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## “Necessity Hath No Law”\*: Executive Power and the Posse Comitatus Act

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*“When a government wishes to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army.”*<sup>1</sup>

Luther Martin

### INTRODUCTION

Dating back to Roman times, civilian distrust of a standing army has been a constant theme.<sup>2</sup> Nations have raised armies to protect their national defense interests but have sharply segregated military and civilian affairs in order to protect civilian life from military oppression. During peacetimes, this segregation has left the military—a highly-trained and effective resource—idle and seemingly available to aid in quelling domestic crises.

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

The issue of military involvement in civilian affairs entered the national spotlight once again in September 2005, when the Depart-

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\* The quoted text was originally articulated by Oliver Cromwell. Max Radin, *Martial Law & the State of Siege*, 30 CAL. L. REV. 634, 641 (1942).

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1. Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward A Right To Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 391 (2003) (quoting Luther Martin of Maryland to the Maryland legislature).

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

ment of Defense (DOD) posited that it would have been illegal for the government to send military troops into New Orleans to evacuate those stranded by Hurricane Katrina and the flood that followed.<sup>3</sup> Specifically, the DOD pointed to the Posse Comitatus Act of 1878 (PCA),<sup>4</sup> a law that purportedly criminalized the use of the military in domestic law enforcement.

After watching live news coverage of thousands of people being herded to the New Orleans Convention Center and the Superdome to be left without food, water, medicine, or sanitation, the nation responded furiously.<sup>5</sup> Clearly, it seemed, the United States ought to have been able to employ the military in rescuing its own people from a natural disaster occurring within America's borders; any law that prohibits such humanitarian efforts must be repealed.

As the saying goes, hindsight is always twenty/twenty. After much legal scrutiny, it appears that the government's trepidation due to the PCA was misguided.<sup>6</sup> In all likelihood, deploying troops to New Orleans for a rescue operation would have been lawful under the PCA, but this conclusion did not end the debate over the propriety of the PCA.<sup>7</sup>

After the Katrina Disaster, some commentators asserted that the PCA must be entirely redrafted or just plain repealed; the Executive should not be prohibited from using the military to enforce the law following a natural disaster.<sup>8</sup> The federal government responded to

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3. Eric Schmitt & Thom Shanker, *Military May Propose an Active-Duty Force for Relief Efforts*, N.Y. TIMES, Oct. 11, 2005, at A1, available at <http://www.nytimes.com/2005/10/11/politics/11military.html>. Interestingly, the first explanation regarding the delay came from former FEMA Director Michael Brown, who claimed there had been a breakdown in communication: the federal government did not know that people were stranded at both the Convention Center and the Superdome. *The Big Disconnect on New Orleans*, CNN, Sept. 2, 2005, <http://www.cnn.com/2005/US/09/02/katrina.response/>. This excuse was not very compelling considering CNN had been running 24-hour live news coverage reporting the locations of the stranded individuals.

4. 18 U.S.C. § 1385 (2000).

5. See, e.g., *Bush to Send More Troops to Louisiana*, FOX NEWS, Sept. 3, 2005, <http://www.foxnews.com/story/0,2933,168398,00.html>; *Relief Workers Confront "Urban Warfare"*, CNN, Sept. 1, 2005, <http://www.cnn.com/2005/WEATHER/09/01/katrina.impact>.

6. See Candidus Dougherty, *While the Government Fiddled Around, the Big Easy Drowned: How the Posse Comitatus Act Became the Government's Alibi for the Hurricane Katrina Disaster*, 29 N. ILL. U. L. REV. (forthcoming 2008), <http://ssrn.com/abstract=938249>.

7. See *id.*

8. See Ashley J. Craw, Casenote & Comment, *A Call to Arms: Civil Disorder Following Hurricane Katrina Warrants Attack on the Posse Comitatus Act*, 14 GEO. MASON L. REV. 829 (2007).

this outcry by amending the Insurrection Acts.<sup>9</sup> In 2006, the President was briefly given the express authority to deploy federal troops in response to a natural disaster,<sup>10</sup> but that express authority was revoked shortly thereafter by a 2008 amendment.<sup>11</sup>

These amendments leave the PCA prohibitions on shaky ground, sparking a new debate surrounding the movement to resurrect it. Many view the PCA as a “bulwark of liberty” that protects civilian life from military oppression.<sup>12</sup> These commentators argue in favor of redrafting the PCA in a clearer and more potent form.<sup>13</sup>

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

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

## I. HISTORICAL BACKDROP

Frequently, legal scholars and commentators rely on history, specifically on the Revolutionary War and Reconstruction Eras, to justify

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9. Michael Greenberger, *Did the Founding Fathers Do “A Heckuva Job”?* *Constitutional Authorization for the Use of Federal Troops to Prevent the Loss of a Major American City*, 87 B.U. L. REV. 397, 400 (2007) (noting that the John Warner National Defense Authorization Act was passed on Oct. 17, 2006).

10. Pub. L. No. 109-364, 120 Stat. 2083 (2006).

11. Pub. L. No. 110-181, 122 Stat. 325 (2008).

12. Dan Bennett, Comment, *The Domestic Role of the Military in America: Why Modifying or Repealing the Posse Comitatus Act Would Be a Mistake*, 10 LEWIS & CLARK L. REV. 935, 936 (2006).

13. See, e.g., John R. Longley III, Note, *Military Purpose Act: An Alternative to the Posse Comitatus Act—Accomplishing Congress’s Intent with Clear Statutory Language*, 49 ARIZ. L. REV. 717 (2007); Joshua M. Samek, Note, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?*, 61 U. MIAMI L. REV. 441 (2007).

excluding the military from civilian affairs. In this section, I review the history surrounding the PCA. I describe the events that took place during these eras, as well as various congressional and presidential actions leading up to the passage of the PCA in 1878.

A. *The Founding Fathers Fear a Standing Army*

The Roman Army, which was not permitted to cross the river Rubicon into Italy,<sup>14</sup> is a prime example of the dangers of a standing military. During nearly the entire 1229 years it existed, the Roman Empire was at war with external enemies, itself or both.<sup>15</sup> Although the Senate (and later the Emperor) was technically in control of the army, generals refused to cede their power, marched on Rome, and wrested control of the Empire on at least twelve occasions.<sup>16</sup> This infighting severely weakened the state's ability to defend against invaders and has been blamed for the eventual fall of the Roman Empire.<sup>17</sup>

The Founding Fathers did not need to look to Roman history to distrust a standing military force;<sup>18</sup> the United States was founded in the wake of an oppressive British military rule over civilian affairs.<sup>19</sup> From 1768 to 1770, British troops occupied Boston to enforce regula-

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14. It was treason for a general to bring his legion across the river Rubicon into Italy. See Lyndon H. LaRouche, Jr., *The Northern Command: Crossing the Rubicon*, 29 *Executive Intelligence Rev.* 64, 65 (2002), available at <http://www.larouche.com/eiw/public/2002/eirv29/eirv29n20.pdf>; Chalmers Johnson, *Remembering the Rubicon*, <http://www.lewrockwell.com/orig4/johnson-chalmers4.html> (last visited Oct. 10, 2008).

15. LaRouche, *supra* note 14, at 64-65; Johnson, *supra* note 14.

16. LaRouche, *supra* note 14.

17. Romano, *supra* note 2, at 238 (stating that after Caesar's march on Rome, Emperors split up the army into small parts to avoid similar trouble, but the legions were then too weak to fight off invaders).

18. The Founding Fathers, however, were aware of the past military infractions. George Washington asserted that "Mercenary Armies . . . have at one time or another subverted the liberties of almost all the Countries they have been raised to defend." 26 GEORGE WASHINGTON, *Sentiments on a Peace Establishment (May 2, 1783)*, in *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799*, at 388, 388 (John C. Fitzpatrick ed., U.S. Gov't Printing Office 1931). James Madison used the Roman Empire and Europe as additional proof of the dangers of a standing military in *The Federalist*: "Not the less true is it, that the liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments." *THE FEDERALIST* NO. 41, at 245-47 (James Madison) (Gary Wills ed., Bantam Dell 1982) (1961) (warning that the standing army needed to be handled cautiously, or the "face of America will be but a copy of that of the Continent of Europe"—liberty crushed by standing armies and taxes).

19. Kealy, *supra* note 1, at 389-91.

tions and to collect taxes set by the King of England.<sup>20</sup> This military presence led to many confrontations between colonists and British troops in Boston as well as a general angst throughout the rest of the colonies.<sup>21</sup>

During the most noted and bloody conflict, the Boston Massacre, the British military killed five colonists while attempting to break up an unruly mob.<sup>22</sup> John Adams, defense counsel for the troops who were tried for these deaths in Boston, declared that such angry uprisings were the inevitable result of using the military for law enforcement.<sup>23</sup> Regardless, British troops remained in Boston until forcibly ejected during the Revolutionary War.<sup>24</sup> In fact, Parliament passed new laws in 1774 to add more safeguards for soldiers maintaining civil order.<sup>25</sup>

In the Declaration of Independence, American colonists spelled out precisely how they felt about the use of troops in civilian affairs: it was tyranny.<sup>26</sup> The Declaration of Independence pointed directly to

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20. *Id.* at 389.

21. See *Reid v. Covert*, 354 U.S. 1, 27-28 (1957) (“[T]he interference of the military with the civil courts aroused great anxiety and antagonism . . . throughout the colonies. For example, Samuel Adams in 1768 wrote: ‘[I]s it not enough for us to have seen soldiers and mariners forejudged of life, and executed within the body of the county by martial law? Are citizens to be called upon, threatened, ill-used at the will of the soldiery, and put under arrest, by pretext of the law military, in breach of the fundamental rights of subjects, and contrary to the law and franchise of the land? Will the spirits of people as yet unsubdued by tyranny, unawed by the menaces of arbitrary power, submit to be governed by military force? No! Let us rouse our attention to the common law, which is our birthright, our great security against all kinds of insult and oppression.’”).

22. Stephen C. O’Neill, *The Summary of the Boston Massacre Trial*, <http://www.bostonmassacre.net/trial/trial-summary1.htm> (last visited Mar. 21, 2008) (stating that the Boston Massacre occurred on Mar. 5, 1770).

23. 3 JOHN ADAMS, *Argument*, in *LEGAL PAPERS OF JOHN ADAMS* 98, 266 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (“Soldiers quartered in a populous town, will always occasion two mobs, where they prevent one. They are wretched conservators of peace!”).

24. See 1 GREGORY FREMONT-BARNES & RICHARD A. RYERSON, *THE ENCYCLOPEDIA OF THE AMERICAN REVOLUTIONARY WAR* 113 (James Arnold & Roberta Wiener eds., ABC-CLIO 2006).

25. David E. Engdahl, *Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 *IOWA L. REV.* 1, 26 (1971) (explaining that under the Administration of Justice Act of 1774 soldiers could remove cases to other colonies or to England when accused of using excessive force in order to disband civil uprisings and that, because of logistical problems, these cases were rarely tried).

26. See *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776) (“The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.”).

the nonconsensual maintenance of a standing army among the civilian population,<sup>27</sup> the military supremacy over the civilian government,<sup>28</sup> the quartering of troops,<sup>29</sup> and the “mock trials” of troops for the murder of civilians<sup>30</sup> as examples of King George III’s repeated “usurpations”<sup>31</sup> and “oppressions.”<sup>32</sup> The Articles of Confederation echoed this distrust of the standing military by restricting states from keeping armies or navies in peacetimes while at the same time requiring states to have a “well-regulated and disciplined militia.”<sup>33</sup>

At the Constitutional Convention, delegates discussed, at length, whether a standing army was necessary since state militias could protect the nation.<sup>34</sup> The debate in Philadelphia largely focused on whom should be in control of calling the militia<sup>35</sup> and whether there should be a standing army in times of peace.<sup>36</sup> Because of the prevalent fear of a standing military and of a “dominant Chief Executive,” the end result was a separation of these powers among the states and federal government.<sup>37</sup>

The Convention delegated to Congress the power to raise a standing army subject to frequent review of military appropriations,<sup>38</sup> as well as the power to declare war.<sup>39</sup> Domestic military needs were

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27. *See id.* at para. 13 (“He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.”).

28. *See id.* at para. 14 (“He has affected to render the Military independent of and superior to the Civil power.”).

29. *See id.* at para. 16 (“For Quartering large bodies of armed troops among us.”).

30. *See id.* at para. 17 (“For protecting [soldiers], by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States.”).

31. *Id.* at para. 31.

32. *Id.* at para. 30.

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

34. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 209 (Max Farrand ed., 1966).

35. *See* Stephen I. Vladeck, Note, *Emergency Power and the Militias*, 114 YALE L.J. 149, 157 (2004).

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

37. *See* Vladeck, *supra* note 35, at 157-58.

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

39. *Id.* at art I, § 8, cl. 11.

deferred to the state militias,<sup>40</sup> which could be nationalized by Congress in limited situations.<sup>41</sup> The Executive ultimately gained control of the militias and the army, but only through Congress.<sup>42</sup>

Despite this system of checks and balances, the debate continued in *The Federalist*, where Alexander Hamilton eventually concluded that the nation needed a standing army.<sup>43</sup> He argued that militias are insufficient to cover the common defense because “[t]he steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind.”<sup>44</sup> His reasoning was that “[w]ar, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.”<sup>45</sup> In his view, the militia lacked training.<sup>46</sup> Additionally, drafting militiamen into service and frequently taking them away from their jobs and families would have an adverse effect on the economy.<sup>47</sup>

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40. See THE FEDERALIST NO. 25 (Alexander Hamilton), *supra* note 18, at 145.

41. See U.S. CONST. art I, § 8, cl. 15 (“[Congress shall have the power t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions[.]”).

42. See *id.* at art II, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States[.]”).

43. See THE FEDERALIST NO. 8 (Alexander Hamilton), *supra* note 18, at 40 (“Safety from external danger is the most powerful director of national conduct . . . . To be more safe, [nations] at length become willing to run the risk of being less free . . . . Frequent war and constant apprehension, which require a state of constant preparation, will infallibly produce [standing armies.]”); THE FEDERALIST NO. 19 (James Madison & Alexander Hamilton), *supra* note 18, at 109 (discussing the red-tape laden German system of government that required consent from multiple parties to call upon an army when threatened and arguing that before the government sorts it out, “the enemy are in the field”); THE FEDERALIST NO. 24 (Alexander Hamilton), *supra* note 18, at 141-43 (arguing that a permanent corps is needed to protect the nation from Europe and the Indians and that the nation needs a navy if it wants to be a commercial nation); THE FEDERALIST NO. 25 (Alexander Hamilton), *supra* note 18, at 144 (stating that relying on the individual states to provide a common defense would be “a project oppressive to some States, dangerous to all, and baneful to the Confederacy” because the militia is not competent to manage national defense); THE FEDERALIST NO. 26 (Alexander Hamilton), *supra* note 18, at 154-55 (expressing that the standing army is something that is evil but needed, and it will be less evil if it is enacted as a unified nation); THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 18, at 160 (stating that a bigger force than a militia is sometimes needed).

44. THE FEDERALIST NO. 25 (Alexander Hamilton), *supra* note 18, at 147 (stating that the nation would likely have lost its bid for independence if it had relied on the militias alone).

45. *Id.*

46. *Id.*

47. See THE FEDERALIST NO. 24 (Alexander Hamilton), *supra* note 18, at 142.

Further, Hamilton argued that it would be unfair to force states that were more vulnerable to attacks from Indians and Europeans because of their location—such as New York—to build up their defenses while landlocked states would not have been required to bear the same burden.<sup>48</sup> He acknowledged that there was always a risk that a standing army would infringe on liberty;<sup>49</sup> however, Hamilton pointed to state militias as the safeguard<sup>50</sup> protecting the nation from a return to tyranny.<sup>51</sup> Hamilton’s contemporaries—George Washington and James Madison—expressed less confidence in the capacity of the state militias and, in their own writings, frequently warned of the power of standing armies by pointing to the fall of the Roman Empire and the destruction in Europe.<sup>52</sup>

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

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48. THE FEDERALIST NO. 25 (Alexander Hamilton), *supra* note 18, at 144 (arguing that allowing one state to beef up its defenses would create “mutual jealousy” among states, which could lead to conflict and in-fighting).

49. See THE FEDERALIST NO. 26 (Alexander Hamilton), *supra* note 18, at 151; cf. THE FEDERALIST NO. 41 (James Madison), *supra* note 18, at 246 (sharing Hamilton’s concession and apprehension regarding a standing army, writing “[a] standing force, therefore, is a dangerous, at the same time that it may be a necessary provision[;] [o]n the smallest scale it has its inconveniences [and o]n an extensive scale its consequences may be fatal”).

50. See THE FEDERALIST NO. 29 (Alexander Hamilton), *supra* note 18, at 164-68 (“There is something so far fetched and so extravagant in the idea of danger to liberty from the militia, that one is at a loss whether to treat it with gravity or with raillery . . . . Where in the name of common-sense are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens?”). This is an interesting argument considering the troops in a standing army would also be citizens and kindred.

51. See THE FEDERALIST NOS. 25, 26, 28 (Alexander Hamilton), *supra* note 18, at 146, 153-54, 162-63 (showing that Hamilton pointed out that it would take a conspiracy between the Legislative and Executive Branches for such an abuse of military power to happen, that it would take a substantial military force to deprive the nation of liberty, and that citizens would notice this build-up and question, it particularly in times of peace).

52. See, e.g., 26 GEORGE WASHINGTON, *Sentiments on a Peace Establishment (May 2, 1783)*, in THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, *supra* note 18, at 388; THE FEDERALIST NO. 41 (James Madison), *supra* note 18, at 245-48.

### B. *The Militia Acts*

In 1789, Congress began chipping away at the stark separation between military and civilian affairs by using its power under the Militia Clause of the Constitution to pass the Judiciary Act of 1789, which allowed federal marshals to “command all necessary assistance” to execute their duties.<sup>53</sup> Shortly thereafter, President Washington received specific authority to use the militia to protect settlers on the Frontier, on two separate occasions.<sup>54</sup>

After the passage of the Bill of Rights in 1791, which codified the existence of militias, the civilian right to bear arms,<sup>55</sup> and the prohibition against the quartering of troops during peacetime,<sup>56</sup> public fear of the military started to dwindle.<sup>57</sup> Since the federal marshals and the Executive had used the limited grants of militia powers as prescribed, Congress took the bolder step of granting a general militia authority to the Executive, and, in doing so, carved out a rather extensive presidential authority that remains in effect today.<sup>58</sup>

On May 2, 1792, Congress passed the Calling Forth Act, a temporary statute<sup>59</sup> that authorized the Executive to call the state militias,<sup>60</sup> as he saw necessary, to repel invasions and, at the request of the state legislature or the state executive, to suppress insurrections.<sup>61</sup> It also permitted the Executive to call the militia from an outside state to enforce the laws of the Union.<sup>62</sup> This power, which was of a limited

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53. Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

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

55. U.S. CONST. amend. II.

56. U.S. CONST. amend. III.

57. W. Kent Davis, *Swords into Plowshares the Dangerous Politicization of the Military in the Post-Cold War Era*, 33 VAL. U. L. REV. 61, 65 (1998).

58. See 10 U.S.C. §§ 331-335 (2000).

59. Calling Forth Act of 1792, ch. 28, 1 Stat. 264 (repealed 1795). The Calling Forth Act was originally due to expire in 3 years. Vladeck, *supra* note 35, at 160.

60. The Calling Forth Act only allowed the calling of the state militia. Calling Forth Act of 1792, ch. 28, 1 Stat. 264 (repealed 1795). The Neutrality Act of 1794, however, allowed the President to call the militia and the regular army, to enforce the Neutrality Proclamation. Neutrality Act of 1794, ch. 50, §§ 7-8, 1 Stat. 381, 384. In an effort to stay out of the war between England and France, President Washington issued the Neutrality Proclamation in April 1793, which criminalized those who aided either side. Sean J. O’Hara, *The Posse Comitatus Act Applied to the Prosecution of Civilians*, 53 U. KAN. L. REV. 767, 770 (2005). He sent the federalized state militias to keep privateers from attacking British ships. *Id.*

61. Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264 (repealed 1795).

62. *Id.*

duration,<sup>63</sup> applied only if Congress was not in session, if the Executive had authorization from a federal judge, and if the Executive had first sent a cease and desist proclamation.

Almost immediately after its passage, President Washington used this newly legislated power to suppress the Whiskey Rebellion.<sup>64</sup> Washington called forth a federalized militia and led it into Pennsylvania to enforce a whiskey excise tax that farmers were refusing to pay.<sup>65</sup> This successful use of the militia powers without an abuse of discretion led Congress to reenact<sup>66</sup> the grant of authority in the Militia Act of 1795.<sup>67</sup>

The 1795 rendition was far more permissive and did away with many of the restrictions on the Executive's powers. It removed the need for a court order, the requirement that Congress not be in session, and the distinction between in-state and out-of-state militia.<sup>68</sup> Also, it arguably changed the cease and desist proclamation requirement to permit a contemporaneous notification rather than to strictly require advance notification.<sup>69</sup> President Jefferson used this broader calling forth power to institute "an instantaneous levee en masse"<sup>70</sup> of "all officers having authority, civil or military, and all other persons" to thwart a rumored insurgency, lead by former-Vice President Aaron Burr, to start a war with the Spanish Territory.<sup>71</sup>

The 1795 Act only included the state militias. It was not until the 1807 passage of the Insurrection Acts that the Executive gained the authority to call both regular army forces and the state militias in cases of insurrection and obstruction of the laws of the Union.<sup>72</sup> President Andrew Jackson used this power in 1832 to send troops to South Carolina, in order to prevent that state's secession from the Union.<sup>73</sup> How-

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63. *Id.*

64. RICHARD NELSON CURRENT & ALAN BRINKLEY, *AMERICAN HISTORY: A SURVEY* 174 (9th ed. 1995).

65. *Id.*

66. CLAYTON D. LAURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1877-1945*, at 18 (1997); see also Vladeck, *supra* note 35, at 162.

67. Militia Act of 1795, ch. 36, § 2, 1 Stat. 424 (repealed 1861).

68. Vladeck, *supra* note 35, at 162.

69. *Id.*

70. MERRILL PETERSON, *THOMAS JEFFERSON AND THE NEW NATION* 851 (1975).

71. H.W.C. Furman, *Restrictions upon the Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 88-89 (1960).

72. Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. §§ 331-335 (2000)). Congress's power to pass this law stemmed from its war powers and the militia powers granted in the Constitution.

73. Furman, *supra* note 71, at 89.

ever, the troops were held outside the South Carolina border until passage of federal legislation authorizing his use of force against the state.<sup>74</sup>

In 1850, the question of whether the Executive, under the United States Constitution, actually needed the authorization of Congress to call forth the militias was debated. Ultimately, it was determined that the President did not need such authorization, as this power was considered inherent in the role of the Executive.<sup>75</sup>

In the years leading up to the Civil War, the federal authorities and the Executive acquired more permissive abilities to utilize the militia and the regular army in the enforcement of federal laws. Perhaps the most contentious antebellum development was the Fugitive Slave Act of 1850,<sup>76</sup> which allowed federal marshals to call a posse comitatus<sup>77</sup> to recapture escaped slaves and return them to their owners.<sup>78</sup> From the start, the law was a source of contention,<sup>79</sup> but Attorney Gen-

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74. *Id.*

75. COAKLEY, *supra* note 36, at 130.

76. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864). This Act allowed federal commissioners to issue removal certificates for alleged fugitive slaves based on the ex parte testimony of the slave owners. PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL REED AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 226 (2006). The testimony of the alleged fugitive slave was not considered. *Id.* It has been estimated that ninety percent of the 332 alleged fugitive slaves tried under the Act were returned to slavery. *Id.*

77. A posse comitatus, Latin for power of the county, is a group of citizens who are called together to help a sheriff keep the peace or conduct rescue operations. BLACK'S LAW DICTIONARY 1200 (8th ed. 2004). The practice of summoning a posse comitatus, often shortened to posse, dates back to English common law where a county sheriff could call upon able-bodied people over the age of fifteen to aid him in the suppression of a riot and in keeping the peace. *See* United States v. Hart, 545 F. Supp. 470 (D.N.D. 1982), *aff'd*, 701 F.2d 749 (8th Cir. 1983) (holding that only a sheriff could organize a posse); OXFORD ENGLISH DICTIONARY 171 (2d ed. 1989) (“[T]he body of men above the age of fifteen in a county (exclusive of peers, clergymen, and infirm persons), whom the sheriff may summon or ‘raise’ to repress a riot or for other purposes.”). English common law allowed military personnel to be called, whereas the American usage of the posse generally did not. *See* Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J. L. & POL'Y 99, 104-05 (2003) (citing the “Mansfield Doctrine,” which said that uniformed soldiers, while acting as citizens, could participate in a posse and enforce laws); Kealy, *supra* note 1, at 389 (pointing out that the difference between English and American treatment emerged from the American perception of the dangers associated with using a standing army for local law enforcement and keeping the peace). This posse practice continues today through statutes that allow police officers to acquire the assistance of bystanders in making an arrest or in capturing an escaped prisoner. O'Hara, *supra* note 60, at 771.

78. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864).

79. O'Hara, *supra* note 60, at 771.

eral Caleb Cushing exacerbated the situation by issuing an advisory opinion, later known as the Cushing Doctrine, that allowed marshals to use the military in a posse comitatus summoned for the purpose of retrieving a slave.<sup>80</sup>

On the eve of the Civil War, Congress passed the last major revisions to the Militia Acts and greatly expanded presidential powers relating to the domestic use of the military. The Suppression of Rebellion Act of 1861 left the decision to summon federal troops to the sole discretion of the Executive and added “rebellion against the authority of the Government of the United States”<sup>81</sup> as a permitted triggering event. These amendments were used to justify the post-War occupation of the Southern states by federal troops from 1865 to 1877.<sup>82</sup>

### C. Reconstruction Era Abuses

Immediately after the war, Southern state governments were left intact under the Presidential Reconstruction Plan.<sup>83</sup> However, President Lincoln left federal forces in the South in order to protect the rights of freed slaves.<sup>84</sup> The Union troops—including more than 100,000 African-American soldiers<sup>85</sup>—did more than merely keep the peace. They showed contempt for slavery, intervened in civilian dis-

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80. Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 960 (1997). This directive, given in 1854, became known as the Cushing Doctrine. It was documented, concluding: “[T]he posse comitatus comprises every person in the district or county above the age of fifteen years whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines. All of whom are alike bound to obey the commands of a sheriff or marshal.” Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight On 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 MIL. L. REV. 86, 99 (2003) (quoting 6 Op. Att’y Gen. 466, 473 (1854)).

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

82. O’Hara, *supra* note 60, at 771.

83. MICHAEL MARTIN & LEONARD GELBER, *DICTIONARY OF AMERICAN HISTORY* 368 (Leo Lieberman ed., Littlefield, Adams Quality Paperback 1978). In his December 1863 proclamation, President Lincoln offered amnesty to those citizens who swore an oath of loyalty to the Union and agreed to abide by the newly promulgated laws regarding slavery. *Id.* Lincoln was operating under the assumption that the Southern states had not seceded from the Union but instead had merely rebelled. *Id.* This plan allowed readmittance to the Union when ten percent of the 1860 voters took such oaths. *Id.* Three occupied Southern states, Louisiana, Arkansas, and Tennessee, were readmitted under this plan in 1864. *Id.*

84. Felicetti & Luce, *supra* note 80, at 99-100; see also JAMES E. SEFTON, *THE UNITED STATES ARMY AND RECONSTRUCTION 1865-1877*, at 5-24 (La. State Univ. Press 1967).

85. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877*, at 8-10 (1988).

putes, and were symbols of the newfound black political power.<sup>86</sup> The wounds of the recently fought war remained fresh.

The Southern states struck back by attempting to reestablish white supremacy through the implementation of the “Black Codes.”<sup>87</sup> These codes reinserted discrimination into the criminal law by creating special crimes with harsh penalties that applied only to the newly freed African-Americans.<sup>88</sup> For example, there were criminal laws

which prohibited [freed men] from keeping weapons or from selling liquor . . . . [D]iscriminatory penalties were [evidenced in] laws which made it a capital offense for a [freed man] to rape a white woman, or to assault a white woman with intent to rape. . . . Vagrancy laws made it a misdemeanor for a [freed man] to be without a long-term contract of employment; conviction was followed by a fine, payable by a white man who could then set the criminal to work for him until the benefactor had been completely reimbursed for his generosity.<sup>89</sup>

White supremacist groups like the Ku Klux Klan perpetrated acts of intimidation and violence against freedmen.<sup>90</sup> Some Southern states passed anti-Klan legislation, but domestic law enforcement efforts were largely unsuccessful in combating the Klan’s unlawful activity, creating significant backlash. North Carolina Governor William Woods Holden took drastic steps to stop the Klan by calling forth the state militia, imposing martial law in some areas of the state, and suspending Klan members’ habeas corpus rights.<sup>91</sup> As a result, he was impeached.<sup>92</sup>

Congress responded to Southern resistance with the passage of a more radical Reconstruction plan,<sup>93</sup> which was codified in 1867, in order “[t]o provide for the more efficient Government of the Rebel

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86. *Id.*

87. Felicetti & Luce, *supra* note 80, at 102-03.

88. See John Frank & Robert Munro, *The Original Understanding of “Equal Protection of the Laws”*, 1972 WASH. U. L.Q. 421, 445-46 (1972).

89. *Id.*

90. Felicetti & Luce, *supra* note 80, at 106.

91. HORACE W. RAPER, WILLIAM W. HOLDEN 178 (George B. Tindall et al. eds., The Univ. of N.C. Press 1985).

92. WYN CRAIG WADE, *THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA* 84-86 (1987).

93. President Johnson’s Restoration Plan was based on Lincoln’s Plan. MARTIN & GELBER, *supra* note 83, at 323. He offered amnesty to everyone except for “certain prominent former Confederate officers, statesmen and owners of large properties.” *Id.* Military governors were installed in the Carolinas, Texas, Florida, Alabama, Mississippi and Georgia, and conventions were held. *Id.* Pro-slavery and secession ordinances were repealed under these interim governments. *Id.*

States.”<sup>94</sup> During this period, President Grant authorized federal troops to act as law enforcement to settle civil disturbances, apprehend Ku Klux Klan members and bootleggers, patrol borders, enforce revenue laws, quell labor disputes, and guard polls.<sup>95</sup> Specifically, the 1871 Ku Klux Klan Act authorized the President to suspend habeas corpus and exert martial law as necessary.<sup>96</sup>

The use of troops to guard Southern polling stations was the most controversial aspect of the Southern occupation and allegedly influenced the results of the 1876 presidential election.<sup>97</sup> In this election, Samuel J. Tilden won the popular vote; Rutherford B. Hayes won the electoral vote, but his victory was disputed in three Southern states and Oregon.<sup>98</sup>

Congress decided for Hayes, and as part of his selection, Hayes agreed to remove federal troops from the South.<sup>99</sup> On June 18, 1878, Congress passed the PCA, which prohibited use of the standing military “as a *posse comitatus* or otherwise to execute the laws.”<sup>100</sup> The original PCA included the following text:

[I]t shall not be lawful to employ any part of the Army of the United States, as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases . . . [as] may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section. And any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor[.]<sup>101</sup>

The domestic use of the military nevertheless continued in more or less the same capacity as it had before the passage of the PCA: between 1877 and 1945, the military was involved in domestic affairs 125 times.<sup>102</sup>

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94. Act of March 2, 1867, ch. 153, 14 Stat. 428.

95. Clarence I. Meeks, III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 89-90 (1975).

96. Act of Apr. 20, 1871, ch. 22, §§ 3-4, 17 Stat. 13, 14-15 (codified as amended at 18 U.S.C. § 241 (2000); 42 U.S.C. §§ 1983, 1985, 1988 (2000)).

97. Davis, *supra* note 57, at 65.

98. Kealy, *supra* note 1, at 394.

99. *Id.*

100. Act of June 18, 1878, ch. 263, § 15, 20 Stat. 152 (codified as amended at 18 U.S.C. § 1385 (2000)).

101. Army Appropriations Act, ch. 263, § 15, 20 Stat. 145, 152 (1878).

102. LAURIE & COLE, *supra* note 66, at 421.

## II. THE POSSE COMITATUS ACT AND THE EXECUTIVE

Contrary to much of the Hurricane Katrina-related debate, the PCA was not intended to prohibit the President from using the military to enforce the laws. Instead, it was passed with a much more limited purpose: to repeal the Cushing Doctrine.<sup>103</sup> In other words, the PCA was meant to criminalize the practice of civilian marshals calling forth military forces, in a posse comitatus, to enforce local law.

While the plain language of the PCA does appear to support the notion that it prohibits the President from executing the law, history and other laws demonstrate otherwise. Much of the confusion regarding the reach of the PCA stems from the words “authorized by the Constitution or Act of Congress” in the statutory text.<sup>104</sup>

The referenced language presents two major issues. First, the Constitution does not explicitly define the Executive’s military privileges or prohibit the use of the military for law enforcement.<sup>105</sup> This clause leaves room to read in the presidential emergency powers doctrine,<sup>106</sup> a somewhat controversial theory that allows the Executive to call the military unilaterally in times of emergency.<sup>107</sup> If this doctrine is valid, and I argue that it is, enforcing a stricter PCA against the President would, in theory, be unconstitutional.<sup>108</sup>

The second issue relates to Congress’s passage of legislation that gives the President express domestic law enforcement authority: the Insurrection Acts.<sup>109</sup> These laws predated the PCA and were not repealed, or even amended, when the PCA was passed.<sup>110</sup> Thus, any law enforcement power the PCA purportedly takes away from the President, the Insurrection Acts give back.

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

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103. Felicetti & Luce, *supra* note 80, at 115-16. The Cushing Doctrine allowed marshals (low ranking officials) to summon army troops into the posse comitatus. *Id.* at 115.

104. 18 U.S.C. § 1385.

105. Canestaro, *supra* note 77, at 116-17.

106. *Id.* at 117.

107. *Id.* at 118.

108. Attorney General Herbert Brownell, Jr. argued this to President Eisenhower in 1957. 41 Op. Att’y Gen. 313, 331 (1957).

109. Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. §§ 331-335 (2000)).

110. *See* 10 U.S.C. §§ 331-335 (2000); *see also* Army Appropriations Act, ch. 263, § 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385 (1994)).

A. *The Purpose of the Posse Comitatus Act*

In the years immediately following its passage, there was disagreement over exactly what the PCA meant. Specifically, there was confusion over how—and whether—the PCA affected the Executive's power to call forth the troops.

Originally, some supporters believed that the PCA reinforced the American tradition of limiting military involvement in civilian affairs<sup>111</sup> and barred the use of federal troops to enforce domestic law—except where explicitly enumerated by statute.<sup>112</sup> Others, including President Hayes,<sup>113</sup> subscribed to the view that the PCA merely reaffirmed the existing state of the law: the use of federal troops required an alternative authorization from the Constitution or Congress, and the President had such authorization inherently in the Constitution and by statute in the Insurrection Acts.<sup>114</sup>

Pursuant to the later view, the Executive continued calling forth the military for domestic purposes after the passage of the PCA. The first such use occurred only a couple months after Hayes signed the PCA, when he sent troops to quell a civil disorder in Lincoln County, New Mexico.<sup>115</sup>

During this deployment, federal troops spent more than a year enforcing local law—a deployment no different from the pre-PCA deployments of Jefferson and Jackson.<sup>116</sup> Hayes's calling forth of the military was significant, since the same lawmakers who had passed the PCA were still in office and did not criticize the President's actions as unlawful.<sup>117</sup>

In 1881, President Arthur acted more conservatively when posed with a similar emergency in Arizona.<sup>118</sup> In Arthur's view, the PCA did restrain his domestic military actions, so he requested that Congress

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111. See *United States v. Johnson*, 410 F.3d 137, 146-47 (4th Cir. 2005) (pointing out that this is not an absolute limitation—Congress can authorize military usage in special circumstances that are expressly authorized).

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

113. Felicetti & Luce, *supra* note 80, at 119. President Hayes did not feel as though the PCA applied to action by the President. 41 Op. Att'y Gen. 313, 331 (1957) (pointing to Hayes's diary of July, 30 1878).

114. Linda J. Demaine & Brian Rosen, *Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act*, 9 N.Y.U.J. LEGIS. & PUB. POL'Y 167, 212-19 (2005).

115. LAURIE & COLE, *supra* note 66, at 68.

116. See *supra* notes 68-74 and accompanying text.

117. Felicetti & Luce, *supra* note 80, at 119.

118. *Id.* at 120.

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amend the PCA—first, in December 1881, and then again in April 1882.<sup>119</sup>

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

The *posse comitatus* clause referred to arose out of an implied authority to the marshals and their subordinates executing the laws to call upon the Army just as they would upon bystanders who, if the Army responded, would have command of the Army or so much of it as they had, just as they would of the bystanders, and would direct them what to do.<sup>120</sup>

The Committee went on to note:

In all these cases the President of the United States having the power of employing any part of the Army from three soldiers to three thousand to assist in the execution of the laws in the Territory of Arizona, retains the dominion over this Army himself and the soldiers under command of their own officers to aid the civil authorities, instead of being under the command of the marshal of the Territory.<sup>121</sup>

Subsequent Presidents readily called forth the military to quell domestic uprisings just as Presidents had done before the passage of the PCA.<sup>122</sup> Apparently, they relied on constitutional or congressional grants of authority, as excepted from the PCA, to do so. The practical result was that the PCA appeared unsuccessful.

#### B. *The Emergency Powers Doctrine*

The emergency powers doctrine is a theory of Executive authority whereby the President gains seemingly extra-constitutional powers to use the military when, during times of national crisis, he or she deems it necessary for the preservation of the nation.<sup>123</sup> Emergency powers are not expressly defined in the Constitution, and, for this reason, there is disagreement in the legal community as to not only the extent of such powers but also whether these powers even exist.<sup>124</sup> The most controversial aspect of the emergency powers doctrine is how, if at all, it applies to domestic law enforcement, and, specifically, whether a unilateral presidential declaration of martial law is ever lawful.

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119. *Id.* at 119-20.

120. 13 CONG. REC. 3458 (1882).

121. *Id.*

122. See Felicetti & Luce, *supra* note 80, at 121-23.

123. Canestaro, *supra* note 77, at 116-17.

124. See Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989).

The existence of this emergency power, as a constitutionally-vested authority, is quite important to the review of presidential action under the PCA. The text of the current statute expressly obviates constitutional action from its terms,<sup>125</sup> but that PCA clause is, at least arguably, superfluous as applied to the Executive. Under the doctrine of separation of powers, Congress is unable to tighten the PCA restrictions on the Executive's use of the military for law enforcement purposes whenever such law enforcement authority is derived from the Constitution. Therefore, those lobbying for more restrictions on presidential power need to seek a constitutional amendment, not a new federal statute, to change any emergency-derived Executive law enforcement power.

### 1. Frameworks of Emergency Power

In 1989, Professor Jules Lobel categorized emergency powers into three frameworks: absolutist, relativist, and liberal.<sup>126</sup> Nearly twenty years later, these frameworks still appear to be an accurate categorization of the views among constitutional law scholars regarding emergency powers.

The absolutist view is that there is no such thing as an emergency power, as it does not exist in the Constitution.<sup>127</sup> The words of Justice Davis in *Ex parte Milligan* aptly describe this view:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.<sup>128</sup>

To the absolutist, the Founding Fathers' failure to include an emergency power that extends beyond the power to call the militias, wage war, or to suspend habeas corpus is proof that such power does not exist.<sup>129</sup> "The Constitution was adopted in a period of grave emer-

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125. 18 U.S.C. § 1385 (2000).

126. Lobel, *supra* note 124, at 1386-88.

127. *Id.* at 1386-87; Canestaro, *supra* note 77, at 119.

128. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866).

129. Lobel, *supra* note 124, at 1387.

gency,” yet the emergency powers delegated to the Executive were still quite limited.<sup>130</sup> Moreover, “a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.”<sup>131</sup>

Unlike the absolutist, the relativist (the second in our framework) acknowledges that exigencies exist and that the Founding Fathers could not have possibly predicted all circumstances for which the Constitution must account.<sup>132</sup> Under the relativist view, “the Constitution is a flexible document that permits the President to take whatever measures are necessary in crisis situations.”<sup>133</sup> This framework is supported by *The Federalist*<sup>134</sup> as well as by early Supreme Court opinions such as *McCulloch v. Maryland* where Chief Justice Marshall famously stated that the “[C]onstitution [was] intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.”<sup>135</sup>

The third framework, which Professor Lobel called the liberal framework, deals with the emergency versus non-emergency dichotomy.<sup>136</sup> This theory is also referred to as constitutional dualism, which is “the notion that there should be provisions for two legal systems, one that operates in normal circumstances to protect rights and liberties, and another that is suited to dealing with emergency circumstances.”<sup>137</sup> The liberalist believes that the Constitution vests the Executive with the power to act in an emergency but that it gives no actual

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130. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425-26 (1934). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (“[The founding fathers] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis.”); *Milligan*, 71 U.S. (4 Wall.) at 121.

131. *Milligan*, 71 U.S. (4 Wall.) at 126.

132. Lobel, *supra* note 124, at 1388.

133. *Id.*

134. See, e.g., THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 18, at 133-38.

135. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

136. Lobel, *supra* note 124, at 1388.

137. John Ferejohn & Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 234 (2004).

legal authority to do so.<sup>138</sup> Thus, the President must act extra-constitutionally and, in theory, face legal liability or even impeachment.

In his 1989 article, Professor Lobel asserts that early Presidents subscribed to the liberalist view of emergency powers, but that present day Presidents subscribe to the relativist view.<sup>139</sup> For the purposes of this article, it does not matter what type of framework—relativist or liberal—applies, as either view supports the existence of emergency powers. However, in my opinion, the relativist and liberal frameworks differ only semantically. No matter what, there is a limit to even the relativist President's power when he or she loses the faith of his or her constituents and ultimately faces impeachment if his or her emergency actions are egregious enough to offend the conscience of the nation. Presidents invoking their emergency powers no longer fall on their swords, as did early Presidents like Thomas Jefferson by openly admitting an extra-constitutional power grab while seeking absolution from Congress. However, Congress has acquiesced to the Executive's use of emergency authority and effectively repudiated the need for *post facto* explanation and vindication.<sup>140</sup>

## 2. *Historical Roots of Emergency Power*<sup>141</sup>

The roots of the emergency powers doctrine can be traced to John Locke's views regarding the English doctrine of prerogative by which the Executive's prerogative included the "[p]ower to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it."<sup>142</sup> According to Locke, it was impossible to designate laws for all "Accidents and Necessities, that may concern the publick," and such unforeseen necessities justified dispatching with the normal law-making process that became too cumbersome or slow to deal with a sudden crisis.<sup>143</sup> In Locke's view, "the Laws themselves should in some Cases give way to the Executive

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138. Lobel, *supra* note 124, at 1390 ("[L]iberalism seeks to separate emergency rule from the normal constitutional order, thereby preserving the Constitution in its pristine form while providing the executive with the power, but not legal authority, to act in an emergency.").

139. *See id.* at 1392.

140. For example, Congress passed the War Powers Resolution of 1973 (codified as 50 U.S.C. §§ 1541-1548) (2000), but no president has followed its terms and Congress has not raised the issue. *See BREST ET AL.*, *supra* note 76, at 723-24.

141. *See* Lobel, *supra* note 124 for an extremely detailed account of the history of emergency power.

142. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 375 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

143. *Id.*

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Power, or rather to this Fundamental Law of Nature and Government . . . [that] all the Members of the Society are to be preserved.”<sup>144</sup> Basically, prerogative was “the exercise of . . . self-preservation.”<sup>145</sup>

The American version of executive prerogative—the theory of emergency powers—paralleled the Lockean reliance on necessity.<sup>146</sup> As explained by Arthur Schlesinger, Jr. in his book, *The Imperial Presidency*:

[W]hen the executive perceived what he deemed an emergency, he could initiate extralegal or even illegal action, but that he would be sustained and vindicated in that action only if his perception of the emergency were shared by the legislature and by the people. Though prerogative enabled the executive to act on his individual finding of emergency, whether or not his finding was right and this was a true emergency was to be determined not by the executive but by the community.<sup>147</sup>

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

As discussed above in Part I, the Founding Fathers were wary of creating an Executive with the supreme power to command the military but, at the same time, acknowledged a need for a military force to protect the nation. Including an express emergency power would have vested great power in the Executive; whereas requiring the Executive to rely on executive prerogative, as defined by Locke, put a greater onus on the President. In other words, the President would have to act unlawfully in situations he or she deemed emergent and then “throw himself on the justice of his country”<sup>148</sup> for vindication after the unlawful act. Under this theory of emergency power, the President remained amenable to individual sanction by law without such after-the-fact approval by the legislature.<sup>149</sup>

In 1806, President Thomas Jefferson invoked this theory of emergency powers when he authorized funds for munitions, exceeding his authority under appropriations laws, after a British frigate attacked a

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144. *Id.*

145. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 8 (Houghton Mifflin 1973).

146. *Id.* at 23.

147. *Id.* at 8-9.

148. THOMAS JEFFERSON, *THE JEFFERSONIAN CYCLOPEDIA* 484 (John P. Foley ed., Russell & Russell 1967) (1900).

149. Lobel, *supra* note 124, at 1392-93 (describing Lockean and early-American views on executive prerogative and emergency power).

United States ship.<sup>150</sup> At the time, Congress was in recess.<sup>151</sup> Thereafter, Jefferson admitted his unlawful action in a full disclosure to Congress.<sup>152</sup>

Several years later, Jefferson expounded on emergency powers:

A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.

...  
... It is incumbent on those only who accept of great charges, to risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake. An officer is bound to obey orders; yet he would be a bad one who should do it in cases for which they were not intended, and which involved the most important consequences. The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.<sup>153</sup>

Notably, there is a significant issue posed by applying the Jeffersonian view of emergency powers to the modern day state of affairs. Jefferson presupposed an “emergency” that presumably involved a change from the status quo. But, since the turn of the Twentieth Century, the United States has been in a near constant state of national emergency, which begs the question of what is normal and what is an emergency.<sup>154</sup>

### 3. *Inherent Emergency Power*

The modern day justification for emergency power is that it is inherent in the powers delegated to the Executive.<sup>155</sup> The rationale is

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150. *Id.*

151. *Id.* at 1392.

152. *Id.* at 1393.

153. THOMAS JEFFERSON, *THE ESSENTIAL JEFFERSON* 208-10 (Jean M. Yarbrough, ed., Hackett Publ'g Co. 2006).

154. In 1974, the Senate Special Committee on National Emergencies and Delegated Emergency Powers noted that there were “at least 470 significant emergency powers statutes without time limitations delegating to the Executive extensive discretionary powers.” STAFF OF S. SPECIAL COMM. ON NAT'L EMERGENCIES & DELEGATED EMERGENCY POWERS, 93D CONG., *A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES*, at v (Comm. Print 1974) (“Emergency government has become the norm.”).

155. Lobel, *supra* note 124, at 1404.

that, under Article II of the U.S. Constitution, the President is charged with enforcing the law of the land, and his or her only means to do so is to use the military.<sup>156</sup> The constitutional sources of this power are the Executive Power Clause, the Take Care Clause, the Commander in Chief Clause, and the implied foreign powers.<sup>157</sup> Because this article is concerned only with domestic emergencies, I focus on the first three sources of emergency powers.<sup>158</sup>

The emergency powers doctrine is supported by a close textual reading of Article II, as compared to Article I, as well as the original intent of the Founding Fathers. Article II's grant of Executive power does not contain the limiting phrase "herein granted" that is present in Article I's grant of legislative power. This textual difference is significant in that it implies that Congress is a body of enumerated powers, whereas the Executive possesses inherent powers not explicitly listed in the Constitution. Some have interpreted this textual difference to stand for the proposition that Executive power includes anything not expressly prohibited by the Constitution.<sup>159</sup>

Perhaps even more compelling support for broad and discretionary Executive powers is the prevailing definition of "Executive power" at the time of the ratification of the Constitution.<sup>160</sup> As noted above, the Founding Fathers were heavily influenced by the theories of John Locke and additionally relied on Blackstone and Montesquieu when drafting the Constitution.<sup>161</sup> All three viewed the Executive as possessing far broader powers than those expressly contained in Article II.<sup>162</sup>

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156. Canestaro, *supra* note 77, at 118.

157. Lobel, *supra* note 124, at 1404 (indicating three—"the 'executive power' clause, the Commander in Chief clause, and the executive's implied power over foreign affairs"—of the four constitutional sources).

158. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) for a judicial discussion of this implied foreign power.

159. See Lobel, *supra* note 124, at 1404 n.96 (noting that Presidents Roosevelt and Truman relied on this principle and that it was also supported by early commentary by Hamilton).

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

161. Charles J. Cooper, Orrin Hatch, Eugene V. Rostow & Michael Tigar, *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 168 (1988).

162. See *id.* See also Locke, *supra* note 142, at 374-80; WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765); CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF LAWS (1762).

The Founding Fathers intended to create an “energetic executive”<sup>163</sup> and expressly charged the President with the responsibility to “take Care that the Laws be faithfully executed[.]”<sup>164</sup> In *The Federalist* Number 23, Alexander Hamilton poignantly made the case for broad Executive powers when he wrote:

[I]t is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed.<sup>165</sup>

Indeed, rejecting the emergency powers doctrine altogether is tantamount to conceding that “there is something in our Constitution that denies the people the right of self-preservation.”<sup>166</sup>

Additionally, the Constitution designates the President as the “Commander in Chief of the Army and Navy of the United States,”<sup>167</sup> which has been interpreted to require that the Executive respond in defense when the nation is attacked by an enemy. In the *Prize Cases*, the Supreme Court expressly recognized that this duty included a response to either an “invasion of a foreign nation” or “States organized in rebellion[.]”<sup>168</sup>

Some argue that the Executive power to respond to insurrection, as articulated in the *Prize Cases*, is based on the militia powers codified in the Insurrection Acts, rather than on Article II Executive powers.<sup>169</sup> This argument is inconsistent with the entirety of the *Prize Cases* opinion. Justice Grier carefully noted that the President, pursuant to his authority as Commander in Chief, may not wage war against a foreign enemy without a declaration from Congress but is permitted to suppress insurrection pursuant to the Militia Acts.<sup>170</sup> However, a different authority is implicated when another party initiates the hostilities. In that case, “the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to

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163. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 18, at 427.

164. U.S. CONST. art. II, § 3.

165. THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 18, at 133-34.

166. 77 CONG. REC. 4391 (1933) (statement of Rep. Lemke).

167. U.S. CONST. art. II, § 2, cl. 1.

168. *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863).

169. See Vladeck, *supra* note 35, at 186-90 (asserting that the courts have misapplied the *Prize Cases* in that the presidential authority in the *Prize Cases* stemmed from the Militia Acts and not Article II). See *infra* Part II.C for further discussion regarding the Insurrection Acts.

170. *The Prize Cases*, 67 U.S. (2 Black) at 668.

accept the challenge . . . .”<sup>171</sup> A war initiated by a rebellious state “is none the less a war[.]”<sup>172</sup>

Inherent emergency Executive power has been recognized in a number of other key Supreme Court opinions. Chief Justice Marshall asserted in *Marbury v. Madison*: “By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.”<sup>173</sup>

Additionally, in the *Grapeshot Case*, the Court found Lincoln’s establishment of provisional courts during a time of rebellion was a constitutional exercise of his power as Commander in Chief, even though such power was not expressly enumerated in the Constitution.<sup>174</sup> This “duty” to provide “for the security of persons and property, and for the administration of justice” was entrusted to the President and lasted until the end of the war.<sup>175</sup> Similarly, in *Stewart v. Kahn*, the Court upheld the constitutionality of Lincoln’s establishment of a blockade—an action part and parcel to dispersing an insurgency.<sup>176</sup> In *Stewart*, the Court noted:

The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution . . . . [T]he power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.<sup>177</sup>

Again, several years later in *Cunningham v. Neagle*, the Supreme Court could not “doubt the power of the president to take measures for the protection of a judge” when it upheld the constitutionality of an Executive Order authorizing the use of a marshal to protect Justice Field.<sup>178</sup> Along the same lines, in *In re Debs* the Court allowed President Cleveland’s use of the military to reestablish order in Chicago

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171. *Id.*

172. *Id.*

173. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

174. *The Grapeshot*, 76 U.S. (9 Wall) 129, 132-33 (1869).

175. *Id.* at 132.

176. *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506-07 (1870).

177. *Id.*

178. *Cunningham v. Neagle*, 135 U.S. 1, 67 (1890).

during the 1894 Pullman strike.<sup>179</sup> Justice Brewer dramatically explained:

[T]here is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws.<sup>180</sup>

It is worth noting, however, that not all American presidents have agreed with the existence of inherent emergency powers. For example, former Chief Justice and President Taft explicitly rejected the theory that executive authority could be derived from anywhere outside the four corners of the Constitution.<sup>181</sup> Taft believed that:

[T]he President can exercise no power which cannot be reasonably and fairly traced to some specific grant of power or justly implied or included within such express grant as necessary and proper to its exercise. Such specific grant must either be in the Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.<sup>182</sup>

#### 4. *Martial Law*

If an inherent emergency power exists, the President would likely employ it by declaring martial law. Martial law, itself, is a ubiquitous and ill-defined legal doctrine. The Supreme Court, legal scholars, and lawmakers have acknowledged that it exists, in some form, but there is no consensus on exactly what such an action or declaration would entail and whether it is lawful.<sup>183</sup>

In 1876, the Supreme Court defined martial law as “the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed.”<sup>184</sup> More recently, Congress defined martial law more broadly, without a reference to a state of war, but as “depend[ing] for its justification upon public necessity. Necessity

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179. *In re Debs*, 158 U.S. 564, 581-82 (1895).

180. *Id.* at 582.

181. See PAOLO E. COLLETTA, *THE PRESIDENCY OF WILLIAM HOWARD TAFT* 12 (1973).

182. *Id.*

183. See generally Vladeck, *supra* note 35.

184. *United States v. Diekelman*, 92 U.S. 520, 526 (1876).

gives rise to its creation; necessity justifies its exercise; and necessity limits its duration.”<sup>185</sup>

Interestingly, some legal scholars believe that the moniker “martial law” is an oxymoron, since by its very nature it requires the President to act extra-constitutionally, or unlawfully. These scholars argue that martial law should be more appropriately termed “martial rule” because that later “term is noncommittal as to its legality.”<sup>186</sup> For example, David Dudley Field argued, before the Supreme Court in *Ex parte Milligan*, that:

People imagine, when they hear the expression martial law, that there is a system of law known by that name, which can upon occasion be substituted for the ordinary system; and there is a prevalent notion that under certain circumstances a military commander may, by issuing a proclamation, displace one system, the civil law, and substitute another, the martial . . . . Let us call the thing by its right name; it is not martial law, but martial rule.<sup>187</sup>

Field raised a valid point, as even today—nearly 150 years later—there is still no body of “martial law” guidelines, and the Supreme Court has issued very few opinions on the matter.<sup>188</sup> The opinions that do exist are confusing and somewhat contradictory when considered side-by-side. In fact, they are better used to determine what is not a valid exercise of presidential emergency power rather than to fashion a test for what constitutes a legitimate act under martial law.

The two seminal martial law cases are *Ex parte Milligan* and *Duncan v. Kahanamoku*. While not martial law cases, the following offer additional insight into the Court’s view of martial law: the *Japanese Internment Cases* (*Korematsu v. United States*, *Hirabayashi v. United States* and *Ex parte Endo*), the *Steel Seizure Case* (*Youngstown Sheet & Tube Co. v. Sawyer*), and the recent War on Terror cases (*Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld*). I consider each case in turn.<sup>189</sup>

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185. 32 C.F.R. § 501.4 (1999).

186. See CHARLES FAIRMAN, *THE LAW OF MARTIAL RULE* 30 (1943).

187. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 35-36 (1866).

188. Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67, 90 (2000).

189. See generally Jason Collins Weida, Note, *A Republic of Emergencies: Martial Law in American Jurisprudence*, 36 CONN. L. REV. 1397 (2004); Davies, *supra* note 188 (presenting additional views on these cases and summaries of other martial law cases).

a. *Ex parte* Milligan

The first Supreme Court case to substantively<sup>190</sup> examine the concept of martial law was *Ex parte Milligan*, decided in 1866 shortly after the end of the Civil War.<sup>191</sup> Writing for the Court in *Milligan*, Justice Davis analyzed President Lincoln's inherent authority to declare martial law and the question of whether some of the actions taken pursuant to that authority were lawful. At issue was the trial of civilian attorney Lambdin P. Milligan by military commission, pursuant to presidential proclamation.<sup>192</sup> In the end, the Court concluded that the trial was illegal.<sup>193</sup>

On August 8, 1862, then Secretary of War Edwin Stanton issued a proclamation that essentially suspended habeas corpus in the United States.<sup>194</sup> The proclamation provided that:

[A]ll U.S. marshals and superintendents or chiefs of police of any town, city, or district be, and they are hereby, authorized and directed to arrest and imprison any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in any way giving aid and comfort to the enemy, or in any other disloyal practice against the United States.<sup>195</sup>

A month later, President Lincoln issued another proclamation that confirmed the suspension of habeas corpus and authorized trial by military commission for "all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice."<sup>196</sup>

The constitutionality of both of these proclamations was suspect, at best, since it was unclear to which branch the Constitution delegated the authority to suspend the writ of habeas corpus. Nevertheless, Congress did back the President's suspension of the Great Writ by passing the Habeas Act in March of 1863.<sup>197</sup> The Habeas Act permitted President Lincoln to suspend habeas corpus "whenever, in his judgment, the public safety may require it."<sup>198</sup> The Act also required

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

191. See *Milligan*, 71 U.S. (4 Wall.) 2.

192. *Id.* at 107-08; see also Brooks Simpson, *Ex parte Milligan*, in *THE PUBLIC DEBATE OVER CONTROVERSIAL SUPREME COURT DECISIONS* 34, 34 (Melvin I. Urofsky ed., 2006).

193. *Milligan*, 71 U.S. (4 Wall.) at 130.

194. MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 53 (Oxford Univ. Press, USA 1992) (1991).

195. *Id.*

196. JEFFREY ALAN SMITH, *WAR & PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER* 105 (Oxford Univ. Press, USA 1999) (1998).

197. Act of March 3, 1863, ch. 81, 12 Stat. 755 (repealed 1873).

198. *Id.* § 1.

the Secretary of War to give a list of the names of those imprisoned under the Habeas Act to the federal civilian courts.<sup>199</sup> The civilian courts were then to convene a grand jury, and if the grand jury returned a no bill, the prisoner would be released from military custody.<sup>200</sup>

Milligan was imprisoned under the Habeas Act, and the Circuit Court of the United States for Indiana convened a grand jury, which did not return an indictment.<sup>201</sup> Milligan was not, however, released from custody.<sup>202</sup> Instead, he was tried by military commission, found guilty of treason, and sentenced to be hanged.<sup>203</sup> Milligan appealed his conviction to the Circuit Court of Indiana, which certified the case to the Supreme Court.<sup>204</sup>

Justice Davis noted that “[n]o graver question was ever considered by this court” than whether a military commission had the legal power to try and sentence a civilian who was neither a prisoner of war nor a citizen of a rebellious state.<sup>205</sup> The Court ultimately decided that the President was “controlled by law” and his “sphere of duty” was to execute the law—not to make the law.<sup>206</sup> While Congress had delegated some power to the President, he had well exceeded that authority by failing to comply with the requirements of the Habeas Act.<sup>207</sup>

The Court addressed the issue of martial law head-on and squarely rejected the assertion that war or the declaration of martial law instilled in the President unrestrained, lawful power “to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will.”<sup>208</sup> This proposition, Justice Davis explained, would be directly at odds with a republican form of government, and that form of martial law was irreconcilable with the constitutional guarantees of civil liberty.<sup>209</sup> Military rule of this nature was precisely what the Founding Fathers sought to prevent.<sup>210</sup>

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

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199. *Id.* § 2.

200. *Id.*

201. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 107-08 (1866).

202. *See id.* at 107.

203. *See id.*

204. *See id.* at 108.

205. *Id.* at 118-19.

206. *Id.* at 121.

207. *Id.* 115-16.

208. *Id.* at 124.

209. *See id.* at 124-25.

210. *Id.*

[A] question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are over-thrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed [in this case was] much more extensive. . . . [T]here was no hostile foot [on Indiana's soil]; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.<sup>211</sup>

Thus, according to the opinion of the Court in *Milligan*, martial law could be imposed if there was actual necessity: a war, insurrection or rebellion; closure of the civilian courts; and in those places within the theater of war.<sup>212</sup> Further, presidential emergency authority was not lawful when it was exercised against a congressional mandate.<sup>213</sup>

Interestingly, in his dissent, Chief Justice Chase defined what he called "military jurisdiction" a little differently.<sup>214</sup> He wrote:

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.<sup>215</sup>

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211. *Id.* at 126-27.

212. Davies, *supra* note 188, at 100.

213. *Id.*

214. *Milligan*, 71 U.S. (4 Wall.) at 141 (Chase, C.J., concurring).

215. *Id.* at 141-42.

The Chief Justice believed that Congress derived constitutional authority from these types of “military jurisdiction” to fashion or authorize military trials for associated crimes.<sup>216</sup> As discussed in more detail in the following sections, Chief Justice Chase’s *dictum proprium* regarding military jurisdiction served as the foundation for the justification of imposing martial law during World War II.<sup>217</sup>

*b. Duncan v. Kahanamoku*

In the 1945 case *Duncan v. Kahanamoku*, the Supreme Court once again considered the legality of trying civilians by military tribunal.<sup>218</sup> This time the tribunals were used in Hawaii, while the territory was under a declaration of martial law.<sup>219</sup> The Court did not invalidate the declaration of martial law but did, once again, find the use of military tribunals unlawful.<sup>220</sup>

On December 7, 1941, after the Japanese attacked Pearl Harbor, the Hawaiian Governor Joseph Poindexter issued a proclamation that suspended the writ of habeas corpus and placed Hawaii under martial law<sup>221</sup> pursuant to the Hawaiian Organic Act.<sup>222</sup> This Act provided that:

[T]he governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.<sup>223</sup>

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216. *Id.* at 142.

217. *See* Weida, *supra* note 189, at 1402, 1426.

218. *See* *Duncan v. Kahanamoku*, 327 U.S. 304, 307-08 (1946).

219. *See id.*

220. *See id.* at 324.

221. *Id.* at 307.

222. Hawaiian Organic Act, ch. 339, 31 Stat. 141, 153 (1900).

223. *Id.*

President Franklin Roosevelt approved the Governor's action the next day.<sup>224</sup> This imposition of martial law stayed in effect until it was revoked by the President nearly three years later.<sup>225</sup>

On December 8, the Governor established military tribunals in lieu of civil and criminal civilian courts.<sup>226</sup> The military tribunals did not follow the normal rules of evidence or procedure, did not have set codes or predetermined punishments, and were not subject to judicial appellate review.<sup>227</sup> Punishment simply needed to be "commensurate with the offense committed" and could include fine, imprisonment, or death.<sup>228</sup>

Duncan was a civilian shipfitter who, on February 24, 1944, fought in a brawl with two Marines.<sup>229</sup> He was tried by military tribunal for violating a military order, convicted, and then sentenced to six months imprisonment.<sup>230</sup> He challenged the jurisdiction of the military tribunals by a petition for writ of habeas corpus.<sup>231</sup>

In reviewing the case, the Supreme Court had to determine to what extent the military could be used, pursuant to the Organic Act, to enforce domestic law.<sup>232</sup> Namely, the Court needed to ascertain whether this Act authorized the Governor to close all courts and replace them with military tribunals.<sup>233</sup> This analysis focused on defining "martial law."<sup>234</sup>

Justice Black, writing for the Court, noted that the term "martial law" "carrie[d] no precise meaning" and was not defined in the Constitution or another Act of Congress.<sup>235</sup> Also, based on the legislative history of the Organic Act, the intended scope of martial law was unclear.<sup>236</sup> For these reasons, the Court thought that "the answer may be found in the birth, development and growth of our governmental institutions up to the time Congress passed the Organic Act."<sup>237</sup>

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224. *See Duncan*, 327 U.S. at 308.

225. *See Davies*, *supra* note 188, at 101.

226. *Duncan*, 327 U.S. at 308.

227. *Id.* at 308-09.

228. *Id.* at 309.

229. *Id.* at 310.

230. *Id.* at 310-11.

231. *Id.* at 311.

232. *Id.* at 314-15.

233. *Id.* at 315.

234. *Id.*

235. *Id.*

236. *See id.* at 319.

237. *Id.*

Justice Black then surveyed American History and the often noted civilian distrust and fear of a standing military.<sup>238</sup> Based on this history, he concluded that “[l]egislatures and courts are not merely cherished American institutions; they are indispensable to our government. Military tribunals have no such standing.”<sup>239</sup> The Court acknowledged that martial law was intended to permit the military to act vigorously to maintain order and protect against rebellion or invasion, but was not meant to permit the total replacement of civilian courts by military tribunals.<sup>240</sup>

Like in *Milligan*, what is notable about *Duncan* is that the Court did not find martial law, itself, an unconstitutional use of Executive power.<sup>241</sup> In fact, it codified it as a theory of military jurisdiction that included vast military authority.<sup>242</sup> The Court concluded that martial law did not permit an all-out military rule—at least not for more than two years after the immediate emergency had been dispelled.<sup>243</sup>

### c. Japanese Internment Cases

During World War II, martial law was not declared in the continental United States, only in Hawaii, which at the time was still a territory. Instead, the Executive and Congress imposed several extreme restrictions on the civil liberties of Japanese-Americans. In two of the three *Japanese Internment Cases* discussed herein, the Supreme Court upheld these actions based on theories of necessity during an emergency.<sup>244</sup>

All three cases stem from violations of orders promulgated by Lt. General J.L. DeWitt. General DeWitt, acting according to authority vested in him by President Roosevelt’s February 19, 1942 Executive Order No. 9066, imposed a curfew and egress restrictions on Japanese-Americans.<sup>245</sup> In this Executive Order, the President explained that “the successful prosecution of the war requires every possible protection against espionage and against sabotage.”<sup>246</sup> This Order allowed military commanders “to prescribe military areas . . . from which any or all persons may be excluded, and with respect to which, the right of

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238. *Id.* at 319-22.

239. *Id.* at 322.

240. *Id.* at 324.

241. *Id.* at 318-19.

242. *Id.* at 324.

243. *Id.*

244. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

245. *Hirabayashi*, 320 U.S. at 83, 86.

246. *Id.* at 85 (quoting Exec. Order No. 9066, 7 Fed.Reg. 1407 (Feb. 19, 1942)).

any person to enter, remain in, or leave shall be subject to whatever restrictions” imposed by the commanders.<sup>247</sup> Congress codified this Executive Order in the Act of March 21, 1942 (the Act), which made it a misdemeanor to disregard a military order.<sup>248</sup>

In *Hirabayashi v. United States*, decided on June 21, 1943, the Court upheld Hirabayashi’s conviction, under the Act, for violating a curfew order.<sup>249</sup> The Court extended great deference to the government when examining “whether it is within the constitutional power of the national government, through the joint action of Congress and the Executive, to impose this restriction as an emergency war measure.”<sup>250</sup> The Court concluded that it could not “sit in review of the wisdom of” this joint action because the Constitution placed war-making responsibility on the two political branches.<sup>251</sup>

Using similar logic, in *Korematsu v. United States*, decided on December 18, 1944, the Court upheld a military order excluding Japanese-Americans from designated areas on the West Coast.<sup>252</sup> Korematsu was convicted for violating the Act because he remained in a so-called “Military Area” in San Leandro, California.<sup>253</sup> Justice Black, writing for the Court, indicated that the Court appreciated the harshness of the exclusion order.<sup>254</sup> He wrote:

[W]e are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.<sup>255</sup>

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247. *Id.* at 86 (quoting Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942)).

248. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942), *reprinted in* 56 Stat. 173 (1942).

249. *Hirabayashi*, 320 U.S. at 105.

250. *Id.* at 92.

251. *Id.* at 93.

252. *Korematsu v. United States*, 323 U.S. 214, 215-16, 223-24 (1944).

253. *Id.* at 215-16.

254. *Id.* at 220.

255. *Id.* at 219-20 (citation omitted).

Despite this hardship, the Court upheld the exclusion order and Korematsu's conviction.<sup>256</sup>

In his dissent, Justice Murphy vehemently disagreed with the exclusion of persons based on their ancestry and viewed such an order as "fall[ing] into the ugly abyss of racism."<sup>257</sup> Importantly, his opinion was premised on the "absence of martial law[.]"<sup>258</sup> His distinction between the present case and permissible levels of deference to military discretion was apparently based on whether martial law had been declared.<sup>259</sup> This distinction implied that Justice Murphy would have sanctioned ancestry-based exclusion had the West Coast areas been under martial law.

The Supreme Court did not, as suggested by the rhetoric in the earlier *Hirabayashi* opinion, give unbridled deference to the government's war-making authority;<sup>260</sup> the Court drew the line at the unjustified detention of loyal Japanese-Americans. In *Ex parte Endo*, which was decided the same day as *Korematsu*, the Court ordered the release of Endo, who had been detained in a "relocation center."<sup>261</sup> The Court found that the Act did not authorize the detention of loyal citizens such as Endo and that the government could achieve its goal of protecting against espionage and sabotage by way of curfews and exclusion orders.<sup>262</sup>

The Court noted that temporary detainment, for purposes of relocation, was acceptable.<sup>263</sup> It was the long-term detention, without other cause, that was problematic.

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

#### d. *Youngstown Sheet & Tube Co. v. Sawyer*

The extent of inherent Executive power was considered by the Court again in 1952 in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>264</sup> At

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256. *Id.* at 223.

257. *Id.* at 233 (Murphy, J., dissenting).

258. *Id.* at 233.

259. *Id.* at 234.

260. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

261. *Ex parte Endo*, 323 U.S. 283, 290, 304 (1944).

262. *Id.* at 297, 302.

263. *Id.* at 301.

264. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

issue in *Youngstown* was whether President Truman had acted constitutionally when he issued an order instructing the Secretary of Commerce to take control of and to operate steel mills nationwide.<sup>265</sup> The Court found that the President had acted unlawfully by issuing this directive.<sup>266</sup>

In 1951, in the midst of the Korean War, a dispute arose between steel companies and their employees over new collectively negotiated agreements.<sup>267</sup> On December 18, 1951, the United Steelworkers of America gave notice of their intention to strike when their existing agreements expired on December 31 of that year.<sup>268</sup> After the Federal Mediation and Conciliation Service and the Federal Wage Stabilization Board were unable to help labor and management reach an agreement, the Union gave notice, on April 4, 1952, that it would commence a nationwide strike at 12:01 A.M. on April 9.<sup>269</sup>

Because steel was a primary component of nearly all weapons and war-related materials, the President viewed this proposed strike as a threat to the national defenses.<sup>270</sup> For this reason, the President issued Executive Order 10,340, instructing the Secretary of Commerce to take possession and operate the steel mills.<sup>271</sup> The Executive Order attempted to justify this action, stating: “[B]y virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered . . . .”<sup>272</sup> The Secretary of Commerce followed this directive and the steel factories protested the lawfulness of this presidential action in federal court.<sup>273</sup>

While the Supreme Court found that President Truman’s taking of property was unconstitutional, it did so in six concurring opinions and three dissents—not exactly a unified decision of the Court.<sup>274</sup> Justice Black, writing for the Court, explained that the President’s power to issue such an order had to be derived from either the Constitution or an Act of Congress.<sup>275</sup> Since there was no relevant congressional action, Justice Black analyzed the Executive powers enumerated in the

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265. *Id.* at 582.

266. *Id.* at 580.

267. *Id.* at 582.

268. *Id.*

269. *Id.* at 582-83.

270. *Id.*

271. *Id.* at 583.

272. *Id.* at 591.

273. *Id.* at 583.

274. *Id.* at 580.

275. *Id.* at 585.

Constitution—namely, whether this action was lawful pursuant to the Take Care or Commander in Chief Clauses.<sup>276</sup>

Similar to its holding in *Milligan*, the Court held that the Commander in Chief powers were relegated to the “theater of war” and that the President was a law enforcer, not a lawmaker.<sup>277</sup> The Court took real issue with expanding the “theater of war” to include seizing “private property in order to keep labor disputes from stopping production.”<sup>278</sup>

*Youngstown* was not a martial law case, but, in his concurrence, Justice Jackson shed some light on inherent executive powers and their relationship to martial law.<sup>279</sup> Justice Jackson believed that “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”<sup>280</sup> To demonstrate his point, he broke executive action into three classes.

The first type of action is when the President “acts pursuant to an express or implied authorization of Congress, [and] his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”<sup>281</sup> A party that challenges this type of action bears a heavy burden of demonstrating that the action was unlawful, since that party would be challenging the federal government’s power as a whole.<sup>282</sup>

The second class of presidential action is when the “President acts in absence of either a congressional grant or denial of authority, [and] he can only rely upon his own independent powers[.]”<sup>283</sup> Justice Jackson opined that there was “a zone of twilight” where executive and congressional power overlap and where a lack of congressional action can enable independent actions of the President.<sup>284</sup>

The third class of presidential action is when the “President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>285</sup> Justice Jackson placed the steel factory controversy of *Youngstown* into this third category, which left presidential action

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276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 649-51 (Jackson, J., concurring).

280. *Id.* at 635.

281. *Id.*

282. *Id.* at 636-37.

283. *Id.* at 637.

284. *Id.*

285. *Id.*

“most vulnerable to attack and in the least favorable of possible constitutional postures.”<sup>286</sup>

Despite believing that Executive power was a malleable concept, Justice Jackson strongly refuted the assertion that the President “enjoy[ed] unmentioned powers”<sup>287</sup> and rejected the existence of inherent powers not expressly provided for in the Constitution.<sup>288</sup> He asserted that “[the Forefathers] knew what emergencies were” but yet only permitted the suspension of the writ of habeas corpus in times of crisis.<sup>289</sup>

Quite notably, Justice Jackson explicitly excluded “the establishment of martial law” from the “extraordinary authority” he found no basis for in the Constitution.<sup>290</sup> In *dictum proprium*, however, Justice Jackson recognized that the potential Executive use of martial law implies that such authority does exist under the Constitution.<sup>291</sup> His tiered classification of presidential authority provided a guide under which the lawfulness of imposing martial law may be reviewed (or justified) in the future.

*e. War on Terror Cases*

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

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

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286. *Id.* at 640.

287. *Id.*

288. *Id.* at 649-50.

289. *Id.* at 650.

290. *Id.* at 651 n.19.

291. *Id.* at 652-53.

nizations or persons.”<sup>292</sup> Pursuant to the AUMF, President Bush sent troops into Afghanistan to oust the Taliban and hunt down al Qaeda operatives.<sup>293</sup>

During this military operation, individuals participating in the resistance to the United States military were detained as “enemy combatants” and then transported to the United States Naval Base in Guantanamo Bay, Cuba.<sup>294</sup> Yaser Esam Hamdi, a United States citizen, was one of these individuals.<sup>295</sup> When it was discovered that Hamdi was a United States citizen, he was transferred to a continental United States military base.<sup>296</sup> Hamdi was held without charge or access to counsel until the Supreme Court heard a petition for a writ of habeas corpus that Hamdi’s father brought on his behalf.<sup>297</sup>

In 2004 in *Hamdi v. Rumsfeld*, the Court reviewed the issue of whether the capture and detention by the military of a United States citizen as an “enemy combatant” was constitutional.<sup>298</sup> The government offered two justifications for such detention. First, “the Executive possess[e] plenary authority to detain pursuant to Article II of the Constitution[,]” and, second, that Congress authorized the detention.<sup>299</sup> The Court did not address the Article II argument and instead decided that Congress had authorized Hamdi’s detention in the AUMF.<sup>300</sup>

Much of the Court’s opinion focused on whether the “all necessary and appropriate force” language of the AUMF included the capture and detention of citizens engaged in hostilities and the length of such detentions.<sup>301</sup> The Court found that detention, as a means to “prevent captured individuals from returning to the field of battle and taking up arms once again[,]” was a legitimate measure and an “important incident of war.”<sup>302</sup> However, the detention could only last as long as the active hostilities,<sup>303</sup> and a citizen-detainee must have some

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292. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

293. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 511.

298. *Id.* at 516.

299. *Id.* at 516-17.

300. *Id.*

301. *Id.* at 518.

302. *Id.*

303. *Id.* at 520.

means through which he or she can contest his or her status as “enemy combatant.”<sup>304</sup>

The Court specifically referenced its earlier holding in *Milligan* as support. In the Court’s view, *Milligan*’s detention would have been legal if he had been detained while engaged in battle in support of Confederate troops, rather than while at home away from the theater of war.<sup>305</sup>

The Court also stressed that, while sensitive to the exigencies of war, it was not prohibited, under the doctrine of separation of powers, from reviewing Presidential action in this context.<sup>306</sup> Specifically, without a congressional suspension of the writ of habeas corpus, the Judiciary still had a role in reviewing the government’s detention of citizens.<sup>307</sup>

In his dissent, Justice Scalia strongly disagreed that the Executive’s asserted “military exigency” justified the detention of a United States citizen without charges.<sup>308</sup> In Scalia’s view, an enemy of the United States should be tried in federal court for treason, and the only constitutional mechanism to relax such constitutional protections is a suspension of the writ of habeas corpus by Congress.<sup>309</sup> Scalia asserted that “indefinite imprisonment at the will of the Executive” was contrary to the “very core of liberty[.]”<sup>310</sup>

Scalia did, nevertheless, recognize the validity of martial law as “a step even more drastic than suspension of the writ [of habeas corpus].”<sup>311</sup> He defined martial law as “limited to ‘the theatre of active military operations, where war really prevails,’ and where therefore the courts are closed.”<sup>312</sup>

Two years later in the 2006 case of *Hamdan v. Rumsfeld*, the Supreme Court again considered the lawfulness of the President’s use of military commissions to try enemy combatants detained pursuant to the AUMF.<sup>313</sup> In *Hamdan*, Salim Ahmed Hamdan, a Yemeni

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304. *Id.* at 533-34.

305. *Id.* at 521-22.

306. *Id.* at 536-37.

307. *Id.* at 536.

308. *Id.* at 554 (Scalia, J., dissenting).

309. *Id.*

310. *Id.* at 554-55.

311. *Id.* at 573 n.4.

312. *Id.* (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866)).

313. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948a-948s (2006)), *as recognized in* *Boumediene v. Bush*, 128 S. Ct. 2229, 2234 (2008).

national, had been captured by United States forces in November of 2001 and subsequently transferred to the Guantanamo Bay military installation in June of 2002.<sup>314</sup> He was still imprisoned when the case went before the Court.<sup>315</sup>

On November 13, 2001, President Bush issued a military order for the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” which provided that all suspected al Qaeda members “shall . . . be tried by military commission . . . and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death.”<sup>316</sup> In 2003, the President designated Hamdan eligible to be tried by military commission, and, by way of writ of habeas corpus, Hamdan disputed the legality of these military commissions before the Supreme Court.<sup>317</sup> Ultimately, the Court agreed.<sup>318</sup>

What is interesting about *Hamdan*, from a martial law perspective, is that the Court expressly recognized martial law as valid.<sup>319</sup> Justice Stevens, writing for the Court, explained that military commissions could be used in three circumstances: (1) where martial law has been declared and civilian courts are closed; (2) where there is a temporary military government; and (3) during the conduct of war.<sup>320</sup> These three “states” of emergency were quite similar to the types of military jurisdiction laid out by Chief Justice Chase in his dissent in *Milligan*.

Justice Stevens went on to describe how military commissions used under declaration of martial law or a military government were more expansive than those used during a time of war.<sup>321</sup> Namely, martial law military commissions may be used to prosecute offenses occurring when martial law or a military government is established, not necessarily during an active hostility.<sup>322</sup> Additionally, they may be used to try all offenses, not just those violations of the laws of war, and may also be used to gain jurisdiction over everyone, not just those participating in the hostilities or members of the military.<sup>323</sup>

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314. *Id.* at 557.

315. *Id.*

316. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

317. *Hamdan*, 548 U.S. at 566.

318. *Id.* at 567.

319. *Id.* at 595.

320. *Id.* at 595-96 (Stevens, J., plurality opinion).

321. *Id.*

322. *Id.* at 598.

323. *Cf. id.* at 608.

### 5. *Supreme Court View of Executive Emergency Powers*

The only clear conclusion that can be drawn from the previously discussed Supreme Court decisions is that a declaration of martial law vests a valid “emergency” power in the President. However, the full extent of that power and whether such a declaration requires joint presidential and congressional action is up in the air. The Court does seem to posit that “martial law” establishes somewhat extreme and normally extra-constitutional authority in the President to enforce the law until order can be reestablished.<sup>324</sup>

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

Of course, all of these general themes can both be supported and refuted by at least one of the cases discussed in this section. This shows that, above all, the analysis of inherent Executive emergency powers is highly fact sensitive and generally still open to debate. Contrary to the assertions of critics,<sup>325</sup> inherent Executive power exists in some form; its extent, not its existence, still must be defined.

#### C. *Insurrection Acts*

Even without the recognition of inherent Executive emergency powers, the President still enjoys broad congressionally-delegated power to call forth the military for law enforcement purposes in times

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324. See *supra* Part II.B.4.

325. See generally Lobel, *supra* note 124, at 1386-97.

of crisis. The Insurrection Acts state that the President can call the state militia and armed forces: (1) at the request of the legislature or governor of a state to suppress an insurrection;<sup>326</sup> (2) to enforce the laws of the United States or suppress a rebellion where normal judicial proceedings would be insufficient;<sup>327</sup> and (3) to protect civil rights guaranteed under the Constitution.<sup>328</sup>

Under this cluster of legislation, the limits to the President's power are mainly procedural. For example, before the President can call on the state militia or armed forces, he needs to order the insurgents to desist peaceably.<sup>329</sup>

The threshold at which this power may be triggered is also quite low. For instance, § 333 only requires a mere "hind[rance]"<sup>330</sup> to permit military involvement. The President also does not need the permission of a state or Congress.<sup>331</sup> The decision to call troops to quell civil disorder is exclusively delegated to the President and is not subject to judicial review.<sup>332</sup>

While the actions of the Confederate states during the Civil War are generally what is thought of as an insurrection, as meant by § 331, courts have adopted a broader view by defining insurrection as "a rising against civil or political authority,—the open and active opposition of a number of persons to the execution of law in [a] city or state."<sup>333</sup> Insurrection does not require violence or a probability of success; it needs, "for the time being to defy the authority of the United States."<sup>334</sup> Those resisting the power of the civil authorities are known as "insurgents," and anyone who participates—regardless of his or her motives<sup>335</sup>—is considered an insurgent.<sup>336</sup>

Under § 333, the President can summon the militia when the "authorities of [a] State are unable, fail, or refuse to protect" the rights,

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326. 10 U.S.C. § 331 (2000).

327. *Id.* § 332.

328. *Id.* § 333.

329. *Id.* § 334.

330. *Id.* § 333.

331. *See id.*

332. *Monarch Ins. Co. v. District of Columbia*, 353 F. Supp. 1249, 1254-55 (D.D.C. 1973).

333. *In re Charge to Grand Jury*, 62 F. 828, 830 (N.D. Ill. 1894). In this case, a grand jury was called to determine whether offenses committed during a railroad union strike should be prosecuted. *Id.* at 829-30. This phrase was used in the jury instructions on the meaning of insurrection. *Id.* at 830.

334. *Id.*

335. This raises an interesting question regarding the people who were looting for food during the Katrina Disaster.

336. *In re Charge to Grand Jury*, 62 F. at 830.

privileges, and immunities guaranteed by the Constitution.<sup>337</sup> The courts have interpreted this statute to mean that the President can order the militia to protect fundamental rights such as the right to interstate travel.<sup>338</sup> Presidents Grant, Eisenhower and Kennedy all used this power to “remove . . . obstructions of justice” that “den[ie]d the equal protections of the law” and to “quell . . . domestic violence” in conjunction with civil rights abuses.<sup>339</sup>

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

It appeared doubtful, however, that Congress would cull back the Insurrection Acts powers. In 2006, the Insurrection Acts were amended, in response to the Hurricane Katrina Disaster, to expand presidential authority.<sup>340</sup> The John Warner National Defense Authorization Act allowed the President, without the consent of the states, to deploy federal troops in response to a natural disaster or other domestic crisis.<sup>341</sup> This amendment appeared to strike a fatal blow to the PCA, as there did not seem to be any type of emergency law enforcement activity not expressly authorized by an Act of Congress and, therefore, left to be restricted by the PCA. Surprisingly, Congress amended the Insurrection Acts in 2008 to retake the power granted in the 2006 Amendments.<sup>342</sup> Thus, the state of the law regarding the use of military for domestic law enforcement is exactly what it was when the Katrina Disaster occurred.

### III. DO WE EVEN NEED THE POSSE COMITATUS ACT?

Ignoring for the moment the issue of whether Congress can, in fact, restrict the Executive’s use of the military to enforce domestic law

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337. 10 U.S.C. § 333 (2000).

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

339. *Id.* at 1401-02.

340. Greenberger, *supra* note 9, at 399-400.

341. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006).

342. Pub. L. No. 110-181, 122 Stat. 325 (2008).

in times of emergency, I would like to consider whether a broad restriction, such as that purportedly included in the PCA, is either needed or prudent. I conclude no, on both counts.

It is important to note that these conclusions neither constitute my support for unbridled Executive power nor my agreement with President Bush's exercise of Executive power. There is a marked difference between, on one hand, taking issue with a blanket and meaningless bar and with the flaws in the arguments in support of such prohibition and, on the other hand, condoning a President's political agenda and use of his or her official powers. To be clear, I believe that there is a limit to Executive power and a threshold where presidential action in the name of protecting the Constitution is prevented.

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

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

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

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

Distrust of a standing military was a theme that pervaded the constitutional debates and *The Federalist* at the time immediately before and after the founding of our nation. But these discussions were based on the colonists' experiences under British rule. It is important to remember that the Founding Fathers were, essentially, common-day insurgents who led a secession movement which resulted in the formation of a new country—the United States.<sup>343</sup>

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343. The primary difference between the actions of the American Colonists and those of the secessionist states during the Civil War was that the colonists triumphed, whereas the South did not.

Despite the fear that another King could use a military force to exert dictatorial power over the infant nation, the Founding Fathers still provided for an army in the Constitution.<sup>344</sup> There was no PCA or the like, just the Constitution that divided military powers between the Executive and Congress.<sup>345</sup>

As discussed in Part I, the presidential power to call forth the militia to enforce the domestic law during times of crisis was expressly codified in the Militia Acts, which were originally passed immediately after the ratification of the Constitution.<sup>346</sup> These Acts were the harbinger for the Insurrection Acts, still in effect today, and gave significant power to the Executive.<sup>347</sup> Since their passage, nearly every President has invoked these Acts in one way or another, and Congress has not repealed them but instead, as recently as 2006, has extended the powers they delegate to the President.<sup>348</sup>

The Militia Acts and their subsequent invocations demonstrate that the Founding Fathers recognized that military occupation during a domestic emergency was, at times, necessary. Such use of the military is certainly distinguishable from a permanent installation of military rule, like that of the British during colonial times.<sup>349</sup>

Lastly, even the Founding Fathers took extra-constitutional action when necessity required it. Presidents, like Thomas Jefferson, invoked the Lockean theory of executive prerogative to extend their own Executive authority.<sup>350</sup>

#### B. *Justification #2: Reconstruction Era Abuses*

During the Reconstruction Era, the South was occupied and under the rule of the North.<sup>351</sup> The Southern governments had been forcibly removed to quell an insurgency, and the Union troops were installed to enforce a new domestic order.<sup>352</sup> While an extended military rule was certainly not desired or even consistent with the American way of life, this era of history was a time of war and great national crisis. It demanded the aid of the military.

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344. *See supra* text accompanying notes 34-42.

345. *See supra* text accompanying notes 34-42.

346. *See supra* text accompanying notes 67-69.

347. *See supra* text accompanying notes 58, 68-72.

348. Greenberger, *supra* note 9, at 400.

349. *See supra* text accompanying notes 18-19, 26-32.

350. *See* JEFFERSON, *supra* note 148, at 484.

351. SUSAN WELCH ET AL., AMERICAN GOVERNMENT 178 (W. Publ'g Co. 5th ed. 1994).

352. *See supra* text accompanying notes 84-85.

The Union troops were an occupying force, and, as noted above, acted like one. This level of military *rule* is distinguishable from the imposition of martial *law* in the face of an emergency. In other words, the United States military would not be entering a domestic forum to “take over” and forcibly change the citizens’ way of life, as did the Union troops, but rather would be descending into the forum to restore order.<sup>353</sup>

Further, the overall view of the American military among civilians has changed significantly from the view during the Reconstruction Era. Civilians today view military personnel with a much higher level of respect and confidence.<sup>354</sup> Many citizens and nationals currently serve in ancillary forces like the National Guard; formerly served as a means to attend college, to start a civilian career or to achieve citizenship; or have relatives or close friends who serve with honor and distinction.

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

Commentators often point to the differences in military and local law enforcement training and objectives to justify excluding the military from law enforcement roles.<sup>355</sup> Specifically, military personnel are not trained to consider the private rights of enemy soldiers; they are trained to react with extreme force in high stress battlefield situations and in armed conflicts on foreign soil against other soldiers.<sup>356</sup> Police, on the other hand, are expected to be peacekeepers first, using deadly force as a last resort.<sup>357</sup> However, in the modern day, this training-based distinction is a misconception.

In 1991, the Pentagon organized Joint Task Force Six (JTF-6) to coordinate the military training of domestic law enforcement<sup>358</sup> and to carry out law enforcement enhancement missions.<sup>359</sup> JTF-6 began using Special Forces and United States Army Military Police to train elite law enforcement units, including Special Weapons and Tactics (SWAT), Special Response Teams (SRT), Emergency Response Teams

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353. Davies, *supra* note 188, at 85-88.

354. *Id.* at 74-75.

355. Karan R. Singh, *Treading the Thin Blue Line: Military Special-Operations Trained Police SWAT Teams and the Constitution*, 9 WM. & MARY BILL RTS. J. 673, 674 (2001).

356. *Id.* at 704-09.

357. See generally *Tennessee v. Garner*, 471 U.S. 1 (1985).

358. Singh, *supra* note 355, at 689.

359. JTF-6 has participated in an estimated 5,000 missions since its inception. See Joint Task Force Six (Apr. 26, 2005), <http://www.globalsecurity.org/military/agency/dod/jtf-6.htm>.

(ERT), Special Emergency Response Teams (SERT), and Emergency Services Units (ESU).<sup>360</sup>

As of the late 1990s, it was estimated that 43% of the 459 SWAT units then in existence had been trained by the military.<sup>361</sup> It is currently estimated that 89% of police departments serving a population of over 50,000 have such units; it is unknown how many received military training.<sup>362</sup>

These specialized police units are typically organized in small teams of five to ten officers equipped with high-destruction weapons and who are called into high-risk situations that require specialized training to diffuse.<sup>363</sup> JTF-6 provides training in skills such as urban warfare tactics, booby trap removal, combat shooting techniques, and nighttime shooting skills.<sup>364</sup> SWAT units use these skills to deal with situations stemming from illegal drugs, gang and organized crime activity, civil rights violations, and domestic terrorism.<sup>365</sup>

Several years later, due to the success of JTF-6, this effort was expanded into several different forces dispersed throughout the United States.<sup>366</sup> In 2002, those task forces were consolidated under the control of United States Northern Command (USNORTHCOM) by the Department of Defense in response to domestic terrorism threats.<sup>367</sup> According to its mission, USNORTHCOM “plans, organizes and executes homeland defense and civil support missions.”<sup>368</sup>

The military’s involvement in training local law enforcement has been a mixed blessing. On one side, increased “sharing” between military and local law enforcement has helped train and equip police forces with new technology that can make a real difference in fighting crime. However, it has also lead to excessive use of force as seen during the Branch Davidian standoff in Waco, Texas in 1996.<sup>369</sup>

Another downside to the military training of police forces is that the tactics taught do not necessarily lend themselves to compliance

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360. Singh, *supra* note 355, at 689.

361. Rowan Scarborough, *Dangerous Alliances*, BNET, Oct. 25, 1999, [http://findarticles.com/p/articles/mi\\_m1571/is\\_ai\\_57155883](http://findarticles.com/p/articles/mi_m1571/is_ai_57155883).

362. Singh, *supra* note 355, at 680.

363. *Id.* at 680-81.

364. *Id.* at 689.

365. *Id.* at 690-98.

366. About USNORTHCOM, <http://www.northcom.mil/About/index.html> (last visited Oct. 14, 2008).

367. *Id.*

368. *Id.*

369. Kealy, *supra* note 1, at 385.

with Fourth Amendment restrictions on police action.<sup>370</sup> “Using tow trucks to remove doors [and] flash bangs,” which are standard operating procedures for SWAT, is a far cry from the “knock and announce” rule to which civilian police officers are held.<sup>371</sup> Unfortunately, gang and drug-related violence has necessitated these more aggressive police actions.

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

#### CONCLUSION

In order to bring the country back together after the Civil War, a compromise was needed. The Posse Comitatus Act was passed to forbid the civilian authority from using the military to enforce the law.<sup>372</sup> The PCA was not passed to restrict presidential action. In fact, Presidents continued to use the military to enforce domestic law—the first of such actions occurring immediately after the passage of the PCA.

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

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

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

What is clear, however, is that, in the aftermath of Hurricane Katrina, the military did what disaster relief organizations like FEMA and local police could not. Within a very short period of time, the active duty troops reestablished order and fed, medicated, and evacu-

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370. Singh, *supra* note 355, at 707.

371. *Id.* at 708.

372. 18 U.S.C. § 1385 (2000).

ated the stranded New Orleanians—without civilian casualty. Had the PCA not been in the law books, the military could have rescued the New Orleanians even faster.

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

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