

**CONGRESS CAN DELEGATE AUTHORITY, BUT NOT  
RESPONSIBILITY: ACCOUNTABILITY FOR THE  
DOMESTIC USE OF THE ARMED FORCES**

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Having now finished the work assigned me, I retire from the great theatre of Action; and bidding an Affectionate farewell to this August body under whose orders I have so long acted, I here offer my Commission, and take my leave of all the employments of public life.

—General George Washington<sup>1</sup>

#### INTRODUCTION

On June 1, 2020, at 6:43 p.m., days after peaceable protests across the United States condemning the murder<sup>2</sup> of George Floyd while in police custody devolved into “chaos,”<sup>3</sup> President Donald J. Trump addressed the nation from the White House Rose Garden.<sup>4</sup>

During the seven-minute statement, President Trump avowed, “[i]f a city or a state refuses to take the actions that are necessary to defend the life and property of their residents, then I will deploy the United States military and quickly solve the problem for them.”<sup>5</sup>

In the wake of this statement, President Trump faced a *revolt of the generals* redux.<sup>6</sup> A number of retired generals and flag officers

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<sup>1</sup> ROBERT K. WRIGHT, JR., *THE CONTINENTAL ARMY 181* (David F. Trask ed., 2006) (quoting GEORGE WASHINGTON, *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799* 285 (John C. Fitzpatrick ed., 1938)).

<sup>2</sup> Joshua McFadden, *Derek Chauvin Trial: Chauvin Found Guilty of Murdering George Floyd*, N.Y. TIMES, <https://www.nytimes.com/live/2021/04/20/us/derek-chauvin-verdict-george-floyd> (last updated Sept. 14, 2021) (“Chauvin . . . was found guilty of second-degree murder, third-degree murder and second-degree manslaughter.”).

<sup>3</sup> Ken Sugiura, *Atlanta Mayor Keisha Lance Bottoms’ Plea for her city*, ATLANTA J.-CONST. (May 30, 2020), <https://www.ajc.com/news/full-text-read-atlanta-mayor-keisha-lance-bottoms-plea-for-her-city/puDJ3iEafspuLZcbuq9rvO/>.

<sup>4</sup> Donald J. Trump, *Statement by the President* (June 1, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-by-the-president-39/> [hereinafter Rose Garden Statement].

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

<sup>6</sup> See James Joyner, *Generals and Political Interventions In American History*, WAR ON THE ROCKS (Aug. 4, 2016), <https://warontherocks.com/2016/08/generals-and-political-interventions-in-american-history/> (describing multiple retired generals

expressed outrage over President Trump's remarks. They took to newspapers, magazines, and social media to condemn the President's ultimatum and other proposed measures.<sup>7</sup> The maelstrom of critiques pointedly questioned the President's judgment, voiced serious disagreement with the President's response to the ongoing civil unrest, and decried the suggestion of military intervention. Some of these critics took their disapproval a step further, seemingly suggesting that the President's avowal to "deploy the United States military" to quell civil unrest was more than a severe error in judgment.<sup>8</sup> Several retired generals and flag officers seemed to suggest that deploying the military in response to the ongoing civil strife violated the

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involvement in politics after service); Sidney Blumenthal, *Revolt of the generals*, THE GUARDIAN (Apr. 20, 2006), <https://www.theguardian.com/commentisfree/2006/apr/21/comment.usa>; Keith D. McFarland, *The 1949 Revolt of the Admirals*, 11 U.S. ARMY WAR COLL. Q.: PARAMETERS 53, 61 (1981) (using "revolt of the generals" to describe several retired military officers decrying Donald Rumsfeld following statements by the Bush Administration in his favor).

<sup>7</sup> See Jeffery Goldberg, *James Mattis Denounces President Trump, Describes Him as a Threat to the Constitution*, THE ATL. (June 3, 2020), <https://www.theatlantic.com/politics/archive/2020/06/james-mattis-denounces-trump-protests-militarization/612640/>; Mike Mullen, *I Cannot Remain Silent*, THE ATL. (June 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/american-cities-are-not-battlespaces/612553/>; @TonyT2Thomas, TWITTER (June 1, 2020, 4:48 PM), <https://twitter.com/TonyT2Thomas/status/1267558773599744019>; John R. Allen, *A Moment of National Shame and Peril—and Hope*, FOREIGN POL'Y (June 3, 2020), <https://foreignpolicy.com/2020/06/03/trump-military-george-floyd-protests/>; James Stavridis, *I Spent My Career in the U.S. Navy. The U.S. Military Must Stand Up for Its Soul in This Moment*, TIME MAG. (June 3, 2020), <https://time.com/5847343/military-stand-up-for-its-soul/>; Leon E. Panetta et al., *Opinion: 89 Former Defense Officials: The Military Must Never Be Used to Violate Constitutional Rights*, WASH. POST (June 5, 2020), <https://www.washingtonpost.com/opinions/2020/06/05/89-former-defense-officials-military-must-never-be-used-violate-constitutional-rights/> [hereinafter *Opinion by 89 former Defense officials, Constitutional Rights*] (criticizing President Trump's threat to use active-duty members of the U.S. military to quell domestic unrest without the consent of local mayors or state governors); Douglas A. Silliman et al., *The Strength of America's Apolitical Military*, JUST SEC., <https://www.justsecurity.org/70608/the-strength-of-americas-apolitical-military/> (last updated June 15, 2020).

<sup>8</sup> Rose Garden Statement, *supra* note 4.

Constitution and the laws of the United States.<sup>9</sup> This suggestion is without merit—the Insurrection Act imbues the President with all the legal authority necessary to take precisely this kind of action if in the President’s judgment, and the President’s judgment alone, the action is warranted.

While civil-military relations scholars debate the prudence of retired generals and flag officers publicly rebuking the civilian leadership’s decisions regarding domestic military deployment, the mischaracterization of President Trump’s proposed response as unlawful creates its own set of problems.

First, the military currently enjoys confidence amongst the American people that is unparalleled by other major U.S. institutions.<sup>10</sup> Recent empirical studies suggest that policies receive an “increase in popularity if the public is told the military is in support of the measure,” and a “decrease[] in popularity if told the opposite.”<sup>11</sup> When retired generals and flag officers mischaracterize the legality of the civilian leadership’s actions, they risk this public “confidence in the military and increase[] doubts about [its] competence, truthfulness, and other dimensions of trustworthiness,” especially if their assertions do not stand up to future scrutiny.<sup>12</sup> In his critique of

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<sup>9</sup> See Goldberg, *supra* note 7; Mullen, *supra* note 7; Stavridis, *supra* note 7; *Opinion by 89 Former Defense Officials, Constitutional Rights*, *supra* note 7.

<sup>10</sup> *Confidence in Institutions*, GALLUP, <https://news.gallup.com/poll/1597/confidence-institutions.aspx> (last visited Nov. 21, 2021) (showing 37% of respondents had a “great deal” of confidence in the military, compared to 13% in the Supreme Court, 5% in Congress, and 16% in the Presidency).

<sup>11</sup> Jim Golby & Peter Feaver, *Military Prestige During a Political Crisis: Use It and You’ll Lose It*, WAR ON THE ROCKS (June 5, 2020), <https://warontherocks.com/2020/06/military-prestige-during-a-political-crisis-use-it-and-youll-lose-it/>.

<sup>12</sup> See *id.* “[R]esearch suggests that linking the prestige of the military to controversial policies carries with it unintended consequences, including the potential for reduced overall confidence in the military . . . .” See also *February 2021 Reagan National Defense Survey*, RONALD REAGAN PRESIDENTIAL FOUND. & INST., <https://www.reaganfoundation.org/reagan-institute/centers/peace-through-strength/reagan-institute-national-defense-survey/> (last visited Sept. 6, 2021) (noting an overall 14% drop in the trust and confidence of the U.S. Military); Heidi Urben, *Generals Shouldn’t Be Welcome At These Parties: Stopping Retired Flag Officer Endorsements*, WAR ON THE ROCKS (July 27, 2020), <https://warontherocks.com/2020/07/generals-shouldnt-be-welcome-at-these-parties->

President Trump’s Rose Garden statement, Admiral Mike Mullen (Ret.), the 17th Chairman of the Joint Chiefs of Staff, began by stating that “[t]he issue . . . is not whether [the] authority [to deploy the military on domestic soil] exists, but whether it will be wisely administered.”<sup>13</sup> However, he did not stop there. Admiral Mullen, after reassuring the American people that service members would “obey *lawful* orders,” went on to declare that events on the ground “[c]ertainly . . . have not crossed the threshold that would make it appropriate to invoke the provisions of the Insurrection Act.”<sup>14</sup> Suppose the President had decided to invoke the Insurrection Act, and service members were to abide by the President’s order. It is at least plausible that Admiral Mullen’s assertions, given the added force of military prestige, might leave Americans to consider two unappealing propositions—both deleterious to the military’s reputation. Either service members are obeying an unlawful order, despite Admiral Mullen’s declaration that events on the ground fell short of satisfying the prerequisites for invoking the Insurrection Act, or the retired generals and flag officers mischaracterized the law in opposing the duly elected President’s proposed course of action. Neither bodes well for the military’s continued esteem.

Second, mischaracterizing the lawfulness of the President’s use of the U.S. military on domestic soil by retired generals and flag officers risks creating uncertainty among the ranks. In a Washington Post op-ed by 89 former Defense officials, the authors stated unequivocally that “the President is betraying [his oath of office] by threatening to order members of the U.S. military to violate the rights of their fellow Americans.”<sup>15</sup> Statements made with this kind of certainty are inexact and are potentially detrimental to the force, leaving service members in the unenviable position of deciding whether they should follow the orders of the President of the United

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stopping-retired-flag-officer-endorsements/ (“[S]uggestions that the American public can distinguish between active duty and retired generals are simply unfounded, as evidenced by a poll Jim Golby and Feaver ran in June 2019 that will be featured in their forthcoming book, in which only 31 percent of Americans could correctly identify Secretary Jim Mattis’s military status as retired.”).

<sup>13</sup> Mullen, *supra* note 7.

<sup>14</sup> *Id.*

<sup>15</sup> *Opinion by 89 former Defense officials, Constitutional Rights, supra* note 7.

States.

In yet another response to President Trump’s Rose Garden statement, General John Allen (Ret.), the former commander of the North Atlantic Treaty Organization (NATO) International Security Assistance Force and U.S. Forces in Afghanistan, suggested that the President’s Rose Garden statement might mark “[t]he slide of the United States into illiberalism” and signal “the beginning of the end of the American experiment.”<sup>16</sup> He went on to posit that “there is *no precedent* in modern U.S. history for a president to wield federal troops in a state . . . over the objections of the respective governor.”<sup>17</sup> Yet, in 1957, President Dwight D. Eisenhower did just that when he sent federal troops to Arkansas to desegregate schools over Arkansas Governor Orval Faubus’s objection.<sup>18</sup> Federal troops would remain in Arkansas for two months, and the federalized National Guard would remain at Arkansas schools for the balance of the school year.<sup>19</sup> After the arrival of federal troops, in an address to the people of Arkansas, Governor Faubus declared, “[w]e are now an occupied territory.”<sup>20</sup>

These kinds of misstatements of fact and law unnecessarily foster confusion among the public, create distrust in the military’s civilian leadership, and erode a foundational democratic principle—“civilian supremacy and subordination of military power.”<sup>21</sup> This bedrock principle’s significance cannot be overstated and accounts for the high threshold for validating a service member’s decision to disobey an order or regulation.<sup>22</sup> An order of the kind proposed by President Trump is presumptively lawful<sup>23</sup> and “disobeyed at the peril of the subordinate.”<sup>24</sup> “The duty to disobey an unlawful order applies

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<sup>16</sup> Allen, *supra* note 7.

<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> David A. Strauss, *Little Rock and the Legacy of Brown*, 52 SAINT LOUIS UNIV. L. J. 1065, 1078 (2008).

<sup>19</sup> *Id.*

<sup>20</sup> *WSB-TV Newsfilm Clip of Governor Orval Faubus claiming that Arkansas is a Territory Occupied by the United States in Little Rock, Arkansas, 1957 September 26*, CIVIL RIGHTS DIGITAL LIB., [http://crdl.usg.edu/do:ugabma\\_wsbn\\_wsbn39763](http://crdl.usg.edu/do:ugabma_wsbn_wsbn39763) (last updated Oct. 2, 2021).

<sup>21</sup> *Laird v. Tatum*, 408 U.S. 1, 19 (1972).

<sup>22</sup> *See generally* 10 U.S.C. § 892.

<sup>23</sup> *United States v. Moore*, 58 M.J. 466, 467–68 (C.A.A.F. 2003).

<sup>24</sup> MANUAL FOR COURTS-MARTIAL UNITED STATES IV-24 (2019 ed.).

only to a positive act that constitutes a crime . . . so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.”<sup>25</sup> As this article will show, invocation of the Insurrection Act, by President Trump, in response to the events unfolding across the country on June 1, 2020, would provide no such justification for disobedience.

Third, mischaracterizing the legality of national leadership’s proposal to employ military force domestically strains civil-military relations and degrades trust between the military and national leadership. While disagreement between senior military leadership, retired or otherwise, and national leadership over tough policy decisions is inevitable, and public vetting of those decisions has virtue, the disputes must be rooted in facts and an accurate application of relevant law or run the risk of appearing partisan. Otherwise, “political distrust may incentivize the perverse practice of ‘*general shopping*’ for those of the ‘correct’ partisan persuasion, and the . . . mass firing of general officers from previous administration[s] . . .”<sup>26</sup> As noted by Lieutenant General David W. Barno, U.S. Army (Ret.) and Dr. Nora Bensahel in a recent article published in *War on the Rocks*, “[i]f [military leaders’] advice comes to be seen as compromised by partisanship, the nation’s elected leaders will not be able to objectively assess their military options . . .”<sup>27</sup>

Fourth, widely circulated mischaracterizations of the legality of the President’s proposed use of the U.S. military on domestic soil risks creating an unduly tentative President. By design, “the Constitution secures all federal executive power in the President to ensure a unity in purpose and energy in action.”<sup>28</sup> Alexander Hamilton

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<sup>25</sup> *Smith v. Obama*, 217 F. Supp. 3d 283, 293 (D.D.C. 2016) (citing *United States v. New*, 55 M.J. 95, 109 (C.A.A.F. 2001)).

<sup>26</sup> Thomas Burke & Eric Reid, *Retired Military Endorsements Erode Public Trust in the Military*, BROOKINGS (June 30, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/06/30/retired-military-endorsements-erode-public-trust-in-the-military> (emphasis added).

<sup>27</sup> David Barno & Nora Bensahel, *The Increasingly Dangerous Politicization of the U.S. Military*, WAR ON THE ROCKS (June 18, 2019), <https://warontherocks.com/2019/06/the-increasingly-dangerous-politicization-of-the-u-s-military/>.

<sup>28</sup> Robert J. Delahunty & John C. Yoo, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that*

discussed the importance of “unity in purpose and energy in action” in Federalist No. 70.<sup>29</sup> He wrote, “[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number.”<sup>30</sup> He goes on to explain, “energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community . . . to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”<sup>31</sup>

President George W. Bush lends credence to this concern during the recounting of the Bush administration’s response to Hurricane Katrina in his memoir *Decision Points*.<sup>32</sup> When it made landfall in 2005, Hurricane Katrina proved to be “the most destructive natural disaster in American history, laying waste to 90,000 square miles of land, an area the size of the United Kingdom . . . . All told, more than 1,500 people died.”<sup>33</sup> In *Decision Points*, President Bush relays that “[w]inds above 120 miles per hour had flattened the Mississippi coastline and driven a wall of water through the levees of New Orleans. Eighty percent of [New Orleans], home to more than 450,000 people, had flooded. Reports of looting and violence filled the news.”<sup>34</sup> His estimate of the state and local response was stark. President Bush wrote, “after four days of chaos, it was clear the authorities in Louisiana could not lead.”<sup>35</sup> Despite the unrest, and after much consideration, the President decided not to federalize the response to Hurricane Katrina. President Bush noted the reasons for his decision in his memoir:

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*Harbor or Support Them*, 25 HARV. J.L. & PUB. POL’Y 487, 492 (2002).

<sup>29</sup> *Id.* (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *See generally* GEORGE W. BUSH, *DECISION POINTS* 308–32 (2010) (discussing generally the United States’ approach to addressing natural disasters).

<sup>33</sup> S. REP. NO. 109-322, at 2 (2006).

<sup>34</sup> BUSH, *supra* note 32, at 308.

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

All my instincts told me we needed to get federal troops into New Orleans to stop the violence and speed the recovery. But I was stuck with a resistant governor, reluctant Pentagon, and an antiquated law [The Insurrection Act]. I wanted to overrule them all. But at the time, I worried that the consequence could be a constitutional crisis, and possibly a political insurrection as well.<sup>36</sup>

The effect of the President's decision on the ability to maintain *unity of command*<sup>37</sup> during the response to Hurricane Katrina is well documented in the Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina.<sup>38</sup> Given the magnitude of the natural disaster, it is impossible to state with certainty that federalizing the response to Hurricane Katrina would have boded better results. What is clear is that concern over "a constitutional crisis, and possibly a political insurrection"<sup>39</sup> stunted the President's instincts despite the Office of Legal Counsel's conclusion that "the federal government had authority to move in even over the objection of local officials."<sup>40</sup>

Further, a significant portion of the criticism heaped on President Trump by retired generals and flag officers after the President's June 1, 2020 statement from the Rose Garden focused on the President's independent judgment of the facts on the ground.<sup>41</sup> During times of crisis, an observer might expect disagreements about

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<sup>36</sup> *Id.* at 321.

<sup>37</sup> H.R. REP. NO. 109-377, at 184 (2006) ("Unity of command is the concept that an individual has only one superior to whom he or she is directly responsible, creating a clear line of supervision and command and control."); JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1: DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES V-1 (2013), [https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp1\\_ch1.pdf](https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp1_ch1.pdf) ("Unity of command means all forces operate under a single commander with the requisite authority to direct all forces employed in pursuit of a common purpose.").

<sup>38</sup> H.R. REP. NO. 109-377, at 184-90.

<sup>39</sup> BUSH, *supra* note 32, at 321.

<sup>40</sup> Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES (Sept. 9, 2005), <https://www.nytimes.com/2005/09/09/us/nationalspecial/political-issues-snarled-plans-for-troop-aid.html>.

<sup>41</sup> See Allen, *supra* note 7.

the severity of the facts on the ground and the appropriate response. Be that as it may, a President's decision to disregard his advisors' learned judgment does not render the President's determination unlawful. On the contrary, the Insurrection Act expressly authorizes the President to use the military on domestic soil.<sup>42</sup> Moreover, the Insurrection Act expressly appoints the President as the ultimate decisionmaker of whether the antecedent statutory facts on the ground have been satisfied for calling forth the armed forces.<sup>43</sup>

Finally, criticism of the President's assessment of whether the exigency exists and mischaracterizing the President's proposed course of action as unlawful obscure Congress's role as the benefactor, providing ever-broadening congressional authorizations to the President and making President Trump's proposed course of action explicitly lawful. President Trump's critics obfuscate Congress's conscious decision not to employ its "considerable power to restrain the President."<sup>44</sup> Congressional acts authorizing the President to use the militia and employ the armed forces on domestic soil are nearly as old as the Republic. Congress has amended the Insurrection Act and its forebearers on numerous occasions, providing for fewer restrictions and an increasingly autonomous President with almost every iteration.<sup>45</sup> As recently as 2008, Congress demonstrated its ability to revisit the Act by passing legislation, subsequently signed by the President, repealing portions of the Insurrection Act.<sup>46</sup> Yet, the Insurrection Act remains the statutory bulwark against critics of President Trump's proposed actions. Future Presidents are likewise free to wield this authority with unencumbered discretion—unless Congress chooses to act.<sup>47</sup>

This Article will begin by briefly reviewing the evolution of the statutory language of "The Militia Acts,"<sup>48</sup> demonstrating how

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<sup>42</sup> See Insurrection Act, 10 U.S.C. § 253 (1956).

<sup>43</sup> *Id.*

<sup>44</sup> *Smith v. Obama*, 217 F. Supp. 3d 283, 303 (D.D.C. 2016).

<sup>45</sup> See William C. Banks, *Providing "Supplemental Security"—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. NAT'L SEC. L. & POL'Y 39, 42–44, 87 (2009) (excepting the 2006 amendment repealed in 2008).

<sup>46</sup> *Id.* at 87.

<sup>47</sup> See Insurrection Act, § 253.

<sup>48</sup> See Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 Yale L. J.

congressional constraints placed on the President's domestic employment of the militia and the U.S. military have eroded. This Part will also set forth the Insurrection Act's current language and establish the lawfulness of President Trump's proposal to use the armed forces to suppress civil unrest in the wake of George Floyd's murder while in police custody.

Part II of this Article suggests that, if President Trump had invoked the Insurrection Act, courts would be unlikely to provide relief because the prayer for relief would require the courts to supplant the President's estimate of the facts on the ground for the court's. This kind of second guessing runs contrary to the plain language of the Insurrection Act. The Act makes the President "the judge of the existence of the exigency."<sup>49</sup> Additionally, this Part addresses another reason the courts are unlikely to provide relief, the specter of Political Question Doctrine. The Political Question Doctrine calls for courts to eschew constitutional questions committed to another branch of government, or those questions lacking judicially discoverable standards, thereby allowing the court to "avoid[] becoming embroiled in . . . [such] disputes."<sup>50</sup>

Part III turns its attention to Justice Robert H. Jackson's concurrence in *Youngstown Sheet & Tube Company v. Sawyer*—the preeminent framework for considering "the validity of the exercise of executive power."<sup>51</sup> This Part asserts that under Justice Jackson's *Youngstown* framework and current statutory language authorizing the use of the armed forces to suppress "insurrection, domestic violence, unlawful combination, or conspiracy,"<sup>52</sup> President Trump's authority to deploy the military on domestic soil was "at its maximum"<sup>53</sup> at the

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149, 152 (2004) [hereinafter *Emergency Power*]; Stephen I. Vladeck, *The Field Theory: Martial Law, The Suspension Power, and the Insurrection Act*, 80 TEMPLE L. REV. 392, 416 (2007) [hereinafter *Martial Law*].

<sup>49</sup> *Martin v. Mott*, 25 U.S. 19, 31 (1827).

<sup>50</sup> John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 182 (1996) [hereinafter Yoo, *War Powers*].

<sup>51</sup> *Id.* at 193.

<sup>52</sup> 10 U.S.C. § 253 (1956).

<sup>53</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

time of his Rose Garden statement. Under Justice Jackson’s framework, President Trump “personif[ied] the federal sovereignty.”<sup>54</sup> Further, this Part posits that recent proposals to amend the Insurrection Act are unlikely to alter the President’s station under the *Youngstown* framework; however, even if Congress managed to effectuate a change to the President’s station under the *Youngstown* framework, federal courts are unlikely to intervene. Only Congress, by “deploy[ing] their own constitutional authority to stop abuses of power,” can place the political and constitutional accountability for the President’s domestic use of the military squarely at the Executive’s feet.<sup>55</sup>

The Conclusion revisits the history of congressional authorization of the President’s use of the militia and the armed forces on domestic soil, emphasizing congressional endorsement of an increasingly autonomous President throughout The Militia Acts’ evolution. Relevant 19th-century Supreme Court precedent regarding The Militia Acts reinforced Congress’s establishment of an independent President with the sole authority to determine whether to use the strong arm of the national government to suppress domestic disorder.<sup>56</sup> Further, Justice Jackson’s famous *Youngstown* concurrence adds additional support to actions taken by the President pursuant to an act of Congress, noting that in such situations, his authority is “at its maximum” and bestows upon him “the strongest of presumptions and the widest latitude of judicial interpretation.”<sup>57</sup> Nevertheless, this Article concludes that despite this wellspring of

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<sup>54</sup> *Id.* at 636. This Article is focused on the President’s authority pursuant to an act of Congress and sets aside the argument that the President may take similar action absent congressional authorization and pursuant to his inherent Article II powers. *See In re Debs*, 158 U.S. 564, 582 (1895) (“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>55</sup> James C. Phillips & John C. Yoo, *You’re Fired: The Original Meaning of Presidential Impeachment*, 94 S. CAL. L. REV. (forthcoming) (manuscript at 54).

<sup>56</sup> *See generally In re Debs*, 158 U.S. at 582–83.

<sup>57</sup> *Youngstown*, 343 U.S. at 635, 637.

precedential support for independent presidential action and decision-making pursuant to the Insurrection Act, the federal courts have decided that the judiciary must not have the final word in disputes of this kind between the political branches. As the federal courts have repeatedly stated under similar facts, “[w]hen the executive takes a strong hand, Congress has no lack of corrective power.”<sup>58</sup> After all, Congress can delegate authority; it cannot delegate responsibility.<sup>59</sup>

### I. THE MILITIA ACTS

This Part examines the statutory language, from 1792 to the present, granting the President the authority to employ the militia and the armed forces in response to various domestic exigencies. Specifically, this Part accentuates Congress’s steady erosion of *checks and accountability mechanisms* on the President’s use of the militia and the armed forces in response to various domestic exigencies.<sup>60</sup> For the purposes of this Part, the separate issue of whether the Militia Clause<sup>61</sup> “confirms that it is Congress, not the President, that

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<sup>58</sup> *Mass. v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971); see *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990) (“[I]f Congress concludes at any time that the President’s actions . . . have usurped Congress’ constitutional role, Congress has many options to check the President.”).

<sup>59</sup> HEADQUARTERS, DEP’T OF THE ARMY, ADP 6-0 MISSION COMMAND, COMMAND AND CONTROL OF ARMY FORCES 1-5 (2019), [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/ARN18314-ADP\\_6-0-000-WEB-3.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN18314-ADP_6-0-000-WEB-3.pdf) (identifying existence of both responsibility and authority of delegates to fulfill a commander’s intent).

<sup>60</sup> Steve Vladeck, *Trump’s George Floyd protest threats raise legal questions. Here’s what he can (and can’t do)*, NBC NEWS (June 2, 2020), <https://www.nbcnews.com/think/opinion/trump-s-george-floyd-protest-threats-raise-legal-questions-here-ncna1222241/> [hereinafter Vladeck, *Trump’s George Floyd protest threats raise legal questions*].

<sup>61</sup> U.S. CONST. art. I, § 8, cl. 15; see also *Emergency Power*, *supra* note 48, at 153 (noting that Congress has authority under the Militia Clause to use the militia to enforce domestic laws); Banks, *supra* note 45, at 39 (recognizing the mechanisms for military support in domestic settings is tightly controlled); Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 207 n.1 (1940) (“Strictly speaking, of course, there are two clauses, but insistence upon the plural would seem pedantic in view of common usage to the contrary—a usage sanctioned by Congress (e.g. H.R. REP. NO. 141, 73d Cong., 1st Sess. (1933) 2, 5)

authorizes the deployment of the military in respon[se] to a domestic crisis”<sup>62</sup> is set aside. Part A reviews the text of the pre-Civil War statutes initially authorizing the President “to call forth the militia”<sup>63</sup> and later “to employ . . . the land or naval force of the United States.”<sup>64</sup> Part B introduces the post-Civil War statutes authorizing the President “to call forth the militia . . . and to employ . . . the land and naval forces of the United States.”<sup>65</sup> Part C analyzes the current version of the Insurrection Act<sup>66</sup> and makes clear the lawfulness of President Trump’s proposed use of the U.S. military to quell civil unrest.

### *A. The Pre-Civil War Statutes*

#### 1. The Calling Forth Act

The scholarly commons are rich with literature on the history of the founding of the United States. Though there is much to consider when endeavoring to divine the Framers’ constitutional design, even the scantest review of the American experience before and after 1787 will uncover two indelible hallmarks. First, surveyors of the scholarly commons will undoubtedly note that colonists were vigorously anti-executive leading up to the rebellion against Great Britain and in the years immediately following. “Antipathy towards the Crown” was reflected “in the first constitutions drafted by the newly independent states.”<sup>67</sup> Second, relevant literature notes that the Pre-Revolutionary, Revolutionary, Convention, Ratification, and other ensuing periods of the American experience are marked by “a traditional and strong resistance of Americans to any military intrusion into civilian

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and by the Supreme Court.”).

<sup>62</sup> Banks, *supra* note 45, at 40.

<sup>63</sup> Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264, (repealed 1795).

<sup>64</sup> Insurrection Act of 1807, ch. 39, Pub. L. No. 9-2, 2 Stat. 443.

<sup>65</sup> Suppression of the Rebellion Act of 1861, ch. 25, Pub. L. No. 36, 12 Stat. 281. *See also* Civil Rights Act of 1871, ch. 22, §§ 3–4, 17 Stat. 13, 14–15 (1871) (authorizing the President to to “employ[] . . . the militia or the land and naval forces of the United States.”).

<sup>66</sup> Insurrection Act, 10 U.S.C. §§ 251–254.

<sup>67</sup> Yoo, *War Powers*, *supra* note 50, at 222.

affairs.”<sup>68</sup> The first of these axioms of the American experience notwithstanding, whether by constitutional design,<sup>69</sup> “congressional inertia, indifference or quiescence,”<sup>70</sup> or the slow grind of presidential practice over time,<sup>71</sup> there emerged a strong, unitary, independent executive.<sup>72</sup> Likewise, only a year after the new government under the Constitution officially commenced in March 1789,<sup>73</sup> Congress would initiate the practice of delegating to the President the authority to call out the militia,<sup>74</sup> a tradition that continues today.<sup>75</sup> Despite “the American Revolution [being] spurred in large part by the colonists’ reaction to King George’s use of the military to enforce English laws in the colonies”<sup>76</sup> and the powers the Framers reserved to Congress in the Militia Clause,<sup>77</sup> the realities of governance and the ever-changing threats to the fledgling republic demanded deviation from the second of these axioms.<sup>78</sup>

The Militia Clause grants Congress the power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repeal Invasions.”<sup>79</sup> Accordingly, in the Calling Forth Act of 1792, Congress provided “[t]hat whenever the United States shall be invaded, or be in imminent danger of invasion from any

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<sup>68</sup> *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

<sup>69</sup> Yoo, *War Powers*, *supra* note 50, at 218, 223.

<sup>70</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 637 (1952).

<sup>71</sup> *See generally* ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* ix (1973).

<sup>72</sup> *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 4, 8, 419 (2008); John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 1979 (2009); *see also* Yoo, *War Powers*, *supra* note 50, at 292.

<sup>73</sup> Establishment of a New Government, *in* 34 *JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789*, 515, 518, 523 (Roscoe R. Hill ed., 1937) [hereinafter *JOURNALS*].

<sup>74</sup> Act of Apr. 30, 1790, ch.10, § 16, 1 Stat. 119, 121.

<sup>75</sup> Insurrection Act, 10 U.S.C. § 251 (2018).

<sup>76</sup> Banks, *supra* note 46, at 39.

<sup>77</sup> U.S. CONST. art. I, § 8, cl. 15.

<sup>78</sup> *See generally* *Emergency Power*, *supra* note 48, at 153 (discussing how authority to impose martial law has been textually and historically committed to Congress); *see also* ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789-1878*, at 4-7 (David F. Trask ed., 1988).

<sup>79</sup> U.S. CONST. art. I, § 8, cl. 15.

foreign nation or Indian tribe, it shall be lawful for the President of the United States, to call forth . . . the militia.”<sup>80</sup> Although the language of the Act was expansive, this “temporary and unprecedented experiment”<sup>81</sup> was not without *checks and accountability mechanisms*<sup>82</sup> on the President’s use of delegated authority.

In a nod to state sovereignty and the fundamental constitutional principle of federalism,<sup>83</sup> § 1 of the Calling Forth Act required, “in case of an insurrection in any state, against the government,” as an antecedent for the President to “call forth . . . the militia,” an “application of the legislature of such state, or of the executive (when the legislature cannot be convened).”<sup>84</sup> The Act contained additional *checks and accountability mechanisms*.<sup>85</sup> Section 2 provided:

[W]henever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, the same being notified to the President of the United States, by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed.<sup>86</sup>

<sup>80</sup> Calling Forth Act of 1792, ch. 28, § 1, 1 Stat. 264, 264 (repealed 1795); *Martial Law*, *supra* note 48, at 417.

<sup>81</sup> *Martial Law*, *supra* note 48, at 417.

<sup>82</sup> Vladeck, *Under the Insurrection Act of 1807, here’s what a U.S. president can and cannot do*, WASH. POST (June 19, 2020), <https://www.washingtonpost.com/politics/2020/06/19/under-insurrection-act-1807-heres-what-us-president-can-cannot-do/> [hereinafter *Under the Insurrection Act*].

<sup>83</sup> See generally Libr. of Cong., *Intro.2.2.3 The Constitution’s Basic Principles: Federalism*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/intro-2-2-3/ALDE\\_00000032/](https://constitution.congress.gov/browse/essay/intro-2-2-3/ALDE_00000032/) (last visited Dec. 21, 2021) (explaining the concept of federalism).

<sup>84</sup> Calling Forth Act of 1792 § 1.

<sup>85</sup> Vladeck, *Trump’s George Floyd protest threats raise legal questions*, *supra* note 60.

<sup>86</sup> § 2, 1 Stat. 264.

Here, the Act *did not* make the President “the sole and exclusive judge . . . of the existence of the exigency”<sup>87</sup> that would authorize “the President of the United States to call forth the militia . . . .”<sup>88</sup> Instead, Congress required an independent assessment and notification “by an associate justice or the district judge” of the existence of the factual predicate for “call[ing] forth the militia.”<sup>89</sup>

Section 2 also employed an additional restraint on the President—*graduated force measures*.<sup>90</sup> Upon receiving confirmation from “an associate justice or the district judge” of the factual predicate for “call[ing] forth the militia,”<sup>91</sup> the Act authorized the President to meet the exigency with the militia of the state under duress.<sup>92</sup> Under the Act, if the militia of the state under duress *refused* to obey the President of the United States or was *insufficient* to execute the laws of the United States, the President could not of his own volition, “call forth the militia” of other states while Congress was in session.<sup>93</sup> Presumably, while the Legislature was in session, Congress withheld its delegation of the Militia Clause’s powers.<sup>94</sup> If, however, “the legislature of the United States” was not in session, the Act authorized the President “to call forth and employ such numbers of the militia of any other state or states . . . as . . . necessary.”<sup>95</sup>

Even then, as an added check, in the instance that the Legislature was not in session, the Act imposed a time constraint on the President’s authority to keep “the militia employed in the service of the United States.”<sup>96</sup> The Act authorized “the use of militia . . . until the expiration of thirty days after the commencement of the ensuing session,” preserving a congressional check on the President.<sup>97</sup> As a

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<sup>87</sup> *Martin v. Mott*, 25 U.S. 19, 29, 31 (1827).

<sup>88</sup> § 2, 1 Stat. 264.

<sup>89</sup> *Id.*

<sup>90</sup> DAVID H. LEE ET AL., OPERATIONAL LAW HANDBOOK 89 (2015) (explaining that “[g]raduated force measures” require an attempt to use lesser means of force to respond to a threat when time and circumstances permit).

<sup>91</sup> § 2, 1 Stat. 264.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> U.S. CONST. art. I, § 8, cl. 15.

<sup>95</sup> § 2, 1 Stat. 264.

<sup>96</sup> § 4, 1 Stat. 264.

<sup>97</sup> § 2, 1 Stat. 264.

final measure, the Act required that the President, “by proclamation, command such insurgents to disperse, and retire peaceably . . . within a limited time” *before* calling forth the militia.<sup>98</sup>

## 2. The Militia Act

In 1794, the fifth year of the new American experiment to implement a viable “economic program . . . for funding the national debt and chartering a national bank,” the federal government sought to increase taxes.<sup>99</sup> One such tax was the Whiskey Act of 1791.<sup>100</sup> Three years after the passage of the Whiskey Act of 1791, “[w]hat had begun as a [Whiskey] tax protest had escalated into an armed rebellion.”<sup>101</sup> In responding to the uprising, President George Washington adhered to the *checks and accountability mechanisms*<sup>102</sup> of the Calling Forth Act “to the letter,”<sup>103</sup> including “present[ing] evidence of the violence to Supreme Court Justice James Wilson, who ruled a military response was justified,”<sup>104</sup> and “easily crushed the rebellion”.<sup>105</sup>

The triumph of the forces of order over the Whiskey Rebels occasioned an outpouring of public sentiment in favor of the government’s decision to use force to put down the rebellion. . . . [President] Washington[] call[ed] for a national day of Thanksgiving to commemorate the suppression of the rebellion.<sup>106</sup>

President Washington’s adherence to the Calling Forth Act was a

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<sup>98</sup> § 3, 1 Stat. 264.

<sup>99</sup> Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883, 894 (2006).

<sup>100</sup> S. JOURNAL, 1st Cong., 3d Sess. 250 (1791).

<sup>101</sup> Cornell, *supra* note 99, at 894.

<sup>102</sup> *Martial Law*, *supra* note 48; *Under the Insurrection Act*, *supra* note 82.

<sup>103</sup> *Martial Law*, *supra* note 48, at 417.

<sup>104</sup> *Whiskey Rebellion*, HISTORY.COM, [https://www.history.com/topics/early-us/whiskey-rebellion#section\\_6](https://www.history.com/topics/early-us/whiskey-rebellion#section_6) (last updated Sept. 13, 2019).

<sup>105</sup> Cornell, *supra* note 99, at 900.

<sup>106</sup> *Id.* at 901.

watershed moment “result[ing] in the establishment of both a permanent law and a precedent for all future use of federal military force in domestic disorders.”<sup>107</sup> In 1795, Congress would make the “temporary and unprecedented experiment” of the Calling Forth Act permanent, “removing several of the . . . checks on presidential unilateralism.”<sup>108</sup>

The newly adopted Militia Act of 1795 retained § 1 of the Calling Forth Act in its totality,<sup>109</sup> preserving the Calling Forth Act’s adherence to state sovereignty and the fundamental constitutional principle of federalism.<sup>110</sup> Section 2, on the other hand, was utterly transformed.

Under the Militia Act, the President became “the sole and exclusive judge . . . of the existence of the exigency.”<sup>111</sup> Congress jettisoned the requirement for an assessment from the Judicial Branch, leaving the Executive Branch to determine whether the factual predicate “to call forth the militia” was satisfied.<sup>112</sup> Additionally, Congress removed the *graduated force measures*<sup>113</sup> and language limiting the President’s response solely to the use of the afflicted state’s militia from the statutory language.<sup>114</sup> Likewise, Congress eliminated the provision precluding the President from “call[ing] forth the militia” of other states while Congress was in session.<sup>115</sup> The time constraint on the President’s authority to keep “the militia employed in the service of the United States”<sup>116</sup> was modified slightly, allowing “use of the militia” to continue “until the expiration of thirty days after the commencement of the next session of Congress,” preserving a congressional check on the President.<sup>117</sup> Finally, while the newly

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<sup>107</sup> COAKLEY, *supra* note 78, at 68.

<sup>108</sup> *Martial Law*, *supra* note 48, at 417–18.

<sup>109</sup> Militia Act of 1795, ch. 36, § 1, 1 Stat. 424, 424 (1795) (repealed in part 1861); Calling Forth Act of 1792, ch. 28, § 1, 1 Stat. 264, 264 (repealed 1795).

<sup>110</sup> *See generally* Libr. of Cong., *supra* note 83.

<sup>111</sup> *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29, 31 (1827).

<sup>112</sup> § 2, 1 Stat. 424.

<sup>113</sup> LEE, *supra* note 90, at 89 (“When time and circumstances permit, Soldiers should attempt to use lesser means of force to respond to a threat.”).

<sup>114</sup> *See* § 1, 1 Stat. 424.

<sup>115</sup> *See id.*

<sup>116</sup> *Id.* § 4, 1.

<sup>117</sup> *Id.* § 2, 1.

minted Militia Act retained the command that the President “by proclamation, command such insurgents to disperse, and retire peaceably . . . within a limited time,” it was no longer required *before* calling forth the militia.<sup>118</sup>

### 3. The Insurrection Act

A third and indelible hallmark of the early American experience was the “strong sentiment against the maintenance of any standing army in the new nation.”<sup>119</sup> Yet, like the vigorously anti-executive mood of the pre-Revolutionary colonies and the “traditional and strong resistance of Americans to any military intrusion into civilian affairs,”<sup>120</sup> the fear of standing armies would give way to the rising exigencies of the day.

The resistance to, and subsequent acceptance of, a standing army was cyclical in early American history. Indeed, “[t]he initial American response to the possibility of armed confrontation with British authorities had been a strengthening of the militia,” not a call for a standing Continental Army.<sup>121</sup> Despite initial reservations, “[o]bjections to a Continental Army enlisted for the duration of the war had ended in late 1776 when Congress realized” that the militia was “insufficient for a long war.”<sup>122</sup> After the Revolutionary War, despite General Washington’s entreaties to the contrary,<sup>123</sup> Congress

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<sup>118</sup> *Id.* § 3, 1.

<sup>119</sup> Banks, *supra* note 46, at 48; *see also Under the Insurrection Act, supra* note 82; *see also* WRIGHT, *supra* note 1, at 180 (“[D]iscussions in 1783 and 1784 would color the development of the United States Army for the remainder of the century.”).

<sup>120</sup> Laird v. Tatum, 408 U.S. 1, 15 (1972).

<sup>121</sup> WRIGHT, *supra* note 1, at 19.

<sup>122</sup> *Id.* at 179–80.

<sup>123</sup> *Id.* at 180–81. “Washington’s proposal called for four components: a small regular army, a uniformly trained and organized militia, a system of arsenals, and a military academy to train the army’s artillery and engineer officers. He wanted four infantry regiments, each assigned to a specific sector of the frontier, plus an artillery regiment. His proposed regimental organizations followed Continental Army patterns but had a provision for increased strength in the event of war. Washington expected the militia primarily to provide security for the country at the start of a war until the regular army could expand—the same role it had carried out in 1775 and 1776. . . . Congress . . . rejected Washington’s concept for a peacetime force . . . .”

quickly disbanded the greater part of the Continental Army.<sup>124</sup> Tensions over the existence of a regular standing army would be a mainstay throughout the Constitutional Convention. Consequently, the resulting text of the Constitution, as it related to the regular army and the militia, would prove to be “broad, general, and in some cases, a little ambiguous—a product of the necessity for compromise and consensus.”<sup>125</sup> Altogether missing from these powers is a “structural constitutional limitation[] on the domestic use of the military.”<sup>126</sup> For example:

Article I [granted] Congress the power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” [Additionally, Article I granted] Congress . . . the authority to “raise and support Armies,” to “provide and maintain a Navy,” to “make Rules for the Government and Regulation of the land and naval Forces,” to “provide for calling forth the *Militia* to execute the Laws of the Union, suppress Insurrections and repel Invasions,” and to “provide for organizing, arming, and disciplining, the Militia.”<sup>127</sup>

Over the ensuing years, after disbanding the Continental Army, “Congress [again] found it expedient to enlarge the Union’s own regular military forces as skirmishes with Indian tribes continued, war with France seemed to threaten, and tensions between the young

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<sup>124</sup> *Id.* at 182; see Letter from David Cobb to Major Gen. Henry Knox, *Farewell Orders to the Armies of the United States* (Oct. 30, 1783), in GEORGE WASHINGTON PAPERS (Ser. 3, Subser. 3B, Varick Transcripts, Letterbook 16), <https://tile.loc.gov/storage-services/service/mss/mgw/mgw3b/016/016.pdf>.

<sup>125</sup> COAKLEY, *supra* note 78, at 19.

<sup>126</sup> Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091, 1103 (2008). See *Arver v. United States*, 245 U.S. 366, 382 (1918) (“The fallacy of the argument results from confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies. It treats them as one while they are different.”).

<sup>127</sup> Yoo, *War Powers*, *supra* note 50, at 175–76 (emphasis added) (internal citations omitted).

nation and Great Britain increased.”<sup>128</sup> In 1807, Congress spoke where the Constitution had not.<sup>129</sup>

On March 3, 1807, Congress passed “[a]n Act authorizing the employment of the land and naval forces of the United States, in cases of insurrection.”<sup>130</sup> The single-sentence authorization provided:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that in all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all the pre-requisites of the law in that respect.*<sup>131</sup>

While the separate constitutional issue of whether “it is Congress, not the President, that authorizes the deployment of the military in respon[se] to a domestic crisis”<sup>132</sup> is set aside, it is worth noting that the passage of the Insurrection Act adds little clarity to the debate. “The legislative history behind the Insurrection Act is nonexistent.”<sup>133</sup> What is clear, as noted by Professor Stephen Vladeck, is that “Congress clearly meant to expand the calling-forth power to the regular army” in the case of “insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory.”<sup>134</sup>

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<sup>128</sup> DAVID E. ENGDahl, SOLDIERS, RIOTS, AND REVOLUTION: THE LAW AND HISTORY OF MILITARY TROOPS IN CIVIL DISORDERS 66 (1971); see also *Emergency Power*, *supra* note 48, at 163–64 (discussing expansion of the President’s power to call forth state militias).

<sup>129</sup> Insurrection Act of 1807, ch. 39, Pub. L. No. 9-2, 2 Stat. 443.

<sup>130</sup> *Id.*

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

<sup>132</sup> Banks, *supra* note 46, at 40.

<sup>133</sup> *Emergency Power*, *supra* note 48, at 164.

<sup>134</sup> *Id.* at 165. The Militia Clause gives Congress authority to call forth the militia. It

## B. The Post-Civil War Statutes

### 1. The Suppression of the Rebellion Act

In 1861, Congress abandoned any remaining tentativeness about “military intrusion into civilian affairs.”<sup>135</sup> What at one time might have been anathema to Americans became an unadulterated feature of the law. The drumbeat of the Civil War was reverberating. On April 14, 1861, Fort Sumter had surrendered to the southern states.<sup>136</sup> Thirteen days later, President Abraham Lincoln “unilaterally suspended the writ of habeas corpus on the route from Philadelphia to Washington and replaced civilian law enforcement with military detention without trial.”<sup>137</sup> Moreover, just days before the passage of the Suppression of the Rebellion Act, on July 21, 1861, Union troops had been roundly defeated at the first Battle of Bull Run.<sup>138</sup> It was against this backdrop, on July 29, 1861, that Congress passed “[a]n Act to provide for the Suppression of Rebellion against and Resistance to the laws of the United States, and to amend [the Militia Act of 1795].”<sup>139</sup>

Of note, the Thirty-Seventh Congress, at least on the margins, untethered the Act from the precise language of the Militia Clause.<sup>140</sup> Where the previous Act accounted for “execut[ing] the Laws of the

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is silent on the regular army. It is not obvious that the president does not have an independent grant of authority via the Take Care Clause and the Commander in Chief Clause to call forth military to execute the law. *See* Yoo, *Unitary, Executive, or Both?*, *supra* note 72, at 1964 (“Presidents may have good reasons, in their view, to accept deviations from a pure theory of a unitary executive.”).

<sup>135</sup> Laird v. Tatum, 408 U.S. 1, 15 (1972); John Yoo, *Lincoln at War*, 38 VT. L. REV. 3, 15 (2013).

<sup>136</sup> John Yoo, *Lincoln at War*, 38 VT. L. REV. 3, 15 (2013).

<sup>137</sup> *Id.* at 17.

<sup>138</sup> *Id.* at 23; *see also* *The Battle of First Manassas (First Bull Run)*, NAT’L PARK SERV., <https://www.nps.gov/mana/learn/historyculture/first-manassas.htm> (last updated Nov. 8, 2021).

<sup>139</sup> Suppression of the Rebellion Act of 1861, ch. 25, § 1, 12 Stat. 281 (1861).

<sup>140</sup> Compare U.S. CONST. art. I, § 8, cl. 15 (“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repeal Invasions.”), with § 1, 12 Stat. 281 (“[I]t shall be lawful for the President of the United States to call forth the militia . . . to enforce the faithful execution of laws of the United States, or to suppress such rebellion . . .”).

Union, suppress[ing] insurrections and repel[ling] invasions,”<sup>141</sup> the Suppression of the Rebellion Act incorporated only the “execution of the laws” language, favoring reference to “rebellion.”<sup>142</sup> The Act provided:

That whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or *rebellion* against the authority of the Government of the United States, it shall become impracticable, in the judgment of the President of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory of the United States, it shall be lawful for the President of the United States to call forth the militia of any or all the States of the Union, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such *rebellion* in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed.<sup>143</sup>

Previous nods to federalism evaporated. Under the Act, Congress declared the President “the sole and exclusive judge . . . of the existence of the exigency”<sup>144</sup> and authorized him “to call forth the militia of any or all the States of the Union, and to employ such parts of the land and naval forces of the United States as he may deem necessary.”<sup>145</sup> Additionally, Congress changed the antecedent facts slightly. Where the previous Act required a determination that the opposition to the laws could not be “suppressed by the ordinary course of judicial proceedings,”<sup>146</sup> the new Act required only that, in the judgment of the President, enforcement of the laws of the United

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<sup>141</sup> Militia Act of 1795, ch. 36, 1 Stat. 424, 424 (1795) (repealed in part 1861).

<sup>142</sup> 12 Stat. 281.

<sup>143</sup> *Id.* (emphasis added).

<sup>144</sup> *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29, 31 (1827).

<sup>145</sup> 12 Stat. 281.

<sup>146</sup> Militia Act of 1795, ch. 36, § 2, 1 Stat. 424, 424 (1795) (repealed in part 1861).

States were “impracticable.”<sup>147</sup> The time constraint on the President’s authority to keep “the militia employed in the service of the United States”<sup>148</sup> increased to “*sixty days* after the commencement of the next *regular* session of Congress, unless Congress . . . expressly provide by law therefor.”<sup>149</sup> The Act retained the obligation that the President “by proclamation, command . . . insurgents to disperse and retire peaceably . . . within a limited time.”<sup>150</sup> Finally, if there was any confusion about the reach of the President’s authority, Congress added, “all other acts as conflict with this act are hereby repealed.”<sup>151</sup> On the eve of the Great Rebellion, there could be no doubt that Congress and the President saw no Constitutional impediment to deploying the U.S. military to quash civil unrest.

## 2. The Civil Rights Act of 1871

Lest observers view the authority Congress granted to the President in the Suppression of Rebellion Act of 1861 as a one-off, attributable to the exigency of the Civil War, the attention of this Article turns now to a statute passed nearly six years after the end of the Great Rebellion—the Civil Rights Act of 1871.

The Act, designed to “enforc[e] the Fourteenth Amendment and prevent[] acts of violence and intimidation by individuals against new black citizens,”<sup>152</sup> neither restored the *checks and accountability mechanisms*<sup>153</sup> of the Militia Act of 1792 nor sustained the broad grant of authority in the Suppression of the Rebellion Act.<sup>154</sup> Instead, the Act imbued the President with even greater power. The Forty-Second Congress called for the President to respond:

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<sup>147</sup> 12 Stat. 281.

<sup>148</sup> § 4, 1 Stat. 424.

<sup>149</sup> § 3, 12 Stat. 281 (emphasis added) (noting there was no such restriction on the land and naval forces).

<sup>150</sup> *Id.* § 2.

<sup>151</sup> *Id.* § 8.

<sup>152</sup> Banks, *supra* note 46, at 63.

<sup>153</sup> Vladeck, *Trump’s George Floyd protest threats raise legal questions*, *supra* note 60.

<sup>154</sup> See Suppression of the Rebellion Act of 1861, ch. 25, 12 Stat. 281 (1861).

[I]n all cases where insurrection, *domestic violence*, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights . . . .<sup>155</sup>

Under § 3, “which was to become part of the permanent law of the United States governing military intervention to ‘enforce the laws of the union,’”<sup>156</sup> safeguards paying homage to the fundamental principle of federalism remained absent. The President retained his place as “the sole and exclusive judge . . . of the existence of the exigency” and the antecedent facts authorizing him “to call forth the militia”<sup>157</sup> of any State and “to employ[] . . . the land and naval forces of the United States.”<sup>158</sup> Congress expanded the President’s authority by adding “or by other means” to the suite of responses at the President’s disposal for dealing with exigencies.<sup>159</sup> As noted above, for the first time, Congress authorized the President to respond to “*domestic violence*.”<sup>160</sup>

Additionally, § 4 of the Act authorized the President “to suspend the privileges of the writ of habeas corpus” in cases where “*in his judgment* the public safety . . . require[d] it.”<sup>161</sup> The time constraint on the President’s authority under the Act extended to “the end of the next *regular* session of Congress”<sup>162</sup> and the Act retained the requirement that the President issue a proclamation commanding

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<sup>155</sup> Civil Rights Act of 1871, ch. 22, § 3, 17 Stat. 13, 14 (1871) (emphasis added).

<sup>156</sup> COAKLEY, *supra* note 78, at 309.

<sup>157</sup> *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29, 31 (1827).

<sup>158</sup> 12 Stat. § 281.

<sup>159</sup> Civil Rights Act of 1871 § 3.

<sup>160</sup> *Id.* (emphasis added).

<sup>161</sup> *Id.* § 4 (emphasis added).

<sup>162</sup> *Id.* (emphasis added).

insurgents to disperse before deploying force.<sup>163</sup>

It is true that “[b]y the time of the Revolution, there was strong sentiment against the maintenance of any standing army in the new nation, because of the military’s demonstrated tendency to threaten its own citizens.”<sup>164</sup> However, opposition to the standing army was not the Framers’ only concern. Alexander Hamilton counterpoised the fear of a standing army in Federalist No. 23:

The authorities essential to the care of the common defense . . . ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & 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>

The Militia Clause makes it clear that Congress has the authority “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repeal Invasions”;<sup>166</sup> however, the Clause says nothing about the use of the regular military in domestic disorders. Some scholars have argued that the Militia Clause “confirms that it is Congress, not the President, that authorizes the deployment of the military in responding to a domestic crisis.”<sup>167</sup> Alternatively, some scholars suggest that “[t]he Framers created the Presidency so that a branch of the government would always be ‘in being’ and could exercise substantive powers in times of crisis and emergency.”<sup>168</sup> Still, others suggest that the Framers purposely left

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<sup>163</sup> Suppression of the Rebellion Act of 1861, ch. 25, 12 Stat. 281 (repealed in part 1861).

<sup>164</sup> Banks, *supra* note 46, at 48.

<sup>165</sup> THE FEDERALIST NO. 23 (Alexander Hamilton).

<sup>166</sup> U.S. CONST. art. I, § 8, cl. 15.

<sup>167</sup> Banks, *supra* note 46, at 40.

<sup>168</sup> *Unitary, Executive, or Both?*, *supra* note 73, at 1965–66 (quoting JOHN LOCKE, THE WORKS OF JOHN LOCKE ESQ; VOL. II 199 (1714)) (explaining that the legislative and executive branches must be separated to ensure that “a power always in being,

some decisions “for future Congresses, presidents, and federal courts to determine.”<sup>169</sup> While these debates are unlikely to be settled soon, the preceding five statutes make it clear that in the 82 years that transpired between the formation of the new American government in March 1789<sup>170</sup> and the passage of the Civil Rights Act of 1871, fears of the standing army had abated. Accordingly, Congress saw fit to significantly expand both the President’s authority and independence in response to civil crises.

### *C. President Trump and the Insurrection Act*

#### 1. Insurrection

As is outlined above and well documented by Professor Stephen Vladeck, the statutory authority for the President “to call forth the militia” has existed with regularity since 1789.<sup>171</sup> Similarly, the President’s statutory power “to employ . . . the land or naval force of the United States” has existed since 1807.<sup>172</sup> These authorities have not since vanished and remain codified at 10 U.S.C. §§ 251–255.<sup>173</sup>

In its current form, 10 U.S.C. § 251 offers a nod to state sovereignty and the fundamental constitutional principle of federalism<sup>174</sup> where an insurrection against a state government persists:

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which should see to the execution of the laws that are made and remain in force”).

<sup>169</sup> COAKLEY, *supra* note 78, at 19.

<sup>170</sup> JOURNALS, *supra* note 73.

<sup>171</sup> *See generally Emergency Power*, *supra* note 48, at 163–64 (discussing Congress’ grant of authority to the President to call forth the militia); *see* BUSH, *supra* note 32, at 321.

<sup>172</sup> Insurrection Act of 1807, ch. 39, Pub. L. No. 9-2, 2 Stat. 443.

<sup>173</sup> 10 U.S.C. §§ 251–255; *see* John Warner National Defense Authorization Act of 2006, Pub. L. No. 109-364, 120 Stat. 2083 (sustaining a massive overhaul in 2006 in response to deficiencies with the federal response to Hurricane Katrina); *but see* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1068, 122 Stat. 3, 325 (2008) (repealing the language of the John Warner National Defense Authorization Act of 2006).

<sup>174</sup> 10 U.S.C. § 251.

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.<sup>175</sup>

Where the laws of the United States are so encumbered, 10 U.S.C. § 252 provides:

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.<sup>176</sup>

The next section affords the broadest authorization:

The President, by using the militia or the armed forces, or both, or by any other means, *shall* take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* § 252.

obstructs the execution of the laws of the United States  
or impedes the course of justice under those laws.<sup>177</sup>

The framework is familiar. There is nothing novel in the text. In pertinent part, 10 U.S.C. §§ 252–253 make the President “the sole and exclusive judge . . . of the existence of the exigency”<sup>178</sup> and the antecedent facts authorize him to “call into Federal service . . . the militia of any State, and use . . . the armed forces . . . to suppress . . . insurrection, domestic violence, unlawful combination, or conspiracy.”<sup>179</sup> There is no prerequisite for an independent assessment of the facts on the ground. What is required is a presidential proclamation “order[ing] the insurgents to disperse and retire peaceably to their abodes.”<sup>180</sup> The Act imposes no time constraint on the President’s use of military force.<sup>181</sup>

## 2. President Trump’s Rose Garden Statement

The statutory authority above leaves no ambiguity. Congress has imbued the presidency with all of the power necessary to use military force to suppress civil unrest. President Trump’s warning, issued from the Rose Garden on June 1, 2020, falls neatly within the confines of the law. The law explicitly authorizes the President to use the militia and the armed forces when “*the President considers . . . it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings.*”<sup>182</sup> The subsequent section expressly states, “[t]he President . . . *shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy.*”<sup>183</sup> While expressing doubt about the manifestation of these antecedent facts is natural in our democratic republic, disagreement does not make the

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<sup>177</sup> *Id.* § 253 (emphasis added).

<sup>178</sup> *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29, 31 (1827).

<sup>179</sup> 10 U.S.C. §§ 252–253.

<sup>180</sup> *Id.* § 254.

<sup>181</sup> *See id.* (imposing no specific time constraint on the President, but suggesting that military force be used “within a limited time”).

<sup>182</sup> *Id.* § 252 (emphasis added).

<sup>183</sup> *Id.* § 253 (emphasis added).

President's response unlawful. The law only requires that the President believes the events that unfolded across the country after the murder of George Floyd satisfied the definition of at least one of the antecedent facts in the Insurrection Act.<sup>184</sup> The determination of whether the unrest rose to a level requiring federal intervention is for the President, and the President alone, to judge. There can be little doubt that the President was facing unrest rarely witnessed in the country's history. Determining the order of magnitude and whether the turmoil required military intervention lay exclusively and lawfully with the Commander in Chief.

On Monday, May 25, 2020, George Floyd died after Derek Chauvin, a Minneapolis officer, handcuffed and pinned George Floyd to the ground by placing his knee on the back of George Floyd's neck for nearly eight minutes.<sup>185</sup> As the harrowing images of George Floyd's murder reached social media platforms, protests sprang up throughout the country; however, these protests quickly devolved into chaos.<sup>186</sup> The demonstrations reached "140 cities across the United States," resulting in the activation of the National Guard in at least 21 states.<sup>187</sup> On May 26, 2020, Minneapolis protestors set businesses on fire, vandalized police cars, and a police station.<sup>188</sup> On May 27, 2020, in St. Louis, protestors "set fires and tried to loot a FedEx truck."<sup>189</sup> In Minneapolis, demonstrators "gather[ed] around the police station . . . where the officers involved in George Floyd's arrest were based and set fire to it. The building [was] evacuated and police retreat[ed]."<sup>190</sup> On May 28, 2020, Minnesota Governor Tim Walz described the situation in Minneapolis as an

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<sup>184</sup> See *supra* text accompanying note 177.

<sup>185</sup> Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Sept. 7, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html>; Associated Press, *Prosecutors say officer had knee on George Floyd's neck for 7:46 rather than 8:46*, L.A. TIMES (June 18, 2020), <https://www.latimes.com/world-nation/story/2020-06-18/derek-chauvin-had-knee-george-floyd-neck-746-rather-than-846>.

<sup>186</sup> See e.g., Sugiura, *supra* note 3.

<sup>187</sup> See Taylor, *supra* note 185.

<sup>188</sup> See *id.*; see also *George Floyd death: US protests timeline*, BBC NEWS (June 4, 2020), <https://www.bbc.com/news/world-us-canada-52921418>.

<sup>189</sup> Taylor, *supra* note 185.

<sup>190</sup> *George Floyd death: US protests timeline*, *supra* note 188.

“attack[] [on] civil society.”<sup>191</sup> In Columbus, Ohio, protests “turned violent as people stormed the Statehouse and damaged downtown businesses.”<sup>192</sup> On May 29, 2020, “[h]undreds of demonstrators poured into the streets near Atlanta’s Centennial Olympic Park.”<sup>193</sup> Demonstrators smashed windows, defaced buildings, looted businesses, and burned police cars, leading to an impassioned plea by Atlanta Mayor Keisha Lance Bottoms, imploring people to “[g]o home.”<sup>194</sup> In New York City, “people threw bottles and debris at officers.”<sup>195</sup> “In Detroit, . . . someone opened fire into a crowd of demonstrators.”<sup>196</sup> In Louisville, Kentucky, seven people were shot after “gunfire erupted.”<sup>197</sup> In Cleveland, protestors looted businesses and set police cruisers on fire.<sup>198</sup> On May 30, 2020, Minneapolis Mayor Jacob Frey tweeted, “[w]hat started as largely peaceful protests for George Floyd have turned to outright looting and domestic terrorism . . . .”<sup>199</sup> Mayor Frey attributed the situation to “white supremacists, members of organized crime, out-of-state instigators, and possibly even foreign actors [there] to destroy and destabilize [the] city and . . . region.”<sup>200</sup>

The Attorney General of the United States, William P. Barr, issued a statement on May 30, 2020, stating “the voices of peaceful

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<sup>191</sup> Taylor, *supra* note 185.

<sup>192</sup> Talia Naquin, *A Timeline of What Led to Protests, Violence Across the Nation After the Death of George Floyd*, FOX 8 NEWS, <https://fox8.com/news/a-timeline-of-what-led-to-protests-violence-across-the-nation-after-the-murder-of-george-floyd> (last updated June 15, 2020).

<sup>193</sup> Taylor, *supra* note 185.

<sup>194</sup> Richard Fausset & Michael Levenson, *Atlanta Protesters Clash With Police as Mayor Warns ‘You Are Disgracing Our City’*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/atlanta-protest-cnn-george-floyd.html>; Sugiura, *supra* note 3.

<sup>195</sup> Taylor, *supra* note 185.

<sup>196</sup> *Id.*

<sup>197</sup> Brakkton Booker, *7 Shot At Louisville Protest Calling For Justice For Breonna Taylor*, NPR (May 29, 2020), <https://www.npr.org/2020/05/29/864775688/7-shot-at-louisville-protests-calling-for-justice-for-breonna-taylor>.

<sup>198</sup> Naquin, *supra* note 192.

<sup>199</sup> Taylor, *supra* note 185.

<sup>200</sup> *Id.*

protest [were] being hijacked by violent radical elements.”<sup>201</sup> Attorney General Barr noted that:

Groups of outside radicals and agitators [were] exploiting the situation to pursue their own . . . violent agenda. In many places, it appear[ed] the violence [was] planned, organized, and driven by anarchistic and far left extremists, . . . many of whom travel[ed] from out of state to promote the violence.<sup>202</sup>

On May 31, 2020, “[a] total of at least five people [were] reported killed in protests from Indianapolis to Chicago.”<sup>203</sup> By this time, “[a]t least 4,400 people [were] arrested.”<sup>204</sup>

At a June 4, 2020, press conference, days after President Trump’s Rose Garden ultimatum, Attorney General Barr issued a statement on the civil unrest:

While many have peacefully expressed their anger and grief, others have hijacked protests to engage in lawlessness—violent rioting and arson, looting of businesses and public property, assaults on law enforcement officers and innocent people, and even the murder of a federal agent. Such senseless acts of anarchy are . . . crimes designed to terrify fellow citizens and intimidate communities. . . . The large preponderance of those who are protesting are peaceful demonstrators who are exercising their First Amendment rights. At some demonstrations, there are groups that exploit the opportunity to engage in looting. And finally, at some demonstration[s], there are extremist agitators who are hijacking the protests to

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<sup>201</sup> Attorney General William P. Barr, *Attorney General William P. Barr’s Statement on the Death of George Floyd and Riots*, DEP’T OF JUST., <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-s-statement-death-george-floyd-and-riots> (last updated May 30, 2020).

<sup>202</sup> *Id.*

<sup>203</sup> *George Floyd death: US protests timeline*, *supra* note 189.

<sup>204</sup> *Id.*

pursue their own separate and violent agenda. We have evidence that Antifa and other similar extremist groups, as well as actors of a variety of different political persuasions, have been involved in instigating and participating in the violent activity. We are also seeing foreign actors playing all sides to exacerbate the violence.<sup>205</sup>

This summary of events following George Floyd’s murder hardly does justice to the nationwide turmoil. There were at least nineteen known fatalities and numerous injuries.<sup>206</sup> All told, “the arson, vandalism and looting . . . result[ed] in at least \$1 billion to \$2 billion of paid insurance claims—eclipsing the record set in Los Angeles in 1992 after the acquittal of the police officers who brutalized Rodney King.”<sup>207</sup>

Of course, for the President to act without the request of the state or states under duress, the Act requires a little more. It is not enough for “insurrection, domestic violence, unlawful combination, or conspiracy” to exist; to invoke the Act the continuing unrest must “hinder[] the execution of the laws of that State, and of the United

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<sup>205</sup> Attorney General William P. Barr, *Attorney General William P. Barr’s Remarks on Mr. George Floyd and Civil Unrest*, DEP’T OF JUST., <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-s-remarks-mr-george-floyd-and-civil-unrest> (last updated June 4, 2020); see *Protests Against Police Brutality (2020): Justice Department*, U.C. SAN DIEGO, <https://ucsd.libguides.com/protests2020/doj> (last updated Sept. 2, 2021) (listing the federal government’s response to racial justice protests following the death of George Floyd).

<sup>206</sup> Jemima McEvoy, *14 Days of Protests, 19 Dead*, FORBES (June 8, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/06/08/14-days-of-protests-19-dead/?sh=405871b64de4>.

<sup>207</sup> Jennifer A. Kingson, *Exclusive: \$1 Billion-Plus Riot Damage is Most Expensive in Insurance History*, AXIOS (Sept. 16, 2020), <https://www.axios.com/riots-cost-property-damage-276c9bcc-a455-4067-b06a-66f9db4cea9c.html>; Jason Deparle, *RIOTS IN LOS ANGELES; General and Troops Have Domestic Mission*, N.Y. TIMES (May 3, 1992), <https://www.nytimes.com/1992/05/03/us/riots-in-los-angeles-general-and-troops-have-domestic-mission.html> (describing “the military forces sent to quell the Los Angeles riots,” which included “a force of 2,500 soldiers from Fort Ord and 1,500 marines from Camp Pendleton, Calif. . . . [and] about 8,000 Federalized soldiers from the National Guard.”).

States within the State, [such] that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law.”<sup>208</sup> Moreover, there must be a finding that “the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection.”<sup>209</sup> The predicate and finding mentioned above are unquestionably prerequisites for invoking the Act; determining whether they are sufficiently present for invoking the Act rests solely with the President.

Further, the statutory language requires “measures *as he considers necessary* to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it . . . opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.”<sup>210</sup> Again, whether the events so oppose or obstruct the execution of the laws rests with the President.

Whether the antecedent facts of the statute were satisfied in the wake of racial justice protests across the country can certainly be debated. Likewise, for 10 U.S.C. § 253(2), assertions that “the . . . disturbances interfere[d] with the execution of some federal laws, such as the mails, communications and transportation”<sup>211</sup> can be challenged; however, these conclusions, in the abstract, are of little consequence. The ultimate decision-making power as to whether the requisite antecedent facts exist rests in one person. For better or worse, Congress has expressly left the ultimate determination to apply military force to domestic disorders with the President and the President alone. The text is rife with language to this effect. The statute uses phrases such as: “as [the President] considers necessary”; “[w]henver the President considers . . . it impracticable to enforce the laws”; and “measures [the President] considers necessary.”<sup>212</sup> Disagreeing with the President’s judgment does not render his decision unlawful. On June 1, 2020, nothing suggested by

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<sup>208</sup> 10 U.S.C. § 253.

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

<sup>210</sup> *Id.* (emphasis added).

<sup>211</sup> John Yoo & Robert Delahunty, *Domestic Military Use Is Lawful but Not Yet Prudent*, NEWSWEEK (June 3, 2020), <https://www.newsweek.com/domestic-military-use-lawful-not-yet-prudent-opinion-1508262>.

<sup>212</sup> 10 U.S.C. §§ 252–253.

President Trump was in contravention with the Constitution or the laws of the United States.

## II. THE COURTS AND THE MILITIA ACTS

This Part considers the impact that federal courts might have if President Trump invoked the Insurrection Act in response to the civil unrest that unfolded after the murder of George Floyd while in police custody. Specifically, this Part considers the federal courts' impact assuming the President had invoked the Insurrection Act absent a request of a state legislature or governor. Part A reviews previous treatment of the Militia Acts by the Supreme Court of the United States. Part B considers the Political Question Doctrine's potential impact on litigation arising out of President Trump's hypothetical invoking of the Insurrection Act.

### *A. The Sole and Exclusive Judge*

On June 18, 1812, President James Madison declared war on Great Britain.<sup>213</sup> President Madison ordered the militia into federal service for this purpose. Federalists opposed the war and “[r]iots broke out between Federalists and Republicans in major cities across the country.”<sup>214</sup> Several states rejected the idea that the President could, unilaterally, call the militia into service.<sup>215</sup> The President’s authority “to call out state troops”<sup>216</sup> was placed squarely before the Supreme Court in *Martin v. Mott*.<sup>217</sup>

The question before the Court in *Mott* was “whether a citizen

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<sup>213</sup> James Madison, Proclamation of a State of War with Great Britain, (June 19, 1812), <https://millercenter.org/the-presidency/presidential-speeches/june-19-1812-proclamation-state-war-great-britain>. See also Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289, 299 (2013).

<sup>214</sup> Dauber, *supra* note 214, at 300.

<sup>215</sup> *Emergency Power*, *supra* note 48, at 171; see also Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (repealed 1795) (declaring the right of the President to call forth the militia when states refuse if the legislature is not in session).

<sup>216</sup> *Emergency Power*, *supra* note 48, at 171.

<sup>217</sup> *Martin v. Mott*, 25 U.S. 19, 29 (1827).

could be court-martialed for his failure to join the New York militia when the President called it out during the War of 1812.”<sup>218</sup> Within his opinion, Justice Joseph Story addressed the issue of who was best suited to determine whether circumstances justified calling forth the military.<sup>219</sup> Justice Story wrote:

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself, is strongly fortified. The words are, “whenever the United States *shall be invaded, or be in imminent danger of invasion*, . . . it shall be lawful for the President . . . to call forth such number of the militia . . . *as he may judge necessary* to repel such invasion.” The power itself is confided to the Executive of the Union, to him who is, by the constitution, “the commander in chief of the militia, when called into the actual service of the United States,” whose duty it is to “take care that the laws be faithfully executed” . . . . *He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts.* If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law . . . . The law does not provide for any appeal from the judgment of the President . . . . Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.<sup>220</sup>

Justice Story’s opinion, upholding the President’s determinations, was forthright and still serves as “the fountainhead [for] precedent[] of

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<sup>218</sup> *Emergency Power*, *supra* note 48, at 171.

<sup>219</sup> *See Martin*, 25 U.S. at 29–30.

<sup>220</sup> *Id.* at 31–32 (emphasis added).

American emergency power.”<sup>221</sup>

In 1849, the Court would answer a similar question in *Luther v. Borden*.<sup>222</sup> This time, Chief Justice Roger Taney would announce the Court’s opinion, referencing *Martin v. Mott* and looking again to the language of the Militia Act of 1795. Chief Justice Taney wrote, “By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President.”<sup>223</sup> Additionally, Chief Justice Taney confirmed the appropriate arbitrator’s identity for parties seeking redress upon the President’s invocation of the Militia Act of 1795: “Undoubtedly, if the President in exercising this power shall fall into error, or invade the rights of the people of the State, it would be in the power of *Congress* to apply the proper remedy. But the courts must administer the law as they find it.”<sup>224</sup>

*Mott* and *Luther’s* facts could hardly bear more resemblance to a case arising out of President Trump’s proposed invocation of the Insurrection Act. The Insurrection Act’s current text is equally fortified.<sup>225</sup> The second section plainly states that it is upon the President’s judgment to determine whether there are “unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, mak[ing] it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings.”<sup>226</sup> Further, where the second section states that the President “may call into Federal service such of the militia of any State, and use such of the armed forces,” the third section broadens the President’s aperture by authorizing the use of “the militia or the armed forces, . . . or by any other means.”<sup>227</sup> It is also worth noting that the third section of the Act, 10 U.S.C. § 253, uses the words “*shall* take such measures as he considers necessary to suppress, in a State,

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<sup>221</sup> *Emergency Power*, *supra* note 48, at 171.

<sup>222</sup> *Luther v. Borden*, 48 U.S. 1, 43 (1849).

<sup>223</sup> *Id.* at 43.

<sup>224</sup> *Id.* at 45 (emphasis added).

<sup>225</sup> 10 U.S.C. §§ 252–253 (granting the President power to call federal troops into service when rebellion against the authority of the United States has made it impracticable to enforce the laws of the United States in any state).

<sup>226</sup> *Id.* § 252.

<sup>227</sup> *Id.* §§ 252–253.

any insurrection, domestic violence, unlawful combination, or conspiracy,” giving extraordinary force to Justice Story’s declaration that the President “is *bound to act* according to *his* belief of the facts.”<sup>228</sup>

The contention that measures of some kind are not just authorized but required by the Act when the President believes the antecedent facts to be in existence is not novel. In 1862, the Court came to a similar conclusion when reviewing President Abraham Lincoln’s blockade of the Southern States.<sup>229</sup> The Court found that “by the Acts of Congress of February 28th, 1795, and 3d of March, 1807 . . . the President [was] *not only authorized but bound* to resist.”<sup>230</sup>

Finally, the Court decided these cases long before Justice Jackson “articulated his famous three-part test for determining the validity of the exercise of executive power.”<sup>231</sup> As will be discussed, action by President Trump, consistent with his Rose Garden statement and “executed . . . pursuant to an Act of Congress,” benefits not only from the nineteenth-century Supreme Court precedent but also from “the strongest of presumptions and the widest latitude of judicial interpretation,” as articulated by Justice Jackson in his *Youngstown* concurrence.<sup>232</sup>

Disagreements between the political branches, and even within the executive branch, about the size and scope of the federal government’s response to a domestic crisis are foreseeable. That said, in light of precedent, it is difficult to see how the federal courts deciding such a case on the merits can supersede the President’s determination of the facts on the ground or the scope of his response.

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<sup>228</sup> *Martin*, 25 U.S. at 31 (emphasis added); 10 U.S.C. § 253.

<sup>229</sup> *The Amy Warwick*, 67 U.S. 635, 636, 694 (1862).

<sup>230</sup> *Id.* at 668 (emphasis added) (“[The President] is authorized to . . . suppress insurrection against the government of a State or of the United States. . . . He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”).

<sup>231</sup> Yoo, *War Powers*, *supra* note 50, at 193.

<sup>232</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

### B. Political Question Doctrine

A decision by the federal courts upending the President’s judgment seems unlikely considering the statutory framework and relevant Supreme Court precedent. It is equally plausible that the courts would find a case challenging the existence of the antecedent facts or the use of the militia or armed forces to suppress domestic disorder nonjusticiable—absent a showing of “clear abuse amounting to bad faith.”<sup>233</sup> In short, determinations of this kind would present a *political question*.

The determination of whether an issue before the Court amounts to a political question is not always straightforward. “Justiciability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . .”<sup>234</sup> Though Political Question Doctrine often appears trussed by facts concerning foreign relations,<sup>235</sup> it is not always so.<sup>236</sup> While the Court first intimated the doctrine in *Marbury v. Madison*,<sup>237</sup> it clearly articulated the factors for invoking Political Question Doctrine in *Baker v. Carr*:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial

<sup>233</sup> *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973).

<sup>234</sup> *Gilligan v. Morgan*, 413 U.S. 1, 9 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

<sup>235</sup> See Yoo, *War Powers*, *supra* note 50, at 182–86.

<sup>236</sup> See generally *Colegrove v. Green*, 328 U.S. 549, 572 (1946); *Colegrove v. Barrett*, 330 U.S. 804, 804 (1947); *South v. Peters*, 339 U.S. 276, 276 (1950); *MacDougall v. Green*, 335 U.S. 281, 284 (1948) (per curiam), *overruled in part by Moore v. Ogilvie*, 394 U.S. 814, 819 (1969).

<sup>237</sup> *Marbury v. Madison*, 5 U.S. 137, 170 (1803). “The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”

policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>238</sup>

Despite the coherent and orderly recitation of the six factors in *Baker*, analysis of the doctrine often turns on the first two.<sup>239</sup> It is to these two pivotal factors that this Article now turns.

As to the first of these pivotal factors, there is no clearer example of a “demonstrable constitutional commitment of the issue to a coordinate political department”<sup>240</sup> than the Militia Clause.<sup>241</sup> The Constitution expressly grants Congress the power “to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repeal Invasions.”<sup>242</sup> At least insofar as the militia is concerned, the Insurrection Act is a straightforward exercise of that authority.

While the militia is dealt with forthrightly in the Militia Clause,<sup>243</sup> “a textually demonstrable constitutional commitment of the issue to a coordinate political department”<sup>244</sup> specifically related to the regular military's domestic use is less clear. Despite this apparent ambiguity, there is little doubt the federal courts have found “that decision-making in the field[] of . . . national security is textually committed to the political branches of government.”<sup>245</sup> The Supreme

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<sup>238</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>239</sup> *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 203–07 (2012) (Sotomayor, J., concurring).

<sup>240</sup> *Baker*, 369 U.S. at 217.

<sup>241</sup> U.S. CONST. art. I, § 8, cl. 15.

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

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

<sup>244</sup> *Baker*, 369 U.S. at 217.

<sup>245</sup> *Smith v. Obama*, 217 F. Supp. 3d 283, 298 (D.D.C. 2016) (quoting *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005)).

Court in *Gilligan v. Morgan* wrote:

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the . . . control of a military force are . . . judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials *which underlies our entire constitutional system . . .*<sup>246</sup>

The Constitution’s plain text bolsters the Court’s articulation in *Gilligan*, placing all issues related to military force squarely in the realm of the political branches:

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<sup>246</sup> *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). In May 1970, the National Guard was called out to deal with a violent anti-Vietnam War protest on the Kent State University campus in Ohio. During the ensuing turmoil, four Kent State students were killed by National Guard gunfire. Respondent students brought a claim that the actions of the National Guard were without legal justification. The Court of Appeals Affirmed the lower Court’s dismissal of all but one claim. The Court of Appeals remanded a single question to the District Court: “Was there and is there a pattern of training, weaponry and orders in the Ohio National Guard which, singly or together, require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that nonlethal force would suffice to restore order and the use of lethal force is not reasonably necessary?” *Morgan v. Rhodes*, 456 F.2d 608, 612 (6th Cir. 1972). The Supreme Court granted certiorari and held that the question was a non-justiciable political question stating, “[I]nitial judicial review and continuing surveillance by a federal court over the training, weaponry, and orders of the Guard, would...embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.” *Gilligan*, 413 U.S. at 2.

Article I gives Congress the power to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” Congress also has the authority to “raise and support Armies,” to “provide and maintain a Navy,” to “make Rules for the Government and Regulation of the land and naval Forces,” to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” and to “provide for organizing, arming, and disciplining, the Militia.”<sup>247</sup>

Additionally, Article II states that “[t]he 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.”<sup>248</sup> It holds *a fortiori* that the question of whether the militia, the regular military, or any other means can be deployed in a state to suppress any insurrection, domestic violence, unlawful combination, or conspiracy is committed “to a coordinate political department.”<sup>249</sup>

As for the second pivotal factor, the federal courts must consider whether there are “a lack of judicially discoverable and manageable standards for resolving [the issue].”<sup>250</sup> Having established that the use of the militia and the regular military is committed to a coordinate political department,<sup>251</sup> the remaining issues are likely to revolve around the existence of the statutorily required antecedent facts. Under 10 U.S.C. § 252, petitioners might ask federal courts to consider whether it is “impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings.”<sup>252</sup> Alternatively, under 10 U.S.C. § 253, petitioners might ask the courts to consider, first, whether there is an “insurrection, domestic violence, unlawful combination, or conspiracy.”<sup>253</sup> Second, petitioners might

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<sup>247</sup> Yoo, *War Powers*, *supra* note 50, at 175–76.

<sup>248</sup> *Id.* at 176.

<sup>249</sup> *Baker*, 369 U.S. at 217.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> 10 U.S.C. § 252.

<sup>253</sup> *Id.* § 253.

ask the court to determine whether the “insurrection, domestic violence, unlawful combination, or conspiracy . . . hinders the execution of the laws of that State, and of the United States within the State,” in a manner that deprives people “of a right, privilege, immunity, or protection named in the Constitution and secured by law.”<sup>254</sup> Third, assuming arguendo that there is domestic violence that so hinders law enforcement within the State, petitioners might ask the court whether the constituted authorities of that State are unable, have failed, or have refused to protect “a right, privilege, immunity, or protection named in the Constitution and secured by law.”<sup>255</sup> Finally, under the second section of 10 U.S.C. § 253, petitioners might ask the court to determine whether the “insurrection, domestic violence, unlawful combination, or conspiracy . . . opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.”<sup>256</sup>

The federal courts are unlikely to answer these questions. While “[q]uestions of statutory construction and interpretation . . . are committed to the Judiciary,” plaintiffs would be asking the federal courts “to second-guess the Executive’s *application* of these statutes to specific facts on the ground.”<sup>257</sup> The existence of the requisite antecedent facts, addressed throughout this Article, are precisely the kinds of facts that evade “discoverable and manageable standards.”<sup>258</sup>

How many businesses looted and set ablaze constitute domestic violence? How many burning police cars and police stations make an insurrection? How much coordination by extremists constitutes a conspiracy? How many peaceful demonstrations can state and federal forces disperse due to violent activity before the peaceful protesters have been “deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law”?<sup>259</sup> The questions regarding orders of magnitude under these circumstances are legion and do not lend themselves to “discoverable

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Smith v. Obama*, 217 F. Supp. 3d 283, 299 (D.D.C. 2016).

<sup>258</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>259</sup> 10 U.S.C. § 253.

and manageable standards.”<sup>260</sup> It quickly becomes evident why Alexander Hamilton argued that “[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than proceedings of any greater number.”<sup>261</sup> The Militia Acts’ underlying history and subsequent transformation,<sup>262</sup> which empower unilateral Executive action, suggest that the various Congresses responsible for drafting the Militia Acts agreed with Hamilton. The *Baker* Court noted as much in its discussion of Chief Justice Taney’s treatment of the act of February 28, 1795. The Court recognized the Executive’s primacy pursuant to the law:

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. . . . After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? . . . *If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order.*<sup>263</sup>

The drafters of the Militia Acts placed these difficult decisions in the capable hands of the President of the United States, and the Supreme Court has reinforced this understanding.

### III. THE SPECTER OF JACKSON’S YOUNGSTOWN CONCURRENCE AND OTHER CONSIDERATIONS

Part II considered the treatment of the Militia Acts by the Supreme Court and the potential impact of the Political Question

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<sup>260</sup> *Baker*, 369 U.S. at 217.

<sup>261</sup> Delahunty & Yoo, *supra* note 28, at 492; THE FEDERALIST NO. 70 (Alexander Hamilton).

<sup>262</sup> *Emergency Power*, *supra* note 48, at 163–64; *see generally Martial Law*, *supra* note 48, at 416–19.

<sup>263</sup> *Baker*, 369 U.S. at 221 (emphasis added) (quoting *Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849)).

Doctrine upon prospective litigation arising out of President Trump’s proposed use of the Insurrection Act. This Part contemplates the bearing that Justice Jackson’s famous *Youngstown* concurrence might have on President Trump’s Rose Garden ultimatum. Part A addresses the *Youngstown* concurrence’s standing as the principal analytical framework when considering “the validity of the exercise of executive power.”<sup>264</sup> Part B assesses whether recently proposed amendments to the Insurrection Act impose more stringent *checks and accountability mechanisms* on the President than the current version and considers whether the proposed amendments influence the President’s standing under *Youngstown*’s categorical framework. Finally, this Part suggests that even if Congress were able to influence the President’s standing under *Youngstown*’s categorical framework by amending the Insurrection Act, the federal courts would still not intervene. This abstention leaves Congress, not the Judiciary, to serve as the preeminent earthwork against presidential excess.

#### A. *The Legacy of The Steel Seizure Case (A Super . . . Concurrence?)*

In its definition of *concurrence*, Black’s Law Dictionary notes that “*concurring opinions* often serve as the robins that foretell a new spring.”<sup>265</sup> Justice Robert H. Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* ushered in what seemed to be a new epoch for “addressing presidential authority.”<sup>266</sup>

In 1952, the United States was in the throes of the Korean War, with a United Steelworkers of America strike looming and threatening to impact the U.S. war effort.<sup>267</sup> In response, President Harry S. Truman issued Executive Order No. 10340, ordering the Secretary of Commerce to seize and operate a portion of the Nation’s steel mills.<sup>268</sup> In a 6–3 opinion affirming the lower court, the Supreme Court held that Executive Order No. 10340 could not be “sustained as an exercise of the President’s military power as

<sup>264</sup> Yoo, *War Powers*, *supra* note 50, at 193.

<sup>265</sup> *Concurrence*, BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis added).

<sup>266</sup> Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 269 (2010).

<sup>267</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952).

<sup>268</sup> *Id.*

Commander in Chief of the Armed Forces.”<sup>269</sup> Concurring in the judgment and opinion of the Court, Justice Jackson wrote separately.<sup>270</sup> As has been noted by Professor Edward Swaine, Justice Jackson “wrote only for himself (there were five such solo concurrences) under considerable time pressure . . . and his contemporaries were not bowled over.”<sup>271</sup> Justice Jackson set out his “tripartite scheme”<sup>272</sup> as follows:

(1) When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

(2) When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables

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<sup>269</sup> *Id.* at 587.

<sup>270</sup> *Id.* at 635 (Jackson, J., concurring).

<sup>271</sup> Swaine, *supra* note 266, at 265.

<sup>272</sup> *Medellin v. Texas*, 552 U.S. 491, 524 (2008).

rather than on abstract theories of law.

(3) 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. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.<sup>273</sup>

Despite its status as a concurrence, over time, the framework outlined in Justice Jackson's concurrence would become "the accepted framework for evaluating executive action . . . ."<sup>274</sup>

Today, Justice Jackson's *Youngstown* framework is a staple in the federal court's executive action analyses, internal political branch appraisals, and parleys between the political branches.<sup>275</sup> To be sure, the Court has employed Justice Jackson's categorical framework in its separation of power jurisprudence with regularity.<sup>276</sup> Likewise, the Office of Legal Counsel routinely invokes Justice Jackson's *Youngstown* concurrence in its memoranda.<sup>277</sup> Some scholars have dubbed *Youngstown Sheet & Tube Co. v. Sawyer* as "super precedent,"<sup>278</sup> and the failure to expressly consider Justice Jackson's

<sup>273</sup> *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

<sup>274</sup> *Medellin*, 552 U.S. at 524.

<sup>275</sup> See Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1714 (2013).

<sup>276</sup> See, e.g., *Dames v. Regan*, 453 U.S. 654, 669 (1981); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015).

<sup>277</sup> Swaine, *supra* note 266, at 267–68.

<sup>278</sup> See *id.* at 270 (quoting Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1217 (2006)). "Supreme Court Justices for years have given special deference to the concurring opinion of Justice Jackson in that case. Members of Congress routinely cite *Youngstown* in separation of powers discussions. They, too, tend to defer to Justice Jackson's concurrence, often referencing it in confirmation hearings. Presidents similarly have pledged fidelity to *Youngstown*, frequently citing Jackson's concurrence as authority. Jackson's concurrence [has become popular because it]

concurrence when considering any exercise of executive power is met with fierce criticism by learned practitioners.<sup>279</sup> Subsequently, as Justice Jackson's concurrence "has been transformed into the *Youngstown* majority,"<sup>280</sup> it seems to follow that it is Justice Jackson's concurrence that carries the seldom-applied status of super precedent. The *Youngstown* concurrence's ascendancy is irrefutable;<sup>281</sup> however, the application of Justice Jackson's categorical framework to President Trump's proposed use of military force does not bode well for his detractors.

As established in Part I of this Article, assuming President Trump deployed the military to address civil strife, the President would unquestionably be acting according to an express authorization of Congress—the Insurrection Act.<sup>282</sup> According to Justice Jackson's framework, the President's authority would be "at its zenith."<sup>283</sup> Under these conditions, President Trump would "personify the federal sovereignty."<sup>284</sup> For the Court to invalidate such an action taken by President Trump under the *Youngstown* framework, it would have to conclude that "the Federal Government as an undivided whole lacks power"<sup>285</sup> to use "the militia or the armed forces . . . [to] suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy."<sup>286</sup> As James Madison noted in Federalist No. 41, "It is in vain to oppose constitutional

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provides a roadmap for lawmakers to follow."

<sup>279</sup> *Id.* at 267–68 n.17.

<sup>280</sup> *Id.* at 269.

<sup>281</sup> Justice Jackson is not without his detractors, however. *See id.* at 270–71 n.27 (citing *The Powers of War and Peace*, WASH. POST, Jan. 13, 2006 (reporting remarks of John Yoo: "I am not a big fan of the concurrence by Justice Jackson . . . I have long thought Justice Jackson's concurrence is more of a statement about politics, and a true one, than one of constitutional law. How could, for example, Congress pass a statute prohibiting the President from exercising a power given to him under the Constitution?").

<sup>282</sup> 10 U.S.C. §§ 251–255.

<sup>283</sup> Yoo, *War Powers*, *supra* note 50, at 193.

<sup>284</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J., concurring).

<sup>285</sup> *Id.* at 636–37.

<sup>286</sup> 10 U.S.C. § 253.

barriers to the impulse of self-preservation.”<sup>287</sup> Such a holding would defy logic, historical presidential practice, consistent and longstanding legislative enactments and reenactments, and run contrary to the Court’s own longstanding precedent.<sup>288</sup> Finally, according to Justice Jackson, President Trump, acting pursuant to the Insurrection Act, “would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”<sup>289</sup> It is clear that under the prevailing circumstances, in the wake of George Floyd’s murder, Justice Jackson’s concurrence favors President Trump’s Rose Garden ultimatum. Barring wholesale abandonment of Justice Jackson’s framework, it is difficult to imagine an application of Justice Jackson’s framework that does not bolster President Trump’s proposed use of the U.S. military on domestic soil.

### *B. Manipulating the Youngstown Framework*

#### 1. Recent Proposals to Amend the Insurrection Act

As mentioned above, the statutory authority for the President “to call forth the militia” for domestic purposes has existed with regularity since the late eighteenth century.<sup>290</sup> Similarly, the President’s statutory power “to employ . . . the land or naval force of the United States” for parallel purposes has existed since 1807.<sup>291</sup> “The 1861 Act represented the third major revision to the Militia Act regime, but the statutes have remained almost entirely unchanged . . . since.”<sup>292</sup> In 2006, Congress briefly amended the Act

<sup>287</sup> THE FEDERALIST NO. 41 (James Madison).

<sup>288</sup> See *Martin v. Mott*, 25 U.S. 19, 29–32 (1827) (discussing how the president, as the head of the executive branch and through express legislative power, has the power to call forth the militia when the president deems it necessary); *Luther v. Borden*, 48 U.S. 1, 44–45 (1849) (citing *Martin*, 25 U.S. at 29–32); *In re Neagle*, 135 U.S. 1, (1890); *In re Debs*, 158 U.S. 564, 565 (1895).

<sup>289</sup> *Youngstown*, 343 U.S. at 637.

<sup>290</sup> See generally *Emergency Power*, *supra* note 48, at 164 (discussing the expansion of the President’s power to call forth the militia beginning in the late 1790s).

<sup>291</sup> Insurrection Act of 1807, ch. 39, Pub. L. No. 9-2, 2 Stat. 443.

<sup>292</sup> *Emergency Power*, *supra* note 48, at 167; see *Banks*, *supra* note 46, at 87 (noting that the 2008 repeal of the 2006 amendment returned the Act to its pre-2006 form).

at the request of President George W. Bush and in response to purported shortfalls with the Act identified after the federal government's maligned response to Hurricane Katrina.<sup>293</sup> Two years later, Congress passed legislation repealing the 2006 amendments, and President George W. Bush signed the repeal into law.<sup>294</sup> Other than this short two-year period, the Act has endured unchanged for 160 years. Moreover, for nearly seventy of those years, including the two-year amendment and repeal detour, Presidents invoking the Act could do so with the surety of being squarely within Justice Jackson's first category—personifying the federal sovereign. It would seem that, at least insofar as Congress has been concerned, fears of a standing army, a tyrannical executive, and military intrusion into civilian affairs have long dissipated.

Even in the immediate wake of President Trump's Rose Garden statement, amidst public statements by elected officials conveying outrage and a flurry of indignation by retired generals and flag officers, legislative attempts to modify the Insurrection Act were fruitless. Just days after President Trump's Rose Garden statement, U.S. Senator Richard Blumenthal (D-CT) introduced legislation to overhaul the Insurrection Act in the Senate.<sup>295</sup> Soon after that, Congresswoman Veronica Escobar (D-TX-16) introduced an amendment to the National Defense Authorization Act (NDAA) for Fiscal Year 2021, also designed to overhaul the Insurrection Act.<sup>296</sup> The suggested modifications were numerous.

Proposed changes to 10 U.S.C. § 251 included reserving application for federal assistance to the governor of the afflicted state, as well as allowing the governor of the afflicted state to determine the appropriate number of militia necessary to aid the afflicted state.<sup>297</sup>

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<sup>293</sup> See John Warner National Defense Authorization Act of 2006, Pub. L. No. 109-364, sec. 1076, § 333, 120 Stat. 2083, 2404; 10 U.S.C. § 333 (1956).

<sup>294</sup> Pub. L. No. 110-181, § 1068, 122 Stat. 3, 325 (2008). The 2008 repeal of the 2006 amendment returned the Act to its pre-2006 form.

<sup>295</sup> Curtailing Insurrection act Violations of Individuals' Liberties Act, S.3902, 116th Cong. (2020).

<sup>296</sup> Cong. Rec. H3329 (daily ed. July 20, 2020) (statement of Rep. Escobar), <https://www.congress.gov/116/crec/2020/07/20/CREC-2020-07-20-pt1-PgH3114-2.pdf>.

<sup>297</sup> S.3902 § 251(a).

Discretion regarding the use of the armed forces to suppress the insurrection remained with the President.<sup>298</sup> The proposed language also eliminated the option for the afflicted state’s legislature to petition the federal government for assistance.<sup>299</sup> Additionally, as a prerequisite for invoking the authority of the Act under the proposed language, “the President, the Secretary of Defense, and the Attorney General [would be required to] certify to Congress that the governor of the State concerned . . . requested the aid described in [§ 251] to suppress an insurrection.”<sup>300</sup>

The amended first section of 10 U.S.C. § 252 jettisoned the phrase “[w]henver *the President considers* . . . it impracticable to enforce the laws.”<sup>301</sup> The original language was replaced with “[w]henver unlawful obstructions, combinations, or assemblages, or rebellion . . . make it impracticable to enforce the laws of the United States.”<sup>302</sup> This change eliminated the President’s role as “the sole and exclusive judge . . . of the existence of the exigency”<sup>303</sup> and the antecedent facts that would authorize the President to invoke the authority under this section. Instead, a fair reading of the revised Act makes the President, the Secretary of Defense, and the Attorney General of the United States the fact finders and requires all three to “certify to Congress that the State concerned is unable or unwilling to suppress an unlawful obstruction, combination, or assemblage, or rebellion against the authority of the United States.”<sup>304</sup> Further, the proposed text required certification by the three Executive branch officials to include:

A description of the circumstances necessitating the invocation . . . [d]emonstrable evidence that the State concerned is unable or unwilling to suppress such unlawful obstruction, combination, or assemblage, or rebellion against the authority of the United States, and

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<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* § 251(b).

<sup>301</sup> 10 U.S.C. § 252 (emphasis added).

<sup>302</sup> S.3902 § 252(a).

<sup>303</sup> *Martin v. Mott*, 25 U.S. 19, 29, 31 (1827).

<sup>304</sup> S.3902 § 252(b)(1).

a legal justification for resorting to the authority under [§ 252, and] . . . [a] description of the mission, scope, and duration of use of the members of the armed forces . . . .<sup>305</sup>

Proposed modifications to 10 U.S.C. § 253 began by refining some of the antecedent facts. Previously, the Act commanded that

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it . . . opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.<sup>306</sup>

Under the proposed language, the Act commanded that

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it . . . opposes or obstructs the execution of *the Federal or State laws to protect the civil rights of the people of the United States under the Constitution and* impedes the course of justice under those laws.<sup>307</sup>

As with the proposals in previous sections (§§ 252–253), the proposed § 253 required “the President, the Secretary of Defense, and the Attorney General [to] certify to Congress that the State concerned is unable or unwilling to suppress an insurrection, domestic violence, an unlawful combination, or a conspiracy described in [the first section

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<sup>305</sup> *Id.* § 252(b)(2).

<sup>306</sup> 10 U.S.C. § 253.

<sup>307</sup> S.3902 § 253(a) (emphasis added).

of the Act].”<sup>308</sup>

Additional sections required “[t]he President, in every possible instance, [to] consult with Congress before invoking the authority under section 251, 252, or 253.”<sup>309</sup> The proposal also called for the passage of a Joint Resolution with 14 days of invocation if the invocation occurred while Congress was in session or 14 days after the commencement of the next session of Congress if Congress was not in session.<sup>310</sup> The proposed language also demanded that the authority invoked by the President *shall* terminate in the absence of a Joint Resolution.<sup>311</sup> The proposed language further stated that the President may not, at any point after the 14 days, re-invoke the terminated authority under any section of the Act “unless there has been a material and significant change in factual circumstances.”<sup>312</sup> Other sections of the proposed language placed time requirements for reconvening the House of Representatives and the Senate after an invocation of the Act by the President; reconvening on committees to which a joint resolution was referred for reporting and discharge; and for proceeding to consideration.<sup>313</sup> The proposed Act excluded consideration upon presentment to the President from the 14-day clock.<sup>314</sup> There is also a section regarding judicial review encompassing remedies, jurisdiction, and requiring expedited review by “the applicable district court of the United States and the Supreme Court of the United States . . . to the greatest possible extent.”<sup>315</sup> Finally, the proposed language prohibited “the Army, Navy, Air Force, or Marine Corps [from direct participation] in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise expressly authorized by law.”<sup>316</sup> On its face,

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<sup>308</sup> *Id.* § 253(b)(1).

<sup>309</sup> *Id.* § 256.

<sup>310</sup> *Id.* § 257(a)(1).

<sup>311</sup> *Id.* § 257(c).

<sup>312</sup> *Id.* § 257(c)(2).

<sup>313</sup> *Id.* § 257(d).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* § 258(b).

<sup>316</sup> *Id.* § 275(a); see LTC TED MARTIN, USA ET AL., DOMESTIC OPERATIONAL LAW 2018 HANDBOOK FOR JUDGE ADVOCATES, CENTER FOR LAW AND MILITARY OPERATIONS 91–92 (2018), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/domestic-law-handbook-2018.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/domestic-law-handbook-2018.pdf).

the proposed amendments to the Insurrection Act sought to increase, if only marginally, *checks and accountability mechanisms* on the President's use of the militia and the armed forces in response to various domestic exigencies.<sup>317</sup>

Despite bipartisan public pushback after President Trump's Rose Garden statement,<sup>318</sup> Senator Blumenthal's bill to curtail the President's use of the Insurrection Act, titled the Curtailing Insurrection Act Violations of Individuals' Liberties Act (CIVIL Act), never received a vote in the Senate.<sup>319</sup> Conversely, the House of Representatives approved Congresswoman Escobar's amendment to curtail the President's use of the Insurrection Act in a 215–190 vote.<sup>320</sup> The passage in the House notwithstanding, after House and Senate negotiators finished reconciliation, the final NDAA for Fiscal Year 2021 contained no language apropos of the Insurrection Act.<sup>321</sup> Yet,

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<sup>317</sup> *Under the Insurrection Act*, *supra* note 82.

<sup>318</sup> See Jordain Carney, *Trump's Vow to Deploy Military Faces GOP Pushback*, THE HILL (June 2, 2020), <https://thehill.com/homenews/senate/500726-trumps-vow-to-deploy-military-faces-gop-pushback>; Jordain Carney, *Democrats Introduce Bill to Rein in Trump's Power Under Insurrection Act*, THE HILL (June 4, 2020), <https://thehill.com/homenews/senate/501274-democrats-introduce-bill-to-rein-in-trumps-power-under-insurrection-act>.

<sup>319</sup> Rebecca Kheel, *Senate Panel Passes Amendment to Bar Using Troops Against Protesters*, THE HILL (June 11, 2020), <https://thehill.com/policy/defense/502258-senate-panel-passes-amendment-to-bar-using-troops-against-protesters>; S.3902 § 1.

<sup>320</sup> Rebecca Kheel, *The Hill: House Votes to Curtail Insurrection Act Powers*, CONGRESSWOMAN VERONICA ESCOBAR (July 20, 2020), <https://escobar.house.gov/news/documentsingle.aspx?DocumentID=396>; H.R. 6395, 116th Cong., Roll Call 141, Clerk U.S. House of Representatives (July 20, 2020), <https://clerk.house.gov/Votes/2020141>.

<sup>321</sup> William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (2021); see also Rebecca Kheel, *Overnight Defense: Lawmakers Release Compromise Defense Bill in Defiance of Trump Veto Threat | Senate Voting Next Week on Blocking UAE Arms Sale | Report Faults Lack of Training, 'Chronic Fatigue' in Military Plane Crashes*, THE HILL (Dec. 3, 2020), <https://thehill.com/policy/defense/overnights/528705-overnight-defense-lawmakers-release-compromise-defense-bill-in> (“Meanwhile, the House’s language to curtail a president’s powers under the Insurrection Act is out, as is the Senate’s language blocking funding from being used to deploy U.S. troops against peaceful protesters.”); Rebecca Kheel, *NDAA underscores GOP differences with Trump on defense*, THE HILL (Dec. 6, 2020), <https://thehill.com/policy/defense/528846-ndaa-underscores-gop-differences-with-trump-on-defense> (“The compromise jettisoned

even if House and Senate negotiators had incorporated the proposed language with a veto-proof majority, it is difficult to envisage how the amendment would have altered the President's standing under Justice Jackson's categorical framework.

The changes to 10 U.S.C. § 251 were modest. Both the current statutory framework and the proposed language require the consent of the afflicted state.<sup>322</sup> The addition of certification to Congress, by three executive branch officials appointed by the President and (usually)<sup>323</sup> confirmed by the Senate, does not appear to hearken back to the independent assessment of an associate justice or the district judge as required by the Calling Forth Act.<sup>324</sup> Likewise, under the proposed language, §§ 252–253 remained primarily unchanged except for Congress's certification, albeit with specific statutory explanations.<sup>325</sup>

The remaining amendments, requiring *consultation* with Congress and imposing *time requirements* for terminating the President's authority under the Act, hardly exemplify robust legislative accountability mechanisms. The proposed language, requiring consultation with Congress, mirrors the *consultation* language set out in the *War Powers Resolution*.<sup>326</sup> In the forty-eight

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some rebukes of Trump, including House-passed language to restrict a president's Insurrection Act powers . . . ."); failure to include the amendments in the NDAA does not provide per se justification for judicial intervention. *See generally* *Raines v. Byrd*, 521 U.S. 811, 824 (1997).

<sup>322</sup> Compare 10 U.S.C. § 251 and S.3902 § 251(a).

<sup>323</sup> Anne Joseph O'Connell, *Acting Officials and Delegated Authority*, THE REGUL. REV. (June 29, 2020), <https://www.theregreview.org/2020/06/29/oconnell-acting-officials-delegated-authority/> ("The report created a snapshot of the staffing status of 321 Senate-confirmed positions in the fifteen cabinet departments and two other executive agencies—the U.S. Environmental Protection Agency and the Office of Management and Budget—as of April 2019. From this snapshot early in President Donald J. Trump's third year, confirmed officials sat in only 65 percent of these positions, leaving about 35 percent of positions formally unoccupied. Acting leaders, however, staffed only about a third of these vacant positions, about 13 percent overall. The remaining 22 percent of all the examined Senate-confirmed positions sat empty because the Vacancies Act's time limits had run out. Presumably, the nonexclusive functions and duties of these unoccupied positions were delegated downward to other officials.").

<sup>324</sup> Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (repealed 1795).

<sup>325</sup> Compare 10 U.S.C. § 252, 10 U.S.C. § 253, and S.3902 § 251(b).

<sup>326</sup> Compare War Powers Resolution, 50 U.S.C. § 1542–49 with S.3902 § 256.

years since the passage of the *War Powers Resolution*, over President Richard Nixon's presidential veto, the political branches have been unable to agree on the meaning of *consultation*.<sup>327</sup> As a result, Executive consultation with Congress has been sporadic and at times nonexistent.<sup>328</sup> Consequently, it is reasonable to expect similar results should amendments, such as those proposed by Senator Blumenthal and Congresswoman Escobar, be adopted.

Furthermore, the proposed *time requirements*, which might appear to be surefire "check[] and accountability mechanisms" on the President's sustained reliance on the Act, are far from ironclad.<sup>329</sup> The proposed language clearly states that "if a joint resolution is not enacted on or before the last day of the 14-day period . . . the President may . . . re-invoke authority under section 251, 252, or 253, [if] there has been a *material and significant change in factual circumstances*, and such circumstances are provided in a new certification to Congress."<sup>330</sup> Determining what makes a change in factual circumstances "material and significant"<sup>331</sup> in the context of deploying the military on domestic soil in response to widespread civil unrest is precisely the kind of determination that "lack[s] . . . judicially discoverable and manageable standards."<sup>332</sup> Moreover, assuming the President satisfies the requirement that a "new certification" accompanies the re-invocation, the federal courts would have to substitute the judgment of the President, the Secretary of Defense, and the Attorney General of the United States, as to specific facts on the ground, with the courts' determination, to hold that the factual circumstances were not "material and significant."<sup>333</sup>

Finally, these changes do little to alter the President's categorical standing, as outlined in Justice Jackson's *Youngstown*

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<sup>327</sup> See generally MATTHEW C. WEED, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE 6 (2019) (discussing how every President since the War Powers Resolution's enactment has viewed the document as an unconstitutional limitation on the President's authority as Commander in Chief).

<sup>328</sup> See *id.* at 10.

<sup>329</sup> Under the *Insurrection Act*, *supra* note 82.

<sup>330</sup> S.3902 § 257(c) (emphasis added).

<sup>331</sup> *Id.*

<sup>332</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>333</sup> S.3902 § 257(c)(2).

framework. Despite the ire expressed at President Trump's proposal to deploy the military to quell civil unrest and pledges to reign in the President's authority, proposed amendments did little to curtail the President's power. Even assuming wholesale adoption of the proposed changes, the President's authority would remain "at its zenith."<sup>334</sup> President Trump would continue to "personify the federal sovereignty" because he would still be acting "pursuant to an express or implied authorization of Congress,"<sup>335</sup> and the federal courts seem no more likely to find an inroad to review the President's judgment. In short, even under the proposed language, disputes are likely to be left for resolution between the political branches.

## 2. The Gauntlet

While the examination of recent proposals to amend the Insurrection Act suggests that the changes are unlikely to alter the President's station under Justice Jackson's categorical framework, it is not to say that Congress cannot modify the President's standing under the framework. There are a myriad of options for devising statutory language that would shift the President's power to what Justice Jackson described as its "lowest ebb."<sup>336</sup> Yet, cataloging these various possibilities is unnecessary in light of a second, though lesser-known, axiom arising out of Justice Jackson's *Youngstown* concurrence, which is frequently applied by the federal courts. In his *Youngstown* concurrence, Justice Jackson noted that courts "may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."<sup>337</sup> Or, as stated by Justice Ruth Bader Ginsburg, then an appellate court judge on the United States Court of Appeals for the District of Columbia Circuit, "Congress has formidable weapons at its disposal . . . . But no gauntlet has been thrown down . . . . 'If the Congress chooses not to confront the President, it is not [the court's]

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<sup>334</sup> Yoo, *War Powers*, *supra* note 50, at 193.

<sup>335</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

<sup>336</sup> *Id.* at 637.

<sup>337</sup> *Id.* at 654.

task to do so.”<sup>338</sup>

In the years since *Youngstown*, the federal courts have shown a penchant toward avoiding inter-branch disputes, particularly, though not exclusively,<sup>339</sup> where the dispute pertains to national security and the conduct of military operations.<sup>340</sup> Despite this penchant, the federal courts have, on numerous occasions, pronounced that judicial review might not be entirely foreclosed; however, to reach the courts, Congress must first assert its “ample powers under the Constitution to prevent Presidential overreaching.”<sup>341</sup> In short, to challenge the President’s judgment under the Act, Congress must throw down the gauntlet. Even absent judicial intervention, Congress is not powerless:

The . . . Constitution gives Congress a series of political tools to bring the Executive Branch to heel. . . . Congress (or one of its chambers) may hold officers in contempt, withhold appropriations, refuse to confirm the President’s nominees, harness public opinion, [or] delay or derail the President’s legislative agenda . . . .<sup>342</sup>

Of course, “the Framers provided for impeachment should the political process not provide a remedy.”<sup>343</sup>

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<sup>338</sup> *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 211 (D.C. Cir. 1985) (quoting *Goldwater v. Carter*, 444 U.S. 996, 998 (1979)).

<sup>339</sup> *See Comm. on Judiciary of U.S. House of Representatives v. McGahn*, 951 F.3d 510, 513 (D.C. Cir. 2020). “The Committee on the Judiciary of the House of Representatives ordered the former White House Counsel, Donald F. McGahn, II, to testify before the Committee. President Donald Trump instructed McGahn to refuse, asserting that certain presidential advisers possess ‘absolute testimonial immunity’ from compelled congressional process. The Committee [sought] to invoke the court’s jurisdiction to enforce its subpoena.”

<sup>340</sup> *See* Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 358 *COLL. OF WILLIAM & MARY L. SCH.; FAC. PUBL’N* 63, 77–81 (2002), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1379&context=facpub>.

<sup>341</sup> *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990); *see also* *Schneider v. Kissinger*, 412 F.3d 190, 200 (D.C. Cir. 2005); *Mass. v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971); *Goldwater v. Carter*, 444 U.S. 996, 998 (1979).

<sup>342</sup> *McGahn*, 951 F.3d at 519 (internal citation omitted).

<sup>343</sup> *Phillips & Yoo*, *supra* note 55, at 56.

## CONCLUSION

This Article has shown that the hasty pronouncements declaring President Trump's proposed use of the military to quell domestic disorder as unlawful were wholly unfounded. Despite the founding generation's notoriously anti-executive mood, resistance to military intrusion into civilian affairs, and strong sentiment against maintaining a standing army, the statutory framework permitting a domestic role for the Nation's military force has existed since nearly the founding. Initially, the founding generation's fears manifested themselves in various *checks and accountability mechanisms* on the President's use of this authority. Over time, and under the pressure of exigencies, Congress gradually empowered the President until he became the sole and exclusive judge of the manifestation of a qualifying exigency and the presence of the antecedent facts required to support the military's deployment on domestic soil. Today, the Insurrection Act preserves Congress's authorization empowering an energetic and independent President with near unencumbered discretion in the face of insurrection, domestic violence, unlawful combination, or conspiracy.

Nineteenth-century Supreme Court precedent expressly acknowledged the immense power bestowed upon the President under the Act, rendering him the sole and exclusive judge of whether the exigency has arisen. Furthermore, upon considering the statutory language, the Court expressly foreclosed any appeal from the President's judgment—declaring that if the President should fall into error or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy.

Nearly 100 years later, Justice Jackson fortified the authority of Presidents acting pursuant to an Act of Congress by announcing his now-famed three-part test for determining the validity of the exercise of executive power.<sup>344</sup> Under Justice Jackson's storied framework, a President's authority is at its zenith when he acts pursuant to an authorization from Congress.<sup>345</sup> Justice Jackson noted that under these circumstances, the President could be said to personify the federal

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<sup>344</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952).

<sup>345</sup> *Id.* at 635.

sovereignty. Further, Justice Jackson announced that a President, whose authority was at its zenith, would be entitled to the strongest presumptions and the widest latitude of judicial interpretations.<sup>346</sup>

Despite the strong endorsement for the Executive's independence under the Act by the nineteenth-century Court and the subsequent strengthening of an Executive's authority when acting pursuant to an Act of Congress, provided by Justice Jackson's categorical framework, later courts increasingly jettisoned themselves from disputes involving national security, military operations, and other clashes which appeared best resolved between the political branches; courts do this by invoking the justiciability doctrines, including: political questions, ripeness, mootness, and standing.<sup>347</sup> The Court's declination of such cases extended equally to instances where Congress was yet to exercise its ample powers under the Constitution for preventing Presidential overreach. In short, as noted by Professor Neal Devins and constitutional scholar Louis Fisher, "[i]f members of Congress fail[ed] to assert their prerogatives . . . federal judges [were] unwilling to fill the breach left open by lawmakers."<sup>348</sup> As noted by Justice Powell in his concurring opinion in *United States v. Richardson* and restated by Chief Justice Rehnquist in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*:

[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.<sup>349</sup>

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<sup>346</sup> *Id.* at 635–36.

<sup>347</sup> Yoo, *War Powers*, *supra* note 50, at 182; *see also* Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 465 (2004) ("What is certain, though, is that . . . the . . . political question doctrine played, and continues to play, a vital role in the Court's affairs.").

<sup>348</sup> Devins & Fisher, *supra* note 340, at 76.

<sup>349</sup> *United States v. Richardson*, 418 U.S. 166, 188 (1974); *Valley Forge Christian*

In keeping with the constitutional design and bedrock principle of separation of powers, this development in the courts correctly leaves Congress, not the Judiciary, to serve as the preeminent bulwark against presidential excess.

Of course “[l]etting political fights play out in the political branches might seem messy or impractical, but democracy can be a messy business . . . .”<sup>350</sup> If we are to reinvigorate our system of checks and balances, Congress must throw off its pattern of inertia. Inertia by Congress upsets the constitutional design. “[T]he Framers believed that the political process should impose the primary restraint on a President,”<sup>351</sup> and where lesser tools at Congress’s disposal fail, Congress can impeach and remove. Federalist No. 66 states it plainly. Alexander Hamilton wrote, “the powers relating to impeachments are . . . an essential check . . . upon the encroachments of the executive.”<sup>352</sup>

On June 1, 2020, at 6:43 p.m., in an address to the Nation from the White House Rose Garden,<sup>353</sup> President Trump invoked authority granted to him by Congress, reenacted by Congress on numerous occasions, and drafted by Congress in such a way as to foreclose appeal from the judgment of the President. Observers can disagree with the President’s judgment, but that does not make his proposed actions unlawful. Averting unlawfulness obscures Congress’s abdication of its role under the constitutional design. “[I]f the President in exercising this power shall fall into error, or invade the rights of the people of the State, it [is] in the power of *Congress* to apply the proper remedy.”<sup>354</sup> Congress can delegate authority, but it must not be allowed to delegate responsibility.

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Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982).

<sup>350</sup> Comm. on Judiciary of United States House of Representatives v. McGahn, 951 F.3d 510, 519 (D.C. Cir. 2020) (en banc) *reh’g granted, vacated sub nom.* Comm. on Judiciary of United States House of Representatives v. McGahn, 968 F.3d 755 (D.C. Cir. 2020).

<sup>351</sup> Phillips & Yoo, *supra* note 55, at 53.

<sup>352</sup> THE FEDERALIST NO. 66 (Alexander Hamilton).

<sup>353</sup> Rose Garden Statement, *supra* note 4.

<sup>354</sup> Luther v. Borden, 48 U.S. 1, 45 (1849) (emphasis added).