoughtful and persistent objections to the proposal made by the governors and adjutant generals.³³ The entire episode was political theater thinly veiled as a serious attempt by the White House to respond to the failings in the response to Hurricane Katrina. Once the Democratic chairs of the relevant committees signaled their willingness to support the governors' proposal to repeal the 2006 amendment, the White House never once throughout the 2007 legislative session objected to the loss of a legislative grant of additional discretion for the President that Congress had sponsored just the previous year.

In legal terms, the enactment and repeal of the Insurrection Act expose major problems that continue to bedevil those who must prepare for and implement homeland security operations plans that contemplate possible military roles. In a general way, the 2008 repeal does reinforce a congressional determination that the President should assert federal military control over the states and cities in a domestic emergency only in the gravest of circumstances, and that the deliberations that have typically preceded invocation of the Insurrection Act in such circumstances³⁴ should continue unaffected by the modernizing language of the 2006 amendment.³⁵ The restored Insurrection Act is flawed, but the 2006 amendment made the Act worse, not better.

Despite the repeal, this article shows that since the Civil War and Reconstruction era, the Insurrection Act, a cornerstone of federal emergency response authority, has exceeded constitutional boundaries erected to protect state decisionmaking prerogatives and to protect citizens

32. Military Commissions Act, 10 U.S.C. §948a-950w (2006); see Karen DeYoung, *Court Told It Lacks Power in Detainee Cases*, WASH. POST, Oct. 20, 2006, at A18; Michael A. Fletcher, *Bush Signs Terrorism Measure*, WASH. POST, Oct. 18, 2006, at A4; Editorial, *Guilty Until Confirmed Guilty*, N.Y. TIMES, Oct. 15, 2006, §4, at 11; Bill O'Reilly, *President Bush Signs Military Commissions Act into Law*, FOX NEWS, Oct. 18, 2006, available at <http://www.foxnews.com/story/0,2933,221967,00.html>.

33. See *infra* text accompanying notes 192 to 202.

34. See Statement of Sen. Patrick Leahy on Legislation To Repeal Changes to the Insurrection Act (S. 513) (Feb. 7, 2007), available at <http://leahy.senate.gov/press/200702/020707.html> (statement of Sen. Leahy, Chairman, Senate Judiciary Committee); see also ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878* (1988); BENNETT MILTON RICH, *THE PRESIDENTS AND CIVIL DISORDER 51-54* (1941); CLAYTON D. LAURIE & RONALD H. COLE, *THE ROLE OF MILITARY FORCES IN DOMESTIC DISORDERS, 1877-1945*, at 133-152 (1997).

35. See *Martin v. Luther*, 689 F.2d 109, 117 (3d Cir. 1932) (repealing statutes should be construed in light of the laws they replaced, rather than in "some sort of interpretative vacuum").

from civil liberties violations wrought by soldiers. At the same time, other articles that have examined the Act and its history contain oversights and errors that should be corrected.³⁶ The 2006 amendment exacerbated the constitutional flaws and also made bad policy. The restored Insurrection Act of early 2008 may be cumbersome and nearly as constitutionally defective as its 1871 ancestor, but history shows that it has worked reasonably well to encourage the deliberations between federal and state and civilian and military officials that should occur before a local incident is federalized with a military force. The Insurrection Act should be repaired to cure its constitutional defect and to better describe the triggering mechanisms and processes for involving federal military forces in a domestic incident. However, the shortcomings in shaping a role for the military in a domestic emergency response are not attributable to a lack of legal authority. The military has all the authority it needs to support civilian efforts to prepare for and respond to emergency situations. Instead of new laws, active duty and National Guard military units need more fully refined operations plans, including detailed arrangements for cooperation and unified or shared command during emergency incidents.

This article will first review briefly the historical record surrounding the framing of the Insurrection Act to demonstrate the careful attention given to the constitutional and statutory mechanisms that permit a federal domestic military role. Part II will show how the nuanced understanding of the limited federal role broke down, especially during and soon after the Civil War. Part III reviews the amendment to the Insurrection Act enacted in 2006 in response to the flawed federal reaction to Hurricane Katrina. Part IV demonstrates that, even after the repeal of the 2006 amendment, the Insurrection Act remains unconstitutional, in violation of the Protection and Calling Forth Clauses. Enactment of the repeal in 2008 simply underscores the intention of Congress to preserve the imperfect mechanism that has worked reasonably well to preserve federalism values. Legally, the repeal makes clearer than before the 2006 amendment that Congress does not expect unilateral presidential decisions to federalize a local incident except in extraordinary circumstances. Although the restored Act has proven workable over time, Part V of this article sketches how Congress could work to reshape the federal legislative framework to assure a more appropriate federal military role during emergencies in the states. Now that the Act has been restored to its pre-2006 terms, all of the stakeholders in homeland security planning should forgo posturing and legislative games and get down to the business of crafting operational plans for utilizing military resources in their most practical roles in emergency conditions.

36. See *infra* text accompanying notes 219 to 239.

I. PRE-CONSTITUTIONAL AND FRAMING HISTORY

Americans have always been opposed to military intrusion into the enforcement of civil law. In this respect, perhaps more than any other, the values embedded in U.S. law descend from England. From the Magna Carta, to the Petition of Right and the English Bill of Rights, English law developed a long, albeit uneven, tradition of protecting its citizens from military enforcement of the laws, consistent with established notions of due process of law.³⁷ Legislation providing for civil responses to riots also had a long history, marred on occasion by the Crown’s assertion of martial law in the face of civil disturbances.³⁸ The revolutionary civil wars of the seventeenth century and the climactic beheading of King Charles, followed by the Restoration of Charles II in 1660, showed the English that the exceptional period of martial law during wartime could be just that – and that the peacetime norm of no domestic use of the military was achievable.³⁹ By that time, Parliament had curtailed by legislation the prerogative power of the Crown to apply martial law, and the common law courts effectively assured civil law enforcement. Eighteenth century legislation provided for the use of the militia in cases of “Insurrection,” “Rebellion,” and “Invasion,” but such occurrences were understood as distinct from mere “unlawful, riotous, and tumultuous Assemblies,” for which Parliament provided a different set of remedies that were wholly civil in nature.⁴⁰ The Riot Act of 1714 provided for the suppression of riots – twelve or more persons “being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the publick peace”⁴¹ – through ordinary civilian law enforcement means, including an early version of the cease and desist proclamation.⁴²

By 1765, Blackstone wrote approvingly of Lord Chief Justice Hale’s observation that martial law is impermissible so long as civilian courts are open, and of Lord Chief Justice Coke’s comment that a soldier who kills a person in peacetime under color of military authority is guilty of murder.⁴³ Blackstone also was disturbed by the recent English practice of maintaining a standing army. He feared that civilian rights might be abused by a militia trained in a military tradition.⁴⁴ Even before Blackstone, early American

37. See Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 2-22.

38. *Id.* at 13-16.

39. *Id.* at 12.

40. *Id.* at 15.

41. 1 Geo. 1, Stat. 2, ch. 5 (1714).

42. *Id.*; see Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 16. This Riot Act is the apparent source of the contemporary expression “Read them the Riot Act!” See full text of the Riot Act of 1714, available at <http://reactor-core.org/riot-act.html.riot-act-title-page.png>.

43. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 400 (1765).

44. *Id.* at 403-404.

colonial charters typically contained provisions for a military defense against invasion, but they included no authorization for any military force to put down domestic disturbances of any kind.⁴⁵ As the colonists grew to treasure the protections of their charters, they also demanded all the rights and protections of English law. When King George III reacted to discontent in the colonies by enforcing his edicts and laws with military force, the colonists' resistance to English rule grew. Apart from the long history of British abuses at home and in the colonies, the very cause of the American Revolution was the use of British troops to enforce heavy-handed and oppressive laws in the colonies.⁴⁶ By the time of the Revolution, there was strong sentiment against the maintenance of any standing army in the new nation, because of the military's demonstrated tendency to threaten its own citizens.⁴⁷

At the same time, colonial and then state leaders recognized that their civil processes and institutions would not always be up to the challenge of law enforcement when confronted with extreme domestic emergencies. Colonies and states employed their own militias not only to fight the British and the Indians, but also to put down disturbances within their borders. After the Revolution, Americans had to decide what should be done to permit the new national government to enforce its laws in extreme circumstances or to enable the new government to come to the aid of a state when the state's militia was unable to quell a disturbance.⁴⁸

A textbook example was the Shays Rebellion, a debtors' revolt in western Massachusetts that occurred just before the Philadelphia Convention. The rebellion's nominal leader, Daniel Shays, had been a captain in General Washington's army and had, along with other small farmers similarly situated, suffered economically after the Revolutionary War. The debtors effectively brought the courts to a standstill in western Massachusetts by defying seizures and other legal actions taken against them by the state. When the state threatened more coercive measures, many in the local militia took sides with the debtors. Henry Knox, a Massachusetts native and Secretary of War under the Articles of Confederation, feared that the revolt could reach Springfield, site of a significant federal arsenal. Knox demanded federal action against the dissidents. Although Congress agreed to increase the size of the Army and to recruit the new members from New England, it lacked the funds to pay or properly equip the troops. The Confederation could not meet the Shays threat, and the challenge fell to the state government. A confrontation occurred in January 1787 between the Shays insurgents and local militia

45. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 18-21.

46. *Id.* at 22-28.

47. COAKLEY, *supra* note 34.

48. *Id.* at 3-4.

armed from the national arsenal. When the commander of the militia ordered cannons to fire at the advancing insurgents, four of them were killed, and the rest fled. The thrust of the insurgency declined after the Springfield confrontation, and although incidents continued into the spring of 1787, the state government regained control and eventually granted pardons and amnesty to the insurgents.⁴⁹

The delegates to the Constitutional Convention were determined to ensure that the Union would be more durable than that established by the Articles of Confederation.⁵⁰ Based in part on the recent experience of the Shays Rebellion, they were also too practical to let their philosophical dispositions against military involvement in civilian affairs get in the way of their recognition that in extreme situations some form of military force must be available to enforce the laws of the Union. In addition to the delegates’ recent familiarity with the use of the militia to suppress insurrections, enforce the laws, and perform other emergency services for governors and local officials, they accepted to some extent an emerging common law doctrine from England that soldiers could be used to enforce the law during civil disorders as long as they were employed as civilians, not as soldiers – the *posse comitatus*.⁵¹

The Framers’ distaste for a military presence in civil disturbances prevented wholesale acceptance of the common law rule,⁵² but there was military involvement in civilian posses in early America, and the delegates knew about the practice.⁵³ The delegates thus were predisposed to create some sort of equivalent force to ensure the enforcement of federal laws in the new Union during emergencies. The challenge was to provide the necessary federal mechanism without risking the abuses that frequently led the British government to trample upon the liberties of the people. In other words, the principal problem to be worked out was who would be responsible for invoking the federal authority, not whether it should exist or even what its scope should be.⁵⁴ Recall that they had as a starting point the English legislation, which provided for a military presence in the event of “rebellion,” “invasion,” or “insurrection.”

James Madison laid the groundwork for the consideration of security for the states in his April 1787 pamphlet, “Vices of the Political System of the United States.”⁵⁵ Madison pointed out that the Articles of Confederation said nothing about providing for state security, implying at least that the

49. *Id.* at 4-7.

50. *Id.* at 3, 7.

51. See Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 31-35.

52. *Id.* at 35.

53. *Id.* at 35-36.

54. See COAKLEY, *supra* note 34, at 3-4.

55. James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON 345, 350 (Robert A. Rutland et al. eds., 1975).

national government lacked authority to so provide. In the pamphlet Madison worried that internal or external dangers could threaten the constitutions and governments of the states.⁵⁶ Still, the Convention records and ratification debates show that the competing spheres of sovereignty led the Framers to create “a more perfect Union,”⁵⁷ not “a perfect union.” Likewise, the promise in the Preamble to the Constitution that the new government would “insure domestic Tranquility”⁵⁸ was at once the acknowledgment of responsibility for the security of the states and, through its open-ended terms, recognition that that responsibility would be concurrently shared. Congress was given responsibility for protecting the security of the states, but only in certain situations. The default rule was that the states would take care of themselves. If they needed the support of the federal military for protection, they would ask for it.

A. Using the Military To Suppress Rebellions or Insurrections

The original plans prepared for submission to the Philadelphia Convention included proposals to provide for federal power to suppress rebellions or insurrection in the states. Early in the proceedings Governor Edmund Randolph of Virginia proposed a clause providing that the Union should guarantee a republican constitution to each state.⁵⁹ There was no mention of the use of a military force to enforce the laws, nor was there any reference to what kind of force would assure republican government.⁶⁰ Randolph’s plan was reported out of the Committee of the Whole to the Convention. During debate James Wilson of Pennsylvania stated that the clause was “merely to secure the States against dangerous commotions, insurrections, and rebellions.”⁶¹ Several delegates joined the discussion. Luther Martin of Maryland preferred leaving it to the states to suppress their own insurrections, while John Rutledge of South Carolina found the clause unnecessary because the principle was implicit in the plan for the Union.⁶² Wilson’s substitute language – “That a Republican form of government shall be guaranteed to each State and that each State shall be protected agst foreign and domestic violence” – was approved as one of the resolutions sent to the Committee on Detail.⁶³

56. *Id.*

57. U.S. CONST., Preamble.

58. *Id.*

59. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 32 (Adrienne Kock ed., 1984) [hereinafter Madison’s Notes].

60. COAKLEY, *supra* note 34, at 8.

61. Madison’s Notes, *supra* note 59, at 321.

62. COAKLEY, *supra* note 34, at 9.

63. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 47-49 (1911).

As reported to the Convention, the Committee on Detail proposed to give Congress the powers:

- To subdue rebellion in any State, on the application of its legislature;
- To make war;
- To raise armies;
- To build and equip fleets;
- To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions.⁶⁴

The guarantee provision became two separate clauses as reported by the Committee of Detail. The first one empowered Congress to put down a rebellion in a state upon the request of that state’s legislature.⁶⁵ During Convention debate, after Thomas Pinckney of South Carolina moved to strike the requirement of a state request, thereby giving Congress the power to intervene on its own initiative, several delegates objected.⁶⁶ According to Madison’s notes, Elbridge Gerry of Massachusetts “was agst. letting loose the myrmidons of the U. States on a State without its own consent. The States will be the best Judges in such cases. More blood would have been spilt in Massts in the late insurrection, if the Genl. authority had intermeddled.”⁶⁷ After further debate, the first of the two clauses lost support, and it disappeared from future drafts.⁶⁸

The second guarantee proposal contained assurances of a republican government and protection for the states. It read: “The United States shall guaranty to each State a Republican form of Government; and shall protect each State against foreign invasions, and, on the application of its Legislature, against domestic violence.”⁶⁹ During debate John Dickinson of Pennsylvania moved to strike the requirement of a state request before federal intervention in response to domestic violence, but his motion was defeated by eight states to three, as was a motion to substitute “insurrection” for “domestic violence” by six states to five. No record was made of the discussion on this issue.⁷⁰ Then the term “foreign” before “invasions” was struck as redundant, and the provision was further amended to permit a state request from the executive or the legislature.⁷¹ As

64. COAKLEY, *supra* note 34, at 10.

65. *Id.* at 11.

66. *Id.*

67. 2 FARRAND, *supra* note 63, at 317.

68. COAKLEY, *supra* note 34, at 11.

69. 2 FARRAND, *supra* note 63, at 182, 185, 188.

70. COAKLEY, *supra* note 34, at 12.

71. *Id.*

approved for the finished Constitution to be sent for ratification, Article IV, Section 4 read, “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”⁷²

B. Using the Military To Execute the Laws

The Committee of Detail also reported to the Convention a federal power “to call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions.”⁷³ Because the Convention delegates’ opinions on the militia ranged from those who favored national regulation as a way of avoiding the need for a standing army to those who lacked confidence in citizen militias, the Convention postponed debate and created a committee to report back on the militia issues.⁷⁴ After some delay and debate, the clause was amended. It became “to provide for calling forth the Militia to execute the laws of the Union, suppress insurrection and repel invasion,” but no debate was recorded, and the amended clause passed without dissent.⁷⁵ However, contemporaneous consideration of the treason provision sheds light on what the delegates intended by the part of the Militia Clause that permits the militia “to execute the laws of the union.”

At the same time that the Convention debated the militia provision, delegates struggled with how to address treason. After a proposal was made to provide for federal protection for treason against a state, the weight of opinion favored making the treason clause apply only to treason “against the United States.”⁷⁶ As the debating delegates’ commentary indicates, the crime of treason was viewed as “resistance against the laws of the U[nited]

72. U.S. CONST. art. IV, §4. Some of the Framers regarded the eventual Protection Clause (as distinguished from the Guarantee Clause) of Article IV as a grant of power to the national government to address extraordinary incidents of violence. These delegates saw the Protection Clause as a recognition that no government incapable of protecting its citizens was worthy of the respect of those citizens. See THE FEDERALIST NO. 21, at 131, 162 (James Madison) (Benjamin F. Wright ed., 1961). So viewed, the United States insures domestic tranquility even when, in the view of the governor or the state legislature, no assistance is necessary. See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 513-520, 536-537 (1991). This minority interpretation is unsupported by the text and undermined by persuasive Convention (defeat of the motion to strike the required state request and defeat of the motion to substitute “insurrections” for “domestic violence”) and early congressional history (described below).

73. Madison’s Notes, *supra* note 59, at 389, 392.

74. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 38.

75. *Id.*

76. *Id.* at 39; see also H.R. DOC. 69-398, at 579 (1935).

States.”⁷⁷ In context, then, resisting the laws of the United States was an especially serious act, far more so than simple disobedience of the laws. Given its explicit mention in the text and the seriousness with which the delegates took the crime of treason, the delegates’ determination to permit the execution of the laws of the Union by military force in the event of treason – engaging in war against the United States, in practical effect – may be understood to underscore their determination that, in company with the words “insurrections” and “invasions” in the Militia Clause, the power to “execute the laws” had a similarly grave connotation.⁷⁸ In other words, the delegates assumed that a federal military authority to “execute the laws of the Union” provided for extraordinary situations, such as insurrections and invasions. The absence of recorded debate or dissent on the motion to amend the Militia Clause is thus not surprising.

Stepping back from the debates, the Convention records suggest that when the delegates provided for military responses to “domestic violence,” they anticipated armed violence akin to foreign invasion, an assault on republican government.⁷⁹ They also permitted a federal military response only following a request from a state. When they approved providing for the militia to “execute the laws of the Union” they had in mind such armed resistance as would amount to treason.⁸⁰ Still, the terms of the finished Militia Clause were sufficiently ambiguous to trigger concerns in some state ratifying conventions, although Madison and others succeeded in persuading their fellow citizens that the Constitution did not deprive the states of the power to arm their own militias.⁸¹ The concurrent power over the militia remained a source of concern to some and contributed to excessively federal-friendly statutes in later years. Yet those who deliberated on ratification could take comfort in the facts that the Militia Clause involved use of the militia, not a standing army, and that the Protection Clause required a state request before federal intervention.⁸²

77. H.R. Doc. 69-398, at 579 (statement of Roger Sherman).

78. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 39; *see also* Jason Mazzone, *The Commander in Chief*, 75 NOTRE DAME L. REV. 265, 306-308 (2007) (concluding that the authority to call forth the militia to execute the laws is triggered “when the implementation of federal laws is opposed with violence”).

79. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 36-37.

80. *Id.* at 38-39. Professor Engdahl maintained that this feature of the 1871 Act “displayed the very features that had so alarmed most members of the Congress in 1792. . . . Among the post-Civil War Radicals . . . there was no . . . respect for the civilian constitutional tradition; and the 1871 Act was adopted despite its patent offense to constitutional law.” *Id.* at 40.

81. *Id.* at 40-41; *see also* Mazzone, *supra* note 9, at 86.

82. COAKLEY, *supra* note 34, at 14.

C. Ratification and Early Commentaries

Urging ratification in Virginia, Madison explained that the federal authority to call forth the militia would only be exercised when the civil power was insufficient.⁸³ However, taking a stand somewhat different from the dominant one at the Convention, he argued that the federal power did not require an insurrection to be exercised for the purposes of federal law enforcement: “There are cases in which the execution of the laws may require the operation of militia, which cannot be said to be an invasion or insurrection. . . . [A] riot [is] not within the legal definition of insurrection. . . . [Yet] the civil power might not be sufficient to quell.”⁸⁴ In *The Federalist*, Madison asserted that the phrase “domestic violence” in Article IV contemplated “violent factions, flying to arms, and tearing a State to pieces” – an outright “insurrection.”⁸⁵ Hamilton’s views complemented those of Madison. Hamilton pointed out in another *Federalist* essay that, for instances of disobedience and disorder in the states in violation of federal law, the proper aid to state law enforcement was the by-then familiar *posse comitatus*, which permitted the military to serve as civilians under the command of a federal marshal.⁸⁶

In the ratifying conventions, little was said about the Article IV provisions. In Pennsylvania, James Wilson did support strong congressional powers but reminded fellow citizens that, prior to the Convention, “[t]he flames of internal insurrection were ready to burst out in every quarter.”⁸⁷ In Virginia, Madison argued that “[i]n cases of imminent danger . . . the general government ought . . . to be empowered to defend the whole Union.”⁸⁸ After Patrick Henry complained that requiring the states to apply first to Congress for aid might be “fatal,”⁸⁹ Madison answered by explaining that the states retained control over their own militias and could protect themselves if in imminent danger. As Madison explained at the Virginia Convention, the Protection Clause provides the states with a “supplemental security to suppress insurrections and domestic

83. Debate Before the Convention of the Commonwealth of Virginia (June 14, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 378 (Jonathan Elliot ed., 2d ed. 1836) (statement of James Madison) [hereinafter ELLIOT’S DEBATES].

84. *Id.* at 410-412.

85. THE FEDERALIST NO. 43, at 314 (James Madison) (Benjamin F. Wright ed., 1961).

86. THE FEDERALIST NO. 29, at 227 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

87. Debates in the Convention of the State of Pennsylvania (Dec. 11, 1787), in 2 ELLIOT’S DEBATES, *supra* note 83, at 521 (statement of James Wilson).

88. Debates in the Convention of the Commonwealth of Virginia (June 14, 1788), in 3 ELLIOT’S DEBATES, *supra* note 83, at 425 (statement of James Madison).

89. *Id.* at 423 (statement of Patrick Henry).

violence.”⁹⁰ Edmund Pendleton added that Article IV contained “a restraint on the general government not to interpose. . . . [T]he power in the general government cannot be exercised, or interposed, without the application of the state itself.”⁹¹

Early commentators on the Constitution also viewed the Protection Clause as a limited and restricted grant of power to Congress. William Rawle, author of a popular treatise on the Constitution, claimed that it was the duty of a state government to apply to the federal government for aid when

its own powers are insufficient to suppress the commotion [sic]. . . . At the same time it is properly provided, in order that such interference may not wantonly or arbitrarily take place, that it shall only be on the request of the state authorities: otherwise the self-government of the state might be encroached upon at the pleasure of the Union.⁹²

Although Rawle emphasized the procedural benefits of the clause in shielding the states, St. George Tucker maintained that the Protection Clause reserved substantive authority to the states:

[E]very pretext for intermeddling with the domestic concerns of any state, under colour of protecting it against domestic violence is taken away, by that part of the provision which renders an application from the legislative, or executive authority of the state endangered, necessary to be made to the federal government, before it's [sic] interference can be at all proper.⁹³

The pro-ratification Federalists had an important advantage in arguing for ratification against the Anti-Federalists. The finished Constitution emphasized the militia as the principal military arm of the federal government. Although Article I authorized Congress to “raise and support” armies,⁹⁴ the Federalists argued successfully that no significant standing army would be necessary during peacetime, because the militia could

90. *Id.*, at 425 (statement of James Madison).

91. *Id.* at 441 (statement of Edmund Pendleton).

92. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 292 (1825).

93. 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, app. at 367 (photo. reprint 1996) (1803). Thomas Cooley and Joseph Story approved of and followed Tucker’s analysis. See THOMAS M. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 198 (1880) (citing Tucker); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1825, at 633 (Boston, Little, Brown & Co., 3d ed. 1858) (citing Tucker).

94. U.S. CONST. art. I, §8, cl. 12.

respond to domestic crises.⁹⁵ The Anti-Federalists responded that the federal government could dictate to the militias, keep them in federal service for unlimited lengths of time, and generally abuse the citizens of the states.⁹⁶ Although ratification was won by 1790, several states recommended changes to the Constitution and measures for enactment by the Congress, many of which concerned the fear of federal military in the states.⁹⁷ The eventual Bill of Rights lacked the detail and specificity of many of the state proposals, and the Second, Third, and Tenth Amendments were intended to preserve for the states, among other things, some control over their militias. The Fifth Amendment, of course, was approved as well and, with it, the implicit subjugation of the military to civilian authority, based on the English history of due process.⁹⁸

The resultant federal powers over use of the military in domestic settings were supplemental to and concurrent with the authority of the states. Still, there is no doubt that the federal authority was sufficient to respond to a repeat of the Shays Rebellion. The delicateness of the overarching enterprise, the need for the support of the small state delegates, and the still-fresh antipathy to the English abuse of military authority combined to stand in the way of a clearer delineation of the military role in the states. The language used was purposefully general to encourage compromise and agreement, and it was to some extent deliberately ambiguous.⁹⁹

II. THE INSURRECTION ACT FROM 1792 TO 2006

The Second Congress considered the first law designed to permit the President to use military force in domestic affairs. The first section of the Calling Forth Act of 1792¹⁰⁰ allowed the President to call on the militia to suppress an “insurrection in any state,” despite the fact that the promise of the Article IV Guarantee Clause was to protect against lesser “domestic Violence” in any state.¹⁰¹ There was no opposition to this part of the Act, likely because the federal action could occur only following a request from the affected state.¹⁰² The debates indicate that use of the term “insurrection” was intended to preserve the traditional bar against the use of military force

95. COAKLEY, *supra* note 34, at 15.

96. *Id.*

97. *Id.* at 18.

98. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 40-41; *see also* COAKLEY, *supra* note 34, at 18-19; Vladeck, *supra* note 10, at 1103.

99. COAKLEY, *supra* note 34, at 14, 19.

100. Act of May 2, 1792, ch. 28, 1 Stat. 264 (1792).

101. *Id.* §1.

102. COAKLEY, *supra* note 34, at 20.

when lesser forms of disturbance erupt.¹⁰³

A second section of the bill permitted federal use of the militia on the President’s say-so without a state request to “execute the laws of the Union, suppress insurrections, and repel invasions.”¹⁰⁴ The broad discretion given to the President was not controversial insofar as insurrections or invasions were concerned. However, members of Congress were concerned about the prospect of military personnel being used to “execute the laws.”¹⁰⁵ After lengthy debate in the House, an agreement was reached to reject the broadly worded Senate bill and instead to appoint a committee to draft a bill that would add some precision to what was meant by “executing the laws of the Union.”¹⁰⁶

By 1792, those debating the bill by and large did not include members of the constitutional Convention and so did not recall that the language “execute the laws” was used there in contemplation of the crime of treason.¹⁰⁷ The broader understanding implied by the words “execute the laws” was softened, in the minds of the supporters of the 1792 bill, by the fact that the likely use of the military in such settings would be as part of the *posse comitatus* – trained and unified as military, but acting as civilians under civilian control and civil laws. The committee draft apparently intended only the use of a militia as part of the *posse comitatus* in their bill, but the bill language did not so indicate, and the full House expressed alarm at the committee’s proposal.¹⁰⁸

Representatives saw the potential for abuse in the committee bill. One remarked that, in the opposition then building to the excise tax on whiskey, “if an old woman was to strike an excise officer with her broomstick, forsooth the military is to be called out to suppress an insurrection.”¹⁰⁹ After considerable further debate, the section was passed, subject to several conditions.¹¹⁰ The federalization of an incident required that the civil authorities first be unable to quell the disturbance (“combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or

103. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 44.

104. *Id.* (quoting U.S. CONST. art I, §8, cl. 15).

105. David E. Engdahl, *Foundations for Military Intervention in the United States*, 7 U. PUGET SOUND L. REV. 1, 18 (1983) [hereinafter Engdahl, *Foundations*].

106. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 45.

107. *Id.*; see *supra* text accompanying notes 80 to 82.

108. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 46.

109. 3 ANNALS OF CONG. 575 (1792) (remarks of Mr. Clark).

110. “That whenever the laws of the United States shall be opposed, or the execution thereof be obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, the same being notified to the President of the United States, by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed.”

Act of May 2, 1792, ch. 28, §2, 1 Stat. 264 (1792).

by the powers vested in the marshals by this act”); that a Supreme Court Justice or district judge certify the need for the federal force; that the President first issue a cease and desist proclamation; that the President could act on his own only when Congress was not in session, and then only for thirty days after Congress convened without legislative approval; and that the Act was subject to sunset in two years.¹¹¹ Rather than attempting to clarify the triggering conditions beyond “executing the laws,” the Calling Forth Act satisfied the concerns of members of Congress by requiring that civilian authorities be unable to respond to the incident and that the courts concur that a federal presence was necessary.

A. *The Whiskey Rebellion*

As early as September 1791, opposition to the excise tax on whiskey in western Pennsylvania was strong enough to prompt a group to tar and feather the federal tax collector as he made his way to the affected counties.¹¹² By September 1792 the revolt was widespread and violent in the affected region of Pennsylvania, leading President Washington to issue a “refrain and desist” proclamation to the dissidents and a proclamation calling on all courts, magistrates, and officers to support enforcement of the law. Although Washington was determined to enforce the federal law, he recognized that the Constitution and laws “must strictly govern” and that the use of federal troops should be “avoided if it be possible to effect order without their aid. . . . [I]f no other means will effectually answer, and the Constitution and the Laws will authorize these they must be used”¹¹³

Washington’s proclamation quieted conditions for a while, but by the summer of 1794 attempts by a U.S. marshal to serve writs against distillers for violation of the excise law led to violence and bloodshed and the amassing of a rebel force of 7,000-15,000 men. No widespread acts of overt rebellion occurred, but the group did attack collectors’ houses, openly defied collection of the tax, and fired upon and seized the federal marshal. The revenue collector and marshal fled western Pennsylvania for their own safety. The federal district court was unable to sit during the insurgency. Based on the 1792 Calling Forth Act, Washington submitted a statement on the Pennsylvania disorders to Associate Justice James Wilson of the Supreme Court and asked for his opinion on whether they constituted “combinations too powerful to be suppressed by the ordinary course of

111. *Id.*

112. Unless otherwise noted, this narrative is based on the account in COAKLEY, *supra* note 34, at 30-68.

113. Letter from George Washington to Alexander Hamilton (Sept. 16, 1792), in 32 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 153 (John C. Fitzpatrick ed., 1931) [hereinafter WRITINGS OF WASHINGTON].

judicial proceedings.”¹¹⁴ At about the same time, Washington called a meeting of cabinet and Pennsylvania officials, among whom opinions about the best course of action varied widely. The governor of Pennsylvania, Thomas Mifflin, doubted his legal authority under Pennsylvania law to call local militia to quell the disturbance without first demonstrating that civil authority could not stem the crisis. Governor Mifflin also maintained that the state militia could only be called to respond to insurrection, not to enforce federal law. In the absence of a consensus, Washington asked for written opinions from those attending the meeting.

After Justice Wilson issued the certificate required by the 1792 Act that conditions in Pennsylvania were such that the federal troops could be deployed, Washington issued a new cease and desist proclamation on August 7, 1794, condemning acts that “amount to treason, being overt acts of levying war against the United States.”¹¹⁵ The President then sent appointed commissioners to travel to the affected area to offer amnesty to those who agreed to cooperate in the present and future collection of the tax. Governor Mifflin cooperated by ordering the local militia into federal service, although he continued to maintain in correspondence with the White House that the civil authorities – not the militia – should attempt to quiet the dissidents on their own. Hamilton drafted answers for the President and argued that the 1792 law expressly permitted calling forth the militia to execute the laws. After dispatching a force of around 15,000 men drawn from four states, Washington successfully ended the disturbance without bloodshed. In November, he asked for and received authority from Congress to extend the deployment beyond the thirty days permitted by the Calling Forth Act, and the force remained throughout the spring of 1795.

It remains unclear whether a military force was necessary to end the Whiskey Rebellion, and the militia apparently did use excessive force against the insurgents.¹¹⁶ Still, on the basis of the information he possessed, Washington reasonably believed that a force of the size he created was needed. The President exercised considerable patience, sought conciliation and settlement with the insurgents, marshaled the cooperation of state officials, obtained a judicial certificate that corroborated his determination that state and local law enforcement could not quell the disturbance, and took steps to protect the civil rights of the citizens.¹¹⁷ In the end, however, the federal response to the Whiskey Rebellion created a problematic precedent – the disturbance was hardly a “rebellion,” and it was certainly

114. This was done in accordance with the 1792 Act.

115. George Washington, Proclamation (Aug. 7, 1794), in 33 WRITINGS OF WASHINGTON, *supra* note 113, at 457-461. In his report to Congress, Washington also stated that the federal judiciary had been “stripped of its capacity to enforce the laws. . . .” Washington’s Sixth Annual Address to Congress, Nov. 19, 1794, 1 JAMES RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 162, 164 (1896).

116. COAKLEY, *supra* note 34, at 66.

117. *Id.* at 67.

not an insurrection against the government as that term was understood by the Framers. On the other hand, the federal court in the district was closed for a time, and the insurgents fired upon and detained the federal marshal and the revenue collector. Governor Mifflin was correct in characterizing the insurgents as “rioters,” and his reticence and reluctance to use federal force until civil authorities had proven ineffective serve as a reminder that the promise of a military “solution” to a civil disturbance may obscure the more difficult but less heavy-handed approach of utilizing state civil resources.

B. From 1795 to Reconstruction

The Calling Forth Act was reenacted in 1795,¹¹⁸ and its terms governed the federal employment of the militia until the Civil War prompted major alterations in 1861.¹¹⁹ The regular Army was expanded over the next decade to contend with Indian tribes and threats of war with France and England.¹²⁰ By 1807, new legislation permitted use of the regular armed forces in circumstances where the militia could act under the Calling Forth Act of 1792.¹²¹ Thereafter it became standard practice to use the standing army in domestic law enforcement emergencies instead of the militia.¹²² The Constitution expressly contemplates use of the militia in such situations, but the Ninth Congress in 1807 was sufficiently removed in time from the founding to ignore¹²³ this limitation on federal authority. Still, before the Civil War military personnel were employed as soldiers to suppress an insurrection on only a few occasions, while they served more commonly as part of a civilian posse to enforce the laws.¹²⁴ In the former instances, the incidents involved struggles for survival by the state governments then at risk, and thus did not overstep the boundaries of the Protection Clause.¹²⁵

For example, the 1842 Dorr Rebellion in Rhode Island involved the

118. Act of February 28, 1795, ch. 36, 1 Stat. 424 (1795).

119. See *infra* text accompanying notes 129 to 131.

120. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 48.

121. Act of March 3, 1807, ch. 39, 2 Stat. 443 (1807).

122. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 49.

123. There was no significant debate. COAKLEY, *supra* note 34, at 81 n.46. Stephen Vladeck has written: “By extending the President’s calling-forth power to the federal armed forces, the Ninth Congress vitiated any arguments that the Constitution, through the [Calling Forth] Clause and other provisions, granted Congress limited authority over only state militias, to be invoked in highly specific situations.” Stephen Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 166 n.68 (2004).

124. Engdahl lists the Shays Rebellion, the Whiskey Rebellion, and the Dorr Rebellion in Rhode Island in 1842 as examples. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 49-50. He later added the civil war in the Territory of Kansas in 1856 to the list. Engdahl, *Foundations*, *supra* note 105, at 20.

125. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 49.

mounting of an entire government in competition with the established government in the state. Dorr, putative governor of the regime, appointed officers for the state, judges for its courts, and an armed force bent on seizing the public arsenal.¹²⁶ The rebellion was directed at the maintenance in Rhode Island of a holdover form of state government based on a charter granted by the King of England in 1663. There was no state constitution; only those possessing property of a certain value could vote; and representation in the virtually omnipotent General Assembly was inequitable. Threats to the elected state government prompted the governor to make a series of requests to President John Tyler for federal military intervention to prevent domestic violence. On four separate occasions Tyler refused to intervene, maintaining that the President was not empowered to anticipate an insurrection by deploying a military force.

Finally, when regular Army officers reported to the President that Dorr had formed a large armed group and that conflict between them seemed imminent and unavoidable, Tyler sent his Secretary of War to Rhode Island with authority to issue a cease and desist proclamation, to federalize the militias of Massachusetts and Connecticut if needed, and to mobilize the regular Army in the vicinity to end the insurrection. The federal intervention never occurred because, contrary to the intelligence report forwarded to the President, putative Governor Dorr had only a small armed band, and they dispersed when a much larger armed group organized by the elected governor moved toward their position. In a lawsuit arising out of damages done to the home of a Dorr partisan by Rhode Island militiamen during the uprising, an eventual decision by the Supreme Court affirming dismissal relied on the 1795 Act and found that Congress had delegated to the President the power to intervene to protect the states against domestic violence upon application of the legislature or executive.¹²⁷ Before the President could act, he had to decide what constituted the lawful government of Rhode Island. When President Tyler issued instructions to call out the militia if they were needed, he made clear his intention to recognize the elected government of Rhode Island. Accordingly, the judiciary had no basis for questioning a decision that Congress conferred on the President.¹²⁸ In the end, the mere threat of the use of federal military force played a role in diffusing the Dorr Rebellion.

The carefully circumscribed powers granted to the President by the Insurrection Act began to unravel when the Civil War erupted. After the attack on Fort Sumter and President Lincoln’s blockade, the President ordered troops to enter the loyal Northern states and arrest persons suspected of disloyalty or espionage. Many were held indefinitely in

126. Unless otherwise noted, this summary is drawn from COAKLEY, *supra* note 34, at 120-127.

127. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

128. *Id.*

military prisons.¹²⁹ Congress returned for a special session and later in 1861 amended the 1795 law, which had regulated the President's use of militia for "execution of the laws." After repealing that portion of the 1795 Act, Congress enacted new legislation that permitted the President to use either a militia or regular armed forces to enforce the law, or suppress "rebellion," whenever, "by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President . . . to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State . . ." ¹³⁰ Three changes to the Insurrection Act are especially important. The 1861 iteration eliminated a requirement put in place in 1792 that, before military force could be used, the powers of the federal marshals aided by members of the military as part of the *posse comitatus* had to be shown inadequate to quell the disturbance. Second, "rebellion" was lumped together with the lesser forms of disobedience, blurring the distinctions embedded in the Protection Clause and preserved by the early Congresses. Third, the President had merely to find it "impracticable" to enforce the laws by ordinary processes to trigger his discretion to militarize the disturbance, where before he had to find that the belligerent forces were "too powerful to be suppressed" by ordinary law enforcement mechanisms.¹³¹ The 1861 statute was an extreme measure enacted in extraordinary times, but it undermined the fundamental constitutional principle that federal military intervention should be undertaken only if civilian measures have failed. The statute lumped together with the very real rebellion then being confronted a range of lesser triggering incidents that the Constitution determined should not be the subject of federal military response except following a state request.

After the war ended, extremists, most notoriously the Ku Klux Klan (KKK), committed acts of intimidation and terrorism in attempting to thwart Reconstruction in the South.¹³² The pre-Civil War reluctance to use the Army to maintain order in civil society except following a request from a state governor was put to an extreme test in the southern states. The situation was aggravated by the unwillingness of President Andrew Johnson to send troops to protect the new governments in the South that he had opposed. The newly reorganized states lacked the support of most of their influential citizens, and once the military occupation governments were withdrawn, the states lacked the civil institutions to provide protection against lawlessness.

129. Engdahl, *Foundations*, *supra* note 105, at 29.

130. Act of July 29, 1861, ch. 25, 12 Stat. 281 (1861).

131. *Id.*; see Engdahl, *Foundations*, *supra* note 105, at 31.

132. Unless otherwise noted, this narrative is drawn from COAKLEY, *supra* note 34, at 294-348.

The Klan and other sympathizers controlled entire counties in some states, and, fearing the prospect of a race war, Republican state governors were disinclined to call out a new black militia against the KKK. The governors and state legislatures passed resolutions asking the President for military forces to put down the Klan. President Johnson was reluctant, and never issued the required cease and desist proclamations or gave formal orders to the military to act. Instead, through his Attorney General, President Johnson approved the use of the federal military as part of the *posse comitatus* in aid of federal marshals in the “rare cases of necessity”¹³³ where civil authorities could not enforce local laws.

In 1869, President Ulysses S. Grant succeeded Andrew Johnson. President Grant did not hesitate to use military force to support the congressional Radicals’ program of Reconstruction, although he recognized the need for and sought new legislation rather than acting outside existing statutory and constitutional bounds. Grant realized that the Klan and related groups were formidable foes and that their presence was pervasive in many mainly rural southern states. Available Army personnel could not, by themselves and with existing troop levels, hope to disarm the groups in any comprehensive way. Witness intimidation and threats to judges had effectively stalled attempts to enforce the laws in many places. In 1870 and early 1871, Congress first enacted two enforcement acts that provided federal support for local elections and trials and criminalized interference with their duties.¹³⁴

In April 1871 Congress enacted the more ambitious Ku Klux Act,¹³⁵ which was aimed primarily at enforcing the Fourteenth Amendment and preventing acts of violence and intimidation by individuals against new black citizens. However, as later codified, the Act also amended the Insurrection Act and gave the President new powers:

The President, by using the militia or 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 combinations, 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 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

133. *Id.* at 300.

134. 15 Stat. 140-146 (1870-1871); COAKLEY, *supra* note 34, at 308.

135. Ku Klux Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871).

- (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.¹³⁶

The President could also declare martial law and suspend habeas corpus in any state or part of a state where combinations were so powerful as to threaten the overthrow of state authorities by violence.¹³⁷ Like the 1861 Act, the Ku Klux Act blurred the distinctions historically and constitutionally made between “insurrection” and lesser forms of “domestic violence.” Nor did the 1871 Act require that civilian means of law enforcement be exhausted. The 1871 edition of the Insurrection Act contained the same features that members of Congress refused to support in 1792.

In the 1871 debates in Congress some members renewed a position taken by some Framers and argued that the Article IV Protection Clause actually enhanced congressional prerogatives to order the federal military into the states. One representative argued that the required state request was a “mere [] technical difficulty.”¹³⁸ Representative James Blair maintained that a state request is not a condition precedent to federal action to suppress domestic violence pursuant to Article IV, Section 4:

The Constitution forbids nothing in this section. It lays a duty upon the United States in a certain event, but it does not prohibit the performance of that duty in case the event does not occur. The Constitution is open to reasonable construction upon that subject, and the construction ought to be such as to promote the manifest object of the provision, which was to protect the people of the States against domestic violence.¹³⁹

For Representative Blair the Protection Clause imposed a continuing obligation on the part of the United States and required no authorizing request from a state. As was the case at the Framing, these arguments run headlong into a clear textual prescription inserted to protect the role of the states and to protect the citizens of the states from overzealous law enforcement by the military. The interpretation of these arguments also presumes that domestic violence in a state empowers the national

136. *Id.* §3, 17 Stat. at 14.

137. COAKLEY, *supra* note 34, at 310.

138. *See* CONG. GLOBE, 42d Cong., 1st Sess. app. at 151 (1871) (statement of Rep. J. Blair).

139. *Id.* at 72-73 (statement of Rep. J. Blair).

government without any evidence that civil authorities in the affected state cannot quell the disturbance, whatever it is.

Other members of Congress took the position that the Fourteenth Amendment eliminated outright the Protection Clause's requirement that a state request assistance before the United States intervenes. New Jersey Senator Frederick Frelinghuysen thought that the Fourteenth Amendment and the Ku Klux Act granted new powers to the President:

When the President, in the exercise of his official judgment, is satisfied that, by reason of combinations, insurrections, or domestic violence in any State, the State fails to give protection to the citizen of the United States in his privileges and immunities, it should be the President's duty to suppress such domestic violence or combination by the use of the military force or other means¹⁴⁰

Frelinghuysen concluded that the new legislation would be giving the President the same power that the fourth article of the Constitution gives him, only it is to be exercised “at his discretion instead of at the discretion and request of a Governor of a State.”¹⁴¹

Opponents of the Ku Klux Act argued persuasively but in vain that the Act plainly violated the Protection Clause. According to Representative George W. Morgan of Ohio, “so jealous is the Constitution of the rights and liberties of the people, that it does not allow the President to interfere, even on the application of the Governor of a State, except when the Legislature cannot be convened.”¹⁴² Citing the statutory interpretation maxim *expressio unius est exclusio alterius*, New Jersey Senator John P. Stockton argued that Article IV, Section 4 provided “a full, ample, and complete remedy” to domestic violence and “absolutely forbid[s] any other interference by other means or under other circumstances.”¹⁴³ Other Congressmen quoted Justice Story's Commentaries for the proposition that “every pretext for intermeddling with the domestic concerns of any State, under color of protecting it against domestic violence, is taken away”¹⁴⁴ by the Protection Clause.

The Ku Klux Act's opponents also argued correctly that the Fourteenth Amendment had not altered the relationship between the federal government and the states vis-à-vis the Protection Clause.¹⁴⁵ Representative Blair drew an analogy between the Protection Clause and “specific jurisdiction,” which he asserted was “fatal to the position assumed by the

140. *Id.* at 501-502 (statement of Sen. Frelinghuysen).

141. *Id.* at 502.

142. CONG. GLOBE, 42d Cong., 1st Sess. 331 (1871) (statement of Rep. Morgan).

143. *Id.* at 574 (statement of Sen. Stockton).

144. *Id.* app. at 49 (statement of Rep. Kerr) (quoting 1 STORY, *supra* note 93, at 633).

145. *Id.* app. at 49 (statement of Rep. Kerr).

advocates of the bill, that general jurisdiction over life, liberty, property, and the rights, privileges, and immunities of the citizen is conferred upon Congress[.] Is it not fatal to any jurisdiction other than that specifically named . . . ?”¹⁴⁶ For Representative Blair, the Fourteenth Amendment, as a broad prohibition, could not have repealed, *sub silentio*, a reservation of power as specific as the Protection Clause. The same logic applies to the enforcement powers granted Congress by Section 5 of the Fourteenth Amendment. Congress could legislate to regulate or criminalize state refusals to treat its citizens equally, but it was not given new authority to proscribe behavior of citizens in the states. The acts of the citizens of a state are not actions of the state.

Once the Ku Klux Act was signed, Grant almost immediately issued a cease and desist proclamation directed at “combinations of lawless and disaffected persons in the late theater of insurrection and military conflict”¹⁴⁷ and relayed instructions to commanders in the South to authorize regular Army forces to aid civil authorities in making arrests, preventing the rescue of those arrested, and “breaking up and dispersing bands of disguised marauders, and of armed organizations, against the peace and quiet”¹⁴⁸ of the citizens. Grant chose to act forcefully in the northern counties of South Carolina, where the Klan had been especially active and vicious. The President relied on a report by his Attorney General and found that the Klan there presented an organized and armed combination in rebellion against the government of the United States.

When elections increased the number of Democrats in Congress, a December 1876 House resolution requested that lame duck President Grant provide all his orders relating to the use of troops in southern states during that year. In his report Grant defended the legality of his actions: “I have not employed troops on slight occasions nor in any case where it has not been necessary to the enforcement of the laws of the United States.” Grant noted that he “been guided by the Constitution and laws,” including the enforcement acts of 1871 and Article IV of the Constitution.¹⁴⁹

After the 1876 elections produced a strengthened Democratic majority in the House and a President, Rutherford B. Hayes, who was reluctant to deploy military force to the states, southern Democrats succeeded in the House but not the Senate in passing a rider to the Army Appropriations Bill for 1877 that would have restricted the domestic employment of the Army. Eventually, Congress instead enacted the Posse Comitatus Act of 1878,¹⁵⁰

146. *Id.* app. at 207 (statement of Rep. J. Blair).

147. Ulysses S. Grant, Proclamation (May 3, 1871), in 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4088-4089 (John D. Richardson ed., 1908).

148. *Id.*; see COAKLEY, *supra* note 34, at 310.

149. 9 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 147, at 4372-4375 (1876).

150. Posse Comitatus Act, June 18, 1878, 20 Stat. 145 (1878), codified as amended, 18

which stated a presumption against military enforcement of civil law but did not countermand statutes that authorized the same, such as the Insurrection Act in its various and evolving iterations.¹⁵¹ Ironically, the Posse Comitatus Act was as much an effort to protect white supremacist groups in the South and to curb what was perceived by many as the Army’s affiliation with the rise of black power¹⁵² as it was to underscore our nation’s baseline federalism and civilian control of the military.

C. An Assessment

The 1871 Ku Klux Act exceeded constitutional limits on the powers of the national government imposed by the Protection and Calling Forth Clauses. The Act failed to distinguish unsolicited federal military responses to insurrection from the less dire categories of “violence, unlawful combination, or conspiracy,” and enabled violations of the constitutional rights of citizens when it authorized military force without requiring that civilian means first be exhausted. Despite its constitutional infirmities, the 1871 legislation became part of the codified Insurrection Act and experienced only minor changes between 1871 and its post-Hurricane Katrina consideration.

The 1871 Act underscores just how far Congress drifted away from the original understanding in the Constitution on domestic use of the military. The Framers thought that any such use of the military would be limited to the state militias and that their involvement would be triggered *only* by insurrections, invasions, or “combinations too powerful to be suppressed by the ordinary course of judicial proceedings” (in other words, when the courts were closed).

Before the Civil War, nearly all the uses of a federal militia in the states were to curb dissident groups in the aim of enforcing federal law.¹⁵³ In these instances, there was no request from state governments, and it is debatable whether the federal law enforcement required in those instances met the implicit constitutional standard of violence equivalent to treason or making war on the United States. Even where there were compelling national interests at stake, such as during the Whiskey Rebellion, the consensus view of historians is that “the amount of force used against the insurgents

U.S.C. §1385 (2000).

151. William C. Banks, *Troops Defending the Homeland: The Posse Comitatus Act and the Legal Environment for a Military Role in Domestic Counter Terrorism*, 14:3 TERRORISM AND POLITICAL VIOLENCE 1-41 (2002).

152. 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, 101-109 (2003).

153. COAKLEY, *supra* note 34, at 346 (citing the Whiskey Rebellion, Fries Rebellion, enforcement of the embargo laws, Nullification, actions in Kansas, and an expedition to Utah).

was undoubtedly excessive and indeed there is some question whether military force was even necessary at all.”¹⁵⁴ In addition, in the view of one commentator, the Whiskey Rebellion was wrongly characterized by President Washington as a “rebellion” and the law violations in Pennsylvania were ill-defined as “reasonable conduct,” thereby charting a course for future Presidents to justify the use of military force in the states.¹⁵⁵

When states did make requests, most were turned down, for good reason.¹⁵⁶ During Reconstruction, federal military deployments were ordered to enforce federal law (primarily rights protections for new citizens), although these deployments were usually also at the request of state governments.¹⁵⁷ In 1871, the President could deploy the militia or the federal Army in a wide range of circumstances, including when the President himself decided that the states were not up to the job of law enforcement. Presidents routinely chose the regular Army, for a variety of reasons, including, according to Coakley, “a lack of reliability of militia to overcome local prejudices and act with unity under national authority.”¹⁵⁸ After the Civil War and Reconstruction struggles necessarily were won without a local militia as the principal force, the very idea of the using the militia in handling domestic crises “had become passé.”¹⁵⁹

Remarkably, these uses of military force in the states almost always overcame the local disturbance without spilling blood.¹⁶⁰ Federally ordered troops also followed practices first instituted by Washington in the Whiskey Rebellion – that military personnel should not perform law enforcement or judicial functions, although they could aid federal marshals and state and local officials in making arrests. Only during the Civil War and Reconstruction was martial law declared. In addition, the troops were instructed to and did, for the most part, use the minimum force necessary to overcome the resistance to civil authority.¹⁶¹

Nonetheless, the blurring of the constitutional lines between invasion and insurrection against the national government, on the one hand, and domestic violence, on the other, continued to broaden the circumstances where the national government decided to deploy military force in the states. The 1871 portion of the Insurrection Act was used to justify the uninvited deployment of federal troops to intervene during the Pullman Strike in 1894 and during the race riots during the second half of the

154. *Id.* at 66.

155. *Id.* at 67

156. *Id.* at 346.

157. *Id.*

158. *Id.* at 347.

159. *Id.*

160. *Id.* at 348.

161. *Id.*

twentieth century, further illustrating the failure of the 1871 Congress to distinguish between true “insurrection” or treasonous federal law violations and the lesser forms of “domestic Violence” that the Constitution’s Framers never intended to be the predicate for unilateral federal military action in the states.¹⁶²

The Pullman Strike¹⁶³ began with a labor dispute in the company town of Pullman, Illinois. The dispute quickly grew to a conflict of nationwide scope when the recently formed National Railway Union, headed by Eugene V. Debs, entered the fray aligned against the General Managers’ Association, which included the major players in the railroad industry. President Grover Cleveland sent uninvited federal troops to Chicago to enforce a sweepingly broad injunction to prevent obstruction of the mails, protect the movement of interstate commerce, and ensure the continued operation of the federal courts. President Cleveland did not, however, first investigate whether state and local law enforcement could have performed those tasks. The disturbances were significant in places, but the strikers did not confront any state with insurrection.

The troops, which were widely perceived as taking sides in order to break the strike, shot and killed twelve persons and destroyed considerable property. President Cleveland acted on the familiar authority of enforcing a judicial injunction, but he neglected to engage in what could have been helpful consultations with state and local officials. Instead, he allowed the military to use force to benefit the railroad owners without having first engaged in efforts to settle the labor dispute.

Race-related riots in Los Angeles in 1965 and 1992 illustrate in a different way the shortcomings of the modern Insurrection Act. The 1965 Watts riot was sparked by the arrest of three members of a black family following a routine traffic stop. Rioting continued for seven days but was contained and eventually quelled by California National Guard forces, together with state and local police. Federal, state, and local officials did discuss calling in federal troops, but state and local officials chose not to make a request for a federal military presence because of the sensitive nature of the riots and because they believed that they could control the situation. A commission created to review the Watts incidents found that the California National Guard performed well but was slow to respond.¹⁶⁴

162. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 62. The codified version of the 1871 Act, 10 U.S.C. §333, was cited by President Eisenhower as authority for using troops in support of desegregating the Little Rock schools in 1957. Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957).

163. Unless otherwise noted, this summary is drawn from LAURIE & COLE, *supra* note 34, at 133-152; BENNETT MILTON RICH, *THE PRESIDENTS AND CIVIL DISORDER* 87-109 (1941).

164. John A. McCone & Warren M. Christopher, *Violence in the City: An End or a Beginning: 144 Hours in August 1965*, available at <http://www.usc.edu/libraries/archives/cityinstress/mccone/part4/html 1-2>.

In 1992, following the videotaped beating of motorist Rodney King and the eventual acquittal of the police officers involved in the beating, riots erupted.¹⁶⁵ This time, the decision was based on the recommendation of Warren Christopher, a former deputy commissioner to the group that studied the 1965 riots. Christopher argued that state National Guard forces would not react quickly enough. He also pointed out that there was apparently a poor relationship between the Los Angeles mayor and the chief of police. Governor Pete Wilson quickly requested federal troops and federalization of the California National Guard, and President George H.W. Bush complied. Within one day, more than 13,000 regular Army troops joined 9,000 federalized California National Guard forces and state and local police in riot control and law enforcement actions. There was no showing that the state and local forces were unable or unwilling to enforce the laws. In addition, a failure to train the active duty military forces in law enforcement had nearly disastrous consequences during the riots. Marines accompanying local police in response to a domestic dispute, where a shot had been fired from a house, responded to the officer's request to "cover me" by spraying the house with 200 M-16 rounds. Instead of being prepared to respond if the police officer was threatened, the Marines preemptively fired on the house.

A few weeks after he signed the Posse Comitatus Act, President Rutherford B. Hayes expressed his misgivings with the Insurrection Act:

The machinery [of the Act permitting the President to use troops to execute the laws] is cumbersome and its exercise will tend to give undue importance to petty attempts to resist or evade the laws. . . . This involves proclamations, the movement of United States land and naval forces, and possibly the calling out of volunteers, and this looks like war.¹⁶⁶

By commenting that it "looks like war," President Hayes candidly expressed a concern borne by all citizens: military personnel in civil support settings may resort to their baseline training and war-fighting orientation and may overreact to civil support assignments.¹⁶⁷

In 1992 Los Angeles, then, the statutory request mechanism was followed,

165. Unless otherwise noted, this summary is drawn from William W. Johnson, *Active Component Rapid Response Force; The Answer to the Military's Issues with Efficient and Effective Support During Response to and Recovery from Incidents of National Significance?*, School of Advanced Military Studies, U.S. Army Command and General Staff College, Ft. Leavenworth, at 31-33 (2006).

166. 3 DIARY AND LETTERS OF RUTHERFORD BRICHARD HAYES, 492-493, quoted in 41 Op. Att'y Gen. 313, 330-331 (1957).

167. William C. Banks, *The Normalization of Homeland Security After September 11: The Role of the Military in Counterterrorism Preparedness and Response*, 64 LA. L. REV. 735, 756 (2004).

but the predicate conditions did not justify the federal military response. The unfortunate lack of appropriate law enforcement support training in this instance simply underscores the complexities of mixing federal and local, and military and civilian commands and mission orientations in responding to domestic incidents.

These two examples illustrate different dimensions of the corrosive effects on federalism of the Insurrection Act. The Pullman Strike showed heavy-handedness at the expense of state and local decisionmakers, and excessiveness in the use of force. This sullied the Army’s reputation as politically neutral. The Los Angeles riots showed how sensible reticence by state and local officials in 1965 enabled an effective response to the Watts riots, while the request mechanism was misused following the Rodney King verdicts in 1992, leading to overreaction and dangerous deployments of regular military into law enforcement situations for which they had not been trained.

At other times, however, the official federal posture has been more nuanced and sensitive to the limited circumstances that permit the President unilaterally to send federal military forces into the states. Even during the period of civil unrest following *Brown v. Board of Education*,¹⁶⁸ when federal troops were used to enforce federal court decrees issued under the Fourteenth Amendment,¹⁶⁹ the Executive expressed its reluctance to assume responsibility except when necessary. For example, during the integration of Little Rock’s schools, Attorney General Herbert Brownell reaffirmed that:

Whenever interference and obstruction to enforcement of law exists, and domestic violence is interposed to frustrate the judicial process, it is the primary and mandatory duty of the authorities of the State to suppress the violence and to remove any obstruction to the orderly enforcement of law. This same duty fully exists where the domestic violence is interposed in opposition to the enforcement of Federal law rather than to the local law of the State.¹⁷⁰

Apart from the codification of the 1871 Ku Klux Act, the source of the current and recently restored section of the Insurrection Act, semantic confusion over the critical predicate terms has sowed the seeds of further posturing by the national government. For example, after riots in several cities during the summer of 1967, Attorney General Ramsey Clark wrote to the governors referring to a different section of the Insurrection Act that permits the use of federal troops, following a request from the states, when “insurrection” has occurred.¹⁷¹ In his letter to the governors, Clark instead

168. 347 U.S. 483 (1954).

169. See President’s Power To Use Federal Troops To Suppress Resistance to Enforcement of Federal Court Orders – Little Rock, Arkansas, 41 Op. Att’y Gen. 313, 329 (1957) (invoking the authority of 10 U.S.C. §§332-333).

170. *Id.* at 322-323.

171. 10 U.S.C. §331.

mistakenly referred to the federal authority in that section as extending to instances of serious “domestic violence.”¹⁷² Although the Attorney General’s letter prompted the National Advisory Commission on Civil Disorders to recommend an amendment to the Insurrection Act to eliminate the confusion surrounding the circumstances where federal troops could be deployed in the states,¹⁷³ no amendment was enacted.¹⁷⁴

Despite the sometimes divisive congressional debates over the Protection Clause and the relationship between national powers and state prerogatives, the executive branch has generally accepted that its independent powers are limited in this sphere.¹⁷⁵ The President has been careful to distinguish between responses to opposition of federal law (for which the Article I Calling Forth Clause supplies the constitutional authority)¹⁷⁶ and formal state requests (for which the Protection Clause supplies the authority).¹⁷⁷ Even as the executive has provided assistance, it has affirmed the primary role of the states as guarantors of the physical safety of the people. The Office of Legal Counsel stated in 1981 that “[t]he statutory and constitutional scheme of our government leaves the protection of life and property and the maintenance of public order largely to state and local governments. Only when civil disorder grows beyond a state’s ability to control or threatens federal rights does the federal government generally intervene.”¹⁷⁸

III. REACTING TO HURRICANE KATRINA – THE 2006 INSURRECTION ACT AMENDMENT

When Hurricane Katrina barreled toward New Orleans and then struck

172. The letter is reproduced in *Laird v. Tatum*, 408 U.S. 1, 3 n.2 (1972).

173. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 288 (1968).

174. Engdahl, *Foundations*, *supra* note 105, at 21.

175. Vladeck, *supra* note 10, at 1107-1109. There is no assignment in the text of the Protection Clause or elsewhere in the Constitution to one branch of the United States Government to carry out the security commitments in Article IV. The assignment is to “[t]he United States.” U.S. CONST. art. IV. From the beginning, Congress has made the policies, and the Executive has carried them out.

176. *See, e.g.*, Proclamation No. 6023, 3 C.F.R. 113 (1990) (regarding domestic disturbances in the Virgin Islands that obstructed execution of federal laws); Exec. Order No. 12,690, 3 C.F.R. 236 (same); Proclamation No. 5748, 3 C.F.R. 178 (1988) (regarding disturbances at a federal penitentiary in Atlanta that made impractical the enforcement of certain federal laws); Exec. Order No. 12,616, 3 C.F.R. 260 (same).

177. *See* Proclamation No. 6427, 3 C.F.R. 44 (1992) (regarding the Los Angeles riots); John Lancaster & Barton Gellman, *4,000 Federal Troops Concentrate in Staging Area for L.A. Deployment*, WASH. POST, May 2, 1992, at A17 (referring to the request from California Governor Wilson and Los Angeles Mayor Bradley for federal assistance).

178. Use of Potatoes To Block the Maine-Canada Border, 5 Op. Off. Legal Counsel 422, 423 (1981).

the city, senior Bush administration officials remained indecisive for days on whether to deploy federal military assets in the Gulf to support rescue and protection operations.¹⁷⁹ After the government in Washington began to grasp the gravity of the disaster, Deputy Secretary of Defense Gordon England ordered NORTHCOM to move resources to the Gulf Coast and authorized it to support the Federal Emergency Management Agency (FEMA) response efforts in the region. NORTHCOM had created a Katrina task force led by Lieutenant General Russel Honoré, who arrived in New Orleans with a few aides two days after the storm hit.¹⁸⁰ Earlier that same day Louisiana Governor Kathleen Blanco, who recognized that state and local response capabilities were overwhelmed by the storm, telephoned President Bush. She reached him on her second attempt after he returned to Washington from his ranch in Crawford, Texas. Governor Blanco asked for federal help with transportation to aid in the continuing evacuation of stranded residents of New Orleans, and she also asked for 40,000 federal troops to take over logistics and search and rescue operations so that state National Guard personnel could focus on law enforcement.¹⁸¹ Although rumors of rampant violence, looting, and out-of-control crowds turned out to be exaggerated, media misrepresentations of the violence contributed to an especially tense and worrisome environment for decisionmakers.¹⁸²

Fueled by media reports, President Bush gave serious consideration to federalizing the military aspects of the incident – either by sending in regular Army personnel or by federalizing the Louisiana National Guard. In subsequent phone conversations, Governor Blanco refused to request the protection that President Bush offered, and she maintained that Louisiana forces could manage the law enforcement problems. After further deliberations, two days later the White House offered a compromise in a faxed memorandum to Governor Blanco that would have brought the Louisiana Guard under the President’s command and would have had a single federal commander obtain dual status as chief of the Louisiana Guard, subject to the governor’s orders, and of federal forces, subject to the President’s orders. Governor Blanco refused the President’s proposal, and Governor Haley Barbour refused a similar arrangement in Mississippi.¹⁸³ In

179. Michael Greenberger, *Did the Founding Fathers Do “A Heckuva Job”?*, *Constitutional Authorization for the Use of Federal Troops To Prevent the Loss of a Major American City*, 87 B.U. L. REV. 397, 401-402 (2007).

180. U.S. Senate, *Hurricane Katrina: A Nation Still Unprepared* 69 (2006), available at http://www.hsgac.senate.gov/_files/Katrina/FullReport.pdf.

181. Martha Derthick, *Where Federalism Didn’t Fail*, 67 PUBLIC. ADMIN. REV. 42-43 (Dec. 2007, Supplemental Issue).

182. *Id.* at 43-44.

183. SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, *A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA*, 109th Cong. 221 (2006), available at <http://www.gpoaccess.gov/Katrinareport/mainreport.pdf>

the aftermath of the spectacle of President Bush locked in a political battle with Governor Blanco over who should lead the rescue and evacuation effort in New Orleans,¹⁸⁴ White House Deputy Chief of Staff Karl Rove reportedly opined that “[t]he only mistake we made with Katrina was not overriding the local government.”¹⁸⁵ Yet the White House also opined rhetorically to *The New York Times*,

Can you imagine how it would have been perceived if a president of the United States of one party had pre-emptively taken from the female governor of another party the command and control of her forces, unless the security situation made it completely clear that she was unable to effectively execute her command authority and that lawlessness was the inevitable result?¹⁸⁶

Some opined that the Administration’s indecisiveness was due to a perceived lack of legal authority to override Governor Blanco.¹⁸⁷ While reticence based on constitutional principles may have been appropriate, as this section will argue, the more persuasive explanation for the delay was political – the Republican male President did not want to be perceived as bullying a Democratic female southern governor in her own state.¹⁸⁸

The modern codification of the 1871 portion of the Insurrection Act would have authorized the President to employ regular military or federalized National Guard “to suppress . . . domestic violence” following a determination by him that the violence “so hinders the execution of the laws . . . that any part or class . . . is deprived of a right, privilege, immunity, or protection named in the Constitution . . . and the constituted authorities of that State are unable, fail, or refuse to protect” the citizens, or, more simply, if the violence “obstructs the execution of the laws of the United States. . . .”¹⁸⁹ The sporadic looting and other unrest actually occurring in New Orleans were sufficient to enable the President to make either of the above determinations and then use the Insurrection Act authority to federalize the military portion of the response to Hurricane Katrina.

[hereinafter A FAILURE OF INITIATIVE].

184. Greenberger, *supra* note 179, at 416-417; *see also* Jason Mazzone, *The Commander in Chief*, 83 NOTRE DAME L. REV. 265, 269-270 (2007).

185. *See Rove Off the Record on Iraq*, THE HUFFINGTON POST, Sept. 17, 2005, available at http://www.huffingtonpost.com/2005/09/17/rove-off-the-record-on-ir_n_7513.html.

186. Eric Lipton, Eric Schmitt & Thom Shanker, *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES, Sept. 9, 2005, at A1; *see* JOHN MCQUAID & MARK SCHEIFSTEIN, *PATH OF DESTRUCTION: THE DEVASTATION OF NEW ORLEANS AND THE COMING AGE OF SUPERSTORMS* 276 (2006).

187. Greenberger, *supra* note 179, at 408; *see also* William Banks, *Who’s In Charge: The Role of the Military in Disaster Response*, 26 MISS. C. L. REV. 75 (2006).

188. Greenberger, *supra* note 179, at 408.

189. 10 U.S.C. §333.

President Bush chose not to exercise his statutory discretion, and the federal military response arrived late and remained independent of the state forces under the command of Governor Blanco in Louisiana.¹⁹⁰ The standoff over control of the response and relief effort between Governor Blanco and President Bush offered a convenient post-crisis scapegoat for the flawed federal response and led to the proposed 2006 bill language, itself a watered down version of the rhetoric from President Bush and Admiral Keating about putting the military “in charge” of domestic emergencies.¹⁹¹

All fifty governors opposed the Administration’s 2006 proposal.¹⁹² They argued that the bill would undermine historic and balanced state-federal and civilian-military relationships, threaten state sovereignty, and impair the ability of the states and cities to carry out core government functions, including the protection of their citizens.¹⁹³ Despite heavy lobbying and thoughtful rebuttals by the states, the Administration’s proposal was enacted as part of the mammoth Defense Authorization Act for fiscal year 2007¹⁹⁴ as follows:

(1) The President may employ the armed forces, including the National Guard in Federal service to –

(A) restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that –

(i) domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order; and

(ii) such violence results in a condition described in paragraph (2); or

(B) suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if such insurrection, violation, combination, or conspiracy results in a condition described in paragraph (2).

(2) A condition described in this paragraph is a condition that –

(A) so hinders the execution of the laws of a State or possession, as applicable, and of the United States within that State

190. Banks, *supra* note 187, at 87.

191. See *supra* text accompanying note 19.

192. See “*The Insurrection Act Rider*” and *State Control of the National Guard: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 52-56 (2007) (reproducing 2006 letters to Donald Rumsfeld, Secretary, Department of Defense, and to congressional leaders).

193. *Id.*

194. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

or possession, that any part of 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 or possession are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(B) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.¹⁹⁵

This brief proposal, buried in the authorization bill, sailed unscathed through the committee process in the Senate and House, where no hearings were held and no debate occurred. The eventual report of the Senate Armed Services Committee explained the basis for approving the change in the Act by concluding, without supporting evidence or analysis, that the “lack of explicit reference to such situations as natural disasters or terrorist attacks [in the Insurrection Act] may have contributed to a reluctance to use the armed forces in situations such as Hurricane Katrina.”¹⁹⁶

After enactment and in tandem with the Democratic takeover of the leadership in the Senate and House following the 2006 mid-term elections, the National Governors Association urged repeal of the change to the Insurrection Act and argued that the new law could cause confusion and uncertainty concerning whether the governor or the President is primarily responsible in a domestic emergency.¹⁹⁷ Other state officials also argued that the “constructive ambiguity”¹⁹⁸ of the previous Act worked well in encouraging consultation and deliberation between state and federal officials and in assuring that the President would assert federal military authority only in extraordinary situations. Washington State Adjutant General Timothy Lowenberg characterized the amendment as “a hastily conceived and ill-advised step backward [that] openly invites disharmony, confusion, and the fracturing of what should be a united effort at the very time when the States and Territories need Federal assistance – not a Federal takeover – in responding to State emergencies.”¹⁹⁹

Senate Judiciary Committee Chairman Patrick Leahy agreed with the governors and asserted that the Insurrection Act had been infrequently invoked in the past because it was “purposefully ambiguous”²⁰⁰ concerning

195. *Id.* §1076, 120 Stat. 2404, codified as amended at 10 U.S.C. §333.

196. S. REP. NO. 109-254, at 384 (2006).

197. “*The Insurrection Act Rider*” and *State Control of the National Guard*, *supra* note 192, at 51.

198. *Id.* at 61 (letter from Roger P. Lempke, President, Adjutants General Association of the United States).

199. *Id.* at 10 (testimony of Major General Timothy J. Lowenberg, Adjutant General, State of Washington); *see also id.* at 40, 45 (statement of Major General Lowenberg).

200. Statement of Sen. Patrick Leahy on Legislation To Repeal Changes to the Insurrection Act (S. 513) (Feb. 7, 2007), *available at* <http://leahy.senate.gov/press/2007/02/020707.html>.

when the President could invoke the Act in situations other than general insurrection. According to Leahy, the ambiguity fostered caution, and it encouraged consultation and deliberation between federal and state and civilian and military decisionmakers.²⁰¹ As Senator Leahy recognized, the amended Act made it easier for the President to act, and it changed a statutory presumption against the exercise of federal military authority to one that calls for military involvement in the states once certain conditions exist.²⁰²

We should be skeptical of the claim by a Senator that Congress’s legislative handiwork is “purposefully ambiguous.” Statutory ambiguity is often the product of indecision, political compromise, or inattention to nuance, but it is not usually intentional. In this instance, history shows that ambiguity crept unintentionally into the text of the Constitution and then was preserved and eventually worsened by Congress in the evolving versions of the Insurrection Act. The governors’ characterization that there was “constructive ambiguity” in the Act is more credible in the sense that the ambiguous terms served as the backdrop for deliberation and cooperation between federal and state officials in the wake of domestic crises.

To be sure, the amended Act grafted onto the antiquated eighteenth century verbiage a more contemporary-sounding set of triggering circumstances – “restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition.”²⁰³ In some circumstances – a terrorist attack with biological weapons on a major U.S. city, for example – the Insurrection Act mechanisms may provide an optimal legal mechanism for the national government to involve the military quickly in a response to a crisis in the states. Of course, the Act was designed in 1792 for just such a purpose – to prescribe the procedures for the federal military to protect the states, and its pre-2006 and now restored language could have and now likely will suffice to authorize the federal military response in those same circumstances.

There were two constitutional problems with the 2006 amendment. First, the changed language effectively turned the presumption against a federal military role in the states on its head and thus usurped state decisionmaking prerogatives and threatened aggregate civil liberties violations, as military personnel untrained in protecting civil liberties while enforcing the laws and prone to rely on the default war-fighting operational orientation will more frequently enforce the laws. As the governors stated in opposing the Administration proposal, the listed triggering conditions that authorized the President’s decision to federalize an incident with a

201. *Id.*

202. *Id.*

203. Pub. L. No. 109-364. §1076, 120 Stat. at 2404 (2006).

military force remove the ambiguities in the Act that have traditionally invited consultation and negotiation between federal and state officials (consider the Whiskey Rebellion and Dorr Rebellion, for example) and, in so doing, effectively told the President to federalize an incident in those situations if, in his view, state officials could not maintain order or if the “domestic violence” obstructed the enforcement of U.S. laws.

Second, the amendment made worse an already glaring constitutional defect in the Insurrection Act: “domestic violence” is not one of the conditions in the states for which the Constitution contemplates an uninvited federal military role. The amendment only enlarged the scope of the President’s discretion to order military forces into the states without an invitation.

The amended Act did retain the existing predicates from the earlier codification of the Act, including “insurrection.”²⁰⁴ In today’s world, a massive terrorist attack in a city might be considered an insurrection if carried out from within (for example, Timothy McVeigh and the 1995 Oklahoma City bombing), or an invasion, if from outside (al Qaeda and September 11)²⁰⁵ and could legitimately trigger the Act. However, short of insurrection or invasion, the Constitution requires that the federal military role be requested by the affected state. Apart from resurrecting long-standing fears of the military enforcing the laws and denigrating state decisionmaking prerogatives, the amended set of mechanisms could have had the ironic result of obstructing an effective emergency response. Any President who orders federal military forces to “restore public order and enforce the laws of the United States” after determining that state authorities “are incapable of maintaining public order”²⁰⁶ may well have been ignorant of real-time facts, could have failed adequately to take into account the contrary estimates of a well-informed state governor or agency head about state capabilities and resources, and could have resulted in federal troops following military rules for the use of force that violate the rights of citizens. Moreover, if a President followed the prescriptions of the amended Act, she could not effectively have made the necessary determinations in a Katrina-like disaster or some fast-moving terrorist attack, because the Act required that she find that the states “are incapable of maintaining public order,”²⁰⁷ not that the states *are likely to become* incapable of maintaining order. Although he may have overstated the point, Michael Greenberger was essentially correct when, in defending the 2006 changes, he argued that the amended Act was “only triggered when

204. *Id.*

205. See Brian C. Brook, *Federalizing the First Responders to Acts of Terrorism Via the Militia Clauses*, 54 DUKE L.J. 999, 1022-1023 (2005).

206. Pub. L. No. 109-364, §1076, 120 Stat. at 2404 (2006).

207. *Id.* (emphasis added).

there is no sovereignty within the state.”²⁰⁸

As applied to Hurricane Katrina, particularly its effects on New Orleans and its residents, the amended Act would have fared no better than the prior and now restored Act in providing a useful mechanism for response to the natural disaster and its effects. First, by the time the President finds that the states are unable to maintain public order, conditions might be as bad as they got in New Orleans.²⁰⁹ Second, it is by no means clear that such a finding *could* have been made. Different and inconsistent stories about local conditions were being reported in the early days after the hurricane’s landfall, and the failure of basic communications technologies further compromised the ability of officials to have real-time information. Even if the finding could have been made by the President, by the time it was made the President could and should have instead convened the relevant federal principals and determined, in coordination with Governor Blanco and Mayor Nagin, how best to deliver federal support to the state and local rescue and recovery operations.²¹⁰ Third, even the worst stories of chaos and suffering in New Orleans may not have met the high “invasion” standard set in the Protection Clause. The storm and its aftermath were not the equivalent of war in New Orleans.

The “supplemental security”²¹¹ promised by the Protection Clause probably should have been provided much earlier than it was, but that is not the fault of the Constitution or the Insurrection Act. Had the federal principals met and activated federal response processes when it should have been clear that the storm would have devastating consequences, federal resources would have likely been better integrated with city and state resources in New Orleans, and Governor Blanco might have been more inclined to request the federal military leadership role if the earlier, better-integrated relief and recovery efforts had proven insufficient.²¹²

IV. THE CONTINUING (UN)CONSTITUTIONALITY OF THE INSURRECTION ACT

The triggering conditions in the amended Insurrection Act – those that result in domestic violence rendering state authorities “incapable of maintaining public order”²¹³ – implicate the very core security concerns that were on the minds of the Framers at the Philadelphia Convention. Presumably, then, the federal authority for the Insurrection Act, before or

208. Greenberger, *supra* note 179, at 416.

209. *Id.* at 418.

210. *Id.* at 416-417.

211. Debates in the Convention of the Commonwealth of Virginia (June 14, 1788), in 3 ELLIOT’S DEBATES, *supra* note 83, at 425 (statement of James Madison).

212. Greenberger, *supra* note 179, at 416.

213. Pub. L. No. 109-364, §1076, 120 Stat. at 2404 (2006).

after the 2006 amendment, could be derived from the Article IV Guarantee and Protection Clauses and the Article I Calling Forth Clause. As this article has shown, however, neither clause, alone or together with the other, supplies the necessary authority to sustain the Insurrection Act. The Guarantee Clause does impose an affirmative obligation on the federal government to step in with military force if the democratic institutions of state government are threatened,²¹⁴ and the dependent Protection Clause (“and shall protect . . .”)²¹⁵ reinforces the federal government obligation. However, the protection portion of the Guarantee Clause confers federal authority on its own call only in the event of “invasion,” the quintessential calamitous war. In the event of “domestic Violence” the Clause permits a federal response, but only “on Application of the Legislature, or of the Executive (when the Legislature cannot be convened).”²¹⁶

Structurally, the two parts of the Article IV, Section 4 commitment are linked, and both must be provided by the national government to the states. Together the two clauses mean that the republican form may not be sustained without security.²¹⁷ As Madison explained at the Virginia Convention, the Protection Clause provides the states with a “supplemental security to suppress insurrections and domestic violence.”²¹⁸ George Nichols agreed that, under Article IV, “protection [of the states] is secured against invasion and domestic violence on application [The Clause] exclude[s] the unnecessary interference of Congress in business of this sort. . . .”²¹⁹ Edmund Pendleton joined the chorus and noted that “the power in the general government cannot be exercised, or interposed, without the

214. See Mazzone, *supra* note 9, at 58-59.

215. U.S. CONST. art. IV, § 4.

216. Professor Jason Mazzone conflates invasion and domestic violence as triggers for federal authority. Mazzone, *supra* note 9, at 35-36. Later in the same article, he asserts that the Protection Clause requires that the national government take charge of providing security for the states. *Id.* at 47. In a subsequent article, Professor Mazzone acknowledges that states must request federal military assistance in the event of domestic violence pursuant to the Protection Clause, *Commandeerer*, *supra* note 184, at 278, although he also claims that the Constitution does not foreclose a unilateral federal decision to intervene in the states in the event of “[v]arious other kinds of emergencies [that] can produce obstructions to an array of federal laws,” *Id.* at 337. Professor Mazzone relies on the Calling Forth Clause for the latter claim, although earlier in the same article he opines that the federal authority to call forth the militia exists only “when the implementation of federal laws is opposed with violence.” *Id.* at 306. Michael Greenberger cites the Protection Clause, Greenberger, *supra* note 179, at 418 n.144, but he does not mention the request limitation on federal authority. Stephen Vladeck does not include the Protection Clause when he lists the limits on federal authority to employ the military domestically. Vladeck, *supra* note 10.

217. Mazzone, *supra* note 9, at 55-56.

218. Debates in the Convention of the Commonwealth of Virginia (June 14, 1788), in 3 ELLIOT’S DEBATES, *supra* note 83, at 425 (statement of James Madison).

219. *Id.* at 427 (statement of George Nicholas).

application of the state itself.”²²⁰

In other words, there is adequate constitutional authority for federal provision of state security in the event of a major attack equivalent to an eighteenth century “invasion,” but the Constitution does not support a federal military response to lesser forms of local domestic violence without the deliberation between local, state, and federal officials contemplated by the Protection Clause and the early Congress’s versions of the Insurrection Act. Professor Jason Mazzone acknowledges the need for a state to “appl[y] for protection” in the event of domestic violence,²²¹ although he claims that the “text leaves unclear whether the national government may act sua sponte against domestic violence” if a state does not apply.²²² On this critical point, the constitutional text is clear. The Protection Clause lists two threats that obligate the national government to protect the states. If an invasion occurs, the national government must act without waiting for an invitation. If the crisis in the states is domestic violence, the state must ask before the national government is obligated to respond. The only additional circumstance for an uninvited federal force in the states would be supported by the Calling Forth Clause following a state’s inability or unwillingness to enforce federal laws where the violations are especially grave and equivalent to waging war against the government.²²³ Reading the Constitution otherwise to permit uninvited federal military action in the event of domestic violence ignores unambiguous constitutional text, and it flies in the face of the original understanding of the Protection Clause. The Framing history makes it abundantly clear that the requirement of a state invitation in the event of domestic violence was purposeful: the delegates in Philadelphia feared a heavy-handed federal response at the expense of state sovereignty, and they anticipated such state requests only in the gravest emergencies.

Viewed most simply, the Protection Clause provides a procedure by which a state can request assistance from the federal government. This plain-meaning reading of the text satisfies the concerns of the Framers that a state have a means of obligating the United States to come to its aid. The Protection Clause also affirms the preferred position of state legislatures over governors. For those states threatened with federal military intervention, the clause provides an explicit process for inviting a federal presence. The state legislature’s power to request federal troops through the Protection Clause is the state’s means to combat violence that it cannot quell on its own.

In early discussions, the Framers, delegates to state ratification conventions, and later commentators approached the Protection Clause in

220. *Id.* at 441 (statement of Edmund Pendleton).

221. Mazzone, *supra* note 9, at 53.

222. *Id.* at 53 n.106.

223. *See supra* text accompanying notes 75 to 84.

different ways. Madison (most of the time) and others considered “domestic violence” as the internal equivalent of invasion, and they equated the term with a direct challenge to a state’s authority.²²⁴ This interpretation was consistent with the Protection Clause’s location in Article IV, juxtaposed with the Guarantee Clause.²²⁵ Similarly, the prevailing Federalists believed that the Protection Clause secured state governments against insurrection, which meant violent threats to the state’s government as the government.²²⁶

For Anti-Federalists and some early commentators, “domestic violence” referred not only to insurrection, but also to other crimes.²²⁷ Under this broader view the term covered not only direct threats to the government’s authority but also actions that indirectly threatened the government by challenging its ability to protect its citizens. Although those subscribing to the narrow view of “domestic violence” found support in the Protection Clause’s proximity to the Guarantee Clause, the broader view of the Protection Clause was consistent with the plain text of the clause and the Framers’ refusal to substitute the term “insurrections” for “domestic violence.”²²⁸

The difference between the two views was not of much consequence at the time, because everyone agreed that the United States could intervene under the terms of the clause only when invited by the state. The difference is significant today, however, when determining whether there exists an area of either insurrection or other domestic violence into which the United States may intervene without a state request.²²⁹ The last part of this article suggests some criteria for determining when a crisis in the states should permit uninvited federal military participation.

One fundamental point about the constitutional mechanisms for dealing with security in the states should not be minimized: The Protection Clause is the *only* constitutional provision that clearly empowers the United States to respond to domestic violence. The Calling Forth Clause only authorizes enforcement of federal law and protection from insurrection or invasion of the United States.²³⁰ Recognizing that the Protection Clause confers a federal power to act in the states, however, does not support expansive interpretations that would moot the Invasion Clause and vastly expand the Calling Forth Clause. An expansive interpretation also fails to respect the context in which the Protection Clause was drafted. There was little sense

224. *See supra* text accompanying notes 83 to 90.

225. *See* U.S. CONST. art. IV, §4.

226. *See supra* text accompanying notes 76 to 79.

227. *See supra* text accompanying notes 94 to 95.

228. *See supra* text accompanying notes 79 to 82.

229. *See infra* text accompanying notes 243-244.

230. *But see* Vladeck, *supra* note 10, at 1103 (asserting that the Calling Forth Clause does not limit federal military involvement in civil law enforcement and not recognizing the limits assessed in this article that are derived from Article IV).

among the Framers that the United States required a general power to address violence in the states. Although the memory of the Shays Rebellion was a powerful reminder of the vulnerability of the states and the need for unity, the Framers were acutely aware of the states' role as the first responders to violence.²³¹

Domestic violence is by its nature local; it refers to the internal affairs of a state. Although a state might believe itself overwhelmed by insurrection or riots, the decision whether assistance is needed belongs to the state. Such a reading of the clause is confirmed by the requirement that state legislatures, rather than the state executive, make the request, which gives the states an additional measure of security by avoiding a precipitous request by the governor.²³²

Viewed holistically, the Protection Clause is both a conditional grant of power and a disability. Because of the structure of the Constitution and its place alongside existing states and their constitutions, Congress may exercise only those powers specifically granted it; the states are denied only such powers as are expressly or implicitly denied them. The states expressly are denied the power to enter into interstate compacts subject to a condition permitting them to do so.²³³ Likewise, the United States is denied the power to intervene in state domestic violence subject to a condition permitting it to do so. The result under both clauses is the same, as the states may not enter into interstate compacts, nor may the United States intervene to suppress a state's domestic violence, except as each is invited.

Professor Mazzone has argued that the Militia Clause, along with the Protection Clause, should be interpreted to permit the federal government to “deploy the states’ modern security personnel for security purposes,” or, in other words, to commandeer state and local law enforcement into federal service.²³⁴ Putting aside the efficacy of the policies Professor Mazzone advocates, the Militia Clause permits Congress to provide for situations where the federalized National Guard or regular military could execute the laws or suppress insurrections. But does that authority extend to federalizing a local incident when a request has not been made by the governor or legislature?

At the Convention, the anti-standing army sentiment was so strong that the Framers nearly declined to include *any* reference in the Constitution to a federal authority to use the military to protect the states. The state militias were widely viewed as a bulwark against federal tyranny and corruption to

231. See *supra* text accompanying notes 50 to 54.

232. See 2 FARRAND, *supra* note 63, at 317 (rejecting a proposal to strike “on the application of the legislature” but agreeing that the request should come from the legislature or governor).

233. U.S. CONST. art. I, §10.

234. Mazzone, *Security Constitution*, *supra* note 9, at 142; Mazzone, *Commandeerer*, *supra* note 184, at 80.

such an extent that there was an operating presumption against granting the national government *any* control over state militias.²³⁵ The compromise arrived at gave Congress the authority to provide for calling out the state militias to protect the states from invasion and domestic violence and to execute the laws of the Union. Congress also would provide for governing the militias when in federal service, but the states would train them and appoint their officers. As Madison explained at the Virginia Ratification Convention, the “only cases” where Congress could assert federal military authority in the states were to “provide for the execution of the laws, suppress insurrections, and repel invasions,”²³⁶ and the federal law enforcement trigger was intended to be limited to dire circumstances – treasonous activities tantamount to war. Congress’s power was thus “concurrent”²³⁷ with state power. At the same time, the Framers most concerned about military overreaching by the national government recognized that the capacity for the national government to call forth the state militias would weaken any claims that a standing army was necessary.²³⁸

Vladeck concludes that “the Calling Forth Clause is effectively a non-starter,”²³⁹ because of Supreme Court precedents that establish that the National Guard is not the “militia” referred to in the Calling Forth Clause. Vladeck correctly notes that there is no “militia” to be called under the Court’s decisions.²⁴⁰ From there, Vladeck concludes that there are no “structural constitutional limitations on the domestic use of the military.”²⁴¹ As this article has shown, the Guarantee, Invasion, and Protection Clauses provide grants of authority and also limits on the exercise of authority. The Protection Clause is particularly structural in form in mandating a preferred order for state legislatures and governors to make requests to the president.

In summary, the Calling Forth Clause permits the national government to repel invasions, suppress insurrections, and execute federal laws. The first category is not controversial, although it may have contemporary meanings different from its original usage. The second category requires interpretation, and there are many historical sources for giving content to “insurrection” that point toward dire circumstances tantamount to war. The third applies when federal laws are being resisted, but the Framers contemplated “such armed resistance to law as would constitute treason”²⁴²

235. Engdahl, *Foundations*, *supra* note 105, at 36-40.

236. Debate before the Convention of the Commonwealth of Virginia (June 6, 1788), in 3 ELLIOT’S DEBATES, *supra* note 83, at 90 (statement of James Madison).

237. *Id.* at 382.

238. Vladeck, *supra* note 10, at 1097.

239. *Id.* at 1102.

240. Draft Law Cases, 245 U.S. 366 (1918); *Cox v. Wood*, 247 U.S. 3 (1918).

241. Vladeck, *supra* note 10, at 1103.

242. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 39.

before unleashing the military in the states. Madison went along with this federal military role in any case where the civil power is not sufficient to quell the situation.²⁴³

On the one hand, most forms of domestic violence present everyday situations for state and local emergency responders and police. Police are trained to respond to riots and other forms of civil disturbance, and they can control crowds and enforce curfews or area restrictions. Local police also inevitably respond to the looting and other forms of unlawful activity that accompany domestic incidents. Local fire department personnel and bomb squads are trained and equipped to react to a range of physical threats, while state and local public health personnel will be first in line to provide medical assistance to the victims of violence, whatever its cause. On the other hand, extreme domestic violence might become an insurrection or an invasion, such as where an insurgent or terrorist group attacks the government. Domestic violence that opposes law enforcement does not pose a similar threat. As David Engdahl argued,

[in an] actual insurrection, organized political society is *in extremis*; the situation is tantamount to war. In such circumstances, it is necessary and appropriate for the government to employ force which is distinctively military in character. It was *only* in such extreme situations – foreign invasion and genuine insurrection – and never in cases of mere riot or civil disorder that the English tradition which the founding fathers endeavored to preserve permitted the domestic application of distinctively military force.²⁴⁴

Arriving at a correct understanding of the structural limits on the domestic use of the military does not, of course, exhaust the constitutional limits on such use. This article has made only brief mention of the civil liberties violations that may occur when troops enforce the laws.²⁴⁵ However, a few textually obvious civil liberties protections apply to limit the military role.²⁴⁶ The Third Amendment,²⁴⁷ which limits the quartering of soldiers, and the Suspension Clause, which assures access to the courts for

243. See *supra* text accompanying notes 85 to 87.

244. Engdahl, *Foundations*, *supra* note 105, at 19. See also Mazzone, *Commandeerer*, *supra* note 184, at 83 n.467. Mazzone concludes that the Framers put in place a “uniquely federalist security apparatus.” Mazzone, *Security Constitution*, *supra* note 9, at 90. But he does not reconcile the request mechanism in the Protection Clause with the authority to federalize an incident with local militia in the Calling Forth Clause.

245. See *Bissonette v. Haig*, 776 F.2d 1384, *aff’d*, 800 F.2d 812 (8th Cir. 1986) (en banc), *aff’d*, 485 U.S. 264 (1988) (setting a standard for reviewing alleged Fourth Amendment violations by federal officials during the occupation of the village of Wounded Knee, South Dakota); *Laird v. Tatum*, 408 U.S. 1 (1972) (rejecting claim of First Amendment violations from military domestic surveillance during the Vietnam War).

246. Vladeck, *supra* note 10, at 1102-1103.

247. U.S. CONST. amend. III.

individuals held under federal authority “except when in Cases of Rebellion or Invasion the public Safety may require it,”²⁴⁸ surely limit the military role in the states. In addition and more generally it has been argued that the Due Process Clause embodies a modern version of the English principle that citizens must have resort to civilian law and processes when the courts are open, and that due process principles apply to limit domestic use of the military.²⁴⁹

V. RESHAPING THE INSURRECTION ACT

It is difficult to admire a long-standing statute that “works” merely because the affected institutions and officials have learned how to navigate around and through ambiguous language to attain the goals that Congress had in mind. Recall, however, that due to the fear of standing armies, authority to use federal military forces in domestic disorders was not granted explicitly to either the President or Congress.²⁵⁰ Because the Framers settled on imprecise language (“insurrection,” “domestic violence,” “execute the laws”) and declined to resolve what could be interpreted as inconsistent instructions to the national and state governments (in the Protection, Guarantee, and Calling Forth Clauses),²⁵¹ even the early Congresses had to resort to procedural mechanisms to ensure that they could control the discretion granted to the President by the earliest Insurrection Act.²⁵² Nonetheless, from the Whiskey Rebellion in 1792 through natural disasters into the twenty-first century (until Hurricane Katrina), presidents, other federal officials, governors, and state legislatures have usually muddled through toward an uncontested resolution of the question whether a federal military response to an incident in the states is warranted.

If the September 11 attacks and the anthrax letters focused our federal government’s attention on the need to plan and prepare generally for a range of emergencies that could impact us domestically, the Hurricane Katrina spectacle provided a good opportunity to revisit the legal mechanisms for prescribing a military role in responding to emergencies in the states. Unfortunately, neither the Bush administration nor Congress

248. U.S. CONST. art. I, §9, cl. 2.

249. Engdahl, *Troops in Civil Disorders*, *supra* note 1, at 28.

250. COAKLEY, *supra* note 34, at 14. At the Virginia ratifying convention, Governor Edmund Randolph stated: “With respect to a standing army, I believe there was not a member of the federal convention, who did not feel indignation at such an institution.” Debates in the Convention of the Commonwealth of Virginia (June 14, 1788), in 3 ELLIOT’S DEBATES, *supra* note 83, at 403 (statement of Edmund Randolph).

251. COAKLEY, *supra* note 34, at 19.

252. *See supra* text accompanying notes 110 to 111.

took seriously the post-Katrina commission recommendations regarding the military role. Instead of hearings, thorough analysis, and carefully written legislative language, the Administration recommended and Congress adopted a simplistic add-on to an already badly written Insurrection Act that effectively made matters worse, not better. The hasty enactment, followed by an early repeal, only underscores the misadventure of the 2006 amendment.

After President Bush signed the repeal bill in January 2008, the pertinent part of the Insurrection Act was amended to its pre-2006 terms:

- (1) IN GENERAL.—Section 333 of title 10, United States Code, is amended to read as follows:

§ 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.²⁵³

The 2008 repeal of the 2006 changes improves the Act marginally by underscoring Congress’s determination that the President’s unilateral commitment of federal forces in response to an incident in the states should occur only in exceptional circumstances. Presumably, then, we could muddle through the foreseeable future with the restored Act, functioning more or less as it did before the 2006 amendment. Because the challenges of homeland security and catastrophic natural disasters are especially daunting, however, the Act should be revised to better articulate the constitutional limits of the unilateral authorities that may be given to the President by Congress and to prescribe more clearly a process for arriving at shared decisions between federal, state, and local decisionmakers both

253. Pub. L. No. 110-181, §1068, 122 Stat. 3, 325 (2008).

before and during a crisis.

For openers, an amended statute should substitute “the National Guard” for “the militia.” Given the transformation of the disorganized bands of citizen militias into a well-organized and trained nationwide National Guard, a federalized National Guard should be the first force available to the President in the extreme circumstances contemplated by the Act. In most domestic crises, state and local civilian authorities and state-deployed National Guard personnel will be able to restore order. The federalized National Guard and regular Army could be called in by the President only if state and local resources cannot provide the necessary security.

Next, the term “domestic violence” should be stricken from the list of conditions that permits a unilateral decision by the President to employ a military force in the states. In addition, the provision permitting the President to act on his own by calling on a federal military force following the existence of any condition that “opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws” should be eliminated, or should be amended to limit it to especially serious violations. This article has shown that the authority under the Calling Forth Clause to use military forces to “execute the laws” was reserved for extraordinary situations when treasonous actions equivalent to waging war on the United States are occurring.

The 1792 Calling Forth Act required that a federal judge certify that “combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act” were present before the President could send in a federalized military force.²⁵⁴ This judicial check was shorn from later versions of the Act, and the potential for fast-hitting disasters or surprise terrorist attacks makes it impractical to imagine restoring the mechanism now. Instead, it would strengthen the Act and enhance the accountability of federal decisionmakers if the President was required to report to relevant congressional committees and to make findings detailing the justifications for the federal military intervention. The 2006 amendment required that the President notify Congress that he had exercised the authority granted as soon as practicable after its exercise and every fourteen days thereafter while the authority was exercised.²⁵⁵ A better reporting provision would add required justification findings and would insert a sunset provision of thirty days for any operation conducted under the Act, subject to a request from the President, with justifications, for an additional thirty days.

The dynamics between presidential discretion and the role of the

254. *See supra* text accompanying notes 110 to 111.

255. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, §1076, 120 Stat. 2083, 2404 (2006), codified as amended at 10 U.S.C. §333, repealed, Pub. L. No. 110-181, §1068, 122 Stat. 3 (2008).

governor or state legislature should also be addressed in a future Insurrection Act. Taking advantage of 2008 revisions to the National Response Plan (NRP), known now as the National Response Framework (NRF),²⁵⁶ the Act should adopt the lexicon of those planning documents and prescribe decisionmaking roles for the leading federal and state officials that match the NRF.²⁵⁷ Unfortunately, the NRF continues to fudge the decision points and fails to say with sufficient clarity when a unilateral decision by the President to federalize an incident in the states with military forces may be lawfully made.²⁵⁸

As the Hurricane Katrina experience demonstrated, governors faced with local crises may also enlist National Guard support from other states by following the procedures of the Emergency Management Assistance Compact (EMAC), an interstate compact approved by Congress in 1996.²⁵⁹ The states affected by Katrina benefited greatly from EMAC provision of National Guard support from other states, where the governors of the affected states command their own as well as EMAC-provided National Guard troops from other states.²⁶⁰ A revised Insurrection Act should incorporate the EMAC procedures, and it should go beyond the NRF and identify with greater precision and clarity the circumstances that may merit triggering the federalization of an incident.

Official assessments of the Katrina response focused on the broader issues of federal versus state and local leadership in response to a crisis, and they commented extensively on the military role.²⁶¹ The reports acknowledged that, in incidents where state and local governments are unable to handle the response, the federal response should be proactive. In homeland security jargon, the federal government should “push” its resources into place rather than waiting for the state to “pull” them through a request.²⁶² At the same time that the reports recommended a proactive federal response in the event of especially dire emergencies, the House Commission report concluded that such a role “does not require federalization of the disaster or the usurping of state authority.”²⁶³ The

256. Available at <http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf>.

257. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, HURRICANE KATRINA: BETTER PLANS AND EXERCISES NEEDED TO GUIDE THE MILITARY’S RESPONSE TO CATASTROPHIC DISASTERS, No. GAO-06-643, at 9, 15 (2006).

258. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, HOMELAND DEFENSE: STEPS HAVE BEEN TAKEN TO IMPROVE U.S. NORTHERN COMMAND’S COORDINATION WITH STATES AND THE NATIONAL GUARD BUREAU, BUT GAPS REMAIN, No. GAO-08-252 (2008).

259. Pub. L. No. 104-321, 110 Stat. 3877 (1996). EMAC is described at <http://www.emacweb.org>.

260. See, e.g., The White House, *The Federal Response to Hurricane Katrina: Lessons Learned* 202 n.35 (2006) [hereinafter *Lessons Learned*].

261. A FAILURE OF INITIATIVE, *supra* note 183; *Lessons Learned*, *supra* note 260.

262. A FAILURE OF INITIATIVE, *supra* note 183, at 132.

263. *Id.* at 136.

White House report similarly concluded that the “Federal government cannot and should not be the Nation’s first responder,”²⁶⁴ that local governments will remain responsible for immediate response to “the vast majority of incidents,” and that governors will continue to meet their “sovereign responsibilities to protect their residents.”²⁶⁵ According to the White House, the federal government should share these responsibilities only in a “catastrophic event.”²⁶⁶

These statements do not answer the critical question. Someone has to be in charge of the response to an emergency in the states, whether it is minor or catastrophic. “Push” and “pull” systems are not mutually exclusive in real time, and it is possible to have elements of federal and state control in responding to an incident. Yet these commission reports did not address directly who does what in a fast-moving crisis when military forces are needed to quell violence or participate in search and rescue, for example, and both the governor and President believe that they should be commanding the response.

The military response to Katrina involved more than 50,000 National Guard personnel from 49 states operating under the command of the governors of the affected states.²⁶⁷ More than 14,000 active duty soldiers were deployed under the command of the President.²⁶⁸ Despite the numbers, coordination problems were legion, and the separate command structures got in the way of shared operations and clear communications.²⁶⁹ As described earlier, the proposal to share military forces under a single commander who would report to both the President and Governor Blanco in Louisiana was rejected by the governor.²⁷⁰ The Katrina commissions recommended further integration of regular military and National Guard units in preparing to respond to emergencies in the states, and they advocated the use of a special statutory mechanism to unify command of all such military units, subordinate to the relevant state governor.²⁷¹

There are undeniable differences in the dynamics of emergencies and in our preparedness and response to them between the Framing and the present. In the late eighteenth and nineteenth centuries, it took weeks to deploy a military force in the states. The slow pace in implementing a decision to deploy prompted deliberations between federal and state officials and provided time for state and local officials to ruminate and to

264. *Lessons Learned*, *supra* note 260, at 52.

265. *Id.* at 81.

266. *Id.*

267. *Id.* at 43.

268. *Id.*

269. *Id.* at 43, 55.

270. *See supra* text accompanying notes 182 to 183.

271. *Lessons Learned*, *supra* note 260, at 94; A FAILURE OF INITIATIVE, *supra* note 183, at 223.

judge the seriousness of the crisis.²⁷² Those features are no longer the norm, as there is often neither a slow response nor the time to weigh options thoughtfully.²⁷³ The speed of communications and deployment of military assets, not to mention the potential for sudden terrorist attacks or fast-moving natural disasters, renders obsolete the buffer of time present in eighteenth, nineteenth, and even early twentieth century deployments. Presidents were more likely to rely on governors when information spread slowly.

Michael Greenberger offered the sensible practical observation that “adroit handling” of emergency response by federal officials “may eliminate any conflict between the state and the federal governments even in situations where the state has difficulty handling the disaster.”²⁷⁴ As Greenberger explains, the National Response Plan envisions “a coordinated, constant, and real time response among all levels of government.”²⁷⁵ Under the federal system, Greenberger predicts that, despite the failures of federal officials to coordinate during the early stages of Katrina, “the federal government may skillfully be able to offer federal assistance under the guise of supplementing the state response without having to officially declare a federal takeover.”²⁷⁶ As the Katrina experience demonstrated, however, the lack of a clear blueprint for a shared state and federal response to a major disaster greatly complicated the response to the storm, and even adroitness would have been too little too late to prevent some of the worst effects of Katrina.

Professor Mazzone has recommended that Congress enact “an emergency commandeering statute”²⁷⁷ pursuant to its Calling Forth Clause power that would authorize the President to “call into periods of mandatory federal service the relevant state and local personnel”²⁷⁸ to meet the Calling Forth objectives. Professor Mazzone advocates the new statutory authority as an add-on to the discretion he argues that the federal government already enjoys under the Constitution to federalize a local incident, including the deployment of regular military or federalized National Guard personnel.²⁷⁹ The statutory authority would enable the President to commandeer state and local government personnel – first responders, police and fire units, public health workers, and others. States would not have the legal authority to resist this commandeering of their personnel, by the terms of the proposed

272. LAURIE & COLE, *supra* note 34, at 22.

273. *Id.* at 54.

274. Greenberger, *supra* note 179, at 416-417.

275. *Id.* at 416.

276. *Id.* at 425.

277. Mazzone, *supra* note 184, at 330.

278. *Id.*

279. *Id.* at 331-332.

statute.²⁸⁰ As applied to a replay of Hurricane Katrina, Professor Mazzone envisions that the new statute would enable the President to commandeer “police officers, firefighters, search and rescue workers, hazardous waste crews, and other emergency personnel” in the affected states by issuing orders directly to the heads of those departments, and would bypass the governors (and state legislatures) altogether.²⁸¹

Based on the analysis in this article, the statute proposed by Professor Mazzone would violate at least the Protection Clause of Article IV, and perhaps the Guarantee Clause, not to mention the Tenth Amendment. Fundamentally, such a statute would authorize an emergency response process that brings to life the fears of the Framers that the national government would seek to ride roughshod over the states. With respect to the critical decisions about maintaining security and protecting the citizens of the states, the Framers recognized and memorialized in the text of the Constitution the first-order responsibilities of states for making those decisions, through their legislatures and governors. As Madison explained, the security that may be provided by military personnel commanded by the President is supplemental, not preemptive.²⁸²

One aspect of Professor Mazzone’s proposal has merit, however. To the extent that emergency response consists of providing security, Mazzone properly notes that “it is preferable to ask police rather than soldiers to perform domestic security work.”²⁸³ His commandeering law would enable the President to rely on state and local law enforcement personnel, rather than regular military, to control crowds, defuse tense situations, and keep citizens calm. He correctly points out that, during Hurricane Katrina, soldiers patrolled New Orleans with weapons raised, while another unit trained in levee repair and not police work locked themselves in the Convention Center rather than deal with an angry crowd of hurricane victims.²⁸⁴ Professor Mazzone also observes that local law enforcement and emergency response personnel “are also accountable to civilian government in ways that might not be true . . . of military forces.”²⁸⁵ Thus, rather than sending in the military in most noncatastrophic emergencies in the states, Professor Mazzone would leave the response in the hands of civilian workers, but under the direction of the President.²⁸⁶ Instead of federal commandeering of the state and local personnel, the better and lawful approach is to further integrate civilian and military emergency response

280. *Id.* at 332.

281. *Id.* at 340.

282. *See supra* text accompanying notes 89 to 90.

283. Mazzone, *supra* note 184, at 345.

284. *Id.* at 345-346.

285. *Id.* at 347.

286. *Id.* at 350.

roles and missions, with federal, state, and local actors and institutions.

Apart from what law permits or requires, military personnel will in all but the most unusual circumstances not engage in law enforcement in response to domestic emergencies. Soldiers’ skills will be most valuable in search and rescue operations by providing shelter, clearing debris, and coordinating other logistical activities. No one inside the Department of Defense or among state and local officials advocates military involvement in enforcing the laws. Under the dire circumstances triggering the Insurrection Act, legal restrictions on such involvement are overcome by following the terms of the Act.

CONCLUSION

As Justice Jackson stated in the *Youngstown* decision in 1952, the Constitution provides “that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.”²⁸⁷ Most commentators agree that the Constitution empowers the federal government, writ large, to act with dispatch to protect the states and the people during emergencies.²⁸⁸ Vladeck maintains that

it is difficult to understand why the Constitution would not contemplate use of the federal military to repel invasions, at the very least. . . . Whereas it would make absolutely no sense today to deny the federal government, on *federalism* grounds, the power to use federal troops anywhere in the country . . . to repel invaders, fears that such authority would provide a dangerous pretext for federal usurpation of the states were as prevalent and widespread in 1787 as they were to prove unfounded thereafter.²⁸⁹

Vladeck is surely correct about invaders, and he correctly notes that it made sense to the Framers to trust the states and their militias to respond to invaders unless and until they could not repel the invasion. The problems we more likely confront, however, are not triggered by invaders but by horrific storms or terrorists bent on destruction and instilling fear but not on takeover of the government. In the gravest of circumstances “invasion” or “insurrection” may be the most apt constitutional categories for a crisis in the states, in which case the constitutional and statutory mechanisms supply ample federal authority. In less grave instances, the constitutional limits reviewed in this article apply, and unencumbered federal discretion comes to an end.

287. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 644 (Jackson, J., concurring) (1952).

288. Vladeck, *supra* note 10, at 1092-1093.

289. *Id.* at 1098.

Although the Insurrection Act should be repaired to cure its constitutional defects and to provide clearer guidance for federal and state decisionmakers, the shortcomings in shaping a role for the military in domestic emergency response are not attributable to a lack of legal authority. The military has all the authority it needs to support civilian efforts to prepare for and respond to emergency situations. Better civilian leadership than that demonstrated during Hurricane Katrina is an important ingredient of a successful future response. Apart from reshaped legal authorities, military units need more fully refined operations plans, including detailed arrangements for cooperation and unified command during emergency incidents.

Ironically, one of the ingredients Americans demanded of their new Constitution – subordination of military to civilian leadership – has added to the difficulties in coordinating military and civilian roles and missions in emergency response. Every military commander has a clear and defined chain of authority from the President, to the Secretary of Defense, to the on-scene commander. While federal military units can participate in federal emergency response, long-standing doctrine based on the subordination of military to civilian control does not permit the military to operate under the NRF-based command system. This feature of our system complicates emergency response, and it adds another layer of decision making to the civilian institutions in the federal and state governments. We have always been willing to brook inefficiencies that go along with the separation of the military from our domestic lives, and finding ways to accommodate the separate military command structure should not stand in the way of fashioning effective emergency response plans, policies, and laws.