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# An Insurrection Act for the 21st Century

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**Thaddeus Hoffmeister<sup>1</sup>**

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*Better twenty-four hours of riot, damage, and disorder than illegal use of troops.*  
--President Theodore Roosevelt<sup>2</sup>

## **Introduction**

Throughout America's history there has been a fundamental disagreement over how best to deal with large scale civil disorder within the United States.<sup>3</sup> Whether brought about because of natural disaster, riot, rebellion, public health emergency or terrorism, Americans have disagreed on how to manage the civil unrest associated with a domestic emergency. More specifically, they differ, especially when military intervention is required, over who should serve as the lead agent in responding to these crises.<sup>4</sup>

On one side are those who fear overreliance on the Executive Branch and consolidating military power within it. Some believe that this will increase the likelihood of martial law or rule by military force<sup>5</sup> and lead to the loss of civil liberties.<sup>6</sup> While these concerns, first raised by the Constitutional drafters, may appear antiquated today, they are actually quiet relevant. The recently declassified 2001 Department of Justice Memo regarding *Authority for the Use of Military Force to Combat Terrorist Activities Within the United States* demonstrates the extent to which the Executive Branch can and will stretch the limits of the law at the expense of individual constitutional rights.<sup>7</sup>

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<sup>2</sup> Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992* pg. 179 (Washington, DC: Center of Military History, US Army, 2005).

<sup>3</sup> Shobhan Morrissey, *Should the Military Be Called in for Natural Disasters*, Time, December 31, 2008. John Yaukey, *Katrina Raises Questions About Domestic Use of Troops*, USA Today, September 13, 2005 (“The reluctance to use federal troops on U.S. soil is rooted in the perennial American struggle between state’s rights and federal authority.”).

<sup>4</sup> *Id.* See also, Mackubin T. Owens, *Hurricane Katrina and the Future of Civil-Military Relations*, New York Post, September 2005, New York Post (“This trend toward increased involvement of the US military in domestic affairs is at odds with healthy civil-military relations.”).

<sup>5</sup> Shobhan Morrissey, *Should the Military Be Called in for Natural Disasters*, Time, December 31, 2008 (“The perception is that a standing military force attempting to enforce civil laws allows for despots to retain power by force of arms rather than by the consent of the governed.”).

<sup>6</sup> For a contrasting view see Scott R. Tkacz, *In Katrina’s Wake: Rethinking the Military’s Role in Domestic Emergencies*, 15 Wm. & Mary Bill Rts. J. 301 (“Us of the Military in Domestic Affairs Would Serve to Protect Civilian’s Constitutional Rights, Not to Abrogate Them.”). Consider that during the 1950s and 1960s the federal government used the military on several occasions to protect and ensure the constitutional rights of minorities.

<sup>7</sup> October 23, 2001 Memo from John C. Yoo and Robert J. Delahunty, *Authority for Use of Military Force to Combat Terrorist Activities Within the United States*, October 23, 2001[hereinafter, DOJ memo] pg. 25 (“...we think that the better view is that the 4<sup>th</sup> Amendment does not apply to domestic military operations...”). See also, Mark Mazzetti and David Johnston, *Bush Weighed Using Military in Arrests*, N.Y. Times, July 24<sup>th</sup>, 2009 (“Some of the advisers to President George W. Bush, including Vice President Dick Cheney, argued that a president had the power to use the military on domestic soil to sweep up the terrorism suspects, who came to be known as the Lackawanna Six, and declare them enemy combatants.”).

There is also a belief that governors and their respective National Guard units are in the best position to handle domestic upheaval. This is because they are closer to the problem and generally more familiar with the people impacted.<sup>8</sup> Moreover, under federalism the “preservation of law and order is basically a responsibility of the state and local governments.”<sup>9</sup> Thus, the federal government is considered a last, not first resort during a civil disorder.<sup>10</sup>

In contrast, others feel that due to the speed, size, scope, complexity and magnitude of modern day domestic emergencies and the potential for large scale suffering and loss, the federal government should be in charge of all but the most routine matters.<sup>11</sup> States, they argue, even with their National Guard at full strength, can quickly become overwhelmed.<sup>12</sup> Taking a wait and see approach to determine whether states are able to handle the situation, before involving the federal government, puts both lives and property at risk.<sup>13</sup> Thus, the federal government with its superior resources, to include the most advanced military the world has ever seen, should have primary responsibility.<sup>14</sup>

Lately, it appears that the pendulum has swung in favor of increased federal government involvement, especially with respect to providing a larger role for the Active Duty military.<sup>15</sup> For example, the Army recently deployed two Active Duty brigades to Northern Command which is located in Colorado Springs, Colorado and responsible for

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<sup>8</sup> *Id.*

<sup>9</sup> Douglas A. Poe, *The Use of Federal Troops to Suppress Domestic Violence*, ABA Journal (February 1968) Vol. 54 pg. 171.

<sup>10</sup> Bennett M. Rich, *The Presidents and Civil Disorder* pg. 5 quoting Washington in a letter to Hamilton September 16, 1792 (“...the employing of the regular troops avoided, if it be possible to effect order without their aid... Yet if no other means will effectually answer, and the constitution and laws authorize these, they must be used as a dernier resort.”).

<sup>11</sup> See Elizabeth F. Kent, “Where’s the Cavalry?” Federal Response to 21st Century Disasters, 40 Suffolk U. L. Rev. 181, 194 (2006) (“The DOD is the federal government’s greatest resource for planning, logistics, and operational support. The DOD has developed proven training exercises, a strong unified command structure, state of the art communications systems, and a body of individuals trained to act and lead under high-stress, crisis-laden, dangerous conditions.”). See also, Wall Street Journal December 8, 2005, (“Admiral Keating who heads US NORTHCOM, a newly created military body overseeing homeland defense, has told lawmakers that active-duty forces should be given complete authority for responding to catastrophic disasters.”).

<sup>12</sup> See Elizabeth F. Kent, “Where’s the Cavalry?” Federal Response to 21st Century Disasters, 40 Suffolk U. L. Rev. 181, 185-186 (2006). This false sense of security includes all man-made or natural disasters with the potential for widespread destruction.

<sup>13</sup> Stephen M. Griffin, *Stop Federalism Before It Kills Again: Reflections on Hurricane Katrina*, 21 St. John’s J. of Legal Commentary 527 (2007). See also, Capatain William A. Osborne, *The History of Military Assistance for Domestic Natural Disasters: The Return to a Primary Role for the Department of Defense in the Twenty-First Century*, December 2006 pg. 18. (“The time has come to accept and recognize that the military should be recongnized as the primary agency during domestic disaster relief.”).

<sup>14</sup> *Id.* See also, Jim Vanderhei and Josh White, *Bush Weighs Greater Role for Military in Disaster Response*, Washington Post, September 26, 2005. Scott R. Tkacz, Note, *In Katrina’s Wake: Rethinking the Military’s Role in Domestic Emergencies*, 15 Wm. & Mary Bill Rts. J. 301,302 (2006).

<sup>15</sup> Wall Street Journal December 8, 2005

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the overall defense of North America.<sup>16</sup> These units serve as an on-call federal response force for domestic emergencies in the United States--a job traditionally performed by state National Guard units under the command and control of their respective governors.<sup>17</sup> Also, by 2011, the Department of Defense plans to have 20,000 additional Active Duty service members deployed within the United States.<sup>18</sup> These changes are occurring despite America's historical aversion to involving the military in domestic civil affairs.<sup>19</sup> For instance, it has been over 100 years since the passage of the Posse Comitatus (PCA), which prohibits federal military forces from actively participating in civilian law enforcement absent a Congressional or Constitutional exception.<sup>20</sup>

This paradigm shift, one that is unlikely to reverse itself in the near future, is due to a variety of modern day factors such as 9/11, increased foreign deployments of the National Guard, Hurricane Katrina and the amplified threat of a future large scale terrorist attack either in the U.S. or abroad.<sup>21</sup> In fact, a blue ribbon panel commission

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<sup>16</sup> See Northern Command web site [www.northcom.mil](http://www.northcom.mil) (last visited on 8-17-09).

<sup>17</sup> Gina Cavallaro, *Brigade Homeland Tours Start Oct 1*, The Army Times, Sep. 30, 2008. ("By 2011 the Department of Defense plans to have 20,000 uniformed troops expressly trained to assist in national disaster rapid response at a moment's notice.").

<sup>18</sup> Spencer S. Hsu and Ann Scott Tyson, *Pentagon to Detail Troops to Bolster Domestic Security*, Washington Post, December 1, 2008; A01.

<sup>19</sup> *Laird v. Tatum*, 408 U.S. 1, 15 (1972) ("[There is a traditional and strong resistance of Americans to a military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military.]). See also, W. Kent Davis, *Swords into Plowshares the Dangerous Politicization of the Military in the Post-Cold War Era*, 33 Val. U. L. Rev. 61, 65 (1998). John Yoo, *Trigger Power*, LA Times, October 2, 2005. ("There is an appropriate cultural reluctance toward the use of military might within the United States.").

<sup>20</sup> 18 USC §1385 Posse Comitatus Act (PCA) "Whoever, except in cases and under circumstances expressly authorized by the Constitution or act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." H.W.C. Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 85 Mil. L. Rev. 87 (1960) "The posse comitatus derives its name from the entourage or retainers which accompanied early Rome's proconsuls to their places of duty and from the *comite* or *counte* courts of England. It was a summons to every male in the country, over the age of fifteen, to be ready and appareled, to come to the aid of the sheriff for the purpose of preserving the public peace or for the pursuit of felons." For a more complete discussion of the PCA see the following articles: Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 Wash. U. L. Q. 953 (1997); Commander Gary Felicetti and Lieutenant 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 (2003); James P'Oshaughnessy, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 Am. Crim. L. Rev. 703 (1976); Note, *Honored in the Breech: Presidential Authority to Execute the Laws With Military Forces*, 83 Yale L. J. 130 (1973); Major Kirk L. Davis, *The Imposition of Martial Law in the United States*, 49 A.F. L. Rev. 67 (2000); Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, 1997-JUL Army Law. 3; Sean Kealy, *Reexamining the Posse Comitatus Act: Toward A Right to Civil Law Enforcement*, 21 Yale L. & Policy Review 383, 398 (2003).;and Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 Wash. U. J.L. & Policy 99, 129 (2003).

<sup>21</sup> Shobhan Morrissey, *Should the Military Be Called in for Natural Disasters*, Time, December 31, 2008. "The call for expanding the military's domestic role did not begin with Katrina." Mackubin T Owens, *Hurricane Katrina and the Future of Civil-Military Relations*, N.Y. Post, Sep. 2005.

recently concluded that “it is more likely than not that a weapon[] of mass destruction will be used in a terrorist attack somewhere in the world by the end of 2013.”<sup>22</sup>

One consequence of this shift in policy has been a renewed interest in the Insurrection Act,<sup>23</sup> which is the focus of this Article. As some are aware, the Insurrection Act is the principal authority relied upon by the President to deploy troops domestically to respond to a domestic emergency.<sup>24</sup> It is also one of the major exceptions to the PCA.<sup>25</sup> This Article, after providing a broad overview of the Insurrection Act to include examining prior episodes of civil disorder, offers recommended changes to the statute. It is hoped that these changes if implemented will allow the Insurrection Act to be an effective and relevant tool in the 21<sup>st</sup> century.

Up until Hurricane Katrina and the passage and repeal of the Enforcement Act, there had not been a significant amount of legal scholarship or even discussion about the Insurrection Act. The works that did address this area of law tended to focus on whether the President had inherent authority to deploy troops domestically and or whether Congress can limit or expand that authority. The one major exception is a recent work that follows up a series of earlier law review articles by Professor David Engdahl<sup>26</sup> and questions the constitutionality of several sections of the Insurrection Act.<sup>27</sup>

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<sup>22</sup> Panel Warns Biological Attack Likely by 2013, (Dec. 1, 2008), available at <http://www.msnbc.msn.com/id/28006645>. See also, The Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism (Dec. 2008), available at , <http://www.preventwmd.gov/report>.

<sup>23</sup> For the purposes of this article, the term “Insurrection Act” refers to the laws codified at 10 U.S.C. §§ 331-335 (2006) unless otherwise stated.

<sup>24</sup> H.W.C. Furman, *Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act*, 85 Mil. L. Rev. 105-107 (1960). Troops have been deployed on an emergency basis outside of the Insurrection Act on a very limited basis and primarily without the prior approval of the president.

<sup>25</sup> Stephen Vladeck, *Calling Forth Clause and the Domestic Commander in Chief*, 29 Cardozo L. Rev. 1104-1105, 1091 (2008) According to Professor Vladeck, the Insurrection Act may be the most important exception to the PCA. In addition to the Insurrection Act, there are other exceptions to the Posse Comitatus Act which has led some to question the PCA’s relevance and importance see for e.g., Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 Wash. U. L. Q. 953 (1997) and Commander Gary Felicetti and Lieutenant 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 (2003). Also, at least one legal commentator has stated that rather than exception to the PCA the Insurrection Act is beyond the scope of the PCA, John R. Longley, *Military Purpose Act: An Alternative to the Posse Comitatus Act—Accomplishing Congress’s Intent with Clear Statutory Language*, 49 Ariz. L. Rev. 717 (2007)

<sup>26</sup> During the early 1970s, Professor Engdahl wrote three law review articles in which he argued that the modern day Insurrection Act did not reflect the intent of the Constitutional drafters nor the English Common law from which the statute was derived. Professor Engdahl argued severely limiting the use of the military in domestic civilian affairs.

<sup>27</sup> William C. Banks, *Providing “Supplemental Security”—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 Journal of National Security Law & Policy 1 (2008) Professor Banks has made a compelling argument that absent exceptional circumstances it is unconstitutional for the federal government to respond to internal domestic violence without a prior request by the state. But see, Steven J.



By way of contrast, this Article explores the practical applications of the Insurrection Act concentrating on ways to improve its use. While this Article does touch upon the previously mentioned constitutional issues briefly, the goal of this Article is to carry the debate to the next level and come up with an improved, updated Insurrection Act that addresses both current and future challenges that are sure to arise as this country grows increasingly reliant on the Active Duty military for homeland security. The difficulty of course is creating a finished product that will allow the President to fulfill his constitutional duties as Commander in Chief while also simultaneously ensuring that governors have the tools necessary to safeguard their residents.

This Article begins, in Part I, with a brief discussion of two early episodes of civil disorder, Shays' Rebellion, the catalyst for the Insurrection Act and the Whiskey Rebellion, which provided the first test for the Insurrection Act. This section then goes on to examine the legislative history of the Insurrection Act. Particularly relevant here is the general lack of clarity and ambiguity found in certain terms within the statute. In fact, the Insurrection Act throughout its two hundred plus year history has been plagued by both broad and undefined terms.<sup>28</sup> By way of example, Presidents have historically used "riot," "lawlessness" and "insurrection" interchangeably."<sup>29</sup>

Next, the Article turns to the most recent effort to modify or update the Insurrection Act, the Enforcement of the Laws to Restore Public Order Act ("Enforcement Act"), which was repealed last year.<sup>30</sup> Here, the article demonstrates that the Enforcement Act, contrary to public opinion, was not in the strictest sense a power grab by the Executive Branch.<sup>31</sup> Rather, the Enforcement Act benefitted both the states and the President.

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Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507 (1991).

<sup>28</sup> This idea is probably summed up best by General George S. Patton who wrote, "[d]ue to the combined effort of ignorance and careless diction, there is widespread misunderstanding of the principle terms used in connection with the enforcement of law by military means." Major George S. Patton Jr., *Federal Troops in Domestic Disturbances*, November 1932. In 1932, General Patton led federal troops against American veterans (Bonus Army) encamped in Washington, D.C.

<sup>29</sup> Note, Harv. L. Rev. 638, 644 (1968), *Riot Control and the Use of Federal Troops*, ("By usage, and not by judicial construction, Section 331 has come to be regarded as authority for utilizing federal troops, and utilizing them as soldiers, in situations of violence with no characteristics of political uprisings or genuine "insurrections" at all."). See also, David E. Engdahl, Anthony F. Renzo and Luize Z. Laitos, *A Comprehensive Study of the Use of Military Troops in Civil Disorders With Proposals for Legislative Reform*, 43 University of Colorado Law Review 399, 413 (1972) [hereinafter, Engdahl et al.]

<sup>30</sup> When signing the law to repeal the Enforcement Act, the President included a somewhat ambiguous signing statement leaving some to question whether he or future presidents will feel bound by the current Insurrection Act. January 28, 2008 White House Press Release.

<sup>31</sup> Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to use the Military in Domestic Emergencies*, 91 Marq. L. Rev. 1027, 1063 (2008). ("Those contending that the amendment served to expand Executive power have the stronger argument.")



In Part III, the Article analyzes two prior episodes of civil disorder, Hurricane Katrina and the Detroit Riot of 1967. Here, the Article examines the three major factors influencing whether the Insurrection Act is invoked: (1) ability of the President and the governor to understand and apply the statute; (2) the relationship between the governor and the President; and (3) public opinion.

Finally, the Article looks at other possible modifications to the Insurrection Act outside of those made by the Enforcement Act. For example, this Article examines reinstating judicial review and requiring a more uniform process by which governors make requests for military assistance to the President.

## **PART I. Insurrection Act**

### **A. Background**

While at least one legal scholar has suggested that the seeds of the Insurrection Act were sown by Lord Chief Justice Mansfield in eighteenth century England,<sup>32</sup> most view Shays' Rebellion, which occurred between 1786 and 1787, as the catalyst for the Act's existence. As some may recall, Captain Daniel Shays a veteran of the Revolutionary War led a group of armed farmers (Shaysites) in Western Massachusetts in a quasi-revolt.<sup>33</sup> These "regulators" or "insurgents" as they were called at the time were angry at not only the state, but also the courts and merchants whom they viewed as responsible for their high taxes and excessive debts.<sup>34</sup> In many instances, the combination of taxes and debt collection resulted in farmers losing their farms and landing in debtor's prison.<sup>35</sup>

At least initially, the uprising or revolt was fairly successful as the Shaysites were able to disrupt commerce, tax collection and the court system of Western Massachusetts.<sup>36</sup> This was due in large part to the Articles of Confederation which left the Massachusetts

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<sup>32</sup> David Engdahl, *Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa Law Review 1, 45, 47 (1971). "With lingering concerns over Shays' Rebellion, some of the Framers regarded the Domestic Violence Clause as a grant of power, a recognition that no government incapable of offering protection to its citizens was worthy of the devotion of those citizens" [hereinafter, Engdahl I]. See also, Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime and the Forgotten Role of the Domestic Violence Clause*, 66 GWLR 1, 77 (1997).

<sup>33</sup> While in retrospect it is questionable whether this was truly a revolt, most at the time took the threat posed by CPT Shays and his men quite serious.

<sup>34</sup> Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* Pgs. 4-7 (Editor ed., DIANE 1996).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

militia undermanned<sup>37</sup> and provided the central or federal government with little real authority or ability to aid the state.<sup>38</sup> In addition, other states were either unable or unwilling to help Massachusetts in its time of need and the central government had no mechanism to require them to do so.<sup>39</sup>

While the rebellion was ultimately put down by a privately financed militia raised by wealthy Boston merchants, CPT Shay and his Shaysites created enough havoc to raise alarms in not only Massachusetts, but also throughout post-Revolutionary War America.<sup>40</sup> The rebellion, *inter alia*, demonstrated the overall impotence of the central government in the face of a small-scale internal military threat. Some believe that it was Massachusetts' inability, at least initially, to put down the rebellion combined with a growing fear of mob rule or democracy run amok that brought individuals like George Washington to the Constitutional Convention in Philadelphia the following year to amend or reconfigure the Articles of Confederation.<sup>41</sup>

As history subsequently demonstrated, the Constitutional or Federal Convention went well beyond amending or reconfiguring the Articles of Confederation as an entire Constitution was created. At the convention, the Constitutional drafters took several steps to prevent a reoccurrence of Shays' Rebellion. Of particular significance was Article I, Clause 15 and Article IV, Section IV. The latter clause, known as the Guarantee or Domestic Violence Clause<sup>42</sup>, reads as follows:

*The United States shall guarantee to every State in this Union a Republican form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.*<sup>43</sup>

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<sup>37</sup> Articles of Confederation Article VI "[n]or shall any body of forces be kept up by any State in time of peace, except such number only, as in the judgment of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State."

<sup>38</sup> Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919, 923 (1988). Articles of Confederation Article II reserved to the states "every power, jurisdiction and right" not "expressly delegated" to Congress. Nothing in the Confederation provided specific authority to Congress to intervene in a rebellion or insurrection in a state. See also, *Vices of the Political System of the United States* (Apr. 1787), in 9 *The Papers of James Madison* 345, 350 (Robert A. Rutland et al. eds., 1975).

<sup>39</sup> Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* Pgs. 4-7 (Editor ed., DIANE 1996)

<sup>40</sup> Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* Pgs. 4-7 (Editor ed., DIANE 1996)

<sup>41</sup> *Id.* See also, *supra* note 10, DOJ Memo FN #7.

<sup>42</sup> Professor Banks goes further and breaks up this section of the Constitution into three categories the Guarantee Clause, the Invasion Clause and the Protection Clause. William C. Banks, *Providing "Supplemental Security"—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 *Journal of National Security Law & Policy* 1 (2008)

<sup>43</sup> U.S. Const. Article IV.

According to one legal scholar, “[a]t its most basic level, the Domestic Violence Clause provides a procedure by which a state can request assistance from the federal government.”<sup>44</sup> Professor Banks in his article *Providing “Supplemental Security”—The Insurrection Act and the Military Role in Responding to Domestic Crises* considers the “request” by the state essential to this clause because without it the federal government is precluded, absent extraordinary circumstances, from deploying troops to the state to combat domestic violence.<sup>45</sup> Others have interpreted this section of the Constitution as imposing a duty on the federal government “to protect states in addressing domestic violence within their borders.”<sup>46</sup>

The other clause, known as the Militia Clause, reads as follows:

*To provide for calling forth the Militia to Execute the Laws<sup>47</sup> of the Union, suppress Insurrections and repel Invasions.*<sup>48</sup>

This clause grants Congress the authority to use the militia to ensure that the law of the land is being executed, insurrections are suppressed and invasions repelled.<sup>49</sup> Interestingly, the debate over Clause 15 at the Constitutional Convention, at least according to legal scholar Alan Hirsch, did not center on the “three situations in which the federal government could call out the militia.”<sup>50</sup> Rather, it focused on whether the federal government should have “any power at all to call out the militia (emphasis added).”<sup>51</sup> This was due in large part to the concerns at the time associated with a standing army or militia.<sup>52</sup>

## B. Legislative History

Although the abovementioned Militia Clause grants Congress the power to call up the militia on certain occasions, it is actually the President, as the Commander in Chief, who

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<sup>44</sup> Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime and the Forgotten Role of the Domestic Violence Clause*, 66 GWLR 1, 76 (1997).

<sup>45</sup> William C. Banks, *Providing “Supplemental Security”—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 Journal of National Security Law & Policy 1, 41 (2008).

<sup>46</sup> Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime and the Forgotten Role of the Domestic Violence Clause*, 66 GWLR 1, 3 (1997).

<sup>47</sup> According to Professor Banks, this applies to “an especially serious act, far more so than simple disobedience of the laws.” William C. Banks, *Providing “Supplemental Security”—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 Journal of National Security Law & Policy 1 (2008).

<sup>48</sup> U.S. Constitution Article I, Clause 15

<sup>49</sup> *Id.*

<sup>50</sup> Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 UCINLR 919, 926 (1988).

<sup>51</sup> *Id.*

<sup>52</sup> “Samuel Adams warned that ‘the Sins of America may be punished by a standing Army,’” Jackson Turner Main, *The Anti-Federalists: Critics of the Constitution 1781-1788* pgs. 14-15 (1961). In addition, during the federal convention, Luther Martin was quoted as saying that “When a government wishes to deprive its citizens freedom, and reduce them to slavery, it generally makes use of a standing army.”

directs or leads the militia when called up.<sup>53</sup> However, the Constitution makes no specific provisions granting the President authority to call up the militia during civil disorders.<sup>54</sup> Thus, Congress felt it necessary to pass legislation giving the President such authority.<sup>55</sup> Congress's initial attempt at such authorization language resulted in the Calling Forth Act, the precursor to the Insurrection Act.<sup>56</sup>

Passed in 1792, the Calling Forth Act authorized the President to call up the militia<sup>57</sup> to: (1) suppress insurrections and repel invasions; and (2) ensure that the laws are being faithfully executed.<sup>58</sup> Section I of the Calling Forth Act reads as follows:

That whenever the United States shall be invaded, or be in imminent danger of *invasion* from any foreign nation or Indian tribe, it shall be lawful for the President of the United States, to call forth such number of militia of the state or states most convenient to the place of danger or scene of action as he may judge necessary to repel such invasion, and to issue his orders for that purpose, to such officer or officers of the militia as he shall think proper; and in case of an *insurrection* in any state, against the government thereof, it shall be lawful for the President of the United States, on the application of the legislature of such state, or of the executive (when the legislature cannot be convened) to call forth such number of the militia of *any other state or states*, as may be applied for, or as he may judge sufficient to suppress such insurrection (emphasis added).<sup>59</sup>

One interesting and somewhat peculiar aspect of Section I which has been replicated in the modern day Insurrection Act is that the statute did not allow the President to call into federal service the militia of the state where the insurrection actually occurs.<sup>60</sup> The President could only call the militia(s) of "any other state or states."<sup>61</sup> One commentator has speculated that the reason for this disconnect is because presumably "the militia of the state applying for aid would already be employed in suppressing the insurrection."<sup>62</sup>

<sup>53</sup> U.S. Constitution Article II, Section 2.

<sup>54</sup> See however the argument *infra* FN# 112 that the President has inherent authority to deploy troops domestically.

<sup>55</sup> Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 Geo. Wash L. Rev. 1, 41 (1997).

<sup>56</sup> *Riot Control and the Use of Federal Troops*, 81 Harv. L. Rev. 638, 644 (1968) ("To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions. However, some believe "the statutes [early versions of the Insurrection Act] were considered expansions of presidential power rather than limitations on it.").

<sup>57</sup> Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919, 943 (1988). In 1789, the Standing Army consisted of 640 men. The state militias were the main fighting forces during this time period.

<sup>58</sup> Act of May 2, 1792, ch. 28, §2, 1 Stat. 264, 264 (repealed 1795) [hereinafter, the "Calling Forth Act"]. In describing the two sections, Professor Gardina states that "Congress created a 'sliding scale' of discretionary authority. When the contrary was facing invasion, the President's authority was at its apex; however, when it came to enforcing the laws, the President's authority was at its lowest ebb." Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to use the Military in Domestic Emergencies*, 91 Marq. L. Rev. 1027 (2008).

<sup>59</sup> Calling Forth Act of 1792

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* 20 (Editor ed., DIANE 1996).

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August 24, 2009

As noted by Professor Vladeck<sup>63</sup> and others, Section I of the Calling Forth Act when initially introduced and debated in Congress met with little opposition.<sup>64</sup> The same, however, cannot be said for Section II of the Calling Forth Act. This section authorizes the President to call out the militia to “execute the laws of the union” when necessary.<sup>65</sup> Section II reads as follows:

[W]henever the laws of the United States shall be *opposed*, or the execution thereof *obstructed*, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, the *same being notified to the President by an associate justice*, or the *district judge*, it shall be lawful for the President of the United States, to call forth the militia of such state to suppress such combinations, and to *cause the laws to be duly executed*. And if the militia of the state, where such combination may happen, shall refuse or be insufficient to suppress the same, it shall be lawful for the President if the legislature of the United States be not in session, to call forth and employ such numbers of the militia of any other state or states most convenient thereto, as may be necessary, and the use of the militia, so to be called forth, may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session (emphasis added).<sup>66</sup>

When first introduced Section II was controversial and garnered the attention of many members of Congress for several reasons. First, some felt that this grant of authority to the President would disrupt the delicate balance<sup>67</sup> created in the Constitution with respect to control and operation of the militia.<sup>68</sup> The drafters of the Constitution ever fearful of a standing army and any one entity or person exerting too much influence over the militia divided control of it among states, Congress and the President.<sup>69</sup> For example, the Constitution gives states the responsibility for appointing and training militia personnel.<sup>70</sup> However, the Constitution says that Congress is in charge of “organizing, arming and disciplining the militia”<sup>71</sup> and can call forth the militia to suppress insurrections, repel invasions and enforce the laws.<sup>72</sup> Once called up, the

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<sup>63</sup> Professor Stephen I. Vladeck has written extensively on the competing power of the President and Congress to use the militia, see for example: *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 Temp. L. Rev. 391 (2007) and *The Suspension Clause as a Structural Right*, 62 U. Miami L. Rev. 275 (2008).

<sup>64</sup> Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 Yale L.J. 149, 159 (2004).

<sup>65</sup> Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to use the Military in Domestic Emergencies*, 91 Marq. L. Rev. 1027, 1057 (2008). Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and current version at 10 U.S.C. §§ 331-335.)

<sup>66</sup> Calling Forth Act of 1792.

<sup>67</sup> John F. Romano, *State Militias and the United States: Changed Responsibilities for a New Era*, 56 A.F. L. Rev. 233, 238 (2005). Interestingly, the Roman professional army was broken into smaller groups, or legions, in order to distribute its power.

<sup>68</sup> Engdahl I at 44 (1971). This attention paid to the militia may seem out of place today. However, at the time, the militia was the main military force for the United States.

<sup>69</sup> One of the grievances listed against King George III of England in the Declaration of Independence was that he “kept among, us, in Time of Peace, Standing Armies, without the consent of our Legislatures.”

<sup>70</sup> U.S. Const. art I, § 8, cl. 16.

<sup>71</sup> U.S. Const. art. I, § 8, cl. 16. The Constitution also provided Congress the authority to appropriate money “[t]o raise and support Armies.” U.S. Const. art. I, § 8, cl. 12

<sup>72</sup> U.S. Const. art. I, § 8, cl. 15. This is the Constitutional Clause relied upon by Congress to pass the Insurrection Act.

Constitution places the militia not under the command and control of Congress, but the President.<sup>73</sup>

This “shared power paradigm” with regards to the military was put in place by the Constitutional drafters to not only prevent any one entity from exercising too much control over the military,<sup>74</sup> but also to create friction as the jurisdictional responsibilities of the states, Congress and the President overlap. This friction in the minds of most is healthy and strengthens the system of checks and balances while simultaneously decreasing the likelihood of martial law.<sup>75</sup> Thus, to some members of Congress, the authority granted the President in Section II upset this power sharing arrangement and the normal friction that accompanies it.

In addition, a few members of Congress viewed the terms *opposed* and *obstructed* found in Section II as too vague. At that time and arguably today, no one could say with certainty what activities or actions these terms covered.<sup>76</sup> For example, Congressman Abraham Clark suggested that pursuant to the Calling Forth Act the President could “call forth the military in case of any opposition to the excise laws; so that if an old woman was to strike an excise officer with her broomstick, forsooth the military is to be called out to suppress an insurrection.”<sup>77</sup> To allay the fears of Congressman Clark and others and ensure passage of the legislation, several procedural additions and safeguards were made to Section II and the statute as a whole to decrease the likelihood of it being misused by the President.

First, in Section II, Congress required a judicial determination that the laws were indeed obstructed by “combinations too powerful to be suppressed by the ordinary course of judicial proceedings or the powers vested in the marshals,” prior to the President calling up the militia.<sup>78</sup> Also, in Section II, unlike Section I, Congress placed restrictions on the President’s ability to use the militia of one state in another state.<sup>79</sup> The statute as a whole also had additional safeguards, e.g., the President had to issue a dispersal order<sup>80</sup> to the insurgents before any troops were deployed and those troops that did

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<sup>73</sup> U.S. Const. art. 2 § 2.

<sup>74</sup> Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to use the Military in Domestic Emergencies*, 91 Marq. L. Rev. 1027, 1032 (2008).

<sup>75</sup> *Id.*

<sup>76</sup> This lack of specificity has plagued the Insurrection Act in future iterations.

<sup>77</sup> 3 Annals of Congress 574 (1792) remarks by Congressman Abraham Clark.

<sup>78</sup> Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* pg. 22 (Editor ed., DIANE 1996).

<sup>79</sup> *Id.*

<sup>80</sup> Bennett M. Rich, *The Presidents and Civil Disorder* pg. 206, according to Edmund Randolph the purpose of the dispersal order was (“to prevent if possible, bloodshed in a conflict of arms, and if this cannot be done, to render the necessity of it palpable, by a premonition to the insurgents to disperse and go home.”).



deploy were limited to periods of three months per year.<sup>81</sup> In addition, the President was limited to acting only when Congress was not in session and then only for 30 days after Congress had convened. Finally, the statute also included a sunset provision.<sup>82</sup> With the addition of these safeguards, the Calling Forth Act successfully passed both the House and Senate and became law in 1792.

It did not take long before the new legislation was put to its first real test during the so-called Whiskey Rebellion.<sup>83</sup> In the early 1790s, western Pennsylvania frontiersmen unhappy with the federal excise tax on alcohol rebelled against the government. Numbering in the thousands, the insurgents or *insurrectionists*<sup>84</sup> gathered to openly challenge the authority of the federal government to tax their alcohol.<sup>85</sup> They burned the home of a tax collector, robbed the mail, halted court proceedings and threatened to assault Pittsburgh.<sup>86</sup> Fearing a repeat of Shays' Rebellion, President George Washington, after consulting with his Cabinet, invoked the Calling Forth Act.<sup>87</sup>

Prior to deploying the militia, the President requested an opinion from Associate Supreme Court Justice James Wilson<sup>88</sup> as to whether the insurrectionists were a "combination too powerful to be suppressed by the ordinary course of judicial proceedings." Justice Wilson responded to Washington within 2 days stating that:

"Sir: From the evidence which has been laid before me, I hereby notify you that in the counties of Washington and Allegheny, in Pennsylvania, laws of the U.S. are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by powers vested in the Marshall of that district."<sup>89</sup>

Shortly after receiving this opinion from Justice Wilson, President Washington issued his dispersal order.<sup>90</sup> When this failed to get the insurrectionists to lay down their arms,

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<sup>81</sup> Jason Mazzone, *The Commandeerer in Chief*, 83 Notre Dame L. Rev. 265, 309 (2007). Similar to the War Powers Act.

<sup>82</sup> Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* pg. 22 (Editor ed., DIANE 1996)

<sup>83</sup> *Id.* at 35.

<sup>84</sup> Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* pg. 66 (Editor ed., DIANE 1996). While President Washington and his Administration appeared to have a firm understanding of the Calling Forth Act as it had only been passed the year before there are some who question whether this was really a "rebellion" in the strictest sense.

<sup>85</sup> *Id.* at 36.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 35-38.

<sup>88</sup> *Id.* at 36-37.

<sup>89</sup> Henry M. Brackenridge, *History of the Western Insurrection 1794* pg. 264 (Arno Press 1859) (1969).

<sup>90</sup> Jason Mazzone, *The Security Constitution*, 53 UCLA L. Rev. 29, 47-49 (2005) [hereinafter *Security Constitution*] "I, GEORGE WASHINGTON President of the United States, do hereby command all persons, being insurgents as aforesaid, and all others whom it may concern, on or before the first day of September next, to disperse and retire peaceably to their respective abodes. And I do moreover warn all persons whomsoever against aiding, abetting, or comforting the perpetrators of the aforesaid treasonable acts, and do require all officers and other citizens, according



President Washington called up over 10,000 members of various state militias from around the country.<sup>91</sup> This large turnout of militia members demonstrates the general population's overall confidence in the President's decision to use military force to put down the insurrection. However, by the time President Washington arrived in Pennsylvania with his show of force most of the insurrectionists had scattered and given up their efforts.<sup>92</sup> The few that remained were easily captured and tried.<sup>93</sup> President Washington returned home even more of a hero than when he left and the troops under his command quickly and quietly returned back to civilian society. While most applauded the President's actions, some like Pennsylvania Governor Thomas Mifflin thought that rather than use military force, the judiciary should have punished the insurrectionists.<sup>94</sup> This is not to say, however, that Governor Mifflin did not support President Washington's efforts to put down the rebellion.

With the successful end of the Whiskey Rebellion and the quick disbandment of Washington's militia, many of the previous fears and concerns associated with the President's possible abuse of power under Section II of the Calling Forth Act were at least for the moment eased. Thus, instead of the Calling Forth Act sun setting, it was reenacted on a permanent basis in 1795 as the Militia Act albeit with fewer constraints on the President's ability to use the militia. In the Militia Act, former Section II of the Calling Forth Act read as follows:<sup>95</sup>

[W]henver the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the President of the United States, to call forth the militia of such state, or of any other state or states, as may be necessary to suppress such combinations and to cause the laws to be duly executed; and the use of militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the next session of Congress.<sup>96</sup>

Under the Militia Act, the judicial determination requirement of whether the laws are indeed obstructed was dropped<sup>97</sup> and Congress removed the limitation on the President

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to their respective duties and the laws of the land, to exert their utmost endeavours to prevent and suppress such dangerous proceedings." President George Washington, Order Calling Up the Militia (Aug. 7, 1794).

<sup>91</sup> Matt Matthews, *The Posse Comitatus Act and the United States Army: A Historical Perspective* pg. 10, available at [http://www.au.af.mil/au/awc/awcgate/army/csi\\_matthews\\_posse.pdf](http://www.au.af.mil/au/awc/awcgate/army/csi_matthews_posse.pdf).

<sup>92</sup> Earl F. Martin, *America's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MSLJ 135, 204-207 (2006). The actual size of President Washington's militia was 12,950 which was approximately the size of the Revolutionary Army.

<sup>93</sup> Matt Matthews, *The Posse Comitatus Act and the United States Army: A Historical Perspective* pg. 12.

<sup>94</sup> Bennett M. Rich, *The Presidents and Civil Disorder* pg. 8.

<sup>95</sup> Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and current version at 10 U.S.C. §§ 331-335.).

<sup>96</sup> Militia Act of 1795.

<sup>97</sup> *Id.*

using the militia from one state in another state.<sup>98</sup> Finally, the dispersal order was modified so that it no longer had to be issued prior to calling out the militia,<sup>99</sup> which arguably laid the groundwork for future Presidents to take vastly different approaches to addressing this section of the statute.<sup>100</sup>

One change that did not occur with the Militia Act, much to the chagrin of future President Thomas Jefferson, was a statutory broadening of the term “militia” to include federal troops. As originally written, the Calling Forth Act only referenced the militia and was silent on federal military forces.<sup>101</sup> Thus, temporary exceptions had to be granted to Presidents Washington, Adams and Jefferson to use federal troops domestically.<sup>102</sup> In some instances, exceptions were not necessarily requested nor granted and those Presidents just acted.<sup>103</sup>

This concern over using federal forces came to a head when President Thomas Jefferson requested a legal opinion from his Secretary of State, James Madison on the legality of using the Army to pursue former Vice-President Aaron Burr whom the President suspected of leading a filibuster into Mexico.<sup>104</sup> Madison informed the President that “it does not appear that *regular troops* can be employed under any legal provision against insurrections—but only against expeditions having foreign countries as the object” (emphasis added).<sup>105</sup>

This inability, at least in the mind of President Jefferson and his Secretary of State, to use federal troops to go after Burr led Congress to pass the Insurrection Act of 1807, which reads as follows:<sup>106</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> Compare Militia Act of 1795, ch. 36, 1 Stat. 424 with the Calling Forth Act of 1792 § 3, 1 Stat 264.

<sup>100</sup> Bennett M. Rich, *The Presidents and Civil Disorder* pg. 173.

<sup>101</sup> Commander Gary Felicetti and Lieutenant John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding*, 175 Mil. L. Rev. 86, 182, n.38. One legal commentator suggests that this was due to the small nature of the federal army in comparison to the state militias. In 1792, the Army's authorized strength (not actual or effective strength, which was almost certainly lower) was around 2000 troops, so the failure to specifically mention the regular troops may have been due to their small numbers in relation to the state militias, which consisted of every free white able-bodied male between eighteen and forty-five. *See Id.*; 7 CONG. REC. 3580 (1878) (remarks of Mr. Potter). By comparison, in 1780-1781, the Commonwealth of Virginia had nearly 50,000 men in the state militia. In 1789, the Standing Army consisted of 640 men. The state militias were the main fighting forces during this time period. Hirsch, *supra* note 38, at 943.

<sup>102</sup> Comments, *The Posse Comitatus Act Applied to the Prosecution of Civilians*, 53 U. Kan. L. Rev. 767, 770 (2005) (“In order to enforce the Neutrality Proclamation, the nascent federal government federalized state militias to prevent privateers from being outfitted to prey on British ships.”) See also, Neutrality Act of 1794 and Act of Mar. 2 1799.

<sup>103</sup> Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* Pgs. 69-84 (Editor ed., DIANE 1996

<sup>104</sup> “Filibuster” in this context denotes the use of a private army to attack a foreign country.

<sup>105</sup> Dumas Malone, *Jefferson the President: Second Term 1805-1809* (University of VA. Press 2006).

<sup>106</sup> Here the author is talking about the actual Act itself not the statutes codified at 10 U.S.C. §§ 331-335.

In all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed it shall be lawful for him to employ, for the purposes, such part of the *land or naval force* of the United States as shall be judged necessary, having first observed all the pre-requisites of the law in that respect (emphasis added).<sup>107</sup>

This new Act made two noteworthy changes. First, it removed the word “invasion” as an occurrence where the President could deploy troops. Up to this point, the prior Acts had all referenced both “insurrections” and “invasions.” Arguably, this change occurred because it was most likely understood that the President would send troops to any state under invasion or facing a foreign threat as opposed to an internal one. However, according to Professor Vladeck, this latter change remains a “rather uncomfortable mystery.”<sup>108</sup> Second, the Insurrection Act of 1807 authorized the President to use both federal troops and the militia to enforce the laws and prevent insurrections.<sup>109</sup>

Some have questioned the constitutionality of the 1807 Insurrection Act arguing that Congress lacked the authority to pass the legislation.<sup>110</sup> Professor Engdahl stated that the “use of regular troops was not pursuant to the letter of the Constitution, which at most contemplated only militia for this role.”<sup>111</sup> In addition, President Millard Fillmore<sup>112</sup> argued that Congress had no such authority to pass the Insurrection Act of 1807.<sup>113</sup> According to President Fillmore, the law could not apply to federal troops because it conflicted with the President’s constitutional duties as Commander in Chief.<sup>114</sup>

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<sup>107</sup> Insurrection Act of 1807.

<sup>108</sup> Vladeck, *supra* note 64, at 165. One potential answer to this mystery is that the drafters were trying to head off any potential problems that occur when the term “invasion,” is used see e.g., See Fredrick B. Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 189 (1940). (“...the New York militia was unanimously of opinion that “to repel Invasions” meant just that, and that it did not involve battling the British in Canada.”).

<sup>109</sup> 10 U.S.C. §§ 331-335.

<sup>110</sup> Major Clarence I. Meeks III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L. Rev. 88 (1975).

<sup>111</sup> Engdahl I, *supra* note 32 at 49.

<sup>112</sup> David J. Barron and Martin S. Lederman, *The Commander in Chief at the Lowest Ebb-A Constitutional History*, 121 Harv. L. Rev. 941, 990-91 (2008). In discussing the Insurrection Act of 1807, President Fillmore stated, “and probably no legislation of Congress could add to or diminish the power thus given but by increasing or diminishing or abolishing altogether the Army and Navy.” In contrast, Senator A.P. Butler of South Carolina who at the time was writing a report responding to the question of the President’s inherent authority to use the military domestically stated “I deny that the President has a right to employ the army and navy for suppressing insurrections, &c., without observing the same prerequisites prescribed for him in calling out the militia for the same purpose.”

<sup>113</sup> Matthews, *supra* note 91 at 15.

<sup>114</sup> *Id.*

The arguments put forward by President Fillmore, Professor Engdahl and others<sup>115</sup> raise interesting and complex Constitutional issues that although beyond the scope of this article still need to be mentioned however briefly. At the center of the debate are two longstanding and still yet unresolved questions. The first is whether and to what degree Congress can restrict or expand the President's domestic Commander in Chief authority.<sup>116</sup> The second is whether the President has inherent constitutional authority to deploy troops domestically.

For the purposes of this Article, the author maintains that the President does not have inherent constitutional authority to deploy troops domestically but rather derives his power from Congressional authorization.<sup>117</sup> This is the generally, but not universally, accepted view.<sup>118</sup> However, the two caveats or exceptions to this position, which depending on their interpretation may swallow the rule are the following: (1) the President has an implied right to protect federal entities or property like the U.S. mail and federal buildings; and (2) Congress cannot pass legislation that prevents the President from fulfilling his constitutional duties.<sup>119</sup>

As for the 1807 Insurrection Act, support for finding it constitutional can be found in several places. First, in looking broadly at Congress's War Powers in their entirety under Article I, Section 8, there is a strong argument that Congress did have the authority to pass the Insurrection Act of 1807 and all subsequent modifications to the

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<sup>115</sup> See for example the opinion by Attorney General Brownell in discussing the PCA "[t]here is are in any event grave doubts as to the authority of the Congress to limit the constitutional powers of the President to enforce the laws and preserve the peace under circumstances which he deems appropriate." President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas, 41 Op. Att'y Gen. 313, 331 (1957).

<sup>116</sup> Arguably, Congress has more ability to restrict the President's power domestically as opposed to internationally.

<sup>117</sup> Candidus Dougherty, "*Necessity Hath No Law*" : *Executive Power and the Posse Comitatus Act* 31 CAMPBLR 1, 18-24 (Fall 2008). The strongest argument for finding that the President does have inherent authority generally arises during emergency situations. See also, *Cunningham v. Neagle*, 135 U.S. 1, 67 (1890).

<sup>118</sup> For an alternative view see President Roosevelt's actions during the North American Aviation strike of 1941. Attorney General and later Supreme Court Justice Jackson stated that President Roosevelt's actions during the strike were based on the "aggregate of the President's powers derived from the Constitution itself and from statutes enacted by Congress." Bennett M. Rich, *The Presidents and Civil Disorder* pg. 184. See also Professor John Yoo who asserts that the President as Commander in Chief and acting pursuant to U.S. Const. art. II, § 3 has inherent or implied authority to deploy troops during a domestic emergency. See Charles Doyle, "The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law," CRS Rep. Order Code 95-964, at n.35 (2000). See also, *In re Debs*, 158 U.S. 564 (1895)

<sup>119</sup> William Taft, the country's only President to serve on the Supreme Court, was quoted as saying that "The President is made Commander-in-Chief of the Army and Navy by the Constitution evidently for the purpose of enabling him to defend the country against invasion, to suppress insurrection and to take care that the laws be faithfully executed. If Congress were to attempt to prevent his use of the Army for any of these purposes, the action would be void...he is to maintain peace of the United States. I think he would have this power under the Constitution even if Congress had not given him express authority to this end..." Taft, "Our Chief Magistrate and His Powers 128-9 (1916). For an alternative view see Professor Vladeck, *The Calling Forth Clause and the Domestic Commander-in-Chief*, 29 Cardozo L. Rev. 1091, 1106-1108 (2008).

statute.<sup>120</sup> Second, the opinion by Secretary of State Madison is just that; his opinion and not binding law. Third and probably most persuasive, Presidents from Washington to Bush when deploying troops domestically have for the most part adhered to the requirements of the Insurrection Act.<sup>121</sup> This demonstrates, *inter alia*, that the individuals most impacted by the Insurrection Act viewed the statute as binding law. Compare this to the War Powers Act, which like the Insurrection Act serves to limit Presidential power, but has yet to be fully recognized by any sitting president as constitutional or binding.<sup>122</sup>

After the Insurrection Act of 1807, Congress refrained from making any additional changes to the statute for the next fifty years. However, this time period did see two significant Supreme Court decisions involving the Insurrection Act. The first was *Martin v. Mott*, which arose from the War of 1812.<sup>123</sup> In *Mott*, the defendant (Martin E. Mott) was court-martialed for failing to report to the New York Militia after it had been called up by President James Madison to fight the British.<sup>124</sup> After being convicted and severely fined, Mr. Mott filed an appeal based on, *inter alia*, that there was no state of emergency when the New York Militia was called up. Moreover, Mr. Mott argued, the President lacked the authority to call out or federalize the New York militia.

The Supreme Court, some 12 years after the conclusion of the War of 1812, ultimately determined that pursuant to the 1795 Militia Act the President did indeed have authority to call up or federalize the militia. Furthermore, the unanimous court led by Chief Justice Story went on to say that:

We are all of the opinion, that the authority to decide whether an exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the [1795 Militia Act].<sup>125</sup>

The second major case of this time period was *Luther v. Borden* decided in 1849. *Borden* arose in the context of an ongoing “civil” war (Dorr’s Rebellion) in the state of Rhode Island in which the Charterites (state government supporters) were pitted against the Dorrites (shadow government supporters). The primary grievance of the Dorrites was the state’s lack of voting rights for all white males. Mr. Martin Luther, a supporter of the Dorrites, filed a trespass suit against Mr. Luther Borden, a Rhode Island state

<sup>120</sup> Stephen Vladeck, *Emergency Powers and the Militia Acts*, 114 Yale L.J. 149, 165 (2004).

<sup>121</sup> While Presidents Washington, Adams and Jefferson for the most part strictly adhered to the Insurrection Act, they at times improperly relied upon the federal Army e.g., the Neutrality Act and Fries Rebellion.

<sup>122</sup> Overview of the War Powers Resolution (WPR), 8 Op. O.L.C. 271, 274 (1984) “The Executive Branch believes that 2(c) of the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces.”

<sup>123</sup> *Mott* 25 U.S. (12 Wheat.) at 30.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

official. Mr. Luther alleged that Mr. Borden was without cause to search his house and arrest him because the state government that employed Mr. Borden was illegitimate and not “republican” in nature, which is required by Article IV, Section IV of the Constitution.

The civil suit brought by Mr. Luther raised two very interesting and unique issues. First, could the Supreme Court decide between two competing state governments? Second, could the Supreme Court review President John Tyler’s decision making with regards to the Domestic Violence Clause? In both instances, it appears that those questions were beyond the review of the courts. With respect to the first question, Chief Justice Taney determined that “it rests with Congress to decide what government is the established one in a state.”<sup>126</sup> As for the second question, the Court added that “[b]y this Act [1795 Act], the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President.”<sup>127</sup> Both *Borden* and *Mott* established that the President is the ultimate arbiter in determining whether or not an insurrection exists and troops should be deployed.

With the prospect of a full-fledged Civil War between the North and the South drawing ever closer, Congress once again re-examined the President’s authority to use the military pursuant to Article I, Clause 15. In 1861, Congress revised the Insurrection Act of 1807 by passing the Suppression of the Rebellion Act, which reflects much of the modern day language of the Insurrection Act.<sup>128</sup> The relevant portions of the Suppression of the Rebellion Act read as follows:

That whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President...to enforce, by the ordinary course of judicial proceedings the laws of the United States within any State or Territory...it shall be lawful for the President...to call forth the militia of any or all the States of the Union, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws..., or to suppress such rebellion in whatever State or Territory thereof the laws...may be forcibly opposed, or the execution thereby forcibly obstructed.<sup>129</sup>

Like with past revisions, this new Act strengthened the President’s ability to use the military to suppress insurrections and execute the laws of the Union.<sup>130</sup> The Act gave the President sole discretion to determine whether it was impracticable to enforce the laws “by ordinary course of judicial proceedings.”<sup>131</sup> Before, the President was authorized to call out the military if there were combinations “too powerful to be

<sup>126</sup> *Luther v. Borden* 48 U.S. (7 How.) at 42.

<sup>127</sup> “if the President in exercising this power shall fall into error or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy.”

<sup>128</sup> Ch. 25, §§ 1,3, 12 Stat. 281, 281-282.

<sup>129</sup> *Id.*

<sup>130</sup> Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* pg. 228 (Editor ed., DIANE 1996).

<sup>131</sup> *Id.*



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suppressed by the ordinary course of judicial proceedings, or by powers vested in the marshals,” he now alone made the decision.<sup>132</sup> In addition, the Act added “rebellion against the authority of the Government of the United States” to the list of occurrences in which the President could call out the military.<sup>133</sup> Finally, the Act doubled the time period in which the President could call out the militia and extended the President’s authority to territories as well as states.<sup>134</sup>

Barely 10 years later, the Insurrection Act was again modified during Reconstruction in the form of the Ku Klux Klan (Civil Rights) Act of 1871.<sup>135</sup> Section 3 of the Ku Klux Klan Act included the following language:

That in all cases where insurrection, domestic violence, unlawful combination, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and<sup>136</sup> of the United States, as to deprive any portion or class of people<sup>137</sup> of such state of any of the *rights, privileges, or immunities, or protection named in the Constitution and secured by this act*, and the constituted authorities of such state, shall either be unable to protect, or shall from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such state of the *equal protection of the laws* to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence or unlawful combination or conspiracy shall oppose or obstruct the laws of the United States, or the due execution thereof, or impede or obstruct the due course of justice under the same, it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or land and naval forces of the United States, or either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under this and the preceding section shall be delivered to the marshal of the proper district, to be dealt with according to the law (emphasis added).<sup>138</sup>

This change authorized the President to call forth the military when insurrection or domestic violence resulted in citizens being denied their civil rights as conferred on them by the 14th Amendment of the Constitution.<sup>139</sup> According to military historian Paul Scheips, the President, pursuant to this Act, has a “duty to use either the militia or regular forces, or both, whenever there were obstructions to execution of the laws that

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<sup>132</sup> Engdahl I at 56.

<sup>133</sup> Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* pg. 228 (Editor ed., DIANE 1996).

<sup>134</sup> *Id.*

<sup>135</sup> For a discussion of the Ku Klux Klan Act of 1871 see Avins, *The Klu Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 St. Louis U.L.J. 331 (1967).

<sup>136</sup> For a discussion of the debate about whether this section should refer to the obstruction of only state law and federal law see Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 41 Duke L.J. 415, 441 (1966).

<sup>137</sup> This may or may not mean 1 or more individuals. *Id.* at 446.

<sup>138</sup> This last clause related to the marshals was deleted in 1875 in the Revised Statutes version and in subsequent recodifications. Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 41 Duke L.J. 415, 456 (1966).

<sup>139</sup> Ku Klux Klan (Civil Rights) Act of 1871, ch 22 § 3, 17 Stat, 13, 14.



deprived any portion or class of the people of any state the equal protection of the laws.”<sup>140</sup>

Like the Suppression of the Rebellion Act, some legal scholars have questioned the constitutionality of the Ku Klux Klan Act of 1871. They claim, *inter alia*, that these latter changes to the Insurrection Act “blurred the distinctions historically and constitutionally made between ‘insurrection’ and lesser forms of ‘domestic violence.’”<sup>141</sup> Furthermore, they argue that these latter changes go well beyond the original intent of the drafters and encourage federal military intervention into matters that are purely state affairs. In conducting a statutory analysis of the Insurrection Act to include looking at the early intent of the Constitutional drafters, it appears that these legal scholars have the better argument. The drafters in keeping with their desire to limit federal military intervention in state affairs would have most likely taken a very narrow reading of the Insurrection Act.

However, these same drafters also never envisioned the size of the standing army nor that the modern day militia, the National Guard would: (1) receive the majority of its funding from the federal government; (2) actually become part of the Army; and (3) routinely be sent overseas.<sup>142</sup> Thus, it is reasonable to take a more nuanced view of the Insurrection Act in light of the expanded role of the modern day militia. In addition, adopting a strict statutory reading of the Insurrection Act would most likely have prevented Presidents Eisenhower and Kennedy from sending federal troops to the South during the 1950s and 1960s. Finally, this article notes that while the Insurrection Act has been challenged in court it has yet to be found unconstitutional.<sup>143</sup>

In due course, the Congressional Acts of 1792, 1795, 1861 and 1871 were codified in the Revised Statutes of the United States in 1875 and reprinted in the United States Code in 1926.<sup>144</sup> They appeared later in Title 10 U.S.C. Chapter 15 §§ 331-335.<sup>145</sup>

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<sup>140</sup>Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992* pg. 5 (Washington, DC: Center of Military History, US Army, 2005).

<sup>141</sup>William C. Banks, *Providing “Supplemental Security”—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 *Journal of National Security Law & Policy* 1, 77-78 (2008). See also, Engdahl I

<sup>142</sup>Fredrick B. Wiener, *The Militia Clause of the Constitution*, 54 *HARV. L. REV.* 181, 207-210(1940). See also, John H. Romano, *State Militias and the United States: Changed Responsibilities for a New Era*, 56 *Air Force Law Review* 233, 234 (2005) (“...the present day organization and responsibilities of the National Guard, the modern day equivalent of a state militia, directly contravene the principles and rationales of the framers.”).

<sup>143</sup>*Jackson v. Kuhn*, 254 F. 2d. 555 (1958). The court, however, never reached the merits of this case as it was dismissed on procedural grounds.

<sup>144</sup>Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* Pg. 5 (Editor ed., DIANE 1996). Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992* pg. 341 (Washington, DC: Center of Military History, US Army, 2005). The Acts of 1795 and 1807 were combined in Section 5297. The Act of 1861 was placed in Section 5298. The Klu Klux Klan Act of 1871 was codified in Section 5299.

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Section 331, which can be traced to the Acts of 1795 and 1807,<sup>146</sup> was last invoked during the Los Angeles Riots of 1992.<sup>147</sup> Section 331 authorizes the President to deploy the militia or the armed forces at the request of state officials to suppress an insurrection.<sup>148</sup> This section also fulfills the federal government's constitutional responsibility pursuant to the Domestic Violence Clause.<sup>149</sup>

Section 332, which can be traced to the Act of 1861,<sup>150</sup> authorizes the President, even without the consent of state officials, to deploy the militia or armed forces when there are "obstructions" or "rebellion" making it impracticable to enforce the laws to include court orders.<sup>151</sup> According to Attorney General Brewster Section 332 "expressly authorized [the President] to employ the military forces of the United States to aid in enforcing the laws" once a determination has been made that such enforcement was being obstructed by "powerful combinations of outlaws and criminals."<sup>152</sup> This section was relied upon by President Dwight D. Eisenhower when he sent in troops to enforce the Supreme Court's desegregation order in Little Rock, Arkansas.<sup>153</sup> Not surprisingly, this section like Section 333 below has at times created friction between the governor and the President.<sup>154</sup>

Section 333, which can be traced to the Acts of 1861 and 1871,<sup>155</sup> authorizes the President even without the consent of state officials, to deploy the military or militia or any other means<sup>156</sup> to suppress any "insurrection, domestic violence, unlawful

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<sup>145</sup> Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992* pg. 5 (Washington, DC: Center of Military History, US Army, 2005).

<sup>146</sup> *Id.*

<sup>147</sup> Isaac Trekie, *Bringing the Troops Home to a Disaster: Law, Order and Humanitarian Relief*, 67 Ohio St. L. J. 1227, 1259 (2007).

<sup>148</sup> 10 U.S.C. § 331.

<sup>149</sup> U.S. Const. art. IV.

<sup>150</sup> Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992* pg. 5 (Washington, DC: Center of Military History, US Army, 2005).

<sup>151</sup> 10 U.S.C. § 332.

<sup>152</sup> *Suppression of Lawlessness in Arizona*, 17 Op. Att'y Gen. 333, 334-335 (1882).

<sup>153</sup> *Aaron v. Cooper*, 156 F. Supp. 220 (E.D. Ark. 1957). See also, George H. Faust, *The President's Use of Troops to Enforce Federal Law*, 7 Clev. Mar. L. Rev. 362 (1958); Daniel H. Pollitt, *A Dissenting View: The Executive Enforcement of Judicial Decrees*, 45 A.B.A.J. 600 (1959); Schmetterer, *Reply to Mr. Schweppe: Military Enforcement of Court Decrees*, 44 A.B.A.J. 727; Comment, 56 Mich. L. Rev. 249 (1957). Some, however did not agree with the use of the military to enforce a court order see for example, Alfred J. Schweppe, *Enforcement of Federal Court Decrees: A "Recurrence to Fundamental Principles,"* 44 A.B.A.J. 113 (1958).

<sup>154</sup> Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992* pg. 36 (Washington, DC: Center of Military History, US Army, 2005).

<sup>155</sup> *Id.* at 5.

<sup>156</sup> While there is uncertainty about "what any other means" covers at least one law review article has suggested that it allows the President to "utilize any individuals or agency which is at his disposal and suited to law enforcement, which would include federal marshalls." see Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 41 Duke L.J. 415, 441 (1966).

combination, or conspiracy,” if such action denies any class of people<sup>157</sup> their rights or obstructs the execution of the laws.<sup>158</sup> Due to the “vague powers conferred by this measure,” it is not clear what is entirely covered by Section 333.<sup>159</sup> For instance, President John F. Kennedy relied on this section when he dispatched federal troops to military bases in the vicinity of Birmingham, Alabama to deal with periodic riots.<sup>160</sup> However, one year later, Attorney General Robert Kennedy found this section inapplicable in the immediate aftermath of the deaths of three civil right workers in Neshoba County, Mississippi.<sup>161</sup> Several law professors disagreed with the Attorney General’s assessment and formalized their concerns in a letter which appeared in both the New York Times and the Congressional Record.<sup>162</sup> According to the law professors, “paragraph 2 of Section 333 authorized federal ‘police action’ to protect civil rights workers in circumstances such as those which existed in Mississippi.”<sup>163</sup>

Section 334, which can be traced to the Acts of 1792 and 1795,<sup>164</sup> requires the President to issue a proclamation ordering the insurgents to disperse. For a variety of reasons, this requirement has been followed haphazardly.<sup>165</sup> By way of example, President McKinley during the Pullman Strike issued his dispersal order 5 days after he deployed troops.<sup>166</sup>

Lastly, Section 335 includes “Guam” and “Virgin Islands” in the definition of state.<sup>167</sup> In 1989, President George H.W. Bush invoked the Insurrection Act in the U.S. Virgin Islands to combat severe looting and violence after Hurricane Andrew.<sup>168</sup>

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<sup>157</sup> *Id.* It is not clear what amount of people constitutes a “class.”

<sup>158</sup> 10 U.S.C. § 334.

<sup>159</sup> Corwin, *The President* pg. 135 (4<sup>th</sup> rev. ed. 1957).

<sup>160</sup> Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 41 Duke L.J. 415, 417 (1966). *But see*, President Kennedy’s refusal to enact the Insurrection Act to protect civil rights workers in Neshoba County, Mississippi, N.Y. Times, June 25, 1964, at A1. The then Alabama Governor attempted to legally challenge the President’s sending of troops to the state without much success. *Alabama v. U.S.* 373 U.S. 545 (1963).

<sup>161</sup> Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 41 Duke L.J. 415, 419 (1966)

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992* pg. 5 (Washington, DC: Center of Military History, US Army, 2005).

<sup>165</sup> Bennett M. Rich, *The Presidents and Civil Disorder* pgs. 201-206. “Practically every president who has been faced with an internal disturbance has placed a different interpretation upon its [proclamation] use.”

<sup>166</sup> Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to use the Military in Domestic Emergencies*, 91 Marq. L. Rev. 1027, 1062 (2008). There is a split of opinion on whether the President sent troops to the Pullman Strike pursuant to the Insurrection Act or based on his inherent authority. As discussed previously most Presidents issue the dispersal order prior to sending in troops.

<sup>167</sup> 10 U.S.C. § 335.

<sup>168</sup> See Operation Hawkeye and Executive Order 12690 dated 20 Sep. 1989.

After codification in the U.S. Code, there were subsequent efforts to amend the Insurrection Act.<sup>169</sup> In 1957, during the 86<sup>th</sup> Congress, two separate pieces of legislation were introduced in Congress in direct response to President Eisenhower's use of the Insurrection Act in Little Rock, Arkansas. The first, H.R. 416, would have amended "section 332 of title 10 of the United States Code to limit the use of Armed Forces to enforce Federal laws or orders of Federal Courts."<sup>170</sup> The second bill, H.R. 1204, would have amended "Title 10 of the United States Code to prohibit the calling of the National Guard into Federal service except in time of war or invasion or upon the request of a State."<sup>171</sup> Neither bill was passed.

Approximately ten years later, during the late 1960s and in the wake of numerous urban riots, further attempts to modify the Insurrection Act were made. The National Advisory Commission on Civil Disorders otherwise known as the Kerner Commission offered several suggestive changes.<sup>172</sup> For example, the Kerner Commission proposed correcting the inconsistent language in Section 331 which if read literally would not allow the President to use the National Guard from the state where the insurrection actually occurs.<sup>173</sup> Further, the Commission suggested replacing the term "militia" with "National Guard" and "insurrection" with "domestic violence."<sup>174</sup> Despite the respect garnered for this bipartisan commission, these suggestive changes were never implemented.<sup>175</sup>

In 1971, the U.S. Army, which was concerned about its ability to respond to urban riots, studied possible changes to the Insurrection Act. Specifically, the Army examined adding the term "civil disturbance" to the statute in an effort to modernize or update the language.<sup>176</sup> In addition, the Army explored modifying the Insurrection Act to allow the President to use both the National Guard and the U.S. Army Reserves.<sup>177</sup> These

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<sup>169</sup> Besides the proposals mentioned in the Article, several academics have proposed changes to the Insurrection Act, see for example Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to use the Military in Domestic Emergencies*, 91 Marq. L. Rev. 1027, 1077-1078 (2008); and Engdahl et al.

<sup>170</sup> New York Times, Oct 2, 1957, p.16

<sup>171</sup> *Id.*

<sup>172</sup> See Report of the National Advisory Commission on Civil Disorders (Washington, DC; Government Printing Office 1968)

<sup>173</sup> Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders*, 1789-1878 pg 20 (Editor ed., DIANE 1996)

<sup>174</sup> Report of the National Advisory Commission on Civil Disorders (Washington, DC; Government Printing Office 1968) (pg 287-88, 292-93). Professor Banks makes an excellent argument as to why you can't replace the term "Insurrection" with "Domestic Violence." William C. Banks, *Providing "Supplemental Security"—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 Journal of National Security Law & Policy 1, 77-78 (2008).

<sup>175</sup> These changes were also addressed in Engdahl et al. pgs. 431-445.

<sup>176</sup> Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992* pg. 340 (Washington, DC: Center of Military History, US Army, 2005).

<sup>177</sup> *Id.*

proposals, like those of the Kerner Commission, were not implemented.<sup>178</sup> Thus, it was not until October 17<sup>th</sup>, 2006 when President George W. Bush signed into law the Enforcement Act that the Insurrection Act was again modified--135 years after the last revision.<sup>179</sup>

## Part II. Enforcement Act

### A. Background

Like most legislation, the Enforcement Act was reactionary i.e., it was not attributable to some eureka moment where a Member of Congress or his or her staff after reviewing the U.S. Code realized that the Insurrection Act needed to be fixed. Rather, the new law arose from the government's inadequate response to Hurricane Katrina and the public backlash that ensued.<sup>180</sup> Instead of taking personal responsibility and holding individuals accountable<sup>181</sup> for the failures that occurred during and immediately after Hurricane Katrina, elected officials decided to change the method by which the government responds to natural disasters and civil disorders to include modifying the Insurrection Act.<sup>182</sup> More specifically, they decided to revisit the federal-state debate and give the federal government a greater role with respect to responding to domestic emergencies. And, unlike earlier proposals, the ideas generated in the aftermath of Hurricane Katrina had the political backing necessary to be implemented.

For example, less than three weeks after Hurricane Katrina touched down, Senator John Warner, Chairman of the Senate Armed Services Committee sent a letter to the Secretary of Defense Donald Rumsfeld urging him to "conduct a thorough review of the entire legal framework governing a President's power to use the regular armed forces to restore public order."<sup>183</sup> This was followed one week later with the President in a national address to the country proclaiming that "it is now clear that a challenge [Hurricane Katrina] on this scale requires greater federal authority and a broader role for

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<sup>178</sup> Report of the National Advisory Commission on Civil Disorders (Washington, DC; Government Printing Office 1968) (pg 287-88, 292-93).

<sup>179</sup> John Warner Defense Authorization Act of 2007, Pub. L. No. 109-364 (2007).

<sup>180</sup> Op-ed, *Insurrection Act Recipe for Weak States*, Tahlequah Daily Press, June 1, 2007.

<sup>181</sup> Arguably, the head of FEMA (Michael Brown) was forced to resign, but most would agree that the government's failed response to Hurricane Katrina was not due solely to one person. David Kilpatrick and Scott Shane, *Ex-FEMA Chief Tells of Frustration and Chaos*, *N.Y. Times*, September 15, 2005.

<sup>182</sup> Mark C. Weston, *Review of the Posse Comitatus Act After Hurricane Katrina* 4 (2006). See also, Peter Gosselin and Doyle McManus, *Katrina's Aftermath, Wider Powers for U.S. Forces in Disasters Are Under Review; The White House would like to dispatch troops faster and give them law enforcement duties*, *Los Angeles Times* September 11, 2005.

<sup>183</sup> Letter from Sen. John Warner to Donald Rumsfeld, Sec'y of Defense (Sept. 14, 2005), available at <http://blogs.washingtonpost.com/earlywarning/files/WarnerPosseComitatus14Sep05.pdf>.

the armed forces—the institution of our government most capable of massive logistical operations on a moment’s notice.”<sup>184</sup>

Yet even with this strong political support, proponents of the Enforcement Act were concerned and rightfully so about potential opposition to any changes to the Insurrection Act. As discussed in the Introduction of this Article, the United States is still sharply divided over who should take the lead in handling civil unrest.<sup>185</sup> Thus, the Enforcement Act was passed with as little fanfare and public scrutiny as possible. Both the House and Senate Armed Services Committees worked on the Enforcement Act, but neither one ever held a hearing or a public debate on the legislation even though the new law changed the name of the *Insurrection Act* to the *Enforcement Act* and made significant alterations to Section 333 of the statute.<sup>186</sup>

As previously discussed, Section 333 of the Insurrection Act authorizes the President, even against the wishes of the governor, to deploy the militia or use any other means to suppress any “insurrection, domestic violence, unlawful combination, or conspiracy” if such action denies any class of people their rights or obstructs the execution of the laws.<sup>187</sup> Section 333 is generally invoked when the governor and the President are unable to reach some type of mutual agreement to deploy troops under Section 331.<sup>188</sup> When the President acts pursuant to Section 333 he normally takes command and control of the local state National Guard by federalizing it, which only works to further polarize the federal-state relationship. Since few if any governors appreciate being stripped of their best resources during times of crisis, they are very leery of any changes to Section 333 of the Insurrection Act, which was the situation with the Enforcement Act.<sup>189</sup>

Once finalized, the Enforcement Act was quietly tucked into a large defense authorization bill, the John Warner Defense Authorization Act of 2007.<sup>190</sup> Very few people, to include many members of Congress who voted on the larger defense bill, actually knew that they were also voting to modify the Insurrection Act.<sup>191</sup> The secrecy

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<sup>184</sup> President George W. Bush, *Address to the Nation on Hurricane Relief from Jackson Square*, New Orleans, LA (Sep. 15, 2005).

<sup>185</sup> FN #s 3-14 *supra*.

<sup>186</sup> Senator Leahy stated that the change to the Insurrection Act “was just slipped in the defense bill as a rider with little study.” 152 Cong. Rec. S10809 (2006).

<sup>187</sup> Section 334 added the phrase “or those obstructing the enforcement of the laws.”

<sup>188</sup> Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992* pg. 46 (Washington, DC: Center of Military History, US Army, 2005).

<sup>189</sup> Kavan Peterson, *Governors Lose in Power Struggle over National Guard*, [www.stateline.org](http://www.stateline.org), January 12, 2007.

<sup>190</sup> Senator Leahy stated that the change to the Insurrection Act “was just slipped in the defense bill as a rider with little study.” 152 Cong. Rec. S10809 (2006).

<sup>191</sup> The author bases this observation on various readings and his personal experience as a congressional aide when this law was being passed.



surrounding the Enforcement Act was so pervasive that the actual sponsor of the new legislation to this day remains unknown.<sup>192</sup>

Unfortunately for the proponents of the Enforcement Act, the lack of openness helped provide the groundwork for the new law's ultimate repeal one year later. In addition to asserting that the Enforcement Act was a power grab by the Executive Branch at the expense of the states (one arguably orchestrated by Congress), opponents claimed that it was passed without public review or consultation from any one of the fifty state governors.<sup>193</sup> According to the new law's detractors, at least some input from the governors was necessary because the Enforcement Act granted the President unprecedented authority to deploy domestically not only federal military forces, but also state military forces like the National Guard.

At this point, it would probably be helpful to point out that the National Guard, unlike the Army or Army Reserves, is "dual hatted," i.e., depending on status, the National Guard can either be under the command and control of the President (Title 10 status) or the governor (Title 32 status).<sup>194</sup> In certain limited exceptions a member of the National Guard may be under the command and control of both the President and the governor. When called up by the President pursuant to the Insurrection Act, the National Guard goes from Title 32 to Title 10 status and the governor loses any control over these forces.

## B. Changes Brought by the Enforcement Act<sup>195</sup>

The change in Section 333 that received the most attention and the one that ultimately led to the repeal of the Enforcement Act concerned a specific reference to events that when combined with domestic violence gave the President authority to deploy troops

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<sup>192</sup> James Bovard, Inside the Martial Law Act of 2006 (Jan. 9, 2008), available at <http://www.counterpunch.org/bovard01092008.html>. (The Act "had bipartisan support on Capitol Hill, including support from Sen. Carl Levin (D-Mich.), Sen. John Warner (R-Va.), Sen. Ted Kennedy (D-Mass.), and Rep. Duncan Hunter (R-Calif.), chairman of the House Armed Services Committee. Since the law would give the feds more power, it was very popular inside the Beltway.") It is widely believed that Senator Warner was responsible for the change Peter Gosselin and Doyle McManus, *Katrina's Aftermath, Wider Powers for U.S. Forces in Disasters Are Under Review; The White House would like to dispatch troops faster and give them law enforcement duties*, Los Angeles Times September 11, 2005.

<sup>193</sup> "Without any hearing or consultation with the governors and without any articulation or justification of need, Section 1076 of the 2007 NDAA changed more than 100 years of well-established and carefully balanced state-federal and civil-military relationships. One hundred years of law and policy were changed without any publicly or privately acknowledged author or proponent of the change." Insurrection Act Rider and State Control of the National Guard: Hearing Before the S. Comm. on the Judiciary, 110<sup>th</sup> Cong. (2007) (testimony of Major General Timothy Lowenberg).

<sup>194</sup> Title 10 references Title 10 of the U.S. Code which covers the Armed Services. Title 32 references Title 32 of the U.S. Code which covers the National Guard.

<sup>195</sup> John Warner Defense Authorization Act for Fiscal Year 2007, H.R. 5122, 109<sup>th</sup> Congress (2006). For a side-by-side comparison of the Insurrection Act and the Enforcement Act see Appendix A taken from Wikipedia.



domestically. The events are listed as follows: *natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition*.<sup>196</sup>

Congressional opponents of the Enforcement Act of which there were many made two basic arguments against the new law. First, they asserted that adding *natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition* “creates triggers that make it virtually automatic that the [Insurrection] Act will be invoked during such emergencies.”<sup>197</sup> Second, they claimed that the aforementioned events provided the President heretofore unprecedented authority to deploy troops domestically.<sup>198</sup> Under either argument, these critics claimed that the Enforcement Act would work to consolidate control of the military within the Executive Branch resulting in governors losing control of their respective National Guard personnel to the President during periods of civil disorder.<sup>199</sup>

The defenders of the Enforcement Act, whose position was made all the more difficult by an unwillingness to openly and publicly debate the new law, claimed that the changes would not necessarily result in greater domestic use of the military by the President.<sup>200</sup> Rather, to them the change to Section 333 was merely a clarification. They argued that the new law granted no new power to the President but rather simply clarified what authority already existed.<sup>201</sup> For example, the new terms listed could also be deemed acts of insurrection, which has historically received a very broad interpretation.<sup>202</sup> Furthermore, the new terms did not operate in a vacuum; they still had to be accompanied by some form of domestic violence.

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<sup>196</sup> These events, however, must be accompanied by or result in some form of domestic violence. John Warner Defense Authorization Act for Fiscal Year 2007, H.R. 5122, 109<sup>th</sup> Congress (2006).

<sup>197</sup> Insurrection Act Rider and State Control of the National Guard: Hearing Before the S. Comm. on the Judiciary, 110<sup>th</sup> Cong. (2007) (testimony of Senator Kit Bond (R-MO)).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* Then Governor of Arizona, Janet Napolitano said shortly after the Enforcement Act was passed that the new law “...could cause confusion in the command—and—control of the National Guard and interfere with states’ ability to respond to natural disasters within their borders.” Letter from Janet Napolitano, Ariz. Governor, et al., to Bill Frist, U.S. Senate Majority Leader, et al. (Aug. 31, 2006).

<sup>200</sup> See Congressional Record Statement of Senator Edward Kennedy: “As I understand the amendment it defines when the President can call on the Armed Forces if there is a major public emergency at home. The amended statute now lists specific situations in which the troops can be used to restore public order...These were not mentioned specifically before. While the amendment does not grant the President any new powers, it fills an important gap in clarifying the President’s authority to respond to these new kinds of emergencies.”

<sup>201</sup> *Id.*

<sup>202</sup> Here are just a few variations of how “insurrection” has been defined. To be an “insurrection” there must be an intent to overthrow a lawfully constituted regime. *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F. 2d. 989; An “insurrection” is a rising against a civil or political authority’ the open and active opposition of a number of persons to the execution of law in city or state. *In re Charge to Grand Jury*, N.D.Ill. 1894, 62 F. 828. Other definitions include: “An insurrection has been defined 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 a state.” 45 AM. JUR. 2d Insurrections §1 (1999). See also, 77 C.J.S. Riot 29 §(1994) (“Insurrection is distinguished from rout, riot and

The argument regarding clarity might have proved more persuasive had the Enforcement Act not also included the term *or other condition*. The addition of this term undercut the whole idea that the events listed in Section 333 of the Enforcement Act were added merely for clarification purposes. *Or other condition* leaves this section in certain instances more vague than under the Insurrection Act. As for the issue of creating triggers, this will be discussed in greater detail later.

Thus, in summary, at least with respect to this first change to the Insurrection Act, it appears that the Enforcement Act did benefit the Executive Branch at the expense of the states because the new law provided the President more authority to federalize the National Guard and deploy troops domestically. However, even with this major flaw, the Enforcement Act should still be recognized for attempting to modernize an outdated statute and clear up, in certain instances, some of the ambiguity that has historically been associated with the Insurrection Act.

Other changes brought by the Enforcement Act in Section 333 occurred in the opening sentence which was modified from “[t]he President, by using the *militia* or the armed forces, or both, or by any other means *shall* take such measures...” to “[t]he President *may* employ the armed forces including the *National Guard* in federal services...(emphasis added).”<sup>203</sup> This modification of the first sentence had two very significant effects. First, replacing the word *militia* with *National Guard* reduced the number of personnel available to the President when he invokes the Insurrection Act. This is because the word *militia*, as evidence by the definition below, is much broader than the term *National Guard*, which is actually a subcomponent of the *militia*.<sup>204</sup>

Title 10 of the U.S. Code states:

(a)The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

(b)The classes of the militia are—

(1) the organized militia, which consists of the National Guard and the Naval Militia; and

(2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.<sup>205</sup>

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offense connected with mob violence by the fact that in insurrection there is an organized and armed uprising against authority or operations of government, while crimes growing out of mob violence, however, serious they may be and however numerous participants, are simply unlawful acts in disturbance of the peace which do not threaten the stability of the government or the existence of political society.”).

<sup>203</sup> John Warner Defense Authorization Act for Fiscal Year 2007, H.R. 5122, 109<sup>th</sup> Congress (2006).

<sup>204</sup> See the Kerner Commission report.

<sup>205</sup> 10 USC §311

Thus, under the Enforcement Act, the President was restricted to deploying only the *National Guard* and the *Armed Services* in Section 333. While under the Insurrection Act, the President could deploy the *Armed Services* and the *militia* which encompasses not only the *National Guard* but other entities like the State Defense Forces (SDFs).<sup>206</sup> This is an important difference because under the Enforcement Act, unlike the Insurrection Act, the governor would not be stripped of all military resources and could retain control of the SDFs.<sup>207</sup> Although this point never came out in public discussion, states stood to benefit from this portion of the Enforcement Act.

The second major change made in the first sentence of Section 333 of the Enforcement Act was the substitution of *may* for *shall*. *May* generally denotes a privilege or discretionary power.<sup>208</sup> In contrast, *shall* generally denotes a duty imposed on a person or entity.<sup>209</sup> As discussed *supra*, historian Paul Scheips states that this section of the Insurrection Act placed a duty on the President to use the military when there were obstructions to the execution of the laws which deprived people of their rights under the 14<sup>th</sup> Amendment. However, the Enforcement Act removed that duty and made it more of an option or choice for the President to act.<sup>210</sup>

In addition to removing the obligatory language, this change also worked to undercut the previously mentioned suggestion that the Enforcement Act created triggers that would automatically require the President to invoke the Insurrection Act. Had this been the purpose of the Enforcement Act then surely the new law's proponents would have kept *shall* instead of instituting *may*. This change to the statute makes implementation of Section 333 much more discretionary under the Enforcement Act. Thus, again here is another direct benefit to the state.

Section 333 of the Enforcement Act also required that Congress be informed when the President deployed troops pursuant to this statute as soon as practicable and every 14 days thereafter during the exercise of federal authority. First and foremost, this change reasserts the "role for congressional oversight, along the lines of the thirty-day (later

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<sup>206</sup> Currently, 22 states maintain SDFs which are voluntary military units that operate completely under state control. Historically, SDFs have served as a back-up to the National Guard. Members of the SDFs generally receive no payment for their services but may be provided uniforms and training. State Defense Forces are authorized pursuant to 32 U.S.C. § 109. See also [www.statedefenseforce.com](http://www.statedefenseforce.com) (last visited on 8-23-09).

<sup>207</sup> Since the Supreme Court decided Perpich v. United States, there has been a question of whether SDFs fell under the broad definition of *militia*. In Perpich, the Supreme Court stated that, "[i]t is nonetheless possible that they [SDFs] are subject to call under 10 U.S.C. §§ 331-333."

<sup>208</sup> Black's Law Dictionary

<sup>209</sup> *Id.*

<sup>210</sup> "The original [Insurrection Act] § 333 required the President to take action." Jason Mazzone, *The Commandeerer in Chief*, 83 Notre Dame L. Rev. 265, 318 (2007).

sixty-day) time limit found in the early iterations of the Insurrection Act.”<sup>211</sup> This reporting requirement also served as a backup to the dispersal order to ensure that the use of the Insurrection Act is not a clandestine affair that goes without public notice.<sup>212</sup> According to Professor Stephen Dycus, “[p]art of the genius of the Insurrection Act is before it can be invoked the President has to make a public declaration that he is doing it...[t]here is no way the President can use that exception to the Posse Comitatus Act secretly.”<sup>213</sup>

Like with the dispersal order, some legal commentators have downplayed the importance of this requirement and rightfully so with respect to the legal significance of failing to report to Congress.<sup>214</sup> However, this is not to say that those reporting requirements don’t carry political significance. This is an important point because in the end any retribution or penalty for improperly using or failing to use the Insurrection Act has generally been administered by the public, not the courts, as explained in Part IV.<sup>215</sup>

The one modification that occurred outside of Section 333 was the actual name change of Chapter 15 from *Insurrection Act* to *Enforcement of the Laws to Restore Public Order*.<sup>216</sup> While more symbolic than substantive in nature, changing the name of Title 10, Chapter 15 did appear to address several previously raised concerns about the statute. First, removal of the word *Insurrection* as the name for Chapter 15 worked to update the statute as the term itself is somewhat antiquated and rarely if ever used today. Second, the change alerted individuals to the fact that the statute encompassed more than just uprisings against the government and instead dealt with public disorder in general, which along with other previously mentioned changes helped to clarify a law that has long been misunderstood.<sup>217</sup> Finally, the name change seemed to signify that the use or commitment of federal troops was more open-ended and likely to continue even after the violence or threat has ended.<sup>218</sup>

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<sup>211</sup> Stephen I. Vladeck, *Executive Power: Exploring the Limits of Article II: Article: The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 Temple L. Rev. 391, 433 (2007).

<sup>212</sup> See for example, the New Orleans sniping incident. Siobhan Morrissey, *Should the Military Be Called in for Natural Disasters?*, Time, Dec. 31, 2008 (Dycus says. “There is no way the President can use that exception to the Posse Comitatus Act secretly.”). However, see the example of the New Orleans sniping incident.

<sup>213</sup> Siobhan Morrissey, *Should the Military Be Called in for Natural Disasters?*, Time, Dec. 31, 2008.

<sup>214</sup> Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to use the Military in Domestic Emergencies*, 91 Marq. L. Rev. 1027, 1063 (2008).

<sup>215</sup> Due to the political nature of deploying troops, Courts have generally been hesitant to entertain questions about the legality of the President actions pursuant to the Insurrection Act. See *supra* FNs 123-126.

<sup>216</sup> Others have recommended changing the name to “Domestic Disaster Relief Act” or “Domestic Disaster Relief and Insurrection Act” to reduce stigma to the name. John A. McCarthy, Randall Jackson, and Maeve Dion, *Posse Comitatus and the Military’s Role in Disaster Relief*, in A.B.A HURRICANE KATRINA TASK FORCE SUBCOMM. REP. 22, 29 (2006).

<sup>217</sup> *Id.*

<sup>218</sup> *Changes to the Insurrection Act*, June, 10, 2008, <http://gdaeman.blogspot.com/search?q=insurrection>.

In sum, the changes brought by the Enforcement Act while favoring the President did provide some advantages to the states. However, because of the manner in which the law was passed few of these state benefits ever came to public light. In addition, the Enforcement Act, unlike the Calling Forth Act during the Whiskey Rebellion, was never thoroughly examined or tested to see if it actually improved government responsiveness to civil disorder. This article now attempts to do just that, albeit hypothetically, by applying the Enforcement Act to Hurricane Katrina to examine the statute's effectiveness. In light of the increased reliance on the military domestically, this application is more than just an academic exercise as it is very likely that in the near future the Insurrection Act will once again be either questioned, under review or modified.

### **Part III. Civil Disorder**

#### **A. Hurricane Katrina**

As most will recall, Hurricane Katrina with 145 mile-per-hour winds was one of the deadliest natural disasters to strike the United States.<sup>219</sup> Hurricane Katrina impacted over 93,000 square miles, caused approximately \$100 billion in damage and displaced over 770,000 people.<sup>220</sup> More importantly, it led to over 1,300 deaths.<sup>221</sup> For some, the most lasting image or memory of Hurricane Katrina was not necessarily the initial destruction that it brought but rather the exposure of the government's inability at all levels federal, state, parish and city to deal with the aftermath.<sup>222</sup> This was no more evident than in the city of New Orleans where the media televised daily the struggles of the city's inhabitants after the storm.<sup>223</sup>

One of the harder hit areas, 80% of New Orleans was flooded as a result of Hurricane Katrina and the subsequent levee failures.<sup>224</sup> Some of the city's residents were forced to seek shelter on their rooftops while they waited in many instances for several days to be rescued.<sup>225</sup> Other residents fled to the Superdome or Convention Center both of which were ill-equipped to handle the large number of people seeking assistance.<sup>226</sup>

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<sup>219</sup>National Hurricane Center, Hurricane Katrina Advisory Number 27 (August 29, 2005).

<sup>220</sup> Frances Fragos Townsend, *The White House, The Federal Response to Hurricane Katrina: Lessons Learned* 54 (2006); see also Donald F. Thompson, *Terrorism and Domestic Response; Can DOD Help Get it Right*, Joint Force Q. (2006).

<sup>221</sup> Frances Fragos Townsend, *The White House, The Federal Response to Hurricane Katrina: Lessons Learned* 1 (2006);

<sup>222</sup> *Id.* at 21.

<sup>223</sup> *Id.* at 28.

<sup>224</sup> *Id.* at 36.

<sup>225</sup> *Id.* at 38.

<sup>226</sup> *Id.*

These shelters of last resort were woefully understaffed and lacked the basic necessities for habitability.<sup>227</sup> Furthermore, there was no running water, electricity or proper sanitation services and the food and water rations available were dangerously low.<sup>228</sup> All of these problems were compounded by the violence and lawlessness found in parts of the city to include the shelters.<sup>229</sup> Law enforcement activities, like other governmental services, were for the most part non-existent.

Save for agencies like the Coast Guard, most grade the government's planning and response to Hurricane Katrina a failure.<sup>230</sup> While Hurricane Katrina eventually resulted in the largest deployment of troops within the United States since the Civil War,<sup>231</sup> many, but not all, wondered why it took them so long to arrive.<sup>232</sup> The answer to that question while multifaceted ultimately comes down to the following key factors: (1) a general misunderstanding of the Insurrection Act; (2) lack of trust between Governor Blanco and President Bush; and (3) public opinion.<sup>233</sup>

On August 30<sup>th</sup>, 2005, the day after Hurricane Katrina made landfall, the Governor of Louisiana, Kathleen Blanco made her now famous statement "I need everything you got" to the President.<sup>234</sup> A few days later, Governor Blanco followed up this request by specifically asking for federal troops.<sup>235</sup> However, unlike many past governors in need of federal military aid, Governor Blanco did not want the federal government to take over the relief efforts or lose control of her National Guard.<sup>236</sup> Therefore, she did not ask the

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<sup>227</sup> *Id.* at 38-39.

<sup>228</sup> *Id.* at 39.

<sup>229</sup> Scott R. Tkacz, *In Katrina's Wake: Rethinking the Military's Role in Domestic Emergencies*, 15 Wm. & Mary Bill of Rts. J. 301, 304 (2006). Some of the reported levels of violence were later found to have been exaggerated.

<sup>230</sup> House Select Committee to Investigate the Preparation for & Response to Hurricane Katrina, H.R. Rep. No. 109-377. "Katrina was a national failure." "An abdication of the most solemn obligation to provide for the common welfare." One telling incident of the ineptitude of the federal response was displayed by the Secretary of Homeland Security who had to be told by National Public Radio that there were thousands of people trapped in the New Orleans Convention Center. Compare, however, a quote attributed to then White House Deputy Chief of Staff, Karl Rove "the only mistake we made with Katrina was not overriding the local government."

<sup>231</sup> S. Rep. No. 109-322, at 476 (2006).

<sup>232</sup> Thaddeus Hoffmeister, *Why We Waited to Send in the Active Army*, San Diego Daily Transcript, Sept. 21, 2005. The troops referenced here are Active Duty federal forces. National Guard personnel were on the ground and continued to constantly arrive.

<sup>233</sup> Stephen M. Griffin, *Stop Federalism Before It Kills Again: Reflections on Hurricane Katrina*, 21 St. John's J. of Legal Commentary 527 (2007). Jason Mazzone, *The Commandeerer in Chief*, 83 Notre Dame L. Rev. 265, 297 (2007).

<sup>234</sup> Michael Greenberger, *Yes, Virginia: The President Can Deploy Federal Troops to Prevent the Loss of a Major American City from a Devastating Natural Catastrophe*, 26 Miss. C. L. Rev. 107, 114 (2007).

<sup>235</sup> *Id.*

<sup>236</sup> Bennett M. Rich, *The Presidents and Civil Disorder* pg. 191. ("In general it may be said that governors who have been compelled to call for help have had little disposition to assert control over the federal forces. On the contrary, they have been thankful to be relieved of a burdensome problem.").



President to invoke Section 331 of the Insurrection Act despite his requests to the contrary.<sup>237</sup>

As discussed *supra*, when the President invokes the Insurrection Act he also normally federalizes the National Guard operating in the area and places them under his command and control rather than the governor.<sup>238</sup> This is done to avoid parallel command structures, which are disfavored by military commanders.<sup>239</sup> In addition, this also prevents misuse of the federal forces by the governor.<sup>240</sup>

After Governor Blanco's initial refusal, the President sent her a formal legal memorandum asking her to request a federal takeover.<sup>241</sup> When this failed, the President suggested a hybrid command structure under which a 3-star general would be sworn into the Louisiana National Guard and would command all of the troops in the area.<sup>242</sup> This, too, was rejected by Governor Blanco.<sup>243</sup> Ultimately and contrary to military doctrine, two separate commands were set up to handle the relief efforts--one federal, the other state.<sup>244</sup>

Governor Blanco's refusal to turn over the National Guard under her control or seek a federal takeover placed the Administration of President George W. Bush in a quandary. First, many in the Administration were unfamiliar with the Insurrection Act and therefore wondered what action they could take, if any.<sup>245</sup> More specifically, they were unsure whether it was legally permissible for the President to send troops and or federalize the

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<sup>237</sup> Elisabeth Bumiller & Clyde, *Bush Makes a Return Visit; 2 Levees Secured*, N.Y. Times, Sept. 6, 2005, at A1. Governor Blanco's press secretary stated that Blanco refused the President's request because "[s]he would lose control when she had been in control from the very beginning."

<sup>238</sup> Arguably, Active Duty troops could have been placed under command of Governor Blanco. However, this would have been against 100 years of precedent established by President Theodore Roosevelt whose Secretary of War Elihu Root stated that the President "can not place such forces [the army] at the disposal of the governor of the State, but must himself direct their operations..." S. Doc. NO. 122, at 11. This policy was most likely due to the misuse of troops by the governor of Idaho during the 1899 Coeur d'Alene mining dispute. Note, *Riot Control and the Use of Federal Troops*, Harv. L. Rev. 638, 642, n.31 (1968).

<sup>239</sup> "A catastrophic major disaster demands unity of command, while an emergency requires unity of effort." Lieutenant Colonel David R. Brooks; Mark C. Weston, *Review of the Posse Comitatus Act After Hurricane Katrina* 12 (2006). Scott Benjamin, *Bigger Military Role in Disasters*, CBS News, September 25, 2005, Major General John White relayed one example of the problems that can arise with multiple commands ("We had someone who needed to be rescued...five helicopters went to the same place to get one person out.").

<sup>240</sup> Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877-1945* pgs. 167-169 (Washington, DC: Center of Military History, US Army, 1997).

<sup>241</sup> Michael Greenberger, *Yes, Virginia: The President Can Deploy Federal Troops to Prevent the Loss of a Major American City from a Devastating Natural Catastrophe*, 26 Miss. C. L. Rev. 107, 114 (2007).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> "This dual chain of command structure, lengthy federal troop activation system, and in the case of Katrina, devastated local authorities, contributed to a poorly coordinated federal response to Katrina." Jason Mazzone, *The Commandeerer in Chief*, 83 Notre Dame L. Rev. 265, 270 (2007). Lt. Gen. Russel Honore led the federal troops in Joint Task Force Katrina and Maj. Gen. Bennett Landreneau led the Louisiana National Guard.

<sup>245</sup> See Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. Times, Sep. 9, 2005, at A1.



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Louisiana National Guard absent a request by Governor Blanco.<sup>246</sup> Second, assuming that the President did have the legal authority, some in the Administration questioned whether such a decision was wise politically.<sup>247</sup> This was aptly summed up by one senior administration official who stated:

“Can you imagine how it would have been perceived if a president of the United States of one party had preemptively taken from the female governor of another party the command and control of her forces, unless the security situation made it completely clear that she was unable to effectively execute her command authority and that lawlessness was the inevitable result?”<sup>248</sup>

After the loss of precious days grappling with the issue,<sup>249</sup> the Department of Justice’s Office of Legal Counsel eventually and correctly determined that pursuant to Section 333 of the Insurrection Act, the President could send in troops and or federalize the Louisiana National Guard even without Governor Blanco’s permission.<sup>250</sup> Ultimately, the President elected not to invoke the Insurrection Act or federalize the National Guard.<sup>251</sup> He did, however, send federal troops and those that deployed were restricted, pursuant to the PCA from participating in law enforcement activities.<sup>252</sup>

## A1. Application of the Enforcement Act

As the above-mentioned paragraphs illustrate, both Governor Blanco and President Bush, like other government officials before them, struggled with the interpretation and

<sup>246</sup> Robert Travis Scott, *Politics Delayed Troops Dispatch to New Orleans, Blanco Resisted Bush Leadership Proposal*, Times Picayune, December 11, 2005.

<sup>247</sup> *Id.* This quandary has not been relegated to this particular President but rather because of federalism has been present throughout this country’s history. Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 41 Duke L.J. 415, 459 (1966). (“Moreover, even if it is decided that there is power to intervene, there is the basic and acute political problem of whether troops are to be the means of intervention...A long tradition of civilian government and distrust of military rule...is hardly conducive to ready acceptance of massive federal intervention...”).

<sup>248</sup> *Id.*

<sup>249</sup> “Our committee has learned ...of some disagreements about the degree to which the Defense Department should operate on U.S. soil. And these disagreements may have limited the military response time and effectiveness in this case because of the initial hesitation to deploy active duty troops and to pre-position assets before Hurricane Katrina made landfall.” Hurricane Katrina: Defense Department’s Role in Response: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs, 109<sup>th</sup> Cong. (2006) (statement of Sen. Lieberman, Ranking Member).

<sup>250</sup> See Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. Times, Sep. 9, 2005, at A1.

<sup>251</sup> Robert Travis Scott, *Politics Delayed Troops Dispatch to New Orleans, Blanco Resisted Bush Leadership Proposal*, Times Picayune, December 11, 2005.

<sup>252</sup> Robert Burns, *U.S. Looks at Role for Military; Some want to change law to permit using soldiers in disasters*, Chicago Sun Times, September 18, 2005 (“The active-duty elements that Bush did send to Louisiana and Mississippi included some Army and Marine Corps helicopters and their crews, plus Navy ships. The main federal ground forces, led by troops of the 82nd Airborne Division from Fort Bragg, N.C., arrived five days after Katrina struck. They helped with evacuations and performed search-and-rescue missions in flooded parts of New Orleans but did not join in law enforcement operations. The federal troops were led by Lt. Gen. Russel Honore.”) See also, Candidus Dougherty, *While the Government Filddled Around, the Big Easy Drowned: How the Posse Comitatus Act Became the Government’s Alibi for the Hurricane Katrina Disaster*, 29 N. Ill. U. L. Rev. 117, 144-145 (2008).

application of the Insurrection Act.<sup>253</sup> In part, it was this confusion that led many to push for the passage of the Enforcement Act.<sup>254</sup> However, it does not necessarily follow that the actions or inactions of state and federal politicians during Hurricane Katrina prove that the Insurrection Act needed to be amended. For example, one post-Hurricane Katrina law review article suggests that the real problem here was simply a misunderstanding of the Insurrection Act by all parties involved and therefore rather than modify the statute we should look to raise and improve awareness of it.<sup>255</sup>

While this Article agrees that a lack of familiarity with the Insurrection Act played an important role in hampering the deployment of federal troops, other factors were at play as well. To demonstrate this point and to show why additional changes, beyond those offered by the Enforcement Act, should be made to the Insurrection Act, this article will now re-examine the state and federal decision making process with regards to using federal troops during Hurricane Katrina. However, this time, the Article will assume that the Enforcement Act, not the Insurrection Act, was in effect at the time.

Had the Enforcement Act been in place during Hurricane Katrina, it is most likely that the Executive Branch would not have wasted as much time grappling with the issue of whether they had the legal authority to federalize the Louisiana National Guard against the wishes of the governor.<sup>256</sup> Section 333 of the Enforcement Act, unlike the Insurrection Act, makes it very clear that the new law applies to *natural disasters* resulting in *domestic violence*. Both of these elements were present in New Orleans. Yet, as discussed before, this was only half of the equation with respect to deploying troops because even after determining that they had legal authority, the President like the governor was still very concerned about public opinion.

At the time, the Executive Branch worried about how the public would view a male President taking military command and control away from a female governor of a

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<sup>253</sup> See for example the Los Angeles riots. Isaac Trekie, *Bringing the Troops Home to a Disaster: Law, Order and Humanitarian Relief*, 67 Ohio St. L. J. 1227, 1259 (2007).

<sup>254</sup> Others have argued that another reason for passage of the Enforcement Act was to get back at Governor Blanco for refusing to request federal troops. See for example, Congressional Record Statement of Senator Patrick Leahy September 29, 2006 “when Governor Blanco of Louisiana would not give control of the National Guard over to President and the federal chain of command. Governor Blanco rightfully insisted that she be closely consulted and remain largely in control of the military forces operating in the State during that emergency. This infuriated the White House, and now they are looking for some automatic triggers — natural disasters, terrorist attacks, or a disease epidemic — to avoid having to consult with the governors.”

<sup>255</sup> Joshua M. Samek, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or A Case for Learning the Law*, 61 U. Miami L. Rev. 441, 465 (2007). See also, Jim VandeHei and Josh White, *Bush Weighs Greater Role for Military in Disaster Response*, Washington Post, September 26 2005 (“Rather than creating new laws and authorities, they say, government officials simply need to execute existing plans competently.”).

<sup>256</sup> House Committee Report discussing the Insurrection Act, “antique terminology and the lack of explicit reference to such situations as natural disasters or terrorist attacks may have contributed to a reluctance to use the armed forces in situations like Hurricane Katrina.”

southern state, especially one from the opposite political party.<sup>257</sup> This is a concern not readily addressed by the Enforcement Act. Granted, the Enforcement Act provided the President more cover than the Insurrection Act. For example, the President could always say that he acted in accordance with the statute as Hurricane Katrina fit one of the specific events listed in the Enforcement Act. However, critics could just as easily turn around and argue that the statute was discretionary and did not require the President to act.

As for Governor Blanco, the Enforcement Act did little to assuage her concerns. While the new law most likely ensured that she would not lose her SDFs, the record is unclear as to what role, if any, these forces would play at the time.<sup>258</sup> More importantly, the Enforcement Act provided no mechanism to allow her to gracefully accept federal intervention without looking inept. Under both the Enforcement Act and the Insurrection Act, governors appear as though they either buckled to pressure from the President or failed to prepare and respond adequately for the domestic emergency. In either case, the governor looks incapable of managing civil disorder.

In conclusion, the Enforcement Act if in place at the time of Hurricane Katrina would have clarified at least in legal terms that the President did indeed have the authority to deploy troops regardless of the governor's views. However, the new law would not have necessarily altered the ultimate outcome of events because it is unlikely to have been invoked. This is due to the fact that like the Insurrection Act, the Enforcement Act did not address or take into account a key issue facing both Governor Blanco and President Bush--their concern about how they would be viewed publicly.

Unfortunately, the flaws within the Insurrection Act as exposed by Hurricane Katrina are neither unique nor restricted to Section 333. Similar situations have arisen with other sections of the Insurrection Act in the past. This Article now looks at one such example, the Detroit Riot of 1967, which, although dealing with a different section of the statute, raised similar problems.

## B. Detroit Riot of 1967

On July 23, 1967, the Detroit police department conducted a large scale raid on the Flying Pig, a speak-easy located on 12<sup>th</sup> and Clairmount in the western and predominantly African-American part of Detroit.<sup>259</sup> As the police were taking the large number of Flying Pig patrons into custody, a crowd gathered on the nearby sidewalks to

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<sup>257</sup> See Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. Times, Sep. 9, 2005, at A1.

<sup>258</sup> Ultimately, over 1,700 SDF personnel assisted during Hurricane Katrina. Colonel Martin Herszkowitz, "Summary of Available State Defense Force After Action Reports From Hurricane Katrina and Rita Deployments" available on line at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA496872&Location=U2&doc=GetTRDoc.pdf>.

<sup>259</sup> Sidney Fine, *Violence in the Model City*, Michigan State University Press 2007 pg. 155

watch the events unfold.<sup>260</sup> As the crowd grew in size, its mood shifted from one of curiosity to anger as allegations of police brutality were made by those being arrested and from the on-looking crowd.<sup>261</sup> Almost immediately after the police made their final arrest at the Flying Pig and left the scene, rioting broke out as those who had gathered on the surrounding streets began looting, destroying and damaging nearby businesses and homes.<sup>262</sup>

The riot, the deadliest of the 1960s, lasted for five days and required the combined efforts of the local and state police, the National Guard and the US Army to put it down. The riot resulted in approximately \$75 million in property damage with over 2,000 buildings destroyed most by arson. In addition, 7,000 people were arrested, 1,200 people were injured and 43 lives lost. However, according to former Detroit Mayor Coleman, the heaviest casualty was the city itself:

“Detroit's losses went a hell of a lot deeper than the immediate toll of lives and buildings. The riot put Detroit on the fast track to economic desolation mugging the city and making off with incalculable value in jobs, earnings taxes, corporate taxes, retail dollars, sales taxes, mortgages, interest, property taxes, development dollars, investment dollars, tourism dollars, and plain damn money. The money was carried out in the pockets of the businesses and the white people who fled as fast as they could.”<sup>263</sup>

At least initially, the city's response to the rioters was to isolate them and hope that they would disperse on their own.<sup>264</sup> However, just the opposite occurred as more and more individuals became active participants in the riots and rioting spread to other parts of the city.<sup>265</sup> By Monday July 24th, the day after the arrests at the Flying Pig, it was clear to almost everyone on the ground that the riot was now overwhelming the capabilities of the police. That day saw over 483 fires and 231 incidents reported per hour in the city.<sup>266</sup> However, sporadic sniper fire in the riot plagued areas prevented firefighters, medical personnel and law enforcement from properly responding.<sup>267</sup> By that afternoon, Detroit Mayor, Jerry Cavanagh asked the Governor of Michigan, George Romney to send in the National Guard. But by that time they too proved unable to quell the rioters. The question then became not if federal troops were coming to restore order but when.

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<sup>260</sup> *Id* at 159

<sup>261</sup> *Id* at 162

<sup>262</sup> However, one should not draw the conclusion that the events at the Flying Pig were only reason for the riots. Instead, the Flying Pig should just be looked at as the spark that ignited the powder keg which had been building up for quite some time. African Americans in Detroit were upset with police practices, housing discrimination, disparate treatment and lack of employment and economic opportunities. *Id* at 1-16.

<sup>263</sup> Young, Coleman. *Hard Stuff: The Autobiography of Mayor Coleman Young*: p.179.

<sup>264</sup> Sidney Fine, *Violence in the Model City*, Michigan State University Press 2007 pgs. 176-178

<sup>265</sup> Reports had the number of rioters as high as 10,000. Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992* pg. 178 (Washington, DC: Center of Military History, US Army, 2005)

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

Unfortunately, for the citizens of Detroit, those troops did not see action in the city until Tuesday at 2:30 am. The reason for their delay was not due to logistics or a lack of available personnel. Despite the on-going Vietnam War, the XVIIIth Airborne Corps out of Ft. Bragg, North Carolina had been alerted early on during the initial stages of the riot and was ready to move five thousand soldiers into Detroit on Monday.<sup>268</sup> Rather, the problem, like with Hurricane Katrina, was getting the President and the governor to agree that troops were needed.

The process for getting federal troops to Detroit began with a phone call from Mayor Cavanagh and Governor Romney to Vice-President Hubert Humphrey who directed them to speak to Attorney General, Ramsey Clark. After an initial telephone conversation with the Attorney General, Governor Romney thought he had a commitment of federal troops, so he went on television to make that announcement public. However, during the press conference, the Attorney General quickly disabused the governor of that idea and told him by phone that he had to submit a formal written request to the President if he wanted federal troops.<sup>269</sup>

During several subsequent phone calls, Governor Romney and Attorney General Clark spent several hours wrangling over the proper form of Governor Romney's request for military assistance. The Attorney General, acting on behalf of the President, wanted the governor to state unequivocally in writing that there was an "insurrection" in Detroit and "that he was unable to enforce law and order in his state without the aid of the United States."<sup>270</sup> In addition, the Attorney General wanted the governor to go beyond merely "recommending" federal troops for Detroit and actually "request" them. According to Attorney General Clark, these were all prerequisites for the President to consider sending troops pursuant to Section 331 of the Insurrection Act.

While Governor Romney redrafted his initial request, the language he finally settled on did not use the terms "insurrection" or "domestic violence" nor did he state categorically that the state of Michigan could not put down the riot without federal assistance.<sup>271</sup> Nevertheless, Attorney General Clark determined that Governor Romney's request met the spirit if not the letter of the law.

Upon receipt of Governor Romney's telegram, the President, who was suspicious of the governor's motivations, did not immediately invoke the Insurrection Act. Rather, the

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<sup>268</sup> Sidney Fine, *Violence in the Model City*, Michigan State University Press 2007 pg. 204.

<sup>269</sup> *Id.* "Believing, it would appear, that he had requested federal troops, Romney called a press conference following his [phone] conversation with the attorney general to announce what he had done...In the midst of the press conference Romney was called to the phone by Clark, who now told the governor that he must submit a written request for troops and must state that there was an 'insurrection' in Michigan that he could not suppress."

<sup>270</sup> *Id.* at 207.

<sup>271</sup> Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992* pg. 183 (Washington, DC: Center of Military History, US Army, 2005).

President, like those before him, sent his own advisors led by special assistant Cyrus Vance to Detroit to assess whether federal troops were indeed necessary.<sup>272</sup> Shortly after arriving in Detroit and touring portions of the city, Mr. Vance informed the President that federal troops were in fact needed.<sup>273</sup> This ultimately led the President to invoke Section 331 of the Insurrection Act. In doing so, President Johnson addressed the nation by television stating that he deployed troops “because of...clear, unmistakable, and undisputed evidence that Governor Romney of Michigan and the local officials in Detroit have been unable to bring the situation under control.”<sup>274</sup>

Similar to Hurricane Katrina, the political leaders involved in the Detroit Riots were criticized over the length of time it took to get federal troops to Detroit.<sup>275</sup> The delay like with Hurricane Katrina was attributable to: (1) a lack of familiarity with the Insurrection Act;<sup>276</sup> (2) a poor relationship between the governor and the President; and (3) concern by the President and governor of how they would be viewed publicly after the riot. The last two factors stemmed from the fact that Governor Romney and President Johnson, similar to Governor Blanco and President Bush, were from different political parties, which in turn created a certain amount of distrust. Also, it did not help that many were touting Governor Romney as the potential Republican candidate to face off against President Johnson in the 1968 presidential race.<sup>277</sup> Thus, arguably there was some uneasiness with their relationship in the summer of 1967. The first factor a lack of understanding or familiarity with the Insurrection Act was evident in both the manner in which the governor first requested troops and also the unnecessarily stringent requirements placed on him to get those troops.

Of the two leaders, President Johnson received the lions share of the blame for the slow federal response and rightfully so since he ultimately determined whether troops would be deployed. Critics claimed that he and his Administration unnecessarily delayed the

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<sup>272</sup> Prior Presidents have also sent their own advisors to survey the scene of the domestic emergency. Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877-1945* pg. 195 (Washington, DC: Center of Military History, US Army, 1997).

<sup>273</sup> Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945-1992* pg. 184 (Washington, DC: Center of Military History, US Army, 2005).

<sup>274</sup> *Id.*

<sup>275</sup> These were not the only examples of Presidents and governors disagreeing on the deployment of military personnel see for example the Pullman Strike and Governor Altgeld and President Cleveland or the strike at Telluride and Governor Peabody and President Theodore Roosevelt. Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877-1945* pgs. 143-144 and 191 (Washington, DC: Center of Military History, US Army, 1997).

<sup>276</sup> Sidney Fine, *Violence in the Model City*, Michigan State University Press 2007 pg. 217

“...the essential fact is that the misunderstandings, misinterpretations and conflicting ambitions of the public officials involved delayed the deployment of federal troops in Detroit until after the riot’s worst day had come to a close.”

<sup>277</sup> Governor Romney ultimately lost to President Nixon in the Republican presidential primary and President Johnson did not seek reelection.



deployment of troops to make Governor Romney look ineffective.<sup>278</sup> For example, Governor Romney and Attorney General Ramsey Clark spent precious time during the Detroit Riots debating the precise format of the governor's request to the President.<sup>279</sup> The Attorney General, in an apparent misapplication of the Insurrection Act claimed that his hands were tied and that the governor would have to strictly adhere to the requirements laid out.<sup>280</sup> Also, President Johnson was unwilling to accept the word of the governor and media reports about Detroit and instead felt compelled to send his own advisors to analyze the situation, which further delayed the deployment of federal troops.

While most of the criticism was directed at President Johnson, Governor Romney did not come out of the situation completed unscathed.<sup>281</sup> Some questioned why the governor just didn't follow the requirements set forth by the Administration. According to noted historian Sidney Fine, Governor Romney did not want "to state categorically that he could not control the disorder."<sup>282</sup> Like his predecessor before him, the governor did want to acknowledge that he could not handle the situation and imply "state incompetence and failure,"<sup>283</sup> which might mean that he was unsuited for higher office.<sup>284</sup>

Other factors influencing Governor Romney's actions with regards to requesting assistance under Section 331 of the Insurrection Act include his fear of losing control of the National Guard and then having the riot spread to other cities in Michigan.<sup>285</sup> This view was reflected in the governor's testimony before the Kerner Commission in which he stated that "[t]he federalization of the National Guard...deprived us of flexibility to control disturbances in other sections of the state." Finally, Governor Romney was also concerned about using the term "insurrection" and whether doing so would void insurance policies thereby making the recoupment of losses suffered by Detroit homeowners and business even more difficult.<sup>286</sup>

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<sup>278</sup> *Romney Says LBJ Played Riot Politics*, 1, Washington Post, Aug. 1, 1967.

<sup>279</sup> Bennett M. Rich, *The Presidents and Civil Disorder* pgs. 192-193. This too was also not the first time that a governor and a President have disagreed on the wording of a request for troops.

<sup>280</sup> Sidney Fine, *Violence in the Model City*, Michigan State University Press 2007 pg. 217.

<sup>281</sup> Andrew J. Glass, *Clark Denies LBJ Played Politics in Detroit Riot*, Aug. 2, 1967. Evans and Nowak, *Detroit and Politics: President Suspected Romney Requested Federal Troops for Political Reason*, Jul. 30, 1967.

<sup>282</sup> Sidney Fine, *Violence in the Model City*, Michigan State University Press 2007 pg. 216.

<sup>283</sup> Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877-1945* pg. 411 (Washington, DC: Center of Military History, US Army, 1997).

<sup>284</sup> Sidney Fine, *Violence in the Model City*, Michigan State University Press 2007 pg. 207

<sup>285</sup> Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945-1992* pg. 213 (Washington, DC: Center of Military History, US Army, 2005).

<sup>286</sup> *Id* at 182. Governor Romney's concerns might have been overblown. See also *Compensation for Victims of Urban Riots*, 68 Colum. L. Rev. 57, 60-62 (1968).

Most likely, it will never be precisely known what the true motivations of both the President and the governor were during the Detroit Riot of 1967. What is clear, however, is that the Insurrection Act over the years has been negatively impacted by governors and Presidents who either were unable to work together or worried more about public opinion than actually resolving the domestic emergency.<sup>287</sup> Furthermore, these same elected officials struggled at times to properly interpret and apply the Insurrection Act.<sup>288</sup> Thus, the question now becomes what if anything can be done to correct these problems or prevent them from reoccurring, especially since it is highly probable that in the near future both governors and Presidents will be faced with interpreting and applying the Insurrection Act. One possible suggestion is to update or modernize the Insurrection Act so that it reflects and addresses these real world difficulties that arise when the statute is actually used. This Article will now attempt to do just that in its final section.

## **Part IV. Changes to the Insurrection Act**

### **A. Adopting the Enforcement Act**

The first change to be considered for the Insurrection Act is the re-adoption of a modified version of the Enforcement Act. While this Article does not necessarily agree with the legislative process by which the Enforcement Act arose, it does find that the statute, for the most part, improved the Insurrection Act.<sup>289</sup> From the Whiskey Rebellion to the Los Angeles Riots of 1992, there has been no consensus view established of what constitutes an “insurrection” or “domestic violence.”<sup>290</sup> Historically, elected officials have applied widely different parameters to these terms.<sup>291</sup> On one extreme is President Hoover who invoked the Insurrection Act to keep W.W. I veterans from

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<sup>287</sup> Sidney Fine, *Violence in the Model City*, Michigan State University Press 2007 pg. 217 (“the essential fact is that misunderstandings, misperceptions, and conflicting ambitions of the public officials involved delayed the deployment of federal troops in Detroit until after the riot’s worst day had come to a close.”).

<sup>288</sup> Besides the examples listed in this Article, see the Los Angeles Riot of 1992. Isaac Trekie, *Bringing the Troops Home to a Disaster: Law, Order and Humanitarian Relief*, 67 Ohio St. L. J. 1227, 1259 (2007).

<sup>289</sup> For an alternative view see William C. Banks, *Providing “Supplemental Security”—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 Journal of National Security Law & Policy 1, 77-78 (2008).

<sup>290</sup> David Engdahl, *The New Civil Disturbance Regulations: The Threat of Military Intervention*, Indiana Law Journal 581, 586 (1974).

<sup>291</sup> Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 Geo. Wash L. Rev. 1, 43 (1997). Engdahl et al. at pg. 413 (“the term ‘insurrection’ in what is now 10 USC § 331 began to be given a meaning far broader than the imperious assault upon the organized government of a state. By usage, and not by judicial construction, Section 331 has come to be regarded as authority for utilizing federal troops, and utilizing them as soldiers, in situations of violence with no characteristics of political uprisings or genuine insurrection at all.”).

trespassing on government property in Washington, D.C.<sup>292</sup> On the other extreme is Hurricane Katrina where despite the large loss of life and property damage both the governor and the President refused to use the Insurrection Act.<sup>293</sup>

Not surprisingly, this has led to uncertainty and confusion as to the circumstances in which the Insurrection Act should be used.<sup>294</sup> It has also hindered and prevented governors from adequately preparing and planning for domestic emergencies because they are unsure whether the federal government will provide military assistance. The Enforcement Act, for the first time, took steps to rectify this problem. Rather than attempt to provide narrow definitions to very broad terms like *insurrection* or *domestic violence*, which might potentially hinder future operations, the Enforcement Act did the next best thing and listed specific conditions that could give rise to the domestic deployment of federal troops and the federalization of the National Guard.

The one major shortcoming of the Enforcement Act was the inclusion of the term *or other condition*. Despite the arguments put forward by the proponents of the Enforcement Act, it is fairly obvious that *or other condition* works against clarifying the Insurrection Act.<sup>295</sup> Furthermore, the term leaves the Enforcement Act vague enough to allow officials at both the state and federal level to manipulate the statute.<sup>296</sup> The term also creates a virtual Pandora's Box of unlimited future incidents that could potentially result in the Insurrection Act being invoked so long as those incidents were coupled with domestic violence.<sup>297</sup> Thus, this Article suggests that the term not be included in any future version of the Insurrection Act. In addition, taking such action would decrease the fears of some that the Enforcement Act was a power grab by the Executive Branch.<sup>298</sup>

Ironically, during the debate over the Enforcement Act, a few Congressional members actually championed the ambiguity surrounding the Insurrection Act claiming that it was intentional and "fostered caution, and it encouraged consultation and deliberation between federal and state and civilian and military decision makers."<sup>299</sup> However, the

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<sup>292</sup> Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877-1945* pg. 367 (Washington, DC: Center of Military History, US Army, 1997).

<sup>293</sup> *Supra* notes 237-244

<sup>294</sup> *Id.*

<sup>295</sup> *Supra* note 197.

<sup>296</sup> Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 41 Duke L.J. 415, FN 165 (1966). ("Alternatively, it may be suggested that the clearer the statutory terms the less opportunity there is for a President to mask a crucial political decision behind the obscurity of the statute.").

<sup>297</sup> Statement of Senator Patrick Leahy ("...or under the nebulous term of 'other condition.'"). See also April 24 2007 statement of Senator Kitt Bond ("...or very ambiguously—'other conditions.'").

<sup>298</sup> *Supra* notes 186-187

<sup>299</sup> William C. Banks, *Providing "Supplemental Security"—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 Journal of National Security Law & Policy 1, 77 (2008).

ambiguity of the Insurrection Act appears to go well beyond the intended jurisdictional friction that has arisen historically between the state and federal governments when responding to domestic emergencies.<sup>300</sup> More importantly, these champions of ambiguity appear to make no mention of the loss of life and property damage that occurs while this consultation takes place, see for example Hurricane Katrina and the Detroit Riot of 1967 discussed *supra*.<sup>301</sup> They also failed to address the fact that the term *or other condition* made the Enforcement Act just as, if not more, ambiguous than the Insurrection Act. Finally, as noted by Professor Banks, “[w]e should be skeptical of the claim by a Senator that Congress’s legislative handiwork is ‘purposefully ambiguous.’”<sup>302</sup>

While coordination and collaboration among the key players during a domestic emergency is important, it can be accomplished by other means besides creating and maintaining an intentionally ambiguous statute. For example, creating pre-established guidelines between the President and the governor for requesting and deploying federal troops discussed *infra* will go a long way in ensuring that the President and state governors work together.<sup>303</sup>

One minor shortcoming of the Enforcement Act was that it for the most part only looked at Section 333 of the Insurrection Act. This Article believes that the Enforcement Act should have been more expansive and examined other sections of the Insurrection Act. For example, replacing the term *militia* with the term *National Guard* improves not only Section 333, but also Section 331.<sup>304</sup> The term *militia* as understood today is far removed from its eighteenth century meaning<sup>305</sup> and has virtually disappeared from most other statutes.<sup>306</sup> Moreover, using the term *National Guard* throughout the statute as opposed to *militia* decreases the likelihood that states will lose control of their SDFs even when they request federal military assistance.

As illustrated during the Detroit Riots, one of Governor Romney’s chief concerns with asking the President to invoke the Insurrection Act was fear of riots breaking out in other

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<sup>300</sup> *Supra* notes 66-74

<sup>301</sup> *Supra* note 276

<sup>302</sup> *Id.* Senator’s Leahy’s statement on On Legislation To Repeal Changes To The Insurrection Act (S. 513) February 7, 2007 (“The primary reason that the law has been invoked so rarely is that there has been an inherent tension in the way it was crafted. Before it was changed last year, the law was purposefully ambiguous about when the President could invoke the Act in cases beyond a clear insurrection or when a state clearly violated federal law in its actions. Because there was this useful ambiguity – a constructive friction in the law -- a President until now would have to use the power with great caution, and with the impetus for appropriate consultation.”).

<sup>303</sup> *Supra* notes 286-292

<sup>304</sup> This change has also been suggested by numerous legal scholars.

<sup>305</sup> David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CNLLR 879 (1996).

<sup>306</sup> Fredrick B. Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 210 (1940). (“...the word ‘militia’ has virtually disappeared from the statute books...”).

parts of the state. Absent relying on private government contractors,<sup>307</sup> Governor Romney would have been forced to try and persuade the President to move soldiers to include the Michigan National Guard formerly under the governor's command to other parts of the state to quell those potential riots. In the alternative, this Article suggests that states could rely on their SDFs. As discussed previously, it is highly unlikely that SDFs would ever fall under federal control pursuant to the Insurrection Act so long as *militia* is replaced by *National Guard*.<sup>308</sup>

Finally, had the Enforcement Act taken a broader view of the Insurrection Act rather than just focus on Section 333, it would most likely have corrected the minor inconsistent language in Section 331. As previously discussed, a literal reading of Section 331 may lead one to believe that the President may not use the militia of the state where the emergency is actually occurring only the militia of outside states.<sup>309</sup>

## B. Procedure to Request Troops

Another practical improvement to the Insurrection Act is the creation of a uniform process by which governors request federal military assistance under Section 331 of the Insurrection Act. Creating guidelines, like adopting a modified Enforcement Act, will work to eliminate some of the uncertainty surrounding the Insurrection Act. As demonstrated throughout history, there has been considerable confusion surrounding the Insurrection Act.<sup>310</sup> For instance, President Theodore Roosevelt directed his Secretary of War, Elihu Root to explain the statute to the governor of Nevada.<sup>311</sup> Other Presidents like Woodrow Wilson,<sup>312</sup> Franklin Roosevelt<sup>313</sup> and Lyndon Johnson issued

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<sup>307</sup> In making one of his numerous critiques of the Enforcement Act, Senator Leahy said that states, like the federal government, may have to turn to contractors for assistance during domestic emergencies. Senate Judiciary Committee Hearing On “‘The Insurrection Act Rider’ And State Control Of The National Guard” April 24, 2007 “If we do not take steps to strengthen and protect the Guard and their ability to respond here at home, we are going to see States resort to private contracting -- that is right, private contractors -- to maintain a baseline level of response capabilities when they are needed to help a State in a crisis. Who do you want at a time of local need? Do you want Blackwater, or do you want the Nation's Adjutants Generals and the outstanding men and women from among our neighbors who wear the uniforms of the National Guard.”

<sup>308</sup> *Supra* notes 197-198.

<sup>309</sup> *Supra* note 60.

<sup>310</sup> This idea is probably summed up best by General George S. Patton who wrote, “[d]ue to the combined effort of ignorance and careless diction, there is widespread misunderstanding of the principle terms used in connection with the enforcement of law by military means.” Major George S. Patton Jr., *Federal Troops in Domestic Disturbances*, November 1932. In 1932, General Patton led federal troops against American veterans (Bonus Army) encamped in Washington, D.C.

<sup>311</sup> Bennett M. Rich, *The Presidents and Civil Disorder* pg. 130.

<sup>312</sup> Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877-1945* pgs. 230-232 (Washington, DC: Center of Military History, US Army, 1997).

<sup>313</sup> Robert Shogan and Tom Craig, *The Detroit Race Riot a Study in Violence*, Chilton Books 1964 pg. 155.

written procedures or guidelines on how states should request federal military assistance.<sup>314</sup>

Unfortunately, the guidelines drafted by these prior Presidents were created in response to a prior problem as opposed to in anticipation of one. Furthermore, these guidelines were never codified.<sup>315</sup> Thus, each subsequent generation appears to have forgotten what the previous one learned.<sup>316</sup> This Article suggests codifying the guidelines in either the Insurrection Act itself or the Code of Federal Regulations, which will ensure that both governors and Presidents are more aware of what to expect and what is required to deploy troops domestically. Codification will also hopefully reduce the last minute scrambling normally associated with requests under Section 331.<sup>317</sup>

The Executive Branch would most likely support creating guidelines as a way to decrease the likelihood of governors making *recommendations* for federal troops as opposed to *requests*. This distinction between a *recommendation* and a *request* for federal military assistance is important for a variety of reasons. First, some legal scholars like Professor Banks have argued that absent exceptional circumstances a state must *request* federal assistance before troops may be deployed to combat domestic violence.<sup>318</sup> Second, by requiring the governor or legislature to make formal *requests*, the President diminishes the possibility that the same governor or legislature will later criticize the presence of the federal troops or hinder their deployment.<sup>319</sup> This in turn makes for a better working relationship among state and federal elected officials.

Conversely, states might favor codified guidelines to avoid the situation Governor Romney found himself in where he thought he had an oral commitment of federal troops from the Attorney General only to learn later that this wasn't necessarily true.<sup>320</sup> Also, there have been numerous historical examples of the President, especially when convenient, finding the request by the governor technically deficient or lacking sufficient

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<sup>314</sup> Bennett M. Rich, *The Presidents and Civil Disorder* pg. 155. See Appendix B for a copy of Attorney General Ramsey Clark's letter to the nation's governors.

<sup>315</sup> There are broad regulations within the CFR that discusses "Employment of Military Resources in the Event of Civil Disturbances." However, these regulations don't really touch upon the request by the governor to the President for military assistance. 32 C.F.R. Part 215. See also, David Engdahl, *The New Civil Disturbance Regulations: The Threat of Military Intervention*, 49 Indiana Law Journal 581 (1974).

<sup>316</sup> Sidney Fine, *Violence in the Model City*, Michigan State University Press 2007 pg. 2 "Following the riot [Detroit Riot of 1943], the War Department provided its commands and state governors with a memorandum regarding the legal prerequisites for the use of federal troops in a civil disorder...the secretary of war and the attorney general prepared a second memorandum specifically for the president that 'succinctly' advised him of the law on the subject. No one in a responsible position in Washington or Lansing appeared to be aware of the existence of either of these memoranda when the need for federal troops became apparent during the Detroit riot of 1967."

<sup>317</sup> *Supra* notes 227-244.

<sup>318</sup> William C. Banks, *Providing "Supplemental Security"—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 Journal of National Security Law & Policy 1 (2008).

<sup>319</sup> Note, Harv. L. Rev. 638, 642-643 (1968), *Riot Control and the Use of Federal Troops*.

<sup>320</sup> Sidney Fine, *Violence in the Model City*, Michigan State University Press 2007 pg. 204.



information to allow him to deploy troops.<sup>321</sup> Creating guidelines will decrease this practice.

### C. Involving the Courts

The first two recommendations primarily focus on reducing the ambiguity associated with the Insurrection Act and to a lesser extent on improving the working relationship between the governor and the President, the last recommendation concentrates on the more elusive topic of public opinion and its influence on the Insurrection Act. At the outset, this Article recognizes that public opinion has both a negative and positive impact on the Insurrection Act. In a democracy, public opinion is beneficial because it increases the likelihood that the military, whether deployed pursuant to the Insurrection Act or some other authority, will be used properly.<sup>322</sup> This is due to the fact that those who either request or deploy the military are elected and therefore accountable to the public.

However, this accountability to the electorate has also caused some leaders to either hesitate or refuse to use the military despite an obvious need. For example, during Hurricane Katrina, the President although he had the legal authority did not invoke Section 333 of the Insurrection Act because he, at least according to media reports, feared the public backlash associated with a male President taking command and control away from a female southern governor of the opposite political party.<sup>323</sup> Thus, the question becomes is there a way to both maintain the positive influences of public opinion on the Insurrection Act while also reducing the negative ones. This Article believes there is and suggests that the answer lies with the judiciary. Like in the original Calling Forth Act of 1792, this Article argues that the courts should have a role with respect to the Insurrection Act.<sup>324</sup>

As discussed *supra*, when the President wanted to call out the militia to “execute the laws of the union,” pursuant to the Calling Forth Act, he had to first obtain a judicial determination that the laws of the United States were opposed or obstructed “by combinations too powerful to be suppressed by the ordinary course of judicial

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<sup>321</sup> Bennett M. Rich, *The Presidents and Civil Disorder* pg. 192. “Two standard excuses have been used by presidents who have wished to avoid sending troops to states requesting aid...The second common method of avoiding the sending of troops is the excuse that the governor’s requisition is incorrectly drawn.”

<sup>322</sup> Andrew S. Miller, Note, *Universal Soldiers: U.N. Standing Armies and the Legal Alternatives*, 81 Geo. L. J. 773, 821 (1993) (“...a permanent U.N. army would not be subject to the same restraining influence that is exerted by public opinion on the military forces of individual member nations.”)

<sup>323</sup> *Supra* note 240. See also Robert Burns, *Bush: Military Role in Domestic Emergencies*, Army Times, September 19, 2005 (“Presidents have long been reluctant to deploy troops domestically, leery of the image of federal troops patrolling in their own country or of embarrassing state and local officials.”).

<sup>324</sup> Professor Gardina has made a similar recommendation. Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to use the Military in Domestic Emergencies*, 91 Marq. L. Rev. 1027, 1075 (2008).

proceedings.”<sup>325</sup> This requirement was originally added to the Calling Forth Act to serve as a potential procedural safeguard against the President abusing his authority under the statute.<sup>326</sup> Today, however, this same requirement could be used to reduce some of the negative effects of public opinion on the Insurrection Act.

As a threshold matter, requiring the involvement of the judiciary prior to the domestic deployment of troops would, if nothing else, add legitimacy to an action undertaken pursuant to the Insurrection Act. In a sense, the court validates the actions of the governor to request troops and the President to send troops. This is because the courts have long been regarded as the most neutral and least partisan branch of government.<sup>327</sup> Courts have also for the most part remained above the political fray.<sup>328</sup>

A byproduct of injecting the court’s legitimacy into the Insurrection Act is that both governors and Presidents when contemplating taking action are more focused on resolving the problem than on public opinion. This assumes of course that the governor or President follows a course of action not at odds with that of the judiciary. By way of example, had the judiciary determined during Hurricane Katrina that the laws in New Orleans were indeed opposed or obstructed the President might have felt more disposed to federalize the Louisiana National Guard knowing that his actions were for the most part supported by another branch of government. The judicial determination might have also provided the Governor Blanco the necessary cover she needed to accept help from the federal government and relinquish command of the Louisiana National Guard.

Similarly in the Detroit Riot of 1967, a judicial determination that laws of the United States were opposed or obstructed “by combinations too powerful to be suppressed by the ordinary course of judicial proceedings,” might have reduced some of the distrust between Governor Romney and President Johnson. Neither individual would have reason to believe that the court was acting to curry favor with public opinion or for partisan purposes. As a result, the President might have acted more quickly in invoking the Insurrection Act. While Governor Romney might have been more willing to acknowledge the dire situation of his state.

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<sup>325</sup> *Supra* notes 53-81

<sup>326</sup> *Supra* notes 66-81.

<sup>327</sup> Luke Bierman, *Comment on Paper by Cheek and Champagne: The Judiciary as a “Republican” Institution*, (“Make no mistake about it--the judiciary is different. It has a role different from the legislature and executive. It has different functions, different purposes, and different norms. The judiciary may be involved in politics, but not the same kind of politics that engulfs the legislature and the executive. We should therefore resist the path that leads us to equate judges with legislators and executives”).

<sup>328</sup> *Id.*

In all of the aforementioned examples, the elected leaders would have less cause for worry over public opinion because their actions would be in line with the highly regarded judiciary. This might have been one reason why President Washington, requested a judicial determination from Associate Justice Wilson. Although unnecessary at the time because the Insurrection Act was being invoked to put down an actual insurrection, President Washington nevertheless obtained the judicial determination, which worked to strengthen public support for his decision to use military force against the insurgents.

Obviously, there are going to be potential issues associated with reinstating judicial review. The first is one of practicality as raised by Professor Banks who states that incorporating the judiciary into the Insurrection Act will slow down the process of deploying troops in the age of fast-hitting disasters and surprise attacks.<sup>329</sup> Generally speaking, adding an additional decision maker to any process has the potential to slow it down. However, this does not always occur. For example, had President Johnson received a determination from the judiciary in addition to Governor Romney that the “laws were being obstructed by combinations too powerful to be suppressed,” the President might have found it unnecessary to take additional time to send his own advisors like Cyrus Vance to assess the situation.<sup>330</sup>

In addition, with advancements in communications, the determination by the judiciary could occur before, during or after the governor’s request for federal military assistance. This determination by the judiciary, unlike during the Whiskey Rebellion when it took Associate Justice Wilson two days to get his report to President Washington, could be transmitted to the President in seconds. Thus, the overall time to deploy troops might actually be shortened rather than lengthened by adding the judiciary.

As for the other practical concerns raised by Professor Banks, natural disasters are no more fast moving today than they were two hundred years ago nor are surprise attacks a relatively new phenomenon. Also, like with the Calling Forth Act, the judicial determination requirement would be limited only to instances where the military was being called out to ensure the proper execution of the laws of the union.<sup>331</sup> Thus, it would not be required if the military is deployed due to an insurrection or invasion.

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<sup>329</sup> William C. Banks, *Providing “Supplemental Security”—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 *Journal of National Security Law & Policy* 1 (2008).

<sup>330</sup> *Supra* note 264.

<sup>331</sup> *Supra* note 77.

The bigger obstacle with reinstating judicial review will most likely center around the courts general reluctance to involve itself in potential political questions.<sup>332</sup> As stated by numerous legal commentators, “a decision by the coordinate executive branch to employ the military to suppress violence is a classic illustration of a ‘political question.’”<sup>333</sup> The judiciary has also been hesitant to interfere with the Presidents Commander in Chief power.<sup>334</sup> In both *Borden* and *Mott* the Court noted that “the power of deciding whether an exigency had arisen upon which the government of the United States is bound to interfere is given to the President.”<sup>335</sup> This is not to say, however, that the President’s actions here are beyond complete judicial review as noted in *Sterling v. Constantin*.<sup>336</sup>

In *Sterling*, the Supreme Court in reviewing the actions of the governor of Texas to declare martial law determined that while the Court should grant deference to the governor of Texas and his decision to invoke martial law, this discretion is not absolute nor beyond the law.<sup>337</sup> Chief Justice Hughes determined that “[e]ven when ‘martial law’ is declared, as it often has been, its appropriateness is subject to judicial review.”<sup>338</sup> The Court went on to say that:

“If...[the executive] can substitute military force for and the exclusion of laws...[then] republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis destroys every guaranty of the Constitution.”<sup>339</sup>

Thus, *Sterling* offers the possibility of imposing some form of judicial review on the President’s decision to deploy troops pursuant to the Insurrection Act. Of course, *Sterling* involved a governor and not the President; however, the same general principles could be applied.

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<sup>332</sup> Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 UCOLOR 849, 852 (1994), (“[t]he political question doctrine is the principle that certain allegations of constitutional violations are not to be adjudicated by the federal judiciary even though all of the jurisdictional and justiciability requirements are met.”).

<sup>333</sup> Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 41 Duke L.J. 415, 452 (1966).

<sup>334</sup> See also, Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to use the Military in Domestic Emergencies*, 91 Marq. L. Rev. 1027, 1064 (2008). (“The statute’s ambiguous language is compounded by the Supreme Court’s hands-off approach to reviewing the President’s decision to employ the military domestically.”)

<sup>335</sup> *Supra* notes 123-127.

<sup>336</sup> *Sterling v. Constantin* 287 U.S. 378 (1932). See also, Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 41 Duke L.J. 415, 453 (1966) (“However, in recent years the judicial deference in matters relating to ‘political questions’ has significantly diminished and it is perhaps unwise to rely upon the assumption that the Court will maintain a strict hands-off policy with respect to those matters reaming within this category.”).

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Sterling* at 402-403 (quoting *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 124 (1866)).

In light of *Borden* and *Mott*, Congress may be hesitant to over rely on *Sterling*. Also, Congress may fear the possibility of creating a potential constitutional crisis by providing the judiciary a direct role in the Insurrection Act.<sup>340</sup> Thus, an alternative to the previous recommendation might be to give the courts a more indirect role. For example, the language from the Calling Forth Act could be modified so that the judicial review is more discretionary than mandatory. In other words, the President could but would not be required to obtain a judicial review prior to calling up the military pursuant to the Insurrection Act.

### **Conclusion**

Unfortunately, there is a strong likelihood that in the near future, American soldiers will be called to guard American streets. As such, Congress should once again re-examine the Insurrection Act to determine what changes need to be made to bring this statute that has stayed relatively static for the past 135 years up to date.<sup>341</sup> Unlike what occurred with the Enforcement Act, however, this re-examination of the Insurrection Act should occur in the open and involve all the major stakeholders, especially the state governors.

The areas of primary concerns, as illustrated throughout this Article, are: (1) clarifying the statute; (2) improving the working relationship between the governor and the President; and (3) reducing the negative impact of public opinion. These improvements to the statute can best be accomplished by looking at the Enforcement Act, creating guidelines to request federal military assistance and reinstating judicial review.

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<sup>340</sup> Michael Gerhardt, *Crisis and Constitutionalism*, 63 MTLR 277 (2002).

<sup>341</sup> Robert Burns "Bush: Boost Military Role in Domestic Emergencies," *Army Times*, September 19, 2005 ("...very archaic laws from a different era in U.S. history...another such law, Di Rita[Pentagon spokesman] said, is the Civil War-era Insurrection Act...").

## Appendix A

Change	
<p data-bbox="181 636 792 667">§ 333. Interference with State and Federal law</p> <p data-bbox="181 709 792 926">The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—</p> <p data-bbox="282 968 792 1507">(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.</p> <p data-bbox="181 1549 792 1692">In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.</p>	<p data-bbox="792 453 1438 520">§ 333. <b>Major public emergencies</b>; interference with State and Federal law</p> <p data-bbox="792 562 1438 630"><b>(a) USE OF ARMED FORCES IN MAJOR PUBLIC EMERGENCIES.--</b></p> <p data-bbox="889 672 1438 1881"><b>(1) The President may employ the armed forces, including the National Guard in Federal service, to--</b> <b>(A) restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that--</b> <b>(i) domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order; and</b> <b>(ii) such violence results in a condition described in paragraph (2); or</b> <b>(B) suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if such insurrection, violation, combination, or conspiracy results in a condition described in paragraph (2).</b> <b>(2) A condition described in this paragraph is a condition that--</b> <b>(A) so hinders the execution of the laws of a State or possession, as applicable, and of the United States within that State or possession, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the</b></p>



	<p>constituted authorities of that State <b>or possession</b> are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or</p> <p>(B) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.</p> <p>(3) In any situation covered by paragraph (1)(B), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.</p> <p><b>(b) NOTICE TO CONGRESS.--</b></p> <p><b>The President shall notify Congress of the determination to exercise the authority in subsection (a)(1)(A) as soon as practicable after the determination and every 14 days thereafter during the duration of the exercise of the authority.</b></p>
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## Appendix B

Attorney General Ramsey Clark made the following statements in a letter sent to all state governors on August 7, 1967:

‘There are three basic prerequisites to the use of Federal troops in a state in the event of domestic violence:’

(1) That a situation of serious ‘domestic violence’ exists within the state. While this conclusion should be supported with a statement of factual details to the extent feasible under the circumstances, there is no prescribed wording.’

(2) That such violence cannot be brought under control by the law enforcement resources available to the governor, including local and State police forces and the National Guard. The judgment required here is that there is a definite need for the assistance of Federal troops, taking into account the remaining time needed to move them into action at the scene of violence.’

(3) That the legislature or the governor requests the President to employ the armed forces to bring the violence under control. The element of request by the governor of a State is essential if the legislature cannot be convened. It may be difficult in the context of urban rioting, such as we have seen this summer, to convene the legislature.’

These three elements should be expressed in a written communication to the President, which of course may be a telegram, to support his issuance of a proclamation under 10 U.S.C. § 334 and commitment of troops to action.

In case of extreme emergency, receipt of a written request will not be prerequisite to Presidential action. However, since it takes several hours to alert and move Federal troops, the few minutes needed to write and dispatch a telegram are not likely to cause any delay.’

Upon receiving the request from a governor, the President, under the terms of the statute and the historic practice, must exercise his own judgment as to whether Federal troops will be sent, and as to such questions as timing, size of the force, and federalization of the National Guard.’

Preliminary steps, such as alerting the troops, can be taken by the Federal government upon oral communications and prior to the governor’s determination that the violence cannot be brought under control without the aid of Federal forces. Even such preliminary steps, however, represent a most serious departure from our traditions of local responsibility for law enforcement. They should not be requested until there is a substantial likelihood that the Federal forces will be needed.’