REPORT DOCUMENTATION PAGE	*Form Approved* **OMB No. 0704-0188**

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Washington Headquarters Service, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188) Washington, DC 20503.
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1. REPORT DATE *(DD-MM-YYYY)*	**2. REPORT TYPE**	**3. DATES COVERED** *(From - To)*
19-05-2019	Major Report/Capstone	

4. TITLE AND SUBTITLE
"Passé" Comitatus?: An Overview of the Limitations on the Employment of United States Military Forces to Enforce Domestic Law

5a. CONTRACT NUMBER

5b. GRANT NUMBER

5c. PROGRAM ELEMENT NUMBER

6. AUTHOR(S)
Hein, Jonah A., LT

5d. PROJECT NUMBER

5e. TASK NUMBER

5f. WORK UNIT NUMBER

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)

8. PERFORMING ORGANIZATION REPORT NUMBER

9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)
Civilian Institutions Office (Code 522)
Naval Postgraduate School
1 University Circle, Herrmann Hall Rm HE046
Monterey, CA 93943-5033

10. SPONSOR/MONITOR'S ACRONYM(S)
NPS CIVINS

11. SPONSORING/MONITORING AGENCY REPORT NUMBER

12. DISTRIBUTION AVAILABILITY STATEMENT

Approved for public release; distribution is unlimited

13. SUPPLEMENTARY NOTES

14. ABSTRACT
This paper traced the history of the employment of the armed forces to enforce domestic law in the United States. It analyzed periods in American history where military units were heavily involved in enforcing domestic law, as well as periods where such use ebbed; further, it considered pertinent statutory authority, including the Insurrection Act and Posse Comitatus Act. Finally, it concluded by summarizing the present state of the law and highlighting factors which will influence the domestic employment of the armed forces in the future.

15. SUBJECT TERMS
Posse Comitatus, Insurrection Act, law enforcement, domestic military operations

16. SECURITY CLASSIFICATION OF:			**17. LIMITATION OF ABSTRACT**	**18. NUMBER OF PAGES**	**19a. NAME OF RESPONSIBLE PERSON**
a. REPORT	**b. ABSTRACT**	**c. THIS PAGE**			**19b. TELEPONE NUMBER (*Include area code)***
U	U	U	UU	31	

Standard Form 298 (Rev. 8-98)
Prescribed by ANSI-Std Z39-18

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“Passé” Comitatus?

An Overview of the Limitations on the Employment of United States Military Forces to Enforce Domestic Law

Jonah Hein

Professor A.E. Dick Howard

Constitutionalism: Nation, Culture, and Constitutions

December 13, 2017

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I. Introduction

Drawing largely from English roots, early American constitutional philosophy displayed a marked aversion to the establishment of a standing army and its employment in domestic situations to enforce the law. This aversion reflected a fear of the usurpation of power by military authority, which would result in a suspension of the limited, ordered government the Framers sought to ordain and protect. Later acts of Congress, such as the Posse Comitatus Act, sought to limit the circumstances in which the armed forces could be employed to enforce domestic laws. This deeply-rooted suspicion of military authority, combined with statutory limitations on domestic military operations, have affected public perceptions about appropriate domestic uses of the armed forces.

However, while the Framers were philosophically apprehensive about the domestic employment of the armed forces, the Constitution provided for domestic use of the militia in certain circumstances, reflecting practical concerns about federal authority in the young Republic. Beyond on this constitutional grant, early American history reveals that federal troops were employed to enforce laws and preserve order in numerous situations; further, their use was not limited to presidential direction, but was often undertaken at the request of a local federal or state official.

The use of federal military forces to enforce domestic law peaked following the Civil War, with the former Confederate states divided into military districts and occupied by federal troops. Throughout the Reconstruction, the armed forces played an active role in combatting the Klu Klux Klan and upholding equality-based legislation in the Southern states. However, as the Southern states regained their political power, they sought to limit the practice of using military forces in domestic roles, culminating in the Posse Comitatus Act in 1878.

While Posse Comitatus Act drastically reduced the frequency and scope of domestic military operations to enforce the law, it did not bar continued resort to military force in certain situations. From the late 19th through the 20th centuries, Presidents continued to invoke the Insurrection Act and other statutory authorities to suppress rioting and break up strikes. Notably, Presidents employed the armed forces to enforce Supreme Court racial integration efforts and protect civil rights protestors.

The terrorist attacks of September 11, 2001 radically altered conventional understandings of the limitations of the Posse Comitatus Act. Unlike previous conflicts, the "War on Terror" has been waged against enemies hiding among civilian populations on both foreign and domestic soil, prompting a reevaluation of the use of the armed forces in the domestic United States.

After analyzing the historic background of the limitations on employment of the armed forces to enforce domestic laws, this paper will assess the future trajectory of their continued use for this purpose. Finally, this paper will conclude by examining whether the proposed trends of domestic military employment are in harmony with the Framers' purpose and intent for the armed forces at the creation of the United States.

II. Historical Attitudes Towards Domestic Use of the Military

American aversion to the domestic employment of the armed forces follows a tradition that was born in England and took root in the political philosophies of the Constitution's Framers.[1] In both countries, abuses of the rule of law through military forces led to express prohibitions on the use of military force in domestic settings.[2]

a. England

Early English restrictions on the use of the armed forces to enforce domestic law appeared in the form of protections against martial law, affirming legal process available to all men prior to forfeiture of their life, liberty or property,[3] an idea which evolved into the concept of "due process of law."[4] This restriction arose in response to royal employment of the "Assize of Arms," royal decrees which required all men to maintain armor and weapons and appear upon call to serve a

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[1] Charles Doyle and Jennifer Elsea, Cong. Research Serv., R42569, The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law, 1 (2012).

[2] Id. at 1-4.

[3] Magna Carta, ch. 39 (1225), *reprinted in* William F. Swindler, Magna Carta, Legend and Legacy 315-16 (1965) ("No freeman shall be taken, or imprisoned, or be disseised of any freehold, or liberties, or free customs, or outlawed, or banished, or in any other way destroyed, nor will we go or send against him, except by the lawful judgment of his peers or *by the law of the land*." (emphasis added)).

[4] The Statute of the Twenty-Eighth Year of King Edward III 1354, 28 Edw. 3 c. 3, *reprinted in* 1 Statutes of the Realm, 1235-1377 at 345 (1810) ("That no Man of what[ever] Estate or Condition that he be, shall be put out of land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.").

royal representative in enforcing the domestic law.[5] These ad hoc forces (*jurata ad arma*) were employed to seize individuals and deliver them to the local sheriff, where they were held until their fate was decided.[6] Opposition to the practice of *jurata ad arma* and summary proceedings by military court were key factors in the development of due process of law.

Several centuries later, the distinction between due process of law and martial law again arose during the reign of Charles I. To support a continental war, Charles I levied a number of loans and quartered military forces in private homes along the southern English coastline.[7] In response to riots and default on the loans, he declared martial law and used the troops to arrest violators, who were tried by military courts.[8] In response, Parliament demanded additional protections against similar royal abuses, resulting in the Petition of Right of 1628.[9] On the issue of military force, the Petition of Right requested that "your Majesty would be pleased to remove the said Souldiers and Mariners [from private homes] and that your people may not be soe burthened [burdened] in tyme to come. And that the aforesaid [military] Comissions, for proceeding by Martiall Lawe, may be revoked and annulled."[10] In subsequent decades, continued abuses by the Crown prompted Parliament to strip Charles I of command of the military, which precipitated the English Civil War and the King's execution by revolutionary forces.[11] Following the English Civil War and restoration of Charles II to the Crown, the *jurata ad arma* lacked statutory basis, leading Parliament enact a new militia law governing the *jurata ad arma* (by this point referred to as the *posse comitatus*), under which these militia groups were organized on a city or county basis.[12] Notably, Parliament conceived this new militia as performing two distinct functions: as a militia, it

[5] David Engdahl, Soldiers, Riots, and Revolution: The Law and History of Military Troops and Civil Disorders, 57 Iowa L. Rev. 1, 3-4 (1971).
[6] Id. at 4.
[7] Id. at 10. See also Jack Landau, Magna Carta Turns 800: An Anniversary Worth Remembering, 75 Or. St. B. Bull. 17, 20 (2015).
[8] Engdahl, supra note 5, at 10.
[9] Doyle, supra note 1, at 3.
[10] Petition of Right 1627, 3 Car. 1 c.1, § 8, *reprinted in* 5 Statutes of the Realm 23, 24 (1819).
[11] Engdahl, supra note 5, at 13-14.
[12] Id. at 15.

could be called out to suppress "Insurrection, Rebellion, or Invasion"; however, in a *posse comitatus* role, it operated under civilian law and afforded due process of law to offenders.[13]

Despite these restrictions, Parliament grew alarmed at the practice of Charles II and his successor, James II, of maintaining a large standing army without parliamentary assent. This tension with the Crown came to a head with the Glorious Revolution of 1688, which ousted James II from the throne.[14] Following his ouster, the English Bill of Rights, to which William of Orange and his wife Mary assented in order to assume the throne, cemented the requirement that maintenance of a standing army required the assent of Parliament and that there was no royal prerogative to assert martial law.[15]

Thus, by the end of the 17th century, English political thought evinced a strong aversion to the domestic use of the armed forces to enforce royal prerogatives and suspend due process of law. This suspicion of military authority soon traveled across the Atlantic and took root in England's American colonies.

b. American Colonies/United States

While colonial feelings towards the use of the military to enforce domestic law largely reflected contemporary English attitudes, opposition to the presence of English armed forces was ignited by the Quartering Act of 1765, which required colonists to provide quarters for English troops stationed in the colonies.[16] Such action ran counter to the protections that colonists believed they had been afforded by the Petition of Right; further, unlike the deployment of troops during the French and Indian War, these forces were deployed not to protect the civilian population, but to police it.[17] The English army was used against rioters in New York in 1766 and Boston in the later

[13] Id.
[14] Id. at 15-16.
[15] Bill of Rights 1689, 1 W. & M. c. 2, *reprinted in* 6 Statutes of the Realm 142, 143 (1688) ("That the pretended Power of Suspending the Laws or the Execution of Laws by Regall Authority without Consent of Parlyament [Parliament] is illegal. . . That the raising or keeping of a standing army within the Kingdome in time of Peace, unless it be with Consent of Parlyament, is against Law.")
[16] Id.
[17] Doyle, supra note 1, at 4. See also Hiller B. Zobel, The Boston Massacre 135 (1987) ("The soldiers, one ought always to remember, went into Boston not as an occupying army but rather as a force of uniformed peace-keepers, or policemen. Their role as even the radicals conceived it was to assist the executive and if necessary the courts to maintain order.")

part of that decade.[18] In the latter case, an impromptu scuffle between a sentry and passing civilians erupted into a disaster, as responding English soldiers fired on the colonial crowd, killing five in what was labeled the "Boston Massacre."[19] This escalating pattern of abuses did not pass unnoticed by the colonial leaders; indeed, six years later, the Continental Congress highlighted the domestic employment of English troops in grievances listed in the Declaration of Independence.[20]

Colored by the events leading to American Revolution, including the use of English troops to enforce the law against the colonists, it is unsurprising that prominent Framers harbored a deep suspicion of a standing army and its inevitable domestic employment. James Madison noted, "[a] standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale, its consequences may be fatal. On any scale, it is an object of laudable circumspection and precaution."[21] Others, including Thomas Jefferson, opposed the maintenance of a standing army completely, fearful that it would be employed domestically to trample individual liberty: "Standing armies [are] inconsistent with [a people's] freedom and subversive of their quiet."[22] The culmination of this aversion to the domestic employment of the armed forces came in the Articles of Confederation, which resolved that the armed forces assembled during peacetime would be no more than absolutely necessary for the common defense and comprised of the state militia, rather than a professional, federal military.[23]

III. References to Domestic Military Employment in the Constitution

Despite philosophical opposition to the maintenance of a standing military force and its domestic use to enforce the laws, the shortcomings of the Articles of Confederation prompted the

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[18] Engdahl, supra note 5, at 24 ("The last die was cast when two regiments of troops were quartered in Boston at the end of the decade. The assemblage of military troops for control of possible civil disorders aggravated the discontent, not only because it affronted the English tradition against domestic use of military troops, but also because it was without warrant in the charter of Massachusetts Bay.").

[19] Id. at 24-25.

[20] "He has kept among us, in times of peace, standing armies without the consent of our legislature. He has effected to render the military independent and superior to the civil power. He has [given assent] . . . For quartering large bodies of armed troops among us." The Declaration of Independence paras. 13-16 (U.S. 1776), *reprinted in* The General Statutes and Codes of the State of Washington 739, at 740 (William Hill ed., 1891).

[21] The Federalist No. 41, at 262 (James Madison) (Modern Library ed., 1941).

[22] Thomas Jefferson, Draft Resolutions on Lord North's Conciliatory Proposal (1775), *reprinted in* The Papers of Thomas Jefferson, at 231 (Julian F. Boyd, ed., 1950).

[23] Articles of Confederation of 1778, art. VI, § 4, *reprinted in* The Revised Statutes of Kentucky, at 91 (1852).

Framers to revisit the domestic use of the armed forces at the Constitutional Convention. Several delegates sought to expand the ability of the national government to "call forth the force of the Union against any member of the Union for failing to fulfill its duty,"[24] arguing that the lack of national power to suppress rebellions was a major defect in the Articles of Confederation.[25] While the convention largely agreed that the federal government should be granted the power to suppress rebellions and insurrections, a split developed on whether this objective could be satisfied by federal control of the various state militia, or whether a professional, standing federal military was required.[26] Reflecting a strong preference for ad hoc militia forces, the Convention authorized Congress "[t]o provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."[27]

Beyond this grant of congressional power, the drafters further contemplated domestic use of military force in Article IV, Section 4: "The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."[28] While "domestic violence" might seem to permit an expansive interpretation of the domestic use of military force, the Convention debates indicated that the phrase primarily referred to large rebellions on a scale comparable to foreign invasion, rather than low-order riots and lawlessness.[29] However, the final draft did not reflect this limited aim for the domestic use of military force, rendering the constitutional text subject to a broader interpretation that would permit

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[24] Engdahl, supra note 5, at 35-36.
[25] Id. at 36.
[26] Id. at 38. ("National regulation of the militia had been promoted as a means of avoiding the need for a standing army in peacetime, an evil which still evoked fears of a military government. Since opinions in the Convention had varied from a fierce distrust of standing troops to a complete lack of confidence in civilian militia, a committee composed of one member from each state had been named to consider the matter further.")
[27] U.S. Const. art. I, § 8, cl. 15.
[28] U.S. Const. art. IV, § 4.
[29] Engdahl, supra note 5, at 35-40 ("Their [the Convention's] records make it clear that when they provided for military control of 'domestic violence' they had in mind that sort of armed violence comparable to foreign invasion in its imperious assault on an established republican government, and that when they provided for the militia to 'execute the laws of the Union' they contemplated such armed resistance to law as would constitute treason.").

deployment of federal troops to "enforce the laws of the Union" and, upon invitation of the state government, to intervene in a state to protect it from "domestic violence."[30]

Against this seemingly broad grant of power to the federal government to deploy federal troops in domestic settings, other sections of the Constitution sought to preserve civilian control over the military and prevent usurpation of power by military authority. Specifically, Congress was authorized "[t]o raise and support armies, but no appropriation of money to that use shall be for a longer term than two years," thus requiring continual evaluation of the necessity of a standing military.[31] Additionally, Congress was empowered "[t]o make rules for the government and regulation of the land and naval forces," ensuring civilian control over the organization and discipline of any federal military force,[32] including the militia, when called into federal service.[33] Beyond the congressional power to organize, train, and equip the federal military, the President was installed as the commander-in-chief of the armed forces, including the militia in federal service.[34] Through these provisions, the Framers firmly established civilian control of any federal military (standing or federalized militia), while bifurcating the associated powers and responsibilities between the legislative and executive branches to forestall potential abuses of military power.

In sum, despite subordinating the federal military to civilian authority and ensuring that the requirement for funding and equipping a standing army would be regularly reviewed, the constitutional text addressed the possibility that federal military force could be domestically employed and explicitly authorized such force in certain situations; most strikingly, "to enforce the laws of the Union"[35] and to suppress "domestic violence" which threatened a state's republican form of government.[36] While the constitutional debates and drafts suggest that military force was only to

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[30] Id. at 40 ("While it is clear on careful examination that the Founding Fathers' intent was thus wholly in line with the ancient principle they had but recently fought to restore, they expressed it in words which were all too easily capable of bearing an entirely different conclusion.")
[31] U.S. Const. art. I, § 8, cl. 12.
[32] U.S. Const. art. I, § 8, cl. 13.
[33] U.S. Const. art. I, § 8, cl. 15.
[34] U.S. Const. art. II, § 2, cl. 1 ("The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States.").
[35] U.S. Const. art. I, § 8, cl. 15.
[36] U.S. Const. art. IV, § 4.

be employed against rebellions and insurrections rivalling the threat of a foreign invasion,[37] the vagueness of the actual text enabled a broad reading, with potentially expansive power for the federal government to employ federal troops to enforce and maintain domestic laws.

IV. Domestic Military Employment in the Early Republic

Despite the Framers' suspicion of military authority and aversion to the domestic employment of military force, feeble federal (and even state) governmental authority in the nascent United States rapidly prompted the federal government to authorize the domestic use of the military.[38] In its first session, Congress set about establishing federal crimes and authorized the President, through federal marshals, to enforce these laws.[39] Shortly thereafter, Congress enacted the Militia Act of 1792, which delegated authority to call forth the militia to the President and held the latter responsible for the federal duty to protect the states from insurrection and invasion.[40] While the first section of the Militia Act largely tracked constitutional guidance on domestic employment of the military, the second section drastically expanded the domestic situations in which military force could be leveraged.[41] Specifically, Section 2 stated:

> That whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals…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 . . . to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed.[42]

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[37] Engdahl, supra note 32.
[38] Doyle, supra note 1, at 5.
[39] Jay S. Bybee, Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Rule of the Domestic Violence Clause, 66 Geo. Wash. L. Rev. 1, 40-42 (1997).
[40] Id. at 41-42 (citing Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264, 264. ("That whenever the United States shall be invaded, or be in imminent danger of invasion . . . it shall be lawful for the President of the United States, to call forth . . . the militia . . . to repel such invasion . . . ; and in case of an insurrection in any state, against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened) to call forth . . . the militia . . . to suppress such insurrection."). Notably, this grant is similar to the congressional power authorized in Article IV, Section 4 of the Constitution, lending support to the argument that the use of "domestic violence" in that section is more akin to "insurrection" than a riot or domestic disturbance.
[41] Id. at 42.
[42] Id. (citing Act of May 2, 1792, § 2, 1 Stat. at 264.). Section 3 of the Act required the President, prior to using military force, to issue a proclamation commanding the insurgents to disperse and retire within a limited period of time. Act of May 2, 1792, § 3, 1 Stat. 264, 264.

Thus, the statute purported to authorize the President to call forth the militia in any circumstance where federal law was opposed by forces too powerful to be suppressed by judicial proceedings or the power of the federal marshals, permitting the domestic employment of military force in situations beyond those apparently considered by the Constitution's text. Further, the authority of the Militia Act augmented the common law power of the federal marshal to call on the *posse comitatus* and require all able-bodied citizens to aid the marshal in the enforcing federal law.[43] Following the grant of authority under the Militia Act, it was understood that the marshal's *posse comitatus* power included the ability to invoke military assistance; thus, the militia could be legally employed to enforce federal law via two methods: under presidential direction as an arm of the government (to repel invasions, suppress insurrections, and enforce federal law), or in support of the *posse comitatus* of the federal marshal (to support the marshal in efforts to enforce the law).[44] In other words, not only did the Militia Act broaden the authority of the President to call forth the militia in situations short of rebellion, it implicitly permitted lesser federal officials (specifically, federal marshals) to call out of the militia or seek federal military assistance to enforce the laws in their local jurisdiction.

Shortly after the enactment of the Militia Act, the new federal government faced its first significant test to its constitutional authority in the Whiskey Rebellion of 1794. In response to congressional attempts to levy an excise tax, four counties in Western Pennsylvania resisted paying the tax, assaulted federal officers, rioted, and burned federal buildings.[45] Rioters included the local militia, 7,000 of whom assembled and attempted to seize a federal fort in Pittsburgh.[46] The governor of Pennsylvania refused to call out the remaining state militia to enforce an unpopular federal law, forcing the local federal district judge to write a letter to President Washington requesting federal military aid.[47] Three days after receipt of the letter, the President issued the requisite proclamation

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[43] Doyle, supra note 1, at 5.
[44] Id. at 6.
[45] Frederick T. Wilson, Federal Aid in Domestic Disturbances, 1903-22, S. Doc. No. 67-263, at 26-27 (1922).
[46] Id. at 27.
[47] The letter noted that in the pertinent counties, "laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshal of that district." Id.

calling on the rioters to disperse and called forth 15,000 militia from the governors of Pennsylvania, Maryland, New Jersey, and Virginia.[48] Upon the failure of the rioters to disperse, the President issued a second proclamation announcing that he was deploying federalized militia and traveled to the militia's assembly point, where he assumed responsibility for preparing the arriving militia for an engagement with the insurgents.[49] Notably, even after the insurrection collapsed, Congress authorized the President, at his discretion, to station up to 2,500 militia in the rebellious counties for three months to ensure that federal laws were faithfully executed.[50]

Following the Whiskey Rebellion, Congress repealed the Militia Act and passed an amended version, which withdrew the ability of federal judges to request federal military forces from the President, preserving for the President alone the ability to determine whether a situation warranted the domestic employment of military force.[51] In 1799, the young federal government was again tested by popular revolt against a property tax in the form of Fries' Rebellion, which occurred in southeastern Pennsylvania.[52] Relying on reports of attacks on federal officials, President Adams called on the governor of Pennsylvania to provide militia forces for federal service and issued the requisite proclamation demanding the insurgents disperse.[53] Similar to the Whiskey Rebellion, the mere presence of federalized militia caused the rebellion to collapse.[54]

a. Insurrection Act

As the size of the federal army gradually increased through the first few decades of the Republic, Congress revised the Militia Act to reflect the increased capability of the standing, professional armed forces in quelling domestic disturbances; specifically, the Insurrection Act of 1807 authorized the President to call forth the militia, as well as the "land and naval force of the United States" to suppress insurrection and execute both state and federal law.[55]

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[48] Id. at 27-29.
[49] Id. at 30-31.
[50] Id.
[51] Id. at 34.
[52] Id.
[53] Id. at 34-35.
[54] Id. at 36.
[55] Id. (citing Act of March 8, 1807, 2 Stat. L., 443) ("That in all cases of insurrection or obstruction to the laws, either of the United States or of any individual State or Territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection or of causing the laws to be duly executed, it shall be

Shortly after the passage of the Insurrection Act, widespread resistance to the Embargo Act in Vermont led to the first domestic employment of the "regular" federal military forces. Faced with widespread smuggling in northern Vermont and rivalries between local militia forces, President Jefferson dispatched a detachment of federal artillery and ordered the militia discharged.[56] Federal troops quickly restored order to the region, prompting Congress to consider a blanket authorization for federal troops to enforce a nationwide expansion of the Embargo Act in 1809.[57]

Several decades later, rumors of slave revolts gripped the southern United States and prompted minor, but widespread deployments of federal troops throughout slave-holding states. Notably, many of these federal troops were employed at the request of local government officials, with the ultimate decision to deploy federal forces made by the local garrison commander.[58] Despite the dubious legality of these deployments, neither the local or federal governments questioned their validity.

While the numerous deployments of federal troops in the nascent Republic had largely occurred with the consent of the affected state, the Nullification Crisis of 1832 presented the first instance of outright defiance of federal authority by a state. In response to continuous federal tariffs, the South Carolina legislature declared the tariffs null and void, further stating that federal attempts to enforce the tariffs by military force would be met with armed resistance.[59] South Carolina's belligerency was met by an equally hostile response from President Jackson, who deployed additional federal military units to forts throughout Charleston harbor and sought authority from Congress to employ force to solve the crisis. At his urging, Congress passed a bill empowering the use of federal military force to maintain peace and enforce revenue laws, but also providing an "escape valve" for South Carolina by lowering the tariff rates.[60]

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lawful for him to employ, for the same purposes, such part of the land or naval force of the United States as shall be judged necessary, having first observed all the prerequisites of the law in that respect.")

[56] Id. at 42.

[57] Id. at 42-43.

[58] Id. at 45-46. For example, upon request from the mayor of Norfolk, the commandant at Fort Monroe dispatched federal troops to the scene of an alleged slave uprising. A few days later, a separate detachment was dispatched to New Bern to investigate another rumored revolt.

[59] Id. at 46-47.

[60] Id. at 48.

In the same decade, federal forces were often deployed to enforce the law at the specific request of state governments. In 1834, two companies of federal troops were sent to aid state civil authorities in quelling violence between Irish laborers working on the Chesapeake and Ohio Canal, helping to stabilize the situation and restore order.[61] Several years later, contested state legislative elections in Pennsylvania turned violent, prompting the governor to call out the local militia and request federal military forces.[62] While President Van Buren decided that the violence was not of a character that state authorities were inadequate to control, a local military commander without knowledge of the President's decision answered the governor's request and deployed federal troops, earning a reprimand from the War Department.[63]

On the borders of the United States, federal troops were frequently deployed to enforce the Neutrality Act in order to keep American citizens from interfering in the affairs of a foreign state. In 1836, the federal government deployed federal troops to the border with Texas in an attempt to prevent Americans from crossing to fight in the Texan War for Independence.[64] Further, in 1838, federal armed forces were stationed on the Canadian border in New York and Vermont to prevent American citizens from participating in a Canadian attempt to rebel against British rule, as well as to prevent British incursions into American territory in pursuit of the rebels.[65]

As the United States drew closer to the Civil War, rising tensions between abolitionists and pro-slavery supporters led to an increasing number of situations which prompted use of military force to enforce domestic laws. In particular, attempts by federal marshals to enforce the Fugitive Slave Act, which required them to capture and return slaves to their southern owners, were met with hostility and armed resistance in many Northern states. In Boston, armed mobs repeatedly stormed the holding areas where fugitive slaves were being held, spiriting the slave away to safety.[66] As federal marshals struggled to enforce the Fugitive Slave Act, the War Department directed the commanding officer of federal troops in Boston to prepare to place himself and his troops under the

[61] Doyle, supra note 1, at 10-11.
[62] Id. at 11.
[63] Id.
[64] Wilson, supra note 48, at 49-50.
[65] Id. at 52-53.
[66] Id. at 62.

command of the marshal as part of a *posse comitatus*.[67] Three years later, in response to massive riots concerning the arrest of a fugitive slave, the district judge invoked the War Department's direction, prompting the commanding officer in Boston to produce two batteries of federal artillery, as well as a detachment of marines and sailors from the Charlestown Navy Yard.[68] Combined with a large police force, federal military forces escorted the fugitive slave to a United States revenue cutter, which returned him to Virginia.[69] Against the background of continued widespread resistance to the Fugitive Slave Act, the Attorney General, Caleb Cushing, announced an expansive new doctrine regarding the domestic employment of federal military forces. Under the Cushing Doctrine, members of the federal military, by virtue of their duties as regular citizens, were subject to the request for *posse comitatus* assistance by the federal marshal.[70] Put another way, while the Insurrection Act placed certain limitations on the direct request for federal military assistance, the federal marshal could request the assistance of military members *as citizens*, thereby bypassing pertinent statutory requirements.[71]

Following the announcement of the Cushing Doctrine, Federal military forces were heavily involved in efforts to restore the rule of law in "Bleeding Kansas" in the 1850s, under the shadow of the looming Civil War. In response to armed bands crossing into Kansas from Missouri and spiraling violence between abolitionist and pro-slavery parties, President Pierce directed the commanding officer of Fort Leavenworth to supply military forces to the governor of Kansas to enable efforts to enforce domestic law.[72] Shortly thereafter, the governor requested and was supplied with federal cavalry and artillery forces, which confronted armed bands of Missouri militiamen and successfully convinced the groups to disband.[73]

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[67] Id. ("If…the marshal or any of his deputies shall exhibit to you the certificate of the circuit or district judge of the United States in the State of Massachusetts, stating that in his opinion the aid of a military force is necessary to insure the due execution of the laws, and shall require your aid and that of the troops under your command as part of the posse comitatus, you will place under the control of the marshal yourself and such portion of your command as may be deemed adequate to the purpose.").
[68] Id. at 64.
[69] Id.
[70] Doyle, supra note 1, at 17.
[71] Id.
[72] Wilson, supra note 48, at 69.
[73] Id. at 70.

V. American Civil War and Reconstruction

While the massive Civil War which wracked the United States from 1861 to 1865 will not be addressed in detail here, it is worth noting that on the eve of major hostilities, Congress made significant revisions to the Insurrection Act, widening the authority of the President to employ federal military forces domestically. Congress provided that the President could use federal military forces to enforce the laws or to suppress rebellion whenever:

> [B]y reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgement of the President of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any state…[74]

Through this revision, the bar to federal intervention was significantly lowered: where the original act referred to illegal activities "too powerful to be suppressed" by the ordinary course of judicial proceedings or by the powers of the marshal, the revised act only required that it be "impracticable" to enforce the laws in the ordinary course of judicial proceedings.[75] This expansive approach to the domestic use of military force provided President Lincoln the necessary legal justification to mobilize and lead Union forces to victory in the Civil War.

Following the Civil War, the Radical Republican Congress imposed outright military rule on the former Confederate states, dividing the South into military districts, governed by federal army commanders.[76] Given the extraordinary circumstances which led to the complete usurpation of civilian authority by federal military forces, the civil administration of the former Confederate states will not be addressed here; however, several instances in which federal troops were employed to enforce domestic law and preserve order are worthy of further examination.

Almost immediately after the Civil War, large-scale riots against newly-freed African Americans broke out, prompting the deployment of federal troops to protect lives and restore order: specifically, federal military forces were deployed in Norfolk, Memphis, and New Orleans at the request of the local mayors, who informed the federal commanders that local police forces were

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[74] Engdahl, supra note 5, at 55 (quoting Act of July 29, 1861, ch. 25, § 1, 12 Stat. 281, 281).
[75] Engdahl, supra note 5, at 56 ("[N]ow the President need not even decide that the ordinary civilian officials *could not* execute the laws—he need only decide that for them to do so was *impracticable*." [emphasis original]).
[76] Robert Coakley, The Role of Federal Military Forces in Domestic Disorders, 1789-1878, at 168 (1988).

inadequate to halt the violence.[77] Often, these requests came too late to prevent the murder of African Americans, prompting Congress to pass the Third Reconstruction Act, which authorized federal military commanders to suppress disturbances and enforce the laws at their own initiative, without awaiting a request from civil authorities.[78]

As sporadic attacks on African Americans grew in number and intensity, the attackers gradually coalesced into an entity known as the Klu Klux Klan (hereinafter "Klan").[79] As this movement spread throughout the former Confederate states, infecting newly constituted local police forces, civil authorities pleaded with the federal government to employ military force against the Klan.[80] Initially, the Attorney General, William Evarts, invoked the Cushing Doctrine, reaffirming the power of the federal marshal and local sheriffs to call forth citizens in the *posse comitatus*, and that the federal occupying troops, in their capacity as citizens, were available for the *posse*.[81] Discretion as to whether to deploy federal military forces was largely placed with the local federal commander, who would have the duty to judge the necessity of the request and deploy military forces appropriately.[82] Throughout the remainder of the 1860s, federal troops were widely deployed to fight the Klan in Tennessee and Louisiana.[83]

With the election of President Grant in 1868, Radical Republicans in Congress obtained a President more receptive to the domestic employment of federal military force. In 1870 and 1871, Congress passed three Enforcement Acts, primarily aimed at the Klan, which authorized federal troops to enforce civil rights in the South.[84] Specifically, Congress authorized federal marshals to directly summon "such portion of land or naval forces, or militia, as may be necessary" as a *posse comitatus*, without the need for Presidential authorization.[85] Almost immediately thereafter,

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[77] Id. at 273-284.
[78] Id. at 288.
[79] Id. at 299.
[80] Id. at 300.
[81] Id. ("And [Attorney General Evarts] held that the drafting of federal military personnel into a *posse* should be limited to 'rare cases of necessity' where state militia and local civilians proved inadequate or unwilling to form one suitable to help the marshal or sheriff enforce the law. But clearly it would permit at least limited use of troops against the Klan without the invocation of federal authority.").
[82] Id. at 301.
[83] Id. at 301-307.
[84] Id. at 308.
[85] Id. at 308-309.

President Grant issued a proclamation announcing his intent to enforce the Acts and informed military commanders throughout the South that they were free to assist civil authorities in implementing the provisions of the Acts.[86] As a show of force, federal troops focused on nine counties in South Carolina, where nearly 1,000 federal soldiers were deployed and arrested hundreds of suspected Klansmen.[87] The combination of the Enforcement Acts and the Cushing Doctrine largely represented the peak employment of federal military forces to enforce domestic laws. In a single military department (the Department of the South), the commanding general reported that federal troops had been deployed to enforce the laws over 200 times in 1871, and over 160 times the following year.[88]

a. Posse Comitatus Act of 1878

As civil authority was gradually restored in the former Confederate states, ex-rebels elected to state government began to resist the use of federal military forces to enforce domestic law. The resurgence of these officials, combined with a waning interest in military occupation by the federal government, prompted a gradual withdrawal of federal troops throughout the 1870s.[89] Reflecting the changing political fortunes of the time, in 1878, the House of Representatives attached a rider to an Army appropriations bill which significantly limited the domestic use of federal military forces.[90] Essentially, this act (subsequently called the "Posse Comitatus Act") precluded the ability of the federal marshal, or local/state officials, to call upon federal military forces to enforce domestic laws; however, presidential authority to deploy federal military forces under the Insurrection Act remained.[91] The Posse Comitatus Act, combined with subsequent military regulations designed to

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[86] Id. at 310.
[87] Id at 311-312.
[88] Id.
[89] Id. at 334.
[90] Doyle, supra note 1, at 19. "From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States as a *posse comitatus* or otherwise under the pretext or for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said forces may be expressly authorized by act of Congress; and no money appropriated in this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section; and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $10,000 or imprisonment not exceeding two years, or both such fine and imprisonment." 7 Cong. Rec. 3845 (1878).
[91] Coakley, supra note 82, at 344 ("The president's powers to use both regulars and militia remained undisturbed by the Posse Comitatus Act, and by the law of 1861 and the Klu Klux Klan Act they had in fact been substantially strengthened during the Civil War and Reconstruction Era.").

ensure compliance, signaled a shift from the broad authorization of the domestic use of military force which had peaked several years earlier. In the following decades, the domestic use of federal troops was sharply curtailed and generally limited to presidential authorization.

VI. Domestic Military Operations in the Late 19th and 20th Centuries

Following the enactment of the Posse Comitatus Act, the domestic use of federal military forces largely reverted to the statutory scheme of the Insurrection Act. In some cases, state officials appealed directly to the President for federal military assistance, while in others, the provisions of the Act were invoked unilaterally by the President to enforce federal law or federal civil rights.

At the turn of the 19th century, the Populist movement engendered a wave of strikes and riots across the United States, prompting requests from both state and federal officials for federal troops to enforce domestic law and restore order. In 1894, federal troops were employed to quell riots associated with railroad strikes in Chicago and the surrounding area; while President Cleveland belatedly issued a proclamation ordering the rioters to disperse, the deployment of federal troops initially came via the request of federal marshals and attorneys, who sought assistance via the Attorney General.[92] Later, at the request of state officials and under the auspices of presidential proclamations, federal troops were deployed to miner's strikes in Idaho in 1899, Nevada in 1907, and Colorado in 1914.[93]

As the United States entered World War I, nearly the entire National Guard (the successor to state militias) was called into federal service to augment federal military forces; consequently, states were left with few state troops to quell large-scale disturbances and riots.[94] In response, the federal government instituted a "Direct Access Policy," permitting local and state officials to make direct requests for federal troops to reduce the burden on states.[95] Essentially, this policy constituted a brief return of the Cushing Doctrine, as local commanders were granted the ability to deploy their federal military forces without presidential authorization.[96] This policy continued through World

[92] Doyle, supra note 1, at 37-38.
[93] Id. at 33-34.
[94] Wilson, supra note 48, at 317.
[95] Doyle, supra note 1, at 34.
[96] Id.

War I and for a period of several years after, as the federal army gradually demobilized and the state National Guard forces were reconstituted. From 1918-1920, federal military forces were deployed to enforce domestic law on 29 occasions (largely minor disorders which would normally have been handled by state forces), none of which triggered the presidential proclamation required by the Insurrection Act.[97]

In the early years of the Great Depression, federal troops were employed in Washington, D.C. itself to disperse an organized protest comprised of World War I veterans.[98] The protestors, known as the "Bonus Army," marched on Washington in 1932 to demand early payment of a bonus for service in World War I.[99] At President Hoover's order, federal infantry and tanks marched down Pennsylvania Avenue and burned the protestors' camp, driving them out of the city.[100] Notably, this employment of federal troops was not accompanied by the requisite Insurrection Act proclamation calling for the protestors to disperse.[101]

Following the election of Franklin Roosevelt, the new President generally declined to authorize the domestic employment of federal military forces, particularly for "strike duty"; however, the external crises posed by World War II prompted President Roosevelt to reconsider this policy. Throughout World War II, the executive branch employed the threat of military takeover of key industries to force striking workers back into the factories; however, the authority for this action lay not in the Insurrection Act, but in the War Labor Disputes Act of 1943, as well as subsequent Executive Orders, which provided the ability to seize and operate facilities deemed necessary to the war effort.[102] Beyond these circumstances, only one civil disturbance triggered invocation of the Insurrection Act. In 1943, at the request of the Michigan governor, President Roosevelt issued a proclamation ordering rioters in Detroit to disperse and subsequently deployed federal troops to restore order.[103] Thus, while federal military forces deployed extensively throughout World War II

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[97] Wilson, supra note 48, at 317.
[98] Doyle, supra note 1, at 34.
[99] Id.
[100] Alan Brinkley, The Unfinished Nation: A Concise History of the American People, at 755-56 (Jane Vaicunas ed., McGraw-Hill Higher Education 2000) (1993).
[101] Doyle, supra note 1, at 34.
[102] Id. at 35.
[103] Proclamation No. 2588, 8 Fed. Reg. 8733 (June 25, 1943).

in response to a variety of foreign threats to the American mainland, invocation of the Insurrection Act was generally limited.

Post-World War II, the domestic employment of federal troops found new vitality as the Civil Rights Movement gained momentum. In one of the most dramatic examples, President Eisenhower ordered paratroopers from the 101st Airborne Division into Little Rock, Arkansas to ensure racial integration efforts ordered by the Supreme Court in *Brown v. Board of Education* were completed.[104] Prior to federal involvement, the Arkansas governor had called out the Arkansas National Guard to *prohibit* integration efforts.[105] In response, the President invoked a section of the Insurrection Act, then codified as Title 10, U.S. Code, Sections 332-333.[106] This section permitted the President to use federal military forces to suppress any "insurrection, domestic violence, unlawful combination, or conspiracy" if local law enforcement was hindered within a state, or if unlawful action "obstructs the execution of the laws of the United States or impedes the course of justice under those laws."[107] Following the requisite proclamation, the 101st Airborne deployed to Little Rock and the entire Arkansas National Guard was federalized; subsequently, Guardsmen under federal command ensured the school was peacefully integrated.[108]

The precedent set by President Eisenhower's actions in Little Rock carried into subsequent administrations, which continued to rely on federal troops to enforce integration efforts and support the Civil Rights Movement. In 1962, in response to mobs preventing federal marshals from integrating the University of Mississippi, President Kennedy issued an Insurrection Act proclamation and employed United States Army units and the federalized Mississippi National Guard to ensure a peaceful integration of the university.[109] Shortly thereafter, President Kennedy issued proclamations and federalized the Alabama National Guard in two analogous circumstances

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[104] Doyle, supra note 1, at 40.
[105] President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas, 41 Op. Att'y Gen. 313, 316 (1957).
[106] Id. at 327.
[107] Id.
[108] Id. at 329.
[109] Exec. Order No. 11053, 27 Fed. Reg. 9693 (Oct. 2, 1962).

the following year.[110] Beyond school integration efforts, President Johnson invoked the same authority to deploy the United States Army and the federalized Alabama National Guard to protect Civil Rights protestors as they marched to Montgomery in 1967.[111]

In conjunction with the use of federal troops to enforce integration orders, an outbreak of race riots in the late 1960s prompted a series of federal military deployments to the affected cities. In 1967, President Johnson deployed federal military forces, as well as federalized National Guard troops, to Detroit upon the request of the Michigan governor.[112] Following the assassination of Martin Luther King, the mayor of Washington, D.C. and the governors of Illinois and Maryland requested federal military assistance in containing violent riots. Citing the Insurrection Act, President Johnson issued appropriate proclamations and deployed federal army units, as well as federalized National Guard soldiers, to Washington, Chicago, and Baltimore.[113] In total, these operations included over 23,000 federal troops and over 15,000 Guardsmen.[114] In a related protest, a combination of federal troops, Guardsmen, federal marshals, and state police deployed to protect the Pentagon from a 1967 anti-war demonstration, ultimately without meeting the requirements of the Insurrection Act.[115] Though invocation of the Act was discussed, ultimately the protest was peaceful and failed to trigger a presidential authorization to employ federal troops, leaving the legal justification for their use murky.[116]

As the United States moved out of the tumultuous riots of the 1960s, the domestic use of federal military forces gradually decreased as well. This largely coincided with an increase in the capabilities of civilian law enforcement to handle a wide variety of civil unrest. In 1973, approximately 200 Native Americans seized the village of Wounded Knee to highlight their grievances; while President Nixon considered sending federal troops, military advisors strongly

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[110] Exec. Order No. 11111, 28 Fed. Reg. 5709 (Jun. 11, 1963); Exec. Order No. 11118, 28 Fed. Reg. 9863 (Sep. 11, 1963).
[111] Doyle, supra note 1, at 40; Exec. Order No. 11207, 30 Fed. Reg. 3743 (Mar. 23, 1965).
[112] Exec. Order No. 11364, 32 Fed. Reg. 10907 (Jul. 24, 1967).
[113] Doyle, supra note 1, at 36.
[114] Id.
[115] Id. at 38.
[116] Id. at 39 ("[A]uthorities decided to rely on a non-statutory basis regarded as an implicit sovereign right to protect government property, although Section 332 was held in reserve in case the level of violence called for federalizing the National Guard.").

counseled for a civilian response. Ultimately, several hundred federal law enforcement officers were employed, with an 1,000-man contingency force from the 82nd Airborne Division placed on alert.[117] During the crisis, serious questions arose as to whether military assistance to civilian law enforcement violated the Posse Comitatus Act, prompting Congress to enact a series of law enforcement exceptions in 1981.[118] These exceptions to the Act permitted limited information sharing,[119] use of military equipment and facilities by civilian police,[120] and the training of civilian police by military personnel.[121] However, it also reaffirmed the key restriction of the Posse Comitatus Act; namely, that military personnel could not participate in search, seizure, or arrest during domestic law enforcement operations.[122] Even with these exceptions, President Reagan issued an Insurrection Act proclamation in 1987, declaring that the Georgia National Guard would be federalized if prison officials were unable to quell a riot at a federal prison.[123]

In 1992, federal military forces and federalized Guardsmen were employed to quell the Los Angeles riots in one of the largest domestic military operations in decades. In response to the acquittal of the police officers charged in the Rodney King beating, thousands of rioters poured into the streets of Los Angeles, starting fires, looting stores, and murdering bystanders.[124] Within two days, approximately 1,000 Guardsmen were deployed to the streets of Los Angeles, operating in conjunction with and under the control of the civilian police, who were unable to control the violence alone.[125] Though the Guard's presence helped mitigate the violence, the mayor of Los Angeles and governor invoked the Insurrection Act and formally requested federal troops from the

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[117] Id. at 39.
[118] 10 U.S.C. §§ 271 – 284 (2012).
[119] 10 U.S.C. § 271 (2012).
[120] 10 U.S.C. § 272 (2012).
[121] 10 U.S.C. § 273 (2012).
[122] 10 U.S.C. § 275 (2012) ("The Secretary of Defense prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment of facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.").
[123] Proclamation No. 5748, 52 Fed. Reg. 46730 (Dec. 9, 1987).
[124] Matt Mathews, The Posse Comitatus Act and the United States Army: A Historical Perspective, at 47 (Combat Stud. Inst. Press ed. 2006).
[125] Id. at 48.

President.[126] In response, President Bush issued an Insurrection Act proclamation and ordered the deployment of 2,500 Army soldiers and 1,500 Marines into Los Angeles to help restore order; additionally, the President's order federalized all National Guard troops conducting operations within Los Angeles.[127] Ironically, the decision to federalize the Guardsmen inhibited their ability to execute law enforcement functions, due to confusion among military legal advisors over the requirements of the Posse Comitatus Act.[128] Rather than continuing to participate in law enforcement missions, the federalized Guardsmen and regular troops were limited to "presence" operations, mainly patrolling to prevent looters from vandalizing vacant storefronts.[129] This limitation reflected the federal military commander's erroneous understanding that his forces remained constrained by the Posse Comitatus Act, even though the circumstances of their employment (under the Insurrection Act) constituted a valid exception to former Act.[130] Ultimately, the massive presence of federal troops and federalized Guardsmen (over 14,000 at their peak) succeeded in bringing the violence under control, despite the self-imposed constraints followed by the on-scene military commanders.[131]

VII. Impact of the September 11th Terrorist Attacks on Domestic Military Operations

The devastating terrorist attacks of September 11, 2001 awakened the United States' national consciousness to the threat of international terrorism. The fact that the terrorists had struck within American territory prompted President Bush to consider whether the constraints of the Posse Comitatus Act were still appropriate for the nascent "War on Terror."[132] In the weeks following the attacks, lawyers in the Justice Department concluded that the President possessed both constitutional and statutory authority to deploy federal military units domestically, without invoking

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[126] Id.
[127] Id. at 49-52.
[128] Id. at 52.
[129] Id. at 55.
[130] Id. at 55-56. ("While the raison d'être remains murky, the available evidence would seem to suggest that JTF-LA [the federal military force deployed to Los Angeles] either misunderstood the Posse Comitatus Act and the executive order or they did comprehend it and chose to use the PCA as a clever stratagem to distance themselves from law enforcement duties. . . To this day, participants are divided as to what really transpired.")
[131] Id. at 54-55.
[132] Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, on Authority for Use of Military Force to Combat Terrorist Activities Within the United States, at 1 (Oct. 23, 2001).

the Insurrection Act or running afoul of the Posse Comitatus Act.[133] Specifically, the Office of Legal Counsel (OLC) concluded that the Authorization to Use Military Force, passed by Congress in the wake of the attacks, authorized the domestic employment of military force[134]; in the alternative, OLC concluded that the Posse Comitatus Act was only intended to restrict the use of military forces in a law enforcement capacity, and that the domestic employment of federal troops in counter-terrorism assignments constituted a military mission, vice a law enforcement role.[135] However, within several years, the Justice Department revised its understanding of the Posse Comitatus Act, significantly reducing its broad interpretation in 2001.[136] With respect to the domestic employment of federal troops, the revised opinion retreated from the positions asserted in the 2001 memorandum, suggesting that those positions "should not be treated as authoritative."[137] Notably, the employment of federal troops in domestic counterterrorism operations has been negligible since the initiation of the "War on Terror."[138] This reluctance largely derives from a paradox regarding the domestic, counter-terror use of federal troops: if the President seeks to bypass the Posse Comitatus Act, he must either invoke the Insurrection Act or argue that the counter-terror operation is a military mission; consequently, the civilian prosecution of suspects detained by such operations would be hampered, since they were not arrested by civilian law enforcement and afforded criminal constitutional rights.[139]

In another high-profile area, recent history has witnessed large scale deployments of federal troops in domestic disaster relief efforts. Perhaps the most notable recent deployment was the substantial response to Hurricane Katrina in 2006, which involved over 42,000 National Guardsmen, 17,000 federal troops, 20 Navy warships, and 450 Navy and Air Force aircraft.[140]

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[133] Id.
[134] Id. at 13.
[135] Id. at 20 ("We conclude that the PCA [Posse Comitatus Act] would not apply to the use of the Armed Forces by the President domestically to deter and prevent terrorist attacks within the United States. Use of the Armed Forces would promote a military, rather than a law enforcement, purpose.").
[136] Memorandum for the Files, Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, Re: October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities, at 1 (Oct. 6, 2008).
[137] Id.
[138] Doyle, supra note 1, at 51.
[139] Id.
[140] Mark Weston, Review of the Posse Comitatus Act After Hurricane Katrina, at 11 (U.S. Army War College ed., 2006).

Despite this massive employment of federal military force, a formal request for federal troops was never invoked by the Louisiana governor, and President Bush declined to exercise a federal takeover absent a state request for such action.[141] Ultimately, federal troops were deployed pursuant to statutory authority pertaining to disaster relief, precluding their use to assist civilian authority in restoring order and enforcing domestic law.[142] Further, Louisiana did not relinquish control of its National Guard forces throughout the recovery effort, creating two "dueling" chains of command in which federal troops reported to federal commanders, and Guardsmen reported to their state commanders.[143] Ultimately, the conflicting chains of command hampered efforts to rescue civilians and created confusion about whether the federal military forces were able to enforce domestic law and restore order in the affected area.

In response to the perceived failures of the federal response to Hurricane Katrina, Congress enacted significant changes to the Insurrection Act, codified in Title 10, Section 333, which broadened the President's ability to employ the armed forces domestically without state request or consent.[144] Specifically, the amendments authorized the President to employ federal military force to "restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State" whenever the President determined that "domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order."[145] This language was a significant expansion of the original presidential authority under the Insurrection Act and was met by widespread resistance from state governors.[146] Ultimately, massive state opposition to the amended Act prompted Congress to repeal it the following year, reverting to the previous language, which only authorized the President to employ

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[141] Id. at 12.
[142] Id.
[143] Id. ("With the exception of the evacuations of the Superdome and the Convention Center in New Orleans, the separate commands [federal and National Guard] divided the area of operates geographically and supported response efforts separately.")
[144] John Warner National Defense Authorization Act for Fiscal Year 2007, § 1076(a), Pub. L. No. 109-364, 120 Stat. 2083, 2404.
[145] Id.
[146] 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, 539 (2014).

federal military forces to suppress "insurrection, domestic violence, unlawful combination, or conspiracy" if such disturbances "hinders the execution of the laws of that State, and of the United States within the State," such that citizens within that state are deprived of their legal and constitutional protections.[147] Since the repeal of the broadened Insurrection Act, no natural disaster or other emergency has triggered a state to request federal military aid under the Act's statutory procedures; instead, federal military disaster relief efforts have largely relied on other statutory authorities.[148] Notably, under such disaster relief authorities, federal troops cannot enforce domestic law or help civil authorities restore order.[149]

VIII. Future Trajectory of the Use of Military Force to Enforce Domestic Law

Despite the blurring of international and domestic counter-terrorist efforts in the "War on Terror" and the recent heavy reliance on the armed forces in domestic disaster relief efforts, the trajectory of employment of federal troops to enforce domestic law appears to reflect a gradual retreat from a peak during the Civil Rights era. For several reasons, the trend towards reduced reliance of the federal military to enforce domestic law is likely to continue, resulting in fewer invocations of the Insurrection Act.

First, civilian police forces across the country are increasingly able to acquire military equipment and training for their domestic law enforcement operations. Under the Department of Defense's Excess Property Program, civilian police departments are able to acquire surplus military equipment, such as M-4 rifles, Mine Resistant Ambush Protected (MRAP) vehicles, and even surplus uniforms.[150] Critics of these programs label this practice "police militarization."[151] While the rationales for such programs are debatable, it is undisputed that the acquisition of such equipment and training provides civilian police forces with capabilities they previously lacked. Possession of

[147] National Defense Authorization Act for Fiscal Year 2008, § 1068(a), Pub. L. No. 110-181, 122 Stat. 3, 325. In addition, the civil authorities within the state must be "unable, fail, or refuse to protect that [constitutional] right, privilege, or immunity, or to give that protection." Id.
[148] Jennifer K. Elsea and R. Chuck Mason, Cong. Research Serv., RS22266, The Use of Federal Troops for Disaster Assistance: Legal Issues, at 4 (2008).
[149] Id.
[150] Arthur Rizer, Trading Police for Soldiers: Has the Posse Comitatus Act Helped Militarize Our Police and Set the Stage for More Fergusons?, 16 Nev. L. J. 467, 502-03 (2016).
[151] Id.

this equipment increases the ability of civilian law enforcement to respond to a greater range of civil disturbances while simultaneously reducing the need to rely on federal military forces to enforce domestic law. Put another way: civilian police departments are becoming "more effective" with the acquisition of military hardware and training, while the federal armed forces, if employed to enforce domestic law, will be "less effective," since federal troops would merely employ the same equipment and training being supplied to civilian police. Consequently, it is increasingly unlikely that federal troops will be called upon to enforce domestic law.

Second, the National Guard is a far cry from the militia employed by President Washington against the Whiskey Rebellion. In 2016, the Army National Guard comprised over 348,000 soldiers, organized geographically by state under the command of their state governors.[152] The modern National Guard is a professional military force that comprises 39 percent of the United States Army's operational forces.[153] The National Guard's integration with the federal armed forces demonstrates its relative parity with the latter; further, National Guard units specifically train to augment and support civilian police forces in enforcing domestic law and restoring order.[154] The deployment of the National Guard to enforce domestic law is at the discretion of the pertinent state governor, and as long as the National Guard is not federalized, the use of Guardsmen to enforce domestic law does not offend the Posse Comitatus Act.[155] In other words, the modern National Guard is a capable military force, under the control of state governors, that can be deployed to enforce domestic law without offending the Constitution or federal law. Thus, when governors are faced with a crisis that requires military force, they can choose to deploy their state's organic National Guard forces, which possess similar training and capability to the federal armed forces, or to "federalize" the response, calling for federal troops, which will likely cause them to lose control of their own Guardsmen, who will be federalized to establish a single federal military chain of

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[152] Army National Guard (ARNG) Overview (Jun. 6, 2016), http://www.nationalguard.mil/About-the-Guard/Army-National-Guard/About-Us/By-the-Numbers/.
[153] Id.
[154] Nat'l Guard Reg. 500-5/Air Nat'l Guard Instruction 10-208, National Guard Domestic Law Enforcement Support and Mission Assurance Operations, at 12 (2010).
[155] Id. ("When approved by the Governor, National Guard units operating in a state active duty or Title 32 status may provide National Guard law enforcement support to include direct participation in civil law enforcement activities such as searches, seizures, and detention.").

command. Understandably, most governors will select the former option, which explains the resistance by state governors to the 2007 expansion of the Insurrection Act.[156] As a result, state governors are less likely to invoke the Insurrection Act and request federal military forces to enforce the laws and restore order.

Assessing whether the current role of the federal military in enforcing domestic law conforms to the intent of the Framers is a complicated inquiry; to begin, it is unlikely the Framers fathomed the enormous military machine necessary to preserve the American position as a world superpower. Highly suspicious of a standing army, the Framers believed that a small professional force, largely guarding the frontiers, could be augmented by ad hoc militia forces in times of crisis.[157] Further, the 1792 Militia Act reflected a vision in which state militia were employed to aid the enforcement of domestic law, rather than standing federal military forces. In this context, the Framers would likely note the gradual decline of domestic federal military employment with approval. The reduced use of federal troops to enforce domestic law, combined with the increased reliance on the National Guard (the modern functional equivalent of the "militia"), is roughly analogous to the original role envisioned by the Framers for state militia forces. Further, as civilian law enforcement officers no longer require the *posse comitatus* and rarely require military forces to augment their operations, the conditions in which the first Congress believed it necessary for federal marshals and local officials to call for military assistance are no longer prevalent. Leaving aside debates about the size of the modern federal military, the general preclusion on its domestic employment and increased reliance on the National Guard and civilian law enforcement largely satisfy the framework envisioned by the Framers.

IX. Conclusion

[156] Bahar, supra note 153, at 539.

[157] The Federalist No. 29, at 176 (Alexander Hamilton) (Modern Library ed., 1941) ("If standing armies are dangerous to liberty, an efficacious power over the militia, in the body to whose case the protection of the State is committed, ought, as far as possible, to take away the inducement and the pretext to such unfriendly institutions. 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 difference kind of force.").

From the founding of the United States to the present day, American political philosophy has demonstrated an aversion to the use of the armed forces to enforce domestic law. This attitude reflects both a suspicion of the federal military by the American citizenry, as well as caution by military commanders in complying with statutory and constitutional requirements. However, the history of the domestic use of the federal armed forces reveals a divergence in actual practice, as the militia and burgeoning federal armed forces played important roles in enforcing domestic law and maintaining order in the young Republic at national, state, and local levels. While the localized use of the *posse comitatus* and federal troops was eliminated by the Posse Comitatus Act, Presidents have continued to rely on the Insurrection Act to deploy federal military forces to enforce domestic law, often without the consent of the affected state. In recent years, the domestic use of federal troops has gradually declined, largely due to the rise of the National Guard as a capable and effective state military force, as well as the increased use of military equipment and training by the civilian law enforcement agencies. This decreased reliance on the federal military to enforce domestic law generally comports with the role of a professional, federal military envisioned by the Framers: to provide for the common defense against foreign enemies, while civilian police and state militia keep the peace at home.

X. Bibliographical Note

Of the sources consulted for this paper, two are worthy of particular mention:

1. Charles Doyle and Jennifer Elsea, Cong. Research Serv., R42569, The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law (2012).
    a. This report provided a thorough overview of the use of the federal military to enforce domestic law in the United States. It provided brief summaries of historical events from the founding of the United States through the date of its creation (2012), analyzed legal implications of the pertinent statutory acts and their revisions throughout history, and identified a number of additional sources which guided further research efforts.
2. Frederick T. Wilson, Federal Aid in Domestic Disturbances, 1903-22, S. Doc. No. 67-263 (1922).
    a. This document is a revised version of an earlier report, first prepared for the Senate in 1903. It is a comprehensive work detailing all major domestic deployments of federal military forces from the founding of the United States until 1922; further, it includes original documents, such as the written requests for federal military aid from local marshals, as well as Presidential responses and proclamations. It was particularly useful in assessing the use of the federal military to enforce domestic law in the early Republic and the Reconstruction.