Toward Military Rule? A Critique of Executive Discretion to Use the Military in Domestic Emergencies

Jackie Gardina

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol91/iss4/5

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obriens@marquette.edu.
TOWARD MILITARY RULE? A CRITIQUE
OF EXECUTIVE DISCRETION
TO USE THE MILITARY IN DOMESTIC
EMERGENCIES

JACKIE GARDINA

I. INTRODUCTION

When President Musharraf declared martial law in Pakistan, he quoted President Lincoln, citing Lincoln’s suspension of rights during the Civil War as justification for his own state of emergency. Given the universal outcry against his actions, President Musharraf’s reliance on American history deserves notice. As a general matter, Americans are confident that an American President could not engage in similar conduct. But the question is whether that confidence is warranted. As President Musharraf’s reference to American history suggests, the American President does have the authority to use military force to respond to internal dissent. The more pressing concern is what safeguards, if any, are in place to prevent the abuse of that authority.

* Associate Professor of Law, Vermont Law School. I would like to thank the following individuals for their guidance and insights: Bruce Duthu, Pam Stephens, Steve Dycus, Norman Stein, Margaret Raymond, Mark Sidel, and especially Diane Mazur. I also want to express my gratitude to my parents, Jack and Jean Gardina. You both encouraged my curiosity, challenged my thinking, taught me the value of education, and, perhaps most importantly, led by example.


2. For purposes of this Article, “military force” or “armed force” refers to both the regular armed services as well as the federalized National Guard. When the distinction is significant to the Article’s thesis, the form of military intervention is noted. The phrase “military force” or “armed force” is more complex than it appears. As is discussed in more detail below, the President has access to both the federal military (the regular Army, Navy, Air Force) and the federalized National Guard. See infra Part II.B. Thus, military or armed force could come in either form. See id. On the one hand, the distinction is irrelevant to the discussion because the Executive’s growing discretion to respond to domestic emergencies with military force regardless of its form is troubling. On the other hand, the Framers thought the distinction was significant, anointing the militia as the primary domestic security force. See infra Part II.A. This Article takes the position that the form of the force is significant in certain situations; specifically that when the President employs armed force domestically, the National Guard should be the first line of defense.
The central purpose of this Article is to explore what safeguards do exist to protect the American public from the type of conduct visited upon the Pakistani people. From a brief review of the debates surrounding the creation of the United States' government, it is clear that the founding generation was very conscious of the threat posed by a strong Executive Branch with access to military power. As a result, it created a series of checks intended to make it difficult for an Executive to harness that power against the public. Unfortunately, over time Congress has undermined this foundational structure and eroded the safeguards intended to prevent the pooling of military power in the Executive Branch.

But Congress is beginning to re-examine the Executive's increasing power to engage the military domestically. Even before the declaration of military rule in Pakistan, some members of Congress had begun to question the Executive's discretionary authority to use military force in the domestic sphere and recognized the threat posed by such authority. Following 9/11 and in the aftermath of Hurricane Katrina, the Bush Administration called for an increased role for the Department of Defense and the federal armed forces in responding to domestic emergencies. Through a variety of statutory measures, Congress answered the President's request for enhanced authority, increasing the Executive Branch's discretionary power to deploy the federal armed forces domestically. Congress's most recent enactment, an amendment to the Insurrection Act, however, faced resistance in both the House and the Senate because it was perceived as inappropriately increasing

3. The current debate is centered on the recent amendment to the Insurrection Act, authorizing the President to use military force to "restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that" the constituted authorities are unable to do so. 10 U.S.C. § 333(a)(1) (2006). As will be discussed more fully below, every state governor opposed the amendment, contending that it constituted a radical shift in authority from governors as commanders in chief of the National Guard to the federal government. See Letter from National Governors Association to The Honorable Bill Frist, Senate Majority Leader, The Honorable Harry Reid, Senate Minority Leader, The Honorable J. Dennis Hastert, Speaker of the House, and The Honorable Nancy Pelosi, House Minority Leader, (Aug. 6, 2006), available at http://www.nga.org/portal/site/nga (Select “Letters” hyperlink; select “Aug. 6, 2006” hyperlink) [hereinafter National Governor's Association Letter].


the Executive's authority. Members of both houses have introduced legislation to repeal the change.

The congressional debate raises important questions about the appropriate role of the military in a democratic society. To be clear, the question posed is not whether to use armed force in certain situations but what limitations there should be on that use. Since the founding of the United States, it has been acknowledged, albeit reluctantly by some, that the federal government may need to resort to armed force to quash insurrections or execute federal law. Presidents have successfully used armed force in both situations, most notably during the Civil War and again to enforce desegregation. The struggle now, as it was then, is to define the appropriate parameters of that use.

The struggle to define the appropriate role of the military in domestic life comes at a critical juncture in our nation's development. With an increased emphasis on homeland security following the 9/11 attack, the government and the public have yielded to the military's growing involvement in domestic affairs. Such acquiescence is not surprising. Following 9/11, public confidence in the military reached record highs. But even before that, the U.S. military had consistently

---

7. Members of both the House and Senate perceive the amendment as inappropriately enhancing Executive authority and have introduced legislation to repeal it. See S. 513, 110th Cong. (2007); H.R. 869, 110th Cong. (2007); "The Insurrection Act Rider" and State Control of the National Guard: Hearing on S. 513 Before the S. Comm. on the Judiciary, 110th Cong. 38 (2007) [hereinafter Hearing] (statement of Sen. Patrick Leahy) ("As with so much else this Administration has done, this is a raw expansion of Presidential power. It is certainly not an expansion of power that should be granted without thoughtful deliberation, and without extensive consideration of the far-reaching consequences."); id. at 27 (statement of Sen. Kit Bond) ("These provisions reduce our nation's governors' control over their Guard units and provide the President with unnecessary and unprecedented power.").


9. See George Mason, Speech to the Constitutional Convention (June 20, 1787), in THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 346, 349 (Max Farrand ed., 1937) [hereinafter George Mason Speech].


rated as the most trustworthy of public and private institutions—even more trustworthy than churches, universities, hospitals, the U.S. Supreme Court, and any other part of the government. In the last two decades, the military has been steadily used to aid law enforcement in a variety of domestic situations. The armed forces have been employed in several different “civil support missions,” from providing humanitarian aid during natural disasters to assisting with drug interdiction to patrolling U.S. borders as part of the immigration control effort. The government’s and public’s reliance on the military is only magnified by concerns regarding another terrorist attack. The line between civil disorder and national security—between domestic law enforcement and military necessity—is continually blurred.

By increasing the military’s presence in the domestic sphere, however, the federal government is obscuring the traditional lines between military and civilian roles. Even when sanctioned by civil leaders, the increased role of the armed forces in the domestic life endangers civil liberties and the democratic process. Over fifty years ago in his farewell address, President Eisenhower cautioned against civil acquiescence to military control when he stated: “In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex.”

---


21. Charles J. Dunlap, Jr., Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military, 29 Wake Forest L. Rev. 341, 357 (1994) (“The transfer of public confidence from the elected leaders to the military challenges civilian control of the armed forces.”).

22. Id. at 342.
and will persist.”

Even the courts have acknowledged the dangers inherent in even a small military presence. In addressing the use of federal armed forces in response to a resistance movement on the Wounded Knee Indian Reservation, the Eighth Circuit recognized that the use of the military on even a small scale could “chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.”

It is essential that Congress engage in an open dialogue regarding these issues. A fundamental tenet of our society, first reflected in the Declaration of Independence, is the desire of civilian supremacy over military power. It is premised on a well-founded fear of domestic tyranny at the hands of a despotic leader with unbridled access to military might. This tenet, inserted into the Constitution and the Bill of Rights, rests on the belief that the “military establishment is, of course, a necessary organ of government; but the reach of its power must be carefully limited lest the delicate balance between freedom and order be upset.”

By increasing a military presence in the domestic sphere, the federal government is erasing the demarcation between military and civilian roles and undermining the primacy of civil rule.

But it is important to recognize that this is not a new topic of discussion. The architects of the Constitution fiercely debated the role of the military in domestic society. It was a subject of significant controversy during the Constitutional Convention as well as the ratification process. What emerged from this dialogue was a carefully balanced system of government in which the military establishment is a necessary organ of governance, but its power is carefully limited to ensure the protection of individual freedoms and the maintenance of civil order.

23. Farewell Radio and Television Address to the American People, PUB. PAPERS 1035, 1038 (Jan. 17, 1961); see also, Dunlap, supra note 21, at 386 (“Without malice aforethought, a political structure that may be subject to nefarious exploitation in the future is being validated.”).
26. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776) (“[The King of Great Britain] has affected to render the Military independent of and superior to the Civil power.”).
29. See Dunlap, supra note 21, at 342.
31. See Letter from the Hon. William Pierce, Esq., to St. George Tucker, Esq. (Sept. 28, 1787), in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 442, 445 (John P. Kaminski & Gaspare J. Saladino eds., 1986) (“I confess however that I am at a loss to know whether any government can have sufficient energy to effect its own ends
constructed compromise and—consistent with the new government—a shared power paradigm. As a starting point, to assuage the fears of those opposed to a standing army, the proponents identified the militia—the precursor to the National Guard—as the primary fighting force in domestic situations. The architects of the Constitution created a vertical check by dividing power over the militia between the states and the federal government. Congress would have authority over the militia’s training and discipline, but the states would appoint the troop commanders, thus ensuring militia loyalty to the states. In addition, the militia would serve as an important check against the federal government’s ability to use a standing army to interfere with state sovereignty. It was contended that an army of citizen-soldiers would be a bulwark against the federal government’s inappropriate use of a standing army.

The founding generation also created a horizontal check within the federal government by providing Congress, as representative of the people, the authority to activate the militia to “execute the Laws of the Union, suppress Insurrection and repel Invasions” and by allowing the Executive to act as “Commander in Chief” of the militia when called into service of the United States. On the federal level, it would take the actions of both Congress and the Executive to employ the military domestically, thereby decreasing the possibility of improper use. While the various factions disagreed on the scope of the military’s role in domestic society, they all agreed that the regular army was an option of last resort, to be used only when the civil authorities and militia had without the aid of a military power. Some of the greatest men differ in opinion about this point.”; see also George Mason Speech, supra note 9, at 346 (“What, would you use military force to compel the observance of a social compact? It is destructive to the rights of the people. Do you ... mean a standing army? ... [It] may turn its arms against the government which employs [it].”); Richard H. Kohn, The Constitution and National Security: The Intent of the Framers, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989, at 61, 67 (Richard H. Kohn ed., 1991).

32. See AMAR, supra note 27, at 117.
35. See U.S. CONST. art. I, § 8, cl. 16.
37. See THE FEDERALIST NO. 29 (Alexander Hamilton), supra note 30, at 140.
39. See AMAR, supra note 27, at 115.
failed.\textsuperscript{40}

Unfortunately, today there is little left of this hard-fought compromise. Congress has delegated excessive discretionary authority to the Executive to use the military domestically.\textsuperscript{41} And, with the transformation of the National Guard into an international fighting force rather than a domestic security force, the federal government has virtually wrested control of the Guard away from the states.\textsuperscript{42} Congress's actions have slowly eroded the shared power paradigm erected by the framing generation.\textsuperscript{43} Other than the good will and good sense of the Executive, there is little to protect the American public from "the corrosive effect upon liberty of exaggerated military power."\textsuperscript{44}

It remains an open question whether Congress's conduct in this area is unconstitutional. Regardless of the legality, Congress's action raises significant questions regarding the continued vitality of the Framers' vision of the predominance of civil rule. The founding generation's concerns regarding the use of the armed force in the domestic sphere are as relevant today as they were in the eighteenth century. One need not search hard for examples of how an increased reliance on the armed forces to address domestic emergencies can have disastrous results.\textsuperscript{45} To avoid similar problems, Congress must recreate the shared power paradigm and act to limit the use of the federal armed forces for domestic purposes. Returning to this paradigm would serve to constrain Executive authority and to prevent the military from interfering with civilian authority. As part of this effort, Congress should return the National Guard to its traditional role as a domestic security force and

\begin{itemize}
  \item \textsuperscript{40} See THE FEDERALIST NO. 29 (Alexander Hamilton), supra note 30; see also Kohn, supra note 16, at 168.
  \item \textsuperscript{41} See infra Part III.B.
  \item \textsuperscript{42} See infra Part IV.
  \item \textsuperscript{43} See infra Part III.
  \item \textsuperscript{44} Warren, supra note 28, at 182; see also Gary Felicetti & John Luce, The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done, 175 MIL. L. REV. 86, 181 (2003) (commenting that the "lack of genuine control has frequently left American citizens at the mercy of the military's and executive branch's good judgment with respect to civil liberties").
  \item \textsuperscript{45} It has long been recognized that military rule often comes on the heels of perceived emergency conditions. See DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 2 (1997) (opining that the use of the emergency power section of the Weimar Constitution was "a crucial moment in the breakdown of Germany's first experiment with democracy"); Bernadette Meyler, Economic Emergency and the Rule of Law, 56 DEPAUL L. REV. 539, 545 (2007); see also PAUL H. LEWIS, GUERRILLAS AND GENERALS: THE "DIRTY WAR" IN ARGENTINA (2002) (describing the multiple military based regimes of twentieth century Argentina).
\end{itemize}
provide the states with increased authority over its deployment domestically.

This Article exposes the erosion of the horizontal and vertical checks on the Executive's power to deploy the military domestically to execute the laws and quash public disorder. Up to this point, no scholar has addressed the corrosion of both structural protections. Scholarship has tended to be myopic, focusing on either one or the other, thus failing to reveal the full effect of Congress's conduct. It begins by briefly describing the historical bases for the founding generation's mistrust of an executive with unbridled access to a military force. Next, it identifies the structural protections that were placed in the Constitution in response to these concerns, placing special emphasis on congressional control. In Part III, it describes the erosion of the structural checks, focusing first on the federalism issues and the disappearing militia and then turns to the division of power between Congress and the Executive. It offers a startling picture of how, over the last two-plus centuries, significant discretionary power has been delegated to the Executive Branch. Finally, Part IV offers a proposal that recognizes the dangers inherent in the introduction of military force into civilian society and attempts to restore the checks originally envisioned by the founders while still providing adequate flexibility to respond to modern day exigencies. The proposal is intended to be a starting point for a dialogue regarding the appropriate role of the armed force in a democratic society.

II. IN THE BEGINNING

To appreciate the current debate, it is important to understand its origins. An historical review provides an important lens through which to view the current framework. It is difficult to appreciate how far the government has gravitated away from its ideological beginnings until the bases for its original decisions are examined.

The framing generation's political ideologies were shaped in a society where the monarch's access to and control of a standing army provided a continual threat to civil liberties. European history was littered with examples of the monarch's misuse of the armed forces to suspend civilian rule, quell internal dissent, quash individual liberties, and enforce imperial edicts. As a result, the Founders worked hard to avoid the pitfalls of the English monarchy and to establish a government of laws, not of men. To achieve this goal, they questioned the necessity of a standing army as well as the propriety of using armed force to execute the laws and quash internal dissent. During the formation of the new government, three main questions needed to be answered: what would be the composition of the young country's armed forces; how would their use be controlled; and how would they be used, if at all, in domestic situations? While there were certainly heated debates on all three questions, the Framers did agree on one issue—the Executive should not have unbridled access to a standing army. To prevent the military excesses of the British monarchy, the new government would disperse control of the armed forces within the central government, thereby reducing the opportunity for abuse.

A. Shared Power and the Domestic Use of Armed Forces in the Constitution

The colonists' fears regarding the misuse of a standing army greatly influenced the early ideas regarding the formation of the new government. Thus, when creating the Articles of Confederation, the nascent government erred on the side of caution. While it was recognized that the fledgling country needed access to some kind of armed force, the Articles of Confederation provided the central government with little power over those forces. Under the Articles,
the government’s coercive power rested primarily with the states.\textsuperscript{52} The central government’s military impotence became painfully apparent during Shay’s Rebellion.\textsuperscript{53} The local militia was either unable or perhaps unwilling to quell the revolt.\textsuperscript{54} The central government was similarly powerless to address the insurgency, lacking both the bureaucratic structure to enlist the necessary men and the money with which to pay them.\textsuperscript{55} The rebellion laid bare the inadequacies of the Articles of Confederation and offered evidence to some that the state militias could neither ensure domestic peace nor protect the borders from foreign enemies.\textsuperscript{56}

Based on their recent experiences under the Articles of Confederation, many members attending the Constitutional Convention acknowledged that the federal government needed the power to deal with eruptions similar to Shay’s Rebellion.\textsuperscript{57} Thus, one of the fundamental goals of the Convention was to create a union capable of securing internal order.\textsuperscript{58} Consequently, the question of the federal

\begin{flushright}
\textsuperscript{52} See id. art. V. Under the Articles, each state remained sovereign, free, and independent with the sole power to tax and to raise armed forces. See id. art. II (“Each State retains its sovereignty, freedom and independence . . . .”); id. art. VII (“When land-forces are raised by any State for the common defence . . . .”); id. art. VIII (“The taxes for paying that proportion [of property value in the State to the Treasury] shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States . . . .”). While the central government could request troops and money, it could do so only if nine of the thirteen states represented in Congress assented, a requirement that was difficult to meet. See id. art. X. Even when Congress did summon the votes, there was no guarantee that the states would honor it. See id. art. XIII. Moreover, when it came to the use of armed forces during peacetime, to patrol the interior of the country, or to guard leftover arms and stores, Congress was not even certain it possessed the authority to make such a request. See Kohn, supra note 31, at 69.

\textsuperscript{53} See COAKLEY, supra note 33, at 4-6.

\textsuperscript{54} Id. at 5.

\textsuperscript{55} Id.

\textsuperscript{56} Id. at 7.

\textsuperscript{57} See U.S. CONST. pmbl.; Letter from Edward Carrington to Edmund Randolph, Governor of Virginia (Dec. 8, 1786), in 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 516, 517 (Edmund C. Burnett ed., 1963) (“[H]ere is felt the imbecility, the futility, the nothingness of the federal powers; the U.S. have no troops, nor dare they call into action, what is called the only safe guard of a free government, the Militia of the State, it being composed of the very objects of the force . . . .”).

\textsuperscript{58} See Letter of His Excellency Edmund Randolph, Esquire, on the Federal Constitution (Oct. 10, 1787), in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 123, 123 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (expressing a desire that the United States Constitution ought to be “a shield against foreign hostility, and a firm resort against domestic commotion”); Letter from Edward Carrington, supra note 57, at 517 (“[H]ere is felt the imbecility, the futility, the nothingness of the federal powers; the U.S. have no troops, nor dare they call into action, what is called the only safe
government's power to use the armed forces to ensure domestic tranquility was a topic of significant debate.59

But the question was more complicated under the proposed constitution. Unlike the Articles of Confederation, the draft constitution contained an Executive with distinct duties and responsibilities.60 The Articles had simply divided power between the states and central government with the states receiving the lion's share of control over the use of the armed forces domestically.61 With the shift away from a state-dominated government, Convention participants had to determine how to divide the power on the federal level between Congress and the Executive.

While it was generally accepted that a mechanism to ensure internal order was necessary,62 the Convention members still maintained a fundamental distrust of a standing army, and more specifically, an executive's ability to employ armed force to quell internal dissent.63 As a result, it was expected that the state militias would be the primary...
coercive tool when civil authorities failed. Working within these political realities, the early ratification debates focused on the dispersion of control over the state militias and the propriety of using armed force generally to execute the laws and quash insurrection, as well as the necessity of a peacetime standing army.

The Federalist and Anti-Federalist writings frame the positions of those closest to the debate. As a general matter, the Anti-Federalists were vehemently opposed to the allowance of a peacetime standing army and specifically with the central government's authority to raise one. The Anti-Federalists were equally opposed to the central government's control over the state militias, believing that federal control would lead to their neglect and eventual decay. For the Anti-Federalist, the states' control over their individual militias established an important check against a powerful central government—especially one with access to a standing army—and provided a guarantee of the states' continued sovereignty.

64. See Virginia Convention Debate, supra note 62, at 319 ("It is left to the militia who will suffer if they become the instruments of tyranny. The general government must have power to call them forth when the general defence requires it."); THE FEDERALIST NO. 29 (Alexander Hamilton), supra note 30, at 137 ("The power of regulating the militia, and of commanding its services in times of insurrection and invasion, are natural incidents to the duties of superintending the common defence, and of watching over the internal peace of the confederacy.").

65. See COAKLEY, supra note 33, at 15 (noting the arguments between the two sides had "particular vigor whenever the issue of the use of military force to execute federal law and suppress domestic insurrection was raised").


[T]he Congress have also the power given them to raise and support armies, without any limitation as to numbers, and without any restriction in time of peace. Thus, Sir, this plan of government, instead of guarding against a standing army, that engine of arbitrary power, which has so often and so successfully been used for the subversion of freedom, has in its formation given it an express and constitutional sanction, and hath provided for its introduction; nor could this be prevented.

Id.

67. See Patrick Henry, Speech at the Virginia State Ratifying Convention (June 5, 1788), reprinted in 5 THE COMPLETE ANTI-FEDERALIST 211, 218 (Herbert J. Storing ed., 1981) ("By this, Sir, you see that their control over our last and best defence, is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: The States can do neither, this power being exclusively given to Congress.").

68. See id.; Essays of Brutus I, N.Y.J., Oct. 18, 1787, reprinted in 2 THE COMPLETE
The Anti-Federalists, however, were not ignorant of the need for the federal government to use force to suppress insurrections.\textsuperscript{69} But the issue was more complex and reflected broader concerns about the appropriate distribution of power between the state and federal governments as well as the type of military force the federal government could employ.\textsuperscript{70} Accordingly, the militia—not a standing army—should be the source of domestic armed force, and the states should retain primary control of the use of the militia.\textsuperscript{71}

In contrast, the Federalists' arguments began with the assumption that "there might some times be a necessity to make use of a force constituted differently from the militia, to preserve the peace of the community, and to maintain the just authority of the laws against those violent invasions of them, which amount to insurrections and rebellions."\textsuperscript{72} The Federalists, however, were sensitive to the fears wrought by the existence of a standing army in peacetime. Several essays attempted to soothe these fears by pointing to the implicit and explicit checks contained within the proposed constitution to counter the potential degradation of liberty at the hands of a standing army.\textsuperscript{73}

Two checks are relevant here. First, Congress, as representative of the people, would control the establishment and use of a standing army.\textsuperscript{74} The Federalists attempted to temper concerns about the federal army as a tool of tyranny by pointing to the power of the Legislature—not the Executive—to raise, support, and activate the military.\textsuperscript{75} In

\textsuperscript{69} See Essays of Brutus I, \textit{supra} note 68, at 370 ("The magistrates in every government must be supported in the execution of the laws, either by an armed force, maintained at the public expence for that purpose; or by the people turning out to aid the magistrate upon his command, in case of resistance.").


\textsuperscript{71} See Essays of Brutus IX, \textit{supra} note 70, at 409; Patrick Henry, \textit{supra} note 67, at 218.

\textsuperscript{72} \textsc{The Federalist} No. 28 (Alexander Hamilton), \textit{supra} note 10, at 135.

\textsuperscript{73} See \textsc{The Federalist} No. 28 (Alexander Hamilton), \textit{supra} note 10, at 136; \textsc{The Federalist} No. 29 (Alexander Hamilton), \textit{supra} note 34, at 140.

\textsuperscript{74} See \textsc{The Federalist} No. 24, at 115 (Alexander Hamilton) (Max Beloff ed., 1948) ("[T]he whole power of raising armies was lodged in the \textit{legislature}, not in the \textit{executive.}"); \textsc{The Federalist} No. 26, at 127 (Alexander Hamilton) (Max Beloff ed., 1948) (noting that the Legislature "[i]s not \textit{at liberty} to vest in the executive department, permanent funds for the support of an army").

\textsuperscript{75} See \textsc{The Federalist} No. 24 (Alexander Hamilton), \textit{supra} note 74, at 115; Mazzone, \textit{supra} note 58, at 73 ("Armies only became problematic if they escaped the control
contrast to the Congress, the Executive was provided with the limited role of Commander in Chief; a function that gave him control over the forces primarily when activated by Congress.  

Second, the existence of a “well-regulated militia” controlled by the states but available to the federal government would counter the need to employ the standing army to quash public disorder and enforce the laws. In The Federalist No. 29, Alexander Hamilton argued that empowering the central government to organize, arm, and discipline the state militias, as well as press them into federal service, would serve to lessen the need to acquire and employ a large standing army. Moreover, according to Hamilton, a standing army is less a threat to liberty when there is a large body of trained citizens who would stand ready to defend the rights of their fellow citizens. Finally, according to the Federalists, any argument that the federal government’s ability to prescribe regulations for the militia or to press them into service somehow results in the militia being potential tools of tyranny was countered by the fact that the states had the sole and exclusive power to appoint the militia’s officers.

In addition to the explicit checks within the proposed constitution, the Federalists contended that the employment of the standing army domestically would be an option of last resort. It was understood that the government would first rely on the civil authorities with the aid of of the people’s elected representatives . . . .”).


77. See THE FEDERALIST NO. 29 (Alexander Hamilton), supra note 30, at 140. Although it is not often discussed, the proposed constitution also explicitly recognized the states’ power to use the militia in an emergency role. U.S. CONST. art. I, § 10, cl. 3 (providing that a State may engage in war if “actually invaded, or in such imminent Danger as will not admit of delay”).

78. See THE FEDERALIST NO. 29 (Alexander Hamilton), supra note 30, at 140; Mazzone, supra note 58, at 67 (“Preventing abuses by a national army therefore required giving the national government power to employ militiamen for security purposes so it would not be tempted to deploy federal troops instead.”).

79. See THE FEDERALIST NO. 29 (Alexander Hamilton), supra note 30, at 140.

80. See id. at 140-41 (“If it were possible seriously to indulge a jealousy of the militia, upon any conceivable establishment under the federal government, the circumstance of the officers being in the appointment of the states, ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.”); Mullins, supra note 46, at 331.

the posse comitatus\textsuperscript{82} and then the militia before it would use the regular army to execute the laws of the Union to establish internal order.\textsuperscript{83}

The three questions that framed the debate were thus answered. The young country's armed forces would be comprised of a standing army (and navy) as well as the state militias when called into federal service.\textsuperscript{84} The Framers dispersed power over the country's military between Congress, the states, and the Executive.\textsuperscript{85} Congress would have the power to raise and regulate the army and navy, as well as to organize, arm, and discipline the state militias.\textsuperscript{86} The states retained control of the militia when not in federal service, and the Constitution "reserv[ed] to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."\textsuperscript{87} While the Executive was identified as the "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," what that role entailed was not specified.\textsuperscript{88}

It was also decided that the federal government should have the authority to enforce federal law and quash internal dissent, like Shay's Rebellion, with armed force. Congress was given the authority to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."\textsuperscript{89} Thus, the Executive's authority to command the militia in domestic emergencies was dependent upon congressional action.\textsuperscript{90} Notably, the Constitution did

\textsuperscript{82.} Posse comitatus is defined as the "power of the country." It was based on the concept that a domestic law enforcement officer, such as a civil magistrate, could call on all able-bodied male citizens to aid in the execution of the law. See Engdahl, supra note 48, at 4–6 (describing the historical origins of the posse comitatus).

\textsuperscript{83.} See COAKLEY, supra note 33, at 19; Kohn, supra note 31, at 74–75; AMAR, supra note 27, at 118.

\textsuperscript{84.} U.S. CONST. art. I, § 8, cls. 12–13, 15.

\textsuperscript{85.} Id.; id. art. II, § 2, cl. 1; UVILLER & MERKEL, supra note 76, at 76–78; AMAR, supra note 27, at 117 ("By balancing military power between two levels of government, the American people would in theory retain greater control over both."); see also Brannon P. Denning, Palladium of Liberty? Causes and Consequences of the Federalization of State Militias in the Twentieth Century, 21 OKLA. CITY U. L. REV. 191, 204–06 (1996) (discussing the Second Amendment and its relationship to the central government's control over the state militias).

\textsuperscript{86.} U.S. CONST. art. I, § 8, cls. 12, 15, 16.

\textsuperscript{87.} Id. art. I, § 8, cl. 16.

\textsuperscript{88.} Id. art. II, § 2, cl. 1.

\textsuperscript{89.} Id. art. I, § 8, cl. 15.

\textsuperscript{90.} Id. art. II, § 2, cl. 1 (providing that the President is Commander in Chief of the militia "when called into the actual Service of the United States").
not explicitly provide for the government to use the federal armed forces in the same manner. As a result, whether the regular army, as opposed to the federalized militia, could be used to respond to domestic emergencies was arguably left ambiguous. As a general matter, however, there was "a consensus that the militia would be used by the federal government in only those instances where civil law should completely fail and that, at all odds, the creation and use of a standing army to control the people was the greatest danger to be avoided."

B. Modern Military Composition

A brief primer on the composition of the modern military provides a sneak preview of the dramatic changes that have occurred in the last two centuries and provides an important foundation for the subsequent discussion. It is no longer possible to neatly divide the United States military into the federal armed forces, the so-called standing army, and the militias that remained under state control unless called into federal service in the narrow circumstances described in the Constitution. The distinction between the two forces has become increasingly difficult to divine.

After the Vietnam War, President Ford ended the draft and Congress began to downsize the standing military force. To meet its military commitments, as well as budgetary constraints, the federal government created an all-voluntary military composed of active-duty forces and a large Reserve component. The Reserve forces are a combination of the state-based National Guard units and the newly minted Reserve units, mainly comprised of retired active-duty servicemembers that maintain their civilian status until called into service. As the name suggests, the Reserve components supplement the regular forces only when necessary. In theory, the new model—

91. See id. art. I, § 8, cl. 15 (explicitly allows for calling forth the militia in domestic situations but is silent regarding the federal armed forces); id. art. II (failing to explicitly provide the Executive branch the authority to deploy the military domestically).
92. COAKLEY, supra note 33, at 19; see also UVILLER & MERKEL, supra note 76, at 74–75.
96. Id. § 10103.
called the "Total Force" concept—would allow the federal government to decrease defense costs while still maintaining a well-trained military force capable of responding to security demands.  

The Total Force concept has not only altered the composition of the military, it has also muddied the constitutional power structure. When the Framers dispersed power over the new government's military force, the forces were clearly divided between the standing army, controlled by the federal government, and the militia, under the command of the state government unless called into federal service. But the National Guard, the modern day militia, is no longer just under the command of the states. As will be discussed more fully below, National Guard members must take a dual oath to both the governor of the state in which they serve as well as the President of the United States as Commander in Chief of the Armed Forces.  

The integration of the National Guard into the federal armed forces also makes discussion about the constitutional power structure difficult. The Guard's dual role raises serious questions about the continued vitality of the distinction between the standing army and militia the Framers thought so significant to the maintenance of liberty.  

Through congressional fiat, the Executive commands both the standing army and the National Guard.  

As will be discussed in the subsequent section, one wonders if Congress has gone too far in providing the Executive control of both forces with the discretionary power to use either in the domestic sphere.

III. EROSION OF THE SHARED POWER PARADIGM

As the preceding discussion illustrates, the founding generation carefully considered the role of the armed forces in domestic society and created a constitutional framework to regulate its use. Unfortunately,

98. See infra note 134 and accompanying text.
99. 10 U.S.C. §§ 101(c)(1)–(4), 10101, 10103 ("Whenever Congress determines that more units and organizations are needed for the national security than are in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States, or such parts of them as are needed, together with units of other reserve components necessary for a balanced force, shall be ordered to active duty and retained as long as so needed.").
100. See infra Part III.A.
today there is little left of this hard-fought compromise. Both the vertical and horizontal checks have slowly eroded. First, Congress has largely replaced the state militias with the National Guard, a fighting force that must take an oath to serve two commanders in chief, the governor and the President, and who is largely trained, disciplined, funded and controlled by the federal government. The transformation of the militia from a largely state-based operation to a critical component of the federal armed forces has adversely affected the division of power between the state and federal governments.

It has also interfered with the states' ability to utilize the Guard in domestic emergencies. The Guard's immersion into the federal armed forces combined with the congressional delegation of authority to the President has created the very scenario the Founders sought to avoid—it has placed nearly unrestrained access and control of a military force in the hands of the Executive.

Second, Congress has delegated enormous discretionary authority to the President to use the armed forces domestically, diluting the shared powers paradigm embedded in the Constitution. Congress has essentially removed itself from the decision-making process, allowing the Executive nearly unchecked power to deploy armed forces in domestic situations.

A. The Erosion of State Control of the Militia

Congress has all but eliminated the vertical check envisioned by the Framers—the shared control of the militia between the states and federal government. This erosion occurred primarily in response to changes in the geopolitical landscape at the turn of the twentieth century. To address new national security concerns, Congress relied on its long-dormant power to organize, arm, and discipline the militia and remade the state militias into an international fighting force. In so

101. See infra note 134 and accompanying text.
102. The National Guard's integration into the federal armed forces was completed with the adoption of the “Total Force” policy. Behan, supra note 97, at 1–2. Under this doctrine, a smaller regular army is augmented by Reserve and National Guard forces. Id. Thus, any major military engagement requires the mobilization and deployment of National Guard units. Id.
103. See infra Part III.A.
104. See supra Part II.A.
106. Id. at 195.
doing, it undermined one of the identified checks against the perceived dangers of a standing army. State militias, once viewed as an important constraint on the federal government’s misuse of a standing army,\(^\text{107}\) were essentially merged with the federal forces.\(^\text{108}\) Along with this merger, Congress increased the federal government’s control over the forces and the states’ control over their use was gradually diminished.\(^\text{109}\) Additionally, the merger had the unintended consequence of interfering with the militia’s identified role as the states’ and the nation’s domestic security force.

As part of the original Militia Act of 1792, Congress provided a basic framework for the militia system but largely relied on the states to implement its requirements. The Act stipulated that all eligible males must arm themselves according to statutory requirements and be available to defend the state and the nation.\(^\text{110}\) Congress required states to appoint adjutant generals to oversee the militias and to report annually to their respective governors and to the President.\(^\text{111}\) It relied on the states to implement the organizational structure laid out in the statute. Congress provided no financial assistance, no federally standardized training, and no federally supervised training, nor was there any mechanism for federal enforcement of the Act’s requirements.\(^\text{112}\) The Militia Act requirements remained unchanged for 111 years.

The conversion from a primarily state-controlled entity began in 1903 when Congress passed the Dick Act,\(^\text{113}\) which transformed the state militias into the National Guard.\(^\text{114}\) The Act divided the militia into two

---

107. See supra Part II.A.
108. Romano, supra note 46, at 243; see also Kohn, supra note 16, at 167.
109. Mullins, supra note 46, at 339 (“[M]any of the states have ceded virtually all of their authority to federal control, a wholesale retreat from the state-controlled character of the militia that had once prevailed.”); id. at 343 (“State control in administering matters such as training, personnel, logistics, doctrine, and military justice has been eliminated by a system of federal conditional spending.”); Nathan Zezula, Note, The BRAC Act, the State Militia Charade, and the Disregard of Original Intent, 27 PACE L. REV. 365, 367 (2007).
110. Militia Act of 1792, ch. 33, § 1, 1 Stat. 271.
111. Id. § 6, 1 Stat. at 273.
112. See UVILLER & MERKEL, supra note 76, at 113.
113. Dick Act, ch. 196, 32 Stat. 775 (1903) (repealed 1956); Denning, supra note 85, at 217 (identifying the Dick Act as the beginning of the “demise” of the state controlled militia system).
114. Dick Act, ch. 196, § 1, 32 Stat. at 775 (differentiating between the “militia” and the “National Guard”). Some historians point to the militias’ failures before the Spanish American War as the true starting point for its demise, especially in the War of 1812. See UVILLER & MERKEL, supra note 76, at 119–20; Wiener, supra note 105, at 188–90 (describing
classes: the "organized militia" to be known as the National Guard units and an "unorganized militia" consisting of the remaining able-bodied male population. At the same time, Congress provided the National Guard with increased federal funding in exchange for, among other things, conforming to the federal army's standards of training and preparation.

Under the Act, however, the National Guard remained a domestic security force. The legislative history of the Act signaled that Congress intended that the Guard services would "be rendered only upon the soil of the United States or of its Territories." Moreover, the Supreme Court recognized that the Act was passed pursuant to the Militia Clause power, thus limiting its territorial reach.

Congress sought to bypass these territorial restrictions when it passed the Militia Act of 1908. Under this Act, the National Guard could be federalized and sent overseas. It was the first move away from the militia's traditional role as a defensive force to be used only in domestic emergencies. The Militia Act was never utilized, however, as both the Judge Advocate General of the Army and the Attorney General deemed its international reach unconstitutional. The Militia Clauses contained only three instances in which the militia could be called—"to execute the Laws of the Union, suppress Insurrections and repel Invasions." Thus, there was no basis for sending the National Guard to fight outside the confines of the United States.

Shortly before the United States' entrance into World War I, Congress successfully avoided the territorial limitations in the Militia Clause when it passed the National Defense Act of 1916 (NDA). The NDA authorized the President to draft members of the National Guard

---

115. Dick Act, ch. 196, § 1, 32 Stat. at 775.
116. Id. §§ 13–20, 32 Stat. at 777–79 (describing the issuance of funds, arms, and the training requirements for the National Guard).
118. Id.
120. Id. (amending section 5 of the Dick Act to allow the President to order the militia to serve "either within or without the territory of the United States").
121. See Wiener, supra note 105, at 197–98.
122. U.S. CONST. art. I, § 8, cl. 15.
123. See id.; Wiener, supra note 105, at 198.
and the Reserves, thereby integrating them into the regular army. Using conscription, a Guard member could serve abroad, bringing an end to the domestic soil only requirement that had followed the state militias since the Republic's inception. Because Congress used the War Power Clause, and not the Militia Clause, there were no constitutional concerns.

The NDA's conscription provision served to decimate the state militias. Under the NDA, Guard members would, “from the date of their draft, stand discharged from the militia” while in the service of the United States. Unfortunately, the NDA never provided for the Guard member's continued service to the state once he was discharged from federal service. The NDA also dramatically increased federal control over the National Guard. While the states received more federal funding, they also were required to meet new federal requirements. The President was allowed to dictate the number and kind of units each state had to maintain, and the Act replaced state codes with the National Military Code. In addition, it required every member of the National Guard to take a dual oath, to support the nation as well as the states and to obey the President as well as the governor.

The NDA also subtly undermined another one of the checks placed in the Constitution to ensure militia loyalty to the states. While the Constitution explicitly reserves to the states “the Appointment of the Officers,” the NDA required Guard units receiving federal funding to obtain federal approval before appointing any officer to a Guard

125. Id. § 111, 39 Stat. at 211.
126. Mullins, supra note 46, at 336.
129. National Defense Act of 1916, ch. 134, § 111, 39 Stat. at 211 (“All persons so drafted shall, from the date of their draft, stand discharged from the militia . . . .”).
130. See id. (failing to provide for reinstatement once federal service was over).
131. See Wiener, supra note 105, at 200 (“The scope of federal control authorized by the 1916 Act completely transformed the Guard.”); Mullins, supra note 46, at 334–35 (“The result [of the 1916 Act] was a dramatic increase in federal control over the militia.”).
133. Id. § 60, 39 Stat. at 197 (“And the President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia . . . .”).
To be recognized as an officer, the individual had to meet the requirements set forth by the Secretary of Defense and pass an examination administered by the federal armed forces. Thus, the governor no longer had absolute control over the appointment of officers in the state militia; his choices were subject to a federal veto.

The National Guard Act of 1933 (NGA) essentially completed the Guard’s merger with the federal armed forces. In part, the NGA was an attempt to fix the damage caused by the “discharge” component of the 1916 Act. Under the NGA, a Guard member could be called to federal service as a member of the regular armed forces but upon release from federal service would remain a member of the state’s National Guard. The Act also created the Reserve components of the United States Armed Forces. With the creation of the Reserve component, Congress allowed the President to bypass the restrictions of the Militia Clause, avoid the conscription requirements contained in the previous statute, and call the Reserves to active duty whenever necessary. Thus, the state militias existed only when the federal government did not need them as part of the federal armed forces.

The Armed Forces Reserve Act of 1952 continued to enhance the President’s power to use the National Guard for federal purposes. For the first time, the President could call out the Guard for any reason, thus bypassing the need for an identified necessity. The President’s power was cabined, however, by the need for gubernatorial consent.

140. See id. § 18, 48 Stat. at 160 (amending section 111 of the 1916 Act).
141. Id.
142. Id. §§ 1, 3-5, 48 Stat. at 153-55. Any individual who entered the National Guard was automatically a member of the Reserves. See id. § 4 (“All persons appointed officers in the National Guard of the United States are reserve officers and shall be commissioned in the Army of the United States.”); id. § 5 (“The National Guard . . . shall be a reserve component of the Army of the United States . . .”). In short, when an individual enlisted in the National Guard, he automatically became a part of the National Guard of the United States. As a member of the National Guard of the United States, he automatically became a member of the reserve component of the federal armed forces. See id. § 9, 48 Stat. at 157.
145. Id. § 233(c), 66 Stat. at 490 (repealed).
146. Id. § 233(d).

“A member of a reserve component may, by competent authority, be
Presumably the gubernatorial veto provision was intended to protect the structural checks embedded in the Constitution by providing the states with some vestige of power over the Guard. By requiring the President to obtain the consent of the governor before federalizing the state’s National Guard units, Congress maintained a small piece of the shared powers paradigm envisioned by the Founders.

In 1986, Congress severely restricted this last remnant of state power when it passed the Montgomery Amendment. The Amendment provided that a governor was precluded from withholding consent “because of any objection to the location, purpose, type, or schedule of such active duty.” Shortly after its enactment, the Governor of Minnesota sought an injunction preventing portions of the Minnesota National Guard from being sent on a training mission to Central America.

The Supreme Court swiftly dashed any attempts by the states to maintain control over National Guard deployments. In *Perpich v. Department of Defense*, the Supreme Court rejected the argument that the Montgomery Amendment violated the Militia Clause because it allowed the Guard to be used in nonemergency conditions and for foreign service. The Court surmised the Militia Clause authorized Congress to provide for the disciplining of the militia and “[i]f the discipline required for effective service in the Armed Forces of a global power requires training in distant lands, or distant skies, Congress has the authority to provide it.”

The Court similarly disposed of the governor’s argument that this interpretation of the Militia Clause would have “the practical effect of nullifying an important state power that is expressly reserved in the

ordered to active duty or active duty for training at any time with his consent: Provided, That no member of the National Guard of the United States or Air National Guard of the United States shall be so ordered without the consent of the Governor or other appropriate authority of the State, Territory, or District of Columbia concerned.”

---

148. Id.
151. Id. at 350.
Constitution.” According to the Court, its interpretation merely “recognize[d] the supremacy of federal power in the area of military affairs,” and the Court further noted that “[t]he Federal Government provides virtually all of the funding, the materiel, and the leadership for the State Guard units.” Moreover, a state is allowed to provide and maintain at its own expense a defense force that is exempt from being drafted into the Armed Forces of the United States.

The recent amendment to the Insurrection Act has been heralded as yet another shift of power from the states to the Executive Branch. Because it allows the President to federalize and utilize the National Guard without the consultation or consent of the states, the National Governors Association described the change as “an unprecedented shift in authority from governors as Commanders and Chief of the Guard to the federal government.” Major General Timothy Lowenberg echoed these sentiments when he testified before the Senate Judiciary Committee. In his written statement, he testified:

Without any hearing or consultation with the governors and without any articulation or justification of need, Section 1076 of the 2007 NDAA changed more than 100 years of well-established and carefully balanced state-federal and civil-military relationships. One hundred years of law and policy were changed without any publicly or privately acknowledged author or proponent of the change. As written, the Act does not require the President to contact, confer or collaborate in any way with a governor before seizing control of a state’s National Guard forces. It requires only notice to Congress that the President has taken the action but no explanation, justification or consent of Congress is required.

In theory, the National Guard is a state entity under the control and direction of the governor. Governors rely on the Guard to work in concert with first responders to address local emergencies and security

152. Id. at 351.
153. Id.
154. Id. at 352; see 32 U.S.C. § 109(c) (2006).
TOWARD MILITARY RULE?

But through a series of statutory maneuvers, including the Insurrection Act amendment, Congress has undermined the National Guard’s primary function.

The Base Realignment and Closure Act of 1990 (BRAC Act) represents a new chapter in the struggle to maintain some semblance of state control over the National Guard. The purpose of the BRAC Act is to "close or realign military installations that create an unnecessary drain on the economic resources of the Department of Defense." In May 2005, then-Secretary Rumsfeld submitted a list of proposed changes and realignments that not only closed National Guard bases but also effectively reorganized National Guard units. In several states, Secretary Rumsfeld recommended reorganizing, or in extreme cases, "deactivating" entire Air National Guard units and moving all the unit’s aircraft to other states. The states' reactions and subsequent court decisions provide a preview of the new front in the battle for control of the National Guard.

Governors in the affected states protested, claiming that Secretary Rumsfeld's order was an infringement on their statutory right to approve all changes in the organization of Guard units within their borders. Although several governors filed suit and sought temporary injunctions, only two district courts directly addressed the arguments advanced. The Governor of Pennsylvania, Edward Rendell, and the state's two Senators, Arlen Specter and Rick Santorum, challenged the

157. Id. at 30 (Statement of Michael F. Easley, Governor of North Carolina).
159. See Zezula, supra note 109, at 368–73.
160. Id. at 369 (quoting Bredesen v. Rumsfeld, No. 3:05-0640, 2005 WL 2175175 (M.D. Tenn. Sept. 7, 2005)).
161. Id.
163. See 32 U.S.C. § 104(c) (2006) ("However, no change in the branch, organization, or allotment of a unit located entirely within a State may be made without the approval of its governor.").
164. Pennsylvania Governor Edward Rendell, Washington Governor Christine Gregoire, Tennessee Governor Phil Bredesen, State of Missouri, then-Massachusetts Governor Mitt Romney, Illinois Governor Rod Blagojevich, and Connecticut Governor Jodi Rell all filed suit to prevent then-Secretary Rumsfeld from recommending the changes.
legality of Secretary Rumsfeld’s recommendation that the 111th Fighter Wing of the Pennsylvania Air National Guard be deactivated and that the Reserve Base in Willow Grove, Pennsylvania be closed. In addition to deactivating the 111th, Secretary Rumsfeld recommended that half of its aircraft be assigned to Air Guard units in Idaho, Maryland, and Michigan and its remaining aircraft be retired.

The plaintiffs argued that the Secretary’s actions violated 32 U.S.C. § 104(c) by making the recommendations without seeking the approval of the governor and further asserted that the proposal would interfere with the state’s ability to address homeland security missions. In response, the Secretary did not deny that he never sought consent but instead argued that the governor lacked standing, that the issue was not yet ripe, and that judicial review was precluded. The district court’s decision began with the statement that “[t]he Complaint springs from the principals of federalism reflected in the dual nature of the National Guard as comprising both units of state militias and a part of the federal armed forces, when those units are called into federal service.” Given this opening, it is not surprising that the court ultimately held that the Secretary had indeed violated the statute and voided the recommendation related to the deactivation of the Fighter Wing. In rejecting the federal government’s arguments, the court stated that “[g]iven Congress’s concerns about federalism as reflected in the dual nature of the National Guard, we find that . . . [the statute] applies generally to require gubernatorial consent to changes in the branch, organization, or allotment of a National Guard unit located entirely within a State.”

Needless to say, the federal government appealed. Between the district court decision and the appeal, however, the Secretary’s recommendation to close the base was rejected. As a result, the Third Circuit determined the appeal was moot. Judge Sloviter dissented,

167.  Id.
168.  Id. at *2. The plaintiffs also argued that Secretary Rumsfeld violated 10 U.S.C. § 18238. Id. The Court ultimately rejected this argument. Id. at *21.
169.  Id. at *6.
170.  Id. at *2.
171.  Id. at *17, *20.
172.  Id. at *17.
173.  Rendell v. Rumsfeld, 484 F.3d 236 (3d Cir. 2007).
174.  Id. at 240–41.
175.  Id.
however. In the opening paragraph he relayed the reason for his dissent.

If the issue before us were a dispute between individuals, or between companies, or between one or more individual and one or more company, I would join Judge Nygaard's fine opinion for the majority without hesitation. But the issue underlying the dispute between Governor Rendell and the Secretary of Defense is not confined to ordinary litigation. The seeds of the difference between the parties goes back to the very beginning of our existence as a nation, and it must be understood in that context. I do not think it can or should be resolved by the expedient of declining to consider the merits under the rubric of mootness.

After reviewing the long and complex history of the National Guard and the parties' arguments, the judge concluded by stating, "I have reached no decision with respect to the conflicting arguments but it is a significant issue, one between the rights of the states and the federal government harking back to the very foundation of our government." Despite the fact that the governor had relied on a solely statutory argument, both the district court and Judge Sloviter relied on the broader federalism concerns underlying the case. Both judges implicitly questioned the scope of the federal government's authority to control the National Guard.

The issues argued in the BRAC cases are more than academic, and they prompt a question left open by the Supreme Court's decision in Perpich. While ultimately upholding the legitimacy of the Montgomery Amendment, the Supreme Court did suggest that a governor could legitimately withhold consent for the deployment of National Guard units "if the order were so intrusive that it deprived the State of the power to train its forces effectively for local service." It seemed this interpretation of the statute was necessary to maintain its constitutional

176. Id. at 243 (Sloviter, J., dissenting).
177. Id. at 243-44.
178. Id. at 251.
The Supreme Court appeared to accept the proposition that there were limits to Congress's ability to commandeer the National Guard for national purposes. What those limits are, however, remains an unanswered and critical question.

The federal government's actions have had a significant and practical impact on the states and their citizens. National Guard units are increasingly called to federal service to provide "boots on the ground" in Iraq and Afghanistan. Since 9/11, National Guard and Reserve personnel in active overseas federal service number over 100,000 at any given time. According to some reports, in September 2005 more than one-third of the 135,000 troops in Iraq were National Guard members and among the casualties over half were either National Guard or military reserve forces. The number of Guard members sent abroad and the duration of their duty represent an historic shift in federal reliance on these units. Guard members can be deployed for up to fifteen months and can be redeployed less than a year later. These deployments can have a devastating impact on families, employers, and communities.

Perhaps more importantly, if the National Guard is serving abroad, its members are unavailable to address domestic emergencies at home. Governors have complained that the Guard's increased workload has left states with inadequate resources to address natural disasters and terrorism concerns as well as made retention of Guard members more difficult. The governors' complaints are not without

181. Id. at 352.
183. See Giuliano, supra note 46, at 348.
184. See id. at 348-49, 348 n.34.
188. See Nathaniel R. Helms, Falling Morale Hurts Guard Retention, MILITARY.COM, Nov. 24, 2004, http://www.military.com/NewContent/0,13190,Defensewatch_112404_Helms,00.html; Dan Balz, Guard Deployments Weigh on Governors; Length, Frequency of Tours
foundation. When Hurricane Katrina struck the Gulf Coast, over forty percent of Louisiana's and Mississippi's National Guard were on active duty in Iraq. But even if Guard members are available, the equipment necessary to respond to catastrophic conditions is not. Following a tornado that devastated a Kansas community, Kansas Governor Kathleen Sebelius commented:

"[S]tates all over the country are not only missing personnel, National Guard troops are—about 40 percent of the troops on the ground in Iraq and Afghanistan—but we're missing the equipment. When the troops get deployed, the equipment goes with them . . . . So, here in Kansas, about 50 percent of our trucks are gone. We need trucks. We're missing Humvees, we're missing all kinds of equipment that can help us respond to this kind of emergency."

Thus, the practical impact of the erosion of state control over the militia cannot be overestimated.

Moreover, the National Guard's deployment abroad would seem to contradict the recent National Strategy for Homeland Security. The National Security Council recognized the important role that the National Guard must play as a domestic security force. In discussing goals for homeland defense, the Homeland Security Council commented that the "National Guard forces are integrated into communities throughout our country, and they bring to bear the largest and most diverse workforce and capabilities in government to protect the United States from direct attacks and conduct missions to deter, ..."
prevent, and defeat threats against our Nation. A Government Accountability Office report supports the seeming contradiction between the National Guard's role at home and abroad. In a statement to Congress, David Walker, the Comptroller General, outlined the Army National Guard's struggle to meet the demands of missions abroad while still maintaining a level of readiness necessary to respond to domestic needs. A year later, Janet St. Laurent, the Director of Defense Capabilities and Management, expressed similar concerns in her testimony before the Commission on National Guard and Reserves.

The recent BRAC Act controversy provides the courts an opportunity to closely examine the erosion of structural checks that has resulted from a century of statutory changes. So far, the courts have been cautious in their approach. But at some point, the issues will need to be addressed. The National Guard is caught in a "tug of war" between the states and federal government—with the states clearly losing. If the National Guard is to perform its domestic security function as provided for in the Constitution, its role as the backbone of the federal forces will need to be reexamined as will the seemingly plenary federal control of its utilization.

B. Congressional Delegation of Authority

The transfer of power over the National Guard from the states to the federal government was accompanied by a similar transfer in power over the military generally from Congress to the Executive Branch. Through a series of statutory enactments, Congress has provided the President with the power to deploy armed forces—both the federal military as well as the federalized National Guard—in domestic situations. When viewed in isolation, it is arguable whether any one statute should cause alarm; when viewed in totality, however, they

194. Id.
196. Id. at 20–23.
198. See supra Part III; Mullins, supra note 46, at 346–47.
199. See WALKER, supra note 195, at 20–23; Mullins, supra note 46, at 339 ("[The National Guard has] become the first line defensive and offensive components of the Total Force.").
provide a startling picture of the increased role of the military in domestic life and the Executive's authority to control that role.

1. Insurrection Acts

The Insurrection Acts provide the primary source of authority for the President to deploy the armed forces domestically to respond to public disorder or to enforce civil law. Immediately following the Constitution's ratification, Congress used its powers under Article I, Section 8, Clause 15 to authorize the Executive to employ the state militias in domestic emergencies. In 1792, under the Calling Forth Clause, the Second Congress embarked on a three-year experiment, delegating its authority to the Executive through the Calling Forth Act. In the Act, Congress created a "sliding scale" of discretionary authority. When the country was facing invasion, the President's discretionary authority was at its apex; however, when it came to enforcing the laws, the President's authority was at its lowest ebb, requiring judicial authorization before it could be triggered, as well as a proclamation order before sending in the militia.

---

200. 10 U.S.C. §§ 331–334 (2006). The Insurrection Acts are a series of statutes that describe situations under which the Executive can order the deployment of the federal armed forces or the National Guard to address domestic emergencies and enforce federal and state law. Section 331 requires that the President receive an explicit request by the state before deploying troops. Id. § 331. However, § 332 and § 333 describe situations in which the President can act in the absence of a state request. Id. §§ 332–333. The focus of this section will be on the latter two sections.


203. Calling Forth Act of 1792, §§ 1–2, 1 Stat. at 264 (differentiating between when the President can call up the militia of his own accord and when he needs outside authority).

204. Id. § 1, 1 Stat. at 264.

That whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States, to call forth such number of the militia of the state or states most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose . . . ; and in case of an insurrection in any state, against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened) to call forth such number of the militia of any other state or states, as may be applied for, or as he may judge sufficient to suppress such insurrection.

Id.
Section 2 of the Calling Forth Act delegated authority to the President to use the militias to execute the laws of the Union when necessary. Unlike the largely discretionary power when an invasion was involved, this Act provided significant limitations. First, the President’s authority was triggered only when an associate justice or a district judge notified him that the execution of the laws was obstructed by “combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals.”

Second, the President was required to call forth the militia of the affected state first and call on other states’ militias only when absolutely necessary. While the President was allowed to take such action when Congress was not in session, his authority ended thirty days after the next session of Congress began.

But the procedural and substantive checks placed in the original Calling Forth Act almost immediately began to erode. Over the next two-plus centuries, Congress provided the Executive with continually expanding power to call on both the state militias and the federal armed forces to execute the laws and control public unrest. Congress’s actions have corroded the horizontal check embedded in the Constitution, resulting in a power imbalance in need of correction.

The first expansion of Executive discretion to use the military domestically occurred within three years of the original statutory

205. Id. § 2, 1 Stat. at 264.

[W]henever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, the same being notified to the President of the United States, by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed. And if the militia of a state, where such combinations may happen, shall refuse, or be insufficient to suppress the same, it shall be lawful for the President, if the legislature of the United State be not in session, to call forth and employ such numbers of the militia of any other state or states most convenient thereto, as may be necessary, and the use of militia, so to be called forth, may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session.

Id.

206. Id.

207. Id.

208. Id.

209. See COAKLEY, supra note 33, at 67–68; Vladeck, supra note 202, at 162.
delegation of authority. President Washington successfully used the 1792 Act to respond to the Whiskey Rebellion. As required by statute, President Washington delayed acting until he received certification from an associate justice that the rebellion had exceeded the control of civil authorities. Then, he issued a proclamation ordering the insurgents to disperse and eventually mustered the militia from the surrounding states to respond to the crisis. While not a model of military precision, the rebellion was successfully quashed.

Although there is no evidence that the requirements in the original statute interfered with the President's response, Congress amended the statute to enhance the President's powers by deleting the requirement that the President obtain a judicial certificate before using the militia and also allowing the President to deploy the militia from other states even when Congress was in session. Under the amended statute, it would appear that the President did not need external affirmation that the situation was beyond civilian authorities but could rely on his own estimations. In addition, Congress removed the sunset provision in the 1792 Act and made it permanent legislation. In a passing nod to limitations, the President was still required to issue a proclamation ordering the rioters to disperse before using armed force to control the unrest.

In the next decade, the federal government's reluctance to call on the regular Army to enforce federal law ended. President Jefferson, frustrated with his seeming lack of resources to combat the Burr conspiracy, shepherded through Congress a bill that would allow the Executive to employ the regular Army to suppress domestic insurrection. The bill, signed into law by Jefferson in 1807, simply

210. See Militia Act of 1795, ch. 36, § 2, 1 Stat. 424, 424 (giving the President the power to call out the militia domestically to enforce the laws of the United States).
211. See COAKLEY, supra note 33, at 67–68.
212. See id. at 36.
213. See id. at 38, 43.
214. Compare Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (requiring “an associate justice or ... district judge” to notify the President that the militia is needed to deal with an insurrection as well as allowing the President “to call forth and employ such numbers of the militia of any other state or states” only when “the legislature of the United States be not in session”), with Militia Act of 1795, ch. 36, § 2, 1 Stat. at 424 (requiring neither judicial approval nor the recess of the Congress before the President can “call forth the militia”).
215. See generally Militia Act of 1795, ch. 36, 1 Stat. 424 (containing no expiration date for the Act).
217. See COAKLEY, supra note 33, at 83.
stated:

[I]n all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all the pre-requisites of the law in that respect.218

The Act of 1807 evidenced a significant shift in the federal government's view of the use of a standing army to enforce domestic law.219 Unfortunately, and surprisingly given the rather abrupt change in position, there is no legislative history to guide a discussion on what prompted the change.220

The 1807 Act blurred the constitutional lines as well. When Congress passed the Militia Acts of 1792 and 1795, it relied on Article I, Section 8, Clause 15 for its authority. That provision clearly states that Congress "shall have the Power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."221 There is no similar provision, however, providing authority to use the regular armed forces in the same manner.222 It is not entirely clear on which constitutional provision Congress relied to authorize the use of the regular forces, although it can be assumed that it relied upon the War Power Clause to do so.223

Congress's passage of the Suppression of the Rebellion Act of 1861

219. COAKLEY, supra note 33, at 347 ("The authorization to call militia and not regulars was in keeping with the constitutional provision and with the feeling of the time that any use of regulars in these domestic affairs smacked of the type of tyranny all good patriots thought the British had practiced during the Revolution.").
220. Id. at 83 n.46 ("There is no record of any debate in Congress.").
221. U.S. CONST. art. I, § 8, cl. 15.
222. See id. art. I, § 8, cls. 11–16.
223. See COAKLEY, supra note 33, at 347 ("The development of law on the two types of action followed a roughly similar course, although the laws were based upon different constitutional clauses.").
further eroded the statutory checks on Executive authority to deploy the military domestically.\textsuperscript{224} As is evident by the language, this amendment greatly enhanced the discretionary authority of the President by altering the trigger necessary to deploy troops.\textsuperscript{225} In the original Act, the President was allowed to send troops only if the laws of the United States were opposed “by combinations too powerful to be suppressed by the ordinary course of judicial proceedings.”\textsuperscript{226} Under the 1861 Act, the President’s authority was triggered if, in his “judgment,” it became “impracticable” to enforce the law “by the ordinary course of judicial proceedings.”\textsuperscript{227} In addition, the Act also omitted reference to civil law enforcement officers contained in the previous Act and doubled the time the President could require the militia to remain in federal service after Congress had convened.\textsuperscript{228}

The language and circumstances under which the Executive was allowed to send troops remained largely unchanged until recently. In response to the chaos following Hurricane Katrina as well as concerns regarding a potential public health emergency, Congress once again amended the Insurrection Act.\textsuperscript{229} Under the recently amended version

\begin{itemize}
\item \textsuperscript{224} Suppression of the Rebellion Act of 1861, ch. 25, §§ 1, 3, 12 Stat. 281, 281–82 (amending Militia Act of 1795, ch. 36, §§ 1–2, 1 Stat. 424, 424) (further removing congressional oversight over the President’s authority to raise and maintain a militia).
\item \textsuperscript{225} Id. § 1, 12 Stat. at 281.
\item \textsuperscript{226} Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264, 264.
\item \textsuperscript{227} Suppression of the Rebellion Act of 1861, ch. 25, § 1, 12 Stat. at 281–82.
\item \textsuperscript{228} Compare Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. at 264 (allowing the President use of the militia for up to thirty days after Congress reconvenes and referencing powers of marshals), with Suppression of the Rebellion Act of 1861, ch. 25, § 3, 12 Stat. at 282 (granting the President up to sixty days use of the militia after Congress reconvenes and failing to reference marshals).
\end{itemize}
of the Insurrection Act, the Executive “may employ the armed forces, including the National Guard” to “restore public order and enforce the laws of the United States, when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States the President determines” that the constituted authorities are unable to do so. Under the previous statute, the President had only the authority to respond to “any insurrection, domestic violence, unlawful combination, or conspiracy.” Now the President has the authority to send in federal troops to restore order following a natural disaster, to enforce a medical quarantine if an epidemic ensues or, in rather broad language, in any “other condition” the President believes warrants military intervention.

The amendment is not without some limitations on Executive action. It did keep in place the requirement that the President issue a proclamation order before ordering military intervention. While the proclamation order is intended to act as a procedural check against unwarranted involvement, its worth is suspect. For example, President Cleveland failed to issue the order until five days after the Army was sent to Chicago during the Pullman strike and the delay had no effect on the Supreme Court’s review of the action. The amendment also inserted an additional requirement—it mandated that the President notify Congress of his decision to exercise his authority under the statute and do so every fourteen days “during the duration of the exercise of authority.” It is unclear what the notification procedure is intended to accomplish. Other than the actual notification, it commands nothing. This requirement—if one can call it that—is a far cry from the original Calling Forth Act, which circumscribed Executive action when Congress was in session and placed a thirty-day time limit on the use of the militia.

234. See In re Debs, 158 U.S. 564, 599 (1895) (upholding the President’s assertion of authority but failing to acknowledge that Cleveland relied on the Calling Forth Act); David Gray Adler, The Steel Seizure Case and Inherent Presidential Power, 19 CONST. COMMENT. 155, 184 (2002) (recognizing that President Cleveland relied on the Calling Forth Act but did not issue the required proclamation until five days after deployment).
236. See Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (allowing the President
Congress is unable to agree on what changes, if any, the recent amendment made to the President's authority. Some in Congress do not believe that the amendment increased the Executive's authority but rather clarified his existing power.237 Other members of Congress perceive the amendment to both increase the power of the President to involve the military in domestic law enforcement missions and to undermine state control of the National Guard.238 The state governors agreed with the latter position, unanimously opposing the amendment contending that it constituted a radical shift in authority from governors as Commanders in Chief of the National Guard to the federal government.239

Those contending that the amendment served to expand Executive power have the stronger argument. One need only examine the language of the two statutes to see that the breadth of situations under which the Executive now has undisputed authority to send the military into a state has grown.240 For example, the amendment appears to provide the President the authority to enforce a public quarantine with military force. Tellingly, before the amendment, President Bush acknowledged he lacked that authority. In advocating for the ability to send the military in situations involving the avian flu, President Bush implored Congress to consider the issue and provide the Executive with the statutory authority to address public health emergencies.241 If, in fact, the previous statute contained this authority, it would have been unnecessary for the Executive to seek congressional authorization. As Senator Kit Bond recognized in his statement before the Senate Judiciary Committee, these changes “create[] triggers that make it virtually automatic that the Act will be invoked during such emergencies.”242

237. See Bill of Rights Defense Committee, Remarks of Senator Edward Kennedy, available at http://www.bordc.org/threats/hr5122.php (last visited May 13, 2008) (“While the amendment does not grant the President any new powers, it fills an important gap in clarifying the President’s authority to respond to these new kinds of emergencies.”)


(“As with so much else this Administration has done, this is a raw expansion of Presidential power. It is certainly not an expansion of power that should be granted without thoughtful deliberation, and without extensive consideration of the far-reaching consequences.”).


Perhaps more important than the listed situations in which the President can use armed force is the rather sweeping catch-all phrase which allows the Executive to identify "any other condition" that may warrant military intervention. The phrase is absent from any previous statute and arguably presents an unprecedented increase in authority. While reasonable people may differ about the importance and necessity of such authority, it is difficult to argue that the amendment did not alter the status quo.

The statute's ambiguous language is compounded by the Supreme Court's hands-off approach to reviewing the President's decision to employ the military domestically. In Martin v. Mott, the Court stated that "the authority to decide whether [an] exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons." 243 The Court made the statement in a case involving President Madison's decision to "call forth" the militia under the 1795 Militia Act. 244 Disagreeing with the President's assessment of emergency conditions, Jacob Mott failed to report for duty and consequently was subject to court martial for delinquency. 245 He was found guilty and appealed the decision on a number of grounds, including that President Madison lacked the authority to call forth the militia because no state of emergency existed. 246 In an opinion written by Justice Story, a unanimous Supreme Court concluded that it is for the President—and the President alone—to decide the necessity of military action. 247

While the Court was certainly sending a clear message that members of the militia were not free to decide for themselves the necessity of their presence, the Court appeared to reject court review as well. 248 Although the appellant raised the specter of a potential abuse of such broad power in the hands of the Executive, the Court was not persuaded that judicial intervention was appropriate.

It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the

244. Id. at 32.
245. Id. at 28.
246. Id. at 32–33.
247. Id. at 30.
248. Id. at 33.
constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.249

Based on this reasoning, the lower courts have cited *Mott* for the proposition "that the decision whether to use troops or the militia (National Guard) in quelling a civil disorder is exclusively within the province of the President" and "is not subject to judicial review."250 Because the President's decision to employ the military is a political one, it is not susceptible to judicial scrutiny.251 If there is a statute authorizing the Executive's action, the Judiciary is restrained from judging the propriety of such action, and as a result, there is no real judicial oversight of the Executive's decision. The absence of judicial review in the face of statutory authorization serves to magnify the effect of Congress's delegation of its authority under the Constitution.

2. Other Statutory Authorization

The Insurrection Acts, however, do not provide the sole authority for the President to use the armed forces in the domestic sphere. Congress has authorized the President, or in some cases an agency housed within the Executive Branch, to deploy the federal armed forces or the National Guard in a number of other situations.252 The statutes are troubling in at least two respects. First, they reveal the extent of military involvement in domestic affairs, a role that is ever increasing in a post-9/11 world. In many ways, the incremental introduction of the military into the domestic life of the nation's citizens is more insidious than the President's decision to send forces in response to unrest.

Second, Congress has left the exact role of the military ill-defined.

249. *Id.* at 32.


While it is generally understood that the majority of these statutes provide the military with only a so-called passive role, neither Congress nor the courts have yet determined the exact meaning of the phrase. Such ambiguity serves to further blur the line between domestic law enforcement and military conduct, thus undermining one of the fundamental tenets of our society—civilian supremacy over military power. Moreover, unlike interventions involving the Insurrection Act, the military's involvement in these activities is protracted, involving long-term missions without defined time parameters.

The military's growing role in domestic life began largely in response to the "War on Drugs." In the 1980s, Congress authorized the military's involvement in drug interdiction efforts, eventually naming the Department of Defense as the "single lead agency" in the effort to curtail the importation of illegal drugs into the United States. The military is authorized to provide civilian authorities with facilities, equipment, training, expert advice, and in certain situations, personnel to aid in domestic law enforcement. Under these provisions, the military can intercept vessels and aircraft, provide aerial reconnaissance, and use its advanced communications system to aid law enforcement efforts.

Congress has not limited the military's involvement to drug interdiction efforts, however. The military is also engaged in enforcing immigration and custom laws. National Guard members have been...


255. 10 U.S.C. § 124(a). Congress has also authorized funding to support state National Guard drug interdiction efforts. Pursuant to 32 U.S.C. § 112, the Secretary of Defense is authorized to provide monies to a governor to use that state's National Guard for counter-drug activities. The National Guard would be acting in its capacity as a state entity.

256. 10 U.S.C. § 373.

257. Id. § 374; see also id. § 371 (allowing the military to provide civilian authorities with information collected during training exercises).

258. Id. § 124(b).

259. Id. § 374(b)(2).

260. On May 15, 2006, President Bush announced that up to 6,000 National Guard troops would be sent to the southern border to support the Border Patrol. Peter Baker, Bush Set to Send Guard to Border, WASH. POST, May 15, 2006, at A1. The military does not...
sent to assist the Border Patrol by, among other things, operating surveillance systems, analyzing intelligence, and installing fences. Congress has authorized the Executive to call on the military to provide domestic disaster relief, including work essential for the preservation of life and property in the immediate aftermath of an incident. The military may be employed in emergency situations involving weapons of mass destruction, and even before 9/11, the armed forces could provide assistance to state and federal law enforcement agencies to respond to terrorism or threats of terrorism.

After 9/11, both Congress and the Executive sought to bolster and consolidate power to better anticipate and respond to another attack, including an increased involvement for the military domestically. Through a variety of statutory measures, Congress expanded the role of the military, blurring the line between domestic law enforcement and military conduct. The USA Patriot Act intended to coordinate the efforts of federal agencies in protecting the United States from further attacks, provided an increased role for the Department of Defense in aiding the FBI in counter-terrorism efforts. The Homeland Security Act of 2002 (HSA) further encouraged the blending of the military into the domestic sphere by creating an enlarged role for the Department of

appear to have direct legislative authorization for such actions but instead relies on 10 U.S.C. § 374.


263. 10 U.S.C. § 382; see also HOMELAND SECURITY COUNCIL, supra note 192, at 6 (identifying terrorist attempts to obtain and use Weapons of Mass Destruction (WMD) as a primary concern).


269. 10 U.S.C § 374; BALL, supra note 268, at 16-17.
Defense in traditionally civilian activities. Before the creation of the Department of Homeland Security (DHS), the military had always been responsible for national security but with an outward-looking approach. DHS was designed to coordinate homeland defense including the military’s involvement in domestic security issues. The presence of USNORTHCOM, with its dual mission of homeland defense and civil support, makes the federal armed forces readily available for deployment domestically.

While Congress has been careful to maintain, at least rhetorically, the primary role for civilian authorities in response to domestic emergencies, the Department of Defense regulations provide several exceptions to this rule. In addition to circumstances involving the Insurrection Acts, the regulations identify so-called “constitutional exceptions,” which, in the view of the Department, allow the military to take a lead role and, in some instances, act without Executive direction. These exceptions are based on the “inherent legal right of the U.S. government—a sovereign national entity under the Federal Constitution—to insure the preservation of public order and the carrying out of governmental operations within its territorial limits, by force if necessary.” Although the regulations indicate that presidential authorization is required for military intervention domestically, they do recognize instances when the military can act in its absence, most notably in “[c]ases of sudden and unexpected emergencies . . . which require that immediate military action be

---

271. BALL, supra note 268, at 25; U.S. DEP’T OF DEF., supra note 13, at iii (“The military has traditionally secured the United States by projecting power overseas.”).
272. BALL, supra note 268, at 25.
In addition, military commanders are authorized to institute martial law "if the circumstances demand immediate action, and time and available communication facilities do not permit obtaining prior approval." While not explicitly stated, the regulations appear to leave those decisions to the military officer present at the scene.

Moreover, the Department of Defense has identified as its "highest priority" the protection of the "United States from direct attack." Before 9/11 the military had consistently resisted Congress's attempts to utilize its resources in the domestic sphere, fearing that it would undermine its missions abroad. But according to the Department of Defense,

[a] new kind of enemy requires a new concept for defending the US homeland. The terrorist enemy now considers the US homeland a preeminent part of the global theater of combat, and so must we. We cannot depend on passive or reactive defenses but must seize the initiative from adversaries. . . . Defending the US homeland—our people, property, and freedom—is our most fundamental duty. Failure is not an option.

It is axiomatic that the military's new mission requires an increased presence domestically and an aggressive stance towards identified security issues.

To further confuse the issue, there are no clear guidelines defining when the armed forces are acting solely in a civil support role and when they are acting as part of a military mission. In the former circumstances, the military is under the control and direction of civilian authorities, thus maintaining at least a semblance of civilian control over the military. In contrast, if the armed forces are on a military mission,
then military commanders are in control, and success of the mission takes precedence over the maintenance of civil liberties. Moreover, it would appear that the military is not subject to the same statutory or constitutional limitations when it is conducting a military mission as it is when it is engaged in civil support.

It may be a distinction without a difference, however. The military's involvement in the domestic sphere, even if sanctioned by civilian leadership, arguably serves to undermine civilian control of the military and leads to increased reliance on military force. It is difficult to assess the effect of an increased military presence in civilian affairs. But it has been recognized that the use of the military in civilian activities, even on a small scale, has a detrimental effect on the exercise of fundamental rights.

While the military's presence in civilian affairs is not something that can be entirely avoided, it is something that should be carefully circumscribed and, when instituted, monitored. The current statutory enactments combined with the culture of fear that has permeated policy decisions since 9/11 leaves little room for limiting or questioning the military's role in the domestic sphere. The military is increasingly viewed as a panacea and, as a result, is becoming an integral part of civilian affairs. Congress has created the very trap the founding generation sought to avoid.

IV. RETURNING TO A SHARED POWER PARADIGM

In the last two centuries, the United States' position in the global community and its national security needs have changed tremendously. To meet these new needs Congress altered the composition and use of the federal armed forces. During this process, Congress shifted a tremendous amount of discretionary authority to the Executive to use the federal armed forces, including the federalized National Guard, in the domestic sphere. By so doing, Congress has undermined the shared power paradigm created to avoid the pitfalls associated with an Executive with the discretion to use military force to suppress internal dissent.

Congress must address this shift in power. There is no question that Congress has the authority to restrain Executive discretion in this area.

285. See Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985).
In the Constitution, Congress, not the Executive, is provided the authority to define the circumstances under which armed force can be used domestically.\textsuperscript{286} And while it is generally recognized that the Executive has the authority to deploy the military to respond to sudden attack or to repel an invasion,\textsuperscript{287} it is also acknowledged that that power is not without limits.\textsuperscript{288} Absent extraordinary circumstances,\textsuperscript{289} the President must adhere to congressional limits in this area.\textsuperscript{290} Any present day argument to the contrary ignores the history of the

\begin{itemize}
\item \textsuperscript{286} U.S. Const. art. I, \S 8, cl. 15.
\item \textsuperscript{287} See \textit{The Prize Cases}, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."); David Gray Adler, \textit{The Constitution and Presidential Warmaking: The Enduring Debate}, 103 POL. SCI. Q. 1, 4 (1988).
\item \textsuperscript{288} Demaine & Rosen, \textit{supra} note 282, at 218 ("Congress has supremacy over the President for the domestic use of the military to execute the civil law."); Jules Lobel, \textit{Emergency Power and the Decline of Liberalism}, 98 YALE L.J. 1385, 1427–28 (1989).
\item \textsuperscript{289} Arthur Schlesinger defined the scope of inherent presidential power in emergency situations:
\begin{quote}
The criteria are clear: the threat must be unquestionably dire; time must unquestionably be of the essence; Congress must be unable or unwilling to prescribe a national course; the problem must be one that can be met in no other way; and the President must do everything he can to explain himself to Congress and the people.
\end{quote}
ARThUR M. SCHLESINGER, JR., \textit{THE IMPERIAL PRESIDENCY} 323 (1973). But even in such circumstances, some scholars suggest that the President must seek "retroactive ratification" for his actions. See Adler, \textit{supra} note 234, at 180 ("The Founders provided a solution to the problem of emergency. If the President perceives an acute emergency for which there is no legislative provision, he might, by virtue of his high station act illegally and then turn to Congress for ratification of his measures."); Henry P. Monaghan, \textit{The Protective Power of the Presidency}, 93 COLUM. L. REV. 1, 38 (1993); Lobel, \textit{supra} note 288, at 1427–28 ("The only emergency power clearly provided under the Constitution is that of defending against armed attacks by other nations. In other situations, the executive should be forced to seek specific congressional authorization prior to acting, or to act unconstitutionally in those rare emergencies which threaten the nation's existence and for which response is needed before Congress can meet."). The Supreme Court has supported the use of retroactive ratification to address constitutionally questionable actions by the President in emergency situations. See \textit{The Prize Cases}, 67 U.S. (2 Black) at 671; The Apollon, 22 U.S. (9 Wheat.) 362, 366–67 (1824).
\item \textsuperscript{290} See Richard A. Epstein, \textit{Executive Power, the Commander in Chief, and the Militia Clause}, 34 HOFSTRA L. REV. 317, 320–22 (2005) (discussing how the Militia Clause defused any argument related to an inherent executive power); cf. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."); Skibell, \textit{supra} note 46, at 183 (recognizing that President Bush is presenting a "unique" argument by suggesting that his authority cannot be infringed upon by Congress).
\end{itemize}
Constitution's development,\textsuperscript{291} the text of the document,\textsuperscript{292} Congress's early use of the Militia Clauses,\textsuperscript{293} the Executive's adherence to longstanding statutory limitations,\textsuperscript{294} and Supreme Court precedents.\textsuperscript{295} Thus, Congress has both the authority and the responsibility to limit presidential conduct in this area.

While it is unnecessary, and probably impossible, to mimic the founding generation's original model, Congress can insert new checks that disperse power as intended. First, it can address the erosion of the vertical checks inserted in the Constitution by restoring the National Guard to its original domestic security function. Second, it can limit the Executive's discretion by creating more transparency in the decision-making process, inserting additional procedural mechanisms, and providing for more oversight. Third, Congress should act to bolster the resources, efficiency, and capabilities of civilian institutions.\textsuperscript{296} Americans have become so enamored with the military and disillusioned by its civilian counterparts that they are hardly aware, let alone concerned, with the increasing role of the military in domestic society.\textsuperscript{297} The three approaches are necessarily intertwined. If

\begin{itemize}
\item \textsuperscript{291} See supra Part II.
\item \textsuperscript{292} See U.S. CONST. art. I, § 8, cl. 15; see also Monaghan, supra note 289, at 17.
\item \textsuperscript{293} See supra Part III.
\item \textsuperscript{294} President Washington closely adhered to the dictates of the Calling Forth Act of 1792 in his response to the Whiskey Rebellion. See George Washington, Proclamation (Aug. 7, 1794), in \textsc{The Writings of George Washington} 457, 460–61 (John C. Fitzpatrick ed., 1940); Letter from Secretary of State Edward Randolph to Governor Mifflin (Aug. 7, 1794), in 4 \textsc{Pennsylvania Archives} 2d Series 112, 120 (1876) ("[T]he President... has determined to take measures for calling forth the militia,... assembling a Body... from Pennsylvania and the neighboring States of Virginia, Maryland and New Jersey."). Similarly, when President Jefferson feared that the militia would be unable to control what he believed to be a growing uprising under Aaron Burr, he sought congressional authorization to use the regular army to suppress the perceived insurrection. Significantly, at no point did Jefferson, one of the architects of the constitutional structure, rely on an inherent authority to deploy the federal army to respond to Burr's conduct. Thus it was understood that the employment of either the federalized militia or the federal army required congressional authorization. See Insurrection Act of 1807, ch. 39, 2 Stat. 443; see also MALONE, supra note 218, at 253 (explaining President Jefferson's motivation behind the passage of the aforementioned Act); COAKLEY, supra note 33, at 79, 80, 83.
\item \textsuperscript{295} See Hamdan, 126 S. Ct. at 2774 n.23; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952) (plurality opinion); \textsc{The Prize Cases}, 67 U.S. (2 Black) 635, 688 (1862).
\item \textsuperscript{296} Kohn, supra note 16, at 182–83 (observing that the federal government is more likely to turn to the regular armed forces for convenience and "because the civilian agencies involved in homeland defense at various levels of government are not being funded adequately").
\item \textsuperscript{297} See Neal Devins, \textit{Congress, Civil Liberties, and the War on Terrorism}, 11 \textsc{Wm. & Mary Bill Rts. J.} 1139, 1146 (2003) (noting the importance of the American public as a
TOWARD MILITARY RULE?

Congress is to reduce the role of the federal armed forces in the domestic sphere, it requires that the federal, state, and local civilian agencies play a lead role with the National Guard acting as the primary source of armed support when necessary.

Certain members of Congress have taken initial steps to address the imbalance. Senators Patrick Leahy and Kit Bond have introduced legislation to repeal the 2006 amendments to the Insurrection Act. Representative Tom Davis, along with thirty-five co-sponsors, has introduced a companion bill in the House. Both bills are intended to return the Insurrection Act to its pre-amendment status. While the bills represent an important acknowledgement of Congress's authority, they are not necessarily sufficient to correct over two centuries of erosion.

Several commentators have also offered possible alterations to current statutes that would narrow Executive power in this area. These commentators focus on reaffirming the importance of the principles underlying the Posse Comitatus Act and clarifying its application, as well as consolidating the confusing labyrinth of statutes that trigger the Executive's authority. Like the bills, the proposals

check on executive power).


300. See S. 513, § 1(b); H.R. 869, § 1(b).


302. 18 U.S.C. § 1385 (2006). The Posse Comitatus Act (PCA) currently provides that “[w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years or both.” Id. It is perceived to be a limitation on the President's ability to use the armed forces as a domestic police force. In practice, it fails to act as a substantive check because of the myriad of exceptions to its application. But the PCA does represent an important principle regarding the nation's distaste for the military as a domestic police force. In this respect, the statute has important symbolic meaning.

303. See, e.g., Hammond, supra note 301, at 980 (“The third and best approach, is a legislative reaffirmation of the fundamental principle behind the PCA with added guidelines to help focus considerations of PCA exceptions.”); Schmidt & Klinger, supra note 266, at 684-86 (amending Hammond's proposal and creating a statutory exception to the PCA);
move the law in a helpful direction but fall short of adequately dispersing power. The proposals fail to effectively limit Executive discretion, and none of the recommendations directly addresses the National Guard’s role.304

Congress must be bolder. As Justice Jackson observed, “[w]e 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.”305 Congress can begin by amending the current Insurrection Acts. Sections 331 through 333 of Title 10 of the United States Code contain the primary situations under which the Executive may deploy the military domestically, while § 334 requires the President to issue a proclamation of dispersal before doing so. These four statutes should be combined and new language inserted that restricts the President’s discretion, increases the states’ role in the decision-making process, and provides the National Guard—not the standing Army—with the primary domestic security responsibilities.

The Calling Forth Act of 1792 provides a helpful blueprint for amending the current statutes. First, it identifies the militia—now the National Guard—as the sole domestic security force.306 In 1792, the militia was a disorganized and undisciplined band of citizens, and states were loath to respond to presidential requests to provide troops.307 Now, the National Guard is the fighting force that President Washington imagined,308 well-organized, well-disciplined, and perhaps most importantly, available. It is capable of supplementing overwhelmed civil authorities. As one commentator opined, “[T]he hundreds of thousands of soldiers in the Guard, embedded in 3,100 communities, are the appropriate pool of military people” to address domestic security issues.309 The federal armed forces would remain

Demaine & Rosen, supra note 282, at 239–44 (recommending changes to the PCA and its exceptions); DeBianchi, supra note 301, at 505–09 (amending the exceptions to the PCA).

304. See Hammond, supra note 301, at 980 (suggesting that the President would be constrained by public opinion); Schmidt & Klinger, supra note 266, at 685–86 (placing a forty-eight to ninety-six hour time limit on the use of armed forces); Demaine & Rosen, supra note 282, at 240–44 (involving the Attorney General or the Secretary of Defense in the decision to provide military assistance); DeBianchi, supra note 301, at 508 (limiting the time of military involvement to ten days unless the governor requests an extension).


307. See COAKLEY, supra note 33, at 43.

308. See Mazzone, supra note 58, at 77.

available but only if neither the civil authorities nor the National Guard were able to restore order. This proposal is consistent with the framing generation’s intention that the militia would have a primary role in domestic security. In addition, it will have the secondary effect of forcing Congress to rethink the National Guard’s role abroad. To fulfill its domestic mission, the National Guard will need to have available both personnel and equipment.

Second, under the original Act, the President was not the sole decision maker. He needed to be notified by a member of the Judicial Branch that the laws could not be “suppressed by the ordinary course of judicial proceedings.” Moreover, the President did not have the discretion to activate the militia from non-affected states if Congress was in session. Thus, at least two branches were involved in the decision to send troops. Such a check is totally absent under the current law. Given today’s communication capabilities, Congress should insert a similar, albeit less stringent, requirement that another branch be involved in the process. Under this proposal, the President could respond to an immediate crisis in the absence of additional approval. No later than forty-eight hours after issuing an order to send troops, however, the President would need to obtain support for the necessity of continued troop involvement from the Chair of the House Committee on Homeland Defense or the congressional delegation from the affected locale.

Third, the states’ role in responding to domestic emergencies, independent of the federal government’s involvement, must be recognized. The federal government is not the only entity capable of activating the National Guard to aid in domestic emergencies. A state’s governor, as commander in chief of the state militia, has the authority to utilize the National Guard in her own state or, upon request, to aid in domestic emergencies in another state. In the aftermath of Hurricane Katrina, Louisiana Governor Blanco requested and received the help of National Guard units from neighboring states. To facilitate interstate

310. See id. (recognizing that the National Guard’s traditional role was homeland security and calling for its “re-orienting and re-ordering” in that direction).
311. See Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. at 264.
312. Id.
313. Id.
314. Eric Lipton, et al., Breakdowns Marked Path from Hurricane to Anarchy, N.Y. TIMES, Sept. 11, 2005, at A1 (reporting that Governors from Alabama, Arkansas, and Mississippi called up over 7,500 National Guard troops after Katrina).
315. There’s a Lot of Time to Play the Blame Game, INTELLIGENCER J. (Lancaster, Pa.),
aid, all fifty states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands have enacted legislation to become members of the Emergency Management Assistance Compact (EMAC). EMAC, established in 1996, provides states with a mechanism for obtaining additional help during natural and man-made disasters as well as terrorist attacks. In such situations, the federal government's intervention should be circumscribed.

The states' ability to request aid must be placed on an equal footing with the federal government's ability to send troops in the absence of such a request. Pursuant to 10 U.S.C. § 331, a state may explicitly request military aid from the federal government, but the circumstances under which this can occur are quite limited. Section 331 only authorizes federal aid upon state request if "there is an insurrection[] in any State against its government." The requirement that a governor declare that the state is experiencing an insurrection has, at times, delayed the request for federal aid. In contrast, under the current version of 10 U.S.C. § 333, the President can use the militia or armed forces "to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy" that interferes with the execution of state or federal law or to "restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession" the state authorities are unable to do so. It is odd that the President has the power to deploy the military domestically in more situations than a state can seek aid. It would seem, under most conditions, the state authorities would be in the best position to determine the necessity of aid. The state should be empowered to request aid under the same conditions that the President can authorize use of the military.

Fourth, Congress should review the propriety of continued troop involvement, thus avoiding their inappropriate use or the open-ended...
commitment of the military to chronic situations. Under the current statute, the President must notify Congress “every 14 days thereafter during the duration of the exercise of that authority.” Such a provision is a step in the right direction but lacks teeth. The statute does not require a report or even provide for congressional oversight. In addition, Congress appears to be a bystander to the process. The statute should require the President to provide a report describing the necessity of continued troop involvement. Further, Congress should be an active participant in the process, approving, disapproving, or amending continued military involvement. As discussed previously, there is no question that Congress has the constitutional authority to play an active role in this area and additionally has a duty to provide oversight.

The following proposal provides a starting point for the discussion:

10 U.S.C. § 331

(a) The State may request, and upon request, the President may call into service the National Guard of other states to suppress any insurrection, domestic violence, unlawful combinations, conspiracy or other domestic emergency if it—

(1) so hinders the execution of the laws of the State, and of the United States within the State, that any part or class of its people is deprived of the right, privilege, immunity, or protection named in the Constitution and secured by the law; or

(2) opposes or obstructs the execution of the laws or impedes the court of justice under those laws.

(b) The President may, in the absence of such request from the State, call into service the National Guard

(1) in circumstances described in (a)(1) if the constituted authorities of the States are unable, fail, or refuse to protect the right, privilege, or immunity, or to give the protection described in (a)(2); or

(2) whenever the President determines that the laws of the United States are 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 civilian

322. Id. § 333(b).
law enforcement officials.

(c) Whenever the President considers it necessary to use the National Guard, he shall by proclamation immediately order the insurgents to disperse and retire peacefully within a set period of time.

(d) The President may use the federal armed forces only if the civil authorities and the National Guard are unable to restore order within a reasonable time.

(e) The President shall notify Congress about the decision to deploy the National Guard or the federal armed forces as soon as practicable. No later than forty-eight hours after issuing the order, the President shall obtain support for the continuation of National Guard or federal armed forces involvement from the Chair of the House Committee on Homeland Defense or the congressional delegation from the affected locale(s).

(f) Every fourteen days thereafter, the President shall provide a report to Congress describing troop activity and evidencing the necessity of continued troop involvement.

Any statutory changes must be careful to balance the constitutional concerns with the country's national security needs. The proposed changes identified above maintain the federal government's ability to respond to domestic emergencies while decreasing the role of the federal armed forces in the domestic sphere. It allows the President to act swiftly but not without oversight, and it returns the states and the National Guard to a more prominent role in domestic security issues. It also does not interfere with statutes that allow the federal armed forces to provide humanitarian aid in domestic emergencies nor does it prevent the military from aiding civilian law enforcement agencies indirectly. The amendment begins to reverse the trend of the federal government's reliance on and use of the federal armed forces in the domestic sphere. It is, however, just a first step.

V. CONCLUSION

When viewed in totality, it is difficult to ignore the pooling of power
in the Executive Branch. Providing the Executive with enormous discretionary power to use the military in domestic emergencies contravenes some of the basic principles that animated the founding of this country. It also opens the door to potential abuse. The founding generation recognized the potential for misuse, creating a shared power paradigm to disperse power amongst the different government actors. We must return to that paradigm, lest the possibility of abuse becomes a reality.

In addition to curbing the potential for abuse, returning to the original model will also bolster our homeland defense by making the National Guard the primary domestic security force. Recent government reports, emanating from both the Executive and Legislative branches, have recognized the key role the National Guard plays in deterring threats and responding to emergencies when they occur. Under the current regime, the National Guard is ill-equipped to meet these responsibilities. Restoring the National Guard to its intended role will not only restore the constitutional balance but aid in the long-term homeland defense goals identified by the federal government.
* * *