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Under what circumstances can military force be used domestically? Does the President get to decide? Is there a role for Congress? Can Congress limit the President's domestic use of the military or would that be an impermissible interference with the powers of the commander in chief?

There might be good reasons to use military force at home to prevent or respond to terrorism and other incidents. Detonation of a nuclear device, for example, or an attack involving a biological weapon, would cause destruction and chaos on a scale that would make use of the military almost essential.[1] How about in lesser circumstances: can the military be used for more ordinary counterterrorism, emergency-response, or law-enforcement purposes?

I will have something to say in a moment about the statutory scheme—including an old statute, the Posse Comitatus Act, and the law Congress put in place in October 2006—but let us begin with the Constitution.

As we have already heard today, the current administration reads the commander in chief provision of the Constitution[2] very broadly to include a whole range of powers that belong exclusively to the President, fenced off from congressional supervision or interference. With respect to domestic deployment of the military, we have more in the Constitution to work with in figuring out the appropriate roles of Congress and of the executive branch.

In that spirit, begin with what the Constitution actually says about the President being commander in chief. According to Article II, section 2: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[3]

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1 For example, a crude nuclear weapon detonated in midtown Manhattan during the day would kill 200,000 people, destroy buildings in a five-mile radius, and render much of New York City "uninhabitable for decades." IRWIN REDLENER, AMERICANS AT RISK: WHY WE ARE NOT PREPARED FOR MEGADISASTERS AND WHAT WE CAN DO NOW 70 (2006).

2 U.S. CONST. art. II, § 2, cl. 1.

3 *Id.*

The reason I am giving you all of this is that it links up with some other important parts of the Constitution in ways that allow us to say something more meaningful about the scope of the President's powers rather than simply infer things from the fact that the President is made the commander in chief.

So here are the other provisions of the Constitution to keep in mind: Article I gives Congress powers to "raise and support Armies,"[4] to "provide and maintain a Navy"[5] and to "make Rules for the Government and Regulation of the land and naval forces."[6] Article I also authorizes Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[7] Article IV of the Constitution says that the United States "shall protect each of [the states] against Invasion; and . . . against domestic Violence."[8] The "shall protect" language is important: Article IV imposes on the United States an affirmative protection obligation, a point I shall return to in a moment. The Constitution also imposes obligations on the President specifically. A series of presidential obligations are contained in section 3 of Article II.[9] Important for our purposes is the one that says the President "shall take Care that the Laws be faithfully executed."[10] These provisions help us address with some precision the constitutional circumstances for using military force at home.

Let us back up and think for a moment about these provisions in their historical context. To the Americans who wrote and ratified the Constitution, security was a large concern.[11] A central purpose of the Constitution was to put in place a system to prevent violence—attacks from external forces, as well as insurrections from within—and to maintain law and order.[12] Everyone under-

4 U.S. CONST. art. I, § 8, cl. 12.
5 *Id.* art. I, § 8, cl. 13.
6 *Id.* art. I, § 8, cl. 14.
7 *Id.* art. I, § 8, cl. 15.
8 *Id.* art. IV, § 4.
9 *Id.* art. II, § 3.
10 *Id.*
11 *See* Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29, 37–47 (2005) [hereinafter Mazzone] (discussing fears in the ratifying era of external attacks and internal violence and the role these concerns played at the Philadelphia Convention and the state ratifying conventions).
12 When the Philadelphia Convention got underway with Edmund Randolph enumerating the defects in the Articles of Confederation and presenting the Virginia Plan, he began with the problem of maintaining security. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 29–30 (Adrienne Koch ed., Ohio Univ. Press, 1984) (1840) ("1. that the confederation produced no security against foreign invasion. . . . 2. that the federal government could not check quarrels between states, nor a rebellion in any, not having constitutional power nor means to interpose

stood that government simply would not work if security were not maintained. It was also clear to the ratifying generation that the national government would have to play an important security role.[13] Left to fend for themselves, the states would not do the job properly or sufficiently.[14] At the same time, Americans in the period after the revolutionary war feared giving a strong role to what they called a standing army: professional soldiers, under the command of a central government.[15] Standing armies had to be avoided wherever possible because while they might produce security it would come at the price of the peoples' liberties.[16]

These two concerns—the need for security on the one hand, the fear of a professional army on the other—explain the provisions of the Constitution I have just identified. The Constitution assigns a security role to the national government: the national government is required to protect the states. In performing that function, the national government is allowed to create and make use of professional military forces. But, recognizing the dangers of this, the Constitution offers an alternative: federal deployment of the militia under the control of the commander in chief. The militia

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according to the exigency."); *id.* at 29 ("The Character of . . . [the new federal] government ought to secure 1. against foreign invasions: 2. against dissentions between members of the Union, or seditions in particular states.").

13 *See* THE FEDERALIST NO. 4, at 21 (John Jay) (Jacob E. Cooke ed., 1961) (explaining how a strong national government will "apply the resources and power of the whole to the defence of any particular part"); THE FEDERALIST NO. 23, at 149 (Alexander Hamilton) (arguing in favor of making the national government "the guardian of the common safety"); *id.* (explaining that the national government will "make suitable provision for the public defence" because it is the "representative of the whole" and so "will feel itself most deeply interested in the preservation of every part").

14 *See, e.g.*, THE FEDERALIST NO. 4, at 21–22 (John Jay). Jay writes:

> Leave America divided into thirteen, or if you please into three or four independent Governments, what armies could they raise and pay, what fleets could they ever hope to have? If one was attacked would the other[s] fly to its succour, and spend their blood and money in its defence? Would there be no danger of their being flattered into neutrality by specious promises, or seduced by a too great fondness for peace to decline hazarding their tranquility and present safety for the sake of neighbors, of whom perhaps they have been jealous, and whose importance they are content to see diminished? Altho' such conduct would not be wise it would nevertheless be natural.

15 U.S. v. Miller, 307 U.S. 174, 178–79 (1939) ("The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion."). *See generally* Bernard Donahoe & Marshall Smelser, *The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 1787–1788*, 33 REV. POL. 202 (1971).

16 LAWRENCE DELBERT CRESS, CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812, at 44 (1982).

comprised members of the local community, operating, ordinarily, under local control.[17] Making the militia available, for temporary federal service, was meant to reduce the need for or temptation to rely on a standing army of professional soldiers.[18]

Focusing on the militia provisions of the Constitution and understanding the history of these provisions illuminate the circumstances under which military force might properly be used in a domestic context. As I have said, Congress is given power to provide for calling forth the militia for three purposes: to execute federal laws, suppress insurrections and repel invasions.[19] A sensible interpretation is that the use of the militia in these three circumstances requires congressional authorization. Unless Congress has so provided, the militia cannot be called forth.

How about regular soldiers? Can they be used domestically? That question is of interest to us because the militia, in its old form, no longer exists.[20] The ratifying history suggests that the availability of the militia was never intended to *preclude* the use of regular forces—only to provide an incentive to use the militia instead.[21] In seeking to maintain security, government might not be able to depend on the militia (militia forces might be the same local people engaged in an insurrection) and so nothing in the Constitution says the militia *must* be used for domestic security.[22]

Congress, we know, is empowered to create the Army and the Navy (and presumably the Air Force), and Congress can set rules

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17 *See generally* JERRY COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920 (1997).

18 *See* THE FEDERALIST NO. 29, at 184–85 (Alexander Hamilton) (stating that the militia is "the only substitute that can be devised for a standing army; [and] the best possible security against it, if it should exist"); THE FEDERALIST NO. 46, at 321 (James Madison) (arguing that given the option of calling forth the militia, the federal government would never need an army bigger than 30,000 men); Debate before the Convention of the Commonwealth of Virginia (June 14, 1788) (statement of James Madison), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 381 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter 3 ELLIOT'S DEBATES] ("The most effectual way to guard against a standing army, is to render it unnecessary. The most effectual way to render it unnecessary, is to give the general government full power to call forth the militia.").

19 U.S. CONST. art. I, § 8, cl. 15.

20 *See* H. RICHARD UVILLER & WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT 153–54 (Duke Univ. Press) (2002) (concluding that neither the National Guard nor any other modern military force is equivalent to the old militia).

21 *See* Mazzone, *supra* note 11, at 64–70 (explaining this incentive scheme).

22 Shays' Rebellion, on the eve of the Constitutional Convention, amply demonstrated that militia forces might be unwilling to suppress a local insurrection. *See* THE FEDERALIST NO. 28 (Alexander Hamilton) (discussing this problem).

for their internal regulation. However, and in contrast to Congress' power to provide for the use of the militia, nothing in the Constitution specifies that Congress must first authorize the domestic deployment of regular forces: the Constitution is simply silent about whether Congress has any authorizing role with respect to the domestic use of soldiers. Congress might decline to create an army or a navy or decline to equip and fund the military in ways conducive to its domestic use. But once these forces are created, nothing in the Constitution requires that Congress give authorization for their domestic use before they can be deployed. That suggests a rather simple conclusion: the President does not need Congress' advance permission to deploy soldiers domestically.

What if Congress *prohibits* the use of military force in the domestic context? That, I think, is more complicated.[23] But go back to Article IV of the Constitution, which requires that the United States protect the states from invasions and from domestic violence. Both the President and the Congress are part of the United States and so they both bear that obligation. The President also has an obligation under Article II to execute the laws of the Union. The President's obligations, then, correspond to the circumstances under which Congress is given authority to provide for the use of the militia: to repel invasions, suppress insurrections, and enforce the law. It follows, I think, that if the militia is not available, either because Congress has not provided for calling it forth, or because for some other reason it would be unwise or undesirable to depend upon the militia, the President, in fulfilling his security obligations,

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[23] Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), is the canonical statement that the scope of the President's authority is a function of Congress' own actions. Jackson explained:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in how own right plus all that Congress can delegate. . . . When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb.

Id. at 635–37 (Jackson, J., concurring). It is not clear that this approach, developed in a case involving President Truman's seizure of private steel mills to protect the ability of the United States to continue to perform a military role in Korea, can be applied wholesale to the question of the domestic use of military force to fulfill constitutional security obligations. Indeed, with respect to constitutional obligations, a converse formula might sensibly apply: if the Congress has not itself fulfilled the security obligations of the United States under Article IV of the Constitution, the President's responsibility to act to fulfill those obligations is heightened.

is allowed, indeed (because these are obligations) is probably required, to deploy regular military forces.

This does not mean, however, that the President's powers are unlimited or that there is no role for Congress. The President's proper use of military force in the domestic context is limited to the three stated categories. Using military force at home for any other purpose is improper. At this point, one might well ask: does terrorism fall within any of the three categories for the proper use of military force? A terrorist attack might be considered an invasion; terrorism might also be deemed a form of domestic violence (though perhaps that term refers more appropriately to riots or attempts to overthrow or destabilize government).[24] The Constitution therefore likely does permit the President to use domestically military forces in cases of terrorism or other kinds of violence. The conclusion flows not from some stretched reading of the commander in chief provision but from the other parts of the Constitution I have told you about.

With respect to the third category of presidential obligations, executing federal laws, Congress probably has considerable scope to limit the President's domestic use of military force. Congress is, of course, responsible for enacting the federal statutes the President is obligated to execute. If enforcement of a statute generates violent opposition, Congress can elect to repeal or revise the statute, rather than leave it in place for the President to enforce with military forces.[25] At least when it comes to enforcement of statutory law, Congress can likely limit the President's use of military power.[26]

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[24] *See* Mazzone, *supra* note 11, at 138–39 (discussing how terrorism falls within the scope of the Protection Clause of Article IV).

[25] More difficult questions might arise if, rather than repeal a statute (leaving the President nothing to enforce), Congress instead places limitations on the means by which the President is permitted to enforce the statute, for example, by specifying that the President cannot use military force. Perhaps a sensible way of recognizing *both* the obligations of the President and the interests of Congress in the enforcement of statutes is to distinguish between wholesale limitations on presidential enforcement mechanisms and statute-specific limitations. Under this approach, it would be permissible for Congress to specify that the President should not use military force to enforce an individual statute. The statute could, therefore, be understood to be in force, as law, only to the extent it is enforceable by ordinary civil authority. By contrast, Congress should not pass a general law prohibiting use of military force in all circumstances because this would cut too deeply into the President's constitutional obligation.

[26] There might be less scope for Congress to interfere if the source of the federal law the President seeks to enforce is the Constitution rather than a statute. For example, there might be good reason to allow the President, without being constrained by Congress, to use military force in order to enforce (over violent opposition) a federal

Moreover, the Constitution probably does not permit the President to use military force to carry out any old law in the first instance. The evidence from the ratifying conventions indicates that military force is only appropriate when civil efforts to enforce federal laws have failed: when the implementation of federal laws is opposed with violence or when federal interests are otherwise under attack.[27] Under that scenario, hopefully rare, the President

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court decree mandating school integration. On the other hand, Congress' special role in enforcing certain constitutional provisions suggests that even here Congress might limit the President's manner of enforcement. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *see also* U.S. CONST. amend. XIII, § 2 & U.S. CONST. amend. XV § 2.

[27] Evidence from the Virginia ratifying convention supports this interpretation. On June 14, 1788, General Green Clay asked "to be informed why the Congress were to have power to provide for calling forth the militia, to put the laws of the Union into execution." Debate before the Convention of the Commonwealth of Virginia (June 14, 1788), *in* 3 ELLIOT'S DEBATES, *supra* note 18, at 378. Madison's explanation focused on the provision as limited to implementing federal laws that have generated opposition and resistance on the ground—Congress' power was not a general power to use the militia to carry out all federal programs but rather was closely tied to suppressing insurrections and repelling invasions. Madison stated:

> If resistance should be made to the execution of the laws . . . it ought to be overcome. This could be done only in two ways—either by regular forces or by the people. . . . If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing, and enable the government to make use of their services when necessary.

Id. The militia, Madison noted, would only be called forth to execute the laws when "resistance to the laws required it" because the sheriff's "posse . . . were insufficient to overcome the resistance to the execution of the laws." *Id.* at 384. Where, however, "the civil power was sufficient," the use of the militia "would never be put in practice." *Id.*

On the other hand, Madison observed that in order to make use of the militia to execute federal laws, resistance did not have to rise to the level of an invasion or insurrection: "There are cases in which the execution of the laws may require the operation of militia, which cannot be said to be an invasion or insurrection. There may be a resistance to the laws which cannot be termed an insurrection." *Id.* at 408. For example, "a riot d[oes] not come within the legal definition of an insurrection. There might be riots, to oppose the execution of the laws, which the civil power might not be sufficient to quell." *Id.* at 410.

The point was hammered home in response to Patrick Henry's concerns. Henry argued that because it made no provision for Congress to use civil powers to enforce its laws, the Constitution dangerously allowed for the use of military powers in the first instance. *Id.* at 387. George Nicholas offered a rebuttal. The Constitution, Nicholas argued, did not say "the civil power shall not be employed," and therefore it did not alter the normal governmental practice that "[t]he civil officer is to execute the laws on all occasions." *Id.* at 392. If, however, the laws were "resisted, this auxiliary power is given to Congress of calling forth the militia to execute them, when it shall be found absolutely necessary." *Id.* Edmund Randolph, agreeing with Nicholas's interpretation, stressed the need for "common sense [as] the rule of interpreting this Constitution." *Id.* at 400. Since there was no "exclusion of civil power," or a suggestion "that

can send in the militia if it is available or, in the alternative, the alternative we live with today, send in federal troops.

Let us talk, then, about the relevant statutes. In 1792, Congress put in place statutory mechanisms for the President to call forth militiamen for domestic security.[28] In addition, the 1807 Insurrection Act authorized the President to use regulars to respond to insurrections within states and to ensure the execution of federal law.[29] There are many occasions on which early presidents acted in accordance with this original statutory scheme.[30]

In 1878, Congress passed the Posse Comitatus Act, which is still in place today.[31] The Posse Comitatus Act came out of opposition to federal troops' activities in the South during Reconstruction. The Act says that "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress," active military forces cannot be used to "execute the laws" of the United States.[32] There are various exceptions to this rule—including the President's use of troops to quell insurrections under the modern incarnation of the old Insurrection Act.[33] Congress could, of course, repeal the Posse Comitatus Act if it were to interfere with counterterrorism or other things Congress thought the President should be free to use the military for.

We have talked a lot today about 9/11 and about the scope of Congress' joint resolution on September 18, 2001, the Authorization for Use of Military Force. But the more relevant event for my purposes is not 9/11, but Hurricane Katrina. After Katrina, and the bungled government response, in October 2006, as part of a military appropriations bill, Congress authorized the President to deploy military forces to states and localities following a natural disaster or other emergency.[34] The provision, which amends the old Insurrection Act, is entitled "Use of the Armed Forces in Major Public Emergencies." It authorizes the President to deploy troops

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the laws are to be enforced by military coercion in all cases," the proper inference was that "when the civil power is not sufficient, the militia must be drawn out." *Id.*

28 *See* Act of May 2, 1792, ch. 28, 1 Stat. 264 ("An act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions."); Act of May 8, 1792, ch. 33, 1 Stat. 271 ("An Act more effectually to provide for the National Defence by establishing an Uniform Militia throughout the United States").

29 Act of March 3, 1807, ch. 39, 2 Stat. 443.

30 *See* Mazzone, *supra* note 11, at 91–137 (collecting examples).

31 20 Stat. 145, ch. 263 (1878) (codified as 18 U.S.C. § 1385 (2006)).

32 *Id.*

33 10 U.S.C. §§ 331–34 (2006).

34 *See* National Defense Authorization Act of 2007, Pub. L. No. 109–364, 120 Stat. 2083.

in order to implement law and order when state government is unable to maintain control such that federal rights are put in jeopardy or there is opposition to the enforcement of federal laws.[35]

Does the President require this congressional authority? Can the President go further than Congress has said? Following the attacks of September 11, 2001, administration lawyers took the position that "the Posse Comitatus Act . . . which generally prohibits the use of the Armed Forces for law enforcement purposes absent constitutional or statutory authority to do so, does not forbid the use of military force for the military purpose of preventing and deterring terrorism within the United States."[36] One might under-

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[35] The section reads:
Use of Armed Forces in Major Public Emergencies.—
(1) The President may employ the armed forces, including the National Guard in Federal service, to—
(A) restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that—
(i) domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order; and
(ii) such violence results in a condition described in paragraph (2); or
(B) suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if such insurrection, violation, combination, or conspiracy results in a condition described in paragraph (2).
(2) A condition described in this paragraph is a condition that—
(A) so hinders the execution of the laws of a State or possession, as applicable, and of the United States within that State or possession, 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 or possession are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or
(B) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.
(3) In any situation covered by paragraph (1)(B), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.
(b) Notice to Congress. The President shall notify Congress of the determination to exercise the authority in subsection (a)(1)(A) as soon as practicable after the determination and every 14 days thereafter during the duration of the exercise of that authority.
Pub. L. No. 109–364 (codified at 10 U.S.C. § 333).

[36] Memorandum from Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice, to William J. Hynes II, General Counsel, Department of Defense, Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan, n. 16 (citing Memorandum to Alberto R. Gonzales, Counsel to the President & William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, Authority for the Use of Military Force to Combat Terrorist Activities within the United States 15–20 (Oct. 23, 2001)), *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 144, 163 (Karen J. Greenberg & Joshua L. Dratel, eds. 2005).

stand this statement to say only that the Posse Comitatus Act, which deals with law enforcement, does not, as a statutory matter, reach counterterrorism. One might, though, understand the claim to be that Congress cannot interfere with the President's powers to deploy military forces in a domestic context to prevent or respond to terrorism. On that score, in light of the obligations the Constitution imposes on the President, if terrorism is an invasion or an insurrection, the claim might well be correct.