ARTICLES

The First Calling Forth Clause: The Constitution's Non-Emergency Power to Call Forth the Militia to Execute the Laws

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ABSTRACT

The January 6 insurrection and the federal government's response to the George Floyd protests highlight the perils of confiding vast military authority in a single person and the possibility of military force being used against civilians. Troublingly, the Insurrection Act gives the President unilateral control over the decision to call out the troops. And the Constitution seemingly contemplates a military role in domestic law enforcement by permitting Congress to "provide for calling forth the Militia to execute the Laws of the Union." This sweeping constitutional provision has surprisingly not been the subject of sustained academic inquiry regarding its original meaning. The scholars who have opined on the Clause's original meaning have generally concluded that "execute the Laws" requires violent resistance to the laws before military force may be brought to bear. This contention does not withstand close scrutiny. This Article breaks new ground by showing that the best evidence from British, colonial, and founding-era history reveals the phrase "execute the Laws" was as broad as its plain meaning suggests. Indeed, the historical record reveals that the text of the Clause was the work of the Constitutional Convention's Federalists, who were troubled by the states' failure to comply with the terms of the peace treaty with Great Britain during the Critical Period.

Importantly, the historical evidence bolsters the understanding that Congress and the judiciary may be intimately involved in the process of deciding to use military force domestically. Even before the Calling Forth Act of 1792—which conditioned the President's ability to deploy the militia on judicial preapproval—two states with strong executives, New York and Massachusetts, carved out involved roles for the courts in controlling the domestic use of the militia. Moreover, state and colonial calling-forth frameworks predating the Constitutional Convention display a strong trend against unilateral executive decision-making in this area. In short, the founding-era history both supports broad permission of the federal government to use troops domestically as well as a significant ability of Congress and

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the courts to regulate and check the executive branch's domestic use of military force, even in a crisis.

INTRODUCTION

As a mob attacked the U.S. Capitol on January 6, 2021, ultimate authority to call out federal forces for Congress's defense rested with the very person who had exhorted that mob to march down Pennsylvania Avenue and to "fight like

hell."[1] This was of course the President of the United States.[2] It has since emerged that President Trump's supporters urged him to invoke the Insurrection Act and send troops against Congress.[3] While he declined on January 6, the President, in response to the 2020 George Floyd protests only a few months earlier,[4] threatened to use the Insurrection Act to deploy the military to "dominate the streets" in American cities.[5] President Trump did not follow through then either, but the federal government's response to the protests included the deployment of federal agents without identification,[6] the use of a military helicopter to intimidate protestors,[7] and a broad assertion of authority to federalize state National Guard units.[8] Together, these two searing moments illustrate twin perils: the conferring of vast crisis authority in a single person and the possibility of military force being brought to bear on civilians.

More generally, the Trump administration's use and misuse of emergency authorities has highlighted a President's ability to declare a fictitious emergency to activate extraordinary crisis powers.[9] For instance, the Insurrection Act confers vast discretion in the President alone to deploy the armed forces domestically to overcome opposition to the laws.[10] Unfortunately, Congress suffers from structural disadvantages that prevent it from effectively checking a President's

1. Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part Of Impeachment Trial*, NAT'L PUB. RADIO, (Feb. 10, 2021, 2:43 PM), https://perma.cc/ML7T-3KAV.

2. *Id.*

3. *E.g.*, ELIZABETH GOITEIN & JOSEPH NUNN, BRENNAN CTR. FOR JUSTICE, THE INSURRECTION ACT: ITS HISTORY, ITS FLAWS, AND A PROPOSAL FOR REFORM 18 (2022) (Statement submitted to the United States House Select Committee to Investigate the January 6th Attack on the United States Capitol); Luke Broadwater, *Fearing a Trump Repeat, Jan. 6 Panel Considers Changes to Insurrection Act*, N.Y. TIMES (Apr. 19, 2022), https://perma.cc/5BNN-L5FZ.

4. Floyd's murder by a Minneapolis police officer ignited nationwide demonstrations against police violence. *Former Police Officer Derek Chauvin Found Guilty of Murder in George Floyd Death*, WASH. POST. (Apr. 20, 2021), https://perma.cc/M3SP-TMU2. Though an urgent topic in its own right, the militarization of local, state, and federal police forces is not the subject of this Article.

5. Matt Zapotosky, *Trump Threatens Military Action to Quell Protests, and the Law Would Let Him Do It*, WASH. POST. (June 1, 2020, 10:31 PM), https://perma.cc/CPC2-69ZX (quoting the President stating that if governors did not "dominate the streets," he would "deploy the United States military and quickly solve the problem for them"); *see also* Tom Cotton, Opinion, *Send in the Military*, N.Y. TIMES (June 3, 2020), https://perma.cc/Q87M-CGSM.

6. Garrett M. Graff, *The Story Behind Bill Barr's Unmarked Federal Agents*, POLITICO (June 5, 2020, 08:08 AM), https://perma.cc/KC9L-T2MP.

7. Thomas Gibbons-Neff & Eric Schmitt, *Pentagon Ordered National Guard Helicopters' Aggressive Response in D.C.*, N.Y. TIMES (June 6, 2020), https://perma.cc/V3CJ-MBCM.

8. *See* Steve Vladeck, *Why Were Out-of-State National Guard Units in Washington, D.C.? The Justice Department's Troubling Explanation*, LAWFARE (June 9, 2020, 10:47 PM), https://perma.cc/SXR3-AXCH.

9. *See, e.g.*, Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATLANTIC (Feb. 15, 2019), https://perma.cc/KEY6-SK6W; *see also, e.g.*, Alden A. Fletcher, Note, *Roosevelt's "Limited" National Emergency: Crisis Powers in the Emergency Proclamation and Economic Studies of 1939*, 12 J. NAT' L SECURITY L. & POL'Y 379, 380–81, 411–12 (2022).

10. 10 U.S.C. § 253; *see* GOITEIN & NUNN, *supra* note 3, at 12–21 (detailing the problems with the current Insurrection Act).

pretextual emergency actions.[11] Congress tried and failed to roll back other "emergency" actions by President Trump.[12] And the Supreme Court has demonstrated an unwillingness to second-guess executive branch actions that implicate "national security."[13]

In response to these worrying trends, scholars have pointed to the Second Congress and the Calling Forth Act of 1792, which required the President to obtain judicial approval *before* calling out the militia in certain circumstances.[14] They argue this statute supports two closely related propositions. First, it shows the founding generation would have understood Congress to be able to closely regulate the President's ability to take emergency measures, including by requiring judicial preapproval of such measures.[15] Second, it demonstrates the same generation anticipating the judiciary's ability to undertake a searching review of a President's crisis actions.[16]

The provision of the Calling Forth Act containing the judicial notice requirement delegated congressional power under the Calling Forth Clause of the Constitution, specifically the portion allowing Congress to "provide for calling forth the Militia to execute the Laws of the Union." Strangely for a constitutional provision so sweeping, the phrase "execute the Laws" has not been the subject of

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11. *See* Stephen I. Vladeck, *The Separation of National Security Powers: Lessons from the Second Congress*, 129 YALE L.J. FORUM 610, 610–12 (2020); Dakota S. Rudesill, *Taking Congress and the Capitol Seriously as National Security Institutions*, J. NAT' L SECURITY L. & POL'Y (Jan. 25, 2021), https://perma.cc/V8EP-T3YU.

12. *See, e.g., U.S. Senate Fails to Override Trump Veto of Bill to End Border Emergency,* REUTERS (Oct. 17, 2019, 7:06PM), https://perma.cc/74XD-XD5X.

13. *See* United States v. Zubaydah, 142 S. Ct. 959, 967 (2022) ("In assessing the Government's claim . . . courts must exercise the traditional reluctance to intrude upon the authority of the Executive in military and national security affairs." (original alteration and quotations omitted)); *id.* at 985 (Gorsuch, J., dissenting) ("Ending this suit may shield the government from some further modest measure of embarrassment. But respectfully, we should not pretend it will safeguard any secret."); Hernandez v. Mesa, 140 S. Ct. 735, 740 (2020) ("[N]ational security decisions are delicate, complex, and involve large elements of prophecy for which the Judiciary has neither aptitude, facilities, nor responsibility." (original alternation and quotations omitted)); Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) ("[W]hen it comes to collecting evidence and drawing inferences on questions of national security, the lack of competence on the part of the courts is marked." (internal quotations omitted)); *see also, e.g.*, Robert Tsai, *Manufactured Emergencies*, 129 YALE L.J. FORUM 590, 599 (2020) ("[The Court] will rarely, if ever, scrutinize a President's motives or the evidence underlying a crisis claim."); David M. Driesen, *How Courts Can Protect Democracy From Abuse of Emergency Powers*, LAWFARE (Feb. 22, 2022; 12:16 PM); https://perma.cc/4BQK-W4YZ.

14. Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (repealed 1795) ("That whenever the laws of the United States shall be opposed, or the execution thereof obstructed . . . 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 . . . ."); *see* GOITEIN & JOSEPH NUNN, *supra* note 3, at 14; Vladeck, *supra* note 11, at 618; AMANDA TYLER, HABEAS CORPUS IN WARTIME 216 (2019).

15. *See* Vladeck, *supra* note 11, at 618–19 (arguing for the constitutional permissibility of involving the judiciary as a precondition to an emergency declaration).

16. *See* TYLER, *supra* note 14, at 216 ("Another early example at odds with the idea that evaluating the existence of a rebellion or invasion is not the proper province of the judiciary is the 1792 Calling Forth Act, ..."); *see also* Vladeck, *supra* note 11, at 618 ("The history surveyed above [of The Calling Forth Act and Whiskey Rebellion] therefore strongly suggests that constitutional arguments against such a judicial role are not based on the original understanding of the separation of powers.").

sustained scholarly inquiry regarding its original meaning. To the extent that contemporary scholars have investigated this language, they have generally assumed that—with its companions "repel Invasions" and "suppress Insurrections"—the phrase designates a crisis-like situation.[17]

Recent work on the founding-era meaning of "execute" makes this position untenable.[18] In the legal context, "to execute" meant nothing more than the process of carrying into effect independently created legal obligations.[19] If the "execute the Laws" provision was not a crisis authority, then this could greatly weaken the probative value of the Calling Forth Act. It could mean the judicial role was acceptable to the founding generation because it came under authority that appears much closer to ordinary law enforcement. Legal scholarship has yet to probe the origins of this judicial notice requirement. A requirement that the President obtain judicial permission before using military force seems extraordinary in light of the rigid conception of the separation of powers that prevails today.[20] But the Act placed a judicial officer at the center of a sensitive presidential determination on a matter of internal security. Numerous scholars have noted this seeming incongruity.[21] Yet few—if any—have tried to explain its origins. As a result, it remains unclear whether the judicial notice requirement was an experiment of the new republic—a onetime aberration by Congress—or whether it reflected some longstanding view of permissible restrictions on the use of the militia by the executive.

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17. *See infra* Section I.A.

18. *See* Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1273 (2020) [hereinafter Mortenson, *The Executive Power*]; Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative,* 119 COLUM. L. REV. 1169, 1173 (2019) [hereinafter Mortenson, *Article II*].

19. *See* Mortenson, *The Executive Power*, *supra* note 18, at 1273; Mortenson, *Article II*, *supra* note 18, at 1173.

20. *See, e.g.*, Seila Law v. Consumer Prot. Fin. Bureau, 140 S. Ct. 2183, 2191–08 (2020) ("[The Framers] gave the Executive the decision, activity, secrecy, and dispatch that characterise the proceedings of one man." (alteration and quotations omitted)).

21. *See* TYLER, *supra* note 14, at 216; Vladeck, *supra* note 11, at 618; Saikrishna Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1400 (2013); Thaddeus Hoffmeister, *An Insurrection Act for the Twenty-First Century*, 39 STETSON L. REV. 861, 877 (2010); William C. Banks, *Providing "Supplemental Security" – The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. NAT. SEC. L. & POL'Y 39, 58 (2009); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb - A Constitutional History*, 121 HARV. L. REV. 941, 963 (2008); Candidus Dougherty, *Necessity Hath No Law: Executive Power and the Posse Comitatus Act*, 31 CAMPBELL L. REV. 1, 9–10 (2008); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1331–32 (2006); Brian C. Brook, Note, *Federalizing The First Responders to Acts of Terrorism via the Militia Clauses*, 54 DUKE L.J. 999, 1018 n.115 (2005); Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 159–58, 161 (2004); Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 42–43 (1997); David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 46–47 (1971); Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 187–88 (1940); Matthew Waxman, *Remembering the Whiskey Rebellion,* LAWFARE (Sept. 25, 2018, 9:35 AM), https://perma.cc/GT8D-S5CM.

The answer bears important consequences for the separation of powers. If the 1792 judicial notice requirement was an aberration, then this strengthens the argument that the President has some reserve of national security powers into which neither Congress nor the judiciary may intrude. One adopting such a broad view of executive power would merely have to argue that Congress made a mistake in 1792. On the flip side, if the judicial notice requirement reflects some deeper understanding, then this considerably strengthens the argument that Congress has broad leeway to shape the executive's exercise of national security powers through procedural devices and that judicial participation in national security cases is permissible.

This Article undertakes the surprisingly neglected task of uncovering the original meaning of the phrase "execute the Laws of the Union" as it appears in the Calling Forth Clause. This implicates two questions. First, what is encompassed within the scope of the phrase? Put another way, does it allow the domestic use of military force only in response to emergencies or does it sweep more broadly? Second, to what extent can Congress impose procedural requirements constraining when the militia may be called out? Specifically, can Congress involve the judiciary as an *ex-ante* check on what would otherwise be unilateral executive decision-making?

The history uncovered here suggests the founding generation understood "execute the Laws" to be a broad grant of enforcement authority not limited to emergency circumstances. This might appear to be startling permission to use soldiers as law enforcement; however, the history also shows the founding generation understood Congress to have the power to impose stringent constraints on the ability to call forth the militia. Specifically, Congress could involve the judicial branch in the process of responding to a violent crisis. As this Article reveals, procedural and substantive restrictions on an executive's decision to deploy the militia have deep roots extending further back into history than just the Calling Forth Act of 1792. Indeed, the lawmakers of the Second Congress likely included searching restraints in the 1792 Act precisely because they understood the text of the Constitution did not impose them.

There is of course good reason not to follow original meaning. As this Article also reveals, the text of the Calling Forth Clause was the product of a coincidence of the Framers' interests in slaveholding and western land speculation. This alone may disqualify originalism as an interpretive methodology.[22] The value of this Article then lies in exposing how a broad federal enforcement power emerged from the Framers' interests in furthering slavery and obtaining Native American land.[23] But for adherents of originalism, this Article adds to the body of scholarship

22. *Cf.* Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 107–13 (2020) (describing legal and dignitary harms from slave case precedent remaining good law).

23. For an understanding of the relevance of this history to law today, see generally K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J 1062 (2021).

challenging an indefeasible or preclusive version of executive power.[24] It shows the Calling Forth Clause was a broad, open-ended grant of power to Congress to define how and when the militia could be called out. And it challenges the assumption that the President must have the sole, unilateral exercise of the calling forth authority.

Part I further frames the inquiry by reviewing works that have previously examined the "execute the Laws" provision of the Calling Forth Clause. Most accounts argue that the provision requires substantial violent resistance or an emergency. Part II surveys British, colonial, and state predecessors to the Calling Forth Clause. This survey reveals a broad trend against the unilateral exercise of the calling forth power as well as two highly revelatory statutes from New York and Massachusetts that intimately involved judicial actors in the suppression of insurrections. It also suggests that "execute the Laws" was not a term of art denoting violent emergencies.

Part III takes a close look at the Critical Period and the Constitutional Convention. The Critical Period reveals an emerging appetite for military law enforcement that led key Federalists to adopt the broadest version of the "execute the Laws" provision considered at the Convention. Part IV reframes the ratification debates away from an overreliance on the narrow reading of the Calling Forth Clause. Antifederalists attacked the "execute the Laws" provision as permitting military law enforcement, a charge the Federalists—with one significant exception—did not refute outright. Part V examines the 1792 Calling Forth Act in light of the larger history presented throughout the piece and the Act's previously overlooked connection to *Hayburn's Case*. Part VI suggests contemporary implications from this history both for constitutional doctrine and present-day concerns. The Final Part concludes by reflecting on the need for close congressional and judicial oversight of the calling forth power.

I. BACKGROUND: SCHOLARSHIP

The U.S. Constitution is famously short on emergency provisions.[25] Only a few clauses in the whole document makes the exercise of certain powers contingent on the existence of emergency conditions. These include the Suspension

24. *See, e.g.*, Barron & Lederman, *supra* note 21, at 1106–11; Mortenson, *The Executive Power*, *supra* note 18, at 1272–73; Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2191–92 (2019); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. (forthcoming 2022) (manuscript at 10). At the same time, other scholars have illuminated how the founding generation understood the Constitution to empower other branches, see, e.g., John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1128 (2014) (Congress), and to impose substantive constraints on coercive government action, see, e.g., TYLER, *supra* note 14, at 139 (Suspension Clause).

25. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring); *see also* Saikrishna Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1339 (2015); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1041 (2004).

Clause,[26] the domestic violence portion of the Guarantee Clause,[27] and the Calling Forth Clause. This last clause is the focus of this work. It empowers Congress, "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[28]

The Calling Forth Clause and its "execute the Laws" provision have received relatively little scholarly attention.[29] This is strange considering the broad reach of the Clause's plain text. Those works that have examined the Clause have divided over how narrowly the founding generation understood its terms. A more prevalent scholarly camp holds that the Framers understood "execute the Laws" to encompass only instances of violent resistance to the laws.[30] Other scholars and practitioners have adopted a broader reading of the Clause, but generally have not grounded this view in an account of founding-era meaning.[31]

In light of Julien Davis Mortenson's path-breaking work on the "executive power," this provision—"execute the Laws of the Union"—merits a reappraisal. As Mortenson convincingly shows through an exhaustive review of founding-era sources, "to execute" meant little more than the carrying into effect of independently created legal obligations.[32] Thus, Mortenson's account considerably strengthens the second view: that the Framers would have understood "execute the Laws" to sweep as broadly as the plain text suggests. However, this realization is not sufficient on its own to dispel the narrow reading. For instance, the founding generation could have understood the militia context to create an exception to the otherwise broad meaning of "execute."[33] And, even if "execute" carried a broad meaning as a textual matter, the founders may have intended the Clause to cover only a limited set of circumstances. This would at least introduce ambiguity and tension into today's interpretation.

Before proceeding further, it will be useful to emphasize that this Article concerns three distinct institutions: the regular army, the militia, and the posse

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26. U.S. CONST. art. I, § 9, cl. 2.

27. *Id*. art. IV, § 4.

28. *Id*. art. I, § 8, cl. 15.

29. *See* Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091, 1092 (2008) [hereinafter Vladeck, *Domestic Commander in Chief*] ("The Calling Forth Clause today remains remarkably understudied in constitutional scholarship."); Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 416 n.173 (2007) ("The Calling Forth Clause has been remarkably understudied in separation-of-powers literature."); Matthew C. Waxman, *What's So Great About the Declare War Clause?*, LAWFARE (Jan. 29, 2018), https://perma.cc/3EZJ-DP6H ("Less remembered and certainly less discussed these days is that the militia clauses then provide that Congress shall have power to 'provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions'").

30. *See infra* Section I.A. This narrow interpretation appears dominant, at least in the legal academy. *See* NATIONAL SECURITY LAW 1238 (Stephen Dycus et al. eds., 6th ed. 2016) (endorsing the Banks and Robert Coakley readings).

31. *See infra* Section I.B.

32. *See* Mortenson, *The Executive Power*, *supra* note 18, at 1278, 1315–18; Mortenson, *Article II*, *supra* note 18, at 1230–34.

33. *But see* Mortenson, *The Executive Power*, *supra* note 18, at 1269–70 (relying on some evidence for the ordinary meaning of "execute" from the militia context).

comitatus.[34] Unhelpfully for any inquiry into the original status of the militia in the constitutional framework, these different bodies were not always kept neatly separate as a practical matter. Complicating the picture further, two of these institutions—the militia and posse comitatus—no longer exist today as they did in 1787 when the Constitution was drafted.[35] Finally, the Supreme Court has held that the Calling Forth Clause's limitations apply only to Congress's power over the militia and do not constrain its separate power to "raise and support Armies."[36] Under this interpretation, the "execute the Laws" provision would limit only the deployment of the successor entity to the militia, not the other branches of the armed forces. However, there is good reason to think that this holding is at odds with founding-era history, at least with regard to domestic crises.[37] This Article leaves resolving this question for another day, and it assumes that the Clause applies to all uses of military force by the federal government. That said, the answer is effectively moot because of this Article's bottom-line conclusion that the Clause does not impose significant limitations.[38]

The balance of this Part first discusses the narrow reading of the "execute the Laws" provision, and it explains why this reading leaves much to be desired. It turns next to the broad reading, which has been adopted more sporadically and without reliance on an account of the founding era. Lastly, it briefly considers the state of prior scholarship on the judicial notice requirement in the Calling Forth Act.

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34. As used here, (1) the "army" refers to a body of professional soldiers, for whom soldiering is a permanent occupation. (2) The "militia" refers to a body of citizen-soldiers, who do something else as their day job, but who may be called up to serve as soldiers. *See* 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 212–13 (4th ed. 1785) (defining and contrasting the army and the militia). Finally, (3) the "posse comitatus" refers to citizens, possibly armed, who accompany the sheriff to help with law enforcement. *See infra* Section II.D.

At the time of the founding, the term "military" was understood to broadly refer to things relating to soldiers. *See* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755). Importantly, both the army and the militia were understood to be "military forces." *See, e.g.*, Federal Farmer, Letter to the Republican, XVIII (Jan. 25, 1788), *in* 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 360, 362 (John Kaminski, et al. eds., 1995) ("The military forces of a free country may be considered under three general descriptions–1. The militia. 2. the navy–and 3. the regular troops."). Consistent with this historic usage, this Article uses "military" to refer to soldiers generally, not to any particular institution.

35. The militia has been replaced by the National Guard, *see* 32 U.S.C. § 101(3), (4), and resort to the posse comitatus has fallen out of style. Moreover, the Posse Comitatus Act prohibits most branches of the U.S. armed forces from acting as a posse comitatus without express constitutional or congressional authorization. 18 U.S.C. § 1385. Being mostly concerned with the powers of *Congress*, this Article does not focus on the Posse Comitatus Act.

36. U.S. CONST. art. I, § 8, cl. 12; Perpich v. Dep't of Def., 496 U.S. 334, 350 (1990) ("The congressional power to call forth the militia may in appropriate cases supplement its broader power to raise armies and provide for the common defense and general welfare, but it does not limit those powers."); Selective Draft Law Cases, 245 U.S. 366, 382–83 (1918).

37. *See* Vladeck, *Domestic Commander in Chief*, *supra* note 29, at 1096–100.

38. If anything, the realization that the Framers adopted a virtually limitless domestic militia power strengthens the inference that the Calling Forth Clause sets out the exclusive circumstances under which military force may be employed within the country. *See id.* at 1098.

A. The Narrow Reading: Violence and Emergency

A set of scholars have argued that the founding generation understood the "execute the Laws" provision to capture a narrow set of circumstances where ordinary law enforcement processes met with substantial—and likely violent—resistance.[39] This view of the Clause benefited from a high-profile endorsement early on. James Madison argued for such a limited reading in the Virginia ratification convention. According to Madison, "execute the Laws" meant only that the militia could be used to suppress resistance to the laws.[40] In his view, it would not permit "the sheriff or constable carrying with him a body of militia to execute [the laws] in the first instance."[41]

Though some might consider Madison's view dispositive,[42] there is reason to approach it with suspicion. Facing a barrage of Antifederalist arguments, Madison tried to limit the provision's reach. Even with the convention's famously poor record, Madison's debate performance bears the hallmark of a lawyer who is pressed for an answer, but who has only bad law at his disposal.[43]

Nonetheless, this narrow reading has found support in modern scholarship. In his article *Soldiers, Riots, and Revolution*, David Engdahl recognizes that the debates of the Constitutional Convention offer little direct evidence of the Clause's meaning.[44] Therefore, to understand its language, he draws from the debates on treason. By his account, Roger Sherman argued that federal treason should be based on resistance to the United States, not against a particular state.[45] According to Engdahl, "resisting the laws of the United States means a great deal more than mere disobedience."[46] He asserts that "Sherman had in mind the kind of resistance that met the strict new test of treason—engaging in war—and called for the execution of the laws of the Union by military force."[47] Engdahl, joined

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39. *See* Banks, *supra* note 21, at 52–53; Engdahl, *supra* note 21, at 38–39; *see also* Hoffmeister, *supra* note 21, at 872 n.59 ("[The 'execute the Laws' provision] applies to 'an especially serious act, far more so than simple disobedience of the laws.'"); Bybee, *supra* note 21, at 37 (endorsing Madison's view); Jason Mazzone, *The Commandeerer in Chief*, 83 NOTRE DAME L. REV. 265, 306 (2007) [hereinafter Mazzone, *The Commandeerer in Chief*]; Jason Mazzone, *Use of Military Force at Home*, 10 N.Y. CITY L. REV. 369, 375–76 & n.27 (2006) [hereinafter Mazzone, *Military Force*] ("[M]ilitary force is only appropriate when civil efforts to enforce federal laws have failed: when the implementation of federal laws is opposed with violence or when federal interests are otherwise under attack."); Brook, *supra* note 21, at 1009 n.50, 1022 n.137 (describing "execute the Laws" as an "exigency" provision allowing the government to overcome resistance to the laws).

40. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 378 (Jonathan Elliot ed., 2nd ed. 1827) [hereinafter ELLIOT'S DEBATES].

41. *Id.* at 415. Justice Joseph Story also advocated a view similar to Madison's. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 81 (1833).

42. *See* Mazzone, *The Commandeerer in Chief*, *supra* note 39, at 306; *see also* Bybee, *supra* note 21, at 36–37 (quoting Madison on this point).

43. *See infra* Section IV.B.

44. *See* Engdahl, *supra* note 21, at 38 ("This was amended so as 'to provide for calling forth the Militia to execute the laws of the Union, suppress insurrection and repel invasions.' The clause as amended passed without dissent. No debate whatsoever is recorded.").

45. *Id.* at 39.

46. *Id.*

47. *Id.*

by William Banks, points to this sort of resistance as what was meant by "execute the Laws."[48] Both also argue that the phrase can be defined by reference to its companions. "[I]n company with the words 'insurrections' and 'invasions,' there is little cause for wonder that even those most concerned about military oppression would find nothing to object to in that clause."[49] Thus, they read "execute the Laws" to require resistance—possibly war-like resistance—to the laws before the government may use the militia.

This reading faces a number of difficulties. First, the absence of the word "resistance" from the text of the Calling Forth Clause calls into question reliance on Sherman's discussion of treason.[50] Second, a *noscitur a sociis* interpretation of the Clause grows considerably weaker after looking at the drafting history.[51] The Committee of Detail's draft had initially included the power to call forth the militia "to enforce treaties," which was subsumed into "execute the Laws."[52] Therefore, only two of four permissible uses of the militia clearly involved violent crises, making the inference that "execute the Laws" must involve a violent crisis much harder to sustain. Finally, contrary to Engdahl's assertion, the "execute the Laws" provision *did* provoke objections. These came during the ratification debates and in congressional deliberations concerning the 1792 Calling Forth Act. Without this context, Engdahl and Banks are forced to argue that the drafters of the 1792 Act forgot that the provision purportedly referred to the crime of treason.[53]

A related account of the Calling Forth Clause comes from Robert Coakley in his history of the domestic use of federal military forces.[54] According to Coakley, a consensus understanding emerged from the Constitutional Convention and ratification process that the militia "would only be used … where the civil law should completely fail."[55] At least implicitly, Coakley's history supports a reading of "execute the Laws" encompassing instances where civil law enforcement

48. *Id*.; Banks, *supra* note 21, at 41, 52–53.

49. Engdahl, *supra* note 21, at 39, 45; Banks *supra* note 21, at 53 ("[I]n company with the words 'insurrections' and 'invasions' in the Militia Clause, the power to 'execute the Laws' had a similarly grave connotation."); *see also* Patrick Todd Mullins, *Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War*, 57 GEO. WASH. L. REV. 328, 338 (1988).

50. That Sherman characterized "levying war" as "resistance against the laws" in his discussion of treason only indicates that one concept includes the other. *See* Engdahl, *supra* note 21, at 39. It does not establish that "resistance against the laws" could only mean "levying war," or that "execute the Laws" meant "execute the Laws [*in cases of resistance*]." *See id.* at 38–39 (emphasis and alterations added). The absence of the word "resistance" from the text of the provision should thus be a strong indication against the Engdahl and Banks reading.

51. *See* Graham Cty. Soil & Water Conservation Dist. v. U.S. *ex rel*. Wilson, 559 U.S. 280, 287 (2010) ("*[N]oscitur a sociis* . . . a word may be known by the company it keeps").

52. Banks makes nothing out of the removal of to "enforce treaties" from the Committee of Detail's draft. *See* Banks, *supra* note 21, at 52; *see also* Engdahl, *supra* note 21, at 38–39.

53. Banks, *supra* note 21, at 57; *see* Engdahl, *supra* note 21, at 45.

54. ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878, at 13 (1988).

55. *Id.* at 19; *see also id.* at 14–18 (chronicling the Virginia ratification convention, including Madison's insistence that the militia could only be used in cases of opposition of the laws).

is insufficient, though not necessarily due to violence.[56] That said, it is difficult to accept this account as a firm conclusion regarding original meaning. Being a more general work, Coakley's history does not examine several developments at the Constitutional Convention that seem highly relevant to the meaning of "execute the Laws."[57] Furthermore, a founding-era consensus as to when the militia should be used is not the same as the founding-era understanding of what is textually permitted by the Calling Forth Clause.[58]

Though the above readings of the Clause differ in slight degrees, they all would narrow it beyond its plain text. Each reflects the view that "execute the Laws" contains internal restraints that limit the situations where the militia may be brought to bear. The common thread is the presence of emergency circumstances, such as violent resistance or the failure of the civil enforcement system. Despite being normatively attractive, the evidentiary support for this view is thin and suffers from the difficulties identified above.

B. The Broad Reading: Carry Out the Law

On the other side of the ledger, some scholars and practitioners have articulated a broad reading of the Clause. In 1912, Attorney General George Wickersham issued an opinion that discussed the meaning of the "execute the Laws" provision. According to Wickersham, the provision was a broad grant of law enforcement power.

> What is certainly meant by this provision is, that Congress shall have power to call out the militia in aid of the civil power, for the peaceful execution of the laws of the Union, wherever such laws are in force and may be compulsorily executed, much as a sheriff may call upon the posse comitatus to peacefully disperse a riot or execute the laws.[59]

In light of the previous Section, Wickersham's opinion appears extraordinary. In his view, the provision refers to the normal act of law enforcement and the carrying out of legal obligations. Wickersham analogizes the role of the militia to

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56. Although they do not endorse a specific reading of the provision, other academic works have come out somewhere close to Coakley's treatment of the clause. *See, e.g.*, Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. CIN. L. REV. 919, 930 n.72 (1988) (discussing George Nicholas favorably at the ratification convention when "[h]e went on to explain why this power was necessary in case the civilian law enforcement mechanisms were inadequate"); Michael Bahar, *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States*, 5 HARV. NAT'L SEC. J. 537, 596 (2014) (suggesting militia can only be used in cases of resistance).

57. For instance, Coakley does not discuss Gouverneur Morris's role in changing the text of the Calling Forth Clause. *See* COAKLEY, *supra* note 54, at 14; *infra* Section III.D. He also reads the rejection of the Randolph plan as a *limitation* on federal power. *See id.* at 13–14. For reasons discussed *infra,* this conclusion does not seem tenable.

58. *See* COAKLEY, *supra* note 54, at 19.

59. George W. Wickersham, *Authority of President to Send Militia into a Foreign Country*, 29 Op. Att'y Gen. 322, 325 (1913).

that of the sheriff and the posse comitatus, both civil methods of law enforcement.[60] He also sets out dispersing a riot or executing the laws disjunctively. Evidently for Wickersham, the power to "execute the Laws" *could* entail dispersing a riot, but it was not limited to quelling rioting. The opinion reaches this conclusion without any citation to precedent, much less any reference to historical sources, yet, as will be seen, there is good reason to think Wickersham captures the Clause's founding-era meaning.

This capacious understanding of the "execute the Laws" provisions has been occasionally adopted or assumed by some modern scholars.[61] Relatedly, some have argued that "insurrection" in the Constitution "consists in the . . . opposition of a number of persons to the execution of the laws, if . . . so formidable as to defy . . . the authority of the government."[62] If this were the case, it would throw Banks and Engdahl's argument into serious doubt, seeing as this reading of insurrection would cover essentially the same ground as their reading of "execute the Laws."

The broad reading of the provision has appeared more sporadically and in works that generally have not set out to ascertain the Clause's original meaning. Moreover, these works have not asked why the Constitution might contain sweeping authority to use military force as domestic law enforcement.

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While few scholars have devoted much attention to the scope of the "execute the Laws" provision, fewer still have sought to explain the presence of the judicial notice requirement in the Calling Forth Act of 1792. The notice requirement plays a central role in an essay by Stephen Vladeck, who draws lessons from the requirement for contemporary problems involving presidential power and emergencies.[63] Similarly, Amanda Tyler, in *Habeas Corpus in Wartime*, uses the Act's structure to support an argument that courts should not fear involvement in sensitive emergency and national security cases.[64] Despite these contributions, an account of the notice requirement's historical foundations remains absent from the literature. Assuredly, the requirement is consistent with a pragmatic

60. See *infra* Section II.D. for a discussion of the posse comitatus.

61. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 585 (1994) (reading the Clause to allow "the President [to] 'execute the Laws of the Union' through the barrel of a gun"); William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 32–33 (1992) (not opining on the meaning of execute the laws, but observing that the Constitution created broad and sweeping militia powers in contrast to the traditional opposition to a standing army); Daniel H. Pollitt, *Presidential Use of Troops to Execute the Laws: A Brief History*, 36 N.C. L. REV. 117, 121 (1958) (arguing that "execute the laws" allowed magistrates to employ the militia against a delinquent state); *see also* Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 116 n.80 (2020) ("To be sure, the militias of the time could be used to help carry law into execution . . . .").

62. Charles Fairman, *Martial Rule and the Suppression of Insurrection*, 23 ILL. L. REV. 766, 770 (1929); *see also* FREDERICK BERNAYS WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 29 (1940). Unfortunately, neither Fairman nor Wiener devotes any attention to the meaning of "execute the Laws."

63. *See* Vladeck, *supra* note 11.

64. *See* TYLER, *supra* note 14.

conception of the separation of powers that some have argued prevailed at the time of the founding, particularly surrounding the courts.[65] However, other scholars have interpreted the structure of the Calling Forth Clause to require Congress to vest the calling forth power exclusively in the executive branch.[66] If correct, this reading of the Clause would be in considerable tension with the Calling Forth Act of 1792, which subjected the President's ability to deploy the militia to the independent check of the judiciary. Existing legal scholarship has yet to provide satisfying answers explaining the inclusion of this inter-branch mechanism in the Act. This lacuna, along with the unsettled scope of the Calling Forth Clause, merits a return to and close examination of historical sources.

II. "DRAW OUT AND EMBODY," BRITISH, COLONIAL, AND STATE CLAUSES

Governments have long grappled with the problem of internal political violence.[67] The British colonies and American states were no exception, with the militia serving as a key feature of legal frameworks designed in anticipation of violent emergencies. This Part surveys British, colonial, and state laws for analogs to the Calling Forth Clause and Calling Forth Act of 1792. Understanding this backdrop is critical.[68] First, it offers a glimpse into how the founding generation would have understood particular terms in the constitutional and legislative context.[69] Second, it helps reveal the norms and background assumptions that animated the founders.[70] The first three Sections look to how legislatures balanced the need to respond to internal, violent emergencies against concerns over the unilateral—and potentially arbitrary—exercise of military power. These Sections consider British and colonial laws, state constitutions, and state laws. The last Section considers state laws that authorized the use of the militia in ordinary law enforcement.

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65. *See* Mashaw, *supra* note 21, at 1256, 1331–34 (describing administrative law role of the early courts); Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 38 DUKE L.J. 561, 571–82 (1989) (detailing congressional control over structure of the first Attorney General's office).

66. *See* Calabresi & Prakash, *supra* note 61, at 585–86 & n.173 ("Note that Congress cannot itself call forth the militias but may only 'provide for calling forth the Militia.' Someone else (i.e., the President) must call forth the militia." (citations omitted)); *see also* Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317, 321–22 (2005).

67. *See generally* DAVID ARMITAGE, CIVIL WAR: A HISTORY IN IDEAS (2017); Charles King, Review, *The Micropolitics of Social Violence*, 56 WORLD POL. 431, 431–34 (2004).

68. Engdahl provides a review of post-revolutionary state laws regarding the militia, but he does so at a high level of generality and does not delve into the particular structures by which the militia was to be called out. *See* Engdahl, *supra* note 21, at 28–31. Prakash, for his part, provides some overview of this area, but focuses specifically on specific actions taken by state legislatures in response to the Revolutionary War and Shays' Rebellion. *See* Prakash, *supra* note 25, at 1353–58.

69. *See* Prakash, *supra* note 21, at 1366 ("Phrases that never conveyed emergency powers in the states could not plausibly be read as ceding such powers in the federal Constitution.").

70. *See id*. at 1365 (arguing for the importance of considering "antecedent" frameworks).

A. British and Colonial Frameworks

By the mid-eighteenth century, the militia in Great Britain was an institution regulated and controlled by Parliament.[71] In 1754, the defeat of a young British officer at the hands of French forces in the Ohio River Valley sparked the global conflict of the Seven Years' War.[72] In the midst of that war, Parliament passed a lengthy act overhauling and reforming the militia in the home country.[73] It dealt with seemingly every aspect of militia regulation, including a provision best understood as an early iteration of the calling forth power.

> [I]n case of actual Invasion, or upon imminent danger thereof, or in case of Rebellion, it may and shall be lawful for his Majesty, . . . (the occasion being first communicated to Parliament, if the Parliament shall be then sitting, or declared in Council, and the Parliament notified by proclamation, if no Parliament shall then be sitting or in Being) to order and direct his lieutenants . . . to draw out and embody the Regiments and Battalions of Militia of their respective counties.[74]

The act then allowed the King to put the milia under command of officers appointed by him, and "to direct" the militia to parts of the country for the "Suppression of such Invasions and Rebellions."[75] As a further precaution against instances where Parliament stood out of session during an invasion or rebellion, the act authorized the Crown to call for a meeting of Parliament.[76]

On one hand, the act gave the Crown effective control over an armed force within the kingdom, yet it also constrained royal authority to a substantial degree. It imposed parliamentary notification as a precondition for militia use, and it limited the substantive reasons for which the militia could be deployed. This was controversial. In the debates leading up to passage, the Earl of Hardwicke opposed the act because it trampled the King's prerogative power over the militia.[77] Referring to the provision letting the Crown "draw out and embody" the militia, Hardwicke stated, "[h]ere your lordships find the only power which is given by this Bill to the crown to make use of this militia; and a formal communication of the occasion to parliament is made a condition precedent indispensably

71. For instance, in response to the Second Jacobite Rebellion, Parliament passed acts allowing the crown to raise the militia. 19 Geo. 2, c. 2, (1745) (Gr. Brit.); *see also* Fields & Hardy, *supra* note 61, at 21–23 (detailing emergence of parliamentary supremacy as it relates to the militia).

72. FRED ANDERSON, THE WAR THAT MADE AMERICA 49–52 (2005). The young officer was—of course—George Washington. *See id.*

73. 30 Geo. 2, c. 25, § 45 (1757) (Gr. Brit.) (effectuating the better ordering of the militia forces in the several counties of the part of Great Britain called England).

74. *Id.*

75. *Id.*

76. *Id.* § 46.

77. 15 PARLIAMENTARY HISTORY OF ENGLAND 728 (William Cobbett ed., 1813); *see also* Eliga H. Gould, *To Strengthen the King's Hands: Dynastic Legitimacy, Militia Reform and Ideas of National Unity in England 1745-1760*, 34 HIST. J. 329, 341 (1991) (describing Hardwicke's opposition).

necessary to the exercise of it."[78] In Hardwicke's opinion, the act left the country vulnerable to situations where Parliament was slow to return to work or where it disagreed with the Crown's determination. He added, "from the strict penning of this clause, it also follows that the crown cannot make use of the militia to suppress a sudden insurrection or even a mob."[79]

Hardwicke's objections are instructive. First, they show that to "draw out and embody" the militia was part of the ability to "make use of" the militia. Second, his fear that the act would impair the Crown's ability to respond to emergencies points to a perception that its requirements were real checks on royal power.[80] This seems to have included the instances in which the King could call out the militia: "Rebellion," "Invasion," or the threat of the latter. Finally, despite Hardwicke's consternation, Parliament as a whole—by passing the 1757 act—had seemingly moved away from a robust understanding of the royal prerogative over the militia.[81] As Hardwicke succinctly put it, the Act only allowed the King to employ the militia, yet it still required him to notify Parliament. Parliament reenacted this provision in 1761,[82] and again in 1776.[83] Anyone looking to British precedent from the founding era would see confirmation of parliamentary supremacy in the sphere of militia powers.

With the coming of the Seven Years' War, the assemblies in the British Colonies wasted little time passing their own militia acts. Virginia's act predated its parliamentary equivalent by two years.[84] The colony's prior law had provided that:

> [U]pon any invasion of an enemy by sea or land, or upon any insurrection, the governor, or commander in chief, . . . shall have full power and authority to levy, raise, arm, and muster such a number of the forces out of the militia of

78. PARLIAMENTARY HISTORY, *supra* note 77, at 728.

79. *Id.* at 728–29. At the time, it appears that "rebellion" denoted a specific subset of the larger category of "insurrections." One dictionary defines rebellion as an "[i]nsurrection against lawful authority." JOHNSON, *supra* note 34. Insurrection, by contrast, was defined more broadly (and somewhat circularly) as a "seditious rising; a rebellious commotion." *Id.*

80. In the lead up to the act's passage, warring pamphlets cast the militia reform both as a necessary instrument of royal control—by giving the King sole command over the militia forces—and, as a check against royal power—by being a counterweight to the standing army. *See* Gould, *supra* note 77, at 339–40.

81. Matthew Hale described a militia power as part of the royal prerogative. *See Reflections by the Lrd. Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe*, *in* 5 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 508 (1924) ("In him alone is the Power of the Militia in this Kingdome, and the raising of Forces both by Land and Sea."); *see also* W. F. FINLASON. COMMENTARIES UPON MARTIAL LAW 84–85 n.(a) (1867) (arguing prerogative included to "keep in readiness a militia, or domestic military force"). *But see* Will Smiley & John Fabian Witt, *Introduction* to FRANCIS LIEBER & G. NORMAN LIEBER, TO SAVE THE COUNTRY: A LOST TREATISE ON MARTIAL LAW 45 (Will Smiley & John Fabian Witt eds., 2019) (calling Finlason "a kind of hack").

82. 2 Geo. 3, c. 20 (1761) (Gr. Brit.).

83. 16 Geo. 3, c. 3 (1776) (Gr. Brit.).

84. Specifically, the Virginia General Assembly passed the acts in the aftermath of Braddock's Defeat. *See* Letter to George Washington from Philip Ludwell (Aug. 8, 1755), *in* 1 THE PAPERS OF GEORGE WASHINGTON, 7 JULY–14 AUGUST 1755, at 356–57 (W. W. Abbot ed., 1983).

> this colony as shall be needful for repelling the invasion or suppressing the insurrection, or other danger.[85]

The act also required "that every officer of the militia, to whom Notice shall be given of any insurrection or invasion, shall have full power and authority, and is hereby required forthwith to raise the Militia under his Command." It further required that officer to "send immediate intelligence to the county lieutenant . . . informing them . . . in what manner he intends to proceed."[86]

The colony's 1755 militia act reiterated its predecessor's directive to lower officers to raise the militia upon notice of insurrection or invasion, and to communicate these circumstances up the chain of command.[87] It further required the officer to "immediately proceed to oppose the enemy, according to orders he shall receive from his commanding officer, until further orders arrive from the governor."[88] The act also ordered the commanding officers in neighboring counties to march out and aid the forces facing the insurrection or invasion. The act imposed a procedural requirement on these officers in neighboring counties. Whether the circumstances in the county that called for help actually required the assistance of the local militia was to "be enquired into by a council of [the commanding officer's field officers]." The act even imposed a penalty of two hundred pounds on officers who failed to call this council.[89]

Virginia was not alone in updating its militia laws. The assembly in New Jersey expanded the militia powers of the colonial governor while reaffirming the continued vitality of a prior militia act.[90] The earlier act permitted the Captain General or commander in chief in cases of "Invasion, Insurrection, or Rebellion, to call so many of the Persons aforesaid [soldiers in the militia] together," for "repelling" the invasion or "quelling the said [insurrection] or rebellion."[91] It also included provisions directing lower-rank officers to expel the enemy and to notify the governor or commander in chief of the insurrection or rebellion.[92] Under the 1757 expansion, the governor could send the militia to New York or Pennsylvania when these colonies requested aid, but only with the "advice and consent" of the colony's royal council.[93] A similar act from Georgia conditioned

85. 6 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 113 (William Hening ed., 1819) (Act of 1748).

86. *Id*.

87. *Id*. at 544–45 (Act of August 29, 1755).

88. *Id*. at 545.

89. *Id*.

90. *See* 2 ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY 139, 141, 143–45 (Samuel Nevill ed., 1761) (Act of June 3, 1757).

91. 1 ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY 301, 303–04 (Samuel Nevill ed., 1752) (Act of 1746, ch. 84).

92. *Id*. at 304.

93. 2 ACTS OF THE GENERAL ASSEMBLY, *supra* note 90, at 141, 143–45.

the governor's ability to "raise and assemble" militia companies on "the advice and consent" of the colony's council.[94]

A general picture emerges from this sampling of colonial statutes. The statutes (1) delegated power to subordinate officers to use the militia in cases of violent emergencies; (2) these officers were to give notice to the commander in chief of the existence of the emergency; and (3) the acts often specified procedural and consultation requirements before an officer could take certain categories of military action.

B. State Constitutional Frameworks

With the arrival of independence, the states established new frameworks governing the use of military force. No state constitution contained a clear analog to the Calling Forth Clause,[95] but several contained provisions allowing the chief executive of the state to "embody the militia." For instance, the Virginia constitution of 1776 provided that "[t]he Governor may embody the militia with the advice of the Privy Council; and when embodied, shall alone have the direction of the militia, under the laws of the country."[96] This batch of constitutions thus gave the executive direction over the militia when embodied but required the consent of the council before that embodiment could occur.

This language—allowing the state executive to "embody" the militia—should not be understood as a precise equivalent to a calling forth clause. As seen in the prior Section, Parliament had used "draw out *and* embody" when authorizing the king to "make use" of the militia.[97] This combination would reappear in the Randolph draft at the Constitutional Convention,[98] suggesting the two terms carried independent significance. "To draw out" meant "to call to action" and thus likely denoted the process of activating the militia.[99] However, to "embody" appears to have meant forming disparate militia units into a single fighting force.[100] This understanding supports an inference that in these constitutions the

94. Act of Mar. 25, 1765, Ga. Acts and Resolutions 265, 271. The act also specified that the governor could activate the militia in cases of "dangerous insurrection[,] rebellion," or sudden invasion. *Id.* at 271.

95. Several constitutions were effectively silent on the area covered by the eventual Calling Forth Clause. *See* PA. CONST. of 1776; N.J. CONST. of 1776; N.C. CONST. of 1777; GA. CONST. of 1777.

96. VA. CONST. of 1776; *see also* DEL. CONST. of 1776, art. IX ("The president, with the advice and consent of the privy council, may embody the militia, and act as captain-general and commander-in-chief of them, and the other military force of this State, under the laws of the same."); MD. CONST. of 1777 ("[T]he Governor, by and with the advice and consent of the consent of the Council, may embody the militia; and, when embodied, shall alone have the direction thereof . . . ."). The North Carolina constitution of 1776 gave this embodiment power to the governor in "the recess of the General Assembly . . . with the advice of the Council of State, . . . for the public safety." N.C. CONST. of 1776, art. XVIII.

97. 30 Geo. 2 c. 25, § 45 (1757) (Gr. Brit.) (emphasis added); PARLIAMENTARY HISTORY, *supra* note 77, at 728.

98. *See infra* Section III.C.1.

99. JOHNSON, *supra* note 34 ("48. To draw out. To call to action; to detach for service.").

100. *See id.* ("To Imbody. . . . To unite into one mass; to coalesce."); *see also id.* ("To Reimbo'dy. . . . [*re* and *imbody*, which is more frequently, but not more properly, written embody.]"). This explains why

legislature retained the power to "draw out" the militia.[101] In addition, many state constitutions specified that the governor was to be the commander in chief of the militia.[102] These provisions, like the analogous provision in the Federal Constitution, specify *who* commands the militia when brought into service,[103] as opposed to giving the executive a calling forth power.

Reviewing the various state constitutions, none gave the executive a unilateral power to decide on the circumstances requiring a military response to a violent emergency. The set of constitutions that granted the "embodiment" power to the governor required the consent of council, thus imposing an independent check on the chief executive's unilateral action. Looking to state constitutions provides an incomplete picture of post-Revolution practice concerning the calling forth power. To gain a fuller understanding of how the newly independent states sought to tackle the twin problems of political violence and arbitrary executive action, the next Section turns to state statutes.

C. State Acts: Calling Forth Power

This Section focuses on state statutes allocating the power to call out the militia and specifying the exigencies the militia could be used to address. During the Revolutionary War, the typical state act empowered the executive to call out the militia in instances of invasion, rebellion, or insurrection.[104] Like their colonial predecessors, these statutes often authorized officers below the level of commander in chief to deploy the militia under these same circumstances.[105] They also included notification provisions requiring subordinate officers to report their

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legislatures in states with these embodiment clauses nonetheless enacted detailed provisions regulating when the executive could call forth the militia. *See infra* Section II.C.

101. The Massachusetts constitution appeared to vest substantial power in the executive; however, this power was quite constrained in cases of internal violence. Importantly, the reference to "rebellion" in the section on militia powers occurred in connection with a requirement of a declaration by the legislature that a rebellion exist. MASS. CONST. of 1780, art. VII. Furthermore, a requirement that the governor obey the constitution and "law" governed all powers granted in the clause. *Id*. New Hampshire copied this structure into a virtually identical clause in its constitution. N.H. CONST. of 1784.

102. N.C. CONST. of 1776, art. XVIII; GA. CONST. of 1777, art. XXXIII. Or, the forces of the state. PA. CONST. OF 1776, § 20; MASS. CONST. of 1780; N.H. CONST. OF 1784; VT. CONST. OF 1777, art. XVII.

103. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb, Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 780–85 (2008).

104. *See* Act of Jan. 8, 1781, ch. 13, 1780 N.J. Acts 39, 46 ("That in case of sudden Invasion, Insurrection, Sedition, or Alarm by the Enemy or their Adherents, it shall be lawful for the governor or Commander in chief for the Time being to call out and array the Whole of the Militia . . . as he may think necessary to repel the Invasion, and to Restore the Peace of the State"); Act of Mar. 20, 1780, ch. 167, 1780 Pa. Laws 347, 357 ("[W]henever it may be necessary to call into actual service any part of the militia, in case of a rebellion or invasion . . . it shall and may be lawful for the president or vice president in council to order into actual service such part of the militia . . . as the exigency may require."); Act of Apr. 3, 1778, ch. 33, 1778 Laws of N.Y. 62, 67, 69 (directing county militia officers to "draw out" the militia "on every emergency of a sudden invasion by the enemy or insurrection within this State").

105. *See* Act of Apr. 3, 1778, ch. 33, 1777 Laws of N.Y. 62, 67, 69 ("[L]ike discretionary power may on sudden emergencies and without waiting for the order of his superior officer, be exercised by the commanding officer of any brigade . . . ."); Act of Jan. 8, 1781, ch. 13, 1780 N.J. Acts 46; Act of Feb. 16, 1779, 1779 Vt. Laws 57, 60.

actions up the chain of command.[106] Some states legislatures also enacted express provisions reserving to the legislature the power to direct the militia.[107]

By the Critical Period, state legislation reflected the demands of a nominal peacetime punctuated by violent incidents. Although Shays' Rebellion often takes center stage, various farmer and debtor revolts convulsed the new states.[108] The South in particular existed in considerable apprehension of an uprising from the population held there in bondage.[109] It is worth remembering that in many states preventing "domestic insurrections" meant suppressing the freedom of enslaved persons in the state.[110]

During this time, the focus of state militia acts pivoted from military readiness to internal disturbances caused by rebellious inhabitants. One statute from New York stands out. The state's militia act of 1786 conferred on its commander in chief—the governor—the power to "order out" the militia in cases of "invasion or other emergency."[111] Although this represents a delegation of unilateral calling forth power, the legislature did not confer this power solely on the governor. It also conferred on regimental commanders the power to "order out the militia under their respective commands" in cases of "invasion" or "insurrection," so long as these officers transmitted information of the invasion or insurrection up the chain of command.[112]

The legislature did not stop there. It further required that "in cases of insurrections . . . . the commanding officer of the regiment . . . shall proceed to take such measures to suppress such insurrection as to *any three of the judges or justices* of the county in which such insurrection shall happen shall appear most proper and effectual."[113] The New York act thus required militia officers, operating under the ultimate command of the governor, to follow the directions of judicial officers. To appreciate the significance of this formulation, one needs only to remember that this is coming from a state where the constitution vested the "supreme executive power" in the governor and made that governor commander in chief.[114]

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106. *See, e.g.*, Act of Feb. 16, 1779, 1779 Vt. Laws 57, 61; Act of Jan. 8, 1781, ch. 13, 1780 N.J. Acts 46.

107. *See* Act of Feb. 16, 1779, 1779 Vt. Laws 57, 61–62 (giving the general assembly *or* the governor and council the power to draft companies out of the state's militia "for any particular service or to be in readiness therefor on sudden emergency"); *see also* Act of 1776, 1776 Conn. Acts 441, 442 (giving militia officers the "Power to draw forth" the militia "as they shall from time to time be ordered by the General Assembly" or other superior military officers).

108. *See* WOODY HOLTON, LIBERTY IS SWEET 521–23, 527–28 (2021).

109. *See* John Fabian Witt, *A Lost History of American Emergency Constitutionalism*, 36 L. & HIST. REV. 551, 564 (2018) (discussing how the fear of a slave uprising pervaded the colonies); CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA 34–35, 40 (2021).

110. *See, e.g.*, Act of 1777, ch. 3, 1777 N.C. Laws 199, 201–02. For an account of the intersection between the institution of the militia and race in the founding era, see generally Benjamin Quarles, *The Colonial Militia and Negro Manpower*, 45 MISS. VALLEY HIST. REV. 643 (1959).

111. Act of Apr. 4, 1786, ch. 25, 1786 Laws of N.Y. 220, 225.

112. *Id.* at 228.

113. *Id.* at 225 (emphasis added).

114. N.Y. CONST. of 1777, art. XVII–XVIII. When referring to the "executive power" in the U.S. constitution, at least one commentator would analogize it to the New York model. *See* A Landholder V,

New York was not alone. On February 20, 1787—close on the heels of Shays' Rebellion—the Massachusetts legislature passed an act "for the more speedy and effectual suppression of Tumults and insurrections in the Commonwealth."[115] This act set up procedures to deal with future insurrections.

> [W]henever an insurrection shall have taken place in either of the counties of the Commonwealth, to obstruct the course of justice, or the due execution of the laws, or there is reason to apprehend that a dangerous insurrection for such purposes will be excited, it shall be the duty of the civil officers, in such county, *as well as* the Sheriff, *as the Justices of the several Courts of Judicature*, within such county, immediately to give information thereof to his Excellency the Governor . . . .[116]

Upon receiving information from any of the listed civil officers, the act "requested" that the governor use the office's constitutionally vested power to direct militia commanders to "detach from . . . their division, such parts of the militia for the support of the civil authority . . . for the apprehension and safe keeping of those who may be concerned in such insurrection."[117]

It further provided that "if in the opinion of the Sheriff, *or any two of the Justices*, either of the Supreme Judicial Court, or the Court of Common Pleas, it shall be necessary for the suppression of any insurrection, . . . a force shall be instantly raised and called forth for that purpose."[118] If the necessary aid could not be obtained in a timely manner "by reason of distance" from the commander in chief, then the Sheriff was to "certify" the existence of conditions requiring the use of militia to the local commander, who was to supply troops to be used "as the said justices or Sheriff may think necessary to defeat the purposes of such Insurgents."[119] The act specified that at all times the militia would be under the control of civil officers, "unless in case of rebellion declared by the Legislature."[120]

The Massachusetts and New York statutes offer a dramatic level of judicial involvement in the suppression of insurrections.[121] On one level, this was a response to revolts preventing courts from carrying out their business.[122] Giving courts a hand in the suppression of insurrections allowed them an extra measure

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Connecticut Courant (Dec. 3, 1787) *in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 334, 337 (John P. Kaminski et al. eds., 1983) [hereinafter 14 DOCUMENTARY HISTORY].

115. Act of Feb. 20, 1787, ch. 9, 1787 Mass. Acts & Laws 564.

116. *Id.* at 564–65 (emphasis added).

117. *Id.* at 565.

118. *Id.* (emphasis added).

119. *Id.*

120. *Id.*

121. There is some evidence of longstanding judicial involvement in the militia. *See* VIRGINIA REPORTS: JEFFERSON – 33 GRATTAN, 1730-1880, at 101 (Thomas Johnson Michie ed., 1902) ("These are Courts of general jurisdiction in Law and Equity; the most important duties in matters of police and economy are confided to them; they nominate militia officers, (below the grade of brigadiers,) . . . .").

122. *See, e.g.*, TYLER, *supra* note 14, at 117–18; Prakash, *supra* note 25, at 1358.

of protection. Yet, the conferral of calling-out authority on multiple actors also represents an effort to solve two founding-era problems. First, how to react swiftly to violent emergencies in a time when information traveled slowly?[123] Second, how to ensure that the suppression of such emergencies did not entail its own abuses? Devolving authority to regimental commanders and requiring them to communicate with superiors addressed the first concern. Inserting the courts into the process addressed the second.

The Massachusetts and New York statutes are profoundly revelatory because they show the involvement of the civil authorities in the suppression of "insurrection." Moreover, the Massachusetts act specifically addressed "insurrection[s] . . . to obstruct . . . the due execution of the laws."[124] If the Federal Constitution's eventual "execute the Laws" provision was only a narrow provision allowing the militia to be used as a backstop to civil authority, why did this require a separately enumerated category? Anyone familiar with the Massachusetts and New York acts would have understood the task of suppressing an insurrection to involve both the civil and military powers.

Finally, Massachusetts and New York were both systems with a strong executive.[125] Yet the legislatures in both states imposed judicial participation on the domestic exercise of the calling forth power. While these statutes did not purport to control the executive directly, they encroached on the executive's discretion by empowering subordinates and judicial officers to decide when to use violent force. Even if such decisions could be eventually reversed by the executive, these laws deprived the governor of the power to pre-approve certain militia deployments.[126] Evidently, legislators did not understand the states' constitutions to create a plenary militia power in the executive branch.

By contrast, other states adopted frameworks tolerating more unilateral power in the hands of the executive. South Carolina's 1784 militia law gave the governor the power to "order out" the militia in cases of "invasion or alarm."[127] Delaware gave its governor unilateral power to call out the militia in specified cases, but it also provided like authority to lower rank officers in the "absence of

123. *See Charges to grand juries of the counties of the fifth circuit in the state of Pennsylvania, in* REPORTS OF CASES IN THE COUNTY COURTS OF THE FIFTH CIRCUIT 122 (Alexander Addison ed., 1800) ("The danger of this country from Indian incursions had rendered it often necessary to assemble the militia without waiting for the orders of government, which would come too late for the danger.").

124. *See* Act of Feb. 20, 1787, ch. 9, 1787 Mass Acts & Laws 564, 565.

125. *See* Mortenson, *The Executive Power*, *supra* note 18, at 78 (describing New York and Massachusetts as strong executive models); Kent et al., *supra* note 24, at 2122. The Constitution of Massachusetts even went so far as to prohibit the different branches from exercising the powers of one another. *See* MASS. CONST. of 1780, art. XXX ("The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.").

126. In a sense, both states represent cases where the legislature should be least likely to enact this sort of restraint, yet in both cases they did exactly that. *See* Jack S. Levy, *Case Studies: Types, Designs, and Logics of Inference*, 25 CONFLICT MGMT. & PEACE SCI. 1, 12 (2008).

127. Act of Mar. 26, 1784, 1784 S.C. Sess. Law 68.

the president or commander in chief."[128] And New Hampshire allowed its governor to "call forth a sufficient number of the Militia" in the event of "any high handed riot, insurrection, or Attempt to obstruct the Courts of Justice."[129] Although these laws might at first appear a thumb on the scales in favor of the executive's unilateral exercise of the calling forth power, they largely occurred in states that placed *constitutional* restrictions on the executive.[130] Thus, the general rule of the pre-constitutional era cuts against broad executive discretion. It rather favors legislative and judicial involvement in decisions to employ military force domestically.

D. State Acts: Execution of the Laws and the Posse Comitatus

In the preceding review, a particular dog did not bark. Among the terms enumerating the various emergencies for which the militia could be put into service, the phrase "execute the Laws" does not appear. "Rebellion," "insurrection," and "invasion," were most common, but "sedition," "obstruction," "emergency," "tumult," and "Alarm" also show up.[131] These encapsulated the situations for which the militia could be brought out. The absence of "execute the Laws" tends to indicate that the phrase was *not* a crisis authority. Consequently, this Section examines the degree to which the militia could be used in law enforcement-like functions.

State statutes reveal uses of the militia to overcome resistance to civil law enforcement, but in far more specific terms than the eventual Calling Forth Clause. For instance, a 1782 New York act permitted the sheriff to request the assistance of the militia in the execution of process. Whenever the sheriff's efforts to apprehend an individual charged with a crime were "forcibly resisted" or the sheriff had "good grounds to suspect that by force and arms he will be obstructed or resisted in the execution of such process," the sheriff could apply to the "brigadier general" or other "commanding officer of the [county's] militia."[132] The officer was to make an independent determination as to whether "there [were] just grounds for such suspicion," and if so, was to "order out" detachments of the militia to act under the sheriff's direction.[133] Similarly, a Vermont act from 1779 provided that "in case great opposition shall be made against any sheriff, in executing lawful writs" or in "case there be a suspicion that such great opposition

128. Act of June 4, 1785, 1785 Del. Acts 11, 15–16. The act authorized militia commanders in the "absence of the president or commander in chief" to "call out" the militia in the cases set forth above, and required immediate transmittal of the circumstances of the calling out to the commander in chief. *Id*. at 16.

129. Act of Sept. 23, 1786, ch. 6, 1786 Laws of N.H. 200.

130. Both North Carolina and Delaware had constitutionally contemplated privy councils. For instance, the South Carolina Constitution of 1778 required the governor to obtain the advice and consent of the privy council to appoint officers, *see* S.C. CONST. of 1778, art. XXXII; *see also* DEL. CONST. of 1776, art. IX.

131. *See supra* Sections II.A–.C.

132. Act of Apr. 4, 1782, ch. 27, 1782 Laws of N.Y. 440, 446.

133. *Id*. at 446.

will be made … [the] sheriff is hereby authorised, to raise the militia of the county … for the removing all opposition out of the way."[134]

Another set of statutes allowed civil officers to call on the aid of the posse comitatus in confronting violent disturbances. The posse comitatus, also known as the "power" or "force of the county," was an old common law institution, consisting—according to Blackstone—of all the male, adult persons in a county.[135] When called by the sheriff, they were to act as an armed band of citizens to assist with law enforcement.[136] As James Wilson wrote in his *Law Lectures*, "if necessity require it for the due execution of the king's writs, the sheriff may, by the common law, take the posse comitatus to suppress such unlawful force and resistance."[137] Traditionally, the posse comitatus could only include civilians.[138] However, in 1780, the British jurist Lord Mansfield offered the opinion that soldiers functioned as civilians when suppressing violent disturbances as part of the posse comitatus.[139] Thus, statutory schemes referencing the posse could plausibly be read to allow use of the militia.

For instance, a 1786 Virginia act provided that "if any riot, assembly, or rout of people [be made] against the law," then "the Justices of Peace … and the Sheriff … shall come with the power of the county (if need be) to arrest them."[140] Similarly, a 1787 New York act provided that "when … the sheriff or any of his deputies shall find resistance will be made against any process of execution, [then] the sheriff, laying aside all other things and taking with him the power of the county, shall forthwith go in his proper person and do execution."[141]

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134. Act of Feb. 16, 1779, Vt. Laws, 113, 114. The sheriff's ability to raise the militia, was conditioned "by and with the advice of two assistants, or one assistant and one justice of the peace, and of such other assistants and justices as may be present." *Id.* For a description of the executive power's inclusion of the power to appoint assistants, see Mortenson, *The Executive Power*, *supra* note 18, at 59.

135. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *332; *see also* David B. Kopel, *The* Posse Comitatus *and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 789 & n.156 (2014); JENNIFER K. ELSEA, CONG. RSCH. SERV., R42659 THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 6 n.27 (2018) ("The Latin phrase literally means attendants with the capacity to act from the words comes and posse meaning companions or attendants (*comes*) and to be able or capable (*posse*).").

136. *See* Kopel, *supra* note 135, at 790; Gautham Rao, The *Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid- Nineteenth-Century America*, 26 L. & HIST. REV. 1, 2–11 (2008) (emphasizing the understanding of service in the *posse* as a duty of citizenship); Dougherty, *supra* note 21, at 11 n.77 (describing posse comitatus and analogizing it to modern-day practice of police requesting assistance of bystanders).

137. 2 THE WORKS OF JAMES WILSON 241 (James De Witt Andrews ed., 1895). According to Blackstone, the sheriff could employ the posse comitatus to defend the county and keep the peace. BLACKSTONE, *supra* note 135, at *332. Kopel argues that the posse comitatus could *only* be used to execute writs and laws when the sheriff faced resistance. Kopel, *supra* note 135, at 790.

138. *See* Engdahl, *supra* note 21, at 16–17.

139. Mansfield's articulation of this doctrine is quoted extensively in Engdahl, *supra* note 21, at 33–34.

140. Act of 1786, ch. 48, 1786 Va. Acts 34, 34.

141. Act of Feb. 19, 1787, ch. 32, 1778 Laws of N.Y. 407, 409.

Founding-era statutes also used language suggesting the execution of laws by the militia in the context of enforcing legal obligations related to militia service and support.[142] In the case of the Vermont militia, each company was to have a clerk authorized to "execute *all* lawful warrants, by his superior officers to him directed," and to have the same powers as a constable.[143] Furthermore, the act gave persons empowered to serve such warrants the authority to command a "sufficient number" of the militia to their assistance if they encountered "opposition in the [warrant's] execution."[144] It seems unlikely that the eventual "execute the Laws" provision of the Constitution refers to this limited function. First, it would not make much sense to speak of calling forth the militia to execute the laws with the only laws that the militia could execute being the ones to support itself. Second, it is doubtful anyone would seriously argue that "the Laws" could refer only to militia-support laws. Third, this sort of execution can be thought of as incidental to the other functions of the militia: suppressing insurrections and repelling invasions. Nonetheless, these acts show specific examples of the militia executing laws during the founding era.

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Surveying antecedent British, colonial, and state law points to four principal conclusions. (1) "[E]xecute the Laws" does not appear as a term of art governing when the militia may be brought out; (2) with only a few exceptions, the laws show a robust tendency *against* the unilateral exercise of the calling forth power; (3) some states—New York and Massachusetts—inserted judicial officers into the process of responding to an insurrection; and (4) many states delegated a component of the calling forth power to lower ranked officers besides the commander in chief.

This last point suggests that when the Federal Constitution states "Congress may provide for calling forth the Militia," the Framers would not necessarily have understood this to mean "Congress may provide for calling forth the Militia [*by the President*]." Instead, as the early acts shows, legislatures routinely allowed other officers, besides just the state's commander in chief, to exercise the calling forth power when necessary. Some like New York did so in the face of unitary executive power and commander-in-chief clauses.[145] Plainly then,

142. *See, e.g.*, Act of Feb. 16, 1779, 1779 Vt. Laws, 57, 63 (authorizing officers to issue warrants to seize "good and chattels"); Act of June 4, 1785, 1785 Del. Acts 11, 18 ("That in case of invasion, rebellion or insurrection as aforsaid, the president or commander in chief, or in his absence, the general or commanding officer in the military line, in each county respectively, is hereby impowered to issue warrants to proper persons, for impressing horses and carriages as the service may require.").

143. Act of Feb. 16, 1779, 1779 Vt. Laws, 57, 59–60. The clerk was also responsible for levying fines on individuals who failed to appear for militia duty. *See id.* at 60.

144. *Id.* at 63.

145. *See* N.Y. CONST. of 1777, art. XVII ("[T]he supreme executive power and authority of this State shall be vested in a governor[.]"); *id.* at XVIII ("That the governor shall . . . be general and commander-in-chief of all the militia. . . .").

legislators did not understand these clauses to bar delegation of the calling forth power to subordinate officers.[146]

III. THE CRISIS AND THE CONVENTION

If the "execute the Laws" provision did not originate with state militia or law-execution statutes, state constitutions, or an act of parliament, then where did the phrase come from? The historical evidence suggests the phrase—used in the calling forth context—was a creation of the Constitutional Convention. It was a response to crises facing the country under the Articles of Confederation, most prominently the states' refusal to comply with the peace treaty with Great Britain. Importantly, the Federalists at the Convention played key roles in shaping the Clause's ultimate language, thereby producing a broad and open-ended power to use the militia to carry duly enacted laws into effect.

A. Debt and Destruction

The period following the Revolution saw crises that derived from the inability of the Articles of Confederation government to execute its laws.[147] Understanding the "execute the Laws" provision in the Calling Forth Clause requires concentrating on a particular crisis: the failure to fulfill the country's obligations under the peace treaty with Great Britain. Admittedly, other events—particularly Shays' Rebellion—contributed to the formation of the Clause.[148] However, as the Massachusetts law shows, this incident was very much understood as an "insurrection," which helps explain one portion of the Clause, but should not be wholly satisfactory when faced with its other components.

1. The Peace Treaty

The 1783 Treaty of Paris between Great Britain and its wayward colonies ended the American Revolution. Its fourth article required American debtors to repay British creditors for debts incurred prior to and during the war.[149] The fifth article instructed states to ensure their courts remained open to these British creditors.[150] Finally, it required the British to evacuate previously occupied forts and

146. Of course, no state appears to have wholly deprived the chief executive of the power to call forth the militia when necessary, and states often required that a subordinate officer's decision to call out the militia be reported up the chain of command. This is consistent with the principle that the commander in chief retains a superintendent function over military decisions. *See* Barron & Lederman, *supra* note 21, at 1102–06.

147. *See* Mortenson, *The Executive Power*, *supra* note 18, at 1279–90.

148. The documentary records surrounding Shays' Rebellion do not contradict this Article's thesis. For instance, Governor James Bowdoin's address upon the occasion of ordering out the state militia used the phrase "execute the laws" in connection with the duties of "Civil Magistrate[s]." *See* James Bowdoin, *An Address*, MASS. GAZETTE, Jan. 16, 1787. Bowdoin indicated that he was deploying the militia to "assemble in arms, for the purpose of protecting the Judicial Courts next to be holden in the County of Worcester; of aiding the Civil Magistrate to execute the laws; of repelling all Insurgents against the government; and apprehending all disturbers of the public peace." *Id.*

149. *See* 24 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 370 (Gaillard Hunt ed., 1783).

150. *Id.*

military positions.[151] In particular, the language stated—in odious terms—that such evacuation would occur "without causing any Destruction, or carrying away any Negroes or other Property of the American inhabitants."[152]

The Treaty was immensely unpopular in the states.[153] Having just emerged from a taxing war, individual Americans and their state governments were not eager to remain on the hook for debts owed to British merchants and loyalists. Instead of complying, several states banned loyalists from returning, and they passed laws deliberately frustrating the ability of British creditors to access their courts.[154] At the same time as American Federalists watched these developments with varying degrees of alarm and horror, Great Britain was also dragging its feet evacuating its former forts.[155] The continued presence of the British military on nominally American soil posed a serious national security threat to the new republic. On December 8, 1786, John Adams, then U.S. Minister to Great Britain, presented a memorial to the British Secretary of State, the Marquis of Carmarthen, requesting that Great Britain turn over these posts to the United States.[156] Adams specifically identified "Oswegathy, Oswego, Niagra, Preaquisle, Sandusky, Detroit, Michillimackinac."[157] These forts traced a defensive line separating the newly American northwest territories from still British Canada to the north.[158] For Americans with financial interests in the vast territories to the west of the country, securing American control of these forts represented a key step toward guaranteeing the security of their investments.[159]

Besides the forts, Adams emphasized another point. "[I]t was stipulated that his Britannick majesty should" withdraw "with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants."[160] The mention of Black individuals represented another area of contention. Enslaved individuals had used the disruption of war to emancipate themselves and flee to British-occupied territories.[161] Many Black Americans

151. *Id.*

152. *Id.*

153. *See* Aaron N. Coleman, *Debating the Nature of State Sovereignty: Nationalists, State Sovereigntists, and the Treaty of Paris (1783)*, 12 J. HIST. SOC. 309, 330 (2012).

154. *See id.* at 327–28 (collecting accounts of actions taken against creditors).

155. GEORGE HERRING, FROM COLONY TO SUPERPOWER 44 (2008) (discussing British motivations for the absence of alacrity).

156. 4 SECRET JOURNALS OF THE ACTS AND PROCEEDINGS CONGRESS 1774–1789, at 185 (Gaillard Hunt ed., 1783) [hereinafter 4 JOURNALS].

157. *Id.* at 186–87.

158. *See* HERRING, *supra* note 155, at 45.

159. *See id.* at 44 ("[The British] used their presence in the territory awarded to the United States in the treaty to abet Indian resistance to American settlement of the Northwest."); HOLTON, *supra* note 108, at 525; *see also* John Mikhail, *James Wilson, Early American Land Companies, and the Original Meaning of "Ex Post Facto Law,"* 17 GEO. J. L. PUB. POL'Y 79, 91–93 (2019) (describing involvement of founders in land speculation).

160. 4 JOURNALS, *supra* note 156, at 186.

161. *See* Farah Peterson, *The Patriot Slave,* AM. SCHOLAR, June 2020, at 32.

had fought for the British.[162] And at the close of war, Black Americans in New York city successfully petitioned the British general there not to comply with the terms of the peace treaty.[163] American slaveowners now pushed for the return of their "property," and Adams reiterated this request to Great Britain.

The Marquis's reply came some three months later, and it obsequiously refused Adams's demands. Carmarthen pointed to the American failure to fulfill the treaty's fourth article.[164] He attached a long list of grievances from British merchants that detailed the variety of measures states had taken to obstruct repayment.[165] This included debtor-relief legislation,[166] as well as "tumultuous and riotous proceedings," which had prevented South Carolina courts from "determining actions for debt."[167]

News of British intransigence quickly reached the Confederation Congress.[168] And the substance of the Marquis's reply became general knowledge after being published in a Baltimore paper.[169] Expressing perhaps the general sentiment of her class, Abigail Adams opined that "there would be more lenity on the part of the Creditor and less distress attending the debtor, if the Laws were repealed and justice had its fair course."[170] John Adams, likewise, laid the blame squarely on states. Neither military forts nor enslaved persons could be recovered from the British, he thought, "while there is a law of one state upon the Continent in force against the recovery of British Debts."[171]

2. Jay's Report on Treaty Infractions

The failure of the Confederation government to fulfill its treaty terms with Great Britain pushed Federalists toward an acceptance of military enforcement of national laws. This stance can be seen in the work of John Jay, who—as Secretary of Foreign Affairs—took up the task of assessing the veracity of the British grievances and charting a path forward for the Congress. The Congress at

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162. *Id.* ("[F]our times more black Americans served as loyalists to the Crown than served as patriots.").

163. *See* HOLTON, *supra* note 108, at 499.

164. 4 JOURNALS, *supra* note 156, at 187–89.

165. Many laws forbade British creditors from collecting interest for the period coinciding with the duration of the war and mandated a plan for the payment of debts in lengthy installments. *See id.* at 200. British creditors complained that this would "run out to such lengths of time, [that it] must subject them to great loss." *Id.*

166. *Id.* at 193 ("[B]y this ordinance, debtors are judicially protected from suits brought at the instance of their creditors, who are chiefly British merchants.").

167. *Id.*

168. Letter from William Grayson to George Washington (May 27, 1786), *in* 4 THE PAPERS OF GEORGE WASHINGTON, 2 APRIL 1786 – 31 JANUARY 1787, at 81, 81–83 (W.W. Abbot ed., 1995).

169. *See* Letter from Abigail Adams to Cotton Tufts (Oct. 10, 1786), *in* 7 THE ADAMS PAPERS, JANUARY 1786 – FEBRUARY 1787, at 359, 359–66 (Margaret A. Hogan, C. James Taylor, Celeste Walker, Anne Decker Cecere, Gregg L. Lint, Hobson Woodward, Mary T. Claffey eds., 2005).

170. *Id.*

171. Letter from John Adams to Samuel Austin (May 25, 1786), *in* 18 THE ADAMS PAPERS, DECEMBER 1785 – JANUARY 1787, at 312–13 (Gregg L. Lint. Sara Martin, C. James Taylor, Sara Georgini, Hobson Woodward, Sara B. Sikes, Amanda M. Norton eds., 2016).

this stage had no general enforcement power and no power to override state laws.[172] Jay presented his findings in October 1786 in his report on treaty infractions.

Jay first considered the legal status of the state laws frustrating the recovery of debt held by British subjects. He asked whether a state of war between a national sovereign and a foreign sovereign allowed state legislatures to "extinguish, remit, or confiscate" debts owed to the subjects of the foreign sovereign.[173] The answer, Jay thought, was no. Because the "rights to make war, to make peace, and to make treaties" belonged "*exclusively* to the national sovereign," state legislatures had "no more authority to exercise the powers, or pass acts of sovereignty on those points, than any thirteen individual citizens."[174] This led Jay to his next conclusion:

> To execute the laws, or exercise the rights of war against a national enemy, belongs only to the national sovereign, or to those to whom the national sovereign may constitutionally delegate such authority.[175]

Here, Jay is arguing that the power "[t]o execute the laws" relating to the debts of foreign subjects belongs to the national sovereign.[176] To understand what Jay meant by "execute the laws," one has to remember that he was refuting the argument that the states could pass and enforce their own laws cancelling British debts. According to Jay, if the national sovereign could enter the legal states of "war" and "peace," and had the power to make "treaties," then that sovereign had the power to carry these legal states into effect.

Jay then moved on to the issue of mob opposition to fulfillment of the peace treaty's terms. He noted that popular uprisings could frustrate debt collection efforts. But he concluded that "while the course of justice continues steadily to bear down that opposition, and *to execute the laws* with punctuality and decision, such vanquished opposition rather does honour than discredit to the government."[177] Here again, Jay used the phrase "execute the laws," yet he was distinctly referring to the "*ordinary* course of justice," a phrase he used in the next paragraph.[178] Thus, for Jay, "execute the laws" did not necessarily imply violent resistance. More troubling for Jay was the "connivance of government," and he indicated the states could be held accountable for these obstructions. "[T]he

172. *See* Kent et al., *supra* note 24, at 2121 ("The government under the Articles of Confederation produced legislative resolves that were nominally binding on the states, but there were no means of enforcement, ...").

173. 4 JOURNALS, *supra* note 156, at 208.

174. *Id*. at 209.

175. *Id*.

176. *Id*.

177. *Id*. at 240 (emphasis added).

178. *See id*. at 241 (emphasis added).

delinquent state cannot be without blame,"[179] and such instances should attract the attention of Congress "to whom it appertains to see that national treaties be faithfully observed throughout the whole extent of their jurisdiction."[180] Though proceeding obliquely, Jay thus suggested an *implied* power of the national government to force compliance by the states.[181]

Following the presentation of the report, Congress created a five-person committee to consider its findings with James Madison as a member.[182] In a letter to Edmund Randolph, Madison confided that Jay's report confirmed the treaty violations had occurred first on the side of the states.[183] Madison took a dim view of possible congressional action. "If [Congress] should be able to agree on any measures for carrying the Treaty into execution, it seems probable that the fundamental one will be a summons of the States to remove all legal impediments which stand at present in the way."[184] This was hardly strong medicine. Yet satisfying British demands, Madison thought, was the only way to attain the objectives in Adams's memorial.[185]

On March 21, 1787, the Confederation Congress adopted a series of resolutions exhorting the states to comply with the peace treaty. To accompany these resolutions, Jay drafted an address to the states.[186] The address vigorously asserted that state legislatures could not alter treaties made by the Confederation.[187] It also likened the treaty between Britain and the United States to a contract, specifically a contract between nations, which allowed the use of armed force as the means of enforcement. One paragraph in particular hinted that such armed force could be turned against the states.

> But although contracting Nations cannot like individuals avail themselves of Courts of Justice to compel performance of contracts, yet an appeal to Heaven and to Arms, is always in their power and often in their Inclination.[188]

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179. *Id.* The term "delinquent state" would reappear in the Federalist papers. *See* FEDERALIST NOS. 15, 22 (Alexander Hamilton), https://perma.cc/F3QD-98H2.

180. 4 JOURNALS, *supra* note 156, at 241.

181. *See id.*

182. 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774 – 1789, at 881 (1787); 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774 –1789, at 43 (1787). The committee consisted of "Mr. Nathan Dane, Mr. Lambert Cadwallader, Mr. James Madison, Mr. William Samuel Johnson and Mr. Rufus King on the Report of the Secretary for Foreign Affairs on Mr. Adams' letter respecting infractions of the treaty . . . . [The] committee was discharged March 8, 1787." *Id.*

183. Letter from James Madison to Edmund Randolph (Feb. 18, 1787), *in* 24 LETTERS OF THE DELEGATES TO CONGRESS NOVEMBER 6, 1786 – FEBRUARY 29, 1788, at 102, 102–03 (Robert A. Rutland & William M. E. Rachal eds., 1975).

184. *Id.*

185. *See id.*

186. *See* Letter from John Jay to Thomas Jefferson (Apr. 24, 1787), *in* 4 THE SELECTED PAPERS OF JOHN JAY, 1785 – 1788, at 509, 509–11 (Elizabeth M. Nuxoll ed., 2015).

187. *See* 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 182, at 177–84.

188. *Id.* at 180.

The phrase is cleverly written. The "appeal to . . . Arms" unmistakably meant the use of armed force, yet precisely how far the Confederation Congress was willing to go remained ambiguous. One could interpret the passage as just a reiteration of the point made earlier in the address, that military force was the method of treaty enforcement between sovereign nations.[189] Alternatively, it could be read to indicate that the Congress was prepared to use military force against the states to ensure its treaties were carried into effect.

Given the weakness of the government under the Articles of Confederation, this was an empty threat. Yet the very weakness of the government seemed to be pushing those who served in it toward the desperate stance of threatening military law enforcement. Crucially, as Jay's work reveals, the urgent need to "execute the laws" was not aimed solely—or even principally—at the threat of violent, mob resistance. Rather, the focus was on state-imposed legal barriers to debt recovery.

B. The Virginia and New Jersey Plans

By the start of the Constitutional Convention in the summer of 1787, the need to give the national government a vigorous and effective enforcement mechanism was uncontroversial, leaving delegates to disagree over form and structure. Part II looked at what the power to "execute the Laws" was *not* by examining parliamentary, colonial, and state analogs to the Calling Forth Clause. This Section accomplishes a similar function by looking at close alternatives to the Constitution: the Virginia and New Jersey Plans. Unlike a body of prior laws, these documents serve a second function by conveying what the Framers were trying to accomplish with the Clause.

On May 29, Edmund Randolph read the Virginia Plan in the Convention.[190] The proposal was an enhancement of the Articles of Confederation. It provided for a legislature elected by the people of the states, an executive chosen by the legislature, and the ability of the national government to "negative all laws" passed by the states contravening "the articles of Union."[191] The Plan did not address military or emergency matters, and it did not include provisions explicitly concerning the militia.[192] However, it did contain a general enforcement clause. This was located in the same portion of the Plan giving the national government a negative over state laws.[193] It read: "the National Legislature ought to be impowered . . . to call forth the force of the Union [against] any member of the Union failing to fulfill its duty under the articles thereof."[194]

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189. *See id.*

190. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20 (Max Farrand ed., 1911).

191. *Id.* at 20–21.

192. *See id.*

193. *Id.* at 21 ("[T]he National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.").

194. *Id.*

Read in conjunction with the power to negate state laws, which directly preceded it, this power "to call forth the force of the Union" seems transparently aimed at state disobedience of the peace treaty. It also mirrors Madison's description of several like powers in his *Notes on Ancient Confederacies*.[195] At first glance, this may seem a shockingly broad power to give the national government, yet the proposed clause likely contained important internal limitations. It is strikingly similar in form and structure to the posse comitatus. The term "force of the Union" mirrors the term of art used to designate the posse comitatus, the "force of the county."[196] The clause also created a law enforcement power just like the posse comitatus.[197] As Farah Peterson has shown, the founding generation displayed a propensity for interpreting the Constitution analogically by reference to other legal documents.[198] Thus, it seems probable that founding-era jurists would have understood this language to carry the common law rules and restrictions surrounding the posse comitatus.[199] If the "force of the union" was to operate like the "force of county," then the clause merely imposed a duty on individual states to comply with a congressional order.[200] In short, it would only allow the national government to call on the states for help.

This proposed enforcement mechanism would almost certainly have left the national government still vulnerable to the whims of the states. This element of the Virginia Plan evokes the "compact" form of government, where individual

195. *See* 9 THE PAPERS OF JAMES MADISON, 9 APRIL 1786 – 24 MAY 1787 AND SUPPLEMENT 1781 – 1784, at 3–23 (Robert A. Rutland and William M.E. Rachal eds., 1975). According to Madison, the Amphyctionic Confederacy "employed whole force of Greece agst. such as refused to *execute* its decrees." *Id.* (emphasis added). Furthermore, in the Helvetic confederacy, "[a]ll disputes are to be submitted to Neutral Cantons who may employ force if necessary in *execution* of their decrees. Each party to choose 2 Judges who may in case of disagreement chuse umpire, and these under oath of impartiality to pronounce definitive sentence, which all Cantons to *enforce*." *Id.* (emphasis added). Both of these examples show Madison using "execute" or "execution" to describe the carrying out of lawful orders by force.

196. *See supra* note 135 and accompanying text. Indeed, the New Jersey Plan—discussed below—uses a term which mirrors the alternate formulation, "power of the county." *See infra* note 204 and accompanying text.

197. *See supra* note 137 and accompanying text (discussing law enforcement activities of the posse comitatus).

198. Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 1, 2 (2020) ("[E]arly American lawyers debated whether the Constitution should be interpreted according to the methodologies applicable to public or private legislation.").

199. For instance, this could have included a necessity requirement. *See supra* note 137 and accompanying text. As discussed above, these rules were in flux at the time. The requirement that the posse comitatus be strictly civilian had already begun breaking down with Mansfield's doctrine. *See supra* notes 138–39 and accompanying text.

200. *Cf.* Rao, *supra* note 136, at 11–12 (describing the common law duty of citizens to participate in the posse without monetary compensation). The term "force of the Union" did appear in instances referring to the states collectively, as opposed to a single military force, such as the continental army. *See* 14 JOURNALS OF THE CONTINENTAL CONGRESS 1774 – 1789, at 961 (1779) ("[A]fter a treaty of peace [British interference with American fishing], shall be a common cause of the said States, and the *force of the Union* be exerted to obtain redress for the parties injured." (emphasis added)).

states were bound together by contract-like obligation,[201] but without an enforcement power under federal control.

On June 15, William Patterson read the small states' answer to the Virginia Plan.[202] Instead of granting the national government a power to negate state laws, the New Jersey Plan specified that acts and treaties of the national government would be the supreme law of the land.[203] It followed this pronouncement with an enforcement power similar to that of the Virginia Plan.

> If any State, or any body of men in any State shall oppose or prevent [the] carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth [the] power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties.[204]

This clause reveals several insights. First, it did not explicitly refer to the militia. Instead, it again used a phrase—"power of the Confederated States"—that harkened back to the posse comitatus. This could have been susceptible to the same deficiencies and limited reading as the Virginia Plan's "force of the Union."[205] Second, the Plan squarely presented a solution to the problem of treaty violations by allowing the use of force in situations where "any State" or "body of men" opposed the execution of national "acts or treaties."

Third, the Plan limited when such force could be used: when parties "oppose or prevent [the] carrying into execution" of treaties or acts. Notably, this limitation is still broader than the reading which Banks and Engdahl impose on the Calling Forth Clause.[206] The Plan merely specified "opposition," not violent resistance on the scale of "levying war" or the collapse of the civil enforcement system. Finally, the New Jersey Plan would have conferred the calling forth power on the executive, which would be plural and selected by Congress.[207] Thus, the Plan does not break from the trend against the unilateral exercise of the calling forth power.

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201. *Cf.* Peterson, *supra* note 198, at 31–32 (describing method of interpretation of Constitution as a compact).

202. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 190, at 242.

203. *Id.* at 245.

204. *Id.* In the excerpt of the Plan surfaced by Ewald and Toler, the New Jersey Plan is slightly shorter. *See* William Ewald and Lorianne Updike Toler, *Committee of Detail Documents*, 135 PA. MAGAZINE HIST. & BIOGRAPHY 239, 307 (2011) ("If any State, or any Body of Men in any State shall oppose or prevent the carrying into Execution the Acts or Treaties of the United States; the Executive shall be authorized to enforce and compel Obedience by calling forth the Powers of the United States.").

205. Indeed, King's summary of the New Jersey Plan actually referred to this as the "force of the union." 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 190, at 247 ("6. The Acts Treaties &c &c to be paramount to State Laws and when any State or body of men oppose Treaties or general Laws, the Executive to call forth the *force of the Union* to enforce the Treaty or Law. . ." (emphasis added)).

206. *See supra* Section I.A.

207. *See* 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 190, at 244.

Considering the New Jersey Plan, a straightforward textualist reading of the Calling Forth Clause would understand the power to call forth the militia to "execute the Laws" to be *broader* than the power to use such forces to "enforce and compel obedience" to the laws when "any State or body of men . . . shall oppose or prevent [their] carrying into execution." The language of the Calling Forth Clause is considerably shorter than in the New Jersey Plan, and it omits the specification regarding the object to which military force can be applied. In structure and substance, both the Virginia and New Jersey Plans reveal more limited predecessors to the final Clause.

C. The Committee of Detail

The text of the Constitution is largely the work of the Committee of Detail, which organized the resolutions approved by the Convention into a coherent draft.[208] A few days before the Convention appointed the Committee, Madison records Dr. James McClurg asking how the executive was to "carry the laws into effect, and to resist combinations [against] them." Specifically, was the executive to be given a standing army or command of the militia?[209] McClurg's question shows at least one delegate contemplating the possibility of military force not only to suppress resistance to the laws, but also to carry them out.[210] The question illuminates the breadth of possibilities before the Committee of Detail.[211] As will be seen below, the version of the Calling Forth Clause that emerged from the Committee was the more capacious of the options considered.

1. The Drafts

The Committee's members included John Rutledge, James Wilson, and Edmund Randolph. Randolph drafted an early sketch of the Constitution, and a

208. *See generally* William Ewald, *The Committee of Detail*, 28 CONST. COMMENTARY 197 (2012).

209. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 69 (Max Farrand ed., 1911). Although Madison records McClurg as using the term "military force" as distinct from the "Militia," it appears that McClurg meant some *new* military force as opposed to the *state* militias. This would explain the description of the militia as the only "existing force" that could be used for law enforcement. McClurg's question has received scant attention in the literature. Coakley presents the question in his history and how it followed on the heels of giving the President the power to execute national laws, but he does not pause to consider its breadth. COAKLEY, *supra* note 54, at 10–11; *see also* Calabresi & Prakash, *supra* note 61, at 623 (arguing that McClurg's questions show the President is to execute laws); Bahar, *supra* note 56, at 596 (pointing to McClurg's questions as demonstrating the ambiguity surrounding whether the regular army and navy may be deployed domestically).

210. It is unclear whether McClurg was referring just to private combinations or combinations of states. Madison's notes routinely referred to the potential mischief of "combinations of states" and of individuals in public positions. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 190, at 218 (executive and "demagogues" in Congress); *id*. at 447 (large states); *id*. at 466 (states); *id*. at 483 (three states); 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 209, at 363 (eastern and southern states). *But see id*. at 54 (combination of private parties).

211. In his account, Coakley also skips over the drafting history, and moves immediately to the results of the committee's work. *See* COAKLEY, *supra* note 54, at 11 ("The committee had evidently answered Dr. McClurg's question by granting to Congress the power to call forth the militia to enforce the laws and suppress domestic insurrections and giving to the president the command of them when so called forth.").

proto-Calling Forth Clause appears in this document.[212] He included among the legislative powers: "[t]o draw forth the militia, or any part, or to authorize the Executive to embody them."[213] This formulation echoes the calling forth power in the parliamentary act of 1757 and in many state constitutions. Specifically, it tracks the state constitutions that conferred a militia embodiment power on the executive, but implicitly left the "drawing out" power to the legislature.[214] Consequently, the draft suggests a traditional militia power except that Randolph substituted the check of the council for that of the legislature, which would now have the power to "authorize" the executive to embody the militia.[215]

Randolph also included a general enforcement power in his section on the executive branch. His draft gave the President a power "to carry into execution the national laws,"[216] as well as the power "to direct the executives of the states to call [the militia] or any part for support of national government."[217] This seems best understood as a new iteration of the enforcement power contemplated in the Virginia and New Jersey Plans. But Randolph's formulation still left the national government dependent on the states to compel obedience to its laws.[218]

According to William Meigs, when this draft reached Rutledge and Wilson, the former crossed out Randolph's language allowing the government to "draw forth . . . [and] . . . embody" the militia.[219] The clause allowing the executive to request militia support from state governors was also crossed out.[220] Instead, Rutledge inserted a legislative power "[t]o make laws for calling forth the Aid of the militia to execute the Laws of the Union, to repel Invasion and suppress internal Commotions." He also added "to inforce treaties" to this list.[221] Wilson, in his draft, incorporated Rutledge's language with only minor changes. He replaced "internal commotions" with "insurrections," and he removed "to make laws." The clause now read "to calling [sic] forth the Aid of the Militia in order to execute the Laws of the Union, enforce Treaties; suppress Insurrections, and repel Invasions."[222]

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212. *See* Ewald & Toler, *supra* note 204, at 275; Ewald, *supra* note 208, at 244.

213. *See* Ewald & Toler, *supra* note 204, at 275.

214. *See supra* Section II.B.

215. The draft also included a separate power to "[t]o subdue a rebellion in any particular state, on the application of the legislature thereof." Ewald & Toler, *supra* note 204, at 275.

216. *Id*. at 277.

217. *Id*. On its face, this proposed power could seem quite broad and open-ended, but it was likely more limited than the eventual Calling Forth Clause in two ways. First, "Support" seems to connote an auxiliary function in a way that "execute the Laws" does not. Second, the structure of the proposed power would make the national executive dependent on the cooperation of the state executives.

218. Though the clause is strongly worded—giving the executive the power to "direct" the state governors—one has to wonder how the President would force compliance from governors who disobeyed such direction.

219. WILLIAM MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787, at 152–53 (1900).

220. *See* Ewald & Toler, *supra* note 204, at 277.

221. *Id*. at 275; MEIGS, *supra* note 219, at 152.

222. Ewald & Toler, *supra* note 204, at 341. This is effectively the language that was reported out of the committee. *See* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 209, at 182.

Now, what were Wilson and Rutledge up to? Allowing the militia to "execute the Laws" and "enforce Treaties" represented a confluence of interests for the two men. Both had strong motivations to give the new national government the power to carry out its treaty obligations. As the founder with some of the most extensive land claims, Wilson had an interest in opening up the lands in the northwest.[223] Putting the still British-controlled forts into American hands would have helped assure the security of any investments in these lands. For his part, Rutledge represented the interests of slaveholders who still sought the return of the people they saw as property from the British.[224] Many had escaped from Rutledge's home state of South Carolina.[225]

Thus, giving the federal government the power to use the militia to "enforce Treaties" and "execute the Laws" remedied a particular failure of the Articles of Confederation in the eyes of both men. Indeed, Jay's report and address had argued that the Confederation government, as the national sovereign, already possessed the implied power to "execute the laws" and to do so by armed force. The Rutledge edits and Wilson draft merely made this power explicit.

Wilson in particular would not have understood "execute the Laws" to mean anything other than the general power of carrying legal obligations into effect. Wilson's later writing would suggest that the process of "execution of the law" differed from preserving "public tranquility" or quelling tumultuous uprisings.[226] Thus, when Wilson wrote that Congress could call forth the militia "to execute the Laws of the Union," he is unlikely to have understood this to be confined to addressing public disturbances, such as riots and insurrections. Instead, he would have understood this to be the broader power of carrying out duly enacted laws and legal obligations.

2. Call Out, Not Embody

One of the Committee of Detail's changes was to initially substitute "call out the aid of . . ." for "draw forth . . . [and] embody." This likely resulted from slight differences between the three key drafters. Rutledge's use of "call out" instead of Randolph's "draw forth . . . [and] embody" seems best understood as a reservation of state power.[227] By denying the President and Congress the power to draw

223. Mikhail, *supra* note 159, at 91.

224. Indeed, two individuals who Rutledge had held in slavery escaped to the British. *See* SIMON SCHAMA, ROUGH CROSSINGS: BRITAIN, THE SLAVES, AND THE AMERICAN REVOLUTION 9 (2006).

225. *Id*. at 8 (citing DAVID RAMSEY, RAMSAY'S HISTORY OF SOUTH CAROLINA 272 (1858)); *see also* M. Foster Farley, *The South Caroline Negro in the American Revolution 1775–1783,* 79 S.C. HIST. MAGAZINE. 75, 84 (1978) (relaying the estimate that somewhere between 25,000 and 5,333 Black individuals fled bondage in South Carolina during the Revolutionary War); Peterson, *supra* note 161 ("In fact, 20,000 enslaved people responded to the 1775 Dunmore Proclamation and the even broader 1779 Philipsburg Proclamation and served with the British forces.").

226. 2 THE WORKS OF JAMES WILSON, *supra* note 137, at 240–41.

227. During the ratification debates, at least one source would assert that the "call forth the aid . . ." formulation left the original militia power with the states. In other words, the national government would have nothing more than the power to request the assistance of state militias. *See* Baltimore

forth and embody the militia, he was denying them the direct control possessed by numerous state governments and by the British Crown. When Rutledge made this edit, the draft did not include a clause allowing for congressional regulation and organization of the militia.[228] In his draft, Wilson inserted precisely such a clause back into the document.[229] For practical purposes then, the difference in phrasing is likely insignificant because Wilson's draft allowed Congress to call out its own military body.

Additionally, Rutledge had given Congress the power to "make laws" for calling out the militia, but Wilson changed this to just "call forth." This edit may have been purely stylistic and been intended to avoid repetition with the next clause in the draft, which began with "make all laws."[230] But it may also have reflected Wilson's personal quest to ensure the Congress could enact laws pursuant to unenumerated and implied powers. In the same draft, Wilson had rewritten the eventual Necessary and Proper Clause to explicitly contemplate such powers.[231] Giving Congress its own calling forth power could have been an effort to make the legislature less dependent on other branches, thus giving it the means to better defend its legislative enactments.[232]

D. On The Convention Floor

As the summer wore on, the whole Convention confronted the thorny issue of national control over the militia. As evidence of the question's sensitivity, it was referred to a committee comprised of members from each state in attendance.[233] The committee produced language giving Congress power to regulate and discipline the militia when in actual service and leaving to the states the appointment of militia officers.[234] The Convention ultimately agreed to this compromise, though not before one delegate worried that "the States might want their Militia for defence [against] invasions and insurrections, and for enforcing obedience

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Maryland Gazette (June 3, 1788), *in* 12 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 742, 744 (John P. Kaminski et al. eds., 2015) [hereinafter 12 DOCUMENTARY HISTORY].

228. *See* Ewald & Toler, *supra* note 204, at 263–85.

229. Specifically, he added a power of Congress "to regulate the Discipline of the Militia of the several States." *Id.* at 341. This same power appeared in a more forceful version in another draft. *See id.* at 309. ("The Legislature of U. S. shall possess the exclusive Right of establishing the Government and Discipline of the Militia of — and of ordering the Militia of any State to any Place within U. S.").

230. *Id.* at 341.

231. *See* Mikhail, *supra* note 24, at 1101–02.

232. After all, Rutledge's "make laws for the calling forth the aid of" formulation could perhaps have been read to leave Congress only the power of making laws that implicated the assistance of the state militias. *See* Ewald & Toler, *supra* note 204, at 275.

233. John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. L. HIST. 147, 166–67 (2006).

234. "To make laws for organizing, arming & disciplining the Militia, and for governing such parts of them as may be employed in the service of the U. S. reserving to the States respectively, the appointment of the officers, and authority of training the militia according to the discipline prescribed." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 209, at 384–85.

to their laws."[235] That same day, the Convention took up consideration of the Calling Forth Clause. At this juncture, it read: "To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions."[236]

Pennsylvania delegate Gouverneur Morris made an initial motion to strike out "enforce treaties." According to Madison's notes, Morris reasoned that this language was "superfluous since treaties were to be laws."[237] This was agreed to without dispute. Morris then made a second motion to alter the remaining language of the Clause. The proposed language now read "to *provide for* calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."[238] The Convention also agreed to this change.[239]

Both of these changes are potentially significant and merit individual attention. First, the deletion of "enforce treaties" seems to have obscured the full reach of the Clause. The "enforce treaties" language explicitly connected the Clause to state non-enforcement of the peace treaty with Great Britain.[240] By removing this overt reference to treaties, Morris was hiding the link between the Clause and the British debt issue.[241]

Morris's amendment subsuming "enforce treaties" into "execute the Laws" seems best understood as a calculated move to ease passage of the Constitution by hiding an objectionable component.[242] According to Jay's report on treaty

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235. *Id*. at 332 (statement of Roger Sherman); *see also id*. at 330–33, 384–88.

236. *Id*. at 389 n.9.

237. *Id*. at 389–90.

238. *Id*. at 382, 390.

239. Surprisingly, these changes have not been examined in the militia context but have received substantial scrutiny in the context of whether treaties are automatically self-executing. *See* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1914–18 (2005); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2231–32 (1999); Martin S. Flaherty, *History Right: Historical Scholarship, Original Understanding, and Treaties as Supreme Law of the Land*, 99 COLUM. L. REV. 2095, 2123–24 (1999).

240. The connection appears all the stronger when one considers that, immediately after adopting the calling forth clause, a delegate proposed unsuccessfully to give Congress the following power: "To negative all laws passed by the several States interfering, in the opinion of the Legislature, with the general interests and harmony of the Union — provided that two thirds of the Members of each House assent to the same." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 209, at 382.

241. Morris did not want to weaken federal power. He was a staunch Federalist, and like many other delegates, was engaged in speculation on western lands. WILLIAM HOWARD ADAMS, GOUVERNEUR MORRIS: AN INDEPENDENT LIFE 141 (2003). Thus, he would also have had a strong interest in seeing these opened up. Indeed, one biography suggests that Morris felt the sting of the government's inability to enforce compliance with the treaty's terms, *id*. at 147, and his experience during the Critical Period had left him distrustful of the states. *Id*.; *see also id*. at 135, 137 (describing how Virginia derailed Gouverneur and Robert Morris's public credit plan). After the Convention, Morris would serve as President George Washington's agent in the United Kingdom, where he continued to press U.S. claims for the forts and the enslaved individuals. *See* Letter from Gouverneur Morris to George Washington (Apr. 7, 1790), *in* THE PAPERS OF GEORGE WASHINGTON 16 JANUARY 1790 – 30 JUNE 1790, at 319, 319–23 (Dorothy Twohig et al. eds., 1996).

242. *Cf*. Mikhail, *supra* note 24, at 1123–24 (describing possible similar motivation of James Wilson).

infractions, the states were the key delinquents under the treaty. His address had hinted that the national government would be within its rights to use armed force against recalcitrant states. Though this was an empty threat under the Articles of Confederation, it would be a different matter under a new national government equipped with a power to use the militia to "enforce treaties."[243]

Judging from the ratification debates, discussed in Part V, Morris was right to make the change. Few commentators mentioned the Calling Forth Clause in terms that indicated a fear of federal coercive action against states.[244] But, where commentators knew of the Committee of Detail draft, they inferred that it would allow such enforcement. The Baltimore Gazette ran a feature comparing the text from a draft—including the "enforce treaties" language—to the final text of the Constitution.[245] The feature noted in an alarmist tone that "the compleat power over militia being given [to] Congress, the States can have no defence left to support their rights, if they have any."[246]

Importantly, Morris's "enforce treaties" amendment imperils a reading of the Calling Forth Clause that attempts to define "execute the Laws" by reference to "insurrections" and "invasions." As first written, the Clause contained two general enforcement provisions and two emergency provisions. Thus, the inference is at least as strong that the Clause is addressed to the ordinary context of law enforcement as to emergency situations. Madison's notes give no indication that Morris sought to change the meaning of the provision. Rather, Morris purportedly eliminated "treaties" because it was already included in "laws."

The second Morris amendment seems to have accomplished more pedestrian functions. The change from the power "to call forth the aid of" the militia to the power "to provide for calling forth the Militia" mirrors the standard account of the drafting of the Declare War Clause.[247] Using "provide" more clearly indicates that Congress has the power to make legislative rules concerning when the militia may be called out, and it weakens the inference that Congress itself was to take charge of the militia.

In its comparative feature, the Baltimore Gazette also discussed the removal of "aid of" from the Committee of Detail draft. According to the Gazette, this

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243. At least one commentator has opined that this was the explicit purpose of the "execute the Laws" provision. *See* Daniel H. Pollitt, *Presidential Use of Troops to Execute the Laws: A Brief History*, 36 N.C. L. REV. 117, 121–22 (1958) (citing to Federalist 21 and 35 for the proposition that the founding generation understood the Calling Forth Clause allowed the federal government to proceed against "delinquent states."). Pollitt moves quickly through the founding-era sources, so it is difficult to appraise the argument, but it seems he is correct that there were at least hints of this power in Federalist 21. *See* THE FEDERALIST NO. 21 (Alexander Hamilton).

244. Rather, most Antifederalists painted a picture of military force being brought to bear against private individuals. *See infra* Section IV.A.

245. Baltimore Maryland Gazette (June 3, 1788), *in* 12 DOCUMENTARY HISTORY, *supra* note 227, at 744.

246. *Id.*

247. *See* Mortenson, *The Executive Power*, *supra* note 18, at 1381 ("[T]he drafters decided to give Congress the power to 'Declare' rather than to 'Make' war. One delegate worried that 'make war might be understood to 'conduct' it which was an Executive function.'").

change gave Congress "an *original* power" over the militia as opposed to a power dependent on state compliance.[248] Per this reading, had the constitutional wording remained as in the draft, the congressional power in the Calling Forth Clause would have remained merely that of requesting the assistance of the states. Although this reading likely puts too much weight on the term "aid," the general thrust seems correct. The calling forth power in the Constitution had already evolved substantially since Randolph's original proposal to let the President call for help from state governors.

Morris may have made one more change to the Clause. Comparing the draft referred to the Committee of Style with the version that emerged reveals that a serial comma disappeared in the portion of the Clause enumerating the reasons for which the Congress may provide for the calling out of the militia.[249] This may have been one of Morris' purely stylistic changes,[250] but the change allows a reading of the Clause that separates "execute the Laws" from "suppress insurrections and repel invasions."[251]

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The Federalists at the Convention played key roles in shaping the language of the eventual Calling Forth Clause. The delegates considered several alternatives to the Clause's ultimate wording, virtually all of which contained greater structural or substantive limitations than "execute the laws." Instead of choosing a phrase that implied limitations like "force of the union" or that contained them explicitly, the Convention produced a phrase which—as Jay's report underscores—was associated with ordinary law enforcement.

The Federalist aim was not to create a garrison state, but to supply the coercive force that the Confederation Congress lacked.[252] Frustrations with the states pushed the Federalists to adopt sweeping language granting the national government broad authority to use military force to carry out ordinary law execution. This was strong medicine. The best evidence suggests Federalists were untroubled

248. Baltimore Maryland Gazette (June 3, 1788), *in* 12 DOCUMENTARY HISTORY, *supra* note 227, at 744.

249. *Compare* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 209, at 570 ("To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; . . . ."), *with id.* at 595 ("To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions."). According to Madison's notes, the serial comma had already been omitted by the time it was debated on the Convention floor. *See id.* at 390. That said, there is good reason to exercise caution with Madison's notes. *See generally* MARY SARAH BILDER, MADISON'S HAND (2015).

250. As William Treanor has convincingly shown, there is good reason to think that Gouverneur Morris used his position on the Committee of Style to make substantive changes to the final document. These changes were subtle—and could easily be missed by a casual observer—but according to Treanor they provide textual support for a Federalist reading of the Constitution. *See generally* William M. Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1 (2021).

251. *Cf.* O'Connor v. Oakhurst Dairy, 851 F.3d 69, 70–72 (1st Cir. 2017) (discussing statutory ambiguity created by the omission of a serial comma).

252. *See* FEDERALIST NO. 21 (Alexander Hamilton). Though, of course, the country being a slaveholding society was in many ways already a garrison state. *See* ANDERSON, *supra* note 109.

by a national government with vast implied and unenumerated powers,[253] and the evidence marshaled here suggests they were similarly unperturbed by an open-ended grant of coercive force to carry these powers into effect. If Congress could be relied upon to exercise broad legislative authority, then it could be similarly entrusted with controlling the uses of the militia.

IV. RATIFICATION

Looking back to the body of state and colonial laws regulating the use of the militia in Part II reveals that a provision simply allowing the use of the militia to "execute the Laws" was unprecedented. The consternation of Antifederalists who read the provision and the evasiveness of Federalist arguments in its defense should dispel any lingering doubt that the founding generation understood the Calling Forth Clause as a source of open-ended and undefined authority. Contemporary accounts have largely downplayed this dynamic. Madison looms large in present-day histories of the Calling Forth Clause, with many scholars uncritically crediting his limited reading of the Clause.[254] Focusing too narrowly on the Virginia ratification debates conveys the mistaken impression that a consensus existed among delegates that the Clause only concerned cases of internal violence or resistance that did not reach the level of "insurrection." If one widens the aperture and looks at the larger ratification debates, a different picture emerges. The picture is one of the Federalists on the back foot trying to defend a Clause that is textually incredibly broad.

A. Widening the Aperture: The Ratification Debates

The Antifederalist argument centered on two readings of the Constitution, which were not always separated in their own writings. The first was that the Constitution simply *allowed* the military enforcement of laws. The second was that the Constitution would *only* be enforced by the militia. Although the second argument appears more of a stretch, it possessed more rhetorical force.

One of the opening salvos came from the writer Brutus. Brutus—possibly the New Yorker Melancton Smith[255]—argued that the new republic would be too large to obtain the support of the people; therefore, it would have to establish "an armed force to execute the laws at the point of the bayonet."[256] According to

253. *See, e.g.*, Mikhail, *supra* note 24, at 1070, 1079.

254. *See* Banks, *supra* note 21, at 54 ("Madison explained that the federal authority to call forth the militia would only be exercised when the civil power was insufficient."); Hirsch, *supra* note 56, at 930 nn.72–73 (relying on Madison and Nicholas) ("[Nicholas] went on to explain why this power was necessary in case the civilian law enforcement mechanisms were inadequate."); Mazzone, *The Commandeerer in Chief, supra* note 39, at 307–08; Mazzone, *Military Force*, *supra* note 39, at 375 n.27; *see also* Bybee, *supra* note 21, at 37; COAKLEY, *supra* note 54, at 17; Brook, *supra* note 21, at 1009 n.50.

255. *See* William M. Treanor, *The Genius of Hamilton and the Birth of the Modern Theory of the Judiciary in* CAMBRIDGE COMPANION TO THE FEDERALIST 464–65 (Jack Rakove & Colleen Sheehan eds., 2020).

256. Brutus I, New York Journal (Oct. 18, 1787), *in* 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 103, 113 (John P. Kaminski et al. eds., 2009) [hereinafter 19 DOCUMENTARY HISTORY].

Brutus, the Constitutional Convention had framed the Calling Forth Clause in anticipation of this eventuality.[257] He went on to label the power to use the militia to execute the laws "novel," and he asserted that "free governments" had always depended on the posse comitatus.[258]

A related attack came from Federal Farmer, who argued that the Constitution showed a dangerous preference for enforcement by the militia over the traditional institution of the posse comitatus.

> I see no provision made for calling out the *posse commitatus* for executing the laws of the union, but provision is made for Congress to call forth the militia for the execution of them—and the militia in general, or any select part of it, may be called out under military officers, instead of the sheriff to enforce an execution of federal laws, in the first instance and thereby introduce an entire military execution of the laws.[259]

Others echoed these fears. One critic opined, "[t]his section will subject the citizens of these states to the most arbitrary military discipline."[260] Another commentator argued that the "execute the Laws" provision was meant to turn the militia into the enforcement arm of the national government.[261]

In the face of attacks aimed squarely at the Calling Forth Clause, Federalists did not argue that the Constitution *prohibited* the use of the militia to execute the laws in the first instance. Instead, they adopted a bevy of arguments that avoided Antifederalist concerns as opposed to addressing them head on. They argued that

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257. Brutus IV, New York Journal (Nov. 29, 1787), *in* 19 DOCUMENTARY HISTORY, *supra* note 256, at 317 ("If then this government should not derive support from the goodwill of the people, it must be executed by force, or not executed at all; either case would lead to the total destruction of liberty. The convention seemed aware of this, and have therefore provided for calling out the militia to execute the laws of the union.").

258. *Id.*; *see also* A Farmer II, Baltimore Maryland Gazette (Feb. 29, 1788), *in* 11 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 325, 338 (John P. Kaminski et al. eds., 2015) [hereinafter 11 DOCUMENTARY HISTORY] ("But perhaps standing troops may be wanted to suppress *domestic* insurrections? . . . I never wish to see any measure of government enforced by arms, which the yeomanry of the United States will not turn out to support."); Minority Report of the Pennsylvania Convention, *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 617, 637 (Merrill Jensen et al. eds., 1976) [hereinafter 2 DOCUMENTARY HISTORY] (arguing that the usual method of executing civilian laws, the posse comitatus, would be ineffective because of the Constitution's unpopularity; therefore, the new federal government would have to rely on "a permanent standing army, and a militia").

259. Federal Farmer, Letter to the Republican (Nov. 8, 1787), *in* 19 DOCUMENTARY HISTORY, *supra* note 256, at 228. It seems that Federal Farmer was objecting primarily to the use of military force under military command to execute the laws, as opposed to a military force under control of a civil officer. *Id.*

260. Centinel III, Philadelphia Independent Gazetteer (Nov. 8, 1787), *in* 14 DOCUMENTARY HISTORY, *supra* note 114, at 55, 60.

261. Letter from Massachusetts (Oct. 24, 1787), *in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 373, 378 (Merill Jensen ed., 1978) [hereinafter 3 DOCUMENTARY HISTORY] ("I observe the expression used is: '*To execute the laws of the union*.' In fact it means, to convert the *militia* of the states into a *standing army* under the entire command and control of Congress; and I would only observe further, *that government* and *those laws* which require a standing army to enforce them ought not to be supported in any nation under Heaven.").

the new government would require ample force. They argued that structural checks would prevent the arbitrary and despotic use of the militia. And they argued that the new national government would not—as a prudential matter—use the militia to execute the laws in the first instance.[262]

The Federalist essays were no exception. The task of responding to Brutus and Federal Farmer fell to Hamilton. In Federalist 27, he addressed the contention that the Constitution would lead to military law enforcement. Tellingly, his response was not that the Constitution forbade such military execution, but that the constitutional structure would make such enforcement unnecessary.[263] Hamilton then addressed Brutus's more expansive military execution argument that the Constitution would *require* military execution of all laws. He refuted this charge by asserting that federal laws would be no worse than their state counterparts, thus resistance would not arise, and the government would see no need for military law enforcement.[264] He did imply that military force could deter

262. *See* Statement of Thomas McKean, *in* 2 DOCUMENTARY HISTORY, *supra* note 258, at 539 (arguing that "[c]ommon sense must oppose the idea" of Congress using the "execute the laws" provision to move troops "from one end of the continent to the other"); Statement of James Wilson, *in* 2 DOCUMENTARY HISTORY, *supra* note 258, at 577–78 (avoiding direct response to argument that Congress should not possess the "execute the Laws" power and instead arguing that militia system will promote energy and strength sufficient to deter foreign invasions); John Kean, Comments on the Constitution (Apr. 8, 1788), *in* 27 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 248, 248 (John P. Kaminski et al. eds., 2016) ("[T]he stability of the government & its tranquility are secured by a sufficient power to execute the laws—to defend it against exterior & interior violence—to collect its revenues & to administer justice with an impartial hand. . . ."); James Wadsworth and Oliver Ellsworth, Speeches in the Connecticut Convention (Jan. 7, 1788), *in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 273, 279 (John P. Kaminski et al. eds., 1984) (arguing against the desirability of enforcing compliance of recalcitrant states through military force); Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *in* 14 DOCUMENTARY HISTORY, *supra* note 114, at 202–04 (arguing that the militia power would be entrusted to Congress because it was popularly elected); Letter from New York (Oct. 31, 1787), *in* 3 DOCUMENTARY HISTORY, *supra* note 261, at 389 ("These states, not to mention other nations, have ever made the military power their last resort for executing their laws; this is seldom ever applied to, but on some occasions it is indispensably necessary."); A Native of Virginia: Observations upon the Proposed Plan of Federal Government (Apr. 2, 1788), *in* 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 655, 673–74 (John P. Kaminski et al. eds., 1990) [hereinafter 9 DOCUMENTARY HISTORY] (arguing the militia would not become an instrument of congressional despotism because the states retained the power of appointing officers).

An "Impartial Citizen" offered perhaps the most glib and unhelpful defense of the Clause. "The Congress can provide for calling forth the militia only in three cases, viz. to execute the laws of the Union, suppress insurrections, and repel invasions: Ought not these three things to be done?" An Impartial Citizen VI, Petersburg Virginia Gazette (Mar. 13, 1787), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492, 499 (John P. Kaminski et al. eds., 1988) [hereinafter 8 DOCUMENTARY HISTORY].

263. THE FEDERALIST NO. 27 (Alexander Hamilton). Hamilton contended that the Constitution, by making itself the supreme law of the land, would rely on the ordinary enforcement mechanisms of the states— the ordinary magistrates of each—to execute the laws. *See id.*

264. *Id.*

"turbulent faction[s]" and "irregular combinations," but he did not suggest that the "execute the Laws" provisions could *only* reach such instances of resistance.[265]

In Federalist 29, Hamilton discussed the power to call forth the militia to execute the laws of the union, but only to dispel the argument that this power foreclosed civil enforcement of federal laws.[266] Hamilton called the contention that federal officers would lack the power to call forth the posse comitatus "absurd" because the Necessary and Proper Clause provided the basis for this civil enforcement power.[267] He concluded, "[w]hat reason could there be to infer, that force was intended to be the sole instrument of authority, merely because there is a power to make use of it when necessary?"

The ratification debates do not reveal Federalist arguments that the Calling Forth Clause could only bear a narrow interpretation; rather, they show Federalists arguing the exact opposite. One Federalist writer, Aratus, endeavored to respond to the charge—advanced by the writer Centinel—that the Constitution would allow the collection of taxes by a standing army.[268] In response, he wrote the following:

> Should there ever exist an occasion to enforce these collections by arms, a provision is made for that purpose in another clause of the same section, authorizing congress 'to call for the militia to execute the laws of the union, suppress insurrections, and repel invasions;' so that the great standing army of congress, at least for domestic purposes, appears to be nothing more than the militia of the several states, which may be called out for the uses enumerated in the clause.[269]

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265. *See id.* Likewise, in Federalist 15, Hamilton argued that where a supranational government could only operate on the states, the law could *only* be enforced by resort to military force. THE FEDERALIST NO. 15 (Alexander Hamilton). He did not, however, argue that this resort to military force would be forbidden under the new Constitution. *See id.*

266. THE FEDERALIST NO. 29 (Alexander Hamilton). In explaining why congressional control over the militia would obviate the need for frequent resort to a standing army, Hamilton included a line that could be read to suggest "execute the Laws" only reached emergency situations. "If the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force." *Id.* One could assume that Hamilton—by referencing instances where the militia is called out "in support of the civil magistrate"—was referring to situations covered by the "execute the Laws" provision. The fact that Hamilton described these as "emergencies" would then indicate that "execute the Laws" was an emergency authority. *See id.* This is the wrong interpretation. By this point in the essay, Hamilton had only discussed "insurrection" and "invasion," and had not yet mentioned the use of the militia to "execute the laws." *See id.* Furthermore, as shown in Part II, recent state laws had allowed the civil magistrates to call forth military aid to face "insurrections." *See supra* notes 113–20 and accompanying text. Thus, when Hamilton referenced "emergencies" that civil magistrates could call on military force to deal with, the inference is at least as strong that he was referring to insurrections.

267. THE FEDERALIST NO. 29 (Alexander Hamilton); *see* Kopel, *supra* note 135, at 794; COAKLEY, *supra* note 54, at 18.

268. Aratus, *To the People of Maryland*, Nov. 2, 1787, *in* 11 DOCUMENTARY HISTORY, *supra* note 258, at 37; *see* Centinel I, Philadelphia Independent Gazetteer, Oct. 5, 1787, *in* 14 DOCUMENTARY HISTORY, *supra* note 114, at 333 ("[T]he collection would be enforced by the standing army, however grievous or improper they may be.").

269. *See* Aratus, *supra* note 268, at 37.

This is a startlingly frank admission that text of the Clause allows the federal government to use the militia to execute the laws in the first instance, before any violence arises. For Aratus, the fact that this could be done by the militia—not by a standing army—was reason for reassurance, not alarm.[270] The image of a federal military force collecting taxes would continue to reappear in debates on the Constitution.[271] The records of one political club show its members understanding "execute the Laws" to describe ordinary law enforcement.[272] One member worried that, under the Clause, "the Milita may be called to enforce the execution of a Writ," therefore he thought the phrase should be "struck out."[273]

The ratification debates reveal what should be plain from the text of the Constitution: that the "execute the Laws" provision was understood to permit the use of the militia to carry out duly enacted laws. Federalists were forced to fall back on prudential arguments that the government would not replace civil law enforcement with the militia. They had to say the Clause would serve only as a last resort or that other structural features—the popular check of Congress or the democratic composition of the militia—would prevent wholesale military law enforcement.

B. The Virginia Ratification Convention Redux

With this backdrop in mind, we can now turn back to the Virginia ratification debates to better appreciate the strained arguments of the convention's Federalists.[274] The convention debated the Calling Forth Clause on June 14th, 1788. One delegate, Clay, asked why "the Congress were to have power to provide for calling forth the militia, to put laws of the Union into execution."[275] Madison responded by noting that resistance to the laws "ought to be overcome," and he opined that this was better done by the militia—"the people"—than by a standing army—"the regulars."[276] Plainly, Madison was trying to dodge the question.[277]

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270. *See id.*

271. The Political Club of Danville, Kentucky, Debates over the Constitution, Feb. 23, 1788 – May 17, 1788, *in* 8 DOCUMENTARY HISTORY, *supra* note 262, at 414.

272. *See id.* The Danville Political Club was a society in Mercer County, Kentucky, that advocated Kentucky statehood. *Id.* at 408–10. The members not only debated the Constitution but also proposed their own amendments. *Id.* Regarding the "execute the Laws" provision, one member proposed an amendment changing "execute" for "enforce obedience to." *Id.* at 413–14. A Mr. Muter objected to this on the grounds that enforcement by "the Civil power" through the use of the posse comitatus was sufficient. *Id.* at 414. This objection was met with the response that "[the posse comitatus] is to all intents a Military Force" and that "such force [was] necessary to enforce the Collection of Taxes." *Id.* This exchange suggests that the members understood "execute the Laws" to confer a military equivalent of the power to call on the posse comitatus.

273. *Id.* at 414.

274. This account consciously inverts the order in which Coakley presents the event from ratification. Whereas Coakley begins with the Virginia ratification debates, this Article ends with them. *See* COAKLEY, *supra* note 54, at 15.

275. 3 ELLIOT'S DEBATES, *supra* note 40, at 378.

276. *Id.*

277. *See id.*

Not letting go of the issue, Clay voiced the fear that the "execute the Laws" provision would lead to "military government."[278] He wondered why "this mode was preferred to the old, established custom of executing the laws."[279] A triumvirate of Madison, Randolph, and George Nicholas rose to the Clause's defense. Madison argued that as long as the civil enforcement system proved sufficient, military enforcement would remain unused;[280] Nicholas labeled the provision an "auxiliary power," not to be used unless "absolutely necessary;"[281] and Randolph emphasized that the provision neither forbade civil enforcement nor called for military execution "in all cases."[282] Like so many other Federalist arguments, these defenses amounted to the contention that—as a practical matter—the new federal government would not avail itself of the militia to execute the laws.

Tellingly, the trenchant textualist arguments at the convention belonged to the Antifederalists. Clay put the matter plainly. "[I]f it was meant that the militia should not be called out to execute the laws in all cases, why were they [at the Convention] not satisfied with the words, 'repel invasions, suppress insurrections'?"[283] He continued on by stating that he "thought [the] word insurrection included every opposition to the laws; and if so, it would be sufficient to call them forth to suppress insurrections, without mentioning that they were to execute the laws of the Union."[284]

Whether he knew it or not, Clay was on solid ground. Many contemporary dictionaries gave "insurrection" a broad meaning.[285] One even defined it as synonymous with a "riot."[286] Furthermore, as Part II shows, pre-1787 constitutions and statutes had used a variety of terms to denote resistance to the laws, with some relying solely on the term "insurrection" to refer to internal violence. Nevertheless, Madison responded that "[t]here may be a resistance to the laws which cannot be termed an insurrection."[287] He continued on to argue "that a riot

278. *Id*. at 384.

279. *Id*.

280. *Id*. ("[I]t was obvious to him, that, when the civil power was sufficient, this mode would never be put in practice.").

281. *Id*. at 392.

282. *Id*. at 400.

283. *Id*. at 407.

284. *Id*.

285. JOHNSON, *supra* note 34 (defining insurrection as a "seditious rising; a rebellious commotion"); NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY 431 (25th ed. 1775) (defining insurrection as "a rising against, a popular tumult, or [an] uproar"); THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY 462 (13th ed. 1768) (defining insurrection as "a rising, uproar, riot, or small sort of civil war or rebellion among the populace, upon account of something very disagreeable done or required by the magistrates"); *see also* JOHN ENTICK, ENTICK'S NEW SPELLING DICTIONARY 205 (William Crakelt ed., 1791) (defining the term as "a rebellion, sedition, commotion"); 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 515 (1775) (giving same definition as Johnson's dictionary).

Notably, the qualifier "rebellious" in Johnson's definition meant only "[o]pponent to lawful authority." JOHNSON, *supra* note 34.

286. *See* DYCHE & PARDON, *supra* note 285.

287. 3 ELLIOT'S DEBATES, *supra* note 40, at 408.

did not come within the legal definition of an insurrection. There might be riots, to oppose the execution of the laws, which the civil power might not be sufficient to quell."[288]

To the extent that Madison sought to imply that the "execute the Laws" provision was added to capture instances of violent resistance below the level of insurrection, this is clearly at odds with the drafting history. The phrase "execute the Laws" was a product of the effort to give the national government a general enforcement power. It had first appeared alongside the phrase "internal commotions," not insurrections. With "commotion" being a broad term to refer to violence and disorder,[289] Madison's statement regarding drafting intent does not hold water.

Debate on the Clause continued into the next day, this time with Patrick Henry leading the Antifederalist charge. Henry indicated that his side of the debate had yet to receive a "satisfactory" answer regarding the proper role of the militia in the execution of the laws.[290] Henry likened the Clause to a riot act, and he returned to the image of the tax collector coming to a citizen's door with the militia to execute the laws.[291]

Pressed, Madison advanced arguments in the alternative. He argued that a government required military force as a backstop to its civil enforcement system, he pointed to smuggling as an unlawful activity that could be reached by the Clause, and he asserted that southern states should be most interested in a strong congressional militia power.[292] Finally, he offered what some have considered the definitive reading of the Clause.[293]

> An act passed, a few years ago, in this state, to enable the government to call forth the militia to enforce the laws when a powerful combination should take place to oppose them. This is the same power which the Constitution is to have. There is a great deal of difference between calling forth the militia, when a combination is formed to prevent the execution of the laws, and the sheriff or constable carrying with him a body of militia to execute them in the first instance; which is a construction not warranted by the clause.[294]

Madison's proposed construction is almost certainly the narrowest to appear in the ratification debates, and it would have an extraordinarily limited reach.

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288. *Id*. at 410.

289. JOHNSON, *supra* note 34 (defining commotion as a "tumult; disturbance; combustion, sedition; public disorder; [or] insurrection").

290. 3 ELLIOT'S DEBATES, *supra* note 40, at 411.

291. *Id*. at 411–12 ("Look at the part which speaks of excises and you will recollect, that those who are to collect excises and duties, are to be aided by military force. . . . . Suppose an exciseman will demand leave to enter your cellar or house, by virtue of his office; perhaps he may call on the militia to enable him to go.").

292. *Id*. at 413–15.

293. *See* Mazzone, *The Commandeerer in Chief*, *supra* note 39, at 306 (describing the scope of the Clause in the same terms).

294. 3 ELLIOT'S DEBATES, *supra* note 40, at 415.

According to Madison, the Clause would prohibit even the use of the militia under a civil officer, so long as this was use "in the first instance." This would seemingly be more restrictive than the New York and Vermont laws which allowed the sheriff to bring the militia in executing writs on the mere "suspicion" of resistance or opposition. The idea that such extreme restrictions were implied in the short phrase "execute the Laws" strains credulity.

Moreover, the possible laws that Madison referenced offer—at best—poor support for his argument. Two years earlier, Virginia had enacted a statute for the suppression of any "riot, assembly, or rout of people against the law."[295] However, this had specifically allowed the sheriff to "come with the power of the county," not to call out the militia. It also specified that the disturbance had to occur "against the law," as opposed to just stating the militia could be used to "execute the law." An older Virginia law had been directed at "combination[s] to hinder by force and violence, the execution and survey of legal land warrants." However, this act had directed justices of the peace and "other civil officers" to suppress this violence.[296]

If the Constitutional Convention had sought to establish only a narrow power to suppress certain violent disturbances below the level of insurrection, then it chose the worst wording to do so. Much more probably, the Clause's drafters created an expansive and undefined power giving Congress substantial leeway to decide when to deploy the militia. The history of the Convention shows that Federalists—Wilson and Morris in particular—played key roles in choosing the words constituting the ultimate version of the Clause. Madison was thus left in the awkward position of defending language that was significantly more open-ended than he would have liked.

C. Execute the Laws, By Whom?

A feature of the ratification debates to keep in mind is that discussions of the Calling Forth Clause did not automatically assume that the calling forth power would be delegated to the President. Both Federalists and Antifederalists seem to have understood the Clause to represent a substantial font of power for Congress.

Detractors urged that the Clause put state militias under congressional—as opposed to presidential—control.[297] For instance, in the words of Patrick Henry, "[u]nder the order of Congress, [the militia] shall suppress insurrections.—Under the order of Congress, they shall be called to execute the laws."[298] Henry also described the Constitution as giving Congress the "power to call [the militia] out, and to provide for arming, organizing, and disciplining them."[299] Although Henry

295. Act of Dec. 4, 1786, ch. 48, 1786 Va. Acts 34, 34.

296. Act of Oct. 3, 1779, ch. 21, 10 Va. Acts 111, 112.

297. Letter from Massachusetts (Oct. 24, 1787), *in* 3 DOCUMENTARY HISTORY, *supra* note 261, at 378 ("'To *execute the laws of the union*'. . . means, to convert the *militia* of the states into a *standing army* under the entire command and control of Congress . . . .").

298. 3 ELLIOT'S DEBATES, *supra* note 40, at 411.

299. *Id.*

opposed ratification, there is no reason to think he misunderstood the Clause's plain meaning. Federalist supporters also described the Clause as conferring a congressional power. One Federalist described it as giving Congress its own power over the process of law execution. "[I]f Congress is invested with power to make laws, the power of executing laws in the most ample and effectual manner ought to be lodged there also."[300] One does not have to believe the Clause actually gave Congress the power to *execute* laws to see that commentators understood it to authorize significant congressional control over the process of execution.

What's more, Federalists, seeking to allay fears of congressional despotism, did not argue that for all practical purposes the President would exercise the calling forth power. Rather, they argued that other features of the constitutional system would restrain the hand of Congress.[301] Given the tendency of Federalists to argue practical realities elsewhere—notably that civil enforcement would be the norm—this absence is telling. It modestly indicates that participants in the ratification debates did not understand the Calling Forth Clause to necessarily require Congress to delegate the calling forth power to the President.

V. THE CALLING FORTH ACT OF 1792

The fear of military government that surfaced during the ratification debates helps explain early congressional hesitation to delegate the calling forth power.[302] The First Congress authorized the President to call forth the militia in some limited instances, and it empowered federal marshals to summon the posse comitatus, but little else.[303] This changed with the Calling Forth Act of 1792. Spurred on by the defeat of the St. Clair expedition,[304] the Second Congress granted the President the power to call forth the militia in response to a range of violent emergencies. However, it also imposed stringent procedural constraints on this power, including depriving the President of the ability to unilaterally call out the militia

300. Letter from New York, 24 (Oct. 31, 1787), *in* 3 DOCUMENTARY HISTORY, *supra* note 261, at 389.

301. A Native of Virginia: Observations upon the Proposed Plan of Federal Government (Apr. 2, 1788), *in* 9 DOCUMENTARY HISTORY, *supra* note 262, at 673–74.

302. With a fuller view of the history of the Calling Forth Clause and of state militia laws, congressional anxieties concerning the Clause suddenly seem much less mysterious. Based on their account, Banks and Engdahl are forced into the position of arguing that legislators forgot the settled meaning of the "execute the Laws" provision and that the Second Congress contained few delegates to the Constitutional Convention. *See* Banks, *supra* note 21, at 57; *see also* Engdahl, *supra* note 21, at 45.

303. *See* Act of Apr. 30, 1790, ch. 10, 1 Stat. 119, 121 (repealed 1795); Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73, 87. As Mortenson and Bagley note, the 1790 Act delegated broad power to the President; however, it also included the important substantive limitation that troops could only be mustered for "protecting the inhabitants of the frontiers of the United States." *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 278, 348 (2021) (citing the Act).

304. Matthew Waxman, *Remembering St. Clair's Defeat*, LAWFARE (Nov. 4, 2018, 9:00 AM), https://perma.cc/F8Y3-WB2G.

in some circumstances.[305] As the history uncovered in this Article reveals, these constraints were not uncommon at the time.

Other works have detailed the precise mechanics of the Calling Forth Act of 1792,[306] so it suffices here to briefly describe the Act's structure and important features. The first section allowed the President to call out the militia in the case of invasion, imminent danger of invasion, or insurrection against a state government.[307] In the latter case of insurrection, the President had to obtain the consent of the state legislature or the governor if the legislature was not in session. The second section empowered the President to call forth the militia when "the laws of the United States shall be opposed, or the execution thereof obstructed in any state."[308] This obstruction or opposition had to be from "combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act." Congress required that the President be notified of this opposition "by an associate justice or the district judge."[309] The President could then use the militia of the state where the resistance occurred to "suppress such combinations, and to cause the laws to be duly executed."[310]

The Act imposed additional requirements if the President needed to call out the militia from other states to suppress such combinations.[311] It also mandated that the President issue a dispersal proclamation in all cases,[312] and it contained a two-year sunset clause.[313] The Act was restrictive and evidenced distrust of the executive's domestic use of the military. However, these restrictions were not extraordinary in the sweep founding-era practice. As seen above, prior state and colonial laws displayed a strong trend against the unilateral exercise of the calling forth power.

Two of the Act's features are worth discussing in greater depth. First, the judicial notice requirement demonstrates the degree to which limitations on the President's power to respond to violent emergencies were accepted by the founding generation. Second, the Act's provision allowing federal marshals to execute the laws underscores the breadth of the Calling Forth Clause.

A. The Judicial Notice Requirement

The Act's most salient and startling feature by modern standards was its insertion of a judicial notice requirement between the President and the ability to use the militia.[314] This made the President's ability to respond to a crisis dependent

305. *See* Vladeck, *supra* note 11, at 613–16.

306. *See id*.; Vladeck, *supra* note 21, at 156–63; Engdahl, *supra* note 21, at 42–45; Barron & Lederman, *supra* note 21, at 962–63.

307. Calling Forth Act of 1792, ch. 28, §1, 1 Stat. 264, 264 (repealed 1795).

308. *Id*. § 2.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id*. §3.

313. *Id*. § 10 at 265.

314. *See* Waxman, *supra* note 21.

on the concurrence of a judicial officer.[315] If such a requirement were imposed today, some might argue that this unduly restricts the President's power under Article II to respond to an emergency or national security threat. However, the evidence from the time speaks to a widely shared understanding of this being consistent with the separation of powers.

The judicial notice requirement was proposed as an amendment by Representative Abraham Baldwin.[316] Although then a congressman from Georgia, Baldwin was born in Connecticut and attended Yale college. He was a chaplain in the Continental Army, and he studied law during his military service. Importantly, Baldwin had served in the Continental Congress under the Articles of Confederation, attended the Constitutional Convention, and signed the Constitution.[317] At the Convention, Baldwin cast a crucial vote that paved the way for the large state–small state compromise.[318] Following ratification, he won election as a Georgia representative to the First Congress.[319] He would be reelected to the House for another four terms, and twice more as a Senator.[320] Baldwin's amendment thus cannot be lightly dismissed as unreflective congressional overreach seeing as its author was both present at the Constitution's inception and active in the governance of the new nation.

Moreover, Baldwin and his congressional colleagues possessed ample notice that they did not have an unfettered ability to involve the judiciary in their statutory schemes. Shortly before the House of Representatives began its debate on the eventual Calling Forth Act, the President transmitted to the House one of the letters which form the core of *Hayburn's Case*. The letter explained the federal court's refusal to carry out the Invalid Pensions Act based in part on separation-of-powers concerns.[321] The Act had required the courts to make determinations about pensioner status, which could then be revised by the Secretary of War.[322] The courts resisted on the grounds that the Act imposed on them "business . . . not of a judicial nature" and because the Act allowed court judgements to be revised by the other branches.[323]

These concerns notwithstanding, Baldwin—and the rest of Congress—went right ahead and inserted the judicial notice requirement into the Calling Forth Act of 1792. What's more, the Court gave no indication that Congress had overstepped proper constitutional bounds. When George Washington sought judicial

315. *See* Vladeck, *supra* note 11, at 615.

316. 3 ANNALS OF CONG. 577 (1792).

317. *See Baldwin, Abraham*, HIST., ART & ARCHIVES, U. S. H.R., https://perma.cc/F73Z-3XJS.

318. DAVID O. STEWART, THE SUMMER OF 1787, at 109–10 (2007); *Abraham Baldwin: The Founding Father of Public Higher Education in America*, UGA TODAY (June 30, 2018), https://perma.cc/SM4T-PRCB.

319. *See Baldwin, Abraham*, *supra* note 317.

320. *Id.*

321. 3 ANNALS OF CONG. 572–73 (1792); *see* Hayburn's Case, 2 U.S. (2 Dall.) 408, 408 (1792).

322. *See* 3 ANNALS OF CONG. 572–73 (1792).

323. *See id.*; *see also* Mortenson & Bagley, *supra* note 303, at 344 (noting that the Supreme Court avoided definitively resolving the case).

notice under the Act some two years later, he brought his request to James Wilson, who was then a Supreme Court Justice. Wilson was also one of the signatories on the very same *Hayburn* letter discussed here (indeed, he had probably written it).[324] Moreover, as discussed above, Wilson had drafted the Calling Forth Clause. Instead of raising *Hayburn*-type objections, Wilson complied with the terms of the statute, and he issued the requisite notification for Washington to use the militia.[325]

What to make of these different outcomes? That the Calling Forth Act of 1792 did not yield another *Hayburn's Case* seems to reflect a shared understanding concerning the propriety of judicial involvement in decisions to employ the militia. After all, two prominent states with strong executives—New York and Massachusetts—had carved out involved roles for the judiciary in regulating the use of the militia in response to violent disturbances. New York reenacted its own judicial involvement provisions in 1793.[326] In doing so, the legislature retained the language of the 1786 Act, but it imposed an additional duty on judges to assess the sufficiency of available militia forces to suppress the insurrection and to request more troops if needed.[327] In an important respect, the New York and Massachusetts acts went further than the Calling Forth Act because they inserted judicial actors in the suppression of "insurrection." Thus, for the founding generation, hermetic separation of the branches was not a necessary feature of statutory schemes dealing with an executive branch's control over military force.

B. Federal Marshals

Although the earlier sections of the Calling Forth Act have received the bulk of scholarly attention, the Act's ninth section contains a highly instructive provision.

> That the marshals of the several districts and their deputies, shall have the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states.[328]

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324. *See* 3 ANNALS OF CONG. 573 (1792); *see also* Max Farrand, *The First Hayburn Case, 1792*, 13 AM. HIST. REV. 281, 284 (1908). Wilson also signed the Court's refusal to provide George Washington with an advisory opinion on the topic of U.S. neutrality. Letter from Supreme Court Justices to George Washington (Aug. 8, 1793), *in* 13 THE PAPERS OF GEORGE WASHINGTON, 1 JUNE–31 AUGUST, 1793, at 392–93 (Christine Sternberg Patrick ed., 2007).

325. Letter from James Wilson to George Washington (Aug. 4, 1794), *in* 1 AMERICAN STATE PAPERS: MISCELLANEOUS 85 (Walter Lowrie ed., 1834). Moreover, President George Washington diligently complied with the certification requirement. Letter from Henry Knox to George Washington (Aug. 4, 1794), *in* 16 THE PAPERS OF GEORGE WASHINGTON, 1 MAY – 30 SEPTEMBER, 1794, at 467–71 (David R. Hoth & Carol S. Ebel eds., 2011).

326. *See* Act of Mar. 9, 1793, ch. 45, 1792 N.Y. Laws 440, 448.

327. *See id.*

328. Calling Forth Act of 1792, ch. 28, § 9, 1 Stat. 264, 265.

This section should be understood as a delegation of the calling forth power as much as the Act's first and second sections. Although many states had only authorized sheriffs to use the posse comitatus to execute laws—which may or may not have included members of the militia[329]—some states like New York had empowered their sheriffs to call on the militia to assist with law enforcement. Thus, Congress was effectively giving federal marshals a power to call out the militia if the state in which the marshal was located authorized its sheriffs to rely on the militia in the process of enforcing and executing laws.

This is a good indication that Congress understood the "execute the Laws" provision to be broad.[330] Had Congress wished, it could have written the section in the same manner as the Judiciary Act of 1789, which more clearly evoked the posse comitatus.[331] Instead, Congress relied on state standards, meaning that in some cases federal marshals might partake in the calling forth power. Given that sheriffs were civil law enforcement officers, this statutory scheme further signals that "execute the Laws" could include the use of the militia in the ordinary process of law enforcement.

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For those espousing a narrow view of the "execute the Laws" provision, the Calling Forth Act of 1792 may seem like an effort by Congress to ensure that the President stays within constitutional bounds. One could argue the Act is probative evidence that the Constitution only allows the use of military force where the civil enforcement system fails. However, history counsels a different reading. The Calling Forth Act should be understood as Congress creating substantive boundaries on when the militia may be used in law enforcement pursuant to its power under the "execute the Laws" provision. This means that the "opposition" or "obstruction" of the laws specified in the Act are not evidence of a constitutionally-imposed minimum necessary to use the militia, but rather substantive categories invented by Congress.

VI. THE POWER TO CALL FORTH THE MILITIA TO EXECUTE THE LAWS OF THE UNION

Despite the militia's presence in the constitutional scheme, the institution has fallen out of style. Therefore, one might justifiably wonder at the contemporary relevance of an inquiry into the founding-era understanding of a power to regulate the deployment of this archaic body. Today, the National Guard is understood as

329. *See* Engdahl, *supra* note 21, at 32–35, 42–48 (discussing Mansfield's doctrine); *supra* notes 138–39 and accompanying text.

330. This is not to say that there weren't divisions within Congress. *See* 3 ANNALS. CONG. 579 (1792) ("Mr. Clark inquired whether the United States have a right to call on the justices of the peace to execute the laws of Congress? If they have not such rights, the amendment, so far as it respects those officers, is nugatory.").

331. Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73, 87 ("[H]e shall have power to command all necessary assistance in the execution of his duty . . . .").

the successor entity to the founding-era militia;[332] however, this Article's conclusions do not warrant a narrow application to just the National Guard. Even if the "execute the Laws" provision was not itself a crisis authority, plenty of the statutes discussed above explicitly addressed "rebellions" and "insurrections." They represent founding-era efforts to grapple with internal security threats,[333] and their lessons should be applied broadly to national security questions that implicate the separation of powers, in addition to those involving federal troops.

The first Section below discusses how the original understanding of the "execute the Laws" provision empowers Congress to allow the military execution of the laws with virtually no internal limitations. The second discusses how this view of history should inform our present-day concerns over the domestic use of military force. The third Section then explains how the founding-era understanding also permits stringent congressional and judicial restrictions on the executive branch's domestic use of military force.

A. Military Execution of the Laws

This Article shows that the founding generation understood the "execute the Laws" provision to have as broad a meaning as its plain text suggests. To impose a narrowing construction on the provision, one has to resort to the conclusory statements of select founders—Madison in particular—and disregard plentiful other evidence of original understanding.

The history makes a strong case for an original understanding of the Calling Forth Clause as a sweeping power without internally imposed constraints. Let's review the evidence. (1) The plain meaning of the word "execute" was as broad during the founding era as it is today.[334] (2) The phrase "execute the Laws" does not appear in eighteenth century militia acts as a term of art denoting violent resistance.[335] (3) State acts that only allowed the militia to be employed to overcome the obstruction of the laws stated so explicitly.[336] (4) Federalists at the Constitutional Convention had reason to give the national government a robust law execution power, and they played key roles in crafting the specific language of the Clause.[337] (5) During the ratification debates, commentators on both sides described a broad power under the "execute the Laws" provision.[338] And (6) the Second Congress enacted detailed procedural and substantive constraints on the President's power to call forth the militia to execute the laws in the Calling Forth Act.[339]

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332. *See* Perpich v. Dep't of Def., 496 U.S. 334, 340–47 (1990); Mullins, *supra* note 49, at 335–38 (describing evolution from militia to national guard).

333. *Cf.* Benjamin Wittes, *Revolutions Podcast,* LAWFARE (Sept. 24, 2013, 10:53PM), https://perma.cc/7E7V-HZTN ("What are revolutions, after all, but internal national security threats that come to fruition?").

334. *See supra* Part I (discussing Mortenson's work).

335. *See supra* Sections II.A.–C.

336. *See supra* Section II.C.–D.

337. *See supra* Part III.

338. *See supra* Part IV.

339. *See supra* Part V.

On the other side of the ledger stand two relevant—but ultimately unconvincing—pieces of evidence. (1) Madison stated that "execute the Laws" did not allow military execution of the laws "in the first instance." And (2) many preceding militia acts had been specifically aimed at "obstruction" of or "resistance" to the laws. Taking each of these objections in turn, we see they do not hold water.

First, if Madison's reading of the Clause is correct, then one would expect to find instances where "execute the Laws" meant putting down resistance to the laws. In statutes governing the militia, "execute the Laws" appears nowhere bearing this meaning. Instead, Jay used "execute the laws" to refer to the ordinary course of justice. Moreover, as Part IV demonstrates, Madison's argument at the convention is riddled with inconsistencies. Thus, as a textualist matter, there is little reason to credit his reading of "execute the Laws" to denote something akin to "overcome resistance to the laws." Madison could have been arguing that the Clause was only *intended* to be used in instances of resistance or where civil law enforcement proved insufficient. But this hardly captures the Federalist intent behind the Clause, and it fails to account for the Clause's capacious plain text.

The second objection stems from the realization that founding-era militia laws specified that the militia could only be employed as law enforcement in cases of "resistance," "obstruction," or suspicion of either. This might lead some to argue that the "execute the Laws" provision implicitly incorporates these restrictions. This reading remains substantially broader than the reading adopted by contemporary scholars, yet the best interpretation of the historical evidence suggests the provision is broader still. Simply put, the drafters of the Calling Forth Clause used a phrase that *differed* from prior militia laws. Instead of reading the Clause to implicitly incorporate restrictions contained in other laws, the more natural reading seems to be that the Clause does not contain these restrictions because it omits them.

Thus, this Article supports a consistent reading of "exec-" root words throughout the Constitution. In the Vesting Clause context, reading "executive" to mean solely the power to carry into effect legislative prescriptions appears to be a *limitation* on power.[340] In that case, such a reading denies the President wide ranging power to act contrary to duly enacted statutes in the areas of foreign affairs and national security.[341] But, in the context of the Calling Forth Clause, the same reading appears as an *expansion* of power because it gives Congress the ability to provide for the carrying out of laws through military force without preconditions imposed internally by the Clause.[342]

That the founding generation understood the Clause in this manner explains the vociferous resistance that the provision faced from Antifederalists during

340. *See* U.S. CONST. art. II, § 1.

341. *See* Mortenson, *Article II*, *supra* note 18, at 1175–88.

342. To be clear, this conclusion differs from Vladeck's, who notes that the Clause does not impose limits on the use of military force as a result of Supreme Court decisions subsequent to the founding. *See* Vladeck, *Domestic Commander in Chief*, *supra* note 29, at 1107. This Article, by contrast, argues that as a matter of *original meaning* the Clause does not contain substantive internal limitations.

ratification. It also explains why Congress imposed both substantive and procedural safeguards on the executive's use of the militia under the Calling Forth Act of 1792. And a broad militia power is consistent with the Federalist vision of a national government without precisely delimited powers.

This is not to say that Federalists affirmatively desired the military execution of the laws; however, frustration with the states led them to insert the strong medicine of the Calling Forth Clause into the Constitution. To them, the Clause would secure the republic against state resistance to the peace treaty with Great Britain. This motivation was in turn connected to the country's shameful legacy of slavery and the desire of some founders to re-enslave individuals they had held in bondage. Other Federalists were motivated by a desire to secure investments in western lands, a system with its own pernicious human toll.[343] The founders' entanglements with slavery and predatory land speculation should temper the quick resort to originalist methodologies. However, if one is committed to originalism, the history here suggests an open-ended power of Congress to allow the militia to execute federal laws.[344] Congress can authorize federal officers to use the militia in a support function analogous to the posse comitatus, or it can even authorize the militia to collect taxes. As the next Section will discuss, such close involvement of federal troops in civilian life presents a real and disturbing possibility.

B. Riots, Protests, and Pandemics

As mentioned in the Introduction, the government's response to the protests in the wake of George Floyd's murder and the events surrounding the January 6 attack underscore the danger of the domestic use of military forces. As numerous commentators have pointed out, this would occur under the Insurrection Act,[345] the successor statute to the Calling Forth Act of 1792.[346] At least one scholar has suggested that the scope of cases in which the President may deploy military

343. *See, e.g.*, Park, *supra* note 23, at 1102–10; K-Sue Park *Insuring Conquest: U.S. Expansion and the Indian Depredation Claims System, 1796–1920*, 8 HIST. PRESENT 57, 80 (2018).

344. Notably, this Article does not claim that the Calling Forth Clause provides constitutional permission to employ martial law. *See* LIEBER & LIEBER, *supra* note 81, at 255 ("Shays' Rebellion in Massachusetts, and the Whiskey Insurrection in Pennsylvania, were not cases of martial law, but were put down by the military power acting in subordination to, and in aid of, the civil . . . ."). Nothing in the history indicates that the "execute the Laws" provision allows the suspension of other constitutional restrictions, for instance those guaranteeing individual rights. *See* Vladeck, *Domestic Commander in Chief*, *supra* note 29, at 1102–03.

345. *See* GOITEIN & NUNN, *supra* note 3, at 20; Elizabeth Goitein, *Yes Trump Can Deploy Troops Suppress Protests*, BOSTON GLOBE (June 2, 2020, 2:00 PM), https://perma.cc/XL9W-HJUW; Steve Vladeck, *Trump's George Floyd Protest Threats Raise Legal Questions. Here's What He Can (and Can't) Do*, NBC NEWS (June 2, 2020, 3:38 PM), https://perma.cc/2R5F-CBCX; Scott R. Anderson & Michel Paradis, *Can Trump Use the Insurrection Act to Deploy Troops to American Streets?* LAWFARE (June 3, 2020, 8:47 AM), https://perma.cc/K9VN-P3HG.

346. GOITEIN & NUNN, *supra* note 3, at 7–8.

force under the Insurrection Act exceeds the constitutional authorization of the "execute the Laws" provision.[347]

Contrary to such claims, the evidence of original meaning discussed in this Article suggests that the modern-day Insurrection Act is on sound constitutional footing. The Act authorizes the President to use the military "to enforce [the] laws" whenever the President considers that "obstructions, combinations, or assemblages" make it "impracticable" to use the ordinary, civil methods of law enforcement.[348] Another provision allows the President to use military force to "suppress" any "unlawful combination, or conspiracy" that "opposes or obstructs the execution of the laws of the United States."[349] As broad as these delegations are,[350] they are still narrower than what an original understanding of the "execute the Laws" provision would permit. The same goes for the executive branch's longstanding view requiring the actual obstruction of the law or the breakdown of civil enforcement before the military may be brought out.[351] Both the statutes and the Department of Justice's interpretation require an element of forceful resistance—however small—that does not seem to be present in the original meaning of "execute the Laws."

As tempting as it may be to imagine that the sweeping power conferred on the President by the Insurrection Act violates internal constitutional restrictions, this is unfortunately not the case from the perspective of original meaning. As illustrated by the comments of the Federalist Aratus, the Clause would even allow the government to use armed federal troops to collect taxes.[352] This state of affairs should be concerning for those who worry about the application of military force to civilian life.[353] On the other hand, some might be cheered by the confirmation that the Constitution does not require violent disturbances before the federal government may deploy soldiers in response to natural disasters and global pandemics. The Stafford Act's authorization to use troops in federal disaster relief appears to rest on firm constitutional foundations.[354] Although the Stafford Act

347. *See* Banks, *supra* note 21, at 88 ("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.").

348. 10 U.S.C. § 252.

349. *Id.* § 253.

350. *See* Anderson & Paradis, *supra* note 345.

351. Memorandum from Steven G. Bradbury, Acting Assistant Attorney Gen., Office of Legal Counsel, for the Files (Oct. 6, 2008), https://perma.cc/NS36-PKDS.("[P]articular application of the Insurrection Act to authorize the use of the military for law enforcement purposes would require the presence of an actual obstruction of the execution of federal law or a breakdown in the ability of state authorities to protect federal rights.").

352. *See supra* notes 268–70 and accompanying text.

353. *See, e.g.*, William J. Perry, *Statement of William J. Perry*, POLITICO (June 4, 2020), https://perma.cc/7EFF-LYT6 ("It is both wrong and dangerous to threaten to deploy American soldiers against American citizens unless there is a complete breakdown of law and order in a state and the governor requests that assistance.").

354. *See* 42 U.S.C. § 5170b(c); JENNIFER K. ELSEA & R. CHUCK MASON, CONG. RSCH. SERV., RS22266, THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES 4 (2012) ("It provides statutory authority for employing the U.S. armed forces for domestic disaster relief. Permitted

on its own does not allow the use of federal troops in a law enforcement capacity, and the Insurrection Act—even at its most permissive extent—still requires a modicum of violent resistance to the laws, Congress would need only to authorize such a function. For instance, the original meaning of the Calling Forth Clause appears to pose no obstacle to Congress authorizing the use of military troops to enforce hypothetical federal quarantine restrictions.[355]

The constitutional permissibility of such broad authority to use military troops should worry us. After all, there is reason to be concerned over a President's potentially opportunistic, self-serving, or discriminatory use of the broad authority already conferred by Congress.[356] Fortunately, the founding-era history also reveals a rich tradition of legislative and judicial checks on the calling forth power. Congress and the courts are not powerless to act as constraints on executive branch decisions to exercise military force even in the event of an emergency.

C. The Power to Provide for Execution

The historical evidence marshaled above shows that the "execute the Laws" provision was not solely a crisis authority. Yet, perhaps surprisingly, founding-era practice still supports searching congressional and judicial involvement in the executive branch's use of military force even in times of crisis. The balance of Part II shows that pre-constitutional legislatures created detailed legal frameworks regulating the deployment of the militia in response to violent upheavals. These included delegating the calling forth power to lower ranked officers coupled with detailed reporting requirements; defining the substantive instances when officers could call out the militia; and requiring notification to the legislature. Most significantly, Massachusetts and New York created highly involved roles for judicial officers in the process of responding to a crisis.

Notably, this rich tradition of close legislative and judicial involvement was not confined to cases where the militia was engaged in the equivalent of ordinary law enforcement. The various statutes from the 1757 act of Parliament onward were addressed to "invasions," "rebellions," "insurrections," and the like. The Massachusetts and New York acts were designed to suppress "insurrections."

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operations include debris removal and road clearance, search and rescue, emergency medical care and shelter, provision of food, water, and other essential needs, dissemination of public information and assistance regarding health and safety measures, and the provision of technical advice to state and local governments on disaster management and control."); Mark P. Nevitt, *The Coronavirus, Emergency Powers, and the Military: What You Need to Know*, JUST SECURITY (Mar. 16, 2020), https://perma.cc/975N-HV5Y.

355. *See generally* Jesse T. Greene, *Federal Enforcement of Mass Involuntary Quarantines: Toward A Specialized Standing Rules for the Use of Force*, 6 HARV. NAT'L SEC. J. 58 (2015) (discussing legal issues relating to mass quarantine enforced by armed forces).

356. *See* GOITEIN & NUNN, *supra* note 345; Tsai, *supra* note 13, at 590–95; Stephen I. Vladeck, *Yes, Trump Can Invoke the Insurrection Act to Deport Immigrants: Congress Has Delegated Too Much Power to Presidents*, ATLANTIC (May 17, 2019), https://perma.cc/SU8R-QAX8; Scott R. Anderson, *The Constitutional Quandary Already at the Border*, LAWFARE (Jan. 22, 2019), https://perma.cc/F26H-XTSW.

Thus, defenders of preclusive presidential power cannot dodge the precedent of the Calling Forth Act of 1792 by asserting that the "execute the Laws" provision—under which Congress enacted its most restrictive procedural requirements—was not a crisis authority. Rather, the evidence from history supports deep legislative and judicial involvement in questions of internal national security.

As discussed, the Supreme Court has articulated a view that deference to the executive branch is appropriate in cases involving "national security."[357] It has stated that "courts must exercise the traditional reluctance to intrude upon the authority of the Executive in military and national security affairs."[358] This Article suggests at a minimum that courts should treat executive branch claims of deference based on "national security" with considerable skepticism. The insertion of judicial actors into the process of responding to violent emergencies and crises was quite familiar to the founding generation. Contrary to pronouncements from today's Court, founding-era history shows that courts were thought to have the "aptitude, facilit[y], [and] responsibility" for domestic national security.[359] As much as the Court may seek to avoid entanglement in questions of national security and crisis response, such avoidance appears at odds with a deep tradition dating back to the earliest days of the republic.

This Article also cuts against claims of a preclusive presidential authority in the area of national security. Proponents of presidential power have argued that the President possesses some area of exclusive authority in foreign affairs and national security into which neither the courts nor Congress may intrude.[360] Relatedly, Attorney General William Barr has argued that the President possesses an inherent executive power to meet domestic emergencies.[361] The history presented here suggests that—at least domestically—a power involving "national security" or "emergency" should not displace judicial review or congressional regulation. The history of the calling forth power suggests the founding generation understood these to be fully consistent with the separation of powers.

This Article shows that the Calling Forth Act of 1792 was not an anomaly. Instead, it emerged from a considerable foundation of intrusive legislative regulation of the calling forth power. This raises the burden for those who would look to history to justify capacious and preclusive presidential power in the national security sphere.

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357. United States v. Zubaydah, 142 S. Ct. 959, 967 (2022).

358. *Id.*

359. *See* Jesner v. Arab Bank, 138 S. Ct. 1386, 1414 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (quoting Chi. & S. Air Lines, Inc. v. Waterman S. S. Corp., 333 U. S. 103, 111 (1948)).

360. *See* Mortenson, *Article II*, *supra* note 18, at 1181–86 (describing a version of this view and listing proponents); *see also* Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1117 (2020).

361. *See* William P. Barr, Att'y Gen., Dep't of Just., 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society's 2019 National Lawyers Convention (Nov. 15, 2019), https://perma.cc/WQD8-DK73 ("A related, and third aspect of Executive power is the power to address exigent circumstances that demand quick action to protect the well-being of the Nation but on which the law is either silent or inadequate – such as dealing with a plague or natural disaster.").

CONCLUSION

The Calling Forth Act of 1792 contained a two-year sunset.[362] When the Act was replaced, Congress removed its more searching procedural constraints and has not seen fit to reinstate them.[363] This is a pity. As the constitutional history shows, the "execute the Laws" provision confers broad and open-ended authority without internal restraints. The willingness of the founding generation to adopt such a provision seems intricately tied to the belief that the courts and Congress could conduct searching oversight and control of the executive branch's domestic use of military force. Judicial and congressional abdication of this role imperils this balance.

As the COVID-19 pandemic revealed, the government will face emergencies that do not involve violent resistance to the laws but could benefit from a response that employs the full panoply of federal resources, including the U.S. military. At the same time, the government's response to the George Floyd protests starkly illustrates the perils of applying military and militarized force to civilian life. And President Trump's actions during the January 6 insurrection underscore the danger of committing vast authority over internal military force to a single individual.

The founding-era understanding of the "execute the Laws" provision empowers the government as a whole to meet internal crises. Although the President remains the commander in chief, the burden rests with Congress to impose adequate substantive and procedural constraints on its delegations of power. Likewise, the courts should not abstain from scrutinizing crisis measures or simply defer to executive authority. Congressional and judicial abstention is not only normatively undesirable but also goes against a rich, founding-era tradition of inter-branch involvement in regulating the domestic use of military force.

362. Calling Forth Act of 1792, ch. 28, § 10, 1 Stat. 264, 265.
363. *See* Vladeck, *supra* note 11, at 616.