POLICY REPORT

BRENNAN CENTER FOR JUSTICE

Limiting the Military's Role in Law Enforcement

A Proposal to Strengthen the Posse Comitatus Act

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Brennan Center for Justice at New York University School of Law

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Introduction

In May 1992, seven U.S. Marines joined two local police officers as they responded to a domestic violence call in the waning days of the Los Angeles riots. Deployed to the city alongside several thousand other federal troops after President George H. W. Bush invoked the Insurrection Act, these Marines now found themselves playing a role for which they had little training: that of civilian law enforcement officer.

At the scene, as the police officers prepared to enter the home, someone inside fired a shotgun through the door. One of the officers shouted to the Marines, "Cover me" — a request, in law enforcement parlance, that they raise their weapons and be ready to fire if necessary. But the Marines, in accordance with their own training, took it as a request for suppressing fire. They riddled the home with more than 200 bullets. Miraculously, no one was killed.[1]

In the United States, federal military participation in civilian law enforcement like this has been rare, particularly over the past half century. The idea of tanks rolling down the streets of American towns and soldiers dressed in camouflage apprehending Americans is anathema to modern sensibilities. Some Americans might even assume that these actions are prohibited by the U.S. Constitution. Indeed, the use of federal troops as a domestic police force is in tension with both constitutional principles and long-standing American traditions, which were informed by the British government's heavy-handed use of the military to police the colonies in the years leading up to the American Revolution. Events like the Boston Massacre illustrated to the founding generation the dangers of domestic deployment of the military. But while the Constitution limits military involvement in civilian affairs in various ways, it does not entirely bar the federal armed forces from conducting law enforcement activities. A partial prohibition comes instead from a law passed by Congress in 1878: the Posse Comitatus Act.

The Posse Comitatus Act rests at the center of a web of laws, regulations, and policies that govern what the U.S. military can and cannot do domestically. It is a crucial safeguard for the preservation of both American democracy and constitutional liberties. At the same time, it is riddled with exceptions, loopholes, and ambiguities that leave it surprisingly weak. The most dangerous exception by far is the Insurrection Act, which gives the president virtually limitless discretion to use the military as a domestic police force. But there are also other ways in which the Posse Comitatus Act fails to provide robust protection against the use of federal troops for law enforcement purposes.

In reality, the principle enshrined in the Posse Comitatus Act is protected more by norms and historical practice than by the text of the law itself. Those norms and practices are significant, to be sure, and efforts to reform the law should embrace and codify them. But in an era in which we can no longer rely on tradition to constrain executive action, the Posse Comitatus Act's flimsiness poses serious risks. Rather than wait for those risks to materialize, Congress should act now to shore up the law's protections.

This report proceeds in three parts. Part I discusses the dangers of using the military for domestic law enforcement, a concern that has been prominent in American legal thinking since the nation's founding. It also explains how the Constitution approaches domestic deployment of the military, including the central role accorded to Congress. Part II lays out the array of problems that undermine the Posse Comitatus Act, from its many statutory exceptions to its lack of meaningful enforcement mechanisms. Finally, part III lays out a legislative proposal for fixing each of these shortcomings.

I. Domestic Deployment and the Constitution

In the United States, military and militia forces have long played a critical role in assisting civilian authorities in response to disasters such as hurricanes, floods, fires, and even the Covid-19 pandemic. But both centuries-long tradition and fundamental legal principles dictate that responsibility for civilian law enforcement should presumptively rest in the hands of civilian authorities.[2]

In British and American law, distrust of military involvement in civilian matters generally — and, particularly, of military enforcement of civilian laws — can be traced to Magna Carta (1215) and the Petition of Right (1628), which together guaranteed civilians the right to trial by a civilian court with a jury, rather than by a military tribunal, and outlawed the quartering of troops in private homes.[3]

As the Supreme Court has said, the "fear [of military intrusion into civilian affairs] has become part of our cultural and political institutions."[4] In *Bissonette v. Haig*, the Eighth Circuit explained why:

> Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.[5]

These are the central dangers posed by domestic deployment of the military. Civilian control over the military is essential to democracy.[6] Widespread insertion of the military into domestic affairs is a threat to that civilian control; at the most extreme, it can degrade civilian institutions and lead ultimately to their collapse and replacement with military rule.[7] That seems an unlikely prospect in the United States, but as the *Bissonette* court observes, there are other, more immediate harms as well.

Like the Marines deployed to Los Angeles in 1992, the vast majority of soldiers are trained and equipped principally to fight and destroy an enemy, one that shoots back and lacks constitutional rights. While some active-duty military personnel and a greater share of National Guard troops do receive law enforcement training, that is rarely their primary duty.[8] Moreover, fundamental differences between the professions of soldier and police officer introduce the potential for deadly miscommunication when the two are working together. It is thus not only dangerous to ask military personnel to participate in civilian law enforcement outside of extreme circumstances, but also unfair to the service members themselves. As one member of the Minnesota National Guard put it when deployed in response to the protests that followed the murder of George Floyd by Minneapolis police in 2020, "We're a combat unit not trained for riot control or safely handling civilians in this context. Soldiers up and down the ranks are scared about hurting someone."[9] Even high-level military leaders have historically been reluctant to take on civilian law enforcement missions, out of an understanding that these operations fall outside the military's core duties and competencies.[10]

Perhaps more important, allowing civilian leaders to freely use the military at home can chill the exercise of rights that define what it means to live in a free society — most notably the freedoms of expression and of assembly.[11] The right to protest is essential to democracy.[12] Yet if citizens know that every demonstration can be met with overwhelming and potentially deadly military force, many of them may choose not to protest at all. To be sure, concerns about government use of force against protesters also apply to civilian police — all the more so as they have become increasingly militarized and more heavily armed in the 21st century. But the danger, real and perceived, is heightened when it comes to the military, both because its capacity to use force remains far greater than that of civilian police and because use of force is so often a key component of a soldier's mission.

In the 1770s, abuses by the British military in the colonies gave the United States' founders firsthand experience with these dangers. The memory of British heavy-handedness is evident in the intense suspicion that the delegates to the 1787 Constitutional Convention showed not only toward domestic deployment of soldiers but also toward military power generally.[13] The convention's attendees vigorously debated whether even to provide for a national standing army or instead to rely exclusively on state militias for national defense.[14]

At the same time, the failure of the United States' first governing charter, the Articles of Confederation, offered a stark demonstration of the problems that come with a weak national government.[15] There is a risk in so limiting

a government that it is unable to respond effectively to genuine crises — a point that was forcefully illustrated by Shays's Rebellion, a violent uprising in western Massachusetts that occurred just a year prior to the Constitutional Convention.[16] With memories of that insurrection fresh in their minds, the drafters of the Constitution recognized that civilian authorities might sometimes need military assistance to suppress domestic violence or enforce the law.[17] Moreover, Shays's Rebellion suggested to the convention's attendees that, while local militias should remain the primary line of defense against both foreign attack and domestic disturbances, they could not always be counted on to handle such crises on their own. The national government would require the power to deploy the military domestically, too.[18]

The framers aimed to strike a balance, one that reflects both the risks and the occasional necessity of domestic deployment of the military. In the words of Supreme Court Justice Robert Jackson, they "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation."[19] Accordingly, the Constitution carefully divides the war powers between the president and Congress, giving the bulk of them to the legislative branch. It also ensures civilian control over the military by making the president commander in chief, giving Congress control over military appropriations, and subjecting the military — like all other parts of the government — to judicial oversight.[20]

Crucially, the Constitution gives Congress, not the president, primary responsibility for regulating the domestic activities of the military through the Calling Forth Clause, which empowers Congress to authorize the president to deploy military forces inside the country to repel invasions, suppress insurrections, or enforce the law.[21] Nothing in the Constitution expressly allows the president to use the military domestically in the absence of such authorization. Notably, the Calling Forth Clause refers only to deployment of the militia, which is today the National Guard. Since 1807, however, Congress has additionally authorized domestic deployment of the active-duty armed forces under the Insurrection Act.[22] The Supreme Court has never directly addressed whether or how this authority is compatible with the Calling Forth Clause, but its lawfulness has been generally accepted for more than two centuries.[23] The constitutional source of this authority can best be explained as a fusion of Congress's powers under the Calling Forth Clause with its general authority to govern the armed forces and its powers under the Necessary and Proper Clause — all powers that the Constitution confers on Congress, not the president.[24]

The Constitution also imposes substantive limits on the federal government's (and therefore the federal military's) domestic activities through the First, Second, Third, Fourth, Fifth, and Sixth Amendments. These protections reinforce and expand on preexisting protections in British law against the prosecution of civilians by military tribunals and the quartering of troops in private homes. Finally, underlining the framers' particular suspicion of powerful land forces that might be deployed domestically, the Constitution imposes a two-year funding limitation on the Army, but not on the Navy.[25] Taken as a whole, the Constitution establishes a framework under which the military's domestic operations are directed by the president as commander in chief, regulated by Congress, and limited by the Constitution.[26]

II. The Posse Comitatus Act and Its Problems

The Posse Comitatus Act adds a layer of protection to this constitutional foundation. It was enacted in 1878 in conjunction with the end of Reconstruction and the return of white supremacists to political power both in the former Confederacy and in Congress. Through the law, Congress sought to ensure that the federal military would not be used to intervene in the establishment of Jim Crow in southern states.[27] Despite its ignominious origins, the law itself fortifies the principle, embedded in the core of our constitutional system, that direct military participation in law enforcement should be exceptional, controlled by civilian authorities, and regulated by law.

Since 1878, the Posse Comitatus Act has been amended only by expanding its coverage. While the law initially referred only to the Army, today it covers every branch of the federal armed forces except the Coast Guard. As amended, it states: "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."[28] The term *posse comitatus* (Latin for "the power of the county") was historically used to describe a group of people mobilized by a sheriff to suppress lawlessness in a county. This is what is happening in any classic Western film when lawmen gather a "posse" to pursue outlaws. A prohibition on using federal troops as a posse comitatus is thus a prohibition on using them as agents of law enforcement.

The Posse Comitatus Act is the most important restriction on the domestic activities of the U.S. military, but it is not an especially strong one. Some of its limitations are immediately apparent. To start, the law allows for military participation in law enforcement when doing so is "expressly authorized by . . . [an] Act of Congress." There are many of these statutory exceptions, including, most significantly, the Insurrection Act — an exception so broad that it virtually swallows the rule.[29] In addition, the Posse Comitatus Act applies only to the federal armed forces.[30] By contrast, members of the National Guard, as armed forces of the states, territories, and the District of Columbia, are subject to its limitations only when they are called into federal service, even though there are circumstances in which the National Guard may act at the president's direction without having been federalized.[31]

There are also vexing ambiguities in the Posse Comitatus Act. Most notably, it applies only when the military's activities constitute "executing the law." This is not itself unreasonable; domestic military operations such as disaster relief do not raise the same concerns as those that involve law enforcement. But what activities count as "executing the law" is less clear than it should be. Another ambiguity stems from the law's allowance for constitutional exceptions, which introduces confusion given that the Constitution contains no *express* authorizations for the president to use the military to enforce the law without congressional authorization.[32]

Finally, the Posse Comitatus Act lacks adequate provisions for its enforcement. It provides only for criminal penalties, a blunt instrument that the Department of Justice has historically been unwilling to wield.

Exceptions and Loopholes

Over the past 150 years, Congress has enacted a multitude of exceptions to the Posse Comitatus Act, substantially reducing the reach of the law. In addition, the complex set of laws that govern the National Guard have enabled the deployment of Guard troops for domestic law enforcement in ways that Congress almost certainly did not anticipate.

Statutory Exceptions

The first and most obvious weakness in the Posse Comitatus Act is that there are too many statutory exceptions that collectively sweep far too broadly. Twenty-six distinct statutes expressly authorize the military to execute the law in one circumstance or another.[33] Several of these laws are woefully outdated and plainly unnecessary, such as 16 U.S.C. § 593, which allows the president to use the military to prevent the destruction of federal timber in Florida, or 48 U.S.C. § 1418, which permits the president to use the military to protect owners' rights on guano islands — uninhabited possessions claimed by the United States that supplied the nation's fertilizer for part of the 19th century. These provisions could be repealed without any harm to the president's ability to respond to domestic crises.

But the single most potent and expansive statutory exception to the Posse Comitatus Act is the Insurrection Act, which gives the president almost boundless discretion to use the military as a domestic police force without

any effective means for Congress or the courts to intervene in cases of abuse.[34] While a full analysis of the problems with the Insurrection Act is beyond the scope of this report, the Brennan Center previously published such an analysis alongside a comprehensive reform proposal.[35] In short, by invoking the Insurrection Act, the president can essentially flip a switch that turns off the Posse Comitatus Act — for virtually any reason and for any length of time, given the vague and overbroad criteria for deployment and the likely unavailability of judicial review. As a result, any reforms made to the Posse Comitatus Act, no matter how robust, will be incomplete and ineffective without an overhaul of the Insurrection Act.

Loopholes Involving the National Guard

There are also loopholes in the Posse Comitatus Act's coverage that function almost like statutory exceptions. These loopholes derive from a combination of recent changes to old statutes, quirks of history, and the fact that an entire component of the U.S. armed forces, the National Guard, is simply not covered by the law most of the time.

The Structure and Function of the National Guard

The National Guard is the modern incarnation of the state militias that both predate and are sanctioned by the Constitution.[36] A unique creation of both federal and state law, the Guard usually operates under state or territorial command and control. But because it can be called into federal service, it is governed principally by federal law and subject to comprehensive regulation by the Department of Defense through the National Guard Bureau. The federal government also provides the vast majority of the Guard's funding. Unlike the active-duty armed forces, most National Guard personnel are not full-time soldiers. The Guard is instead a reserve component of the U.S. military whose members lead normal civilian lives when they are not called up for duty. There are 54 National Guards, one for each state as well as for Puerto Rico, Guam, the U.S. Virgin Islands, and the District of Columbia. Each state or territory's Guard is divided into an Army National Guard and an Air National Guard, which correspond to the active-duty Army and Air Force, respectively.[37]

Members of each state and territory's Army and Air National Guard (excluding those of the District of Columbia) generally serve under their governor's command and control. When under state or territorial control, they are not "part of the Army . . . [or] the Air Force" for the purposes of the Posse Comitatus Act and are therefore not bound by it. Only when Guard personnel have been "called into federal service," or "federalized," by the president do they become subject to the law.[38] But while the question of whether the Guard has been called into federal service is binary, there are in fact three different types of "duty status" in which members of the Guard may serve at any given moment. Understanding these duty statuses is crucial to understanding the loopholes in the Posse Comitatus Act.

First, in "State Active Duty" status, National Guard troops carry out a state- or territory-defined mission at that jurisdiction's own expense, serving under the command and control of their state or territorial governor.[39] In these operations, governors are largely free to use their Guard forces as they see fit. Rightly or wrongly, the Posse Comitatus Act's drafters — and the framers of the Constitution before them — were concerned principally with restraining the president's power to use the military at home against Americans. In keeping with Anglo-American legal tradition, they were less concerned about regulating local use of the militia. To this day, neither the Posse Comitatus Act nor any other federal law substantively restricts how states may use their own National Guard forces when in State Active Duty status — except, of course, that Guard personnel are subject to the general rule that state actors may not violate constitutional rights or federal laws. Moreover, state and territorial laws generally put few if any restrictions on governors' use of their National Guard forces, including for law enforcement purposes; no state has adopted its own equivalent to the Posse Comitatus Act.

Second, in "Title 32" (or "hybrid") status, National Guard troops remain in principle under the command and control of their governor, but they are paid by the federal government and receive federal benefits.[40] Title 32 status is used to fulfill the Guard's federally mandated training requirements, but it also allows Guard troops to perform "other duty" that serves no training purpose, including "operations or missions" requested by the president or secretary of defense.[41] In addition, Title 32 covers certain state-initiated operations that Congress has specifically authorized and funded, such as drug interdiction programs.[42] Even though Guard members in this status may be performing fundamentally federal missions on the federal payroll, they are not subject to the Posse Comitatus Act because they remain, at least nominally, under state command and control.[43]

Finally, when federalized, National Guard units operate in "Title 10" status.[44] In this status, National Guard personnel serve under federal command and control, are paid with federal funds, receive federal benefits, and are used for federal missions, including deployment overseas. Effectively, they temporarily become part of the federal military, just as though they were full-time members of the Army or Air Force. As a consequence, federalized National Guard personnel are bound by the Posse Comitatus Act unless a statutory exception applies.

The DC National Guard's Anomalous Command Structure

This framework governs every National Guard except for the District of Columbia National Guard, which reports at all times to the president.[45] This is not a function of the

District's lack of statehood; the governors of Puerto Rico, Guam, and the U.S. Virgin Islands are all the commanders in chief of their respective territories' National Guards. Instead, presidential control over the DC Guard is a relic of history. Established in 1802, the DC Guard is far older than the District's current local government, which was not established until the 1970s, when Congress ceased directly governing the city. At the time of the DC Guard's creation, there was no mayor acting as the local chief executive, and Washington's population was less than 15,000; the main function of the DC National Guard was to protect the federal government itself.[46] Accordingly, Congress designated the president as its commander in chief.[47]

Under Executive Order 11485, issued in 1969, the president delegated authority over the DC Guard to the secretary of defense.[48] In turn, the secretary of defense delegated this authority by memorandum to the secretaries of the Army and Air Force for the DC Army National Guard and DC Air National Guard, respectively.[49] The secretaries exercise this authority through the commanding general of the DC Guard, who is appointed by the president and fulfills a role similar to that of adjutant general, the title for the military commander of state and territorial National Guard organizations.[50] As a matter of practice, whenever the mayor of Washington "desires civil support from the D.C. Guard," she submits a request to the commanding general, who passes it on to the secretary of the Army.[51] The head of Washington's elected local government has no other means of calling out the district's own militia in an emergency.

Even though the DC National Guard is always under the president's command and control and always federally funded, the Department of Justice has long maintained the legal fiction that it may nonetheless operate in a non-federal "militia" status, in which it is not subject to the Posse Comitatus Act.[52] While the validity of this interpretation has never been adjudicated by a court, in practice it means the president can use the DC Guard for law enforcement without having to invoke an exception to the Posse Comitatus Act — a possibility that exists in direct conflict with the law's core purpose.

The Dangerous Overbreadth of Section 502(f)

The second major loophole in the Posse Comitatus Act's coverage is created by 32 U.S.C. § 502, the primary statute that authorizes National Guard operations in Title 32 status. As explained above, when operating in Title 32 status, the Guard at least nominally remains under state command and control but is paid with federal funds, and its members receive federal benefits. This hybrid status was created in the 1950s to allow Congress to cover the cost of the substantial training requirements it imposes on states' National Guards. When used for training, it does not animate any of the concerns raised by military participation in law enforcement. But over time, the purposes for which Title 32 status may be used have expanded to include operational missions, including those undertaken at the president's direct request. These missions resemble in several significant ways the federally controlled missions that the Posse Comitatus Act is designed to regulate.

As befits a statute concerned primarily with training, the bulk of Section 502 is devoted to "required drills and field exercises" — the particulars of how often and in what manner Guard units are required to train each year.[53] Subsection (f), however, is not so limited and contains two provisions that together undermine the Posse Comitatus Act. Section 502(f)(1) was added in 1964, a decade after the original Section 502 was enacted.[54] It allows National Guard personnel to be ordered to perform "training *or other duty*" beyond the training regime established by the preceding provisions of the statute.[55] Section 502(f)(2)(A) was added in 2006.[56] It provides that this "training or other duty" may include "support of operations or missions undertaken by the member's unit *at the request of the President or Secretary of Defense*."[57]

The Department of Justice takes the position that "other duty" can essentially mean any duty — that under Section 502(f)(2)(A), National Guard troops provided by a willing governor may be used to perform any mission the president could request, including ones that involve civilian law enforcement activities.[58] There is a strong argument, however, for reading Section 502(f) more narrowly. Prior to 1964, the use of Title 32 status — and the federal funding that came with it — was limited to the Guard's regular training regime established in Section 502(a). While "other duty" is an open-ended phrase, the legislative history of the adoption of Section 502(f) in 1964 suggests that it was intended principally to provide funding and authorization for training-related duties beyond the specific exercises cited in the law.[59] Consistent with this intent, for the next 25 years there was no move to use this provision for non-training missions.

Only in 1989 did Congress begin to expand the contours of what "other duty" could mean. Lawmakers added a new provision to Title 32, Section 112, that authorized the National Guard to undertake counter-drug operations under Section 502(f), but only pursuant to state-created plans that had been reviewed and approved by the Department of Defense.[60] In 2004, in the aftermath of the September 11 attacks, Congress added a new chapter to Title 32 that authorized National Guard personnel operating under state control to be federally funded under Section 502(f) while engaging in certain "homeland defense activities."[61]

Over the next two years, state governors had difficulty obtaining Department of Defense approval (and therefore federal funding) for homeland defense activities due to "cumbersome administrative requirements" combined with the limitation that missions under this new chapter

must respond to a "threat . . . against the United States" as a whole.[62] In 2005, Hurricane Katrina exposed serious shortcomings in the federal government's ability to respond to natural disasters. The next year, Congress responded by expanding the potential non-training uses of Section 502(f), this time by amending the provision itself rather than adding a new provision to Title 32. The newly added subsection (2)(A), which authorizes National Guard support of operations or missions "at the request of the President or Secretary of Defense," was undoubtedly meant to simplify and ease the process by which National Guard forces could perform domestic operational missions under Title 32.[63] However, although the legislative history for the 2006 amendment does not clearly identify the exact bounds of what Congress intended to authorize, it does suggest that Congress was concerned primarily with facilitating homeland defense activities authorized elsewhere in Title 32 and National Guard deployments after natural disasters like Katrina.[64]

There is thus a strong argument that Section 502(f) was intended to encompass activities already authorized under other provisions of Title 32 as well as traditional Guard missions like natural disaster response, rather than to create an open-ended authorization for the National Guard to perform any task requested by the president or secretary of defense (albeit under their governor's command). This narrower reading would comport with basic principles of statutory interpretation. In *Whitman v. American Trucking*, the Supreme Court explained that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."[65] It is highly unlikely that Congress would have inserted such a sweeping deployment authority into a provision of the law concerned principally with training exercises.

Even if Section 502(f) is read more broadly, the president or secretary cannot directly order National Guard personnel to duty under Section 502(f), and a governor is under no obligation to acquiesce to a request for troops.[66] That, and the fact that the Guard troops involved remain under state command and control, arguably support exempting Section 502(f) operations from the Posse Comitatus Act, which is designed to regulate federal military operations.

Yet the president's need to find one governor willing to provide troops is a trivial barrier when there are 53 of them, any number of whom may be members of the president's party and eager to offer their portion of the National Guard's roughly 450,000 troops. Fundamentally, all Title 32 missions are to some degree federal in that their purpose is either federally mandated (training), federally authorized (drug interdiction and homeland defense), or federally requested ("other duty" under Section 502(f)).[67] For Section 502(f) deployments, apart from command and control and the fact that the Guard troops involved are not subject to the Uniform Code of Military Justice, all aspects of these operations can be — and often are — federal. The law allows the federal commander in chief to request deployment of military personnel for a federally defined mission that serves a federal purpose and is paid for using federal funds. The Department of Defense also defines important parameters of these missions, such as whether the Guard personnel involved may be armed, reflecting a degree of federal control not present in State Active Duty operations.[68] Given that the purpose of the Posse Comitatus Act is to limit federally initiated and controlled domestic military operations, the balance of factors tips toward extending the law's coverage to Section 502(f) deployments.

When combined, the DC National Guard and Section 502(f) loopholes can result in the president directly commanding an army of thousands, entirely free from the constraints of the Posse Comitatus Act. This is exactly what happened in June 2020, when President Donald Trump deployed DC National Guard troops in Washington, DC, to suppress largely peaceful protests that erupted after the police killing of George Floyd.[69] As the permanent commander in chief of the DC Guard, Trump was able to deploy Guard troops against protesters without the mayor's consent. He could use these troops for law enforcement purposes without regard to the Posse Comitatus Act thanks to the Department of Justice's conclusion that the DC Guard can operate in a non-federal "militia" status. At the same time, Trump relied on Section 502(f) to request the deployment of National Guard troops from 15 states into the city. Eleven governors acceded, sending thousands of troops into Washington even though its mayor had not requested them or otherwise consented to their deployment. And because these out-of-state forces were acting in coordination with the DC Guard, they were all, in practice, reporting up a federal chain of command to the president.[70]

The 21st-Century Evolution of the National Guard

In considering whether the Posse Comitatus Act should be extended to cover a wider variety of National Guard deployments, such as those involving the DC Guard or those occurring under Section 502(f), it is worth bearing in mind how the National Guard has changed in recent decades. In the past, there was a notable cultural distinction between the active-duty armed forces and the National Guard. Members of the active-duty armed forces are professional soldiers at all times, ready at a moment's notice for deployment to combat foreign enemies. Guard members, on the other hand, were traditionally seen as "citizen soldiers" who held ordinary jobs during the week and trained on weekends. The Guard, together with the Reserve Title 10 forces, constituted a reserve force that could be called up to fight if the United States were invaded

or became involved in a conflict requiring an extraordinary mobilization. Otherwise, Guard members could expect to perform tasks such as disaster relief or search-and-rescue missions to help their own communities.

In the 21st century, however, this cultural distinction between the Guard and active-duty armed forces has become blurred. Since the end of the draft after the Vietnam War, and especially since the late 1990s, the Department of Defense has transformed the National Guard and the other Reserve components from reserve forces into operational units as part of the Pentagon's Total Force Policy.[71] This effort aims to integrate all of the U.S. armed forces into a single, seamless whole.[72] While Guard members continue to perform vital services in their communities, they have increasingly been called on to serve and fight for long periods overseas, shoulder to shoulder with active-duty troops.[73] As early as 2010, the general in charge of the National Guard's domestic operations said that a decade at war had transformed the Guard from a "strategic reserve" into "a battle-tested, hardened organization . . . with many combat veterans."[74] Nearly half of U.S. troops deployed to Iraq and Afghanistan were members of the National Guard or reserves; more than 1 million Guard members have been deployed overseas in the past two decades.[75] By comparison, fewer than 1 percent of U.S. troops deployed to Vietnam were members of the National Guard, and during the Gulf War, Guard units were kept in support roles away from the front lines.[76]

Given the degree of federal regulation over the National Guard and the force's changing role over the past 20 years, the concerns at the heart of both the Posse Comitatus Act and constitutional restrictions on the military's domestic activities seem more and more applicable to the National Guard, insofar as it is used to perform law enforcement functions. The Guard is an increasingly national entity, one that resembles far more closely the kind of standing army that the framers feared than it does the local militias with which they were familiar. Particularly when the Guard is operating in Title 32 status, performing federal missions at the direction of the president or secretary of defense and not local missions defined by locally accountable leaders, the rationale for exempting the Guard from the Posse Comitatus Act is tenuous.

Ambiguities

In addition to these exceptions and loopholes, the Posse Comitatus Act is weakened by its ambiguous scope. There are two main sources of that ambiguity: lack of clarity about what activities may be characterized as law enforcement and the law's cryptic reference to constitutional exceptions.

What Is, and Is Not, Civilian Law Enforcement

The Posse Comitatus Act prohibits the involvement of federal military personnel in domestic law enforcement, yet what constitutes law enforcement — or in statutory terms, what qualifies as "executing the law" — is not always apparent. Soldiers making an arrest or searching a home would undoubtedly be executing the law.[77] A military helicopter crew conducting search-and-rescue operations after a hurricane plainly would not be. But other jobs that the military might be asked to perform fall somewhere in between, where the line separating law enforcement and non–law enforcement is less clear.

The Department of Defense has issued policy guidelines to interpret and clarify the law for members of the armed forces. For the most part, these guidelines take a broad view of what activities constitute law enforcement, including making arrests, conducting searches, using or threatening to use force, collecting evidence, performing crowd control, and staffing checkpoints. However, they exempt federal forces operating military equipment, such as surveillance aircraft and drones, in support of law enforcement operations, an activity that can play a critical role in modern law enforcement.[78]

Moreover, the guidelines assert a broad license for the armed forces to participate in civilian law enforcement when doing so furthers a primarily military or foreign-affairs purpose "regardless of incidental benefits to civil authorities."[79] Although this claim, referred to as the Military Purpose Doctrine, has no clear basis in statute, federal and state courts have consistently agreed that "as long as the primary purpose of an activity is to address a military purpose, the activity need not be abandoned simply because it also assists civilian law enforcement efforts." Courts have been particularly willing to apply the Military Purpose Doctrine when it comes to maintaining order on military bases, allowing military personnel to, for example, arrest civilian lawbreakers who have fled onto a military installation and turn them over to civilian police without violating the Posse Comitatus Act.[80] Yet when it comes to off-base cooperation between military forces and civilian police, courts have been inconsistent in their application of the Military Purpose Doctrine. Some courts have required nothing more than a logical military nexus, while others have insisted on a clear, specific military connection.[81] The outer bounds of what is permitted by the Military Purpose Doctrine are thus unclear.

Other than in cases implicating the Military Purpose Doctrine, the federal courts have had few opportunities to explore the full range of conduct covered by the Posse Comitatus Act. In a series of cases arising out of the 1973 Indigenous rights protest at Wounded Knee, South Dakota, the courts determined that, at the very least, the military has been used as a police force in violation of the law whenever (1) civilian law enforcement officials have

made a "direct active use" of military investigators to "execute the law"; (2) the use of the military has "pervaded the activities" of the civilian officials; or (3) the military has been used so as to subject "citizens to the exercise of military power which was regulatory, prescriptive, or compulsory in nature."[82] Taken together, these criteria might appear to capture a wide range of potential activities, but the courts that have applied them have almost always found that the law was not violated — even in cases where military personnel acted as undercover agents on behalf of civilian police.[83] The executive branch has also argued that activities such as conducting general surveillance, assisting with the inspection of vehicles entering the United States, and monitoring Customs and Border Protection license plate readers and other electronic systems at ports of entry and checkpoints fall outside the law's prohibition, even if these activities form a critical and pervasive part of a law enforcement operation.[84]

Within this gray zone, and partly in an effort to clarify the military's authority to assist civilian law enforcement operations after the Wounded Knee cases, Congress has authorized specific kinds of indirect military support to law enforcement while prohibiting military forces from conducting activities that courts and the executive branch have deemed "core" law enforcement functions, such as executing warrants and making arrests.[85] But whether these laws should be viewed as statutory exceptions to the Posse Comitatus Act or as falling outside the law's prohibition because they do not permit direct participation in those core law enforcement activities is itself a source of ambiguity. Moreover, permitting a wide range of activities characterized as indirect "support to law enforcement," as opposed to direct "participation in law enforcement," has made military involvement in civilian law enforcement in certain areas, especially at the U.S.–Mexico border, routine.[86]

Whether Constitutional Exceptions Exist

Another ambiguity is created by the Posse Comitatus Act's reference to constitutional exceptions. The law allows for military participation in law enforcement when "expressly authorized by the Constitution or Act of Congress." Yet nothing in the text of the Constitution expressly authorizes the president to deploy the military inside the United States absent congressional authorization (i.e., without an "Act of Congress") under any circumstances, let alone for domestic law enforcement. Instead, the Calling Forth Clause empowers Congress "to provide for" — that is, to regulate and control the authority and procedures for — "calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[87] As Justice Jackson explained in the landmark 1952 Supreme Court decision in *Youngstown Sheet & Tube Co. v. Sawyer*, the Calling Forth Clause was "written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic." It thus "underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy."[88] Instead of giving the president permanent domestic deployment authority, the drafters of the Constitution empowered Congress to grant or retract that power as it saw fit. In this way, the Calling Forth Clause forms "part of Article I's broader structural check on the President's domestic emergency power."[89]

The absence of any express constitutional authority for the president to use the military for domestic law enforcement raises an obvious question: why did Congress include language in the Posse Comitatus Act that suggests such an authority exists? The legislative history from 1878 indicates that the reference to constitutional exceptions was included as part of a compromise to secure passage of the bill. The House version of the bill included no constitutional exception, while the Senate version allowed for constitutional exceptions that were either express or implied. This difference reflected a disagreement between the two chambers as to the scope of the president's implied constitutional authority to use the military domestically, and also as to whether the bill should (or must) acknowledge that authority. In conference, the House and Senate managers settled on the current language, recognizing only express constitutional exceptions, not because they believed any such exceptions existed but as a way to allow both sides to save face.[90]

Nonetheless, the executive branch has long claimed that constitutional exceptions to the Posse Comitatus Act do exist.[91] For example, Department of Defense guidelines claim an "emergency authority" under which federal military commanders may "quell large-scale, unexpected civil disturbances" when communication with the president is impossible and doing so is necessary to prevent significant loss of life or wanton destruction of property, or when state and local authorities are unable or unwilling to protect federal property and functions.[92] Although the current policy statements that assert this authority offer no legal justification for it whatsoever, an earlier iteration, set forth in long-standing regulations that were rescinded in 2018, argued that the authority was grounded in the Constitution.[93] Yet it appears nowhere in the text of Article II. If such authority exists at all (no court has ruled on the question), it is implicit or inherent rather than express. Regardless of how the Department of Defense characterizes this or other claimed constitutional authorities, they are not the express exceptions sanctioned by the Posse Comitatus Act, but rather situations in which the executive branch believes, for whatever reason, that it is not bound by the Posse Comitatus Act.

The Supreme Court's ruling in *Youngstown*, and particularly Justice Jackson's opinion mentioned above, governs

the proper analysis of such claims.[94] Jackson's opinion established the doctrinal framework for evaluating executive actions when the president and Congress may disagree, particularly when those disputes implicate the two branches' war powers.[95] Under this framework, the degree of deference that the courts show to presidential actions varies depending on whether the president is acting in accordance with or contrary to the will of Congress.

A deployment of federal troops to execute the law on the basis of a claimed exception to the Posse Comitatus Act that is not expressly recognized in either the Constitution or a statute would, by definition, be contrary to Congress's will as expressed in the text of the law. It would therefore fall within the third zone of Jackson's *Youngstown* framework, where the president's powers are at their "lowest ebb" and presidential actions are rarely upheld.[96] This zone reflects a general rule of constitutional law: that laws passed by Congress within the scope of its constitutional powers, such as the Posse Comitatus Act, "disable" contrary executive action.[97] This rule may be overcome only when a "conclusive and preclusive" grant of presidential power in the Constitution authorizes the president's action.[98] If the Constitution gives Congress any powers in that area, however, Congress's will must prevail. When it comes to domestic deployment, the president's powers are anything but conclusive and preclusive. Indeed, the Calling Forth Clause and other relevant constitutional provisions establish a distribution of power that decisively favors Congress.[99]

Of course, the president as commander in chief must be responsible for directing any military operation, whether it takes place overseas or inside the United States.[100] But as Jackson noted in *Youngstown*, "the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy" would mean the president was also "Commander-in-Chief of the country, its industries and its inhabitants."[101] The Commander-in-Chief Clause certainly grants something more than an "empty title," but it is not a source of domestic regulatory authority.[102] On the contrary, the Calling Forth Clause — and the absence of any similar grant of power to the president — suggests that any authority for the president to deploy the military domestically can come only from Congress.

There is one established exception to the foregoing analysis: if a foreign enemy launches a sudden attack inside the United States, it is generally understood that the president may act to repel that attack, even if Congress has not given its blessing.[103] The Supreme Court has recognized this power, which would likely extend to a major terrorist attack as well as a more traditional military attack by a foreign adversary, but has not recognized any similar power with respect to domestic crises that do not involve such attacks.[104]

Congress, for its part, enacted a resolution in 2002 that included a "finding" that the Posse Comitatus Act does not apply when "the President determines that the use of the Armed Forces is required to fulfill the President's obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency." Yet the primary function of this resolution was not to weaken the Posse Comitatus Act but to reaffirm its "continued importance" in the face of post-9/11 pressures to increase the military's involvement in domestic law enforcement.[105] A finding within a resolution expressing the "sense of Congress" as to the Posse Comitatus Act's importance cannot be read to amend that law in a way that lowers the bar for domestic deployment.

There is, in short, little reason to believe that any constitutional exceptions to the Posse Comitatus Act exist, apart from whatever degree of military participation in law enforcement may be necessary to repel an invasion or respond to a "sudden attack" by a foreign adversary.[106] Furthermore, no constitutional exception is necessary: for more than 230 years, Congress has provided ample authority to the president — indeed, far more than is necessary — to respond to domestic crises. Proposed reforms to the Insurrection Act would preserve the core of that authority while ensuring that such activities are subject to appropriate restrictions and meaningful oversight. Assertions of constitutional exceptions to the Posse Comitatus Act are, at best, a solution in search of a problem.

The Enforcement Problem

Finally, the Posse Comitatus Act lacks sufficient mechanisms to enforce its prohibition. Although it is a criminal statute, no one has ever been convicted of violating it, despite evidence of occasional violations. The only two prosecutions that have ever occurred under the law arose out of a single incident that took place in 1879, just a year after the law was enacted.[107] Particularly when soldiers are acting at the direction of their commander rather than engaging in rogue behavior, the chances that they would be prosecuted for participating in a mission that unlawfully involves law enforcement activities are essentially zero. Enforcement of the Posse Comitatus Act thus depends principally on the Department of Defense's commitment to complying with its strictures. That commitment has historically been strong.[108] But it would be shortsighted to assume that this pattern of restraint obviates the need for concrete legal safeguards.

III. How to Fix the Posse Comitatus Act

The Posse Comitatus Act may be the most important restriction on the domestic activities of the U.S. military, but it is hampered by exceptions and loopholes, unnecessary ambiguities, and the absence of an effective enforcement mechanism. In practice, the law more closely resembles a norm than a binding rule. Addressing these numerous problems will require a commensurately broad approach.

First, Congress should trim the law's statutory exceptions. It should begin by reforming the Insurrection Act along the lines that the Brennan Center and others have proposed.[109] These reforms should clarify and narrow the criteria for deployment under the Insurrection Act and what actions the president can take when those criteria are met. They should also ensure that Congress and the courts can serve as meaningful checks against abuse.

Congress also should eliminate outdated and unnecessary exceptions to the Posse Comitatus Act, such as 16 U.S.C. §§ 23 and 78 (concerning Yellowstone, Sequoia, and Yosemite National Parks), 16 U.S.C. § 593 (concerning federal timber in Florida), 43 U.S.C. § 1065 (concerning unlawful enclosures on public lands), and 48 U.S.C. § 1418 (concerning guano islands). Each of these authorities either is no longer needed or pertains to activities that can readily be performed by federal civilian personnel. Paring down the president's statutory authorities in this way would reaffirm the constitutional principle that the military's role in civilian affairs should be confined to emergencies and carefully regulated by the legislative branch.

Second, Congress should ensure that the president cannot deploy the National Guard free from the Posse Comitatus Act's constraints. Specifically, Congress should extend the Posse Comitatus Act to 32 U.S.C. § 502(f)(2)(A), under which the National Guard acts at the behest of the president even though it is technically not under the president's command and control. Congress also should either extend the law's coverage to include the District of Columbia National Guard, currently under the control of the president, or transfer control from the president to the mayor of Washington, DC, except when the Guard is federalized.[110]

In addition, state legislatures should consider codifying principles similar to those in the Posse Comitatus Act.[111] In doing so, they may wish to give governors significant flexibility to use Guard forces for law enforcement purposes. But that flexibility would be pursuant to legislative delegation, and the default rule, absent such delegation, would be that civilian authorities are responsible for domestic law enforcement.

Third, Congress should eliminate the Posse Comitatus Act's reference to constitutional exceptions. Given that no provision of the Constitution expressly authorizes the president to deploy the military domestically under any circumstances, let alone to enforce the law, the Posse Comitatus Act's mention of express constitutional exceptions creates unnecessary and potentially dangerous ambiguity as to the scope of the president's authority. Alternatively, if Congress believes that there are implied constitutional powers to deploy the military domestically, it could amend the Posse Comitatus Act to delineate the precise scope of those powers. (A mere reference to "implied constitutional powers" would be insufficient, as there is no common understanding of what these might be.) It is likely, however, that these powers would duplicate those set forth in the Insurrection Act — either in its present state or reformed — and so spelling them out in the Posse Comitatus Act itself would be duplicative and unnecessary.

Fourth, Congress should abolish the amorphous distinction between direct "participation in law enforcement" and indirect "support to law enforcement" that arose out of the Wounded Knee cases and Congress's subsequent enactment of broad authorizations for military support to federal law enforcement agencies' counter-drug efforts. This dichotomy serves only to obscure what activities constitute "executing the law," creating room for the president to assert authority that Congress may not have intended. Instead, the Posse Comitatus Act should explicitly cover the military's engagement in, participation in, or direct or indirect support to law enforcement activities.[112] Importantly, this does not mean the military could never provide support to law enforcement; it would just have to be explicitly authorized by Congress. Congress has already provided multiple statutory authorizations for such support in a variety of contexts.

Finally, Congress should address the Posse Comitatus Act's lack of meaningful enforcement mechanisms. To do so, Congress should provide for an exclusionary rule that bars the introduction in criminal prosecutions of evidence obtained through any violation of the Posse Comitatus Act.[113] Such a rule was included in the versions of the National Defense Authorization Act passed by the House in 2021 and 2022, only to be removed in conference.[114] Congress should also create a private cause of action that would allow individuals who have been injured by a violation of the Posse Comitatus Act to sue for damages. People who are harmed by soldiers acting as police in

violation of the law should be compensated for their injuries. They could sue the offending soldiers if those soldiers were acting against orders, or the Department of Defense if the soldiers were following orders passed down the chain of command. Both of these remedies — an exclusionary rule and a right of action — would create a stronger deterrent against violations than the criminal penalties currently provided by the law.

Conclusion

Addressing all of the problems with the Posse Comitatus Act will require substantial and sustained effort on the part of Congress. This effort ought to be a bipartisan one. In designing the Constitution, this country's founders recognized that even though the government they were creating would be a republic, it would be just as capable of abusing the power to deploy the military domestically as the British government had been. In the same way, presidents of any political party can misuse the authorities at their disposal, particularly when those authorities provide convenient ways to consolidate power and suppress dissent.

Under current law, the president has far too much power to use the military for law enforcement at home. Reining in this authority is essential to ensuring that both American democracy and constitutional rights are robustly protected.

Endnotes

1 See Kyle Daly, "1992: Rioting in Los Angeles," *Leatherneck*, October 2020, 30, 34, https://www.mca-marines.org/wp-content/uploads/1992-Riots-in-Los-Angeles.pdf. See also Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945–1992* (Washington, DC: Center of Military History, United States Army, 2012), 448, https://www.govinfo.gov/content/pkg/GOVPUB-D114-PURL-gpo82975/pdf/GOVPUB-D114-PURL-gpo82975.pdf.

2 Jennifer K. Elsea, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, Congressional Research Service, R42659, November 6, 2018, 1, https://crsreports.congress.gov/product/pdf/R/R42659.

3 Magna Carta, ch. 29 (1215), https://www.nationalarchives.gov.uk/education/resources/magna-carta/british-library-magna-carta-1215-runnymede/; and Petition of Right, 3 Car. I, c.1, §§ 3, 4, 7, 10, https://archive.csac.history.wisc.edu/2_The_Petition_of_Right.pdf. These rights were preserved and reinforced in the U.S. Constitution. See U.S. Const. amend. III, VI.

4 Duncan v. Kahanamoku, 327 U.S. 304, 319 (1946).

5 Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985), *aff'd en banc*, Bissonette v. Haig, 800 F.2d 812 (8th Cir. 1986), *aff'd as if by an equally divided court for want of a quorum*, Haig v. Bissonette, 485 U.S. 264 (1988).

6 See generally Jim Golby, "Uncivil-Military Relations: Politicization of the Military in the Trump Era," *Strategic Studies Quarterly* 15, no. 2 (2021): 149–74, https://www.airuniversity.af.edu/Portals/10/SSQ/documents/Volume-15_Issue-2/Golby2.pdf; Polina Beliakova, "Erosion of Civilian Control in Democracies: A Comprehensive Framework for Comparative Analysis," *Comparative Political Studies* 54, no. 8 (2021): 1393–1423, https://doi.org/10.1177/0010414021989757; Douglass C. North, John Joseph Wallis, and Barry R. Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (New York: Cambridge University Press, 2009); Ulrich Pilster and Tobias Böhmelt, "Do Democracies Engage Less in Coup-Proofing? On the Relationship Between Regime Type and Civil-Military Relations," *Foreign Policy Analysis* 8, no. 4 (October 2012): 355–71, https://www.jstor.org/stable/24910794; Metin Heper and Aylin Guney, "The Military and the Consolidation of Democracy: The Recent Turkish Experience," *Armed Forces & Society* 26, no. 4 (July 2000): 635–57, https://www.jstor.org/stable/45347152; Clayton L. Thyne and Jonathan M. Powell, "Coup d'État or Coup d'Autocracy? How Coups Impact Democratization, 1950–2008," *Foreign Policy Analysis* 12, no. 2 (April 2016): 192–213, https://www.jstor.org/stable/26168099; and Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil–Military Relations* (Cambridge, MA: Harvard University Press, 1981).

7 See generally Michael Head and Scott Mann, *Domestic Deployment of the Armed Forces: Military Powers, Law and Human Rights* (London, UK: Ashgate, 2009); Richard H. Kohn, "Using the Military at Home: Yesterday, Today, and Tomorrow," *Chicago Journal of International Law* 4, no. 1 (April 2003), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1201&context=cjil; Matthew Carlton Hammond, "The Posse Comitatus Act: A Principle in Need of Renewal," *Washington University Law Quarterly* 75, no. 2 (1997), 953–54, 972, https://journals.library.wustl.edu/lawreview/article/7456/galley/24289/view/; and Charles J. Dunlap Jr., "The Thick Green Line: The Growing Involvement of Military Forces in Domestic Law Enforcement," in *Militarizing the American Criminal Justice System: The Changing Roles of the Armed Forces and the Police*, ed. Peter B. Kraska (Boston: Northeastern University Press, 2001), 29, 31–32.

8 To be sure, military personnel are also required to follow different rules — the Standing Rules for Use of Force — when assisting with domestic law enforcement operations. These are more restrictive than the Standing Rules of Engagement, which are designed for combat operations. But following more restrictive rules for the use of force is far from equivalent to law enforcement training.

9 Ken Klippenstein, "Exclusive: The Military Is Monitoring Protests in 7 States," *Nation*, May 30, 2020, https://www.thenation.com/article/society/national-guard-defense-department-protests/.

10 Mark P. Nevitt, "Unintended Consequences: The Posse Comitatus Act in the Modern Era," *Cardozo Law Review* 36, no. 1 (2014): 145–47, http://cardozolawreview.com/wp-content/uploads/2018/08/NEVITT.36.1.pdf.

11 See Head and Mann, *Domestic Deployment of the Armed Forces*; Kohn, "Using the Military at Home"; Hammond, "The Posse Comitatus Act: A Principle in Need of Renewal," 972; and Dunlap, "The Thick Green Line," 31–32.

12 See, e.g., Daniel Q. Gillion, *The Loud Minority: Why Protests Matter in American Democracy* (Princeton, NJ: Princeton University Press, 2024); and Omar Wasow, "Agenda Seeding: How 1960s Black Protests Moved Elites, Public Opinion and Voting," *American Political Science Review* 114, no. 3 (August 2020): 638, https://doi.org/10.1017/S000305542000009X.

13 See William C. Banks and Steve Dycus, *Soldiers on the Home Front: The Domestic Role of the American Military* (Cambridge, MA: Harvard University Press, 2016), 47–49; Nevitt, "Unintended Consequences," 127–33; and Stephen I. Vladeck, "Emergency Power and the Militia Acts," *Yale Law Journal* 149, no. 1 (2004): 156–58, https://www.yalelawjournal.org/pdf/427_pa9skxwv.pdf.

14 Vladeck, "Emergency Power," 156.

15 Vladeck, "Emergency Power," 156–57.

16 Banks and Dycus, *Soldiers on the Home Front,* 31.

17 Banks and Dycus, *Soldiers on the Home Front*, 47–49; Nevitt, "Unintended Consequences," 127–33; and Vladeck, "Emergency Power," 156–58. See also Richard Beeman, *Plain Honest Men: The Making of the American Constitution* (New York: Random House, 2009), 16–18.

18 Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789–1878* (Washington, DC: U.S. Government Printing Office, 2011): 3–19.

19 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

20 U.S. Const. art. I, § 8, art. II, § 2. See Banks and Dycus, *Soldiers on the Home Front*, 47–49.

21 U.S. Const. art. I, § 8, cl. 15.

22 Insurrection Act of 1807, ch. 39, 2 Stat. 443. Congress has also authorized domestic deployment of the active-duty armed forces for non–law enforcement purposes though statutes like the Stafford Act. 42 U.S.C. § 5121 et seq.

23 Vladeck, "Emergency Power," 163–66. See also Martin v. Mott, 25 U.S. 19 (1827); and Luther v. Borden, 48 U.S. 1 (1849).

24 Vladeck, "Emergency Power," 163–66. See generally Stephen I. Vladeck, "The Calling Forth Clause and the Domestic Commander-in-Chief," *Cardozo Law Review* 29, no. 3 (January 2008): 1091–1108, https://heinonline.org/HOL/LandingPage?handle=hein.journals/cdozo29&div=43&id=&page=.

25 U.S. Const. art. I, § 8, cl. 12–13. See Nevitt, "Unintended Consequences," 126.

26 Banks and Dycus, *Soldiers on the Home Front*, 47–49; Nevitt,

"Unintended Consequences," 127–33; and Vladeck, "Emergency Power," 156–58.

27 See Elsea, *The Posse Comitatus Act and Related Matters*, 21; and Coakley, *The Role of Federal Military Forces*, 342–48.

28 18 U.S.C. § 1385.

29 See generally Elizabeth Goitein and Joseph Nunn, *Statement to the January 6th Committee on Reforming the Insurrection Act*, Brennan Center for Justice, September 20, 2022, https://www.brennancenter.org/our-work/research-reports/statement-january-6th-committee-reforming-insurrection-act; and Joseph Nunn, "The Most Dangerous Law in America," *Democracy: A Journal of Ideas*, no. 73 (Summer 2024), https://democracyjournal.org/magazine/73/the-most-dangerous-law-in-america/.

30 The Coast Guard, though part of the federal military, is exempt from the Posse Comitatus Act by virtue of having been granted broad law enforcement authority by Congress. See 14 U.S.C. § 2, 89, 91; and 19 U.S.C. §§ 1401(i), 1709(b).

31 Gilbert v. United States, 165 F.3d 470, 473 (6th Cir. 1999); United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997); United States v. Benish, 5 F.3d 20, 25–26 (3d Cir. 1993); United States v. Kyllo, 809 F. Supp. 787, 792–93 (D. Ore. 1992), *aff'd* 190 F.3d 1041 (9th Cir. 1999), *rev'd on other grounds* 533 U.S. 27 (2001); and Wallace v. State, 933 P.2d 1157, 1160 (Alaska App. 1997). But see United States v. Banks, 383 F. Supp. 368, 376 (D.S.D. 1974); United States v. Jaramillo, 380 F. Supp. 1375, 1380-1381 (D.Neb. 1974); and United States v. McArthur, 419 F. Supp. 186, 193 n.3 (D.N.D. 1976) (Wounded Knee cases in which the involvement of state-controlled National Guard troops helped to sink federal prosecutions).

32 The Calling Forth Clause grants Congress the power to authorize the president to use the military for domestic law enforcement, rather than giving that authority to the president directly.

33 5 U.S.C. App. § 8(g); 10 U.S.C. §§ 251–55, 12406; 16 U.S.C. §§ 23, 78, 593, 1861(a); 18 U.S.C. §§ 112, 1116, 351, 1201, 1751, 3056 note, 3192; 22 U.S.C. §§ 408, 461, 462; 25 U.S.C. § 180; 42 U.S.C. §§ 97, 1989, 5170b; 43 U.S.C. § 1065; 48 U.S.C. §§ 1418, 1422, 1591; 49 U.S.C. § 324; and 50 U.S.C. § 220. See Elsea, *The Posse Comitatus Act*, 31n224; and U.S. Department of Defense (hereinafter DoD), *Instruction 3025.21, Defense Support of Civilian Law Enforcement Agencies*, February 8, 2019, 16, 26, https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302521p.pdf.

34 10 U.S.C. §§ 251–255. See Nunn, "The Most Dangerous Law in America."

35 See Goitein and Nunn, *Statement to the January 6th Committee*.

36 Maryland v. United States, 381 U.S. 41, 46 (1965).

37 In addition to the National Guard, 22 states and the Commonwealth of Puerto Rico maintain "state defense forces," a type of militia authorized by Congress under 32 U.S.C. § 109. State defense forces are entirely state funded and are not ordinarily subject to federalization. They tend to be small, auxiliary units whose members, often unpaid, are trained in specialized areas such as search-and-rescue operations. See Joseph Nunn, "Reestablishing Florida's State Guard Won't Give DeSantis a Private Army Free of Federal Control," *Just Security*, December 9, 2021, https://www.justsecurity.org/79501/reestablishing-floridas-state-guard-wont-give-desantis-a-private-army-free-of-federal-control/.

38 *Gilbert*, 165 F.3d at 473; *Hutchings*, 127 F.3d at 1258; *Benish*, 5 F.3d at 25–26; *Kyllo*, 809 F. Supp. at 792–93; and *Wallace*, 933 P.2d at 1160. But see *Banks*, 383 F. Supp. at 376; *Jaramillo*, 380 F. Supp. at 1380–1381; and *McArthur*, 419 F. Supp. at 193n3. See also Perpich v. Department of Defense, 496 U.S. 334 (1990).

39 See Steve Vladeck, "Why Were Out-of-State National Guard Units in Washington, D.C.? The Justice Department's Troubling Explanation," *Lawfare*, June 9, 2020, https://www.lawfareblog.com/why-were-out-state-national-guard-units-washington-dc-justice-departments-troubling-explanation; and Steven B. Rich, "The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of 'In Federal Service,'" *Army Lawyer*, no. 6 (June 1994): 35–43, https://tjaglcs.army.mil/API/Evotiva-UserFiles/FileActionsServices/DownloadFile?ItemId=605&ModuleId=5398&TabId=1214.

40 See 32 U.S.C. § 502. National Guard personnel operating in Title 32 status (that is, under Section 502) are to remain under state command and control per 32 U.S.C. § 101(19). See Vladeck, "Why Were Out-of-State National Guard Units in Washington, D.C.?"

41 32 U.S.C. § 502(f).

42 See 32 U.S.C. § 112.

43 *Gilbert*, 165 F.3d at 473; *Hutchings*, 127 F.3d at 1258; *Benish*, 5 F.3d at 25–26; *Kyllo*, 809 F. Supp. at 792–93; and *Wallace*, 933 P.2d at 1160. But see *Banks*, 383 F. Supp. at 376; *Jaramillo*, 380 F. Supp. at 1380–81; and *McArthur*, 419 F. Supp. at 193n3.

44 10 U.S.C. §§ 12401–12407. See Vladeck, "Why Were Out-of-State National Guard Units in Washington, D.C.?"

45 D.C. Code § 49-409.

46 District of Columbia National Guard, "History," accessed July 24, 2024, https://dc.ng.mil/About-Us/Heritage/History/; and Georgetown University Library, "Washington, D.C., History Resources," accessed July 24, 2024, https://guides.library.georgetown.edu/c.php?g=1096877&p=8002816.

47 D.C. Code § 49-409.

48 Supervision and Control of the National Guard of the District of Columbia, Exec. Order No. 11485, 34 F.R. 15411 (1969), https://www.federalregister.gov/executive-order/11485.

49 Lloyd J. Austin (Secretary of Defense) to Christine Wormuth (Secretary of the Army), Re: Authority to Approve District of Columbia Government Requests for District of Columbia National Guard Support Assistance, December 30, 2021, https://media.defense.gov/2021/Dec/30/2002916255/-1/-1/1/SECRETARY-OF-DEFENSE-MEMO-REGARDING-AUTHORITY-TO-APPROVE-DISTRICT-OF-COLUMBIA-GOVERNMENT-REQUESTS-FOR-DISTRICT-OF-COLUMBIA-NATIONAL-GUARD-SUPPORT-ASSISTANCE.PDF.

50 The DC Guard also has an adjutant general, who reports to the commanding general.

51 Vladeck, "Why Were Out-of-State National Guard Units in Washington, D.C.?"

52 Douglas W. Kmiec (Assistant Attorney General, Office of Legal Counsel) to the Acting Associate Attorney General, Re: Use of the National Guard to Support Drug Interdiction Efforts in the District of Columbia, April 4, 1989, https://www.justice.gov/file/151081/dl?inline=.

53 32 U.S.C. § 502(a)–(e).

54 Pub. L. 88-621, 78 Stat. 999, § 1(1) (1964), https://www.congress.gov/88/statute/STATUTE-78/STATUTE-78-Pg999.pdf.

55 32 U.S.C. § 502(f)(1) (emphasis added).

56 John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, Div. A, Title V, § 525(c), 120 Stat. 2195 (2006), https://www.govinfo.gov/content/pkg/PLAW-109publ364/pdf/PLAW-109publ364.pdf.

57 32 U.S.C. § 502(f)(2)(A) (emphasis added).

58 William P. Barr (Attorney General) to Muriel Bowser (Mayor, Washington, DC), June 9, 2020, https://twitter.com/kerrikupecdoj/status/1270487263324049410 ("At the direction of the President, the Secretary of Defense . . . 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.' ").

59 A statement of the purpose of the bill in the *Congressional Record* submitted by the House Armed Services Committee explained that the purpose of the new provision was to "clarif[y] the eligibility of National Guard personnel for the protective provisions of statutes providing disability and related benefits to reservists who suffer disability or death while participating in authorized training functions beyond the 48 [meetings for] unit drill[ing] and 15 days' training specifically authorized by law for National Guard personnel in sections 502 and 504." 110 Cong. Rec. 24063 (daily ed. October 3, 1964).

60 Christopher R. Brown, "Been There, Doing That in a Title 32 Status: The National Guard Now Authorized to Perform Its 400-Year Old Domestic Mission in Title 32 Status," *Army Lawyer*, no. 5 (May 2008): 30, https://tjaglcs.army.mil/API/Evotiva-UserFiles/FileActionsServices/DownloadFile?ItemId=1515&ModuleId=5398&TabId=1214. See, e.g., 32 U.S.C. § 112(b)(1) ("Under regulations prescribed by the Secretary of Defense, personnel of the National Guard of a State may, in accordance with the State drug interdiction and counter-drug activities plan referred to in [32 U.S.C. § 112(c)], be ordered to perform full-time National Guard duty under section 502(f) of this title for the purpose of carrying out drug interdiction and counter-drug activities.").

61 Brown, "Been There, Doing That," 31. See also 32 U.S.C. ch. 9.

62 Brown, "Been There, Doing That," 31–32; and 32 U.S.C. § 901.

63 Brown, "Been There, Doing That," 31–32.

64 The Report of the House Armed Services Committee states that the National Guard's "roles and responsibilities have changed dramatically since the start of the global war on terrorism and the committee believes it is necessary to adjust existing authorities and create new authorities to better reflect the nation's continuing reliance on the national guard." The committee recommended creating new authority to (1) "enable . . . mobilization . . . to provide assistance in serious natural or manmade disasters"; (2) "formally authorize current practices in which full-time national guard . . . members are performing many additional functions beyond their traditional support to the reserve components"; and (3) "authorize State governors, under title 32, . . . to mobilize national guard forces to support operational missions taken at the request of the President or the Secretary of Defense." Committee on Armed Services, National Defense Authorization Act for Fiscal Year 2007, H.R. Rep. No. 109-452, at 311 (2006), https://www.congress.gov/109/crpt/hrpt452/CRPT-109hrpt452.pdf. Nothing in the legislative history clarifies what kinds of "operational missions" the president would be authorized to direct under this authority. The Conference Committee Report noted only that the Senate concurred in amending Section 502(f) to permit National Guard members to "support operations or missions undertaken by the member's unit at the request of the President or the Secretary of Defense, and to support training operations and training missions assigned in whole or in part to the National Guard by the Secretary concerned." Conference Report to Accompany H.R. 5122, John Warner National Defense Authorization Act for Fiscal Year 2007, H.R. Rep. No. 109-702, at 714 (2006), https://www.govinfo.gov/content/pkg/CRPT-109hrpt702/pdf/CRPT-109hrpt702.pdf. Commentators have suggested that the main purpose of this third provision, which became Section 502(f)(2)(A), was to allow governors to choose to supply state National Guard forces to support preexisting federal missions, such as FEMA's operations in New Orleans following Hurricane Katrina. See Steve Vladeck, "Why Were Out-of-State National Guard Units in Washington, D.C?" See also Jim Absher, "What's the Difference Between Title 10 and Title 32 Mobilization Orders?," *Military.com*, April 9, 2020, https://www.military.com/benefits/reserve-and-guard-benefits/whats-difference-between-title-10-and-title-32-mobilization-orders.html ("Normally, Title 32 orders are for natural disasters.").

65 Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 468 (2001). In a similar case, the Court held that the FDA's authority does not include power to regulate tobacco products as drugs, saying that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." FDA v. Brown & Williamson Tobacco Corporation, 529 U.S. 120, 160 (2000).

66 This reading is confirmed by 32 U.S.C. § 328, which makes clear that a governor is the party empowered to order National Guard troops to duty under Section 502(f).

67 Training is covered by 32 U.S.C. § 502; drug interdiction by 32 U.S.C. § 112; homeland defense by 32 U.S.C. ch. 9; and "other duty" by 32 U.S.C. § 502(f)(2)(A).

68 See, e.g., Paul Sonne, Fenit Nirappil, and Josh Dawsey, "Pentagon Disarms National Guard Activated in D.C., Sends Active-Duty Forces Home," *Washington Post*, June 5, 2020, https://www.washingtonpost.com/national-security/pentagon-disarms-guardsmen-in-washington-dc-in-signal-of-de-escalation/2020/06/05/324da91a-a733-11ea-8681-7d471bf20207_story.html.

69 Greg Myre, "Trump Orders National Guard to Pull Out of Washington," NPR, June 7, 2020, https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/07/871701963/trump-orders-national-guard-to-pull-out-of-washington.

70 Department of Defense Authorities and Roles Related to Civilian Law Enforcement, Hearing Before the H. Committee on Armed Services, 116th Cong. 10 (2020) (statement of General Mark A. Milley, Chairman of the Joint Chiefs of Staff), https://www.congress.gov/116/chrg/CHRG-116hhrg42162/CHRG-116hhrg42162.pdf.

71 Ellen M. Pint et al., *Review of Army Total Force Policy Implementation* (Santa Monica, CA: RAND Corporation, 2017), https://www.rand.org/pubs/research_reports/RR1958.html.

72 Assistant Secretary of the Army (Manpower and Reserve Affairs), "Army Total Force Policy," U.S. Army, July 6, 2010, https://www.army.mil/article/42866/army_total_force_policy; and Pint et al., *Review of Army Total Force*.

73 See National Guard Bureau, *2022 National Guard Bureau Posture Statement*, 2022, 12–22, https://www.nationalguard.mil/portals/31/Documents/PostureStatements/2022%20NGB%20Posture%20Statement-low.pdf; and Jim Garamone, "Leaders Detail Future of National Guard," National Guard, January 25, 2023, https://www.nationalguard.mil/News/Article/3276928/leaders-detail-future-of-national-guard/.

74 Darron Salzer, "Post 9/11: This Isn't Your Father's National Guard," National Guard Bureau, September 9, 2010, https://www.nationalguard.mil/News/Article-View/Article/576443/post-911-this-isnt-your-fathers-national-guard/.

75 National Guard Bureau, *2021 National Guard Bureau Posture Statement*, 2022, 18, https://www.nationalguard.mil/portals/31/Documents/PostureStatements/2021%20National%20Guard%20Bureau%20Posture%20Statement.pdf.

76 Lawrence J. Korb, "Overuse of the Guard Could Undermine Its Effectiveness," Center for American Progress, September 24, 2004, https://www.americanprogressaction.org/issues/security/news/2004/09/24/1110/overuse-of-guard-could-undermine-its-effectiveness/; and Ellen Krenke, "Army Guard Provides Combat Support Troops in First Gulf War," National Guard Bureau, November 4, 2010, https://www.nationalguard.mil/News/Article/587811/army-guard-provides-combat-support-troops-in-first-gulf-war/.

77 See United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975). See also DoD, *Instruction 3025.21*, 18–19.

78 DoD, *Instruction 3025.21*, 16–19. See also DoD, *Directive 3025.18, Defense Support of Civil Authorities*, March 19, 2018, https://www.dco.uscg.mil/Portals/9/CG-5R/nsarc/DoDD%203025.18%20Defense%20Support%20of%20Civil%20Authorities.pdf.

79 DoD, *Instruction 3025.21*, 16–17. See also Stephen G. Bradbury (Principal Deputy Assistant Attorney General, Office of Legal Counsel) to Files, Re: October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities, October 6, 2008, https://nsarchive2.gwu.edu/torturingdemocracy/documents/20081006.pdf.

80 Elsea, *The Posse Comitatus Act and Related Matters*, 50.

81 Elsea, *The Posse Comitatus Act and Related Matters*, 52 (discussing State v. Sanders, 303 N.C. 608, 613, 281 S.E.2d 7, 10 (1981); State v. Short, 113 Wash.2d 35, 38–40, 775 P.2d 458, 459–60 (1989); People v. Wells, 175 Cal.App.3d 876 (1985); United States v. Walden, 490 F.2d 372 (4th Cir. 1974); People v. Tyler, 854 P.2d 1366, 1369 (Colo. App. 1993), *rev'd on other grounds* 874 P.2d 1037 (Colo. App. 1994); State v. Pattioay, 78 Haw. 455, 464–65, 896 P.2d 911, 920–21 (1995); United States v. Hitchcock, 286 F.3d 1064, 1070 (9th Cir. 2002); Moon v. State, 785 P.2d 45, 48 (Alaska App. 1990); State v. Maxwell, 174 W.Va. 632, 635, 328 S.E.2d 507, 509 (W.Va. 1985); State v. Presgraves, 174 W.Va. 683, 328 S.E.2d 699 (W.Va. 1985); and Hayes v. Hawes, 921 F.2d 100, 103–4 (7th Cir. 1990)).

82 Elsea, *The Posse Comitatus Act and Related Matters*, 57 (citing Taylor v. State, 640 So.2d 1127, 1136 (Fla. App. 1994)); United States v. Kahn, 35 F.3d 426, 431 (9th Cir. 1994); United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991); *Hayes*, 921 F.2d at 104; United States v. Gerena, 649 F. Supp. 1179, 1182 (D. Conn. 1986); United States v. Hartley, 678 F.2d 961, 978 n.24 (8th Cir. 1982); *Jaramillo*, 380 F. Supp. at 1379–80, *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975); *Banks,* 383 F. Supp. at 375; *Red Feather*, 392 F. Supp. at 921; and *McArthur*, 419 F. Supp. 194–95, *aff'd sub nom.* United States v. Casper, 541 F.2d 1275, 1278 (8th Cir. 1976). See also Nevitt, "Unintended Consequences," 155–59.

83 Elsea, *The Posse Comitatus Act and Related Matters*, 57. See Hall v. State, 557 N.E.2d 3, 4–5 (Ind. App. 1990); and United States v. Bacon, 851 F.2d 1312, 1313–14 (11th Cir. 1988).

84 Steven A. Engel (Assistant Attorney General, Office of Legal Counsel) to General Counsel, Department of Defense, Re: Military Support for Customs and Border Protection Along the Southern Border Under the Posse Comitatus Act, January 19, 2021, https://www.justice.gov/olc/opinion/military-support-customs-and-border-protection-along-southern-border-under-posse.

85 10 U.S.C. §§ 271–74, 282–84; 18 U.S.C. § 831; and 42 U.S.C. § 98. See Elsea, *The Posse Comitatus Act and Related Matters*, 42–49. See also *Red Feather*, 392 F. Supp. 916.

86 See generally Peter Andreas, *Border Games: The Politics of Policing the U.S.-Mexico Divide,* 3rd ed. (New York: Cornell University Press, 2022); Douglas S. Massey, Jorge Durand, and Karen A. Pren, "Why Border Enforcement Backfired," *American Journal of Sociology* 121, no. 5 (March 2016): 1557–1600, https://doi.org/10.1086/684200; Timothy J. Dunn, "Border Militarization Via Drug and Immigration Enforcement: Human Rights Implications," *Social Justice* 28, no. 7 (Summer 2001): 7–30, https://www.jstor.org/stable/29768073; and Timothy J. Dunn, *The Militarization of the U.S.-Mexico Border 1978–1992: Low-Intensity Conflict Doctrine Comes Home* (Austin, TX: University of Texas at Austin Press, 1996).

87 U.S. Const. art. I, § 8, cl. 15.

88 *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring).

89 Vladeck, "The Calling Forth Clause," 1094.

90 See Elsea, *The Posse Comitatus Act and Related Matters*, 27–29.

91 Office of Legal Counsel to General Counsel, Department of the Army, Re: Use of Federal Troops to Protect Government Property and Functions at the Pentagon Against Anti-War Demonstrators, October 4, 1967, https://knightcolumbia.org/documents/s6kwb7vqev; William H. Rehnquist (Assistant Attorney General, Office of Legal Counsel) to Robert E. Jordan, III (General Counsel, Department of the Army), Re: Statutory Authority to Use Federal Troops to Assist in the Protection of the President, November 12, 1969, https://harvardnsj.org/2024/02/09/statutory-authority-to-use-federal-troops-to-assist-in-the-protection-of-the-president-nov-12-1969/; Office of Legal Counsel to General Counsel, Department of the Army, Re: Authority to Use Troops to Execute the Laws of the United States, March 27, 1970, https://harvardnsj.org/2024/02/09/authority-to-use-troops-to-execute-the-laws-of-the-united-states-mar-1970/; William H. Rehnquist (Assistant Attorney General, Office of Legal Counsel) to Robert E. Jordan, III (General Counsel, Department of the Army), Re: Authority to Use Troops to Protect Federal Functions, Including the Safeguarding of Foreign Embassies in the United States, May 11, 1970, https://harvardnsj.org/2024/02/09/authority-to-use-federal-troops-to-protect-federal-functions-including-the-safeguarding-of-foreign-embassies-in-the-united-states-may-11-1970/; William H. Rehnquist (Assistant Attorney General, Office of Legal Counsel) to Acting General Counsel, Department of the Army, Re: Authority to Use Troops to Prevent Interference with Federal Employees by Mayday Demonstrations and Consequent Impairment of Government Functions, April 29, 1971, https://www.justice.gov/file/147726/dl; and 32 C.F.R. § 215.4(b),(c)(1) (repealed 2018).

92 DoD, *Instruction 3025.21*, 16–18; and DoD, *Directive 3025.18*, 6 (discussing "Emergency Authority"). The legal justification for Emergency Authority, arguing that it was a constitutional exception to the Posse Comitatus Act, was formerly found in 32 C.F.R. § 215.4(c)(1), which was repealed in early 2018.

93 32 C.F.R. § 215.4(c)(1) (repealed 2018).

94 *Youngstown*, 343 U.S. 579.

95 Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 1350 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area."); Dames & Moore v. Regan, 453 U.S. 654, 661 (1981) ("Justice Jackson in his concurring opinion in *Youngstown* . . . brings together as much combination of analysis and common sense as there is in this area."); and H. Jefferson Powell, *The President as Commander in Chief: An Essay in Constitutional Vision* (Durham, NC: Carolina Academic Press, 2014), 53–135.

96 *Youngstown*, 343 U.S. at 639 (Jackson, J., concurring).

97 Hamdan v. Rumsfeld, 548 U.S. 557, 593n23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."); *Youngstown*, 343 U.S. at 654–55 (Jackson, J., concurring); Little v. Barreme, 6 U.S. 170 (1804); and Powell, *The President as Commander in Chief*, 101–8.

98 *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring).

99 In addition to the Calling Forth Clause, two other provisions of the Constitution implicate domestic deployment authority: the Commander in Chief Clause in Article II and the Guarantee Clause in Article IV. U.S. Const. art. II, § 2, cl. 1; and U.S. Const. art. IV, § 4. The Commander in Chief Clause is discussed in this section. The Guarantee Clause requires the United States to "protect each [state] against Invasion; and on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence." This language is less clear-cut than the Calling Forth Clause, but it certainly does not constitute a "conclusive and preclusive" commitment of power to the executive. Instead, it grants authority to the federal government as a whole. Furthermore, it allows unilateral federal action only in the case of invasion. In the event of "domestic violence," the affected state must request help before the federal government can act. See Banks and Dycus, *Soldiers on the Home Front*, 38.

100 Vladeck, "The Calling Forth Clause," 1094.

101 *Youngstown*, 343 U.S. at 643–44 (Jackson, J., concurring).

102 *Youngstown*, 343 U.S. at 643–44 (Jackson, J., concurring). See Powell, *The President as Commander in Chief*, 120–21.

103 See generally Vladeck, "The Calling Forth Clause"; and Banks and Dycus, *Soldiers on the Home Front*, 33–42.

104 *Prize Cases*, 67 U.S. (2 Black) 635, 669 (1862). See also Vladeck, "The Calling Forth Clause"; and Banks and Dycus, *Soldiers on the Home Front*, 33–42.

105 6 U.S.C. § 466.

106 *Prize Cases*, 67 U.S. (2 Black) at 669; and Banks and Dycus, *Soldiers on the Home Front*, 33–42. See generally Christopher Mirasola, "Sovereignty, Article II, and the Military During Domestic Unrest," *Harvard National Security Journal* 15, no. 1 (December 2023): 199–256, https://harvardnsj.org/2023/12/15/sovereignty-article-ii-and-the-military-during-domestic-unrest/.

107 Elsea, *The Posse Comitatus Act and Related Matters,* 66n442.

108 Elsea, *The Posse Comitatus Act and Related Matters*, 70. For the Department of Defense policies with respect to abiding by the Posse Comitatus Act, see DoD, *Directive 3025.18*, 18; and U.S. DoD, *Instruction 3025.21*, 16, 26.

109 See Goitein and Nunn, *Statement to the January 6th Committee*; Nunn, "The Most Dangerous Law in America"; and American Law Institute, *Principles for Insurrection Act Reform*, April 8, 2024, https://www.ali.org/media/filer_public/32/a4/32a425d8-d80a-44e5-af39-7ff00ebf809d/principles-insurrection-act-reform.pdf.

110 The latter course of action is preferable, as it would not only solve the Posse Comitatus Act problem but allow the mayor to quickly deploy the Guard to address local emergencies rather than engaging in the bureaucratic process of requesting deployment by the Department of Defense. See Elizabeth Goitein and Joseph Nunn, "D.C.'s National Guard Should Be Controlled by Its Mayor, Not by a President Like Trump," *Slate*, December 2, 2021, https://slate.com/news-and-politics/2021/12/defense-authorization-dc-national-guard-trump.html.

111 State and territorial legislatures should also consider setting our rules governing when their National Guard forces may be used outside their home jurisdiction and when out-of-state National Guard units are welcome within their borders. For related discussion, see Emily Berman and Chris Mirasola, "Texas, Military Federalism, and the Southern Border," *Lawfare*, April 8, 2024, https://www.lawfaremedia.org/article/texas-military-federalism-and-the-southern-border.

112 Doing so will require not just revising the Posse Comitatus Act, but also making minor changes to 10 U.S.C. ch. 15, where the authorities authorizing indirect military support to law enforcement agencies are located.

113 In doing so, Congress should explicitly repudiate the Ninth Circuit's decision in United States v. Dreyer, 804 F.3d 1266 (9th Cir. 2015) (holding that a one-off violation of the Posse Comitatus Act was not sufficient to warrant excluding evidence).

114 National Defense Authorization Act for Fiscal Year 2022, H.R. 4350, 117th Congress (2021), https://www.congress.gov/bill/117th-congress/house-bill/4350/amendments?r=9&s=1&pageSize=100&page=11; and Office of Rep. Adam Schiff, "Congressman Schiff on Passage of 2023 National Defense Authorization Act," July 14, 2022, https://schiff.house.gov/news/press-releases/congressman-schiff-on-passage-of-2023-national-defense-authorization-act.

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