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SOVEREIGNTY, ARTICLE II, AND THE MILITARY DURING DOMESTIC UNREST

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ABSTRACT

In this article, I contest two theories of inherent presidential power, rooted in Article II, to use the military to respond to domestic unrest during peacetime. This question is more contested than one might imagine. Based on all available evidence, in June 2020 President Trump relied on a doctrine of inherent Article II authority to deploy thousands of National Guard personnel to the streets of Washington, D.C. in response to Black Lives Matter protests. On January 6, 2021, the Commanding General of the D.C. National Guard more explicitly contemplated using a second, different doctrine of inherent authority to deploy his soldiers to retake the Capitol Building. This article mines archival War Department legal opinions and previously unavailable Department of Justice Office of Legal Counsel memoranda obtained under the Freedom of Information Act to reconstruct and critique the legal arguments underpinning these two doctrines of inherent authority.

This critique brings together two bodies of scholarship: (1) whether and how executive powers may be imputed from federal sovereignty and (2) methodologies for using historical practice to define ambiguous constitutional text. I reconstruct how the executive has justified these two doctrines by relying on historical assertions of power implied from federal sovereignty and based in necessity. My reconstruction shows how the executive disregards and mischaracterizes congressional responses to these assertions. It also demonstrates how the executive incompletely addresses Supreme Court precedent concerning inherent executive authority. I then draw on these observations to argue that an essential and underemphasized precondition for using historical practice as a means of constitutional interpretation is establishing the notoriety of executive branch

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practice and associated legal rationales. Finally, I consider what might be done to rein in this type of overreach, which rarely (if ever) is subject to judicial scrutiny.

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INTRODUCTION

Consider two scenarios. In the first, it is months before a general election. The Postmaster General has decided to cut costs by implementing changes that slow mail delivery, stoking concern about the viability of vote-by-mail procedures. Grassroots organizers plan a nationwide protest, threatening to protest at every post office to prevent the Postal Service from removing high-speed sorting machines. The President responds by directing the Secretary of Defense to send soldiers to

protect every post office in the country.[1] On the day of the protest, soldiers temporarily detain several individuals who try to prevent Postal Service employees from removing the sorting machines.

In the second, it is a gubernatorial inauguration day. As the governor-elect approaches the capitol building, disaffected partisans of the losing candidate swarm the governor-elect's convoy and attempt to overtake government offices across the capitol. The federal commanding officer of a nearby naval base, en route to the inauguration, directs federal forces to assist local police in restoring order until the Pentagon sends further orders. Service members engage in many armed confrontations and assist with arrests and detention.

This paper presents and critiques the two doctrines of inherent Article II authority that the president and the commanding officer would likely point to in justifying these actions. The first is the asserted inherent Article II authority to use the military to protect federal functions, persons, and property, or what is called the "protective power."[2] There is only one publicly available legal memorandum of which I am aware asserting the protective power—a 1971 Department of Justice Office of Legal Counsel (DOJ OLC) memorandum asserting the President's inherent authority to use the military to protect federal buildings in Washington, D.C. during Vietnam War protests.[3] The second is the asserted Article II authority to enforce the laws more generally, known as the "emergency authority."[4] It was most famously employed by a garrison commander to justify, under presidential direction, using the Army to police and generally administer large swaths of San Francisco in the wake of the April 18, 1906, earthquake.[5]

It should at least be surprising that these doctrines of inherent constitutional authority exist. The Posse Comitatus Act has, since 1876, criminalized using the Army "as a posse comitatus or otherwise to execute the laws" except where

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[1] This isn't outside the realm of practical reality. There were about 34,600 post offices in 2020, *The state of the U.S. Postal Service in 8 charts*, PEW RSCH. SERV. (May 14, 2020), https://www.pewresearch.org/fact-tank/2020/05/14/the-state-of-the-u-s-postal-service-in-8-charts/ [https://perma.cc/C43T-DNAD], and there are currently about 190,000 soldiers in the U.S. Army Reserve, *About Us*, U.S. ARMY RSRV., https://www.usar.army.mil/About-Us/ [https://perma.cc/DVP7-29QA] (last visited Feb. 6, 2023), meaning that at least five soldiers could be deployed to every post office without calling upon any soldiers in active-duty service or any National Guard personnel (let alone personnel of the Space Force or any other branch of the armed forces).

[2] This term, to the best of my knowledge, was first used by Henry Monaghan. *See generally* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993).

[3] Authority to Use Troops to Prevent Interference with Federal Employees by Mayday Demonstrations and Consequent Impairment of Government Functions, 1 Supp. Op. O.L.C. 343, 344 (1971) [hereinafter 1971 Opinion].

[4] DEP'T OF DEF., Directive 3025.18, *Defense Support of Civil Authorities (DSCA)* § 4(k) (Dec. 29, 2010) [hereinafter DoD Directive 3025.18].

[5] FEDERAL AID IN DOMESTIC DISTURBANCES, 1903–1922 S. DOC. NO. 67-263, at 309 (1922) [hereinafter FEDERAL AID].

"expressly authorized by the Constitution or Act of Congress."[6] There are any number of statutes that might authorize deployments in the above scenarios. But the only constitutional provisions that explicitly concern suppression of riots and continuity of government function are in Article I[7] and Article IV.[8]

This seeming disconnect isn't just a legal curiosity. Notwithstanding the significant effects of deploying the military for domestic law enforcement on the health of a representative democracy, these doctrines exist almost entirely outside public view. The protective power is described and justified in only one publicly available OLC memo, from 1971. The emergency authority is similarly buried within a Department of Defense (DoD) regulation.[9] And although the 1971 DOJ OLC memo asserts that the protective power exists notwithstanding the prohibitions of the Posse Comitatus Act, the DoD regulation governing the emergency authority does not address this apparent tension at all. Moreover, neither of these documents require that the President or lower-level commander inform the public of a decision to use either authority, let alone explain the reasons for doing so.

The perils of this secrecy were manifest in the military response to Washington, D.C., Black Lives Matter protests in June 2020. At the time, pursuant to presidential direction, the Secretary of Defense deployed 5,100 National Guard personnel, primarily around the National Mall and Lafayette Square, to perform a number of duties, including protecting federal functions, persons, and property.[10] Although this deployment far exceeded the military presence in D.C. after September 11, 2001,[11] it took eight days from the initial deployment for DOJ to publicize, by tweet, a letter addressed to D.C. Mayor Muriel Bowser providing a legal justification.[12]

It is only with a detailed understanding of the statutory and constitutional law regarding domestic deployment of the military that one can now deduce that this deployment was, at least with respect to non-D.C. National Guard personnel,

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[6] 13 U.S.C. § 1385.
[7] U.S. CONST. art. I, § 8, cl. 15 (empowering Congress "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions").
[8] U.S. CONST. 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.").
[9] *See infra* Part I.A.
[10] *Department of Defense Authorities and Roles Related To Civilian Law Enforcement: Hearing Before the H. Comm. on Armed Servs*., 116th Cong. 51–58 (2020) (statement of Mark T. Esper, U.S. Sec'y of Def.) (July 9, 2020).
[11] *9/11 Response*, D.C. NAT'L GUARD, https://dc.ng.mil/About-Us/Heritage/History/9-11-Response/ [https://perma.cc/SS9D-C2G6] (last visited Jan. 12, 2023).
[12] Kerri Kupec (@KerriKupecDOJ), TWITTER/X (June 9, 2020, 6:45 PM), https://twitter.com/KerriKupecDOJ/status/1270487263324049410/photo/2 [https://perma.cc/FXG4-GC3Y] ("Consistent with the President's direction, the Secretary of Defense assigned to out-of-state").

grounded in the President's inherent constitutional authority. First, the letter to Mayor Bowser noted that National Guard personnel would "protect[] federal functions, persons, and property within the District of Columbia."[13] The letter went on to explain:

> [This] mission includes the protection of federal properties from destruction or defacement (including through crowd control, temporary detention, cursory search, measures to ensure the safety of persons on the property, and establishment of security perimeters, consistent with the peaceful exercise of First Amendment rights); protection of federal officials, employees, and law enforcement personnel from harm or threat of bodily injury; and protection of federal functions, such as federal employees' access to their workplaces, the free and safe movement of federal personnel throughout the city, and the continued operations of the U.S. mails.[14]

These descriptions of the duties that the non-D.C. National Guard personnel were authorized to undertake are taken, almost verbatim, from the 1971 DOJ OLC memorandum establishing the protective power.[15] The constitutional, rather than statutory, basis for these tasks is evidenced by the fact that the only statute mentioned in the letter to Mayor Bowser[16] is a mobilization authority, which DoD understands to pertain only to the department's ability to bring a member of the Reserves onto military duty, not justify the underlying mission that the reservist will undertake.[17]

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[13] *Id*.

[14] *Id*. This description of the authority was reiterated in subsequent testimony by DoD officials before the House Armed Services Committee. *See* Letter from Mark Milley, Chairman of the Joint Chiefs of Staff, and Mark Esper, Secretary of Defense, to Adam Smith, Chairman of the House Armed Services Committee (June 10, 2020), https://media.defense.gov/2020/Jul/06/2002434495/-1/-1/1/4-10-JUN-2020-RESPONSE-OSD005360-20-REPLY-061720-CJCS-AND-SD.PDF [https://perma.cc/RM6X-ALK4] [hereinafter Milley & Esper Letter] ("There were approximately 3,800 National Guard members . . . protecting Federal functions, persons, and properties within the District of Columbia"); Esper, *supra* note 10 (non-D.C. National Guard troops "protected Federal functions, persons, and property in collaboration with Federal law enforcement agencies").

[15] 1971 Opinion, *supra* note 3, at 344 (noting the "historical and judicial recognition of the President's inherent powers to use troops to protect federal property and functions as a necessary adjunct of his constitutional duties under Article II").

[16] 32 U.S.C. § 502(f).

[17] *See, e.g.*, Dep't of Def., Directive 3160.01, *Homeland Defense Activities Conducted by the National Guard* (June 6, 2017) (distinguishing the authority for homeland defense activities undertaken by National Guard personnel, 32 U.S.C. §§ 901-908, from the authority to mobilize the National Guard personnel to perform such duty, 32 U.S.C. § 502(f)). DoD has long distinguished mobilization authority from authority to undertake a particular mission. *See, e.g.*, Dep't of Def., Directive 3025.12, *Employment of Military Resources in the Event of Civil Disturbances*, § V.C.2.b (Aug. 19, 1971), http://harvardnsj.org/wp-content/uploads/2024/01/1971-DoD-Directive-3025.12.pdf [https://perma.cc/G7AD-VHSA] (noting in a discussion of statutory and constitutional exceptions to the Posse Comitatus Act that "none of the above authorities, in and of itself, provides sufficient legal basis to order members of the Reserve components to active Federal service.") [hereinafter 1971 Directive 3025.12].

Aside from this single letter, of the three other press products released by DoD, only one of them suggested a connection to the protective power by describing the deployment as assisting "district law enforcement agencies, [sic] protect buildings, federal installations, monuments. You know, peace, order and public safety."[18]

A perhaps more striking example of the import of these asserted inherent authorities was the claim by the Commanding General of the D.C. National Guard that he could use the emergency authority during the January 6, 2021, attack on the Capitol Building. In testimony before the Senate Homeland Security and Governmental Affairs Committee, General Walker testified that he believed the emergency authority gave him the power to deploy his soldiers to expel rioters from the Capitol Building without direction from any other officials, civilian or military.[19] Although this belief relied on a misapplication of the policy,[20] his views nonetheless demand attention.

These practices and beliefs stand in stark contrast, for example, to President Lyndon Johnson's use of the military in 1968 to respond to riots in D.C. Relying on provisions of the Insurrection Act (described in Part I) and not inherent authority, Johnson issued both a proclamation calling on rioters to disperse[21] and, nearly simultaneously, an executive order articulating the legal basis for the deployment, the military chain of command, and the overarching purposes of the deployment.[22]

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[18] *Department of Defense Officials Brief Reporters on the Department's Response to Civil Unrest*, DEP'T OF DEF. (June 2, 2020), https://www.defense.gov/News/Transcripts/Transcript/Article/2207222/department-of-defense-officials-brief-reporters-on-the-departments-response-to/ [https://perma.cc/982L-A98U]. The other press engagements occurred on June 2, *Statement by Assistant to the Secretary of Defense for Public Affairs on Support to Civil Authorities*, DEP'T OF DEF. (June 2, 2020), https://www.defense.gov/News/Releases/Release/Article/2206031/statement-by-assistant-to-the-secretary-of-defense-for-public-affairs-on-suppor/ [https://perma.cc/4FX2-KL5G], and June 3, *Secretary of Defense Esper Addresses Reporters Regarding Civil Unrest*, DEP'T OF DEF. (June 3, 2020), https://www.defense.gov/News/Transcripts/Transcript/Article/2206685/secretary-of-defense-esper-addresses-reporters-regarding-civil-unrest/ [https://perma.cc/J3KW-QPCK].

[19] *Examining the January 6 Attack on the U.S. Capitol (Part II): Joint Hearing Before the S. Comm. On Homeland Sec. and Gov't Aff. And the S. Comm. On Rules and Admin.*, 117th Cong. 242–43 (2021), https://www.hsgac.senate.gov/examining-the-january-6-attack-on-the-us-capitol-part-ii.) [https://perma.cc/MP5B-GAN3].

[20] *See infra* Part I.A.

[21] Lyndon B. Johnson, *Proclamation 3840—Law and Order in the Washington Metropolitan Area*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/proclamation-3840-law-and-order-the-washington-metropolitan-area [https://perma.cc/R99L-B8HM] (reproducing Proclamation No. 3840, 3 C.F.R. 35 (1968), *reprinted in* 82 Stat. 1622 (1968)).

[22] Lyndon B. Johnson, *Exec. Order 11403—Providing for the Restoration of Law and Order in the Washington Metropolitan Area*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/executive-order-11403-providing-for-the-restoration-law-and-order-the-washington [https://perma.cc/7VLE-NJYA] (reproducing Exec. Order No. 11,403, 3 C.F.R. 107–08 (1968)).

Relying on archival War Department and DoD legal memoranda, as well as DOJ OLC opinions obtained under the Freedom of Information Act (FOIA), I find that these doctrines have centuries-old roots in executive branch practice. Specifically, I use these documents to explain the executive's constitutional arguments justifying the protective power and emergency authority, show why these justifications don't withstand scrutiny, propose methodological implications for the use of history in justifying inherent presidential authority, and outline statutory reforms to rein in executive branch practice. Three overarching conclusions emerge. First, there is no constitutional basis for the executive branch to rely on the protective power or emergency authority during peacetime.[23] Second, although the executive branch purports to justify the protective power and emergency authority by reference to the Take Care Clause[24] and Executive Vesting Clause,[25] these references are a red herring. In fact, both doctrines are better understood as justified by arguments about implied authority stemming from national sovereignty and military necessity. And third, we confront particular challenges in using historical practice to establish the constitutionality of inherent presidential authorities that counsel greater transparency from the executive branch.

This paper proceeds in five parts. Part I provides background. I describe the statutory restrictions on using the military for law enforcement purposes and the exceptions to these prohibitions. I present how the executive has described the protective power and emergency authority in contemporary public documents. And I survey the case law and academic literature regarding implied presidential authority and methods for ascertaining constitutional meaning from executive branch practice.

Part II relies on archival materials and OLC legal opinions to uncover the executive branch's justifications for the protective power and emergency authority. In recovering these justifications, I show how the executive branch has relied almost exclusively on War Department practice and legal opinions, while de-prioritizing the constitutional tenets of national security law established by the Supreme Court.

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[23] The bounds of peacetime, much like the those of war, are inherently contestable. The only mention of the concept in the Constitution is in the Third Amendment, which prohibits the quartering of soldiers "in time of peace" without the consent of the owner. U.S. CONST. amend. III. I am not aware of any federal court defining peacetime for the purposes of the Third Amendment, notwithstanding detailed treatment of the protection by the Second Circuit. *See* Engbolm v. Carey, 677 F.2d 957 (2d Cir. 1982) (in ascertaining whether New York violated the rights of corrections officers by quartering New York National Guard soldiers in their homes, finding in dicta that the amendment was "designed to assure a fundamental right to privacy"). For the purposes of this article, I will take peacetime to exist outside times and locations of armed conflict, as understood as a concept of international humanitarian law, whether domestic or international.

[24] U.S. CONST. art. II, § 3 (The president "shall take Care that the Laws be faithfully executed.").

[25] U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

In Part III, I critique this reliance on executive practice and demonstrate how the executive has mischaracterized the congressional responses to such practice. Three conclusions emerge from analyzing this historical record. First, I argue that these doctrines find no support in the practice of the early Republic. Second, I find that although there is consistency in the articulation of and recourse to the protective power after the early Republic, there is no such continuity as to the emergency authority. And third, notwithstanding continuity in the executive's assertion of the protective power, statutory law now so occupies the field such that it extinguishes any residual claim to independent presidential authority.

Part IV assesses the methodological implications of these conclusions. First, I argue that we must recognize that these doctrines of inherent authority arise not from the text of Article II, but from notions of sovereignty and military necessity. I then argue that we should be particularly cautious in using indicia of historical practice to establish the constitutionality of practices unmoored from constitutional text. Specifically, I propose we focus on three lines of inquiry. First, whether executive branch practices and their legal basis are notorious. Without such notice, whether to the public writ large or Congress, we cannot determine whether Congress has acquiesced in the constitutionality of an implied executive authority. Second, whether more recent statutory law occupies the field of law at issue, since practices rooted in sovereignty and necessity are particularly susceptible to redefinition over time. Third, and relatedly, whether a body of statutory law, regardless of whether Congress ever intended to impinge upon asserted executive branch authorities, in fact does so.

Part V provides recommendations for closing statutory loopholes that make it easier for the executive to rely on the protective power and emergency authority. I propose removing vague exceptions currently enshrined in the Posse Comitatus Act and eliminating authorities that make it easier for the President or Secretary of Defense to use the National Guard to evade the Posse Comitatus Act's prohibitions. I then conclude by considering areas for continued academic inquiry.

I. INHERENT PRESIDENTIAL AUTHORITY AND USING THE MILITARY FOR LAW ENFORCEMENT PURPOSES

This section lays the groundwork for understanding the protective power and emergency authority. I first provide the executive branch's definitions for the two doctrines and discuss the legal framework governing use of the military for domestic law enforcement. Next, I present two bodies of scholarship critical to understanding the protective power and emergency authority. The first concerns implied constitutional authority. The second concerns the use of historical executive branch practice to give meaning to ambiguous constitutional text, particularly in the separation of powers context.

A. Defining the Protective Power and Emergency Authority

First, the protective power. DOJ OLC claims it is an inherent presidential authority "to use troops for the protection of federal property and federal functions."[26] This includes the authority to protect federal personnel.[27] OLC hasn't enumerated the specific actions the executive can take to achieve these ends, although it distinguishes between "protection" and the "essentially law enforcement duties" that are prohibited by the Posse Comitatus Act.[28] Ascertaining where to draw this line is not at all straightforward. Circuit courts have established no less than three separate tests for what constitutes impermissible law enforcement under the Posse Comitatus Act.[29] But for present purposes, it is sufficient to know that such a distinction is thought to exist.

Second, the emergency authority. It is defined by DoD in Directive 3025.18, "Defense Support of Civil Authorities (DSCA),"[30] which authorizes, in pertinent part, Federal military commanders:

> [I]n extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances because: (1) Such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order; or, [sic] (2) When duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions. Federal action, including the use of Federal military forces, is authorized when necessary to protect the Federal property or functions.[31]

The federal military response to the April 18, 1906, San Francisco earthquake is a commonly cited example of a commander's use of the emergency authority. In the days after this disaster,[32] the local garrison commander, without orders from higher authority, directed thousands of soldiers to enforce curfews, arrest criminals, put

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[26] 1971 Opinion, *supra* note 3, at 343.
[27] *In re* Neagle, 135 U.S. 1, 2 (1890) (the Supreme Court case most frequently cited to justify extending the protective power to protection of federal personnel).
[28] 1971 Opinion, *supra* note 3, at 343.
[29] Military Support for Customs and Border Protection Along the Southern Border Under the Posse Comitatus Act, 45 Op. O.L.C. __, 5 (Jan. 19, 2021) [hereinafter Southern Border Opinion].
[30] DoD Directive 3025.18, *supra* note 4.
[31] *Id*.
[32] The earthquake destroyed most of the city, including 500 city blocks, ignited several fires that persisted for three days, and killed around 3,000 residents, leaving another 400,000 homeless. *San Francisco Earthquake, 1906*, NAT'L ARCHIVES (Sept. 30, 2020), https://www.archives.gov/legislative/features/sf [https://perma.cc/MXF7-2PH5].

out fires, and care for hundreds of thousands of homeless San Franciscans.[33] The extent of this devastation, which in its immediate aftermath impeded communication out of the city, stands in stark contrast to the January 6 insurrection. Notwithstanding the D.C. National Guard Commanding General's belief that he could use the emergency authority to suppress rioting in the Capitol Building, it was not "impossible" to receive direction from the President, who by all accounts was operating in the Oval Office. It is not surprising, then, that the Secretary of Defense relied on other, statutory means for assisting the Capitol Police.[34]

B. Statutory Framework for Using the Military for Civilian Law Enforcement

We are often told, and tell ourselves, that using the military for domestic law enforcement is alien to the U.S. constitutional tradition.[35] Yet, presidents have frequently used the military for law enforcement purposes since at least the Whiskey Rebellion in 1794,[36] and there is a substantial body of statutory law governing such uses of the military. Indeed, it is only by understanding this body of statutory law that the exceptional nature of the protective power and emergency authority truly comes into view.

Our baseline is the Posse Comitatus Act, codified at Section 1385 of Title 18, U.S. Code. This Act, passed after the acrimonious Hayes-Tilden election,[37] in its current form prohibits using any part of the Army, Navy, Marine Corps, Air Force, or Space Force "as a posse comitatus or otherwise to execute the laws" "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress."[38] The meaning of this antiquated language is contested. At common law, English sheriffs had the power to summon a group of men (a *posse*

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[33] FEDERAL AID, *supra* note 5, at 309.

[34] *See, e.g.*, OFF. OF INSPECTOR GEN., DEP'T OF DEF., REP. NO. DODIG-2022-039, REVIEW OF THE DOD'S ROLE, RESPONSIBILITIES, AND ACTIONS TO PREPARE FOR AND RESPOND TO THE PROTEST AND ITS AFTERMATH AT THE U.S. CAPITOL CAMPUS ON JANUARY 6, 2021, at 70–71 (Nov. 16, 2021).

[35] *See, e.g.*, Laird v. Tatum, 408 U.S. 1, 15 (1972) ("The concerns of the Executive and Legislative Branches in response to disclosures of the Army surveillance activities—and indeed the claims alleged in the complaint—reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs."); Southern Border Opinion, *supra* note 29, at 3 (stating that the Posse Comitatus Act "reflect[s] an American tradition of limiting direct military involvement in civilian law enforcement").

[36] *See generally* ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789–1878 (1988); CLAYTON D. LAURIE & RONALD H. COLE, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1877–1945 (1997); PAUL J. SCHEIPS, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1945–1922 (2012); WILLIAM C. BANKS & STEPHEN DYCUS, SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY (2016). *See also infra* Part III.A.–B.

[37] During which soldiers were deployed throughout the South pursuant to a range of statutory authorities, as discussed in greater detail in Part III.

[38] 18 U.S.C. § 1385 (as amended by Pub. L. No. 117–81, § 1045, 135 Stat. 1904).

comitatus) to aid in enforcing the laws.[39] But courts have established that the Act sweeps more broadly than a prohibition on federal military *posses*. There are no fewer than three tests defining the scope of proscribed activities.[40] For the purposes of this article, however, it is sufficient to know that the Act provides a baseline presumption against using the military for law enforcement activities.

The Act provides two exceptions to this presumption. The first is for express constitutional provisions of authority. Even at the time of its enactment, it was unclear to many in Congress whether any such exceptions existed.[41] Some older War Department documents list the Constitution's Guaranty Clause[42] as a constitutional exception. But the War Department abandoned this approach by the end of World War II, and current DoD regulations list no constitutional exceptions to the Act.[43]

There are, however, a host of statutes that expressly authorize using the military for domestic law enforcement.[44] The most noteworthy example is the statutes collectively referred to as the Insurrection Act.[45] The first provision authorizes the President to use the Armed Forces to suppress an insurrection upon the request of a State.[46] The second authorizes the President to use the Armed

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[39] *See, e.g.*, MICHAEL DALTON, THE COUNTREY JUSTICE 453 (1618); MICHAEL DALTON, OFFICIUM VICECOMITUM, THE OFFICE AND AUTHORITY OF SHERIFFS: GATHERED OUT OF THE STATUTES, AND BOOKS OF THE COMMON LAWS OF THIS KINGDOM 5 (1682).

[40] Southern Border Opinion, *supra* note 29, at 5. The first variant focuses on whether the military activity "is that which is regulatory proscriptive, or compulsory in nature and causes the citizens to be presently or prospectively subject to regulations, proscriptions, or compulsions imposed by military authority." United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1974), *aff'd sub nom.* United States v. Casper, 541 F.2d 1275 (8th Cir. 1976) (per curiam). The second queries whether the military activities involve "the direct active participation of federal military troops in law enforcement activities." United States v. Red Feather, 392 F. Supp. 916, 924 (D.S.D. 1975). The last, perhaps least helpfully, investigates whether the military activity "pervade[s] the activities of civilian officials." Hayes v. Hawes, 921 F.2d 100, 104 (7th Cir. 1990) (quoting United States v. Bacon, 851 F.2d 1312, 1313 (11th Cir.1988)). *See also* United States v. Dreyer, 804 F.3d 1266, 1275 (9th Cir. 2015) (en banc).

[41] *See infra* Part III.C.

[42] U.S. CONST. 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.").

[43] *See infra* Part II.B.

[44] *See infra* Part III.C. for a more fulsome list.

[45] 10 U.S.C. §§ 251–55 (Chapter 13).

[46] 10 U.S.C. § 251. In its original form, this statute is oftentimes referred to as the "Calling Forth Act" of May 2, 1792, 1 Stat. 264 (1792), which authorized the President, after issuing a proclamation for the "insurgents" to disperse, to use the militia to suppress "combinations too powerful to be suppressed by ordinary course of judicial proceedings" and "to cause the laws to be duly executed." The statute required a determination by an associate justice or district judge. This authority is generally understood to have been authorized under Article I, Section 8, Clause 15 of the Constitution, which provides that "[t]he Congress shall have power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."

Forces to enforce Federal law or suppress rebellion when "unlawful obstructions, combinations, or assemblages" or rebellion against the United States make it "impracticable" to enforce Federal law through "ordinary . . . judicial proceedings."[47] The third authorizes the President to use the Armed Forces when any "insurrection, domestic violence, unlawful combination, or conspiracy" makes it necessary to use the military to (1) protect the rights of "any part or class" of people in a State who are deprived of "a right, privilege, immunity, or protection named in the Constitution and secured by law" or (2) ensure the execution of Federal law or "the course of justice under those laws."[48] Before the President can invoke any of these authorities, she must first issue a proclamation to disperse.[49] Together, these statutes formed the legal basis for nearly every military deployment to suppress unrest and enforce federal law during the Civil Rights era.[50]

The National Guard sits uneasily within this scheme because of the three "hats"[51] under which its members may operate. First, National Guard units may be deployed for state missions under the command and control of their respective state or territorial governors (state duty).[52] Second, they may be deployed for federal missions under Federal command and control (commonly called active duty, but in statutory terms the "military service of the United States").[53] Third, they may be deployed for federal missions but remain under the command and control of their respective governors (which I will refer to as Title 32 duty status, but which, confusingly, is called in statute "full-time National Guard duty").[54] Critically, the Posse Comitatus Act's prohibitions do not apply to the National Guard when in State duty or Title 32 duty status because a National Guard member in these statuses is not in the active military service of the United States and therefore not subject to the Act's restrictions.[55] By virtue of this Title 32 duty status, the thousands of National Guard personnel deployed to D.C. in June 2020 and January 2021 were not limited by the Posse Comitatus Act and formally accountable only to their

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Congress subsequently expanded this authority in the Act of February 28, 1795, which removed the requirement for a determination by an associate justice or district judge, expanded the circumstances in which the President might call forth the militia, and made the authority permanent. 1 Stat. 424 (1795). *See also* COAKLEY, *supra* note 36, at 71–72.

[47] 10 U.S.C. § 252.

[48] 10 U.S.C. § 253.

[49] 10 U.S.C. § 254.

[50] Joseph Nunn & Elizabeth Goitein, *Guide to Invocations of the Insurrection Act*, BRENNAN CTR. FOR JUST. (April 25, 2022), https://www.brennancenter.org/our-work/research-reports/guide-invocations-insurrection-act [https://perma.cc/3RW3-XBBB].

[51] To my knowledge, this turn of phrase was first introduced by the Supreme Court in Perpich v. Dep't of Def., 496 U.S. 334 (1990), although I enumerate the "hats" here differently than in *Perpich* (which discussed the three "hats" of a National Guard member as including their civilian, militia, and Army roles).

[52] The law governing such deployments is provided in state and territorial, not federal, law.

[53] 32 U.S.C. § 101(12).

[54] 32 U.S.C. § 101(19).

[55] Recall that the Act prohibits only members of the Army or Air Force from being used as a posse comitatus, and members of the National Guard are only members of the Army or Air Force when in the "military service of the United States," i.e., in federal active-duty status.

respective governors.[56]

C. Sovereignty as a Basis for Implied Constitutional Authority

It is received wisdom that our constitution is one of enumerated powers.[57] The Tenth Amendment most explicitly manifests this proposition, providing that "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."[58] The Legislative Vesting Clause is used to support the proposition that there are authorities withheld from the general government.[59] Various Supreme Court decisions support this view,[60] as do writings by the Framers.[61]

This rather straightforward picture, however, poorly reflects reality.[62] In the

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[56] *See, e.g.*, Milley & Esper Letter, *supra* note 14, at 2 ("The out-of-state National Guard personnel remained under the command and control of their respective State Governors and were under tactical control of Major General Walker.").

[57] *See, e.g.*, McCulloch v. Maryland, 17 U.S. 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.").

[58] *See, e.g.*, Kansas v. Colorado, 206 U.S. 46, 89–90 (1907) (finding that the "natural construction" that the constitution is one of enumerated powers "is made absolutely certain by the 10th Amendment"); Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus, The Limits of Enumeration*, 124 YALE L.J.F. 180, 180–81 (2014) ("Whatever else is uncertain about the scope of delegated power, the constitutional text, reasonably interpreted, communicates that the sum of all actual delegated federal power amounts to something less than all possible delegated power.").

[59] U.S. CONST. art. I, § 1 (providing that "All legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives") (emphasis added). For examples of how the legislative vesting clause is used to impute limits on Congress's authority, *see, e.g.*, United States v. Lopez, 514 U.S. 549, 592 (1995). For more examples, *see* Richard A. Primus, *Herein of 'Herein Granted': Why Article I's Vesting Clause Does Not Support the Doctrine of Enumerated Powers*, 35 CONST. COMM. 301, 302 n.6 (2020).

[60] *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 124 (1876) (finding that "When the people of the United Colonies separated from Great Britain[,] . . . [t]hey retained for the purposes of government all the powers of the British Parliament, and through their state constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States."); Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936) (finding that "[t]hose who framed and those who adopted that instrument meant to carve from the general mass of legislative powers, then possessed by the states, only such portions as it was thought wise to confer upon the federal government.").

[61] *See, e.g.*, THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

[62] For one of the more recent contributions to the ongoing critique of enumerationism, at least

same opinion where Chief Justice Marshall said that the government was one of enumerated powers, for example, he also noted "there is no phrase in the [Constitution] which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described."[63] More germane to my analysis, Sarah Cleveland has noted the many ways, particularly since the late 1800s, in which the Supreme Court has upheld implied federal authorities based on federal sovereignty and not constitutional text.[64] Among some notorious examples, Cleveland notes how the Supreme Court used this reasoning to uphold the Chinese Exclusion Act.[65] This method of analysis reached a high water mark in *United States v. Curtiss-Wright Export Corporation* (*Curtiss-Wright*) in 1936.[66] Justice Sutherland, writing for the majority, found that "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."[67] In matters of foreign affairs, on the other hand, he wrote that "the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective corporate capacity as the United States of America."[68] Therefore, Justice Sutherland concluded, even if the Constitution nowhere mentioned the authority to declare and wage war or conclude peace and enter into treaties, these powers would "have vested in the federal government as necessary concomitants of nationality."[69]

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insofar as it applies to the legislative power, *see generally* Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, ARIZ. L. STUD. DISCUSSION PAPER NO. 23-02 (Jan. 17, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4327619 [https://perma.cc/U6YR-MVUB?type=standard].

[63] McCulloch v. Maryland, 17 U.S. 316, 406 (1819).

[64] Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

[65] *See, e.g.*, *id.;* Chae Chan Ping v. United States, 130 U.S. 581, 603–04 (1889) (upholding Congress's authority to enact legislation excluding Chinese laborers because "[j]urisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power"); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (citing a range of prior Supreme Court case law and executive branch practice to stand for the proposition that "every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe") (citing Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892)). The earliest suggestion of such implied authority may have been by Chief Justice Marshall in Little v. Barreme, 6 U.S. (2 Cranch) 170, 177 (1804) (suggesting an implied presidential power to seize vessels during hostilities). For a more comprehensive treatment of other such precedent, see Cleveland, *supra* note 64, at Parts III–V.

[66] 299 U.S. 304 (1936).

[67] *Id*. at 315–16.

[68] *Id*. at 316.

[69] *Id*. at 318. This was not the first time that Justice Sutherland advanced this line of reasoning in 1936. *See* Carter v. Carter Coal Co., 298 U.S. 238, 295 (1936) ("The question in respect of the inherent power of that government as to the external affairs of the Nation and in the field of international law is a wholly different matter which it is not necessary now to consider.").

But we should not take Justice Sutherland at his word. There are two cases, used by the executive to justify the protective power and emergency authority, that extend this approach to entirely domestic matters. The first is *In re* Neagle (*Neagle*), a decision affirming a U.S. marshal's power to use force, in the absence of explicit statutory authority, to protect Justice Field.[70] The opinion begins with a conclusion; namely, 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. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."[71] Instead of beginning its analysis by identifying the constitutional text that establishes this general authority, the Court searches for a department of government that could execute this power to protect Justice Field.[72] The Court dispenses first with the judicial branch, since it has no independent ability to enforce its orders.[73] The legislative branch is given even shorter shrift because, in the Court's words, it "can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed."[74]

The Court then turns to the executive, concluding that the President can execute this general authority in light of the Take Care Clause and Commander-in-Chief authority.[75] These citations to Article II, however, establish only the basis for the President exercising the protective power, and not the basis for the protective power itself, which the Court locates more generally in "the rights, duties and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution?"[76] In this way, much like in *Curtiss-Wright* and its progeny, the Court imputes powers of the general government, derived from more inchoate notions of nationhood and sovereignty, to the President through the Take Care Clause.

The second is *In re* Debs (*Debs*), a decision upholding a circuit court's authority to issue an injunction against those involved in the 1894 Pullman labor strikes.[77] More specifically, this decision affirmed the circuit court's finding that Eugene Debs, one of the principal organizers of the strike, was in contempt of the injunction.[78] Instead of analyzing the relevant statutory regime, the Court relied on the inherent authorities of the government to reach this conclusion.[79] Specifically, it opined that "the government of the United States . . . has within the limits of [its

[70] 135 U.S. 1, 60 (1890) (quoting *Ex parte* Siebold, 100 U.S. 371, 394 (1880)).
[71] *Id*.
[72] *Id*. at 63.
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] *Id*. at 64.
[77] 158 U.S. 564 (1895).
[78] *Id*. at 600.
[79] *See id.* at 599.

enumerated] powers all the attributes of sovereignty."[80] It went on to find that "the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways . . . to the passage of interstate commerce or the carrying of the mail."[81] Further, the Court claimed that it was "competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions."[82] Again, as in *Curtiss-Wright*, the Court in *Debs* established a general authority of the federal government based on sovereign prerogatives.

Courts[83] and scholars[84] alike have criticized establishing inherent federal government powers based on the incidents of federal sovereignty. Yet its reverberations continue to be felt, notwithstanding indications of a move towards reliance on statute in the Court's foreign affairs case law.[85] In *Zivotofsky v. Kerry*, for example, Justice Kennedy's majority opinion declined to adopt a robust interpretation of Justice Sutherland's opinion[86] yet nonetheless upheld the President's inherent, constitutional authority to disregard the requirements of statute.[87]

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[80] *Id*.
[81] *Id.*
[82] *Id*.
[83] In addition to Zivotofsky v. Kerry, 576 U.S. 1 (2015) and Haig, v. Agee, 453 U.S. 280 (1981), discussed subsequently, *see also, e.g.*, American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).
[84] *See, e.g.*, David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION, 94 (1990); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 863 n.307 (1997); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs* Power, 42 WM. & MARY L. REV. 379 (2000); Cleveland, *supra* note 64.
[85] For indications of a retreat from broad inherent authorities concerning foreign affairs, *see, e.g.*, Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1902–05 (2015); Jack L. Goldsmith, Zivotofsky II *as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 133 (2015). David Driesen and William Banks conclude, however, that this retreat (at least as it pertains to the separation of powers and as compared to the implied authorities of Congress) is overstated. *Implied Presidential and Congressional Powers*, 41 CARDOZO L. REV. 1301, 1308 (2020).
[86] 576 U.S. at 20–21. Notably, this is consistent with Justice Jackson's treatment of *Curtiss-Wright* in *Youngstown*. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring).
[87] *Zivotofsky*, 576 U.S. at 21. Indeed, Justice Kennedy went so far as to say that "whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law." *Id*. Notably, Chief Justice Roberts adopts the same critique of *Curtiss-Wright*, but argues that this critique argues in favor of finding that the President's non-compliance is unlawful. *Id.* at 65–66. Although in less explicit terms than the majority and dissenting opinions in *Zivotofsky*, the Court in *Haig v. Agee* similarly declined to extend the logic of *Curtiss-Wright*. 453 U.S. at 289 n.17.

D. Historical Practice and Ambiguous Constitutional Text

In this section, I focus specifically on interpretation of the Executive Vesting Clause and the Take Care Clause, the wording of which is notably ambiguous.[88] Before proceeding to the leading methodologies for using historical practice to interpret these provisions of the constitution, we should ask whether they are, in fact, ambiguous. Unsurprisingly, the debate is unsettled.

We begin first with the Executive Vesting Clause. Julian Mortenson, in an exhaustive review of legal and political tracts available to eighteenth-century readers, has argued that vesting the President with the "executive power" granted the President authority only to "execute plans, instructions, and above all else the laws. They would have understood the power as an empty vessel whose authority in any particular case depended entirely on the substantive decisions of the entity . . . which possessed the *legislative* power to direct executive action."[89] It was emphatically not, Mortenson argues, a grant of the much more capacious, non-statutory, prerogatives of the Crown.[90] Mortenson goes on to demonstrate that these prerogatives were, themselves, not sacrosanct, but "a residual and defeasible authority for Crown action in areas that Parliament—or more precisely the 'King-in-Parliament'—had not (yet) chosen to occupy."[91] In a similar vein, Ilan Wurman argues for a "thick" version of Mortenson's law execution thesis that "includes the power to issue regulations and to appoint, remove, and direct executive officers in furtherance of law execution."[92]

These conclusions critique a formalist view, adopted by Justice Thomas in his *Zivotofsky* concurrence,[93] that the Executive Vesting Clause reserves all foreign affairs powers "not allocated elsewhere by the [Constitution's] text" to the President.[94] Justice Thomas's position in *Zivotofsky* is notably consistent with the approach taken by OLC in 2001 to justify nearly unfettered presidential authority

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[88] Jack L. Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1836 (2016) (characterizing the Take Care Clause as one expressed in "simple but delphic terms").

[89] Julian D. Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1269 (2019).

[90] Prerogatives which included the power to issue proclamations that "enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary." *Id*. at 1223–25.

[91] *Id*. at 1223. This is consistent with arguments separately made by John Harrison, *Executive Power*, SSRN (June 15, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398427 [https://perma.cc/T22A-6REB], and Matthew Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 BUFF. L. REV. 557 (2018). It is also resonant of earlier work by Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004).

[92] Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 104 (2020).

[93] 576 U.S. 1, at 34–35 (Thomas, J., concurring in the judgment in part and dissenting in part).

[94] Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 253 (2001).

to use the military to respond to terrorist attacks within the United States.[95] Although a 2008 OLC memorandum notably advised "caution" before relying "in any respect" on the 2001 opinion, it is not surprising that OLC did not critique the "royal residuum" thesis.[96]

A similar debate has played out regarding an original understanding of the Take Care Clause. Andrew Kent, Ethan Leib, and Jed Shugerman, for example, find that the Take Care Clause and presidential oath of office would have been understood at ratification "to limit the discretion of public officials"[97] by requiring three types of fiduciary duties: first, the "true, honest, diligent, due, skillful, careful, good faith, and impartial execution of law or office"; second, a prohibition against "misappropriating profits that the discretion inherent in their offices might afford them"; and third, an obligation to "obey the law, instrument, instruction, charter, or authorization that created the officer's power."[98] Samuel Bray and Paul Miller, among others, dispute this imputation of fiduciary duties in the Take Care Clause, though they do not suggest a more definite meaning of the text.[99]

One might strongly agree with any of the above interpretations of the Executive Vesting Clause or Take Care Clause, and on this basis correspondingly come to a strong conclusion on the constitutionality of the protective power or emergency authority. But executive branch lawyers have not done so. Instead, particularly since the beginning of the twentieth century, executive branch attorneys have relied on historical practice to argue that presidential practice is constitutional.[100] Taking up the argument on the executive's terms, and believing that this case study has little to add to ongoing originalist debates about the Executive Vesting and Take Care clauses, I will assume that their text is indeterminate at least with respect to establishing the constitutionality of the protective power and emergency authority.

Using historical practice as a tool for constitutional interpretation itself has a long history. James Madison, for example, suggested that the meaning of ambiguous constitutional provisions might be "liquidated" (i.e., given a more

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[95] *See generally* Memorandum from John C. Yoo, Acting Assistant Att'y Gen., Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to Alberto R. Gonzalez, Counsel to the President, and William J. Haynes, II, Gen. Counsel, Dep't of Def., *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States*, 4–11 (Oct. 23, 2001) (emphasis in original).

[96] *See generally* Memorandum for the Files from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, *Re: October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities* (Oct. 6, 2008). *See infra* Part II.A. for a more detailed description of why this approach should not be surprising, even in the more limited context of the protective power and emergency authority.

[97] *Faithful Executive and Article II*, 132 HARV. L. REV. 2111, 2117 (2019).

[98] *Id*. at 2118.

[99] *See generally* Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479 (2020).

[100] *See infra* Part II.

concrete meaning) based on practice.[101] A line of Supreme Court precedent supports this view,[102] including, perhaps most famously, *Youngstown*[103] and its progeny.[104]

In *Youngstown*, the Court struck down President Truman's wartime order to seize certain steel plants in a manner inconsistent with statutes governing the seizure of private property for national defense purposes.[105] The case is perhaps best known for Justice Jackson's concurrence, which presented a three-part framework for assessing claims to inherent presidential authority. Justice Jackson argued that the President acts at the maximum of authority when an action is taken "pursuant to an express or implied authorization of Congress."[106] It was only in these circumstances, known as "zone one," that the President could be seen as "personify[ing] the federal sovereignty."[107] Next came a "zone of twilight" (zone two), where the President "acts in absence of either a congressional grant or denial of authority" and the distribution of authority between the executive and legislative branches is "uncertain."[108] Finally, there is zone three, where the President "take[s] measures incompatible with the expressed or implied will of Congress" and presidential authority is at its "lowest ebb."[109]

Justice Frankfurter's concurrence shied away from establishing an explicit test, but did argue why it can make sense to rely on executive branch practice in constitutional interpretation. Specifically, Frankfurter noted that a "systematic, unbroken, executive practice" "long pursued to the knowledge of the Congress" that has "never before [been] questioned" could be good grounds for ascertaining the constitutionality of an executive practice.[110]

Will Baude and Curtis Bradley (joined occasionally by others) have engaged in the most detailed contemporary methodological debates extrapolating this approach to constitutional interpretation.[111] Baude has mined Madison's

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[101] THE FEDERALIST NO. 37 (James Madison).
[102] *See, e.g.*, Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803); McCulloch v. Maryland, 17 U.S. 316 (1819); United States v. Midwest Oil Co., 236 U.S. 459, 472–74 (1915); Ex *parte* Grossman, 267 U.S. 87, 118–19 (1925); The Pocket Veto Case, 279 U.S. 655, 689 (1929).
[103] 343 U.S. 579, 610–11 (1952).
[104] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 686 (1981); Mistretta v. United States, 488 U.S. 361, 401 (1989); Medellin v. Texas, 552 U.S. 491, 532 (2008); Nat'l Labor Relations Bd. v. Noel Canning, 573 U.S. 513, 524 (2014); Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015); Trump v. Mazars USA, LLP, 140 S.Ct. 2019, 2035 (2020); New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S.Ct. 2111 (2022).
[105] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 n.2 (1952).
[106] *Id*. at 635–36 (Jackson, J., concurring).
[107] *Id*.
[108] *Id*. at 637.
[109] *Id*.
[110] *Id*. at 610 (Frankfurter, J., concurring).
[111] As will be discussed in Part IV, scholars dispute whether, and the extent to which, the judiciary should have a substantive role in adjudicating separation of powers concerns. *See, e.g.*, Nikolas

understanding of liquidation to posit three criteria for using historical practice to define ambiguous constitutional text. First, he argues that there must be "indetermina[te]" constitutional text.[112] Second, the practice must be repeated and consistent (i.e., "neither a one-off nor a continually contested question") and "be one of constitutional interpretation"—not just "political will."[113] Finally, this course of practice must be "settled" by way of acquiescence (both as between political factions and departments of government) and "public sanction" (i.e., reflecting acquiescence by "the people at large").[114]

In their most recent contribution[115] to this debate, Curtis Bradley and Neil Siegel posit a different approach, taken under the banner of historical gloss. Relying primarily on the Court's analysis in *NLRB v. Noel Canning* (2014),[116] Bradley and Siegel also propose a three-part analysis. First, historical gloss looks to governmental practice (i.e., actions and inactions, not traditions, general events, or social attitudes) to establish constitutional meaning, and places less weight on political rhetoric.[117] Second, the practice must be "longstanding."[118] Although no number of years is prescribed, the interpretive value of practice is strongest when it has "continued over numerous administrations" and "enjoyed the support of both major political parties."[119] Finally, there must be "acquiescence" by the affected branch.[120]

Although the general orientations of the two approaches are relatively consistent, there are differences in emphasis which can be quite meaningful. Unlike in liquidation, for example, Bradley and Siegel look only for "stability" in practice, not indicia that the adversely affected branch has agreed to an interpretation of the Constitution.[121] Liquidation, moreover, also looks for acquiescence both as between the two political branches and by "the people at large," a criteria not required by historical gloss. For the sake of completeness, and to highlight the practical consequences of these different approaches, I will use both approaches in this paper.

Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022).

[112] William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 14 (2019).

[113] *Id*. at 16–17.

[114] *Id*. at 18–19.

[115] Prior work on historic gloss can be found in Curtis Bradley & Trevor Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 415 (2012), and Curtis Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017).

[116] 573 U.S. 513.

[117] Curtis Bradley & Neil Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 18 (2020).

[118] *Id*. at 19.

[119] *Id*.

[120] *Id*. at 19–20.

[121] *Id*. at 20.

II. CONTEMPORARY EXECUTIVE BRANCH RATIONALES FOR THE PROTECTIVE POWER AND EMERGENCY AUTHORITY

The executive branch's methodology for justifying the protective power and emergency authority selectively engages with Supreme Court case law. Specifically, DOJ OLC has relied exclusively on *Neagle* and *Debs* to justify the protective power (and, by extension, the emergency authority), ignoring cases like *Youngstown* and its progeny that require more rigorous analysis of historical practice and congressional acquiescence. And when the executive does engage with past practice and congressional reactions, its engagement is incomplete and sometimes wrong.

A. DOJ OLC Opinions Concerning the Protective Power

OLC's 1971 opinion is the most recent executive branch legal opinion pertinent to the protective power. Prior to my FOIA request, it was also the only publicly available executive branch justification for the power. In this opinion, OLC found that the President has an "inherent constitutional authority to use federal troops to ensure that Mayday Movement demonstrators do not prevent federal employees from getting to their posts" or "carry[] out their assigned government functions."[122] Mayday Movement organizers planned to protest the Vietnam War by, among other tactics, blocking entrances to the Pentagon and Department of Justice.[123]

The 1971 Opinion relied on three justifications for the protective power. First, it cited four prior OLC opinions concluding that the Posse Comitatus Act does not "impair the President's inherent authority to use troops for the protection of federal property and federal functions."[124] I will dispense with one of these four prior OLC opinions because it does not, in fact, address the protective power.[125] Second, it argued that the "Supreme Court . . . recognized this authority" in *Neagle* and *Debs*. Third, it relied on "historic . . . recognition" of the protective power "as a necessary adjunct of [the President's] constitutional duties under Article II, Section 3 (the "take care" clause) of the Constitution," citing Edward Corwin's

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[122] 1971 Opinion, *supra* note 3, at 343.
[123] SCHEIPS, *supra* note 36, at 423. The military personnel deployed to protect federal functions, property, and persons had little action on the day of the protest. *Id.* at 424–25.
[124] 1971 Opinion, *supra* note 3, at 343.
[125] Memorandum from William Rehnquist, Assistant Att'y Gen., Office of Legal Counsel, to Robert E. Jordan, III, Gen. Counsel, Dep't of the Army, *Statutory authority to use federal troops to assist in the protection of the President* 1 (Nov. 12, 1969), http://harvardnsj.org/wp-content/uploads/2024/01/Nov.-1969-Memo_Presidential-Protection-Memo.pdf [https://perma.cc/977Q-HTKA] ("This memorandum is confined to a discussion of the scope of [Public Law 90-331, 82 Stat. 170, which authorizes the use of the armed forces if requested by the Director of the Secret Service] and is not addressed to the authority to use federal troops for the protection of federal functions and property generally – a subject previously discussed in our memorandum of October 16, 1967.").

scholarship concerning presidential power.[126]

Let's begin with analyzing how the three remaining OLC opinions address *Neagle* and *Debs*. The oldest in this line of OLC opinions (which I will call the Pentagon Opinion), dated October 4, 1967, most clearly reflects a view that neither *Neagle* nor *Debs* establish a prerogative based outside the Constitution's text. It argues that the President has inherent constitutional authority to use the military to protect the Pentagon from anti-war demonstrators.[127] Relying on DoD and War Department precedent,[128] OLC defends the protective power as "the sovereign right of any nation to protect itself, its agencies, and its property against molestation and to use for that purpose such of the means at its disposal as circumstances require."[129] Crucially, this sovereign right is said to be "a particular expression of the martial law principle that when unlawful force threatens the order of the State and the appropriate civil authorities are unable to preserve order, the sovereign may use military force to whatever degree is necessary for that purpose."[130] When the opinion does rely on *Neagle* and *Debs*, it is only within the context of this more expansive martial law justification.[131] In fact, these references to War Department martial law practice concern the emergency authority, evincing how both doctrines share a foundation in notions of sovereignty and necessity.[132] Notwithstanding the fact that the Supreme Court decided *Youngstown* 15 years before the Pentagon

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[126] 1971 Opinion, *supra* note 3, at 344. Note also that OLC's Oct. 13, 2001, opinion similarly relied on what I will demonstrate is Corwin's flawed accounting of history.

[127] Memorandum from the Office of Legal Counsel to the Gen. Counsel, Dep't of the Army, *Use of Federal Troops to Protect Government Property Against Anti-War Demonstrators* 1 (Oct. 4, 1967), http://harvardnsj.org/wp-content/uploads/2024/01/Oct.-1967_Pentagon-Protection-Memo.pdf [https://perma.cc/N2YR-GFLW] [hereinafter *Pentagon Opinion*]. These protests were far larger than the May Day protests. Around 18,000 to 22,000 anti-war demonstrators amassed directly in front of the Pentagon. SCHEIPS, *supra* note 36, at 257. Demonstrators, in groups numbering from the hundreds to the thousands, made multiple attempts to forcibly enter the Pentagon, with twenty or thirty ultimately entering the building. *Id.* at 258–60. This achievement, though substantial, pales in comparison to what organizers promised—raising the Pentagon 300 feet in the air. Peter Manseau, *Fifty Years Ago, a Rat-Tag Group of Acid-Dropping Activists Tried to 'Levitate' the Pentagon*, SMITHSONIAN MAG. (Oct. 20, 2017), https://www.smithsonianmag.com/smithsonian-institution/how-rag-tag-group-acid-dropping-activists-tried-levitate-pentagon-180965338/ [https://perma.cc/SE6V-SYHA].

[128] *Pentagon Opinion*, *supra* note 127, at 2. The opinion cites the relevant language from Army Regulation 500-50 in full: "The right of the United States to protect its property by intervention with Federal troops in an emergency is an accepted principle of our Government. The exercise of this right is an executive function and extends to all Government property of whatever nature and wherever located, including premises in the possession of the Federal Government. Intervention is warranted where the need for protection of Federal property exists and the local authorities cannot or will not give adequate protection." *Id.*

[129] *Id*. at 3–4.

[130] *Id*. at 4.

[131] *Id*. Other sources cited to stand for this proposition are Luther v. Borden, 48 U.S. 1 (1849) (concerning, among other matters, the constitutionality of the Governor of Rhode Island declaring martial law to forcibly suppress a rival state government constituted out of dissatisfaction with the state's antiquated limitation of the franchise) and F.B. WIENER, A PRACTICAL MANUAL OF MARTIAL LAW (1940). *Id*.

[132] *See infra* Part IV.A. for a more detailed discussion of this shared legal basis.

Opinion, OLC does not reference *Youngstown* or investigate whether Congress acquiesced in these practices.

OLC changes tack in the two remaining OLC opinions, recharacterizing *Neagle* and *Debs* as establishing that the text of Article II was the basis for the protective power. Both of these opinions address the same controversy—whether federal troops could be used to protect foreign embassies in the United States. Although the earlier of these opinions (Embassy Opinion I) found that the President had this inherent authority,[133] it concluded that it was insufficiently express to escape the prohibitions of the Posse Comitatus Act.[134] After the Department of the Army requested a reexamination,[135] OLC reversed itself, concluding that, in fact, the Posse Comitatus Act's proscriptions did not apply to this use of the military.[136] OLC presented its reasoning in two opinions—the first of which (Embassy Opinion II) was cited in the published 1971 OLC Opinion and a second (OLC Study Opinion) which was not.

Together, Embassy Opinions I and II and the Study Opinion characterize *Neagle* and *Debs* as establishing, "with absolute certainty,"[137] that the protective power was "unquestioned,"[138] although they recognized that the operative language

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[133] Memorandum from William Rehnquist, Assistant Att'y Gen., Office of Legal Counsel, to Robert E. Jordan, III, Gen. Counsel, Dep't of the Army, *Authority to use federal troops to assist in the protection of foreign embassies in the District of Columbia* 3 (Nov. 14, 1969), http://harvardnsj.org/wp-content/uploads/2024/01/Nov-1969-Memo-Embassy-Protection-Memo-I.pdf [https://perma.cc/9KME-E7MT] [hereinafter *Embassy Opinion I*] ("Our general views with respect to the use of federal troops to protect federal property and functions are detailed in our memorandum on that subject, dated October 16, 1967, the substance of which need not be repeated here. It is appropriate to add, however, that the federal responsibility for the proper conduct of foreign affairs, in our view, is within the ambit of the federal functions which may properly be protected. This was recognized, in powerful dicta, by *In re* Neagle.").

[134] *Id*. at 4–5.

[135] The Army General Counsel, in this request, argued that the proper question was not whether the protective authority constituted an exception to the Posse Comitatus Act, but whether the Posse Comitatus Act "applies to the conduct in question." Robert E. Jordan, III, Gen. Counsel, Dep't of the Army, to William Rehnquist, Assistant Att'y General, Office of Legal Counsel, at 2 (Apr. 28, 1970), Box 83, Accession No. 335-73-101, UD-UP 34, Records of the Office of the Secretary of the Army, Record Group 335, National Archives at College Park, College Park, MD [hereinafter Jordan Interpretation].

[136] Memorandum of William Rehnquist, Assistant Att'y Gen., *Authority to use troops to execute the laws of the United States* 1 (Mar. 27, 1970), http://harvardnsj.org/wp-content/uploads/2024/01/March-1970-Memo-Background-Research-Memo.pdf [https://perma.cc/7G87-EVFY] [hereinafter *OLC Study Opinion*]; Memorandum from William Rehnquist, Assistant Att'y Gen., Office of Legal Counsel, to Robert E. Jordan, III, Gen. Counsel, Dep't of the Army, *Authority to use troops to protect federal functions, including the safeguarding of foreign embassies in the United States* 1 (May 11, 1970), http://harvardnsj.org/wp-content/uploads/2024/01/May-1970-Memo-Embassy-Protection-Memo-II.pdf [https://perma.cc/DJ5P-7B8B] [hereinafter *Embassy Opinion II*]. By way of explanation, the revised memo notes that the original opinion "was hastily written under the press of circumstances and appears inconsistent with views expressed by this Office in October 1967." *Id*.

[137] *OLC Study Opinion*, *supra* note 136, at 2.

[138] *Id*. at 3.

in *Neagle* was only "powerful dicta."[139] Once again, none of these opinions reference *Youngstown* or engage in a broader analysis of the larger body of statutory law relevant to this analysis.[140] Interestingly, although these opinions dispense with any references to martial law, the renewed Department of the Army request did (obviously taking its cue from OLC's earlier opinion).[141]

Although all five of these OLC opinions consider historical practice, they do so in significantly different ways. The OLC Study Opinion relies only on Corwin to stand for the proposition that historical practice supports the protective power.[142] Embassy Opinion II, on the other hand, only addresses historical practice by stating that "Presidents have long maintained that the [Take Care Clause] . . . together with the natural right of the sovereign to protect itself, gives rise to inherent authority to use troops when this becomes necessary to protect the federal government, its functions and its property."[143] Embassy Opinion I is the most sparse in its treatment of history, only incorporating by reference the history recounted in OLC's Pentagon Opinion.[144]

The three opinions also take inconsistent and confused approaches to addressing congressional acquiescence. They don't clearly distinguish, for example, between acquiescence in the President's assertion of inherent authority and legislative intent regarding the scope of the Posse Comitatus Act. Take, for example, the OLC Study Opinion, which focuses solely on the Posse Comitatus Act's legislative history. It notes that: (1) Presidents used the Army "with increasing frequency in policing functions" during Reconstruction; (2) a House Resolution requested copies of all orders relating to use of the Army during the Hayes-Tilden election; (3) in 1878, the same committee reported an Army appropriations bill drastically reducing the size of the Army; (4) debate on this bill focused primarily on using the military to "police the polls and close down State legislatures"; and (5) Senators nonetheless offered an amendment to include the constitutional exception now in the Act.[145] In combination with a number of other statutory enactments (during debate of which military deployments responding to civil unrest were mentioned), the opinion concludes that "it seems clear that the

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[139] *Embassy Opinion I*, *supra* note 133, at 3.
[140] *See infra* Part III.C. for the implications of not considering this considerable body of statutory law.
[141] Noting "a further implied limitation" on the protective power, "[t]hat the authority rest on the quasi-martial law principle of necessity; that is, that its existence be predicated upon a finding that, in the particular case, the functions of Government cannot adequately be protected by civil authorities, whether Federal or State." The letter goes on to say that the General Counsel read a similar implied limitation in the *Pentagon Opinion*, *supra* note 127. *See* Jordan Interpretation, *supra* note 135, at 3.
[142] *OLC Study Opinion*, *supra* note 136, at 1. As will be discussed in Part III, however, Corwin appears to significantly err in his characterization of early Republic practice.
[143] *Embassy Opinion II*, *supra* note 136, at 1–2.
[144] *Embassy Opinion I*, *supra* note 133, at 3.
[145] *OLC Study Opinion*, *supra* note 136, at 4–6.

President may call troops to perform or execute the law when necessary."[146] Yet it is not at all clear why congressional knowledge of military deployments during Reconstruction, during which time there were a bevy of statutes authorizing military deployments throughout the reconstructed South, says much of anything about the President's inherent constitutional authorities. And even if they do take these legislative steps as indicia of congressional acquiescence in presidential claims to inherent authority, this recapitulation of legislative action is both incomplete and inaccurate.[147]

Little more can be gleaned from Embassy Opinion I or II. The second simply summarizes this legislative history in more general terms.[148] And the first does not reference legislative history or congressional acquiescence at all.[149]

So where does this leave us? First, we see that there is some connection, at least historical and possibly legal, between the protective power and emergency authority. I discuss this connection in greater detail below. Second, although the opinions liberally cite *Neagle* and *Debs*, they don't reference *Youngstown* or any other contemporaneous cases concerning the constitutionality of inherent presidential authority. And finally, though they invoke historical legislative and executive branch practice, they do so in a manner that is at least confused.

B. War Department and Department of Defense Policy Establishing the Emergency Authority

In considering the emergency authority, we don't have the benefit of a similar raft of OLC opinions. Thus, in this section, I trace how the authority developed and, based on its text and context, argue that it relies both on the legal arguments justifying the protective power noted above and doctrines of necessity.

The War Department issued three general orders (i.e., instructions given by a higher command within the military) concerning the Posse Comitatus Act immediately after its enactment. The first, issued a day after enactment, just transmitted the text of the statute.[150] The second, issued about two weeks later, provided a lengthy list of statutory and constitutional exceptions to the Act.[151] The

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[146] *Id*. at 6–7.
[147] *See infra* Part III.
[148] *Embassy Opinion II*, *supra* note 136, at 3–4.
[149] *See generally Embassy Opinion I*, *supra* note 133.
[150] *See* General Order 37, Headquarters of the Army (June 19, 1878), enclosed in Index of General Orders, Adjutant General's Office 1878, General Orders, Circulars, and General Courts-Martial Orders 1860-1944, Records of the Judge Advocate General (Army), Record Group 153, National Archives Building, Washington, D.C.
[151] *See* General Order 49, Headquarters of the Army (July 7, 1878), enclosed in Index of General Orders, Adjutant General's Office 1878, General Orders, Circulars, and General Courts-Martial Orders 1860-1944, Records of the Judge Advocate General (Army), Record Group 153, National Archives Building, Washington, D.C. Notably, the only constitutional exception listed was the

third, issued two and a half months after that, amended that list of exceptions and included, for the first time, the emergency authority:

> If time will admit, the application for the use of troops for these purposes must be forwarded . . . for the consideration and action of the President; but, in cases of sudden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or in cases of attempted or threatened robbery or interruption of the United States mails, or other equal emergency, officers of the Army may, if they think a necessity exists, take such action before the receipt of instruction from the seat of Government as the circumstances of the case and the law under which they are acting may justify.[152]

This text has been remarkably resilient, though its history is a bit tortured. An 1895 general order seemed to narrow the doctrine's scope by adding a requirement that the emergency be "so imminent as to render it dangerous to await instructions requested through the speediest means of communication."[153] This text was repeated in 1908,[154] 1910,[155] 1913,[156] 1923,[157] and 1931.[158] It was revised in 1937 to include responses to "earthquake[s], fire[s], or flood[s], or other public calamit[ies] disrupting the normal processes of government."[159] The War

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Guaranty Clause. *Id*. at 1. Subsequent revisions to this order would continue citing the Guaranty Clause as a constitutional exception to the Act until 1945.

[152] *See* General Order 71, Headquarters of the Army (Oct. 1, 1878), enclosed in Index of General Orders, Adjutant General's Office 1878, General Orders, Circulars, and General Courts-Martial Orders 1860-1944, Records of the Judge Advocate General (Army), Record Group 153, National Archives Building, Washington, D.C.

[153] This revised version also rephrased another section of the authorization, though that appears to not have a substantive legal significance. Taken together, it read: "If time will admit, the application for the use of troops for these purposes must be forwarded . . . for the consideration and action of the President; but in case[s] of sudden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or in case[s] of attempted or threatened robbery or interruption of the United States mails, or other equivalent emergency, so imminent as to render it dangerous to await instructions requested through the speediest means of communication, an officer of the Army may take such action before the receipt of instructions as the circumstances of the case and the law under which he is acting may justify." DEP'T OF WAR, REGULATIONS FOR THE ARMY OF THE UNITED STATES 68 (1895).

[154] *See* DEP'T OF WAR, REGULATIONS FOR THE ARMY OF THE UNITED STATES, War Dep't Doc. No. 317, at 92 (1908).

[155] *See* DEP'T OF WAR, REGULATIONS FOR THE ARMY OF THE UNITED STATES, War Dep't Doc. 384, at 97 (1910).

[156] *See* DEP'T OF WAR, REGULATIONS FOR THE ARMY OF THE UNITED STATES, War Dep't Doc. 445, at 111 (1913) (corrected to Apr. 15, 1917).

[157] *See* Army Regulations, No. 500-50 § III.5.b., *Employment of Troops: Enforcement of the Laws* (June 6, 1923).

[158] *See* Army Regulations, No. 500-50, *Employment of Troops: Enforcement of the Laws* (July 15, 1931) (noting no change to § III.5.b from the 1923 regulation).

[159] So the authorization now read in full: "If time will admit, the application for the use of troops

Department published substantially similar texts in 1945[160] and 1948.[161]

At this point, successive regulations reversed course and incrementally broadened the text. A 1971 DoD regulation characterized the emergency authority (along with the protective power) as one of only two constitutional exceptions to the Posse Comitatus Act.[162] It also articulated the circumstances under which the emergency authority may be exercised in more general terms (i.e., "civil disturbances, disasters, or calamities"[163] instead of "sudden and unexpected invasion, insurrection, or riot, endangering the public property of the United States").[164] In a seeming about-face, a 1972 Army regulation noted that "the availability of rapid communications capabilities" made it unlikely that commanders could rely on this authority.[165] But in, what appears to be, the next

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for these purposes must be forwarded . . . for the consideration and action of the President; but, in cases of sudden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or in cases of attempted or threatened robbery or interruption of the United States mails, or of earthquake, fire, or flood, or other public calamity disrupting the normal processes of government, or other equal emergency, so imminent as to render it dangerous to await instructions from the War Department requested through the speediest means of communication available, officers of the Army, if they think a necessity exists, may take such action before the receipt of instructions as the circumstances of the case and the law under which they are acting may justify." Army Regulations 500-50 § 5.b, War Dep't (Apr. 5, 1937), Box No. 317, Legal Opinion Precedent Files 1943-1955, Records of the Judge Advocate General, Record Group 153, National Archives at College Park, College Park, MD.

[160] Yet again, so the authorization now read in full: "In case of sudden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or of attempted or threatened robbery or interruption of the United States mails, or of earthquake, fire, or flood, or other public calamity disrupting the normal processes of Government, or other equivalent emergency, so imminent as to render it dangerous to await instructions from the War Department requested through the speediest means of communication available, an officer of the Army in command of troops may take such action, before the receipt of instructions, as the circumstances of the case reasonably justify." Army Regulations 500-50 § II.4, War Dep't (July 17, 1945), Box No. 2849, Army-AG Decimal File 1940–45, Records of the Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD.

[161] *See* Army Regulations 500-50 § II.4, War Dep't (Aug. 17, 1948), Box No. 1266, Army-AG Decimal File 1946–48, Records of the Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD [hereinafter 1948 Army Regulation].

[162] "The Constitutional exceptions [to the Posse Comitatus Act] are two in number and are based upon the inherent legal right of the United States Government -- a sovereign national entity under the Federal Constitution -- to insure the preservation of public order and the carrying out of governmental operations within its territorial limits, by force if necessary." *See* 1971 Directive 3025.12, *supra* note 17, § V.C.1., at 3.

[163] *Id.* The authorization now read in full: "The emergency authority: Authorizes prompt and vigorous Federal action, including use of military forces, to prevent loss of life or wanton destruction of property and to restore governmental functioning and public order when sudden and unexpected civil disturbances, disasters, or calamities seriously endanger life and property and disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situation." *Id*. § V.C.1.a., at 3–4.

[164] 1948 Army Regulation, *supra* note 161, § II.4.

[165] DEP'T OF THE ARMY, Army Regulation 500–50, *Emergency Employment of Army and Other Resources: Civil Disturbances*, § 2–4.a., at 3 (Apr. 21, 1972). The authorization now read in full:

update, issued in 1994,[166] DoD returned nearly verbatim to the 1971 DoD text.[167] The 1994 text appears to have been at least republished in 1997 and next updated, to its contemporary wording, in 2010. This 2010 text removes nearly all references to civil disturbances, but otherwise tracks the 1994 regulation.[168]

The text, and its history, indicate that there are two aspects of the emergency authority. First, there is a concern for protecting executive branch instrumentalities—that is, the protective power. Language resonant of protective power appears in every version of the emergency authority in increasingly explicit form. This is consistent with the connection that the 1967 OLC opinions draws between these two doctrines.[169] It seems reasonable, then, to conclude that the legal basis for this aspect of the emergency authority is consistent with that discussed in Part II.A.

The second aspect of the emergency authority is a more general power to prevent the breakdown of public order, a power articulated in more varied form over time. Through 1931, it seemed to also be tied to the protective power since the first clause limited intervention to circumstances in which U.S. property (including U.S. mails) was in danger. The reference to "other equal emergency," however, is sufficiently broad to at least call into question how much of a federal nexus was required. Although the 1972 Army text significantly reframed the policy, on closer inspection it includes all the same operative elements first introduced in 1878. In

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"In cases of sudden and unexpected invasion or civil disturbance, including civil disturbances incident to earthquake, fire, flood, or other public calamity endangering life or Federal property or disrupting Federal functions or the normal processes of government, or other equivalent emergency so imminent as to make it dangerous to await instructions from the Department of the Army requested through the most expeditious means of communication available, an officer of the Active Army in command of troops may take such action, before the receipt of instructions, as the circumstances of the case reasonably justify. However, in view of the availability of rapid communications capabilities, it is unlikely that action under this authority would be justified without prior Department of the Army approval while communications facilities are operating. Such action, without prior authorization, of necessity may be prompt and vigorous but should be designed for the preservation of law and order and the protection of life and property until such time as instructions from higher authority have been received, rather than as an assumption of functions normally performed by the civil authorities." *Id*.

[166] DEP'T OF DEF., Directive 3025.12, *Military Assistance for Civil Disturbances (MACDIS)* (Feb. 4, 1994).

[167] *Compare* DoD policy now provides that commanders could only provide "military assistance for civil disturbances" without presidential authorization when: (1) "the use of Military Force is necessary to prevent loss of life or wanton destruction of property, or to restore governmental functioning and public order. 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" or (2) "duly constituted State or local authorities are unable or decline to provide adequate protection for Federal property or Federal Governmental functions," *id*. § D.2.b, *with* 1971 Directive 3025.12, *supra* note 17, § V.C.1.a–b, at 3.

[168] *See supra* Part I.

[169] *See supra* Part II.A.

fact, it is the 1971 DoD regulation, including its restatement in 2010, that reflects the most significant change in scope. In this update, aside from removing a separate reference to exercising the protective power, suggestion of a necessary federal nexus appears to be gone. Instead, all that is required is that communication with the President be impossible and the civil disturbance be sufficiently large and unexpected to require a response to prevent "significant" loss of life or "wanton" destruction of property and "restore governmental function and public order."[170]

To the extent that a civil disturbance impedes the execution of a federal function or endangers a federal employee or property, OLC's justification of the protective power would seem to apply. Absent such a nexus, and it appears from the text that such a nexus is not required, we need a more wide-ranging legal theory. One likely possibility is that this authority stems from notions of military necessity.[171]

III. HISTORICAL PRACTICE AND CONGRESSIONAL ACQUIESCENCE CONCERNING THE PROTECTIVE POWER AND EMERGENCY AUTHORITY

In this section, I demonstrate why executive branch practice and congressional responses to this practice fail to establish a constitutional basis for the protective power or emergency authority. To reach this conclusion, I rely on the criteria proposed by the liquidation and historical gloss theories.

A. Executive Branch Practice in the Early Republic

Although presidents used the military for law enforcement during the early Republic, they didn't rely on theories of inherent authority to do so. Because the OLC opinions rely on such theories so heavily, I focus on inaccuracies in Corwin's recounting of how presidents used the military for domestic law enforcement.[172]

Corwin starts off well. He notes the three statutes that are the earliest antecedents of the Insurrection Act.[173] And he correctly observes that it was under the earliest of these authorities that President Washington called forth the Maryland, New Jersey, Pennsylvania, and Virginia militias to suppress the Whiskey Rebellion in 1794.[174] But after this point Corwin's accounting is both selective and wrong.

First, he neglects other instances in which Presidents Washington and Adams relied on, or sought out, statutory authority to employ the military for law enforcement purposes. For example, Corwin ignores the fact that President

[170] DEP'T OF DEF., Directive 3025.18, *Defense Support of Civil Authorities (DSCA)* § 4(k) (Dec. 29, 2010) (incorporating Change 2, Mar. 19, 2018).
[171] *See infra* Part IV.A.
[172] *See* EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, at 130–39 (1957).
[173] *Id*. at 131.
[174] *See id*.; COAKLEY, *supra* note 36, at 39 (providing states' participation).

Washington requested, and ultimately received in the Neutrality Act of 1794,[175] additional statutory authority to use the military to enforce neutrality in response to the Genet Affair.[176] Corwin likewise doesn't mention President Adams's March 12, 1799, invocation of the Calling Forth Act to use the military to enforce new federal taxes in certain eastern Pennsylvania counties.[177] And he further fails to note how President Jefferson relied on the Neutrality Act use the military to pursue Aaron Burr in his conspiracy against the United States.[178]

Corwin also incorrectly asserts that President Jefferson used the military in 1808 to enforce the Embargo Act without statutory authority.[179] First, Corwin ignores that the Embargo Act itself authorized the President "to give such instructions to the officers of the revenue, and of the navy and revenue cutters of the United States" to enforce an embargo.[180] And although not cited in Jefferson's proclamation, Corwin fails to note the many other statutory authorities in force at the time that supported Jefferson's use of the military.[181] That Jefferson, like Washington, at least understood the preference for relying on statutory authority is further supported by his proposal, and Congress's enactment, of the "Force Bill," which authorized more specific use of the Army, Navy, or militia to enforce the embargo.[182]

A leading modern compilation of the Army's response to civil disorders finds no use of military personnel under anything but statutory authority until the slave rebellions of the 1830s.[183] Indeed, for the entirety of the Founding Era, I am not aware of practice supporting a theory of inherent presidential authority to use

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[175] 1 Stat. 381 (June 5, 1794).

[176] In which revolutionary France's emissary to the United States, notwithstanding repeated disapproval by President Washington and his cabinet, attempted to raise French privateers in American ports to disrupt British trade. *See generally* HARRY AMMON, THE GENET MISSION (1973).

[177] John Adams, *Proclamation 9—Law and Order in the Counties of Northampton, Montgomery, and Bucks, in the State of Pennsylvania*, AM. PRESIDENCY PROJ. (Mar. 12, 1799), https://www.presidency.ucsb.edu/documents/proclamation-9-law-and-order-the-counties-northampton-montgomery-and-bucks-the-state [https://perma.cc/87RG-DM9C?type=standard]; COAKLEY, *supra* note 36, at 70–72.

[178] COAKLEY, *supra* note 36, at 79–80.

[179] Corwin claims that, in a proclamation warning insurgents in the Lake Champlain region, a hotbed for resistance to the embargo on trade with what is now Canada, "Jefferson by no means confined himself" to the express terms of a March 8, 1807 act authorizing the President to use the land or naval forces of the United States "in all cases of insurrection nor obstruction of the laws" on the same terms as provided in the revised Calling Forth Act. CORWIN, *supra* note 172, at 132.

[180] 2 Stat. 451 (Dec. 22, 1807).

[181] This included, for example, the act of March 3, 1807 (authorizing the President to use the Army and Navy to enforce the laws on the same terms as the revised Calling Forth Act), 2 Stat. 443 (1807), and the Judiciary Act of 1789 (establishing that U.S. marshals execute in their district "all lawful precepts directed to him, and issued under the authority of the United States," including by "command[ing] all necessary assistance in the execution of his duty," 1 Stat. 73 (1789)).

[182] COAKLEY, *supra* note 36, at 88–89.

[183] *See id*. at 91 ("no significant use of troops under federal control . . . in the suppression of civil unrest or the enforcement of federal law").

the military to enforce the laws or to protect federal functions. To the extent one is disposed to privileging practice during the early Republic, these omissions and mischaracterization of early Republic history are fatal to finding a constitutional basis for the protective power and emergency authority.

B. Executive Branch Practice after the Early Republic

A rigorous analysis of historical practice after the early Republic is no more availing. There is no period during which a liquidationist approach would support finding a constitutional basis in Article II for the protective power or emergency authority. Although the criteria of historic gloss may have been satisfied at some point before the twenty-first century, I show that statutory law now so pervades this area as to defeat any inherent presidential authority that once existed. Since executive branch practice does not clearly distinguish between the protective power and emergency authority in the years leading up to the Civil War, I treat this first period more generally before passing to post-war practice particular to each doctrine.

1. Antebellum Practice

The Army was next used for domestic law enforcement to help local officials arrest those involved in the Nat Turner slave rebellion in 1831.[184] This assistance was provided at the discretion of a local military commander without presidential direction, reference to statutory authority, or articulation of a legal theory.[185] This legal theory would first be provided in 1851 by President Fillmore, after Bostonians freed from jail Shadrach Brown, a black man held as a fugitive slave.[186] In response to this jailbreak, President Fillmore issued a proclamation directing "all officers, civil and military" to "quell[] this and other such combinations and assist[] the marshal and his deputies in recapturing" Mr. Brown.[187]

President Fillmore justified this use of the military based on the Take Care Clause and his authority as Commander-in-Chief:

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[184] *Id*. at 93.

[185] *Id*. at 93–94. There is some evidence of orders from the Secretary of War authorizing limited assistance. Another example of recourse to inherent authority includes the seeming protection of customs agents in South Carolina during the Nullification Crisis. *See id*. at 97. Note, however, other instances in which statutory criteria were followed, e.g., regarding the Dorr Rebellion. *Id*. at 125.

[186] *See id*. at 129; 5 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 104–05 (1897) (articulating the constitutional basis for President Fillmore's proclamation deploying military personnel in Boston).

[187] Millard Fillmore, *Proclamation 56—Calling on Citizens to Assist in the Recapture of a Fugitive Slave Arrested in Boston, Massachusetts* (Feb. 18, 1851), AM. PRESIDENCY PROJ., https://www.presidency.ucsb.edu/documents/proclamation-56-calling-citizens-assist-the-recapture-fugitive-slave-arrested-boston [https://perma.cc/PG6H-9YFT].

> [T]he Constitution declares that "the President shall take care that the laws be faithfully executed," and that "he shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States," . . . [f]rom which it appears that the Army and Navy 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.[188]

In addition to being a product of the time, the indirect phraseology may be attributed to the fact that his cabinet was divided on this conclusion. In an October 28, 1850, letter to Secretary of State Daniel Webster concerning a similar case arising in Pennsylvania, President Fillmore noted the cabinet was:

> somewhat embarrassed by the legislation of Congress on the subject, in 1807, and subsequent Acts, which would seem to imply that this was a power to be conferred by Congress, but after a careful examination of the subject, I came to the conclusion that it was an inherent Executive power enforced by the Constitution, when it made the President commander-in-chief of the Army and Navy, and required him to take care that the laws be faithfully executed. In this, however, the whole Cabinet were not agreed.[189]

As an alternate basis, some within his cabinet argued that U.S. marshals had the authority to call upon units of the Army and Navy as a *posse comitatus* to enforce the laws.[190] This alternate (statutory and common law) theory would be widely adopted after its more formal articulation by Franklin Pierce's Attorney General, Caleb Cushing.

The Senate Committee on the Judiciary responded to Fillmore's assertion that:

> [w]hen occasions arise (which must necessarily be rare) where the civil power proves inadequate to maintain the law, the President is authorized, by the acts of Congress of February 28, 1795, and March 3, 1807, to call forth and employ, in the manner prescribed by these acts, the militia of the States, and the land and naval forces of the United States, to suppress insurrections, and to enforce the due

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[188] RICHARDSON, *supra* note 186, at 104. He later went on to assert that "so far as depends on me the laws shall be faithfully executed and all forcible opposition to them suppressed; and to this end I am prepared to exercise, whenever it may become necessary, the power constitutionally vested in me to the fullest extent." *Id*. at 105–06.

[189] PUBLICATIONS OF THE BUFFALO HISTORICAL SOCIETY, VOL. X: MILLARD FILLMORE PAPERS VOL. ONE 335–36 (Frank Severance ed., 1907).

[190] *See id*.

execution of the laws.[191]

This response pointedly does not endorse Fillmore's theory of inherent authority.

It's difficult to parse executive practice between the Fillmore and Hayes administrations because of Attorney General Cushing's opinion. In it, Cushing concluded that U.S. marshals, primarily due to the Judiciary Act of 1789, were authorized to summon military personnel to serve as a *posse comitatus*.[192] Again, this is notably not couched in constitutional terms, though the frequency with which it was invoked makes it difficult to parse examples of inherent constitutional authority from this more statutorily-bound legal rationale. In the years that followed, for example, there is evidence of local military commanders responding to requests from marshals under the Cushing Doctrine,[193] Presidents using the military to enforce the laws without recourse to statute or the Cushing Doctrine,[194] and direction being given (at the local command, War Department, and presidential levels) that the only permissible basis for such military deployments were statutory.[195]

Practice during this period would seem to fail both the liquidation and historic gloss tests. Let's turn first to liquidation. As noted above, I assumed an indeterminate constitutional provision—the Take Care Clause. There does not

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[191] S. COMM. REP. NO. 31-320, at 1 (Mar. 3, 1851). A dissenting view, offered by Sen. Butler, did not object to the committee's conclusion that no new legislation was necessary, but attacked more directly the President's claim to inherent authority. To wit, "[w]hatever might be the views of our ancestors, it is certain that until 1807 the militia was the only force put at the disposal of the President to suppress insurrections, &c." *Id*. at 4. He went on to say that "I do not think he has the right to call out the military force of the government without observing the prerequisites of the act of 1795" *Id.* And that "[t]he precedent for the direction of a mild and just President may be the rod of power for a military despot." *Id*. at 5.

[192] *See* Extradition of Fugitives from Service, 6 Op. Att'y Gen. 466, 473 (1854), in 11 OFFICIAL OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES ADVISING THE PRESIDENT AND HEADS OF DEPARTMENTS IN RELATION TO THEIR OFFICIAL DUTIES (C.C. Andrews ed., 1856).

[193] COAKLEY, *supra* note 36, at 144 ("Only after the Civil War was the doctrine to be openly invoked by both the attorney general and the War Department."). At least one compendium of the history of the Army's response to domestic disturbances can find no example of the Cushing Doctrine being invoked prior to the Civil War. *See id.* at 143–44. After the Civil War there was a more robust practice, based in part on renewed Attorney General instructions to U.S. marshals (discussed below).

[194] For example, President Buchanan, without recourse to the statutorily required proclamation or based on any request from U.S. marshals, authorized the use of force if the elected territorial government of Utah (overwhelmingly affiliated with the Church of Latter-Day Saints (LDS)) forcibly resisted an incoming non-LDS governor. *Id*. at 195–96.

[195] For example, President Pierce and lower-level commanders declined to act on repeated requests for military assistance by the territorial government of Kansas until the scale of unrest between pro- and anti-slavery factions provoked Pierce to issue, consistent with statute, a proclamation to disperse and authorization to use the military on February 11, 1856. *See id*. at 150. President Buchanan similarly signed a proclamation ordering John Brown's military force to disperse, after being informed of the imminent uprising, although then-Colonel Robert E. Lee did not issue it before firing on John Brown's forces in Harper's Ferry. *Id*. at 190, 192.

appear, however, to be a repeated and consistent practice of constitutional interpretation given the number of instances in which presidents relied on statutory authority or the Cushing Doctrine to use the military for law enforcement purposes. But even assuming the practice was consistent, it certainly was not "settled." Congress's response to President Fillmore is far from agreement with his legal theory. And it seems at least unlikely that we would find bipartisan agreement upholding an inherent presidential authority to enforce the Fugitive Slave Act in the years leading up to the Civil War.

This history would also seem to fail the criteria of historical gloss. There is certainly evidence of government practice. But presidents during this period had very different legal approaches to justifying use of the military, making it hard to conclude that the practice was "longstanding." It's at best unclear whether Congress acquiesced in an inherent presidential authority. Though no statutes were passed in response to President Fillmore's legal views, the responsive Senate report doesn't suggest that there was "stability" through uncontested executive branch practice.

2. The Protective Power

Turning to practice concerning the protective power after the Civil War, the criteria of historical gloss may well have been satisfied. The same can't be said of liquidation.

There is striking consistency, since the Civil War, in the opinion that the President or lower-level commanders may exercise the protective power. In 1877, for example, President Hayes authorized the Army to protect numerous federal buildings and facilities in Philadelphia during widespread unrest among railroad workers.[196] In a more pointed way, the Judge Advocate General in 1878 argued that the Posse Comitatus Act "does not interfere with the authority and duty of the executive to protect the United States mails from the depredation of robbers, and I advise the prompt use of whatever number of troops it may be necessary to employ for this purpose."[197] This proposition was reiterated in a 1921 Judge Advocate General memorandum opining that the military could be used to defend against "obstructions to the enforcement of the laws of the United States, or to the protection of United States property, or interference with the dispatch of United States mail, or other matters concerning agencies of the United States."[198] This

[196] LAURIE & COLE, *supra* note 36, at 40.
[197] Judge Advocate General to Secretary of War (Sept. 11, 1878) Letters Sent ("Record Books") (1842–1889) Vol. 39 of 57 Entry 1, Records of the Office of the Judge Advocate General (Army), Record Group 153, National Archives Building, Washington, D.C. (regarding a request by the governor of Wyoming, seemingly to protect the mails in the territory).
[198] Memorandum from the Judge Advocate General to the Chief of Staff, *Employment of United States Troops to quell domestic disturbances in a State*, at 7 (Jan. 6, 1921), Box No. 867, Central Decimal Files 1917-1925, The Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD [hereinafter Memorandum from the Judge Advocate General to the Chief of Staff].

proposition was reiterated in War Department legal documents in 1924,[199] 1925,[200] 1928,[201] 1941,[202] and 1943.[203] And as noted above, Army regulations from 1945 and 1948 also asserted this authority.

Let's pause to take stock of how this practice stacks up against our two tests. First, liquidation. As can be seen from the examples cited immediately above, the protective power was justified not by the text of Article II, but by reference to self-

[199] *Use of the Army*, § 480(1): Use of the Army in General: Emergencies., enclosed in DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 1912–1940, at 403 (1942), Box. No. 54, Army-AG Decimal File 1940-45, Records of the Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD (finding in a November 5, 1924, opinion that using troops to guard property of the Alaska Railway, which at the time was wholly owned by the Federal government, in case of strike "is entirely proper and requires no proclamation by the President or other special formality) [hereinafter *Use of the Army*]

[200] Letter from the Judge Advocate General to the Adjutant General, at 19 (Feb. 13, 1925), Box No. 58, Central Decimal Files 1917-1925 (Formerly Security Classified) Project Files, Record of the Adjutant General's Office, 1917, Record Group 407, National Archives at College Park, College Park, MD (in reviewing a forthcoming treatise on the use of the military to combat domestic disturbances, the Judge Advocate General opining that "the Government may exercise the inherent right of self-defense of its property or of property entrusted to its agencies without the issue of a proclamation.") [hereinafter Letter from the Judge Advocate General to the Adjutant General].

[201] *Use of the Army*, *supra* note 199, § 480(1), at 401–02 (in passing on the legality of assisting immigration authorities during a riot amongst Chinese immigrants on Angel Island, the Judge Advocate General opined that, "The common law recognizes the right of a nation to protect itself, its agencies and its property against violence.") (citing Apr. 13, 1928 decision, *id*. at 402).

[202] *Authority for Use of Federal Troops*, enclosed in WAR DEP'T, BASIC FIELD MANUAL: MILITARY LAW DOMESTIC DISTURBANCES, at 2 (Feb. 6, 1941), Box No. 317, Legal Opinion Precedent Files 1943–1955, Records of the Judge Advocate General, Record Group 153, National Archives at College Park, College Park, MD (noting that during "local emergencies" local commanders may undertake actions on their own accord that are "appropriate to the occasion, as are necessary to protect government property or the mails from damage or interruption" or "government officials from violence.") [hereinafter WAR DEP'T].

[203] *Use of Federal Troops at Request of State*, Memorandum No. S-500-1-43 (July 24, 1943), Box No. 317, Legal Opinion Precedent Files 1943–1955, Records of the Judge Advocate General, Record Group 153, National Archives at College Park, College Park, MD (in a memo from the Secretary of War transmitted to President Roosevelt concerning the use of the military during domestic disturbances, noting that "the President may call on the Army to protect government buildings without issuing a proclamation, where he deems it expedient."). This memo cited, as support for this proposition, President Hoover's 1932 response to the Bonus Marchers. *Id*. The legal basis for President Hoover's response is not entirely clear. The President issued a proclamation on July 28, 1932, noting that the Commissioners of the District of Columbia had requested military assistance because they "can no longer preserve law and order in the District." Herbert Hoover, *Statement About the Bonus Marchers.*, AM. PRESIDENCY PROJ. (July 28, 1931), https://www.presidency.ucsb.edu/documents/statement-about-the-bonus-marchers [https://perma.cc/3BAH-Y5HL]. The proclamation does not include the direction to disperse that would be required if the action was based on provisions of the Insurrection Act. *Id*. Although some of the actions involved the protection of federal government buildings, troops under the command of Gen. MacArthur routed bonus marchers across the Anacostia River from the seat of government, an area with no obvious federal property or functions to protect. The fact that this was done against the orders of President Hoover complicates what, if anything, of precedential value might be gleaned from this use of the military. LAURIE & COLE, *supra* note 36, at 382–83.

defense, sovereignty, and the common law. This seemingly wouldn't meet liquidation's first criteria—that a specific constitutional provision is indeterminate. This would also be an issue for historical gloss.[204] But, if we take OLC's contemporary view that these practices as based in the text of Article II, both the first and second criteria of liquidation and historical gloss would be met, as this practice was both "consistent" and "longstanding." I will return to analyzing the third prong of both tests after turning to the emergency authority, since congressional responses to executive branch practices have not been specific to either doctrine.

3. The Emergency Authority

Although the definition of the emergency authority has been remarkably consistent since 1878, what it has entailed in practice has varied significantly. This began in the years directly after its promulgation.[205] In 1879 the Judge Advocate General, for example, found no statutory or constitutional basis for the Army to accompany U.S. customs inspectors "for the purpose of better enforcing the revenue laws."[206] Yet in the same year, a local commander used the authority to protect property (public and private) in Salt Lake City during violence stemming from enforcement of anti-polygamy laws.[207]

War Department policy in the years during and immediately after World War I led to further confusion. Upon U.S. entry into the war, the War Department authorized local commanders to respond to any state or local request for law enforcement support.[208] Although this authority was later limited to "unforeseen emergenc[ies]" that prevented receiving instructions from higher headquarters, in practice commanders rarely sought such instruction.[209] Yet the Judge Advocate General issued two contemporaneous opinions at the same time contending that providing assistance in such circumstances were unlawful, further muddying the doctrinal water.[210]

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[204] *See* Bradley & Siegel, *supra* note 117, at 31.

[205] *See, e.g.*, LAURIE & COLE, *supra* note 36, at 73 ("After troops suppressed disorders, authorities in Washington either issued belated reprimands or justified intervention based on the extraordinary nature of the emergency. A process so disorderly and unpredictable confused both soldiers and civilians.").

[206] Letter from the Judge Advocate General to the Secretary of War, at 77 (Sept. 2, 1879), Vol. 41, Letters Sent ("Record Books") (1842-1889), Records of the Office of the Judge Advocate General (Army), Record Group 153, National Archives building, Washington, D.C.

[207] LAURIE & COLE, *supra* note 36, at 76–77.

[208] *Id*. at 230.

[209] *Id*. at 231–32.

[210] *See, e.g.*, Letter from the Acting Judge Advocate General to the Adjutant General (Oct. 25, 1917), Box No. 868, Central Decimal Files 1917-1925, The Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD (opining that commanding officer of Fort Pike Arkansas did not have the authority to act "upon his own initiative" to respond to request by the governor of Arkansas "for aid in suppressing riot or other civil disturbance beyond the control of civil authorities"); Letter from the Adjutant General to the Governor of

In 1919, the War Department established a similar policy days after President Wilson returned to D.C. after suffering a stroke that substantially incapacitated him for the remainder of his presidency.[211] Commanders were empowered "to take necessary action in cases arising within your Department" authorized under the Constitution and provisions of the Insurrection Act "without reference to [the] War Department.[212] In truth, however, it seems more accurate to characterize the War Department's actions as based in a theory of inherent authority. This is because the delegation is inconsistent with the Insurrection Act's requirements for a presidential proclamation before each invocation[213] and because the Supreme Court has held that Article 4, Section 4 empowers Congress, not the President.[214] This sea of delegated authority defies straightforward categorization. Were these wartime measures species of the emergency authority? Separate delegations? There is evidence to support both theories.[215]

Georgia (Sept. 13, 1917), Box No. 868, Central Decimal Files 1917-1925, The Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD (concerning a request from the Governor of Georgia); *Right of Military Police to Assist the Civil Authorities in the Execution of the Law* (Mar. 21, 1918), enclosed in DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY (March 1918), Box No. 48, Central Decimal Files 1917-1925, The Adjutant General's Office, Record Group 407, National Archives at College Park, College Park MD (opining that "military authorities have no power to order the Military Police or any other part of the Army, as such, to assist the civil authorities in the execution of the law, except when called upon in the manner provided for in the Constitution of the United States and the acts of Congress.").

[211] *Woodrow Wilson – Strokes and Denial*, UNIV. OF ARIZ. UNIV. LIBR., https://lib.arizona.edu/hsl/materials/collections/secret-illness/wilson [https://perma.cc/JLA2-8F8V]; Memorandum from Chief, Operations Branch, War Dep't to the Adjutant General, *Employment of Troops in emergency* (Sept. 29, 1919), Box No. 867, Central Decimal Files 1917-1925, The Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD [hereinafter Memorandum from Chief, Operations Branch]. Examples of actions taken by the military pursuant to these instructions can be startling. Military officers imposed martial law in a variety of cities (including by prohibiting public meetings, parades, and bearing arms), LAURIE & COLE, *supra* note 36, at 269, raided labor meetings, *id*. at 237, arrested union organizers, *id*. at 236, and sponsored "loyal" unions, *id*. at 237–38.

[212] *See* Memorandum from Chief, Operations Branch, *supra* note 211. Reading this delegation in conjunction with contemporaneous memoranda sent to several governors make clear that the War Department was specifically referring to Article 4, Section 4 of the Constitution. *See* Memorandum from the Secretary of War to the Governor of California (Sept. 29, 1919), Box No. 867, Central Decimal Files 1917-1925, The Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD (stating that "[i]n case of necessity for use of Federal troops in your State as protection against domestic violence under Article Four Section Four of the Constitution of the United States you are requested to communicate directly with General Liggett . . . who has been authorized to take the necessary action"). The provisions of the Revised Statutes cited in the memo represented the then-codification of the Insurrection Act (now in Chapter 13 of Title 10, U.S. Code).

[213] 10 U.S.C. § 254 (2023).

[214] Luther v. Borden, 48 U.S. 1, 42–43 (1849) (holding that it "rests with Congress to decide what government is the established one in a State" and to "determine upon the means proper to be adopted to fulfil this guarantee" of protection).

[215] *Compare*, a February 13, 1925, memo from the Judge Advocate General to the Secretary of War's Chief of Staff reviewing a pre-publication version of MILITARY AID TO THE CIVIL POWER that disputed the legality of the 1919 order and sought to recast past examples of emergency

By the 1920s, the War Department abandoned expansive interpretations of the emergency authority. In a variety of memoranda, the War Department asserted that the emergency authority could only be used when the military was needed to execute the protective power.[216] This retrenchment[217] seems to have been motivated by a desire to reset civil-military relations, which had suffered because of the

activity as falling within the emergency authority (specifically, the Judge Advocate General asserted that "[n]o authority is known for the power given corps area commanders in the year 1919, and it is unnecessary at this time to determine whether or not the authority given to such commanders could legally be given," Letter from the Judge Advocate General to the Adjutant General*, supra* note 200, at 20), *with* a December 2, 1920, memorandum restoring the "true relationship" of federal and state obligations after the "indulgent construction of the limitations upon the use of the Federal forces" required during World War I, Memorandum from the Secretary of War to the Chief of Staff (Dec. 2, 1920), Box No. 867, Central Decimal Files 1917-1925, The Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD.

[216] Again, in the February 13, 1925, memorandum, the Judge Advocate General asserted that the emergency authority only pertains to "the Government's right of self-defense . . . not authority for them to attempt to enforce the laws generally or to suppress insurrection prior to the issue of a presidential proclamation." Letter from the Judge Advocate General to the Adjutant General*, supra* note 200, at 18. Even more explicitly, the Judge Advocate General states that "the authority therein contained [i.e., in the emergency authority] is obviously limited to the defense of Federal property or instrumentalities and does not even by inference warrant the use of troops for the enforcement of the laws." *Id*. at 20. This opinion was endorsed by the Secretary of War on February 20, 1925. *See* Letter from the Assistant Chief of Staff, War Dep't, to the Adjutant General (Feb. 20, 1925), Box No. 58, Central Decimal Files 1917–1925 (Formerly Security Classified) Project Files, Record of the Adjutant General's Office, 1917–, Record Group 407, National Archives at College Park, College Park, MD. The lack of a more general emergency authority can also be inferred from other opinions stating unequivocally the need to abide by statute before undertaking law enforcement tasks. *See, e.g.*, an October 22, 1921, memorandum from the War Department Chief of Staff (on behalf of the Secretary of War) to War Department representatives to a meeting conducted by the Department of Commerce on labor unrest in the railway industry, which stated that "[t]he Statutes are exact as to when the military power of the Government can be exercised. Until the conditions therein specified arise and the laws placing the military in control are fully complied with the Civil Government is supreme," Letter from Acting Chief of Staff to War Dep't Representatives, *Measures to be taken in case of a General Railroad Strike*, at 1 (Oct. 22, 1921), Box No. 14, Central Decimal Files 1917-1925, Adjutant General's Office, 1917-, Record Group 407, National Archives at College Park, College Park, MD; a July 10, 1929, Judge Advocate General opinion which similarly stated that, "The War Department does not in time of peace cooperate with or render any assistance to any civil agency for this purpose except as authorized by the President during emergencies in which Federal troops are or may be employed in aid of civil authorities." *Use of the Army*, *supra* note 199, § 502: Suppression of insurrection against a State. This construction of the emergency authority persisted in War Department doctrine through the early 1940s. The February 6, 1941, BASIC FIELD MANUAL ON MILITARY LAW: DOMESTIC DISTURBANCES, for example, notes that local commanders may act in cases of "local emergencies" based on War Department regulations, which limit authorized actions to those "appropriate to the occasion, as are necessary to protect government property or the mails from damage or interruption" or to protect "Government officials from violence." WAR DEP'T, *supra* note 202, at 2.

[217] *See, e.g.*, January 6, 1921, Judge Advocate General opinion noting that "[o]f course there is no inherent authority in the military establishment itself to maintain, upon its own initiative, the supremacy of the law either of the United States or of a State." Memorandum from the Judge Advocate General to the Chief of Staff, *supra* note 198.

Army's many interventions in labor disputes throughout the prior decades.[218]

The pendulum swung back towards a more capacious understanding of the emergency authority in the mid-1940s. In memoranda for President Roosevelt[219] and other legal documents,[220] the War Department (and later DoD) emphatically

[218] *See generally* LAURIE & COLE, *supra* note 36 (describing episodes of Army interventions). A December 2, 1920 memorandum by the Secretary of War is explicit about this about-face and the tenuous legality of wartime measures: "It should be stated that during the emergency caused by the World War, the National Guard of the several States having been drafted into the Federal service and the States being thus stripped of domestic military forces, a relaxation of this rule was necessary in the public interest. After the return and demobilization of the Army the National Guard was of course discharged from its Federal and State obligations at the same time, and until new forces could be organized the same public necessity required an indulgent construction of the limitation upon the use of the Federal forces." Memorandum from the Secretary of War to the Chief of Staff, *supra* note 215. Similarly, the War Plans division in a 1921 update to civil disturbance contingency plans noted that, "United States troops have been employed in the past under conditions which might have involved the use of fore accompanied by loss of human life resulting therefrom. Had such loss of life occurred, the courts might have held that the United States troops then employed were not authorized to use force and were therefore not employed in strict accordance with the law." Memorandum from the Assistant Chief of Staff to the Chief of Staff, *Employment of United States Troops in Minor Emergencies under the War Plan White.* § IV.2, at 3 (Dec. 11, 1920), Box No. 867, Central Decimal Files 1917-1925, The Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD.

[219] In a memorandum provided to President Roosevelt in 1943, the War Department noted two non-statutory authorities for using military personnel. The first is the emergency authority, articulated in terms identical to that provided in Army regulations and illustrated by the military response to the 1906 San Francisco earthquake. *See The Use of Federal Troops in Case of Civil Disorder*, enclosed in Letter from the Secretary of War to the President (Aug. 19, 1943), Box No. 2849, Army-AG Decimal File 1940–45, Records of the Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD; *The Use of Federal Troops in Connection with Domestic Disturbances Within the United States* § 2 (1943), Box No. 317, Legal Opinion Precedent Files 1943-1955, Records of the Judge Advocate General, Record Group 153, National Archives at College Park, College Park, MD [hereinafter *The Use of Federal Troops in Connection with Domestic Disturbances Within the United States*]. The second is the authority to act without a request from a local authority or need for a proclamation to protect government buildings; for which the illustrative example provided is the military response to Bonus Marchers. *See id.*, § 4.

[220] *See, e.g.*, June 22, 1945 memorandum concerning the need to revise Army Regulation 500-50, highlighting in particular the fact that the 1937 version does not distinguish the protective power from the emergency authority, Memorandum of the Provost Marshal General to the Assistant Chief of Staff, Operations Division et al., *Proposed Revision of AR 500-50* (June 22, 1945), Box No. 2849, Army-AG Decimal File 1940–45, Records of the Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD; June 5, 1946 memorandum similarly noting that the Army must be prepared "on call of the civil powers to assist them in the control of domestic emergences in the event of imminent necessity," without reference to any Federal nexus, Memorandum from the Adjutant General to the Commanding Generals of the Army, *Control of Domestic Emergencies (Interim Instructions*) § 5.c.(1) (June 5, 1946), Box No. 1266, Army-AG Decimal File 1946-48, Records of the Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD; January 17, 1969 memorandum asserting two non-statutory grounds for using military personnel for civil disturbance response, "protect[ion of] Federal property and functions" and "the authority of a commander to act in the event of an emergency." Memorandum from Army General Counsel to Administrative Officer for

asserted that this doctrine authorized using the military for general law enforcement purposes. This re-expansion was most obviously manifest in revisions to Army Regulation 500-50 and DoD regulations starting in 1971, which distinguished the protective power from the emergency authority.[221]

The emergency authority doesn't fare well under liquidation or historical gloss. It is difficult to reconcile the emergency authority with liquidation because there's no indication that the executive has ever sought to justify the emergency authority by the text of Article II.[222] Instead, the executive has consistently rooted it in general principles of sovereignty and doctrines of military necessity. But, even if we assume that the text of Article II justifies the emergency authority, there was no consistency in the actions taken under it. This would suggest that liquidation's second criteria would, regardless, also not be met. This inconsistency may be less fatal under a historical gloss analysis. As Bradley has noted, in the context of the President's unilateral authority to terminate treaties, constitutional settlements mediated under a historical gloss approach may change over time if the question is seen through a historical lens.[223] Executive branch lawyers, therefore, might argue that it is only the executive's post-World War II understanding of the emergency authority that reflects a modern gloss on the President's authority. This argument, however, is unpersuasive for two reasons. First, I am aware of no actual practice taken under this theory after World War II. And, even if there is, I am equally unaware of any congressional notice of, let alone acquiescence to, such a theory.

C. Congressional Reaction to Executive Branch Practice

Congressional reaction to this pattern of practice entirely fails to meet the standards of liquidation and only tentatively meets those of historical gloss. Specifically, I find no instance in which Congress affirmatively acquiesced to an assertion of inherent executive branch authority under the protective power or emergency authority.

OLC opinions regarding the protective power make much of Reconstruction-era congressional debates. OLC relies, for example, on President Grant's January 22, 1877, report to Congress regarding uses of the Army in Virginia, South Carolina, Louisiana, and Florida beginning in August 1876.[224] In it, President Grant cites a plethora of authorities the executive relied upon to use the military for law enforcement. These include the Guaranty Clause (without indicating whether he understood it to grant independent presidential authority), Title 24 of the Revised Statutes (which codified the Enforcement Acts and

National Commission on the Causes and Prevention of Violence, at 4 (Jan. 17, 1969), Box 83, Accession No. 335-73-101, UD-UP 34, Records Of the Office of the Secretary of the Army, Record Group 335, National Archives at College Park, College Park, MD.

[221] *See supra* Part II.B.

[222] *See infra* Part IV.A.

[223] *See* Curtis Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 826 (2014).

[224] MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 44–30, at 1 (1877).

empowered the President or "such person as he may empower" to use the Army, Navy, or militia to enforce its terms), Title 69 of the Revised Statutes (which codified the Calling Forth Act and the authority to use the Army to enforce the laws), and the practice of Presidents "exercis[ing] his power as commander of the Army and Navy to prevent or suppress resistance to the laws of the United States, or where he has exercised like authority in obedience to a call from a State to suppress insurrection."[225]

The report reproduces three General Orders that reflect this heterogeneous approach. General Order 48, for example, implemented the Enforcement Act by authorizing commanders to respond to requests for assistance from "authorized civil authorities of the United States."[226] General Order 96 transmitted instructions from Attorney General Alphonso Taft to U.S. marshals reaffirming the Cushing Doctrine.[227] In General Order 85 the President directed that commanders "protect[] all citizens . . . in the exercise of the right to vote" when requested by proper legal authorities based on "the spirit" of a House Resolution.[228] None of them explicitly rely on an inherent presidential authority. Of course, one cannot be ruled out in any of the many military actions undertaken during this period. But it's telling that, although inherent authorities are noted in the report, they are markedly absent from the documents on which the report is based.

Regardless of what the executive conveyed in this report, Congress did not debate its contents after receiving it. Its contents, however, did motivate debates about the Posse Comitatus Act. Yet even here the congressional record is contradictory. Senator Samuel Kirkwood described the debates best when he asked how "without ourselves agreeing upon the circumstances under which the Army may be lawfully used, differing as widely as the poles . . . we undertake by this section to say that if the officers of the Army take the views of one set of Senators, they shall be subjected to the penitentiary or to a fine."[229] There was no consensus about what inherent authority, if any, the President had to use the Army for law enforcement purposes or whether that authority was express or implied in the Constitution. Some Senators opined that there simply was no such authority. For example, Senator Francis Kernan, a Democrat of New York, noted:

I suppose . . . no one claims that you can use the Army as a *posse*

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[225] *Id*. at 2–4.
[226] *Id*. at 10.
[227] *Id*. at 7–8. Although not referenced, it is possible that this revised General Order, and Attorney General instructions to U.S. marshals, was motivated by the Supreme Court's decision in United States v. Cruikshank, 92 U.S. 542 (1875), which struck down significant portions of the Enforcement Act of 1870 and held that the due process clause and equal protection clauses of the 14th Amendment pertained only to State government action.
[228] In pertinent part, the House resolution called on the President to resist "all attempts by force, fraud, terror, intimidation, or otherwise, to prevent the free exercise of the right of suffrage in any State should meet with certain, condign, and effectual punishment" H.R. DOC. NO. 44–30, *supra* note 224, at 5.
[229] 7 CONG. REC. 4297 (1878) (statement of Sen. Kirkwood).

> *comitatus* unless that use is authorized by the Constitution, which it clearly is not, or by act of Congress. The Constitution authorizes its use to repel the invasion of a State and to suppress domestic insurrection, on the call of the Legislature if in session, or, if it be not in session, on the call of the governor.[230]

Others argued that the President's inherent authority was implied in the Take Care Clause. For example, Senator George Edmunds, Republican from Vermont, in criticizing the Act, argued that:

> [I]f a mob were to assail the Treasury Department to-day and undertake to get possession of it, the President of the United States could not send for the Marine Corps or for the little handful of men down at the arsenal to protect that public property, for there is no statute of the United States that I can find which authorizes him to do it. He does it under his general duty of taking care of the execution of the laws and the protection of public property.[231]

Still others pointed to the Guaranty Clause.[232] In the end, the Senate passed a revised version of the text that struck out the requirement that constitutional or statutory exception be "expressly" stated.[233] Yet this revised text did not survive conference with the House.[234]

What to make of this legislative sausage making? Even the Senate and House conference reports are unable to provide a consensus view about the scope

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[230] *Id*. at 4240. Later, Sen. Kernan again argued "[u]nless there is some law that says that if there shall be resistance to the collection of the revenue the marshal may call in the military as a posse, I deny the right to so use it, notwithstanding the opinion of any Attorney-General. Unless there be some express authority to do it, I am opposed to leaving it so that any Attorney-General, under the general authority of the President to see that the laws are executed, may say that he can use the military against the citizen as a *posse comitatus* at all." *Id*. at 4242. Taking a different approach, but arriving at the same conclusion, Sen. Augustus Merrimon, Democrat of North Carolina, argued that if "[t]here is an assassin here in front of the Capitol; he is about to take my life; and there comes along a lieutenant with a squad of men. That lieutenant has no right to command the soldiers to fire upon the assassins, none on the face of the earth, but it is the duty of the lieutenant and it is the duty of the soldiers to interpose to prevent that murder, not as soldiers but as men having souls in their bodies." *Id*. at 4245. Sen. Merrimon, when pressed, asserted that this would be justified "[b]y the law of nature; by the common law of the country; by the Constitution of the country." *Id*. at 4246.

[231] *Id*. at 4295. Likewise, Sen. Thomas Bayard, Democrat of Delaware, on the second day of debate and at pains to argue that the Act would leave the President's authority untouched, said that "if the Army were necessarily employed it would be a power lawfully exercised." *Id*. at 4296.

[232] *Id*. at 4243 (statement of Sen. Merrimon) ("the Constitution provides for the case of insurrection in a State or resistance to the laws of the state").

[233] *Id*. at 4303–04.

[234] *Id*. at 4648, 4686.

of the President's inherent authority.[235] At a minimum, it takes a selective review of this record to find in it any consensus about the President's constitutional authority to use the military for law enforcement.

I am aware of only two further instances in the twentieth century in which these doctrines of inherent authority came before Congress. In both 1903 and 1922, Congress requested a War Department report on the domestic use of the military.[236] I can find no evidence of congressional debate based on these reports, though their content (or lack thereof) is itself illuminating. For example, in recounting President Fillmore's use of the military to assist U.S. marshals in the Shadrach case, the report doesn't mention President Fillmore's theory of inherent presidential authority.[237] Indeed, throughout the report, there is no mention of any provision of Article II generally or the Take Care Clause specifically. Like the War Department and Army regulations discussed above, the only constitutional authority mentioned is the Guaranty Clause.[238]

This is not to say that the reports ignored instances in which we independently know that the protective power or emergency authority were used. The report reproduced, for example, the 1901 Army regulation authorizing activities under the emergency authority (and, incidentally, the protective power).[239] Further, a careful reader will see indications of presidents and other executive branch officials acting without statutory authority. For example, the report contains an 1877 presidential order, delivered by the Secretary of War, for troops to protect Treasury officials and otherwise protect U.S. property.[240] The report also notes how the War Department informed the governor of Michigan that troops were available to "protect public property" during the 1877 Detroit labor strikes.[241] Perhaps most opaquely, for the entire extraordinary period surrounding World War I, the report only notes that "[f]ederal troops were sent to the scenes of

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[235] The Senate reporter seems to allow for an understanding that an express constitutional exception may exist, or at least that the President might argue one exists ("With reference to the word 'expressly,' we restored it and allowed it to go in, so that now the employment of such force must be expressly authorized by the Constitution or by act of Congress, they assenting that the words 'the Constitution or by' before the words 'act of Congress' might remain in, so that if the power arises under either the Constitution or the laws it may be exercised and the Executive would not be embarrassed by the prohibition of Congress to act where the Constitution requires him to act; and the embarrassments would not have the effect of restraining the action of an upright and energetic Executive, but still might raise a question which he would desire to avoid if possible."). *Id*. at 4648. The House reporter seemed to allow no such conclusion, asserting that—by rejecting the Senate amendment to strike out the word "express"—the Senate yielded to "the great principle that the Army of the United States in time of peace should be under the control of Congress and obedient to its laws." *Id*. at 4686.

[236] S. Res. 354, 67th Cong. (Sept. 20, 1922) (reproduced in FEDERAL AID, *supra* note 5).

[237] FEDERAL AID, *supra* note 5, at 62–63.

[238] *See, e.g.*, *id.* at 1 (summarizing the legal framework), 122, 129, 290–91, 317, and 320.

[239] *Id*. at 6.

[240] *Id*. at 173.

[241] *Id*. at 175.

minor disorders which now would be quelled by State forces."[242] It goes on to say that, "[f]rom July 1, 1918, to September 1, 1920, Federal troops were ordered out on 29 such occasions, but in no case was it deemed necessary to issue the proclamation" required under relevant statutory provisions.[243]

Liquidation and historical gloss would seem to treat these indicia of congressional engagement differently. Congress did not, in any instance, endorse an assertion of inherent authority. Indeed, doing so in many instances would have been complicated by opaque and incomplete executive branch reports. Without assessing whether the protective power or emergency authority enjoyed public sanction, they were not sanctioned by Congress and as such, would fail under a liquidationist approach. Historic gloss would seem to take a more charitable view of this congressional silence. Unlike Congress's response to President Fillmore's report, there were no expressions of congressional disapproval during the twentieth century. True, the arguments of any one of many Senators during consideration of the Posse Comitatus Act could be used to support or detract from a theory of inherent presidential authority. But Bradley and Siegel, correctly in my view, dismiss the value of such one-off statements.[244]

These congressional reactions (or lack thereof), however, are only part of the story. Since the end of World War II, Congress has enacted a significant body of law governing the protection of federal instrumentalities and provision of military support to federal law enforcement agencies. The following partial summary provides a glimpse at the scope of relevant law.

First, the number of federal law enforcement agencies has radically increased since the end of World War II, such that there is now not a federal agency without a statutorily provided protective organization. For example, statute requires the Secretary of Homeland Security to "protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government (including any agency, instrumentality, or wholly owned or mixed-ownership corporation thereof) and the persons on the property."[245] This authority includes the ability to detail officers (from what is now known as the Federal Protective Service) to other agencies to more effectively protect their properties.[246] There are also a panoply of agency-specific law enforcement agencies, including the National Park Police,[247] U.S. Secret Service,[248] Bureau of Indian Affairs Police,[249] Bureau of Reclamation

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[242] *Id*. at 317.
[243] *Id*.
[244] Bradley & Siegel, *supra* note 117, at 18 (noting that, under a historical gloss perspective, "more weight is generally placed on the actual behavior of institutions than on their stated views, for the obvious reason that talk can be cheap in politics").
[245] 40 U.S.C. § 1315(a) (2022).
[246] *See* 40 U.S.C. § 1315(b)(1) (2022).
[247] 54 U.S.C. § 102701 (2022).
[248] 18 U.S.C. § 3056 (2022).
[249] 25 U.S.C. § 2802 (2022).

Security Response Force,[250] Diplomatic Security Service,[251] police forces of the Bureau of Engraving and Printing and the U.S. Mint,[252] Department of Veterans Affairs police,[253] U.S. Postal Police,[254] U.S. Capitol Police,[255] Supreme Court Police,[256] Smithsonian Institution police,[257] and (certainly not least) Federal Bureau of Investigation,[258] just to name a few. Further, Congress has provided several statutorily defined means by which DoD may support some, though not all, of these law enforcement agencies in their protective or other federal functions.[259]

Second, there are the many statutes that expressly authorize military personnel to conduct law enforcement activities. These include, of course, the provisions of the Insurrection Act.[260] But the list continues, to include assisting in the protection of National Parks and other federal lands (including, quite specifically, the protection of timber in Florida),[261] execution of quarantine and specified state health laws,[262] enforcement of certain customs laws,[263] and enforcement of certain prohibited transactions involving nuclear materials[264] and weapons of mass destruction,[265] just to name a few.[266]

It is entirely possible, likely even, that the enacting Congresses did not "intend" for any of these statutes to defeat assertions of inherent presidential authority. But, even when taking the more generous view of legislative activity counseled by Bradley and Siegel,[267] I must conclude that even the protective power no longer has a constitutional basis. There currently exists a substantial body of statutory law directing which organs of the executive branch have responsibility for all manner of federal property, persons, and functions. This body of statutory law further defines the terms by which the military may support these law enforcement agencies, terms that vary significantly from agency to agency. And this body of

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[250] 43 U.S.C. § 373b (2022).
[251] 22 U.S.C. §§ 4802, 4821 (2022).
[252] 5 U.S.C. § 5378 (2022).
[253] 38 U.S.C. § 902 (2022).
[254] 18 U.S.C. § 3061 (2022).
[255] 2 U.S.C. § 1961 (2022).
[256] 40 U.S.C. § 6121 (2022).
[257] 40 U.S.C. § 6306 (2022).
[258] *See, e.g.,* 28 U.S.C. § 533 (2022).
[259] *See, e.g*., 2 U.S.C. § 1970 (2022); Presidential Protection Assistance Act of 1976, Pub. L. No. 94–524, 90 Stat. 2475 (1976).
[260] *See* 10 U.S.C., Ch. 13 §§ 251–55 (2022).
[261] *See, e.g.*, 16 U.S.C. §§ 23, 78, 593 (2022).
[262] 42 U.S.C. § 97 (2022).
[263] 50 U.S.C. § 220 (2022).
[264] 18 U.S.C. § 831 (2022).
[265] 10 U.S.C. § 282 (2022).
[266] Many, though not all, of these exceptions are listed in DEP'T OF DEF., Instruction 3025.21, *Defense Support of Civilian Law Enforcement Agencies* (Feb. 27, 2013) (incorporating Change 1, effective Feb. 8, 2019).
[267] Bradley & Siegel, *supra* note 117, at 20 (advocating an approach that takes account of "various forms of congressional 'soft law,' such as committee reports and nonbinding resolutions").

statutory law goes yet further by providing enumerated circumstances in which the President, or another executive branch official, may nevertheless use the military to enforce the laws.

The Supreme Court's more generous approach to inherent executive power, expressed in *Dames & Moore v. Regan*,[268] is unavailing in the face of these statutes. In *Dames & Moore*, Justice Rehnquist upheld the President's authority to suspend claims filed in federal court made against Iran following the Iranian Revolution and attendant hostage crisis.[269] In so determining, the Court argued that although there was no express statutory basis for this power, two related statutes (the International Emergency Economic Powers Act and Hostage Act) were "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action."[270] Unlike in *Dames & Moore*, the range of statutes noted above makes it implausible that a consistent "indication of legislative intent" can be drawn to buttress claims that the claims of power emanates asserted through the protective power and emergency authority. Indeed, the fact that these statutes repeatedly repose the powers asserted through the protective power and emergency authority in federal law enforcement, and not military, organizations belies any shared congressional-executive vision of inherent authority. And as noted above, there is no explicit "history of congressional acquiescence" of the kind that the *Dames & Moore* Court substantially relied.

Indeed, my conclusion sits comfortably alongside the Court's decision in *Hamdan v. Rumsfeld*.[271] There, Justice Stevens refused to read in the general language of the 2001 Authorization for the Use of Military Force or Detainee Treatment Act specific authorization for the military commission under which Salim Ahmed Hamdan was tried.[272] The same is true here—a statutory regime empowering federal law enforcement agencies and specifically providing the (much more limited) circumstances in which the military may be used do not amount to congressional acquiescence in either doctrine.

There are almost certainly discrete situations in which one or more of the above statutes don't authorize the military to execute law enforcement functions, or at least only authorize it in a manner that is unsatisfying for policy or practical reasons. The Insurrection Act, for example, does not apply to Washington D.C.[273] But the D.C. Code, in a provision codifying federal statute, does authorize the President to use the D.C. National Guard to respond to riots in a manner

[268] 453 U.S. 654 (1981).
[269] *Id*. at 688.
[270] *Id*. at 677.
[271] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
[272] *Id*. at 593–95.
[273] 10 U.S.C. § 255 (2022) (providing that the word "state" only includes Guam and the Virgin Islands).

substantially similar to the Insurrection Act.[274] This limitation may be unsatisfying (it certainly limited the realm of statutory responses to the January 6 attacks). Yet this policy choice, in view of the sweeping volume of statutory law on the subject, is Congress's to make.

IV. SOVEREIGNTY AND NECESSITY: IMPLICATIONS FOR THEORIES OF INHERENT PRESIDENTIAL AUTHORITY

Why does the executive persist in asserting the protective power and emergency authority notwithstanding the Supreme Court's modern approach to inherent presidential authorities? In a word, because the executive's analysis rests on arguments rooted in sovereignty and necessity, not arguments about the meaning of the Take Care Clause. In this section, I first show why this is true[275] and then suggest how we might use historical practice to assess these assertions of power more productively.

Of course, the executive may simply be unlikely to abandon prerogatives not explicitly denied by the courts. This would be consistent with Rebecca Ingber's observations about the trajectory of presidential war powers.[276] I'm inclined to this view, though I think it only goes so far in helping us understand why the executive would ignore a case like *Youngstown*, which does touch on *Neagle* significantly in Justice Vinson's dissent.

A. The Role of Sovereignty and Necessity

Very little is said about the legal basis for the protective power and emergency authority through the early twentieth century. A comprehensive overview of military law (first published in 1896 and reissued in 1920), for example, fails to mention the protective power and notes only in a footnote the emergency authority.[277] Interestingly, both this overview and an April 12, 1878, Judge Advocate General opinion provide that Army officers and soldiers may in

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[274] D.C. CODE § 49–103 (2023) (authorizing the President to authorize the D.C. National Guard to aid in suppressing a "tumult, riot, mob, or a body of men acting together by force with attempt to commit a felony or to offer violence to persons or property, or by force or violence to break and resist the laws" when requested by the D.C. Mayor, U.S. Marshal for the District of Columbia (a federal official), or the National Capitol Service Director (a federal official within the Executive Office of the President, *see* 40 U.S.C. § 8502 (2022)).

[275] This is consistent with observations by Goldsmith & Manning, *supra* note 88, at 1838. In canvassing a wide range of Supreme Court cases invoking the Take Care Clause, the authors argue that the Clause has become "a placeholder for broad judicial judgements about the appropriate relationship among the branches in our constitutional system—like the Court's own Key Number for freestanding separation of powers principles." *Id*. at 1867.

[276] *See* Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces That Entrench Executive Power*, 110 AM. J. INT'L L. 680, 680 (2016) (arguing that systematic forces within the executive branch serve as a "slow, staircase-like, one-way ratchet, over time expanding and then entrenching assertions of power.").

[277] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 868 n.26 (1920).

their private capacity interpose "to prevent a breach of the peace," but cannot (outside the provisions of statute) do so as an effort of the Army.[278]

It is in the twentieth century that War Department legal opinions adopted the notions of sovereignty used in *Neagle* and *Debs* (though I found almost no references to either case in the record). Throughout the 1920s the War Department characterized the protective power as an example of the "government's right of self-defense."[279]

These opinions don't tie this authority to any provision of Article II or, for that matter, any other constitutional provision.[280] The same was true of the emergency authority (notwithstanding the vicissitudes of its scope)—War Department documents characterized it as stemming from, and justified by, necessity.[281] Again,

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[278] *Id*. at 877 ("While officers or soldiers of the army may individually, in their capacity as citizens, use force to prevent a breach of the peace or the commission of a crime in their presence, they cannot, (except as above,) legally take part, in their military capacity, in the administration of civil justice or law."); Memorandum from the Judge Advocate General to the Secretary of War, *Duty of Troops at El Paso* (April 12, 1878), Vol. 41, Letters Sent ("Record Books") (1842-1889), Records of the Office of the Judge Advocate General (Army), Record Group 153, National Archives building, Washington, D.C. ("Any person, it may be added, may interfere to prevent a breach of the peace attempted in his presence, but *this he does as a citizen*. Any combined action of U.S. troops, *as such*, to prevent breaches of the peace in violation of local law, must, in my opinion, be illegal and unauthorized, unless where such troops may be acting under the special authority above indicated.") (emphasis in original).

[279] *See, e.g., Use of the Army*, *supra* note 199, § 480(1), at 402 (recapitulating an earlier, 1922 Attorney General opinion which stated: "Certainly the Government of the United States may through its various departments protect the property committed to the care of such departments and may defend the operations of such departments against those who endeavor to obstruct them"); *Id*. at 401–02 (Judge Advocate General opinion holding that it was lawful for the commanding officer of Fort McDowell to use troops to detain Chinese immigrants on Angel Island Federal quarantine station); Letter from the Judge Advocate General to the Adjutant General, *supra* note 200, at 19 (the Judge Advocate General opining that "the Government may exercise the inherent right of self-defense of its property or of property entrusted to its agencies without the issue of a proclamation"). The 1921 Judge Advocate General opinion condemning the 1919 assertion of local commander authority was less straightforward in identifying a legal basis for the protective power, noting only that it "rest[s] on a different basis" (i.e., one other than Article IV's Guaranty Clause). Memorandum from the Judge Advocate General to the Chief of Staff*, supra* note 198, at 4.

[280] *See generally id*.

[281] *See, e.g.*, Jan. 6, 1921, Judge Advocate General memorandum noting that local commanders exercising the emergency authority are "exercise[ing] *his* judgment relying upon necessity for his justification. Such exceptional cases rest upon necessity and not upon the law." Memorandum from the Judge Advocate General to the Chief of Staff*, supra* note 198, at 4 (emphasis in original). In a 1943 memorandum to commanding officers, activities taken under the emergency authority "must be justified under the law of necessity and should be such that the commander would be criticized later had he not taken action," *The Use of Federal Troops in Connection with Domestic Disturbances Within the United States*, *supra* note 220, § 2. A 1945 memorandum directing revisions to AR 500–50, which characterized the emergency authority as justified "by the circumstances" and "the law of necessity," Memorandum of the Provost Marshal General to the Assistant Chief of Staff of the Operations Division and the Adjutant General, at 2 (June 22, 1945),

I can find no instance in which there is any reference to particular constitutional text. Indeed, guidance documents are often quite clear about the extra-constitutional nature of the commanding officer's authority.[282] In at least one War Department document, the protective power was explicitly justified on the same necessity-based grounds.[283]

There is an interesting semantic parallel here with a line of Supreme Court decisions regarding takings in wartime. The Court in *Mitchell v. Harmony*,[284] for example, upheld a claim against the government for property lost in war brought by a trader accompanying the Army during the Mexican-American War.[285] The Court found that a military officer may take the property of a U.S. citizen in time of war only where the danger posed to U.S. troops if the action wasn't taken was "immediate and impending; or the necessity urgent for the public service, such as will not admit of delay and where the action of the civil authority would be too late in providing the means which the occasion calls for."[286] Going further, the Court explicitly grounded this right in the emergency of the circumstance, not in any provision of the Constitution or a statute.[287]

Similarly, the Court in *United States v. Russell*[288] considered a claim for compensating the owner of three steamboats requisitioned into military service during the Civil War.[289] Again, the court asserted that:

> Extraordinary and unforeseen occasions arise . . . in cases of extreme necessity in time of war or of immediate and impending public

Box No. 2849, Army-AG Decimal File 1940–45, Records of the Adjutant General's Office, Record Group 407, National Archives at College Park, College Park, MD.

[282] *See, e.g*., Army Regulations 500–50, *supra* note 159, § 5.b ("[C]ommanding officers who have been confronted with emergency situations caused by floods, earthquakes, fires, and other like disasters have in the past taken prompt and vigorous action to the fullest extent permitted by the men and material at their disposal, in order to relieve suffering; and their action has been supported by their superiors and by public opinion."); *The Use of Federal Troops in Case of Civil Disorder, supra* note 219, at 3 (noting that "[t]here is no specific statutory authority for [the emergency authority], but officers who in the past have taken prompt and vigorous action in such circumstances have been supported by their superiors and by public opinion. Military commanders, confronted by such situations in the future, who act likewise, may reasonably anticipate that their action will be similarly supported.").

[283] In the 1943 memorandum for commanding officers, noting "the 'law of necessity' inherent in every sovereign to preserve its existence. Thus, the President may call on the Army to protect government buildings without issuing a proclamation, where he deems it expedient." *Use of Federal Troops in Connection with Domestic Disturbances within the United States*, *supra* note 219, § 4(b).

[284] 54 U.S. 115 (1851).

[285] *Id*. at 128–30, 135, 137.

[286] *Id*. at 134.

[287] *Id*. ("It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."); *Id.* at 137 ("Urgent necessity would alone give him the right" to take private property).

[288] 80 U.S. 623 (1871).

[289] *Id*. at 628–29.

> danger, in which private property may be impressed into the public service or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner.[290]

Consistent with the language used in *Mitchell*, and again reminiscent of the emergency authority, the Court found that the "public danger must be immediate, imminent, and impending, and the emergency in the public service . . . extreme and imperative, and as such will not admit of delay or a resort to any other source of supply" and again that "it is the emergency, as was said by a great magistrate, that gives the right."[291]

These textual similarities show how the logic of the emergency authority serves the same purposes as the concept of military necessity under the *jus in bello* (international law related to the conduct of hostilities). The International Committee of the Red Cross, for example, defines military necessity as "measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited" by the laws of war.[292] The concept of military necessity was first codified in the Lieber Code, which governed the conduct of hostilities during the Civil War.[293] And as noted above, OLC's Pentagon Opinion acknowledged this connection between principles of martial law and the legal basis for the protective power, even when exercised during peacetime.[294]

By shifting to a focus on *Neagle* and *Debs*, OLC can only go so far in abandoning the sovereignty and necessity-based roots of prior government opinions. Rooting the protective power and emergency authority in Article II requires significant abstraction from constitutional text. Henry Monaghan's 1993 article arguing for a constitutional foundation for the protective power, for example, relies primarily on structure.[295] Similarly, Michael Paulsen argues, relying on the

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[290] *Id*. at 627.
[291] *Id*. at 628.
[292] *Military Necessity*, INT'L COMM. OF THE RED CROSS, https://casebook.icrc.org/glossary/military-necessity [https://perma.cc/ZXU5-FTDN] (last visited Jan. 19, 2023).
[293] *General Orders No. 100: Instructions for the Government of Armies of the United States in the Field*, Adjutant General's Office (Apr. 24, 1863) (Article 15 providing that: "Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.").
[294] *Pentagon Opinion*, *supra* note 127, at 3–4.
[295] Monaghan, *supra* note 2, at 11 (interpreting the Take Care Clause, concluding that the Clause

President's oath of office, that the constitution includes a "meta-rule of construction" by which "constitutional and national self-preservation" may "in cases of extraordinary necessity, trump specific constitutional requirements."[296] by relying on the President's oath of office, not a textual analysis of the Take Care Clause or Executive Vesting Clause.[297] Whatever one's perspective on this type of argument,[298] we have seen how these rationales have little connection to the executive branch's legal justifications for the protective power or emergency authority.

The challenge of reconciling broad assertions of constitutional authority with constitutional text isn't limited to the protective power and emergency authority, and certainly isn't new. Take, for example, an 1861 opinion by President Lincoln's Attorney General, Edward Bates, regarding unilateral presidential suspension of the writ of *habeas corpus*.[299] Bates notes that, unlike in Europe, the U.S. constitution advertently "keep[s] the sovereignty always out of sight"[300] and recognizes the principle that "[o]ur government indeed, as a whole, is not vested with the sovereignty, and does not possess all the powers of the nation."[301] Yet, even Bates resorts to the oath of office and references to the Take Care Clause to argue that the President "in a peculiar manner, and above all other officers, [is] the guardian of the Constitution—its *preserver*, *protector*, and *defender*."[302] Like in *Neagle* and *Debs*, Bates locates this power outside the Constitution, as "a power necessary to the peace and safety of the country, [which] undeniably belongs to the Government, and therefore must be exercised by some department or officer thereof."[303]

For all these reasons, it isn't unusual or particularly unique that sovereignty and necessity underpin these two doctrines of inherent, implied constitutional authority. But it does suggest that we should be particularly careful in assessing whether a theory of inherent authority thought to be rooted in Article II is, in fact, plausibly connected to constitutional text.

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creates "the constitutional conception of a Chief Executive authorized to enforce the laws [that] includes a general authorization to protect and defend the personnel, property, and instrumentalities of the United States from harm.").

[296] Michael Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1257–58 (2004).

[297] *Id*. at 1258.

[298] *See, e.g.*, Michael K. Curtis, *Lincoln, the Constitution of Necessity, and the Necessity of Constitutions: A Reply to Professor Paulsen*, 59 ME. L. REV. 1, 10 (noting that "[i]t is one thing to recognize that, in exceedingly rare situations, presidents may act outside the constitution and still be judged as having acted reasonably, if not constitutionally. It is quite another to believe that the constitution itself allows the President to ignore its provisions in cases of emergency, in effect in cases the president says he considers an emergency.").

[299] Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74 (1861).

[300] *Id*. at 76.

[301] *Id*. at 77.

[302] *Id*. at 81–82 (emphasis in original).

[303] *Id*. at 84.

B. Revisiting Methodologies of Historical Interpretation Concerning Inherent Presidential Authority

Having established that the protective power and emergency authority aren't based in the text of Article II, is either a liquidationist and or historical gloss analysis even appropriate? Both, after all, are predicated on using historical practice to define ambiguous constitutional text. In this section, however, I argue that there's value in applying their criteria to questions of implied authority so long as the executive branch practice and underlying legal theory is notorious.

Let's start with first principles—do we gain anything useful from applying tests like those proposed by liquidation or historical gloss in contexts like this? Niko Bowie and Daphna Renan, for example, dispute the usefulness of judicially enforceable standards such as these.[304] Specifically, they argue that the turn to "juristocratic" standards is not essential to our constitutional scheme and was in fact a product of the Taft Court.[305] Instead of privileging judicial adjudication, they argue in favor of a republican approach to the separation of powers; empowering Congress and the President, "working through the interbranch legislative process," to "decide whether any particular institutional arrangement is compatible with the Constitution's separation of powers."[306]

Although Bowie and Renan reject liquidation and historic gloss as models of constitutional interpretation, it seems that one need not buy into a judicially-centered vision of constitutional law for liquidationist or historical gloss approaches to be useful. These two methodologies, after all, prioritize executive and legislative branch practices. And, as Curtis Bradley has noted, there is limited case law concerning historical gloss precisely because it is most useful in analyzing separation of powers matters that, for a variety of reasons, aren't litigated.[307] The methodologies also seem to agree that room exists for re-negotiating the division of power between the legislative and executive branches in light of changing practice (however that it is manifested). The greatest point of departure appears to be whether constitutional text in any way establishes a justiciable outer limit for this negotiated interbranch settlement. Bowie and Renan appear to dispute any such limit, concluding that based on their approach, "[w]e are aware of no statutory design, enacted to date, that we think would violate" republican separation of powers.[308] Baude, Bradley, and Siegel, appear to, at least implicitly, conclude that courts are capable of policing this interbranch settlement.[309]

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[304] Bowie & Renan, *supra* note 111, at 2029.
[305] *Id*. at 2028.
[306] *Id*. at 2030.
[307] Bradley, *supra* note 223, at 787–88.
[308] Bowie & Renan, *supra* note 111, at 2030.
[309] Baude, *supra* note 112, at 24–45 (citing Chief Justice Marshall's reasoning in support of the National Bank's constitutionality in McCulloch v. Maryland as an example of liquidation-type constitutional analysis); Bradley & Siegel, *supra* note 117, at 17–18 (rooting the historical gloss

Practically, at least as it relates to matters of national security, this ultimate question appears to be increasingly irrelevant. Courts routinely absent themselves from these separation of powers disputes. For example, the U.S. District Court for the District of Columbia refused to entertain an *ultra vires* claim against the Secretary of Defense in deploying National Guard personnel to Lafayette Square during the Black Lives Matter protests.[310] This should not be surprising in light of precedent establishing that *ultra vires* review is "essentially a Hail Mary pass."[311] The Supreme Court continues to progressively foreclose opportunities for bringing claims against Federal officials for violating constitutional rights.[312] And this is all without addressing more general issues of Article III standing.

Regardless of whether it will ever (or frequently) be enforced by a court, adopting a framework that scrutinizes executive branch assertions of power is important, particularly when dealing with powers implied from sovereignty. Bowie and Renan's framework appears to assume an ongoing, statutorily based conversation between the executive and legislative branches. The history of the protective power and emergency authority, however, suggest that this ideal type may, at least in this case, poorly reflect reality. And this ideal may be especially inapt in situations where executive branch practice and associated legal theories are not notorious, either to the public or to Congress. Again, this lack of notoriety is equally challenging for liquidation and historical gloss, which seem to both assume a level of interbranch transparency. So, in all cases, we are confronted with an informational asymmetry that undermines practical opportunities for hashing out the constitutional order.

Notoriety of executive branch practice is particularly important if you assume, as I do, that the executive is not the default conduit for exerting sovereign prerogatives (to whatever extent they may exist). This assumption is, of course, contested.[313] But this understanding of executive power is consistent with the historical work concerning the Executive Vesting Clause and Take Care Clause as well as constitutional structure.[314] The Necessary and Proper Clause and Guaranty Clause, for example, together empower Congress to authorize a wide range of conduct to preserve the republican integrity of the several states. And, finally, this view follows from the analytic approach taken by Justice Robert Jackson, who

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perspective in the Supreme Court's adjudication of separation-of-powers disputes in cases like *Youngstown* and Noel Canning v. NLRB).

[310] Black Lives Matter D.C. v. Trump, 544 F.Supp.3d 15, 41 (D.D.C. 2021).

[311] Nyunt v Chairman, Broad Bd. of Governors, 589 F.3d 445, 449 (D.C. Cir. 2009).

[312] *See, e.g.*, Egbert v. Boule, 142 S. Ct. 1793 (2022) (declining to find a new *Bivens* context).

[313] *See generally, e.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996) (arguing that the President has substantial constitutional war powers apart from any action that may be taken by Congress, even under the declare war clause); MICHAEL MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION (2020) (identifying a number of executive powers, stemming from the powers of the British monarchy, that are entirely subject to the president's discretion).

[314] *See supra* Part I.D.

argued that the President is the organ of federal sovereignty only in the absence of legislation.[315]

If the President is derogating from congressional authority when asserting power implied from sovereignty, it's instructive to think of how other areas of law treat attempts to assert the legal powers of another, like in the private law of prescription. There are many types of prescription, but most instructive for us is the form that countenances a claim to land that, "adverse to the owner of the land or the interest in land against which the servitude is claimed."[316] For this type of prescription, the claimant needed to prove that the landowner had knowledge of and acquiesced in the hostile claim.[317] This is broadly reflected in the generally prevailing test for prescription articulated by the Restatement (Third) of Property, which provides that an individual may establish a prescriptive use of land formally in the title of another through activity that is "open or notorious" and "continued without effective interruption for the prescriptive period."[318]

This heuristic suggests emphasizing three questions when assessing claims to inherent constitutional authority based in sovereignty. First, whether the executive branch practice and its legal basis are notorious. What constitutes sufficient notoriety will depend on context. Let's take the military response to Black Lives Matter protests in D.C. as an illustrative example. On June 1, when the military started to be deployed, the President stated only that "I am mobilizing all available federal resources—civilian and military—to stop the rioting and looting, to end the destruction and arson, and to protect the rights of law-abiding Americans."[319] On the same day, DoD officials were silent on the legal authority for deploying National Guard personnel (though the officials did note the authority was not the Insurrection Act).[320] Indeed, this exchange actually muddied the waters by confusing the authority for putting the National Guard on military duty with the underlying authority for the military personnel to protect federal property.[321] As

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[315] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
[316] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 (AM. L. INST. 1999).
[317] *See id*. § 2.17 cmt. b.
[318] *Id*. at § 2.17.
[319] Donald Trump, *Statement by the President*, WHITE HOUSE (June 1, 2020) https://trumpwhitehouse.archives.gov/briefings-statements/statement-by-the-president-39/ [https://perma.cc/FB8J-2SMU]. He continued, "I am dispatching thousands and thousands of heavily armed soldiers, military personnel, and law enforcement officers to stop the rioting, looting, vandalism, assaults, and the wanton destruction of property." *Id*.
[320] *Transcript: Department of Defense Officials Brief Reporters on the Department's Response to Civil Unrest*, DEP'T OF DEF. (June 1, 2020), https://www.defense.gov/News/Transcripts/Transcript/Article/2205228/department-of-defense-officials-brief-reporters-on-the-departments-response-to/ [https://perma.cc/PR76-EJW9].
[321] *Id*. (In response one senior defense official noted that "D.C. is a little bit different because of the relationship. The – the President – actually, the head of the National Guard in D.C. who's delegated that authority to the Secretary of Defense has delegated to the Secretary of the Army previously. So it is – we are nationalizing the National Guard forces."). A second official then noted "Quite simply the – the D.C. National Guard always does its missions for the district in the

discussed in the Introduction, even when officials appeared to reference the protective power eight days later, it was necessarily incomplete because it did not explicitly confirm the legal basis for the military action. Congress was never expressly put on notice about the executive's constitutional claims. Without some articulation of these claims, it's unclear how Congress could ever substantially engage with them (whether to refute or adopt them).

Second, and relatedly, is whether there are indicia that Congress acquiesced in the legal basis for an exercise of inherent authority. As shown by the history of the emergency authority, the activities that may be undertaken pursuant to a necessity-based authority may change significantly based on prevailing political realities, advances in technology, or other factors. The scope of activities justified by the emergency authority in the 1920s, for example, was radically different from what was understood to be authorized in the 1940s. Yet throughout this period, the articulation of the emergency authority in public-facing documents hardly changed. The same was true of the legal theories employed to justify the protective power and emergency authority, though of course these theories were significantly opaque to Congress over the past 150 years and were recharacterized significantly from 1967 to 1971.

Finally, in assessing congressional acquiescence, we should be particularly solicitous to statutory law that in whole or substantial part pervades the field, regardless of congressional intent. The statutes governing protection of federal functions were enacted over a huge swath of history. And they almost certainly weren't enacted in response to the protective power or emergency authority. Yet, they undeniably are germane to these two areas of practice. Discounting this accretion of statutory law makes even less sense in light of executive branch practice attributing congressional acquiescence to nineteenth-century debates or twentieth-century reports to Congress. Taken together, this history suggests, perhaps counterintuitively, that we should be most skeptical of executive branch practices taken to be longstanding. As the history of the protective power and emergency authority show, such practices may, in actuality, represent anything but a single, coherent, long-held practice or legal theory.

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same 502(f) status, which is federally funded on your [sic] the control, not Title 10 control, but under the control of the local authority, in this case, delegated to the Secretary of the Army. The troops – the soldiers coming from the other states will also be in that same status, so federally funded status but not Title 10, it's Title – it's Title 32." *Id*. As noted in the introduction, it would take someone unusually well-versed in the intricacies of statutory authorities governing the use of National Guard personnel to make any sense of these answers.

V. POSSIBILITIES FOR REFORM

Reining in the executive branch's reliance on the protective power and emergency authority won't be easy. As Oona Hathaway,[322] Daphna Renan,[323] and Rebecca Ingber[324] have noted, executive branch assertions of inherent legal authority are structurally difficult to limit once exercised. This paper suggests that these difficulties are amplified when engaging with legal arguments based in sovereignty and necessity. For this reason, this Part proposes statutory reforms that increase the political and practical costs for the executive to rely on these two doctrines.

The military response to Black Lives Matter protests and January 6 insurrection led to a torrent of criticism and sharp uptick in proposals for legislative reform. Thus far, the only reform that has been enacted is to extend the Posse Comitatus Act to cover all active-duty service members (not just members of the Army and Air Force).[325] Nevertheless, the list of proposed reforms continues. There is renewed interest, for example, in making D.C.'s mayor the commander-in-chief of the D.C. National Guard,[326] currently the only one that always reports to the President (even when conducting militia duties in what otherwise would be a state status).[327] There are also proposals to reform the Insurrection Act.[328] These reforms

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[322] Oona Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 U.C.L.A. L. REV. 2 (2021).
[323] Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017).
[324] *See* Ingber, *supra* note 276.
[325] 18 U.S.C. § 1385 (2022). Originally enacted as § 15 of Public Law 45–263, 20 Stat. 152 (1878), an act making appropriations for the Army in 1878, it originally prohibited employing "any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment." *See* Part I for a more detailed discussion of the Posse Comitatus Act.
[326] *See, e.g.*, Elizabeth Goitein & Joseph Nunn, *Why DC's Mayor Should Have Authority Over the DC National Guard*, BRENNAN CTR. FOR JUST. (Jan. 8, 2021) https://www.brennancenter.org/our-work/analysis-opinion/why-dcs-mayor-should-have-authority-over-dc-national-guard [https://perma.cc/VNZ2-VNBQ]; Press Release, Congresswoman Eleanor Holmes Norton, *Norton, Van Hollen, Carper, Maloney, Brown Call for D.C. Mayor to be Given Control Over D.C. National Guard in Final National Defense Authorization Act for Fiscal Year 2023* (Dec. 1, 2022), https://norton.house.gov/media/press-releases/norton-van-hollen-carper-maloney-brown-call-dc-mayor-be-given-control-over-dc [https://perma.cc/7Z9W-B5KC].
[327] D.C. CODE § 49–409 (2022).
[328] *See, e.g.*, Michael Waldman, *Reform the Insurrection Act*, BRENNAN CTR. FOR JUST. (Sept. 20, 2022), https://www.brennancenter.org/our-work/analysis-opinion/reform-insurrection-act [https://perma.cc/9FFP-FTD8]; Elizabeth Goitein & Joseph Nunn, *Statement to the January 6th Committee on Reforming the Insurrection Act*, BRENNAN CTR. FOR JUST. (Sept. 20, 2022) https://www.brennancenter.org/our-work/research-reports/statement-january-6th-committee-reforming-insurrection-act [https://perma.cc/3NZB-EMTT]. Proposals to revise the Insurrection

aim primarily at increasing the factual showings required of the President before the military can be used to enforce the laws. There are also initiatives to further amend the Posse Comitatus Act so that it may more readily be used by criminal defendants as a bar for admitting evidence allegedly obtained through an unlawful use of the military to perform a law enforcement function.[329]

The foregoing analysis, however, suggests that we should be cautious in how exacting we make these standards. If presidents have believed that the Insurrection Act, in its current form, is too restrictive, leading them to rely on inherent authority, there is a risk that these reforms will exacerbate this tendency. And there are also certain ways in which the Insurrection Act may in fact be insufficient. Take for example, its exclusion of D.C. from the jurisdictions in which the President may invoke the Act's authority. While the D.C. National Guard may have been sufficient to protect seat of government when the D.C. National Guard was established in the Jefferson administration, the military response marshalled by President Johnson in 1968 and in the aftermath of January 6 both significantly outstripped the D.C. National Guard's capabilities. This isn't to say that the Insurrection Act doesn't require updating, particularly to increase executive accountability. Canada's Emergencies Act, for example, requires that the executive make much more robust findings before invoking the powers granted in the Act and affords a degree of guaranteed legislative oversight that far exceeds any provision in U.S. law.[330] But it is to say that we should, however, be cautious of erring too far in favor of making the Insurrection Act an impediment to effective federal action when such action is needed during exigency.

The first fruitful avenue for reform I would propose, then, is to revise the Posse Comitatus Act to remove its reference to constitutional exceptions. As already discussed, there never was a consensus that any such exceptions exist. Aside from the protective power and emergency authority, I know of no other doctrines that rely on OLC's expansive understanding of this exception.[331] Moreover, constitutional powers most explicitly concerning domestic unrest are unequivocally afforded to Congress. The Militia Clause, for example, grants to Congress the power to "provide for calling forth the Militia to execute the Laws of

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Act are not new. Steve Vladeck, in a detailed analysis of the Constitution's militia clauses, for example, argues for some of the restraints included in the earliest grants of statutory authority. Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 193–94 (2004). *See* Part I for a more detailed discussion of the provisions of the Insurrection Act.

[329] *See, e.g.*, H.R. 7297, 116th Cong. § 2 (2020).

[330] *See, e.g.*, Emergencies Act § 58, R.S.C., 1985, c. 22 (4th Supp.) (Can.) (requiring in Part IV that the Prime Minister present to Parliament a justification for use of the authorities provided by the act and authorizes Parliament to revoke the declaration).

[331] Also note how OLC's approach to ascertaining whether the Take Care Clause provides an "express" exception to the Act is considerably more expansive than its approach to assessing whether a statute provides such an exception. *Compare* Southern Border Opinion, *supra* note 29, at 10, *with* Memorandum for the Att'y Gen. from Jay S. Bybee, Ass't Att'y Gen., Office of Legal Counsel*, Re: Determination of Enemy Belligerency and Military Detention*, at 9 (June 8, 2002).

the Union, suppress Insurrections and repel Invasions."[332] As noted above, the Guaranty Clause, as a power of the general government, is similarly within the ambit of Congress by virtue of the Necessary and Proper Clause. Nevertheless, the continued existence of this statutory exception only encourages the type of legal argumentation that continues to sustain the protective power and emergency authority.

Second, legislation should be enacted striking out Section 502(f) of Title 32, U.S. Code. Currently, this provision of law authorizes the President or Secretary of Defense to request that governors authorize their National Guard to perform a federal mission in a state duty status. In so doing, National Guard personnel remain members of the militia and are not subject to the Posse Comitatus Act.[333] It's clear that the political costs of using National Guard members for civil disturbance response is lower than using active-duty service members.[334] Removing this avenue for using the National Guard without mobilizing them into a federal duty status may increase the costs of resorting to these inherent authorities, and possibly disincentivize their use.

CONCLUSION

This article has shown the insidious effects of comingling reliance on historical executive branch practice and arguments about inherent constitutional authority based in sovereignty and necessity. Yet, I hypothesize that this combination of sovereignty, necessity, and historical practice may provide a deeper understanding of authorities asserted under the royal residuum approach to the Take Care and Executive Vesting clauses. To determine if this is correct, more work needs to be done to excavate what other doctrines of inherent authority, supposedly rooted in the text of Article II, share in this admixture of legal argumentation. This, in turn, will require developing a more detailed accounting of how sovereignty and necessity operate within our constitutional order.

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[332] U.S. CONST. art. II § 8 cl. 15.

[333] The Army and Air National Guard are the organized militia of the States and territories (including Puerto Rico) and the District of Columbia that meet the requirements of 32 U.S.C. § 101(4)–(7). For a more detailed discussion of this statutory scheme, *see supra* Part I.B.

[334] Susan B. Glasser & Peter Baker, *Inside the War Between Trump and His Generals*, THE NEW YORKER (Aug. 15, 2022), https://www.newyorker.com/magazine/2022/08/15/inside-the-war-between-trump-and-his-generals [https://perma.cc/X9RM-3GYA].