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"Necessity Hath No Law": Executive Power and the Posse Comitatus Act

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Executive Power and the *Posse Comitatus* Act
Candidus Dougherty*

Abstract

In this article, I comment on the debate over whether the *Posse Comitatus* Act, which criminalizes the use of the military for domestic law enforcement, should be tightened to restrict Executive action. In Part I, I catalog the historical context in which the *Posse Comitatus* Act was passed and describe the military events that are most commonly used to support the case for sharply divided civilian and military authorities. In Part II, I discuss the true purpose and intent of the *Posse Comitatus* Act: to prohibit civilian marshals from calling forth active duty military to enforce domestic law. I also explore the contours of the emergency power doctrine to show that it is not clear that Congress could limit Executive action as a revamped *Posse Comitatus* Act may attempt to do. Lastly, in Part III I examine whether a *Posse Comitatus* Act-like law is even necessary by discussing its commonly proffered justifications. Ultimately, I conclude that these justifications are flawed and that the *Posse Comitatus* Act is unnecessary.

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1 The quoted text was originally articulated by Oliver Cromwell. Radin, *Martial Law & the State of Siege*, 30 Calif. L. Rev. 634, 641 (1942).

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When a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army.

- Luther Martin

Introduction

Dating back to Roman times, civilian distrust of a standing army has been a constant theme. Nations have raised armies to protect their national defense interests but have sharply segregated military and civilian affairs in order to protect civilian life from military oppression. During peacetimes, this segregation leaves the military — a highly-trained and effective resource — idle and seemingly available to aid in quelling domestic crises.

Yet, when the civilian authority has utilized the armed forces in domestic law enforcement roles, time and again the eventual result has been disaster. For the Romans, it was the fall of their empire. For the American Colonists, it was the Boston Massacre. For the Reconstruction Era South, it was the federal troop occupation.

The issue of military involvement in civilian affairs entered the national spotlight once again in September 2005, when the Department of Defense (DOD) posited that it would have been illegal for the government to send military troops into New Orleans to evacuate those stranded by Hurricane Katrina and the flood that followed. Specifically,

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3 In Roman times, the professional army was broken into smaller groups, or legions, in order to distribute its power. John F. Romano, *State Militias and the United States: Changed Responsibilities For A New Era*, 56 A.F.L. Rev 233, 238 (2005).

4 Eric Schmitt and Thom Shanker, *Military May Propose An Active-Duty Force For Relief Efforts*, New York Times, Oct. 11, 2005; United States Air Force AIM Points website: http://aimpoints.hq.af.mil. Interestingly, the first explanation regarding the delay came from former FEMA Director Michael Brown who claimed that there had been a breakdown in communication: the federal government did not know that people were stranded at both the Convention Center and the Superdome. *The Big Disconnect on New Orleans*, CNN, Sept. 2, 2005, http://www.cnn.com/2005/US/09/02/katrina.response/. This excuse was not very compelling considering CNN had been running 24-hour live news coverage reporting the locations of the stranded individuals.
the DOD pointed to the *Posse Comitatus* Act of 1878 (PCA), a law that purportedly criminalized the use of the military in domestic law enforcement.

After watching live news coverage of thousands of people being herded to the New Orleans Convention Center and the Superdome and left without food, water, medicine and sanitation, the nation responded furiously. Clearly, we ought to be able to employ our military to rescue our own people from a natural disaster that occurred within our own borders. Surely, any law that prohibits such humanitarian efforts must be repealed.

As they say, hindsight is 20/20. After much legal scrutiny, it appears as though the government's trepidation due to the *Posse Comitatus* Act was misguided. In all likelihood, deploying troops to New Orleans for a rescue operation was lawful under the PCA, but this conclusion did not end the debate over the propriety of the *Posse Comitatus* Act.

After the Katrina Disaster, some commentators asserted that the PCA must be entirely redrafted or just plain repealed; the Executive should not be prohibited from using the military to enforce the law following a natural disaster. The federal government responded to this outcry by amending the Insurrection Acts. Now, the President has the express authority to deploy federal troops in response to a natural disaster.

This amendment leaves the *Posse Comitatus* Act prohibitions on shaky ground, which has sparked a new debate in support of its resurrection. Many view the *Posse Comitatus* Act as a "bulwark of liberty" that protects civilian life from military oppression.

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12 Dan Bennett, *The Domestic Role of the Military in America: Why Modifying Or Repealing the Posse Comitatus Act*
These commentators argue in favor of redrafting the *Posse Comitatus* Act in a clearer and more potent form.\(^{13}\)

This debate is, however, premised on two misconceptions. First, that the *Posse Comitatus* Act applies to presidential action, and, second, that the PCA can, consistently with the United States Constitution, be amended to restrain Executive action in times of national crisis. In this article, I demonstrate how both of these assumptions are flawed.

In Part I, I catalog the historical context in which the *Posse Comitatus* Act was passed and describe the military events that are most commonly used to support the case for sharply divided civilian and military authorities. In Part II, I discuss the true purpose and intent of the *Posse Comitatus* Act: to prohibit civilian marshals from calling forth active duty military to enforce domestic law. I also explore the contours of the emergency power doctrine to show that it is not clear that Congress could limit Executive action as a revamped *Posse Comitatus* Act may attempt to do. Lastly, in Part III I examine whether a *Posse Comitatus* Act-like law is even necessary by discussing its commonly proffered justifications. Ultimately, I conclude that these justifications are flawed and that the *Posse Comitatus* Act is unnecessary.

I. Historical Backdrop

Frequently, legal scholars and commentators rely on history — specifically the Revolutionary War and Reconstruction Eras — to justify excluding the military from civilian affairs. In this section, I review history. I describe the events that took place during these eras as well as the various congressional and presidential actions leading up to the passage of the *Posse Comitatus* Act in 1878.

A. The Founding Fathers Fear a Standing Army

The Roman Army, which was not permitted to cross the river Rubicon into Italy,\(^ {14}\) is a prime example of the dangers of a standing military run amok. During nearly the entire

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1,229 years it existed, the Roman Empire was at war with external enemies, itself or both.\textsuperscript{15} The Senate and, later, the emperors were technically in control of the army, but, on at least twelve occasions, generals refused to cede their power, marched on Rome and wrested control of the state.\textsuperscript{16} This in-fighting severely weakened the State's ability to defend against invaders and has been blamed for the eventual fall of the Roman Empire.\textsuperscript{17}

The Founding Fathers did not need to look at Roman history\textsuperscript{18} to distrust a standing military force; the United States was founded in the wake of an oppressive British military rule over civilian affairs.\textsuperscript{19} From 1768 to 1770, British troops occupied Boston to enforce regulations and to collect taxes set by the King of England.\textsuperscript{20} This military presence led to many confrontations between colonists and British troops in Boston as well as general angst throughout the rest of the colonies.\textsuperscript{21}


\textsuperscript{17} John F. Romano, \textit{State Militias and the United States: Changed Responsibilities For A New Era}, 56 A.F.L. Rev 233, 238 (2005). After Caesar's march on Rome, Emperors then split up the army into small parts in order to avoid similar trouble, but the legions were then too weak to fight off invaders. \textit{Id}.

\textsuperscript{18} But, they were aware of the past military infractions. George Washington asserted that “Mercenary Armies . . . have at one time or another subverted the liberties of almost all the Countries they have been raised to defend.” 26 Writings of Washington (Fitzpatrick ed.) 388. Madison used the Roman Empire and Europe as additional proof of the dangers of a standing military in the Federalist Papers: “Not the less true is it, that the liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments.” The Federalist No. 41 (James Madison). James Madison warned that the standing army needed to be handled cautiously, or the “face of America will be but a copy of that of the continent of Europe. It will present liberty everywhere crushed between standing armies and perpetual taxes.” \textit{Id}.


\textsuperscript{21} Reid v. Covert, 354 US 1, 27-28 (1957) (quoting Samuel Adams who said in 1768: “(I)s it not enough for us to have seen soldiers and mariners forejudged of life, and executed within the body of the county by martial law? Are citizens to be called upon, threatened, ill-used at the will of the soldiery, and put under arrest, by pretext of the law military, in breach of the fundamental rights of subjects,
During the most noted and bloody conflict, the Boston Massacre, the British military killed five colonists while attempting to break up an unruly mob. John Adams, defense counsel for the troops who were tried in Boston, declared that such angry uprisings were the inevitable result of using the military for law enforcement. Regardless, British troops remained in Boston, until forcibly ejected during the Revolutionary War. In fact, Parliament passed new laws, in 1774, to add more safeguards for soldiers maintaining civil order.

In the Declaration of Independence, American colonists spelled out precisely how they felt about the use of troops in civilian affairs: it was tyranny. The Declaration of Independence points directly to the nonconsensual maintenance of a standing army among the civilian population, the military supremacy over the civilian government, the quartering of troops and the “mock trials” of the troops for murdering civilians as examples of King George III’s repeated “usurpations” and “oppressions.” The Articles of Confederation echoed this distrust of the standing military by restricting states from keeping armies or navies in peacetimes while at the same time requiring states to have a

and contrary to the law and franchise of the land? Will the spirits of people as yet unsubdued by tyranny, unawed by the menaces of arbitrary power, submit to be governed by military force? No! Let us rouse our attention to the common law,—which is our birthright, our great security against all kinds of insult and oppression.”


23 John Adams, Argument, in 3 Legal Papers of John Adams 266 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). Adams argued self-defense (on behalf of the soldiers and officer in Rex v. Preston and Rex v. Wemms) and declared: “Soldiers quartered in a populous town, will always occasion two mobs, where they prevent one. They are wretched conservators of peace!” Id.

24 David E. Engdahl, Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders, 57 Iowa L. Rev 1, 26 (1971). Soldiers could remove cases to other colonies or to England when accused of using excessive force while disbanding civil uprisings under the Administration of Justice Act of 1774. Id.

25 THE DECLARATION OF INDEPENDENCE para. 13 (U.S. 1776) (“He has kept among us, in times of peace, Standing Armies without the consent of our legislatures.”).

26 Id. ¶ 14 (“He has affected to render the Military independent of and superior to the Civil power.”).

27 Id. ¶ 16 (“For Quartering large bodies of armed troops among us.”).

28 Id. ¶ 17 (“For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States.”).

29 Id. ¶ 31.

30 Id. ¶ 30.
“well-regulated and disciplined militia.”

At the Constitutional Convention, delegates discussed, at length, whether a standing army was even necessary, since state militias could protect the nation. The debate in Philadelphia largely focused on who should be in control of calling the militia and whether there should be a standing army in times of peace. Because of the prevalent fear of a standing military and of a “dominant, Chief Executive,” the end result was a separation of these powers among the states and federal government.

The Convention delegated to Congress the power to raise a standing army that was subject to frequent review of military appropriations and the power to declare war. Domestic military needs were deferred to the state militias, which could be federalized by Congress in limited situations. The Executive ultimately gained control of the militias and army but only through Congress.

Despite this system of checks and balances, the debate continued in the Federalist Papers, where Alexander Hamilton eventually concluded that the nation did need a standing army. He argued that militias were insufficient to cover the common defense.

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31 ARTICLES OF CONFEDERATION art. VI, § 4 (“No vessel of war shall be kept up in time of peace by any State . . . nor shall any body of forces be kept up by any State in time of peace . . . but every State shall always keep up a well-regulated and disciplined militia.”).


34 Robert Coakley, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878 12 (1988) (“[T]he military clauses of the Constitution were hammered out in a debate in which the opposition to peacetime armies and to federal control over the militia asserted itself strongly.”).


36 U.S. CONST. art I, § 8, cl. 12 (“To raise and support Armies, but no Appropriate of Money to that Use shall be for a longer Term than two Years.”).

37 U.S. CONST. art I, § 8, cl. 11.

38 THE FEDERALIST No. 25 (Alexander Hamilton).

39 U.S. CONST. art I, § 8, cl. 15 (Congress shall have the power “[t]o provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions”).

40 U.S. CONST. art II, § 2 (“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.”).

41 THE FEDERALIST No. 8 (Alexander Hamilton) (saying that “Safety from external danger is the most powerful director of national conduct . . . To be more safe, [nations] at length become willing to
because “the steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind.” His reasoning was that “[w]ar is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.” In his view, the militia lacked that training, and drafting militiamen into service frequently, away from their jobs and families, would have an adverse effect on the economy.

Further, Hamilton argued that it is coercive to force states such as New York, which are more open to attack, to build up their defenses while landlocked states do not need to bear the same burden. He acknowledged that there was always a risk that a standing army would infringe on liberty; however, Hamilton pointed to the state militias as the safeguard to protect the nation from a return to tyranny. Hamilton's run the risk of being less free. Frequent war and constant apprehension, which require a state of constant preparation, will infallibly produce [standing armies]”;

42 THE FEDERALIST No. 25 (Alexander Hamilton). Hamilton went as far as to say that the nation would have likely have lost its bid for independence if it had relied on the militias alone. Id.

43 Id.

44 Id.

45 Id. Hamilton also argued that allowing one state to beef up its defenses would create “mutual jealousy” among states, which could lead to conflict and in-fighting. Id.

46 James Madison shared Hamilton’s concession and apprehension regarding a standing army, writing “a standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal.” THE FEDERALIST No. 41 (James Madison).

47 Hamilton seemed to have a lot of faith in the loyalty of the state militias – even when they were called into action by the federal government. “There is something so far-fetched and so extravagant in the idea of danger to liberty from the militia, that one is at a loss whether to treat it with gravity of with raillery . . . Where in the name of common-sense, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens?” THE FEDERALIST No. 25. This is an interesting argument considering the troops in a standing army would also be citizens and kindred.

48 THE FEDERALIST Nos. 25, 26 & 28 (Alexander Hamilton). Hamilton pointed out that it would
contemporaries — George Washington and James Madison — expressed less confidence in the capacity of the state militias and, in their own writings, frequently reminded of the power of standing armies by pointing to the fall of the Roman Empire and the destruction in Europe.\(^{49}\)

This consternation and extensive debate emphasized the general climate of uneasiness regarding a standing military force that existed at the birth of the Nation. This wariness was, however, somewhat short-lived.

**B. The Militia Acts**

In 1789, Congress began chipping away at the stark separation between military and civilians affairs by using its power under the Militia Clause of the Constitution to pass the Judiciary Act of 1789, which allowed federal marshals to “command all necessary assistance” to execute their duties.\(^{50}\) Shortly thereafter, President Washington received specific authority to use the militia to protect settlers on the Frontier on two separate occasions.\(^{51}\)

After the passage of the Bill of Rights in 1791, which codified the existence of militias, the civilian right to bear arms\(^{52}\) and the prohibition against the quartering of troops during peacetimes,\(^{53}\) public fear of the military started to dwindle.\(^{54}\) Since the federal marshals and the Executive had used the limited grants of militia powers as proscribed, Congress took the bolder step of granting a general militia authority to the Executive, and, in doing so, carved out a rather extensive presidential authority that remains in effect today.\(^{55}\)

take a conspiracy between the Legislative and Executive branches for such an abuse of military power to happen. *Id.* Also, it would take a substantial military force to deprive the nation of liberty. *Id.* Citizens would notice this build-up and question it – particularly in times of peace. *Id.*

\(^{49}\) See, e.g. 26 Writings of Washington (Fitzpatrick ed.) 388; \textit{THE FEDERALIST No. 41} (James Madison).

\(^{50}\) The Judiciary Act of 1789, ch, 20, § 27, 1 Stat 73, 87 (1789).

\(^{51}\) See \textit{Act of Sept. 29, 1789}, ch. 25 § 5, 1 Stat. 95, 96 (expired 1790); \textit{Act of Apr. 30, 1790}, ch. 10, § 16, 1 Stat 119, 121 (repealed 1795).

\(^{52}\) U.S. CONST. amend. II.

\(^{53}\) U.S. CONST. amend. III.


\(^{55}\) The current codification of the Militia Act legislation is found in 10 U.S.C.A. §§ 331-335.
On May 2, 1792, Congress passed the Calling Forth Act, a temporary statute that authorized the Executive to call the state militias, as he saw necessary, to repel invasions and, at the request of the state legislature or executive, to suppress insurrections. It also permitted the Executive to call the militia from an outside state to enforce the laws of the Union. This power, which was of a limited duration, applied only if Congress was not in session, if the Executive had authorization from a federal judge and if the Executive had first sent a cease and desist proclamation.

Almost immediately after its passage, President Washington used this newly legislated power to suppress the Whiskey Rebellion. Washington called forth a federalized militia and led it into Pennsylvania to enforce a whiskey excise tax that farmers were refusing to pay. This successful use of the militia powers without an abuse of discretion led Congress to reenact the grant of authority in the Militia Act of 1795.

The 1795 rendition was far more permissive and did away with many of the restrictions on the Executive's powers. It removed the need for a court order, the requirement that Congress not be in session and the distinction between in-state and out-of-state militia. Also, it arguably changed the cease and desist proclamation requirement to permit a contemporaneous notification rather than a strictly advance notification.

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56 The Calling Forth was originally due to expire in 3 years. Stephen I. Vladeck, Emergency Power and the Militias, 114 Yale L.J. 149, 160 (2004).

57 The Calling Forth Act only allowed the calling of the state militia. The Neutrality Act of 1794, however, allowed the President to call the militia and the regular army, to enforce the Neutrality Proclamation. The Neutrality Act of 1794, Ch. 50, §§ 7-8, 1 Stat. 381 (1794). In an effort to stay out of the war between England and France, President Washington issued the Neutrality Proclamation in April 1793, which criminalized those who aided a side. Sean J. O'Hara, The Posses Comitatus Act Applied to the Prosecution of Civilians, 53 U. Kan. L. Rev. 767, 770 (2005). He sent the federalized state militias to keep privateers from attacking British ships. Id.

58 § 2, 1 Stat 264.

59 Id.

60 Id.

61 Id.


65 Id.
President Jefferson used this broader calling forth power to institute "an instantaneous levee en masse" to thwart a rumored insurgency, lead by former-Vice President Aaron Burr, to start a war with the Spanish Territory.

The 1795 Act only included the state militia; it was not until the 1807 passage of the Insurrection Act that the Executive gained the authority to call both regular army forces and the state militias in cases of insurrection and obstruction of the laws of the Union. President Andrew Jackson used this power in 1832 to send troops to South Carolina, in order to prevent the state's secession from the Union. He, however, waited outside the South Carolina borders for federal legislation authorizing his use of force against the state.

In 1850, the question of whether the Executive, pursuant to the United States Constitution, actually needed the authorization of Congress to call forth the militias was debated. Ultimately, it was determined that the President did not need such authorization, as this power was considered inherent in the role of the Executive.

In the years leading up to the Civil War, the federal authorities and the Executive acquired more permissive abilities to utilize the militia and regular army in the enforcement of federal laws. Perhaps the most contentious antebellum development was the Fugitive Slave Act of 1850, which allowed federal marshals to call a posse comitatus to re-capture

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67 H.W.C. Furman, Restrictions upon the Use of the Army Imposed by the Posse Comitatus Act, 7 MIL. L. REV. 85, 79-80 (1960).


69 H.W.C. Furman, Restrictions upon the Use of the Army Imposed by the Posse Comitatus Act, 7 MIL. L. REV. 85, 89 (1960).

70 H.W.C. Furman, Restrictions upon the Use of the Army Imposed by the Posse Comitatus Act, 7 MIL. L. REV. 85, 89 (1960).


72 The Fugitive Slave Act allowed federal commissioners to issue removal certificates for alleged fugitive slaves based on the ex part testimony of the slave owners. Paul Brest, Sanford Levinson, J. M. Balkin & Akhil Reed Amar, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 182 (2000). The testimony of the alleged fugitive slave was not considered. Id. It has been estimated that 90% of the 332 alleged fugitive slaves tried under the Act were returned to slavery. Id.
escaped slaves and return them to their owners. From the start, the law was a source of contention, but Attorney General Caleb Cushing exacerbated the situation by issuing an advisory opinion, known later as the Cushing Doctrine, allowing marshals to use the military in a *posse comitatus* summoned for the purpose of retrieving a slave.

On the eve of the Civil War, Congress passed the last major revisions to the Militia Acts and greatly expanded presidential powers relating to the domestic use of the military. The Suppression of Rebellion Act of 1861 left the decision to summon federal troops to the sole discretion of the Executive and added “rebellion against the authority of the Government of the United States” as a permitted use. These amendments were used to justify the post-War occupation of the Southern states by federal troops from 1865 to 1877.

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73. A *posse comitatus*, Latin for power of the county, is a group of citizens who are called together to help a sheriff keep the peace or conduct rescue operations. Black’s Law Dictionary (8th ed. 2004). The practice of summoning a *posse comitatus*, often shortened to *posse*, dates back to English common law where a county sheriff could call upon able-bodied people over the age of 15 to aid him in the suppression of a riot and in keeping the peace. See United States v. Hart, 545 F. Supp. 470 (N.D. 1982), aff’d, 701 F.2d 749 (8th Cir. 1983) (holding that only a sheriff could organize a *posse*); 12 Oxford English Dictionary 171 (2d ed. 1989) (stating “the body of men above the age of fifteen in a county (exclusive of peers, clergymen and inform persons), whom the sheriff may summon or ‘raise’ to repress a riot or for other purposes”). English common law allowed military personnel to be called, whereas the American usage of the *posse* generally did not. See Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 Wash. U. J. L. & Pol’y 99, 104-105 (2003) (citing the “Mansfield Doctrine” which said that uniformed soldiers, while acting as citizens, could participate in a *posse* and enforce laws); Sean Kealy, *Reexamining the Posse Comitatus Act: Toward A Right To Civil Law Enforcement*, 21 Yale J & Pol’y Rev. 383, 389 (2003) (pointing out that the difference between English and American treatment emerged from the American perception of the dangers associated with using a standing army for local law enforcement and keeping the peace.) This *posse* practice continues today through statutes that allow police officers to acquire the assistance of bystanders in making an arrest or in capturing an escaped prisoner. Sean O’Hara, *The Posse Comitatus Act Applied to the Prosecution of Civilians*, 53 U Kan L Rev 767, 771 (2005).

74. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850).


76. Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 Wash. U. L. Q. 953, 960 (1997). This directive, given in 1854, became known as the Cushing Doctrine. It was documented as: “The *posse comitatus* comprises every person in the district or county above the age of fifteen years whatever may be their occupation, whether civilian or not; and including military of all denominations, militia, soldiers, marines. All of whom are alike bound to obey the commands of a sheriff or marshal.” Gary Felicetti and John Luce, *The Posse Comitatus Act: Setting the Record Straight: On 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 Mil L Rev 86, 99 (2003).

77. Act of July 29, 1861, ch. 25, § 1, 12 Stat. 281.

C. Reconstruction Era Abuses

Immediately after the war, Southern state governments were left intact under the more benign Presidential Reconstruction plan; however, the President Lincoln left federal forces in the South in order to protect the rights of freed slaves. The Union troops — including the more than 100,000 black soldiers — did more than merely keep the peace. They showed contempt for slavery, intervened in civilian disputes and were symbols of the newfound black political power. The wounds of the recently fought war remained fresh.

The Southern states struck back by attempting to reestablish white supremacy through the implementation of the “Black Codes.” These codes reinserted discrimination into the criminal codes by creating special crimes with harsh penalties that applied only to the newly freed blacks. For example, there were criminal laws which prohibited [freedmen] from keeping weapons or from selling liquor. [Discriminatory penalties were] evidenced in laws which made it a capital offense for a [freedman] to rape a white woman, or to assault a white woman with intent to rape. Vagrancy laws made it a misdemeanor for a [freedman] to be without a long-term contract of employment; conviction was followed by a fine, payable by a white man who could then set the criminal to work for him until the benefactor

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79 In his December 1863 proclamation, President Lincoln offered amnesty to those citizens who swore an oath of loyalty to the and agreed to abide by the newly promulgated laws regarding slavery. Leonard Gelber, D ICTIONARY OF A MERICAN H ISTORY 368 (1978). Lincoln was operating under the assumption that the southern states had not seceded from the Union but instead had merely rebelled. Id. This plan allowed readmittance to the Union when ten percent of the 1860 voters took such oaths. Id. Three occupied Southern states, Louisiana, Arkansas, and Tennessee, were readmitted under this plan in 1864. Id.

80 § 8, 12 Stat. 281.

81 Eric Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 8-10 (1988).

82 Eric Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 8-10 (1988).

83 Gary Felicetti and John Luce, The Posse Comitatus Act: Setting the Record Straight On 124 Years of Mischief and Misunderstanding Before Any More Damage is Done, 175 Mil L Rev 86, 103, 106 (2003).

had been completely reimbursed for his generosity.\textsuperscript{85}

Hate groups and terrorist organizations like the Ku Klux Klan perpetrated acts of intimidation and violence against freedmen.\textsuperscript{86} Some southern states had passed anti-Klan legislation, but domestic law enforcement efforts were largely unsuccessful in combating the Klan’s unlawful activity and created significant backlash. North Carolina governor William Woods Holden took drastic steps to stop the Klan by calling forth the state militia, imposing martial law in some areas of the state and suspending Klan members’ habeas corpus rights. As a result, he was impeached.

Congress responded to southern resistance with the passage of a more radical Reconstruction plan,\textsuperscript{88} which was codified in 1867 in order “[t]o provide for the more efficient Government of the Rebel States.”\textsuperscript{89} During this period, President Grant authorized federal troops to act as law enforcement to settle civil disturbances, apprehend Ku Klux Klan members and bootleggers, patrol borders, enforce revenue laws, quell labor disputes and guard polls.\textsuperscript{90} Specifically, the 1871 Ku Klux Klan Act authorized the President to suspend habeas corpus and exert martial law as necessary.\textsuperscript{91}

The use of troops to guard southern polling stations was the most controversial aspect of the southern occupation and allegedly influenced the results of the 1876 presidential election.\textsuperscript{92} In this election, Samuel J. Tilden won the popular vote; Rutherford B. Hayes won the electoral vote, but his victory was disputed in three southern states and

\textsuperscript{85} Id.

\textsuperscript{86} Gary Felicetti and John Luce, The Posse Comitatus Act: Setting the Record Straight On 124 Years of Mischief and Misunderstanding Before Any More Damage is Done, 175 Mil L. Rev 86, 103, 106 (2003).


\textsuperscript{88} President Johnson’s Restoration Plan was based on Lincoln’s Plan. Leonard Gelber, DICTIONARY OF AMERICAN HISTORY 333 (1978). He offered amnesty to everyone except for “certain prominent former Confederate officers, statesmen and owners of large properties.” Id. Military governors were installed in the Carolinas, Texas, Florida, Alabama, Mississippi and Georgia, and conventions were held. Id. Pro-slavery and secession ordinances were repealed under these interim governments. Id.

\textsuperscript{89} March 2, 1867, ch. 153, 14 stat 428.

\textsuperscript{90} Clarence I. Meeks, III, Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act, 70 Mil. L. Rev. 83, 86 (1975).

\textsuperscript{91} Act of Apr. 20, 1871, ch. 22, 1, 17 Stat. 13.

Oregon. 93

Congress decided for Hayes, and, as part of his selection, Hayes agreed to remove federal troops from the South. 94 These political maneuvers re-opened the debate regarding the proper use of the military in domestic law enforcement and ultimately paved the way for the passage of the Posse Comitatus Act.

On June 18, 1878, Congress passed the Posse Comitatus Act (PCA), which prohibited the use of the standing military "as a posse comitatus or otherwise to execute the laws." 95 The original PCA included the following text:

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 as 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[]. 96

The domestic use of the military did, nevertheless, continue in more or less the same capacity as it had before the passage of the Posse Comitatus Act: between 1877 and 1945, the military was involved in domestic affairs 125 times. 97

II. The Posse Comitatus Act and the Executive

Contrary to much of the Katrina-related debate, the Posse Comitatus Act was not intended to prohibit the President from using the military to enforce the laws. Instead, the PCA was passed with a much more limited purpose: to repeal the Cushing Doctrine. 98 In


94 Id.


96 97 Clayton D. Laurie & Ronald Cole, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1877-1945 42 (U.S. Army Center of Military History).

98 Gary Felicetti and John Luce, The Posse Comitatus Act: Setting the Record Straight On 124 Years of Mischief and Misunderstanding Before Any More Damage is Done, 175 Mil L Rev 86, 116 (2003). The Cushing Doctrine allowed marshals (low ranking officials) to summon army troops into the posse comitatus. Id. at 115.
other words, the PCA was meant to criminalize the practice of civilian marshals calling forth military forces, in a *posse comitatus*, to enforce local law.

While the plain language of the PCA does appear to support the notion that it prohibits the President from executing the law, history and other laws demonstrate otherwise. Much of the confusion regarding the reach of the PCA seems to stem from the "authorized by the Constitution or Act of Congress" statutory text.

There are two major issues with this textual reference. First, the Constitution does not explicitly define the Executive’s military privileges or prohibit the use of the military for law enforcement. This clause leaves room to read in the presidential emergency power doctrine, a somewhat controversial theory that allows the Executive to unilaterally call the military in times of emergency. If this doctrine is valid, which I argue that it is, enforcing a stricter PCA against the President would, in theory, be unconstitutional.

The second issue is that Congress has passed legislation that expressly gives the President domestic law enforcement authority: the Insurrection Acts. These laws predated the *Posse Comitatus* Act and were not repealed, or even amended, when the PCA was passed. Thus, any law enforcement power the PCA purportedly takes away from the President, the Insurrection Acts give back.

In this section, I discuss the real purpose of the *Posse Comitatus* Act, as stated by the Senate Judiciary Committee shortly after its passage. I also investigate the applicability of the emergency power doctrine and presidential law enforcement authority under the Insurrection Act.

**A. The Purpose of *Posse Comitatus* Act**

In the years immediately following its passage, there was disagreement over exactly what the *Posse Comitatus* Act meant. Specifically, there was confusion over how — if at all — the PCA affected the Executive's power to call forth the troops.

Originally, some supporters believed that the PCA reinforced the American

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tradition of limiting military involvement in civilian affairs and barred the use of federal troops to enforce domestic law — except where explicitly enumerated by statute. Others, including President Hayes, subscribed to the view that the PCA merely reaffirmed the existing state of the law: the use of federal troops required an alternative authorization from the Constitution or Congress and the President had such authorization inherently in the Constitution and by statute in the Insurrection Acts.

Pursuant to the later view, the Executive continued calling forth the military for domestic purposes after the passage of the PCA. The first such use occurred only a couple months after Hayes signed the PCA, when he sent troops to quell a civil disorder in Lincoln County, New Mexico.

During this deployment, federal troops spent more than a year enforcing local law—a deployment no different from the pre-PCA deployments of Jefferson and Jackson. Hayes's calling forth of the military was significant, since the same lawmakers who had passed the Posse Comitatus Act were still in office and did not criticize the President's actions as unlawful.

In 1881, President Arthur acted more conservatively when posed with a similar emergency in Arizona. In Arthur's view, the Posse Comitatus Act did restrain his domestic military actions, so he requested that Congress amend the PCA — first, in December 1881, and then again in April 1882.

In response to the second request, a unanimous Senate Judiciary Committee expressly confirmed that:

103 See United States v. Johnson, 410 F.3d 137, 146-147 (4th Cir. 2005) (pointing out that this is not absolute limitation – Congress can authorize military usage in special circumstances that are expressly authorized).

104 See United States v. Wooten, 377 F.3d 1134, 1139 (10th Cir. 2004).


106 Paul Jackson Rice, New Laws and Insights Encircle the PCA, 104 Mil. L Rev. 109, 111 (Spring 1984).

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The posse comitatus clause referred to arose out of an implied authority to the marshals and their subordinates executing the laws to call upon the Army just as they would upon bystanders who, if the Army responded, would have command of the Army or so much of it as they had, just as they would of the bystanders, and would direct them what to do.\textsuperscript{110}

The Committee went on to note:

In all these cases the President of the United States having the power of employing any part of the Army from three soldiers to three thousand to assist in the execution of the laws in the Territory of Arizona, retains the dominion over this Army himself and the soldiers under command of their own officers to aid the civil authority, instead of being under the command of the marshal of the Territory.\textsuperscript{111}

Subsequent presidents readily called forth the military to quell domestic uprisings just as presidents had before the passage of the PCA. Apparently, they relied on constitutional or congressional grants of authority, as excepted from the PCA, to do so. The practical result was that the \textit{Posse Comitatus} Act appeared unsuccessful.

\section*{B. The Emergency Power Doctrine}

The emergency power doctrine is a theory of executive authority whereby the President gains seemingly extra-constitutional powers to use the military when, during times of national crisis, he or she deems it necessary for the preservation of the nation. Emergency powers are not expressly defined in the Constitution, and, for this reason, there is disagreement in the legal community as to not only the extent of such powers but even whether these powers exist. The most controversial aspect of the emergency power doctrine is how, if at all, it applies to domestic law enforcement, and, specifically, whether a unilateral, presidential declaration of martial law is ever lawful.

The existence of this emergency power, as a constitutionally-vested authority, is quite important to the review of presidential action under the \textit{Posse Comitatus} Act. The text of the statute currently expressly obviates constitutional action from its terms, but that PCA clause is, at least arguably, superfluous as applied to the Executive. Under the doctrine of separation of powers, Congress is unable to tighten the PCA restrictions on the

\textsuperscript{110} 13 CONG. REC. 3458 (1882).

\textsuperscript{111} 13 CONG. REC. 3458 (1882).
Executive's use of the military for law enforcement purposes whenever such law enforcement authority is derived from the Constitution. Therefore, those lobbying for more restrictions on presidential power need to seek a constitutional amendment, not a new federal statute, to change any emergency-derived Executive law enforcement power.

1. Frameworks of Emergency Power

In 1989, Professor Jules Lobel categorized emergency power into three frameworks: absolutist, relativist and liberal.\textsuperscript{112} Nearly twenty years later, these frameworks still appear to accurately categorize the views among constitutional law scholars regarding emergency powers.

The absolutist view is that there is no such thing as an emergency power, as it does not exist in the Constitution.\textsuperscript{113} The words of Justice Davis in \textit{Ex Parte Milligan} aptly describe this view:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.\textsuperscript{114}

To the absolutist, the Founding Fathers' failure to include an emergency power that extends beyond the power to call the militias, wage war or to suspend \textit{habeas corpus} is proof that such power does not exist. The "Constitution was adopted in [a] period of grave emergency" but yet the emergency powers delegated to the Executive were still quite limited.\textsuperscript{115} Moreover, "a country, preserved at the sacrifice of all the cardinal principles of

\begin{thebibliography}{99}
\bibitem{milligan1866} \textit{Ex Parte Milligan}, 71 U.S. 2, 120-121 (1866).
\bibitem{blaisdell1934} \textit{Home Bldg. & Loan Ass’n v. Blaisdell}, 290 U.S. 398, 425-26 (1934). \textit{See also} Milligan, 71 U.S. at 121.
\end{thebibliography}
liberty, is not worth the cost of preservation.\textsuperscript{116}

Unlike the absolutist, the second framework, the relativist, acknowledges that exigencies exist and that the Founding Fathers could not have possibly predicted all circumstances that the Constitution must account for.\textsuperscript{117} Under the relativist view, the "Constitution is a flexible document that permits the President to take whatever measures are necessary in crisis situations."\textsuperscript{118} This framework is supported by the Federalist Papers\textsuperscript{119} as well as by early Supreme Court opinions such as \textit{McCulloch v. Maryland} where Chief Justice Marshall famously stated that the "[C]onstitution [was] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."\textsuperscript{120}

The third framework, what Professor Lobel called the liberal framework, deals with the emergency versus non-emergency dichotomy.\textsuperscript{121} This theory is also referred to as constitutional dualism, which is "the notion that there should be provisions for two legal systems, one that operates in normal circumstances to protect rights and liberties, and another that is suited to dealing with emergency circumstances."\textsuperscript{122} The liberalist believes that the Constitution vests the Executive with the power to act in an emergency but that it gives no actual legal authority to do so.\textsuperscript{123} Thus, the President must act extra-constitutionally and, in theory, face legal liability or even impeachment.

In his 1989 article, Professor Lobel asserted that early presidents subscribed to the liberalist view of emergency power but that present day presidents subscribe to the relativist view.\textsuperscript{124} For the purposes of this article, it does not matter what type of framework — relativist or liberal — applies, as either view supports the existence of

\begin{footnotesize}
\begin{enumerate}
    \item Milligan, 71 U.S. at 126.
    \item See, e.g., \textit{The Federalist} No. 23 (A. Hamilton).
    \item 17 U.S. 316, 415 (1819).
    \item Jules Lobel, \textit{Emergency Power and the Decline of Liberalism}, 98 Yale L.J. 1385, 1390 (1989) ("liberalism seeks to separate emergency rule from the normal constitutional order, thereby preserving the Constitution in its pristine form while providing the executive with the power, but not the legal authority, to act in an emergency").
\end{enumerate}
\end{footnotesize}
emergency power. However, in my opinion, the relativist and liberal frameworks differ only semantically. No matter what, there is a limit to even the relativist president's power when he or she will lose the faith of his or her constituents and, ultimately, face impeachment if his or her emergency actions are egregious enough to offend the conscience of the nation. While presidents invoking emergency power no longer fall on their swords, as did early presidents like Thomas Jefferson, and openly admit an extra-constitutional power grab while seeking absolution from Congress, Congress has acquiesced to the Executive's use of emergency authority and effectively repudiated the need for post facto explanation and vindication.\(^\text{125}\)

2. Historical Roots of Emergency Power\(^\text{126}\)

The roots of the emergency power can be traced to John Locke's views regarding the English doctrine of prerogative by which the executive's prerogative included the "power to act according to discretion, for the public good, without the prescription of the law and sometimes even against it.\(^\text{127}\)" According to Locke, it was impossible to designate laws for all "accidents and necessities that may concern the public" and such unforeseen necessities justified dispatching with the normal law-making process that may be too cumbersome or slow to deal with a sudden crisis.\(^\text{128}\) In Locke's view, "the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of Nature and government . . . [that] all the members of the society are to be preserved.\(^\text{129}\) Basically, prerogative was "the exercise of self-preservation.\(^\text{130}\"

The American version of executive prerogative — the theory of emergency power — paralleled the Lockeian reliance on necessity.\(^\text{131}\) As explained by Arthur Schlesinger, Jr. in his book, *THE IMPERIAL PRESIDENCY*:

\(^{125}\) For example, Congress passed the War Powers Resolution of 1973 (codified as 50 U.S.C. §§ 1541-1548 (2000)), but no president has followed its terms and Congress has not raised the issue. *See* Paul Brest, Sanford Levinson, J.M. Balkin & Akhil Reed Amar, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 723-24 (2000).


\(^{127}\) John Locke, *TWO TREATISES OF GOVERNMENT* § 160.

\(^{128}\) John Locke, *TWO TREATISES OF GOVERNMENT* § 160.

\(^{129}\) John Locke, *TWO TREATISES OF GOVERNMENT* § 159.


When the executive perceived what he deemed an emergency he could initiate extralegal or even illegal action, but that he would be sustained and vindicated in that action only if his perception of the emergency were shared by the legislature and by the people. Though prerogative enabled the executive to act on his individual finding of emergency, whether or not his finding was right and this was a true emergency was to be determined not by the executive but by the community.\textsuperscript{132}

Prerogative was not expressly included in the Executive powers conferred by the Constitution, but such inclusion would have been counterintuitive.

As discussed above in Part I, the Founding Fathers were weary of creating an Executive with the supreme power to command the military but, at the same time, acknowledged a need for a military force to protect the nation. Including an express emergency power would have instilled great power in the Executive, whereas requiring the Executive to rely on executive prerogative, as defined by Locke, put a greater onus on the President. In other words, the President would have to act unlawfully in situations he or she deemed emergent and then "throw himself on the justice of his country"\textsuperscript{133} for vindication after the fact. Under this theory of emergency power, the President remained amenable to individual sanction by law without such after-the-fact approval by the legislature.\textsuperscript{134}

In 1806, President Thomas Jefferson invoked this theory of emergency power when he authorized funds, exceeding his authority under appropriations laws, for munitions after a British frigate had attacked a United States ship.\textsuperscript{135} At the time, Congress was in recess.\textsuperscript{136} Thereafter, Jefferson admitted his unlawful action in a full disclosure to Congress.\textsuperscript{137}

Several years later, Jefferson expounded on emergency powers:

A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a


\textsuperscript{133} Thomas Jefferson, THE JEFFERSONIAN CYCLOPEDIA 484 (1900).


scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.

. . . .

It is incumbent on those only who accept of great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake. An officer is bound to obey orders; yet he would be a bad one who should do it in cases for which they were not intended, and which involved the most important consequences. The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.  

Notably, there is a significant issue posed by applying the Jeffersonian view of emergency powers to the modern day state of affairs. Jefferson presupposed an "emergency" that presumably involved a change from the status quo. But, since the turn of the twentieth century, the United States has been in a near constant state of national emergency, which begs the question of what is normal and what is an emergency.

3. Inherent Emergency Power

The modern day justification for emergency power is that it is inherent in the powers delegated to the Executive. The rationale is that, under Article II, the President is charged with enforcing the law of the land and his only means to do so is to use the military. The constitutional sources of this power are the Executive Power Clause, the Take Care Clause, the Commander-in-Chief Clause and the implied foreign powers. Because this article is concerned only with domestic emergencies, I focus on the first three


139 In 1974, the Senate Special Committee on the Termination of the National Emergency noted that there were "at least 470 significant emergency powers statutes without time limitations delegating to the Executive extensive discretionary powers[]." Staff of Senate Special Comm. on National Emergencies and Delegated Emergency Powers, 93d Cong., 2d Sess., A Brief History of Emergency Powers in the United States at v. "Emergency government has become the norm." Id.


sources of emergency power. The emergency power is supported by a close textual reading of Article II, as compared to Article I, as well as the original intent of the Founding Fathers. Article II's grant of Executive power does not contain the limiting phrase "herein granted" that is present in Article I's grant of legislative power. This textual difference is significant in that it implies that Congress is a body of enumerated powers, whereas the Executive possesses inherent powers not explicitly listed in the Constitution. Some have interpreted this textual difference to stand for the proposition that Executive power includes anything not expressly prohibited by the Constitution.

Perhaps even more compelling support for broad and discretionary executive powers is the prevailing definition of "executive power" at the time of the ratification of the Constitution. As noted above, the Founding Fathers were heavily influenced by the theories of John Locke, and, additionally, relied on Blackstone and Montesquieu when drafting the Constitution. All three viewed the Executive as possessing far broader powers than those expressly contained in Article II.

The Founding Fathers intended to create an "energetic executive" and expressly charged the President with the responsibility to "take Care that the Laws be faithfully executed.[148] In Federalist No. 23, Alexander Hamilton poignantly made the case for broad executive powers when he wrote:

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142 For a judicial discussion of this implied foreign power, see United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). It is worth noting that a foreign-based conflict has been used to justify domestic use of the military. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

143 See Jules Lobel, Emergency Power and the Decline of Liberalism, 98 Yale L.J. 1385, 1404 n.96 (1989) (noting that Presidents Roosevelt and Truman relied on this principle and that it was also supported by early commentary by Hamilton).

144 See Michal R. Belknap, The New Deal and the Emergency Powers Doctrine, 62 Tex. L. Rev. 67, 77 (1983) (opining that the Founding Fathers probably intentionally left emergency powers out of the Constitution because they wanted to create Constitution that was ready for anything).


146 See generally, John Locke, TWO TREATISES OF GOVERNMENT § 159-168; William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1765); Charles de Secondat Montesquieu, THE SPIRIT OF LAWS (1762).

147 THE FEDERALIST No. 70 (A. Hamilton).

148 U.S. CONST. Art. II, Cl. 3.
It is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed.\(^{149}\)

Indeed, rejecting the emergency powers doctrine altogether is tantamount to conceding that "there is something in our Constitution which denies the people the right to self-preservation."\(^{150}\)

Additionally, the Constitution designates the President as the "Commander in Chief of the Army and Navy of the United States"\(^{151}\), which has been interpreted to require that the Executive respond in defense when the nation is attacked by an enemy. In the \textit{Prize Cases}, the Supreme Court expressly recognized that this duty included a response to either an "invasion by a foreign nation" or "States organized in rebellion.\(^{152}\)

Some argue that this Executive power to respond to insurrection, as articulated in the \textit{Prize Cases}, is based on the militia powers codified in the Insurrection Acts, rather than on Article II Executive powers,\(^{153}\) but this argument is inconsistent with the entirety of the \textit{Prize Cases} opinion. Justice Grier carefully noted that the President, pursuant to his authority as Commander-in-Chief, may not wage war against a foreign enemy without a declaration from Congress and is permitted to suppress insurrection pursuant to the Militia Acts.\(^{154}\) However, a different authority is implicated when another party initiates the hostilities. In that case, the President "is not only authorized but bound to resist force by force. He does not initiate war, but is bound to accept the challenge\(^{155}\). A war initiated by a rebellious state "is none the less a war\(^{156}\).

\(^{149}\) The \textbf{Federalist} No. 23 (A. Hamilton).

\(^{150}\) William Lemke, 77 Cong. Rec. 4391 (1933).

\(^{151}\) U.S. Const. Art. II, Cl. 2.

\(^{152}\) The \textit{Prize Cases}, 67 U.S. (2 Black) 635, 668 (1863).

\(^{153}\) See Stephen I. Vladeck, Note, \textit{Emergency Power and the Militia Acts}, 114 Yale L. J. 149 (2004) (asserting that the courts have misapplied the \textit{Prize Cases} in that the presidential authority in the \textit{Prize Cases} stemmed from the Militia Acts and not Article II). \textit{See infra} Section II-C for further decision regarding the Insurrection Acts.

\(^{154}\) The \textit{Prize Cases}, 67 U.S. (2 Black) 635, 668 (1863).

\(^{155}\) The \textit{Prize Cases}, 67 U.S. (2 Black) 635, 668 (1863).

\(^{156}\) The \textit{Prize Cases}, 67 U.S. (2 Black) 635, 668 (1863).
Inherent emergency Executive power has been recognized in a number of other key Supreme Court opinions. Chief Justice Marshall asserted, in *Marbury v. Madison*, that:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.\(^{157}\)

Additionally, in the *Grapeshot Case*, the Court found that Lincoln's establishment of provisional courts, during a time of rebellion, was a constitutional exercise of his power as Commander-in-Chief, even though such power was not expressly enumerated in the Constitution.\(^{158}\) This "duty" to provide "for the security of persons and property, and for the administration of justice" was entrusted to the President and lasted until the end of the war.\(^{159}\) Similarly in *Stewart v. Kahn*, the Court upheld the constitutionality of Lincoln's establishment of a blockade — an action part and parcel to dispersing an insurgency.\(^{160}\) In *Stewart*, the Court noted that:

> The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. . . .[T]he power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.\(^{161}\)

Again, several years later in *Cunningham v. Neagle*, the Supreme Court could "not doubt the power of the President to take measures for the protection of a judge" when it upheld the constitutionality of an Executive Order authorizing the use of a marshal to protect Justice Field.\(^{162}\) Along the same lines in *In Re Debs*, the Court held that President


\(^{159}\) *The Grapeshot*, 76 U.S. 129, 132-33 (1869).


\(^{162}\) *In Re Neagle*, 135 U.S. 1, 67 (1890).
Cleveland's use of the military to reestablish order in Chicago during the 1894 Pullman strike was constitutional.\textsuperscript{163} Justice Brewer dramatically explained that:

\begin{quote}
[T]here is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.\textsuperscript{164}
\end{quote}

It is, however, worth noting that not all American presidents have agreed with the existence of inherent emergency powers. For example, former Chief Justice and President Taft explicitly rejected the theory that executive authority could be derived from anywhere outside the four corners of the Constitution.\textsuperscript{165} Taft believed that:

\begin{quote}
[T]he President can exercise no power which cannot be reasonably and fairly traced to some specific grant of power or justly implied or included within such express grant as necessary and proper to its exercise. Such specific grant must either be in the Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.\textsuperscript{166}
\end{quote}

4. Martial Law

If an inherent emergency power exists, the President would likely employ it by declaring martial law. Martial law, itself, is a ubiquitous and ill-defined legal doctrine. The Supreme Court, legal scholars and lawmakers have acknowledged that it exists, in some form, but there is no consensus on exactly what such an action or declaration would entail and whether it is lawful.

In 1876, the Supreme Court defined martial law as "the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his

\begin{itemize}
\item \textsuperscript{163} In Re Debs, 158 U.S. 564, 581-82 (1895).
\item \textsuperscript{164} In Re Debs, 158 U.S. 564, 582 (1895).
\item \textsuperscript{165} See Paolo E. Colletta, THE PRESIDENCY OF WILLIAM HOWARD TAFT (1973).
\item \textsuperscript{166} See Paolo E. Colletta, THE PRESIDENCY OF WILLIAM HOWARD TAFT 12 (1973).
\end{itemize}
will. Of necessity it is arbitrary, but it must be obeyed. More recently, Congress defined martial law more broadly, without a reference to a state of war, but as "depend[ing] for its justification upon public necessity. Necessity gives rise to its creation; necessity justifies its exercise; and necessity limits its duration.

Interestingly, some legal scholars believe that the moniker "martial law" is an oxymoron, since by its very nature it requires the President to act extra-constitutionally, or unlawfully. These scholars argue that martial law should be more appropriately termed "martial rule" because that later term is noncommittal as to its legality. For example, David Dudley Field argued, before the Supreme Court in *Ex Parte Milligan*, that:

People imagine, when they hear the expression martial law, that there is a system of law known by that name, which can upon occasion be substituted for the ordinary system; and there is a prevalent notion that under certain circumstances a military commander may, by issuing a proclamation, displace one system, the civil law, and substitute another, the martial. . . . Let us call the thing by its right name; it is not martial law, but martial rule.

Field raised a valid point, as even today — nearly one hundred and fifty years later — there is still no body of "martial law" guidelines and the Supreme Court has issued very few opinions on the matter. The opinions that do exist are confusing and somewhat contradictory when considered side-by-side. In fact, they are better used to determine what is not a valid exercise of presidential emergency power rather than to fashion a test for what constitutes a legitimate act under martial law.

The two seminal martial law cases are: *Ex Parte Milligan* and *Duncan v. Kahanmoku*. While not martial law cases, the Japanese Internment cases, *Korematsu v. United States*, *Hirabayashi v. United States* and *Ex Parte Endo*; the Steel Strike Case, *Youngstown Sheet & Tube Co. v. Sawyer*; and the recent War on Terror cases, *Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld*, offer insight into the Court's view of martial law. I consider each case in turn.

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167 United States v. Diekelman, 92 U.S. 520, 526 (1876).
172 For additional views on these cases and summaries of other martial law cases, see Jason Collins Weida, *Note, A Republic of Emergencies: Martial Law in American Jurisprudence*, 36 Conn. L. Rev. 1397 (Summer 2004) and Major Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. Rev. 67.
a. Ex Parte Milligan

The first Supreme Court case to substantively examine the concept of martial law was *Ex Parte Milligan*, decided in 1866 shortly after the end of the Civil War. In *Milligan*, Justice Davis, writing for the Court, analyzed President Lincoln's inherent authority to declare martial law and whether some of the actions taken pursuant to that authority were lawful. At issue was the trial of civilian attorney Lambdin P. Milligan by military commission, pursuant to presidential proclamation. In the end, the Court concluded that said trial was illegal.

On August 8, 1862, then Secretary of War Edwin Stanton issued a proclamation that, essentially, suspended *habeas corpus* in the United States. The proclamation provided that:

> [A]ll U.S. marshals and superintendents or chiefs of police of any town, city, or district be, and they are hereby, authorized and directed to arrest and imprison any person or persons who may be engaged, by act, speech or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States.

A month later, President Lincoln issued another proclamation that confirmed the suspension of *habeas corpus* and authorized trial by military commission for "all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice."

The constitutionality of both of these proclamations was, at best, suspect, since it was unclear to which branch the Constitution delegated the authority to suspend the writ of *habeas corpus*. Congress did, nevertheless, back the President's suspension of the great

(2000).

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173 Martial law came before the Court in 1849 in *Luther v. Borden*, but the Court dismissed the issue as a political question. 48 U.S. (7 How.) 1, 45-47 (1849).

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

175 *Ex Parte Milligan*, 71 U.S. 2, 107-08 (1866).

176 *Ex Parte Milligan*, 71 U.S. 2, 130 (1866).


writ by passing the Habeas Act in March 1863.\textsuperscript{180} The Habeas Act permitted President Lincoln to suspend \textit{habeas corpus} "whenever, in his judgment, the public safety may require it."\textsuperscript{181} The Act also required that the Secretary of War give a list of the names of those imprisoned pursuant to the Habeas Act to the federal civilian courts.\textsuperscript{182} The civilian courts were then to convene a grand jury, and, if the grand jury returned a no bill, the prisoner should be released from military custody.\textsuperscript{183}

Milligan was imprisoned, under the Habeas Act, and the Circuit Court of the United States for Indiana convened a grand jury, which, on January 27, 1865, did not return an indictment.\textsuperscript{184} Milligan was not, however, released from custody.\textsuperscript{185} Instead, he was tried by military commission, found guilty of treason and sentenced to be hanged.\textsuperscript{186} Milligan then appealed his conviction to the Circuit Court of Indiana, which certified the case to the Supreme Court.\textsuperscript{187}

Justice Davis noted that "[n]o graver question was ever considered by this court" than whether the military commission had the legal power to try and sentence a civilian who was neither a prisoner of war nor a citizen of a rebellious state.\textsuperscript{188} The Court ultimately decided that the President was "controlled by law" and his "sphere of duty" was to execute the law — not to make the law.\textsuperscript{189} While Congress had delegated some power to the President, he had well exceeded that authority by failing to comply with the requirements of the Habeas Act.\textsuperscript{190}

The Court addressed the issue of martial law head-on and squarely rejected the assertion that war or the declaration of martial law instilled unrestrained lawful power in the President "to suspend all civil rights and their remedies, and subject citizens as well as

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\textsuperscript{180} Act of March 3, ch. 81, 12 Stat. 755 (repealed by 1873).
\textsuperscript{181} Act of March 3, ch. 81, 12 Stat. 755 (repealed by 1873).
\textsuperscript{182} Act of March 3, ch. 81, 12 Stat. 755 (repealed by 1873).
\textsuperscript{183} Act of March 3, ch. 81, 12 Stat. 755 (repealed by 1873).
\textsuperscript{184} Ex Parte Milligan, 71 U.S. 2, 107-08 (1866).
\textsuperscript{185} Ex Parte Milligan, 71 U.S. 2, 107 (1866).
\textsuperscript{186} Ex Parte Milligan, 71 U.S. 2, 107 (1866).
\textsuperscript{187} Ex Parte Milligan, 71 U.S. 2, 108 (1866).
\textsuperscript{188} Ex Parte Milligan, 71 U.S. 2, 118-19 (1866).
\textsuperscript{189} Ex Parte Milligan, 71 U.S. 2, 121 (1866).
\textsuperscript{190} Ex Parte Milligan, 71 U.S. 2, 115-16 (1866).
soldiers to the rule of his will.191 This proposition, Justice Davis explained, would be directly at odds with a republican form of government and that form of martial law was irreconcilable with the civil liberty guarantees of the Constitution.192 Military rule of this nature was precisely what the Founding Fathers sought to prevent.193

Yet, martial law was not, on its face, unlawful. The Court did not see the issue raised in Milligan as:

[A] question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are over-thrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed [in this case wa]s much more extensive. . . . [T]here was no hostile foot [on Indiana's soil]; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such ad effectually closes the courts and deposes the civil administration.194

Thus, according to the opinion of the Court in Milligan, martial law could be imposed if there was actual necessity; a war, insurrection or rebellion; closure of the civilian courts; and in places in the theater of war.195 Further, Presidential emergency authority was not lawful when it was exercised against a congressional mandate.196

Interestingly, in his dissent, Chief Justice Chase defined what he called "military jurisdiction" a little differently.197 He wrote:

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war

191 Ex Parte Milligan, 71 U.S. 2, 124 (1866).
192 Ex Parte Milligan, 71 U.S. 2, 124-25 (1866).
193 Ex Parte Milligan, 71 U.S. 2, 124-25 (1866).
194 Ex Parte Milligan, 71 U.S. 2, 126-27 (1866).
197 Ex Parte Milligan, 71 U.S. 2, 141 (1866).
within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.\textsuperscript{198}

The Chief Justice believed that Congress derived constitutional authority, from these types of "military jurisdiction", to fashion or authorize military trials for associated crimes.\textsuperscript{199} As discussed in more detail in the following sections, Chief Justice Chase's dicta regarding military jurisdiction served as the foundation for the justification of imposing martial law during World War II.\textsuperscript{200}

b. \textit{Duncan v. Kahanmoku}

In 1945 in \textit{Duncan v. Kahanamoku}, the Supreme Court once again considered the legality of trying civilians by military tribunal.\textsuperscript{201} This time the tribunals were used in Hawaii, while the territory was under a declaration of martial law.\textsuperscript{202} The Court did not invalidate the declaration of martial law but did, once again, find the use of military tribunals unlawful.\textsuperscript{203}

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\textsuperscript{198} Ex Parte Milligan, 71 U.S. 2, 141-42 (1866).
\textsuperscript{199} Ex Parte Milligan, 71 U.S. 2, 142 (1866).
\textsuperscript{200} Jason Collins Weida, Note, A Republic of Emergencies: Martial Law in American Jurisprudence, 36 Conn. L. Rev. 1397, (Summer 2004).
\end{flushleft}
On December 7, 1941, after the Japanese attacked Pearl Harbor, the Hawaiian Governor Joseph Poindexter issued a proclamation that suspended the writ of habeas corpus and placed Hawaii under martial law,\(^{204}\) pursuant to the Hawaiian Organic Act.\(^{205}\) This Act provided that:

[The governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.\(^{206}\)

President Franklin Roosevelt approved the Governor’s action a couple days later.\(^{207}\) This imposition of martial law stayed in effect until it was revoked by the President nearly three years later.\(^{208}\)

On December 8, the Governor established military tribunals in lieu of civil and criminal civilian courts.\(^{209}\) The military tribunals did not follow the normal rules of evidence or procedure, did not have set codes or predetermined punishments and they were not subject to judicial appellate review.\(^{210}\) Punishment simply needed to be "commensurate with the offense committed" and could include fine, imprisonment or death.\(^{211}\)

Duncan was a civilian shipfitter who, on February 24, 1944, got into a brawl with

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\(^{205}\) 31 Stat. 141, 153.

\(^{206}\) 31 Stat. 141, 153.


two Marines.\footnote{212} He was tried by military tribunal for violating a military order, convicted and sentenced to six months imprisonment.\footnote{213} He challenged the jurisdiction of the military tribunals by a petition for writ of habeas corpus.\footnote{214}

In reviewing the case, the Supreme Court had to determine to what extent the military could be used, pursuant to the Organic Act, to enforce domestic law.\footnote{215} Namely, the Court needed to ascertain whether this act authorized the Governor to close all courts and replace them with military tribunals.\footnote{216} This analysis focused on defining "martial law."\footnote{217}

Justice Black, writing for the Court, noted that the term "martial law" "carri[ed] no precise meaning" and was not defined in the Constitution or another Act of Congress.\footnote{218} It was also unclear, based on the legislative history of the Organic Act, the intended scope of martial law.\footnote{219} For these reasons, the Court thought that "the answer may be found in the birth, development and growth of our governmental institutions up to the time Congress passed the Organic Act."\footnote{220}

Justice Black then surveyed American History and the often noted civilian distrust and fear of a standing military.\footnote{221} Based on this history, he concluded that "[l]egislatures and courts are not merely cherished American institutions; they are indispensable to our Government. Military tribunals have no such standing."\footnote{222} The Court acknowledged that martial law was intended to permit the military to act vigorously to maintain order and protect against rebellion or invasion but was not meant to permit the total replacement of

\footnote{212} Duncan v. Kahanamoku, 327 U.S. 304, 310 (1946).
\footnote{216} Duncan v. Kahanamoku, 327 U.S. 304, 315 (1946).
\footnote{218} Duncan v. Kahanamoku, 327 U.S. 304, 315-16 (1946).
\footnote{221} Duncan v. Kahanamoku, 327 U.S. 304, 319-22 (1946).
\footnote{222} Duncan v. Kahanamoku, 327 U.S. 304, 322 (1946).
civilian courts by military tribunals.\footnote{223}

Like in \textit{Milligan}, what is notable about \textit{Duncan} is that the Court did not find martial law, itself, an unconstitutional use of executive power. In fact, it codified it as a theory of military jurisdiction that included vast military authority. The Court simply concluded that martial law did not permit an all-out military rule — at least not for more than two years after the immediate emergency had been dispelled.

c. Japanese Internment Cases

During World War II, martial law was not declared in the continental United States, just in Hawaii, which at the time was still a territory. Instead, the Executive and Congress imposed several extreme restrictions on the civil liberties of Japanese Americans. In two of the three Japanese Internment cases discussed herein, the Supreme Court upheld these actions based on theories of necessity during an emergency.

All three cases stem from violations of orders promulgated by Lt. General J.L. DeWitt. General DeWitt, acting according to authority vested in him by President Roosevelt’s February 19, 1942 Executive Order No. 9066, imposed a curfew and egress restrictions on Japanese Americans.\footnote{224} In this Executive Order, the President explained that "the successful prosecution of the war requires every possible protection against espionage and against sabotage.”\footnote{225} This Order allowed military commanders "to prescribe military areas . . . from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions" imposed by the commanders.\footnote{226} Congress codified this Executive Order in the Act of March 21, 1942, which made it a misdemeanor to disregard a military order.\footnote{227}

In \textit{Hirabayashi v. United States}, decided on June 21, 1943, the Court upheld Hirabayashi’s conviction, under the Act of March 21, for violating a curfew order.\footnote{228} The Court extended great deference to the government when examining "whether it is within the constitutional power of the national government, through joint action of Congress and
the Executive, to impose this restriction as an emergency war measure."\(^{229}\) The Court concluded that it could not "sit in review of the wisdom of" this joint action because the Constitution placed war-making responsibility on these two branches.\(^{230}\)

Using similar logic, in *Korematsu v. United States*, decided on December 18, 1944, the Court upheld a military order excluding Japanese Americans from designated areas in the West Coast.\(^{231}\) Korematsu was convicted for violating the Act of March 21 because he remained in a so-called "Military Area" in San Leandro, California.\(^{232}\) Justice Black, writing for the Court, indicated that the Court appreciated the harshness of the exclusion order.\(^{233}\) He wrote:

> [W]e are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.\(^{234}\)

Despite this hardship, the Court upheld the exclusion order and Korematsu's conviction.

In his dissent, Justice Murphy vehemently disagreed with the exclusion of persons based on their ancestry and viewed such an order as "fall[ing] into the ugly abyss of racism."\(^{235}\) Importantly, his opinion was premised on the "absence of martial law."\(^{236}\) He appeared to distinguish between the permissible level of deference to military discretion — based on whether martial law had been declared. This distinction implied that Justice

\(^{229}\) Hirabayashi v. United States, 320 U.S. 81, 93 (1943).

\(^{230}\) Hirabayashi v. United States, 320 U.S. 81, 93 (1943).


\(^{233}\) Korematsu v. United States, 323 U.S. 214, 220 (1944).


\(^{236}\) Korematsu v. United States, 323 U.S. 214, 233 (1944) (emphasis added).
Murphy would have sanctioned ancestry-based exclusion had the West Coast areas been under martial law.

The Supreme Court did not, as suggested by the rhetoric in the earlier Hirabayashi opinion, give unbridled deference to the government’s war making authority; the Court drew the line at the unjustified detention of loyal Japanese Americans. In Ex Parte Endo, which was decided the same day as Korematsu, the Court ordered the release of Endo, who had been detained in a "relocation center". The Court found that the Act of March 21 did not authorize the detention of loyal citizens such as Endo and that the government could achieve its goal of protecting against espionage and sabotage by way of curfews and exclusion orders.

The Court noted that temporary detainment, for purposes of relocation, was acceptable. It was the long-term detention, without other cause, that was problematic.

Considered together, these three opinions demonstrate how far the Court is willing to go in an emergency situation when martial law is not declared. It is reasonable to infer that the Court could permit at least equal — if not more extensive — Executive emergency authority when an area is, in fact, under martial law.

d. Youngstown Sheet & Tube Co. v. Sawyer

The extent of inherent Executive power was considered by the Court again in 1952 in Youngstown Sheet & Tube Co. v. Sawyer. At issue in Youngstown was whether President Truman had acted constitutionally when he issued an order instructing the Secretary of Commerce to take control of and to operate steel mills nationwide. The Court found that the President had acted unlawfully by issuing this directive.

In 1951, midst the Korean War, a dispute arose between steel companies and their employees over new collectively negotiated agreements. On December 18, 1951, the United Steelworkers of America gave notice of their intention to strike when their existing agreements expired on December 31 of that year. After the Federal Mediation and Conciliation Service and the Federal Wage Stabilization Board were unable to help labor

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237 Ex Parte Endo, 323 U.S. 283, 290 (1944).

238 Ex Parte Endo, 323 U.S. 283, 297, 302 (1944).


and management reach an agreement, the Union gave notice, on April 4, 1952, that it would commence a nation-wide strike at 12:01 A.M. on April 9.\footnote{Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582-83 (1952).}

Because steel was a primary component of nearly all weapons and war-related materials, the President viewed this proposed strike as a threat to the national defenses.\footnote{Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582-83 (1952).} For this reason, the President issued Executive Order 10340 that instructed the Secretary of Commerce to take possession and operate the steel mills.\footnote{Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589-90 (1952).} The Executive Order justified this action:

\[\text{[B]y virtue of the authority vested in [the President] by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States[.]}\]\footnote{Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 591 (1952).}

The Secretary of Commerce followed this directive, and the steel factories protested the lawfulness of this presidential action in federal court.\footnote{Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583-84 (1952).}

While the Supreme Court found that President Truman's taking of property was unconstitutional, it did so in six concurring opinions and three dissents, not exactly a unified front.\footnote{Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 581 (1952).} Justice Black, writing for the Court, explained that the President's power to issue such an order had to be derived from either the Constitution or an Act of Congress.\footnote{Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-86 (1952).} Since there was no relevant congressional action, Justice Black analyzed the Executive powers enumerated in the Constitution — namely, whether this action was lawful pursuant to the Take Care or Commander-in-Chief Clauses.\footnote{Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-87 (1952).}

Similarly to the holding in \textit{Milligan}, the Court held that the Commander-in-Chief powers were relegated to the "theater of war" and that the President was a law enforcer, not a lawmaker.\footnote{Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).} The Court took real issue with expanding the "theater of war" to
include seizing "private property in order to keep labor disputes from stopping production."\(^{252}\)

Youngstown was not a martial law case, but, in his concurrence, Justice Jackson shed some light on inherent executive power and its relationship to martial law.\(^{253}\) Justice Jackson believed that "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."\(^{254}\) To demonstrate his point, he broke executive action into three classes.

The first type of action was when the President "acts pursuant to an express or implied authorization of Congress, [and] his authority is at its maximum, for it includes all that he possesses in his own right plus that Congress can delegate."\(^{255}\) Someone challenging this type of action bore a heavy burden to demonstrate that the action was unlawful, since that party would be challenging the federal government's power as a whole.\(^{256}\)

The second class of presidential action was when the "President acts in absence of either a congressional grant or denial of authority, [and] he can only rely upon his own independent powers[.]."\(^{257}\) Justice Jackson opined that there was "a zone of twilight" where executive and congressional power overlap and where a lack of congressional action can enable independent actions of the President.\(^{258}\)

The third class of presidential action is when the "President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional power of Congress over the matter."\(^{259}\) Justice Jackson placed the steel factory controversy of Youngstown into this third category, which left presidential action "most vulnerable to attack and in the least favorable of possible constitutional postures."\(^{260}\)

Despite believing that Executive power was maleable, Justice Jackson strongly

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refuted the assertion that the President "enjoy[ed] unmentioned powers" and rejected the existence of inherent powers not expressly provided for in the Constitution. He asserted that "[the forefathers] knew what emergencies were" but yet only permitted the suspension of the writ of habeas corpus in times of crisis.

Quite notably, Justice Jackson explicitly excluded "the establishment of martial law" from the "extraordinary authority" he found no basis for in the Constitution. Even though in dicta, Justice Jackson’s recognition of the potential Executive use of martial law implies that such authority does exist under the Constitution. His tiered classification of presidential authority provided a guide under which the lawfulness of imposing martial law may be reviewed (or justified) in the future.

c. War on Terror Cases

The detention and treatment of so-called "enemy combatants" at Guantanamo Bay as well as the military commissions employed by the Bush Administration to try said alleged terrorists have been topics of widespread debate in the legal community since 2001 and are the subject of numerous law review articles. While full coverage of these military commission cases is outside the scope of this article, they do warrant mentioning because the Court has touched upon inherent executive power and martial law in some of these opinions.

On September 11, 2001, al Qaeda executed terrorist attacks against the United States. In response to this attack, Congress passed the Authorization for Use of Military Force (AUMF), which authorized President Bush to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pursuant to the AUMF, President Bush sent troops into Afghanistan to oust the Taliban and hunt down al Qaeda operatives.

During this military operation, individuals participating in the resistance of the United States military were detained as "enemy combatants" and then transported to the

United States Naval Base in Guantanamo Bay, Cuba. When it was discovered that Hamdi was a United States citizen, he was transferred to a continental United States military base. Hamdi was held without being charged or given access to counsel, until the Supreme Court heard a petition for a writ of habeas corpus that Hamdi's father brought on his behalf.

In 2004 in *Hamdi v. Rumsfeld*, the Court reviewed the issue of whether the capture and detention, by the military, of a United States citizen as an "enemy combatant" was constitutional. The government offered two justifications for such detention. First, "the Executive possesses[d] plenary authority to detain pursuant to Article II of the Constitution," and, second, that Congress authorized the detention. The Court did not address the Article II argument and instead decided the case based on the fact that Congress had authorized Hamdi's detention in the AUMF.

Much of the Court's opinion focused on whether the "all necessary and appropriate force" language of the AUMF included the capture and detention of citizens engaging in hostilities and how long such detention could last. The Court found that detention, as a means to "prevent captured individuals from returning to the field of battle and taking up arms again," was a legitimate measure and an "important incident of war." However, the detention could only last as long as the active hostilities and a citizen-detainee must have some means through which he can contest his status as "enemy combatant."

The Court specifically referenced its earlier holding in *Milligan* as support. In its view, Milligan's detention would have been legal if he had been detained while engaged in
battle in support of Confederate troops, rather than while at home away from the theater of war.\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 535-36 (2004).} 

The Court also stressed that, while sensitive to the exigencies of war, it was not prohibited, under the doctrine of separation of powers, from reviewing Presidential action in this context.\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 536-37 (2004).} Specifically, without a congressional suspension of the writ of habeas corpus, the Judiciary still had a role in reviewing the government's detention of citizens.\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 521-22 (2004).}

In his dissent, Justice Scalia strongly disagreed that the Executive's asserted "military exigency" justified detention of a United States citizen without charge.\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004).} In Scalia's view, an enemy of the United States should be tried in federal court for treason, and the only constitutional mechanism to relax such constitutional protections was for Congress to suspend the writ of habeas corpus.\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 572 n.4 (2004).} Scalia asserted that "indefinite imprisonment at the will of the Executive" was contrary to the "very core of liberty[.]\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 554-55 (2004).} Scalia did, nevertheless, recognize the validity of martial law as "a step even more drastic than suspension of the writ [of habeas corpus].\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 572 n.4 (2004) (quoting Ex parte Milligan, 71 U.S. 2, 127 (1866)).} He defined martial law as "limited to 'the theatre of active military operations, where war really prevails,' and where therefore the courts are closed."\footnote{Hamdi v. Rumsfeld, 542 U.S. 507, 572 n.4 (2004) (quoting Ex parte Milligan, 71 U.S. 2, 127 (1866)).}

Two years later in 2006 in Hamdan v. Rumsfeld, the Supreme Court again considered the lawfulness of the President's use of military commissions to try enemy combatants detained pursuant to the AUMF.\footnote{Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (superseded by statute).} In Hamdan, Salim Ahmed Hamdan, a Yemeni national, had been captured by United States forces in November 2001 and subsequently transferred to the Guantanamo Bay military installation in June 2002.\footnote{Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (superseded by statute).} He was still imprisoned when the case was before the Court.\footnote{Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (superseded by statute).}
On November 13, 2001, President Bush had issued a military order for the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," which provided that all suspected al Qaeda members "shall . . . be tried by military commission . . . and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death." In 2003, the President had designated Hamdan eligible to be tried by military commission, and, by way of writ of habeas corpus, Hamdan disputed the legality of these military commissions before the Supreme Court. Ultimately, the Court agreed.

What is interesting about Hamdan, from a martial law perspective, is that the Court expressly recognized martial law as valid. Justice Stevens, writing for the Court, explained that military commissions could be used in three circumstances: 1) where martial law has been declared and civilian courts are closed; 2) where there is a temporary military government; and 3) during the conduct of war. These three "states" of emergency were quite similar to the types of military jurisdiction laid out by Chief Justice Chase in his dissent in Milligan.

Justice Stevens went on to describe how military commissions used under declaration of martial law or a military government were more expansive than those used during a time of war. Namely, martial law military commissions may be used to prosecute offenses occurring when martial law or a military government is established, not necessarily during an active hostility. Additionally, they may be used to try all offenses, not just those violations of the laws of war, and have jurisdiction over everyone, not just those participating in the hostilities or members of the military.

5. Supreme Court View of Executive Emergency Power

The only clear conclusion that can be drawn from the previously discussed

Supreme Court decisions is that a declaration of martial law vests a valid "emergency" power in the President. The full extent of that power and whether such a declaration requires joint presidential and congressional action is, however, up in the air. The Court does seem to posit that so-called "martial law" establishes somewhat extreme and normally extra-constitutional authority in the President to enforce the law until order can be reestablished.

While the Court as recently as *Hamdi* has expressly refused to define Article II Executive emergency power absent a declaration of martial law, there are general trends that can be gleaned from the relevant opinions. First, there must be a genuine emergency or exigency, not a mere threat of one. Second, there seems to be a valid emergency power when there is joint Executive and congressional action, even if the Executive acts primarily (and arguably unlawfully) and is subsequently backed by Congress. Third, the Executive's law enforcement authority, pursuant to an emergency power, must occur in the "theater of war" or hostilities, yet this "theater" is quite loosely defined. Fourth, the domestic civilian courts must be closed due to crisis, but the Executive cannot close them. Fifth, absent a suspension of the writ of habeas corpus by Congress, the Judiciary still maintains appellate review over Executive detentions. Sixth, while the full extent of permissible action is not defined, the military may take somewhat drastic measures like detention without process or finite time limits. Lastly, the domestic law enforcement must be affected through the imposition of military law — not military rule or occupation.

Of course, all of these general themes can both be supported and refuted by at least one of the cases discussed in this section. This shows that, above all, the analysis of inherent Executive emergency power is highly fact sensitive and generally still open to debate. Contrary to the assertions of critics, inherent Executive power exists in some form; its extent, not its existence, still must be defined.

C. Insurrection Acts

Even without a recognition of an inherent Executive emergency power, the President still enjoys broad congressionally-delegated power to call forth the military for law enforcement purposes in times of crisis. The Insurrection Acts state that the President can call the state militia and armed forces: 1) at the request of the legislature or governor of a state to suppress an insurrection; 2) to enforce the laws of the United States or suppress a rebellion where normal judicial proceedings would be insufficient; and 3) to protect civil rights guaranteed under the Constitution.

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The limits to the President's power, under this cluster of legislation, is mainly procedural. For example, before the President can call on the state militia or armed forces, he needs to order the insurgents to stop peaceably.\textsuperscript{299}

The threshold to trigger this power is also quite low. For instance, Section 333 only requires a “mere frustration”\textsuperscript{300} to permit military involvement. The President also does not need the permission of a state or Congress.\textsuperscript{301} The decision to call troops to quell civil disorder is exclusively delegated to the President and is not subject to judicial review.\textsuperscript{302}

While the actions of the Confederate states during the Civil War are generally what is thought of as an insurrection, as meant by Section 331,\textsuperscript{303} courts have adopted a broader view by defining insurrection as “a rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in [a] city or state.”\textsuperscript{304} Insurrection does not require violence or a probability of success; it needs to “defy for the time being the authority of the government.”\textsuperscript{305} Those resisting the power of the civil authorities are known as “insurgents,” and anyone – regardless of their motives\textsuperscript{306} – that participates is considered an insurgent.\textsuperscript{307}

Under Section 333, the President can summon the militia when the “authorities of [a] State are unable, fail or refuse to protect” the rights, privileges and immunities guaranteed by the Constitution.\textsuperscript{308} The courts have interpreted this statute to mean that the President can order the militia to protect fundamental rights such as the right to interstate

\textsuperscript{299} 10 U.S.C.A. § 334.
\textsuperscript{300} 10 U.S.C.A. § 333.
\textsuperscript{301} Id. at 1403.
\textsuperscript{303} Stevens v. Griffith, 111 US 48 (1884).
\textsuperscript{304} In re Charge to Grand Jury, 62 F. 828, 830 (1894). In this case, a grand jury was called to determine whether offenses committed during a railroad union strike should be prosecuted. This is how the judge instructed the jury on what insurrection meant.
\textsuperscript{305} Id.
\textsuperscript{306} This raises an interesting question regarding the people who were looting for food during the Katrina disaster.
\textsuperscript{307} In re Charge to Grand Jury, 62 F. at 830.
\textsuperscript{308} 10 U.S.C.A. § 333.
travel. Presidents Grant, Eisenhower and Kennedy all used this power to “remove obstructions of justice” that “den[ied] the equal protections of the law” and to “quell domestic violence” in conjunction with civil rights abuses.

Unlike the Executive emergency power, the Insurrection Acts are only Acts of Congress. Therefore, Congress could, conceivably, repeal them if it wished to extend the law enforcement prohibitions of the Posse Comitatus Act to restrict Presidential action. But, until these laws are repealed or, at the least amended, the President may avail him or herself of the "Act of Congress" exclusion to the PCA and enforce domestic law pursuant to the generous confines of the Insurrection Acts.

It is, however, doubtful that Congress will cull back the Insurrection Act powers. As recently as 2006, the Insurrection Acts were amended, in response to the Katrina Disaster, to expand presidential authority. The John Warner National Defense Authorization Act allows the President, without the consent of the states, to deploy federal troops in response to a natural disaster or other domestic crisis. This latest amendment appears to strike a fatal blow to the Posse Comitatus Act, as there does not seem to be any type of emergency law enforcement activity not expressly authorized by an Act of Congress and, therefore, left to be restricted by the PCA.

III. Do We Even Need the Posse Comitatus Act?

Ignoring for the moment the issue of whether Congress can, in fact, restrict the Executive’s use of the military to enforce domestic law in times of emergency, I would like to consider whether a broad restriction, such as that purportedly included in the Posse Comitatus Act, is either needed or prudent. I conclude no, on both counts.

It is important to note that these conclusions neither constitute my support for unbridled Executive power nor my agreement with President Bush’s exercise of Executive power. There is a marked difference between taking issue with a blanket and albeit meaningless bar and with the flaws in the arguments in support of such prohibition and condoning one President’s political agenda and use of his official powers. To be clear, I

309 Bergman v. United States, 565 F. Supp. 1353, 1401 (1983) (finding that the President could have sent the military in to protect the rights of the black citizens where a white supremacist group was planning on blocking (with force if necessary) the black citizens from disembarking and entering a bus station.)

310 Id. at 1401-1402.


believe that there are limits to Executive power and a threshold where Presidential action in the name of protecting the Constitution actually perverts it. Perhaps President Bush's actions in the War Against Terrorism surpass that threshold, but that is not the subject of this article.

Instead, I dispute the need for a law that has a broad, ill-defined restriction on Presidential authority. If our nation has issue with the actions of one particular President, than there are appropriate individual remedies — such as impeachment — that do not require more drastic law-altering action.

Like the Founding Fathers, we cannot possibly anticipate every emergency that may arise. Ten or twenty years ago, many people would have found it unbelievable that a small cell of terrorists could hijack and pilot commercial airplanes into the World Trade Center and the Pentagon, but it happened in 2001. The Hurricane Katrina Disaster reaffirmed that, when unexpected circumstances create a state of chaos, the result is a lawlessness that domestic police are not necessarily suited to handle.

Moreover, the justifications for this broad prohibition against the use of military for domestic law enforcement are misplaced. In the following sections, I take a closer look at the typically proffered reasons and demonstrate their flaws.

A. Justification #1: Founding Fathers' Distrust of a Standing Military

Distrust of a standing military was a theme that pervaded the constitutional debates and the Federalist papers at the time immediately before and after the founding of our nation. But, these discussions were based on the colonists' experiences under British rule. It is important to remember that the Founding Fathers were, essentially, common-day insurgents who led a secession movement, which resulted in the formation of a new country — the United States.

Despite the fear that another king could use a military force to exert dictatorial power over the infant nation, the Founding Fathers still provided for an army in the Constitution. There was no Posse Comitatus Act or the like, just the Constitution that divided military powers between the Executive and Congress.

As discussed in Part I, the presidential power to call forth the military to enforce the domestic law during times of crisis was expressly codified in the Militia Acts, which were originally passed immediately after the ratification of the Constitution. These acts were the harbinger for the Insurrection Acts, still in effect today, and gave significant power to the Executive. Nearly every President, since their passage, has invoked them in one way or another, and Congress has not repealed them but instead, as recently as 2006, extended the powers they delegate to the President.

The primary difference between the actions of the American Colonists and those of the secessionist states during the Civil War is that the colonists triumphed, whereas the South did not.
The Militia Acts and their subsequent invocations demonstrate that the Founding Fathers recognized that military occupation during a domestic emergency was, at times, necessary. Such use of the military is certainly distinguishable from a permanent installation of military rule, like that of the British during Colonial Times.

Lastly, even the Founding Fathers took extra-constitutional action when necessity required it. Presidents, like Thomas Jefferson, invoked the Lockeian theory of executive prerogative to extend their own Executive authority.

B. Justification #2: Reconstruction Era Abuses

During the Reconstruction Era, the South was occupied and under the rule of the North. The southern governments had been forcibly removed to quash an insurgency, and the Union troops were installed to enforce a new domestic order. While an extended military rule was certainly not desired or even consistent with the American way of life, this era of history was a time of war and great national crisis. It demanded the aid of the military.

The Union troops were an occupying force, and, as noted above, acted like one. This level of military rule is distinguishable from the imposition of martial law in the face of an emergency. In other words, United States military would not be entering a domestic forum to "take over" and forcibly change the citizens' way of life, as did the Union troops, but rather would be descending into the forum to restore order to the same way of life.

Further, the overall view of the American military, among civilians, has changed significantly from the view during the Reconstruction Era. Civilians view military personnel with a much higher level of respect and confidence. Many citizens and nationals currently serve in ancillary forces like the National Guard; formerly served as a means to attend college, to start a civilian career or to achieve citizenship; or have relatives or close friends who serve, with distinction.

C. Justification #3: Differences Between Military and Police Forces

Commentators often point to the differences in military and local law enforcement training and objectives to justify excluding the military from law enforcement roles. Specifically, military personnel are not trained to consider the private rights of enemy soldiers; they are trained to react with extreme force in high stress battlefield situations and in armed conflicts on foreign soil against other soldiers. Police, on the other hand, are expected to be peacekeepers first, using deadly force as a last resort. However, in the modern day, this training-based distinction is a misnomer.

In 1991, the Pentagon organized Joint Task Force Six (JTF-6) to coordinate the military training of domestic law enforcement and to carry out law enforcement enhancement missions. JTF-6 began using Special Forces and United States Army Military Police to train elite law enforcement units including Special Weapons and Tactics (SWAT), Special Response Teams (SRT), Emergency Response Teams (ERT), Special Emergency Response Teams (SERT) and Emergency Services Units (ESU).

As of the late 90’s, it was estimated that 43% of the 459 SWAT units then in existence had been trained by the military. It is currently estimated that 89% of police departments serving a population of over 50,000 have such units; it is unknown how many received military training.

These specialized police units are typically organized in small teams of five to ten officers, are equipped with high-destruction weapons and are called into high-risk situations that require specialized training to diffuse. JTF-6 provides training in skills such as urban warfare tactics, booby trap removal, combat shooting techniques and nighttime shooting skills. SWAT units use these skills to deal with situations stemming from illegal drug, gang and organized crime activity, civil rights violations and domestic terrorism.

Due to the success of JTF-6, this effort was expanded in 1999 into five different forces dispersed throughout the United States. In 2002, the task forces were then


318 Rowan Scarborough, *DANGEROUS ALLIANCES – INFLUENCE OF UNITED STATES MILITARY ON CIVILIAN LAW ENFORCEMENT* (1999).


323 http://www.northcom.mil/.
consolidated under the control of United States Northern Control (US Northcom) by the Department of Defense in response to domestic terrorism threats. According to its mission, US Northcom “plans, organizes and executes homeland defense and civil support missions.” At one point, it employed approximately 1,200 employees at its headquarters at Peterson Air Force Base in Colorado.

The military’s involvement in training local law enforcement has been a mixed blessing. On one side, increased “sharing” between military and local law enforcement has helped train and equip police forces with new technology that can make a real difference in fighting crime. However, it has also lead to excessive use of force as seen during the Branch Davidian standoff in Waco, Texas in 1996.

Another downside to the military training of police forces is that the tactics taught do not necessarily lend themselves to compliance with Fourth Amendment restrictions on police action. “Using tow trucks to remove doors [and] flash bangs,” which are standard operating procedures for SWAT, are a far cry from the “knock and announce” rule to which civilian police officers are held. Unfortunately, gang and drug-related violence has necessitated these more aggressive police actions.

Having a police force that uses the same techniques as the military is not far from having the standing army executing laws. At the end of the day, the difference between a militarized police force and a military force policing is nonexistent.

Conclusion

In order to bring the country back together after the Civil War, a compromise was needed. The Posse Comitatus Act was passed to forbid the civilian authority from using the military to enforce the law. Contrary to the present debate, the Posse Comitatus Act was not passed to restrict presidential action. In fact, Presidents continued to use the military to enforce domestic law — the first such action occurring immediately after the passage of the Posse Comitatus Act.

While many argue that the Posse Comitatus Act should be strengthened to prevent presidential abuses of power, it is not clear that Congress even has the power, under the Constitution, to restrict the Executive's action in this manner. Under the controversial emergency power doctrine, the Executive has the inherent authority to command the military, to enforce domestic law, to uphold the Constitution and to protect the nation in times of peril.

It is not clear that a stronger Posse Comitatus Act, if constitutionally permissible, would have any meaningful effect on Presidential action. Throughout history, Presidents have acted first and sought congressional vindication later. There is no indication that the future would yield different results.

There are several posited justifications for separating military and civilian law enforcement roles. These reasons range from the wishes of the Founding Fathers to the dangers of military oppression. The validity of these justifications is, like much else in this debate, unclear.

What is clear, however, is that, in the aftermath of Hurricane Katrina, the military did what disaster relief organizations like FEMA and local police could not. Within a very short period of time, the active duty troops reestablished order and fed, medicated and evacuated the stranded New Orleanians — without civilian casualty. Had the Posse Comitatus Act not been in the law books, the military could have rescued the New Orleanians even faster.

Neither the Posse Comitatus Act nor a more vigorous adaptation will stop a military coup d'etat or a President from issuing an emergency order he or she feels constitutionally justified in making. Having a law like the Posse Comitatus Act simply forces military commanders to choose between obeying a direct order from their Commander-in-Chief or facing criminal liability for unlawfully enforcing the domestic law...or, worse, choosing between criminal liability and rescuing people like those who were stranded in New Orleans.

Personally, I would rather live with the risk that some day an Executive may attempt to impose military rule than be stranded in my attic without food, water or medication next hurricane season. I imagine the Katrina refugees would agree.