POLICY BRIEF:

THE U.S. MILITARY MAY BE USED TO SECURE THE BORDER

Ken Cuccinelli & Adam Turner

March 25, 2024

INTRODUCTION

> During the first days of August, 1915 [during the so-called "bandit wars"[1]], a formidable group of Mexican horsemen was reported to be in the brush country north of Brownsville[, Texas]. When their destination, the headquarters of the southern end of the King Ranch, became apparent, Caesar Kleberg telephoned to the Rangers at Brownsville and to the Army command at Fort Brown, requesting immediate help. Only a handful of cowboys, headed by foreman Tom Tate, was available to protect the southern end of the ranch. Early in the afternoon of the eighth of August, a special train left Brownsville bound for Norias, [Texas] about seventy miles north. ***It carried an Army captain, a squad of eight troopers from the Twelfth Cavalry, two Texas Ranger captains, several Rangers, and a group of local peace officers***. Upon their arrival at Norias, they found King Ranch horses ready and waiting.
>
> While the Rangers and others went into the brush to find the bandits, the eight troopers were left at the ranch headquarters. ***The Mexicans attacked the ranch, apparently unaware of the presence of the troops.*** During the battle [of] Gordon Hill, ***a deputy sheriff of Cameron County***, and three other civilians, arrived on a gasoline truck from Harlingen just in time to take part in the fighting. The beleaguered men turned back charge after charge of the bandits. Finally, in the darkness of night, the raiders slipped away carrying a number of their wounded, leaving ten dead.[2]

---

[1] Alicia A. Garza, *Norias Ranch Raid*, Texas State Historical Association, https://www.tshaonline.org/handbook/entries/norias-ranch-raid (updated Mar. 23, 2019).

[2] Wesley Hall Looney, *The Texas Rangers in a Turbulent Era*, at 12-13, Thesis in History, Texas Tech University https://ttu-ir.tdl.org/server/api/core/bitstreams/28e11fe9-b70c-40b7-b321-020cbb4df5f3/content (May 1971) (emphasis added).

As this historical episode shows, it was once thought unremarkable that transborder criminal activity could be met with force by combinations of civilian and military authorities (both federal and state) acting together. In this Norias Ranch Raid, civilian Texas Ranger and local Texas police authorities combined with both U.S. Army and U.S. Cavalry to fight off Mexican outlaws. With the right exercise of presidential power, what is old could easily be new again and the relevant legal and practical tools available to Presidents and border state Governors could be used once more to energetically combat the illicit activities of the Mexican drug cartels, their allies, and the illegally entering aliens being trafficked or propelling themselves across the border.

Federal, state and local law enforcement forces are increasingly overwhelmed at the U.S. southern border with Mexico. As we demonstrate in this paper, the President of the United States could, without doubt, use the military to secure the border between legal ports of entry. Ordinarily, we would begin with the President's constitutional powers. But in an attempt to persuade skeptics, we begin with what most of those critics regard as the principal obstacle to using the military to stem the current border crisis—namely, the Posse Comitatus Act, 18 U.S.C. § 1385 (hereafter "PCA"), which was passed in the wake of the Civil War. Those who are skeptical of using military power to repulse the border invasion consider the border problem to be purely one of immigration law enforcement and thus they invoke the PCA to argue that the military cannot be used for domestic law enforcement of what they characterize as civil and criminal immigration and asylum laws.[3]

This approach is flawed in several respects as we explain below.

The use of the U.S. military to secure the border is entirely within both the statutory and constitutional powers of the President. By passing the PCA, some assert that Congress has prohibited widespread use of the military by the President, even if there is just a mere law enforcement nexus. For example, when the Biden Administration sent active-duty troops to the border, NBC found it necessary to assure its nervous readers (inured to an incorrect, but quite popular, layperson view of what the Posse Comitatus Act means) as follows:[4]

> The troops would be active-duty, not National Guard, and they would not be armed. They would not use force or make arrests, but they would support border patrol as needed, in compliance with the Posse Comitatus Act, which prevents the military from enforcing law within U.S. borders.

The conventional view of the Posse Comitatus Act expressed by the quotation above is not correct. The PCA does not bar the President from sending the military to enforce the law at U.S.

---

[3] We also refer readers to our prior paper (from Oct. 26, 2021) on the border invasion and the constitutional powers of the States to repel that invasion, which can be found here. We next prepared a related paper (July 15, 2022) explaining why federal civil rights criminal law could not credibly be used by the Biden Administration to prevent the States from exercising their constitutional powers of self help at the border. And that paper is available here. Readers wanting to immerse themselves in the full array of federal and state powers to repel the border invasion, as well as rebut misplaced arguments that the federal government is powerless to do anything about that invasion, except perhaps to provide immigration hearings to purported asylum seekers, should read both of the prior papers as well as this one.

[4] Julia Ainsley, *et al.*, *Biden to Send Active-Duty Troops to the Southern Border as Covid Restrictions End*, NBC NEWS, May 2, 2023, https://www.nbcnews.com/politics/joe-biden/biden-expected-send-active-duty-troops-southern-border-covid-restricti-rcna82429 [hereafter "*Ainsley Article*"].

borders. Furthermore, even if that were not correct, Congress cannot remove the inherent constitutional power of the President—via the PCA or any other statute—to use the military to protect America's border.

The paper is divided into four parts:

In Part I, we show that the PCA, standing alone, authorizes the use of the military to help solve the border crisis. In that discussion, we unpack the text, purposes, and legislative history of the PCA, as well as examine PCA case law and a circuit split in approach between the Eighth and Fourth Circuits.

In Part II, we show that the Insurrection Act (10 U.S.C. §§ 251-255) and several other federal laws each serve as express exceptions to the PCA and we discuss how the Insurrection Act also reinforces the propriety of using the military at the border to stem lawlessness.

In Part III, we show that the PCA contains an express constitutional exception. This ***clinches*** the indisputable power of the President to use the military to repel invasion and solve the border crisis. In the discussion in Part III, we delve deeply into the President's constitutional authority, which, of course, cannot be displaced or diminished by statutes passed by Congress, such as the PCA and/or the Insurrection Act.

Finally, in Part IV, we show that use by a President—acting as Commander in Chief as well as Chief Magistrate—of the military to solve the border crisis (primarily by defining the problem as one fit for the military to solve and secondarily by using the military for law enforcement purposes in accord with the Insurrection Act) would not threaten to impinge on the rights of any law-abiding Americans.

Clearly, from international human and drug smuggling cartel members all the way down to illegal border-crossing invaders, we are witnessing a perpetual state of invasion of the United States. These heinous criminals and other invaders would be the only ones facing a well-founded fear that their days of abusing the United States have come to an end—something the President could announce in a proclamation giving these foreign lawbreakers the opportunity to cease and desist in the dire threat they have manifested to our citizenry. The liberty of the citizens of the United States would be enhanced, not destroyed.

PART I: THE POSSE COMITATUS ACT—ITS TEXT, PURPOSES, AND LEGISLATIVE HISTORY—PERMIT USE OF THE MILITARY TO SOLVE THE BORDER CRISIS.

The Posse Comitatus Act ("PCA")

The PCA is a federal law of the United States that was passed in 1878, after the end of Reconstruction. The modern—and severely mistaken—view of the PCA is that it significantly

restricts the President's ability to deploy the military to protect America's borders and enforce its laws. As we will discuss herein, the foregoing view has no foundation in the PCA itself.

The PCA is currently located at 18 U.S. Code § 1385.[5] It currently states (emphasis added):

> Whoever, ***except in cases and under circumstances expressly authorized by the Constitution or Act of Congress***, willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space 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.[6]

The proviso beginning "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress" is capacious; indeed, ***it is enormous***. We unpack in detail how a variety of other Acts each authorize the use of the military to stem the border crisis. In Part II, we will focus in particular on how the Insurrection Act stands as one of the Acts that fits in the PCA's capacious set of exceptions and we unpack how the President's constitutional authority applies in Part III below. But, as it relates to the PCA, suffice to say at the outset that both statutory and constitutional powers exist to repel the current border invasion that stand far outside the limited situations in which the murky Posse Comitatus Act actually applies.

First, consider just 10 U.S.C. § 252, part of the codified Insurrection Act. It reads as follows:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

This commits to the President's discretion the decision of whether there are unlawful obstructions or combinations arrayed against the United States. The Mexican drug cartels, as just one example, which are causing fentanyl to pour across the border killing tens of thousands of our citizens each year, are an unlawful combination acting against the United States. Use of ordinary legal processes is plainly insufficient to stop this unlawful activity and thus, under the plain terms of Section 252, the President can use the military to enforce the drug and immigration laws and suppress the unlawful combination acting against the United States, particularly at the border where use of the military is most natural and most likely to stop problems before they penetrate into the interior of the United States.

---

[5] 18 U.S. Code § 1385.

[6] Some are puzzled by the absence of the Coast Guard from the list to which the PCA applies because the Coast Guard is part of the "armed services." *See* 10 U.S.C. § 101(a)(4); 14 U.S.C. § 101. But this is no doubt because the Coast Guard is also a law enforcement agency. *See* 14 U.S.C. § 102. The Coast Guard can, in wartime, operate as part of the Navy, but we agree with the conclusion of the Congressional Research Service that even when that occurs, the Coast Guard would remain outside the PCA because statutes explicitly imbue it with law enforcement powers. *See* Jennifer K. Elsea, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, CONGRESSIONAL RESEARCH SERVICE (November 6, 2018), 60, https://sgp.fas.org/crs/natsec/R42659.pdf [hereafter "Elsea CRS at [page #]]."

Second, while Congress controls the conditions when the militia can be called out, the President is the Commander in Chief and he takes over from Congress once the militia is called up. Congress has no field commanders and it was not assigned the role to provide them. Moreover, at all times, our Commander in Chief controls the army and the navy: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States…"[7]

These two quick examples should make clear that, given the nature of the border problem this paper addresses, the PCA is no impediment to the President using the military to secure the border. Compliance with the terms of the Constitution and the Insurrection Act are not difficult. For the remainder of Part I, we therefore put off to the side the opening constitutional and statutory proviso that appears at the start of the PCA and imagine, *arguendo*, that the PCA does apply to somehow cabin presidential options at the southern border. Nevertheless, when one peers into the topic, the scope of the PCA is not as broad as laypeople or the mainstream media assume.

According to this conventional (but deeply flawed) understanding, the PCA generally prohibits Federal military personnel and units of the United States National Guard when they are "federalized" and thus, under Federal authority, from acting in a law enforcement capacity within the United States (again, putting aside the proviso). The original act only referred to the Army, but later revisions added the Navy, the Marine Corps, the Air Force, and the Space Force.

There is a disagreement between DOJ's Office of Legal Counsel and the Defense Department about whether the PCA applies to civilian workers and contractors at DOD.[8] The Defense Department takes the position that the PCA does so apply, although they have advanced this position only by means of policy guidance, not by means of a regulation.[9] However, OLC takes the position that non-military personnel are not included under the PCA.[10] Given that the Defense Department has approved personnel details to the FBI (the result blessed in the relevant OLC opinion), it would seem that the Pentagon's general instruction for civilian employees/contractors to avoid involvement in law enforcement governs only when the Pentagon wants it to govern as a matter of its own internal organization. Moreover, such Pentagon policy guidance can be scrapped or changed by the President at will.

In reality and most importantly, the PCA is not as restrictive as the conventional understanding supposes it to be.[11] It has only five elements. To violate the PCA, someone must: (1) willfully (2) use the Army, the Navy, the Marine Corps, the Air Force, or the Space Force (3) as a posse

---

[7] U.S. Const., art. II, § 2, cl. 1.

[8] Elsea CRS at 5.

[9] *See* Department of Defense, Instruction No. 3025.21, Defense Support of Civilian Law Enforcement Agencies (last updated Feb. 8, 2019), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302521p.pdf.

[10] *Permissibility Under Posse Comitatus Act of Detail of Defense Department Civilian Employee to the National Infrastructure Protection Center*, 22 OLC Op. 103 (1993), https://www.justice.gov/file/146556-0/dl?inline.

[11] Gary Felicetti and John Luce, *The Posse Comitatus Act: Liberation from the Lawyers*, Parameters Vol. 34 No. 3 (August 2004): 94-107, https://press.armywarcollege.edu/cgi/viewcontent.cgi?article=2215&context=parameters [hereafter "Felicetti & Luce at [page #]"].

comitatus or otherwise (4) to execute the laws (5) in a way that is not expressly authorized by the Constitution or an act of Congress.

Let's unpack some of the language from the PCA that requires further explanation:

- **Whoever:** "Whoever" is a term with an uncertain span of meaning:
    - There was significant debate on the issue of "to whom" the PCA was intended to apply. *See, e.g.,* 7 Cong. Rec. 4301 (1878) (colloquy of Sens. Christiancy and Conkling).
    - But Rep. James Knott (D-KY), the House amendment sponsor, said "(t)he amendment I propose is comprehensive. It reaches from the Commander-in-Chief down to the lowest officer in the Army who may presume to take upon himself to decide when he shall use the military force in violation of the law of the land. It is not only the Executive who has been guilty of using troops under circumstances not authorized by law, but officers of various grades."[12]
    - The Senate debate also confirmed this applied to all kinds of officials, including the President.[13]
- **Willfully:** The traditional meaning of willfully is that it requires deliberate acts, acting with what lawyers call *scienter*. Modern judicial decisions have sometimes watered down the meaning of "willfully." Under that newer-fangled approach, "willfully" could mean as little as that the defendant knowingly performed an act, deliberately and intentionally, or, by contrast, that the accused acted with knowledge that his conduct was generally unlawful. If the proscribed conduct could honestly be considered innocent, then a willful *mens rea* may require the defendant to have more specific knowledge of the law being violated.

  The less-restrictive meaning of "willfully" is arguably consistent with the legislative history, however. This is because the original Senate version of the original Act would have limited proscription to "willful and knowing" violations,[14] but the House version had no such limitation and its approach is what eventually passed.[15]
- **Posse Comitatus:**

[12] Rep. James Knott, on May 27, 1878, 45th Congress, 2nd session, Congressional Record Vol. 7, Part 4: 3847, https://www.congress.gov/bound-congressional-record/1878/05/27/house-section.

[13] June 7, 1878, 45th Congress, 2nd session, Congressional Record Vol. 7, Part 5: 4240, https://www.congress.gov/bound-congressional-record/1878/06/07.

[14] June 8, 1878, Congress, 2nd session, Congressional Record Vol. 7, Part 5: 4302, https://www.congress.gov/bound-congressional-record/1878/06/08/senate-section.

[15] June 6, 1878, 45th Congress, 2nd session, Congressional Record Vol. 7, Part 5: 4181, https://www.congress.gov/bound-congressional-record/1878/06/06/senate-section.

- "The Latin phrase "*posse comitatus*" literally means attendants with the capacity to act from the words "*comes*" and "*posse*" meaning companions or attendants (*comes*) and to be able or capable (*posse*). Among the Romans, *comitatus* referred to one who accompanied the proconsul to his province. Later, *comes* (sometimes referred to as *comites* or counts) meant the king's companions or his most trusted attendants and *comitatus* came to refer to the districts or counties entrusted to their care."[16]

- At English common law, the sheriff of every county was obligated "to defend his county against any of the king's enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the posse comitatus, or power of the county; which summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning, under pain of fine and imprisonment."[17]

- "Congress quickly established a law enforcement capability in the federal government in order to effectuate its constitutional powers and provide a means to enforce the process of federal courts. This authority was vested through the President in federal marshals, who were empowered to call upon the posse comitatus to assist them, an authority similar to that enjoyed by the sheriff at common law, and which was understood to include the authority to call for military assistance."[18] This provides context to Federalist No. 69 referring to the President as the "Chief Magistrate."[19]

- In Federalist No. 29, Alexander Hamilton discussed the power of posse comitatus, by which he meant the power of an official of the federal government to summon, as *Black's Law Dictionary* puts it, "(t)he entire population of a county above the age of fifteen…to his assistance in certain cases; as to aid him in keeping the peace, in pursuing and arresting felons, etc."[20] This included the military.

- If the PCA prohibited only using the military for law enforcement purposes utilizing posse comitatus-style means, the statute would be extremely narrow. However, the statute's posse comitatus language is expanded by use of the phrase "or otherwise," as we next consider.

- **Or Otherwise:**

---

[16] John Bouvier, Bouvier's Law Dictionary: A Concise Encyclopedia of the Law (University Publishing House, Inc, 1914), 529 and 2635, https://ia600201.us.archive.org/29/items/cu31924022836245/cu31924022836245.pdf (emphasis added).

[17] William Blackstone, Blackstone's Commentaries on the Laws of England (Oxford: The Clarendon Press, 1765), *The Avalon Project*, Book 1, Chapter 9, 332, https://avalon.law.yale.edu/18th_century/blackstone_bk1ch9.asp.

[18] Elsea CRS at 5.

[19] Alexander Hamilton, *The Federalist* No. 69, *The Real Character of the Executive*, The Avalon Project, https://avalon.law.yale.edu/18th_century/fed69.asp ("[W]e must conclude that a duration of FOUR years for the Chief Magistrate of the Union is a degree of permanency far less to be dreaded in that office, than a duration of THREE years for a corresponding office in a single State.").

[20] Alexander Hamilton, *The Federalist* No. 29, *Concerning the Militia*, The Avalon Project, https://avalon.law.yale.edu/18th_century/fed29.asp. Henry Campbell Black, *Black's Law Dictionary* revised 4th edition (St. Paul: West Publishing Company, 1968), 1324, https://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th.pdf.

- In the PCA Senate debate, Sen. William Windom (R-MN) felt that "posse comitatus or otherwise" was too broad, and, as a result, that the PCA "should be read as if the words were omitted, because the words 'or otherwise' cover everything…"[21] The Senate did not do so. Later, Sen. Benjamin Hill (D-GA) also made an amendment to strike out the phrase "posse comitatus or otherwise," but his amendment was also not acted upon.[22] Assuming the statute were considered to be unclear on its face, allowing resort to legislative history, these two snippets could be given significance by proponents of an aggressive reading of the PCA to say that the phrase "or otherwise" is designed to prevent circumventions of the PCA ***by any means***.

- Thus, with the term "or otherwise" being present in the PCA, one has to have a theory of what, exactly, the PCA's language precludes once augmented by the "or otherwise" phraseology. The core problem is that the language "or otherwise" is not clear.

    - Neither the phrase "or otherwise" nor the word "otherwise" were defined in *Bouvier's Law Dictionary* of 1839 or in the *Black's Law Dictionary* of 1891 (these two dates bracket the PCA's enactment and we selected them to try to isolate the word's or phrase's meaning at the time the statute passed).

    - Accordingly, there is no reason to think that the word or phrase had a special meaning in 1878 when the PCA was initially enacted. We are therefore free to examine how the most current version of *Black's Law Dictionary* defines "otherwise" in the following three relevant senses (and note that the concept goes back to before the Twelfth Century): "**otherwise** *adv.* (bef. 12c) **1.** In a different way; in another manner <David Berkowitz, otherwise known as Son of Sam>. **2.** By other causes or means <to succeed by hard work and otherwise>. **3.** In other conditions or circumstances <to know him otherwise than through law practice>."

    - Under this definition, appending the term "or otherwise" to "posse comitatus" suggests a desire by Congress to seal off attempts at circumvention via the expedient of simply using the military to enforce the law without formally labeling such a use the mustering of the posse comitatus.[23]

    - The problem with the word "otherwise" is that it presumes knowledge of what the baseline object of any given statutory prohibition is attempting to accomplish. "Or otherwise" is suggestive that any means to the same rough end

[21] Sen. William Windom, on June 7, 1878, 45th Congress, 2nd session, CONGRESSIONAL RECORD Vol. 7, Part 5: 4245, https://www.congress.gov/bound-congressional-record/1878/06/07.

[22] Sen. Benjamin Hill, on June 7, 1878, 45th Congress, 2nd session, CONGRESSIONAL RECORD Vol. 7, Part 5: 4248, https://www.congress.gov/bound-congressional-record/1878/06/07.

[23] BLACK'S LAW DICTIONARY (11th ed. 2019), *available on* Westlaw.

were intended to be made part of the prohibition on using the military as a posse comitatus. But using the phrase "or otherwise" is certainly not as clear as stating, hypothetically, as follows: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force as a posse comitatus or ***in any other capacity of any kind*** to execute the laws shall be fined under this title or imprisoned not more than two years, or both."

- It is possible that Congress might have intended the phrase "or otherwise" to mean the equivalent of "in any other capacity of any kind" (the apparent interpretation Senator Windom was trying to avoid by suggesting pulling the phrase out of the statute prior to its enactment). But there is also no clear evidence to read it that broadly. We think a reasonable interpretation of "or otherwise" could be that the PCA is merely meant to "prohibit actions of the same general class as placing Army troops into a posse comitatus at the order of the local marshal."[24] Thus, "or otherwise" might have "sought to limit any implied authority of the marshals to order Army troops to help supervise the [voting] polls,"[25] for instance. Indeed, President Hayes believed that the PCA did limit his authority to use troops in such a manner.[26]

- All of this leaves us in a textual gray zone because of Congress's use of the vague term "or otherwise." And we believe one reason that the PCA has been used so infrequently is this very ambiguity in the phrase "or otherwise" means that it would be very difficult to square a prosecution in the vast gray zone with due process fair notice and the canon of statutory interpretation known as the rule of lenity.[27] The only situation that would be clear enough for prosecution would be where a U.S. Marshal or the FBI, for instance, purported to return to use of pre-PCA common law powers in order to call up members of the U.S. Marines to serve as a posse comitatus. But those situations no longer occur, so one could argue that the statute's main purpose has already been fully achieved and its applicability in the modern world is so unusual as to now approach insignificance.

---

[24] Felicetti & Luce at 99.

[25] *Id.* at 100.

[26] *The Posse Comitatus Act and Using Military as a Police Force*, Rutherford B. Hayes Presidential Library, accessed January 11, 2024, https://www.rbhayes.org/scholarlyworks/the-posse-comitatus-act-and-using-military-as-a-police-force/. [hereafter "Hayes Library *Posse Comitatus Act*"].

[27] But note that in recent years, the Supreme Court has been scaling back the force of the canon: "[E]even assuming that the rule of lenity can be invoked in this particular civil immigration context, the rule applies only if 'after seizing everything from which aid can be derived,' there remains 'grievous ambiguity. *Ocasio v. United States*, 578 U.S. 282, 295, n.8 (2016) (internal quotation marks omitted)." *Pugin v. Garland*, 599 U.S. 600, 610 (2023).

- **To Execute the Laws:** In three district court cases, the federal courts developed three formulations of an active versus a passive test to determine whether a violation of the PCA element "to execute the laws" had occurred.[28] The district courts set out these three tests of when the military is engaged in execution of the laws: "1) when civilian law enforcement officials made a direct active use of military investigators, 2) when the use of the military pervades the activities of the civilian officials, or 3) when the military is used so as to subject citizens to the exercise of military power which was regulatory, pr[o]scriptive, or compulsory in nature."[29] All of these formulations allow passive assistance in support of law enforcement without causing a PCA violation. (Please see pgs. 19-21 for a fuller explanation of this element.[30]

- The Eighth Circuit resolved the three-way split amongst its district courts in *United States v. Casper*[31] and concluded that the PCA is violated when citizens are subjected to military power that is regulatory, proscriptive, or compulsory in nature (which was the test pioneered for PCA purposes in the *McArthur* case, but which strangely traces back not to a particular federal statute analogous in any way to the PCA, but to a Supreme Court First Amendment case, *Laird v. Tatum*[32]).[33]

- **Expressly Authorized by an Act of Congress:** In the PCA Senate debate, Sen. Francis Kernan (D-NY), a co-sponsor of the PCA, claimed that: "I will say but a word to explain what I mean by 'express authority.' Unless there is some law that says that if there shall be resistance to the collection of the revenue the marshal may call in the military as a posse, I deny the right to so use it, notwithstanding the opinion of any Attorney-General."[34] Later, he admitted that "expressly" was entirely superfluous—"So far as I am concerned the words 'expressly authorized by act of Congress' mean precisely what the words 'authorized by act of Congress' mean."[35] This statement was confirmed by Sen. Benjamin Hill (D-GA).[36] Nevertheless, when the Senate voted to remove the word, the Conference report brought "expressly" back.

---

[28] *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975); *United States v. Jaramillo*, 380 F. Supp. 1375, 1381 (D. Neb. 1974); *United States v. McArthur*, 419 F. Supp. 186 (D.N.D. 1976).

[29] Elsea at 57.

[30] We pause here to note how far the PCA has taken us from the sensible era of the Norias Ranch Mexican raiders episode in our history. *See supra* nn.1 &2. If the same incident were to occur in 2024, by the time the Pentagon convened the necessary lawyers to determine whether one or more of these three tests had been satisfied, the rustled cattle would have been long gone deep down into the interior of Mexico and Americans would have suffered a serious loss of property and concomitant international lawlessness.

[31] 541 F.2d 1275, 1277 (8th Cir. 1976).

[32] 408 U.S. 1 (1972).

[33] There is a useful District Court case in D.C. that unpacks what each element of this test means: (1) regulatory power means "controls or directs;" proscriptive power either "prohibits or condemns;" and compulsory power requires "coercive force." *United States v. Yunis*, 681 F. Supp. 891, 895-96 (D.D.C. 1988) (denying motion to dismiss indictment for hijacking where the defendant was transported to the United States aboard an U.S. naval vessel).

[34] Sen. Francis Kernan, on June 7, 1878, 45th Congress, 2nd session, CONGRESSIONAL RECORD Vol. 7, Part 5: 4242, https://www.congress.gov/bound-congressional-record/1878/06/07.

[35] *Id.* at 4246.

[36] Sen. Benjamin Hill, on June 7, 1878, 45th Congress, 2nd session, CONGRESSIONAL RECORD Vol. 7, Part 5: 4246, https://www.congress.gov/bound-congressional-record/1878/06/07.

The PCA is a criminal statute under which there have only been a small number of prosecutions, none of them successful.[37] "It has been invoked with varying degrees of success, however, to challenge the jurisdiction of the courts; as a defense in criminal prosecutions for other offenses; as a ground for the suppression of evidence; as the grounds for, or a defense against, civil liability; and as a means to enjoin proposed actions by the military."[38] Also, as noted above, we believe the lack of prosecutions (which, after all, is the main purpose of a criminal statute, not to provide a defense to non-military defendants charged with other crimes) is explainable by the grave ambiguity in the phrase "or otherwise."

Related Law

Congress has also passed a related federal law. It is currently located at 10 U.S. Code § 275.[39] Section 275 is part of a larger enactment called the Military Cooperation with Civilian Law Enforcement Officials Act (and related amendments).[40] Section 275 states:

> The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

This provision of law merely requires the issuance by the Defense Department of regulations concerning the PCA, based on that statute's conventional understanding. However, as we cover below, the larger cooperation statute does permit a wide variety of forms of military-civilian law enforcement coordination, as its title suggests.[41]

A Short History of What Was Behind the Passage of the PCA

The Cushing Doctrine

Using the military for law enforcement purposes became controversial in the 1850s, when it was intermixed with the issue of slavery. Caleb Cushing, President Franklin Pierce's (Democrat) Attorney General, decided to clear up misunderstandings of posse comitatus law by issuing a legal opinion on it in 1854.[42] This opinion stated that:

---

[37] *See* Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REVIEW 383, 405 (2003) (referring to "the currently toothless criminal penalty established in the PCA").

[38] Elsea at 5.

[39] 10 U.S. Code § 275.

[40] *See* Pub. L. No. 97-86, § 905, 95 Stat. 1115 (Dec. 1, 1981). It is currently codified at 10 U.S.C. §§ 271-284.

[41] We also address two other provisions of federal law below that the President could make use of in appropriate circumstances.

[42] 6 Op. Att'y Gen. 466 (1854).

> A Marshal of the United States, when opposed in the execution of his duty, by unlawful combinations, has authority to summon the entire able-bodied force of his precinct, as a posse comitatus. This authority comprehends, not only bystanders and other citizens generally, but any and all organized armed forces, whether militia of the State, or officers, soldiers, sailors, and marines of the United States.

More specifically, it stated:

> These considerations apply as well to the military as to the civil force employed; for the posse comitatus comprises every person in the district or county above the age of fifteen years, (Watson's Sheriff, p. 60,) whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a sheriff or marshal. The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the posse comitatus. (xxi Parl. list., p. 672, 688, per Lord Mansfield.)[43]

The Cushing opinion also expanded the doctrine of posse comitatus in another way: for the first time, the federal government allowed deputy marshals, the local sheriffs, and other "officer(s) of the law" to call forth federal troops as a posse comitatus.[44] The idea that officers of the law could command the military was, of course, very unpopular with military leadership at the time.

Post-Civil War, there was increasing use of the military for law enforcement purposes in the South, especially to protect the rights of black citizens. Since the newly freed blacks voted overwhelmingly Republican, the use of the federal troops in this manner was very unpopular with Southern Democrats. And members of the Union army leadership were also opposed, as mentioned above, based on their beliefs that using troops to enforce the Reconstruction-era laws had a negative effect on army morale, readiness, and most importantly, the chain of command. These two different streams of opposition to the Cushing opinion would eventually converge to pave the way for passage of the PCA.

The U.S. House Debate

In 1877, the House Democrat majority passed H.R. 4691, the Army appropriations bill, which contained the following language:

> That no part of the money appropriated by this act, nor any money heretofore appropriated, shall be applied to the pay, subsistence, or transportation of troops used, employed, or to be used or employed, in support of the claim[s of various individuals and bodies purporting to comprise the valid government of Louisiana]; nor in the aid of the execution of any process in the hands of the

[43] *Id*. at 473.

[44] *Id*. at 468.

> United States marshal in said State issued in aid of and for the support of any such claims. Nor shall the Army, or any portion of it, be used in support of the claims, or pretended claim or claims, of any State government, or officer thereof, in any State, until the same shall have been duly recognized by Congress. Any person offending against any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned at hard labor for not less than five years or more than ten years.[45]

This legislation, a precursor of the PCA, barred the use of the Army as a posse comitatus without the assent of Congress and repealed the law that permitted the Army to maintain peace at election polls. Another rider forbade U.S. Marshals to act to enforce state election laws. This legislation was prompted by use of the Army to reinforce Republican state governments in the South, especially Louisiana,[46] and also sought to "deprive the federal government of its power to enforce the Fifteenth Amendment in the South."[47] In the end, this legislation did not become law.

The House Democrats tried again the next year. On May 13, 1878, H.R. 4867, the Army appropriations bill, was introduced by Rep. Abram Hewitt (D-NY) in the House.[48] On May 20, 1878, Rep. William Kimmel (D-MD) started off the posse comitatus debate, introducing the first version of the PCA amendment, which stated:

> it shall not be lawful to use any part of the land or naval forces of the United States to execute the laws either as a posse comitatus or otherwise, except in such cases as may be expressly authorized by act of Congress.[49]

Kimmel gave his reasoning in a lengthy floor speech, in which he said the legislation was "to restrain the Army so that it may not be used as a posse comitatus without even the color of law" because if "the standing Army of the United States can be used as a posse comitatus for the execution of the laws, we are living under a military despotism unqualified and absolute" and "[i]t matters not how many the troops, nor by whom commanded, whether a platoon by a corporal or an army by a general, whether directed by a deputy collector of revenue or the President of the United States."[50] He also tied this legislation to the Founding Fathers' fears of a standing army. Kimmel quoted numerous generals, including such well-known Northern Civil War Commanders as George Halleck and Irwin McDowell, as protesting the use of their troops

---

[45] March 2, 1877, 44th Congress, 2nd session, Congressional Record Vol. 5, Part 3: 2119, https://www.congress.gov/bound-congressional-record/1877/03/02/house-section.

[46] Elsea at 21, https://sgp.fas.org/crs/natsec/R42659.pdf.

[47] Kenneth W. Leish ed., The American Heritage Pictorial History of the Presidents of the United States, Volume 1 (New York: American Heritage Publishing Co., Inc., 1968), 496 [hereafter "Leish Dictionary at [page #]"].

[48] Rep. Abram Hewitt, on May 13, 1878, 45th Congress, 2nd session, Congressional Record Vol. 7, Part 4: 3449, https://www.congress.gov/bound-congressional-record/1878/05/13/house-section.

[49] May 20, 1878, 45th Congress, 2nd session, Congressional Record Vol. 7, Part 4: 3586, https://www.congress.gov/bound-congressional-record/1878/05/20/house-section.

[50] Rep. William Kimmel, on May 20, 1878, 45th Congress, 2nd session, Congressional Record Vol. 7, Part 4: 3579, https://www.congress.gov/bound-congressional-record/1878/05/20/house-section.

to enforce the law by a multitude of U.S. Marshals and other government officials, to appeal to Republicans in the U.S. Senate, who controlled that chamber, and Republican President Hayes.[51]

At a later date, Rep. James Knott (D-KY) introduced the second version of the PCA amendment.[52] Rep. Knott made the following statement: "this amendment is designed to put a stop to the practice, which has become fearfully common, of military officers of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws."[53]

During the full House debate, Knott and other proponents of the PCA significantly focused on the "unlawful" use of Army troops to supervise polling places, without acknowledging that federal law, both before and after the PCA, "clearly permitted the action."[54] This, of course, was part of Reconstruction in the South, which many Democrats were strongly opposed to, as part of their opposition to the granting of voting protections to African-Americans in the South; this Democrat opposition clearly prompted the PCA's introduction.[55]

Ironically, the Democrats had done a 180 degree turnabout on the subject of the PCA—"[d]uring the controversial Fugitive Slave Law years, the South leaned on the posse comitatus mechanism to ensure that escaped slaves would be returned by allowing for U.S. Marshals to call upon citizens to protect the transport of slaves to the South."[56]

As a result of Reps. Kimmel and Knott's efforts, the PCA passed on a Democrat majority party line vote in the House on May 28, 1878.[57] This version, with emphasis added, said:

> …it shall not be lawful to employ any part of the Army of the United States as a posse comitatus or otherwise ***under the pretext or for the purpose of executing the laws***, except in such cases and under such circumstances as such employment of said forces may be expressly authorized by act of Congress…[58]

The U.S. Senate Debate

[51] *Id.* at 3581. Kimmel's quotation of Generals Halleck and McDowell show the fusion of the anti-Reconstructionist strand of support for adopting the PCA and preserving the military chain of command without interruption by periodic calls by the U.S. Marshal.

[52] Rep. James Scott, on May 27, 1878, 45th Congress, 2nd session, Congressional Record Vol. 7, Part 4: 3845, https://www.congress.gov/bound-congressional-record/1878/05/27/house-section.

[53] *Id.*

[54] Felicetti & Luce at 99 ("The debate's significant focus on the 'unlawful' use of Army troops to supervise polling places, without acknowledging that federal law (before and after the Posse Comitatus Act) clearly permitted the action, highlights the initial deception surrounding the Act."). *See also* John H. Franklin, Reconstruction: After the Civil War 172 (Chicago: Univ. of Chicago Press, 1961).

[55] *Id.*; Elsea at 16; Leish Dictionary at 1:496.

[56] Hayes Library *Posse Comitatus Act*.

[57] "Roll Call Votes: House Vote #190 (45th Congress)" (May 28, 1878), GovTrack, https://www.govtrack.us/congress/votes/45-2/h190.

[58] May 27, 1878, 45th Congress, 2nd session, Congressional Record Vol. 7, Part 4: 3845, https://www.congress.gov/bound-congressional-record/1878/05/27/house-section.

Early on in the Senate debate, Sen. James Beck (D-KY), a proponent of the PCA in the Senate, echoed his House counterpart, Rep. Knott, saying that the PCA was about barring U.S. Marshals and other government officials from using the army as a posse comitatus:

> There is a clause in the Army bill, passed by a very decided majority of the House, denying the use of the Army to enforce writs in the hands of marshals of the United States or their power to call on them as a posse comitatus under the election laws passed years ago. Those laws and the practices under them have had very serious consideration in the courts of the country and elsewhere, and the Committee on Appropriations ought to look carefully to see how far the marshals of the United States and the Attorney-General of the United States or any civil officer of the United States can summon the Army of the United States as a posse comitatus to control State elections in the interest of anybody.[59]

On June 7, 1878, Senators Bayard (R-DE) and Kernan (D-NY) introduced their amended version of the PCA, which stated:

> [I]t shall not be lawful to employ any part of the Army of the United States as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section; and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $10,000 or imprisonment not exceeding two years, or by both such fine and imprisonment.[60]

This Senate amendment amended the PCA to insert the words "the Constitution or by." They later also removed the word "expressly."

The Republicans in the Senate objected to the PCA. Sen. William Windom (R-MN) stated:

> My objection to the section as amended now is that it is utterly useless legislation. It is in my judgment a very foolish expression, that can do no good but may do harm. As a matter of course, you cannot limit the power of the President as authorized and granted by the Constitution.[61]

Windom then asked the Democrats for the reasoning behind the amendment. Two Senators both responded that it was meant to prevent U.S. marshals and other government officials from using the army as a posse comitatus.

---

[59] Sen. James Beck, on June 1, 1878, 45th Congress, 2nd session, Congressional Record Vol. 7, Part 4: 3976, https://www.congress.gov/bound-congressional-record/1878/06/01.

[60] June 7, 1878, 45th Congress, 2nd session, Congressional Record Vol. 7, Part 5: 4240, https://www.congress.gov/bound-congressional-record/1878/06/07.

[61] Sen. William Windom, on June 7, 1878, 45th Congress, 2nd session, Congressional Record Vol. 7, Part 5: 4240, https://www.congress.gov/bound-congressional-record/1878/06/07.

Conference Debates

On June 15, 1878, the conference committee reports of the appropriations bill were both agreed to, which included the final language of the PCA. The final language was:

> [I]t shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress.[62]

Of interest, the House voted overwhelmingly, but with an almost two to one Republican edge in the vote, for the appropriations bill containing the final version of the PCA, meaning that Republican votes were more crucial to its final passage.[63] (The Senate voted unanimously by voice vote.) On the House floor, after final passage, Rep. Hewitt claimed of the PCA's passage:

> But these are all minor points and insignificant questions compared with the great principle which was incorporated by the House in the bill in reference to the use of the Army in time of peace…Thus have we this day secured to the people of this country the same great protection against a standing army which cost a struggle of two hundred years for the Commons of England to secure for the British people.[64]

After it made its way through Congress, President Hayes signed the appropriation bill with the PCA attached on June 18, 1878.

Summary of the Congressional Debate

To sum up, the PCA was passed into law by a coalition of: (1) Republicans and Democrats who sought to prevent the disruption to the chain of command in the military by barring U.S. Marshals, local sheriffs, and other government officials from commandeering the U.S. military; and (2) Democrats who sought to limit the use of the military to execute the laws, implicitly to end Reconstruction in the South, and thereby end the protection of African Americans in the South.

The Senate debate almost entirely revolved around the former purpose, presumably because the Republicans controlled the Senate and the Democrat sponsors of the PCA wished to appeal to them and President Hayes. Considering the final votes in each chamber, it seems likely that a majority of those voting for the final version of the PCA in the House and Senate believed that its main purpose was to prevent the disruption to the chain of command in the military by barring U.S. Marshals, local sheriffs, and other government officials from commandeering the U.S. military. And "[i]n the end, both parties depicted the act as an innocuous addition since it still

[62] June 15, 1878, 45th Congress, 2nd session, Congressional Record Vol. 7, Part 5: 4686, https://www.congress.gov/bound-congressional-record/1878/06/15/house-section.

[63] "Roll Call Votes: House Vote #230 (45th Congress)" (June 15, 1878), GovTrack, https://www.govtrack.us/congress/votes/45-2/h230.

[64] Rep. Goldsmith Hewitt, June 15, 1878, 45th Congress, 2nd session, Congressional Record Vol. 7, Part 5: 4686, https://www.congress.gov/bound-congressional-record/1878/06/15/house-section.

allowed for the use of the military when the Constitution or Act of Congress allowed" (the very point we began Part I of this paper by making).[65]

President Hayes' View of the PCA

Although he felt that the President was somewhat impeded by the PCA, President Rutherford Hayes also believed that on the whole it could not stop the President from enforcing the law using all tools available to him.[66] President Hayes wrote, in his diary entry for July 30, 1878:

> No doubt the Government is a good deal crippled in its means of enforcing the laws by the proviso attached to the Army Appropriation Bill which prohibits the use of the Army as a posse comitatus to aid United States officers in the execution of process…But in the last resort, I am confident that the laws give the Executive ample power to enforce obedience to United States process…My duty is plain. The laws must be enforced.[67]

Twice, in 1878, President Hayes asked Congress to repeal the PCA.[68] In the successive Congress, in the next Army appropriations, Hayes responded to House Democrats who sought to add another rider, explicitly preventing any federal military or civil authorities from monitoring the polls. Hayes objected, and vetoed it. He stated that the purpose of the PCA was:

> [T]hat we shall take away the idea that the Army can be used by a general or special deputy marshal, or any marshal, merely for election purposes, as a posse, ordering them about the polls or ordering them anywhere else, when there is an election going on, to prevent disorders or to suppress disturbances that should be suppressed by the peace officers of the State; or, if they must bring others to their aid they, should summon the unorganized citizens, and not summon the officers and men of the Army as a posse comitatus to quell disorders, and thus get up a feeling which will be disastrous to peace among the people of the country.[69]

But President Hayes objected to the new legislation because it would:

> [D]eprive the civil authorities of the United States of all power to keep the peace at the Congressional elections. The Congressional elections in every district, in a very important sense, are justly a matter of political interest and concern throughout the whole country. Each State, every political party, is entitled to the

---

[65] Hayes Library Posse Comitatus Act.

[66] Felicetti & Luce at 100.

[67] 41 Op. Att'y Gen. 313 (1957).

[68] Rutherford B. Hayes, *Second Annual Message* (December 2, 1878), UVA Miller Center, https://millercenter.org/the-presidency/presidential-speeches/december-2-1878-second-annual-message. Also see December 2, 1878, 45th Congress, 2nd session, Congressional Record Vol. 8, Part 1: 5, https://www.congress.gov/bound-congressional-record/1878/12/02/senate-section. In this message, Hayes noted the recommendations of the Secretary of War that the PCA provision be repealed or amended to permit employment of the Army to counter lawlessness in Arizona territory.

[69] Rutherford B. Hayes, *Veto of Army Appropriations Bill* (April 29, 1879), UVA Miller Center, https://millercenter.org/the-presidency/presidential-speeches/april-29-1879-veto-army-appropriations-bill.

> share of power which is conferred by the legal and constitutional suffrage. It is the right of every citizen possessing the qualifications prescribed by law to cast one unintimidated ballot and to have his ballot honestly counted. So long as the exercise of this power and the enjoyment of this right are common and equal, practically as well as formally, submission to the results of the suffrage will be accorded loyally and cheerfully, and all the departments of Government will feel the true vigor of the popular will thus expressed.[70]

President Hayes ultimately subscribed to the view that the President had the authority to use the military for law enforcement purposes, as grounded inherently in the Constitution and by statute in the Militia Acts (which can be considered precursors of the Insurrection Act).[71] A fact that is further borne out, when, a few months after signing the PCA into law, he also signed a broad proclamation concerning the lawless situation in the New Mexico Territory and deployed troops ***for 17 months*** to enforce local law.[72]

What the PCA Meant Until the 1970's

Immediately after the passage of the PCA in 1878, most contemporary political observers agreed that the PCA barred U.S. Marshals and others from ordering Army troops to join the posse comitatus in subordination to the U.S. Marshal (or another actor).[73] An 1882 U.S. Senate Judiciary Committee report, reflecting the earlier Senate debate, read into the congressional Record by Senator George Edmunds (R-VT), confirmed that the primary evil addressed by the PCA was a U.S. Marshal's power to call out and control the Army, but that, by contrast, the President could, essentially, use troops in Arizona as he saw fit, provided that military officers maintained command over those forces.

> The posse comitatus clause referred to arose out of an implied authority to the marshals and their subordinates executing the laws to call upon the Army just as they would upon bystanders who, if the Army responded, would have command of the Army or so much of it as they had, just as they would of the bystanders, and would direct them what to do.[74]

Many contemporary political observers did not believe the PCA really limited the power of the President. President Chester Arthur (Republican), who succeeded Hayes (after an abbreviated term by President James Garfield (Republican)) felt as Hayes did,[75] and also deployed federal

---

[70] *Id.*

[71] Paul Jackson Rice, *New Laws and Insights Encircle the PCA*, *Military Law Review* 104 (1984), 111, https://heinonline.org/HOL/LandingPage?handle=hein.journals/milrv104&div=5&id=&page=.

[72] Clayton D. Laurie & Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders 1877-1945* (Washington: Center of Military History United States Army, 1997), https://history.army.mil/html/books/030/30-15-1/CMH_Pub_30-15-1.pdf. *See id.* at 59-73, for a recounting of the deployment of federal troops to quell the civil disorder in Lincoln County, New Mexico.

[73] Felicetti & Luce at 99.

[74] Sen. George Edmunds, on May 1, 1882, 47th Congress, 1st Session, Congressional Record Vol. 13, Part 4: 3458, https://www.congress.gov/bound-congressional-record/1882/05/01.

[75] Chester A. Arthur, *First Annual Message to Congress* (Dec. 6, 1881), The American Presidency Project, https://www.presidency.ucsb.edu/documents/first-annual-message-13. *See also* December 6, 1881, 47th Congress, 1st Session, Congressional Record Vol. 13, Part 1: 28, https://www.congress.gov/bound-congressional-record/1881/12/06/senate-section (advising an exception permitting

troops after similar civil unrest emerged in Arizona.[76] This view was also echoed by a prominent contemporary military jurist, Colonel William Winthrop, who viewed the new law as "a mere impediment to the constitutional exercise of the executive power of the nation."[77]

Other observers, at the opposite end of the spectrum from Colonel Winthrop, believed that the PCA simply meant that federal troops could not be deployed domestically on any lesser authority than that of Congress or the President.[78]

Overall, the Act was considered "obscure and all-but-forgotten" by 1948.[79]

A Change in the 1970s

It was in the Wounded Knee Cases of the 1970s that the PCA was first described as a means to prevent the enforcement of civilian law by the military. In 1973, members of the radical American Indian Movement (AIM) pillaged a trading post near the Pine Ridge Reservation in Wounded Knee. These radicals then grabbed control over the entire village, prompting FBI agents, U.S. Marshals, and Bureau of Indian Affairs agents to establish a blockade around the entire village.

Soon after, federal troops were sent to the area, to advise the federal government on the situation, counsel the Justice Department on handling the negotiations, help patrol the outskirts of the village, conduct aerial reconnaissance, and provide and maintain armored vehicles and other equipment to support the blockade. About two weeks later, the AIM members tried to break out, were arrested, and were charged with various criminal violations. The accused AIM members advanced the PCA as a defense, claiming that the non-military peace officers had acted unlawfully by using the assistance of the federal troops to "execute the law," and that the charges against them should be dismissed as a consequence.

We should applaud the defense bar's creative attempt to repurpose a federal statute to help ensure that any type of criminal convictions remain consistent with the full *corpus juris*. But we should not lose sight of the irony that most PCA case law traces to attempts to use the statute to get criminal defendants off the hook and not to prosecute purported Executive Branch violators of the PCA. This is certainly not what the drafters of the PCA thought they were accomplishing. It is almost as if the contemporary meaning of the PCA would actually be better termed the PCCDA—the Posse Comitatus Criminal Defense Act.

---

the military to assist the civil Territorial authorities in enforcing the laws of the United States). *See also* Chester A. Arthur, *Second Annual Message* (Dec. 4, 1882), The American Presidency Project, https://www.presidency.ucsb.edu/documents/second-annual-message-13; and April 27, 1882, 47th Congress, 1st Session, Congressional Record Vol. 13, Part 4: 3355, https://www.congress.gov/bound-congressional-record/1882/04/27/senate-section. (same).

[76] Felicetti & Luce at 100.

[77] William Winthrop, Electronic Abridged Military Law and Precedents (1920), U.S. Army Trial Judiciary, see 866, *supra* n.150 at 867, https://www.jagcnet.army.mil/Sites/trialjudiciary.nsf/homeContent.xsp?documentId=563824A9F16305F585257B48006745EE.

[78] Robert W. Coakley, The Role of Federal Military Forces in Domestic Disorders 1789-1878 (Washington: Center of Military History, U.S. Army, 1988), 344, https://history.army.mil/html/books/030/30-13-1/CMH_Pub_30-13-1.pdf.

[79] *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948). It is worth noting that the Court of Appeals also described the applicability of the PCA as focused on removing the Army from policing polling places following the Civil War. *Id*.

In three separate rulings establishing an intra-circuit split, the district courts involved established three competing and conflicting tests to define the "execute the laws" element of the posse comitatus act:

> 1) when civilian law enforcement officials made a direct active use of military investigators (the standard adopted in the *Red Feather* case);[80]
>
> 2) when the use of the military pervades the activities of the civilian officials (the standard adopted in the *Jaramillo* case);[81] or
>
> 3) when the military is used so as to subject citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature (the standard adopted in the *McArthur* case).[82]

As we noted above, in *Casper*, the Eighth Circuit went on to adopt the definition issued in the *McArthur* case and reject the rationale of the first two cases. By doing so, the Eighth Circuit resolved its three-way district court split and rendered Eighth Circuit law uniform.[83]

These three cases have been criticized:

> The courts defined "to execute the laws," found this element unmet, and ruled against the defense. In doing so, however, the courts provided only a limited discussion of the Act and did not explicitly note the many other un-discussed elements. This proved to be a significant source of future misunderstanding.[84]

In another important case during the 1970s, *United States v. Walden*,[85] the Fourth Circuit focused on a DOD directive (which it thought of, without analysis, as being a regulation). *Walden* is a curious case that was not at all about the perceived historical evil that the PCA was designed to address. In this case, a married couple worked at a department store on the Quantico Marine base. At the time of the alleged criminal offense, the PCA applied by its text only to the Army and the Air Force, not to the Navy (or its component Armed Service, the Marines). Several Marines, together with a special investigator of the Alcohol, Tobacco and Firearms agency (then part of the Treasury Department), ran a sting operation where the married couple was induced to unlawfully sell firearms to out-of-state and minor purchasers, using middle-men straw purchasers otherwise qualified to purchase the firearms. As a result, they were convicted of the federal firearm offenses charged. They went on to appeal, arguing that their convictions violated the PCA. The Fourth Circuit, however, rejected their PCA arguments and affirmed.

---

[80] *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975).

[81] *United States v. Jaramillo*, 380 F. Supp. 1375, 1379-80 (D. Neb. 1974).

[82] *United States v. McArthur*, 419 F. Supp. 186 (D.N.D. 1976).

[83] *United States v. Casper*, 541 F.2d 1275, 1278 (8th Cir. 1976) (referring with approval to the *McArthur* test formulated in the district court), *cert. denied sub nom.*, *Casper v. United States*, 430 U.S. 970 (1977).

[84] Felicetti & Luce at 102.

[85] *United States v. Walden*, 490 F.2d 372 (1974).

Under current administrative law, the voluntary policy of the Navy at the time to make Navy forces and Marines subject to the PCA would have had no effect in helping the criminal defendants. This is for two reasons: 1) nothing in the PCA purports to delegate to any particular agency the ability to interpret the statute and thereby extend the PCA's reach via regulation, especially because doing so would extend the reach of a federal ***criminal*** statute; and 2) even if such a delegation had been made, a mere policy directive by the Navy could not have had that effect—instead, a notice-and-comment regulation doing so would, at the very least, have been required.[86]

The Fourth Circuit also failed to apprehend that it was material to the case's outcome that the ensnared defendants' conduct occurred on a military base. Military police, unremarkably, have law enforcement authority on a military base and to do so they often wield civilian law pursuant to the Assimilative Crimes Act, which generally makes the law of the State in which the military base is situated the source of law for most criminal law. This does not displace the application of federal criminal law, however. Quite the contrary, the whole purpose of the Assimilative Crimes Act is to fill in gaps in federal criminal law so that on a military base everyone knows what the comprehensive criminal code provides.

Hence, someone on a military base in Virginia like Quantico would be governed by the criminal law of Virginia under the Assimilative Crimes Act as well as by the federal criminal law (which is less comprehensive as to what it covers).[87] Moreover, given that one of the purposes of the PCA was to free military authorities from civilian law enforcement control (such as by the U.S. Marshals), when the military was being called as a posse comitatus into duty off of military bases, it would be odd in the extreme to apply the PCA to the military acting to police its own base territory—an enclave of the United States under the Enclaves Clause.[88]

Dicta in *Walden* suggests that the Constitution may prohibit use of the military in civilian law enforcement but the Court declined to reach that issue, finding use of the military instead illegal under the DOD regulations (again, though, this is a clearly erroneous legal conclusion because there were no regulations at issue, just policy guidance, and the regulations certainly could not have altered the span of the PCA, which was inapplicable at the time to the Navy and Marines).

The real rationale of the decision affirming the convictions of the firearm-selling couples was rooted in what the Fourth Circuit saw as an insufficient basis to extend the Fourth Amendment's exclusionary rule to the unique facts of the case.[89] The warrant requirement of the Fourth Amendment, of course, is not what was violated in *Walden*, so the Fourth Circuit was right that the exclusionary rule did not apply. At most, what was violated was a voluntary management

---

[86] For instance, contrast the Clean Air Act. It criminalizes a variety of acts that occur "under" the Clean Air Act and thus would embrace violations of regulations that EPA has adopted to administer the Act. *See* 42 U.S.C. 7413(c). The PCA is not a statute of that type. It is designed to prohibit federal military authorities from enforcing civilian law in certain circumstances. There is no role for each military agency to expand the criminal reach of the PCA.

[87] United States v. Brown, 608 F.2d 551, 553 (5th Cir.1979) ("The purpose of the Assimilative Crimes Act (ACA) is to provide a set of criminal laws for federal enclaves by the use of the penal law of the local state to fill the gaps in federal criminal law.").

[88] *See* U.S. Const., art. I, § 8, cl. 17.

[89] *Walden*, 490 F.2d at 376-77.

directive issued by DOD to Navy and Marines. And, as that court noted, compliance with that directive was not a personal right afforded by the PCA or the directive to the defendants.[90]

Putting the point differently, what the Fourth Circuit saw in *Walden* is that it was odd in the extreme to imagine that the PCA could form a defense to a non-PCA crime. And, in that respect, the Fourth Circuit's approach to the PCA puts it at odds with the Eighth Circuit's approach arising out of the Wounded Knee incident, which affirmed convictions, but which nevertheless recognized that in some circumstances the PCA could operate, when violated, as a defense to be prosecuted for non-PCA criminal activity.

For all of these reasons, the *Walden* case, properly understood, provides no real guide as to how to interpret and apply the PCA.

Developments in the 2000s

More recently, there has been some pushback against the conventional view of the PCA.

After the attacks on September 11, 2001, in his OLC memo, Deputy Assistant Attorney General Yoo directly made the case that:

> We conclude that the PCA does not apply to, and does not prohibit, a Presidential decision to deploy the Armed Forces domestically for military purposes.[91]

Moreover, Congress has acknowledged in the Homeland Security Act (HSA) of 2002, that it was the sense of Congress that the PCA does not bar the President from using "the Armed Forces for a range of domestic purposes, including law enforcement functions, when . . . the President determines that the use of the Armed Forces is required to fulfill the President's obligations under the Constitution. . . ."[92] The HSA also enacted Congress' interpretation of the PCA as having been "expressly intended to prevent United States Marshals, on their own initiative, from calling on the Army for assistance in enforcing Federal Law."[93] The enactment of the HSA following the 1970s cases addressing the PCA, and with full knowledge of the conclusions of those cases, reinforces our conclusions concerning the breadth of the exceptions to the PCA.

In sum, the PCA is: (1) at best quite an ambiguous enactment because the boundaries of the clause "or otherwise" are highly uncertain; (2) the PCA's main focus on banning posse comitatus usage of the military is quite narrow, as was apparent from how it was treated by the actions of Presidents in the not-too-distant wake of the statute's passage; (3) the statute largely became moribund, especially until the 1970s, when (4) the PCA entered into ironic use as a potential defense to conviction of non-PCA crimes.

---

[90] *Id.* at 477 (the DOD "policy … is for the benefit of the people as a whole, but not one that may fairly be characterized as expressly designed to protect the personal rights of defendants").

[91] Yoo to Gonzales, Oct. 23, 2001, 16, https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memomilitaryforcecombatus10232001.pdf.

[92] Pub. L. No. 107-296, 116 Stat. 2135 (codified in 6 U.S.C. § 466 (2006)).

[93] *Id.*

One sees a yawning chasm between the conventional wisdom regarding the PCA as compared to its actual text, history, and case law. Remember our early reference in this paper to NBC's quaking fear of the Biden Administration using the military at the border (which can be summed up as counseling that great restraint is needed to use the military in any fashion at the border or the shibboleth of the PCA will be violated).

But the PCA is not all that the mainstream media cracks it up to be. And that is even before we consider ***the two key provisos of the PCA***: (1) statutory exceptions (*infra* Part II); and (2) constitutional exceptions (*infra* Part III).

PART II: THE INSURRECTION ACT (BOTH OF ITS OWN FORCE, AND AS TRIGGERING AN EXPRESS EXCEPTION TO THE POSSE COMITATUS ACT) REINFORCES THE PROPRIETY OF USING THE MILITARY TO COMBAT THE BORDER CRISIS.

The Insurrection Act as a Proviso to the PCA

Here, in Part II, we show that the Insurrection Act (10 U.S.C. §§ 251-255) acts as an express exception to the PCA and that the Insurrection Act also independently reinforces the propriety of using the military at the border to stem border lawlessness.

The PCA is currently located at 18 U.S. Code § 1385.[94] To remind readers, the PCA currently states (emphasis added):

> Whoever, ***except in cases and under circumstances expressly authorized by the Constitution or Act of Congress***, willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space 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.

Part II here focuses on the statutory proviso in the PCA (leaving the constitutional proviso for Part III). We will next unpack several provisions of the Insurrection Act that are sufficient to make the point that the military can be used to stem the border crisis as the President directs:

10 U.S.C. § 252 Use of Militia and Armed Forces to Enforce Federal Authority

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia

[94] 18 U.S. Code § 1385.

> of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.[95]

Accordingly, when federal law is being violated and threatened, the President can use the Insurrection Act's Section 252, even without being asked to do so by the state legislature or Governor (as appropriate) to get violations of state law under control.

When order is threatened by "unlawful obstructions, combinations, or assemblages, or rebellion," the President could use the militia of any State and/or the armed forces to suppress such threats as long as the emergency is such that "the ordinary course of judicial proceedings" are not up to the task and make using those processes impracticable. As we look realistically at the situation in the first quarter of 2024, the law enforcement resources of both the federal and border State governments are overwhelmed by the scale and severity of the border crisis. Hence, the President can appropriately call out the militia or order deployment of the armed forces in order to enforce federal law. Finally, the Mexican cartels and the hordes of illegal aliens engage in unlawful obstruction of the law, as well as unlawful combinations to thwart the law.

10 U.S.C. § 253 Interference with State and Federal Law

Section 253 of the Insurrection Act provides as follows:

> 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—
>
> **(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;[96] ….

Accordingly, even if a state legislature does not call on the President to invoke his Insurrection Act powers or the President decides that some particular set of Mexican cartel and/or alien invasion activity is not an "unlawful obstruction[], combination[], or assemblage[], or rebellion," the President still possesses Section 253 power to suppress unlawful combinations or conspiracies. And the Mexican cartels and the horde of illegal alien invaders they facilitate engage in many domestic law violations. The cartels and their operations, like all organized crime entities, have at their heart a criminal conspiracy. Hence, the Insurrection Act power to call up the militia or use the armed forces still exists to thwart all of the foregoing.

It is important to note that the illegal aliens themselves—every single person crossing our border illegally—are participating in the unlawful combinations and conspiracies occurring at, near, and

[95] 10 U.S.C. § 252.

[96] 10 U.S.C. § 253.

after illegally crossing the border. While of a lesser degree of moral culpability than cartel and gang members that manage and monetize much of the cross-border traffic in people and illicit products, every voluntary participant in crossing America's borders illegally fits within the categories identified in this paper that provide more than enough authority for the President to utilize military forces to secure the border.

Under Section 253, all that is required is that the violations of state and federal law deprive any group of American citizens of a right, privilege, immunity, or protection named in the Constitution or secured by law. Activities like kidnapping, deprivation of civil rights (*e.g.*, destruction of property), are all engaged in by the cartels and the illegal alien invaders. What follows is the list of privileges and immunities, Supreme Court Justice Bushrod Washington famously listed in *Corfield v. Coryell*[97]:

> Protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the Government must justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefits of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State…[98]

And the cartels and illegal alien invaders serve to vitiate protection by the government; interfere with the enjoyment of life and liberty; strip people of property rights; destroy happiness and safety; and interfere with travel rights, for instance, by their kidnapping activities. As such, Section 253 readily allows the President to use the military to put an end to the border crisis.[99]

Progressive arguments against broader use of Sections 252 and 253 are weak. One such paper, by Professor Harold Hongju Koh for the American Constitution Society, essentially argues that pursuant to 10 U.S.C. § 251, States can call on the President to send in troops. But the President can only use Sections 252 and 253 to call out federal troops on his own where States are rebelling against federal authority, as occurred during the Civil Rights era during the 1960s.[100] But the text of Sections 252 and 253 is much broader than that. Professor Koh essentially argues for what he wants the Insurrection Act to say, regardless of what the law actually provides.

10 U.S.C. § 254 Proclamation to Disperse

Section 254 provides as follows:

---

[97] 6 F. Cas. 546 (1823).

[98] *Corfield*, 6 F. Cas. at 552.

[99] In general, the Supreme Court tends to avoid construing and applying the Privileges and Immunities Clauses of the Constitution but here, because Section 253 includes the term, it is unavoidable that to understand when the Insurrection Act's Section 253 can be used, the term must be given meaning and content.

[100] Harold Hongju Koh & Michael Loughlin, American Constitution Society, *The President's Legal Authority to Commit Troops Domestically Under the Insurrection Act* (Sept. 2020); *see especially id.* at 1-2.

> Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.[101]

Section 254 is a gating condition that applies to all possible uses of the Insurrection Act, which is codified in Title 10, Subtitle A, Part I, Chapter 13. That is the "chapter" to which Section 254 refers.

Passing the gating condition is not hard: The President could simply make a public proclamation (perhaps supplemented by direct communications to the Mexican government and to known cartel members to the extent that they can be found) that the militia and/or the armed forces will be used to put down cartel and invading border activity beginning in one week unless the cartels cease and desist from their unlawful activities.[102]

And if that presidential warning is not heeded, the cartels and their accomplices (including all illegal border crossers), will have brought down the ensuing consequences on their own heads.

Brief Summary of Some of the Key Provisions in the Military Cooperation with Civilian Law Enforcement Officials Act

The Military Cooperation with Civilian Law Enforcement Officials Act (MCCLEOA) is codified at 10 U.S.C. §§ 271-284. It is a far more detailed and complex statute than the Insurrection Act. In general, the reader will recognize that these provisions of law seem to be framed as if to comport with the Eighth Circuit's approach in *Casper*, even though, as we demonstrate above, the Pentagon (which no doubt had to have been involved in drafting this statute) could have taken the position that the Eighth Circuit was wrong, instead relying on the Fourth Circuit's approach in its holding in *Walden* (though not *Walden*'s dicta) in how it construed the PCA.

Section 275 of the MCCLEOA, in particular, seems designed to comport with *Casper* because, all else being equal (*i.e.*, no exercise of the President's superior Article II powers and no use of the Insurrection Act), the military is forbidden by the statute from direct participation in certain law enforcement activities.

10 U.S.C. § 271

This provision of MCCLEOA allows the military, when engaged in training or operations, to collect information and share it with federal, state, and local law enforcement. The MCCLEOA even allows the military to design operations and training to take into account the needs of civilian law enforcement officers. And Section 271 also tasks the Secretary of Defense with sharing classified information with civilian law enforcement for a variety of purposes, focused on drug interdiction.

---

[101] 10 U.S.C. § 254.

[102] The last provision of the Insurrection Act is 10 U.S.C. § 255. But that provision simply defines a "State" to include Guam and the Virgin Islands. And so that provision is irrelevant to our problems at the southern border.

10 U.S.C. § 272

This provision of the MCCLEOA allows the Secretary of Defense to allow domestic law enforcement officers the use of military bases, supplies, spare parts, other equipment, and research facilities.

10 U.S.C. § 273

This provision of the MCCLEOA allows the Secretary of Defense to have Defense Department personnel train domestic law enforcement on the use of equipment made available pursuant to Section 272, including providing expert advice.

10 U.S.C. § 274

This provision of the MCCLEOA allows the Secretary of Defense to make Defense Department personnel available to provide for the maintenance of equipment in accord with Section 272. Additionally, Defense Department personnel can be made available to operate such equipment including for these purposes:

> (A) Detection, monitoring, and communication of the movement of air and sea traffic.
>
> (B) Detection, monitoring, and communication of the movement of surface traffic outside of the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary.
>
> (C) Aerial reconnaissance.
>
> (D) Interception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with such vessels and aircraft to direct such vessels and aircraft to go to a location designated by appropriate civilian officials.
>
> (E) Operation of equipment to facilitate communications in connection with law enforcement programs specified in paragraph (4)(A).
>
> (F) Subject to joint approval by the Secretary of Defense and the Attorney General (and the Secretary of State in the case of a law enforcement operation outside of the land area of the United States)—
>
> > (i) the transportation of civilian law enforcement personnel along with any other civilian or military personnel who are supporting, or conducting, a joint operation with civilian law enforcement personnel;

(ii) the operation of a base of operations for civilian law enforcement and supporting personnel; and

(iii) the transportation of suspected terrorists from foreign countries to the United States for trial (so long as the requesting Federal law enforcement agency provides all security for such transportation and maintains custody over the suspect through the duration of the transportation).[103]

10 U.S.C. § 275

This provision of the MCCLEOA prohibits the Secretary of Defense from allowing direct participation of the armed forces "in search, seizure, arrest, or other similar activity." But even this prohibition contains a donut hole where "participation in such activity by such member is otherwise authorized by law." In other words, when constitutional authority or the Insurrection Act apply, the MCCLEOA does permit direct participation by the armed forces in law enforcement.

10 U.S.C. § 276

This provision of the MCCLEOA sensibly requires the various forms of lawful assistance the Defense Secretary provides not to adversely affect the military preparedness of the United States.

10 U.S.C. § 277

This provision of the MCCLEOA requires the Secretary of Defense to secure reimbursement from domestic law enforcement authorities for the assistance they receive unless he waives that requirement. The details of how the reimbursement scheme works are beyond the scope of this paper but suffice to say that use of the Insurrection Act or direct invocation of the President's superior constitutional authorities would have the effect of lifting any need by the Pentagon to even worry about reimbursement that would tax federal law enforcement agency budgets or the more strained budgets of border States and localities in crisis.

10 U.S.C. § 279

This provision of the MCCLEOA covers the special case of the Coast Guard, which as we have noted above, is a hybrid armed forces-law enforcement agency. In particular, it provides special directives to using Coast Guard personnel to naval vessels for drug interdiction purposes.

10 U.S.C. § 280

This provision of the MCCLEOA brings in the Attorney General and the Administrator of General Services so they can become cooperators and can run an information repository for helping state and local law enforcement officials understand the Pentagon resources available to them.

---

[103] 10 U.S.C. § 274.

10 U.S.C. § 281

This provision of the MCCLEOA allows state and local governments to purchase equipment through the Department of Defense for purposes of counter-drug, homeland security, and emergency response activities. The details of that program are beyond the scope of this paper.

10 U.S.C. § 282

This provision of the MCCLEOA allows for the Defense Secretary to provide special assistance to Justice Department law enforcement activity concerning responding to the threats of weapons of mass destruction.

10 U.S.C. § 283

This provision of the MCCLEOA allows the Defense Secretary to provide special assistance to Justice Department law enforcement activity concerning explosive ordnance, similar in some ways to how Section 282 works as to DOD assistance concerning weapon of mass destruction law enforcement efforts. But, as to such ordnance, for instance, DOD cannot generally go so far as to arrest suspects. (This provision does not consider the President's constitutional powers or the Insurrection Act, however.)

10 U.S.C. § 284

This provision of the MCCLEOA allows for the Defense Secretary to provide support for federal, state, local, ***tribal***, ***or foreign*** law enforcement activities. The provision is complex and can sometimes require a request to DOD to provide such help. So, suffice to say, that where direct constitutional authority by the President is exercised and where the Insurrection Act is brought into play, the complexities of complying with the Byzantine regime of Section 284 can be avoided.

In sum, the MCCLEOA represents further erosion of the baseline of the PCA, which is largely moribund in any event. The military can engage in a wide variety of activities at the border to solve the border crisis, fight transnational crime, and fight the drug crisis—all of which the Mexican cartels and millions of others are intimately involved in.

<u>Two Other Relevant Provisions of Federal Law</u>

Originally enacted as part of the National Defense Authorization Act for 1995, there is also 10 U.S.C. § 12406, which provides as follows:

> Whenever—
>
> (1) the United States, or any of the Commonwealths or possessions, is invaded or is in danger of invasion by a foreign nation;

(2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or

(3) the President is unable with the regular forces to execute the laws of the United States;

the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States or, in the case of the District of Columbia, through the commanding general of the National Guard of the District of Columbia.

The term "foreign nation" in Section 12406(a) is not defined. Nevertheless, the position that criminal entities acting like a nation unto themselves are sufficient to trigger the power is colorable.

Lastly, during the unrest in Washington, D.C. in the Summer of 2020, Attorney General Barr cited 32 U.S.C. § 502(f) as allowing National Guard forces to keep order in that city. Section 502(f) provides in relevant part as follows:

(f)

(1) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—

(A) without his consent, but with the pay and allowances provided by law; or

(B) with his consent, either with or without pay and allowances;
be ordered to perform training or other duty in addition to that prescribed under subsection (a).

(2) The training or duty ordered to be performed under paragraph (1) may include the following:

(A) Support of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense ….

The Barr letter to Mayor Bowser argued the following, in relevant part:

The federal response has also benefited from the assistance of DCNG [D.C. National Guard] and National Guard units from other States. The DCNG has been operating pursuant to the request of a number of responsible officials, including a request from the U.S. Park Police and joint request of the United States Marshal

> for the Superior Court of the District of Columbia and the Chief Deputy United States Marshal, District of Columbia. as authorized by D.C. Code § 49-103.[104] At the direction of the President, the Secretary of Defense also requested assistance from out-of-state National Guard personnel, pursuant to 32 U.S.C. § 502(f), which authorizes States to send forces to assist the "(s)upport of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense." I understand that the MPD [Metropolitan Police Department (of the District of Columbia)] deputized members of the DCNG and National Guard members from other States to act as special police in the District under D.C. Code § 5-129.03, and therefore, the District should have information concerning those National Guard personnel who have been operating in the city. Where necessary, the USMS [U.S. Marshals Service] also employed its authority to deputize National Guard personnel to act as deputy marshals in enforcing federal law.
>
> Consistent with the President's direction, the Secretary of Defense assigned to out-of-state National Guard personnel the mission of protecting federal functions, persons, and property within the District of Columbia. That mission includes the protection of federal properties from destruction or defacement (including through crowd control, temporary detention, cursory search, measures to ensure the safety of persons on the property, and establishment of security perimeters, consistent with the peaceful exercise of First Amendment rights); protection of federal officials, employees, and law enforcement personnel from harm or threat of bodily injury; and protection of federal functions, such as federal employees' access to their workplaces, the free and safe movement of federal personnel throughout the city, and the continued operation of the U.S. mails. Each of those units operated under the control of their respective State commanders, who have operated through a coordinated and centralized command center.[105]

We have found only one paper on the progressive side that even recognizes that Section 502(f) exists and it is from the Brookings Institution.[106] And the paper only briefly adverts to Section 502(f); it does not analyze its breadth. But surely if this provision was enough to call out troops to keep order during the Summer of 2020 riots in Washington, D.C., it could be used to quell (or assist in quelling) the far-more dangerous border crisis.

PART III: THE PRESIDENT HAS THE INHERENT CONSTITUTIONAL AUTHORITY TO USE THE MILITARY TO SECURE THE BORDER.

We next turn here in Part III to the issue of the constitutional powers the President possesses (juxtaposed and interpreted in light of the powers Congress possesses) that bear on the issue of using the military at the southern border. Again, we remind the reader that these are "double

---

[104] D.C. Code § 49-103 is a D.C.-specific provision of law that parallels in many ways the Insurrection Act. Analysis of it is beyond the scope of this paper as the District of Columbia is not on the border.

[105] Steve Vladeck, X Post (June 9, 2020) (Barr letter to Mayor Bowser is attached in picture form).

[106] Brookings Institution, *Reference Sheet on the Insurrection Act and Related Authorities* (undated, but last visited March 14, 2024).

powers" in the sense that they are (a) powers the President cannot be stripped of without violating the separation of powers (*i.e.*, without violating the Constitution, making such statutory or regulatory attempts at reducing presidential power void) and (b) these powers are expressly carved out of the PCA from the jump, as it were, meaning that the PCA leaves presidential power undisturbed. Putting the point differently, when the President wields his constitutional powers to use the military for appropriate law enforcement activities, he is also typically acting consistently with his statutory powers under the Insurrection Act, the MCCLEOA, and Section 502(f), as well.

The Constitution

The Congress

Article I, Section 1, states that:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.[107]

This is a limited grant of power, as the Constitution vests Congress only with those legislative powers that are "herein granted." "Unlike state legislatures that enjoy plenary authority, Congress has authority only over the subject matter specified in the Constitution."[108] As is well known, the federal government is one of enumerated powers only.[109]

Article I, Section 8, Clause 11 states that:

> The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water…[110]

According to his own notes of the Constitutional Convention, Founding Father and Father of the Constitution James Madison successfully moved to replace the phrase "make" war with "declare" war, "leaving to the Executive the power to repel sudden attacks." It also was changed to make clear that the conduct of war was vested exclusively in the President.[111]

---

[107] U.S. Const. Article I, Section 1.

[108] William N. Eskridge, Jr. and Neomi Rao, *Article I, Section 1: General Principles*, National Constitution Center, https://constitutioncenter.org/the-constitution/articles/article-i/clauses/749.

[109] *See United States v. Comstock*, 560 U.S. 126 (2010) ("Nearly 200 years ago, this Court stated that the Federal "[G]overnment is acknowledged by all to be one of enumerated powers," *McCulloch*, 4 Wheat. at 405, which means that '[e]very law enacted by Congress must be based on one or more of' those powers, *United States v. Morrison*, 529 U.S. 598, 607 (2000)."). However, Congress is also empowered to use broad means to accomplish enumerated powers objectives using the Necessary and Proper Clause, also know as the Sweeping Clause. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 (4 Wheat.) 316, 421 (1819).

[110] U.S. Const. Article I, Section 8, Clause 11.

[111] Connecticut originally voted against the amendment to substitute "declare" for "make," but, "On the remark by Mr. King that 'make' war might be understood to 'conduct' it which was an Executive function, Mr. Ellsworth gave up his objection, (and the vote of Cont was changed…)." United States Constitutional Convention, and Max Farrand, The Records of the Federal Convention of 1787, Vol. 2 (New Haven: Yale University Press, 1911), 319, https://www.loc.gov/resource/llscdam.llfr002/?st=pdf&r=-0.494%2C-0.033%2C1.51%2C1.51%2C0&pdfPage=325. *Cf.*, footnote 10: "The

Article I, Section 8, Clause 12 says that:

> The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; . . .[112]

Article I, Section 8, Clause 14 states that:

> The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces;[113]

This is the Rulemaking Clause, which has been interpreted to give Congress the power to prescribe the rules for the governance of the military, such as the rules for officer and enlisted-man discipline, codes of military justice, the age requirements for military service, compensation levels, and—as a modern issue—the role of the sexes in military service, as well as other such regulations.[114]

Article I, Section 8, Clause 15 (emphasis added) states that:

> The Congress shall have Power . . . To provide for calling forth the Militia ***to execute the Laws of the Union***, suppress Insurrections and repel Invasions…[115]

This is the Calling Forth Clause. The "Militia" mentioned in the Calling Forth Clause is not to be identified with the regular Army or the modern National Guard,[116] and—importantly—the Supreme Court has found the Clause not to limit the domestic use of U.S. armed forces, the federalized National Guard included.[117] But note that 10 U.S.C. § 246(b) defines the various types of militia: "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."

---

contemporary and subsequent judicial interpretation was to the understanding set out in the text." *ArtI.S8.C11.3 Declarations of War*, Constitution Annotated, https://constitution.congress.gov/browse/essay/artI-S8-C11-3/ALDE_00013589/#ALDF_00026412.

[112] U.S. Const. Article I, Section 8, Clause 12.

[113] U.S. Const. Article I, Section 8, Clause 14.

[114] *ArtI.S8.C14.1 Care of Armed Forces*, Constitution Annotated, https://constitution.congress.gov/browse/essay/artI-S8-C14-1/ALDE_00001076/.

[115] U.S. Const. Article I, Section 8, Clause 15.

[116] Jason Mazzone, *The Security Constitution*, UCLA Law Review, Vol. 53, No. 29, (2005): 142, *available at* SSRN: https://ssrn.com/abstract=880076.

[117] William C. Banks, *Providing "Supplemental Security"—The Insurrection Act and the Military Role in Responding to Domestic Crises*, Journal of National Security Law & Policy, 3 (2009), 40, https://jnslp.com/wp-content/uploads/2010/08/02-Banks-V13-8-18-09.pdf [hereafter "Banks at [page #]."]. *See also Selective Draft Law Cases*, 245 U.S. 366 (1918); *Cox v. Wood*, 247 US. 3 (1918); *Perpich v. Department of Defense*, 496 U.S. 334 (1990); Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander-in-Chief*, *Cardozo L. Rev.* 29, no. 3 (January 2008): 1091-1108. [note: not available via a publicly accessible link to our knowledge, but the article is abstracted at https://digitalcommons.wcl.american.edu/facsch_lawrev/60/].

Of course, by its very language, this clause clearly allows the Congress to use the Militia to execute the law. In 1807, Congress substituted the use of the regular armed forces in circumstances where the Militia could act.[118] Hence, the federal government does have power to use the regular military to execute the law.

Summary

Congress had the power to declare war, and as James Madison explained during the constitutional Ratifying Convention of Virginia, the power of the "purse."[119] Former Deputy Assistant Attorney General, and noted legal scholar, John Yoo, further explained this:

> Congress has a broad range of war powers …Congress has the power to tax and spend. Congress has the power to raise and support armies and to provide and maintain a navy. And Congress has the power to call forth the militia, and to make rules for the government and regulation of the armed forces. In other words, although the President has the power of the sword, Congress has the power of the purse.[120]

The President

Article II, Section 2 states that:

> The executive power shall be vested in a President of the United States of America.

Article II, Section 2, Clause 1, expressly designates:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States…[121]

This is a more substantial grant of power than the one given to Congress, as "this provision confers substantive constitutional power upon the Executive Branch to engage military forces in hostilities. The executives throughout British history as well as in the colonial governments and several of the states prior to the Constitution generally enjoyed such power."[122] It is especially important to realize that "[a]lthough Article II expressly authorizes the President to engage in other foreign relations powers (such as the making of treaties and the appointment of

---

[118] Banks at 60.

[119] "The Sword is in the hands of the British King; the Purse in the hands of the Parliament. It is so in America." James Ho & John Yoo, *The Sword and the Purse (Part 2); The President as Commander in Chief*, The Heritage Foundation, June 20, 2011, https://www.heritage.org/the-constitution/report/the-sword-and-the-purse-part-2-the-president-commander-chief [hereafter "Ho & Yoo"].

[120] *Testimony of Mr. John Yoo, Before the Senate Judiciary Committee,* 107th Congress, 3 (2002) (John Yoo, Deputy Assistant Attorney General), https://www.judiciary.senate.gov/imo/media/doc/yoo_testimony_04_17_02.pdf.

[121] U.S. Const. Article II, Section 2, Clause 1.

[122] Ho & Yoo.

ambassadors) only with the consent of Congress, it imposes no such check with respect to the use of military force."[123]

Article II, Section 3 says that the President:

> …shall take Care that the Laws be faithfully executed.[124]

This is commonly called the Take Care Clause. "The Take Care Clause is [the] major source of presidential power because it … invests the office with broad enforcement authority."[125]

Summary

After the terrorist attacks on September 11, 2001, President George W. Bush asked the Office of Legal Counsel (OLC) in the U.S. Department of Justice to provide a legal opinion on the scope of the President's authority to respond to the foreign terrorist attack. This memo evaluated the three constitutional clauses we have just reviewed concerning presidential power. In the memo, Deputy Assistant Attorney General John Yoo wrote:

> These powers give the President broad constitutional authority to use military force in response to threats to the national security and foreign policy of the United States... By their terms, these provisions vest full control of the military forces of the United States in the President. The power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces because the power of Commander in Chief is assigned solely to the President. It has long been the view of this Office that the Commander-in-Chief Clause is a substantive grant of authority to the President and that the scope of the President's authority to commit the armed forces to combat is very broad. The President's complete discretion in exercising the Commander-in-Chief power has also been recognized by the courts. In the *Prize Cases*, for example, the Court explained that, whether the President "in fulfilling his duties as Commander-in-Chief" had met with a situation justifying treating the southern States as belligerents and instituting a blockade, was a question "to be decided ***by him***" and which the Court could not question, but must leave to "the political department of the Government to which this power was entrusted."[126]

---

[123] *Id.*

[124] *Take Care Clause: Overview*, Cornell Law School Legal Information Institute, https://www.law.cornell.edu/constitution-conan/article-2/section-3/take-care-clause-overview.

[125] William B. Marshall & Saikrishna B. Prakash, *Article II, Section 3: Common Interpretation*, National Constitution Center, https://constitutioncenter.org/the-constitution/articles/article-ii/clauses/348.

[126] John C. Yoo, *Memorandum on the President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, Teaching American History, 2001, https://teachingamericanhistory.org/document/memorandum-on-the-presidents-constitutional-authority-to-conduct-military-operations-against-terrorists-and-nations-supporting-them/.

In *Hamilton v. Dillin*, the Supreme Court also said it is "the President alone, who is constitutionally invested with the entire charge of hostile operations."[127] And, as John Yoo said in congressional testimony, "the Courts have never stopped the President from deploying U.S. armed forces or engaging them in hostilities."[128]

In a memorandum, Yoo reiterated this critical point:

> The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of compelling, unforeseen, and possibly recurring, threats to the nation's security. Drawing on their experiences during the Revolutionary War and the Articles of Confederation, the Framers designed a Constitution that would vest the federal Government with sufficient authority to respond to any national emergency. In particular, the Framers were aware of the possibility of invasions or insurrections, and they understood that in some cases such emergencies could be met only by the use of federal military force. By definition, responding to these events would involve the use of force by the military within the continental United States. [129]

He later wrote:

> As a result, to the extent that the constitutional text does not explicitly allocate to a particular branch the power to respond to critical threats to the nation's security and civil order, the Vesting Clause provides that it remains among the President's unenumerated executive powers.[130]

And he wrote:

> In sum, the clauses of Article I relating to a standing army and a navy flow together with Article II's Commander in Chief and Executive Power Clauses to empower the President to use the armed forces to protect the nation from attack, whether domestically or abroad. All three of the first Presidents assumed that they possessed such authority.[131]

This included deploying the military:

---

[127] *Hamilton v. Dillin*, 88 U.S. 73 (1874).

[128] Testimony of Mr. John Yoo, Before the Senate Judiciary Committee, 107th Congress, 4 (2002) (John Yoo, Deputy Assistant Attorney General), https://www.judiciary.senate.gov/imo/media/doc/yoo_testimony_04_17_02.pdf.

[129] John C. Yoo & Robert J. Delahunty to Alberto R. Gonzales & William J. Haynes, II, Memorandum, *Authority for Use of Military Force to Combat Terrorist Activities Within the United States*, October 23, 2001, U.S. Department of Justice Office of Legal Counsel, 4, https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memomilitaryforcecombatus10232001.pdf.

[130] Yoo to Gonzales, Oct. 23, 2001, 7, https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memomilitaryforcecombatus10232001.pdf.

[131] *Id.* at 10.

> There can be little doubt that the decision to deploy military force is "executive" in nature, and was traditionally so regarded.[132]

This included directing the military:

> At the time of the Framing, the commander in chief and executive powers were commonly understood to include the executive's sole authority to use the military to respond to attacks, invasions, or threats to a nation's security. Using the military to defend the nation requires action and energy in execution, rather than the deliberate formulation of rules to govern private conduct.[133]

And doing so domestically as well:

> [T]he Framers understood the executive and commander in chief powers to give the President the full constitutional authority to respond to an attack. It was clearly understood that this authority included the power to use force domestically as well as abroad.[134]

And the courts have recognized this:

> The courts have also consistently recognized that the executive power extends to the domestic deployment of military force when necessary to safeguard civil order or to protect the public from violent attacks. Although the courts have had little occasion to review the domestic deployment of military force by the President, they have frequently been confronted with its use by Governors, who are similarly imbued with the executive power and the duty to faithfully execute the laws.[135]

Commentary and actions by the Founding Fathers echoed this belief. At the Constitutional Convention, James Madison and Elbridge Gerry successfully "moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks."[136] Alexander Hamilton stated that Article II "ought ... to be considered as intended by way of greater caution to specify and regulate the principal articles implied in the definition of Executive Power, leaving the rest to flow from the general grant of that power," and that [t]he general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President; subject only to the exceptions and qualifications, which are expressed in the instrument."[137] In the Federalist papers, he wrote "(t)he direction of war implies the direction of the common strength, and the power of directing and employing the common strength forms a usual and essential part in the

---

[132] *Id.* at 7.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 23.

[136] United States Constitutional Convention, and Max Farrand, The Records of the Federal Convention of 1787, Vol. 2 (New Haven: Yale University Press, 1911), 318, https://www.loc.gov/resource/llscdam.llfr002/?st=pdf&pdfPage=324.

[137] Alexander Hamilton, 1793, *Pacificus No. 1, in* 15 The Papers of Alexander Hamilton, 33, 39.

definition of the executive authority."[138] Another signer of the Constitution and (future) Supreme Court Associate Justice William Paterson wrote that even without statutory authorization, it would be "the duty ... of the executive magistrate ... to repel an invading foe."[139]

As the Supreme Court has noted, Article II's Vesting Clause "establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law . . . [and] the conduct of foreign affairs."[140]

The Constitution entrusts the "power [to] the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety."[141]

Other Relevant Constitutional Clauses

Article IV, Section 4, requires the federal government to protect the states, *inter alia*, against invasion. This is the Guarantee Clause:

> 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.[142]

The Guarantee Clause guarantees the citizens of the United States a republican form of government; protection against foreign invasion; and upon request by the State, protection against "domestic violence." "Domestic violence" was understood to mean insurrection or unlawful force fomented from within the state.[143]

Many of the Founding Fathers strongly believed that the federal Government must have the authority to respond to emergency situations. James Madison observed before the start of the Constitutional Convention, that a chief difficulty with the Articles was the "want of Guaranty to the States of their Constitutions & laws against internal violence."[144] Alexander Hamilton, the

---

[138] Alexander Hamilton, *The Federalist* No. 74, "The Command of the Military and Naval Forces, and the Pardoning Power of the Executive," The Avalon Project, March 25, 1788, https://avalon.law.yale.edu/18th_century/fed74.asp.

[139] *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342).

[140] *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982).

[141] *Duncan v. Kahanamoku*, 327 U.S. 304, 335 (1946) (Stone, C.J., concurring).

[142] U.S. Const. Article IV, Section 4.

[143] "'The Clause uses the term "domestic violence" in the now-archaic sense of "[i]nsurrection or unlawful force fomented from within a country," and not the modern usage meaning violence between romantic partners or within a household.' *See Domestic Violence*, BLACK'S LAW DICTIONARY (11th ed. 2022); The Federalist No. 21 (Alexander Hamilton). From *ArtIV.S4.1.1 Historical Background on Guarantee Clause*, Cornell Law School Legal Information Institute, Footnote 2, https://www.law.cornell.edu/constitution-conan/article-4/section-4/historical-background-on-guarantee-clause#fn2art4.

[144] James Madison, *Vices of the Political System of the United States*, April 1787, FOUNDERS ONLINE, National Archives, https://founders.archives.gov/documents/Madison/01-09-02-0187#:~:text=Constitutions%20%26%20laws%20against-,internal%20violence.

(future) first Secretary of the Treasury, reasoned that "there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy" and that "there may happen cases in which the national government may be necessitated to resort to force."[145] Edmund Randolph argued that "the confederation produced no security agai[nst] foreign invasion; congress not being permitted to prevent a war nor to support it by th[eir] own authority."[146]

Congressional and Presidential Actions Related to Using the Military to Enforce the Laws, Prior to the Posse Comitatus Act

During the First Congress of 1789-1791, where many of the Founding Fathers served, the Congress recognized emergency presidential authority to broadly use the military.

In 1789, in response to President George Washington's request to regularize the status of the troops in the service of the United States, Congress ratified President Washington's request to seek regular federal military forces ***to defend the frontier*** from hostile Indians, but the statute remained silent on the purposes for which the troops might be deployed.[147] James Madison seems to have understood this statutory silence to signify that when Congress raised troops for the President, he could deploy them for defensive purposes as he wished—"(b)y the constitution, the President has the power of employing these troops for the protection of those parts [of the frontier] which he thinks require[] them most."[148] President Washington and his Secretary of War Henry Knox thought that the President had the inherent power to use the troops for offensive operations as well.[149] In 1790, Congress set up 1,216 non-commissioned officers, privates, and musicians (not counting the commissioned officers to lead them), in a law that clearly assumed that the President had the inherent power to protect the frontiers.[150] It can naturally be inferred that Congress believed this authority was implicit in the office of Commander in Chief.[151]

The Founders Clearly Expected the President to Use the Military to Protect Our Borders.

In 1792, the Second Congress passed the first part of what would become the Insurrection Act. It was initially named the Calling Forth Act or Militia Act, and it allowed for federalization of state

---

[145] Alexander Hamilton, *The Federalist* No. 23: *The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union*, The Avalon Project, December 18, 1787, https://avalon.law.yale.edu/18th_century/fed23.asp; *see also The Federalist* No. 28: *The Same Subject Continued (The Idea of Restraining the Legislative Authority in Regard to the Common Defense Considered)*, The Avalon Project, https://avalon.law.yale.edu/18th_century/fed28.asp.

[146] United States Constitutional Convention, and Max Farrand, The Records of the Federal Convention of 1787, Vol. 1 (New Haven: Yale University Press, 1911), 19, https://www.loc.gov/resource/llscdam.llfr001/?st=pdf&pdfPage=47 (alterations in original).

[147] Act of September 29, 1789, 1 Stat. 95.

[148] *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875*, "Annals of Congress, House of Representatives, 1st Congress, 1st Session," American Memory - Library of Congress, 724, https://memory.loc.gov/ll/llac/001/0300/03640723.gif.

[149] David P. Currie, The Constitution in Congress: The Federalist Period 1789-1801 (Chicago: University of Chicago Press, 1997), 84.

[150] Act of April 30, 1790, 1 Stat. 119.

[151] Currie, The Constitution in Congress at 83.

militias, with language that allowed either for federalization of state militias or use of the regular military in the case of rebellion against a state government.[152]

The first section of the Calling Forth Act allowed the President to call on the militia to suppress an "insurrection in any state," even though the Constitution's Guarantee Clause specifically mentioned that the President could protect against a lesser standard of "domestic Violence" in any State.[153] The initial act was modified in 1807, to substitute out the militia and replace it with the military, and to change its name, and again the legislation was modified in 1861 and 1871.

Today (as noted above in Part II), the Act empowers the president to call into service the U.S. military and the National Guard, either: (1) when requested by a state's legislature, or governor if the legislature cannot be convened, to address an insurrection against that state (10 U.S. Code § 251);[154] (2) to address an insurrection, in any state, which makes it impracticable to enforce the law (10 U.S. Code § 252);[155] or (3) to address an insurrection, domestic violence, unlawful combination or conspiracy, in any state, which results in the deprivation of constitutionally secured rights, and where the State is unable, fails, or refuses to protect said rights (10 U.S. Code § 253).[156]

In 1794, President George Washington used the military to put down a rebellion in Pennsylvania against a federal tax on whiskey. The rebels terrorized excise agents, forced U.S. troops to surrender, and threatened to march on Pittsburgh. Legal indictments of those perpetrating the violence went unanswered. In response, Washington and Congress raised an army, and the President stated:

> Now, therefore, I, George Washington, President of the United States, in obedience to that high and irresistible duty, consigned to me by the Constitution, "to take care that the laws be faithfully executed;" deploring that the American name should be sullied by the outrages of citizens on their own Government; commiserating such as remain obstinate from delusion; but resolved, in perfect reliance on that gracious Providence which so signally displays its goodness towards this country, to reduce the refractory to a due subordination to the laws; do hereby declare and make known, that, with a satisfaction which can be equalled only by the merits of the militia summoned into service from the States of New Jersey, Pennsylvania, Maryland, and Virginia, I have received intelligence of their patriotic alacrity, in obeying the call of the present, though painful, yet commanding necessity; that a force, which, according to every reasonable expectation, is adequate to the exigency, is already in motion to the scene of disaffection; that those who have confided or shall confide in the protection of Government, shall meet full succor under the standard and from the arms of the

[152] Banks at 56.

[153] *Id.* at 40.

[154] 10 U.S. Code § 251.

[155] 10 U.S. Code § 252.

[156] 10 U.S. Code § 253.

> United States; that those who having offended against the laws have since entitled themselves to indemnity, will be treated with the most liberal good faith, if they shall not have forfeited their claim by any subsequent conduct, and that instructions are given accordingly.[157]

For a period of time, President Washington personally led the federal troops towards the rebels. The insurrection itself finally collapsed as the federal army marched into western Pennsylvania in October of 1794.[158]

The second President, John Adams (Federalist), used regular federal troops to put down the 1799 Fries Rebellion against federal authority.[159] That year, the Congress voted a direct federal tax on all real property, including land, buildings, and slaves. This tax caused widespread national resentment in Pennsylvania against the federal government. Eventually, several hundred farmers took up arms under the leadership of John Fries. At Bethlehem, Pennsylvania, Fries and his men forced, by intimidation rather than by actual violence, the release of a group of tax resisters who had been imprisoned under the custody of the federal marshal. The federal troops eventually arrested Fries, and other participants, turning them over to civil authorities to be tried for treason—Fries was convicted twice—although they were eventually pardoned.[160]

Under President Thomas Jefferson (Democratic-Republican), in 1807, the Insurrection Act was renamed and revamped, which permitted use of the regular armed forces in circumstances where the militia could act under the original Act of 1792. It then became standard practice to deploy regular troops in domestic law enforcement emergencies rather than the militia.[161] In 1807, at Jefferson's behest, Congress passed an embargo on goods to the warring nations of Europe. To enforce this embargo, the administration made use of congressional legislation to call out the military, both the Army and Navy, to enforce the law in the nation's ports. This effort was unprecedented:

> Aside from the Civil War, domestic use of the military has been targeted at localized disturbances, troops have been quickly withdrawn, and civilian government soon restored. During the embargo, Jefferson deployed military forces throughout the nation for long periods, sometimes for more than a year.[162]

---

[157] George Washington, "Proclamation of Militia Service" (September 25, 1794), UVA Miller Center, https://millercenter.org/the-presidency/presidential-speeches/september-25-1794-proclamation-militia-service.

[158] At least one commentator concluded that "the disturbance was hardly a 'rebellion,' and it was certainly not an insurrection against the government as that term was understood by the Framers." Banks at 59. But the power to tax is the power to destroy, *McCulloch v. Maryland*, 17 (4 Wheat.) 316 (1819), and the rebels resisted judicial process being delivered by a U.S. Marshal transmitting writs ordering them to comply to their attention. For these reasons, it is hard to agree with Banks that an insurrection against federal taxing and judicial processes was not involved.

[159] Editors of *Encyclopaedia Britannica*, *Fries's Rebellion*, Encyclopedia Britannica, March 17, 2020, https://www.britannica.com/event/Friess-Rebellion.

[160] Elsea at 8.

[161] Banks at 60.

[162] John C. Yoo, *Jefferson and Executive Power*, Boston U. L. Rev., Vol. 88 (2008), 452, https://www.bu.edu/law/journals-archive/bulr/documents/yoo.pdf.

In 1832, President Andrew Jackson (Democrat) issued his Nullification Proclamation, in response to South Carolina's ordinance which declared "that the several acts and parts of acts of the Congress of the United States purporting to be laws for the imposing of duties and imposts on the importation of foreign commodities … are unauthorized by the Constitution of the United States, and violate the true meaning and intent thereof, and are null and void and no law, nor binding on the citizens of that State or its officers; and by the said ordinance it is further declared to be unlawful for any of the constituted authorities of the State or of the United States to enforce the payment of the duties imposed by the said acts within the same State."[163] In the proclamation, he wrote:

> But the dictates of a high duty oblige me solemnly to announce that you can not succeed. The laws of the United States must be executed. I have no discretionary power on the subject; my duty is emphatically pronounced in the Constitution … Having the fullest confidence in the justness of the legal and constitutional opinion of my duties which has been expressed, I rely with equal confidence on your undivided support in my determination to execute the laws, to preserve the Union by all constitutional means, to arrest, if possible, by moderate and firm measures the necessity of a recourse to force; and if it be the will of Heaven that the recurrence of its primeval curse on man for the shedding of a brother's blood should fall upon our land, that it be not called down by any offensive act on the part of the United States.[164]

Under President James Polk (Democrat), from 1846 through 1848, the U.S. went to war against Mexico. The Mexican War marked the first recorded instance of a tribunal labeled a "military commission."[165] General Winfield Scott, commander of the American forces, actually created these courts without prior congressional or even presidential approval to try criminals. Scott was concerned that ***the Mexican court system had broken down***, and there was no way to punish Mexicans, or Americans, both military and civilians, from committing criminal actions including "assassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft, the wanton desecration of churches, cemeteries, or other religious edifices and fixtures, the interruption of religious ceremonies, and the destruction, except by order of a superior officer, of public or private property."[166] Thus, he declared martial law in Mexico, and issued General Orders No. 20, establishing these tribunals. Scott acted purely out of a feeling of necessity; he believed that congressional legislation, either before or after the fact, was still required. However, by the end of the war, over one hundred military tribunals had been convened in Mexico, and the U.S. Congress had still not authorized these commissions (and never would).

---

[163] Andrew Jackson, *Nullification Proclamation* (December 10, 1832), UVA Miller Center, https://millercenter.org/the-presidency/presidential-speeches/december-10-1832-nullification-proclamation#:~:text=they%20declare%20%22that-,the,-several%20acts%20and.

[164] *Id.*, *available at* https://millercenter.org/the-presidency/presidential-speeches/december-10-1832-nullification-proclamation#:~:text=excite%20your%20envy%3F-,But%20the%20dictates,-of%20a%20high.

[165] *Military Commissions Should Follow Court-Martial Standards, Glazier Says*, University of Virginia School of Law, October 27, 2004, https://www.law.virginia.edu/news/200410/military-commissions-should-follow-court-martial-standards-glazier-says [hereafter "Glazier Says"].

[166] *Military Commissions History*, Office of Military Commissions Website, accessed January 9, 2024, https://www.mc.mil/About-Us/Military-Commissions-History [hereafter "Military Commissions History"].

In 1851, President Millard Fillmore (Whig) advanced "the doctrine that his use of the Army and Navy to enforce federal law was an inherent power"[167]:

> I have to observe that the Constitution declares that "the President shall take care that the laws be faithfully executed," and that "he shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States," and that "Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." From which it appears that the Army and Navy are by the Constitution placed under the control of the Executive; and probably no legislation of Congress could add to or diminish the power thus given but by increasing or diminishing or abolishing altogether the Army and Navy.[168]

Fillmore even suggested that the President could not be restricted by the Insurrection Act's requirements, saying that that Act's condition to issue a proclamation when calling forth the militia should be dispensed with when such a proclamation might frustrate the law's purpose by alerting persons to be arrested.[169]

During the Civil War Era, President Abraham Lincoln (Republican) frequently used military troops, and the military court systems, to enforce the law throughout the entirety of the nation.

President Lincoln suspended the writ of habeas corpus, declared martial law, and aggressively created and used military commissions during the Civil War, making it "the heyday of military commissions," with thousands of military trials being held by the United States in the Southern States, in the border States, and sometimes even in loyal States.[170] President Lincoln initiated these tribunals on his own authority. President Lincoln issued General Order No. 100, Instructions for the Government of the Armies of the United States in the Field, known as the "Lieber Code," recognizing military commissions as the appropriate forum for trying "cases which do not come within the 'Rules and Articles of War,' or the jurisdiction conferred by statute on courts-martial."[171] Lincoln used a necessity argument to explain away his failure to seek prior congressional legislation to suspend the writ of habeas corpus and institute martial law. He did, however, seek, and gain, later congressional support for these actions. Among those tried before these tribunals included members of South's organized military, Southern irregular troops, Northern civilian "Copperheads," and even a former U.S. Congressman.

---

[167] Elsea at 18.

[168] James D. Richardson, ed., *President Fillmore's Message to the Senate, February 19, 1851*, A Compilation of the Messages and Papers of the Presidents 1789-1908, Vol. V, Part 1 (Bureau of National Literature and Art, 1908), Project Gutenberg, https://www.gutenberg.org/files/10951/10951.txt#:~:text=of%0Athe%20Senate%2C-,I%20have%20to%20observe,-that%20the%20Constitution.

[169] Elsea at 18.

[170] Glazier Says.

[171] Military Commissions History.

Attorney General Edward Bates defended President Lincoln's inherent authority to deploy federal troops to subdue the domestic enemies of the United States:

> It is the plain duty of the President (and his peculiar duty, above and beyond all other departments of the Government) to preserve the Constitution and execute the laws over all the nation; and it is plainly impossible for him to perform this duty without putting down rebellion, insurrection, and all unlawful combinations to resist the General Government . . . In such a state of things, the President must, of necessity, be the sole judge, both of the exigency which requires him to act, and of the manner in which it is most prudent for him to deploy the powers entrusted to him, to enable him to discharge his constitutional and legal duty—that is, to suppress the insurrection and execute the laws.[172]

The Supreme Court largely confirmed President Lincoln's actions. In *Ex parte Milligan*, decided immediately after the war, the Court approved of Lincoln's wartime use of military commissions, and held that only with the end of the Civil War emergency, with the civil courts now operating fully, and the end of the declaration of martial law, was there no longer any authority for the use of a military commission to enforce the law.[173] However, other cases demonstrated that besides the martial law requirement, these additional factors mentioned in *Milligan* did not seem to be required, since military commissions were still being used in the South (post-*Milligan*) during Reconstruction, even in areas where there was a functioning civil court. [174]

President Ulysses S. Grant (Republican) often used military force to support the congressional Radical Republicans' program of Reconstruction in the South. Congress also produced new legislation to support Reconstruction. In 1870 and 1871, Congress enacted two pieces of legislation that provided federal support for local elections and trials and criminalized interference with their duties, and (in 1871) passed the Ku Klux Klan Act, which was aimed primarily at enforcing the Fourteenth Amendment and preventing acts of violence and intimidation by individuals against new black citizens (The KKK Act amended the Insurrection Act.[175]) Grant followed up this legislation by issuing a cease and desist proclamation directed at "combinations of lawless and disaffected persons in the late theater of insurrection and military conflict"[176] and relaying instructions to military commanders in the South to authorize regular Army forces to aid civil authorities in making arrests, preventing the rescue of those arrested, and "breaking up and dispersing bands of disguised marauders, and of armed organizations, against the peace and quiet" of the citizens.[177]

---

[172] 10 Op. Att'y Gen. 74, 82, 84 (1861).

[173] *Ex Parte Milligan*, 71 US 2 (1866).

[174] Louis Fisher, "Military Tribunals, Historical Patterns and Lessons," Congressional Research Service (July 9, 2004), 25, http://www.loufisher.org/docs/mt/RL32458.pdf.

[175] National Constitution Center, Congress, Ku Klux Klan Act of 1871, An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes (Apr. 20, 1871).

[176] Ulysses S. Grant, "Message Regarding Fourteenth Amendment" (May 3, 1871), UVA Miller Center, https://millercenter.org/the-presidency/presidential-speeches/may-3-1871-message-regarding-fourteenth-amendment.

[177] *As cited by* Robert W. Coakley, The Role of Federal Military Forces in Domestic Disorders 1789-1878 (Washington: Center of Military History, U.S. Army, 1988), 310, https://history.army.mil/html/books/030/30-13-1/CMH_Pub_30-13-1.pdf.

PART IV: USE OF THE PRESIDENT'S BROAD AND DEEP CONSTITUTIONAL POWERS, COUPLED WITH HIS STATUTORY POWERS, TO GET THE SOUTHERN BORDER UNDER CONTROL DO NOT RISK CREATING A PERMANENT STANDING ARMY RULING THE INTERIOR OF THE COUNTRY.

Parts I through III of this paper forcefully demonstrate the following:

1) the Posse Comitatus Act has never been a clear enactment that even, by its own terms, seeks to significantly restrict the President's constitutional powers;

2) the PCA has become moribund and has morphed into more of a defense to criminal conduct potentially available in one Circuit that is not available in another Circuit (with the Supreme Court never receiving or deciding the questions involved);

3) by its textual terms the PCA does not restrict presidential constitutional power and includes a huge set of exceptions that embraces both a) the Insurrection Act's suite of powers as well as b) the Military Cooperation with Civilian Law Enforcement Officials Act's suite of powers; and

4) presidential authority to safeguard the interior of the Nation via use of his Commander in Chief and his Chief Magistrate powers (both singly and as they can fused together) plainly embraces efforts by the President to control the border.

The focus of the PCA, especially given the skepticism that, if the statute is read wrongly, it would intrude on presidential powers, has always focused on banning the use of the military as a posse comitatus, *i.e.,* placing military troops under the direction of U.S. Marshals. That historical problem, which threatened the military chain of command, unit cohesiveness, and defense readiness is now long solved. It is a distant memory that has no prospect of returning, particularly with the rise of professionalized and highly resourced law enforcement agencies including the Federal Bureau of Investigation (as much in need of reform as the FBI currently is) and the internal resources of the U.S. Marshal's Service.

The historical concern arising from abuse of the military in England (and elsewhere on the continent of Europe), which the Framers took as painful historical lessons they were determined to avoid in the United States, was never intended to preclude England's self-defense or France's self-defense or Spain's self-defense, where such countries were actually invaded.

And make no mistake, the recruitment and weaponization by the Mexican cartels (assisted by China) of hordes of migrants to flood our country and bring in or mask veritable boatloads of fentanyl killing our populace (to say nothing of other illegal drugs) ***is an actual invasion***. Indeed, it is an invasion made worse by the fact these lawless activities victimize not only Americans in border towns and the interior alike, but the illegal aliens themselves who are sexually trafficked or who become economic slaves to pay off the *coyotes* smuggling them into

the United States, creating revenue streams that fuel the cartels in a kind of transnational criminal perpetual motion machine.

Anyone who argues that the southern border's breakdown is sustainable and, worse yet, that it must be sustained because we cannot stop it without embarking on a slippery slope to authorizing vast standing armies roaming the countryside hundreds of miles north of the border is lying to the American people.

And, as we noted at the outset of this paper, where we recounted the Norias Ranch Raid in 1875, America acting to use both its federal law enforcement officers and its federal military forces (working in conjunction with Texas Rangers—state law enforcement officers) to protect the border did not result in a loss of American liberty. Quite the contrary, it was the appropriate antidote to foreign lawlessness abetted at the time by the Mexican army. As a result, American life north of the border—and American property rights—were safeguarded.

That more than a century-old commonsense approach can be new again. Only the political will of an energetic President is required to dust it off and reinvigorate it.

Such protections are what a federal government owes to its citizens. It is not a perversion of the Constitution to regain control of the southern border; it is instead a fulfillment of the vision of the Constitution to protect the Nation's people from dangerous foreign threats. This is the irreducible and fundamental task of having a military. And the Framers—as well as a host of past Presidents—well understood all of this.

CONCLUSION

Considering the above facts—grounded in the U.S. Constitution, law, and historical precedent—we strongly believe that the inherent constitutional authority of the President of the United States as Commander-in-Chief of the armed forces (and the militia) provides the President with all necessary authority needed to utilize the U.S. military to secure America's borders from invasion by any person, group, or force. We also believe that the Posse Comitatus Act does not conflict with or restrict that set of presidential powers, and the PCA has, in fact, ***never barred the use of the military to secure the U.S. border***, contrary to certain presumptions that appear to have taken hold in the modern era—as aided and abetted by a mainstream media that has never made a study of these questions or really shown any indication to engage in a sober appraisal of PCA law and history.

Right now, the Southern border of the United States is wide open. Since President Biden took office, the U.S. Border Patrol has observed or interdicted over 10 million illegal border crossers between ports of entry on the Southwest border.[178] In addition to people seeking employment ***at***

[178] *Nationwide Encounters*, U.S. Customs and Border Protection, *last modified* December 22, 2023, https://www.cbp.gov/newsroom/stats/nationwide-encounters.; *see also* MaryAnn Martinez, *1.5M "Gotaways" Have Slipped Into the US Under Biden — Three Times as Many as During 3 Years of Trump*, New York Post, May 15, 2023, https://nypost.com/2023/05/15/1-5m-gotaways-have-slipped-into-the-us-under-biden-three-times-as-many-as-during-3-years-of-trump/.

the expense of lower-income Americans, this number, unfortunately, also includes criminals and terrorists alike. This is nothing short of a full-blown foreign invasion. Our Constitution and our laws allow the President to use the U.S. military to enforce our laws, protect our border, and stop this invasion, before the United States suffers further consequences.

At the Center for Renewing America, we unashamedly believe use of the military to secure our border is long overdue, and objections based on concerns related to the Posse Comitatus Act are clearly unfounded. The President possesses all necessary powers under the Constitution, the Insurrection Act, the Military Cooperation with Civilian Law Enforcement Officials Act, and other congressional statutes we outline above to get the border under control.

And no slippery slope to martial law in the interior of the United States will be created if the President simply wields his constitutional and statutory powers to safeguard the interior of the country from the southern border crisis.