

ARTICLE

The Presidential Intervention Principle:
The Domestic Use of the Military and the Power of the
Several States

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Abstract

There is no more irregular use of force than the use of force domestically. There are rare times, however, when the Commander-in-Chief can, and must, order federal troops to respond to internal crises—whether catastrophic natural disasters, devastating nuclear accidents, or terrorist attacks. At times, the President may even have to direct federal forces to ensure the equitable enforcement of federal law, including civil rights laws, against armed opposition. It is therefore critical to understand presidential emergency and war powers relative to the powers wielded by those who could most readily enhance or undermine these presidential efforts: the power of the state governors. This Article looks at this greatly under-analyzed aspect of national security federalism and derives a guiding constitutional, statutory, and historical principle. The presidential intervention principle holds that the President can and sometimes must intervene when state and ordinary judicial proceedings cannot or will not maintain order, public safety, or the equitable enforcement of the law against armed opposition. The President may also intervene when federal personnel or facilities are in grave danger. Short of—and at times even during—these emergency situations, however, states and

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their governors provide a critical and often underappreciated structural check on presidential power. Finally, while irregular warfare discussions tend to focus on the Title 10/Title 50 debate, the domestic use of force implicates those titles plus Titles 18, 32, and a host of constitutional and statutory thicket, as well as opportunities, best thought of before the crisis hits.

Introduction

After the 2010 National Level Exercise focused on a nuclear detonation in an American city, a Cabinet Secretary slammed his fist on the White House Situation Room's polished conference table and voiced a frustration so many administrations have felt when responding to national catastrophes: "Why can't we just go in there and tell the governors what to do?!"¹

Indeed, due to the federalist nature of the Constitution, oftentimes Presidents cannot simply tell governors what to do, even in the wake of domestic violence or a natural disaster. After Hurricane Katrina, for example, federalism became the legal face of failure. According to the New York Times, the "fractured division of responsibility" within the constitutional structure meant no one person was in charge, proving "disastrous."² The Washington Post argued that the response to Katrina, "exposed one of the few real structural weaknesses in our Constitution: a mechanism to coordinate the work of local, state and national governments."³ With mass destruction across multiple states, the Secretary of Homeland Security, himself a former federal judge, laid the blame at federalism's feet:

¹ Personal recollection of the author while serving as Deputy Legal Advisor to the National Security Council Staff. Under the Obama Administration, the staffs of the Homeland Security Council and the National Security Council were merged.

² Eric Lipton, Christopher Shew, Scott Shane & David Rohde, *The Path from Storm to Anarchy*, N.Y. TIMES (Sept. 11, 2005), http://www.nytimes.com/2005/09/11/national/nationalspecial/11response.html?pagewanted=print&_r=0 [<http://perma.cc/5Y2C-83W5>].

³ David S. Broder, *The Right Minds for Recovery*, THE WASH. POST, (Sept. 29, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/28/AR2005092802121.html> [<http://perma.cc/QZN9-79DT>].

We come in to assist local and state authorities. Under the Constitution, state and local authorities have the principle first line of response obligation [T]he federal government does not supersede the state and local government.⁴

And, as much as the states were desperate for federal assistance, they resisted even requesting it.⁵

In 2006, Congress joined the attack on federalism,⁶ passing a law specifically authorizing the President, without state request or consent, to use the armed forces to restore public order after a “natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition.”⁷ All fifty governors opposed this statute, viewing it as a presidential power grab. They succeeded in getting it repealed one year later.⁸ For then-Arizona Governor Janet Napolitano, later President Obama’s Secretary of Homeland Security, this statute would “cause confusion in the command-and-control of the National Guard and interfere with states’ ability to respond to natural disasters within their borders.”⁹

⁴ CNN REPORTS, *KATRINA: STATE OF EMERGENCY* 46 (2005).

⁵ For example, Louisiana Governor Kathleen Blanco refused President Bush’s entreaties to request officially the federal government to take control of the Louisiana National Guard and the New Orleans police. See Manuel Roig-Franzia & Spencer Hsu, *Many Evacuated, but Thousands Still Waiting*, THE WASH. POST (Sept. 4, 2005), at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090301680.html> [<http://perma.cc/AE5E-J347>].

⁶ The House Select Committee on Katrina recognized that “[l]ocal control and state sovereignty are important principles rooted in the nation’s birth,” but nonetheless blamed federalism, and explained that these principles “cannot be discarded merely to achieve more efficient . . . operations on American soil.” H.R. REP. NO. 109-377, at 223, (2006).

⁷ National Defense Authorization Act of 2007, 109 Pub. L. No. 364, 120 Stat. 2083 (2006).

⁸ *Governors Association Opposes Senate Authorization Measure, Inside the Army* (Sept. 4, 2006), available at 2006 WL 15348717 (Westlaw); see Press Release, Office of Governor Janet Napolitano, *Napolitano Urges Removal of Provisions in Federal Legislation Usurping Governors’ Control of National Guard* (Sept. 20, 2006), available at <http://votesmart.org/public-statement/211040/press-release-napolitano-urges-removal-of-provisions-in-federal-legislation-usurping-governors-control-of-national-guard> [<http://perma.cc/U2Z9-UWVX>].

⁹ Letter from Janet Napolitano, Tim Pawlenty, Michael Easley & Mark Sanford, Governors, to Donald Rumsefld, Secretary of Defense (Aug. 31, 2006), http://www.nga.org/cms/home/federal-relations/nga-letters/archived-letters--2006/col2-content/main-content-list/title_august-31-2006.html [<http://perma.cc/E5VV-NB9H>].

Scholars piled on. They agreed that federalism was the culprit, considering it to be a grave structural impediment to the federal government's ability to plan for, and respond to, domestic violence and internal emergencies. Professor Jason Mazzone, for example, concluded that during Katrina, a commitment to federalism proved disastrous.¹⁰

But, in truth, federalism is not necessarily the problem, and the 2006 amendment, as a constitutional and statutory matter, was largely unnecessary. Under the Constitution and statutes dating back to the early Republic, the President at times can intervene. There are even times when the Chief Executive and Commander-in-Chief must intervene.

Hurricane Katrina, in fact, was one of those times in which the President could have taken a far more direct role. While it is true that states have primacy over domestic peace and security, as well as ensuring public health and safety within their states,¹¹ as a matter of constitutional law—reinforced by statute and executive practice—when a state cannot or will not perform those functions, Presidents have the authority to step in. In other words, certain emergencies are so dire that they can transform what is “truly local” into a matter of national concern.¹²

There is (thankfully) no more irregular use of force¹³ than the use of the military domestically, although, as this Article will discuss, not every domestic use of the military is a use of force. When the dire need arises, however, it is crucial to understand the relative authorities, responsibilities, and capabilities between the President and the states. This Article therefore looks to help fill a substantial hole in the literature on presidential power.

¹⁰ See generally Jason Mazzone, *The Commandeerer in Chief*, 83 NOTRE DAME L. REV. 265, 297 (2007).

¹¹ See, e.g., *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central government, than the suppression of violent crime and vindication of its victims.”).

¹² *Id.*

¹³ This term is used in its more colloquial sense. Department of Defense doctrine defines irregular warfare as “a violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s).” Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms (2014). That being said, U.S. troops have largely not conducted traditional warfare within the homeland (with the most notable exception being the Civil War) and are not likely to do so any time soon.

Professor Matthew Waxman recently demonstrated that national security scholarship is too focused on the horizontal relationships among the federal branches.¹⁴ It misses the “significant, tangible effects of security policies” that take place at the state and local level.¹⁵

I agree.

This Article picks up where Waxman left off and focuses on presidential power relative to state power during natural and man-made crises like terrorist strikes, catastrophic hurricanes and earthquakes, insurrections, and armed opposition to federal law, especially civil rights laws.¹⁶ It derives a core constitutional principle and traces a rich history of presidential–state interactions that both reinforces that principle¹⁷ and provides important lessons for today’s leaders. What this Article calls the “presidential intervention principle” holds that the President can and sometimes must intervene when state and ordinary judicial proceedings cannot or will not maintain order, public safety, or equitable enforcement of the law against armed opposition. The President may also intervene when the United States, its personnel, or its facilities are in grave danger. Short of—and at times even during—these emergency situations, states and their governors provide a critical, and often underappreciated, check on presidential power.

Part I concludes that presidential power is at its height relative to state power for external threats (for example, an armed attack). In terms of the presidential intervention principle, since the Constitution intentionally left the several states with few foreign affairs and war powers, states are presumed to be systematically unable to maintain order, ensure public health and safety, and equitably enforce the law in the face of an armed

¹⁴ Matthew Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 291 (2012).

¹⁵ *Id.*

¹⁶ Waxman explicitly states that he “puts aside some other significant elements such as disaster response.” *Id.*

¹⁷ The “gloss” on executive power that transforms “systematic, unbroken, executive practice” into a “part of the structure of our government” should be seen to apply equally to relations between the President and the States as it does to relations between the President and the Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring). See U.S. Dep’t of Justice, Best Practices for OLC Legal Advice and Written Opinions 2 (2010), available at <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> [<http://perma.cc/5MTZ-EBPB>].

attack from abroad. However, Part I also demonstrates that through the state militias, the Constitution also intentionally vested the states with more influence over presidential war and foreign policy than is traditionally thought. This power waned through the nineteenth and twentieth centuries as the militias, organized under the Militia Clauses,¹⁸ gradually gave way to the National Guard, primarily organized under Congress's power to raise and support a national army.¹⁹ But, with domestic vulnerability returning to the homeland with the advent of modern terrorism, the constitutional militias of old are being reborn in the form of twenty-first century state and local police, firefighters, and Emergency Medical Technicians ("EMTs"), many of whom are part-time. With states on the front lines, these citizen-soldiers are the first responders, and their expertise, capabilities, and national influence have consequently surged. Accordingly, we are seeing a resurgence in state power to affect foreign affairs as well.

While presidents still maintain the last word over the response to external threats, Part II demonstrates the far greater state authority and responsibility over internal threats. Presidential military intervention can only occur within a state, without state request, when that state and ordinary judicial proceedings cannot, or will not, maintain order, ensure public health and safety, or equitably enforce the law against armed opposition. Part II also demonstrates, however, that the President has the statutory and inherent authority to protect the United States, its personnel or facilities, against grave threats even when those facilities are physically within states.

Whether in response to an armed attack or domestic calamity, both Parts also make clear that military intervention—even under inherent presidential authority—does not equal martial law. Unless some exception narrowly and temporarily applies, the Constitution's full panoply of civil liberty protections apply in force, and what this article demonstrates is how much national security federalism buttresses those critical protections.

¹⁸ Two clauses of Article I, clauses 15 and 16 of section 8, are often referred to as the "Militia Clauses." They provide that "The Congress shall have Power . . . To provide for calling for the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;" and "To provide for organizing, arming, and disciplining, the Militia, for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress" U.S. CONST. art. 1 sec. 8, cl. 15–16.

¹⁹ *See id.* cl. 12–14.

Ultimately, as much as the Constitution separates, disaggregates, and disunifies power to preserve liberty, it recognizes that there are times when unity is necessary to preserve liberty, and even the country itself. Federalism need not be the face of failure when disasters strike. With a full understanding of the relative authorities, responsibilities, and capabilities, as well as with the history of presidential interventions, federalism can be a great source of strength, as well as an important safeguard against presidential overreach and guarantor of civil liberties.

I. Presidential Power over External Threats

While presidential war powers relative to congressional war powers are hotly debated, it is fairly well-settled that in times of invasions, or threat thereof, presidential authority to defend the homeland is at its height, regardless of legislative sanction.²⁰ Even the War Powers Resolution itself, perhaps the greatest challenge to presidential war powers, concedes that the constitutional powers of the President as Commander-in-Chief include the ability to introduce forces for a “national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”²¹ So it is with presidential power relative to the several states. When faced with an outside armed attack or threat thereof, presidential power is at its height.

²⁰ For example, Alexander Hamilton wrote: “Admitting that we ought to try the novel and absurd experiment in politics of tying up the hands of government from offensive war founded upon reasons of state, yet certainly we ought not to disable it from guarding the community against the ambition or enmity of other nations.” *THE FEDERALIST* NO. 34, at 208 (Alexander Hamilton) (Clinton Rossiter ed., 1961). James Madison similarly argued: “The only case in which the Executive can enter on a war, undeclared by Congress, is when a state of war has been actually produced by the conduct of another power.” *3 LETTERS AND OTHER WRITINGS OF JAMES MADISON* 600 (Philadelphia, J.B. Lippincott & Co. 1865). *See* *The Prize Cases*, 67 U.S. 635 (1863) (“[The President] is the Commander-in-chief of the Army and Navy of the United States He has no power to initiate or declare a war either against a foreign nation or a domestic State [But if] a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”) Even modern scholars who hold an extremely restrictive view of presidential war powers relative to Congress’ concede that the President maintains the inherent ability to respond to invasions by a foreign power. For example, Francis Wormuth and Edwin Firmage conclude that “Congress exclusively possess the constitutional power to initiate war, whether declared or undeclared, public or private, perfect or imperfect, de jure or de facto,” with the only exception being the President’s power “to respond self-defensively to sudden attack upon the United States.” *FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR* 299 (2d ed. 1989).

²¹ 50 U.S.C. § 1541.

This constitutional federal primacy to repel invasions came not without great debate in 1789, with lasting relevance to the present day. On the one hand, many Framers wanted the President to continue to rely on individual governors' volunteering their part-time militias to defend the United States against armed foreign attack, as well as to defend against a strong federal executive at home. Domestic tyranny was foremost on their minds. On the other hand, many other Framers saw that the federal government needed the ability to call forth the militias under presidential command as well as to establish a standing national military to defend against trained, professional foreign armies. While domestic tyranny was a concern, so was the viability, and greatness, of the new nation. So, the Founders struck a compromise between liberty and security, with militias as the lynchpin. They authorized a national army, but they retained the militias, and in those militias would be the sword of the republic and the shield against tyranny. State militias, normally at the command of the state governors and able to be constitutionally called forth only for defensive purposes, became the primary military weapon of the Republic. Over years to come, they successfully served as a foundational feature of federalism, checking presidential power to wage war as well as hindering the President's ability to conduct foreign policy.

While the United States remained a developing nation, relatively uninterested in foreign affairs (and enjoying the protection from foreign ambition the oceans and Great Britain's Navy provided), this division of power worked well. But, as America began to emerge as a Great Power towards the end of the nineteenth century, presidential power over states and their militias for external matters sharply grew.

Then, the pendulum swung back. In the twenty-first century, concern for the safety of the homeland reemerged. International terrorism struck on 9/11 and the threat of further strikes within U.S. cities, subways, and shopping malls remains. With that pendulum swing, state police, fire, and EMTs are now again on the defensive front lines as they were throughout the eighteenth and nineteenth centuries, and the characteristic aversion to the national military patrolling the streets first articulated in the Framers' constitutional debates revives. Presidential power relative to state powers is still at its height relative to state powers over external threats, but with this greater reliance on state capabilities to defend the nation, we are seeing a renewed state influence over—if not a check on—presidential foreign affairs powers.

A. Militias, a National Army, and Constitutional Compromise

In the 1789 militia debate was the fight for the heart of the new nation. It was an ideological battle about how to design a nation that could maximize individual liberty while still enabling national unity and national security. At the Constitutional Convention, certain Framers promoted the citizen-soldiers on their merits as a fighting force. Luther Martin, for example, argued that states were in a better position to understand the “situation and circumstances of their citizens, and the regulations that would be necessary and sufficient to effect a well-regulated militia in each.”²² While local expertise was undoubtedly an advantage for the state militias, most largely favored the militias as a way to limit the power of the President and a national army.²³ Theirs was the ideal of Cincinnatus, dropping the plow for the sword (or musket) only when necessary. The soldier of avocation was the “bulwark of our liberty,”²⁴ but an army of vocation was “always dangerous to the Liberties of the People.”²⁵

²² LUTHER MARTIN, *THE GENUINE INFORMATION DELIVERED TO THE STATE OF MARYLAND* 53 (1788).

²³ As Professor Jason Mazzone states, even though the American Revolution required the use of a full time, Continental Army to defeat the British, its success nonetheless revived an “old ideal of the militia as the guardian of liberty, ever ready to defend against abuses of a tyrannical government and its standing army of professional soldiers.” *The Security Constitution*, 53 U.C.L.A. L. REV. 29, 74–75 (2005). Note also that one of the chief complaints the American colonists had against England, as stated in the Declaration of Independence, was that King George III “has kept among us, in times of peace, Standing Armies” and “has affected to render the Military independent of and superior to the Civil power.” *DECLARATION OF INDEPENDENCE* ¶ 3 (U.S. 1776).

²⁴ In 1787, Jonathan Maxcy wrote that “our liberty, property, and every thing dear to us, depends on the exertions of a brave, well-regulated militia,” which is why he felt that a “well-regulated militia will ever be the bulwark of our liberty.” Jonathan Maxcy, *A POEM OF THE PROSPECTS OF AMERICA* 30 (1787). At the time of the Convention, the state militias consisted of adult, white males who were required to participate in training and other exercises just several days per year. The Constitution does not define the term “militia,” but the U.S. Supreme Court in *Perpich v. Department of Defense* adopted an Illinois Supreme Court definition of “militia” as follows: “Lexicographers and others define militia, and so the common understanding is, to be ‘a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in times of peace.’” 496 U.S. 334, 348 (1990) (citing *Dunne v. People*, 94 Ill. 120 (1879)). See James Biser Whisker, *The Citizen Soldier under Federal and State Law*, 94 W. VA. L. REV. 949 (1992) (“He is, by vocation, a scholar, physician, lawyer, butcher, baker, candle-stick maker, or farmer; he is by avocation, a soldier.”). Militiamen were to provide and maintain their own arms and other equipment according to a specified list (the Continental Congress’ first national militia law directed that “every person directed to be enrolled as

While there may not have been a “member of the federal convention who did not feel indignation” at the idea of a standing army,²⁶ certain Founders realized what George Washington had realized during the Revolution: that against enemy powers, placing “any dependence upon militia is assuredly resting upon a broken staff.”²⁷ True security mattered. Hamilton, for example, strenuously warned against any “excess of confidence or security” as native tribes and British and Spanish colonies surrounded the fledgling United States.²⁸

Accordingly, Hamilton argued for a strong military force under the command of a President, writing that individual state militias, left to their own devices and own commanders, would be painfully ill-suited to defend against external threats to other states, even if that threatened the United States as a whole. They would “not long, if at all,” submit to be dragged from their occupations and families to perform military duties, he argued, especially in peacetime, and the opportunity cost to the fruits of their primary occupations “would form conclusive objections to the scheme.”²⁹

above shall at his place of abode be also provided with one pound of Powder and three pounds of Bullets of proper size to his Musket or Firelock . . . [a]nd to furnish himself with a good Musket or Firelock, and Bayonet, Sword or Tomahawk, a steel ramrod, Worm, Priming Wire and Brush fitted thereto, a Cartouch Box to contain twenty-three rounds of Cartridges . . . under the forfeiture of two Shillings for the want of a Musket or Firelock . . .”). Militia companies were usually organized at the district level, with all of the men from one district belonging to a single company. They ultimately answered to the Governor, but felt the most loyalty at the local level.

²⁵ Letter from Samuel Adams to James Warren (Jan. 7, 1776), in 1 Warren-Adams Letters 197, 197–98 (1917). Luther Martin also argued that the militias would best “thwart and oppose the general government.” Luther Martin, *supra* note 22, at 53.

²⁶ At the Virginia ratification convention, Edmund Randolph stated that “there was not a member in the federal Convention, who did not feel indignation” at the idea of a standing Army.” JONATHAN ELLIOT, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 401 (1836).

²⁷ See EDWARD G. LENGEL, THIS GLORIOUS STRUGGLE: GEORGE WASHINGTON'S REVOLUTIONARY WAR LETTERS 79 (2007). In a letter to Samuel Huntington, Washington also wrote that: “Regular troops alone are equal to the exigencies of modern war, as well as for defense as for offence, and whenever a substitute is attempted, it must prove illusory and ruinous. No militia will ever acquire the habits necessary to resist a regular force.” *Id.* at 208.

²⁸ THE FEDERALIST NO. 24, at 156 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁹ *Id.*

Fellow Federalist John Jay warned of an intrinsic collective action dilemma.³⁰

If one was attacked would the other[s] fly to its succor, and spend their blood and money in its defense? Would there be no danger of their being flattered into neutrality by specious promises, or seduced by too great a fondness for peace to decline hazarding their tranquility and present safety for the sake of neighbours, of whom perhaps they have been jealous, and whose importance they are content to see diminished.³¹

Jay also outlined the dangerous practical limitations in relying on a confederation of militias that individually only convened on a state or local level a few days a year. Even if they could be dragged from their occupation and families to help a distant state, how and when were they to be paid? Who would command them? Who would settle inter-militia disputes and enforce compliance?³²

For these Framers, armies needed to prepare in advance, and they had to be coordinated in a common fight. Militias also could not be expected to provide permanent security at forts and harbors. These “[v]arious difficulties and inconveniences,” Jay concluded, could only be cured by a strong national government, which could institute “uniform principles” and render the individual state militias “more efficient than if divided into thirteen...independent bodies.”³³

So, in the face of external threats, the Constitutional Convention struck the balance between liberty and security by empowering the President and largely subordinating the states. For the sake of unity, the Constitution essentially neutered most state foreign affairs powers. They could not enter into Treaties or military alliances—and thereby could not look to save themselves at the expense of the others. States could not wage offensive war, and the Constitution curtailed individual state abilities to establish immigration standards and conduct trade with foreign nations. Conversely, the federal government received the power to “declare war,” “raise and support armies,” “provide and maintain a Navy,” “provide for the

³⁰ THE FEDERALIST NO. 4, at 21–22 (John Jay).

³¹ *Id.*

³² *Id.*

³³ *Id.*

calling forth the Militia,”³⁴ and it got a federal “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 It also received the treaty power³⁶ and a host of other foreign affairs powers.

In exchange for these vast powers, the federal government incurred a critical obligation to protect the states against “invasion,” that is, external threats.³⁷ Because states could no longer fully defend themselves, maintain order, ensure public health and safety, or enforce the law in the face of an armed attack, the federal government became constitutionally obligated to take charge. But, for the sake of liberty, the Constitution did not take away the state militias. States retained command over their citizen soldiers and the President could only call them forth in three defensive (and hopefully rare) circumstances, one of which was in response to an invasion.³⁸ This power over the President’s primary force would soon give the states substantial leverage over the President’s use of force and even foreign policy.

B. Curtiss-Wright, the Derivation of Presidential Powers from State Powers, and the Missing Militias

Surprisingly, however, the Supreme Court, in one of its most famous cases on presidential war powers, overlooked the impact and constitutional importance of the state militias, to the detriment of its core holding.

In *Curtiss-Wright*,³⁹ the Court in 1936 found that the President’s authority to declare arms sales to Paraguay and Bolivia illegal rested not

³⁴ U.S. CONST. art. I, § 8.

³⁵ *Id.* art. II, § 2.

³⁶ *Id.* cl. 2.

³⁷ *Id.* art. IV, § 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.”) The Article discusses this provision at much greater length in Part II.

³⁸ *Id.* art. I, § 8, cl.15, affording Congress the power to prescribe rules for the calling forth of the militias only: “to execute the Laws of the Union, suppress Insurrections and repel Invasions” (The “First Militia Clause”). While in this Part we focus on Invasions, in Part II we discuss the latter two circumstances in which the militias may be called forth under the First Militia Clause.

³⁹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). On the influence of this decision on presidential foreign affairs powers, David Gray Adler observes: “There can

solely on a legislative grant, but also on “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”⁴⁰ On close inspection, the Court derived this conclusion not from the text of the Constitution, but from the perceived lack of state war and foreign affairs power, even prior to the Constitution:

The Union existed before the Constitution, which was ordained and established among other things to form ‘a more perfect Union.’ Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be ‘perpetual,’ *was the sole possessor of external sovereignty*, and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise.⁴¹

Switching the usual default of a federal government of specifically granted powers relative to states,⁴² the Court reasoned that because the states lacked powers of external sovereignty, that which was not expressly carved out from the federal government in the realm of foreign affairs automatically passed to it: “the powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.”⁴³

The step from the Federal government to the President was then made with what Saikrishna Prakash and Michael Ramsey call “necessity,

be little doubt that the opinion . . . has been the Court’s principal contribution to the growth of executive power in foreign affairs Even when the sole-organ doctrine has not been invoked by name, its spirit, indeed its talismanic aura, has therefore largely provided a common thread in a pattern of cases that has exalted presidential power above constitutional norms.” David Gray Adler, *Court, Constitution and Foreign Affairs*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 25 (1996).

⁴⁰ *Curtiss-Wright*, 299 U.S. at 319.

⁴¹ *Id.* at 317 (emphasis added).

⁴² *See, e.g.*, U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”).

⁴³ *Curtiss-Wright*, 299 U.S. at 318 (“It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.”)

and convenience.”⁴⁴ These powers, according to the Court, had to be exercised by the President, as he “alone has the power to speak or listen as a representative of the nation.”⁴⁵ In other words, with the entire universe of foreign affairs powers housed within the federal government, that which was not apportioned to the Congress with its enumerated powers, must then befall the presidency with its broader grant of “all executive powers.”⁴⁶

Much more nuance was later added to the *Curtiss-Wright* holding on the breadth of the President’s inherent foreign affairs powers,⁴⁷ but for purposes of this analysis, it is critical to note that the Court’s holding was premised on a false assumption. Through the militias, states did have some foreign affairs powers. In fact, in cases of repelling foreign invasions, there was an express concurrence of power.⁴⁸

By virtue of a presidency dependent on states for the majority of its forces, the President’s early ability to conduct war policy was sharply impacted by state militias. For example, during the War of 1812, the New York Militia refused an order from President Madison’s commander, Major General Dearborn, to cross into Canada to battle the British there, being “unanimously of the opinion that ‘to repel Invasions’ meant just that, and that it did not involve battling the British in Canada.”⁴⁹ The practical effect

⁴⁴ Saikrishna Prakash and Michael Ramsey, *Executive Power over Foreign Affairs*, 111 *YALE L. J.* 231, 239 (2001).

⁴⁵ *Curtiss-Wright*, 299 U.S. at 319.

⁴⁶ U.S. CONST. art. II, § 1. See Prakash and Ramsey, *supra* note 44, at 254 (stating that the President’s foreign affairs powers are “residual;” that which are not allocated away from the President, remain with the President).

⁴⁷ See, e.g., *Youngstown*, 343 U.S. at 637 n.2 (Jackson, J., concurring); *Dames and Moore v. Regan*, 453 U.S. 654 (1981). But see Harold Hongju Koh, *THE NATIONAL SECURITY CONSTITUTION* 134 (1990) (describing a “subtle judicial revival” of the *Curtiss-Wright* theory after Vietnam and its challenge to *Youngstown*).

⁴⁸ See U.S. CONST. art I, § 10 (“No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or *engage in war, unless actually invaded, or in such imminent danger as will not admit of delay*”) (emphasis added). Madison explained the fact that the United States had an obligation to protect the States did not mean that the States could not protect themselves as well: “Does this bar the states from calling forth their own militia? No; but it gives them a supplementary security to suppress insurrections and domestic violence.” James Madison, 5 *THE WRITINGS OF JAMES MADISON: 1787–1790* 204–05 (1904).

⁴⁹ Frederick B. Wiener, *The Militia Clause of the Constitution*, 54 *HARV. L. REV.* 181, 189 (1948). See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815* 680 (2009) (stating that the unruly New York militia developed “constitutional

of this constitutional state objection was “complete failure” of Dearborn’s plan,⁵⁰ or, in the words of a contemporary, a “miscarriage without even [the] heroism of disaster.”⁵¹

Other states also flexed their muscle during the War of 1812, which stands in contrast to *Curtiss-Wright’s* image of a prostrate state in matters of external affairs. The state objections, again on constitutional grounds, also set the stage for lasting precedents. At the start of the war, Massachusetts, Connecticut, and Rhode Island refused to comply fully with President Madison’s call for their militias. They believed that governors, not the President, had the right to determine whether the constitutional criteria for calling forth the militia to repel invasions were met. Backed by his state supreme court,⁵² for example, Governor Caleb Strong of Massachusetts wrote to Secretary of War William Eustis that the “people of this State appear to be under no apprehension of an invasion,” and thus it was within his discretion—and his duty—to refuse to allow the President to call forth his militias.⁵³

President Madison strongly disagreed, and he raised the specter of an excess of liberty undermining the unity necessary for security, and thus for liberty itself. If individual states could frustrate the ability to call forth the militia in the common defense, the United States would not be “one nation for the purpose most of all requiring it,” Madison argued, and the United States would then have “no other resource” but in the “large and

scruples” to crossing the border); JEFFREY A. JACOBS, *THE FUTURE OF THE CITIZEN-SOLDIER FORCE: ISSUES AND ANSWERS*, 29 (1994) (stating that the New York militia found it unconstitutional to “become invaders themselves”).

⁵⁰ WOOD, *supra* note 49, at 680.

⁵¹ *Id.* (citing JOHN CHARLES ANDERSON STAGG, *MR. MADISON’S WAR* 268 (1983)).

⁵² In an Advisory Opinion based on questions Governor Strong presented on August 1, 1812, the Supreme Court of Massachusetts concluded that because the Constitution was silent on when an invasion, insurrection, or need to execute federal law exists, under the Tenth Amendment, it befell the states. Opinion of the Supreme Judicial Court (Feb. 28, 1812) (*cited in* REPORTS OF THE CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS, Vol. VIII, 548 (1853)). The Massachusetts Court also declared that the Constitution allows only the President, in person, to command militia units called forth into federal service: “we know of no constitutional provision, authorizing any officer of the army of the United States to command the militia, or authorizing any officer of the militia to command the army of the United States.” *Id.* at 550.

⁵³ AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE OF THE CONGRESS OF THE UNITED STATES, Vol. III, Class V, 70 (1860).

permanent military establishments which are forbidden by the principles of our free government, and against the necessity of which the militia were meant to be a constitutional bulwark.”⁵⁴ For Madison, an attack on one had to be an attack on all.

Eventually, the situation worsened and the governors acquiesced to presidential leadership,⁵⁵ establishing the important historical precedent of federal primacy over external threats and presidential discretion on the response. Additionally, after finally conceding to a request for militia troops in 1814, Governor Strong asked James Monroe, then the acting Secretary of War, for reimbursement,⁵⁶ setting the stage for another important precedent. Monroe told Strong that the federal government would only reimburse for those services requested by Dearborn.⁵⁷ Beyond that, “measures . . . adopted by a State Government for the defense of a State must be considered as its own measures, and not those of the United States.”⁵⁸

Thus, contrary to the image of pre-Constitutional state subservience upon which the *Curtiss-Wright* holding was based, the War of 1812 and the conflict between Madison and the northeast states demonstrated that it was not until decades after the Constitution that federal primacy over repelling armed attacks was truly established. As a statutory matter, in 1830, Congress agreed to reimburse Massachusetts, with an appropriation of \$430,748.⁵⁹ As part of that appropriation, Congress mandated that in

⁵⁴ James Madison, Fourth Annual Message to Congress (Nov. 4, 1812).

⁵⁵ After a series of coastal attacks, the coastal commander, Major General Dearborn, in July 1814, requested a detachment of artillery and an infantry corps for a three month period of federal service. Letter from General Dearborn to Caleb Strong, Governor of Massachusetts (July 8, 1814) in *AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE OF THE CONGRESS OF THE UNITED STATES*, Vol. III, Class V, 72 (1860). This time, the Governor agreed with the federal assessment. Letter from Caleb Strong, Governor of Massachusetts, to James Monroe, Secretary of War (Sept. 7, 1814) in *id.* at 73–74.

⁵⁶ Letter from Caleb Strong, Governor of Massachusetts, to James Monroe, Secretary of War (Sept. 7, 1814) in *id.* at 73 (asking whether “the expenses thus necessarily incurred for our protection will be ultimately reimbursed to this State by the General Government”).

⁵⁷ Letter from James Monroe, Secretary of War, to Caleb Strong, Governor of Massachusetts (Sept. 17, 1814) in *id.* at 75.

⁵⁸ *Id.*

⁵⁹ 21 Cong. Ch. 234, May 31, 1830, 4 Stat. 428 (specifying that the reimbursement was only for those circumstances: (1) “where the militia of the said state were called out to repel actual invasion, or a well-founded apprehension of invasion” and “their numbers were not in undue proportion to the exigency;” (2) when the militia “were called out by the authority of the state and afterwards recognized by the federal government;” and (3) when the militia were “called out by, and served under, the requisition of the President.”)

matters of threats from foreign powers, it is up to the federal government, and its Commander-in-Chief, to determine when the threat was sufficiently severe, and that the federal government would pay for the services of the state on its behalf.⁶⁰

C. Martin v. Mott and the Ascendancy of Presidential Discretion to Respond to External Threats

It was also not until decades after the Founding that the Supreme Court affirmed the primacy of the federal government over states for responding to armed attacks. In *Martin v. Mott*, a case inexplicably absent from any *Curtiss-Wright* citation, militiaman James Mott ignored the orders of the Governor of New York to enter into federal service during the War of 1812.⁶¹ He appealed his conviction by federal court martial on the basis, among other things, that the President lacked the authority to call out the militia.⁶² The Court in 1827 unanimously decided that, under the Militia Act of 1795, an act which still largely exists today, “the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons.”⁶³

While ostensibly a holding based on statutory interpretation, there were strong constitutional implications. First, presumably in reaction to state refusals to cross into Canada to fight the British on the basis that the Militia Clauses prohibited expeditionary actions,⁶⁴ the Court considered there to be “no ground for doubt” that the power to call forth the militia to repel invasions in the 1795 Militia Act had to include the power to repel invasions before they actually landed on American soil,⁶⁵ thereby also indicating that such a power had to be consistent with the First Militia Clause of the Constitution as well.

Second, the Court’s broad affirmation of presidential power over the States for foreign invasions hints at more than just statutory interpretation. For the Court, this defensive power does not just result from the “manifest

⁶⁰ *Id.*

⁶¹ 25 U.S. 19 (1827).

⁶² *Id.* at 23.

⁶³ *Id.* at 30. The Militia Act of 1795 will be discussed in depth in Part II.

⁶⁴ See *supra* note 49 and accompanying text.

⁶⁵ *Martin v. Mott*, 25 U.S. 19, 29 (1832).

object contemplated by the act of Congress,” but from the “nature of the power itself.”⁶⁶ The Court explained:

If we look at the language of the act of 1795, every conclusion drawn from the *nature of the power itself, is strongly fortified*. The words are, “whenever the United States shall be invaded, or be in imminent danger of invasion, &c., it shall be lawful for the president, &c., to call forth such member of the militia, &c., as he may judge necessary to repel such invasion.’ *The power itself is confided to the executive of the Union, to him who is, by the constitution, ‘the commander-in-chief- of the militia, when called into the actual service of the United States,’ whose duty it is to ‘take care that the laws be faithfully executed,’ and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions.*⁶⁷

Like something slowly emerging from beneath the water, here is a first judicial bubble to indicate the presence of an inherent presidential intervention authority. We return to this critical—and provocative—issue in Part II. At this point, however, what is firmly settled after *Mott* in 1827, and the congressional appropriation in 1830, is what the Court in *Curtiss-Wright* presumed was an “irrefutable principle” even before the Constitution: that “though the states were several their people in respect of foreign affairs were one”⁶⁸—but still only in respect to repelling foreign invasions.

D. The Embargo Act and the States’ Continuing Power over Foreign Military Affairs

States, however, did retain the ability to affect foreign affairs more generally. *Curtiss-Wright* missed the fact that state militias were also a bulwark against a unilateralist foreign policy, for diplomacy is often hampered when there is no power to back it up.

Perhaps the Founders missed this point as well. Alan Hirsch notes that “amidst the great concern that federal control of the militia would result in domestic tyranny, there was no discussion as to whether the conditions in

⁶⁶ *Id.* at 30.

⁶⁷ *Id.* at 31 (emphasis added).

⁶⁸ *Curtiss-Wright*, 299 U.S. at 317.

clause fifteen might give the federal government too much or too little power to conduct foreign policy.”⁶⁹ Regardless of specific intent, the fact remained that with a limited national army and a defensive militia, there was at least a *de facto* limit on the President’s ability to conduct a robust foreign policy.

This constraint coincided with a nation that looked to develop itself from within rather than entangle itself in the affairs of others. Even with his knowledge that the Union would need a national army,⁷⁰ Washington, for example, warned against “overgrown military establishments,” urged impartiality towards all nations, and warned against “permanent alliances with any portion of the foreign world.”⁷¹ Instead, he stressed a “respectable defensive posture” and detachment from the “ordinary vicissitudes” of European politics.⁷²

Yet even a defensive posture requires an active foreign policy. Here the states, particularly through their militia powers, had a palpable effect. For example, President Jefferson was desperate to avoid entanglement in the Napoleonic Wars between Britain and France. To Jefferson, war was the “great enemy, particularly for republics, because it called for powerful governments, higher taxes, and more spending.”⁷³ Jefferson and his fellow Republicans feared a standing army, so in office, he reduced expenditures on the national army, and consequently increased reliance on state

⁶⁹ Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. CIN. L. REV. 919, 930 (1988).

⁷⁰ See *supra* note 27.

⁷¹ George Washington, Farewell Address (Sept. 17, 1796).

⁷² *Id.* He also added: “Our detached and distant situation invites and enables us to pursue a different course. If we remain one people, under an efficient government, that period is not far off when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality we may at any time resolve upon to be scrupulously respected; when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard the giving us provocation” *Id.* Washington, however, was not a pacifist, nor was he advocating a complete detachment from foreign affairs. While warning to steer clear of “permanent alliances,” he immediately added: “so far, I mean, as we are now at liberty to do it; for let me not be understood as capable of patronizing infidelity to existing arrangements.” *Id.* Instead, he recommended “temporary alliances” on a “respectable defensive posture” for “extraordinary emergencies.” *Id.* He also held out the possibility for offensive military engagements, concluding the above paragraph by stating that the period is not far off, “when we may choose peace or war, as our interest, guided by justice, shall counsel.” *Id.*

⁷³ John Yoo, *Jefferson and Executive Power*, 88 BOS. UNIV. L. REV. 421, 447 (2008).

militias.⁷⁴ But as Hamilton had warned, while the United States may try to avoid offensive war, we “ought not to disable it from guarding the community against the ambition or enmity of other nations.”⁷⁵ With the U.S. military weakened, Britain and France freely harassed U.S. shipping through seizures and the impressment of American seamen. By 1807, British and French orders rendered “virtually any U.S. vessel on the high sea fair game for the British or French navies” or their privateers.⁷⁶ War against such great powers would have been a difficult proposition for the United States at this point in any case, but the reduced national army made it basically infeasible. So Jefferson chose to restrict all transport of goods from U.S. ports to foreign destinations in order to “keep our seamen and property from capture, and to starve the offending nations.”⁷⁷

The embargo, however, also starved portions of the United States, particularly in the northeast. In large part through their militias, northeast states undercut the President’s foreign policy objective by refusing to deploy state militias to enforce the deeply unpopular law and the acts designed to force compliance. The Connecticut General Assembly, for example, passed a special resolution calling the Embargo Force Acts unconstitutional, and instructed, “persons holding executive offices under this State,” to refrain from “affording any official aid or cooperation in the execution of the act aforesaid.”⁷⁸ The measure explicitly applied to the state militia.⁷⁹

This official state opposition to the embargo, combined with continued popular resistance, proved fatal to Jefferson’s attempt to force Britain and France to change their policies on neutral shipping, which “failed utterly.”⁸⁰ In February 1809, Congress replaced the embargo with an

⁷⁴ An Act Fixing the Military Peace Establishment of the United States, ch. 9, 2 Stat. 132 (1802).

⁷⁵ THE FEDERALIST NO. 34, at 208 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁷⁶ Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1809*, 116 YALE L.J. 1636, 1648 (2007).

⁷⁷ Letter from President Thomas Jefferson to Albert Gallatin, Sec’y of the Treasury (Apr. 8, 1808) in 11 THE WRITINGS OF THOMAS JEFFERSON 27 (Andrew A. Lipscomb ed. 1905).

⁷⁸ Cited in Louis Martin Sears, JEFFERSON AND THE EMBARGO 186 (1966).

⁷⁹ The special resolution asserted the Assembly’s approval of Governor John Trumbull’s refusal to put the Connecticut Militia in the service of the embargo. *Id.*

⁸⁰ Yoo, *supra* note 73, at 452.

anodyne “non-intercourse” policy⁸¹ that effectively posed no obstacle to foreign trade. International commerce soon resumed to pre-embargo levels.⁸²

Three years later, as previously mentioned, the northeast states also successfully blocked Major General Dearborn’s order to enter Canada to attack the British there, interposing the constitutional argument that the first Militia Clause does not authorize militias to be called forth on foreign soil.⁸³ The practical effect of this refusal, even if *Mott* later proved it legally misguided, was the complete failure of Dearborn’s plan.⁸⁴ Both the embargo and the failure of President Madison’s war strategy, therefore, indicate that states, through their militias, maintained the ability to constrain national foreign policy and check presidential power.

E. Perpich, 9/11, and the Death and Reincarnation of the Constitutional Militias

As militias have become more associated with radical anti-government groups than with the citizen-soldiers of old,⁸⁵ it is easy to overlook how foundational a source of state power they were, and to miss their enduring legacy on governor-President relations. But the militias gradually did decline, especially at the dawn of the twentieth century, and thus so did state power to affect foreign affairs.

The Spanish-American War in 1898 established the United States as a world power, and it had a profound impact on the defense-oriented, part-

⁸¹ See An Act To Interdict the Commercial Intercourse Between the United States and Great Britain and France, and Their Dependencies; and for Other Purposes, ch. 24, 2 Stat. 528 (1809).

⁸² Sears, *supra* note 78, at 194.

⁸³ A bitter debate arose in Congress in 1810 as to whether state militias could be used in an offensive war beyond the border of the United States, which likely contributed to the refusal to cross the border into Canada two years later. See Carl Edward Skeen, *CITIZEN SOLDIERS IN THE WAR OF 1812* 13 (1999) (“Surely arguments used in this debate, which gained wide circulation, served some militiamen during the War of 1812 in their refusal to cross into Canada.”).

⁸⁴ WOOD, *supra* note 49, at 680.

⁸⁵ See, e.g., Barton Gellman, “The Secret World of Extreme Militias,” *TIME MAGAZINE*, (Sept. 30, 2010).

time militias.⁸⁶ Shortly thereafter, President Theodore Roosevelt began to overhaul the militia system and transform the militias into an effective fighting force not only for national defense, but also for power projection.⁸⁷ The process accelerated after World War II and with the rise of the modern Administrative State. Today's National Guard eventually emerged.⁸⁸ Although it considers itself the successor to the militias,⁸⁹ strictly as a constitutional matter it cannot be. The militias were organized under the Militia Clauses and can only be called forth for three, defensive purposes. The National Guard, in 1903, was originally confined to American shores⁹⁰ and thus could be the constitutional successor to the militias. By 1908, however, Congress allowed it to serve "either within or without the territory of the United States."⁹¹ For Roosevelt's Attorney General, this expeditionary authority was unconstitutional if it "were construed to authorize Congress to use the Organized Militia for any other than the three purposes specified."⁹² But, in fact, it was not unconstitutional if the National Guard was no longer a constitutional militia. By 1908, the National Guard had effectively severed its constitutional tie to the militias

⁸⁶ MICHAEL D. DOUBLER, *CIVILIAN IN PEACE, SOLDIER IN WAR* 128–29 (2003). The War was still largely fought by militiamen who had to volunteer into service since the Constitution only permitted the calling forth for defensive purposes.

⁸⁷ *Id.*

⁸⁸ The first step in the modern transformation came with the Dick Act of 1903, which created an "organized militia," to be known as the National Guard, and a "reserve militia." An Act to Promote the Efficiency of the Militia, and for Other Purposes, ch. 196, 32 Stat. 775, 775 (1903).

⁸⁹ See, e.g., NATIONAL GUARD: ABOUT, <http://www.nationalguard.mil/AbouttheGuard.aspx> [<http://perma.cc/BMD5-X3WP>] (last visited June 1, 2014).

⁹⁰ See *Perpich*, 496 U.S. 334, 342 (1990) (explaining that the legislative history indicates that Congress still saw the National Guard as a constitutional militia formed under the Militia Clauses, contemplating that the National Guard would still be rendered "only upon the soil of the United States or of its territories").

⁹¹ 60 Cong. Ch. 204, May 27, 1908, 35 Stat. 400, Sec. 4.

⁹² 29 Op. Att'y Gen 322, 329 (1912). He did find constitutional those cross border incursions necessary to repel invasions, just as the Court had done in *Mott*, and he remarked that the 1908 revision was "inserted as a matter of precaution and to prevent the possible recurrence of what took place in our last war with Great Britain, when portions of the militia refused to obey orders to cross the Canadian frontier. *Id.* During World War I, the President effectively got around Wickersham's opinion by not calling forth the National Guard directly but rather by drafting individual members of the National Guard into the Regular Army, a practice upheld in the *Selective Draft Law Cases*. 245 U.S. 366 (1918). Congress authorized the individual drafting of National Guard members in the National Defense Act of 1916, Ch. 134, 39 Stat. 166. Importantly, once drafted, these members of the National Guard were discharged from the militia.

and tethered itself to the national military, constitutionally rooted in Congress's power to raise an army.⁹³

It was not until 1990, however, that the U.S. Supreme Court finally acknowledged this break and the consequent loss of state power over external affairs that came with the demise of the constitutional militias. In *Perpich v. Department of Defense*, the Governor of Minnesota, who refused to allow President Reagan to call forth his militia to train overseas, argued that ordering the National Guard to federal duty outside the United States violated the Militia Clause's three criteria for federalizing the militia.⁹⁴ The Supreme Court disagreed, finding that when the National Guard was federalized, it ceased to be the state national guard, or, in other words, the constitutional militia.⁹⁵ "The congressional power to call forth the militia," the Court explained, "may in appropriate cases supplement its broader power to raise armies and provide for the common defense and general welfare."⁹⁶ Under this "dual enlistment system," the President can therefore employ the National Guard for any purpose, not just in cases of invasions, rebellion, or insurrection.

The Governor made a vigorous, national security federalism objection, but the Court brushed aside his concerns:

The Governor argues that this interpretation of the Militia Clauses has the practical effect of nullifying an important state power that is expressly reserved in the Constitution. We disagree. It merely recognizes the supremacy of federal power in the area of military affairs.⁹⁷

⁹³ See U.S. CONST. art. I, § 8, cl. 12.

⁹⁴ See generally *Perpich*, 496 U.S. 334.

⁹⁵ *Id.*

⁹⁶ *Id.* at 350. See *Selective Draft Law Cases*, 245 U.S. 366 (1918) (the power to raise armies was "not qualified or restricted" by the Militia Clauses, and thus National Guard members drafted into federal service could serve beyond those three domestic circumstances listed in the Militia Clause); *Cox v. Wood*, 247 U.S. 3, 6 (1918) (in which a unanimous Supreme Court reiterated and clarified its central holding in the *Selective Draft Law Cases* that "the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause.").

⁹⁷ *Perpich*, 496 U.S. at 351.

The *Perpich* Court, however, overstated the supremacy of federal power in military affairs.⁹⁸ It failed to note the distinction between external and internal military affairs.⁹⁹ It also understated the effect of the militias on national security federalism, just as the Governor argued.¹⁰⁰ Severing the link between the National Guard and the Militia Clauses did impede an important state power, but that break had happened decades prior. As Edward Corwin observed, World War II mobilization and post-war national security imperatives came at the expense of dual federalism.¹⁰¹ So far gone were the militias that the Court failed to appreciate their significance.

They did not die, however. Rather, they entered a dormant, chrysalis stage, emerging in the bloody spring of a new century in a different form. As Jason Mazzone has noted, the musket-carrying farmers of the early Republic have become the modern day state and local police, firefighters, EMTs, and other first responders, many of whom are also part-time.¹⁰² These state and local officials are becoming increasingly important to national security, and are thereby causing a resurgence in state power to affect foreign affairs.¹⁰³ Matthew Waxman has demonstrated that they play an integral part in collecting and processing national security intelligence,¹⁰⁴ and President Obama has acknowledged their integral role in the context of al Qaeda-inspired terrorism:

In our efforts to counter violent extremism, we will rely on existing partnerships that communities have forged with Federal, State, and local government agencies. . . . In many instances, our partnerships and related activities were not created for national security purposes but nonetheless have

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ EDWARD SAMUEL CORWIN, *TOTAL WAR AND THE CONSTITUTION* 70, 173–74 (1947).

¹⁰² Jason Mazzone, *The Commandeerer in Chief*, 83 NOTRE DAME L. REV. 265, 276 (2007–2008) (“The militia units of 1789 no longer exist. However, the federal government’s emergency commandeering power should be understood today to apply to the emergency response personnel of state and local government who today perform duties once allocated to the militia.”). He concludes that since the Constitution does not define the term “militia” for purpose of the calling forth power, Congress could pass legislation allowing the President to commandeer state and local police officers, firefighters, and other emergency responders.

¹⁰³ *See id.*

¹⁰⁴ *See* Waxman, *supra* note 14, at 302–07.

an indirect impact on countering violent extremism (CVE).¹⁰⁵

Furthermore, the Intelligence Reform and Terrorism Prevention Act of 2004, passed in response to 9/11, specifically requires the President to facilitate the sharing of terrorism-related information with state and local authorities,¹⁰⁶ while states have recently begun to register their dissent with certain federal policies by looking to curtail their participation in intelligence collection and sharing.¹⁰⁷

Thus, the federal government must rely on, and cooperate with, state and local officials today in a way that is reminiscent of the early days of the Republic. At the same time, however, it is important to recognize that in times of foreign-born crises, presidential power over states is, and should be, at its height. While cooperation and comity is essential, what President Madison argued in 1812 is no less true today: if the United States is to survive within a dangerous world, state power has to be subordinate to presidential discretion. In times of crises, there can be no confusion that liberty may require national unity.

¹⁰⁵ NAT'L SEC. STAFF, EXEC. OFFICE OF THE PRESIDENT, STRATEGIC IMPLEMENTATION PLAN FOR EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES 1 (2011).

¹⁰⁶ 6 U.S.C. § 485 (2012).

¹⁰⁷ See, e.g., Nigel Duara, *States Look to Rein in Government Surveillance*, Associated Press (Feb. 5, 2014) (“Angry over revelations of National Security Agency surveillance and frustrated with what they consider outdated digital privacy laws, state lawmakers around the nation are proposing bills to curtail the powers of law enforcement to monitor and track citizens. Their efforts in at least 14 states are a direct message to the federal government: If you don’t take action to strengthen privacy, we will.”). Robert Leider has argued that loss of the constitutional militias, particularly after *Perpich*’s endorsement of the dual-enlistment system, has diminished state power and thus destroyed the federalism-based checks, leaving only the horizontal limitations provided by separation of powers to check federal military power, “unlike at the Framing when vertical checks provided supplementary safeguards.” Robert Leider, *Federalism and the Military Power of the United States* 3 (2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330648 [<http://perma.cc/BBT9-2AJB>]. However, he does not address the impact the modern-day militias have on reinvigorating the federalist checks.

II. Presidential Power over Internal Threats

The growth of presidential power over states with regard to internal threats emerged almost immediately after the Constitution was ratified, if not before, and essentially concluded during Reconstruction. In many ways, the growth was inevitable. A strong constitutional and statutory presumption of state primacy over domestic law enforcement and the provision of public health and safety, however, remain to this day. Until a state is unable or unwilling to perform these functions, the President cannot simply pound a fist and tell a governor what to do. Conversely, when states and ordinary judicial proceedings cannot or will not maintain order, ensure public health and safety, or equitably enforce the law against armed opposition, or when federal property or personnel are in grave danger, the President can, and sometimes must, intervene within a state.

But presidential intervention, even on the basis of presidential inherent authority, does not equal martial law. Unless some exception narrowly and temporarily applies, the Constitution's full civil liberty protections continue to apply during an intervention. Furthermore, during calamitous times when presidential leadership is necessary, the legacy of Presidents dating back to Washington demonstrates the value of intergovernmental comity and consultation, particularly as: (a) federal resources for internal threats largely rely on state resources; (b) these state resources are best situated to know the needs of their state; and because (c) long after the federal government moves on, these resources, and the Governors who command them, remain to lead the recovery. The history matters not only for its reinforcement of core constitutional principles, but also for its lessons for today. Properly understood, federalism can be a great source for effective presidential and gubernatorial leadership.

A. Shays' Rebellion and the Need for an Empowered Federal Government

The first system of government after the Revolution, the Articles of Confederation, made the federal government too dependent on the states, eventually leading to a constitutional convention to strengthen it and better safeguard liberty. After the Revolution, the Continental Congress dissolved

most of the Continental Army and returned to a reliance on the militias.¹⁰⁸ On June 3, 1784, the Continental Congress recommended that Connecticut, New Jersey, New York, and Pennsylvania provide a 700-man militia for twelve months of service.¹⁰⁹ Though these states complied, Congress could not raise an army or navy, and it had no mechanism to require the states to provide their quotas of troops. The militias trained to no uniform standard and they could not be compelled at the national level to fight. In response to a plan proposed by Hamilton to improve the situation in 1783, for example, David Howell and William Ellery of Rhode Island asked:

Why [should] Rhode Island, New Jersey, or Delaware . . . be at the expense of maintaining a chain of forts from Niagara to Mississippi to secure the fur trade of New York, or the back settlements of Virginia!¹¹⁰

Worse, individual militias under the command of individual governors created a fear of territorial competitions among states, with large states pitted against smaller neighbors. Oliver Ellsworth of Connecticut, arguing for greater centralized authority over the armed forces out of fear for the “ambition and rapacity of New York,” stated:

We must unite, in order to preserve peace among ourselves. If we be divided, what is to prevent wars from breaking out among the states? States as well as individuals are subject to ambition, to avarice, to those jarring passions which disturb the peace of society. What is to check these? If there be a parental hand over the whole, this, and nothing else, can restrain the unruly conduct of the members.¹¹¹

For Ellsworth, true and lasting liberty required a measure of unity against threats from within.

¹⁰⁸ See MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKINGS OF THE AMERICAN STATE* 82 (2003) (noting the Continental Congress kept eighty troops to secure federal arms depots).

¹⁰⁹ *Id.*

¹¹⁰ WILLIAM R. STAPLES, *RHODE ISLAND IN THE CONTINENTAL CONGRESS* 445 (1870).

¹¹¹ Debates in the Convention of the State of Connecticut (Jan. 4, 1788) (statement of Oliver Ellsworth).

What came to be known as Shays' Rebellion proved for many that a weak national government could neither safeguard liberty nor secure the nation. Between August 1786 and June 1787, an armed uprising took place in central and western Massachusetts, which shut down state courts and resulted in violent conflicts between the State and the rebels. After protests in Great Barrington, Concord, and Taunton succeeded in shutting down the courts, James Warren wrote to Samuel Adams on October 22, 1786 that: "We are now in a state of Anarchy and Confusion bordering on Civil War."¹¹²

While Thomas Jefferson, then serving as Ambassador to France, thought that such little rebellions now and again were good things,¹¹³ George Washington was appalled and recognized the fatal weakness in a federal government that could not respond to domestic threats. To Henry Lee, Washington wrote:

You talk, my good sir, of employing influence to appease the present tumults in Massachusetts. I know not where that influence is to be found, or, if attainable, that it would be a proper remedy for the disorders. Influence is no government. Let us have a one by which our lives, liberties and properties will be secured; or let us know the worst at once.¹¹⁴

At the Constitutional Convention in Philadelphia in May 1787 and during the ratification debates that followed, the experience of Shays' Rebellion was fresh in many people's minds, and it sparked keen debate over the need for a standing army under the command of a federal President. Looking to the "experiment" without such a national force and the "consequences in their rapid approach to anarchy," under the Articles of Confederation, Charles Pinckney concluded that there "must also be a real military force,"

¹¹² Letter from James Warren to Samuel Adams (Oct. 22, 1786), *cited in* James MacGregor Burns & Susan Dunn, *GEORGE WASHINGTON, THE AMERICAN PRESIDENTS SERIES: THE FIRST PRESIDENT (1789–1797)* 32 (2004).

¹¹³ Letter from Thomas Jefferson to Colonel Smith (Nov. 13, 1787) *available at* <http://www.theatlantic.com/past/docs/issues/96oct/obrien/blood.htm> [<http://perma.cc/TD5J-LJV4>] (famously stating: "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure").

¹¹⁴ Letter from George Washington to Henry Lee (Oct. 31, 1786) *available at* <http://teachingamericanhistory.org/library/document/letter-to-henry-lee-3/> [<http://perma.cc/6VF4-D9ZN>].

as this “alone can effectually answer the purpose.”¹¹⁵ Edmund Randolph considered among the key defects of the Articles of Confederation that the federal government “could not check the quarrel between the states, nor a rebellion in any, not having constitutional power, nor means, to interpose according to the exigency.”¹¹⁶ Hamilton held out the “tempestuous situation, from which Massachusetts has scarcely emerged,” as an example of what would happen without a credible federal “guarantee.”¹¹⁷

On the other hand, Elbridge Gerry believed that a federal response to Shays’ Rebellion would have been worse. According to Madison’s notes, Gerry:

[W]as agst. letting loose the myrmidons of the U. States on a State without its own consent. States will be the best Judges in such cases. More blood would have been spilt in Massts in the late insurrection, if the Genl. authority had intermeddled.¹¹⁸

Others joined Gerry to rail not only against a national army, but against federal control of the militias, which would enslave the states and leave them to “pine away to nothing.”¹¹⁹

Madison turned their argument on its head, arguing that federal control over the militias was essential to safeguard liberty, since the alternative, if there was to be a union, was that most hated of bugaboos—the standing army:

As the greatest danger is that of disunion of the States, it is necessary to guard agst. it by sufficient powers to the Common Govt. and as the greatest danger to liberty is from

¹¹⁵ FARRAND, 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 205 (1911).

¹¹⁶ JONATHAN ELLIOT, 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 127 (1845).

¹¹⁷ THE FEDERALIST NO. 23 (Alexander Hamilton).

¹¹⁸ 2 FARRAND, *supra* note 115, at 317. Gerry would also argue: “Will any man say that liberty will be as safe in the hands of eighty or a hundred men taken from the whole continent, as in the hands of two or three hundred taken from a single State?” 3 FARRAND, *supra* note 115, at 206.

¹¹⁹ 3 FARRAND, *supra* note 115, at 205 (statement of Ellsworth).

standing armies, it is best to prevent them by an effectual provision for a good Militia.¹²⁰

As we saw above in relation to external threats, the role of the militias for internal threats was in truth a debate that went to the heart of the American experiment, an experiment that hypothesized that liberty can co-exist with security, if only the right structures and institutions could be designed.

B. Constitutional Compromise

And so, to protect liberty as well as to “insure domestic Tranquility,”¹²¹ the Constitution forged a specific compromise to strengthen the federal government vis-à-vis the states, while still leaving the states the primary responsibility over domestic security.¹²² In this compromise, the last resort doctrine for presidential military intervention in domestic affairs was born.

Much of the compromise—but importantly not all—was embodied 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.¹²³

For the reasons discussed above, the new Constitution obliged the federal government to protect the states against external threats, even without state request, which made sense given how few external powers states retained.¹²⁴ The Constitution, however, would not let the United States claim that it was similarly obliged to step in against internal threats without state request. This distinction also made sense since the Constitution did not

¹²⁰ *Id.* at 207.

¹²¹ U.S. CONST. pmbl.

¹²² See, e.g., Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95. COLUM. L. REV. 1001, 1032 n.120 (1995) (The Militia Clauses “expressly struck a particular balance between federal interests and state autonomy in the military context.”).

¹²³ U.S. CONST. art. IV, § 4.

¹²⁴ See discussion *supra* at Part II.

generally deprive the states of their power and responsibility to ensure internal peace and security.

It did, however, oblige the U.S. to intervene upon formal state request when domestic violence overwhelmed the state. If, in Hamilton's words, domestic dangers were to "threaten the existence of the State constitution,"¹²⁵ or in Madison's words, to involve "violent factions, flying to arms, and tearing a State to pieces,"¹²⁶ and the state requested assistance, the federal government could be obliged to intervene. As Jay Bybee noted, the federal government was to have "secondary" responsibility over domestic threats, but it was nonetheless agreeing to be the ultimate guarantor.¹²⁷

Another key constitutional aspect of the compromise was the First Militia Clause.¹²⁸ By this Clause, the Constitution granted Congress the power to call forth the state militias, but *only* in three discrete circumstances of emergency—the last of which was discussed in Part I above—to execute the laws of the Union, to suppress insurrections, and to repel invasions.¹²⁹

When Patrick Henry voiced concern that the federal government might abuse its militia powers under the Constitution *regularly* to call forth the militias to execute the laws, men like Virginia House of Delegates member George Nicholas emphasized how the First Militia Clause only empowered the federal government to use the militias as a last resort against violent opposition. Nicholas explained that there is a "great difference" between having the power in three cases and in all cases, and "can any thing be more demonstrably obvious, than that the laws ought to be enforced if

¹²⁵ THE FEDERALIST NO. 21 (Alexander Hamilton)

¹²⁶ THE FEDERALIST NO. 43 (James Madison).

¹²⁷ Jay Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 23 (1997). See William C. Banks, *Providing "Supplemental Security"—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. NAT'L SEC. L. & POL'Y 39, 50 (2009) ("The default rule was that the states would take care of themselves. If they needed the support of the federal military for protection, they would ask for it."). Douglas A. Poe, *The Use of Federal Troops to Suppress Domestic Violence*, 54 A.B.A. J. 168, 171 (1968) (federalism dictates that the "preservation of law and order is basically a responsibility of the state and local governments").

¹²⁸ U.S. CONST. art. I, § 8, cl. 15 (affording Congress the power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions").

¹²⁹ *Id.*

resisted, and insurrections quelled, and foreign invasions repelled?”¹³⁰ When Patrick Henry continued to worry that martial law would become the norm,¹³¹ Nicholas insisted that the Constitution did not prohibit, let alone alter the normal practice of, civilian law enforcement.¹³² Only when “found absolutely necessary,” would the militia power be exercised.¹³³

Madison endorsed Nicholas’ last-resort view of the constitutional permissibility of calling forth the militias to enforce domestic law. Where the civil power was sufficient, he argued, the use of the militia “would never be put in practice.”¹³⁴

The Second Militia Clause also gave states specific powers over their militias, which in turn empowered states vis-à-vis the federal government. While the President could appoint officers of the federal Army and Navy (with the advice and consent of the Senate, which originally was closely tied to states),¹³⁵ only the states could appoint officers in the militias.¹³⁶ This power was considered critical as many Framers feared that a federally-appointed officer corps would be more loyal to the federal government than to the states.¹³⁷ The Constitution also placed states in charge of training their militias, although to ensure compatibility and interoperability across states and with the federal military, Congress could provide certain standards.¹³⁸

Finally, the Constitution provided the federal government with a national military under presidential command.¹³⁹

¹³⁰ 3 ELLIOT, *supra* note 26, at 392 (statement of George Nicholas).

¹³¹ 3 ELLIOT, *supra* note 26, at 387.

¹³² *Id.* at 392.

¹³³ *Id.*

¹³⁴ *Id.* at 384.

¹³⁵ U.S. CONST. art. II, § 2.

¹³⁶ U.S. CONST. art. I, § 8, cl. 16 (affording Congress the power to “provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to *the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress*” (emphasis added)).

¹³⁷ *See, e.g.,* THE FEDERALIST NO. 29 (Alexander Hamilton).

¹³⁸ U.S. CONST. art. I, § 8, cl. 16 (“ . . . reserving to *the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress*” (emphasis added)).

¹³⁹ The federal government would be permitted to “raise and support” a standing army, U.S. CONST. Art. I, § 8, cl. 12., and “provide and maintain a Navy,” *id.* at cl. 13, which the

For Hamilton, in separating, limiting, and balancing the federal powers with the state militias in this way, liberty and security would find equipoise. In Federalist No. 29, he argued that it “will be possible to have an excellent body of well-trained militia, ready to take the field whenever the defense of the State shall require it.”¹⁴⁰ This plan would “lessen the call for military establishments” and serve as the “only substitute that can be devised for a standing army, and the best possible security against it, if it should exist.”¹⁴¹ In Federalist No. 28, Hamilton even went so far as to say that should the federal government “raise and maintain an army capable of erecting despotism,” the people might, through their state militias, “take measures for their own defense.”¹⁴²

Madison agreed, reasoning that even a large national army would be dwarfed by the number of militiamen, “with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence.”¹⁴³

In the end, others remained unconvinced, particularly of the necessity of a standing army, however small and checked by the militias. When the final text of the Constitution came before the State of Virginia, for example, George Mason decried: “I abominate and detest the idea of a government, where there is a standing army.”¹⁴⁴

But the Federalists’ arguments for a national army under presidential command and for a federal ability to call forth the militias as a last resort prevailed. Nonetheless, the ideal of the citizen-soldier, the fear of a standing army, the trust in the knowledge and loyalty of locals, and the concern of too strong a president would have lasting effect.

President commanded, *id.* at Art. II, § 2, cl. 1, to ensure that there was a force capable of providing for the common defense.

¹⁴⁰ THE FEDERALIST NO. 29 (Alexander Hamilton).

¹⁴¹ *Id.*

¹⁴² THE FEDERALIST NO. 28 (Alexander Hamilton). Interestingly, Hamilton originally advocated for the militia to be “under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them,” but he never submitted that proposal. THE DEBATES IN THE FEDERAL CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 164 (Hunt & Scott eds., 1920).

¹⁴³ THE FEDERALIST NO. 46 (James Madison).

¹⁴⁴ DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 270 (1805).

C. The 1792 Militia Act and the Critical Distinction between Delegation and Authorization

On May 2, 1792 Congress passed the first Militia Act. This legislation, still largely in effect today, authorized the President to call forth the militias to protect the states against invasions and domestic threats, as well as to protect the United States.¹⁴⁵ Importantly, the Congress in the Militia Act did not delegate this intervention authority. Rather it shaped and restricted what is, in essence, an inherent presidential authority.

The 1792 Militia Act's first section, which occasioned little debate,¹⁴⁶ read:

That whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation or Indian tribe, it shall be lawful for the President of the United States, to call forth such number of the militia of the state or states most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose, to such officer or officers of the militia as he shall think proper; and in the case of insurrection in any state, against the government thereof, it shall be lawful for the President of the United States, on the application of the legislature of such state, or the executive (when the legislature cannot be convened) to call forth such number of the militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection.¹⁴⁷

The second section was fiercely debated,¹⁴⁸ as it authorized the President to employ the militias, without state request, to enforce the laws of the Union.

¹⁴⁵ An Act to Provide for Calling Forth the Militia, to Execute the Laws of the Union, to Suppress Insurrections and Repel Invasions [hereinafter The Militia Act of 1792], ch. 28, 1 Stat. 264.

¹⁴⁶ See ROBERT COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789–1878 22 (1988), available at: http://www.history.army.mil/html/books/030/30-13-1/CMH_Pub_30-13-1.pdf [http://perma.cc/B93X-TG8A].

¹⁴⁷ The Militia Act of 1792, ch. 28, § 1, 1 Stat. 264.

¹⁴⁸ Coakley, *supra* note 146, at 20.

It is this second section that proved historic in the development of presidential power over states. It read:

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 the powers vested in the marshals by this act, the same being notified to the President of the United States, by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed. And if the militia of the state, where such combinations may happen, shall refuse, or be insufficient to suppress the same, it shall be lawful for the President, if the legislature of the United States be not in session, to call forth and employ such numbers of the militia of any state or states most convenient thereto, as may be necessary, and the use of the militia, so to be called forth, may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session.¹⁴⁹

On the plain reading of the text of section two, three key features emerge: (a) a statutory authorization to the President of the power to call forth and command the militias; (b) a requirement to demonstrate the inability of civil authorities to remedy the situation; and (c) a set of procedural restrictions on this vast power.

Section three provided another important procedural restriction, while reinforcing presidential discretion. It read:

That whenever it may be necessary, in the judgment of the President, to use the military force hereby directed to be called forth, the President shall forthwith, and previous thereto, by proclamation, command such insurgents to disperse and retire peaceably to their respective abodes, within a limited time.¹⁵⁰

¹⁴⁹ The Militia Act of 1792, ch. 28, § 2, 1, Stat. 264.

¹⁵⁰ *Id.*

David Barron and Martin Lederman rightfully explain that with the Militia Act, Congress “inaugurated a practice that would become even more common in the subsequent decades as to the use of military force more generally.”¹⁵¹ Congress would enact a measure “triggering the President’s constitutional ‘command’ authorities, but its delegation to the President to exercise such authorities would be confined to ensure they were exercised in a manner consistent with whatever objectives and directives Congress had expressly or implicitly prescribed.”¹⁵²

However, while many critics of inherent presidential domestic authority, including Barron and Lederman, consider the 1792 Militia Act, and its successors, to be delegations of authority that Congress can revoke,¹⁵³ on close inspection, it cannot be. The Constitution gave Congress all “legislative Powers herein granted”, including the power to “provide for calling forth the Militia.”¹⁵⁴ It did not give it the power to actually call them forth.¹⁵⁵ The President, on the other hand, has “[t]he executive power,” and he, not Congress, is the constitutional Commander-in-Chief of the militias when called into federal service.¹⁵⁶ Congress can shape and restrict the President’s ability to call them forth, as it did with the Militia Act, but so long as the constitutional protective obligation exists, the means of doing so has to exist as well.¹⁵⁷

¹⁵¹ David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 961 (2008).

¹⁵² *Id.*

¹⁵³ See Stephen Vladek, who in a pioneering note argued that: “Although this body of constitutional emergency power today belongs to the Executive, it is not because of the constitutional authority provided by Article II, but rather because of congressional delegation.” Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 153 (2004). He concludes by arguing that, “because this immensely significant form of emergency power is legislative, Congress can by statute regulate and circumscribe its limits—what Congress giveth, Congress can surely taketh away.” See also the discussion of *Luther v. Borden*, *infra* at 165.

¹⁵⁴ U.S. CONST. art. I, § 8, cl. 15.

¹⁵⁵ Cf. Louis Fisher, *Domestic Commander in Chief: Early Checks by Other Branches*, 29 CARDOZO L. REV. 961, 968 (2008) (“Congress, not the president, does the calling. The Constitution gives to Congress the power to provide ‘for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.’”) Fisher removes the critical word from the quotation. Congress only has the power to *provide* for calling forth the militia. If it had the power to call them forth, the Clause would have said just that.

¹⁵⁶ U.S. CONST. art. II.

¹⁵⁷ See *Loving v. United States*, 517 U.S. 748, 757 (1996) (“[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.”).

As we have seen in *Martin v. Mott*, the Court has already hinted at the presence of some inherent presidential power to respond to external threats. As we will see below, other bubbles will surface. By the end of the nineteenth century, both courts and presidents will firmly acknowledge the existence of presidential inherent authority to intervene against foreign and domestic threats.

D. The Whiskey Rebellion and the Constitutionality of the Militia Act

While later presidents would rely, at least in part, on inherent presidential authority, Washington relied solely on the 1792 Militia Act to survive the Constitution's first great test—the Whiskey Rebellion. By 1794, protests against the federal government's imposition of a tax on distilled whiskey climaxed, particularly in western Pennsylvania. When a U.S. marshal arrived to serve writs to distillers who had not paid the tax, 500 armed men attacked the fortified home of the federal tax inspector. Two years earlier, hoping to quell the growing violence, President Washington had issued a warning;¹⁵⁸ but as matters intensified, Washington gave the protestors until September 1 to “disperse and retire peaceably to their respective abodes” or face a military response.¹⁵⁹

Washington moved ahead with this federal response under the controversial Section 2 of the Militia Act, sparking a principles and instructive dispute with Pennsylvania's Governor. Even though there was no requirement under Section 2 for state request, President Washington closely consulted with Governor Mifflin and called a joint meeting between his cabinet and Pennsylvania authorities.¹⁶⁰ Governor Mifflin initially

¹⁵⁸ George Washington, “Proclamation” (Sept. 15, 1792), <http://founders.archives.gov/documents/Washington/05-11-02-0058> [<http://perma.cc/MC8J-ZYHL>].

¹⁵⁹ George Washington, “Proclamation—Cessation of Violence and Obstruction of Justice in Protest of Liquor Laws in Pennsylvania” (Aug. 7, 1794), <http://www.presidency.ucsb.edu/ws/?pid=65477> [<http://perma.cc/XQ8J-L2JB>].

¹⁶⁰ See WILLIAM HOGELAND, *THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY 186–87* (2006). Treasury Secretary Alexander Hamilton, Secretary of War Henry Knox, Secretary of State Edmund Randolph, and Attorney General William Bradford represented the federal government. Governor Mifflin, Attorney General

explained that he was reluctant to use the state's militia against the rebellion, believing that the judiciary should first be employed to punish the rioters.¹⁶¹ After Justice James Wilson certified that the resistance was beyond the judiciary's power, however, Washington decided to call forth the militia.

Governor Mifflin protested and questioned whether the President had the authority, without state request, to call up the militia to enforce *federal law* in this instance. Although opposition to federal tax laws triggered the riots, the violence in his view was indistinguishable from other acts of organized violence:

Had the riot been unconnected with the system of federal policy, the vindication of our laws would be left to the ordinary course of justice; and only in the last resort, at requisition, and as an auxiliary of the civil authority, would the military force of the State be called forth.¹⁶²

In a few years, the Supreme Court would settle the matter as to who had the discretion to invoke the Militia Act,¹⁶³ but in the moment, Washington relied on careful diplomacy to persuade Governor Mifflin to pledge his cooperation. On the same day of Washington's "cease and desist" proclamation, Governor Mifflin relented, issuing his own proclamation condemning the riots and directing his state's militia leaders to prepare their units for federal service.¹⁶⁴

With this force in hand, Washington issued a final warning.¹⁶⁵ Less than two weeks later, his army swelled to 15,000 militiamen, and Washington (via Hamilton) provided to the commander, Virginia Governor Henry Lee, the internal security reasons for which the militias were called forth: to "suppress the combinations which exist in some of the western

Jared Ingersoll, Secretary of the Commonwealth Alexander J. Dallas, and Chief Justice Thomas McKean represented Pennsylvania.

¹⁶¹ *Id.* at 186–87.

¹⁶² 4 ANNALS OF CONG. app. at 2827–28 (1796) (letter from Governor Mifflin).

¹⁶³ See *Luther v. Borden*, 48 U.S. 1 (1849), discussed *infra* at Part II.H.

¹⁶⁴ See Coakley, *supra* note 146, at 39.

¹⁶⁵ See George Washington, "Proclamation—Authorizing Military Intervention to End Violence and Obstruction of Justice in Protest of Liquor Laws in Pennsylvania," (September 25, 1794), <http://www.presidency.ucsb.edu/ws/?pid=65478> [<http://perma.cc/PK5V-DRCL>].

counties of Pennsylvania in opposition to the laws laying duties upon spirits distilled within the United States and upon stills;” and to “cause the laws to be executed.”¹⁶⁶

The show of force was sufficient, and the rebellion dissolved. While the federal response cost the United States more than a million dollars in militia pay and expenses, while certain militia regiments did not answer the call, and while many units were ill-prepared, George Washington recognized the historic success. “[N]o money could have been more advantageously expended,” he exclaimed, “both as it respects the internal peace and welfare of this country, and the impression it will make on others.”¹⁶⁷ To those who believed the United States could not govern itself as a free and secure nation, Washington proclaimed, “[t]hey will see, that republicanism is not the phantom of a deluded imagination.”¹⁶⁸

In demonstrating that through national security federalism, liberty and security can co-exist across a large country, Washington set a number of important precedents. First, when responding to grave threats from within, states and the federal government are in a cooperative relationship. States have the first role, and when necessary, the federal government has the final role, but often the final role depends heavily on state capabilities. Consultation and comity are critical, even when consent is not required.¹⁶⁹

Second, intervention does not equal martial law. Washington, through Hamilton, instructed Lee that the leaders of the rebellion were to be “delivered to the civil magistrates,” not military commissions, with the “rest to be disarmed, admonished, and sent home (except such as may have been particularly violent and also influential).”¹⁷⁰ Furthermore, troops were to “countenance and support,” not supplant, the civil officers and normal judicial process.¹⁷¹ Washington also instructed that individual Army members were themselves not above the law. Rather, they were “mere agents of the Civil power; that out of camp, they have no other authority,

¹⁶⁶ Letter from Alexander Hamilton to Henry Lee (Oct. 20, 1794), in the Government Printing Office, Congressional Serial Set, Vol. 19 (1922).

¹⁶⁷ Letter from George Washington to Edmund Pendleton (Jan. 22, 1795).

¹⁶⁸ *Id.*

¹⁶⁹ Washington also directed Lee, via Hamilton, to “promise a general pardon,” but to do so “with the cooperation of the Governor of Pennsylvania.” Letter from Alexander Hamilton to Henry Lee, *supra* note 166.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

than other citizens that offenses against the laws are to be examined, not by a military officer, but by a magistrate; that they are not exempt from arrests and indictments for violations of the law; . . . and that the whole country is not to be considered as within the limits of the camp.”¹⁷²

Third, for insurrections against the United States or armed opposition to its laws, the President can constitutionally intervene without state request. Some modern commentators argue that Governor Mifflin’s objection to Washington’s readiness to unilaterally intervene was a “fair one,”¹⁷³ and that Section 2 of the Militia Act, which permits federal intervention without state request, “went far beyond the language of the Constitution.”¹⁷⁴ These commentators, and Governor Mifflin, however, tend to merge Article IV, Section 4, which has a state request requirement, with the First Militia Clause, which does not. They also assume that the 1792 Militia Act is grounded just in the latter, and not also in the former. Jay Bybee, for example, focuses solely on Article IV, Section 4 to argue that if Congress has enumerated powers only,¹⁷⁵ while states have all residual powers,¹⁷⁶ then since Article IV only specified that Congress is obliged to intervene upon state request, Congress could not have granted the President an ability to intervene domestically without state request:

The Domestic Violence Clause plays the role of a Tenth Amendment for crime. It is a reaffirmation of the enumerated powers doctrine and a promise of federal noninterference that prohibits not only the uninvited use of federal troops to combat crime, but also forbids federal legislation that displaces the states’ obligation to protect their citizens by suppressing domestic violence.¹⁷⁷

The problem with that argument, however, is that Congress did have the enumerated power in the First Militia Clause. That clause, which authorizes

¹⁷² Coakley, *supra* note 146, at 65 (quoting letter from George Washington to Rep. Morgan of Mar. 27, 1795).

¹⁷³ See Bybee, *supra* note 127, at 51.

¹⁷⁴ *Id.* at 43.

¹⁷⁵ The enumerated powers doctrine provides that Congress’s power is limited to those powers expressly conferred by the Constitution. See *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 395 (1805) (Marshall, C.J.) (“[U]nder a constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.”).

¹⁷⁶ U.S. CONST. amend. X.

¹⁷⁷ Bybee, *supra* note 127, at 4.

Congress to provide for the calling forth of the militia to execute the laws of the Union, to suppress insurrections and repel invasions, has no state consent requirement. If you place the two provisions side by side, they do not merge. Article IV, Section 4 is an obligation. The First Militia Clause is a means, and only *one* means at that, for as we shall see, the United States did not just have to rely on the militias to support itself.¹⁷⁸

Furthermore, Article IV, Section 4 is designed for the benefit of the states, whereas the First Militia Clause is primarily designed to protect the United States. Section 1 of the 1792 Militia Act involves threats against states. It therefore maps onto Article IV, Section 4, which obligates the United States to act against a foreign power without state request while requiring federal intervention against domestic threats to a state only upon state application. As discussed above, this dichotomy makes sense. The Constitution stripped almost all state foreign affairs powers, leaving states largely helpless against external threats without federal protection; but it left states with vast domestic enforcement powers and responsibility.¹⁷⁹ Furthermore, by ratifying the Constitution, states consented to dependency on federal protection from foreign invaders, as well as to the notion that an attack on one was an attack on the whole. Out of fear of a large standing army and its effect on liberty, however, the constitutional compromise left states in the lead against domestic violence and sought to build presidential reliance on state militias.

¹⁷⁸ According to President Lincoln's Attorney General, Edward Bates, "The duty to suppress the insurrection being obvious and imperative, the two acts of Congress, of 1795 and 1807, come to his aid, and furnish the physical force he needs, to suppress the insurrection and execute the laws The manner in which he shall perform that duty is not prescribed by any law, *but the means of performing it are given, in the plain language of the statutes, and they are all means of force—the militia, the army, and the navy.*" 10 U.S. Op. Att'y. Gen. 74, 83 (1861) (emphasis added).

¹⁷⁹ In *United States v. Lopez*, 514 U.S. 549, 564 (1995), the Supreme Court struck down a federal criminal, the Gun-Free School Zones Act, while stating that criminal law enforcement has been an area "where States historically have been sovereign." The Constitution "requires a distinction between what is truly national and what is truly local," the Rehnquist decision explained, and "recognizing this fact," the Court in *United States v. Morrison*, 529 U.S. 598, 618 (2000), similarly struck down a federal law while affirming the historical responsibility of states over domestic violence:

[W]e preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in intrastate commerce has always been the province of the States.

The fact that Section 1 of the Act only authorizes the President, but does not obligate him, to intervene with militias, does not change the fact that despite being known as the Militia Act, the Act derives its constitutional authority both from the First Militia Clause as well as from Article IV, Section 4. After all, some of the language of Article IV, Section 4 is excerpted verbatim in the 1792 Act: when “in case of an insurrection in any state, against the government thereof, it shall be lawful for the President of the United States, *on the application of the legislature of such state, or of the executive (when the legislature cannot be convened)*, to call forth such number of the militia of any other state or states, as may be applied for, or as he may judge sufficient to suppress such insurrection.”¹⁸⁰ The Militia Act provided the President with a means to fulfill the federal government’s Article IV obligations.

Section 2 of the Act, on the other hand, is primarily directed at threats against the United States. It therefore maps onto the First Militia Clause, which authorizes the United States to protect *itself* with state militias. As discussed above, one of the key purposes behind the Constitutional Convention was to enable the United States to be a proper sovereign, not like the Government under the Articles of Confederation,¹⁸¹ and many Framers feared a standing army. The Framers hoped that militias—state-manned, trained, equipped, and led by state-appointed officers—could serve as the domestic enforcers of least concern. And, while the President would be the Commander-in-Chief, it would be Congress (consisting of state-elected members)¹⁸² who would provide the rules for calling forth the militias.

¹⁸⁰ 1792 Militia Act; Act of May 8, 1 Stat. 271 (1792) (emphasis added).

¹⁸¹ See, e.g., Coakley, *supra* note 146, at 7 (“[T]he right of the federal government . . . to use military force in domestic disorders was not a subject of extended debate in the Constitutional Convention. With few exceptions the convention delegates accepted the premise that the new national government must possess a coercive power that the Confederation had lacked . . .”).

¹⁸² Congress, after all, is the branch of the federal government designed to represent state interests. See, e.g., Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546–52 (1954) (describing the states’ role in selecting members of Congress); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L. J. 749 (1999) (arguing that whether Congress actually protects the states, Congress’s political constituencies create greater incentives to cater to state interests than does the President’s national constituency).

Furthermore, recognizing the power that they were giving to the federal government to defend itself, the Framers sought to circumscribe it to three circumstances. Looking closely at the First Militia Clause, it is clear that “to repel invasions” concerns invasions of the United States (since an invasion of any state is an invasion of the United States), and it is clear that to “execute the laws of the Union” enables the use of the militias for the sake of the federal government. So it stands to reason that “insurrections,” wedged in between the two, also applies to insurrections against the United States.¹⁸³ While there can be insurrections against a state government, that situation should be understood as a subset of “domestic violence,” requiring state request under Article IV, Section 4, not as an invitation for unilateral presidential intervention under the First Militia Clause.¹⁸⁴ Thus, Section 2 of the Militia Act assigns to the President those powers over the militia necessary primarily to defend the United States, while placing even more procedural checks than are constitutionally required.

Indeed, this was essentially the Washington Administration’s view of the Whiskey Rebellion. For Washington, the Whiskey Rebellion was not an insurrection against Pennsylvania, but an armed opposition to the United States. Section 2 was therefore the appropriate provision. Even after the cabinet meeting and the decision was made, Governor Mifflin continued to correspond with the President throughout the month of August, reiterating his initial concerns. At one point the Governor wrote: “I hope . . . that it will never be contended that a military force ought now to be raised with any other view but to suppress the Rioters; or that, if raised with that view, it ought to be employed for any other.”¹⁸⁵ Edmund Randolph signed the responses (although Hamilton drafted them), and, importantly, he specifically pointed to the First Militia Clause’s authorization to call forth

¹⁸³ For example, on August 16, 1861, President Lincoln publicly proclaimed that the inhabitants of the seceded states to be “in a state of insurrection against the United States,” and relied, in part, on the Militia Act, as amended, to call forth the militia. Of course, no state in insurrection requested that federal intervention.

¹⁸⁴ For example, as will be discussed further below, in 1856, the Governor of California appealed to President Pierce for arms and ammunition to help put down what he considered an insurrection in San Francisco. When President Pierce received the Governor’s letter, he sought the opinion of his Attorney General, Caleb Cushing. Cushing found no acts of resistance to the Constitution or the laws of the United States, and thus he advised Pierce not to intervene, since pursuant to Article IV, Section 4 and Section 1 of the Militia Act, there had been no request from the state legislature, only the state executive. *See infra* at Part II.J.

¹⁸⁵ See Coakley, *supra* note 146, at 39.

the militia to execute federal law and to its analog in the second section of the Militia Act:

It is therefore plainly contrary to the manifest general intent of the Constitution and of this act, *and to the positive and express terms of the second section of the act*, to say that the militia called forth are not to be continued in service for the purpose of causing the laws to be duly executed.¹⁸⁶

Some modern commentators critical of presidential intervention powers conjecture that Washington simply did not invoke Section 1 because he did not feel that the rebellion rose to the level of insurrection.¹⁸⁷ The rhetoric Washington employed, however, indicates that he felt the uprising to be severe. For example, he wrote that “many persons in the said western parts of Pennsylvania have at length been hardy enough to perpetrate acts which I am advised amount to treason, being overt acts of levying war against the United States”¹⁸⁸ Washington did not invoke Section 1 because the Whiskey Rebellion was armed opposition against the United States.

Ultimately, no one sets a precedent like George Washington. His decisive, but measured, handling of the Whiskey Rebellion set three crucial, lasting precedents. As we shall see, the law has evolved from the 1792 Militia Act, including in some significant ways; but the essence of it remains the same to this day. In the modern era, it is worth looking back on Washington’s example to best manage and leverage federalism in the face of domestic calamity.

¹⁸⁶ *Id.* at 39–40 (emphasis added).

¹⁸⁷ See, e.g., Stephen Vladek, Note, *Emergency Power and the Militia Acts*, 114 Yale L.J. 149, 161 n.46 (2004) (“Why Washington used section 2 instead of section 1—i.e., why he did not treat the uprising as an “insurrection,” but rather as “combinations too powerful to be suppressed by the ordinary course of judicial proceedings”—is unclear. It may have been dubious whether the actions of the Whiskey Rebellion farmers truly rose to the level of insurrection.”). William C. Banks argues that the disturbance was “hardly a rebellion,” and that it was “certainly not an insurrection against the government as that term was understood by the Framers.” Banks, *supra* note 127, at 59.

¹⁸⁸ Washington, *supra* note 159.

*E. The 1795 Militia Act, the Fries Rebellion, and the First Death
Knell of the Constitutional Militia*

In a twist of historical irony, or perhaps political savvy, it was Washington's restraint, and consultations with the state, that actually gave his successors more power over state governors for domestic threats. In 1795, Congress permanently authorized the President to call forth the militia (the 1792 Act was to sunset after three years),¹⁸⁹ and thereby enshrined the practice of employing federal military force in domestic disorders, including without state consent, when the United States or its laws were threatened with armed opposition. The 1792 Militia Act also dropped the judicial certification requirement¹⁹⁰ and the requirement that Congress not be in session for the President to call up the militias to enforce federal law.¹⁹¹ As Robert Coakley noted, “[b]y his actions in the Whiskey Rebellion, Washington had apparently dissipated the fears expressed in 1792 that these powers ‘could not with safety be entrusted to the President of the United States.’”¹⁹²

Only four years after Washington's response to the Whiskey Rebellion, however, President Adams adopted a more confrontational stance, and for the first time, the President would use the *standing army* to enforce federal law against armed opposition within a state. On March 7, 1799, in response to a federal property tax, one hundred men led by John Fries attacked the local marshal and set free thirty prisoners. After a state, not federal, judge notified Secretary of State Timothy Pickering that the laws were opposed, Adams issued his cease and disperse proclamation¹⁹³

¹⁸⁹ Act of May 8, Sec. 10, 1 Stat. 265 (1792) (“That this act shall continue and be in force, for and during the term of two years, and from thence to the end of the next session of Congress thereafter, and no longer.”).

¹⁹⁰ This provision is interesting in light of the current debate on whether to insert judicial certification prior to lethally targeting a U.S. person. This 1792 judicial certification requirement was never challenged in court, but its constitutionality may be suspect since it may not be a case or controversy. U.S. CONST. Art. III, § 2. See *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Renne v. Geary*, 501 U.S. 312 (1991).

¹⁹¹ Act of Feb. 28, 1795, ch. 36, 1 Stat. 424 (“provid[ing] for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to repeal the Act now in force for those purposes”).

¹⁹² See Coakley, *supra* note 146, at 67–68. This is not to say that President Washington got everything he wanted. His proposed fixes to the militia system were not acted upon.

¹⁹³ See John Adams, “Proclamation” (March 12, 1799) (“Whereas by the Constitution and laws of the United States I am authorized, whenever the laws of the United States shall be opposed or the execution thereof obstructed in any State by combinations too powerful to

and directed Governor Mifflin to call in the militia, all without consulting with the governor.¹⁹⁴ Hamilton, orchestrating the military response while Adams was at home in Quincy, argued for the federal government to appear “like a Hercules” whenever it got involved.¹⁹⁵ This show of force would be so formidable as to prevent the actual need for force. By April, the troops were amassed and the resistance to the law ended immediately.¹⁹⁶

Significantly, this show of force involved federal regulars, a move Congress authorized shortly before Adams’ proclamation.¹⁹⁷ By doing so, Congress in effect sounded the first death knell of the state constitutional militias, at least as the primary federal response mechanism for domestic threats.

The Adams response to the Fries’ Rebellion is also significant for three other reasons. First, Adams’s Proclamation, unlike Washington’s, cited the Constitution in addition to the laws of the United States as a source of his authority to call forth the military to suppress the unlawful combinations and cause the laws to be duly executed.¹⁹⁸ Here may be the earliest presidential indication of an inherent intervention authority.

be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshals, to call forth the military force to suppress such combinations and to cause the laws to be duly executed.”).

¹⁹⁴ PAUL DOUGLAS NEWMAN, *THE FRIES’S REBELLION: THE ENDURING STRUGGLE FOR THE AMERICAN REVOLUTION* 147 (2004) (contrasting the comity Mifflin enjoyed with President Washington and the lack of comity President Adams exercised).

¹⁹⁵ Letter from Alexander Hamilton to James McHenry (Mar 18, 1799), <http://founders.archives.gov/documents/Hamilton/01-22-02-0344> [<http://perma.cc/ZD5J-CX7J>].

¹⁹⁶ *See supra* note 194, at 149.

¹⁹⁷ Act of March 2, ch. 31, § 7, 1 Stat. 725, 726 (1799) (repealed in 1802). The first statute allowing the President to call forth the militia to supplement the national army was the Neutrality Act of 1794, ch. 50, §§ 7–8, 1 Stat. 381, 384 (current version at 18 U.S.C. 960 (2000)). This Act forbade any American to “set on foot or provide or prepare the means for any military expedition or enterprise . . . against the territory or dominions of any foreign prince or state of whom the United States was at peace.” It had nothing to do with domestic threats.

¹⁹⁸ *See supra* note 159. Washington’s cease and disperse proclamation of August 7, 1794, cited in detail the 1792 Militia Act, and did not mention any constitutional source of authority. His final warning on September 25, 1794, *supra* note 160, did include a reference to his constitutional duty to execute the laws, but that duty more likely refers to his obligation to execute the 1792 Militia Act, particularly given his previous proclamation and his Administration’s ongoing debate with Governor Mifflin, neither of which indicated any claim to constitutional sources of power.

Second, he affirmed the fact that presidential intervention, even under a measure of inherent authority, does not necessarily entail martial law. Similar to Washington's actions after the Whiskey Rebellion, President Adams pardoned the three main rebels, including John Fries, who had been convicted of treason in the district court at Philadelphia—not in a court martial.¹⁹⁹

Adams's lack of intergovernmental comity is also noteworthy. Perhaps it was no coincidence that Adams, of the Federalist Party, received no such general commendation for his actions in the Fries' Rebellion as Washington did for his command of the Whiskey Rebellion response.²⁰⁰ Indeed, the areas in eastern Pennsylvania that had been the scene of the action became more solidly Republican in their sentiments than before.²⁰¹

F. To the Precipice of Tyranny: Jefferson, the 1807 Insurrection Act, and the Enforcement Act

President Jefferson, while initially critical of expanding federal authority over states, soon found himself using federal troops to enforce domestic law within states, not as a last resort against armed opposition, but regularly, bringing the country to the precipice of tyranny. It was only due to state interposition that the country stepped back, proving that national security federalism can be a powerful check on domestic presidential intervention.

Jefferson first started using federal troops and militias domestically in response to Aaron Burr's alleged conspiracy to seize territory from Louisiana to Mexico. Jefferson did not, however, invoke the Militia Act²⁰²

¹⁹⁹ John Adams, "Proclamation of Pardons for those Engaged in Fries Rebellion" (May 21, 1800), <http://millercenter.org/president/speeches/detail/3944> [<http://perma.cc/A4RW-HAE6>].

²⁰⁰ Coakley, *supra* note 146, at 76.

²⁰¹ *Id.*

²⁰² Thomas Jefferson, "Proclamation on Spanish Territory" (Nov. 27, 1806) ("Whereas information has been received that sundry persons, citizens of the United States or residents within the same, are conspiring and confederating together to begin and set on foot, provide, and prepare the means for a military expedition or enterprise against the dominions of Spain; that for this purpose they are fitting out and arming vessels in the western waters of the United States, collecting provisions, arms, military stores, and means; are deceiving and seducing honest and well-meaning citizens, under various pretenses, to

because it did not authorize the use of regular troops.²⁰³ The Neutrality Act, as Madison pointed out to him, did permit the use of regulars and militias to take possession of and detain any ship disobeying neutrality,²⁰⁴ but it had little to do with internal threats, which is what Jefferson believed the Burr Conspiracy to be.²⁰⁵

This end run around the Militia Act to ensure he could use federal troops domestically proved unsatisfactory. While he openly praised the militias, especially after the Mississippi militia caught Burr, Jefferson urged Congress to pass a statute that would definitively allow the President to use the national army against internal threats. What resulted was the Insurrection Act of 1807, which permanently empowered the President to do what for President Adams had been a temporary authorization:

[I]n 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 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.²⁰⁶

Jefferson wasted little time in using this new authority. One year later, on April 19, 1808, he invoked the Insurrection Act to send in militia and

engage in their criminal enterprise; are organizing, officering, and arming themselves for the same, contrary to the laws in such cases made and provided.”)

²⁰³ The Act Adams had relied upon to employ the standing army (ch. 31, § 7, 1 Stat. 725, 726) was repealed in 1802. In 1806, Madison advised Jefferson that, “it does not appear that regular troops can be employed under any legal provision against insurrections—but only against expeditions having foreign countries as the object.” *Cited in* DUMAS MALONE, *JEFFERSON THE PRESIDENT: SECOND TERM, 1805–1809* 253 (1974).

²⁰⁴ Neutrality Act of 1794, ch. 50, §§ 7–8, 1 Stat. 381, 384 (current version at 18 U.S.C. 960 (2000)).

²⁰⁵ While he made “no mention in public of any design to separate the Western states from the Union,” his biographer Dumas Malone notes that “he had said privately that he believed this to be Burr’s purpose.” MALONE, *supra* note 203, at 252.

²⁰⁶ Act of Mar. 3, 1807, ch. 39, 2 Stat. 443. While there is no legislative history of this Act, it seems clear that the constitutional source of this congressional authorization was a combination of Congress’s Militia Clause powers plus its other Article I, Section 8 powers. *See* Coakley, *supra* note 146, at 347.

federal troops to enforce compliance with the Embargo Acts in the Northeast.²⁰⁷ As discussed above, the Embargo Acts were passed at the confidential request of Jefferson, who hoped to avoid being dragged into the war between Britain and France by a self-blockade of the nation's commerce. Such a total cessation of merchant activity, however, hit the New England region hard. The area began to resist, leading Jefferson to the "precipice of unlimited and arbitrary power."²⁰⁸

Jefferson found the pretext to invoke this power when smugglers in Lake Champlain responded to Jefferson (and the Congress') increasingly draconian measures to enforce the embargo²⁰⁹ by using armed rafts to export goods. Eventually the armed guards onboard began to battle with the federal border guards. Vermont called out its militia to enforce the law, but to no real effect. Citizens appealed to the President, explaining that there was no insurrection, only continuing evasion and violation of the embargo laws. As the situation worsened, Jefferson promised that if the New York Governor called forth the militia to enforce the law, he would ensure that the federal government paid their expenses.²¹⁰ George Washington had floated this scheme before, and in many ways it presaged the calling forth

²⁰⁷ Proclamation by the President of the United States, American State Papers, 10th Cong., No. 258, April 19, 1808 ("Whereas information has been received that sundry persons are combined or combining and confederating together on Lake Champlain . . . for the purposes of forming insurrections against the authority of the laws of the United States, for opposing the same and obstructing their execution, and that such combinations are too powerful to be suppressed in the ordinary course of judicial proceedings or by the powers vested in the marshals by the laws of the United States.").

²⁰⁸ LEONARD W. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* 102 (1963).

²⁰⁹ Between December 1807 and March 1808, Congress responded to Jefferson's call for an embargo with three Embargo Acts, each more punitive than the last (Act of Dec. 22, 1807, 2 Stat. 451; Act of Jan. 8, 1808, 2 Stat. 453; Act of Mar. 12, 1808, 2 Stat. 473), while defiance of the laws in New England caused Jefferson to seek the draconian First Enforcement Act in April 1808 (Act of April 25, 1808, ch. 66, 2 Stat. 499). Section six of this Act read: "no ship or vessel having any cargo whatever on board, shall . . . be allowed to depart from any port of the United States, for any other port or district of the United States, adjacent to the territories, colonies, or provinces of a foreign nation . . . without special permission of the President of the United States."

²¹⁰ Albert Gallatin conveyed the offer from the New York Governor in a letter to Jefferson on August 9, 1808. The Secretary of War was unaware of this side deal and thus initially refused New York's request for reimbursement. Letter from Albert Gallatin, Sec'y of the Treasury, to President Thomas Jefferson (Aug. 9, 1808), in 12 *THE WRITINGS OF THOMAS JEFFERSON* 120 (Andrew A. Lipscomb, ed.) (1905).

of National Guard troops under Title 32 status,²¹¹ but it was still novel in practice.

Ultimately, when Secretary Gallatin warned that either Congress must “invest the Executive with the most arbitrary powers and sufficient force to carry the embargo into effect, or give it up altogether,”²¹² Jefferson chose the former. In the so-called Enforcement Act of 1809,²¹³ Congress became complicit, vesting the President with the power to call out the militia and the standing army, not in the event of organized violent opposition, but in the regular enforcement of federal law.²¹⁴ As Professor Mashaw has noted, there is “little doubt that the embargo, as established by statute and carried out in practice, violated virtually every constitutional principle that the Jeffersonian Republicans held dear.”²¹⁵

With congressional complicity, it fell to the states to preserve the constitutional order and check presidential overreach. State militia powers gave teeth to that check. According to Bradley Hays, in the early American Republic, state governments were vibrantly and powerfully involved in constitutional debate “in an effort to define the new constitutional order.”²¹⁶ “When a factious national government attempted to alter the constitutional order” as Jefferson had, Hays explains, states intervened by issuing “‘declarations of disagreement’ . . . not to nullify the policy in question” but rather to magnify the political resistance to national policies.²¹⁷ The Massachusetts House of Representatives, for example, condemned the Force Act and declared it “in many respects unjust, oppressive and

²¹¹ See discussion *infra* at Part III.B.

²¹² Quoted in HENRY ADAMS, 4 HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON 262 (1891).

²¹³ This authority included the ability “to employ such part of the land or naval forces or militia of the United States, or of the territories therefor as may be judged necessary . . . for the purpose of preventing the illegal departure of any ship or vessel, or detaining, taking possession of, and keeping in custody any ship or vessel . . . in any manner opposing the execution of the laws laying an embargo, or otherwise violating, or assisting and abetting violations of the same.” Act of Jan. 9, 2 Stat. 506 (1809).

²¹⁴ *Id.*

²¹⁵ Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1655 (2007).

²¹⁶ Bradley D. Hays, *A Place for Interposition? What John Taylor of Caroline and the Embargo Crisis Have to Offer Regarding Resistance to the Bush Constitution*, 67 MD. L. REV. 200, 202 (2007).

²¹⁷ *Id.* at 205–06.

unconstitutional, and not legally binding on the citizens of this State.”²¹⁸ The Connecticut General Assembly similarly resolved that it is the “duty of the Legislature” to safeguard individual and state rights from federal encroachment (while urging popular compliance with the law).²¹⁹ Accordingly, the Legislature instructed all state office holders, *including militia officers*, to resist affording any official aid or cooperation to the Force Act.²²⁰

It worked. While Governor Mifflin’s and Governor Strong’s constitutional protests during the Whiskey Rebellion and War of 1812 respectively had proved unsuccessful, both in their effects and as matters of law, Connecticut’s and Massachusetts’ constitutional protestations and refusal to send forth their militias successfully undermined Jefferson’s policy and were largely justified as matters of law. Within months, Jefferson folded, and as a legal matter, these Governors were correct that the Enforcement Act was unconstitutional.²²¹ What the First Militia Clause requires before the militias can be federalized is an invasion, an insurrection, or *armed resistance* to federal law which the state is unwilling or unable to quell. To “execute federal law” in the First Militia Clause is not an at-will invitation for federal martial law, nor does it subvert the default primacy of state law enforcement. It does not grant the presidency an army at the ready whenever it wants to enhance federal enforcement efforts. If that were the case, every case of federal income tax evasion could trigger the calling forth of the militia.²²² Rather, as George Nicholas noted, the Constitution did not alter the normal governmental practice that the “civil

²¹⁸ LEG. OF MASS., THE PATRIOTIC PROCEEDINGS OF THE LEGISLATURE, 69, Sess. from Jan. 26 to Mar. 4, 1809.

²¹⁹ GENERAL ASSEMB. OF CONN., SPECIAL SESS. (Feb. 1809).

²²⁰ *Id.*

²²¹ It is important to note that while one federal court upheld the constitutionality of the Embargo Acts, *see* United States v. The William, 28 F. Cas. 614 (D. Mass. 1808), no court reviewed the constitutionality of the Enforcement Act, particularly its authorization to call forth the militia generally to enforce federal law. Regardless, it is no coincidence that such a sweeping, generalized authority to call forth the militias for the routine execution of federal law has not been granted since, whereas the Militia Act largely survives to this day.

²²² As Congressman Abraham Clark colorfully put it in opposition to Section 2 of the 1792 Militia Act: “So that if an old woman was to strike an excise officer with her broomstick, forsooth the military is to be called out to suppress an insurrection.” 3 ANNALS OF CONG. at 575 (1792).

officer is to execute the laws on all occasions.”²²³ Only when “found absolutely necessary,” would the militia power be exercised.²²⁴

The First Militia Clause also does not subvert the primacy of federal civilian measures to enforce the law, except in an emergency. As Madison stated, only when the sheriff’s “posse . . . were insufficient to overcome the resistance to the execution of the laws,” would the militia be called forth.²²⁵

This same principle applies to the use of the regular army for domestic law enforcement; what is required is an emergency, defined as the inability or systemic unwillingness of state or civilian authorities equitably to enforce the laws in the face of armed opposition. While the use of the regular army is not similarly confined to the three defensive triggers of the First Militia Clause, the rest of the Constitution applies in force on domestic soil—including the restriction on quartering troops, the Fourth Amendment search and seizure protections, the rules governing suspension of habeas, and the other due process rights²²⁶—except perhaps in the very rare cases, and locations, of emergency.

G. Jackson, the South Carolina Tariff Nullification Controversy, and the First Precedent of Inherent Presidential Authority to Protect Federal Property and Personnel

During the Tariff Nullification Controversy of 1832–1833, despite the opportunity to be as heavy-handed as Jefferson was, President Andrew Jackson exercised restraint in dealing with the nullification challenge South Carolina presented, refusing to call forth the South Carolina militia to enforce federal law until actual armed resistance occurred, and doing so as a matter of law. His restraint not only proved wise in forestalling a civil war, but it also re-affirmed the statutory necessity of armed opposition prior to presidential intervention. Additionally, his quiet steps to protect a federal fort in the South may be the first instance of a President acting on inherent constitutional authority to safeguard federal property and personnel in the face of grave threats.

²²³ 3 ELLIOT, *supra* note 26, at 392 (statement of George Nicholas).

²²⁴ *Id.*

²²⁵ *Id.* at 384.

²²⁶ Additionally, the rules of war could also apply.

While earlier states had voiced constitutional objections and refused to allow their forces to take part in what they viewed as unconstitutional schemes, South Carolina's challenge to the federal protective tariff represented the first real state challenge to federal authority writ large. With Andrew Jackson's own Vice President, John C. Calhoun, leading the charge, South Carolina threatened to defy federal authority by repudiating federal tariffs and passing laws that could be used to recover property seized by the federal government for tariff violations. Calhoun's view, to be known as nullification, was that a state acting in its sovereign capacity could declare a congressional law null and void within its borders.²²⁷ On November 24, 1832, South Carolina passed an ordinance to do just that. It also threatened to secede if federal force was used to enforce the tariff. Three days later, Governor James Hamilton recommended legislation to raise a volunteer force and the purchase of arms and supplies to make sure that the federal government could not impose its will over the state. As Jackson quietly and cautiously gathered his military strength, so too did South Carolina.

As the crisis worsened, Jackson nonetheless abided by the constitutional intervention principle. In a letter to Joel Poinsett, commander of the "Unionists" forces, on February 7, 1833, Jackson explained that he did not have the legal authority to call forth militias under the Militia Act or under the Constitution, until there was actual armed resistance:

Notwithstanding all their tyranny and blustering conduct, until some act of force is committed, or there is some assemblage of armed force . . . to resist the execution of the laws of the United States, the Executive of the United States has no legal and constitutional power to order the militia into the field to suppress it, and not then until his proclamation commanding the insurgents to disperse has been issued.²²⁸

Despite the caricatures of 'King Jackson,' the President sought "preservation of the union, not personal vengeance; a powerful presidency,

²²⁷ See generally JOHN C. CALHOUN, *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 367, 367–400 (Ross M. Lence ed., 1992).

²²⁸ Letter from Andrew Jackson to Joel Poinsett (Feb. 7, 1833), in *THE STATESMANSHIP OF ANDREW JACKSON AS TOLD IN HIS WRITINGS AND SPEECHES*, 25–26, (Francis Newton Thorpe, ed., 1909).

not a military dictatorship.”²²⁹ He was like Washington during the Whiskey Rebellion. Jackson amassed forces, and the congressional sanction to use them, but he did not rush to arms, nor did he seek the extreme powers that Jefferson had. In fact, the Force Bill²³⁰ that he signed was no more than what the 1795 Militia Act plus the 1807 Insurrection Act already afforded him, with the additional requirement of judicial certification that the 1792 Militia Act had. His authorization act to use military force to counter the internal threat also explicitly required precisely what the Constitution mandated to call forth the militia and the regular army: actual armed opposition that state authorities or federal civilian authorities may be unable or unwilling to quell.²³¹

In other words, although he already possessed the necessary statutory authority, by reiterating through the Force Bill his readiness to use strength and bolstering that position with the sanction of Congress, in addition to actually amassing strength, he presented that strength sufficient to forge a bloodless compromise. This mix proved effective, forestalling what could have been the start of the Civil War by almost thirty years.²³²

Also important, President Jackson dispatched federal regulars to South Carolina to secure federal facilities without invoking any statutory authority to do so. Here is the first instance of a President acting solely on an inherent authority to safeguard federal property and personnel in the face of a grave, internal threat. While the Insurrection Act of 1807 authorized the

²²⁹ JOHN MEACHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* 246 (2008).

²³⁰ Act of Mar. 2, 4 Stat. 632 (1833).

²³¹ The text of the Force Bill read, in part: “That whenever the President of the United States shall be officially informed, by the authorities of any state, or by a judge of any circuit or district court of the United States, in the state, that, within the limits of such state, any laws or laws of the United States, or the execution thereof, or of any process from the courts of the United States, *is obstructed by the employment of military force, or by any other unlawful means, too great to be overcome by the ordinary course of judicial proceeding, or by the powers vested in the marshal by existing laws*, it shall be lawful for him, the President of the United States, forthwith to issue his proclamation, declaring such fact or information, and requiring all such military and other force forthwith to disperse; and if an any time after issuing such proclamation, any such opposition or obstruction shall be made, in the manner or by the means aforesaid, the President shall be, and hereby is, authorized, promptly to employ such means to suppress the same, and to cause the said laws to be duly executed.” *Id.* at 634 (emphasis added).

²³² As his biographer, John Meacham writes, “Jackson had an intuitive sense of timing that served him well, and this capacity to find the right moment for action never served America better than it did in the winter of 1832–1833.” Meacham, *supra* note 229, at 246.

use of federal regulars “where it is lawful for the President of the United States to call forth the militia,” it is clear that Jackson did not feel it was legally appropriate to call forth the militia.²³³ Thus the 1807 authorization was unavailable. Nonetheless, in the fall of 1832, Jackson sent out confidential orders to place federal garrisons in key forts to protect federal property. He also sent General Winfield Scott to Charleston under the guise of a routine inspection tour, but with secret orders to prepare troops for possible conflict. By February 1833, Jackson clarified that these troops could take matters in self-defense.²³⁴ In other words, while they had to wait for actual armed opposition, they did not have to wait on the required proclamation under the Militia Act, which would also have triggered the 1807 Act’s authorization to use regulars. By these measures, therefore, Andrew Jackson had to be acting, or at least preparing to act, on an inherent authority to use the national military to protect federal property and personnel within a state without state consent—a little appreciated, although historic, footnote to the Nullification Controversy.

H. Luther v. Borden, the Dorr Rebellion, and the President’s Discretion under the Militia Act

Just as Washington’s restraint during the Whiskey Rebellion resulted in greater statutory powers for the President, restraint by President Tyler during the Dorr Rebellion a half-century later rendered a similar result, this time at the hands of the Supreme Court.

In 1842, a group of Rhode Island citizens purported to replace their Constitution and elect Thomas Dorr under it. Samuel King, the state Governor at the time, requested federal assistance to quell what he considered to be an insurrection against his state. President Tyler, however, determined that the disturbances in Rhode Island were not beyond the state’s capacity to address, and that the federal government was not obliged to intervene because the request did not come from the legislature as required under Article IV, Section 4. He refused to call up the militia, but he recognized Governor King as the executive power of the state and took

²³³ Act of Mar. 3, ch. 39, 2 Stat. 443 (1807).

²³⁴ In the same letter to Poinsett, Jackson assured him that, “[i]n resisting the tyrannic measures by which the ruling party in So Carolina have prepared to obstruct the laws of the Union you are thrown back upon the right of self-defense Do not doubt that the shield will be upheld with all the power which I am or may be authorized to use” Letter from Andrew Jackson to Joel Poinsett, *supra* note 228.

preliminary steps to call out the militia to support Governor King if necessary. That action alone was sufficient to put an end to the armed opposition.

The legal battle, however, continued. Ultimately, the Supreme Court, in *Luther v. Borden*,²³⁵ held that the power to determine the legitimate state government²³⁶ and to determine when to intervene in matters of domestic violence²³⁷ belonged to Congress, not the courts, and that Congress had delegated this Militia Act power to the President.²³⁸

As we have discussed, however, the Militia Act authorized, but did not delegate, the power to intervene.²³⁹ The Court itself, as it did in *Martin v. Mott*,²⁴⁰ seemed uncomfortable with resting the authority solely on a statutory basis. The *Luther* Court closed by saying that “[a]t all events,” the power is conferred upon [the President] “by the Constitution and laws of the

²³⁵ *Luther v. Borden*, 48 U.S. 1 (1849) (In a trespass suit, Martin Luther alleged that the Rhode Island state government that employed Borden was illegitimate because it was not a republican form of government as required by Article IV, Section 4 of the Constitution.) *Id.* at 35, 42.

²³⁶ *Id.* at 42. (“Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.”).

²³⁷ *Id.* at 42–43 (“So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of the court to decide when the contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely . . .”).

²³⁸ *Id.* at 43 (“By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. . . . If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government.”).

²³⁹ See discussion *supra* Part II.D.

²⁴⁰ See *supra* note 68 and accompanying text.

United States, and must therefore be respected and enforced in its judicial tribunals.”²⁴¹

Future Courts and presidents—including Tyler’s immediate successor—would have little hesitation in locating an inherent presidential authority to intervene against threats to the United States and its property and personnel; but no court has squarely confronted the issue of whether an inherent authority exists to intervene in response to an insurrection against a state.

Nonetheless, it is possible to construct an argument that the President has some inherent authority under Article IV, Section 4 to suppress an insurrection against a state, so long as the state requests federal assistance. First, the Constitution obligates the *United States* to “guarantee to every State in this Union a Republican Form of Government,” and it obligates the United States to “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.”²⁴² It does not specify which branch of the United States.

Second, a Congress of enumerated powers has no power to actually call forth the militias nor command the Army. While the protection obligation does not have to involve the use of force, if force is required, only the President has the constitutional authority and capability to do so.

There is therefore no reason to read in “Congress” to the latter half of Article IV, Section 4’s protection obligation. It is certainly a shared obligation, and Congress can limit the means the President has; but the President, strictly speaking, does not have to wait for legislative sanction to fulfill it, and Congress cannot completely deprive the President of fulfilling it. What the President does need to wait on before responding to an insurrection against a state, however, is a state request.

In other words, there is strong federalist check that backstops the separation of powers check on presidential emergency intervention power. The *Luther* Court did accurately recognize the weight of its ruling on the liberty versus security debate, but perhaps because it did not fully assess the constitutional aspects, it did not fully appreciate the federalist check. The

²⁴¹ *Luther*, 48 U.S. at 44 (emphasis added).

²⁴² U.S. CONST. art. IV, § 4.

Court argued that it would be difficult to find any alternative “more safe, and at the same time equally effectual,” than giving the President this extraordinary power.²⁴³ When citizens of the same State “are in arms against each other,” and the “authorities unable to execute the laws,” the Court instructed that decisive presidential action was essential: “the interposition of the United States must be prompt, or it is of little value.”²⁴⁴ In those grave circumstances, the “elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human prudence and foresight could well provide.”²⁴⁵ This is certainly true. But human prudence and foresight also provided for a federalist check on domestic presidential overreach.

I. President Fillmore and the Pronouncement of Inherent Presidential Authority to Enforce Federal Law

While President Adams first invoked the Constitution in his Fries’ Rebellion Proclamation,²⁴⁶ President Millard Fillmore was the first fully to surface the proposition that an inherent presidential authority to respond to internal threats existed, at least to enforce federal law.

The occasion for Fillmore’s pronouncement was the question of extending slavery into the new lands, an issue that would eventually consume the United States in a Civil War. The Compromise of 1850, besides carving up the new states into free and slave states, also included an act known as the Fugitive Slave Law.²⁴⁷ Signed by President Fillmore in 1850, any slave from one state who had escaped to another had to be delivered up on the claim of the party to whom such services of labor may be due.²⁴⁸ Federal marshals were bound to enforce this law, and were authorized to summon a *posse comitatus* to assist them.²⁴⁹

²⁴³ *Luther*, 48 U.S. at 44.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See *supra* note 193 and accompanying text.

²⁴⁷ Fugitive Slave Act, 9 Stat. 462 (1850, repealed 1864).

²⁴⁸ *Id.* at § 10.

²⁴⁹ *Id.* at § 5.

In response to the breakout of an escaped slave in Massachusetts, the Senate passed a resolution asking the President for his views on the sources of his authority to enforce the Fugitive Slave Act against forcible resistance and for any legislative recommendations to execute the law more vigorously.²⁵⁰ In his February 19, 1851, “Special Message,” Fillmore stated that he had inherent executive authority to use military force to enforce federal law.²⁵¹

The Army and the Navy, according to Fillmore, “are by the Constitution placed under the control of the Executive; and probably no legislation of Congress could add to or diminish the power thus given but by increasing or diminishing or abolishing altogether the Army and Navy.”²⁵² He did acknowledge that the calling forth of the militia was governed by the 1795 Militia Act and its procedural requirements, but he dismissed the 1807 Act, which authorized the President to use regulars wherever militia forces were authorized, as essentially unnecessary and ineffectual:

But the power of the President under the Constitution, as Commander of the Army and Navy, is general, and his duty to see the laws faithfully executed is general and positive; and the act of 1807 ought not be construed as evincing any disposition in Congress to limit or restrain this constitutional authority.²⁵³

While noxious in its application to the Fugitive Slave Act, President Fillmore was at least correct that there are no explicit constitutional provisions prohibiting the use of regular troops where the use of the militia would be lawful in response to armed resistance. As discussed above, just because the Federal government can only be obligated to intervene in domestic violence against a state upon state application, it does not follow that the United States cannot intervene against armed opposition against the United States on its own volition. The President has “the executive power,” not just the specifically enumerated powers that Congress has,²⁵⁴ and he is

²⁵⁰ CONG. GLOBE, 31st Cong., 2d Sess. 596 (1851).

²⁵¹ Presidential Message to the Senate (Feb. 19, 1851) [hereinafter Special Message].

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Alexander Hamilton may have been the first, but certainly not the last, to argue that the difference in wording between Article I and Article II demonstrates the presence of

charged with taking care that the laws be faithfully executed. He is also the Commander-in-Chief of the armed forces, and contrary to what many Framers desired, there is no explicit restriction on the use of the Army and Navy in domestic matters. In fact, Dr. James McClurg of Virginia asked during the Constitutional Convention:

[W]hether it would not be necessary before a committee for detailing the constitution should be appointed, to determine on the means by which the Executive is to carry the laws into effect, and to resist combinations agst. them. Is he to have a military force for the purpose, or to have command of the Militia, the only existing force that can be applied to that use? As the Resolutions now stand the committee will have no determinate direction on this great point.²⁵⁵

Alas, no determinate direction emerged. For many, the ideal of the militia could not live up to the reality of its inherent unreliability, while for others an empowered national army was anathema to liberty. In ambiguity, there was compromise.

In fact, by the first presidency, there were already some advocating to Washington in favor of supplementing the militia with regulars to suppress the Whiskey Rebellion,²⁵⁶ and by the second, Congress approved the use of regulars to put down the Fries' Rebellion.²⁵⁷ Upon the expiration of the authorization, Madison opined to Jefferson that he could not use regular troops against insurrections under the 1795 Militia Act, leading to the 1807 Insurrection Act,²⁵⁸ which some have considered an unconstitutional authorization,²⁵⁹ while others, like Fillmore, have considered it an unnecessary authorization.

inherent presidential powers. See Alexander Hamilton, *First Letter of Pacificus*, No. 1 (Jun. 29, 1773).

²⁵⁵ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 69–70 (Max Farrand ed., 1911).

²⁵⁶ See *supra* Part II.D.

²⁵⁷ See *supra* Part II.E.

²⁵⁸ See *supra* note 203.

²⁵⁹ See, e.g., Clarence I. Meeks, III., *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 83–93 (1975). See also David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 49 (1971).

The 1807 Insurrection Act, however, is neither unconstitutional nor wholly unnecessary. Congress has more than just the Militia Clauses; it has all the war powers in Article 1, Section 8.²⁶⁰ The lack of a specific restriction on these powers for internal uses is significant, particularly given how this issue was fiercely debated. Furthermore, as discussed more below, the Supreme Court, in finding support for some of Lincoln's actions during the Civil War in the 1807 Insurrection Act, implicitly found it constitutional.²⁶¹ Either way, even if Congress lacks the power to use or require the use of the national army for internal threats, it can authorize such use by the President. This congressional imprimatur is legally important,²⁶² and can even be politically necessary.

As for presidential inherent authority, the strongest case in favor of that came a half-century after Fillmore. In 1894 the Supreme Court recognized the President's constitutional ability to respond to an emergency. *In re Debs* upheld President Cleveland's use of federal troops to enforce an injunction to end the Pullman Railroad Strike, which according to the Court "forcibly obstructed" interstate transportation of persons and property "as well as the carriage of the mails."²⁶³ It is an "incontrovertible principle," the Court found, that the "government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it."²⁶⁴ This principle, the Court continued, "necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."²⁶⁵

The Court further noted that Congress's power to criminally sanction those who do not follow the laws of the United States could not be the only recourse the federal government has, precisely because the

²⁶⁰ Thaddeus Hoffmeister, who does not find inherent presidential authority to intervene domestically, does make this argument in support of the constitutionality of the Insurrection Act. See Thaddeus Hoffmeister, *An Insurrection Act for the Twenty-First Century*, 39 STETSON L. REV. 861, 884–85 (2010).

²⁶¹ *The Prize Cases*, 67 U.S. at 668 ("by the Acts of Congress of February 28th, 1795 and 3rd of March, 1807, he is authorized to call out the militia and use the military and naval force of the United States in case of invasion by foreign nations and to suppress insurrection against the government of a State or of the United States").

²⁶² See *Youngstown*, 343 U.S. at n.1 (J. Jackson concurring).

²⁶³ 158 U.S. 564, 577 (1895).

²⁶⁴ *Id.* at 578–79 (citing *Ex parte Siebold*, 100 U.S. 371, 395).

²⁶⁵ *Id.* at 579.

opposition could be state-based.²⁶⁶ Since trials had to be located within the state in which they were committed, the Court reasoned: “If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offences had in such a community would be doomed in advance to failure.”²⁶⁷ Therefore, to avoid the “whole interests of the nation in these respects” to be at the “absolute mercy” of a single state, the Court concluded that the:

[S]trong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation, to compel obedience to its laws.²⁶⁸

In other words, despite what many of the Framers feared,²⁶⁹ for the Court in *Debs*, the President may intervene militarily, even against the inhabitants of the state, using the federal army.²⁷⁰ The only condition, to the *Debs* Court, is that it be an “emergency.”²⁷¹ The Court never defined what an emergency is, implicitly leaving it to the discretion of the President. As we have seen, however, an “emergency” should be understood as—and narrowly confined to—a situation in which a state and ordinary judicial

²⁶⁶ *Id.* at 581.

²⁶⁷ *Id.* at 581–82.

²⁶⁸ *Id.* at 582.

²⁶⁹ According to one contemporary who recounted the presence of federal troops in Chicago, “The Fourth of July dawned upon a scene that would start the blood of the signers of the Declaration of Independence leaping in flames of fire through their veins . . . they would think that they had fought, bled and died in vain, that victory after all was but defeat.” W.F. BURNS, *THE PULLMAN BOYCOTT: A COMPLETE HISTORY OF THE GREAT R. R. STRIKE* 51 (1894).

²⁷⁰ The Court also cited *Ex Parte Siebold*, 100 U.S. at 395, for the proposition that the “power to enforce federal law ‘does not derogate’ from the power of the State to simultaneously execute its laws; but, where both cannot be executed at the same time, the words of the Constitution itself show which to yield. ‘This Constitution, and all laws which shall be made in pursuance thereof, shall be the supreme law of the land.’” *In re Debs*, 158 U.S. at 579 (internal citations omitted).

²⁷¹ 158 U.S. at 582.

proceedings cannot, or will not, maintain order, ensure public health and safety, or equitably enforce the law in the face of armed opposition.²⁷²

Importantly, *Debs*' sweeping holding is constitutionally based. *In re Debs* did not discuss the Militia Act, the 1807 Insurrection Act, or any other congressional authorization on the domestic use of force,²⁷³ thus indicating what Fillmore first proclaimed: the existence of inherent presidential authority to intervene within a state, in times of emergency, to enforce federal law, without state consent.

The famous case of *Cunningham v. Neagle*,²⁷⁴ upon which *Debs* partially relies, adds Supreme Court imprimatur to a slightly different invocation of inherent presidential authority as well. In that case, a United States deputy-marshal, acting in his official capacity, protected Supreme Court Justice Stephen Field from a "murderous assault," by lethally firing upon the attacker.²⁷⁵ The case came before the Supreme Court because the deputy-marshal was subsequently held for murder under California law. The Court held that he could not be detained for murder under state law since he was in the discharge of his official, federal duties.²⁷⁶ What this case supports is essentially what President Jackson had done; namely, to send armed federal personnel to defend federal property and personnel against armed attack. Even without a statute authorizing the President to protect the "millions of acres of valuable public land" which the United States owns,

²⁷² As the Court framed the issue for the underlying injunction: "The picture drawn in it of the vast interests involved, *not merely of the city of Chicago and the State of Illinois, but of all the states*, and the general confusion into which the interstate commerce of the country was thrown; *the forcible interference* with that commerce; the attempted exercise by individuals of powers belonging only to government, and the threatened continuance of such invasions of public right, presented a condition of affairs which called for the fullest exercise of all the powers of the courts." *Id.* at 592 (emphasis added).

²⁷³ Stephen Vladek argues that *Debs* does not stand for presidential inherent authority but was rather a ruling of statutory interpretation. Vladek, *supra* note 153, at 185. For Vladek, what was "truly at issue" in *Debs* was President Cleveland's authority under the Militia Acts to call out the national army to execute the laws, even though there was no discussion of the Militia Acts. *Id.* Vladek argues that Cleveland "generally followed the guidelines of the Militia Acts," *id.*, but in many of its most important aspects, he did not. For example, he did not issue the required proclamation. While Cleveland wrote to Illinois Mayor John Altgeld that he was acting "in strict accordance with the Constitution and laws of the United States," he never specified which laws. *Infra* at note 363.

²⁷⁴ 135 U.S. 1 (1890).

²⁷⁵ *Id.* at 5.

²⁷⁶ *Id.* at 75.

the Court answered in the affirmative whether the President has the authority to “place guards upon the public territory to protect its timber.”²⁷⁷ Similarly, the President has the inherent authority to protect a federal judge against grave danger.²⁷⁸

In other words, while federal property and personnel may be located within a state, they remain federal, and the United States, as sovereign, has the right to protect them, with force if necessary, against grave danger. Moreover, the right is derivative from the presidential intervention principle. Over federal property (e.g. a military base), the state generally lacks the jurisdiction to enforce the law, and for federal personnel like Justice Field, who travel outside of federal facilities and across state lines, state officials likely lack the ability to protect them all of the time.

Returning to Fillmore, he rightfully acknowledged that the President can be limited in his means of defending the United States and enforcing domestic order against armed resistance by the Militia Clauses, which entrusts Congress with the power to provide rules for the calling forth of the militias. Congress also does have the constitutional power to raise and support the Army and Navy, which limits the President’s capabilities, albeit in ways beyond merely the binary choice of whether to raise or not, as Fillmore believed.²⁷⁹

Fillmore, however, omitted the fact that the President is also restricted in his domestic use of the military by the rest of the Constitution as well. For example, he is restricted in his ability to quarter troops²⁸⁰ or to suspend habeas,²⁸¹ trial by jury,²⁸² and other due process rights.²⁸³ The

²⁷⁷ *Id.* at 65.

²⁷⁸ *Id.* at 67 (“We cannot doubt the power of the president to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death.”).

²⁷⁹ See generally Barron, *supra* note 151.

²⁸⁰ U.S. CONST. amend. III.

²⁸¹ *Id.* at Art. I, § 9.

²⁸² *Id.* at amend. VI.

²⁸³ See discussion of *Ex Parte Milligan*, *infra* at 610–11. See also *Sterling v. Constantin*, 287 U.S. 378, 402–03 (1932), which, while reviewing a Texas Governor’s imposition of martial law, nevertheless proves instructive: “If . . . the Executive [can] substitute military force for and [to] the exclusion of the laws . . . [then] republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution”

President, or his party, also has to run for re-election.²⁸⁴ Furthermore, as discussed in reference to the Force Act and Jefferson, the ability to execute federal law does not subvert the default, constitutional primacy of state law enforcement. Only when armed opposition to the execution of federal law exceeds state and federal civilian capabilities or willingness, is the right to intervene with federal arms triggered.

Additionally, Fillmore did not acknowledge the power of the states to influence and shape presidential uses of their militias, particularly through officer appointments. At the same time, Fillmore did not adequately appreciate what can be lost when the President chooses not to use state forces; namely, the loss of state expertise and local knowledge, as well as the loss of a partner in the governor.²⁸⁵

J. Posse Comitatus and the Cushing Opinions

Despite being a one-term President who ascended to the office upon Tyler's death, President Fillmore contributed much to the history of presidential authority over states. In addition to advancing presidential inherent authority to intervene within a state to enforce federal law, President Fillmore also wrote the first chapter in what would become the

²⁸⁴ Of course, the President's power is also at its "lowest ebb" when it is in contradiction to an act of Congress. See *Youngstown*, 343 U.S. at 637; see also Barron, *supra* note 151.

²⁸⁵ After 1878, using the national army vice the militia or National Guard in non-Title 10 status, also can limit the President in terms of law enforcement under the Posse Comitatus Act (PCA), now codified at 18 U.S.C. 1385 (2000) ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both."). See discussion *infra* at 602–03. Of course, such a congressional limitation begs the question whether there is such an inherent presidential authority to execute federal law, and, if so, whether the PCA is constitutional. In 1957, Eisenhower's Attorney General noted that there were "grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate." 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, 331 (1957). In 1989, OLC also remarked that "even in the domestic sphere, the legislators did not intend the Act to extend to situations where only the discipline and armed strength of the military could assure execution of the laws." Extraterritorial Effect of the Posse Comitatus Act, 13 Op. Off. Legal Counsel 321, 329 n.6 (1989).

most significant statutory limitation on domestic presidential authority, the Posse Comitatus Act.²⁸⁶

Fillmore's February 19, 1851 "Special Message" was sparked by the specific question of whether the federal military could support civilian, federal marshals in enforcing the Fugitive Slave Law as members of a *posse comitatus*.²⁸⁷ For Fillmore, it was "not to be doubtful" that all citizens, including those enrolled in the militia, can be summoned as individual members of a *posse comitatus*.²⁸⁸ But, he asked Congress to consider legislation to explicitly authorize U.S. Marshals to summon an *organized* militia force to its posse, without the consent of its Governor-appointed officers, since such a power "might be doubted."²⁸⁹

Congress referred the President's request to the Judiciary Committee and the Committee Report found that the U.S. Marshals already had sufficient authority to call anyone they liked into posses, including organized militia and regular units: "Because men are soldiers or sailors, they cease not to be citizens; and while acting under the call and direction of the civil authority, they may act with more efficiency, and without objection, in an organized form, under appropriate subordinate command."²⁹⁰ To the Committee, this method of law enforcement, even with organized military units, was still civil enforcement, and that is what mattered.

The Attorney General under President Pierce, Caleb Cushing, adopted this reasoning shortly thereafter in a doctrine that would bear his name:

²⁸⁶ The Posse Comitatus Act, Sec. 15, 20 Stat. 145, 152 (1878), will be discussed in further detail in Part O below.

²⁸⁷ On February 17, 1851, Fillmore's Secretary of War directed the commander of the troops in Boston Harbor that if the federal marshal requested assistance, so long as he displayed the judicial certification of necessity, he was to "place under the control of the marshal yourself and such portion of your command as may be deemed adequate to the purpose." Message quoted in Coakley, *supra* note 146, at 129.

²⁸⁸ Special Message, *supra* note 251.

²⁸⁹ *Id.* ("It is supposed not to be doubtful that all citizens, whether enrolled in the militia or not, may be summoned as members of a *posse comitatus*, either by the martial or a commissioner according to law But perhaps it may be doubted whether the marshal or commissioner can summon as the *posse comitatus* an organized militia force, acting under its own appropriate officers, without the consent of such officers.").

²⁹⁰ S. REP. NO. 320 (1851). The Report also noted that no State could change this fact, as the Constitution and U.S. laws are "paramount to" State law. *Id.*

A Marshal of the United States, when opposed in the execution of his duty, by unlawful combinations, has authority, to summon the entire able-bodied force of his precinct, as a *posse comitatus*. The Authority comprehends, not only bystanders and other citizens generally, but any and all organized armed forces, whether militia of the state, or officers, soldiers, sailors and marines of the United States.²⁹¹

The fact that these individual posse members were organized units of the armed forces, under command of military officers, did not, according to Cushing, “in any wise affect their legal character. They are still the *posse comitatus* anyway.”²⁹²

In other words, the Cushing Doctrine stood for the proposition that any U.S. Marshal, on his own authority, can call forth the militia, or call in regulars, to enforce federal law within a state without a state request or without fulfilling the requirements of the Militia Act. His doctrine was employed only rarely during his time, but it came into full use during the Reconstruction Era, with the effect that Congress would step in to limit it with the Posse Comitatus Act (“PCA”).²⁹³

While some commentators have called the Cushing Doctrine constitutionally suspect and in opposition to the Founders’ intent,²⁹⁴ it does have an element of soundness to it. For example, in the modern era, military assets and personnel can be “chopped” to federal civilian agencies to assist in their law enforcement efforts. The Department of Justice and the Department of Defense have opined that military personnel are not subject to the PCA when they are detailed to a civilian agency because those personnel act under the supervision of the civilian agency rather than the military.²⁹⁵ Recall the Senate Committee’s reasoning which underlined

²⁹¹ 6 U.S. Op. Atty. Gen. 466, 466 (1854).

²⁹² *Id.* at 473.

²⁹³ See discussion *infra* at Part II.O.

²⁹⁴ See, e.g., Gary Felicetti and James Luce, “The Posse Comitatus Act: Setting the Record Straight on 124 years of Mischief before any more Damage is Done,” 175 MIL. L. REV. 86, 178 (2004) (citing Alexander Hamilton for the principle of elected, civilian control of the military, they argue that the Cushing doctrine “violated this important principle by permitting minor, unelected officials to control parts of the standing army.”)

²⁹⁵ See, e.g., Permissibility Under Posse Comitatus Act of Detail of Defense Department Civilian Employee to the National Infrastructure Protection Center, Op. Off. Legal Counsel

Cushing's Opinion: "while acting *under the call and direction of the civil authority*, they may act with more efficiency, and without objection, in an organized form, under appropriate subordinate command."²⁹⁶ The Department of Justice has made clear that these personnel must be under the "exclusive orders" of the head of the civilian agency, to the effect that they are no longer any part of the military for purposes of the PCA.²⁹⁷ For the uprising that prompted the Cushing Doctrine—the Anthony Burns Fugitive Slave case—approximately 180 soldiers and marines were employed in a 1,600 man posse.²⁹⁸ These federal Soldiers and Marines were under the exclusive control of the civilian U.S. Marshal or the civilian Boston Mayor. They were arguably not under the control of U.S. military authorities once their military commander subordinated himself to civilian control.

Even if they had been under some military command, other modern statutes shed instructive light on the potential soundness of the Cushing Doctrine. Congress has legislated instances when the U.S. military, not just individuals or individual units, can perform civilian law enforcement activities within a state. Consistent with the presidential intervention principle, so long as: (1) the situation poses a serious threat to the United States; (2) enforcement of the law would be seriously impaired if the assistance were not provided; and (3) civil law enforcement personnel are incapable of enforcing the law, then the military, at the request of the civilian U.S. Attorney General, and under the command of the President, can intervene, regardless of the PCA and regardless of state request or consent. 18 U.S.C. § 831, dealing with weapons of mass destruction, is an example of just such a modern law.²⁹⁹ While not a nuclear or radiological event, the Anthony Burns affair did involve a request from a civilian authority when local civilian authorities were incapable of enforcing the law

n.5 (May 26, 1998), available at <http://www.justice.gov/olc/opiniondocs/op-olc-v022-p0103.pdf> [<http://perma.cc/PSC9-PNR9>] ("earlier opinions of the Office concluded that military personnel who are detailed to a civilian agency are not covered by the PCA because they are employees of the civilian agency for the duration of their detail, 'subject to exclusive orders' of the head of the civilian agency, and therefore 'are not "any part" of the military for purposes of the PCA.'").

²⁹⁶ S. REP. NO. 320 (1851) (emphasis added).

²⁹⁷ *Supra* note 295, at n.5.

²⁹⁸ Coakley, *supra* note 146, at 137.

²⁹⁹ See 18 U.S.C. § 831(e) (permitting the Attorney General to request assistance from the Secretary of Defense to enforce the prohibited transactions involving nuclear materials when an emergency exists that "poses a serious threat to the interests of the United States;" and in which "the enforcement of law would be seriously impaired if the assistance were not provided;" and "civilian law enforcement are not capable of enforcing the law").

against armed opposition, and when the country was already barreling towards a civil war based in large part on the slavery question.

Accordingly, when asked two years later to opine on the use of federal forces as part of a civilian posse, Cushing drew a sharp distinction between the use of federal forces in a posse to enforce federal law, which was more readily permissible, and the obligatory use of federal troops to intervene in armed opposition to state authorities. In 1856, the Governor of California appealed to the military commander of the Department of the Pacific for arms and ammunition to help put down what he considered an insurrection in San Francisco. The Commander demurred, insisting that the Governor had to appeal to the President. When President Pierce received the Governor's letter, he sought Cushing's opinion. Cushing found "no evidence" of any threatened or actual "act[s] of resistance or obstruction to the Constitution, laws, or official authority of the United States."³⁰⁰ Additionally, under the 1795 Militia Act, the 1807 Act, and the Constitution, Cushing noted that federal intervention where no threat to the United States or its laws exists requires the request of a state legislature—not the state executive (unless the legislature was not in session).³⁰¹ Finally, Cushing noted that the Governor was just asking for arms. While he thought that there were circumstances in which arms could be provided where men could not, he asserted that such presidential involvement in state affairs should be reserved for "circumstances of the most exigent emergency."³⁰² He went on further to explain how high a bar he was describing: "[F]or instance, a case of indisputable *bellum flagrans* in a given state in which all the constitutional power of the state shall have been exerted in vain to prevent or suppress domestic war"³⁰³

President Pierce accepted his Attorney General's opinion,³⁰⁴ joining the likes of Tyler in exercising restraint in employing presidential power in

³⁰⁰ Caleb Cushing, Jul. 19, 1856, in 8 OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES 10 (1872).

³⁰¹ *Id.* at 13. Cushing did not make an argument of inherent presidential authority to intervene within a state without state request. He found relevant only the First Militia Clause and stated that: "I do not perceive in the Constitution any other provision of *specific* pertinency." *Id.* at 11. He even opined that the take care clause was unavailing for insurrections against state laws and government because it "refers primarily to the laws of the United States." *Id.*

³⁰² *Id.* at 14.

³⁰³ *Id.*

³⁰⁴ Coakley, *supra* note 146, at 140.

state affairs, even at the state's request. By doing so, he also further reinforced the argument that the militia and the national army are constitutional means of defending the United States and its laws against armed opposition, but that they may only be used to defend the states upon a request that complies with Article IV, Section 4.³⁰⁵

K. The Civil War and Presidential Statutory and Inherent Authority to Quell Insurrection against the United States

The Civil War was an existential threat to the United States itself. It was an actual insurrection, not just armed opposition to the execution of certain of its laws.³⁰⁶ In fact, so great was the insurrection that it became tantamount to an invasion. Therefore, it is necessary to see Lincoln's exertions of presidential powers over the states as a function both of presidential statutory and constitutional powers to call forth the militia and the national military in the face of a domestic insurrection against the United States, and as an exertion of inherent authority to defend against an armed attack. These historic presidential actions would give rise to similarly historic congressional actions and judicial opinions, all of which greatly influence presidential intervention powers to this day.

The dual nature of presidential authority emerged quickly after the first shots were fired at Fort Sumter in April 1861. President Lincoln initially issued a Proclamation on April 15 consistent with the 1795 Militia Act. He called forth the militia of the several States of the Union to the "aggregate number of 75,000" and commanded the "persons composing the combinations aforesaid" to disperse and retire peaceably to their respective abodes within twenty days.³⁰⁷ Like Adams, Lincoln referenced both his statutory and constitutional authority to call forth the militia to intervene within a state to enforce federal law without state consent.³⁰⁸

³⁰⁵ See *supra* Part II.H.

³⁰⁶ As the Court in *Ex Parte Milligan* would describe it: "An armed rebellion against the national authority, of greater proportions than history affords an example of." 71 U.S. 2, 115 (1866).

³⁰⁷ 5 THE WRITINGS OF ABRAHAM LINCOLN 286 (Arthur Brooks Lapsley ed., 1906).

³⁰⁸ Lincoln stated:

"Now, therefore, I, Abraham Lincoln, President of the United States, in virtue of the power vested in me *by the Constitution and the laws*, have thought it fit to call forth, and hereby do call forth, the militia of the several States of the Union to the aggregate number of seventy-five

Four days later, as the persons composing those combinations did not retire, and as the Confederate States further consolidated their power, Lincoln also began treating the insurrection as a foreign invasion. He ordered a blockade of Confederate ports. Curiously, while in his April 19 Proclamation he invoked “the laws of the United States” and “the law of nations” to impose the blockade,³⁰⁹ Lincoln did not specifically invoke any constitutional authority, even though with the repeal of the Embargo Acts at the end of Jefferson’s Administration³¹⁰ there was no statute authorizing a domestic blockade.

Congress convened in a special session in July 1861 to ratify the President’s emergency actions solely under a domestic insurrection rubric. They set out to lower the bar to presidential intervention under the 1795 Militia Act by requiring only that it be “impracticable” to enforce the laws of the United States by ordinary judicial proceedings.³¹¹ They also

thousand, in order to suppress said combinations, and to cause the laws to be duly executed.”

Id. (emphasis added).

³⁰⁹ *Id.* at 287. While as will be discussed further below, a blockade is a belligerent act, Lincoln still was apparently not prepared to operate fully under a law of war model. In this Proclamation, he effectively was stating that he would not afford belligerent rights to the insurrectionist states under international law, stating instead that he would treat those who “shall molest a vessel of the United States” as domestic criminals under the laws of “piracy.” *Id.* at 288. A few months into the war, however, on July 5, 1861, Lincoln’s Attorney General deemed the insurrection a war, stating: “The civil administration is still going on in its peaceful course, and yet we are in the midst of a war, a war in which the enemy is, for the present, dominant in many States, and has his secret allies and accomplices scattered through many other States which are still loyal and true. A war all the more dangerous, and more needing jealous vigilance and prompt action, because it is an internecine and not an international war.” 10 U.S. Op. Att’y Gen. 74, 92 (1861).

³¹⁰ *See supra* Part II.F.

³¹¹ Act of July 29, ch. 25, 12 Stat. 281–82 (1861) (“That whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory . . . it shall be lawful for the President . . . to call forth the militia . . . and to employ such part of the land and naval forces . . . to enforce the faithful execution of the laws . . . or to suppress such rebellion in whatever State or Territory thereof the laws . . . may be forcibly opposed, or the execution thereof forcibly obstructed . . .”). Of course, lowering the bar on intervention was hardly necessary given the magnitude of the current insurrection and opposition to federal law. It was also hardly necessary—other than from a messaging perspective—for the 1861 Act to

authorized the President to retain those troops for twice as long.³¹² Additionally, codifying *Luther*, Congress vouchsafed the determination on when to send forth the troops to the President's judgment.³¹³

The Supreme Court, on the other hand, perceived that the President was not just operating under a domestic insurrection rubric, but also under a foreign invasion paradigm. The Court also saw that the President was acting under both statutory and inherent constitutional authority. With the expiration of Jefferson's Embargo Acts, there was no statutory basis behind the blockade. Nonetheless, in the *Prize Cases*, the Court upheld it "on the principles of *international law*, as known and acknowledged among civilized States."³¹⁴ In other words, they found authority in the President's inherent power to conduct war against another nation.

The majority also stated that while Congress cannot declare war against a state, or any number of states, the President has the inherent authority to send in troops to enforce federal law and preserve the Union:

The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the Army

add "rebellion against the authority of the Government of the United States" to the list of instances under which the power to use the militia to execute the laws could be invoked. It is possible that including the word "rebellion" may have been a tentative step towards merging the power to employ the militia with the power to suspend habeas corpus. By adding this word, Congress could have been attempting to reference the Suspension Clause to the two existing clauses (the Article IV, Section 4 and the Militia Clause) upon which the Militia Act was based. Interestingly, the day after President Lincoln's July 4 address to Congress, Attorney General Bates suggested that the power to detain prisoners, and to ignore judicial writs for production of such detainees (like the one issued by Chief Justice Taney in *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861)), was already in accord with the authority given the President in the 1795 Militia Act and the 1807 Insurrection Act. See *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att'y Gen. 74, 83-84, 90-91 (1861). That being said, Congress would not suspend habeas until 1863.

³¹² Under the 1795 Militia Act, the President could only maintain in federal service any militia for thirty days after the convening of the next session of Congress. Act of Feb. 28, Sec. 2, 1 Stat. 424 (1795).

³¹³ *Id.*

³¹⁴ 67 U.S. at 685 (emphasis added). The Court also stated: "On this first question therefore we are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard." *Id.* at 671. *Cf.* Barron, *supra* note 151, at 997 ("The Supreme Court would later hold in the *Prize Cases* that those statutes authorized the blockade.").

and Navy of the United States, and of the militia of the several States when called into the actual service of the United States.³¹⁵

No doubt with Article IV's federal obligation to protect the states in mind, the Court added:

If a war be made by invasion of a foreign nation, the President is not only authorized but *bound* to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.³¹⁶

The same applied to rebellious states. The President was "bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name."³¹⁷

The *Prize* Court did find statutory authorization in the Militia and Insurrection Acts for the *means*, other than the blockade, to fulfill the president's protection obligation. In so doing, the Court implicitly upheld the constitutionality of them.³¹⁸

[B]y the Acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call[] out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, *and* to suppress insurrection against the government of a State or of the United States."³¹⁹

Thus, while there is robust statutory authority for the President relative to states in cases of insurrection against the United States, the *Prize Cases*

³¹⁵ 67 U.S. at 668.

³¹⁶ *Id.* at 668–69 (emphasis added).

³¹⁷ *Id.*

³¹⁸ That being said, the Court appears to have believed that the 1807 Act authorized the use of the regular Army and Navy, in addition to the militia, to repel invasions. In fact, it did not actually use the word "invasion" or otherwise make a reference to it. The Court also did not mention the 1861 amendment as a source of Lincoln's authority, at least implicitly agreeing that it was unnecessary to lower the bar on intervention based on the extreme magnitude of the opposition to federal law.

³¹⁹ *Id.* at 668 (emphasis added).

affirm that there is also an inherent presidential authority to repel invasions—including when the invaders are states.

Finally, while not discussed by the *Prize* Court, Lincoln also had no statutory basis, prior to the outbreak of the Civil War, to dispatch federal warships to Fort Sumter with instructions to return fire if attacked, much like there was no statutory authority when President Jackson order troops to protect federal forts thirty years prior.³²⁰ Recall that the 1807 Act required that the 1795 Act be triggered before federal regulars could be used, and Lincoln's actions here preceded actual armed opposition and the proclamation that the 1795 Militia Act required.³²¹ A later Court, however, would find an inherent right to protect federal property and personnel.³²²

There were still important limits, though, even during this most extreme of crises when presidential inherent intervention power was at its height. As necessity creates the presidential intervention principle, so it limits its duration, location, and application. President Lincoln's expansive powers over the states ended with the close of the War, and its full reach extended only to those states in which the civil authorities were unable or unwilling to perform its essential functions. Shortly after the War, in *Ex Parte Milligan*, the Supreme Court emphasized what it means to be an emergency:

Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be 'mere lawless violence.'"³²³

Commentators critical of presidential intervention authority have found significant that the 1861 Act omitted any reference to civilian federal

³²⁰ See *supra* part II.G.

³²¹ See DANIEL FARBER, LINCOLN'S CONSTITUTION 116 (2003).

³²² See *Neagle*, 135 U.S. at 1.

³²³ *Ex Parte Milligan*, 71 U.S. 2, 127 (1866).

marshals, arguing that this law upended the constitutional tradition of preferring civilian over military law enforcement.³²⁴ But the law still required that it be “impracticable” for the “ordinary course of judicial proceedings” to enforce the laws of the United States in any state or Territory in which they are “forcibly opposed.”³²⁵ The 1861 Act did not make federal military intervention a matter of “convenience,”³²⁶ because it did not change the basic rule that only in times of emergency, when states or federal civilian authorities (including judges) cannot or will not keep the peace, enforce the law, or protect public health and safety against armed opposition, can the federal government intervene. *Milligan* never mentioned the 1861 Act, but its holding affirms this essential principle, and it makes clear that even when domestic military force is employed, the rest of the Constitution is in effect, unless some other exception temporarily, and narrowly, applies.³²⁷

Ultimately, while the 1861 Act was not the true basis for Lincoln’s conduct of the War,³²⁸ it did have lasting significance. It represented

³²⁴ See, e.g., David E. Engdahl, *Foundations for Military Intervention in the United States*, 7 SEATTLE U. L. REV. 1, 31–32 (1983).

³²⁵ Act of July 29, ch. 25, 12 Stat. 281–82 (1861).

³²⁶ Engdahl, *supra* note 324, at 32.

³²⁷ See generally *Milligan*, 71 U.S. 2. Cf. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, “Authority for the Use of Military Force to Combat Terrorist Activities Within the United States (Oct. 23, 2001), available at <http://www.justice.gov/olc/docs/memomilitaryforcecombatus10232001.pdf> [<http://perma.cc/YL7J-7V74>]. The opinion, while cursorily acknowledging that “of course” *Milligan* stands for the proposition that war does not suspend civil liberties, *id.* at 34, by equating the 9/11 attacks to a full-scale invasion of indeterminate length, essentially swept away *Milligan*’s core holding that extraordinary presidential powers to respond to emergencies are confined in duration and locale. A later OLC memo rightfully advised “that caution should be exercised before relying in any respect” on this memo, particularly the sweeping conclusion that the Fourth Amendment does not apply to domestic military operations designed to deter and prevent future terrorist attacks. Memorandum for the Files from Stephen G. Bradbury, Principal Deputy Assistant General, Office of Legal Counsel, Re: October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities within the United States (Oct. 6, 2008), available at <http://www.justice.gov/olc/docs/memoolcopiniondomesticusemilitaryforce10062008.pdf> [<http://perma.cc/JB2Y-N8RU>].

³²⁸ Coakley, *supra* note 146, at 228. That is not to say, however, that Lincoln did not invoke the 1861 Act. See, e.g., Abraham Lincoln, “Proclamation 86—Prohibiting Commercial Trade with States in Rebellion,” Aug. 16, 1861, available at <http://www.presidency.ucsb.edu/ws/?pid=69990> [<http://perma.cc/5YKL-N76C>] (“Now, therefore, I, Abraham Lincoln, President of the United States, in pursuance of an act of

another legislative step away from the founding ideal of reliance on state militias to keep the peace, guarantee republican forms of government, and preserve a more perfect Union. Critically, it did not upend the preference for state law enforcement or federal civilian law enforcement. It did, however, further reinforce that keeping the peace, guaranteeing republican forms of government, and preserving a more perfect Union were responsibilities of the President when any of these were threatened by powers that overwhelmed states, or were caused by states.

It is this law, still in existence today as 10 U.S.C. § 332, that President Eisenhower relied upon a century later to enforce federal law in Little Rock, Arkansas when Governor Orval Faubus refused to let a young African American girl attend a white-only desegregating school.³²⁹

L. Reconstruction, the Ku Klux Klan Act, and the Final Growth Spurt of Presidential Power over States for Internal Threats

While the Ku Klux Klan (“KKK”) attempted to thwart Reconstruction in the South, Congress further empowered the President over the states, consistent with the recently amended Constitution. At the request of President Ulysses S. Grant, Congress passed the 1871 Ku Klux Klan Act³³⁰ to enforce equal protection under the Fourteenth Amendment³³¹ against systemic and violent resistance. The President gained an authority that it retains to this day³³² to “take such measures . . . as he may deem necessary,” whenever the President determines that “any insurrection, domestic violence, unlawful combinations or conspiracy”:

[S]o hinders the execution of the laws of that state, and of the United States within the State, that any part or class of

Congress approved July 13, 1861, do hereby declare that the inhabitants of the said States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida . . . are in a state of insurrection against the United States . . .” (emphasis added).

³²⁹ President Eisenhower issued Executive Order 10,730 partially on the basis of this provision, authorizing the Secretary of Defense to call up the National Guard in Arkansas and the regular Army to enforce orders of the District Court for the Eastern District of Arkansas requiring the desegregation of the Little Rock School District. (September 24, 1957). *See* Exec. Order No. 11,053, 27 Fed. Reg. 7628 (1962).

³³⁰ Ku Klux Klan Act of April 20, ch. 22, 17 Stat. 13 (1871) [hereinafter KKK Act].

³³¹ U.S. CONST. Amend. XIV.

³³² *See* 10 U.S.C. § 334.

people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposed or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.³³³

Section 4 of the 1871 Act—the most extreme provision (which sunset after one year)—allowed the President to suspend the writ of habeas corpus when the unlawful combinations were not only “so numerous and powerful as to be able, by violence,” to either overthrow or set at defiance the authorities of the State or of the United States, but also when the “constituted authorities are in complicity with” these unlawful combinations.³³⁴ Recall that Washington and Adams marched into Pennsylvania to put down the unlawful combinations they faced under the earlier version of the Militia Acts and afterwards sought criminal prosecutions,³³⁵ not military court-martial. By contrast, this amendment to the Militia Act authorized President Grant, according to certain requirements, not only to mount a military intervention, but to deny captives—American citizens—a civilian trial. This is precisely what he did.

On March 24, 1871, in response to a South Carolina request for assistance in dealing with the KKK, Grant issued a cease and disperse proclamation, referencing Article IV, Section 4, as well as the 1795 Militia Act.³³⁶ After the KKK Act was passed on April 20, however, he upped the stakes to enforcing equal protection. While in March, the stated cause for the Proclamation was “insurrection in any state or of obstruction of the laws thereof,”³³⁷ on May 3, Grant warned that he was prepared to intervene under the 1871 Act where necessary to secure to “all citizens of the United States

³³³ 10 U.S.C. § 333.

³³⁴ KKK Act. The Republican governors of several Southern states had warned President Grant that civilian trials would be ineffective since the KKK would regularly intimidate any potential witnesses against them.

³³⁵ *See supra* Parts I.D and E.

³³⁶ Ulysses S. Grant, “Proclamation 197” (Mar. 24, 1871). While the preamble referenced the obligation on the United States to protect each State, Grant grounded his cease and disperse Proclamation in the 1795 Militia Act and the 1861 amendments.

³³⁷ *Id.*

the peaceful enjoyment of the rights guaranteed to them by the Constitution and the laws.”³³⁸

After this forceful Proclamation, Grant nonetheless delayed, taking time to encourage South Carolina’s Governor—who was pleading for presidential assistance under Article IV, Section 4—to first use state resources to remedy the situation.³³⁹ If the state’s efforts were insufficient, Grant promised to provide “every aid for which I can find law or constitutional power.”³⁴⁰

When it became clear that the state could not protect the rights of its citizens, President Grant stepped in.³⁴¹ On October 12, he issued a proclamation threatening federal intervention into South Carolina and the suspension of habeas in nine counties based on the “unlawful combinations and conspiracies” that were “depriving certain portions and classes of the people of that state of the rights, privileges, immunities, and protection named in the Constitution of the United States and secured by [the 1871 Act]” which the state was “unable to protect.”³⁴² Five days later, with his warning unheeded, Grant suspended habeas in those nine counties “to the end that such rebellion may be overthrown.”³⁴³

The 1871 Act renewed the legislative debates about the power of the federal government to intervene in domestic affairs without state request. Representative James Blair, for example, correctly saw the Act as consistent with Article IV, Section 4, arguing that the Constitution does not forbid federal intervention without state request: “It lays a duty upon the United

³³⁸ Proclamation No. 199, 17 Stat. 949.

³³⁹ Letter from Ulysses S. Grant to D.H. Chamberlain, Governor of South Carolina, (July 26, 1876), available at <http://teachingamericanhistory.org/library/document/letter-to-d-h-chamberlain-governor-of-south-carolina/> [<http://perma.cc/G4B4-G3UA>].

³⁴⁰ *Id.*

³⁴¹ Grant also had sent in his Attorney General, Amos T. Ackerman, to examine the conditions firsthand before Grant would suspend habeas. Coakley, *supra* note 146, at 311.

³⁴² Proclamation No. 200, 17 Stat. 950.

³⁴³ Proclamation No. 201, 17 Stat. 951. While his three previous warnings did not invoke his constitutional authority, this one announcing his decision did: “Now, therefore, I, Ulysses S. Grant, President of the United States of America, by virtue of the authority vested in me by the Constitution of the United States and the act of Congress aforesaid, do hereby declare that in my judgment the public safety especially requires that the privileges of the writ of habeas corpus be suspended, to the end that such rebellion may be overthrown” *Id.* at 952.

States in a certain event, but it does not prohibit the performance of that duty in case the event does occur.”³⁴⁴

On the other hand, Representative George W. Morgan of Ohio opposed the Act, incorrectly arguing that “so jealous is the Constitution of the rights and liberties of the people, that it does not allow the President to interfere, even on the application of the governor of a state, except when the Legislature cannot be convened.”³⁴⁵ Senator John P. Stockton of New Jersey also voted nay, making the flawed merger argument discussed above, namely that Article IV, Section 4 provided a “full, ample and complete remedy” to domestic violence and “absolutely forbids any other interference by other means or under other circumstances.”³⁴⁶

At least one modern commentator, critical of domestic intervention, also asserts that this aspect of the 1871 Act was unconstitutional,³⁴⁷ but again, Article IV, Section 4 addresses only the *obligation* of federal intervention, while the First Militia Clause indicates a primary, but not exclusive, *means* of doing so. There was, intentionally, no express prohibition on the use of the national army to intervene domestically, and there was no requirement in the First Militia Clause for state consent to execute the laws of the Union, suppress insurrections or repel invasions. The 1871 Act authorized presidential intervention when constitutional rights and their enabling laws were systematically incapable of enforcement at the state level, which is precisely the situation in many Southern States at the time. For example, although Klansman had committed hundreds of crimes, by means of disguise, coercion, and perjury, the Klan had kept almost all its members from being prosecuted in North Carolina.³⁴⁸

Less than a century later, when states themselves refused to enforce equal protection by desegregating schools, the law was again rightfully invoked to justify federalizing the National Guard.³⁴⁹

³⁴⁴ CONG. GLOBE, 42d Cong., 1st Sess. App. 72 (1871) (statement of Rep. J. Blair).

³⁴⁵ CONG. GLOBE, 42d Cong., 1st Sess. 331 (1871) (statement of Rep. Morgan).

³⁴⁶ *Id.* at 574 (statement of Sen. Stockton).

³⁴⁷ Banks, *supra* note 127, at 13–14 (stating that the 1871 KKK Act “exceeded constitutional limits on the powers of the national government imposed by the Protection and Calling Forth Clauses.”).

³⁴⁸ Coakley, *supra* note 146, at 309.

³⁴⁹ See Exec. Order No. 10,730, *supra* note 329 (“Whereas such obstruction of justice constitutes a denial of the equal protection of the laws secured by the Constitution of the United States and impedes the course of justice under those laws . . .”).

The key point remains consistent—when the President has to step in to preserve the Union or to protect a state and its republican form of government, the President can. After the Civil War and the Fourteenth Amendment, a republican form of government now means a state government that *equitably* enforces the law for *all* of its citizens. Furthermore, where the 1871 Act was found unconstitutional actually reinforces where it is otherwise constitutional. Section 2 of the Act made it a crime under federal law to conspire together to overthrow the United States or to deny individuals civil rights. The Court in *United States v. Harris*³⁵⁰ correctly struck down that section, stating that:

When the state has been guilty of no violations of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when on the contrary, the laws of the state, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons—the [Fourteenth] amendment imposes no duty and confers no power upon congress.³⁵¹

Indeed, where federal law, federal personnel or property, or the Union itself is not threatened by armed opposition, and when the state can and does equitably enforce the law and maintain public health and safety, there is no need—and thus no ability—for federal intervention. As a foundational, federalist principle, states have primacy over domestic law enforcement and public health and safety, which the Supreme Court in *Harris* reaffirmed. Only in emergencies, which means when states cannot, or will not, equitably enforce the law or guarantee public health and safety in light of armed opposition, can the President intervene within or against a state.

Accordingly, the most forward leaning section of the Act is also constitutional. Consistent with *Milligan*, the one-year authorization for presidential suspension of *habeas* was applicable only when the armed

³⁵⁰ 106 U.S. 629 (1883).

³⁵¹ *Id.* at 639.

opposition effectively shut down the courts, and only in those areas declared actual localities of war.³⁵²

M. The Enduring Legacy of the 1871 Act

By 1871, what began in 1792—and was periodically modified for almost a century thereafter—reached a maturity that would last without significant amendment until the ill-fated, and largely unnecessary, 2006 post-Katrina amendment. At the same time, presidents, despite the extraordinary powers the Act authorizes, have shown a remarkable restraint in invoking it. They have been meticulous, for the most part, in distinguishing between those federal interventions based on state request and those based on the need to enforce federal laws against armed opposition. Additionally, they have largely been careful to honor primacy of state response, as well as the exhaustion of federal civilian measures. Almost 200 hundred years after the 1792 Militia Act, for example, a 1981 Office of Legal Counsel Memo correctly stated:

The statutory and constitutional scheme of our government leaves the protection of life and property and the maintenance of public order largely to state and local governments. Only when civil disorder grows beyond a state's ability to control or threatens federal rights does the federal government generally intervene.³⁵³

In 1987, President Reagan called up the National Guard and employed the armed forces in response to disturbances at a federal penitentiary in

³⁵² KKK Act (“That whenever in any State or part of a State the unlawful combinations . . . shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such district impracticable, in every such case such combinations shall be deemed a rebellion against the government of the United States, and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of habeas corpus, to the end that such rebellion may be overthrown.”).

³⁵³ Use of Potatoes to Block the Maine-Canada Border, 5 Op. O.L.C. 422, 423 (1981).

Georgia.³⁵⁴ Reagan specified that the Attorney General, not the Secretary of Defense, would be in charge of coordinating the activities of all federal agencies assisting in the suppression of the violence, and importantly, he specifically charged the Attorney General with coordinating federal efforts with State and Local efforts.³⁵⁵ Two years later, President George H.W. Bush called up the National Guard and employed the armed forces to restore law and order in the Virgin Islands³⁵⁶ after proclaiming that the domestic violence and disorder endangered life and property and obstructed the execution of the laws.³⁵⁷ He also noted that the law enforcement resources available to that territory, including the National Guard (in a non-federalized status), were “unable to suppress such acts of violence and to restore law and order.”³⁵⁸ President Bush also intervened when California pleaded for assistance to quell the L.A. Riots in 1992.³⁵⁹

There have been some examples of potential overreaching to enforce federal law, most notably in President Cleveland’s response to the Pullman strike. When the President sent federal troops into Chicago to enforce the injunction to prevent the forcible obstruction of the mails, protect the movement of interstate commerce, and ensure the continued operation of the federal courts, he was accused of not assessing the ability of Indiana, or of federal law enforcement officials, to restore order.³⁶⁰ He certainly did not consult with the Indiana Governor in advance. In fact, when the federal troops arrived in the middle of the night on July 4, there was relative calm, and in a series of fascinating telegrams between the Governor and President Cleveland, it was clear that Indiana did not request or want federal troops. Governor John Altgeld aggressively chastised the President for ignoring vital principles of the Constitution and of intergovernmental comity when the President intervened despite a fully capable state:

To absolutely ignore a local government in matters of this kind, when the local government is ready to furnish assistance needed, and is amply able to enforce the law, not only insults the people of this State by imputing to them an

³⁵⁴ See Exec. Order No. 12,616, 3 C.F.R. 260 (1988). See also Proclamation No. 5748, 3 C.F.R. 178 (1988).

³⁵⁵ See Exec. Order No. 12,616, *supra* note 354.

³⁵⁶ See Exec. Order No. 12,690, 3 C.F.R. 236 (1990).

³⁵⁷ See Proclamation No. 6023, 3 C.F.R. 113 (1990).

³⁵⁸ *Id.*

³⁵⁹ Proclamation No. 6427, 3 C.F.R. 44 (1993).

³⁶⁰ See, e.g., Burns, *supra* note 269, at 44.

inability to govern themselves, or an unwillingness to enforce the law, but is in violation of a basic principle of our institutions. The question of Federal supremacy is in no way involved. No one disputes it for a moment, but, under our Constitution, Federal supremacy and local self-government must go hand in hand, and to ignore the latter is to do violence to the Constitution.³⁶¹

In response, Cleveland asserted his constitutional and statutory authority and responsibility to intervene to protect *federal* interests and *interstate* commerce against armed opposition,³⁶² while taking care to point out that he is not “interfering with the plain duty of the local authorities to preserve the *peace of the city*.”³⁶³ As discussed above, the Court essentially agreed, upholding President Cleveland’s inherent ability to protect the sovereignty of the United States and its laws when the President determines an emergency exists.³⁶⁴

With discretion comes accountability, however. While Governor Altgeld warned that the “only chance of failure” for presidential domestic imperium “could come from rebellion,” which could “readily be crushed,”³⁶⁵ the power of regular democratic politics is, in truth, formidable. A President and his or her party must face the voters every two-to-four years.³⁶⁶ As Stephen Dycus has noted, “[p]art of the genius of the

³⁶¹ ALTGELD, JOHN PETER, GOVERNOR ALTGELD’S PROTESTS AGAINST THE USE OF FEDERAL TROOPS IN ILLINOIS DURING THE LATE STRIKE AND THE PRESIDENT’S REPLIES 5 (1894), *available at* <http://lincoln.lib.niu.edu/file.php?file=jpaprotests.html> [<http://perma.cc/868T-3TUH>].

³⁶² *Id.* at 6. The strike did involve tens of thousands of workers across the country. Movement of the mail was blocked on the Southern Pacific lines in California, and similar complaints were coming in from other areas of the West. As the Court presented the issue: “the United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly opposed, and that a combination and conspiracy exists to subject the control of said transportation to the will of the conspirators, applied to one of their courts, sitting as a court in equity, for an injunction to restrain such obstruction and to prevent carrying into effect such conspiracy.” In *Re Debs*, 158 U.S. at 577.

³⁶³ *Id.* (emphasis added).

³⁶⁴ *See Debs*, 158 U.S. at 564.

³⁶⁵ ALTGELD, *supra* note 361, at 7.

³⁶⁶ As the Court in *Mott* said:

It is no answer, that such a power may be abused, for there is no power which is not susceptible of abuse The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the

Insurrection Act,” by which he also means the Militia Act, as amended, “is before it can be invoked the President has to make a public declaration that he is doing it.”³⁶⁷ There is no way to intervene militarily within a state secretly, and for that reason, as Thaddeus Hoffmeister has observed, “in the end, any retribution or penalty for improperly using or failing to use the Insurrection Act is generally administered by the public, not the courts.”³⁶⁸ Election results are always the product of many factors, but after the Fries’ Rebellion, Adams’s heavy-handed response tilted eastern Pennsylvania solidly for the Republican.³⁶⁹ After Jefferson’s exercise in tyranny with the Embargo Enforcement Act, the opposition party (the Federalists) picked up 24 seats in the U.S. House of Representatives, almost all of which came from states in the northeast³⁷⁰ and Jefferson retired with the “deepest humiliation of his career.”³⁷¹ A century later, Cleveland’s party did not re-nominate him in favor of the very populist William Jennings Bryan.³⁷² The

constitution itself The frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

25 U.S. at 32. Lincoln’s Attorney General Bates also noted that impeachment is another check on presidential emergency powers:

The power to do these things is in the hand of the President, placed there by the Constitution and the statute law, as a sacred trust, to be used by him, in his best discretion, in the performance of his first great duty—to preserve, protect and defend the Constitution. And for any breach of that trust he is responsible before the high court of impeachment, and before no other human tribunal.

10 U.S. Op. Att’y Gen. 74, 91 (1861).

³⁶⁷ Quoted in Siobhan Morrisey, *Should the Military be Called in for Natural Disasters*, TIME (Dec. 31, 2008).

³⁶⁸ Hoffmeister, *supra* note 260, at 904.

³⁶⁹ See *supra* note 201 and accompanying text.

³⁷⁰ Hays, *supra* note 216, at 214.

³⁷¹ Sears, *supra* note 78, at 190.

³⁷² According to a recent biographer, while Cleveland enjoyed a favorable Senate Resolution and largely positive press, he came under attack from two disparate groups, “champions of labor and champions of states’ rights.” ALYN BRODSKY, GROVER CLEVELAND: A STUDY IN CHARACTER 344 (2000). For the former, “their rancor over the President’s behavior would play a pivotal role in William Jennings Bryan’s, ‘the Great Commoner,’ replacing Grover Cleveland as the Democratic Party’s titular head.” *Id.* In fact, at a speech in New York City in front of ten thousand people, one reformer stood up and invoked the old constitutional fear, saying that while he was for property rights, he did

state of Illinois, which supported Cleveland in 1892, went to the Republicans in 1896, as did much of the Labor vote.³⁷³

And when President George W. Bush debated whether to call forth the Louisiana National Guard after Hurricane Katrina, an anonymous senior Administration official summarized the political ramifications that weighed on top of the legal considerations:

Can you imagine how it would have been perceived if a [P]resident of the United states of one party had preemptively taken from the female governor of another party the command and control of her forces, unless the security situation made it completely clear that she was unable to effectively execute her command authority and that lawlessness was the inevitable result?³⁷⁴

Of course, on the other side, decisive interventions and strong presidential leadership, coupled with intergovernmental comity and discretion, can be politically rewarded, as it was for Washington. But, the point is that the intentionally public nature of the Insurrection Act is meant as an additional check on the domestic use of force.

N. The Posse Comitatus Act Then and Today

Shortly after the 1871 Act, Congress restricted presidential enforcement power over states by passing the Posse Comitatus Act (“PCA”). The PCA remains in effect to this day,³⁷⁵ and because of a lack of

not want them “preserved by means of a federal standing army.” *Id.* For the latter, Cleveland “hurt himself irreparably among the Illinois Democrats.” *Id.* at 345.

³⁷³ It should also be said that Labor, including railroad workers, feared Bryan’s pro-inflationary stance.

³⁷⁴ See Eric Lipton, Eric Schmikt & Thom Shankar, *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES (Sept. 9, 2005).

³⁷⁵ With some modifications, to include adding the Air Force to the prohibition on using the Army as a *posse comitatus*. The Air Force was expressly included under the PCA when Congress codified Title 10 of the U.S. Code in 1956. *United States v. Walden*, 490 F.2d 372, 375 n.5 (4th Cir. 1974). See 10 U.S.C. § 375 (2012), which similarly prohibits the military from directly participating in searches, seizures or arrest in support of civilian law enforcement.

understanding, it has sometimes caused paralyzing confusion at the precise moments when decisive presidential leadership has been needed.³⁷⁶

The fact that the PCA and the Militia/Insurrection Acts laws co-exist indicates that while the PCA reflects and reasserts the strong presumption against military enforcement of civilian law, it does not strip the President of the inherent and statutory ability to intervene when states and civilian authorities cannot, or will not, equitably enforce the law or provide for public health and safety in the face of armed opposition. In fact, the legislative history behind the PCA supports the presidential intervention principle.

Originally enacted as a response to the Cushing Doctrine,³⁷⁷ which in turn derived from Fillmore's "Special Message,"³⁷⁸ the PCA, in its modern version, reads:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.³⁷⁹

Its roots are painfully ignoble, since it was passed to limit the use of the military to enforce civil rights.³⁸⁰ Nonetheless, William H. Taft, Department of Defense General Counsel, explained to Congress in 1981 that the PCA expresses one of the clearest political traditions in Anglo-American history: that no matter the intentions, "using military power to enforce the civilian

³⁷⁶ See, e.g., Gary Felicetti & John Luce, *The Posse Comitatus Act: Liberation from the Lawyers*, PARAMETERS: U.S. ARMY WAR COLL. Q. (Autumn 2004), at 94 (explaining how a misunderstanding of the PCA has resulted in a set of "overbroad limits that bear little resemblance to the actual law," all to the detriment of the homeland security mission).

³⁷⁷ Senator Beck, from Kentucky, for example, read aloud Cushing's opinion in the debates surrounding passage of the PCA. Cited in 3 APPLETON'S ANNUAL CYCLOPAEDIA AND REGISTER OF IMPORTANT EVENTS OF THE YEAR 1878 198 (hereafter APPLETON'S).

³⁷⁸ See Special Message, *supra* note 251.

³⁷⁹ 18 U.S.C. § 1385 (2012).

³⁸⁰ The triggering moment came when federal troops were sent as a *posse comitatus* to support federal marshals at polling places in the south during the 1876 presidential election.

law is harmful to both civilian and military interests.”³⁸¹ It may be necessary—in fact it must be necessary—but it should never be desirable.

The PCA is often read too broadly,³⁸² and its history, albeit baleful, indicates a more limited application than is popularly understood. As the Homeland Security Act of 2002 stated, the PCA “was expressly intended to prevent United States Marshals, *on their own initiative*, from calling on the Army for assistance in enforcing Federal law.”³⁸³ At its narrowest, it is therefore arguable that the PCA applies only when civilian authorities willfully call upon the military to execute laws,³⁸⁴ not when the military acts on its own accord.³⁸⁵ Thus, when circumstances are so dire that military commanders, on their own volition, feel they must intervene to prevent loss of life or wanton destruction of property, or to restore governmental functioning and public order, in the wake of sudden and unexpected civil

³⁸¹ *Posse Comitatus Act: Hearing on H.R. 3519 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 97th Cong. 16 (1981) (statement of William H. Taft, General Counsel, Dep’t of Def.). See *Bissonette v. Haig*, 776 F.2d 1384, 1389 (8th Cir. 1985) (stating that as the PCA is “the embodiment of a long tradition of suspicion and hostility towards the use of military force for domestic purposes,” military occupation in violation of the PCA could violate the Fourth Amendment).

³⁸² See, e.g., Felicetti & Luce, *supra* note 376.

³⁸³ 6 U.S.C. § 466(a)(2) (2012) (emphasis added). See Candidus Dougherty, ‘*Necessity Hath no Law*’: *Executive Power and the Posse Comitatus Act*, 31 CAMPBELL L. REV. 1, 15 (2008) (arguing that the PCA was not intended to prohibit the President from using the military to enforce the laws, but rather, to “criminalize the practice of civilian marshals calling forth military forces”).

³⁸⁴ While technically the PCA only applies to the Army and Air Force, the DoD has, by policy, extended it to cover the Navy. U.S. DEP’T OF DEF., DIRECTIVE NO. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, encl. 4, at 4–6 (Jan. 15, 1986).

³⁸⁵ See, e.g., *Riley v. Newton*, 94 F.3d 632, 637 (11th Cir. 1996) (in which the court stated that a civilian officer who was assisted in an arrest by an Army investigator, acting on his own volition, did not necessarily violate the PCA because the PCA appears to require “a willful use of a military person” to execute the law: “the evidence fails to show that [the officer] at any point instructed or encouraged [the Army investigator] to assist him in the arrests”). At issue was the question of qualified immunity, so the court was not asked to determine what exactly constituted a PCA violation but rather whether the willful use requirement was an interpretation that may be valid. See also *Harker v. State*, 663 P.2d 932, 937 (Alaska 1983) (rejecting a claim of a PCA violation since there was “no indication in the record of this case that the police requested assistance from the Army.... Therefore, the army [sic] was not ‘willfully used’ for civilian law enforcement”); Linda J. Demaine & Brian Rosen, *Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act*, 9 N.Y.U. J. OF LEGIS. AND PUB. POL’Y 167, 192 (2005).

disturbances (including civil disturbances incident to earthquake, fire, flood, or other such calamity endangering life), they are given authority to do so, for a limited time, without seeking higher approval, and without a state request.³⁸⁶ If they waited on state request, or for a request from another civilian authority—including those potentially within DoD itself—those requesting civilian officials would face potential PCA liability for “using” the military.³⁸⁷

Most important, however, the PCA does not apply in cases and circumstances expressly authorized by the Constitution or Act of Congress. Of course, it should go without saying that an act of Congress cannot trump a constitutional power; but by saying it nonetheless, the PCA acknowledges the presence of inherent presidential authority, cabined by the presidential intervention principle.

This point was made clear in a brilliant debate among Senator Edmunds from Vermont, Senator Blaine from Maine, and Senator Merriman from North Carolina. In response to Senator Edmunds’ question about what to do when a federal attempt to enforce an excise on an illicit distillery was met with opposition from the whole of the population, Merriman and Blaine exchanged the following:

Merriman: Do as in the case of the Whisky insurrection in western Pennsylvania.

³⁸⁶ See U.S. Dep’t of Def., Directive No. 3025.12, Military Assistance for Civil Disturbances (MACDIS) (Feb. 4, 1994) (“Military Forces shall not be used for [military assistance for civil disturbances] unless specifically authorized by the President, except in the following emergency circumstances. In these circumstances, responsible DoD officials and commanders will use all available means to seek Presidential authorization through the chain of command while applying their emergency authority under this Directive That ‘emergency authority’ applies when sudden and unexpected civil disturbances (including civil disturbances incident to earthquake, fire, flood, or other such calamity endangering life) occur, if duly constituted local authorities are unable to control the situation and circumstances preclude obtaining prior authorization by the President.”).

³⁸⁷ Accordingly, when under an “immediate response request,” a state governor directly seeks military aid “to save lives, prevent human suffering, or mitigate great property damage” from certain DoD officials “under imminently serious conditions and if time does not permit approval from higher authority,” a DoD Directive states that this authority “does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory.” U.S. Dep’t of Def., Directive No. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES 4 (Dec. 29, 2010).

Blaine: The troops were called in.

Merriman: Of course, but not at once. Not until civil remedy after civil remedy was exhausted, not until after a proclamation was issued in pursuance of the laws of the United States, were the military called to aid in enforcing the law.

Blaine: Then the Senator from North Carolina would have the President issue a great proclamation every time an illicit distillery was to be seized.

Merriman: No, sir; when we proceed according to the Constitution and the laws it will be very seldom in this country when such power will have to be employed.³⁸⁸

Merriman then emphasized that the “army, under the Constitution, is not to be used for the purpose of executing the law in the ordinary sense of executing the law.”³⁸⁹ Rather:

It can only be called into active service for the purpose of suppressing insurrection, where there is organized resistance against the Government in the execution of the law; and then, as my friend from Pennsylvania suggests, the forms of the law must be strictly observed, as they were observed by the President when the army was used to suppress the whisky insurrection in western Pennsylvania.³⁹⁰

Again, no one sets a precedent like Washington.

Thus, the legislative history itself indicates that the biggest exception to the PCA is what we have been discussing to this point—the inherent and statutory ability of the President to call forth and command the militia/National Guard and regular military in response to an invasion, insurrection, rebellion, unlawful combination in violent opposition to federal law or constitutional rights. Today, these statutorily-sanctioned,

³⁸⁸ APPLETON’S, *supra* note 377, at 200.

³⁸⁹ *Id.* at 201.

³⁹⁰ *Id.*

constitutional circumstances appear as 10 U.S.C. §§ 331–333, with the required proclamation at 10 U.S.C. § 334.

Additional important statutory PCA exceptions have also developed to cover specific domestic disasters. All of these exceptions should be seen as deriving from the presidential intervention principle, since the underlying situations are almost certainly going to overwhelm state and ordinary judicial proceedings or involve grave threats to federal personnel or facilities:

- The authorization for military enforcement of certain laws regarding nuclear and radiological weapons and their associated materials;³⁹¹
- The authorization for military enforcement of certain laws regarding chemical and biological weapons;³⁹² and
- The authorization to intercept certain vessels and aircraft “detected outside the land area of the United States” and direct them to “go to a location designated by appropriate civilian officials”³⁹³ if the interception is conducted for the purposes of enforcing certain laws regarding controlled substances, immigration and customs, or if the interception is conducted as part of a counterterrorism operation.³⁹⁴

O. The Stafford Act and Presidential Power

It is for a reason that this Article is not subtitled “the domestic use of *force* and the power of the several states.” Calling forth the federal (or federalized) military in response to a domestic crisis does not—and should not—necessarily entail a use of force. There is no greater example of this

³⁹¹ 18 U.S.C. § 831(e) (2012). Consistent with our main principle, this statutory authorization only kicks in when the violations pose a serious threat to the United States and when civilian law enforcement is overwhelmed. *Id.* Congress modified the normal procedural requirements by adding an Attorney General Request and dropping the proclamation requirement, which, considering the immediate destruction, certain panic and lawlessness to follow, and high profile nature of the event, makes sense in light of the purpose of the proclamation. *See supra* note 361 and accompanying text. Once the requirements are met, the statute explicitly authorizes the “use of the personnel of the Department of Defense to arrest persons and conduct searches and seizures with respect to violations of this section.” *Id.* at (e)(3)(A). At the end of the day, however, for a nuclear disaster, the President would almost certainly have had the authority to intervene militarily under the Militia/Insurrection Act anyway, regardless of the PCA.

³⁹² 10 U.S.C. § 382 (2010).

³⁹³ 10 U.S.C. § 124 (2012).

³⁹⁴ *Id.*; 10 U.S.C. § 374(b) (2012).

than the Robert T. Stafford Disaster Relief and Emergency Act (“Stafford Act”).³⁹⁵ It is a powerful tool the President can use in a domestic emergency to authorize federal assistance, including military assistance, short of enforcement and intervention. Importantly and instructively, it follows the presidential intervention principle. Furthermore, since it does not include the power for federal troops to conduct law enforcement, it is not affected by the PCA³⁹⁶—a point which is critical in times of catastrophic natural disasters.³⁹⁷

An emergency eligible for federal assistance under Stafford is not unlike an emergency eligible for federal law-enforcement intervention under Section 1 of the Militia Act and its constitutional predicate, Article IV, Section 4. Under Stafford, the President cannot act unless the governor requests assistance based on her belief that state capacities are overwhelmed. Stafford does not require the legislature to make the request. When the governor believes that federal assistance is needed to “supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States,” she may appeal to the President, via the Federal Emergency Management Agency (“FEMA”), for a presidential Emergency Declaration, thereby enabling the provision of certain types of federal aid.³⁹⁸ When the governor determines that a natural catastrophe “including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought” or “regardless of cause, [after a] fire, flood or explosion,”³⁹⁹ is of “such severity and magnitude that effective response is beyond the capabilities” of the affected state and local

³⁹⁵ Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 102 Stat. 4689 (codified as amended, 42 U.S.C. §§ 5121–207 (2010)).

³⁹⁶ In the Homeland Security Act of 2002, Congress emphasized that the PCA would not apply to the Stafford Act since that existing law “grant[s] the President broad powers that may be invoked in the event of domestic emergencies, including an attack against the Nation using weapons of mass destruction, and these laws specifically authorize the President to use the Armed Forces to help restore public order.” 6 U.S.C. § 466(a)(5) (2012). Restoring public order, however, is not exactly the same thing as enforcing the law, which Stafford does not authorize. Thus Stafford should not implicate the PCA anyway.

³⁹⁷ See, e.g., Dougherty, *supra* note 383, at 49–50 (arguing that after Katrina, the military did what civilian disaster relief agencies and states could not: reestablish order and feed, medicate and evacuate the stranded New Orleanians. With the confusion engendered by the PCA, she concludes, the military “could have rescued the New Orleanians even faster.”)

³⁹⁸ 42 U.S.C. § 5122(1) (2010).

³⁹⁹ 42 U.S.C. § 5122(2) (2010).

authorities, she may apply to the President, via FEMA, for a Major Disaster declaration, thereby triggering even greater federal assistance.⁴⁰⁰

However, consistent with the reasoning behind section 2 of the Militia Act, as well as the holdings of *Neagle* and *Debs* and the practices and theories of Jackson, Fillmore, and Cleveland, Stafford makes clear that the President can unilaterally exercise any authority within the Act when he or she determines that an emergency exists in an area which “the United States exercises exclusive or preeminent responsibility and authority.”⁴⁰¹ In a statutory nod to intergovernmental comity, however, this section requires the President to consult the governor to determine whether such an emergency exists, if practicable.⁴⁰²

Like federal unilateral interventions under the Militia Act, unilateral actions under Stafford are exceedingly rare. Whereas in 2013 alone President Obama issued sixty-two major disaster declarations and five emergency declarations,⁴⁰³ there have been only three unilateral emergency declarations in the history of the Stafford Act. President Clinton unilaterally issued an emergency after the Oklahoma City bombing of the Alfred P. Murrah Federal Building in 1995.⁴⁰⁴ President George W. Bush issued the other two unilateral declarations, first after the Space Shuttle Columbia Disaster,⁴⁰⁵ and second to ensure safety at the inauguration of President Barack Obama.⁴⁰⁶ During my two years on the National Security Staff, there were always crisis-born questions about the president’s unilateral authority under Stafford. Rarely did the facts—and the critical considerations of comity—merit such a move, even in exercise scenarios.

⁴⁰⁰ 42 U.S.C. § 5170 (2010). This assistance is vast, but does not include direct military support to law enforcement. It can consist of helping state and local governments distribute food, medicine, and other consumables (42 U.S.C. § 5170a (2010)) and it can even consist of direct federal aid to displaced persons (42 U.S.C. § 5174(b)(1) (Supp. 2010)).

⁴⁰¹ 42 U.S.C. § 5191(b) (2010).

⁴⁰² *Id.*

⁴⁰³ *Disaster Declarations*, FED. EMERGENCY MGMT. AGENCY, <http://www.fema.gov/disasters> [<http://perma.cc/7CT4-PNYS>].

⁴⁰⁴ Oklahoma; Emergency and Related Determinations, 60 Fed. Reg. 22,579 (May 8, 1995).

⁴⁰⁵ Space Shuttle Columbia; Emergency and Related Determinations, 68 Fed. Reg. 9667–68 (Feb. 28, 2003).

⁴⁰⁶ Press Release, Fed. Emergency Mgmt. Agency, President Announces Declaration for District of Columbia (Jan. 13, 2009), <http://www.fema.gov/news-release/2009/01/13/president-announces-declaration-district-columbia> [<http://perma.cc/5YJB-PT63>].

III. Separated Institutions Sharing Power

While federalism divides power to protect liberty, it also enables the unity necessary to preserve, protect, and defend it. In his Farewell Address, George Washington retired from forty-five years of public service with the “pleasing expectation” that he would soon retreat “in the midst of his fellow citizens” and enjoy the “benign influence of good laws under a free government.”⁴⁰⁷ Some of his final, public words were devoted to explaining to his fellow citizens how free government, and individual liberty itself, came from a mutual dedication to the common unity that enables it. The “unity of Government,” he said, “is a main pillar in the edifice of your real independence, the support of your tranquility at home, your peace abroad; of your safety; of your prosperity; of that very Liberty, which you so highly prize.”⁴⁰⁸

As much as separating, disaggregating, and disunifying power was essential to liberty, the Framers realized, at times reluctantly, that a strong central government was necessary to defend against the inevitable nationwide tribulations, be they invasions, insurrections, inter-state conflicts, or unlawful combinations forcibly opposed to law. As a systemic matter, unity overcame collective action dilemmas, and as a moral matter, the Union gave common purpose, identity, and a willingness to pull together when necessary. Washington took on the Whiskey Rebellion to make the case for union, and by uniting otherwise independent state militias under federal command to defend federal law within a state against armed opposition, he demonstrated that “republicanism is not the phantom of a deluded imagination.”⁴⁰⁹ Similarly, Andrew Jackson summoned his forces against the Nullifiers, and Lincoln fought a civil war to prove that the Union of the people, by the people, and for the people can exist. Grant also took up arms to ensure that the Constitution’s amended blessings of liberty would befall all, just as Eisenhower would do some eighty years later.

Presidential intervention is rare, but when individual states cannot or will not keep the peace against armed opposition, equitably enforce the law, or preserve public health and safety for all, the Constitution, key statutes

⁴⁰⁷ George Washington, Farewell Address to the People of the United States (Sept. 17, 1796).

⁴⁰⁸ *Id.*

⁴⁰⁹ Letter from George Washington to Edmund Pendleton (Jan. 22, 1795).

dating back to 1792, Supreme Court precedent, and the practice of Presidents from the very first, all enable, if not require, presidential intervention. Short of these emergencies, those same sources of authority, and the wisdom that underlies them, keep the responsibility firmly with the states and provide a crucial check on presidential power. Finally, this dual system national security federalism created enables and rewards inter-governmental cooperation and comity to bring the best resources, in the best way, to respond to calamity.

A. The 2006 Amendment, Its Repeal, and Irrelevance

So with this history, and the principle that accompanies it, we realize that while Congress repealed its 2006 amendment to the 1871 Insurrection Act to authorize explicitly the President to call forth the military in the event of a terrorist or natural disaster, the President has lost no real authority to use federal troops, when necessary, to aid in a homeland security disaster. As a corollary, therefore, the 2006 Amendment did not exceed constitutional limits.

As Senator Edward Kennedy remarked in the debates surrounding the 2006 amendment: “While the amendment does not grant the President any new powers, it fills an important gap in *clarifying* the President’s authority to respond to these kinds of emergencies.”⁴¹⁰ Clarity, especially in times of crisis, is crucial. Clarity saves lives. Confusion costs them. But, what this article hopes to make clear is that even in the absence of an explicit, statutory list of situations in which the troops can be used to restore public order after a major public emergency, the power is still there. The authority may be found in Title 10, Title 18, Title 32, or in the Constitution itself, but when individual states cannot or will not keep the peace in the face of armed opposition, equitably enforce the law, or preserve public health and safety for all, the power is there.

Let us return to the hypothetical example of a nuclear detonation in an American city. If such a disaster were a terrorist attack, 18 U.S.C. § 831(e) provides specific authority for Defense assistance. If it were a conventional detonation, and widespread, armed lawlessness results which makes it “impracticable” to enforce federal law, then 10 U.S.C. § 332, derived from the Militia Acts, may be available. And, either way, if the state

⁴¹⁰ 152 CONG. REC. 21,693 (2006) (statement of Sen. Edward Kennedy) (emphasis added).

properly requests military assistance, 10 U.S.C. § 331 may provide the means for the President to fulfill the United States' obligation under Article IV, Section 4.

Similarly, even though one section of Title 10 prohibits the President from calling up the National Guard in the event of a natural disaster,⁴¹¹ if a hurricane or earthquake causes such chaos—and armed opposition—that the enforcement of federal law becomes impracticable, or if the ensuing domestic violence so hinders the execution of the laws of that state or of the United States that constitutional rights are denied, the President should be able to invoke 10 U.S.C. § 332 or § 333 and at least send in the regular armed forces, even without state request.⁴¹²

And, of course, under *Neagle* and the example of Jackson and Lincoln, the President could rely on inherent authority to protect federal personnel and property, while under *Debs* and the example of Fillmore and Cleveland, the President could also rely on inherent authority to enforce federal law against armed resistance that overwhelms civilian authorities within a state. If a terrorist event amounts to an armed attack, the *Prize* Court and the examples of Madison and Lincoln also reaffirm presidential inherent authority to respond, and if a terrorist event or natural disaster is, or results in, an insurrection against a state government or the failure of republican government within a state, *Luther* indicates that the President even has inherent authority to fulfill the Federal government's protection and guarantee obligations under Article IV, Section 4—so long as the state so requests.

⁴¹¹ 10 U.S.C. § 12406, enacted in 1994, authorizes the President to call into federal service the National Guard of any state when the United States is invaded or is in danger of invasion, there is a rebellion or danger of rebellion, or “the President is unable with the regular forces to execute the laws of the United States” in order to “repel the invasion, suppress the rebellion, or execute the laws.” 10 U.S.C. § 12406 (2012). But, 10 U.S.C. § 12304(c)(1) states that “[n]o unit or member of a reserve component may be ordered to active duty under this section to perform any of the functions authorized by chapter 15 or section 12406 of this title, except as provided in subsection (b) [related to weapons of mass destruction or terrorist attacks] to provide assistance to either the Federal government or a State in time of a serious natural or manmade disaster, accident or catastrophe.” 10 U.S.C. § 12304(c)(1) (2012).

⁴¹² It is here that the 2006 amendment could have been helpful to clarify this apparent conflict within Title 10, which is why it also made a “conforming amendment” to 10 U.S.C. § 12406.

B. Federalism as the Mother of Invention—Title 32 Status and Dual Status Commanders

While his magisterial study of presidential power did not evaluate how that power fluctuates with the power of states, Richard Neustadt's key insight⁴¹³ nevertheless applies in force. In repelling invasions, quelling insurrections, responding to domestic catastrophes and equitably enforcing law against forcible resistance, the President and the governor are best not seen as separated powers, but as "separated institutions sharing powers." In the push and pull that federalism fosters, creativity can and has flourished, providing formidable powers for those who are aware of them. In the tensions of national security federalism are the solutions.

For example, as Washington first raised and Jefferson first attempted, the President can today federalize the National Guard in what is called Title 32, as opposed to Title 10,⁴¹⁴ status to assist state relief efforts, as well as enforce the law. In times of crisis, this middle option is often forgotten. Under Title 32 status, the National Guard is federally funded while gubernatorially commanded,⁴¹⁵ which promotes intergovernmental comity and leverages the comparative advantages state National Guardsmen have in serving under their governor and alongside their fellow citizens.⁴¹⁶ Moreover, when the federal component redeploys, the responsibility for longer-term recovery remains with the governor, so retaining the trust and

⁴¹³ RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 29 (1990).

⁴¹⁴ 10 U.S.C. § 12304(b) authorizes the President to empower the Secretary of Defense to augment the active forces with any Reserve component, including the National Guard, for up to 365 consecutive days in response to an emergency involving "a use or threatened use of a weapon of mass destruction," or "a terrorist attack in the United States that results, or could result, in significant loss of life or property." 10 U.S.C. §§ 12304, 12304(b) (2012).

⁴¹⁵ 32 U.S.C. § 502(f) (2012).

⁴¹⁶ As Major General Timothy J. Lowenberg, Adjutant General of Washington, eloquently puts it: "Use of the National Guard under state control (for example, Title 32) for domestic missions always protects vital state interests and nearly always maximizes attainment of national defense and homeland security objectives as well. Regrettably, these considerations are not always understood or taken into account by federal authorities." Timothy J. Lowenberg, *The Role of the National Guard in National Defense and Homeland Security*, 59 NAT'L GUARD (Sept. 2005), at 97.

confidence of citizens in their local government is likely to prove wise, rather than “fostering an ill-advised dependence on Washington.”⁴¹⁷

Also, the PCA does not apply when the National Guard is in state status, nor when it is under Title 32 status,⁴¹⁸ which makes Title 32 status an ideal choice when the primary purpose of these State-supplemental efforts is law enforcement.

Of course, the downside to Title 32 federalization, from a President’s perspective, is the loss of presidential command and control. For example, while National Guardsmen in Title 32 status helped enforce federal laws in the nation’s airports after September 11, there were fifty-one commanders-in-chief.⁴¹⁹ Furthermore, the President can only federalize under Title 32 when the Governor agrees or so requests—although it is unlikely any Governor would be quick to refuse an offer to have someone else foot the bill while being allowed to remain in command.

Additionally, there is opportunity in the shared nature of power for those who anticipate and train for it. As Washington proved, comity goes a long way, and a wise President and Governor will look for ways to collaborate and coordinate, both during a crisis and in advance. There is no greater recent example of this than the relationship between Governor Chris Christie of New Jersey and President Obama during Hurricane Sandy in 2012. Obama initially reached out to Christie the day after the superstorm, which began an extensive period of close consultation. As the Governor recounted:

He and I spoke every day for at least the next 10 days — every day — sometimes more than once a day and it was substantive conversations. I needed help on something that the bureaucracy wasn’t giving me. That was at least four or five times I called him and said, ‘I hate to bother you with this, sir, but you told me if I needed help to call you, and

⁴¹⁷ Bert T. Tussing, *Implementing a New Vision: Unity of Effort in Preparing for and Responding to Catastrophic Events 2* (U.S. Army War Coll., Ctr. for Strategic Leadership, Issue Paper Vol. 2-11, Mar. 2011).

⁴¹⁸ See *Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999); *United States v. Hutchings*, 127 F.3d 1255, 1258 (10th Cir. 1997).

⁴¹⁹ The President is the Commander-in-Chief of the Washington, D.C. National Guard. D.C. Code § 49-409 (2014). See Exec. Order No. 11,485, 3 C.F.R. 143 (1970).

FEMA is driving me crazy or the Army is driving me crazy and I don't understand this and can you help me?' And each and every time that I did that, within an hour the problem was fixed.⁴²⁰

But that was not always the case. In fact, as the Obama Administration began, the relationship between Washington and the Governors was off to a "rocky start."⁴²¹ Tensions between the presidency and the governors were high as the memory of Katrina festered. To improve matters, the President established the Council of Governors, charging it with conferring with the Secretary of Defense to review "such matters as involving the National Guard of the various States; homeland defense; civil support; synchronization and integration of State and Federal military activities in the United States; and other matters of mutual interest pertaining to the National Guard, homeland defense, and civil support activities."⁴²² As President Washington sought out Governor Mifflin's advice and cooperation to put down the Whiskey Rebellion, President Obama looked to find ways to institutionalize and improve comity between the federal government and the state governments in advance of the next crisis.

The first major accomplishment of the Council became the "Joint Action Plan for Unity of Effort," which among its five key areas included a commitment for improving integrated planning at every level of government and establishing links and forums to socialize plans and promote integrated planning throughout the whole of community.⁴²³ The plan called for greater use and familiarity with "Pre-Scripted Mission Assignments."⁴²⁴ It also instituted the Dual Status Command concept to overcome the inherent federalism fault line of divided leadership. The Governor will always be the commander-in-chief of his or her National Guard forces unless they are called forth into federal service under Title 10 as a result of an invasion, insurrection or as necessary to execute the laws of

⁴²⁰ Melissa Hayes, *Christie recalls how Obama reached out after Sandy*, BERGEN RECORD (Oct. 26, 2013).

⁴²¹ Tussing, *supra* note 417.

⁴²² Exec. Order No. 13,528, 3 C.F.R. 187 (2011).

⁴²³ COUNCIL OF GOVERNORS, JOINT ACTION PLAN FOR DEVELOPING UNITY OF EFFORT (2010), <http://www.nga.org/files/live/sites/NGA/files/pdf/CoGPlanforDevelopingUnity.pdf> [<http://perma.cc/9W73-2G79>].

⁴²⁴ *Id.*

the union against armed opposition.⁴²⁵ The President, on the other hand, is the Commander-in-Chief of the Armed Forces and the National Guard when operating in Title 10 status only. Thus, in catastrophes like a hurricane when federal forces are working alongside state forces, there can be no unity of command. Dual Status Commanders, who carry commissions both in the state National Guards and the U.S. military, however, bring together Title 10 and Title 32 forces under a single commander who reports simultaneously to the President and to the Governor,⁴²⁶ thereby realizing a unity of effort. In response to Hurricane Irene in 2011, Dual Status Commanders were finally appointed, marking the first time this concept has been implemented in support of a natural disaster.⁴²⁷

Conclusion

In an OP-ED on the Arab Spring, former President George W. Bush wisely pointed out that:

There is nothing easy about the achievement of freedom. In America, we know something about the difficulty of protecting minorities, of building a national army, of defining the relationship between the central government and regional authorities—because we faced all of those challenges on the day of our independence. And they nearly tore us apart. It took many decades of struggle to live up to

⁴²⁵ See *Cox v. Wood*, 247 U.S. 3, 5 (1918).

⁴²⁶ See 32 U.S.C. §§ 315, 325 (2012).

⁴²⁷ For Hurricane Irene, the Department of Defense and the Governors appointed four commanders already National Guard officers. News Release, U.S. Dep't of Def., *DoD Announces Hurricane Irene Dual-Status Commanders* (Aug. 27, 2011), <http://www.defense.gov/Releases/Release.aspx?ReleaseID=14756> [<http://perma.cc/L2G9-XAUS>]. During Hurricane Katrina, President Bush offered Governor Blanco to appoint, with her permission, a Regular Army officer from U.S. Northern Command as a simultaneous member of the Louisiana National Guard, to command Joint Task Force Katrina as a dual status commander, but she refused. Jeffrey W. Burkett, *Command and control of Military Forces in the Homeland*, 51 *JOINT FORCES Q.* 130, 131 (2008). A Dual Status Commander was also appointed for the response to Hurricane Sandy in 2012. See News Release, U.S. Dep't of Def., *Department of Defense Prepares for Hurricane Sandy*, (Oct. 27, 2012), <http://www.defense.gov/releases/release.aspx?releaseid=15646> [<http://perma.cc/6WYH-AJLB>] (“With the goal of helping to save lives and property during the storm, the Secretary has agreed with the Governors of Maryland, New Hampshire, New York, New Jersey, Massachusetts and Rhode Island to appoint Dual Status Commanders as the storm approaches.”).

our own ideals. But we never ceased believing in the power of those ideals—and we should not today.⁴²⁸

He is correct. The pursuit of freedom and liberty in the United States has always been caught up in defining the relationship between the central and regional authorities and of building a truly national army. We have also known the difficulty of protecting minorities, which has largely been fought out as a conflict between the federal government and the states by a national army whose size, strength and authorities has been in dispute since before the Constitutional Convention. While President Bush is correct that it took many decades of struggle to live up to those ideals, Hurricane Katrina, the struggle against terrorism, and the other threats to the homeland prove that the challenge is not yet over. In fact, each generation in America is charged anew with furthering those ideals.

History has borne out a fundamental principle to aid this charge when the stakes are at their highest: that when a state and ordinary judicial proceedings cannot, or will not, maintain order, ensure public health and safety, or equitably enforce the law against armed opposition, or when the United States, its personnel or facilities are in grave danger, the President can, and sometimes must, intervene. At all other times, however, the President cannot simply tell the governors what to do, no matter how hard the fist bangs against the table. State power provides a powerful, and largely under-realized, check on presidential power. Even when the President is in charge during calamity, he or she still often has to rely on state resources and expertise.

Ultimately, it is a wise President and governor who fully understands the shared nature of the power to respond to disasters. As much as national security federalism protects liberty, it is not an insurmountable roadblock when disaster strikes. In fact, it can be a great source of shared strength to restore liberty, and security, for all.

⁴²⁸ George W. Bush, *The Arab Spring and American Ideals*, WALL ST. J. (May 18, 2012).