



James Meredith walks to class at University of Mississippi accompanied by U.S. Marshal James McShane (left) and John Doar of Justice Department, October 1, 1962 (Library of Congress/*U.S. News & World Report*/Marion S. Trikosko)

Calling Forth the Military

A Brief History of the Insurrection Act

By Michael R. Rouland and Christian E. Fearer

In the literal sense, the Insurrection Act does not exist. Rather than a singular piece of legislation, it is a broad, overarching concept for a series of acts dating to the 1790s that concern the use of American military forces within the United States.¹ These statutes, later

codified in current Title 10 *U.S. Code* 251–255, serve as the primary rationale for the delegation of authority to the President to use military forces domestically. In the past 50 years, only one President, George H.W. Bush, has used these emergency powers: in the Virgin Islands in 1989 and in Los Angeles in 1992. The 28 years since the Los Angeles riots mark the longest period in American history without a domestic deployment of troops under the act. In

part, local authorities—many armed and equipped to military standards—have proved more capable of handling disturbances and other crises. Additionally, domestic military deployments have proved politically difficult for Presidents whose critics have attacked such actions as gross usurpations of local authority by an overreaching Federal executive.

Our intention in this article is to outline the key historical events and

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decisions that frame the discussion of the Insurrection Act, which we will refer to henceforth as the *militia acts*, and the domestic use of military force. Rather than parse legal terms and interpretations, this historical discussion underlines the seminal events, laws, and court decisions that outline the broad Presidential authorities granted by the Constitution and Congress from our republic's earliest days.

Constitution of the United States

Apprehension over the use of military force is rooted in America's inherited political culture, which held a deep distrust of standing armies and their potential for domestic misuse. The founding generation was especially sensitive to this possibility and worked to alleviate such concerns in the Constitution.² The framers were in part spurred to action by the revolt of Daniel Shays in western Massachusetts in 1786, an economic and civil rights protest that revealed the weakness of the new central government under the Articles of Confederation. While there was discomfort at the notion of a regular Federal force or a means to draw state militias into Federal service, this revolt proved a serious threat to order and stability. The challenge was to equip the new Federal Government with the means to enforce the law and maintain order without curtailing the citizens' rights or infringing on states.

Delegates to the Constitutional Convention accepted the premise that the national government must possess a coercive emergency power the earlier articles lacked. A common view, espoused by Alexander Hamilton, argued that "the power of regulating the militia and of commanding its services in times of insurrection and invasion are natural incidents to the duties of superintending the common defence, and of watching over the internal peace of the confederacy."³ The central point of contention in Philadelphia concerning the domestic use of military force was over who would be responsible for invoking it. A standing military was a powerful instrument. To allay concerns, the Constitution did not

grant unequivocal or explicit authority to one branch but gave overlapping authorities to the President and Congress to use the military to quell domestic unrest.

The Constitution guaranteed the United States would protect its constituent states "against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." Article I granted this authority to Congress in two distinct clauses on the use of the militia. Congress was granted the power "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively." At the same time, the President was granted military authority in Article II: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." As commander in chief, the President would lead and direct those forces called forth by Congress. With respect to domestic unrest, Article II charges that the President "shall take Care that the Laws be faithfully executed." Whether this responsibility refers to broad powers of enforcement or "duty of fidelity" remains debated by legal scholars.⁴

Militia Acts of 1792, 1795, and 1807

Understanding the possibility that certain events may require swift action while Congress is in recess, the Second Congress temporarily delegated its authority under the First Militia Clause to the President by passing a statute "for calling forth the Militia" in May 1792.⁵ Under this law, Congress granted a President the authority to "call forth such number of the militia of the state or states" closest to the problem—in this case, invasion by a foreign power, conflict with Native Americans, or an insurrection in a given state—judged necessary to repel the

threat. This authority did not permit the President to act unilaterally. Rather, permission to call forth the militia was dependent on a request for assistance by either a state's legislature or governor.⁶

While Congress generally supported emergency executive powers to confront invasions and insurrections, Members of the Second Congress remained concerned over the prospect of using the militias to enforce the laws domestically.⁷ There were very few Federal officers in the new republic to enforce Federal law, and those few were ill-equipped to compel compliance. Using martial force to that end made many uncomfortable, presenting what more modern critics might call a slippery slope to overreach and abuse. To guard against this possibility, Congress included judicial, legislative, and temporal checks on the President's new emergency powers. Before a President could employ military force to enforce Federal law, an associate justice of the Supreme Court or Federal district judge had to certify that routine enforcement would be insufficient. Furthermore, anticipating that members of state militias might be unwilling to impose order within their own states, the President was granted the power to call forth militia from neighboring states and to keep them in the field up to 30 days after Congress returned to session.⁸

Still, after granting the President these powers, Congress required additional measures to avoid a confrontation with rioters and irascible citizens. Rather than having troops march straight to the place of unrest, the act required the President to issue a notification ordering the unruly body—insurgents, as described in the bill's language—to disperse.⁹ With all these precautions and protections, however, Congress was unwilling to permanently cede these powers, including in the bill's final section an expiration by the end of the next Congress.¹⁰

Two years later, in July 1794, President George Washington relied on this authority when responding to armed farmers protesting the new Federal excise tax in western Pennsylvania during what is known as the Whiskey Rebellion, thereby demonstrating the will of the



Within 1 hour of President Eisenhower's decision on September 24, 1957, Soldiers from 1st Airborne Battle Group, 327th Infantry Regiment, deployed to Little Rock, Arkansas, to escort nine Black high school students into formerly segregated Central High School amid racial protests (U.S. Army)

newly established Federal Government to suppress violent resistance to its laws. After negotiations failed to resolve the dispute, Washington requested certification from a Supreme Court justice that local law enforcement could no longer enforce the law. He then issued a proclamation in August indicating that he would raise a militia and demanded the Pennsylvania insurgents disperse by September 1. Washington, with the governor's support, assembled 13,000 militiamen from Pennsylvania and three other states. As the army marched west, the rebels dispersed.¹¹ When the army remained in the field as Congress came into session, legislators reauthorized the calling forth of the militia for an additional 3 months. Yet, to allay concerns

over potential abuses by the army, Washington disbanded the federalized force, its purpose achieved. At the time, critics generally praised Washington for his actions against the whiskey rebels and reaffirmed the validity of the Militia Act.¹² Washington demonstrated clear and persuasive deference to both the courts and the legislature in committing armed forces to dispel the largest incident of armed resistance to Federal authority between the Constitution's ratification and the Civil War.

The Third Congress replaced the original statutes in the Calling Forth Act with a new Militia Act in February 1795.¹³ While the Second Congress intended the delegation of authority to call forth the militia to be temporary and required the

explicit support of a Federal judge, the Third Congress made the delegation of authority permanent and eliminated three key checks on the President's authority: the antecedent court order, the limits on out-of-state militia, and the time requirements on the notification for dispersal.¹⁴ The President could now act quickly and unilaterally. As amended in 1795, this iteration of the Militia Act provided the foundation for the current law for 10 *U.S. Code*, Section 251.

The next century brought new challenges, prompting new laws. Thirteen years after Washington marched against the whiskey rebels, President Thomas Jefferson sought to use Federal troops—distinct from state militias—to challenge Spanish border incursions along the new

frontier at Natchitoches, Louisiana, and to intercept his former Vice President, Aaron Burr, who was suspected of organizing a filibuster expedition into Mexico.¹⁵ Jefferson himself drafted a new law *authorizing the employment of the land and naval forces of the United States, in cases of insurrections* that was approved by the Ninth Congress in March 1807, one of several bills passed on its last day.¹⁶ This legislation was an important expansion of emergency powers by adding Federal forces to the state militias available to quell insurrections and domestic unrest.

Congress refrained from passing any similar law for the next 50 years, although Federal Soldiers were used domestically for a variety of purposes and almost always in support of state governments that simply required additional forces. Cases included the putting down of slave revolts, enforcing fugitive slave laws, combatting vigilantism, and enforcing Federal laws governing relations with American Indians.

Instrumental Supreme Court Decisions of the 19th Century

While constitutional authority for the use of military force was clearly articulated in Articles I and II, the judiciary likewise weighed in on the subject. In the first half of the 19th century, two Supreme Court cases, *Martin v. Mott* (1827) and *Luther v. Borden* (1849), provided additional context for the statutory discussion of the President's authority to call forth the militia and would validate the President's broad powers derived from the militia acts. In both cases, the courts ultimately deferred to the executive to establish the limits on this authority.

Martin v. Mott adjudicated whether a citizen could be court-martialed for failure to report to the New York militia when the President called it up during the War of 1812. Justice Joseph Story, writing for the court, rejected the argument that the President lacked the authority to call forth individual citizens in their state militias, arguing that such authority came from the 1795 Militia Act. Specifically, Story argued that the

court shared the opinion "that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons." Story continued that the power was confided to the President as commander in chief and whose duty is to "take care that the laws be faithfully executed" and "whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions."¹⁷ Ultimately, the court confirmed a broad and unchallenged authority for the President when acting appropriately in calling forth the militia. Moreover, the court sided with the President over the states in deciding when to call forth the militia.¹⁸

Luther v. Borden was another early test for the Supreme Court to evaluate the legality of the President's "calling forth of the militia." Writing for the court, Chief Justice Roger B. Taney argued, "It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands."¹⁹ The court did not suggest that such power was without a check. "Undoubtedly," Taney wrote, "if the President in exercising this power shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it."²⁰ Scholars have generally agreed that this decision codified the President's emergency powers as well as their basis in the militia acts.²¹

The 1860s and 1870s: Suppression of the Rebellion to the Third Enforcement Act

Immediately after the attack on Fort Sumter and the seizure of other Federal property in the South, President Abraham Lincoln issued a proclamation closely following the formula laid down by the 1795 law, calling on the states for a militia of 75,000 men to oppose combinations too powerful to be suppressed by the ordinary course of judicial proceedings. Attorney General Edward Bates justified the administration's measures by citing

Taney's opinion in *Luther v. Borden*, writing that "the duty to suppress the insurrection, being obvious and imperative, the two acts of Congress, of 1795 and 1807, come to his aid, and furnish the physical force which he needs, to suppress the insurrection and *execute the laws*. Those two acts authorize the president to employ, for that purpose, the Militia, the Army and the Navy."²²

Lincoln issued further proclamations closing Southern ports, calling for a limited number of volunteers to serve for 3 years, increasing the size of the Regular Army and Navy, and suspending the writ of habeas corpus in certain areas. These actions were a tremendous expansion of the use of armed forces and executive power itself. Yet when the Thirty-Seventh Congress convened on July 4, it ratified Lincoln's actions and passed additional laws that would enable him to mount a full-scale effort to compel the rebellious states' return to the Union.

In particular, in late July 1861, Congress approved *An act to provide for the Suppression of Rebellion against and Resistance to the Laws of the United States*. Grounded in the 1795 Militia Act, this measure expanded the discretion of the President to call forth both the militia and Regular Army to suppress insurrections and execute the laws of the Union. The trend of the multiple versions of the militia acts since 1792 was one of increasing the authority of the President to call forth the militia. (The current language in 10 *U.S. Code*, Sections 252 and 254, remains virtually unchanged since July 1861.) Lincoln secured a definitive expansion of Presidential authority in the first section of the 1861 Militia Act with the addition of the President's ability to call forth the militia to "enforce the faithful execution of the laws of the United States."²³ According to James Randall, author of the most comprehensive legal analysis of Lincoln's actions, "the emergency, as interpreted by the Lincoln administration, was precisely that for which the use of militia had been expressly authorized. To execute the laws, to suppress an insurrection, to put down combinations

too powerful for judicial methods—these were the purposes for which the Government needed troops.”²⁴

While this 1861 act was drafted with the rebellious states in mind, Lincoln relied on these authorities to suppress disorder within the loyal states during the war as well, most infamously during the 1863 New York City draft riots. Bloodshed in the city’s streets, wrought by the military and rioters, caused considerable consternation for the Lincoln administration. His critics in Congress, as well as in the South, argued that the deployment of troops to suppress the riots was further evidence that the President was a tyrant.

Once more, the Supreme Court would ultimately judge the boundaries of the President’s authority in the *Prize Cases* (1863) decision. Justice Robert Cooper Grier wrote on behalf of the court, and this opinion remains a definitive statement of war powers under the laws of the United States. Grier explained that Congress did not need to give the President the authority to act unilaterally in 1861 because congressional authority was already granted in 1795 and 1807. “Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*,” Grier wrote, “and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. He must determine what degree of force the crisis demands.”²⁵ While confirming the President had considerable powers, the court ultimately deferred to Congress, as that body had established the legal precedent and the broad parameters for the President to call forth the military.

After the war, Federal military forces were garrisoned throughout the South during Reconstruction and were relied on to uphold Federal law in the former Confederate states and check violence perpetrated by the Ku Klux Klan and other white supremacists. In its most

recent modification to the militia acts in 1871, Congress approved *An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes*. This act allowed the President to use the military when domestic violence or an insurrection resulted in the denial of citizenship rights or equal protection conferred to citizens by the new Fourteenth Amendment.²⁶ And although the 1871 Militia Act specifically targeted violence instigated by the Klan, the delegation of authority was broader than the 1861 version, including not only calling forth the militia and Regular Army but also “other means” to enforce the protections granted by the Fourteenth Amendment. This act is also noteworthy in that the President did not require a request or approval from the state government to call forth the military when Federal laws or civil rights were at stake. As updated, this militia act provided the foundation for the current law for 10 *U.S. Code*, Section 253.

Critics argued that this latest law blurred distinctions between insurrection and lesser forms of civil unrest. They worried that such provisions allowed the President to deploy forces to combat minor incidents of civil disorder that they argued were state affairs regardless of whether state authorities requested Federal assistance. More than a reflection on the President’s evolving authority to deploy the military domestically, the 1871 Militia Act reflected changes in the ways the courts and Congress were applying the Constitution as a check against abuses by states after the Civil War. Taking advantage of the broad affirmation of the President’s authority to quell unrest and enforce Federal law, Presidents began to call on the military for a variety of reasons beyond Reconstruction. The end of the 19th century was a tumultuous period, one in which a rapidly industrializing America witnessed widespread social strife. Presidents increasingly called on military forces to protect property, aid in enforcing Federal laws, and protect victimized minorities from mob violence.

The Posse Comitatus Act of 1878 and Domestic Disputes into the Early 20th Century

The 1861 and 1871 revisions of the 1795 Militia Act granted the President broad statutory discretion to use state militias or the Regular Army to confront domestic unrest. Congress and the courts were both complicit in this expansion of executive power. With the Posse Comitatus Act of 1878, Congress introduced a new check on the use of the military to enforce civil law. More recently, this has been viewed by military leaders as an important check on the military’s role in domestic law enforcement, but it was not viewed in this manner by Presidents at its inception.

Congress intended the Posse Comitatus Act to correct a specific set of military law enforcement issues emerging from an opinion expressed by Attorney General Caleb Cushing in May 1854, during Franklin Pierce’s administration. At the time, Cushing argued that under Section 27 of the Judiciary Act of 1789, U.S. marshals could raise a posse comitatus of men regardless of their

*occupation, whether civilian or not, and including the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a sheriff or marshal. The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any way affect their legal character. They are still the posse comitatus.*²⁷

Twenty-four years later, President Rutherford B. Hayes’s attorney general was advancing similar arguments, and Congress responded with a legal remedy in the Posse Comitatus Act.²⁸ This law, driven by Southern Members of Congress responding to the widespread and unconstrained use of Regular Army forces during Reconstruction, specifically stated that

it shall not be lawful to employ 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



The Evacuation of Fort Sumter, albumen silver print from glass negative, J.M. Osborn, April 1861 (Metropolitan Museum of Art/Gilman Collection)

*and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress.*²⁹

Ultimately, the Posse Comitatus Act confirmed that only Congress or the President could authorize the military to execute or enforce the law.

By century's end, despite the multiple and flexible legislative options for the President to use Federal forces in aiding civil authorities, state and Federal authorities often had difficulty in determining which statutes applied to their unusual circumstances of domestic unrest. In numerous cases, Presidents simply dispatched units to the proximity of a disturbance without seeking a specific state request or statutory justification. The threat of intervention or mere

presence of the Regular Army was often enough to restore order without using the formal process for direct Federal military intervention. After the first major Regular Army intervention in a labor dispute during the Great Railroad Strike of 1877, Presidents felt increasingly secure deploying military forces—both state and Federal—to confront domestic unrest.

A critical test was the Pullman Strike in May and June 1894, which involved 250,000 striking rail workers in 27 states shutting down most of the railways west of Detroit, Michigan. When President Grover Cleveland demanded strikers stop interfering with trains carrying mail, they refused, and Cleveland sent in thousands of marshals and 12,000 Soldiers.³⁰ The following year, organizer Eugene V. Debs challenged the Federal Government's authority to intervene and in so doing

brought the courts to adjudicate the use of the military as well.

In the *In re Debs* decision of 1895, the Supreme Court confirmed unanimously that the government had broad powers under the Sherman Antitrust Law to protect the mail and interstate commerce. The court sustained the President's use of the military and explained that "the strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or to the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws."³¹ As the Posse Comitatus Act suggested, there are limits on the domestic use of the military, but "insurrection, domestic violence, unlawful combinations, or conspiracies" provided the President

essentially unfettered authority to respond in preservation of the law.

For instance, in 1903, President Theodore Roosevelt sent military forces to pacify labor disputes in Arizona and Colorado; 4 years later, he acted similarly in Nevada. In the summer of 1919, President Woodrow Wilson suppressed race riots in Washington, DC; Omaha, Nebraska; Elaine, Arkansas; and Lexington, Kentucky.³² Wilson also quelled labor unrest with Federal forces in Butte, Montana; Seattle, Washington; Gary, Indiana; Knoxville, Tennessee; and Denver, Colorado, in 1919 and 1920.³³ And the National Guard and Regular Army took part in West Virginia's mine wars in 1920–1921. The military proved largely effective, and it consequentially became a Presidential tool of first (rather than last) resort in these complex cases.

Effective as it may have been, the use of the military in this capacity continued to provoke criticism. While public attitudes toward strikers and protestors varied, reports of Federal military forces using brutal—and at times lethal—force were met with stern criticism within Congress and among the people, especially among those groups against whom the force was directed, whether they were labor organizations, citizens of a particular region, or some broader class. Meanwhile, in January 1903, Congress sought “to promote the efficiency of the militia,” thereby redefining the militia and establishing tighter Federal control of the National Guard, which had by this time developed a reputation for harsh anti-labor attitudes and practices.³⁴ The Regular Army, on the other hand, was regarded as inherently nonpartisan, more reliable, and generally more efficient.

The Apogee and Abandonment of the Militia Acts in the 20th Century

The decades following World War II saw significant unrest throughout the United States, prompted by issues of race and an unpopular war in Vietnam. Presidents continued to deploy military forces to compel adherence to Federal law and to support local authorities in restoring order. The former consis-

tently proved controversial. However, before the civil rights era began in earnest, the Supreme Court weighed in for the first time to check the President's seemingly unfettered militia act authorities in *Youngstown Sheet & Tube Co. v. Sawyer* (1952).

In April 1952, President Harry S. Truman issued an executive order directing Secretary of Commerce Charles W. Sawyer to seize most of the Nation's steel mills and avert a potential strike that could undermine the national defense and military operations in the Korean War, citing his authorities in the Constitution and laws of the United States. This action was immediately challenged in the courts. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court addressed the power of the President to act without express constitutional or statutory authority. By a vote of six to three, the court resolved that the President acted unconstitutionally.³⁵

Justice Hugo L. Black wrote the majority opinion, but six other justices also wrote opinions, offering insights into the constitutional authorities of the President on military matters. Black's opinion stated that “the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”³⁶ Truman had contended that “presidential power should be implied from the aggregate of his powers under the Constitution” and that based on provisions in Article II which state that “he 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.” Black wrote that Truman's commander-in-chief argument “cannot properly be sustained. . . . The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war.”³⁷ Commanding in a theater of war was far different from “commanding” private businesses within the United States.

Justice William O. Douglas noted in his concurring opinion that “our history and tradition rebel at the thought that the grant of military power carries with

it authority over civilian affairs.”³⁸ Justice Robert H. Jackson concluded in his concurrence, “Congress . . . authorized the President to use the army to enforce certain civil rights. On the other hand, Congress has forbidden him to use the army for the purpose executing general laws except when *expressly* authorized by the Constitution or Act of Congress.”³⁹ He observed that “when the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”⁴⁰ Finally, reflecting on the many military emergencies of the past century, Jackson cautioned that our forefathers “knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.”⁴¹

Civil rights legislation brought new challenges to Federal authority akin to those encountered in the wake of the Fourteenth Amendment. The passage of the 1957 Civil Rights Act and the Supreme Court's earlier decision in *Brown v. Board of Education* (1954), mandating school desegregation, prompted a harsh backlash across the South. In 1957, Arkansas's governor vowed to resist desegregation and used his state's police and National Guard to prevent black students from accessing Little Rock Central High School. President Dwight D. Eisenhower believed that a failure to act by the Federal Government would be tantamount to acquiescence to anarchy. He argued that the governor's actions were a direct obstruction of Federal law, signed a proclamation commanding Arkansas police to disperse, federalized portions of the state's guard, and sent five rifle companies of the 101st Airborne Division to the state capital to enforce the court order. Segregationist Arkansans were irate. Rather than desegregate at the point of the bayonet, the governor closed the state's high schools for the following year.

A more dramatic episode unfolded 5 years later in Oxford, Mississippi, when



THE RIOTS AT NEW YORK—THE RIOTERS BURNING AND SACKING THE COLORED ORPHAN ASYLUM.—[SEE PAGE 494.]

The Riots at New York—The Rioters Burning and Sacking the Colored Orphan Asylum, 5th Avenue and 46th Street, New York City draft riot in 1863, wood engraving in Harper's Pictorial History of the Civil War, ca. 1866–1868 (Library of Congress)

a black student sought to enroll at the University of Mississippi. The state's governor vowed to defy a court order that the student be allowed to matriculate, prompting President John F. Kennedy to utilize U.S. marshals, federalized national guardsmen, and deployed Regular Army soldiers; their combined force numbered nearly 30,000. Segregationists reacted violently in a 2-day riot dubbed the Battle of Oxford, shooting at Army convoys and attacking troops and marshals. Federal forces remained in Oxford for 9 months. As in Arkansas, local citizens and their political leaders argued that Federal troops were the tools of an abusive, overreaching Federal Government intent on forcing its will on a matter of local concern.

The clash in Oxford was one of many instances of unrest during the 1960s, a decade of social disruption prompted

by deep-rooted racial antagonisms, the civil rights movement, and opposition to the Vietnam War. Federal troops were deployed on a number of occasions to help local authorities quell unrest and restore order. For example, Federal forces were sent to the Nation's capital for the March on Washington for Jobs and Freedom in 1963 in the event protests turned violent and to Detroit in 1967 to help local authorities subdue a violent race riot. Antiwar demonstrations gathered momentum in October 1967 when a major rally in Washington turned toward the Pentagon and was met by military police, Federal marshals, and Active-duty Soldiers. Federal forces were used in that case to maintain order and returned 6 months later to help restore order during the 1968 riots following the assassination of Martin Luther King, Jr. Troops were

likewise deployed to Detroit, Baltimore, and Chicago that month after violent riots in those cities. Eventually, 23,000 Regular Army and 15,600 federalized National Guard Soldiers were collectively used in these responses. In each case, Presidents issued a proclamation ordering dispersal forthwith in recognition of the legal obligations established by the 1795 Militia Act.

Responding 20 years later to "conditions of domestic violence and disorder" that resulted from Hurricane Hugo, President George H.W. Bush deployed 1,200 military police and Federal marshals to St. Croix in the U.S. Virgin Islands in September 1989, when local police could not contain an outbreak of violence. The most recent use of the militia acts occurred in May 1992 when Bush deployed troops to restore order



Washington Reviewing the Western Army at Fort Cumberland, Maryland [before their march to suppress the Whiskey Rebellion in western Pennsylvania], oil painting, attributed to Frederick Kemmelmeyer, after 1795 (Metropolitan Museum of Art)

in Los Angeles when rioting broke out after white police officers were acquitted of using excessive force against Rodney King, an unarmed black man. Nearly 10,000 California National Guardsmen mobilized. When they could not quell unrest, California's governor requested Federal assistance. Bush then deployed 2,000 Soldiers from the 7th Infantry Division and 1,500 Marines from the 1st Marine Division to help local and state authorities. In both cases, governors requested Federal support.

No President since then has deployed Federal forces in the United States to enforce Federal law and restore civil order under the terms of calling forth the military. Political considerations have weighed heavily in recent Presidential decisions not to use Federal military forces domestically; the evolution of the all-volunteer force since the 1970s may also play a role. Increasing capabilities of local law enforcement to handle domestic disorders

have accompanied the increasing political opposition to using Federal troops for the same purposes, rendering the Federal Government's involvement unnecessary and perhaps coercive. For the last three decades, Presidents appear to have accepted that calling in Federal forces is a measure to be saved for truly grave crises in which there is no serious dispute over the need for Federal intervention.

Conclusion

Since our nation's founding, Congress has seen fit to support the need for emergency powers for the President to confront "insurrection, domestic violence, unlawful combinations, or conspiracies." There has been no congressional effort to revoke the authority to call forth the militias. Congress instead expanded the President's powers on four occasions. History demonstrates how both Congress and the courts have repeatedly deferred to Presidents.

Importantly, this emergency power is not inherent in the Constitution and thus subject to judicial review and legislative action. Supreme Court cases—especially *Martin v. Mott* (1827), *Luther v. Borden* (1849), and the *Prize Cases* (1863)—affirmed the foundational authority of the militia acts as well as the President's all-encompassing, congressionally delegated authority to act appropriately. *Youngstown Sheet & Tube Co. v. Sawyer* (1952), however, raised the concern that domestic use of the military requires congressional authorization and that a President cannot act with impunity on military matters.

The Civil War had a profound influence on the militia law, and subsequent Presidents called forth the military on more than 125 occasions before World War II to quell violent labor disputes and race riots. The use of Federal military forces provided valuable social stability



Special patrolling train Rock Island Railroad, with Company C, 15th U.S. Infantry, at Blue Island, Illinois, during great railroad strike, 1894 (Foss Etching & Photo Company)

and assured that changes in American institutions were evolutionary and not revolutionary in nature during an era of radical economic and social changes.⁴² Again, in the 1950s and 1960s, Presidents called on military forces to maintain order during the movement for and reactions against civil rights. Over the course of a century, military leaders emphasized tactical restraint, military command and control of federal troops, strict adherence to legal guidelines, and discipline that would prove valuable in the effective use of this emergency power. Although no President has exercised these authorities since 1992, it is reasonable to assume a future President could, although Congress would determine the parameters and restrictions for calling forth the military. For its part, the military—Active, Guard, and Reserve—should understand the legal framework that supports the lawful orders of a President. JFQ

Notes

¹ The five statutes are the Calling Forth Act of 1792, ch. 28, 1 Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and c 331-335 [2000]); the Insurrection Act of 1807, ch. 39, 2 Stat. 443 (331-335 [2000]); the Suppression of the Rebellion Act of 1861, version at 10 U.S. Code 331-335 [2000]; and specific parts of the Act of 1871, ch. 22, 3-4, 17 Stat. 13, 14-15 (expired in part 18 U.S. Code 333).

² See Frederick T. Wilson, *Federal Aid in Domestic Disturbances, 1787-1903*, Senate Document 57-209 (2nd sess., 1903); Frederick T. Wilson, *Federal Aid in Domestic Disturbances, 1903-1922*, Senate Document 67-263 (2nd sess., 1922); Frederick Bernays Wiener, "The Militia Clause of the Constitution," *Harvard Law Review* 54, no. 2 (December 1940), 181-220; Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* (New York: Free Press, 1975); Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* (Washington, DC: U.S. Army Center of Military History, 1988); Henry P. Monaghan, "The Protective Power of the Presidency," *Columbia Law Review* 93, no. 1

(January 1993), 1-74; Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877-1945* (Washington, DC: U.S. Army Center of Military History, 1997); Stephen I. Vladeck, "Emergency Power and the Militia Acts," *The Yale Law Journal* 114, no. 1 (October 2004), 149-194; and Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945-1992* (Washington, DC: U.S. Army Center of Military History, 2005).

³ Alexander Hamilton, Federalist No. 29 (January 9, 1788).

⁴ For opposing views on its applicability to Presidential action in domestic disorders, see Monaghan, "The Protective Power of the Presidency"; Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" *Yale Law Journal* 112, no. 5 (February 2003), 1011-1134; and Andrew Kent, Ethan J. Leib, and Jed Handelsman Shugerman "Faithful Execution and Article II," *Harvard Law Review* 132, no. 8 (June 2019), 2111-2192.

⁵ For the discussion in the House of Representatives, see *Annals of Congress*, House of Representatives, 2nd Cong., 1st sess., 574-580. On May 2, 1792, Congress approved "An Act

to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and rebel invasions,” *Acts of the Second Congress of the United States* (Philadelphia: Francis Childs and John Swaine, 1793), 264–265. This act is known as the Calling Forth Act.

⁶ “An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and rebel invasions,” 264.

⁷ David E. Engdahl, “Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders,” *Iowa Law Review* 57, no. 1 (October 1971), 1–73, quoted on 44.

⁸ “An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and rebel invasions,” 264.

⁹ *Ibid.*

¹⁰ *Ibid.*, 265.

¹¹ See Leland D. Baldwin, *Whiskey Rebels: The Story of a Frontier Uprising* (Pittsburgh: University of Pittsburgh Press, 1939), for the most authoritative account.

¹² Vladeck makes the important point that each branch abided by its roles and responsibilities in the 1792 militia in “Emergency Power and the Militia Acts,” 161.

¹³ On February 28, 1795, Congress approved “An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and rebel invasions; and to repeal the Act now in force for those provisions,” *Acts of the Third Congress of the United States* Philadelphia: Francis Childs and John Swaine, 1794), 424–425. This act is known as the Calling Forth Act.

¹⁴ See Vladeck, “Emergency Power and the Militia Acts,” 163, for a discussion on the removal of these checks on authority.

¹⁵ Wilson, *Federal Aid in Domestic Disturbances, 1787–1903*, 45–49; Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789–1878*, 77–83; George M. Dennison, “Martial Law: The Development of a Theory of Emergency Powers, 1776–1861,” *American Journal of Legal History* 18, no. 1 (January 1974), 56–59.

¹⁶ Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789–1878*, 83 n46. Also see Dumas Malone, *Jefferson the President, Second Term, 1805–1809* (Boston: Little, Brown, Co., 1974), 252–253. The full text is available in *Acts of the Ninth Congress of the United States* (Washington, DC: Authority, 1807), 443.

¹⁷ U.S. Reports: *Martin v. Mott.*, 25 U.S. (12 Wheat.) 19 (1827), 31.

¹⁸ Alan Hirsch, “The Militia Clauses of the Constitution and the National Guard,” *University of Cincinnati Law Review*, No. 59 (1988), 950–956.

¹⁹ U.S. Reports: *Luther v. Borden et al.*, 48 U.S. (7 How.) 1 (1849), 44.

²⁰ *Ibid.*, 45.

²¹ Dennison, “Martial Law,” 76; Wilson, *Federal Aid in Domestic Disturbances, 1787–1903*, 291–292; and Coakley, *The Role of*

Federal Military Forces in Domestic Disorders, 1789–1878, 34–36.

²² Edward Bates, “Suspension of the Privilege of the Writ of Habeas Corpus,” 10 Ops. of Att. Gens., 74–92 (1861); Bates letter, July 5, 1861. Emphasis added.

²³ James G. Randall, *Constitutional Problems Under Lincoln* (New York: D. Appleton & Co., 1926), 48–73, would describe this as part of Lincoln’s dual theory of the war, both an insurrection and an international conflict.

²⁴ *Ibid.*, 243.

²⁵ U.S. Reports: *Prize Cases*, 67 U.S. (2 Black) 635 (1863), 670.

²⁶ On April 20, 1871, Congress approved “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes,” *Acts of the Forty-Second Congress of the United States* (Washington, DC: Government Printing Office, 1872), 13–15. This is known as the Third Enforcement Act, the Ku Klux Klan Act, and the Civil Rights Act of 1871.

²⁷ C.C. Andrews, ed., *The Attorneys General of the United States, Advising the President and Heads of Departments, in Relation to Their Official Duties*, vol. 6 (Washington, DC: W.H. & O.H. Morrison, 1871), 473. Also see Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789–1878*, 132–133.

²⁸ See the culminating discussion in the Senate on June 7, 1878, in 7 *Congressional Record*, 4239–4248. Also, Laurie and Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877–1945*, 18–21. The entire body of Federal law was codified in the 1874 Revised Statutes. Four of these statutes (5297, 5298, 5299, and 5300) dealt with Federal aid to civil authorities and insurrections against either state or Federal authority.

²⁹ *Acts of the Forty-Fifth Congress of the United States* (Washington, DC: Government Printing Office, 1878), 144.

³⁰ Laurie and Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877–1945*, xx.

³¹ U.S. Reports: *In re Debs*, Petitioner, 158 U.S. 564 (1895), 582.

³² Laurie and Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877–1945*, 277–301; William Cohen, “Riots, Racism, and Hysteria: The Response of Federal Investigative Officials to the Race Riots of 1919,” *Massachusetts Review* (Summer 1972), 373–400.

³³ Laurie and Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877–1945*, 255–275.

³⁴ *Acts of the Fifty-Seventh Congress of the United States* (Washington, DC: Government Printing Office, 1902), 775–780. In 1916, Congress further distinguished the militia as organized (National Guard and Naval Militia) and unorganized. This latter definition remains in 10 U.S. Code 246 today.

³⁵ U.S. Reports: *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952).

³⁶ *Ibid.* Black suggested that the government had two relevant statutory mechanisms through the Selective Service Act (1948) and Defense Production Act (1950) to take action, but the government did not pursue them for expediency reasons.

³⁷ U.S. Reports: *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952), 587.

³⁸ *Ibid.*, 632.

³⁹ *Ibid.*, 644–645.

⁴⁰ *Ibid.*, 637.

⁴¹ *Ibid.*, 644–645.

⁴² Laurie and Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877–1945*, 421–425.