Insurrection By Any Other Name? Race, Protest, and Domestic Military Intervention

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During the summer of 2020, protests against police violence and racial injustice erupted around the country. In response to the movement, governors and the federal government deployed National Guard troops in several states and Washington, D.C. President Trump also threatened to invoke the Insurrection Act to suppress the protests.

Drawing on the concepts of antisubordination and racial citizenship, this Note contends that modern military suppression of racial justice protest reproduces racial hierarchy by physically and symbolically suppressing the valid exercise of citizenship, speech, and demand for equal treatment. After surveying the historical and modern legal landscape governing domestic military deployment—including the Posse Comitatus and Insurrection Acts—this Note calls for an updated framework that significantly curtails presidential and gubernatorial authority to suppress social unrest with military force. This Note therefore expands on existing scholarship that has explored how policing exacerbates racial violence and inequality by examining how the military can and has been used to maintain white supremacy.

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INTRODUCTION

During the summer of 2020, protests against police violence and racial injustice erupted throughout the country.[1] Over 10,000 demonstrations by millions of protesters occurred across all fifty states and Washington, D.C. in a mobilization that some rank among the largest mass movements in American history.[2] Although approximately ninety-four percent of the protests remained peaceful,[3] then-President Donald J. Trump delivered a speech during the summer's climax[4] in which he threatened to "deploy the United States military and quickly solve the problem" for states that failed to quash unrest.[5] The comment referred to his unilateral power to invoke the Insurrection Act, send in active duty Army troops to facilitate law enforcement, and override gubernatorial command over the National Guard in a legal maneuver previously used by President Eisenhower to integrate the Little Rock public schools.[6]

About six months later, on January 6, 2021, a group of demonstrators breached the United States Capitol in an historic attempt to block Congress' certification of then-President-elect

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1. ARMED CONFLICT LOCATION & EVENT DATA PROJECT, DEMONSTRATIONS & POLITICAL VIOLENCE IN AMERICA: NEW DATA FOR SUMMER 2020 1 (2020) [hereinafter ACLED SUMMER 2020], https://acleddata.com/acleddatanew/wp-content/uploads/2020/09/ACLED_USDataReview_Sum2020_SeptWebPDF_HiRes.pdf [https://perma.cc/D7HW-SFH6]. Many protests were affiliated with the Black Lives Matter movement. Brian Bennett, *President Trump's Big Moment in Front of a Church Shows He Has Missed the Point of the Protests*, TIME (June 2, 2020), https://time.com/5846449/trump-church-protests/ [https://perma.cc/XTR8-EZV4].

2. ACLED SUMMER 2020, *supra* note 1, at 2; Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/EYA2-LDAE].

3. ARMED CONFLICT LOCATION & EVENT DATA PROJECT, A YEAR OF RACIAL JUSTICE PROTESTS: KEY TRENDS IN DEMONSTRATIONS SUPPORTING THE BLM MOVEMENT 1 (2021) [hereinafter ACLED KEY TRENDS], https://acleddata.com/acleddatanew/wp-content/uploads/2021/05/ACLED_Report_A-Year-of-Racial-Justice-Protests_May2021.pdf [https://perma.cc/CEG8-ZZYZ]; CAROL LEONNIG & PHILIP RUCKER, I ALONE CAN FIX IT: DONALD J. TRUMP'S CATASTROPHIC FINAL YEAR 142 (2021) (explaining that "[m]ost of the protests of [George] Floyd's death and displays of solidarity with the Black Lives Matter movement across the country were peaceful, but in some places there was unrest, violence, and looting").

4. President Trump's speech on June 1, 2020, occurred moments before police cleared a peaceful demonstration outside of the White House in Lafayette Park and five days before half a million protesters turned out on June 6, which represented the Black Lives Matter movement's peak. *See* Buchanan et al., *supra* note 2; Bennett, *supra* note 1.

5. *See* Bennett, *supra* note 1.

6. *See infra* Part III.D.

Joseph R. Biden.[7] Violence broke out and some demonstrators carried Confederate flags in a manner historians characterized as an unprecedented act of insurrection.[8] Nonetheless, President Trump expressed support for the demonstrators, delayed deploying the D.C. National Guard, and otherwise remained silent on the possibility of invoking the Insurrection Act.[9]

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7. *See* Amanda Holpuch, *U.S. Capitol's Last Breach Was More Than 200 Years Ago*, GUARDIAN (Jan. 6, 2021), https://www.theguardian.com/us-news/2021/jan/06/us-capitol-building-washington-history-breach [https://perma.cc/AJ7G-XGWX]; ARCHITECT OF CAPITOL, *A Most Magnificent Ruin: The Burning of the Capitol During the War of 1812* (Aug. 22, 2012), https://www.aoc.gov/explore-capitol-campus/blog/most-magnificent-ruin-burning-capitol-during-war-1812 [https://perma.cc/992J-GLUM]. The uprising failed and Congress certified the election results in the early morning on January 7, 2021. *See Live Updates: Congress Finalizes Joe Biden's Victory Over President Trump—Despite Violent Siege and GOP Delaying Tactics*, TIME (Jan. 7, 2021, 6:57 AM), https://time.com/5926772/live-updates-congress-elector-certification/ [https://perma.cc/2T2B-XA8B]; Vera Bergengruen & Time Photo Dep't, *A Pro-Trump Mob Stormed the Halls of Congress. Photographs From Inside the Chaos at the Capitol*, TIME (Jan. 6, 2021), https://time.com/5927132/donald-trump-mob-capitol-chaos/ [https://perma.cc/9S8A-KQWV].

8. *See Video Shows Police Officer Dragged down Capitol Steps, Violently Beat by Mob*, WASH. POST (Jan. 11, 2021), https://www.washingtonpost.com/video/national/video-shows-police-officer-dragged-down-capitol-steps-violently-beat-by-mob/2021/01/11/cc59a0e4-9214-4075-b8ac-f58fd9eee600_video.html [https://perma.cc/2NJB-WM8Y]; Kelsie Smith & Travis Caldwell, *Disturbing Video Shows Officer Crushed Against Door by Mob Storming the Capitol*, CNN (Jan. 9, 2021), https://www.cnn.com/2021/01/09/us/officer-crushed-capitol-riot-video/index.html [https://perma.cc/RJ2Q-VRK6]; *see also* Maria Cramer, *Confederate Flag an Unnerving Sight in Capitol*, N.Y. TIMES (Jan. 9, 2021), https://www.nytimes.com/2021/01/09/us/politics/confederate-flag-capitol.html [https://perma.cc/F222-NNVR] ("The Mississippi flag, which once featured the Confederate symbol prominently, hung in the Capitol until June 2020, when it was replaced after a vote by the State Legislature to remove the emblem. But Wednesday [January 6] was the first time that someone had managed to bring the flag into the building as an act of insurrection, according to historians."); Press Release, DEP'T OF JUST., Two Delaware Men Charged in Federal Court Following Events at the United States Capitol (Jan. 14, 2021), https://www.justice.gov/usao-dc/pr/two-delaware-men-charged-federal-court-following-events-united-states-capitol [https://perma.cc/QNT5-QYH7].

9. Maggie Koerth, *The Police's Tepid Response to the Capitol Breach Wasn't an Aberration*, FIVETHIRTYEIGHT (Jan. 7, 2021), https://fivethirtyeight.com/features/the-polices-tepid-response-to-the-capitol-breach-wasnt-an-aberration/ [https://perma.cc/L9W2-8DZF] ("Instead of peaceful protesters being doused in tear gas, we saw a mob posing for selfies with police and being allowed to wander the corridors of power like they couldn't decide whether they were invading the Capitol or touring it. Instead of President Trump calling these violent supporters 'thugs,' as he called racial justice protesters, and advocating for more violent police crackdowns, we saw him remind his followers that they were loved before asking them nicely to go home."); Alana Wise, *DOD Took Hours to Approve National Guard Request During Capitol Riot, Commander Says*, NPR (Mar. 3, 2021), https://www.npr.org/2021/03/03/973292523/dod-took-hours-to-approve-national-guard-request-during-capitol-riot-commander-s [https://perma.cc/9PNJ-BX4U] ("It took more than three hours for former President Donald Trump's Defense Department to approve a request for D.C.'s National Guard to intervene in the deadly Jan. 6 Capitol insurrection, the commanding general of the outfit told senators on Wednesday.").

Many commentators expressed alarm at the federal and state governments' reliance on the National Guard to suppress protests during the racial justice movement[10] but not during the Capitol breach.[11] This asymmetry, however, mirrors the United States' history of relying on military deployment to strategically advance racial justice and injustice according to the politics of elected officials. During Reconstruction, for example, the federal government relied on Army troops to *protect* formerly enslaved people and to suppress the Ku Klux Klan.[12] During the civil rights era, by contrast, governors frequently relied on the National Guard to quell "race riots," a precedent that President Trump expressly sought to follow during the summer of 2020.[13]

Critically, when the president and a governor disagree on National Guard deployment, the president's political objectives prevail because federal authority supersedes that of the state.[14] This issue arose during school integration in the 1950s, for example, when a governor's attempt to *block* integration failed

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10. Howard Altman, *National Guard Civil Unrest Update: More Than 17,000 Troops in 23 States and DC Activated*, MIL. TIMES (June 1, 2020), https://www.militarytimes.com/news/your-military/2020/06/01/national-guard-civil-unrest-update-more-than-17000-troops-in-23-states-and-dc-activated/ [https://perma.cc/E6U3-BPH2] (explaining that Guard troops were activated in Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Kentucky, Michigan, Minnesota, Nevada, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin and D.C).

11. *See, e.g.*, Marty Johnson, *Police Criticized for Double Standard After Capitol Riot*, HILL (Jan. 07, 2021), https://thehill.com/homenews/news/533182-police-criticized-four-double-standard-after-capitol-riot [https://perma.cc/RQR4-VS6Z]. Then-President-Elect Joe Biden tweeted, "No one can tell me that if it had been a group of Black Lives Matter protestors yesterday that they wouldn't have been treated very differently than the mob that stormed the Capitol." @JoeBiden, TWITTER (Jan. 7, 2021, 4:45 PM), https://twitter.com/JoeBiden/status/1347298213422747649 [https://perma.cc/P3WG-ADMA]. Similarly, MSNBC anchor Joy Reid, who is Black, reflected on her time covering the "mass marches" in response to the police killing of Freddie Grey in April 2015: "The uprisings that took place after Freddie Grey brought in a level of policing that I have never witnessed, ever, in my life. It looked like a war zone. Police brought in tanks. They brought in body armor. . . . [I] guarantee you if that was a Black Lives Matter protest in D.C, there would be [protesters] shackled, arrested, or dead." MSNBC, *Reid: If This Was a BLM Protest, 'There Would Already Be People Shackled, Arrested or Dead*, YOUTUBE (Jan. 6, 2021), https://www.youtube.com/watch?v=TWgQ1vKCeEo [https://perma.cc/3XQT-EMP5].

12. *See infra* Part I.A.

13. President Trump explicitly compared the Summer 2020 protests to the 1960s, "reason[ing] that the protesters had to be stopped just like when troops were used in the 1960s to bring order to the streets." LEONNIG & RUCKER, *supra* note 3, at 148. Mark Milley vehemently contested this characterization, explaining that the protests did not "compare anywhere to the summer of sixty-eight. . . . It's not even close." *Id.*

14. *See infra* Part II for an explanation of the shared federal and state control over the National Guard.

because the President took command of the National Guard and ordered troops to facilitate integration.[15] A similar clash occurred during the Summer 2020 protests: President Trump threatened to supersede the authority of some governors who resisted responding with militarized force.[16]

This Note argues that domestic military deployment—like policing[17]—can and has been used as a similar mechanism to maintain racial hierarchy in the United States. Drawing on the critical race theory concepts of antisubordination and racial citizenship, this Note contends that the modern use of military force to suppress racial justice protest has reproduced racial hierarchy by physically and symbolically suppressing the valid exercise of citizenship, speech, and demand for equal rights by racial justice protesters.[18] Consequently, this Note maintains that civil rights advocates concerned about abusive policing and state violence as a mechanism to suppress marginalized groups should not overlook the military as a threat to racial justice and racial freedom. This Note ultimately calls for an updated statutory framework that significantly curtails presidential and gubernatorial authority to respond to moments of social and racial unrest through military suppression.

This Note proceeds in four parts. Part I recounts how the United States government deployed the military domestically to protect the rights of formerly enslaved people after the Civil War and how the subsequent backlash led to the enactment of the Posse Comitatus Act, which bans domestic law enforcement by military personnel. Part II explains the modern constitutional and statutory landscape that governs domestic military deployment, including the Commander in Chief clause and the Insurrection Act, which grants broad authority to the president to suppress

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15. *See* discussion *infra* Part III.D.

16. *See* Bennett, *supra* note 1; Lauren Camera, *Democratic Governors Reject Trump's Threat to Deploy Military*, U.S. NEWS (June 2, 2020), https://www.usnews.com/news/national-news/articles/2020-06-02/democratic-governors-reject-trumps-threat-to-deploy-military [https://perma.cc/4J5Q-HUXC].

17. *See, e.g.*, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL L. REV 1781, 1839 (2020); Fanna Gamal, Note, *The Racial Politics of Protection: A Critical Race Examination of Police Militarization*, 104 CAL L. REV. 979, 980–84, 1001 (2016); *see generally* Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (explaining how the criminal justice system establishes and maintains a racial caste system in the United States).

18. Part III.A describes the concepts of antisubordination and racial citizenship.

insurrection and domestic violence by military means.[19] Part III introduces theoretical underpinnings of race and racial justice before surveying the history of military deployment during the late twentieth century and in response to the 2020 Black Lives Matter protests. This Part concludes that, unlike how the late nineteenth century government used the military to enable Black communities to exercise their citizenship rights, the trend has largely reversed. Nonetheless, because the military can and has served as a last-resort tool to protect constitutional rights, as during Reconstruction and school integration, modern policy must permit some role for domestic military deployment.

Part IV recommends statutory reform. First, Congress should repeal and replace the Posse Comitatus Act with a new statute that reaffirms the federal prohibition on military law enforcement but reflects the modern military apparatus. The updated statute should also correct the existing loophole that allows the National Guard to enforce domestic law when controlled by state governors. Additionally, Congress should substantially narrow the scope of the Insurrection Act, which authorizes sweeping authority for the president to deploy the military during instances of domestic turmoil. Finally, Congress should curb presidential authority by requiring that the president consult with a designated, bi-partisan subcommittee before invoking the Insurrection Act, similar to the process required to introduce forces abroad.[20] By strengthening the prohibition on domestic military law enforcement and limiting presidential and gubernatorial authority to deploy the military during moments of social and racial unrest, this revised framework advances antisubordination and promotes racial citizenship by limiting and how when the government can use force against its own people.

I. HISTORY MATTERS: THE MILITARY'S ROLE IN PROTECTING CIVIL RIGHTS DURING RECONSTRUCTION

The contemporary legal framework governing domestic military intervention is best understood in its historical context. A logical beginning is the American Revolution against the British, which has become the hallmark of the United States' origin story.

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19. U.S. CONST. art. II, § 2; 10 U.S.C. §§ 251–254.
20. *See* 50 U.S.C. § 1542. See *infra* Part IV.B for a complete discussion.

The narrative includes a romanticized tale of a markedly white rebellion[21] against the oppressive King George, whose use of the military to enforce English Law in the colonies abridged liberty and catalyzed the war.[22]

As a consequence of this prevailing American historiography, the United States inherited and continues to harbor a skepticism of military law enforcement on domestic soil.[23] In the modern era, for example, the Supreme Court has acknowledged the "suspicion" that attaches to the use of military force in homeland affairs because military power—as opposed to police power—"often involves the temporary suspension of some of our most cherished rights—government by elected civilian leaders, freedom of expression, of assembly, and of association."[24] The idea of the military enforcing laws, the argument goes, calls to mind authoritarian military regimes that are antithetical to liberal democracy.[25]

Given this American opposition to domestic military intervention, it is perhaps unsurprising that a law, the Posse Comitatus Act, expressly forbids the military from enforcing domestic law. Although sound in principle, this single-sentence Act oddly imposes criminal penalties—up to two years imprisonment—for any person who "willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute

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21. Black American revolutionary soldiers fought in the war, but are often excluded from the revolution's portrayal altogether or are deemed "Black patriots," a term that arguably obscures the fact that "Black American revolutionary soldiers [fought] in the war, not out of love for a country that oppressed them, but out of love for life, survival, and the preservation of their race [as well as] their desire to be free of enslavement and second-class citizenry." LaGarrett J. King & Jason Williamson, *The African Americans' Revolution: Black Patriots, Black Founders, and the Concept of Interest Convergence*, BLACK HIST. BULL., Spring 2019, at 10.

22. *See* William C. Banks, *Providing "Supplemental Security"—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. NAT'L SEC. L. & POL'Y 39, 39 (2009) ("It is well known that the American Revolution was spurred in large part by the colonists' reaction to King George's use of the military to enforce English laws in the colonies."); *see generally* CONG. RSCH. SERV., R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 2–5 (2018).

23. *See* CONG. RSCH. SERV., *supra* note 22, at 1 ("Americans have a tradition, born in England and developed in the early years of our nation, that abhors military involvement in civilian affairs, at least under ordinary circumstances.").

24. Scheuer v. Rhodes, 416 U.S. 232, 246 (1974), *overruled on other grounds by* Davis v. Scherer, 468 U.S. 183 (1984).

25. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 632 (1952) (Douglas, J., concurring) ("Article II, Section 2 makes the Chief Executive the Commander in Chief of the Army and Navy. But our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs.").

the laws."[26] The Act's prohibition on using the *posse comitatus*[27] is a relic of English common law—a reference to the historical power of local sheriffs and federal marshals to summon all able-bodied residents to form a type of regional militia[28]—but the Act is understood today as a general prohibition on using the federal military for domestic law enforcement.[29]

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26. 18 U.S.C. § 1385. The full text of the Posse Comitatus Act 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.* The original statute only concerned the Army, but later included the Air Force when the Air Force was created as a subset of the Army. *See* Arthur Rizer, *Trading Police for Soldiers: Has the Posse Comitatus Act Helped Militarize Our Police and Set the Stage for More Fergusons?*, 16 NEV. L.J. 467, 478–79 (2016). After the Air Force split off from the Army and became its own branch, Congress amended the Posse Comitatus Act in 1956 to maintain the Act's application to the Air Force. *Id.*; *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, 144 (2003). For an overview of the reorganization of the military departments, see PAUL J. SCHEIPS, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1945–1992 6–9 (2012). The Posse Comitatus Act also does not apply to the United States Navy and Marine Corps. *See* Rizer at 479. Rizer explains:

> This fact is not based on congressional intent to exclude these branches from the Act, but rather because the original Posse Comitatus Act was passed as part of an Army Appropriations Bill. The Department of Defense, however, by an internal directive, extended the Posse Comitatus Act to include the Navy and the Marine Corps.

Id.

27. The Latin word *posse* means to be able. The word *comitatus* derives from the word *comes*, which means attendants. The combined phrase *posse comitatus* therefore "literally means attendants with the capacity to act" and refers to the common law requirement that able-bodied men over the age of fifteen to attend to the sheriff's summons to help defend the county against the king's enemies, lest face fine or imprisonment. *See* CONG. RSCH. SERV., *supra* note 22, at 6 nn.27–28; *see also* Rizer, *supra* note 26, at 473 & nn.29–31 (explaining that *posse comitatus* refers "power of a sheriff to keep the peace by calling together a group of citizens [a posse] to act in a law enforcement capacity"); Felicetti & Luce, *supra* note 26, at 99 ("In 1854, Attorney General Cushing formally documented the doctrine, concluding: '[T]he posse comitatus comprises every [man] in the district or county above the age of fifteen years whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines. All of whom are alike bound to obey the commands of a sheriff or marshal.").

28. *See* CONG. RSCH. SERV., *supra* note 22, at 5–6 ("Despite the retention of most police powers by the several states, Congress quickly established a law enforcement capability in the federal government in order to effectuate its constitutional powers and provide a means to enforce the process of federal courts. This authority was vested through the President in federal marshals, who were empowered to call upon the posse comitatus to assist them . . . .").

29. *See e.g.*, United States v. Jaramillo, 380 F. Supp. 1375, 1379–1382 (D. Neb. 1974) (explaining that the Posse Comitatus Act was "intended . . . to eliminate the use of federal troops to execute the laws of the United States"); *see also* United States v. Red Feather, 392 F. Supp. 916, 922 (D.S.D. 1975) ("[The Posse Comitatus Act] was intended by Congress . . . to eliminate the direct active use of federal troops by civil law enforcement officers.").

It is incorrect, however, to interpret this particular nineteenth century act as merely reflecting a wholesome American ideal that soldiers ought not abridge the liberty of citizens, or that principles of federalism require state and local police to handle civil unrest.[30] Rather, history makes clear that the Posse Comitatus Act is first and foremost a Reconstruction-era statute enacted by Southern Democrats as a direct response to militarized protection of the formerly enslaved.[31] Thus, any modern theory concerning the appropriate role of the military in domestic affairs must reckon with the historical reality that white supremacy—and *not* concern for civil liberty—precipitated the Posse Comitatus Act's prohibition on law enforcement by the military.[32]

A. THE ROLE OF THE MILITIA AND MILITARY IN COMBATING SOUTHERN RACISM

Immediately after the Civil War, federal troops—including over 130,000 Black soldiers—occupied large swaths of the former Confederacy.[33] The Army's presence humiliated the recently defeated Confederates and served as a poignant reminder of the growing appetite for Black rights.[34]

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30. A number of sources describe the Act in these terms. *See, e.g.*, Gilbert v. United States, 165 F.3d 470, 472 (6th Cir. 1999) ("The Act reflects a concern, which antedates the Revolution, about the dangers to individual freedom and liberty posed by use of a standing army to keep civil peace."); Matthew Carlton Hammond, Note, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 960, 979 (1997) ("The post-Civil War military presence in the South continued to foment a distaste for military involvement in the civilian sphere. . . . [I]t should be remembered that in 1878 the [Posse Comitatus Act] was enacted precisely because the government had to be reminded of the fundamental principle of separating the military from the civilian sphere.").

31. *See* Felicetti & Luce, *supra* note 26, at 89–90 (explaining that the Posse Comitatus Act "has been mischaracterized from its very beginnings, at times deliberately" in an attempt to "hide the Act's racist origins by linking the Act with the principles surrounding the founding of the United States, without accounting for the passage of the Constitution or the Civil War"); *see also* David E. Engdahl, *The New Civil Disturbance Regulations: The Threat of Military Intervention*, 49 IND. L.J. 581, 597–98 (1974).

32. *See* Felicetti & Luce, *supra* note 26, at 90 (explaining that the misinterpretation of the Act "grew over the years by frequent repetition that eventually transformed a hate law into the respected shorthand for the general principle that Americans do not want a military national police force").

33. *See id.* at 100.

34. *Id.* For example, the federal troops took an active role in protecting Black political organizations, such as the Union Leagues and the Freedmen's Bureau, which "openly sought black equality." *See id.* at 102 n.64 ("Initially, the Bureau had no separate appropriation, so it drew personnel and resources from the Army. One of the Bureau's most important missions was the creation of schools for black children. By 1869, the Bureau oversaw about 3000 schools serving 150,000 students. While hated by white Southerners,

In several former Confederate states, Congress formally imposed military rule[35] to quash rampant racial violence and discrimination.[36] States like Louisiana, Arkansas, and Tennessee, for example, rejoined the Union after taking oaths of loyalty in the early 1860s,[37] but the ex-Confederates who controlled the state legislatures nonetheless turned a blind eye to the Ku Klux Klan's terrorism and implemented harsh laws, called Black Codes,[38] that legally subordinated Black residents.[39] Congress responded by adopting a strategy of radical reconstruction that dissolved state governments, imposed direct military rule, and encouraged voting by Black constituents.[40]

In some states, governors also implemented martial law and relied on military rule and intense policing to quash the Klan's violence. For example, in 1869, Tennessee's governor imposed martial law on nine counties ravaged by violence, a drastic move

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this activity eventually helped lay the groundwork for a public education system in the South." (citations omitted)).

35. *Id.* at 105.

36. *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 430–432, 439–440 (2002) (detailing Klan brutality); Felicetti & Luce, *supra* note 26, at 103–04 (describing discriminatory state laws, called Black Codes).

37. Louisiana, Arkansas, and Tennessee reentered the Union in 1864 under President Lincoln's Reconstruction Plan. *See* Felicetti & Luce, *supra* note 26, at 102 n.66. Under Lincoln's program, most Southerners could receive general amnesty after they "pledged loyalty to the Union and accepted the end of slavery." *Id.* Then, once ten percent of the voting population took the oath, the newly "[l]oyal voters could set up a state government" and rejoin the United States. *Id.*

38. *Id.* at 102–04 ("[T]hese state governments contained many familiar Confederate faces [and passed discriminatory Black Codes]. These laws, while varying from state to state, [included harsh measures like prohibiting] blacks from taking any jobs other than as plantation workers or domestic servants. Unemployed blacks could be arrested for vagrancy by local officials, fined by the courts, and then hired out to private employers to satisfy the fine. . . . Many states also established an 'apprentice' system for black minors that, in practice, provided free plantation labor indistinguishable from slavery. As one Southern Governor stated, the newly reconstructed governments were a white man's government and intended for white men only." (footnotes omitted)).

39. *See id.* at 104 (noting that the newly reconstructed governments failed to protect their Black residents from "widespread racial terrorist"). Even some Republican governors in the Deep South turned a blind eye to the Ku Klux Klan's terrorism for both practical and political reasons. *See* FONER, *supra* note 36, at 438 (explaining that Republican leaders "vacillated" when it came to enforcing laws that targeted the Klan out of concern that the ex-Confederate soldiers could overtake the state's militia should a conflict break out and because cracking down on the Klan might detract from Republican efforts to gain support from white voters).

40. The federal government divided a number of Southern states into military districts under the control of a military commander. Felicetti & Luce, *supra* note 26, at 105 n.84. In these districts, voters comprised of Black men and white men who had not served as Confederate soldiers elected a convention to draft a new state constitution. *Id.*

that succeeded in slowing Klan terrorism.[41] Governors in Arkansas and Texas acted similarly.[42] In North Carolina, the governor suspended Klan-controlled local courts, tried prisoners before a military commission, and "refused to honor a writ of habeas corpus issued by the state's chief justice."[43]

Needless to say, Southerners reacted negatively to the extreme military measures. The political fallout from the crackdowns ripped across North Carolina, Alabama, and Georgia during the 1870 elections as the Southern Democrats—aided by campaigns of violence—began to make political strides.[44]

Despite the violence, the Republicans who remained in control of Congress were politically split and reluctant to continue to intervene.[45] Only after prolonged Klan terrorism did the Republican Congress intervene by enacting the so-called Enforcement Acts, which sought to protect civil rights and suppress Klan violence.[46] In April 1871, Congress passed the third of the Enforcement Acts—called The Ku Klux Klan Act—which

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41. *See* FONER, *supra* note 36, at 439–40.

42. *Id.* at 440. In Arkansas, the Governor "placed ten counties under martial law at the end of 1868 and dispatched a state militia" comprised largely of newly freed Black men and sympathetic white southerners. *Id.* As a result, "scores . . . of suspected Klansmen" were arrested and "others fled the state" altogether. *Id.* In Texas, the governor instituted a "crack two-hundred-member State Police, 40 percent of whose members were black" and which led to over 6,000 arrests in two years, "effectively suppressing the Klan." *Id.*

43. *See id.* at 440–41.

44. *See id.* at 441, 453–54 (describing how the backlash led to sweeping victories of Southern Democrats in the state elections and the first impeachment of a governor in United States history for "subvert[ing] personal liberty"). Beyond the political backlash, the sheer violence in the Deep South was so pervasive that it effectively blocked pro-Reconstruction Republicans from campaigning or voting in large segments of Georgia. *Id.* at 441–42. The Southern Democrats also benefited from superior economic resources, a near-monopoly over the press, and the potent appeal of white supremacy. *Id.*; *see* Felicetti & Luce, *supra* note 26, at 106 ("Southern Democrats did everything possible to undermine rapidly the Republican mixed-race state governments. . . . Terrorist organizations such as the Ku Klux Klan, the Knights of the White Camellia, and the Knights of the Rising Sun served as the unofficial, and highly decentralized, Southern white army in the war against Northern rule. For this 'army,' no act of intimidation or violence was too vile, so long as it was directed against blacks and their white political allies." (footnotes omitted)).

45. *See id.* at 452–54.

46. *See id.* at 454–56. After the enactment of the postwar amendments to the Constitution, Congress passed a series of Enforcement Acts to enable federal enforcement of the amendments—particularly the Fifteenth Amendment right to vote—and to combat Klan terrorism. *Id.* at 454. The first act was a criminal code that prohibited race-based discrimination in voting and authorized the President to appoint election supervisors who could bring to federal courts cases of election fraud, bribery of voters, voter intimidation, and conspiracies to prevent citizens from exercising their constitutional rights. *Id.* The second act empowered enforcement in large cities. *Id.*

authorized the president to suspend habeas corpus and declare martial law to quash Klan violence.[47] President Grant employed this stopgap exactly once.[48]

Although extreme, the use of federal power worked. As historian Eric Foner summarized:

> By 1872, the federal government's evident willingness to bring its legal and coercive authority to bear had broken the Klan's back and produced a dramatic decline in violence throughout the South. So ended the Reconstruction career of the Ku Klux Klan, certainly one of the most ignoble chapters in all of American history. National power had achieved what most Southern governments had been unable, and Southern white public opinion unwilling, to accomplish: acquiescence in the rule of law.[49]

The military successfully quashed Klan violence, but in so doing created deep resentment among Southern states. Once the Southern Democrats gained political control, their latent resentment led to the passage of the Posse Comitatus Act.

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47. *See* FONER, *supra* note 36, at 454–55; Nicholas Mosvick, *Looking Back at the Ku Klux Klan Act*, NATIONAL CONSTITUTION CENTER (Apr. 20, 2021), https://constitutioncenter.org/interactive-constitution/blog/looking-back-at-the-ku-klux-klan-act [https://perma.cc/GLC2-C25Q]. The Ku Klux Klan Act of 1871, also known as the Civil Rights Act of 1871, was the third and final of the Enforcement Acts. Mosvick, *supra*. Notably, the 1871 Act authorized federal suits for civil rights violations, which remains today as Section 1983 of the U.S. Code. *Id.* The Ku Klux Klan Act dramatically expanded federal power, particularly in criminal law "as the federal government no longer depended upon local law enforcement officials to protect the freedmen. Instead, the full authority and resources of the national government could be used, for a short time, to protect civil and political rights." Felicetti & Luce, *supra* note 26, at 107 n.93; *see also* FONER, *supra* note 36, at 455. However, the Act pushed constitutional limits, FONER, *supra* note 36, at 455, and its constitutionality has been questioned as "exceed[ing] the constitutional limits on the powers of the national government imposed by the Protection and Calling Forth Clauses." Banks, *supra* note 22, at 67. Many Black congressman at the time "expressed impatience with 'legal technicalities,' and evinced little interest in abstract debates about the Constitution." *Id.* As one Congressman declared: "I desire that so broad and liberal a construction be placed upon its provisions . . . as will insure the protection to the humblest citizen." *Id.* at 456.

48. *See* FONER, *supra* note 36, at 457–58. In October 1871, President Grant declared a "condition of lawlessness" in nine counties in South Carolina. *Id.* at 457. He suspended the writ of habeas corpus and sent in federal troops that made "hundreds of arrests." *Id.* at 457–58; *see also* Felicetti & Luce, *supra* note 26, at 107 ("President Grant used the relatively few federal troops remaining in South Carolina and other states to make arrests and enforce the anti-Klan law.").

49. FONER, *supra* note 36, at 458–59.

B. ANTI-MILITARY SENTIMENT AS A BACKLASH TO FORCED RECONSTRUCTION

The use of military force to suppress the Klan came at a price. By the end of President Grant's term, the Democrats drew on the "excesses of military Reconstruction" to rally support for an end to occupation, charging "that federal troops were intimidating electors in the South, seizing political prisoners, interfering with civilian governments in the states, and even going so far as to remove and install state legislatures."[50] Some Democrats considered the military supervision of polls to be a "tyrannical and unconstitutional use of the Army to protect and keep in power unelected tyrants."[51] In the end, the results of the 1876 presidential election were sufficiently contested, with claims that voter intimidation by the federal troops skewed the election for the Republicans.[52] Consequently, a deal was struck: federal troops would withdraw from the South in exchange for Republican candidate Rutherford B. Hayes assuming the presidency.[53] Without the troops, "the traditional white ruling class resumed power. In the words of W.E.B. Du Bois, 'The slave went free; stood a brief moment in the sun; then moved back again toward slavery.'"[54]

The 1878 election constituted the "peak of Southern resentment over military intervention to protect black voting rights" in Southern states.[55] When Democrats finally gained Congressional control, they quickly passed the Posse Comitatus Act in order to

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50. *See* Engdahl, *supra* note 31, at 597. Of course, Republicans argued that the use of the Army was lawful and necessary to stop Klan intimidation. *See id.* at 598–99; Felicetti & Luce, *supra* note 26, at 110. The Republicans' concern with Klan intimidation was not unfounded. In South Carolina, for example, Democrats' "Plan of Campaign" urged supporters to "control the vote of at least one Negro by intimidation, purchase, keeping him . . . away or as each individual may determine." Felicetti & Luce, *supra* note 26, at 108–09.

51. Felicetti & Luce, *supra* note 26, at 110.

52. *See* Engdahl, *supra* note 31, at 597–98 (recounting how Democrats "charged . . . that had it not been for intimidation of the voters by the federal troops, the vote in may districts in the South would have differed enough to have secured the Presidency for Tilden and the Democrats").

53. *See* Felicetti & Luce, *supra* note 26, at 109 & n.105 ("In a nutshell, Democrats, whose candidate had won the popular vote and perhaps the electoral vote, dropped opposition to the selection of Republican Rutherford B. Hayes in exchange for the withdrawal of most federal troops from the South, a non-interference policy, and certain other concessions.").

54. *See id.* at 109 (footnote omitted).

55. *Id.* at 109; *see also* Engdahl, *supra* note 31, at 597–98.

ban—indeed, criminalize—military domestic law enforcement.[56] One Democratic Congressman who sponsored the Act "denounced regular troops as bloodthirsty brutes."[57] Similar comments from other supporters of the Posse Comitatus Act make clear the "bill's reflection of lingering Reconstruction bitterness."[58]

The principle behind the Posse Comitatus Act—that civilian, rather than military institutions, must conduct domestic law enforcement—remains a touchstone democratic value. But this normative goal cannot eclipse the historical fact that the federal government in one era chose to protect the rights of its Black citizens, and in the next "exercised its power over military force to ensure white domination in the South."[59] In that regard, the Posse Comitatus Act is far from a neutral statute. Instead, history reveals that Congress specifically enacted the Posse Comitatus Act "to ensure black subordination in the post-Civil War South by blocking state protection of black rights and black lives,"[60] a history that present day reforms to the contemporary legal landscape must reckon with.

II. THE LEGAL LANDSCAPE GOVERNING DOMESTIC MILITARY DEPLOYMENT

The Posse Comitatus Act's ban on domestic military law enforcement sounds sweeping, but the prohibition is, in fact, quite circumscribed.[61] First, the Act does not apply "in cases and under circumstances expressly authorized by the Constitution or [an] Act

56. *See* Engdahl, *supra* note 31, at 597–98.

57. Felicetti & Luce, *supra* note 26, at 111.

58. *Id.* at 110–12 ("[A]ccording to one member, Congressman Atkins, military supervision of polling places was a tyrannical and unconstitutional use of the Army to protect and keep in power unelected tyrants.").

59. Gamal, *supra* note 17, at 984.

60. *Id.*; *see also* Banks, *supra* note 22, at 67 ("[T]he Posse Comitatus Act was as much an effort to protect white supremacist groups in the South and to curb what was perceived by many as the Army's affiliation with the rise of black power as it was to underscore our nation's baseline federalism and civilian control of the military." (footnote omitted)).

61. Although the Posse Comitatus Act has existed since 1878, the Supreme Court has "only [explicitly] mentioned the Posse Comitatus Act in a single case, *Laird v. Tatum*, [which] involved a challenge to the Army's domestic surveillance program." Rizer, *supra* note 26, at 479 (footnotes omitted). However, Justice Jackson in his famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* references the Act, noting that "Congress has forbidden [the President] to use the army for the purpose of executing general laws except when expressly authorized by the Constitution or by Act of Congress." 343 U.S. 579, 644–45 (1952).

of Congress."[62] Second, the Act only covers certain parts of the military, namely the Army and the Air Force.[63] Regardless of the Act's controversial history, these broad exceptions render the Posse Comitatus Act's prohibition on domestic military intervention in civilian affairs ineffective.[64] As this section explains, the existing constitutional and statutory legal framework for domestic military law enforcement—in particular, the Insurrection Act—confers sweeping authority on the president and state governors to deploy the military at home, notwithstanding the Posse Comitatus Act's ostensible prohibition on law enforcement by the military.

A. COMMANDER IN CHIEF OF THE COUNTRY? THE PRESIDENT'S CONSTITUTIONAL DOMESTIC MILITARY AUTHORITY

The Constitution empowers the president to control the military. Article II, Section 2 provides that the president is "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."[65] As Professor Steven Vladeck

62. 18 U.S.C. § 1385. Some argue that "the Constitution contains no provision expressly authorizing the use of the military to execute the law" and that the Posse Comitatus Act's reference to constitutional exceptions was included "as part of a face-saving compromise that consequently should be ignored" when analyzing the Act. CONG. RSCH. SERV., *supra* note 22, at 28; *see also* Joseph Nunn, *The Posse Comitatus Act Explained*, BRENNAN CTR. FOR JUST. (Oct. 14, 2021) https://www.brennancenter.org/our-work/research-reports/posse-comitatus-act-explained [https://perma.cc/V2RH-ASD5]. According to the Congressional Research Service, "[w]hen the phrase was added originally, those who opposed the Posse Comitatus Act believed that the Constitution vested implied and/or inherent powers upon the President to use the Armed Forces to execute the laws; those who urged its passage believed the President possessed no such powers. As initially passed by the House, the bill contained no constitutional exception. The Senate version contained an exception for instances authorized by the Constitution whether expressed or otherwise. The managers of each house described the compromise reached at conference and subsequently enacted as upholding the position of their respective bodies on the issue. While the House manager believed that retention of the word 'expressly' was important to prevent the use of the Army wherever implied authority could be inferred, the Senate manager suggested that the term could safely be kept in without affecting the President's ability to act as required by the Constitution." CONG. RSCH. SERV., *supra* note 22, at 28–29 (footnotes omitted).

63. The Act only prohibits the willful use of "any part of the Army or the Air Force" when acting as a posse comitatus or otherwise to execute the laws. 18 U.S.C. § 1385.

64. *See* Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH U. J.L. & POL'Y 99, 116–34 (2003) (discussing the erosion of the Posse Comitatus Act through the broad exceptions to the Act).

65. U.S. CONST. art. II, § 2; *but see* Steven Vladeck, *Why Were Out-of-State National Guard Units in Washington, D.C.? The Justice Department's Troubling Explanation*, LAWFARE (June 9, 2020), https://www.lawfareblog.com/why-were-out-state-national-guard-

writes, "[a]t the heart of virtually every contemporary debate over the scope of domestic presidential power during times of crisis is the Constitution's Commander in Chief Clause."[66] The president must also "take Care that the Laws be faithfully executed."[67] Read together, the role of the president as Commander in Chief combined with the president's duty to execute laws could be read to create an inherent authority for the president to oversee military operations on domestic soil. Under this expansive theory of presidential power, Congress has a limited ability, if any, to restrict the president's power to deploy the armed forces in civilian affairs and consequently statutory abridgements, like the Posse Comitatus Act, are unconstitutional.[68]

The Supreme Court has suggested, however, that the Commander in Chief power is not absolute. While the Court has neither expressly delineated the president's domestic military power nor ruled on the Posse Comitatus Act's constitutionality,[69] the Court has provided guideposts. In *Youngstown Sheet & Tube*

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units-washington-dc-justice-departments-troubling-explanation [https://perma.cc/G9W9-QGWN] [hereinafter Vladeck, *National Guard Units in Washington*]("The only exception to this structure [of presidential control only when state National Guard members are called into actual service of the United States] is the D.C. National Guard. Although four of the six federal territories have National Guards (all but American Samoa and the Commonwealth of the Northern Mariana Islands), the National Guards for Guam, Puerto Rico and the U.S. Virgin Islands are commanded by the territorial governors. D.C.'s Guard, in contrast, is always at the command and control of the president of the United States—at least in part because the Guard predates the creation of the D.C. local government in the early 1970s. Thus, it [takes] no special authority for the president to activate the D.C. National Guard in response to [ ] disorder in Washington. . . . The D.C. National Guard, though, is quite small.").

66. Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091, 1091 (2008) [herein after Vladeck, *The Calling Forth Clause*].

67. U.S. CONST. art. II, § 3.

68. CONG. RSCH. SERV., *supra* note 22, at 27 ("Some commentators feel that this implied or incidental constitutional authority to use the Armed Forces . . . is immune from congressional direction or limitation.").

69. The Supreme Court has only explicitly addressed the Posse Comitatus Act by name in a single case. Rizer, *supra* note 26, at 479. Lower courts have generally not addressed the question either. *See* CONG. RSCH. SERV., *supra* note 22, at 25 (explaining that the courts have generally avoided addressing the "possible constitutional underpinnings" of the Posse Comitatus Act); *see e.g.*, United States v. Walden, 490 F.2d 372, 376 (4th Cir. 1974) ("[W]e do not find it necessary to interpret relatively unexplored sections of the Constitution in order to determine whether there might be constitutional objection to the use of the military to enforce civilian laws."). However, Justice Jackson seems to have alluded to the Posse Comitatus Act in his famous *Youngstown Sheet & Tube* concurrence. *See* Youngstown, 343 U.S. at 644–45, 645 n.13 (Jackson, J., concurring) ("Congress has forbidden [the president] to use the army for the purpose of executing general laws except when expressly authorized by the Constitution or by Act of Congress.").

Co. v. Sawyer, for example, Justice Douglas' concurring opinion cautioned that while "Article II, Section 2 makes the Chief Executive the Commander in Chief of the Army and Navy[,] our history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs."[70]

Consistent with this principle, Justice Jackson defended Congress' power to curb the president's domestic military power in his own concurrence.[71] He emphasized the Calling Forth Clause in particular, which authorizes *Congress* "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[72] That the founders granted Congress—and not the president—power over the militia "at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores," Justice Jackson maintained, "the Constitution's policy that *Congress*, not the Executive, should control utilization of the war power as an instrument of domestic policy."[73] Congress' legislation authorizing the president to use the Army in certain domestic situations—to enforce civil rights, as in the Insurrection Act—and forbidding it in others, like "executing general laws," are therefore legitimate exercises of congressional power.[74]

Justice Jackson also advanced the theory that the president's emergency military powers may only occupy the "zone of twilight"

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70. *Youngstown*, 343 U.S. at 632 (Douglas, J., concurring). *Youngstown* held that the Take Care clause and the Commander in Chief power did not provide constitutional authority for the president to direct the Secretary of Commerce to seize and operate the country's steel mills. *Id.* at 583, 589 (majority opinion). Scholars have even cited the broad principle against domestic military intervention, similar to the one expressed by Justice Douglas, to argue for a general right to civilian law enforcement. *See, e.g.*, Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL'Y REV. 383, 389 (2003).

71. *Youngstown*, 343 U.S. at 643–45 (Jackson, J., concurring).

72. U.S. CONST. art. I, § 8; *see Youngstown*, 343 U.S. at 644–45 (Jackson, J., concurring).

73. *Youngstown*, 343 U.S. at 644–45 (Jackson, J., concurring) (emphasis added).

74. *Id.* ("Congress, fulfilling that function [of domestic policy creation], has authorized the President to use the army to enforce certain civil rights. On the other hand, Congress has forbidden him to use the army for the purpose of executing general laws except when expressly authorized by the Constitution or by Act of Congress."). This view has been supported by scholars, too. *See* Vladeck, *The Calling Forth Clause*, *supra* note 66, at 1105–06 (explaining that "[t]here can be no question" that the Calling Forth Clause permits Congress "the power to substantively regulate domestic use of the military."); Banks, *supra* note 22, at 40 ("[T]he [Calling Forth C]lause confirms that it is Congress, not the President, that authorizes the deployment of the military in responding to a domestic crisis.").

in which the president may act if Congress has not.[75] In other words, presidential power is "at its lowest ebb" when Congress has expressly or impliedly legislated on the matter.[76] The Posse Comitatus Act and the Insurrection Act both constitute legislative limits on presidential domestic military authority and, consequently, the president may not exceed their limits.[77]

The president also arguably derives some authority from the Guarantee Clause of Article IV, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature . . . against domestic Violence."[78] However, the Supreme Court has emphasized that "the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress."[79] The Court's emphasis on the legislative power indicates that both Congress and state legislatures—rather than the president—are primarily responsible for providing domestic tranquility.[80] In the context of the broader Constitution, then, the Commander in Chief power over the armed forces does not make the president Commander in Chief over the entire country.[81]

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75. *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring). Even in the absence of Congressional action, the president's constitutional powers may not be sufficient to authorize military action. *See* CONG. RSCH. SERV., *supra* note 22, at 27 ("[T]he President may not always use the Armed Forces to meet a domestic emergency when Congress has previously resisted an invitation to sanction their employment. [Additionally], even when Congress has disclaimed any intent to limit the exercise of the President's constitutional powers, the President's implied and incidental powers will not always trump conflicting, constitutionally grounded claims." (footnotes omitted)).

76. *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

77. *See* Vladeck, *The Calling Forth Clause*, *supra* note 66, at 1105–06 ("[T]he Posse Comitatus Act arguably places the President's power at its "lowest ebb" when he acts in excess of [the statute's limitation]."). *Id.* (citations omitted).

78. *Id.* art. IV, § 4.

79. Texas v. White, 74 U.S. 700, 730 (1868), *overruled on other grounds by* Morgan v. United States, 113 U.S. 476 (1885); *see also* CONG. RSCH. SERV., *supra* note 22, at 27 ("The [Supreme] Court has pointed out that the President's power under the Guarantee Clause . . . is only provisionally effective until such time as Congress acts.").

80. Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez*, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 5 (1997) (emphasis added).

81. *See Youngstown*, 343 U.S. at 643–44 (Jackson, J., concurring) ("[T]he Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute him also Commander-in-Chief of the country.").

B. STATUTORY AUTHORITY: THE INSURRECTION ACT

Notwithstanding the Posse Comitatus Act's prohibition on domestic military law enforcement, the Insurrection Act is one exception that provides sweeping authority for the president to order domestic military deployment during periods of unrest.[82] The Insurrection Act, which dates back to 1807, details three circumstances in which the president may deploy the military to handle specified exigent domestic situations, namely, *state insurrections*, *interference with federal law enforcement*, and *enforcement of constitutional rights*.[83] Upon invoking any section of the Insurrection Act, the president must immediately issue a proclamation that orders the "insurgents to disperse and retire peaceably to their abodes within a limited time."[84]

If one of the three conditions apply, the Insurrection Act unlocks the entire armed forces—including the Army, Navy, Air

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82. *See* Felicetti & Luce, *supra* note 26, at 109–12 (detailing how proponents of the Posse Comitatus Act sought to reign in the existing statutes, including the Insurrection Act). Other exceptions to the Posse Comitatus Act are outside the scope of this Note. *See* Rizer, *supra* note 26, at 482 n.104 ("There are many minor statutory exceptions to the Posse Comitatus Act."). For a list of statutory exceptions, see CONG. RSCH. SERV., *supra* note 22, at 31 n.224.

83. 10 U.S.C. §§ 251–253 Although the Insurrection Act was originally enacted in 1807, it can be directly traced to the 1792 Calling Forth Act. *See* Stephen Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 159–67 (2004) [herein after Vladeck, *Emergency Powers*] (tracing the history from the 1792 Calling Forth Act to the modern Insurrection Act). The 1792 Act was the first law in which Congress authorized the President to control state *militia* in certain domestic affairs. *See* Banks, *supra* note 22, at 56. The Calling Forth Act spurred major debate over when and how the President could control the militia, and Congress ultimately curbed presidential discretion by requiring judicial approval before invoking the Act. *See* Vladeck, *Emergency Power*, at 159–60 (2004). The 1792 Act was also only a temporary delegatory of power that expired after three years. *Id.* When Congress reenacted the Calling Forth Act in 1792, in what would ultimately lead to the 1807 Insurrection Act, it enhanced the President's authority to control the militia. As Professor Steven Vladeck summarizes:

> [The 1792 Act] envisioned a multistage process . . . in which the President first had to receive judicial acknowledgment of a crisis requiring the militia, then could issue a proclamation ordering the insurgents to disperse, and then could call out the militia only after such a proclamation had gone unheeded . . . [By contrast, the 1792 Act] authorized the President to act decisively, expeditiously, and, of most significance, unilaterally [by removing] the requirement of an antecedent court order and the bar on the use of out-of state militiamen and changing the timing of the dispersal proclamation requirement.

Id. at 163. Later, Congress enacted the equal protection provision in 1871 to help combat Klan violence. *See* Banks, *supra* note 22, at 60–64; FONER, *supra* note 36, at 454–55.

84. 10 U.S.C. § 254 ("Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.").

Force, Marine Corps, Space Force, and Coast Guard[85]—as well as troops from state militia.[86] The *militia* is an outdated term and in practice refers to the modern National Guard.[87] Accordingly, to understand how the Insurrection Act operates today, one must understand how the National Guard functions.

The National Guard is a hybrid military organization with both state and federal functions. All members of *state* National Guard units (e.g., the Michigan National Guard) simultaneously enlist in the National Guard of the United States, and, although the federal military primarily funds and trains National Guardsmen, members retain their state status unless and until called into active federal duty by the president.[88] The status of the Guard is critical because it determines whether state or federal law governs its operation and whether the governor or the president commands the troops.[89]

In practice, National Guardsmen wear three different "hats" depending on their status: State Active Duty, Title 32 status, or Title 10 status.[90] When operating under State Active Duty Status, state law governs as the Guard generally facilitate state functions. Second, when under Title 32 status, the troops support *federal* missions, but remain under *state* command and control.[91] Finally,

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85. 10 U.S.C. § 101(a)(4).

86. Prior to the 1807 Insurrection Act, the President only had authority to deploy the militia. *See* Banks, *supra* note 22, at 60. However, the Insurrection Act expanded authority to the federal armed forces. *Id.*; *See* Vladeck, *Emergency Power*, *supra* note 83 at 166–67 (describing how the 1807 Insurrection Act and subsequent amendments expanded presidential power in domestic affairs).

87. For an overview of the history of how the National Guard originated from organized local militias, see Kevin Winnie, Note, *The National Guard in Title 32 Status: How the Executive's Power Becomes a City's Crisis*, 48 FORDHAM URB. L.J. 1287, 1295–1298 (2021).

88. *See* Canestaro, *supra* note 64, at 125–26 (footnotes omitted); *see also* Perpich v. Dep't of Def., 496 U.S. 334, 345 (explaining that "[s]ince 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States. In the latter capacity they became a part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they retained their status as members of a separate State Guard unit").

89. Canestaro, *supra* note 64, at 125–26.

90. *See* Winnie, *supra* note 87, at 1298; *Perpich*, 496 U.S. at 348 ("[T]he members of the State Guard unit . . . [all] keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time."); Vladeck, *National Guard Units in Washington*, *supra* note 72 (explaining the three different "hats" worn by the National Guard, including State Active Duty (SAD) status, Title 32 status, and Title 10 status for National Guard troops).

91. Attorney General William Barr controversially relied on section § 502(f) of Title 32, which principally deals with training, to summon National Guard troops from other states to D.C. during the Summer 2020 protests. *See* Vladeck, *National Guard Units in Washington*, *supra* note 72 ("One of two things is true: Either § 502(f) does not authorize

under Title 10 status, the Guard is "federalized" by the President. When federalized, federal law governs the troops—subjecting the Guardsmen to the Posse Comitatus Act's ban on enforcing the law, for example—and the president rather than a governor commands the operation.[92] In effect, the Guard troops become members of the federal military: they are no longer affiliated with the state and are not distinct from federal troops.[93] The D.C. National Guard is the only exception to this general structure because the president always commands the D.C. unit.[94]

When the president invokes one or more of the Insurrection Act's three provisions—to quash state insurrections, to handle unrest that interferes with federal law enforcement, or to enforce equal protection—the president gains sweeping authority over the entire United States armed forces and National Guard. Under the first provision, Section 251, the president can help quell insurrections in states upon request. Specifically, the provision authorizes military suppression of "insurrection in any State against its government" following a request from the state legislature or governor.[95] To suppress an insurrection, the president may "call into Federal service such of the militia of the other States, in the number requested by that State, and *use such of the armed forces*, as he considers necessary."[96] Section 251 only

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the use of out-of-state National Guard troops in the manner in which they were deployed in Washington last week, or it does—and is therefore a stunningly broad authorization for the president to use the military at any time and for any reason, including as a backdoor around the Posse Comitatus Act.").

92. *See* Vladeck, *National Guard Units in Washington*, *supra* note 72 (explaining that "when National Guard troops are federalized, the Posse Comitatus Act does apply"); Winnie, *supra* note 94, at 1290 ("[T]he National Guard is innately a state entity under a state governor's control unless federalized by the executive branch.").

93. *See* Vladeck, *National Guard Units in Washington*, *supra* note 65 ("In essence, National Guard troops become part of the federal military until and unless they are returned to state status.").

94. *Id.* ("The only exception to this structure [of presidential control only when state National Guard members are called into actual service of the United States] is the D.C. National Guard. . . . D.C.'s Guard . . . is always at the command and control of the president of the United States—at least in part because the Guard predates the creation of the D.C. local government in the early 1970s. Thus, it [takes] no special authority for the president to activate the D.C. National Guard in response to [ ] disorder in Washington. . . . The D.C. National Guard, though, is quite small.").

95. 10 U.S.C. § 251 ("Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.").

96. *Id.* (emphasis added).

applies in limited circumstances. First, this section only authorizes force in the narrow context of suppressing *insurrections* against state governments; the provision does not authorize force to manage protests or other less extreme instances of civil unrest. Second, the provision provides a backstop to unilateral presidential action because the state itself must request assistance. When invoked, however, the provision authorizes a substantial military force to handle the insurrection: not only can the president federalize state National Guards, but also any number of armed forces that the president deems necessary. Accordingly, although the provision applies only narrowly to select situations, Section 251 nonetheless authorizes sweeping military power.[97]

The second provision, Section 252, allows military intervention when certain civilian conduct interferes with federal law. The provision states:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service *such of the militia of any State, and use such of the armed forces*, as he considers necessary to *enforce those laws* or to suppress the rebellion.[98]

Unlike the state insurrection provision, this section authorizes the president to deploy the federalized National Guard and armed forces in an exceedingly broad number of circumstances: whenever an obstruction, combination, or assemblage, or rebellion against the United States authority interferes with federal law enforcement.[99] This section also grants unilateral discretion to the president to decide *when* the unrest sufficiently interferes with federal law enforcement.[100]

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97. For a summary of historical requests and invocations of this Act, see CONG. RSCH. SERV., *supra* note 22, at 34–38.

98. 10 U.S.C. § 252 (emphasis added). For a summary of this section's invocation, see CONG. RSCH. SERV., *supra* note 22, at 38–41.

99. 10 U.S.C. § 252.

100. *See* Vladeck, *Emergency Power*, *supra* note 83, at 166–67 (describing the effect of Congress' 1861 Amendment to the Insurrection Act, which among other changes "expressly

Congress enacted the final provision of the Insurrection Act, Section 253, in 1871 as part of the Ku Klux Klan Act.[101] This section, which was added primarily to enforce the Fourteenth Amendment's equal protection guarantee, authorizes the federal government to deploy the military to enforce constitutional rights.[102] The section offers the greatest source of statutory power for the president to deploy military force for domestic policing, because the president may activate troops without "the request or even permission of the governor of the affected state."[103] Specifically, Section 253 authorizes the president to unilaterally—without state request—send in the "the militia or the armed forces" or use "any other means . . . necessary" to suppress "insurrection, domestic violence, unlawful combination, or conspiracy" under two circumstances: first, if the unrest hinders the execution of state or federal laws in a way that deprives individuals of a Constitutional right, and the state is unable or unwilling to protect that right; and, second, if the unrest "opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws."[104]

III. THE NEED TO REDEFINE THE POSSE COMITATUS AND INSURRECTION ACTS

Civil rights advocates concerned about abusive policing and state violence as a mechanism to suppress marginalized groups ought not overlook the military as a threat to racial justice and

committed to the President's sole discretion the determination it was 'impracticable' to execute the laws").

101. *See* Banks, *supra* note 22, at 63–64; FONER, *supra* note 36, at 454–55.

102. 10 U.S.C. § 253. The full provision provides:

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

Id.

103. *See* CONG. RSCH. SERV., *supra* note 22, at 42.

104. 10 U.S.C. § 253.

racial freedom. This Part draws on the critical race theory concepts of antisubordination and racial citizenship to argue that the use of military force to suppress social protest has reproduced racial hierarchy by physically and symbolically suppressing the valid exercise of citizenship, speech, and equal rights by historically disadvantaged groups.[105]

This Part begins with a theoretical overview of critical race theory concepts that inform how to conceptualize race and racial justice. This Part then surveys how presidents and governors have used the National Guard to suppress racialized protests, including during the 2020 Black Lives Matter protests. This survey illustrates two problems with the current legal landscape governing domestic military deployment. First, the Posse Comitatus Act does not apply to the National Guard when under state control. Consequently, governors can instantaneously expand their local police forces by calling in the Guard to suppress protest under State Active Duty status. Presidents, too, can use the National Guard to complete federal missions under Title 32 and, because the state technically controls the Guard, the troops are free to enforce domestic law under the Posse Comitatus Act. Second, because the Insurrection Act fails to define operative terms like insurrection and unlawful obstruction, presidents and governors have exceedingly broad authority to deploy troops during protests. Finally, this Part concludes by recounting how, despite the recent trend of protest suppression, the military can be used as a tool to protect constitutional rights and equal citizenship, as was the case during school integration in Little Rock, Arkansas.

A. THEORETICAL UNDERPINNINGS OF RACE AND RACIAL JUSTICE

Although the idea of *race* is often conceived as a static and neutral property, critical race theorists like Professor Kendall Thomas contend that race can be thought of as a verb, that people "are raced" by social and political practices that in turn "construct and control racial subjectivities."[106] Professors Michael Omi and Howard Winant offer a similarly dynamic conception of race, defining *racial formation* as the process of race-making, the

105. *See* Gamal, *supra* note 17, at 988.

106. *See* Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 V.A. L. REV, 1805, 1806 (1993).

"sociohistoric process by which racial identities are created, lived out, transformed, and destroyed."[107]

Bearing in mind that policy and practice can *construct* social ideas around race, critical race theory offers frameworks to conceptualize how the law can help *dismantle* racial hierarchy. Some scholars, for example, argue that the state has an affirmative obligation to dismantle the subordinate status of historically oppressed groups and, conversely, to avoid policies that enforce the inferior social statuses of disadvantaged communities. This approach is called *antisubordination* theory.[108] Another approach argues for a political understanding of racial justice that seeks to advance what he calls *racial citizenship*. Professor Thomas explains: "The central task of the political conception of racial justice is not to determine how [a policy] regime affects the racial reputation and standing of Black 'communities'. Rather, it seeks to assess the impact of these laws on the political power of Black civic publics."[109] Factors include the extent to which a law or policy increases or diminishes access to "the means and modes of collective political action," whether it "enhance[s] or undermine[s] the institutions and practices through which Black political identity and opinion are shaped and mobilized," and how it "burdens or benefits" the "social and cultural conditions" of Black citizenship.[110] The following section explains how the existing

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107. Michael Omi & Howard Winant, RACIAL FORMATION IN THE UNITED STATES 109 (2015).

108. *See* Jack M. Balkin & Reva B. Siegel, *American Civil Rights Tradition: Anticlassification or Antisubordination*, 58 U. MIAMI L. REV. 9, 10–11 (2003). Although antisubordiation theory originated as a theory of constitutional interpretation, Professor Jocelyn Simonson efficiently summarizes how the framework can be deployed outside traditional constitutional analysis:

> The legal theory of antisubordination was generated amidst debates over the interpretation of the Equal Protection Clause in the 1970s and 1980s. . . . [T]he underlying normative thrust of antisubordination theory is that laws should not "perpetuate . . . the subordinate stature of a specially disadvantaged group." Antisubordination theory therefore rests on the conviction that "it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups." In the context of constitutional jurisprudence, this means interpreting the Constitution in the context of an idea of equality that centers the need to dismantle unequal status relations, and especially to reduce and eliminate racial subordination—whether that subordination is deliberate or not.

Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 838–39 (2021) (internal footnotes and brackets omitted); *see generally* Kendall Thomas, *Racial Justice: Moral or Political?*, 17 NAT'L BLACK L.J. 222, 223–227 (2002) (summarizing the debate between antisubordination and anticlassification theory in the context of racial justice).

109. Thomas, *supra* note 108, at 241.

110. *Id.*

legal landscape governing domestic military deployment runs afoul of both antisubordination and racial citizenship objectives.

B. A SURVEY OF MILITARY FORCE AS A TOOL TO SUPPRESS RACIAL PROTEST

A survey of domestic military deployment historically as well as during the Summer 2020 Black Lives Matter protests and January 6 Insurrection reveals that current policy and practices reproduce racial hierarchy by physically and symbolically suppressing the valid exercise of citizenship by racial justice protestors.[111] The Insurrection Act's failure to narrowly define operative terms also provides near unbridled authority for presidents to respond to protest or assemblages with force. The Posse Comitatus Act only applies when troops are under presidential control, consequently, governors can and have freely deployed their Guards to effectively expand their local police forces to enforce domestic law and generally suppress racialized protest. Unlike how the late nineteenth century government used the military to *enable* Black communities to exercise their citizenship rights, the trend has largely reversed.[112]

The Insurrection Act was invoked on a number of occasions during and in the aftermath of the civil rights movement.[113] In 1968, following the assassination of Martin Luther King, Jr., for example, President Lyndon Johnson authorized military deployment on three occasions after the mayor of Washington, D.C., and the governors of Illinois and Maryland requested reinforcement during demonstrations. President Johnson cited the entire Title 10 chapter on insurrections—rather than specify the relevant provision—and deployed over 23,008 regular Army

111. This is not room within these pages to fully document every instance in which the president invoked the Insurrection Act or states deployed their National Guard. Rather, this Note highlights key instances in which the federal and state governments deployed troops to respond to racialized protest. For a comprehensive review of domestic military deployment in the latter half of the twentieth century, see SCHEIPS, *supra* note 26.

112. *See* FONER, *supra* note 36, at 458 (explaining that the Enforcement Acts effectively restored order after barrages of Klan terrorism and "enabl[ed] blacks to exercise their right as citizens").

113. *See generally* SCHEIPS, *supra* note 29 (chronicling the details of federal military intervention throughout the civil rights era and its aftermath, including during turmoil related to school integration, freedom rides, the assignation of Martin Luther King, and race riots).

troops and 15,586 federalized Guardsmen to handle the demonstrations.[114]

Not all deployments during this era followed monumental events, like Martin Luther King's assassination, however. Only one year earlier, in 1967, for example, Michigan Governor George Romney called in the state National Guard and requested backup from the federal government during a "riot" that began after police raided and arrested eighty-two patrons from a Black club in Detroit.[115] The mass arrest sparked outrage, and a protest of 10,000 formed by noon of the following day.[116] When violence erupted, the Governor stationed 7,000 state Guardsmen armed with rifles, machine guns, and tanks throughout the city, ordering them to "use whatever force was necessary" to ensure that the laws of the state were obeyed.[117] Shortly thereafter, Governor Romney called for federal help. To do so legally, however, the state Attorney General explicitly requested that Romney call the unrest an "insurrection" in order to trigger Section 251, which only permits the state to request federal troops to suppress "insurrection" against the government.[118] The Governor requested the troops, even though no political insurrection existed and state authorities were likely equipped to handle the crowds.[119]

Another notable deployment occurred during the so-called Rodney King riots. In 1992, after a jury acquitted the police officers who beat Black motorist Rodney King on camera, President George H.W. Bush invoked the Insurrection Act. Although Bush cited the governor's request for help suppressing the riots, Section 251 only permits state requests against *insurrection*; consequently, Bush also cited interference with the

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114. CONG. RSCH. SERV., *supra* note 22, at 38 & n.271.

115. *See id.* at 177–80 (2012).

116. *Id.* at 178.

117. *Id.* at 178–80.

118. *Id.* at 182; 10 U.S.C. § 251 ("Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.").

119. *See* SCHEIPS, *supra* note 26, at 182 (explaining that Governor Romney maintained in conversations that "he could not say positively that the state with all its resources would be unable to control the situation"); Proclamation No. 3795, 32 Fed. Reg. 143 (July 24, 1967) (implicitly citing 10 U.S.C. § 251's authority to respond to the governor's request and inability to enforce federal law); Exec. Ord. No. 11364, 32 Fed, Reg. 10907 (July 24, 1967), https://www.presidency.ucsb.edu/documents/executive-order-11364-providing-for-the-restoration-law-and-order-the-state-michigan [https://perma.cc/9NAH-GK3N].

execution of federal law to lawfully deploy troops to Los Angeles.[120] The president dispatched over 13,000 Army troops and federalized 9,000 California National Guard personnel to join local authorities. As in Detroit, "[t]here was no showing that the state and local forces were unable or unwilling to enforce the laws."[121] In each instance, by heavily deploying troops in near one-to-one ratios with protestors and symbolically labeling the protestors insurrectionists, the government communicated that the protesters warranted suppression rather than protection by the state.

Although decades have passed, little has changed by way of response to mass demonstrations sparked by racial injustice. The Summer 2020 protests, discussed in detail in the next section, is the latest example. Like the Rodney King riots, the protests over George Floyd's murder and the pattern of police killings of unarmed Black people were met with a heavy military response. Governors across the country relied on their National Guards to quell the protests, actions that evades any regulation under the federal Posse Comitatus Act because the state Guard operates under state law.[122] The Trump administration also summoned National Guard troops from several states to Washington, D.C. under an obscure provision of Title 32.[123] The federal government also threatened to invoke the Insurrection Act to suppress the protests. President Trump's now-infamous speech in which he threatened to deploy the armed forces to quash unrest in the states that failed to "stop the rioting and looting" was rife with racial inuendo.[124] Advisors ultimately persuaded the President from invoking the Insurrection Act,[125] but the Pentagon nonetheless

120. *See* Proclamation No. 6427, 57 Fed. Reg. 19, 359 (May 1, 1992); Exec. Ord. No. 12804, 57 Fed. Reg. 19361 (May 1, 1992); *see also* Thaddeus Hoffmeister, *An Insurrection Act for the Twenty-First Century*, 39 STETSON L. REV. 861, 890 (2010); Banks, *supra* note 22, at 70; CONG. RSCH. SERV., *supra* note 22, at 38.

121. *Id.*; *see also* SCHEIPS, *supra* note 26, at 182.

122. *See* Altman, *supra* note 10. As explained above, federal law generally only applies to the National Guard when "federalized" by the United States president. *See supra* Part II.B.

123. *See* Vladeck, *National Guard Units in Washington*, *supra* note 65.

124. Bennett, *supra* note 1.

125. Prior to the speech, in tense Oval Office meetings, the Chairman of the Joint Chiefs of Staff Mark Milley and Attorney General William P. Barr reportedly argued against invoking the Act, in part because the local authorities were equipped to handle the unrest. *See* LEONNIG & RUCKER, *supra* note 3, at 147–50. Milley reportedly informed President Trump that "there were only two cities with violent protests so large that local authorities might have needed reinforcements. Otherwise, he said, 'there was some vandalism and

ordered D.C. National Guard helicopters to hover over protesters in Washington, D.C., that night[126] in a move that did not require the President to invoke the Insurrection Act because the president always commands the D.C. National Guard.[127]

C. THE PROBLEM OF SWEEPING AUTHORITY

The militarized response to racialized protest has two effects. First, it reproduces racial hierarchy by delegitimizing and suppressing racial justice movements that challenge the status quo. Second, it unequally burdens the exercise of citizenship by erecting barriers to collective political action aimed at advancing racial equality, and by detracting public attention and resources from the very causes of racial injustices that the protests seek to challenge.

Scholars have already analyzed the ways in which militarized *policing* contributes to racial subordination.[128] Professor Fanna Gamal, for example, analyzed how the militarized response to race riots during the 1960s "mark[ed] black communities as the objects of military-like control."[129] The images of police "patrol[ing] black

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some rioting, but they were handled by local police. . . . [I]t is the Pentagon's assessment that the law enforcement authorities could control the situation." *Id.* at 146. He advised that "deploying active-duty troops on American streets was almost never a good idea, especially not to handle civil unrest." *Id.* at 145.

126. *See* Thomas Gibbons-Neff & Eric Schmitt, *Pentagon Ordered National Guard Helicopters' Aggressive Response in D.C.*, N.Y. TIMES (June 6, 2020), https://www.nytimes.com/2020/06/06/us/politics/protests-trump-helicopters-national-guard.html [https://perma.cc/6WCK-64VD]; Alex Horton, *D.C. Guard Misused Helicopters In Low-Flying Confrontation with George Floyd Protesters, Army Concludes*, WASH. POST (Apr. 15, 2021), https://www.washingtonpost.com/national-security/2021/04/15/dc-guard-helicopter-george-floyd-protest/ [https://perma.cc/S8BH-NPGA].

127. Vladeck, *National Guard Units in Washington*, *supra* note 65.

128. *See, e.g.*, Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, 1486–1491, 1542 (2019) (describing the problem of militarized policing of Black communities and offering an abolitionist approach to non-police anti-violence reforms, which could empower communities to combat structural violence); Gamal, *supra* note 17, at 1006–07 (concluding that increased police militarization is the result of "concerted political decisions that often traded on racial fear and anxiety" and calling on activists and scholars to examine the intersection of race and militarization).

129. *See* Gamal, *supra* note 17, at 994. For a summary of the 1965 Watts riot, see Banks, *supra* note 22, at 39 ("The 1965 Watts riot was sparked by the arrest of three members of a black family following a routine traffic stop. Rioting continued for seven days but was contained and eventually quelled by California National Guard forces, together with state and local police. Federal, state, and local officials did discuss calling in federal troops, but state and local officials chose not to make a request for a federal military presence because of the sensitive nature of the riots and because they believed that they could control the situation.").

neighborhoods with armored trucks and weaponry" helped "the State communicate[ ] its politics of protection" in which white communities received protection at the expense of Black ones.[130] The physical patrolling, combined with political rhetoric of law and order, Gamal argues, labeled Black communities an "internal threat."[131] Data supports the observation that protest by different groups attract disparate degrees of militarized force.[132] According to analysis by the Armed Conflict Location & Event Data Project (ACLED):

> Between May 1, [2020] and November 28, 2020, authorities were more than twice as likely to attempt to break up and disperse a left-wing protest than a right-wing one. And in those situations when law enforcement chose to intervene, they were more likely to use force—34 percent of the time with right-wing protests compared with 51 percent of the time for the left.[133]

Violence by protestors, however, does not explain the asymmetric treatment. The data reveal that over 90% of protests associated with the Black Lives Matter movement remained peaceful.[134] Even when considering peaceful protests—ones that lacked violence, vandalism, looting, or other destructive activity—law enforcement "still engaged in peaceful BLM-related demonstrations over twice as often: 5% of the time compared to 2% of the time for other types of peaceful protests."[135] The data suggest, therefore, "that law enforcement responses are not simply dictated by situational threats, but are rather guided by strategic

130. *See* Gamal, *supra* note 17, at 994.
131. *Id.*
132. A left-wing protest "includes protests that are anti-Trump or pro-Biden, in support of the Democratic Party, affiliated with the BLM movement, associated with Antifa or left-leaning groups such as Abolish ICE, the NAACP, the Democratic Socialists of America as well as Count Every Vote demonstrations." *See* Koerth, *supra* note 9. A right-wing protest "[i]ncludes pro-Trump or anti-Biden rallies, events in support of the Republican Party, pro-police demonstrations such as Back the Blue or Blue Lives Matter movements that often organize against the BLM movement, demonstrations involving QAnon conspiracy theories, militias or street movements to 'keep the peace' during an event, and Stop the Steal demonstrations." *Id.*
133. *Id.*
134. *Id.*
135. ACLED KEY TRENDS, *supra* note 3, at 6–7.

approaches to policing certain demonstrations, divorced from the actual actions of demonstrators."[136]

The same problems exists when the government has broad authority to deploy the *actual* military against racial justice movements. The suppression of racialized protest by the National Guard is particularly troubling because it mirrors the ways in which the militia was historically used to protect slave owners, serve as slave patrols, search the homes of enslaved people for weapons, and quell rebellions by enslaved people.[137]

Both the actual and threatened military response delegitimizes the protest and the community's concerns by communicating that the government believes the cause is a threat—if not physically than to the socio-political order—rather than as a valid exercise of citizenship, speech, and demand for equal rights. That President Trump, for example, sought to invoke the Insurrection Act against the Black Lives Matter protest because he did not want to look "weak" against the movement implies that the racial justice movement was to be treated more like a foreign enemy that warranted military intervention than a valid democratic movement.[138] President Trump also cited a need to "protect the rights of law abiding Americans" and to "restore security and safety in America" as justifications for his calls for military intervention.[139] This language ignored the root cause of the protests—police brutality against Black lives—and suggested that the safety concerns of the communities subject to police violence failed to warrant government acknowledgement, legitimation, or protection.[140] The President did not ultimately invoke the Insurrection Act, he nonetheless wielded the Act as a political tool and as a valid threat. And his administration *did* use his authority over the D.C. National Guard send helicopters over protesters in Washington, D.C. in a move that signaled to the country that the

136. *Id.*

137. *See generally* CAROL ANDERSON, THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA 34 (2020) (explaining the racialized history of the militia).

138. On the morning of June 1, 2020, the day D.C. National Guard helicopters hovered over the District, Trump expressed that he was frustrated with looking weak against the protesters and, for that reason, "proposed bringing in military troops" and invoking the Insurrection Act. *See* LEONNIG & RUCKER, *supra* note 3, at 149.

139. *Id.*

140. *Id.*

government would not tolerate resistance by those advocating for racial justice.[141]

The Trump administration also justified summoning National Guard troops from other states—a move with questionable legal authority—in part by citing optics.[142] In a letter to D.C. Mayor Muriel Bowser, Attorney General Barr wrote that "[t]he television footage of [the unrest]—viewed by people across the Nation and around the world—conveyed the impression that the United States was on the brink of losing control of its capital city."[143] This justification was clear pretext to suppress the racial justice movement, however, because the same administration failed to swiftly deploy the D.C. National Guard when demonstrators actually overtook the United States Capitol on January 6.[144]

Indeed, the events of January 6 satisfied the conditions to trigger the Insurrection Act—an obstruction, combination, or assemblage, or rebellion against the United States' authority that interferes with federal law enforcement.[145] Far from a mere civil disorder, the breach led organized political society into extremis—at least temporarily—while the public waited to see if the election results would be certified[146] or blocked by a demonstration that occurred on behalf and at the behest of the outgoing president.[147] Nonetheless, it was the racial justice protesters who President Trump and his advisors sought to characterize as insurrectionists

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141. *See* Gibbons-Neff & Schmitt, *supra* note 126; Vladeck, *National Guard Units in Washington*, *supra* note 65.

142. *See* Vladeck, *National Guard Units in Washington*, *supra* note 65. Letter from Attorney General William Barr to Washington, D.C. Mayor Muriel Bowser (June 9, 2020) (on file with the *Columbia Journal of Law & Social Problems*); @KerriKupecDOJ, TWITTER (June 9, 2020, 6:45 PM), https://twitter.com/KerriKupecDOJ/status/1270487263324049410?s=20 [https://perma.cc/3HVY-MDBE].

143. *Id.*

144. *See* Wise, *supra* note 9; *See* Koerth, *supra* note 9.

145. 10 U.S.C. § 252.

146. *See* Wise *supra* note 9 and accompanying text.

147. *See Transcript of Trump's Speech at Rally Before U.S. Capitol Riot*, ASSOCIATED PRESS (Jan. 13, 2021) [hereinafter "*Trump Transcript*"], https://apnews.com/article/election-2020-joe-biden-donald-trump-capitol-siege-media-e79eb5164613d6718e9f4502eb471f27 [https://perma.cc/PZ34-NJU2] ("And after this, we're going to walk down . . . to the Capitol . . . [b]ease you'll never take back our country with weakness."); Spencer S. Hsu et al., *Retired Firefighter Accused of Attacking Police, Man Carrying Confederate Flag Charged in Capitol Riots*, WASH. POST (Jan. 14, 2021), https://www.washingtonpost.com/local/legal-issues/captiol-riot-arrests-confederate-flag/2021/01/14/7feee3a8-567b-11eb-a08b-f1381ef3d207_story.html [https://perma.cc/EF9X-BME9] (describing how one violent protestor deliberately "traveled on a bus with a group to Washington, listened to Trump's speech [on the morning of January 6, 2020], 'and then had followed the President's instructions and gone to the Capitol'").

and delegitimize with military force.[148] The government communicated, consequently, which causes were threatening and which were "legitimate" exercises of citizenship.

Broad military responses to racial justice protest also burdens the exercise of citizenship by erecting barriers to collective political action. Military deployment suppresses the very act of protesting by escalating violence. The critique of police militarization, for example, stems in part from the "distinction between the role and purpose of a police officer and the role and purpose of a soldier."[149] The concern, as President Rutherford B. Hayes once articulated, is that "military personnel in civil support settings may resort to their baseline training and war-fighting orientation and may overreact to civil support assignments."[150] In fact, this concern materialized during the 1992 Los Angeles demonstrations when "a failure to train the active duty military forces in law enforcement had nearly disastrous consequences during the riots."[151] In that case, Marines who accompanied local police to handle a domestic dispute, responded "to the officer's request to 'cover me' by spraying the house with 200 M-16 rounds."[152] Inadequately prepared to respond appropriately to a police threat, the Marines reflexively employed their military training to fire on the house.[153] Responding to protest, specifically, with excessive military force

148. Steven Miller, an advisor to the President who has no military training, deliberately characterized the Black Lives Matter protests as "an insurrection." LEONNIG & RUCKER, *supra* note 3, at 148. Mark Milley reportedly "pointed to a picture of President Lincoln saying 'Mr. President, that guy had an insurrection . . . you don't have an insurrection. When guys show up in gray and start bombing Fort Sumter, you'll have an insurrection. Right now, you don't have an insurrection." *Id.* at 148–49.

149. Police theoretically receive training in protecting and serving communities, but "if the officer is 'dressed like a soldier[ ], armed like [a] soldier[ ], and trained' in military tactics, there arises a very real concern that he or she will eventually begin to act like a soldier." *See* Rizer, *supra* note 26, at 469.

150. Banks, *supra* note 22, at 70. Hayes was concerned with engaging in what looked like war for small skirmishes: "The machinery [of the Act permitting the President to use troops to execute the laws] is cumbersome and its exercise will tend to give undue importance to petty attempts to resist or evade the laws." *Id.*

151. Banks, *supra* note 22, at 70–71 ("In 1992 Los Angeles . . . the predicate conditions did not justify the federal military response. The unfortunate lack of appropriate law enforcement support training in this instance simply underscores the complexities of mixing federal and local, and military and civilian commands and mission orientations in responding to domestic incidents . . . The Los Angeles riots showed how sensible reticence by state and local officials in 1965 enabled an effective response to the Watts riots, while the request mechanism was misused following the Rodney King verdicts in 1992, leading to overreaction and dangerous deployments of regular military into law enforcement situations for which they had not been trained.").

152. *Id.*

153. *See id.*

also escalates tension by creating an us-versus-them, militaristic narrative.[154]

Deploying the military also misdirects public attention away from the underlying root causes of the demonstrations and toward debate over the methods of protest and appropriateness of the state's response.[155] In each case discussed above, the problem underpinning the unrest was a confluence of broader social problems—racism and racial injustice—and catalyzed by a triggering event: the arrest of the Black patrons in Detroit, the murder of Martin Luther King, Jr., the beating of Rodney King, and the murder of George Floyd. In Minneapolis, for example, unequal conditions for Black residents—earning one-third as much as white residents and graduating high school at lower rates, among other factors—exacerbated the unrest; yet the governor responded with force rather than acknowledging the root causes.[156] State-sanctioned military deployment therefore obscures, detracts from, and exacerbates causes of social unrest, be it violent racism in policing, economic insecurity, or inequality.[157] The resources devoted to domestic military deployment also diverts funds from other social policies that could help mitigate the underlying conditions that cause the unrest to begin with.[158]

The historical handling of race riot and the modern events of Summer 2020 and January 6 revealed how legal considerations often yield to political concerns. Governors and presidents alike approve domestic military force even when it may not be

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154. SCHEIPS, *supra* note 26, at 180 (explaining Governor Romney's deployment of troops in Michigan created a war-like atmosphere and effectively "threatened to put a second armed mob onto the streets" by deploying untrained Guardsmen and creating "the equivalent of an urban guerrilla war in Detroit").

155. *See* Gamal, *supra* note 17, at 991 (explaining that media tended to neglect *why* the racial unrest occurred during the Watts riot, which included reasons ranging from the failing education system, to poverty, unemployment, and discrimination.).

156. Matt Furber et al., *National Guard Called as Minneapolis Erupts in Solidarity for George Floyd*, N.Y. TIMES (May 28, 2020), https://www.nytimes.com/2020/05/28/us/george-floyd-minneapolis-protests.html [https://perma.cc/44MT-V7ZB].

157. *See* Gamal, *supra* note 17, at 991 (explaining that media tended to neglect *why* the racial unrest occurred during the Watts riot, which included reasons ranging from the failing education system, to poverty, unemployment, and discrimination.); LEONNIG & RUCKER, *supra* note 3, at 144 (noting that "the nation was reeling from unprecedented confluence of health, economic and social crises" during the Summer 2020 protests).

158. *See e.g.*, Gimbel & Muhammad, *supra* note 128, at 1539–40 ("[T]he violent connection between U.S. militarism and the deprivation of poor communities of color has become explicit in President Trump's proposed budget, promising to pay for a $54 billion increase in military spending by cutting funding for education, environmental protection, and other federally funded social welfare programs.").

necessary,[159] or may be swayed by advisors who want to show "strength."[160] It is clear that domestic military law requires additional safeguards to ensure the military is not deployed unnecessarily and unequally against communities or at the whim of a president. As Professor Steve Vladeck urged, "There are, obviously, a number of areas in which the past four years have underscored the need for statutory reforms. Clarifying how and when federal [troops] and state National Guard units can be used for what really looks like ordinary law enforcement ought to be among them."[161]

D. AN EXCEPTION FOR CONSTITUTIONAL RIGHTS

Although reliance on the military to respond to racial justice movements delegitimizes valid protest and creates barriers to collective political action, one section of the Insurrection Act remains an important tool to *advance* racial justice: Section 253's authorization of military deployment to protect constitutional rights.[162] This section, enacted under the Ku Klux Klan Act of 1871, lay dormant until President Eisenhower invoked the provision to override the Arkansas governor's attempt to use the state National Guard to block school integration.[163] The story of

159. In the case of 1967 Detroit, state authorities maintained that local authorities could handle the unrest, and President Johnson remained "unconvinced that Romney's request for troops met all legal requirements" but he nonetheless approved the request because he was afraid of what his critics would say. SCHEIPS, *supra* note 26, at 185. Similarly, there was "no showing" that local authorities could not handle law enforcement during the 1992 Rodney King riots, *see* Banks, *supra* note 22, at 70, or during the Summer 2020 unrest, *see* LEONNIG & RUCKER, *supra* note 3, at 149 (explaining that Mark Milley persistently pushed back on Present Trump's plan to invoke the Insurrection Act because he felt the local authorities could handle the "few dangerous lawbreakers" among the protesters).

160. *See* LEONNIG & RUCKER, *supra* note 3, at 145–50 (summarizing the debate between President Trump and his advisors about invoking the Insurrection Act and how some, like Steven Miller, "egged on Trump" to use troops in other to "show strength," how President Trump was concerned that failing to "control our own capital city" looked wear to foreign countries, but how other advisors emphasized how extreme invoking the Insurrection Act appears to the American public); *see also* Thomas Gibbons-Neff et al., *Former Commanders Fault Trump's Troops Against Protesters*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/06/02/us/politics/military-national-guard-trump-protests.html [https://perma.cc/N44M-GM5V] (discussing how some of President Trump's advisors urged him not to invoke the Insurrection Act).

161. @steve_vladeck, TWITTER (Jan. 19, 2021, 9:56 PM), https://twitter.com/steve_vladeck/status/1351725188635910146 [https://perma.cc/YJ4J-T4EJ] (special characters omitted).

162. President Eisenhower was the first to invoke Section 253's Equal Protection section since the end of Reconstruction. *See* CONG. RSCH. SERV., *supra* note 22, at 42.

163. *See id.*

Little Rock is a cautionary tale about the potential need for the federal government to protect civil rights with force as a last resort.

In 1957, after the Supreme Court declared public school segregation unconstitutional in *Brown v. Board of Education of Topeka*, those opposed to integrating schools engaged in a deliberate attempt to frustrate the Court's ruling.[164] Similar to the Southern Democrats' characterization of troops as the tool of political tyrants during the 1878 election,[165] the Deep South traditionalists[166] and anti-*Brown* federal lawmakers[167] levied an ideological backlash against mandated desegregation.[168] The anti-*Brown* sentiment eventually reached Little Rock, Arkansas.[169] One day before a Little Rock public school's integration, on September 2, 1957, the governor sought to mobilize the state National Guard to *prevent* school integration by ordering the Guard to enforce segregated parts of the school.[170] The governor openly defied the Court's authority by mobilizing the Guard in this way.[171] Disorder spiraled. A segregationist mob harassed Black students as they attempted to enter the school and the Black

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164. SCHEIPS, *supra* note 26, at 19 ("[The movement came to be known as the 'massive resistance' strategy, which was] rooted in a states' rights philosophy that predated the nation . . . [and] was embodied in the principle of interposition—the doctrine that a state, by implanting its sovereignty between the federal government and its own citizens, could declare a federal act null and void or even brand it unconstitutional. With the passage of *Brown*, every state in the South except North Carolina and Texas adopted interposition resolutions. . . . Other efforts of the southern states to avoid or delay racial integration included attempts to disqualify potential litigants, particularly the NAACP; the enactment of pupil assignment laws designed to continue racial separation by classifying blacks by aptitude or on some other basis besides race; and affording tuition grants to segregated private schools.").

165. *See supra* Part I.B.

166. *See* SCHEIPS, *supra* note 26, at 19.

167. *See id.* at 20.

168. *Id.* at 20 (describing how anti-*Brown* lawmakers and their supporters decried the decision as "clear abuse of judicial power" and created a Southern Manifesto that "pledged that its signers would seek the reversal of the ruling by 'all lawful means.'"). Notably, a key group in the massive resistance coalition was the Citizens' Council. This group, which originated in 1954 in the Mississippi Delta and was "unofficially called the White Citizens' Council," was a white supremacist organization that spread throughout the South. *Id.* The Council came to be known as the "'uptown Klan' or 'country club Klan.'" *Id.* Although "the organization pledged itself to use only legal means in defending segregation" in the form of "subtler forms of intimidation" rather than outright terrorism, the group "became, with perhaps 300,000 members by 1956, a potent force for maintaining segregation and a significant vehicle for propagating massive resistance." *Id.*

169. *See id.* at 27–32.

170. The Governor ordered the Guard to "place off limits to white students the schools heretofore operated for colored students and to place off limits to colored students the schools heretofore operated or recently set up for white students." *Id.* at 34.

171. *Id.*

children were sent home for their safety.[172] After hesitation, President Eisenhower invoked the Insurrection Act to federalize the National Guard and deprive the governor of forces.[173] President Eisenhower, now in command, ordered "the removal of obstruction of justice" to integration of Little Rock.[174] The mission succeeded: the same troops that would have prevented integration under the governor ultimately enforced *Brown* under the president.[175] Eisenhower later explained his decision to intervene—after initially refusing to do so—by arguing that "[f]ailure to act . . . would [have been] tantamount to acquiescence in anarchy and the dissolution of the Union."[176]

Little Rock offers a few lessons about the Insurrection Act and the role of the military in domestic affairs, some of which harken back to the use of the military during Reconstruction. At times, military intervention may be necessary to advance equal protection. Second, there may be times, albeit rare, in which local authorities cannot be trusted to protect minority members. Finally, it may be appropriate for the president to invoke the Insurrection Act over a state's objections certain circumstances if the state is abridging equal protection. The next Part recommends how to maintain these beneficial options while minimizing the risks.

IV. RECOMMENDATIONS

Congress should adopt four statutory revisions to strengthen the legal framework governing use of the military in policing domestic unrest. Each recommendation seeks to reduce the president's and governors' ability to unilaterally use the military to respond to moments of social and racial turmoil. In so doing, the revised framework advances antisubordination and promotes

172. *See* SCHEIPS, *supra* note 26, at 34–37.

173. *See* CONG. RSCH. SERV., *supra* note 22, at 42. President Eisenhower cited all three sections of the Insurrection Act, even though he was removing control from the state, but he expressly cited language referencing current Section 252 and 253, which permit action during obstructions of federal law and to enforce the constitution's Equal Protection mandate. Proclamation No. 3204, 22 Fed. Reg. 7628 (Sept. 23, 1957) (noting that the "obstruction of justice constitutes a denial of the equal protection of the laws"); *see also* SCHEIPS, *supra* note 26, at 38–39.

174. SCHEIPS, *supra* note 26, at 54.

175. *Id.* at 53.

176. *Id.* at 54.

racial citizenship by limiting and how when the government can use force against its citizens.

A. REPEAL & REPLACE THE POSSE COMITATUS ACT: UPDATED LANGUAGE AND APPLICATION TO THE NATIONAL GUARD

The principle that the military should not enforce domestic law is "obvious from the Constitution and from elementary American history."[177] Blind calls to strengthen the Posse Comitatus Act, however, ignore the Act's racial history.[178] Rather than building on a troublesome act, Congress should replace the Posse Comitatus Act with a new statute that reaffirms the principle against domestic military law enforcement for the modern era.

The existing the Posse Comitatus Act, which prohibits anyone from "willfully us[ing] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws" uses confusing and outdated language.[179] The Act offers little guidance for the modern military and creates disorganization in the legal landscape that governs the military. As Professor Nevitt summarized:

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177. *See Youngstown*, 343 U.S. at 644 (Jackson, J., concurring) ("That military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history); *see generally* Part II.A.

178. *See* Gamal, *supra* note 17, at 984. Gamal notes that "[a]rguments that suggest police militarization might be blocked, or at least slowed, by strengthening the [Posse Comitatus Act], miss its peculiar racial history." *Id.* Moreover, "[w]hile these scholarly critiques of police militarization point to an erosion of the [Posse Comitatus Act] as responsible for the militarization of the civilian law enforcement, they miss the reality that state protection has never been dispensed equally, and the enactment of the [Posse Comitatus Act] fits within, rather than outside, the narrative of unequal protection. . . . This history prompts us to read the [Posse Comitatus Act], not as a broad condemnation of militarism, but as evidence of an unequal pattern of protection, administered by the federal government, along racial lines. If the [Posse Comitatus Act] functioned to protect white hegemony, then surely this alters the way we read its protective capacity today. Arguments that suggest police militarization might be blocked, or at least slowed, by strengthening the [Posse Comitatus Act] . . . miss its peculiar racial history." *Id.*

179. 18 U.S.C. § 1385. The confusion generated by the Posse Comitatus Act is well documented. *See generally* John R. Longley III, *Military Purpose Act: An Alternative to the Posse Comitatus Act—Accomplishing Congress's Intent with Clear Statutory Language*, 49 ARIZ. L. REV. 718 (2008); Mark Nevitt, *Good Governance Paper No. 6 (Part Two): Domestic Military Operations—The Role of the National Guard, Posse Comitatus Act and More*, JUST SEC. (Oct. 21, 2020), https://www.justsecurity.org/72988/good-governance-paper-no-6-part-two-domestic-military-operations-the-role-of-the-national-guard-posse-comitatus-act-and-more/ [https://perma.cc/THV4-VW3T]; *cf.* Vladeck, *National Guard Units in Washington*, *supra* note 65.

> Today, the military's precise role in domestic military operations is governed by an increasingly convoluted array of exceptions, judicial holdings, and Department of Defense guidance on what constitutes a PCA violation. Last revised in 1947 . . . the PCA's day-to-day application is more heavily governed by regulations and court opinions than by the statute itself. Department of Defense regulations, for example, cite 14 specific statutes that authorize the armed forces to participate directly in law enforcement matters. And even where it does squarely apply, the PCA only prevents federal military forces from exercising a direct role in law enforcement, such as making arrests and searching or seizing people or property. The PCA does not restrict federal military forces from providing indirect assistance, such as providing logistical support to local law enforcement entities. Further, federal military forces may directly participate in law enforcement matters when performed primarily for a "military purpose." Unfortunately, the PCA itself does not provide a bright line between direct and indirect assistance, much less define "military purpose" or say anything about militarized federal civilian troops.[180]

Given that the Posse Comitatus Act is ineffective, unclear, and outdated, the new statute should discard the outdated *posse comitatus* language and adopt a modern prohibition on all domestic law enforcement.

The new statute should clearly define (i) *what action* constitutes illegal law enforcement by the military, (ii) *which actors* are covered by the law, and (iii) when exceptions apply. First, as it stands, three conflicting judicially created tests exist to define *what* constitutes "execut[ing] the laws" under the Act.[181] The first test asks whether citizens are being subject to military power that is regulatory, proscriptive, or compulsory in nature; the second asks whether the military was used in a direct and active role; and the third asks whether the use of the military pervades the

180. Nevitt, *supra* note 179.

181. *See* United States v. McArthur, 419 F. Supp. 186, 189, 192–94 (D.N.D. 1975) (citizen-subject test); United States v. Red Feather, 392 F. Supp. 916, 918, 921–24 (D.S.D. 1975) (direct-and-active-role test); United States v. Jaramillo, 380 F. Supp. 1375, 1376, 1378–81 (D. Neb. 1974) (pervades test). For a complete discussion of these tests, *see* Rizer, *supra* note 26, at 479–81.

activities of law enforcement officials.[182] Under these split tests—which the Supreme Court has never reviewed—it is exceptionally difficult for government officials and the *public* to know what action violates the Act. For example, whether the Trump administration's decision to order the D.C. National Guard helicopters to hover over Black Lives Matter protestors during the Summer 2020 violated the Posse Comitatus Act likely depends on which test is applied.[183] The law that governs when the government can deploy the military against its own citizens should not be as murky as a swamp.

Second, Congress should extend the new Posse Comitatus Act to cover all armed forces rather than only the Army and Air Force,[184] including the National Guard when under state control.[185] As it stands, the existing Posse Comitatus Act cannot

182. *See* Rizer, *supra* note 26, at 479–81.

183. For example, the action might not violate the citizen-subject test because the protesters were arguably not subject to military power that was regulatory, proscriptive, or compulsory, but it likely would violate the pervades test because flying the helicopter over protestors to monitor or disperse the crowd arguably "pervades the activities of law enforcement officials."

184. Recall that the original statute only concerned the Army, but later included the Air Force when the Air Force was created as a subset of the Army. *See* Rizer, *supra* note 26. Congress then amended the Posse Comitatus Act in 1956 to maintain the Act's status quo. *Id.*; Felicetti & John Luce, *supra* note 26. However, the 116th Congress recently considered an amendment that expanded the Posse Comitatus Act beyond just the Army and Air Force. Strengthening the Posse Comitatus Act of 2020, H.R. 7297, 116th Cong. (2020) (proposing to strike "the Army or the Air Force" and insert "an Armed Force under the jurisdiction of the Secretary of a military department (as those terms are defined in section 101 of title 10)"). Another amendment proposed including "Space Force" in the Act. S. 1215, 116th Cong. § 1715 (2019) ("(a) Posse Comitatus. Section 1385 of title 18, United States Code, is amended by striking 'or the Air Force' and inserting ', the Air Force, or the Space Force'. (b) Firearms as Nonmailable. Section 1715 of such title is amended by inserting 'Space Force,' after 'Marine Corps,'.").

185. Because the Guard is a creature of federal and state control, whether Congress can regulate the Guard at all times remains an open question. The Calling Forth Clause or the Guarantee Clause could provide a Constitutional source that empowers Congress enact this legislation. *See* U.S. CONST. art. I, § 8; U.S. CONST art. IV, § 4. Some would certainly argue that congressional regulation of the state Guard violates the constitution. *See e.g.*, Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez*, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 5 (1997) (arguing that because "the states have the primary duty to provide domestic tranquility," the federal government should not pass "legislation that threatens to displace or co-opt the states' responsibility against domestic violence"). At the very least, Congress should consider closing the Title 32 § 502(f) loophole. *See* Vladeck, *National Guard Units in Washington*, *supra* note 65 ("§ 502(f) may be totally uncontroversial when used the way it was intended, with states simply choosing to support preexisting federal missions with local troops that remain under the governors' command. But when the federal government gains the ability to control a cohort of (potentially armed) troops without the restrictions of laws like the Posse Comitatus Act, that seems like a very different matter altogether—and one Congress may well not have intended, at least to this degree, when it passed the relevant provision

effectively govern the National Guard because the Act does not apply when the Guard is under state control.[186] Consequently, whether the same soldier can or cannot enforce domestic law depends entirely on the Guard's status.[187] This means that the National Guard can act as a sizeable extension of local police forces and can enforce domestic laws under the Posse Comitatus Act, as long as the president does not invoke the Insurrection Act and take command.[188] By extending the new Posse Comitatus Act to the Guard in all circumstances, the legislation would massively downscale the ability of the Guard to serve as police during unrest. Congress should also clearly delineate when exceptions should exist, as during natural disasters.

Finally, the statute should be a civil rather than criminal statute. The Act's current criminal form is an odd aberration for a governing military principle and it is unlikely that actors would levy criminal charges against the president for violating the Act.

B. UPDATE THE INSURRECTION ACT: NARROW THE SCOPE AND EMPOWER CONGRESS AS A STOPGAP

In addition to repealing and replacing the Posse Comitatus Act, Congress should narrow the Insurrection Act's scope by (i) narrowing and clearly defining the limited circumstances in which the president can deploy troops and (ii) requiring some Congressional approval before the president invokes the Act. The current Insurrection Act does not define operative terms, including insurrection, rebellion, obstructions, and domestic violence. Under Section 253, for example, the president has the sole discretion to determine whether "an obstruction, combination, or assemblage, or rebellion against the United States authority" interferes with federal law enforcement.[189] Section 252, the provision authorizing

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in 2006"). Activists can also encourage state lawmakers to independently create legislation to scale back the role of the National Guard and to prevent the Guard from serving as an inappropriate extension of local police forces.

186. See *supra* Part II.B. Other scholars have also already proposed closing loopholes when the Guard acts under Title 32. *See* Winnie, *supra* note 87, at 1322–25 (exploring options for limiting the President's ability to control the National Guard while under Title 32 status and concluding that Congress should amend the Posse Comitatus Act to cover the D.C. National Guard and the Guard when operating under Title 32).

187. Canestaro, *supra* note 64, at 125–26.

188. *Perpich*, 496 U.S. at 346 ("The National Guard units have under this plan become a sizable portion of the Nation's military forces. . . .").

189. 10 U.S.C. § 252.

federal military assistance during an "insurrection" against a state government, does not define insurrection.[190] The ambiguity not only creates confusion[191] but also permits presidents and governors to conflate protest with insurrection against the government.[192] This imprecise and fluid application of the Insurrection Act, which allows for sweeping domestic military deployment that is inconsistent with historical and modern normative goals. Professor Engdahl explains:

> [In an] actual insurrection, organized political society is in extremis; the situation is tantamount to war. In such circumstances, it is necessary and appropriate for the government to employ force which is distinctively military in character. It was only in such extreme situations—foreign invasion and genuine insurrection—and never in cases of mere riot or civil disorder that the English tradition which the founding fathers endeavored to preserve permitted the domestic application of distinctively military force.[193]

As with the Posse Comitatus Act, adding clear, narrow definitions to the Insurrection Act will require authorities to make distinctions between protests and rare events that warrant the insurrection label and military force.[194] Under Section 253,

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190. 10 U.S.C. § 251.

191. *See* Banks, *supra* note 22, at 71 ("[T]he source of the current and recently restored section of the Insurrection Act, semantic confusion over the critical predicate terms has sowed the seeds of further posturing by the national government. For example, after riots in several cities during the summer of 1967, Attorney General Ramsey Clark wrote to the governors referring to a different section of the Insurrection Act that permits the use of federal troops, following a request from the states, when 'insurrection' has occurred. In his letter to the governors, Clark instead mistakenly referred to the federal authority in that section as extending to instances of serious 'domestic violence.' Although the Attorney General's letter prompted the National Advisory Commission on Civil Disorders to recommend an amendment to the Insurrection Act to eliminate the confusion surrounding the circumstances where federal troops could be deployed in the states, no amendment was enacted." (citations omitted)).

192. *See* Hoffmeister, *supra* note 120, at 908 ("From the Whiskey Rebellion to the Los Angeles Riots of 1992, there has been no consensus as to what constitutes either 'domestic violence' or an 'insurrection.'").

193. Engdahl, *supra* note 31, at 586–87. According to Merriam-Webster, an insurrection is "an act or instance of revolting against civil authority or an established government." *Insurrection*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/insurrection [https://perma.cc/E69M-SD8S].

194. Some argue that, as a Constitutional matter, the President already must "discern between domestic violence in the states (for which he needs a request before intervening), and insurrection against the United States or invasion of a state or the United States (for which he needs no further authorization)" because "the Constitution distinguishes between

Congress can limit presidential discretion by removing broad terms like obstruction, combination, or assemblage and leaving only rebellion against the United States' authority—narrowly defined—as the predicate condition. Similarly, Congress should narrowly define what constitutes a sufficient insurrection against a state government under Section 252, perhaps requiring some showing that the rioters intend to upend the political system and that the state authorities cannot adequately manage the situation.[195] In other words, Section 252 should not be used to meet protest or ordinary unrest.

Circumscribing when force can be used will help increase access to collective political action and reduce racial subordination. This is not to imply, however, that the military can or should never be deployed domestically; rather, this is a call to Congress to reexamine and precisely define the narrow class of circumstances when force may be appropriate as in cases that, for example, advance constitutionally protected rights.

Congress should also replace references to the "militia" with the National Guard. This change would not only update the statute and reduce confusion,[196] but would also allow Congress to create a legislative history that recognized and disavowed the problematic history of local militias supporting slave owners and suppressing rebellions by formerly enslaved people.[197]

Finally, Congress should curb presidential authority by requiring congressional approval before the president invokes the Act. Although military advisors checked the President during the

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invasion (of the United States or a state), insurrection (against the United States), and domestic violence (against a state)." Bybee, *supra* note 87, at 76.

195. Although adding narrow definitions would limit presidential power, it still comports with the arguably federal constitutional obligation to protect states in the event of an insurrection. *See id.* at 41 ("Reading the Article I and Article IV clauses harmoniously, if an invasion or insurrection against the national government occurs—in modern settings, conceivably a major terrorist attack threatening the nation as well as one or more states—the Constitution requires that the federal government use military force to protect the state. In the event of an 'insurrection' within a state that presents a direct threat to its republican form of government (an attack on the state qua state), the federal government is likewise obligated to use the military to defend the state.").

196. *See* Hoffmeister, *supra* note 120, at 910 ("The term 'militia,' as understood today, is far removed from its eighteenth-century meaning and has virtually disappeared from most other statutes." (citations omitted)). The statute could also clarify that privately formed, vigilante militias have no place in state law enforcement.

197. *See* Anderson, *supra* note 137; CONG. RSCH. SERV., *supra* note 22, at 61 (noting that "it was the state militia, called to the aid of the marshal enforcing the Fugitive Slave Act"); *see generally* FONER, *supra* note 36, at 438–39 (describing the racial politics of militias in the South during reconstruction).

Summer 2020 protests when he threatened to invoke the Insurrection Act,[198] Executive Branch officials may not always check themselves or each other. Requiring congressional approval, even if only by a bipartisan subcommittee designated for this particular emergency advisory role, would impose a necessary check on presidential power.[199] The congressional check could mirror that which already exists in the foreign context under the War Powers Resolution of 1973, which requires the President to consult with Congress "in every possible instance" before introducing forces.[200] There is no reason why a similar mechanism ought not exist in the domestic context.

It is worth considering that congressional approval may interfere with the need for flexibility in responding to emergencies. For example, during the insurrection at the Capitol, the over three-hour delay by President Trump's Defense Department to approve deployment of the D.C. National Guard offered a window of opportunity for the violence to spread.[201] However, as in the foreign context, Congress can authorize exceptions and write protocols for exigencies in which Congress cannot convene. By adding a congressional buffer, this amendment would at the very least express an intent to reduce the discretion that exists under the Act—if not actually curb presidential power—and check when military can be deployed against its own people. In fact, the House passed an amendment requiring congressional approval before the

198. The Chairman of the Joint Chiefs of Staff Mark Milley declined to indulge the President's plan to invoke the Insurrection Act—assuring the president that "[t]here's no insurrection. There's no need for troops." LEONNIG & RUCKER, supra note 3 at 148–49.

199. At least as it applies to the militias, congress can likely withdraw the power it previously delegated to the Executive Branch. See Vladeck, *Emergency Power*, *supra* note 83, at 153 ("Although this body of constitutional emergency power today belongs to the Executive, it is not because of the constitutional authority provided by Article 1I, but rather because of congressional delegation.").

200. 50 U.S.C. § 1542.

201. Wise, *supra* note 9 ("It took more than three hours for former President Donald Trump's Defense Department to approve a request for D.C.'s National Guard to intervene in the deadly Jan. 6 Capitol insurrection, the commanding general of the outfit told senators on Wednesday.").

president can unilaterally[202] deploy military force under the Act.[203] Congress should enact this amendment into law.

CONCLUSION

Given the "success" of military intervention during Reconstruction and school integration at advancing racial justice, it would be easy to hastily conclude that the military should have an expansive domestic role. The current legal framework does just that, by authorizing stunningly broad authority for the president to deploy the military during moments of turmoil. As with any policy, however, what can be used to advance racial justice in one moment can be used to support white supremacy in the next.

This Note has argued for an updated statutory framework governing domestic military policy. Drawing on concepts of racial citizenship and antisubordination, this Note has argued that the use of military force to suppress racial justice protest has reproduced racial hierarchy by physically and symbolically suppressing the valid exercise of citizenship, speech, and equal rights by historically disadvantaged groups. Accordingly, Congress should replace the Posse Comitatus Act with a new statute that would, among other things, apply its ban on domestic law enforcement to the National Guard at all times. Additionally, Congress should substantially narrow the scope of the Insurrection Act. Finally, Congress should curb presidential authority by requiring that the president consult with a designated, bi-partisan subcommittee before invoking the Act, similar to the process required before the president can introduce forces abroad. By strengthening the prohibition on domestic law enforcement by the military and limiting presidential and gubernatorial authority to

202. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. § 513 (2020). The Conference Committee Report summarized that the "House bill contained a provision (sec. 1052) that would amend sections 251, 252, and 253 of title 10, United States Code, to require that prior to invoking the Insurrection Act, the President and the Secretary of Defense must certify to the Congress that a State is unable or unwilling to suppress an insurrection or domestic violence, or that the State concerned is unable or unwilling to suppress an unlawful rebellion against the authority of the United States; provide 'demonstrable evidence' of same; and detail the mission, scope, and duration of the proposed use of members of the Armed Forces. Further, the provision would require the President, in every possible instance, to consult with the Congress before invoking the Insurrection Act. Finally, the provision would prohibit direct participation by military personnel in a search, seizure, arrest, or similar activity, unless expressly authorized by law." H.R. REP. NO. 116-617, at 1756 (2020) (Conf. Rep.).

203. *Id.*

deploy the military during moments of social and racial inflection, the revised framework advances antisubordination and promotes racial citizenship by limiting and how when the government can use force against its citizens.