

AN INSURRECTION ACT FOR THE TWENTY-FIRST CENTURY

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*Better twenty-four hours of riot, damage, and disorder than illegal use of troops.*¹

I. INTRODUCTION

Hurricane Katrina, with 140 mile-per-hour winds, was one of the deadliest natural disasters to ever strike the United States.² It impacted more than 93,000 square miles, caused approximately \$100 billion in damage, and displaced more than 770,000 people.³ Worse still, it killed more than 1,300 people, leaving many families devastated.⁴ For some, the most lasting image or memory of

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1. President Theodore Roosevelt, as quoted in Clayton D. Laurie & Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877-1945*, at 179 (Ctr. of Military History, U.S. Army 1997).

2. Doyle Rice, USATODAY.com, *Hurricane Katrina Stronger than Andrew at Landfall*, http://www.usatoday.com/weather/stormcenter/2005-08-31-Katrina-intensity_x.htm (posted Aug. 31, 2005, 3:11 p.m. EDT).

3. Frances Fragos Townsend, *The Federal Response to Hurricane Katrina: Lessons Learned* 1, 1, 7-8 (U.S. Govt. 2006) (available at <http://library.stmarytx.edu/acadlib/edocs/katrinawh.pdf>).

4. *Id.* at 1.

Hurricane Katrina was the city of New Orleans where the media televised the daily struggles of the city's inhabitants.⁵

One of the harder-hit areas, eighty percent of New Orleans was underwater as a result of Hurricane Katrina and the subsequent levee failures.⁶ 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.⁷ Other residents either fled to the Louisiana Superdome or New Orleans Convention Center, both of which were ill-equipped to handle the large number of people seeking assistance.⁸ These shelters of last resort were woefully understaffed and lacked the basic necessities for habitability.⁹ Most notably, they had no running water, electricity, or proper sanitation services, and the available food and water rations were grossly inadequate.¹⁰ The violence and lawlessness found throughout the city and even in some shelters compounded all of these problems.¹¹ Law enforcement activities, like other government services, were essentially nonexistent.¹²

Save for agencies like the Coast Guard, most Americans consider the government's planning and response to Hurricane Katrina a failure.¹³ While Hurricane Katrina eventually resulted

5. *Id.*

6. *Id.* at 36.

7. *Id.* at 38.

8. *Id.* at 38–39.

9. *Id.*

10. *Id.* at 39; see also Robert Travis Scott, *Politics Delayed Troops Dispatch to N.O.: Blanco Resisted Bush Leadership Proposal*, Times Picayune [¶] 25] (Dec. 11, 2005) (available at 2005 WLNR 19945145) (noting that the “Superdome . . . had become an understaffed and poorly supplied evacuation center with no power or running water.”).

11. Scott R. Tkacz, *In Katrina's Wake: Rethinking the Military's Role in Domestic Emergencies*, 15 Wm. & Mary Bill Rights J. 301, 304 (2006). Some of the reported levels of violence were later found to have been exaggerated. Candidus Dougherty, *While the Government Fiddled 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, 143–144 (2008) [hereinafter Dougherty, *Big Easy Drowned*].

12. Tkacz, *supra* n. 10, at 304.

13. Select Bipartisan Comm. to Investigate the Prep. for and Response to Hurricane Katrina, *A Failure of Initiative*, H.R. Rpt. 109-377 at 205 (Feb. 15, 2006). “Katrina was a national failure, an abdication of the most solemn obligation to provide for the common welfare.” *Id.* at x. 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 thousands of people were trapped in the New Orleans Convention Center. CNN, *CNN Reports: Katrina—State of Emergency 70* (Andrews McMeel Publg. 2005). Specifically, Secretary Chertoff stated: “I have not heard a report of thousands of people in the Convention Center who [do not] have food and water.” *Id.* Compare, however, a quote attributed to then White House Deputy Chief of Staff, Karl Rove: “The only mistake we made with

in the largest domestic deployment of troops since the Civil War,¹⁴ many wondered why a country with the most advanced military the world has ever seen struggled to deliver water to one of its major cities.¹⁵ The answer to this question serves as the thesis for this Article.

On August 29, 2005, the night of Hurricane Katrina's landfall on the Gulf Coast, Louisiana Governor Kathleen Blanco made her now-famous request to President George W. Bush for "everything you have got."¹⁶ This request came as Governor Blanco began to realize she lacked the resources to address the ongoing crisis in Louisiana. As the situation continued to deteriorate, Governor Blanco followed up her earlier request to the President by specifically asking for assistance in the form of federal troops.¹⁷ Traditionally, state governors and their respective National Guard units,¹⁸ not the federal government, are primarily responsible for handling domestic emergencies because state officials are both closer to the crisis and generally more familiar with the

Katrina was not overriding the local government." The Huffington Post, *Rove off the Record on Iraq: Iraq Will Transform the Middle East . . .*, http://www.huffingtonpost.com/2005/09/17/rove-off-the-record-on-ir_n_7513.html (posted Sept. 17, 2005, 10:39 p.m.).

14. Sen. Comm. on Homeland Sec. & Govtl. Affairs, *Hurricane Katrina: A Nation Still Unprepared*, Sen. Rpt. 109-322 at 476 (June 1, 2006).

15. Thaddeus Hoffmeister, The Daily Transcript, *Why We Waited to Send in the Active Army*, <http://www.sddt.com/Search/Article.cfm?SourceCode=20050921tzb> (posted Sept. 21, 2005). The troops referenced here are active-duty federal forces. *Id.* National Guard personnel were on the ground and continually arrived. See also Stephen M. Griffin, *Stop Federalism before It Kills Again: Reflections on Hurricane Katrina*, 21 St. John's J. Leg. Comment. 527, 531 (2007) (describing the United States Army and National Guard's delayed response to New Orleans due to arguments over jurisdiction and a slowed initial federal response); Jason Mazzone, *The Commandeerer in Chief*, 83 Notre Dame L. Rev. 265, 300-301 (2007) [hereinafter Mazzone, *Commandeerer*] (stating that using dual military forces—the active-duty military and the National Guard—causes delay because of coordination issues and duplicate efforts).

16. 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).

17. *Id.* at 114.

18. At this point, it would probably be helpful to point out that the National Guard, unlike the Army or Army Reserves, can either be under the command and control of the President (Title 10 status) or the governor (Title 32 status). Mazzone, *Commandeerer*, *supra* n. 15, at 288. "Title 10" refers to 10 U.S.C. § 101 (2006), and "Title 32" refers to 32 U.S.C. § 502 (2006). In certain limited exceptions, a member of the National Guard may be under the command and control of both the President and the governor. *Id.* 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 his or her control over these forces. *Id.*

people impacted than the federal government.¹⁹ Moreover, federalism dictates that the “preservation of law and order is basically a responsibility of the state and local governments.”²⁰ But unlike many past governors in need of federal military aid, Governor Blanco did not want the federal government to completely take over the relief efforts, nor did she want to lose control of the Louisiana National Guard—a normal, but not mandatory, prerequisite for a state seeking federal military aid.²¹ So, despite requesting federal military assistance, Governor Blanco did not ask President Bush to invoke the Insurrection Act.²²

The Insurrection Act is the principal authority relied upon by the President when deploying troops within the United States in response to a domestic emergency.²³ The Act serves as the major exception to the Posse Comitatus Act (PCA),²⁴ which prohibits

19. Christopher R. Brown, *Been There, Doing That in a Title 32 Status: The National Guard Now Authorized to Perform its 400-Year Old Domestic Mission in Title 32 Status*, 2008 Army Law 23, 33–34.

20. Douglas A. Poe, *The Use of Federal Troops to Suppress Domestic Violence*, 54 ABA J. 168, 171 (Feb. 1968).

21. Elisabeth Bumiller & Clyde Haberman, *Bush Makes a Return Visit; 2 Levees Secured*, N.Y. Times A1 (Sept. 6, 2005) (available at 2005 WLNR 13994973). Arguably, active-duty troops could have been placed under Governor Blanco’s command. But this would have been against one hundred years of precedent, established by President Theodore Roosevelt. President Roosevelt’s Secretary of War, Elihu Root, stated that the President “can[] not place [the army] at the disposal of the governor of the State, but must himself direct their operations” Commr. of Labor, *Labor Disturbances in the State of Colorado from 1880 to 1904, Inclusive*, Sen. Doc. 58-122 at 11 (Jan. 27, 1905). This policy was probably due to the Governor of Idaho’s misuse of troops during the 1899 Coeur d’Alene mining dispute. *Riot Control and the Use of Federal Troops*, 81 Harv. L. Rev. 638, 642 n. 33 (1968) [hereinafter *Riot Control*]. See also Bennett Milton Rich, *The Presidents and Civil Disorder* 191 (Brookings Institution 1941) (stating that “[i]n 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.”).

22. The Insurrection Act is codified at 10 U.S.C. §§ 331–335 (2006). Governor Blanco’s press secretary stated that Governor Blanco refused President Bush’s request because “[s]he would lose control when she had been in control from the very beginning[.]” Bumiller & Haberman, *supra* n. 21, at [¶] 15].

23. 10 U.S.C. §§ 331–335; H.W.C. Furman, *Restrictions upon Use of the Army Imposed by the Posse Comitatus Act*, 7 Mil. L. Rev. 85, 105–107 (1960). For the purposes of this Article, the term “Insurrection Act” refers to the law codified at 10 U.S.C. §§ 331–335 (2006), unless otherwise stated. Troops have been deployed on an emergency basis outside of the Insurrection Act on a very limited basis and primarily without prior Presidential approval. Furman, *supra* n. 23, at 104–107.

24. 18 U.S.C. § 1385 (2006). Commentators have frowned on such exceptions. See e.g. Gary Felicetti & 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) (offering that exceptions to the Act undermined Homeland Security strategy);

federal military forces from actively participating in civilian law enforcement absent congressional or constitutional authority.²⁵ When invoked by the President, the Insurrection Act allows federal military forces to participate in domestic law-enforcement activities.²⁶

In light of Governor Blanco's earlier refusal to request federal troops pursuant to the Insurrection Act, President Bush sent a formal legal memorandum asking her to request a federal takeover of the relief effort.²⁷ When this also failed, President Bush suggested a hybrid command structure under which a three-star general, commanded and controlled by the federal government,

Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 Wash. U. L.Q. 953 (1997) (arguing that exceptions to the PCA are inconsistent with the Act's policy).

25. The Act states: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1385 (emphasis added). Etymologically speaking,

The *posse comitatus* derives its name from the entourage or retainers [that] accompanied early Rome's proconsuls to their places of duty and from the *comte* 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.

Furman, *supra* n. 23, at 87 (emphasis in original). For a more complete discussion of the PCA, see generally Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 Wash. U. J.L. & Policy 99, 101 (2003) (examining the history and origins of the PCA and arguing that the "War on Terrorism" will "be fatal" to the Act); Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. Rev. 67 (2000) (discussing martial law and how the military's role in the United States has evolved over time); Felicetti & Luce, *supra* n. 24, at 87 (seeking to "set the record straight on the [PCA]" by correcting policymakers' "profound misunderstanding of this law"); Hammond, *supra* n. 24, at 953 (arguing that the PCA should be revised to prevent its use in "drug interdiction at our borders"); Note, *Honored in the Breach: Presidential Authority to Execute the Laws with Military Force*, 83 Yale L.J. 130, 152 (1973) (providing an overview of the President's authority to deploy troops domestically and concluding that "[a]ction by Congress is necessary if it is to prevent the continued erosion of its power to control the use of military force in domestic affairs."); Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward A Right to Civil Law Enforcement*, 21 Yale L. & Policy Rev. 383 (2003) (discussing the PCA's shortcomings); James P. O'Shaughnessy, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 Am. Crim. L. Rev. 703, 704 (1976) (examining "whether the [PCA] remains viable in its present form or, if not, what modification best suits the contemporary world"); Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, 1997 Army Law. 3, 3 (discussing the "legal authorities supporting the [Department of Defense's] response to the Oklahoma City bombing").

26. Furman, *supra* n. 23, at 103.

27. Greenberger, *supra* n. 16, at 114.

would be sworn into the Louisiana National Guard. The general would control all of the troops in the area.²⁸ This suggestion was also rejected by Governor Blanco.²⁹

Governor Blanco's refusal to either turn over the National Guard under her control or seek a federal takeover placed the Bush Administration in a difficult position. First, many Administration members were unfamiliar with the Insurrection Act and wondered what action, if any, they could take.³⁰ More specifically, they were unsure whether President Bush could legally send troops, federalize the Louisiana National Guard, or both, absent a request by Governor Blanco.³¹ Second, assuming that President Bush did have legal authority to take action, some members of the Administration questioned the political wisdom of doing so.³² An anonymous senior Administration official aptly summarized the Administration's conundrum, stating:

Can you imagine how it would have been perceived if a [P]resident of the United States of one party had preemptively taken from the female governor of another party the command and control of her forces, unless the security situation made it completely clear that she was unable to effectively execute her command authority and that lawlessness was the inevitable result?³³

28. *Id.*

29. *Id.*

30. See Eric Lipton, Eric Schmitt & Thom Shanker, *Political Issues Snarled Plans for Troop Aid*, N.Y. Times A1 [¶ 5] (Sept. 9, 2005) (available at 2005 WLNR 14201473) (stating that "[i]nterviews with officials in Washington and Louisiana show that as the situation grew worse, they were wrangling with questions of federal/state authority, weighing the realities of military logistics and perhaps talking past each other in the crisis.").

31. *Id.* at [¶¶ 1, 5, 28–29].

32. *Id.* at [¶¶ 2–3]. This quandary has not been relegated to this particular President, but rather has been present throughout this country's history due to federalism. *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 1966 Duke L.J. 415 [hereinafter *Federal Intervention*]. *Federal Intervention* further states:

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 . . .

Id. at 459.

33. Lipton, Schmitt & Shanker, *supra* n. 30, at [¶ 9].

After losing precious time grappling with the issue,³⁴ the Department of Justice's Office of Legal Counsel eventually and correctly determined that under Section 333 of the Insurrection Act, President Bush could take action by either sending troops or federalizing Louisiana's National Guard even without Governor Blanco's permission.³⁵ But instead of invoking the Insurrection Act, two separate commands, contrary to military doctrine, were put in place to handle the relief efforts—one directed by President Bush and the other directed by Governor Blanco.³⁶ Because the Insurrection Act was not invoked, the federal troops under the command of President Bush could not, pursuant to the PCA, participate in law enforcement activities.³⁷

34. Senator Joe Lieberman, Ranking Member of the Senate Committee on Homeland Security and Governmental Affairs, stated:

Our Committee has learned . . . of some disagreements about the degree to which the Defense Department should operate on [United States] soil, and these disagreements may have limited the military's response time and effectiveness in this case because of the initial hesitation to deploy active[-]duty troops or even to preposition assets before Hurricane Katrina made landfall . . .

Sen. Comm. Homeland Sec. & Govtl. Affairs, *Hurricane Katrina: The Defense Department's Role in Response*, 109th Cong., 2d Sess. 5 (Feb. 9, 2006).

35. Lipton, Schmitt & Shanker, *supra* n. 30, at [¶] 30].

36. H.R. Rpt. 109-377 at 201. "This dual chain of command structure, lengthy federal troop activation system, and, in the case of [Hurricane] Katrina, devastated local authorities, contributed to a poorly coordinated federal response to [Hurricane] Katrina." *Id.*; see also Mazzone, *Commandeerer*, *supra* n. 15, at 301 (discussing the dual chain of command and its shortcomings); Mark C. Weston & David R. Brooks, *Review of the Posse Comitatus Act after Hurricane Katrina* 12 (U.S. Army War College 2006) (available at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA448803>) (stating that "[u]nfortunately a catastrophic major disaster demands unity of command, while an emergency requires unity of effort."). Lieutenant General Russel Honore led the federal troops in Joint Task Force Katrina, and Major General Bennett Landreneau led the Louisiana National Guard. Scott, *supra* n. 10, at [¶] 17]. Major General John White relayed one example of the problems that can arise with multiple commands when he noted that at one point "[w]e had someone who needed to [be] rescued . . . [and] five helicopters went to the same place to get one person out." Scott Benjamin, CBS News, *Bigger Military Role in Disasters? Lawmakers Must Decide Pentagon's Role While Respecting States*, <http://www.cbsnews.com/stories/2005/09/25/national/main883220.shtml> (posted Sept. 25, 2005).

37. 18 U.S.C. § 1385. See Robert Burns, ArmyTimes, *Bush: Boost Military Role in Domestic Emergencies*, <http://www.armytimes.com/legacy/new/1-292925-1108645.php> (posted Sept. 19, 2005) stating:

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 [Eighty-Second] Airborne Division from Fort Bragg, [North Carolina], arrived five days after [Hurricane] Katrina struck. They helped with evacuations and performed search[-]and[-]rescue missions

As the Hurricane Katrina relief effort illustrates, both Governor Blanco and President Bush, like previous elected officials before them, struggled to properly and promptly deploy federal troops during a domestic emergency. This shortcoming was due to problems associated with: (1) interpreting the Insurrection Act; (2) federalism; and (3) public opinion.³⁸ This Article, divided into four Parts, attempts to resolve those problems, or at least decrease the likelihood of their reoccurrence, by offering suggestive changes to the Insurrection Act.

Part II provides a general overview of the Insurrection Act. It begins 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 of the statute. Part II concludes with the Insurrection Act's codification.

Part III examines the most recent effort to clarify or update the Insurrection Act, the Enforcement of the Laws to Restore Public Order Act (Enforcement Act).³⁹ The Enforcement Act, often viewed as a power grab by the Executive Branch,⁴⁰ was passed in the immediate aftermath of Hurricane Katrina and repealed

in flooded parts of New Orleans but did not join in law enforcement operations. The federal troops were led by Lt. Gen. Russel Honore.

Id. See also Dougherty, *Big Easy Drowned*, *supra* n. 11, at 144–145 (describing the lawlessness of New Orleans after Hurricane Katrina and local authorities' inability to control it).

38. Isaac Tekie, *Bringing the Troops Home to a Disaster: Law, Order, and Humanitarian Relief*, 67 Ohio St. L.J. 1227, 1258 (2006).

39. Pub. L. No. 109-364, 120 Stat. 2083, 2404 (Oct. 17, 2006). The Enforcement Act was part of the John Warner Defense Authorization Act of 2007. *Id.* For more information surrounding the Enforcement Act's passage, see *infra* pt. III, which details the Act's controversial history and subsequent repeal. When signing the law to repeal the Enforcement Act, President Bush included a somewhat ambiguous signing statement that left some to question whether he or future Presidents will feel bound by the current Insurrection Act:

Provisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President.

Dennis J. Kucinich, *Articles of Impeachment of President George W. Bush*, Art. XI, <http://kucinich.house.gov/News/DocumentSingle.aspx?DocumentID=93581> (Jun. 10, 2008) (quoting President Bush's statement when signing the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3 (2008)).

40. See Jackie Gardina, *Toward Military Rule? A Critique of Executive Discretion to Use the Military in Domestic Emergencies*, 91 Marq. L. Rev. 1027, 1063 (2008) (stating: "Those contending that the amendment served to expand Executive power have the stronger argument.").

shortly thereafter.⁴¹ While generally supportive of the Enforcement Act, Part III asserts that it would have had little effect on the government's response to Hurricane Katrina. This is because the Enforcement Act, while adding clarity to the Insurrection Act, failed to address the two other major issues associated with deploying the military domestically: (1) federalism, or state and federal relations; and (2) public opinion. Thus, like the Insurrection Act, President Bush probably would not have invoked the Enforcement Act in response to Hurricane Katrina.

Part IV offers possible solutions beyond the Enforcement Act to both reduce federal-state friction and minimize the negative impact of public opinion when federal troops are used domestically. For instance, Part IV suggests creating uniform standards by which governors can request military assistance from the President. Part IV also advocates reinstating judiciary advisory opinions to help determine when troops should be deployed domestically.

Until Hurricane Katrina and the subsequent passage and repeal of the Enforcement Act, legal scholarship on the Insurrection Act was limited.⁴² The works that did address this area of law tended to focus on whether the President had inherent authority to deploy troops domestically. One notable exception is a recent work that questions the constitutionality of several sec-

41. Others argue that another reason for passing the Enforcement Act was to retaliate against Governor Blanco's refusal to request federal troops. For example, Senator Patrick Leahy stated:

[W]hen Governor Blanco . . . would not give control of the National Guard over to [the] 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.

152 Cong. Rec. S10805 (daily ed. Sept. 29, 2006).

42. During the early 1970s, Professor Engdahl wrote three law review articles in which he argued that the modern-day Insurrection Act reflected neither the intent of the constitutional drafters nor the English common law from which the statute was derived. David E. Engdahl, *The New Civil Disturbance Regulations: The Threat of Military Intervention*, 49 Ind. L.J. 581 (1974) [hereinafter Engdahl, *New Civil*]; David E. Engdahl, Anthony F. Renzo & Luize Z. Laitos, *A Comprehensive Study of the Use of Military Troops in Civil Disorders with Proposals for Legislative Reform*, 43 U. Colo. L. Rev. 399 (1972) [hereinafter, Engdahl, Renzo & Laitos, *Comprehensive Study*]; David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1 (1971) [hereinafter Engdahl, *Soldiers*].

tions of the Insurrection Act.⁴³ By way of contrast, this Article explores the practical applications of the Insurrection Act by concentrating on ways to improve its use. While this Article does briefly touch upon the previously mentioned constitutional issues, the main goal is to carry the debate to the next level and develop an improved, updated Insurrection Act. The revised Insurrection Act must address both the current and future challenges that are sure to arise as this country becomes increasingly reliant on the active-duty military for homeland security.⁴⁴

II. THE INSURRECTION ACT

A. Background

While at least one legal scholar suggests that the seeds of the Insurrection Act were sown by Lord Chief Justice Mansfield in eighteenth-century England,⁴⁵ most view Shays' Rebellion, which occurred between 1786 and 1787, as the catalyst for the Insurrection Act's existence. Shays' Rebellion, named after Captain Daniel Shays, a Revolutionary War veteran, was a quasi-revolt in which armed farmers in western Massachusetts, known as "Shaysites," took up arms.⁴⁶ These "regulators" or "insurgents," as they were

43. William C. Banks, *Providing "Supplemental Security"—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. Natl. Sec. L. & Policy 39 (2009). Professor Banks compellingly argues that, absent exceptional circumstances, it is unconstitutional for the federal government to respond to internal domestic violence without a prior request by the state. *Id.*; but see Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507 (1991) (arguing for the federal government's increased role in protecting United States citizens).

44. For example, by 2011, the Department of Defense plans to have 20,000 additional active-duty service members deployed within the United States. Spencer S. Hsu & Ann Scott Tyson, *Pentagon to Detail Troops to Bolster Domestic Security*, Wash. Post [¶ 1] (Dec. 1, 2008) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/30/AR2008113002217.html>).

45. Engdahl, *Soldiers*, *supra* n. 42, at 45, 47. "With lingering concerns over Shays' Rebellion, some of the Framers regarded the Domestic Violence Clause as a grant of power to the federal government . . . a recognition that no government incapable of offering protection to its citizens was worthy of the devotion of those citizens." 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, 77 (1997).

46. See U.S.History.org, *U.S. History: Pre-Columbian to the New Millennium: 15a. Shays' Rebellion*, <http://www.ushistory.org/us/15a.asp> (accessed Aug. 27, 2010) (providing a historical overview of Shays' Rebellion). While in retrospect it is questionable whether this was truly a revolt, at the time most people took the threat posed by Captain Daniel Shays and his men quite seriously. See e.g. Jason A. Crook, Student Author, *Toward a*

called at the time, were angry at not only the state, but also the courts and merchants whom the Shaysites held responsible for their high taxes and excessive debts.⁴⁷ The combination of tax and debt collection had caused numerous farmers to lose their farms and land in debtors' prison.⁴⁸

At least initially, the uprising was fairly successful and the Shaysites managed to disrupt Western Massachusetts' commerce, tax collection, and court systems.⁴⁹ This was due in large part to the governing structure of the Articles of Confederation, which left Massachusetts' militia understaffed.⁵⁰ The Articles also gave the central federal government little real authority or ability to aid the state.⁵¹ Meanwhile, other states were either unable or unwilling to help Massachusetts in its time of need, and the central government could not require them to do so.⁵²

While the rebellion was ultimately put down by a privately financed militia raised by wealthy Boston merchants, Captain Shay and his Shaysites generated enough havoc to raise alarms in not only Massachusetts, but also throughout post-Revolutionary War America.⁵³ The rebellion demonstrated the central government's overall impotence when faced with a small-scale internal military threat. To some, Shays Rebellion and the idea of democracy run amok greatly contributed to the presence of men like George Washington at the Constitutional Convention, which was held the following year to amend the Articles of Confederation.⁵⁴

More "Perfect" Union: The Untimely Decline of Federalism and the Rise of the Homogenous Political Culture, 34 U. Dayton L. Rev. 47, 76 (2008) (stating that "[i]f nothing else, Shay[s'] Rebellion certainly illustrated that a relatively small insurgency could pose a serious danger to the political order").

47. Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders 1789–1878*, at 4 (David F. Trask ed., U.S. Army Ctr. of Military History 1988).

48. *Id.*

49. *Id.*

50. Art. of Confederation, art. VI (superseded 1787 by U.S. Const. arts. I–VII) (stating: "[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 defen[s]e of such State.").

51. Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919, 923 (1988).

52. Coakley, *supra* n. 47, at 6.

53. *Id.* at 5.

54. *Id.* at 7.

As history subsequently demonstrated, the Constitutional or Federal Convention went well beyond amending or reconfiguring the Articles of Confederation. In fact, an entirely new Constitution was created. In drafting the Constitution, the Framers took several steps to prevent a reoccurrence of uprisings like Shays' Rebellion. Of particular significance were Article I, Clause 15 and Article IV, Section IV. The latter clause, known as the Guarantee or Domestic Violence Clause,⁵⁵ reads: "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."⁵⁶ 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."⁵⁷ Others have interpreted this Section as imposing a duty on the federal government "to protect states against domestic violence, but only when states request assistance."⁵⁸

The other clause, known as the Militia Clause, reads: "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections[,] and repel Invasions[.]"⁵⁹ This clause grants Congress the authority to use the militia to ensure that: (1) the law of the land is being executed; (2) insurrections are suppressed; and (3) invasions are repelled.⁶⁰ Interestingly, the debate over the Militia Clause 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."⁶¹ Rather, it focused on "whether the federal gov-

55. Professor William C. Banks, a national security and constitutional law scholar, goes further by dividing these clauses into three categories: (1) the Guarantee Clause; (2) the Invasion Clause; and (3) the Protection Clause. Banks, *supra* n. 43, at 40.

56. U.S. Const. art. IV, § 4.

57. Bybee, *supra* n. 45, at 75. According to Professor Banks, the state's "request" is essential to this clause because without it, the federal government is precluded from combating domestic violence by deploying troops to the state absent extraordinary circumstances. Banks, *supra* n. 43, at 40–41.

58. Bybee, *supra* n. 45, at 4.

59. U.S. Const. art. I, § 8, cl. 15. According to Professor Banks, this applies to "an especially serious act, far more so than simple disobedience of the laws." Banks, *supra* n. 43, at 53.

60. Banks, *supra* n. 43, at 53.

61. Hirsch, *supra* n. 51, at 926.

ernment should have *any* power [at all] to call out the militia.”⁶² This was due in large part to concerns with the standing army and militia at the time.⁶³

B. Legislative History

Although the above-mentioned Militia Clause grants Congress the power to call up the militia on certain occasions, it is actually the President, as Commander-in-Chief, who directs or leads that militia.⁶⁴ The Constitution, however, does not explicitly grant the President authority to call up the militia.⁶⁵ Thus, Congress felt it necessary to pass legislation delegating that authority to the President.⁶⁶ Congress’ initial attempt at drafting authorization language resulted in the Calling Forth Act, a precursor to the Insurrection Act.⁶⁷

Passed in 1792, the Calling Forth Act authorized the President to call up the militia to: (1) suppress insurrections; (2) repel invasions; and (3) ensure that the laws are being faithfully executed.⁶⁸ Section 1 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

62. *Id.* (emphasis in original).

63. “Samuel Adams warned that ‘the Sins of America may be punished by a standing Army’” Jackson Turner Main, *The Antifederalists: Critics of the Constitution 1781–1788*, at 14–15 (U. of N.C. Press 1961). And during the federal convention, Luther Martin stated that “when a government *wishes* to deprive its citizens of freedom, and reduce them to *slavery*, it *generally makes use of a standing army*” Luther Martin, Speech, *General Information* (Phila., Pa., 1787) in *Records of the Federal Convention of 1787* vol. 3, at 209 (Max Ferrand ed., Yale U. Press 1911) (emphasis in original).

64. U.S. Const. art. II, § 2.

65. *Id.*; but see Bybee, *supra* n. 45 (arguing that the President has inherent authority to deploy troops domestically).

66. Bybee, *supra* n. 45, at 42.

67. Calling Forth Act of 1792, 1 Stat. 264 (1792) (repealed 1795). But some commentators believe that early versions of the Insurrection Act expanded, rather than limited, Presidential power. *Riot Control*, *supra* n. 21, at 644.

68. 1 Stat. at 264. In 1789, the Standing Army consisted of 640 men. Hirsch, *supra* n. 51, at 943. The state militias were the main fighting forces during this time period. *Id.* When describing the two statutory Sections, Professor Gardina states that “Congress created a ‘sliding scale’ of discretionary authority. When the country was facing invasion, the President’s discretionary authority was at its apex; however, when it came to enforcing the laws, the President’s authority was at its lowest ebb” Gardina, *supra* n. 40, at 1057.

United States, to call forth such number of the militia of the state or states most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose, to such officer or officers of the militia as he shall think proper; and in case of an *insurrection* in any state, against the government thereof, it shall be lawful for the President of the United States, on 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.⁶⁹

One interesting and somewhat peculiar aspect of this Section, which is replicated in the modern-day Insurrection Act, is that the statute did not allow the President to call the militia of the state where the insurrection actually occurred into federal service.⁷⁰ The President could only call the militia(s) of “any other state or states.”⁷¹ One commentator speculates 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.”⁷²

As noted by Professor Vladeck and others,⁷³ Section 1 of the Calling Forth Act was met with little opposition when it was initially introduced and debated in Congress.⁷⁴ Most congressmen were in agreement that the President should be able to call out the militia under the circumstances described in Section 1. But the same cannot be said for Section 2 of the Calling Forth Act,

69. 1 Stat. at 264 (emphasis added).

70. *Id.*

71. *Id.*

72. Coakley, *supra* n. 47, at 20.

73. Professor Stephen I. Vladeck has written extensively on the President and Congress' competing power to use the militia. See e.g. Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. Miami L. Rev. 275 (2008) (arguing that in the debate over habeas corpus rights for noncitizens in United States territories technically outside of jurisdiction, the answer is not clear-cut and may be that the Military Commissions Act of 2006 is constitutional); Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 Temp. L. Rev. 391 (2007) [hereinafter Vladeck, *Field Theory*] (contending that habeas rights cannot be suspended unless there is a situation where martial law is appropriate).

74. Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 Yale L.J. 149, 159 (2004) [hereinafter Vladeck, *Emergency Power*].

which authorizes the President to call out the militia “to execute the laws of the [u]nion when necessary.”⁷⁵ Section 2 states:

[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 of the United States, by an associate justice or the district judge*, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to *cause the laws to be duly executed*. And if the militia of the state, where such combinations may happen, shall refuse, or be insufficient to suppress the same, it shall be lawful for the President, if the legislature of the United States be not in session, to call forth and employ such numbers of the militia of any 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.⁷⁶

When first introduced, Section 2 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 disrupted the delicate constitutional balance with respect to controlling and operating the militia.⁷⁷ The Framers, ever fearful of a standing army and any one entity or person exerting too much influence over the militia, divided control of it among the states, Congress, and the President.⁷⁸ For example, the Constitution gives states the responsibility for appointing and training militia personnel.⁷⁹ But the Constitution also states that Congress

75. Gardina, *supra* n. 40, at 1058. (discussing 1 Stat. at 264).

76. 1 Stat. at 264 (emphasis added).

77. John F. Romano, *State Militias and the United States: Changed Responsibilities for a New Era*, 56 A.F. L. Rev. 233, 238 (2005). The attention paid to the militia may seem out of place today; however, at the time, the militia was the primary military force for the United States. Engdahl, *Soldiers*, *supra* n. 42, at 44. But interestingly, the Roman Professional Army was broken into smaller groups, or legions, in order to distribute its power. Romano, *supra* n. 77, at 238.

78. In the Declaration of Independence, one of the grievances listed against King George III of England was that he “kept among us, in times of peace, Standing Armies without the Consent of our legislatures.” *Declaration of Independence* [¶ 13] (1776).

79. U.S. Const. art. I, § 8, cl. 16.

is in charge of “organizing, arming, and disciplining[] the [m]ilitia,”⁸⁰ and can use the militia to suppress insurrections, repel invasions, and enforce the laws.⁸¹ And once called up, the Constitution places the militia under the command and control of the President, not Congress.⁸²

The Framers put this “shared[-]power paradigm” in place to not only prevent any one entity from exercising too much control over the military,⁸³ but also to create friction as the jurisdictional responsibilities of the states, Congress, and the President overlap. For the most part, this friction is thought to be healthy because it strengthens the system of checks and balances while simultaneously decreasing the likelihood of martial law.⁸⁴ Thus, to some members of Congress, granting this new authority to the President in Section 2 of the Calling Forth Act upset the traditional power-sharing arrangement.⁸⁵

A few members of Congress also viewed the terms “opposed” and “obstructed” in Section 2 as too vague.⁸⁶ At the time, and arguably today, no one could definitively state what activities or actions these terms actually covered.⁸⁷ For example, Congressman Abraham Clark suggested that under the Calling Forth Act the President could “call forth the military in case of any opposition to the excise law; 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.”⁸⁸ To allay the fears of Congressman Clark and others, and also ensure the legislation would pass, Congress added several procedural safeguards to Section 2—and the statute as a whole—to decrease the likelihood of potential misuse by the President.

80. *Id.* The Constitution also grants Congress the authority to appropriate money “[t]o raise and support Armies.” *Id.* at cl. 12.

81. *Id.* at cl. 15. Congress relied on this constitutional clause when it passed the Insurrection Act.

82. *Id.* at art. II, § 2.

83. Gardina, *supra* n. 40, at 1032.

84. *Id.*

85. *Id.* at 1058; *see also* Coakley, *supra* n. 47, at 22 (noting that Congress eventually reached a “consensus . . . that the delegation of powers to the [P]resident should be as restricted as possible.”).

86. 3 Annals of Cong. 574–575 (1792).

87. *Id.* at 574. This lack of specificity has plagued the Insurrection Act in future iterations. Gardina, *supra* n. 40, at 1033; *see* Coakley, *supra* n. 47, at 22–23 (discussing changes made and ambiguities within earlier renditions of the Act).

88. 3 Annals of Cong. at 575.

First, in Section 2, 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” before the President could call up the militia.⁸⁹ Also, in Section 2, unlike Section 1, Congress placed restrictions on the President’s ability to use the militia of one state in another state.⁹⁰ The statute as a whole also contained additional safeguards. One such safeguard required that the President issue a dispersal order to the insurgents before any troops were deployed, and those troops that did deploy were limited to periods of three months per year.⁹¹ The President was also limited to acting only when Congress was not in session, and then only for thirty days after Congress convened.⁹² Finally, the statute included a sunset provision.⁹³ With the addition of these safeguards, the Calling Forth Act successfully passed in both the House and Senate, and became law in 1792.⁹⁴

It was not long before the new legislation was put to its first real test during the Whiskey Rebellion. In the early 1790s, western Pennsylvania frontiersmen—who were unhappy with the federal excise tax on alcohol—rebelled against the government.⁹⁵ Numbering in the thousands, these insurgents, or “insurrectionists,” gathered openly to challenge the federal government’s authority to tax their alcohol.⁹⁶ They burned the home of a tax collector, robbed the mail, halted court proceedings, and threatened to attack Pittsburgh.⁹⁷ Fearing a repeat of Shays’ Rebellion, President George Washington, after consulting with his Cabinet, invoked the Calling Forth Act.⁹⁸

89. Coakley, *supra* n. 47, at 20–21.

90. Vladeck, *Emergency Powers*, *supra* n. 74, at 160.

91. Mazzone, *Commandeerer*, *supra* n. 15, at 309.

92. Coakley, *supra* n. 47, at 22.

93. *Id.*

94. 1 Stat. at 265.

95. Bybee, *supra* n. 45, at 49–50.

96. Coakley, *supra* n. 47, at 30, 35. While President George Washington and his Administration appeared to have a firm understanding of the Calling Forth Act, some critics questioned whether this was really a “rebellion” in the strictest sense. *Id.* at 37.

97. Melvin I. Urofsky, *A March of Liberty: A Constitutional History of the United States* vol. 1, at 120 (Knopf 1988).

98. Bybee, *supra* n. 45, at 49–50.

Before deploying the militia, President Washington requested an opinion from Associate Supreme Court Justice James Wilson as to whether the insurrectionists were a “combination[] too powerful to be suppressed by the ordinary course of judicial proceedings”⁹⁹ Justice Wilson responded to President Washington within two days, stating:

Sir:—From the evidence which has been laid before me, I hereby notify to you that in the counties of Washington and Allegheny, in Pennsylvania, laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshal of that district.¹⁰⁰

President Washington’s judicial inquiry was not technically necessary because he could have invoked the Calling Forth Act under either Section 1 or 2, and Section 2 was the only one that required a judicial determination.¹⁰¹ But this judicial determination helped lend support and legitimacy to the federal government’s action against the insurrectionists, which might be one reason why President Washington was able to obtain such a large turnout of militia volunteers to combat the insurrectionists.¹⁰²

Shortly after receiving Justice Wilson’s opinion, President Washington issued his dispersal order.¹⁰³ When insurrectionists

99. Coakley, *supra* n. 47, at 36.

100. H.M. Brackenridge, *History of the Western Insurrection 1794*, at 264 (Arno Press & N.Y. Times 1969).

101. 1 Stat. at 264.

102. President Washington’s popularity was another factor in the large turnout of militia members. See e.g. Brackenridge, *supra* n. 100, at 265–266 (indicating that President Washington successfully solicited assistance from other states bordering Pennsylvania, and with the help of Pennsylvania’s state governor, President Washington also managed to rally Pennsylvanians to join the militia).

103. Jason Mazzone, *The Security Constitution*, 53 UCLA L. Rev. 29, 110 (2005) [hereinafter Mazzone, *Security*]. When calling up the militia on August 7, 1794, President Washington stated:

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 to their respective duties and the laws of the

ignored the order and refused to lay down their arms, President Washington and over 12,000 members of various state militias from around the country marched to Pennsylvania.¹⁰⁴ But by the time President Washington arrived in western Pennsylvania with his show of force, most of the insurrectionists had scattered and given up their efforts.¹⁰⁵ The few who remained were easily captured and tried.¹⁰⁶ President Washington returned home even more of a hero than when he left, and the troops under his command quickly and quietly returned to civilian life.¹⁰⁷ While most applauded the President's actions, some, like Pennsylvania Governor Thomas Mifflin, thought that the judiciary, rather than the militia, should have handled the insurrection.¹⁰⁸

With the successful end of the Whiskey Rebellion and the quick disbandment of President Washington's militia, many of the previous fears and concerns associated with a President's possible abuse of power under Section 2 of the Calling Forth Act were momentarily eased. And instead of the Calling Forth Act sunsetting, it was permanently reenacted in 1795 as the Militia Act, albeit with fewer constraints on the President's ability to use the militia.¹⁰⁹ In the Militia Act, former Section 2 of the Calling Forth Act was amended as follows:

land, to exert their utmost endeavors to prevent and suppress such dangerous proceedings.

George Washington, *By the President of the United States of America: A Proclamation*, in James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789–1897* vol. 1, 132 (Bureau Natl. Literature 1897).

104. Earl F. Martin, *America's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 *Miss. L.J.* 135, 204 (2006). The actual size of President Washington's militia was 12,950, which was approximately the size of the Revolutionary Army. *Id.* at 204 n. 347. The militia members' large turnout demonstrated the general population's overall confidence in the President's decision to use military force to put down the insurrection. Matt Matthews, *The Posse Comitatus Act and the United States Army: A Historical Perspective* 10 (Combat Studies Inst. Press 2006) (available at http://www.au.af.mil/au/awc/awcgate/army/csi_matthews_posse.pdf).

105. Martin, *supra* n. 104, at 206.

106. *Id.*

107. See Coakley, *supra* n. 47, at 76 (noting that President Washington received praise for his actions involving the militia during the Whiskey Rebellion).

108. Rich, *supra* n. 21, at 8. This is not to say, however, that Governor Mifflin did not support President Washington's efforts to put down the rebellion. *Id.*

109. Militia Act of 1795, 1 Stat. 424 (1795) (repealed in part 1862 and current version at 10 U.S.C. §§ 331–335 (2006)).

[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, 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.¹¹⁰

The Militia Act omitted both the judicial determination requirement of whether the laws are obstructed and the limitation on the President's use of the militia from one state in another state.¹¹¹ The Militia Act also modified the dispersal order requirement so that the President no longer had to issue it before calling out the militia.¹¹² Arguably, this last change laid the groundwork for future Presidents to take vastly different approaches to issuing dispersal orders, sometimes choosing not to issue one at all.¹¹³

One change not implemented by the Militia Act, much to future President Thomas Jefferson's dismay, was a statutory broadening of the term "militia" to include federal troops.¹¹⁴ As originally written, the Calling Forth Act only referenced the militia, and was silent on the use of federal military forces.¹¹⁵ Thus,

110. *Id.*

111. *Compare* 1 Stat. at 264 *with* 1 Stat. at 424 (removing both the judicial determination requirement and the constraints on using militia from other states).

112. *Id.*

113. *See e.g.* Rich, *supra* n. 21, at 171 (noting that upon receipt of the District of Columbia's request for federal troops during the Bonus March, President Hoover "at once instructed the Secretary of war to call out the troops.").

114. President "Jefferson, devoutly committed to the defense of the nation by militia, reduced the size of the already small standing army and championed legislation, passed in 1806, prescribing greater federal oversight of the militia." Hirsch, *supra* n. 51, at 943.

115. 1 Stat. at 264. One legal commentator suggests 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.

Felicetti & Luce, *supra* n. 24, at 97 n. 38. In 1789, the Standing Army consisted of 640 men. Hirsch, *supra* n. 51, at 943. The state militias were the main fighting forces during this time period. *Id.*

temporary exceptions had to be granted to Presidents Washington, Adams, and Jefferson to allow for their use of federal troops domestically.¹¹⁶ In some instances those Presidents simply acted, neither requesting exceptions to the Acts nor receiving congressional permission to deploy federal troops.¹¹⁷

The issue of using federal troops reached its apex 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.¹¹⁸ Secretary of State Madison informed President Jefferson that “it does not appear that *regular troops* [as distinguished from militia] can be employed under any legal provision against insurrections—but only against expeditions having foreign countries as the object.”¹¹⁹ This inability, at least in the mind of President Jefferson and his Secretary of State, to use federal troops to stop Vice President Burr led to the passage of the Insurrection Act of 1807, which reads as follows:

[I]n all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the *land or naval force* of the United States, as

116. Sean J. O'Hara, *The Posse Comitatus Act Applied to the Prosecution of Civilians*, 53 U. Kan. L. Rev. 767, 770 (2005) (stating that “[i]n order to enforce the Neutrality Proclamation, the nascent federal government federalized state militias to prevent privateers from being outfitted to prey on British ships.”). Additionally, the Neutrality Act of 1794 provides that

[I]n every case of the capture of a ship or vessel within the jurisdiction or protection of the United States . . . and in every case in which any process issuing out of any court of the United States, shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, . . . it shall be lawful for the President of the United States . . . to employ such part of the land or naval forces of the United States or of the militia thereof as shall be judged necessary for the purpose of taking possession of, and detaining any such ship or vessel.

1 Stat. 381, 384 (1794) (repealed 1818).

117. Coakley, *supra* n. 47, at 69–84.

118. In this context, “filibuster” denotes the use of a private army to attack a foreign country. *Black's Law Dictionary* 661 (Bryan A. Garner ed., 8th ed., West 2004).

119. Dumas Malone, *Jefferson the President: Second Term, 1805–1809*, at 253 (Little, Brown & Co. 1974) (emphasis added and alterations in original).

shall be judged necessary, having first observed all the [pre-requisites] of the law in that respect.¹²⁰

The Insurrection Act of 1807 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 all referenced both “insurrections” and “invasions.”¹²¹ This change most likely occurred because it was understood that the President would send troops to any state under invasion or facing a foreign threat, as opposed to an internal one.¹²² Second, the Insurrection Act of 1807 authorized the President to use both federal troops and the militia to enforce the laws and prevent insurrections.¹²³

The constitutionality of the 1807 Insurrection Act has come under question by some who argue that Congress lacked authority to pass the legislation.¹²⁴ This argument is premised upon the fact that Article I, Section 8, Clause 15 of the Constitution only references the “militia” and makes no mention of any other military force, federal or otherwise.¹²⁵ According to Professor Engdahl, who has written extensively on domestic military use, using “regular troops was not pursuant to the letter of the Constitution, which at most contemplated only militia for this role.”¹²⁶ This view was shared by President Millard Fillmore.¹²⁷ President Fill-

120. 2 Stat. at 443 (emphasis added). This Part is discussing the original Act, not the statutes codified at 10 U.S.C. §§ 331–335.

121. Compare 2 Stat. at 443 with 1 Stat. at 264 (removing the word “invasion” from the Act).

122. But according to Professor Vladeck, this latter change remains a “rather uncomfortable mystery.” Vladeck, *Emergency Power*, *supra* n. 74, at 165. One potential answer to this mystery lies in the fact that the drafters were trying to head off any potential problems that occur when the term “invasion” is used. See e.g. Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 189 (1940) (stating that “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.”).

123. 2 Stat. at 443.

124. See e.g. Clarence I. Meeks, III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L. Rev. 83, 83–93 (1975) (discussing the history of “[s]trong opposition to military encroachment into civil affairs” leading up to the passage of the Posse Comitatus Act).

125. U.S. Const. art. I, § 8, cl. 15.

126. Engdahl, *Soldiers*, *supra* n. 42, at 49.

127. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 Harv. L. Rev. 941, 989–991 (2008). In discussing the Insurrection Act of 1807, President Fillmore stated: “[A]nd 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. . . .” *Id.* at 989. In contrast, Senator Andrew

more also noted that the law could not apply to federal troops because it conflicted with the President's constitutional duties as Commander-in-Chief.¹²⁸

The arguments put forth by President Fillmore, Professor Engdahl, and others raise interesting and complex constitutional issues that, although beyond the scope of this Article, still require at least brief mention.¹²⁹ The debate centers on two longstanding and currently unresolved questions. The first is whether and to what degree Congress can restrict or expand the President's domestic Commander-in-Chief authority.¹³⁰ The second is whether the President has inherent constitutional authority to deploy troops domestically.¹³¹

For the purposes of this Article, it is maintained that the President does not have inherent constitutional authority to deploy troops domestically, but rather derives this power from congressional authorization.¹³² This is the generally, but not universally, accepted view.¹³³ Two caveats or exceptions to this

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 . . . without observing the same prerequisites prescribed for him in calling out the militia for the same purpose." *Id.* at 991.

128. *Id.* at 989.

129. President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas, a 1957 Attorney General opinion, provides one such example. 41 Op. Atty. Gen. 313, 331 (1957). Attorney General Herbert Brownell, Jr. opines that within the PCA "[t]here are . . . 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 [that] he deems appropriate." *Id.*

130. Barron & Lederman, *supra* n. 127, at 989–990.

131. Candidus Dougherty, "Necessity Hath No Law": *Executive Power and the Posse Comitatus Act*, 31 Campbell L. Rev. 1, 15, 22–23 (2008).

132. *Id.* at 18–24. The strongest argument for granting the President inherent authority generally arises during emergency situations. *Cunningham v. Neagle*, 135 U.S. 1, 67 (1890). *Cunningham* is often cited as support for "the concept of 'inherent' [P]residential emergency power and the concept that the President, by virtue of the Take Care Clause, has emergency powers nowhere explicit in the Constitution." Vladeck, *Emergency Power*, *supra* n. 74, at 184.

133. For an alternative argument, see President Roosevelt's actions during the North American Aviation strike of 1941. Rich, *supra* n. 21, at 184. Attorney General and later Supreme Court Justice Robert H. 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." *Id.*; see also *In re Debs*, 158 U.S. 564 (1895) (denying a writ of habeas corpus and holding an injunction may be issued to enjoin an obstruction of interstate commerce even if the obstruction is an offense resulting in criminal prosecution, and the punishment for violation of the injunction is not an exercise of criminal jurisdiction); Charles Doyle, *The Posse Comitatus Act and Related Matters: The*

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 United States mail and federal buildings; and (2) Congress cannot pass legislation that prevents the President from fulfilling his or her constitutional duties.¹³⁴

As for the 1807 Insurrection Act, support for its constitutionality can be found in several places. First, looking beyond Article I, Section 8, Clause 15 and examining Congress' War Powers in their entirety under Article I, Section 8, there is a strong argument that Congress did have authority to pass the Insurrection Act of 1807.¹³⁵ Second, the opinion by Secretary of State Madison is simply his opinion, not binding law. Third and probably most persuasive, when deploying troops domestically, Presidents from Washington to Bush have mostly adhered to the Insurrection Act's requirements.¹³⁶ This trend helps demonstrate that the individuals most impacted by the Insurrection Act viewed the statute as binding law. Compare this with the War Powers Act which, like the Insurrection Act, serves to limit Presi-

Use of the Military to Execute Civilian Law, Cong. Research Serv. 95-964 (June 1, 2000) (available at <http://www.fas.org/sgp/crs/natsec/95-964.pdf>) (summarizing the Posse Comitatus Act and related provisions).

134. William Taft, the country's only President to serve on the Supreme Court, was quoted as saying:

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. . . . [H]e is to maintain the 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.

William Howard Taft, *Our Chief Magistrate and His Powers* 128-129 (Columbia U. Press 1916); *contra* Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 *Cardozo L. Rev.* 1091, 1095 (2008) (stating: "[T]he reality that the Constitution expressly envisions a role for Congress to play in providing for governmental responses to even the most existential crises dramatically undermines arguments evoking a broad independent authority for the domestic Commander-in-Chief.").

135. Vladeck, *Emergency Power*, *supra* n. 74, at 156, 165.

136. While Presidents Washington, Adams, and Jefferson strictly adhered to the Insurrection Act for the most part, they at times improperly relied upon the federal army—for example, the circumstances surrounding use of the Neutrality Act and how Fries Rebellion was handled. *See generally* Coakley, *supra* n. 47, at 69-77 (detailing President John Adams' Administration's use of military force during the Fries Rebellion); O'Hara, *supra* n. 116, at 770 (discussing the federal government's efforts to "federalize state militias to prevent privateers" from preying on British ships, which was prohibited under the Neutrality Act of 1794).

dential power but has yet to be fully recognized by any sitting President as either constitutional or binding.¹³⁷

After the Insurrection Act of 1807, Congress refrained from passing any similar laws for the following fifty years. But this time period did see two significant Supreme Court decisions involving the Insurrection Act. The first was *Martin v. Mott*,¹³⁸ which arose out of the War of 1812.¹³⁹ In *Martin*, defendant Jacob E. Mott was court-martialed for failing to report to the New York Militia after President James Madison called it up to fight the British.¹⁴⁰ After being convicted and severely fined, Mott filed an appeal alleging there was no state of emergency when the New York Militia was called up.¹⁴¹ Mott also argued that President Madison lacked authority to either call out or federalize the New York militia.¹⁴²

Nearly twelve years after the War of 1812 concluded, the Supreme Court finally determined that the 1795 Militia Act did give the President authority to call up or federalize the militia.¹⁴³ Justice Story delivered the unanimous Court's opinion, stating:

We are all of opinion that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. 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].¹⁴⁴

The second major case during this time period was *Luther v. Borden*,¹⁴⁵ which was decided in 1849.¹⁴⁶ *Luther* arose in the con-

137. Overview of the War Powers Resolution, 8 Op. Off. Leg. Counsel 271, 274 (1984). The Executive Branch believes that "[Section] 2(c) of the [War Powers Resolution] does not constitute a legally binding definition of Presidential authority to deploy our armed forces." *Id.* For more information on Presidents' loose adherence to, and the history and proposed reform of the War Powers Act, see generally Geoffrey S. Corn, *Triggering Congressional War Powers Notification: A Proposal to Reconcile Constitutional Practice with Operational Reality*, 14 Lewis & Clark L. Rev. 687 (2010).

138. 25 U.S. 19, 20 (1827).

139. *Id.*

140. *Id.* at 20–22.

141. *Id.* at 22–24.

142. *Id.* at 24.

143. *Id.* at 31–32.

144. *Id.* at 30.

145. 48 U.S. 1 (1849).

146. *Id.* at 1.

text of an ongoing “civil” war, Dorr’s Rebellion in Rhode Island, in which the Charterites (state-government supporters) were pitted against the Dorrites (shadow-government supporters).¹⁴⁷ The Dorrites’ primary grievance was Rhode Island’s lack of voting rights for all white males.¹⁴⁸ The Dorrites drafted a competing state constitution and actually engaged in skirmishes with the Charterites.¹⁴⁹ At the time, President John Tyler was hesitant to invoke the Militia Act and send federal troops to Rhode Island to quell the ongoing dispute between the Charterites and the Dorrites.¹⁵⁰

Luther found its way to the Supreme Court of the United States because Martin Luther, a Dorrite supporter, filed a trespass suit against Luther Borden, a Rhode Island state official.¹⁵¹ Martin Luther alleged that the Rhode Island state government that employed Borden was illegitimate because it was not “republican” in nature, as required by Article IV, Section 4 of the Constitution.¹⁵² Thus, Luther claimed that Borden was without cause to search his house and arrest him.¹⁵³ The civil suit brought by Luther raised two very interesting and unique questions. First, could the Supreme Court determine which of the two competing state governments was legitimate? Second, could the Supreme Court review President John Tyler’s decisionmaking under the Domestic Violence Clause?

The Court found both questions were beyond judicial review.¹⁵⁴ 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.”¹⁵⁵ As for the second

147. Rhode Island was divided into “two vying state governments: the government established by th[e] so-called ‘People’s Constitution,’ headed by Thomas W. Dorr, and the Charter government.” Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 Cal. L. Rev. 1473, 1476 (1987). While Dorr was away in Washington, the Charter government seized prominent officials of the People’s government, strengthening its hold in Rhode Island. Paul M. Thompson, *Is There Anything “Legal” About Extralegal Action? The Debate over Dorr’s Rebellion*, 36 New Eng. L. Rev. 385, 403 (2002).

148. *Luther*, 48 U.S. at 35; Thompson, *supra* n. 147, at 397–399.

149. Colantuono, *supra* n. 147, at 1476; Thompson, *supra* n. 147, at 400.

150. Thompson, *supra* n. 147, at 402.

151. 48 U.S. at 2, 34.

152. *Id.* at 35, 42.

153. *Id.* at 34.

154. *Id.* at 42–45.

155. *Id.* at 42.

question, the Court stated: “By th[e 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.”¹⁵⁶ Both *Luther* and *Martin* established that the President is the ultimate arbiter in determining whether an insurrection exists and, if so, whether troops should be deployed.

In 1861, with the prospect of a full-fledged Civil War drawing ever nearer, Congress again reexamined the President’s authority to use the military under Article I, Section 8, Clause 15, which resulted in passage of the Suppression of the Rebellion Act.¹⁵⁷ This new law reflected much of the modern-day language of the Insurrection Act. 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.¹⁵⁸

As with past laws, this Act also strengthened a President’s ability to use the military to suppress insurrections and execute the laws of the Union.¹⁵⁹ The Act gave the President sole discretion to determine whether it was impracticable to enforce the laws “by the ordinary course of judicial proceedings.”¹⁶⁰ Previous Acts authorized the President to call out the military only if there existed “combinations too powerful to be suppressed by the ordi-

156. *Id.* at 43. “[I]f 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.” *Id.* at 45.

157. 12 Stat. 281, 281–282 (1861).

158. *Id.* at 281.

159. Engdahl, *Soldiers*, *supra* n. 42, at 55.

160. *Id.*

nary course of judicial proceedings, or by powers vested in the marshals.”¹⁶¹ But under the new Act, the President made the decision alone.¹⁶² The Suppression of the Rebellion Act also added “rebellion against the authority of the government of the United States” to the list of occurrences during which the President could call out the military.¹⁶³ Finally, the Act doubled the time period in which the President could call out the militia, and extended the President’s authority to include territories as well as states.¹⁶⁴

Ten years later, Congress modified the law again during Reconstruction, in the form of the Ku Klux Klan (Civil Rights) Act of 1871.¹⁶⁵ Section 3 of the Ku Klux Klan Act included the following language:

That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States,^[166] as to deprive any portion or class of the people^[167] 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, 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 the land and

161. *Id.* at 55–56 (emphasis omitted).

162. 12 Stat. at 281.

163. Coakley, *supra* n. 47, at 228.

164. *Id.*

165. Ku Klux Klan Act, 17 Stat. 13 (1871) (codified as amended at 18 U.S.C. § 241; 42 U.S.C. §§ 1983, 1985(3), 1988); see Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 St. Louis U. L.J. 331, 332–356 (1967) (discussing the debates surrounding the passage of the Ku Klux Klan Act of 1871).

166. For a discussion of the debate about whether this Section should refer to the obstruction of both state law and federal law, see *Federal Intervention*, *supra* n. 32, at 441–442.

167. This may mean one or more individuals. *Id.* at 446.

naval forces of the United States, or of 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 the provisions of this and the preceding section shall be delivered to the marshal of the proper district, to be dealt with according to law.¹⁶⁸

This change authorized the President to call forth the military when domestic violence or an insurrection resulted in a denial of the civil rights conferred to citizens by the Fourteenth Amendment.¹⁶⁹ According to military historian Paul Scheips, under this Act the President had a “‘duty’ to use either the militia or regular forces, or both, whenever there were obstructions to execution of the laws that deprived ‘any portion or class of the people’ of any state ‘the equal protection of the laws.’”¹⁷⁰

Like the Suppression of the Rebellion Act, some legal scholars have questioned the constitutionality of the Ku Klux Klan Act of 1871, claiming these later changes to the Insurrection Act “‘blurred the distinctions historically and constitutionally made between ‘insurrection’ and lesser forms of ‘domestic violence.’”¹⁷¹ According to critics, combining acts of insurrection with lesser forms of domestic violence allows the President to deploy federal troops to combat minor state episodes of civil disorder or domestic violence, regardless of whether state officials request assistance.¹⁷² This interpretation goes well beyond the Framers’ original intent, and encourages federal military intervention in matters that are purely state affairs.

A statutory analysis of the Insurrection Act encompassing the Framers’ early intent reveals that these legal scholars have the better argument, assuming all variables remain constant. But that is not the case. The Framers, who preferred limiting federal

168. 17 Stat. at 14 (emphasis added). This last clause “relating to the marshals was deleted in 1875 in the *Revised Statutes* version and in subsequent recodifications.” *Federal Intervention*, *supra* n. 32, at 455–456.

169. 17 Stat. at 14.

170. Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992*, at 5 (Ctr. of Military History, U.S. Army 2005) (quoting 17 Stat. at 13).

171. Banks, *supra* n. 43, at 64; see also Engdahl, *Soldiers*, *supra* n. 42 (discussing the reasons behind not permitting the use of military force to suppress civil disorders).

172. See generally *Federal Intervention*, *supra* n. 32 (discussing the President’s ability to intervene in state episodes of domestic violence without the state requesting federal assistance).

military intervention in state affairs, envisioned neither the size of the current 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.¹⁷³ Thus, a more nuanced view of the Insurrection Act in light of the expanded role of the modern-day militia is appropriate.

Additionally, adopting a strict statutory reading of the Insurrection Act may have prevented the use of federal troops in the South during the 1950s and 1960s.¹⁷⁴ Those civil rights examples—where state officials never requested federal assistance—could be classified as “lesser forms of domestic violence.”¹⁷⁵ It should also be noted that the Insurrection Act and its earlier versions, although challenged in court, have yet to be found unconstitutional.¹⁷⁶

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 1926.¹⁷⁷ They appeared later in Title 10 U.S.C. §§ 331–335.¹⁷⁸

Section 331, which can be traced to the Acts of 1795 and 1807,¹⁷⁹ was last invoked during the Los Angeles Riots of 1992.¹⁸⁰ Section 331 authorizes the President to deploy the militia or the armed forces at the request of state officials to suppress an insur-

173. Wiener, *supra* n. 122, at 207–210; *see also* Romano, *supra* n. 77, at 233–234 (discussing how “the present-day organization and responsibilities of the National Guard, the modern equivalent of a state militia, directly contravene the principles and rationales of the [F]ramers”).

174. *See e.g.* Danielle Crockett, *The Insurrection Act and Executive Power to Respond with Force to Natural Disasters* 8–9, <http://www.law.berkeley.edu/library/disasters/Crockett.pdf> (accessed June 23, 2010) (indicating that when President Eisenhower invoked the Insurrection Act to send federal troops to Little Rock, Arkansas in the 1950s, and when President Kennedy invoked the Act to send federal troops to Mississippi and Alabama in the 1960s, it was unclear upon which Section of the Act each President actually relied).

175. The term “lesser form of domestic violence” is highly subjective; its meaning depends on who is making the claim and may be subject to very different interpretations.

176. *Jackson v. Kuhn*, 254 F.2d. 555 (1958). But the court never reached the merits of this case because it was dismissed on procedural grounds. *Id.* at 560.

177. Scheips, *supra* n. 170, at 5, 5 n. 7. The Acts of 1795 and 1807 were combined in Section 5297 of the Revised Statutes of the United States, Section 5297. *Id.* at 5 n. 7. The Act of 1861 was placed in Section 5294. *Id.* The Klu Klux Klan Act of 1871 was codified in Section 5299. *Id.*

178. *Id.* at 5.

179. *Id.* at 5 n. 7.

180. Tekie, *supra* n. 38, at 1259.

rection.¹⁸¹ This Section also fulfills the federal government's constitutional responsibility under the Domestic Violence Clause.¹⁸²

Section 332, which can be traced to the Act of 1861,¹⁸³ authorizes the President—even without the consent of state officials—to deploy the militia or armed forces when “obstructions” or “rebellion[s]” make it impracticable to enforce the laws through court orders.¹⁸⁴ According to one Attorney General, Section 332 “*expressly authorized* [the President] to employ the military forces of the United States to aid in enforcing the laws” once determining that such enforcement was being obstructed by powerful “combinations of outlaws and criminals.”¹⁸⁵ President Dwight D. Eisenhower relied on this Section when he sent federal troops to enforce the United States District Court for the Eastern District of Arkansas’ desegregation order in Little Rock, Arkansas.¹⁸⁶ Not surprisingly, this Section, like Section 333 below, has at times created friction between state governors and the President.¹⁸⁷

181. 10 U.S.C. § 331.

182. U.S. Const. art. IV, § 4.

183. Scheips, *supra* n. 170, at 5 n. 7.

184. 10 U.S.C. § 332.

185. Op. on Suppression of Lawlessness in Ariz., 17 Op. Atty. Gen. 333, 335 (1882) (emphasis in original).

186. See *Aaron v. Cooper*, 156 F. Supp. 220, 226–227 (E.D. Ark. 1957) (enjoining the Governor of Arkansas from preventing eligible black students from attending a white high school because the governor was acting beyond his lawful authority and contrary to the federal Constitution, the school district’s integration plan, and that court’s prior order); Allan L. Bioff, *Use of Troops to Enforce Federal Law*, 56 Mich. L. Rev. 249 (1957) (discussing the constitutionality and implications of federal-state and congressional-Executive relationships after President Eisenhower used federal troops in Little Rock, Arkansas); George H. Faust, *The President’s Use of Troops to Enforce Federal Law*, 7 Clev.-Marshall L. Rev. 362 (1958) (discussing various Presidents’ use of troops to enforce federal law and concluding with a discussion on the reasoning behind President Eisenhower’s sending troops into Arkansas when the governor refused to follow the ruling of a federal judge); Daniel H. Pollitt, *A Dissenting View: The Executive Enforcement of Judicial Decrees*, 45 A.B.A. J. 600 (1959) (discussing the constitutional provisions and acts of Congress that have given the President the authority to enforce federal judicial decrees by using military force); Jack B. Schmetterer, *Reply to Mr. Schweppe: Military Enforcement of Court Decrees*, 44 A.B.A. J. 727 (1958) (arguing that President Eisenhower had the authority to use federal troops in Little Rock, Arkansas under Sections 332 and 333); Alfred J. Schweppe, *Enforcement of Federal Court Decrees: A “Recurrence to Fundamental Principles”*, 44 A.B.A. J. 113 (1958) (arguing that President Eisenhower did not have constitutional authority to enforce the District Court for the Eastern District of Arkansas’ decree by using federal troops because only Congress possessed that authority).

187. Scheips, *supra* n. 170, at 36–38.

Under Section 333, which can be traced to the Acts of 1861 and 1871,¹⁸⁸ the President, without state officials' consent, can deploy the military, militia, or "any other means"¹⁸⁹ to suppress "any insurrection, domestic violence, unlawful combination, or conspiracy"¹⁹⁰ if the action denies any class of people its rights or hinders the execution of the laws.¹⁹¹ Due to the broad terms used in Section 333, it is not entirely clear what events are actually covered by Section 333.¹⁹² For instance, President John F. Kennedy relied on this Section when he dispatched federal troops to military bases near Birmingham, Alabama to suppress periodic race riots.¹⁹³ But one year later, Attorney General Robert Kennedy found Section 333 did not apply when three civil-rights workers were killed in Neshoba County, Mississippi.¹⁹⁴ Attorney General Kennedy's decision was met with strong criticism from a group of law professors who, in a letter that appeared in both the *New York Times* and the *Congressional Record*,¹⁹⁵ argued that "paragraph 2 of [S]ection 333 authorized federal 'police action' to protect civil rights workers in circumstances such as those which existed in Mississippi."¹⁹⁶

Section 334, which can be traced to the Acts of 1792 and 1795,¹⁹⁷ requires the President to issue a proclamation ordering the insurgents to disperse.¹⁹⁸ For a variety of reasons, Presidents

188. *Id.* at 4–5.

189. While the phrase "any other means" lacks certainty, at least one law review article has suggested that it allows the President to "utilize any individuals or agency [that] is at his disposal and suited to law enforcement, which would include federal marshals." *Federal Intervention*, *supra* n. 32, at 451.

190. 10 U.S.C. § 333.

191. *Id.* It is not clear what number of people constitutes a "class." *Federal Intervention*, *supra* n. 32, at 446.

192. See Edward S. Corwin, *The President: Office and Powers, 1787–1984*, at 152–161 (5th rev. ed., N.Y.U. 1984) (discussing the President's legal authority when faced with widespread civil disorder).

193. *Federal Intervention*, *supra* n. 32, at 417 (stating the statutory authority for dispatching federal troops in the vicinity of Birmingham, Alabama was Section 333, paragraph 1). The then-Alabama Governor unsuccessfully challenged the President's deployment of federal troops to the state. *Ala. v. United States*, 373 U.S. 545, 545 (1963).

194. *Federal Intervention*, *supra* n. 32, at 418. "Attorney General Kennedy ostensibly took the position that such intervention was *legally* impossible[.]" *Id.* (emphasis in original).

195. *Id.* at 418, 419 n. 20.

196. *Id.* at 419.

197. Scheips, *supra* n. 170, at 4–5.

198. 10 U.S.C. § 334.

have followed this requirement haphazardly.¹⁹⁹ For example, during the Pullman Strike, President Grover Cleveland issued his dispersal order five days after he deployed troops,²⁰⁰ while President Herbert Hoover never issued a dispersal order when he used the Insurrection Act to evict the Bonus Army from Washington, District of Columbia.²⁰¹ Conversely, both Presidents George H.W. Bush and Eisenhower issued repeated dispersal orders before invoking the Insurrection Act.²⁰² Finally, Section 335 includes both Guam and the Virgin Islands in its definition of “State.”²⁰³ In 1989, President George H.W. Bush invoked the Insurrection Act in the United States Virgin Islands to combat severe looting and violence after Hurricane Andrew.²⁰⁴

After codification, subsequent efforts to amend the Insurrection Act began.²⁰⁵ In direct response to President Eisenhower’s use of the Act in Little Rock, Arkansas, two separate pieces of legislation were introduced during the eighty-sixth Congress in 1957. The first, H.R. 416, would have amended “[S]ection 332 of

199. Rich, *supra* n. 21, at 201–206. “Practically every [P]resident who has been faced with an internal disturbance has placed a different interpretation upon [the proclamation’s] use.” *Id.*

200. Gardina, *supra* n. 40, at 1062. 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. *Id.*

201. See Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations under the Internal Revenue Code and Related Laws*, 69 Brook. L. Rev. 1, 18 (2003) (noting that President Hoover, who felt the Bonus Army’s “demands were budget-breaking, extortionist, and a threat to public order” simply “ordered the real Army to evict them.”).

202. See *A Stern President’s ‘Inescapable’ Action*, 43 LIFE 40 (Oct. 7, 1957) (stating that “President Eisenhower . . . issued an emergency proclamation, ordering obstructionists to ‘cease and desist’ from interference with integration” in Little Rock, Arkansas); Douglas Jeh. & James Gerstenzang, *The Mind of the President; In Making Policy, George Bush Relies on a Group of Comfortable Managers and Shies Away from Grand Ideas*, L.A. Times (Oct. 11, 1992) (discussing President George H.W. Bush’s televised May 2, 1992 address to the nation on the Los Angeles Riots, during which he stated: “[L]et me assure you: I will use whatever force is necessary to restore order”).

203. 10 U.S.C. § 335 (2006).

204. Providing for the Restoration of Law and Order in the Virgin Islands, Exec. Or. 12690, 54 Fed. Reg. 39153 (Sept. 20, 1989).

205. See Engdahl, Renzo & Laitos, *Comprehensive Study*, *supra* n. 42, at 413 (noting that the Riot Commission suggested amending Section 331 because despite its historic meaning, the Section is now regarded as authority to use federal troops in violent situations that do not have the “characteristics of political uprisings or genuine ‘insurrections’ at all.”); Gardina, *supra* n. 40, at 1077–1078 (discussing the current statute, which requires the President to notify Congress “every [fourteen] days thereafter during the duration of the exercise of that authority,” but suggesting that the statute does not provide enough congressional oversight) (internal quotations omitted) (quoting 10 U.S.C. § 333(b)).

[T]itle 10 of the United States Code to limit the use of the Armed Forces to enforce Federal laws or the orders of Federal Courts.²⁰⁶ The second bill, H.R. 1204, would have amended “[T]itle 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.”²⁰⁷ H.R. 1204 appears to be in keeping with those who worry that the lines between “insurrection” and “lesser forms of domestic violence” have been blurred.²⁰⁸ Neither bill was enacted.

Further attempts to modify the Insurrection Act were made approximately ten years later, in the wake of numerous urban riots during the late 1960s. The National Advisory Commission on Civil Disorders, otherwise known as the Kerner Commission, offered several suggestive changes.²⁰⁹ For example, the Kerner Commission proposed correcting the inconsistent language in Section 331 which, if read literally, does not allow the President to use the National Guard from the state in which the insurrection actually occurs.²¹⁰ The Commission also suggested replacing the term “militia” with “National Guard,” and the term “insurrection” with “domestic violence.”²¹¹ Despite the respect garnered for this bipartisan commission, Congress never implemented these suggested changes.²¹²

In 1971 the Army, which was concerned about its ability to respond to urban riots, studied possible changes to the Insurrection Act. The Army specifically examined the possibility of adding

206. Furman, *supra* n. 23, at 129 n. 258 (internal quotations omitted).

207. *Id.* (internal quotations omitted).

208. See e.g. Banks, *supra* n. 43, at 64 (noting that prior changes made to the Insurrection Act “blurred the distinctions historically and constitutionally made between ‘insurrection’ and ‘lesser form of domestic violence.’”).

209. See *Report of the National Advisory Commn. on Civil Disorders* 288 (D.C., Govt. Printing Off.) [hereinafter *Kerner Commn. Report*]. The report investigated the urban riots that took place in several United States cities between 1964 and 1967. *Id.* at 19–22. The commission was to answer questions regarding what happened, why, and what could be done to prevent such riots in the future. *Id.* at 1.

210. *Id.* at 288; see Coakley, *supra* n. 47, at 20 (noting that the first Section of the Calling Forth Act “did not explicitly authorize the [P]resident to call into federal service the militia of the state where the insurrection should occur, only that of ‘any other state or states.’”).

211. *Kerner Commn. Report*, *supra* n. 209, at 288. For an excellent argument as to why the term “insurrection” cannot be replaced with “domestic violence,” see Banks, *supra* n. 43, at 78.

212. Engdahl, Renzo & Laitos, *Comprehensive Study*, *supra* n. 42, at 431–445.

the term “civil disturbance” to the statute in an effort to modernize or update the language.²¹³ The Army also explored modifying the Insurrection Act to allow the President to use both the National Guard and the Army Reserves.²¹⁴ Like the Kerner Commission’s proposals, Congress did not implement the Army’s suggested changes.²¹⁵ As such, the Insurrection Act was not modified until President George W. Bush signed the Enforcement Act into law on October 17, 2006—135 years after its last revision.²¹⁶

III. 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 United States Code, realized that the Insurrection Act needed revision. Rather, the new law arose from the government’s inadequate response to Hurricane Katrina and the public backlash that ensued.²¹⁷ Instead of holding individuals accountable for the failures surrounding the way the government handled Hurricane Katrina,²¹⁸ elected officials decided to change the method by which the government responds to natural disasters and civil disorders. Part of this movement included modifying the

213. Scheips, *supra* n. 170, at 340.

214. *Id.*

215. See Kerner Commn. Report, *supra* n. 209, at 279–281 (discussing military task forces that examined and reviewed military policies).

216. 120 Stat. at 2083.

217. See Brown, *supra* n. 19, at 32 (noting that the government’s response to Hurricane Katrina was a contributing factor in the 2006 amendment); see also Interview by Ray Suarez, PBS, with Andrew Kowhut, Pres. of Pew Research Ctr. (Sept. 9, 2005) (available at http://www.pbs.org/newshour/bb/politics/july-dec05/opinion_9-09.html) (discussing the country’s negative opinion of how the government handled Hurricane Katrina).

218. While the head of FEMA (Michael Brown) may have been forced to resign in Hurricane Katrina’s wake, the government’s failed response to the disaster arguably was not solely due to one person. David Kilpatrick & Scott Shane, NYTimes.com, *Ex-FEMA Chief Tells of Frustration and Chaos*, <http://www.nytimes.com/2005/09/15/national/nationalspecial/15brown.html> (posted Sept. 15, 2005) (noting that Brown’s retelling of the events surrounding the government’s response to Hurricane Katrina “raises questions about whether the White House and [the Secretary of Homeland Defense] acted aggressively enough in the response. . . . The account also suggests that responsibility for the failure may go well beyond Mr. Brown . . .”).

Insurrection Act.²¹⁹ And, unlike earlier proposals, the ideas generated in the aftermath of Hurricane Katrina had the political backing necessary for implementation.

For example, less than three weeks after Hurricane Katrina made landfall, Senator John Warner, Chairman of the Senate Armed Services Committee, sent a letter to 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 in those limited situations involving a large-scale . . . emergency like the present one.”²²⁰ The next day, the President’s national address to the country proclaimed: “[I]t is now clear that a challenge [of Hurricane Katrina’s] scale requires greater federal authority and a broader role for the armed forces—the institution of our government most capable of massive logistical operations on a moment’s notice.”²²¹ Yet even with this strong support, there was concern over potential political opposition to any modification of the Insurrection Act because many Americans were, and remain, divided over who should be the lead agent in responding to domestic emergencies—especially when military intervention is required.²²²

On one side of the debate are those who fear overreliance upon, and consolidation of military power within, the Executive Branch. They believe that giving the President primary responsi-

219. See Weston & Brooks, *supra* n. 36 (reviewing the PCA in light of the government’s response to Hurricane Katrina and recommending that Congress modify the PCA to clarify the Act’s limitations); see e.g. Peter Gosselin & Doyle McManus, *Katrina’s Aftermath: Wider Powers for U.S. Forces in Disasters Are under Review*, L.A. Times [¶ 2] (Sept. 11, 2005) (available at <http://articles.latimes.com/2005/sep/11/nation/na-posse11>) (reporting that “Dan Bartlett, counselor to President Bush, said that the [A]dministration was reviewing whether to increase the [P]resident’s power to dispatch troops at the outset of a disaster and to give them law enforcement duties.”).

220. CBS MoneyWatch.com, *Militarizing Law Enforcement?*, http://findarticles.com/p/articles/mi_m0JZS/is_21_21/ai_n25117695/ (posted Oct. 17, 2005) (quoting Ltr. from John Warner, Sen. Armed Services Comm. Chairman U.S. Senator, to Donald Rumsfeld, Sec. of Def., *Reexamination of Posse Comitatus* (Sept. 14, 2005)).

221. President George W. Bush, Speech, *Address to the Nation from Jackson Square* (New Orleans, La., Sept. 15, 2005) (available at <http://www.cnn.com/2005/POLITICS/09/15/bush.transcript/>).

222. See Mackubin T. Owens, *Hurricane Katrina and the Future of Civil-Military Relations*, N.Y. Post [¶ 5] (Sept. 2005) (available at <http://www.ashbrook.org/publicat/oped/owens/05/katrina.html>) (addressing the pros and cons of having the military respond to domestic disturbances). Owens also argues that increasing United States Military involvement in domestic affairs is at odds with healthy civil-military relations. *Id.* at [¶ 4].

bility for handling domestic emergencies will increase the likelihood of martial law or rule by military force²²³ and lead to the loss of civil liberties.²²⁴ While these concerns, first raised by the Framers, may appear unwarranted and antiquated today, they are actually quite relevant. The recently declassified 2001 Department of Justice memorandum entitled *Authority for 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.²²⁵ Thus, to those against expanding the role of the Executive Branch during domestic emergencies, the federal government should be considered the last—not first—resort during times of civil disorder.²²⁶

In contrast, others feel that due to the speed, size, scope, complexity, and magnitude of modern-day domestic emergencies, combined with the potential for large-scale suffering and loss, the federal government should be in charge of all but the most routine matters.²²⁷ Proponents of this view argue that even when at full

223. See Siobhan Morrissey, *Should the Military Be Called in for Natural Disasters?*, TIME (Dec. 31, 2008) (available at <http://www.time.com/time/nation/article/0,8599,1869089,00.html>) (stating that a standing military attempting to enforce civil laws may signal a “creeping militarism” into our civilian culture and the erosion of the Posse Comitatus Act”).

224. *Contra* Tkacz, *supra* n. 11, at 302 (arguing that using the military in domestic affairs protects civilian’s constitutional rights; it does not abrogate them). But 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. *Id.* at 313–314.

225. Memo. from John C. Yoo, Deputy Assistant Atty. Gen., to Alberto R. Gonzales, counsel to the President, *Authority for Use of Military Force to Combat Terrorist Activities within the United States* 25 (Oct. 23, 2001) [hereinafter *DOJ Memo*] (stating “that the better view is that the Fourth Amendment does *not* apply to domestic military operations”) (emphasis in original); see Mark Mazzetti & David Johnston, *Bush Weighed Using Military in Arrests*, N.Y. Times [¶] 2 (July 24, 2009) (available at <http://www.nytimes.com/2009/07/25/us/25detain.html>) (noting that some of President Bush’s advisors, “including Vice President Dick Cheney, argued that a President ha[s] the power to use the military on domestic soil to sweep up [] terrorism suspects”).

226. Rich, *supra* n. 21, at 5. In a letter to then Treasury Secretary Alexander Hamilton dated September 16, 1792, President George Washington stated: “[T]he 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 [C]onstitution and laws will authorize these, they must be used as the dernier resort.” *Id.*

227. See Robert Block & Amy Schatz, *Florida Beat Back Washington during Hurricane Wilma*, Wall St. J. A1 (Dec. 8, 2005) (stating that “Adm. Timothy J. Keating . . . told lawmakers that active-duty forces should be given complete authority for responding to catastrophic disasters.”); Elizabeth F. Kent, “Where’s the Cavalry?”: *Federal Response to 21st Century Disasters*, 40 Suffolk U. L. Rev. 181, 193 (2006) (arguing that the Department

strength, the National Guard of an individual state can quickly become overwhelmed during a crisis.²²⁸ So taking a “wait-and-see” approach to determine whether a state can handle a specific crisis, before involving the federal government, puts both lives and property at risk.²²⁹ Thus, the argument continues, the federal government with its superior resources—including the most advanced military in the world—should have primary responsibility for managing civil disasters.²³⁰

In light of this split in American opinion, the Enforcement Act was passed with little fanfare or public scrutiny. Both the House and Senate Armed Services Committees helped draft the Enforcement Act, but held neither hearings nor public debates on the legislation.²³¹ Once finalized, the Enforcement Act was quietly tucked into a large defense authorization bill: the John Warner Defense Authorization Act of 2007.²³² Very few people, including many members of Congress who voted on the larger defense bill, actually knew they were also voting to modify the Insurrection Act.²³³ The secrecy surrounding the Enforcement Act was so pervasive that the actual sponsor of the new legislation remains unknown to this day.²³⁴

of Defense “is the federal government’s greatest resource for planning, logistics, and operational support.”).

228. Kent, *supra* n. 227, at 185–186. This false sense of security includes all man-made or natural disasters with the potential for widespread destruction. *Id.* at 181.

229. See 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?*, 2006 Army Law. 1, 18 (arguing that “the military should be recognized as the primary agency to manage domestic disaster relief.”).

230. *Id.*; see Tkacz, *supra* n. 11, at 302 (noting that “[t]he delayed reaction to [Hurricane Katrina] suggests the need for an expansion of existing [P]residential authority to use active military forces to rapidly secure the disaster area and rescue survivors”); Jim VandeHei & Josh White, *Bush Weighs Greater Role for Military in Disaster Response*, Wash. Post [¶ 5] (Sept. 26, 2005) (available at <http://community.seattletimes.nwsources.com/archive/?date=20050926&slug=ritabush26>) (noting that President Bush was “asking Congress to consider a major change, potentially shifting federal responsibility for major natural disasters from the Department of Homeland Security to the nation’s top military generals.”).

231. Senator Leahy stated that the changes to the Insurrection Act were “just slipped in the defense bill as a rider with little study.” Jeff Stein, *CQ Homeland Security*, Cong. Q. [¶ 17] (Dec. 1, 2006) (available at 2006 WLNR 21099617) (internal quotations omitted).

232. *Id.* at [¶¶ 2, 18].

233. This observation is based on various readings and the Author’s personal experience as a congressional aide when the law was being passed.

234. But it is widely believed that Senator Warner was responsible for the change. Gosselin & McManus, *supra* n. 219, at [¶¶ 12–13]. See James Bovard, CounterPunch, *Stomping Freedom: Inside the Martial Law Act of 2006*, <http://www.counterpunch.org/>

Unfortunately for the Enforcement Act's proponents, this lack of openness helped lay the groundwork for the law's ultimate repeal one year later.²³⁵ 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 the Act passed without public review or consultation from any of the fifty state governors.²³⁶ According to the new law's detractors, state governors were entitled to at least some input because the Enforcement Act granted the President unprecedented unilateral authority to domestically deploy both federal and state military forces.²³⁷

B. Changes Brought by the Enforcement Act²³⁸

Most of the changes brought by the Enforcement Act involved Section 333 of the Insurrection Act. As previously discussed, this Section authorizes the President, even against the wishes of a state 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 its rights or obstructs the execution of the laws.²³⁹ Section 333 is gen-

bovard01092008.html (posted Jan. 9, 2008) (stating that 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.).").

235. See H.R. 4986, 110th Cong. § 1068 (Jan. 3, 2008) (proposing to repeal the Enforcement Act passed one year prior).

236. Major General Timothy Lowenberg testified before the Senate Committee on the Judiciary as follows:

Without any hearing or consultation with the governors and without any articulation or justification of need, Section 1076 of the 2007 [National Defense Authorization Act] changed more than [one hundred] 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.

Sen. Jud. Comm., *The "Insurrection Act Rider" and State Control of the National Guard*, 110th Cong. 1076 [¶ 13] (April 24, 2007) (testimony of Major Gen. Timothy Lowenberg) (available at http://judiciary.senate.gov/hearings/testimony.cfm?id=2713&wit_id=6390).

237. See *id.* (stating that "imposing [p]residential control over the National Guard for domestic purposes without notice to the governor and without the governor's consent negates the unity of local-state-federal effort needed in times of domestic peril and would undermine the speed and efficiency with which the National Guard responds under the [g]overnor's control").

238. For a side-by-side comparison of the original Insurrection Act with the Enforcement Act, see Appendix 1.

239. 120 Stat. at 2404. Revised Section 333 added the phrase "or those obstructing the

erally invoked when a governor and President are unable to reach some sort of mutual agreement to deploy federal troops under Section 331.²⁴⁰ When the President acts under Section 333, federal-state relations are undermined because the President usually assumes command and control of the National Guard by federalizing it.²⁴¹

The most controversial Section 333 modification, which ultimately led to the Enforcement Act's repeal, concerned a specific reference to events that, when combined with domestic violence, gave the President nearly unchecked authority to deploy troops domestically. The listed events were: "natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition."²⁴²

Congressional opponents of the Enforcement Act, of which there were many, made two basic arguments against the new law. First, it was asserted that the listed events "create[d] triggers that make it virtually automatic that the [Enforcement] Act w[ould] be invoked during such emergencies."²⁴³ Second, it was claimed that the events provided the President with unprecedented authority to deploy troops domestically.²⁴⁴ 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.²⁴⁵

enforcement of the laws." *Id.* at 2405.

240. Scheips, *supra* n. 170, at 46.

241. Kavan Peterson, *Governors Lose in Power Struggle over National Guard* [¶ 6], <http://www.stateline.org/live/details/story?contentId=170453> (posted Jan. 12, 2007).

242. 120 Stat. at 2404. These events, however, must be accompanied by or result in some form of domestic violence. *Id.*

243. Sen. Jud. Comm., *The "Insurrection Act Rider" and State Control of the National Guard*, 110th Cong. 1076 (April 24, 2007) (testimony of U.S. Sen. Kit Bond (R-MO)) [hereinafter *Statement of Kit Bond*] (available at http://judiciary.senate.gov/hearings/testimony.cfm?id=2713&wit_id=6399).

244. *Id.* (arguing that the changes would "provide the President with unnecessary and unprecedented power.").

245. *Id.* Shortly after the Enforcement Act was passed, then-Governor of Arizona Janet Napolitano said the new law's "expansion of federal authority during natural disasters . . . 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." Ltr. from Janet Napolitano to Sens. Bill Frist & Harry Reid and Reps. Dennis Hastert & Nancy Pelosi, *Governors' Opposition to the House and Senate Dept. of Defense Authorization Bills to Federalize the National Guard during Certain Emergencies and Disasters* (Aug. 31, 2006) (available at

The Enforcement Act's defenders, whose position was made all the more difficult by an unwillingness to openly and publicly debate the law, claimed that the changes would not necessarily result in greater domestic use of the military by the President.²⁴⁶ Instead, they argued, the change to Section 333 was merely a clarification—the law did not grant the President any new power, it only explained the authority the President already possessed.²⁴⁷ For example, the new terms listed could also be deemed acts of insurrection, which have historically received a very broad interpretation.²⁴⁸ Furthermore, the new terms did not operate in a vacuum because domestic violence remained a prerequisite to the President's ability to deploy troops domestically.²⁴⁹ The clarity argument might have been more persuasive if the Enforcement Act did not include the term “or other condition,” because adding this term undercut the whole idea that the events listed in Section 333 of the Enforcement Act existed merely for clarification

<http://www.nga.org/portal/site/nga/menuitem.d48f170fad5788d18a278110501010a0/?vgnnextoid=0a05e362c5f5d010VgnVCM1000001a01010aRCRD&vgnnextchannel=70ad6eb58fda0010VgnVCM1000001a01010aRCRD&vgnnextfmt=print>.

246. See Sen. Edward Kennedy's remarks in favor of amending the Insurrection Act:

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.

Bill of Rights Defense Committee, *Public Law 109-364, the "John Warner Defense Authorization Act of 2007"* (H.R. 5122), <http://www.bordc.org/threats/hr5122.php> (updated May 8, 2009).

247. *Id.*

248. There are several variations on how to define “insurrection.” For example, one court stated that “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, 1005 (2d Cir. 1974). Another court called an “[i]nsurrection . . . a rising against civil or political authority,—the open and active opposition of a number of persons to the execution of law in a city or state.” *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894). The term has also 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 state.” 45 Am. Jur. 2d *Insurrections* § 1 (2007). And one journal further clarifies the term by stating:

Insurrection is distinguished from rout, riot, and offenses 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 the participants, are simply unlawful acts in disturbance of the peace [that] do not threaten the stability of the government or the existence of political society.

77 C.J.S. *Riot* § 37 (2006).

249. 120 Stat. at 2404.

purposes—namely, “or other condition” leaves this Section more vague than the initial Insurrection Act.

Other changes brought by Section 333 of the Enforcement Act 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 . . .”²⁵⁰ to “[t]he President *may* employ the armed forces, including the *National Guard* in Federal service . . .”²⁵¹ 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 invoking the Insurrection Act. This is because the word “militia,” as evidenced by the definition below, is much broader than the term “National Guard,” which is actually a subcomponent of the “militia.”²⁵² Title 10 of the United States Code states:

- (a) The militia of the United States consists of all able-bodied males at least [seventeen] years of age and, except as provided in section 313 of title 32, under [forty-five] 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.²⁵³

Thus, the Enforcement Act restricted the President to deploying only the “Armed Services” and the “National Guard” under Section 333. But the Insurrection Act permits the President to deploy both the Armed Services and the “militia,” which encompass not

250. 10 U.S.C. § 333 (emphasis added).

251. 120 Stat. at 2404 (emphasis added).

252. 10 U.S.C. § 311 (2006).

253. *Id.*

only the National Guard but other entities like the State Defense Forces (SDFs).²⁵⁴ This difference is important because under the Enforcement Act, unlike the Insurrection Act, the governor maintains some military resources, including the option to retain control over SDFs.²⁵⁵ Although the point was never made publicly, 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.”²⁵⁶ “May” generally denotes a privilege or discretionary power,²⁵⁷ while “shall” generally indicates a duty imposed on a person or entity.²⁵⁸ Thus, 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 that deprived people of their rights under the Fourteenth Amendment.²⁵⁹ The Enforcement Act removed that duty, making Presidential action optional.²⁶⁰

In addition to removing the obligatory language, this change also undercut the previously mentioned suggestion that the Enforcement Act created triggers that 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 substituting “may.” This change to the statute makes implementing Section 333 much more discretionary under the Enforcement Act—another direct benefit to the states.

254. Currently, twenty-one states maintain SDFs, which are voluntary military units that operate completely under state control. State Defense Force, *About the SDF*, <http://statedefenseforce.com/database/about-the-sdf/> (accessed Sept. 2, 2010). Historically, SDFs have served as a backup to the National Guard. *Id.* Members of the SDFs generally do not receive payment for their services but may be provided uniforms and training. *Id.* State Defense Forces are authorized pursuant to 32 U.S.C. § 109 (2006). *Id.*

255. Since the Supreme Court decided *Perpich v. United States*, there has been a question of whether SDFs fall under the broad definition of “militia.” 496 U.S. 334 (1990). In *Perpich*, the Supreme Court stated that “[i]t is nonetheless possible that [SDFs] are subject to call under 10 U.S.C. §§ 331–333 . . .” *Id.* at 353.

256. Compare 10 U.S.C. § 333 with 120 Stat. at 2404 (noting the change in the statute from “may” to “shall”).

257. *Black’s Law Dictionary* at 1000.

258. *Id.* at 1407.

259. See 120 Stat. 2083, at § 333 (noting the change in the statute from permissive Presidential action to mandatory Presidential action).

260. “The original [Insurrection Act] § 333 required the President to take action . . .” Mazzone, *Commandeerer*, *supra* n. 15, at 318.

Section 333 of the Enforcement Act also required that the President inform Congress as soon as practicable when he deployed troops under this statute, and every fourteen days thereafter, when exercising federal authority.²⁶¹ First and foremost, this change reasserted the “role for congressional oversight, along the lines of the thirty-day (later sixty-day) time limit in the early iterations of the Insurrection Act.”²⁶² The reporting requirement also served as a backup to the dispersal order that ensured invoking the Insurrection Act was not a clandestine affair that went without public notice.²⁶³ 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 There is no way the President can use that exception to the Posse Comitatus Act secretly.”²⁶⁴ Similar to the dispersal order requirement, some legal commentators have correctly downplayed the legal significance of a President failing to report to Congress.²⁶⁵ But this is not to say those reporting requirements do not 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 is generally administered by the public, not the courts, as explained in Part III.²⁶⁶

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.”²⁶⁷ While more symbolic than substantive in nature, changing the name of Title 10, Chapter 15 did appear to address several previously raised

261. 120 Stat. at 2405.

262. Vladeck, *Field Theory*, *supra* n. 73, at 434.

263. See Morrissey, *supra* n. 223, at [¶ 12] (quoting Professor Stephen Dycus, a national-security-law scholar).

264. *Id.* (quoting Professor Stephen Dycus).

265. See e.g. Gardina, *supra* n. 40, at 1063 (explaining that the President “now has undisputed authority to send the military into a state”).

266. Due to the political nature of deploying troops, courts are generally hesitant to entertain questions about the legality of the President’s actions under the Insurrection Act. See *supra* pt. II(B), at nn. 109–125 (discussing the predominant legislative evolution of the Insurrection Act).

267. Other commentators recommend changing the name to “Domestic Disaster Relief Act” or “Domestic Disaster Relief and Insurrection Act” to reduce the stigma associated with the name. ABA Standing Comm. on L. & Natl. Sec., *Hurricane Katrina Task Force Subcommittee Report* 29 (Feb. 2006) (available at <http://www.abanet.org/adminlaw/KatrinaReport.pdf>).

concerns about the statute. First, removal of the word “insurrection” from Chapter 15 updated the statute, as the term itself is somewhat antiquated and rarely, if ever, used today.

Second, the change alerted individuals that the statute encompassed more than just uprisings against the government; instead, it dealt with public disorder in general. This evolution, along with other previously mentioned changes, helped clarify a law that has long been misunderstood.²⁶⁸ For example, Presidents have historically used “riot,’ ‘lawlessness,’ and ‘insurrection’ interchangeably.”²⁶⁹ Also, at least one law review article argues that the real problem with deploying federal forces during Hurricane Katrina was simply a misunderstanding of the Insurrection Act by all parties involved.²⁷⁰ That article suggested that instead of modifying the statute we should look to raise and improve awareness of it, which is exactly what this name change does.²⁷¹ Finally, changing the title 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.²⁷²

In sum, the changes brought by the Enforcement Act, like past legislation, strengthened the power of the President. But this is not to say that the states did not benefit from the Enforcement Act. Aside from increasing the President’s authority, the changes offered in the Enforcement Act lent some clarity to the Insurrection Act, which was plagued by both broad and undefined terms throughout its two-hundred year history.²⁷³ But because of the

268. *Id.*

269. *Riot Control*, *supra* n. 21, at 644; *see also* Engdahl, *Comprehensive Study*, *supra* n. 42, at 413 (stating that “[b]y 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.”).

270. 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* VandeHei & White, *supra* n. 230, at [¶] 9 (arguing that “[r]ather than creating new laws and authorities . . . government officials simply need to execute existing plans competently.”).

271. Samek, *supra* n. 270, at 465.

272. GDAEman, *Changes to the Insurrection Act*, <http://gdaeman.blogspot.com/search?q=insurrection> (Jun. 10, 2008) (noting that changes made via the John Warner Defense Authorization Bill “[e]xpand[] the military rights to a more open-ended role”).

273. General George S. Patton, Jr., who led federal troops against American veterans (the Bonus Army), summarizes this idea best, stating: “Due to the combined effort of ignorance and careless diction, there is widespread misunderstanding of the [principal] terms used in connection with the enforcement of law by military means.” George S. Pat-

manner in which the law was passed, few of the Enforcement Act's positive attributes ever came to public light.

Also, unlike the Calling Forth Act during the Whiskey Rebellion, the Enforcement Act 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 the federal-state dilemma experienced during the Hurricane Katrina crisis to examine the statute's effectiveness. In light of increased reliance on the military domestically,²⁷⁴ this application is more than just an academic exercise, as it is very likely that the Insurrection Act will be questioned, reviewed, or modified again in the near future.

C. Application

As previously discussed, federal troops were not promptly deployed in the immediate aftermath of Hurricane Katrina due to problems associated with: (1) interpreting the Insurrection Act; (2) federalism; and (3) public opinion. The Enforcement Act, had it been in place during Hurricane Katrina, would most likely have addressed the concerns surrounding the statute's interpretation. Under the Enforcement Act, the Executive Branch probably would not have wasted as much time grappling with the issue of whether it could legally federalize the Louisiana National Guard against Governor Blanco's wishes.²⁷⁵ Unlike the Insurrection Act, Section 333 of the Enforcement 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 earlier, this was only part of the equation with respect to deploying troops because even after determining that the Executive Branch had legal authority, the President, like the Governor, was still very concerned about public opinion.

ton, Jr., *Federal Troops in Domestic Disturbances* [¶ 13] (Nov. 1932) (available at <http://www.pattonhq.com/textfiles/federal.html>).

274. See Peter B. Kraska, *Militarizing the American Criminal Justice System* 31-32 (Northeastern U. Press 2001) (discussing the increased use of domestic military forces since "the early 1980s with the onset of the drug crisis.").

275. See Sen. Rpt. 109-254 at 384 (May 9, 2006) (providing that "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 such as Hurricane Katrina.").

At that time, the President worried about how the public would view his taking military command and control away from a female governor of a southern state, especially one from the opposite political party.²⁷⁶ The Enforcement Act does not readily address this concern. Arguably, the Enforcement Act, more so than the Insurrection Act, insulated the President from negative public opinion. For example, the President could always say that he acted in accordance with the requirements of the statute because Hurricane Katrina fit one of the specific events listed in the Enforcement Act. But critics could just as easily turn around and argue that the statute was discretionary, and did not require Presidential action.

As for Governor Blanco, the Enforcement Act did little to assuage her concerns. While the new law most likely ensured that Governor Blanco would not lose her SDFs, the record is unclear as to what role, if any, these forces would play.²⁷⁷ More importantly, the Enforcement Act provided no mechanism for Governor Blanco to gracefully accept federal intervention without appearing inept. Under both the Enforcement Act and the Insurrection Act, governors appear as though they either buckle under pressure from the President or fail to prepare for and adequately respond to domestic emergencies; in either case, the governor looks incapable of managing civil disorder. Finally, the statute has no built-in mechanism that addresses the relationship between the governor and the President—the statute simply assumes that the two elected officials will be able to work together.

In sum, if the Enforcement Act were in place at the time of Hurricane Katrina, it would have clarified, at least in legal terms, that President Bush could legally deploy troops regardless of Governor Blanco's views. But the new law would not necessarily have altered the ultimate outcome because it was unlikely to be invoked. This is because, like the Insurrection Act, the Enforcement Act neither addressed the political relationship between

276. See Lipton, Schmitt & Shanker, *supra* n. 30, at [¶ 8] (discussing the President's concerns about his public image if he unilaterally took the command and control away from a female governor of a different political party absent her request for a federal takeover).

277. Ultimately, nearly 1,700 SDFs assisted during Hurricane Katrina. Martin Hershkowitz, *Summary of Available State Defense Force after Action Reports from Hurricane Katrina and Rita Deployments*, 2 State Def. Force J. 13, 14 (2006) (available at <http://www.23bn-vdf.com/s3/AARs%20of%20SDFs%20in%20Katrina.pdf>).

President Bush and Governor Blanco nor thoroughly considered the impact of public opinion on the two elected leaders.

IV. RECOMMENDED CHANGES TO THE INSURRECTION ACT

A. Readopting the Enforcement Act

In light of the shortcomings of both the Enforcement Act and the Insurrection Act, this Article will now offer a few suggested changes. The Insurrection Act for the Twenty-First Century should first readopt a modified version of the Enforcement Act. While this Article does not necessarily agree with the legislative process by which the Enforcement Act was passed, it does find that the statute, for the most part, improved the Insurrection Act.²⁷⁸ From the Whiskey Rebellion to the Los Angeles Riots of 1992, there has been no consensus as to what constitutes either “domestic violence” or an “insurrection.”²⁷⁹ Historically, elected officials have applied widely different parameters to these terms.²⁸⁰ On one extreme, those terms justified using the military to forcibly remove the Bonus Army (World War I veterans) from peacefully taking up residence in Washington, District of Columbia.²⁸¹ On the other extreme, the terms were deemed inapplicable to Hurricane Katrina, despite the chaos, lack of government services, and large loss of life and property damage.²⁸²

Not surprisingly, this unequal application of the Insurrection Act has led to uncertainty and confusion as to the circumstances under which the statute can be invoked.²⁸³ It has also hindered and prevented governors from adequately preparing and planning

278. For an alternative view, see Banks, *supra* n. 43, at 77–78 (noting skepticism about Congress’ intent to create a statute that was “purposefully ambiguous,” and explaining the constitutional problems with the 2006 amendment).

279. Engdahl, *New Civil*, *supra* n. 42, at 586.

280. Bybee, *supra* n. 45, at 43; *see also* Engdahl, *Comprehensive Study*, *supra* n. 42, at 413 (noting that “the term ‘insurrection’ in what is now 10 U.S.C. § 331 began to be given a meaning far broader than imperious assault upon the organized government of a state.”).

281. Laurie & Cole, *supra* n. 1, at 375 (noting that President Hoover followed “an array of preliminary steps as required under . . . Section 331, Title 10, United States Code[]” before deploying federal troops to disperse the Bonus Army) (emphasis removed).

282. *See supra* pt. I (discussing the government’s response to Hurricane Katrina).

283. *See supra* pt. II(B) (discussing several instances of confusion surrounding when the President can invoke the Insurrection Act).

for domestic emergencies because they are unsure which situations will give rise to federal military intervention. The Enforcement Act, for the first time, took steps to rectify this problem. Rather than attempting to narrowly define broad terms like “insurrection” or “domestic violence,” which might potentially hinder future operations, the Enforcement Act did the next best thing by listing specific conditions that could give rise to deploying federal troops domestically and federalizing the National Guard.²⁸⁴

One major shortcoming of the Enforcement Act was the inclusion of the phrase “or other condition.” Despite arguments made by the Enforcement Act’s proponents, it is fairly obvious that “or other condition” works against clarifying the Insurrection Act.²⁸⁵ The phrase also leaves the Enforcement Act vague enough to allow both state and federal officials to manipulate the statute.²⁸⁶ Further, “or other condition” creates a virtual Pandora’s Box of unlimited future incidents that could result in the Insurrection Act being invoked, so long as those incidents are coupled with domestic violence.²⁸⁷ Thus, this Article suggests that Congress should remove that phrase from any future version of the Insurrection Act. Taking such action would also mitigate fears that the Enforcement Act was a power grab by the Executive Branch.²⁸⁸

Ironically, during the debate over the Enforcement Act, a few congressional members actually championed the ambiguity traditionally found in the Insurrection Act, claiming that it was intentional, “fostered caution, and . . . encouraged consultation and deliberation between federal[,]state[,]civilian[,] and military decisionmakers.”²⁸⁹ But the ambiguity found in the Insurrection

284. 120 Stat. at 2404. These events, however, must be accompanied by or result in some form of domestic violence. *Id.*

285. See *supra* pt. II(B) (discussing the development of the Enforcement Act’s ambiguous language).

286. See *Federal Intervention*, *supra* n. 32, at 461 n. 165 (noting 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.”).

287. See *Statement of Kit Bond*, *supra* n. 243 (arguing that “[u]nder the [Insurrection Act], the President can invoke the act and declare martial law in cases where public order breaks down as a result of a natural disaster, epidemic, terrorist attack, or—very ambiguously—‘other conditions.’”).

288. See Bybee, *supra* n. 45, at 4 (discussing the assertion that the Enforcement Act was instituted as a power grab by the Executive Branch).

289. Banks, *supra* n. 43, at 77.

Act goes well beyond the intended jurisdictional friction that has historically arisen between state and federal governments when responding to domestic emergencies.²⁹⁰ The congressional members also failed to address the fact that the term “or other condition” made the Enforcement Act just as, if not more, indefinite than the Insurrection Act. Finally, as noted by Professor Banks, “[w]e should be skeptical of the claim by a Senator that Congress’[] legislative handiwork is ‘purposefully ambiguous.’”²⁹¹ More importantly, these champions of uncertainty appear to make no mention of the loss of life and property damage that occurs while this consultation takes place.²⁹²

While coordination and collaboration among the key players during a domestic emergency is important, it can be accomplished by means other than creating and maintaining an intentionally ambiguous statute. For example, creating pre-established guidelines and procedures between the President and governors for requesting and deploying federal troops, discussed below, will go a long way to ensure that the President and state governors work together.

Additionally, one minor shortcoming of the Enforcement Act was that, for the most part, it only modified Section 333 of the Insurrection Act. The Enforcement Act should have taken a more expansive view and examined other sections of the Insurrection Act. For example, replacing the term “militia” with the term “National Guard” would improve not only Section 333, but also Section 331. The term “militia,” as understood today, is far removed from its eighteenth-century meaning and has virtually disappeared from most other statutes.²⁹³ Moreover, using the term “National Guard” throughout the statute, as opposed to “militia,” decreases the likelihood that state governments will lose control of their SDFs even when requesting federal military assistance.

290. See *supra* pt. II(B) (discussing the legislative history and evolution of language that contributed to the development of the Insurrection Act).

291. Banks, *supra* n. 43, at 77.

292. See e.g. David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 Cornell L. Rev. 879, 879, 886 (1996) (discussing United States citizens’ right to bear arms and the potential impact that right can have in the event that, for instance, “armed citizens . . . stage a revolution.”).

293. See Wiener, *supra* n. 122, at 210 (noting that “the word ‘militia’ has virtually disappeared from the statute books”); Williams, *supra* n. 292, at 887–888 (discussing how the militia was viewed during the eighteenth century).

Finally, if the Enforcement Act took a broader view of the Insurrection Act, rather than focusing only on Section 333, it probably would 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 only use the militia of outside states, and not the militia of the state in which the domestic emergency actually occurs.²⁹⁴

B. Procedure to Request Troops

The Insurrection Act for the Twenty-First Century should also create a uniform process by which governors request federal military assistance under Section 331. Creating guidelines will not only eliminate some of the uncertainty surrounding the Insurrection Act, but also improve the relationship between the President and state governors. As demonstrated throughout history, considerable confusion has surrounded the Insurrection Act.²⁹⁵ For example, during the labor unrest of the early twentieth century, President Theodore Roosevelt asked Secretary of War Elihu Root to explain “the steps that would be necessary before the federal government could take further action” by sending federal troops to Governor Sparks of Nevada.²⁹⁶ Other Presidents, such as Woodrow Wilson,²⁹⁷ Franklin Roosevelt,²⁹⁸ and Lyndon Johnson, issued written procedures or guidelines on how states should request federal military assistance.²⁹⁹

294. Bybee, *supra* n. 45, at 4. Professor Bybee notes that when discussing the Militia and Domestic Violence clauses, “James Madison . . . explained that states could use the militia to suppress insurrections and quell riots [locally,] and then call on the federal government to aid them if necessary.” *Id.* at 37. Professor Bybee also notes that John Marshall agreed with this interpretation, because “despite Congress’[] grant of power to use and control the militia, the Constitution did not disable the states’ power over the militia.” *Id.* at 37 n. 234.

295. See Patton, *supra* n. 273 (providing a historical prospective demonstrating confusion over the Insurrection Act).

296. Rich, *supra* n. 21, at 130.

297. See Laurie & Cole, *supra* n. 1, at 328 n. 4 (noting that President Woodrow Wilson issued Weekly Intelligence Summaries in connection with “[a]rmy contingency plans for dealing with a leftist-radical insurrection”).

298. Franklin D. Roosevelt, *A Proclamation by the President of the United States* in Robert Shogan & Tom Craig, *The Detroit Race Riot: A Study in Violence* 153–154 (Chilton Books 1964).

299. Rich, *supra* n. 21, at 153–154. For example, President Lyndon Johnson’s written instructions resulted in Attorney General Ramsey Clark’s letter to the nation’s governors, a copy of which is reproduced *infra.* at Appendix 2. *Cases and Materials on Terrorism:*

Unfortunately, the guidelines drafted by earlier Presidents were reactive, as opposed to proactive. Furthermore, these guidelines were never codified.³⁰⁰ Thus, each subsequent generation appears to have forgotten what the previous one learned.³⁰¹ This Article suggests codifying the guidelines in either the Insurrection Act itself or the Code of Federal Regulations to 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 331.³⁰²

Creating guidelines will probably appeal to the Executive Branch because guidelines provide a way to decrease the likelihood of governors making *recommendations* for federal troops as opposed to *requests*. The distinction between a “recommendation” and a “request” for federal military assistance is important for two reasons. First, some legal scholars, like Professor Banks, argue that absent exceptional circumstances, a state must “request” federal assistance before troops may be deployed to combat domestic violence.³⁰³ Second, requiring that the governor or legislature make formal requests diminishes the possibility that the same governor or legislature will later either criticize the President’s use of federal troops or hinder those troops’ deploy-

Three Nations’ Response 434–435 (Michael F. Noone & Yonah Alexander eds., Kluwer Law Intl. 1997).

300. Broad regulations exist within the Code of Federal Regulations that discuss the employing military resources during civil disturbances. 32 C.F.R. §§ 215.1–215.10 (2009). But these regulations do not reach the governor’s request for federal military assistance, and instead defer to Section 331 on such matters. *Id.* at § 215.9(a)(2).

301. This was painfully evident in the Detroit Riot of 1967, which occurred twenty-four years after an earlier Detroit race riot during which the President also invoked the Insurrection Act. Sidney Fine, *Violence in the Model City 2* (U. of Mich. Press 1989). Fine notes that:

Following the [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. . . . [T]he 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 [R]iot of 1967.

Id.

302. See *supra* pt. III(B) (discussing some beneficial changes brought by the Enforcement Act).

303. Banks, *supra* n. 43, at 67.

ment.³⁰⁴ This, in turn, makes for a better working relationship among state and federal elected officials.

States may also favor codified guidelines due to the numerous historical examples of the President, especially when convenient, finding the request by the governor technically deficient or lacking sufficient information to allow for federal troop deployment.³⁰⁵ Creating guidelines will decrease this practice because under the Insurrection Act for the Twenty-First Century, the governor will know beforehand exactly what is required to receive federal troops.

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. This 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.³⁰⁶ This is due to the fact that those who either request or deploy the military are publicly accountable elected officials.

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 possessing the legal authority—did not invoke Section 333 of the Insurrection Act because, at least according to media reports, he feared the public backlash asso-

304. *Riot Control*, *supra* n. 21, at 642–643.

305. Rich, *supra* n. 21, at 191–192 (providing that “[t]wo standard excuses have been used by [P]residents 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.”).

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

ciated with a male President taking command and control away from a female, southern governor of the opposite political party.³⁰⁷ 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 influences? There is, and this Article suggests that the answer lies with the judiciary. As in the original Calling Forth Act of 1792, this Article argues that the courts should have a role with respect to the Insurrection Act.³⁰⁸

As discussed above, when the President wanted to call out the militia to execute the laws of the Union under the Calling Forth Act, he had to first obtain a judicial determination that United States laws were opposed or obstructed “by combinations too powerful to be suppressed by the ordinary course of judicial proceedings.”³⁰⁹ 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.³¹⁰ Today, this same requirement could be used to reduce negative public opinion when the President invokes the Insurrection Act.

Requiring judicial involvement before deploying federal troops domestically would, if nothing else, add legitimacy to an action undertaken pursuant to the Insurrection Act because the judiciary is generally the most-respected, and least-politicized, branch of government.³¹¹ Thus, any decision to use or request troops in response to a judicial determination that the laws are being obstructed would probably be viewed as more legal than political. For example, successfully strengthening public support for the use of military force to quell the Whiskey Rebellion may have been one reason why President Washington thought it important to request a judicial determination from Associate Jus-

307. Lipton, Schmitt & Shanker, *supra* n. 30, at [¶ 8]; *see also* Burns, *supra* n. 37 (stating: “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.”).

308. Professor Gardina has made a similar recommendation. Gardina, *supra* n. 40, at 1075.

309. 1 Stat. at 264.

310. *See supra* pt. II(B) (discussing the negative aspects of the Calling Forth Act).

311. Because Supreme Court Justices are appointed rather than elected, and because neither their job security nor income depend directly upon public opinion, U.S. Const. Art. III, § 1, it is widely believed that the Judiciary Branch is not susceptible to the same political pressure, accountability, and influence as the other two branches of government.

tice Wilson before moving forward, even though judicial input was unnecessary at the time.³¹²

Assuming that the state governor or President follows a course of action not at odds with that of the judiciary, involving a second branch of government in determining whether to invoke the Insurrection Act may also decrease the pressure of public opinion on both governors and Presidents. For example, if the judiciary determined that the laws in New Orleans were indeed opposed or obstructed during Hurricane Katrina, then President Bush may have felt more disposed to federalize the Louisiana National Guard because he knew his actions were, for the most part, supported by another branch of government. A judicial determination may have also provided Governor Blanco with the necessary cover to accept federal assistance by relinquishing command of the Louisiana National Guard without appearing weak or attempting to make a political point. In sum, a judicial determination would have given both Governor Blanco and President Bush less cause to worry about public opinion because their actions would be consistent with, and ratified by, the highly regarded Judicial Branch.

Obviously, there will be potential issues associated with reinstating the judicial determination. The first is one of practicality. For example, incorporating the judiciary into the Insurrection Act might slow down the process of deploying troops in the age of fast-hitting disasters and surprise attacks.³¹³ Generally speaking, adding another decisionmaker to any process has the potential to slow it down. But with advancements in communication, the judicial determination could occur before, during, or after the state governor's request for federal military assistance. This determination by the Court, unlike during the Whiskey Rebellion when it took Associate Justice Wilson two days to get his report to President Washington, could now be transmitted to the President in seconds.

312. Pursuant to the Calling Forth Act, a judicial determination was unnecessary because President Washington was using the military not only to enforce the laws, but also to put down an actual insurrection. Louis Fisher, *The War Power: Original and Contemporary* 12 (Am. Historical Assn. 2009). Public support for the President's decision was demonstrated by the large number of individuals who volunteered to fight the insurgents. See generally Brackenridge, *supra* n. 100 (discussing the need for federal assistance to deal with civil unrest).

313. Banks, *supra* n. 43, at 61.

As for the other practical concerns raised, natural disasters are no more fast-moving today than they were two hundred years ago, nor are surprise attacks a relatively new phenomenon.³¹⁴ Also, as with the Calling Forth Act, the judicial determination requirement would be limited to instances where the military is called to ensure the proper execution of the laws of the Union.³¹⁵ Thus, a judicial determination would not be required if the military is deployed in response to an insurrection or invasion.

The bigger obstacle with reinstating the judicial determination will most likely center on the Court's general reluctance to either interfere with the President's Commander-in-Chief power,³¹⁶ or involve itself in potential political questions.³¹⁷ 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.'"³¹⁸ In both *Luther* and *Martin*, the Court found 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."³¹⁹ But this is not to say that the President's actions here are beyond complete judicial review, as noted in *Sterling v. Constantin*.³²⁰

In *Sterling*, the Supreme Court granted deference to the governor of Texas when he declared martial law, but stated that this discretion was neither absolute nor beyond the law.³²¹ The *Ster-*

314. *Id.*

315. See Mazzone, *Commandeerer*, *supra* n. 15, at 309 (discussing the first congressional authorization for federal use of the militia).

316. See Gardina, *supra* n. 40, at 1064 (noting that "[t]he 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.").

317. Erwin Chemerinsky, *Cases under the Guarantee Clause Should be Justiciable*, 65 U. Colo. L. Rev. 849, 852–853 (1994) (providing that "[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 other justiciability requirements are met.").

318. *Federal Intervention*, *supra* n. 32, at 452.

319. *Luther*, 48 U.S. at 43; *Martin*, 25 U.S. at 30 (stating that "the authority to decide whether the exigency has arisen[] belongs exclusively to the President.").

320. 287 U.S. 378, 402–403 (1932) (declining to review the actions of the President); *but see Federal Intervention*, *supra* n. 32, at 453 (noting that "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 rearing within this category.").

321. 287 U.S. at 401–404.

ling decision generally stands for the proposition that “[e]ven when ‘martial law’ is declared, as it often has been, its appropriateness is subject to judicial review.”³²² Specifically, Chief Justice Hughes stated: “If . . . the Executive [can] substitute military force for and [to] the exclusion of the laws . . . [then] republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution. . . .”³²³ Thus, *Sterling* offers the possibility of imposing some form of judicial review on the President’s decision to deploy troops under the Insurrection Act. Of course, *Sterling* involved a governor and not the President; however, the same general principles apply.

In light of *Luther* and *Martin*, Congress may be hesitant to heavily rely on *Sterling*. Congress may also fear the possibility of creating a potential constitutional crisis by giving the judiciary a direct role in the Insurrection Act.³²⁴ Thus, an alternative to the previous recommendation might be to give the courts a more indirect role. For example, Congress could modify the Calling Forth Act’s language to make the judicial determination more discretionary than mandatory. In other words, the President could, but would not be required to, obtain a judicial determination before calling up the military under the Insurrection Act.

V. CONCLUSION

Unfortunately, there is a strong likelihood that American soldiers will be called to guard American streets in the near future. In fact, a blue ribbon panel commission 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.”³²⁵ As such, Congress should once again reexamine the

322. *Laird v. Tatum*, 408 U.S. 1, 19 (1972) (summarizing *Sterling*, 287 U.S. at 401, 403–404).

323. *Sterling*, 287 U.S. at 402–403.

324. See generally Michael J. Gerhardt, *Crisis and Constitutionalism*, 63 Mont. L. Rev. 277 (2002) (explaining the criteria for determining a crisis in constitutional law by examining three different kinds of constitutional law crises—judicial, political, and constitutional).

325. Commn. on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism, *Preventing Terrorism: Assessing the Nation’s Progress*, <http://www.preventwmd.gov/> (accessed Sept. 5, 2010); see also Bob Graham & Jim Talent, *World at Risk: The Report of the Commission on the Prevention of WMD Proliferation and Terrorism* xv (Vin-

Insurrection Act to determine what changes need to be made to bring this statute, which has remained relatively static for the past 135 years, up-to-date in the twenty-first century.³²⁶ But, unlike the events surrounding the Enforcement Act, this reexamination of the Insurrection Act should occur in public and involve all major stakeholders, especially the state governors.

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

tage Books 2008); MSNBC.com, *Panel Warns Biological Attack Likely by 2013*, <http://www.msnbc.msn.com/id/28006645> (updated Dec. 1, 2008) (discussing a panel's recommendation that President Barack Obama prepare for a biological attack that is likely to occur before 2013).

326. See Burns, *supra* n. 37 (commenting that “the Civil War-era Insurrection Act” and PCA are “very archaic laws from a different era in [United States] history”).

APPENDIX 1

Side-by-Side Comparison of the Insurrection Act and the Enforcement Act (Amendments Bolded)

<p style="text-align: center;"><u>Insurrection Act of 1807</u> 2 Stat. 443 (1807)</p>	<p style="text-align: center;"><u>Enforcement of the Laws to Restore Public Order Act</u> Pub L. No. 109-364, 120 Stat. 2083 (Oct. 17, 2006)</p>
<p>§ 333. Interference with State and Federal law</p> <p>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 style="padding-left: 40px;">(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</p> <p style="padding-left: 40px;">(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.</p> <p>In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws</p>	<p>§ 333. Major public emergencies; interference with State and Federal law</p> <p>(a) USE OF ARMED FORCES IN MAJOR PUBLIC EMERGENCIES.—</p> <p style="padding-left: 20px;">(1) The President may employ the armed forces, including the National Guard in Federal service, to—</p> <p style="padding-left: 40px;">(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—</p> <p style="padding-left: 20px;">(i) domestic violence has occurred to such an</p>

<p>secured by the Constitution.</p>	<p>extent that the constituted authorities of the State or possession are incapable of maintaining public order; and</p> <p>(ii) such violence results in a condition described in paragraph (2); or</p> <p>(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).</p> <p>(2) A condition described in this paragraph is a condition that—</p> <p>(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 constituted authorities of that State or possession 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 Con-</p>
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	<p>stitution.</p> <p>(b) NOTICE TO CONGRESS.—</p> <p>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.</p>
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APPENDIX 2

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 Fed-

eral 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.