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Paradoxes of Sovereignty and Citizenship: Humanitarian Intervention at Home

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PARADOXES OF SOVEREIGNTY AND CITIZENSHIP: HUMANITARIAN INTERVENTION AT HOME

Hawa K. Allan†

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INTRODUCTION

“If I invoked the Insurrection Act against her wishes, the world would see a male Republican president usurping the authority of a female Democratic governor by declaring an insurrection in a largely African American city. That would arouse controversy anywhere. To do so in the Deep South, where there had been centuries of states’ rights tension, could unleash holy hell.”

—George W. Bush, *Decision Points*¹

“George Bush doesn’t care about Black people.”

—Kanye West²

“I am deeply insulted by the suggestion that we allowed American citizens to suffer because they were black. As I told the press at the time, ‘The storm didn’t discriminate, and neither will the recovery effort. When those Coast Guard choppers, many of whom were first on the scene, were pulling people off roofs, they didn’t check the color of a person’s skin.’”

—George W. Bush, *Decision Points*³

“. . . and the fiction of the facts assumes randomness and indeterminacy.”

—Claudia Rankine, *Citizen*⁴

In the days after Hurricane Katrina breached critical levees and submerged most of New Orleans under water, news reporters

¹ GEORGE W. BUSH, *DECISION POINTS* 321 (2010).

² See, e.g., Lisa de Moraes, *Kanye West’s Torrent of Criticism, Live on NBC*, WASH. POST (Sept. 3, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090300165.html> [<https://perma.cc/Z46B-QUKQ>] (“West: I hate the way they portray us in the media. You see a Black family, it says, ‘They’re looting.’ You see a white family, it says, ‘They’re looking for food.’ And, you know, it’s been five days [waiting for federal help] because most of the people are Black. And even for me to complain about it, I would be a hypocrite because I’ve tried to turn away from the TV because it’s too hard to watch. I’ve even been shopping before even giving a donation, so now I’m calling my business manager right now to see what is the biggest amount I can give, and just to imagine if I was down there, and those are my people down there. So anybody out there that wants to do anything that we can help — with the way America is set up to help the poor, the Black people, the less well-off, as slow as possible. I mean, the Red Cross is doing everything they can. We already realize a lot of people that could help are at war right now, fighting another way — and they’ve given them permission to go down and shoot us! . . . George Bush doesn’t care about Black people!”).

³ BUSH, *supra* note 1, at 325.

⁴ CLAUDIA RANKINE, *CITIZEN: AN AMERICAN LYRIC* 85 (2014).

referred to the city as a “third world country”⁵ and to its mostly-Black residents stranded in attics and other makeshift shelters as “refugees.”⁶ Commentators condemned these labels, which they said betrayed a persistent perception of Black citizens as foreigners in their own country.⁷ While corrective monikers surfaced—such as *internally displaced persons*, a term for persons dislocated within their country by, say, civil war or natural disaster⁸—newscasters posed more troubling questions, their cameras rolling at home and minds wandering abroad. “Why no massive airdrop of food and water?”⁹ CNN news anchor Soledad O’Brien asked on a broadcast aired five days after the hurricane hit. “In Banda Aceh, in Indonesia, they got food dropped two days after the tsunami struck.”¹⁰

The above anecdotes raise questions that are this article’s point of departure and site of eventual return. How does one reconcile the swift federal response to a “third world country” abroad relative to the “third world country” at home? Does this Freudian slip, the rhetorical stripping of Black citizenship, bear any rele-

⁵ See, e.g., David Carr, *The Pendulum of Reporting on Katrina*, N.Y. TIMES, (Sept. 5, 2005), <http://www.nytimes.com/2005/09/05/business/media/the-pendulum-of-reporting-on-katrina.html> [https://perma.cc/D57W-HQZM] (“It was left to reporters embedded in the mayhem to let Americans know that a third world country had suddenly appeared on the Gulf Coast.”).

⁶ See, e.g., Joseph B. Treaster & Deborah Sontag, *Local Officials Criticize Federal Government Over Response*, N.Y. TIMES (Sept. 2, 2005), <http://www.nytimes.com/2005/09/02/us/nationalspecial/local-officials-criticize-federal-government-over.html> [https://perma.cc/2QP3-7B96] (“Thousands of refugees from Hurricane Katrina boarded buses for Houston, but others quickly took their places at the filthy, teeming Superdome, which has been serving as the primary shelter.”).

⁷ See, e.g., *Calling Katrina Survivors ‘Refugees’ Stirs Debate*, NBC NEWS (Sept. 7, 2005, 2:06 PM), http://www.nbcnews.com/id/9232071/ns/us_news-katrina_the_long_road_back/t/calling-katrina-survivors-refugees-stirs-debate/ [https://perma.cc/RZ3F-SU69] (“Many, including The Associated Press, have used ‘refugee’ to describe those displaced by the wrath of Hurricane Katrina. But the choice has stirred anger among some readers and other critics, particularly in the black community. They have argued that ‘refugee’ implies that the displaced storm victims, many of whom have been black, are second-class citizens—or not even Americans.”); Tina Daunt & Robin Abcarian, *Survivors, Others Take Offense at Word ‘Refugees’*, L.A. TIMES (Sept. 8, 2005), <http://articles.latimes.com/2005/sep/08/entertainment/et-refugee8> [https://perma.cc/6SL8-XEYK].

⁸ See, e.g., Francis M. Deng (Representative of the Secretary-General on Internally Displaced Persons), *Guiding Principles on Internal Displacement*, ¶ 2, U.N. Doc E/CN.4/1998/53/Add.2, annex (Feb. 11, 1998), <http://www.ohchr.org/EN/Issues/IDPersons/Pages/Standards.aspx> [https://perma.cc/RP3F-Z6QF].

⁹ See Marc Fisher, *Essential Again*, AM. JOURNALISM R., Oct.-Nov. 2005, <http://www.ajr.org/article.asp?id=3962> [https://perma.cc/A8PD-9N7B] (quoting Soledad O’Brien).

¹⁰ *Id.*; see also *Transcripts: American Morning*, CNN (Sept. 2, 2005, 7:00 AM), <http://transcripts.cnn.com/TRANSCRIPTS/0509/02/1tm.01.html> [https://perma.cc/XRG8-CD8S].

vance to the delayed federal response to Hurricane Katrina? While provocative, these questions are not erudite translations of Kanye West's blunt assertion. They also do not deign to infer what lies in the hearts or minds of federal decision-makers. These questions, rather, are raised to consider the value of thinking internationally about domestic concerns – specifically, as this article will explore, to consider the federal response to crises at home in light of the conceptual framework developed to guide humanitarian intervention abroad.

Returning, for the moment, to this article's epigraph, why in response to a natural disaster had President Bush's administration considered declaring an "insurrection"? Why, given this inclination, had the presidential administration been *hesitant* to declare an "insurrection in a largely African American city"?¹¹ The source of this conundrum is the Insurrection Act of 1807:¹² an arcane and largely-unstudied statute that also happens to be the linchpin of iconic events that—from pro- and anti-slavery clashes of Bleeding Kansas, through public school desegregation in the South, to the Los Angeles riots—epitomize the formation and frustrations of Black citizenship in the United States. The Insurrection Act, in brief, authorizes the president to domestically deploy federal troops with law enforcement powers in the event of an "insurrection," "rebellion" or "unlawful combination."¹³ In other words, in the event of some internal crisis or chaos or upheaval, as it were, the Insurrection Act allows the president to use federal military force to restore law and order.

While the Insurrection Act provides clear *legal authority* for the domestic deployment of federal troops to enforce the law, determining when to exercise this authority is ambiguous because, among other things, there is no definition of "insurrection" (or "rebellion" or "unlawful obstruction") in the statute.¹⁴ Thus, what constitutes an "insurrection" is in the eye of the beholder – either

¹¹ BUSH, *supra* note 1, at 321.

¹² Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. §§ 331-335 (2006)). The Insurrection Act is part of a bundle of legislation passed over the course of a century defining the powers of the federal government to call forth state militias or deploy federal troops, colloquially referred to as the Militia Acts. *See generally* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 152-53 n.9 (2004).

¹³ 10 U.S.C. §§ 331-333 (2006).

¹⁴ There is some case law defining insurrection, however largely in the context of insurance litigation. *See, e.g.*, *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1005 (2d Cir. 1974) (stating that insurrection requires "an intent to overthrow a lawfully constituted regime").

that of the *president*, who may *unilaterally* proclaim an incident as such, or of the *state governor*, who may *request* that the president make a proclamation of “insurrection,” thereby, in either scenario, formally triggering the authorization for federal troops to be deployed with law enforcement powers.¹⁵ As an “insurrection” is effectively what the executive proclaims one to be, it is difficult to *deductively* define whether a given incident warrants such a proclamation. Thus, the term lends itself to being defined *inductively*—that is, by reference to a survey of past incidents that have been proclaimed as such.

As will be discussed in this article, the Insurrection Act is a recurring facet of the history of civil rights in the United States—generally, in scenarios where the federal government has militarily intervened to enforce the civil rights of Black Americans and/or to suppress “race riots.” Bleeding Kansas, public school desegregation, and the Los Angeles riots, noted above, are merely three examples. Under the Insurrection Act, federal military intervention was also authorized, for example: during Radical Reconstruction; to enforce the rights of civil rights protesters to march from Selma to Montgomery; and, further, to suppress riots that erupted in Detroit during 1947 and 1963; as well as to put down civil unrest in the wake of Martin Luther King, Jr.’s assassination in Baltimore and Washington D.C.

Past invocations of the Insurrection Act, then, reflect a historical tension over the legitimacy of federal intervention in state affairs where Black citizens are concerned. An overview of the above incidents reveals that the Insurrection Act has generally been invoked *unilaterally* by the President to enforce civil rights (violated by state actors), or *by request* of the state governor in order to suppress “race riots” (engaged in by non-state actors)—with intervention in the former instances deemed *more* politically fraught insofar as state officials considered it an *illegitimate* intrusion upon sovereignty,¹⁶ and in the latter cases—while *less* politically fraught insofar as federal military intervention was requested by state officials—still nonetheless the subject of controversy.

Accordingly, in the case of Hurricane Katrina, the proposed invocation of “insurrection” was controversial in light of the state

¹⁵ See *infra* Section I.A.2. on the Insurrection Act; see also Timothy E. Steigelman, Note, *New Model for Disaster Relief: A Solution to the Posse Comitatus Conundrum*, 57 NAVAL L. REV. 105, 113-16 (2009).

¹⁶ See *infra* Section I.B. on Just Cause.

governor's objection to federal law enforcement.¹⁷ President Bush was reportedly concerned over media reports of looting and violence in New Orleans, and therefore did not want to deploy a requested 40,000 federal troops to Louisiana without law enforcement powers provided under invocation of the Insurrection Act¹⁸—*i.e.*, without the authority to, among other things, search suspects, seize evidence, make arrests, and, more generally, use force.¹⁹ Then-Louisiana Governor Kathleen Blanco, for her part, objected to the proposed invocation of the Insurrection Act.²⁰ Instead, she contended that the president authorize the deployment of the requested troops and other assistance solely in accordance with an act that had already been triggered²¹—the Robert T. Stafford Disaster Relief and Emergency Assistance Act.²² The Staf-

¹⁷ See, e.g., Manuel Roig-Franzia & Spencer Hsu, *Many Evacuated, but Thousands Still Waiting*, WASH. POST (Sept. 4, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/03/AR2005090301680_pf.html [<https://perma.cc/Z8KU-W5P4>] (“Behind the scenes, a power struggle emerged, as federal officials tried to wrest authority from Louisiana Gov. Kathleen Babineaux Blanco (D). Shortly before midnight Friday, the Bush administration sent her a proposed legal memorandum asking her to request a federal takeover of the evacuation of New Orleans, a source within the state’s emergency operations center said Saturday. The administration sought unified control over all local police and state National Guard units reporting to the governor. Louisiana officials rejected the request after talks throughout the night, concerned that such a move would be comparable to a federal declaration of martial law.”).

¹⁸ See, e.g., Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES (Sept. 9, 2005), <http://www.nytimes.com/2005/09/09/us/nationalspecial/political-issues-snarled-plans-for-troop-aid.html> [<https://perma.cc/2HST-WYZV>].

¹⁹ *Id.* (“To seize control of the mission, Mr. Bush would have had to invoke the Insurrection Act, which allows the president in times of unrest to command active-duty forces into the states to perform law enforcement duties.”).

²⁰ Spencer S. Hsu et al., *Documents Highlight Bush-Blanco Standoff*, WASH. POST (Dec. 5, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/12/04/AR2005120400963_pf.html [<https://perma.cc/BTV8-Y7WA>] (“Blanco’s reluctance stemmed from several factors. According to documents and aides, her team was not familiar with relevant laws and procedures, believed the change would have disrupted Guard law enforcement operations in New Orleans and mistrusted the Bush team, which they saw as preoccupied with its own public relations problems and blame shifting.”).

²¹ Letter from Kathleen Babineaux Blanco, Governor, La., to George W. Bush, President, U.S. (Aug. 27, 2005), <http://blancogovernor.com/index.cfm?md=newsroom&tmp=detail&catID=1&articleID=778&navID=3> [<https://perma.cc/A7S8-D5SF>]; see also *Blanco’s State of Emergency Letter to President Bush*, TIMES-PICTAYUNE (Aug. 27, 2005, 12:00 PM), http://www.nola.com/katrina/index.ssf/2005/08/blancos_state_of_emergency_letter_to_president_bush.html [<https://perma.cc/7GQS-3FWC>].

²² Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988) (current version at 42 U.S.C. §§ 5121-5191). The Stafford Act is the statutory authority for most federal disaster response activities, especially with regard to FEMA and FEMA programs. The Stafford Act was originally signed into law on November 23, 1988 as an amendment to the Disaster Relief Act of

ford Act is generally applied to coordinate the federal response to natural disasters such as hurricanes, floods and brush fires, (although it can also be applied to respond to “man-made disasters,” as defined therein). Moreover, and importantly, the Stafford Act does *not* authorize any federal troops deployed thereunder to enforce the law. Thus, a dispatch of federal troops consistent with the Stafford Act would allow Blanco, as governor, to retain control over the police powers of the state. A deployment of requested federal troops under the Insurrection Act, by contrast, would have both conferred such troops with law enforcement authority and stripped the governor of her role as ultimate commander-in-chief of the National Guard, which would have been federalized under executive command. In the end, the Louisiana governor prevailed in the federalism dispute, and the requested additional troops were deployed five days after the hurricane hit landfall²³—well into the televised crisis in New Orleans.

In the end, as will become clear by international analogy, the president’s proposed invocation of the Insurrection Act was more akin to contemplated *humanitarian intervention*—in one sense, military action taken against an insurgency that gravely endangers the rights and lives of civilians—than *humanitarian aid*—the provision of emergency relief to help rescue and shelter civilians amid a disaster. Indeed, akin to the ostensible purpose of humanitarian intervention, the Insurrection Act has been invoked, on the one hand, to enforce the fundamental rights of persons persecuted by a given state (or whom such state is unable or unwilling to protect from persecution), and, on the other, to enforce the law amid a total breakdown of order—in other words, to enforce civil rights or to suppress race riots. In light of this analogy, the president’s hesitancy to deploy federal troops to Louisiana under the Insurrection Act is analogous to the formal inhibitions to engage in humanitarian intervention abroad. The contemplated proclamation of “insurrection” at home, then, is more analogous to the decision whether to restore law and order (and thereby save lives) in, say,

1974, Pub. L. No. 93-288, 88 Stat. 143. The most recent reauthorization happened in 2013. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 113-2, 127 Stat. 4.

²³ STEVE BOWMAN ET AL., CONG. RESEARCH SERV., HURRICANE KATRINA: DOD DISASTER RESPONSE 1 (2005), <https://fas.org/sgp/crs/natsec/RL33095.pdf> [<https://perma.cc/4VYJ-FSX4>] (“The Department of Defense’s Northern Command began its alert and coordination procedures before Katrina’s landfall, however many deployments did not reach the affected area until days after.”).

Somalia in the early 1990s,²⁴ than the decision to help provide aid and shelter to tsunami victims in Indonesia.²⁵

Following the international analogy to its conclusion—namely, the paradox of sovereignty and citizenship—this article reconsiders the Katrina crisis and other federal military interventions at home in light of the pre-existing analytical framework of “just war” theory. In other words, this article applies the conceptual framework developed to guide humanitarian intervention abroad—*i.e.*, questions of *legality*, *necessity*, and *purpose*—to the federal response to Hurricane Katrina and other “crises” at home. Though immediately counterintuitive, the conceptual framework is useful for considering—both retrospectively and prospectively—domestic federal military intervention. This framework not only sheds new light on familiar historical events, but also can be a useful aid in the decision-making process regarding future domestic deployments of federal troops.

As discussed in Part I, similar questions of legality, necessity, and purpose—or, in “just war” parlance, *legal authority*, *just cause*, and *right intention*—arise domestically that can be clarified by reference to the international context. Further, in distinguishing humanitarian intervention—*i.e.*, the use of military force to enforce fundamental rights and/or law and order—from humanitarian aid—*i.e.*, the non-combative extension of emergency relief to save lives—this article considers how the interpretation of a given crisis at the executive level can influence the nature of federal response. Accordingly, the following question is presented in Part I: when is domestic federal intervention framed as humanitarian intervention versus humanitarian aid? Moreover, in considering the purpose (or intention) of federal military intervention, Part I of this article examines the potential for selective enforcement where domestic humanitarian intervention and aid are concerned.

As discussed in Part II of this article, an overview of domestic federal military intervention in light of “just war” theory uncovers two paradoxes—one of *sovereignty* and another of *citizenship*. As for sovereignty, while it would appear that federal military infringement upon the sovereignty of the several states during a crisis should be relatively uncontroversial given the clear legal authority

²⁴ See, e.g., *Somalia, 1992-1993*, U.S. DEP'T STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/somalia> [<https://perma.cc/4WFX-PXS9>].

²⁵ See, e.g., *Tsunami Aid: Who's Giving What*, BBC NEWS (Jan. 27, 2005, 8:40 AM), <http://news.bbc.co.uk/2/hi/asia-pacific/4145259.stm> [<https://perma.cc/4EBQ-K9L5>] (“Washington also sent military assistance involving 12,600 personnel, 21 ships, 14 cargo planes and more than 90 helicopters.”).

to do so, the potential political fallout of doing such renders the sovereignty of the states far less permeable than would be imagined—perhaps akin to that of a foreign state. As to citizenship, while the federal government’s responsibility to protect all citizens within United States borders is unequivocal and expected to be fulfilled uniformly, an overview of the nature of federal military intervention in response to a given domestic crisis raises the question whether, where Black citizens have been concerned, the primary intention to restore law and order has trumped any intention to save lives.

I. HUMANITARIAN INTERVENTION AT HOME

Though a single definition of “humanitarian intervention” has not emerged, the term is generally understood to refer to the use or threat of use of *military force* by one or more states within another state for ostensibly humanitarian purposes.²⁶ Humanitarian intervention is at times construed to encompass the provision of *emergency relief* by one or more states to another in order to help rescue and shelter civilians amid a disaster—a relatively uncontroversial activity referred to herein as humanitarian aid.²⁷ Indeed, U.S. provision of emergency aid to Indonesia in the wake of the tsunami is an example of such aid.²⁸ Used here, and as illustrated in the table below, “humanitarian intervention” describes a relatively controversial activity; it refers to the military intervention of one or more states into another (1) for the ostensible purpose of

²⁶ See, e.g., Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107, 107 n.2 (2006), <http://www.law.harvard.edu/faculty/rgoodman/pdfs/RGoodmanHumanitarianInterventionPretextsforWar.pdf> [<https://perma.cc/95TB-8TST>] (“A conventional definition of ‘humanitarian intervention’ is ‘the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.’” (quoting SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 11-12 (1996))).

²⁷ See, e.g., Kate Mackintosh, *Beyond the Red Cross: The Protection of Independent Humanitarian Organizations and Their Staff in International Humanitarian Law*, in INTERNATIONAL LAW AND HUMANITARIAN ASSISTANCE: A CROSSCUT THROUGH LEGAL ISSUES PERTAINING TO HUMANITARIANISM 33, 36 (Hans-Joachim Heintze & Andrej Zwitter eds., 2011); *Deliver Humanitarian Aid*, UNITED NATIONS, <http://www.un.org/en/sections/what-we-do/deliver-humanitarian-aid/index.html> [<https://perma.cc/F8KT-RCHW>].

²⁸ Press Release, Office of the Press Sec’y, White House of President George W. Bush, Fact Sheet: Continuing Report for Tsunami Relief (Feb. 9, 2005), <https://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050209-20.html> [<https://perma.cc/DYW5-WRAU>] (“The Defense Department has been providing vital supplies and logistics to the humanitarian effort since December 30.”).

enforcing the human rights of persons persecuted by the target state or whom the target state is unable or unwilling to protect from persecution by some third party, or, further, (2) amid a total breakdown of law and order. Prior to the events of September 11, 2001, examples of such interventions made by the United States through the North Atlantic Treaty Organization (“NATO”) or otherwise include those in Bosnia, Kosovo, and Somalia;²⁹ moreover, an example of a situation that, in hindsight, has been deemed to warrant such intervention is the genocide in Rwanda.³⁰

²⁹ See generally *The Evolution of NATO, 1988-2001*, U.S. DEP’T STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/evolution-of-nato> [<https://perma.cc/D3MU-YFZU>]; see also *The War in Bosnia, 1992-1995*, U.S. DEP’T STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/bosnia> [<https://perma.cc/Z2M7-HGVK>]; *Somalia, 1992-1993*, U.S. DEP’T STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1993-2000/somalia> [<https://perma.cc/J445-Z9N6>]; *Peace Support Operations in Bosnia and Herzegovina*, NATO (Sept. 7, 2015, 2:52 PM), http://www.nato.int/cps/en/natohq/topics_52122.htm [<https://perma.cc/772M-DPCD>]; *NATO’s Role in Kosovo*, NATO (Sept. 6, 2016, 12:23 PM), http://www.nato.int/cps/en/natohq/topics_48818.htm [<https://perma.cc/Q2GK-2L62>].

³⁰ See, e.g., ALAN J. KUPERMAN, *THE LIMITS OF HUMANITARIAN INTERVENTION: GENOCIDE IN RWANDA* 109 (2001) (“A realistic U.S. military intervention launched as soon as President Clinton could have determined that genocide was being attempted in Rwanda would not have averted the genocide. It could, however, have saved an estimated 75,000 to 125,000 Tutsi from death, about 15 to 25 percent of those who ultimately lost their lives, in addition to tens of thousands of Hutu.”); Scott R. Feil, *Could 5,000 Peacekeepers Have Saved 500,000 Rwandans?: Early Intervention Reconsidered*, ISD REP., April 1997, at 1, 1-5, https://isd.georgetown.edu/sites/isd/files/ISDreport_Could_5000_Feil.pdf [<https://perma.cc/6QLB-PAYW>]; *Ghosts of Rwanda: America’s Response to the Genocide*, PBS.ORG: FRONTLINE (Apr. 1, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/ghosts/themes/response.html> [<https://perma.cc/KEC4-G9JJ>]. For more background on the institutional failures that prevented intervention in the Rwandan Genocide, see Matthew Levinger, *Why the U.S. Government Failed to Anticipate the Rwandan Genocide of 1994: Lessons for Early Warning and Prevention*, 9 GENOCIDE STUD. & PREVENTION, no. 3, 2016, at 33, <http://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1362&context=gsp> [<https://perma.cc/Z99K-D35R>].

TABLE 1.1 DOMESTIC ANALOGIES TO HUMANITARIAN INTERVENTION & AID

International Intervention	Domestic Federal Intervention	Purpose of Intervention
Humanitarian Intervention	Insurrection Act	Use of Military Force in Order to Enforce Fundamental Rights and/or Restore Law and Order
Humanitarian Aid	Stafford Act	Extension of Emergency Relief in Order to Save Lives and Alleviate Suffering

Legal scholars, moral philosophers, as well as both crafters and critics of U.S. foreign policy have long theorized about and debated the legitimacy of humanitarian intervention in the international context.³¹ The *legitimacy* of such intervention has been at issue in light of the general *non-intervention principle*—whereby the sovereignty of a given state is inviolable absent certain *exceptional* circumstances.³² While legal scholars of humanitarian intervention have predominantly considered the requisite exceptional authority of a given state to infringe upon the sovereignty of another state, under the UN Charter and otherwise,³³ moral philosophers have attempted to establish criteria for determining those instances where humanitarian concerns trump the integrity of state sovereignty.³⁴ Furthermore, moral philosophers, as well as commentators on U.S. foreign policy, have contemplated the purity of

³¹ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 703 cmt. e, 905 (AM. LAW INST. 1987); Alex J. Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq*, ETHICS & INT'L AFFAIRS, October 1, 2005, at 31, 50-54, <http://teachers.colonelby.com/krichardson/Grade%2012/Carleton%20-%20Int%20Law%20Course/Week%207/R2P%20or%20Trojan.pdf> [<https://perma.cc/SR4F-KPDX>]; Goodman, *supra* note 26; Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824 (1999); Rachel VanLandingham, *Politics or Law? The Dual Nature of the Responsibility to Protect*, 41 DENV. J. INT'L L. & POL'Y 63 (2012); *With Good Intentions: U.S. Foreign Policy & Humanitarian Intervention*, CATO INST. (Mar. 14, 2006), <https://www.cato.org/events/good-intentions-us-foreign-policy-humanitarian-intervention> [<https://perma.cc/YWT5-5X94>].

³² See, e.g., G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970), <http://www.un-documents.net/a25r2625.htm> [<https://perma.cc/63FM-T6L3>].

³³ See, e.g., MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 61 (1977).

³⁴ *Id.* at 107-08.

motives guiding humanitarian intervention. The former have elaborated, among the established moral criteria for such intervention, that intervening states use military force – in all instances warranting such – for purely humanitarian purposes;³⁵ the latter have relied on empirical analyses to point out that, in practice, such intervention has been selectively conducted by states pursuing interests that are not solely humanitarian in nature.³⁶ In sum, and borrowing terminology also used in “just war” theory, domestic federal military intervention has largely considered questions of (1) legality, or proper (*i.e.*, legal) authority to intervene; (2) necessity, or whether the relevant incident constitutes a just cause warranting intervention; and, (3) purpose, that is, independent of the stated cause or goal of a given intervention, whether the intervention is made with the right intention.³⁷

As an initial matter, principles developed to guide humanitarian intervention abroad are instructive at home insofar as they contextualize and assist an analysis of the *decision-making process* entailed in authorizing domestic federal military intervention. Taking the delayed federal response to Hurricane Katrina as a key example and cautionary tale, it will become clear that decisions made at the executive level as to whether to invoke the Insurrection Act—*i.e.*, engage in humanitarian intervention at home—are not only influenced by the same kind of concerns that arise when contemplating humanitarian intervention abroad, but can also hinder or distort the federal response to domestic disaster. As summarized in the table below, this conceptual framework—questions of legal authority, just cause, and right intention—is applied in Part I to reconsider domestic federal military intervention. This conceptual exercise will elaborate on federal military intervention in *theory* and *practice*. The *theory*, as will be discussed in subsection A.1., is grounded in *legal authority*—that is, the legal framework authorizing domestic federal military intervention in the exceptional event of an “insurrection.” The consideration of *practice* as discussed in subsections A.2. and A.3., will be illustrated by each of those incidents deemed to warrant a *just cause*—*i.e.*, events deemed to be “insurrections”—and by a consideration of *right intention*—*i.e.*, the disparate purposes of “crisis” response set forth in the Insurrection

³⁵ *Id.*

³⁶ *See, e.g., id.* at 102-03.

³⁷ For an overview of the definitional components of “just war” – and in particular, *jus ad bellum*, which refers to the theory of justification for initiating a war – see *War*, STAN. ENCYCLOPEDIA PHIL. (May 3, 2016), <https://plato.stanford.edu/entries/war/#JusAdBell> [<https://perma.cc/T25A-UV3J>].

and Stafford Acts, respectively, and the possibility of selective enforcement as to which legislation is applied to respond to a given event. This analysis will ultimately show how the legal framework governing domestic federal military intervention betrays the fraught relation between race and state sovereignty, and, further, raises questions of disparate responses to disaster as to different subsets of citizens. In other words, this exercise will summarily reveal paradoxes of sovereignty and citizenship.

TABLE 1.2 DOMESTIC APPLICATION OF CONCEPTUAL FRAMEWORK

Conceptual Framework	Humanitarian Intervention Abroad	Humanitarian Intervention at Home
Non-Intervention Principle	General Inviolability of State Sovereignty	General Inviolability of the Sovereignty of the Several States as to Implied Police Powers
Legal Authority	UN Charter, Chapter VII	Insurrection Act (and Article IV, Sections 2 & 4, Article I, Section 8, and Article II, Section 2 of the Constitution)
Just Cause	Grave Violation of Human Rights by State Actors, or by Non-State Actors that Overwhelms Capacity of State to Respond	Violation of Constitutional Rights by State Actors, or by Non-State Actors that Overwhelms the Capacity of any of the Several States to Respond
Right Intention	Theoretical: Solely Humanitarian Purposes Empirical Trend: State-Sponsored Human Rights Violation; Insurgency by Non-State Actors that causes Human Rights Violations	Theoretical: Solely Humanitarian Purposes Empirical Trend: State-Sponsored Civil Rights Violations; 'Race Riots' Engaged in by Non-State Actors

A. *Legal Authority*

The conceptual exercise employed in this article—considering federal military intervention at home in light of the analysis developed to guide humanitarian intervention abroad – could appear

incongruous where legal authority is concerned. Indeed, as discussed further, while the legal authority of one state to militarily intervene in the affairs of another state is equivocal, the same authority domestically, by contrast, is unequivocal. The “non-intervention” principle in the international context establishes a high threshold for one state to violate the sovereignty of another—a threshold that is not only politically fraught but also legally vague.³⁸ However, as will become clear, there is an analogous “non-intervention” principle in effect in the U.S. federalist system of government, which renders federal military intervention politically fraught regardless of the unambiguous legal authorization of the executive to engage in it.

In the international context, the UN Charter is the primary source of the legal authority of one or more member states to engage in humanitarian intervention.³⁹ However, such authority is established in the Charter as an exception to a general rule that prohibits a given state from intervening in the internal affairs of another. Specifically, the UN Charter sets forth a “non-intervention principle” enshrining the sanctity of state sovereignty, stating in Article 2(7) that “nothing . . . shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”⁴⁰ Member states, accordingly, must not violate the territorial integrity of another state except for reasons of self-defense or, arguably, to maintain international peace and security.⁴¹ While some scholars have cited other sources of international law that legally authorize humanitarian intervention⁴²—including, for example, the obligation to prevent and punish genocide under the Genocide Convention⁴³—it is clear that any incidents internal to a given state that legally warrant intervention constitute exceptions to the general rule to respect state sovereignty.

³⁸ See generally Jane Stromseth, *Rethinking Humanitarian Intervention: The Case for Incremental Change*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 232, 242 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

³⁹ Compare U.N. Charter arts. 41-42 with U.N. Charter art. 2, ¶¶ 4, 7.

⁴⁰ U.N. Charter art. 2, ¶ 7.

⁴¹ U.N. Charter art. 2, ¶ 4.

⁴² See, e.g., Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683 (2000); Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 2002 FINNISH Y.B. INT'L L. 141, [http://eprints.lse.ac.uk/21492/1/Humanitarian_intervention_the_case_of_Kosovo\(LSERO\).pdf](http://eprints.lse.ac.uk/21492/1/Humanitarian_intervention_the_case_of_Kosovo(LSERO).pdf) [<https://perma.cc/3NYB-8BXF>].

⁴³ United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280, <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf> [<https://perma.cc/5YBW-KF4S>].

Again, similar quandaries of legal authority may not be immediately thought to occur domestically. For one, the responsibility of the U.S. government to protect non-citizens abroad is of dubious legal certainty and politically fraught;⁴⁴ by contrast, the same obligation at home is legally unequivocal and, moreover, presumably politically uncontroversial. However, upon further reflection, it is clear that the degree of autonomy reserved to the several states in the federalist system of U.S. government is a domestic analogue to the sanctity of state sovereignty enshrined in the U.N. Charter.

Indeed, federalism entails a separation of powers between the federal and state governments—the latter of which are entitled to a degree of autonomy, (or, as popularly termed, “states’ rights”), that is analogous to the international concept of “state sovereignty.” Certainly, there are instances in which federal and state governments have overlapping powers; however, key to a consideration of humanitarian intervention at home is the constitutional delegation of police powers to the several states, (subject, of course, to specified exceptions).

The constitutional and legislative manifestations of the “non-intervention principle,” as well as codified exceptions to this principle, are discussed in this section. First, this section gives an overview of the limits on the domestic deployment of federal troops enumerated in the U.S. Constitution, including a brief discussion of anxieties documented in *The Federalist Papers*⁴⁵ about the threat of establishing a federal military force. Next, this section discusses the Posse Comitatus Act of 1878,⁴⁶ post-Civil-War legislation that generally prohibits the domestic deployment of federal troops to enforce the law. Further, this section discusses a relevant exception to the Posse Comitatus Act—the Insurrection Act, which is the domestic analogue to legally authorized humanitarian intervention. Finally, this section discusses the Stafford Act, which is legislation that authorizes the federal administration of humanitarian aid to the several states.

⁴⁴ Compare MADELEINE K. ALBRIGHT & RICHARD S. WILLIAMSON, *THE UNITED STATES AND R2P: FROM WORDS TO ACTION* (2013), <https://www.ushmm.org/m/img/20130613-The-United-States-and-R2P.pdf> [<https://perma.cc/8S9W-PLMH>], with STEVEN GROVES, *THE HERITAGE FOUND.*, *THE U.S. SHOULD REJECT THE U.N. “RESPONSIBILITY TO PROTECT” DOCTRINE*, (2008), <http://www.heritage.org/research/reports/2008/05/the-us-should-reject-the-un-responsibility-to-protect-doctrine> [<https://perma.cc/3UHV-SYTH>].

⁴⁵ *THE FEDERALIST PAPERS* (Clinton Rossiter ed., 1961).

⁴⁶ Posse Comitatus Act of 1878, ch. 263, § 15, 20 Stat. 145, 152 (current version at 18 U.S.C. § 1385 (1994)).

1. “Non-Intervention” Principle

Analogous to the non-intervention principle in the international context, the Constitution, as a general rule, reserves to the several states the power to enforce the law within their respective territories. The Tenth Amendment reserves to the several states, or to the people, any powers not expressly granted to the federal government or not otherwise prohibited by the Constitution—including implied police powers.⁴⁷ The implied police powers of the state have been construed as those exercised to promote and maintain the health, safety, morals, and general welfare of the public—powers which are understood to authorize each of the several states to enforce law and order within their territories. The laws of the several states, moreover, are fairly uniform in establishing the governor, chief executive of the state, as commander-in-chief of the state militia—which, in modern day, has been formally reconstituted as the National Guard.⁴⁸

The Constitution, however, also establishes a framework for the federal exercise of police power in exceptional circumstances. Article IV, Section 4 of the Constitution guaranteeing a republican form of government may be interpreted to authorize the domestic deployment of federal troops in furtherance of such guarantee;⁴⁹ further, Article IV, Section 4 regarding the federal obligation to protect the several states from domestic violence may be interpreted to authorize the same.⁵⁰ As for the federal government’s exceptional authorization to commandeer *state* military forces, Article I, Section 8, Clause 15 of the Constitution authorizes Congress to *call forth* the state militia to execute the laws of the union—*i.e.*, federal law—to suppress insurrections and repel invasions.⁵¹ Further, under Article II, Section 2, Clause 1 the president is the commander-in-chief of the U.S. army and navy, as well as of the militia of the several states *when called into the actual service of* the federal government.⁵² In tandem, these provisions allow for state militia, when called forth by Congress, to be federalized under presidential command. In other words, the president is authorized to federalize, and thereby usurp, a state governor’s command over state mili-

⁴⁷ U.S. CONST. amend. X.

⁴⁸ 53 AM. JUR. 2D *Military & Civil Defense* § 30 (2017).

⁴⁹ U.S. CONST. art. IV, § 4.

⁵⁰ *Id.*

⁵¹ *Id.* art. I, § 8, cl. 15.

⁵² *Id.* art. II, § 2, cl. 1.

tia—as presently constituted, the National Guard—and, further, deploy such troops domestically in order to enforce the law.

As discussed in this subsection, Congress delegated to the president its authority to call forth the state militia to enforce the law in, among other legislation, the Insurrection Act and related statutes collectively referred to as the Militia Acts.⁵³ Before elaborating on the legislative authority for the president to use federal (and in the case of the state militia, federalized) military force domestically, it is useful to briefly consider the general constitutional rule and its exceptions in light of initial concerns over the establishment of a federal military documented in *The Federalist Papers*⁵⁴—namely, anxieties over the threat of standing armies and the potential abuse of federal power.

a. *The Federalist Papers*

*The Federalist Papers*⁵⁵ set forth the theoretical underpinning for the domestic non-intervention principle, namely anti-federalist fears about the potential use of the federal military to subjugate the peoples of the several states. In allaying such fears, federalists—Alexander Hamilton and James Madison, in particular—minimized the perceived threat posed by a federal military, whose domestic deployment they presumed would be limited to protecting the republic from invasion and suppressing any insurrections in one or more of the several states.⁵⁶ Moreover, they extolled the potency of the state militia, which they contended would be sufficiently robust to combat any abuse of federal military power.⁵⁷

⁵³ See, e.g., Vladeck, *supra* note 12, at 152-53 n.9 (“The five statutes are the Calling Forth Act of 1792, ch. 28, 1 Stat. 264 (repealed 1795); the Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed in part 1861 and current version at 10 U.S.C. §§ 331-335 (2000)); the Insurrection Act of 1807, ch. 39, 2 Stat. 443 (current version at 10 U.S.C. §§ 331-335 (2000)); the Suppression of the Rebellion Act of 1861, ch. 25, 12 Stat. 281 (current version at 10 U.S.C. §§ 331-335 (2000)); and specific parts of the Ku Klux Klan (Civil Rights) Act of 1871, ch. 22, §§ 3-4, 17 Stat. 13, 14-15 (expired in part 1873 and current version at 10 U.S.C. § 333).” *Id.* at 159-67.

⁵⁴ THE FEDERALIST PAPERS, *supra* note 45.

⁵⁵ *Id.*

⁵⁶ See THE FEDERALIST NO. 29 (Alexander Hamilton), No. 46 (James Madison).

⁵⁷ It is worth noting, here, an analogy to the international context – namely, early discussions over the contemplated authority of the UN Security Council to use military force in order to “maintain or restore international peace and security.” U.N. Charter art. 39. Similar to the adjudged weakness of the American confederation of sovereign states as compared to the proposed federalist system of government, founding members of the UN determined that the establishment of an armed force commandeered by the Security Council was a marked improvement over the former system under the League of Nations—which lacked its own military force and depended solely on the armed forces of state members.

Before elaborating on the non-intervention principle set forth in *The Federalist Papers* and its relation to insurrection, it is useful to first delineate the “militia,” as referenced therein and in the Constitution, from the distinct and at times encapsulating “federal military.” “Militia” is referred to in *The Federalist Paper No. 29* as the military forces of the several states subject to the direction of state officials.⁵⁸ Such militia, further, was to be distinct from the body of troops that would constitute the proposed federal military—*i.e.*, those bodies of armed forces including the army and the navy, among others.

The Federalist Papers also contemplated the role of the federal military in suppressing insurrections. As Alexander Hamilton expressed in *The Federalist Paper No. 28*, regardless of the ultimate form of government, it would be necessary to have “a force constituted differently from the militia, to preserve the peace of the community and to maintain the just authority of the laws against those violent invasions of them which amount to insurrections and rebellions.”⁵⁹ Though Hamilton contemplated that a federal military would be the force of first resort for suppressing insurrection, he also considered the deployment of state militia as a supplemental force in such a scenario: “In times of insurrection, or invasion, it would be *natural and proper* that the militia of a neighboring State should be marched into another, to resist a common enemy, or to guard the republic against the violence of faction or sedition.”⁶⁰

Apart from the emphasized need for a federal military to suppress insurrection, the role and potency of this force was generally downplayed relative to the state militia and other armed mobilizations of peoples within the several states. James Madison, for example, attempted to dispel any concerns over the potential for the abuses of a federal military force by asserting that the state militia would be sufficiently armed and numerous to repel an army that served at the will of the federal government.⁶¹ Similar assertions were made about the relative potency of state and federal military forces in discussions about the unorganized militia—*i.e.*, self-mobil-

⁵⁸ THE FEDERALIST NO. 29 (Alexander Hamilton). It was proposed therein that the federal government provide for the organizing, arming, and disciplining of the militia, and for governing them when they are in federal service. However, the appointment of officers and the authority of training the militia according to a discipline prescribed by Congress would be reserved to the several states.

⁵⁹ THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁶⁰ THE FEDERALIST NO. 29, at 187 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

⁶¹ THE FEDERALIST NO. 46, at 299 (James Madison) (Clinton Rossiter ed., 1961).

ized collectives of armed civilians. Hamilton presumed that armed state citizens who exercised “that original right of self-defense which is paramount to all positive forms of government” would be better equipped to resist the “usurpations of national rulers” than that of state representatives.⁶² He further surmised that any collective of armed civilians would be woefully unorganized and ill-equipped to combat the unjust encroachment of state power, but not that of federal power.⁶³

Finally, while promoting a system of military checks and balances,⁶⁴ it was assumed in *The Federalist Papers* that the federal government would have the authority to commandeer state militias in order to enforce the law. Hamilton rejected as “absurd”⁶⁵ that the president would be prohibited from calling out the *Posse Comitatus*—in Latin, ‘the power of a county’,⁶⁶ and, colloquially, a body of armed men summoned by a sheriff to enforce the law⁶⁷—because the then-proposed Constitution did not expressly authorize such a power.⁶⁸ For one, Hamilton submitted that the inherent loyalty of members of the ‘militia’ to state officials would check any federal abuse of authority when the president commandeered such forces.⁶⁹ Further, to the extent that such a notion was considered a danger to public safety, Hamilton preemptively asked:

Where in the name of common-sense, are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens? What shadow of danger can there be from men who are daily mingling with the rest of their countrymen and who

⁶² THE FEDERALIST NO. 28, at 180 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁶³ THE FEDERALIST NO. 29, at 185 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁶⁴ THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[T]he general government [would] at all times stand ready to check the usurpations of the state governments, and these [would] have the same disposition towards the general government.”).

⁶⁵ THE FEDERALIST NO. 29, at 183 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁶⁶ See *Posse Comitatus*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/posse%20comitatus> [<https://perma.cc/774A-UNTZ>]; see also Hawa Allan, *By What Authority?*, BAFFLER (Nov. 23, 2016), <http://thebaffler.com/latest/insurrection-hawa-allan> [<https://perma.cc/AW7A-5XCZ>].

⁶⁷ See ERIC V. LARSON & JOHN E. PETERS, RAND CORP., PREPARING THE U.S. ARMY FOR HOMELAND SECURITY: CONCEPTS, ISSUES, AND OPTIONS 243 (2001), https://www.rand.org/content/dam/rand/pubs/monograph_reports/MR1251/MR1251.AppD.pdf [<https://perma.cc/5HDV-PQ83>] (quoting the Black’s Law Dictionary definition of *posse comitatus*).

⁶⁸ THE FEDERALIST NO. 29, at 183-84 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁶⁹ *Id.*

participate with them in the same feelings, sentiments, habits and interests? What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia and to command its services when necessary, while the particular States are to have *the sole and exclusive appointment of the officers*?⁷⁰

b. *Posse Comitatus*

Despite Hamilton's incredulity, the Posse Comitatus Act—a legislative response to the abovementioned “shadow of danger”—was later enacted. As discussed *infra*, Posse Comitatus was passed in 1878 as a response to federal military intervention in Southern states during Reconstruction.⁷¹ Specifically, Posse Comitatus codified the hitherto unwritten agreement made as part of the Compromise of 1877, which secured the election of Rutherford B. Hayes to the office of president in exchange for the removal of federal troops from former Confederate states.⁷² In short, Posse Comitatus became the legislative manifestation of the domestic “non-intervention” principle.

The text of Posse Comitatus as currently codified is as follows:

Whoever, *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.⁷³

The precise language of Posse Comitatus renders the statute a palliative rather than a cure-all because, despite the general prohibition on the domestic deployment of federal troops to enforce the law, the statute expressly authorizes exceptions to this rule “authorized by the Constitution or Act of Congress,” which include the Insurrection Act, discussed below.⁷⁴

As for the practical import of Posse Comitatus, the statute has been interpreted by federal district courts to disallow the “active” use of federal or federalized armed forces to enforce the law—prohibiting such troops from making arrests, seizing evidence, conducting searches, investigating crimes, and interviewing wit-

⁷⁰ *Id.* at 186 (emphasis added).

⁷¹ Posse Comitatus Act of 1878, ch. 263, § 15, 20 Stat. 145, 152 (current version at 18 U.S.C. § 1385 (1994)).

⁷² Andrew Buttarò, *The Posse Comitatus Act of 1878 and the End of Reconstruction*, 47 ST. MARY'S L.J. 135, 136, 161 (2015).

⁷³ 18 U.S.C. § 1385 (1994) (emphasis added).

⁷⁴ *Id.* Other exceptions include the National Defense Authorization Act.

nesses.⁷⁵ However, other federal district courts have interpreted *Posse Comitatus* *not to* prohibit the “passive” engagement of federal and federalized troops in law enforcement activity—*i.e.*, the “mere presence” of such troops for reporting purposes, preparation of contingency plans, advice or recommendations given to civilian law enforcement authorities and the provision of materials or equipment to such authorities.⁷⁶

It is worth noting, here, the analogous operational limitations that generally apply to the U.S. military when facilitating the provision of humanitarian aid abroad—that is, when intervening in the affairs of a sovereign state, typically by local invitation, in order to provide emergency relief in the aftermath of a disaster that overwhelms the capacity of such state to respond. In brief, the U.S. military plays a supporting role in such missions, restricted not only to complementing the activities of the United States Agency for International Development (“USAID”) and non-governmental organizations, but, further and importantly, supplementing the efforts of the civilian authorities of the state to which relief is being provided.

2. Insurrection Act

The Insurrection Act is among the legislative exceptions to the non-intervention principle enumerated in the Constitution and later codified in *Posse Comitatus*. The domestic analogue to an authorization of humanitarian intervention abroad, the Insurrection Act, in brief, authorizes the president to domestically deploy federal troops with law enforcement powers. As the Insurrection Act lacks any legislative history, this subsection will detail the more technical aspects of the legislation—including its antecedents and other related statutes, such as those enacted to allow for federal military intervention to suppress the Ku Klux Klan and enforce the

⁷⁵ *See, e.g.*, *United States v. Red Feather*, 392 F. Supp. 916, 925 (D.S.D. 1975).

⁷⁶ This distinction between active and passive law enforcement was articulated in decisions in a number of federal cases brought by members of the American Indian Movement (AIM) who challenged the use of federal military intervention to disband their armed occupation of the village of Wounded Knee in South Dakota. In at least two such decisions, federal courts overturned the criminal convictions of AIM defendants involved in the occupation, finding that, absent any presidential proclamation authorizing such use under the Insurrection Act, they were apprehended in violation of *Posse Comitatus* with the *active* engagement of federal armed forces. *See, e.g.*, *United States v. Red Feather*, 392 F. Supp. 916, 923 (D.S.D. 1975) (“It is clear from the legislative history of 18 U.S.C. § 1385 and the above cases, the intent of Congress in enacting this statute and by using the clause ‘uses any part of the Army or the Air Force as a posse comitatus or otherwise’, was to prevent the direct active use of federal troops, one soldier or many, to execute the laws. Congress did not intend to prevent the use of Army or Air Force materiel or equipment in aid of execution of the laws.”).

Fifteenth Amendment. As this subsection will begin to demonstrate, the Insurrection Act has been a site of contention over theoretical federalist principles, and, in practice, has played a key role in federal enforcement of the civil rights of Black citizens.

The Insurrection Act is among the legislation referred to as the Militia Acts, which, among other things, collectively defined the form and function of the state militia.⁷⁷ With the enactment of the Militia Act of 1903 (also known as the Dick Act), the state militia was reconfigured as the modern-day National Guard.⁷⁸ The Dick Act established the current system of administration of state militia—*i.e.*, whereby the National Guard is a reserve force that, under a given state constitution, generally serves at the will of the state governor and, further, is subject to being ‘called forth’ into federal service by the president.

The Militia Acts also set forth the terms and conditions regarding executive authority to engage in “humanitarian intervention” in one or more of the several states. The Insurrection Act—which remains in force to date⁷⁹—authorizes the president to deploy both state militia and federal armed forces to respond to specified internal disturbances. Recalling Article I, Section 8 of the Constitution, the Insurrection Act authorizes the president to call forth the militia, as well as federal armed forces, in order to suppress insurrection and/or enforce federal law.⁸⁰ The Insurrection Act gives the president considerable discretion to determine when a given

⁷⁷ As to *form*, the first of this series of legislation, titled the 1792 Uniform National Militia Act, provided that “each and every free able-bodied white male citizen of the respective states” between the ages of 18 and 45 was enrolled in the militia, and set forth requirements for how state officials were to organize and arm its members. Militia Act of 1792, ch. 33, 1 Stat. 271, 272. This early definition was altered with subsequent legislation that shifted more control to the federal government in designating precisely how state militia was to be organized and equipped (thereby limiting discretion of state officials as to such matters), and, further, expanding the criteria for membership – including the racial desegregation of the militia in 1862. Militia Act of 1862, ch. 201, 12 Stat. 597.

⁷⁸ Militia Act of 1903, ch. 196, 32 Stat. 775, 775.

⁷⁹ 10 U.S.C. §§ 331-335 (1956).

⁸⁰ *Id.* § 331 (“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.”). Ability to repel invasion is mysteriously absent in the Act, though it is likely that such authorization is inherent. *Cf.* U.S. CONST. art. I, § 8, cl. 15 (“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions[.]”).

internal disturbance rises to the level of an “insurrection”⁸¹ that warrants federal military intervention. While Section 331 of the currently-in-force Insurrection Act conditions such intervention *upon the request* of the governor or legislature of the target state, Sections 332 and 333 authorize the president to *unilaterally* deploy state and federal troops to suppress any “rebellion” or “insurrection” that impedes the execution of federal law or obstructs the execution of state law so as to deprive persons within a given state of any constitutional right, respectively. The sole condition to unilateral action, apart from the requisite presidential determination, is the proclamation of dispersal set forth in Section 334.⁸²

The current text of the Insurrection Act reflects the state of the law after a number of limits on presidential discretion to domestically call forth the militia (and, later, federal armed forces) had been removed.⁸³ Among the remaining statutory requirements

⁸¹ Or, in addition, any instance of domestic violence or unlawful obstruction, combination, assemblage or rebellion.

⁸² 10 U.S.C. § 334.

⁸³ See generally Vladeck, *supra* note 12, at 159-67. The Militia Act of 1792—the original predecessor of the Insurrection Act—authorized the president to call forth only the militia (and not federal armed forces) in order to suppress an insurrection upon “application of the legislator of such state” or the executive (*i.e.*, governor) of a given state if the legislature was not in session. Further, once the requisite state legislative requests (or approvals) were made, the president was authorized to commandeer both the militia of the given state as well as of any other states “as may be applied for.”

The president’s authorization to call forth the militia in order to “execute the laws of the union,” meanwhile, was subject to additional conditions under the 1792 Act. In addition to the president’s initial order that any insurgents “disperse,” such authorization was subject to notification by a Supreme Court justice or other federal judge that the laws of the union were being opposed or their execution obstructed “by combinations too powerful to be suppressed by the ordinary course of judicial proceedings.” Upon receiving such notification, the president was authorized to call forth the militia of states other than the target state only if militia of the target state refused to execute federal law and Congress were not in session. Moreover, the president’s authorization to commandeer militia of other states was time-bound: the president could do so for up to thirty days after the commencement of the ensuing session of Congress.

Intervening legislation—namely, the Militia Act of 1795 (1795 Act)—eliminated the requirements for approvals from state and judicial branches, as well as the time limitation imposed on the deployment of militia from other states when Congress was out of session. Furthermore, the Insurrection Act as passed in 1807 broadened the president’s powers by authorizing the unilateral deployment of both state militia *and* federal armed forces.

The Suppression of the Rebellion Act of 1861 represents the final major revision to the legislative regime authorizing the president to domestically deploy the militia and federal armed forces in order to suppress insurrection. Incorporated into the text of the current-day Insurrection Act, the 1861 version expanded both the time period during which the president was authorized to call forth the militia and federal armed forces, and the discretion of the president in determining those instances that warranted federal military intervention.

for federal military intervention under the Insurrection Act is a proclamation of insurrection—specifically, pursuant to Section 334, the president must “immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.”⁸⁴ Once made, such a proclamation defines an internal disturbance as an “insurrection” warranting federal military intervention. Courts have determined that – in the absence of the requisite presidential proclamation—the deployment of federal troops with law enforcement powers was a violation of *Posse Comitatus*.

A review of archival presidential proclamations for this article reveals that past presidents have invoked the Insurrection Act or its preceding legislation at least 24 times.⁸⁵ While presidential proclamations based on a grant of constitutional or statutory authority have the force of law, they are directed *outside* the government at civilians; accordingly, proclamations of insurrection are supplemented by executive orders, which are directives aimed at parties inside the government in order to facilitate the requisite federal military action to be taken to restore law and order.⁸⁶

a. *2007 National Defense Authorization Act*

In the wake of the Hurricane Katrina crisis, the Insurrection Act was amended to broaden the category of scenarios that would authorize the president to deploy federal troops with law enforcement powers⁸⁷—a move that was later countered by the National

⁸⁴ 10 U.S.C. § 254 (2016) (formerly codified at 10 U.S.C. § 334).

⁸⁵ A presidential proclamation is “‘an instrument that states a condition, declares a law and requires obedience, recognizes an event or triggers the implementation of a law (by recognizing that the circumstances in law have been realized)’”. In short, presidents ‘define’ situations or conditions on situations that become legal or economic truth. These orders carry the same force of law as executive orders—the difference between the two is that executive orders are aimed at those inside government while proclamations are aimed at those outside government. The administrative weight of these proclamations is upheld because they are often specifically authorized by congressional statute, making them ‘delegated unilateral powers.’ Presidential proclamations are often dismissed as a practical presidential tool for policy making because of the perception of proclamations as largely ceremonial or symbolic in nature. However, the legal weight of presidential proclamations suggests their importance to presidential governance.” *Presidential Proclamation Database*, PERFECT SUBSTITUTE (Nov. 4, 2009), <http://perfectsubstitute.blogspot.com/2009/11/presidential-proclamation-database.html> [<https://perma.cc/2WNT-XK4N>] (citation omitted). See also *Presidential Proclamations: Washington - Trump*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/proclamations.php> [<https://perma.cc/X4DQ-267Q>].

⁸⁶ JOHN CONTRUBIS, CONG. RESEARCH SERV., 95-772 A, EXECUTIVE ORDERS AND PROCLAMATIONS (1999).

⁸⁷ National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, sec. 1076, § 333, 120 Stat. 2083, 2404-05 (2006).

Association of Governors, who mobilized to revoke all such amendments and, thus, once again limit the presidential discretion to deploy federal troops with law enforcement powers.⁸⁸

The Insurrection Act amendments were buried in the 2007 National Defense Authorization Act, passed on October 17, 2006. Specifically, Section 333—the title of which was renamed “*Major public emergencies; interference with State and Federal law*”—was amended to authorize the president to militarily intervene to “restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition”⁸⁹ Such intervention, under the revised text, was authorized upon the president’s determination that “domestic violence ha[d] occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order,” and such violence results in the obstruction of federal law or the inability of the state or possession to protect the constitutional rights of persons present therein.⁹⁰

After a nearly year-long challenge led by the National Governors Association, amendments to the Insurrection Act were repealed in their entirety in a scarcely noticed section of the defense appropriations bill for the 2008 fiscal year.⁹¹ However, upon signing the 2008 defense appropriations bill into law, President Bush issued a signing statement stating that its provisions would be construed in a manner consistent with the constitutional authority of the President.⁹²

⁸⁸ NAT’L GOVERNORS ASS’N, AMERICA WINS: THE STRUGGLE FOR CONTROL OF THE NATIONAL GUARD (2012), <https://www.nga.org/files/live/sites/NGA/files/pdf/1210NationalGuardAmericaWins.pdf> [<https://perma.cc/B6RM-WNPD>].

⁸⁹ National Defense Authorization Act for Fiscal Year 2007, sec. 1076, § 333 (a)(A).

⁹⁰ *Id.*

⁹¹ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, sec. 1068, § 333, 122 Stat. 3, 325-26 (2008).

⁹² “Provisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President’s ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President.” Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

b. *Reconstruction Act and the Enforcement Acts*

It is well known that the Reconstruction Act of 1867⁹³ and the Enforcement Acts passed in 1870 and 1871⁹⁴ authorized executive deployment of federal troops to enforce the law in specific response to violations of civil rights during Reconstruction and, later, carried out by vigilante groups such as the Ku Klux Klan. What has been generally little discussed is the relationship between this legislation and the antecedent Insurrection Act. Provisions of the Reconstruction Act and the Enforcement Acts track the language in the Insurrection Act, partially delegating the calling forth power of Congress to the president in order to suppress “insurrection” or “rebellion.” Unlike the Insurrection Act, these statutes *specified* instances of “insurrection” warranting federal military intervention, respectively, to be disturbances of the fledgling peace in former Confederate states after the Civil War, and, thereafter, the vigilante violence carried out in former rebel states by the Ku Klux Klan. In other words, their legislation authorized federal military intervention to enforce the fundamental rights of persons who were being persecuted by the state and/or an insurgent third party.

The Reconstruction Act essentially subjected the former Confederate states (with the exception of Tennessee) to federal military administration. The act provided for the division of eleven former Confederate states into five military districts,⁹⁵ with each one to be administered by an officer of the army. Each such officer was to be detailed military force to “enable [him] to perform his duties and enforce his authority within the district to which he [was] assigned.”⁹⁶ Among such officer’s assigned duties was to “protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals[.]”⁹⁷ The Reconstruction Act was subsequently amended to expressly add as duties of such military officers the registration of voters and the supervision of elections.⁹⁸

⁹³ First Reconstruction Act of 1867, ch. 153, 14 Stat. 428.

⁹⁴ Enforcement Act of 1870, ch. 114, 16 Stat. 140; Enforcement Act of 1871, ch. 22, 17 Stat. 13.

⁹⁵ “[R]ebel States shall be divided into military districts and made subject to the military authority of the United States as hereinafter prescribed, and for that purpose Virginia shall constitute the first district; North Carolina and South Carolina the second district; Georgia, Alabama, and Florida the third district; Mississippi and Arkansas the fourth district; and Louisiana and Texas the fifth district.” § 1, 14 Stat. at 428.

⁹⁶ *Id.* § 2.

⁹⁷ *Id.* § 3.

⁹⁸ Second Reconstruction Act of 1867, ch. 6, 15 Stat. 2.

The premise for federal military intervention, as set forth in the preamble to the statute, was that no “legal . . . governments or adequate protection for life or property” existed in such former rebel states.⁹⁹ In other words, the former rebel states were analogous to “failed states.” Accordingly, people of such failed states were denied representation in Congress until new constitutions were drafted and ratified in each such state that provided for the suffrage of *all* men aged twenty-one and over and adopted the Fourteenth Amendment of the U.S. Constitution. Until such time, federal military forces would administer the rebel states and any civilian governments functioning in the interim period would be deemed provisional.¹⁰⁰

The Enforcement Acts—of May 31, 1870, February 28, 1871, and April 20, 1871—(“Force Acts”) were enacted to enforce, among other things, Black suffrage, and authorized the use of federal military force to protect the right of newly enfranchised Black citizens to vote. The 1870 Act imposed fines and criminal penalties¹⁰¹ upon persons who did, or conspired to, “by force, bribery, threats, intimidation, or other unlawful means, . . . hinder, delay, prevent or obstruct, . . . any citizen . . . from voting at any election”¹⁰² Further, in a clause aimed at the Ku Klux Klan, the 1870 Act provided for the felony conviction of “two or more persons [who] shall band or conspire together, or in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of [the] act, or to injure, oppress, threaten, or intimidate any citizen” with intent to deprive such citizen of his or her constitutional rights.¹⁰³ Any warrants issued pursuant to the Force Acts were to be executed by federal marshals, who were authorized to call forth the militia—as well as federal armed forces and even civilian bystanders—in order to do such. The subsequent acts expanded the authorized scope of federal intervention, chiefly

⁹⁹ § 1, 14 Stat. at 428.

¹⁰⁰ ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877* 276-77 (1988) (“The Reconstruction Act of 1867 divided the eleven Confederate states, except Tennessee, into five military districts under commanders empowered to employ the army to protect life and property. And without immediately replacing the Johnson regimes, it laid out the steps by which new state governments could be created and recognized by Congress—essentially the writing of new constitutions providing for manhood suffrage, their approval by a majority of registered voters, and ratification of the Fourteenth Amendment. . . . The act contained no mechanism for beginning the process of change, an oversight soon remedied by a supplemental measure authorizing military commanders to register voters and hold elections.”).

¹⁰¹ Enforcement Act of 1870, ch. 114, 16 Stat. 140.

¹⁰² *Id.* § 4.

¹⁰³ *Id.* § 6.

by providing for federal supervision of elections in February 1871, and, in April 1871, making it lawful for the president to suspend the writ of habeas corpus during a “rebellion.”¹⁰⁴

3. Stafford Act

Whereas the Insurrection Act is the domestic authority for humanitarian intervention at home, the Stafford Act provides for the domestic provision of *humanitarian aid*.¹⁰⁵ Again, the Stafford Act is worth discussing here in light of its contrast to the *combative* federal law enforcement effectively authorized by the Insurrection Act—and, in other words, for the *non-combative* intention evident in the text of the Stafford Act and the potential fallout of a federal response to internal crisis under the statute versus the Insurrection Act. Moreover, as the Stafford Act provides for federal intervention that does not usurp the police powers of the several states, such intervention—analogueous to humanitarian aid abroad—has been relatively less controversial than intervention authorized under the Insurrection Act.

¹⁰⁴ KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION 1865-1877* 200-01 (1965) (“Two so-called Force Acts, passed on May 31, 1870, and February 28, 1871, provided that the use of force or intimidation to prevent citizens from voting was to be punished by fine or imprisonment, authorized the President to use the military when necessary to enforce the Fifteenth Amendment, and placed congressional elections under federal supervision. A third Force Act, the Ku Klux Act of April 20, 1871, imposed heavier penalties on persons who ‘shall conspire together, or go in disguise . . . for the purpose . . . of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws.’ Additional federal troops were sent into the South, and President Grant suspended the writ of habeas corpus in a number of South Carolina counties. After scores of arrests, fines, and imprisonments, the Klan’s power was finally broken, and by 1872 it had almost disappeared.”).

¹⁰⁵ Notably, the purpose set forth in the Stafford Act tracks that set forth in the policies and procedures of the U.S. Office of Foreign Disaster Assistance (OFDA)—a unit of USAID responsible for facilitating and coordinating foreign disaster response missions under the Foreign Assistance Act of 1961. Further, OFDA implements its mission to “save lives, alleviate human suffering” and “reduce the economic and social impacts of present and future disasters” with policies derived from the U.N. Guiding Principles for Internal Displacement—a list of humanitarian principles to which the United Nations has advised governments to adhere when responding to internally displaced persons. *Guiding Principles on Internal Displacement*, *supra* note 8; *see also Office of U.S. Foreign Disaster Assistance*, USAID, <https://www.usaid.gov/who-we-are/organization/bureaus/bureau-democracy-conflict-and-humanitarian-assistance/office-us> [<https://perma.cc/XZ2C-FZJQ>] (last updated Nov. 15, 2016) (“OFDA fulfills its mandate of saving lives, alleviating human suffering, and reducing the social and economic impact of disasters worldwide in partnership with USAID functional and regional bureaus and other U.S. Government agencies.”). However, unlike under the Stafford Act, U.S. disaster assistance can only be provided if, among other things, the affected country either requests such assistance or is “willing to accept” such assistance, thus formally enshrining the sanctity of the sovereignty of the affected state.

The Stafford Act is the foremost—though not sole—statutory authority governing federal intervention, military or otherwise, in a natural or man-made disaster.¹⁰⁶ Enacted in 1988, the Act is among the most recent in a series of legislation passed since 1950 establishing a statutory framework for the federal government to assist states and localities in the event of a disaster scenario.¹⁰⁷ The Stafford Act provides for the federal government to assist states and localities with both disaster *response*—*i.e.*, the provision of emergency services to aid search-and-rescue and other response efforts—and disaster *recovery*—whereby monetary aid and other resources are administered to support the reconstruction and rehabilitation of the affected state or locality. The Stafford Act also, importantly, establishes the primary statutory framework for the Federal Emergency Management Agency (“FEMA”) to coordinate and implement disaster response and recovery efforts in collaboration with other federal agencies, as well as state and localities, in the wake of small- and large-scale disasters.

The text of the Stafford Act, emphasized below, characterizes missions carried out thereunder with humanitarian language. The congressional findings and declarations set forth in Title I of the Act as last amended in 2013, for instance, acknowledge that disasters “often cause loss of life, human suffering, loss of income, and property loss and damage; and because disasters often disrupt the normal functioning of governments and communities, and adversely affect individuals and families with great severity; special measures . . . are necessary.”¹⁰⁸ Moreover, a number of provisions

¹⁰⁶ Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988) (current version at 42 U.S.C. §§ 5121-5191); *see also* Michael Bahar, *The Presidential Intervention Principle: The Domestic Use of the Military and the Power of the Several States*, 5 HARV. NAT’L SECURITY J. 537, 626-27 (2014) (“There is no greater example of this than the Robert T. Stafford Disaster Relief and Emergency Act (“Stafford Act”). It is a powerful tool the President can use in a domestic emergency to authorize federal assistance, including military assistance, short of enforcement and intervention.” (footnote omitted)).

¹⁰⁷ In 1950, Congress passed the Federal Disaster Relief Act, which standardized the process of requesting federal assistance for emergency management, replacing an older system of providing funding on an “incident-by-incident” basis. Congress then passed the Disaster Relief Act of 1974, which created a program to directly assist individuals and households in the event of disaster. The Stafford Act built on that foundation when passed as an amendment to the Disaster Relief Act in 1988. FEMA, U.S. DEP’T OF HOMELAND SEC., THE FEDERAL EMERGENCY MANAGEMENT AGENCY PUBLICATION 1, 24, 35 (2010), https://www.fema.gov/media-library-data/20130726-1823-2504-5-8164/pub_1_final.pdf [<https://perma.cc/RC5T-PQJ3>].

¹⁰⁸ Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, § 1, 88 Stat. 143, 143 (1974) (codified as amended at 42 U.S.C. § 5121 (2013)).

therein refer to the intention to save lives and alleviate or prevent human suffering.

Pursuant to the Stafford Act, the federal government is authorized to supplement state and local efforts to respond to, and provide monetary and other relief as to, any “emergency” or “major disaster,” as defined thereunder.

Under the act, an “emergency” means:

any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to *save lives and to protect property and public health and safety*, or to lessen or avert the threat of a catastrophe in any part of the United States.¹⁰⁹

An “emergency,” as defined, tends to be a fairly small incident that warrants limited federal intervention and pursuant to which total monetary federal assistance is capped at \$5 million per emergency unless the president determines that additional funds are necessary.¹¹⁰

A “major disaster” is defined in the Stafford Act as follows:

any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, . . . which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this Act to supplement the efforts and available resources of the States, local governments, and disaster relief organizations in *alleviating the damage, loss, hardship, or suffering caused thereby*.¹¹¹

As compared to an emergency, a “major disaster” is a large-scale catastrophe that is expected to warrant extensive resources of the federal government, which shares with affected states or localities not less than 75 percent of the costs of the provided assistance.¹¹²

¹⁰⁹ 42 U.S.C. § 5122(1) (emphasis added).

¹¹⁰ Michael Widomski, *Bringing in Federal Disaster Help: The Disaster Declaration Process*, FEMA: BLOG (June 16, 2012, 3:02 PM), <https://www.fema.gov/blog/2012-03-07/bringing-federal-disaster-help-disaster-declaration-process> [<https://perma.cc/VR9X-W7G4>] (“The total amount of assistance provided for a single emergency may not exceed \$5 million.”).

¹¹¹ *Id.* § 5122(2) (emphasis added).

¹¹² *Public Assistance: Frequently Asked Questions*, FEMA, <https://www.fema.gov/public-assistance-frequently-asked-questions#Q01> [<https://perma.cc/2GCQ-RAR6>] (last updated Mar. 7, 2016, 10:13 AM) (“FEMA provides supplemental assistance for State and local government recovery expenses, and the Federal share will always be at least 75 percent of the eligible costs.”).

Although the Stafford Act does not authorize the president to domestically deploy troops with law enforcement powers, it is worth noting that, similar to the use of military force under the Insurrection Act, domestic humanitarian aid can be extended under the Stafford Act either unilaterally or by local invitation. Federal assistance is triggered under the Stafford Act either unilaterally, by the president, or pursuant to a presidential declaration of an “emergency” or “major disaster” made at the request of the governor of the affected state.¹¹³ As for the latter trigger, the governor of the affected state may request that the president make a declaration of “emergency” or “major disaster” based, in each instance, “on a finding that the situation is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.”¹¹⁴ Furthermore, the governor must furnish such a request with information describing efforts and resources that have already been and are expected to be used at the state and local level to respond to the disaster. As for the former trigger of federal assistance, the president may make a unilateral determination that an “emergency” exists, for which the federal government must assume primary responsibility because the incident involves a subject area for which the federal government exercises exclusive or preeminent authority. Though the president is authorized to unilaterally make such a determination, the president must, if practicable, consult with the governor of the affected state in the course of doing so.

B. Just Cause

A “just cause,” as considered in the context of international humanitarian intervention, is a circumstance deemed to justify military intervention in order to protect human life and dignity.¹¹⁵ This definition is knowingly tautological because such a determination is more philosophical and moral than it is legal in nature, and, thereby, eschews concrete criteria. Indeed, questions of legal authority discussed above arise after a crisis has erupted that elicits from one or more states a responsibility to protect human life that transcends the respect for sovereignty. To the extent that criteria

¹¹³ *Id.* § 5170.

¹¹⁴ *Id.* § 5170(a).

¹¹⁵ INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* XII (2001) [hereinafter *RESPONSIBILITY TO PROTECT*], <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [<https://perma.cc/X59M-6XQA>].

for a just cause were legally definable, it would be akin to a standard rather than a rule—for instance, an attack on human life and dignity so grave as to “shock the conscience.”¹¹⁶

However, because different consciences bear different thresholds for shock, additional attention has been paid to the *process* by which a just cause is determined, with some scholars conferring more legitimacy to multilateral (and, perhaps, coalition-based) deliberations than unilateral ones.¹¹⁷ Specifically, just causes identified by a “jury”—most preferably by the U.N. Security Council or General Assembly and, perhaps, by a regional body—are afforded more formal credibility and moral weight than those made by one state or even a given state and a coalition of its allies.¹¹⁸ Further, official decision-makers have tended to confer legitimacy to those interventions made pursuant to “local invitation”—that is, a request for or consent to intervention by a state government or internationally recognized non-state actors.¹¹⁹

While efforts have been made by moral philosophers and legal scholars to specify standards for what constitutes a just cause as well as processes for determining them, commentators on foreign policy have generally identified just causes *empirically*—that is, by reference to what one or more states have, in practice, deemed them to

¹¹⁶ *Id.* at 75 (“If we believe that all human beings are equally entitled to be protected from acts that shock the conscience of us all, then we must match rhetoric with reality, principle with practice.”); *id.* at 32 (“In the Commission’s view, military intervention for human protection purposes is justified in two broad sets of circumstances, namely in order to halt or avert:

- large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product of either of deliberate state of action, or state neglect or inability to act, or a failed state situation; or
- large scale ‘ethnic cleansing,’ actual or apprehended, whether carried out by killing, forced expulsion, actions of terror or rape.

If either or both of these conditions are satisfied, it is our view that the ‘just cause’ component of the decision to intervene is amply satisfied.”).

¹¹⁷ See, e.g., Stefano Recchia, *Authorising Humanitarian Intervention: A Five-Point Defence of Existing Multilateral Procedures*, 43 REV. INT’L STUD. 50 (2017).

¹¹⁸ *Id.* at 65, 65 n.80 (citing G.A. Res. 60/1, ¶ 139, 2005 World Summit Outcome (Sept. 16, 2005)).

¹¹⁹ See, e.g., Michael S. Lund, *Preventive Diplomacy for Macedonia, 1992-1999: From Containment to Nation Building*, in OPPORTUNITIES MISSED, OPPORTUNITIES SEIZED: PREVENTIVE DIPLOMACY IN THE POST-COLD WAR WORLD 173, 206 (Bruce W. Jentleson ed., 2000) (“[A] local invitation was the immediate prompting. This helped greatly overcome barriers to third-party entry that would otherwise be posed by sovereign prerogatives of unwilling protagonists or a dangerous situation.”); James D. Boys, *A Lost Opportunity: The Flawed Implementation of Assertive Multilateralism (1991-1993)*, EUR. J. AM. STUD., Spring 2012, at 1, 7 (describing negative effects from intervening without receiving a local invitation).

be.¹²⁰ Accordingly, in realist foreign policy terms, a “just cause” is one for which the political will has been mobilized to support intervention, or, in the absence of timely intervention, a circumstance that has been deemed to warrant intervention by an *ex post facto* moral consensus. For instance, prior to the terrorist attacks of September 11,¹²¹ classic examples of crises deemed, whether retrospectively or at the time, to have warranted humanitarian intervention are the genocidal or other grave events that occurred in Bosnia, Kosovo, Rwanda, and Somalia.¹²²

With the above international atrocities in mind, some might consider it hyperbolic to map the dilemmas of humanitarian intervention onto apparently less dire situations at home. Furthermore, while it is unequivocal that the United States government has a responsibility to protect its citizens, which would be presumably uncontroversial to fulfill, the responsibility to do the same for non-citizens abroad is, by comparison, not only of dubious certainty, but its assumption is often politically unpopular.¹²³ However, as discussed in more detail below, it is fitting to consider humanitarian intervention at home in light of crises deemed to constitute just causes abroad.

As for the relative gravity of crises at home and abroad, what is key in mapping international “just cause” considerations onto domestic ones is not simply the *degree* of violence or rights violations on the ground, but the *nature* of circumstances deemed to warrant intervention. Analogous to the international context, circumstances at home deemed “just causes” are those in which a state was unwilling or unable to protect the rights of persons harmed therein. Specifically, an overview of the application of the Insurrec-

¹²⁰ See, e.g., James Joyner, *How Perpetual War Became U.S. Ideology*, ATLANTIC (May 11, 2011), <https://www.theatlantic.com/international/archive/2011/05/how-perpetual-war-became-us-ideology/238600> [<https://perma.cc/27RA-Q56H>] (describing the legitimacy of interventions through the lens of past interventions); CHRISTOPHER C. BURKETT, THE HERITAGE FOUND., REMAKING THE WORLD: PROGRESSIVISM AND AMERICAN FOREIGN POLICY (2013), http://thf_media.s3.amazonaws.com/2013/pdf/fp47.pdf [<https://perma.cc/7NHG-TQEV>].

¹²¹ Recent conflicts, revolutions, and rebellions in Egypt, Libya, Syria, Bahrain, and the Arab Spring are beyond the scope of this article.

¹²² See *supra* note 28 and accompanying text.

¹²³ Andrew Kohut, *American International Engagement on the Rocks*, PEW RES. CTR. (July 11, 2013), <http://www.pewglobal.org/2013/07/11/american-international-engagement-on-the-rocks> [<https://perma.cc/C9VR-9E5T>]; Lesley Wroughton, *As Syria War Escalates, Americans Cool to U.S. Intervention*, REUTERS (Aug. 24, 2013, 8:32 PM), <http://www.reuters.com/article/us-syria-crisis-usa-poll-idUSBRE97O00E20130825> [<https://perma.cc/9DDU-3PRT>].

tion Act shows that humanitarian intervention has been largely¹²⁴ deemed warranted to, on the one hand, enforce the civil rights of Black (and other non-white) citizens over the objection of state officials, and, on the other, to suppress “race riots.” In other words, “just cause” considerations are apt, regardless of the relative degree of domestic disturbances, because implicit in such considerations, whether at home or abroad, are deliberations over a government’s unjust deprivation of rights or a “failed state” scenario brought about by “civil war” or “insurgency.”

Further, as elaborated in the above discussion of *The Federalist Papers* and the legislative context of Posse Comitatus, federal military intervention at home is not politically uncontroversial. Such intervention has not only been contentious in light of a constitutional balance of federal and state powers, but also poses particular political concern when considered in Southern states (as indicated in President Bush’s quote).¹²⁵ Humanitarian intervention at home tends to be more politically fraught when contemplated *unilaterally*, solely by the presidential administration, rather than *mutually*, with the consent or at the request of state officials—in other words, without “local invitation.” Finally, domestic “just causes” are similarly disposed to tautological definitions: the legal authorization for the president to engage in humanitarian intervention at home, ultimately, relies largely on a *subjective* judgment call—that is, whether a circumstance is deemed to be an “insurrection” or not.

Such instances that reveal the trend outlined above are proclamations of insurrection to enforce civil rights during the post-war Reconstruction Era, to desegregate public schools in Alabama, Arkansas, and Mississippi, and to enforce the rights of protestors to march from Selma to Montgomery. Further, insurrection was proclaimed to suppress the following “race riots”: (1) the violent clashes in “Bleeding Kansas” prior to the Civil War; (2) anti-Chinese expulsion campaigns in the Northwest; (3) the Detroit race riots of 1943 and 1967; (4) riots in Baltimore and Washington, D.C. following the assassination of Martin Luther King, Jr.; (5) looting in St. Croix in the aftermath of Hurricane Hugo, and (6) riots in Los Angeles in the wake of the Rodney King verdict.¹²⁶

¹²⁴ *But see, e.g.*, Marjorie Jean Bonney, *Federal Intervention in Labor Disputes*, 7 MINN. L. REV. 467, 472 (1923) (“President Cleveland sent the federal troops to the [Pullman] strike scene, not to quell domestic violence, as did President Hayes, but to protect the United States mails and interstate commerce and to enforce the orders of the federal courts.”).

¹²⁵ *See* notes 1, 3, 87-92 and accompanying text *supra*.

¹²⁶ *See infra* section I.B.1. (on enforcing civil rights) and I.B.2. (on suppressing

Many of these incidents are well-known and have been discussed in far more detail elsewhere. Accordingly, they are cursorily reconsidered here only in light of their designation as “just causes” warranting the exceptional deployment of federal troops with law enforcement powers. The overview in this subsection will elaborate on the trend noted above (and illustrated in the table below) – namely, that a significant number of proclamations of “insurrection” were made to authorize federal military intervention to enforce civil rights violated by state actors or suppress “race riots” incited by non-state actors, with intervention in the former category of incidents typically authorized *unilaterally* and the latter by gubernatorial request or, in other words, by *local invitation*.

Moreover, as indicated from public speeches made by the president or state officials at the time, those interventions deemed relatively less politically fraught were made at the request of the state governor or other state official(s), and, further, the relevant incident or insurrection in question tended to be a “race riot.”¹²⁷ On the other hand, those interventions that were at the time deemed more politically fraught were those made unilaterally in the sole discretion of the executive, and, further, the nature of the incident in question *generally* involved the enforcement of civil

“race riots”). The federal government also intervened during the Gilded Age to protect market forces, capital, and property, instead of protecting civil rights. FONER, *supra* note 100, at 582-83 (“Among other things, 1877 marked a decisive retreat from the idea, born during the Civil War, of a powerful national state protecting the fundamental rights of American citizens. Yet the federal government was not rendered impotent in all matters—only those concerning blacks. Hayes did not hesitate to employ the national state’s coercive powers for other purposes. Even as the last Reconstruction governments toppled, troops commanded by former Freedmen’s Bureau Commissioner O. O. Howard relentlessly pursued the Nez Percé Indians across the Far West to enforce a federal order removing them from Oregon’s Wallowa Valley.”). *Id.* at 583 (“Nor did the federal government prove reluctant to intervene with force to protect the rights of property.”). *Id.* at 584 (“As requests for troops descended upon the Administration from frightened governors and beleaguered railroad executives, Hayes neither investigated the need for troops nor set clear guidelines for their use. Thus, when soldiers were sent to cities from Buffalo to St. Louis, they acted less as impartial defenders of order than as strikebreakers, opening railroad lines, protecting nonstriking workers, and preventing union meetings.”)

¹²⁷ See, e.g., Jake Lefferman, *A Look Back at Presidential Responses to Racial Violence*, ABC News (Aug. 15, 2014, 1:37 PM), <http://abcnews.go.com/blogs/politics/2014/08/a-look-back-at-presidential-responses-to-racial-violence> [https://perma.cc/Q4DQ-7NYG]; President George Bush, Address to the Nation on the Civil Disturbances in Los Angeles, California (May 1, 1992), <http://www.presidency.ucsb.edu/ws/?pid=20910> [https://perma.cc/5MBW-HGMK]; President Lyndon Johnson, Statement on the Harlem Race Riots (July 21, 1964), <http://www.nytimes.com/1964/07/22/statement-by-president.html> [https://perma.cc/TJ3L-M9K2].

rights.¹²⁸

TABLE 1.3 INSURRECTION AS CIVIL RIGHTS VIOLATION & RACE RIOT

Incident(s)	Civil Rights or 'Race Riot'	Unilateral	Local Invitation
Bleeding Kansas	'Race Riot'		X
Radical Reconstruction	Civil Rights	X	
Anti-Chinese Expulsion	'Race Riot'		X
Detroit Riots of 1943 and 1967	'Race Riot'		X
Public School Desegregation	Civil Rights	X	
March from Selma to Montgomery	Civil Rights		X
Riots in Baltimore and DC after MLK Assassination	'Race Riot'		X
Hurricane Hugo	'Race Riot'	Territorial Governor Claims No Request	Presidential Administration Claims Request from Territorial Senator & Legislative Liaison to White House
Atlanta Prison Riots ¹²⁹	'Race Riot'	X	
Los Angeles Riots	'Race Riot'		X

¹²⁸ Note that the distinction between suppressing a race riot and enforcement of civil rights can be blurry, as the enforcement of civil rights does incite rioting, as with James Meredith's attempted entry into Ole Miss. However, the relevant distinction here is whether civil rights enforcement was the primary intention of the intervention, as opposed to the restoration of law and order made necessary by riotous civil unrest.

¹²⁹ See, e.g., Robert Pear, *Military Hostage Specialists Sent to Help F.B.I. at Atlanta Prison*, N.Y. TIMES (Nov. 26, 1987), <http://www.nytimes.com/1987/11/26/us/military-hostage-specialists-sent-to-help-fbi-at-atlanta-prison.html> [<https://perma.cc/FF3A-A4KM>].

1. Enforcing Civil Rights

As discussed in this article, an overview of past proclamations of insurrection reveals that at least thirteen incidents involved the federal military enforcement of civil rights—namely, the deployment of federal troops to enforce constitutional rights of Black citizens in the South during Radical Reconstruction, to desegregate public schools in Alabama, Arkansas, and Mississippi, and to enforce the right of protesters to march from Selma to Montgomery. Of the twelve proclamations of insurrection, eleven were made *unilaterally*, and only one—regarding the march from Selma to Montgomery—was made by request of the state governor (albeit, as will be discussed further, as the result of political maneuvering by both the president and the state governor).¹³⁰

¹³⁰ Andrew Johnson, Proclamation No. 166, Warning Against Obstruction of Justice in the States of North and South Carolina (Sept. 3, 1867), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=72124> [<https://perma.cc/995X-4TN8>]; Ulysses S. Grant, Proclamation No. 197, Law and Order in the State of South Carolina (Mar. 24, 1871), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70253> [<https://perma.cc/UT5D-XUAS>]; Ulysses S. Grant, Proclamation No. 200, Law and Order in the State of South Carolina (Oct. 12, 1871), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70257> [<https://perma.cc/UL58-87K7>]; Ulysses S. Grant, Proclamation No. 213, Law and Order in the State of Louisiana (May 22, 1873), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70364> [<https://perma.cc/ZZU5-L5C3>]; Ulysses S. Grant, Proclamation No. 218, Law and Order in the State of Arkansas (May 15, 1874), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70420> [<https://perma.cc/SF5U-KXAB>]; Ulysses S. Grant, Proclamation No. 220, Law and Order in the State of Louisiana (Sept. 15, 1874), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70422> [<https://perma.cc/WLZ2-4458>]; Ulysses S. Grant, Proclamation No. 223, Law and Order in the State of Mississippi (Dec. 21, 1874), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=70459> [<https://perma.cc/7EDB-UDFP>]; Ulysses S. Grant, Proclamation No. 232, Law and Order in the State of South Carolina (Oct. 17, 1876), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=70542> [<https://perma.cc/3NC6-QXR8>]; Dwight D. Eisenhower, Proclamation No. 3204, Obstruction of Justice in the State of Arkansas (Sept. 23, 1957) in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=107178> [<https://perma.cc/BB7U-MYWS>]; John F. Kennedy, Proclamation No. 3497, Obstructions of Justice in the State of Mississippi (Sept. 30, 1962), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=24042> [<https://perma.cc/SZ7C-CXZ3>]; John F. Kennedy, Proclamation No. 3542, Unlawful Obstructions of Justice and Combinations in the State of Alabama (June 11, 1963), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=9270> [<https://perma.cc/93N2-DP96>]; John F. Kennedy, Proclamation No. 3554, Obstructions of Justice in the State of Alabama (Sept. 10, 1963), in AM.

Eight of the twelve proclamations of insurrection were issued during the roughly ten-year period after the Civil War¹³¹ known as “Radical Reconstruction,” when the newfound constitutional rights of freed Blacks were enforced, in part, through federal military intervention (or, as sometimes termed, military “occupation” of the South).¹³² As discussed above, the Reconstruction Act provided for the division of “rebel States” into districts subject to federal military authority, and, further, the army officer appointed to administer each district was authorized thereunder to use military force to suppress insurrection and otherwise enforce the law. However, despite military officers’ authority under the Reconstruction Act to call forth the militia and federal armed forces in former Confederate states, President Ulysses S. Grant made seven proclamations between 1871 and 1876¹³³—each of which track the text of the

PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=24115> [<https://perma.cc/9YYZ-XTFN>]; Lyndon B. Johnson, Proclamation No. 3645, Providing Federal Assistance in the State of Alabama (Mar. 20, 1965), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=106237> [<https://perma.cc/9US3-RT6M>].

¹³¹ While historians date the start of the overarching Reconstruction Era to 1863—when President Abraham Lincoln issued the Emancipation Proclamation—the era of “radical” Reconstruction was introduced in 1867 with the enactment of the Reconstruction Act, discussed above, and ended in 1877 with the withdrawal of federal troops from the South. FONER, *supra* note 100, at xvii.

¹³² Borne, in part, from Republican frustration with then President Andrew Johnson’s unwillingness to enforce the formal pronouncements of Black incorporation into the body politic (as enumerated in the Thirteenth and Fourteenth Amendments), the Reconstruction Act authorized federal military “occupation” of former Confederate states.

¹³³ Ulysses S. Grant, Proclamation No. 197, Law and Order in the State of South Carolina (Mar. 24, 1871), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70253> [<https://perma.cc/UT5D-XUAS>]; Ulysses S. Grant, Proclamation No. 200, Law and Order in the State of South Carolina (Oct. 12, 1871), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70257> [<https://perma.cc/UL58-87K7>]; Ulysses S. Grant, Proclamation No. 213, Law and Order in the State of Louisiana (May 22, 1873), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70364> [<https://perma.cc/ZZU5-L5C3>]; Ulysses S. Grant, Proclamation No. 218, Law and Order in the State of Arkansas (May 15, 1874), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70420> [<https://perma.cc/SF5U-KXAB>]; Ulysses S. Grant, Proclamation No. 220, Law and Order in the State of Louisiana (Sept. 15, 1874), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=70422> [<https://perma.cc/WLZ2-4458>]; Ulysses S. Grant, Proclamation No. 223, Law and Order in the State of Mississippi (Dec. 21, 1874), *in* AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=70459> [<https://perma.cc/7EDB-UDFP>]; Ulysses S. Grant, Proclamation No. 232, Law and

Insurrection Act and order “insurgents” to disperse, thus triggering the authority of the president to deploy state and federal troops to enforce law. Of the seven proclamations, four were issued with respect to South Carolina, two regarding Louisiana, one as to Arkansas, and another as to Mississippi.

Four proclamations of insurrection were issued to enforce the desegregation of public schools in Arkansas, Mississippi, and Alabama, respectively, in accordance with the Supreme Court’s landmark decision in *Brown v. Board of Education*.¹³⁴ All four proclamations track the text of the Insurrection Act,¹³⁵ specifically citing the president’s authority thereunder to unilaterally deploy federal troops to enforce the law. On September 23, 1957—after failed talks with Arkansas Governor Orval Faubus, who earlier that month had ordered the state National Guard to blockade the Central High School in Little Rock to prevent Black students from entering—President Dwight D. Eisenhower issued a presidential proclamation and, the next day, both deployed U.S. army troops and federalized the entire Arkansas National Guard to protect Black students as they walked into the school.¹³⁶ President John F. Ken-

Order in the State of South Carolina (Oct. 17, 1876), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=70542> [<https://perma.cc/3NC6-QXR8>].

¹³⁴ *Brown v. Bd. of Educ.*, 347, U.S. 483 (1954) (holding that racially segregated public schools violate the Fourteenth Amendment); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (requiring the *Brown* decision to be implemented “with all deliberate speed”); see also Dwight D. Eisenhower, Proclamation No. 3204, Obstruction of Justice in the State of Arkansas (Sept. 23, 1957) in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=107178> [<https://perma.cc/BB7U-MYWS>]; John F. Kennedy, Proclamation No. 3497, Obstructions of Justice in the State of Mississippi (Sept. 30, 1962), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=24042> [<https://perma.cc/SZ7C-CXZ3>]; John F. Kennedy, Proclamation No. 3542, Unlawful Obstructions of Justice and Combinations in the State of Alabama (June 11, 1963), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=9270> [<https://perma.cc/93N2-DP96>]; John F. Kennedy, Proclamation No. 3554, Obstructions of Justice in the State of Alabama (Sept. 10, 1963), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=24115> [<https://perma.cc/9YYZ-XTFN>].

¹³⁵ Each order specifically referred to the “the authority vested in [the president] by the Constitution and statutes of the United States, including Chapter 15 of Title 10 of the United States Code, particularly Sections 332, 333 and 334 thereof,” in ordering any person obstructing the law to cease and desist from such obstruction and disperse. See *supra* note 134.

¹³⁶ Dwight D. Eisenhower, Proclamation No. 3204, Obstruction of Justice in the State of Arkansas (Sept. 23, 1957), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=107178> [<https://perma.cc/BB7U-MYWS>]; Exec. Order. No. 10,730, 22 Fed. Reg. 7628 (Sept.

nedy issued three unilateral proclamations of insurrection: one in 1962 to enforce James Meredith's right to attend the University of Mississippi over the objection of Governor Ross Barnett, and two in 1963 to compel the entry of Black students into the University of Alabama and the Tuskegee High School in Huntsville—overriding the defiance of Alabama governor George Wallace, a staunch opponent of desegregation.¹³⁷

The proclamation issued to enforce the right of protestors to march from Selma to Montgomery, however, was technically made by gubernatorial request. On March 20, 1965, President Lyndon B. Johnson issued a proclamation ordering the dispersal of persons obstructing the federal-court ordered¹³⁸ right of such protesters, who had attempted to march two times prior—the first on March 7 in a televised confrontation known as “Bloody Sunday,” in which state troopers and local police brutally attacked non-violent protestors with nightsticks and tear gas.¹³⁹ The proclamation referenced the federal court order and stated that Governor Wallace had “advised [President Johnson] that the state is unable and refuses to provide for the safety and welfare, among others, of the plaintiffs and the members of the class they represent”¹⁴⁰—an advisement

24, 1957); Anthony Lewis, *President Sends Troops to Little Rock; Federalizes Arkansas National Guard; Tells Nation He Acted to Avoid Anarchy*, N.Y. TIMES, Sept. 24, 1957, at A1.

¹³⁷ John F. Kennedy, Proclamation No. 3497, Obstructions of Justice in the State of Mississippi (Sept. 30, 1962), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=24042> [https://perma.cc/SZ7C-CXZ3]; John F. Kennedy, Proclamation No. 3542, Unlawful Obstructions of Justice and Combinations in the State of Alabama (June 11, 1963), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=9270> [https://perma.cc/93N2-DP96]; Exec. Order No. 11,111, 28 Fed. Reg. 5709 (June 12, 1963) (directing the Secretary of Defense to take all appropriate steps to enforce the laws of the United States in Alabama, including calling the National Guard into active service); John F. Kennedy, Proclamation No. 3554, Obstructions of Justice in the State of Alabama (Sept. 10, 1963), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=24115> [https://perma.cc/9YYZ-XTFN].

¹³⁸ President Johnson made the proclamation following an order by Judge Frank Minis Johnson of the federal district court of the Middle District of Alabama that upheld the First Amendment rights of protestors to march and provided injunctive relief prohibiting police harassment and requiring the state of Alabama to provide police protection to protestors. See *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965).

¹³⁹ Lyndon B. Johnson, Proclamation No. 3645, Providing Federal Assistance in the State of Alabama (Mar. 20, 1965), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=106237> [https://perma.cc/9US3-RT6M]; Jessie Kindig, *Selma, Alabama, (Bloody Sunday, March 7, 1965)*, BLACKPAST.ORG, <http://www.blackpast.org/aah/bloody-sunday-selma-alabama-march-7-1965> [https://perma.cc/TJZ2-X9QA].

¹⁴⁰ Lyndon B. Johnson, Proclamation No. 3645, Providing Federal Assistance in the

which, as will be discussed below, was part of an underlying tactic by Wallace to publicly maintain the appearance of defiance in the face of federal intervention. Subsequently, civil rights protestors—including Dr. Martin Luther King, Jr. and Ralph Bunche—marched from Selma to Montgomery under the protection of approximately 2,000 U.S. army troops and 1,900 federalized members of the Alabama National Guard.¹⁴¹

None of the above proclamations was issued without controversy—which, this paper suggests, was due to the involvement of state actors in fomenting “insurrection” and (with the technical exception of the march from Selma to Montgomery) the unilateral nature of the proclamations. Indeed, the last in the series of proclamations issued to suppress insurrection during Radical Reconstruction foretold the death knell of federal military administration of the former Confederate states. In January 1875, President Grant ordered¹⁴² the use of federal military force in New Orleans, Louisiana when Democrats attempted to forcibly install party members in five contested state assembly seats.¹⁴³ After the five members were escorted out of the assembly chambers by federal troops, “Louisiana . . . came to represent the dangers posed by excessive federal interference in local affairs. The spectacle of soldiers ‘marching into the Hall . . . and expelling members at the point of the bayonet’ aroused more Northern opposition than any previous federal action in the South.”¹⁴⁴ In the aftermath of this incident, Republican representatives in Congress became “extremely wary” of further federal military intervention in the South.¹⁴⁵ The following

State of Alabama (Mar. 20, 1965), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=106237> [<https://perma.cc/9US3-RT6M>].

¹⁴¹ Roy Reed, *Freedom March Begins at Selma; Troops on Guard*, N.Y. TIMES, Mar. 21, 1965, at A1.

¹⁴² General Philip Sheridan, a former military governor of the district incorporating both Louisiana and Texas, led the military action. FONER, *supra* note 100, at 307, 554.

¹⁴³ *Id.* at 554 (“Having suppressed the New Orleans insurrection of September 1874, Grant, newly determined to ‘protect the colored voter in his rights,’ ordered General Sheridan to use federal troops to sustain the Kellogg administration and put down violence. On January 4, 1875, when Democrats attempted to seize control of the state assembly by forcibly installing party members in five disputed seats, a detachment of federal troops under the command of Col. Phillippe de Trobriand entered the legislative chambers and escorted out the five claimants. The following day, Sheridan wired Secretary of War Belknap, urging that military tribunals be established to try White League leaders as ‘banditti.’”).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 555 (“The uproar over Louisiana convinced Grant of the political dangers posed by a close identification with Reconstruction, and made Congressional Republi-

year, concerns over such intervention were leveraged in resolving the hotly contested presidential election in favor of Republican candidate Rutherford B. Hayes. Among the terms of the Compromise of 1877—an unwritten pact made between the political factions to settle the 1876 presidential election—was an agreement by Southern Democrats to recognize Hayes as the victor of the election over Democrat Samuel Tilden in return for, among other things, removing all remaining federal troops from the former Confederate states.¹⁴⁶ The removal of federal troops from the South, indeed, constituted the end of Radical Reconstruction, and, as discussed above, was codified in the Posse Comitatus Act passed the following year.

Of the four proclamations regarding public school desegregation, two emphasize the insubordination of the state governors, thus implying that *unilateral* deployment of federal troops in these instances was a last resort. All of the governors involved in these incidents were publicly defiant in the face of court-ordered desegregation.¹⁴⁷ Indeed, in publicly voicing dissent against federal court orders mandating public school desegregation, Governor Faubus referred to Eisenhower's unilaterally ordered intervention at Little Rock as "the military occupation of Arkansas."¹⁴⁸ The governors of Mississippi and Alabama, for their part, called upon the constitutional principles of federalism and characterized federal

cans extremely wary of further military intervention in the South."). *Id.* at 556 ("The legislative infighting of January and February 1875 illustrated how divided Republicans had become over Reconstruction. 'Is it possible,' asked one House member, 'that you can find power in the Constitution to declare war, levy taxes . . . and pass laws upon all conceivable subjects and find means to enforce them, but can find no power to protect American citizens . . . in the enjoyment and exercise of their constitutional rights?' Yet Congressional Republicans had little stomach for further intervention in Southern affairs. Even men like Connecticut's Joseph R. Hawley, who proclaimed (with some exaggeration), 'I have been a radical abolitionist from my earliest days,' had resigned themselves to the conclusion that the South's 'social, and educational, and moral reconstruction' could 'never come from any legislative halls.' Others now echoed the Democratic refrain that blacks should abandon 'the habit . . . [of relying] upon external aid,' and sang the praises of 'local self-government.'" (alterations in original)).

¹⁴⁶ See *id.* at 582 ("'[H]ome rule' quickly came to Louisiana and South Carolina. Within two months of taking office, Hayes ordered federal troops surrounding the South Carolina and Louisiana statehouses, where Chamberlain and Packard still claimed the office of governor, to return to their barracks. (Hayes did not, as legend has it, remove the last federal troops from the South, but his action implicitly meant that the few remaining soldiers would no longer play a role in political affairs.)").

¹⁴⁷ See *infra* notes 148-53 and accompanying text.

¹⁴⁸ Peter Applebome, *Orval Faubus, Segregation's Champion, Dies at 84*, N.Y. TIMES (Dec. 15, 1994), <http://www.nytimes.com/1994/12/15/obituaries/orval-faubus-segregation-s-champion-dies-at-84.html> [<https://perma.cc/XR24-WHCY>].

encroachment into state affairs as a form of foreign invasion. Prior to President Kennedy's formal proclamation, Governor Wallace of Alabama¹⁴⁹ issued a statement that President Kennedy had "order[ed] the federal troops to invade Alabama . . ."¹⁵⁰ Further, in a speech delivered about two weeks before President Kennedy would deploy federal troops to Mississippi, Governor Barnett recited the Tenth Amendment and referred to "an ambitious federal government, employing naked and arbitrary power, [which] has decided to deny us the right of self-determination in the conduct of the affairs of our sovereign state."¹⁵¹ Calling desegregationists agitators and trouble makers "pouring across our borders," the governor stated that the "federal government teamed up with a motley array of un-American pressure groups against us."¹⁵² In the end, Governor Barnett assured his constituency that he would do all in his power to prevent integration and instigated a form of "posse comitatus," in the traditional sense of the term, by "call[ing] on every public official and every private citizen of [his] great state to join [him]."¹⁵³

As for enforcing the right of protestors to march from Selma to Montgomery, Governor Wallace did technically request that President Johnson deploy federal troops in order to safely escort marching civil rights protestors—*technically*, because he refused the president's advisement to deploy National Guard troops to do the same.¹⁵⁴ The circumstances of the request, however, highlight the

¹⁴⁹ Governor Wallace sent a telegram to President Kennedy erroneously interpreting the Insurrection Act as precluding the executive from unilaterally deploying federal troops, and asserting that he had not requested any federal military intervention to "quell domestic violence." Telegram from George Wallace, Governor, Ala., to John F. Kennedy, U.S. President (May 13, 1963), in ALA. DEP'T ARCHIVES & HIST., <http://digital.archives.alabama.gov/cdm/ref/collection/voices/id/2224> [https://perma.cc/USL8-QNSP].

¹⁵⁰ Governor George C. Wallace, Statement Made by Governor George C. Wallace After President Kennedy Sent Federal Troops to Handle the Violent Situation in Birmingham, Alabama (May 13, 1963), in ALA. DEP'T ARCHIVES & HIST., <http://digital.archives.alabama.gov/cdm/singleitem/collection/voices/id/2968/rec/20> [https://perma.cc/MWY5-9NBR].

¹⁵¹ Governor Ross Barnett, Governor Barnett's Declaration to the People of Mississippi (Sept. 13, 1962), in *Integrating Ole Miss: A Civil Rights Milestone*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, <http://microsites.jfklibrary.org/olemiss/controversy/doc2.html> [https://perma.cc/PQY6-E4P8].

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See Lyndon B. Johnson, News Conference at the LBJ Ranch (Mar. 20, 1965), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=26816&st=&st1=> [https://perma.cc/23YV-KQV7] ("Even more surprising was your telegram of yesterday stating that both you and the Alabama Legislature, because of monetary consideration, believe that the

controversial nature of federal military intervention in enforcing civil rights because, as is clear from White House transcripts of conversations after Bloody Sunday and before the proclamation was made, President Johnson had communicated a strong preference for Governor Wallace to protect the marchers with the state's National Guard,¹⁵⁵ a move that Wallace resisted in a deft political move to appear defiant before his anti-desegregationist base. In essence, then, Governor Wallace's "request" was less a genuine cry for help, so to speak, and more so an official re-characterization of his unwillingness to act. A press statement made by President Johnson, accordingly, highlights both the executive reluctance to declare an insurrection as to the incident and the effective gubernatorial abdication of the state's implied police powers:

It is not a welcome duty for the Federal Government to ever assume a State Government's own responsibility for assuring the protection of citizens in the exercise of their constitutional rights. It has been rare in our history for the Governor and the legislature of a sovereign state to decline to exercise their responsibility and to request that duty be assumed by the Federal Government. Governor Wallace and the legislature of the State of Alabama have now done this.¹⁵⁶

2. Suppressing 'Race Riots'

In addition to the enforcement of civil rights, an overview of past proclamations of insurrection reveals that a significant number were made in response to "race riots." Similar to "insurrection," the term "race riot" is contentious and tautological, subject to varying interpretations and, thereby, self-defining.¹⁵⁷ For one,

State is unable to protect American citizens and to maintain peace and order in a responsible manner without Federal forces."); Fendall W. Yerxa, *Johnson Calls Up Troops, Deplores Wallace's Acts; Alabama March on Today*, N.Y. TIMES, Mar. 21, 1965, at 1.

¹⁵⁵ Yerxa, *supra* note 154.

¹⁵⁶ Lyndon B. Johnson, News Conference at the LBJ Ranch (Mar. 20, 1965), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=26816&st=&st1=> [<https://perma.cc/23YV-KQV7>]; see also Laurence Stern, *Sending the Troops to Selma*, WASH. POST (Mar. 21, 1999), https://www.washingtonpost.com/archive/lifestyle/1999/03/21/sending-the-troops-to-selma/6e5ae053-fd08-4147-899d-df18a5e0f5e5/?utm_term=.4f291a16cf15 [<https://perma.cc/8K3A-HGJM>]; Alice Anne Stephens, *LBJ, Governor Wallace, and Buford Ellington in Selma, Alabama: The President, the Wildcard, and the Link*, MILLER CTR., <http://archive.millercenter.org/educationalresources/lbj-governor-wallace-and-buford-ellington-in-selma-alabama> [<https://perma.cc/H9VB-E9ZN>].

¹⁵⁷ For one, though, in the United States, the term is commonly used to refer to civil disturbances incited by Black residents of urban areas, the majority of "race riots" have historically been incited by white vigilante groups. Further, in reference to "race riots" incited by Black residents in urban areas, attempts have been made to re-desig-

the distinction between suppressing a “race riot” and enforcing civil rights can be blurry, as past attempts to exercise and enforce civil rights have incited riots—which, in turn, have been suppressed by federal military intervention in order to enforce civil rights.

Again, by international analogy, those incidents deemed to warrant humanitarian intervention abroad are all marked by a grave violation of human rights and, thereby, a critical disruption of law and order; *however*, a fine distinction can be made between those incidents where rights violations were the *primary* justification for intervention (as with civil rights enforcement at home) and those where rights violations were *incident to* large-scale unrest (as with “race riots”). For instance, there is an analogous distinction between those incidents deemed just causes on account of the grave violation of human rights, as in the genocides in Bosnia, Kosovo, and Rwanda, and those incidents deemed such on account of violent insurgencies or clashes that required suppression in order to restore law and order (and thereby enforce human rights), as in Somalia.

Accordingly, this article categorizes as “race riots” those incidents where suppressing a race-related civil disturbance was the *priority* of federal military intervention, regardless of whether presumed or apparent civil rights violations brought about or were implicit in the disturbance. Those incidents that meet such criteria are: the violent clashes in Bleeding Kansas; anti-Chinese expulsion campaigns in the Northwest; the Detroit race riots of 1943 and 1967; riots in Baltimore and Washington, D.C. following the assassination of Martin Luther King, Jr.; looting in St. Croix in the aftermath of Hurricane Hugo; and riots in Los Angeles in the wake of the Rodney King verdict.¹⁵⁸ With the exception of the Hurricane

nate such incidents as “rebellions” or “uprisings” to indicate the socio-economic and civil-rights related grievances that may underlie them and, thereby, the righteous indignation behind such disturbances. Neutral descriptors such as “unrest” or “civil disturbance,” accordingly, have been used to sidestep the contention that can arise from designating an incident a “race riot.” Nonetheless, the term is used here to highlight larger claims made in this article about race and state sovereignty illustrated through the history of insurrection.

¹⁵⁸ See, e.g., Vivienne M. Baulch & Patricia Zacharias, *The 1943 Detroit Race Riots*, Detroit News: Mich. Hist. (Feb. 10, 1999, 8:00 PM), <http://blogs.detroitnews.com/history/1999/02/10/the-1943-detroit-race-riots/> [<https://perma.cc/79H6-2E26>]; William Branigin, *Hurricane Hugo Haunts Virgin Islands*, WASH. POST (Oct. 31, 1989), <http://www.washingtonpost.com/wp-srv/national/longterm/hurricane/archives/hugo89a.htm> [<https://perma.cc/72LM-C5W6>]; Kathleen Koch, *Nation's Capital Still Recovering from 1968 Riots*, CNN (Apr. 4, 1998, 2:16 PM), <http://www.cnn.com/US/9804/04/mlk.dc.riots> [<https://perma.cc/6VS3-UADX>]; *People and Events: Bleeding*

Hugo incident, federal military intervention in all of the above was at the request of the state governor, and—though they collectively raised less concern among state officials over the legitimacy of such intervention—they were nonetheless the subject of controversy.

Several of the above incidents—namely, the Detroit riots, the riots following Martin Luther King, Jr.’s assassination, and the Los Angeles riots—are well-known and commonly understood to be ‘race riots’. They are notable for the purposes of this article in that they illustrate the trend discussed above: race-related civil disturbances deemed insurrections for the purposes of authorizing federal military intervention (by *local invitation*) to enforce law and order disrupted by *non-state actors*. Indeed, federal military intervention in each of these instances was authorized at the behest of the respective state governor. Further, notwithstanding that intervention in these instances was requested by state officials, the rhetoric of public speeches (and private discussions) indicates the controversial nature of the insurrection proclamation.

With the exception of the proclamation made attendant to the Detroit riot of 1943,¹⁵⁹ all of the remaining proclamations include substantially overlapping language advising that “the law enforcement resources available to the City and State, including the National Guard, have been unable to suppress such acts of violence and to restore law and order”¹⁶⁰—language which signals that federal military intervention was a *last resort*. Such framing is evident in a transcript of President Johnson’s conversations with advisers and relevant state governors in the midst of riots sparked by Martin Luther King, Jr.’s assassination. In discussing plans for the domestic deployment of troops to suppress the riots, President Johnson instructed Mayor Richard Daley of Chicago that the governor of Illi-

Kansas, 1853-1861, PBS.ORG, <http://www.pbs.org/wgbh/aia/part4/4p2952.html> [<https://perma.cc/AK2R-6Y32>]; Robert Reinhold, *Riots in Los Angeles: The Overview; As Rioting Mounted, Gates Remained at Political Event*, N.Y. TIMES (May 5, 1992), <http://www.nytimes.com/1992/05/05/us/riots-los-angeles-overview-rioting-mounted-gates-remained-political-event.html> [<https://perma.cc/ZHE3-3FR4>]; Kie Relyea, *Remembering Washington’s Chinese Expulsion 125 Years Later*, SEATTLE TIMES (Nov. 7, 2010, 9:46 AM) <http://www.seattletimes.com/seattle-news/remembering-washingtons-chinese-expulsion-125-years-later> [<https://perma.cc/S99R-7ULC>].

¹⁵⁹ Franklin D. Roosevelt, Proclamation No. 2588, Directing Detroit Race Rioters to Disperse (June 23, 1953), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=16414> [<https://perma.cc/9VL6-MASJ>].

¹⁶⁰ See, e.g., Lyndon B. Johnson, Proclamation 384, Law and Order in the State of Illinois (Apr. 7, 1968), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=106125> [<https://perma.cc/LYM4-ARW5>].

nois would have to make a “finding” that the state had “used all [its National] Guard, that [it had] used all [its] facilities, that [it is] unable to take care of the situation”¹⁶¹ President Johnson’s reticence was even more apparent as to civil disturbances in Detroit, where Michigan governor and presidential hopeful George Romney vacillated on formally requesting the deployment of federal troops. Given his political aspirations, Governor Romney, on the one hand, was loath to admit that the riots had escalated to a level beyond his control; and President Johnson, on the other hand, was generally averse to the domestic deployment of troops and, accordingly, insisted on Romney’s formal request to exercise this exceptional measure.¹⁶²

In some instances, the then-president further emphasized that such intervention was not authorized in order to enforce civil rights, but for the sole purpose of stemming criminal activity. For instance, in response to the Detroit riots of 1967, President Johnson supplemented the proclamation of insurrection with a public address noting that such action was taken with the “greatest regret” and assuring that “[p]illage, looting, murder, and arson have nothing to do with civil rights,” but were “criminal conduct.”¹⁶³ Similar qualifications were used long after the decade characterized by the

¹⁶¹ *Johnson Conversation with Richard Daley on Apr 06, 1968 (WH6804.01)*, MILLER CTR., <http://archive.millercenter.org/presidentialrecordings/lbj-wh6804.01-12910> [<https://perma.cc/EDR9-7EGN>].

¹⁶² JOSEPH A. CALIFANO, JR., *THE TRIUMPH AND TRAGEDY OF LYNDON JOHNSON: THE WHITE HOUSE YEARS 212-13* (1991) (“Johnson could have ignored Romney’s vacillation and political maneuvering. He had the constitutional and legal authority to deploy troops. He had only to determine that the situation was out of control, order the rioters to disperse, and if they did not, send in troops. But . . . Johnson did not like to use military troops in domestic disorders. He believed that local and state authorities should maintain order. He couldn’t stand the thought of American soldiers killing American civilians. . . . Romney was reluctant to ‘request’ the President to deploy troops and he refused to admit that he was ‘unable’ to maintain order in Detroit. Johnson insisted on a written request. Finally, Romney sent a telegram to the President, ‘I hereby officially request the immediate deployment of federal troops. . . . There is reasonable doubt that we can suppress the existing looting, arson and sniping without the assistance of federal troops.’”).

¹⁶³ Lyndon B. Johnson, *Remarks to the Nation After Authorizing the Use of Federal Troops in Detroit (July 24, 1967)*, in *AM. PRESIDENCY PROJECT* (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=28364> [<https://perma.cc/2SEV-2AWS>] (“I am sure the American people will realize that I take this action with the greatest regret—and only because of the clear, unmistakable, and undisputed evidence that Governor Romney of Michigan and the local officials in Detroit have been unable to bring the situation under control. Law enforcement is a local matter. It is the responsibility of local officials and the Governors of the respective States. The Federal Government should not intervene—except in the most extraordinary circumstances.”).

civil rights movement; in the midst of the L.A. riots, President George H.W. Bush stated in a public address that the unrest was “not about civil rights,” but, rather, “the brutality of a mob, pure and simple.”¹⁶⁴ Such distinctions, it can be inferred, were publicly made in order to help legitimize federal military intervention before a watching public, which, perhaps, might have associated such intervention with the controversial proclamations of insurrection attendant to past enforcements of civil rights.

For the sake of brevity, this section will discuss in detail those incidents that are either less well known and/or less commonly understood to be “race riots”: (a) violent clashes in “Bleeding Kansas,” (b) anti-Chinese expulsion campaigns in the Northwest, and (c) looting in St. Croix in the aftermath of Hurricane Hugo.

a. *Bleeding Kansas*

On February 11, 1856, President Franklin Pierce issued a proclamation ordering the dispersal of persons obstructing law and order in Kansas.¹⁶⁵ The proclamation addressed the violent clashes between pro- and anti-slavery factions in a conflict known as “Bleeding Kansas,” which arose after the 1894 Kansas-Nebraska Act effectively nullified the Missouri Compromise of 1820 by authorizing settlers to vote on whether slavery would be allowed in the eponymous territories. In other words, the Kansas-Nebraska Act authorized settlers of the new territories to decide whether slavery would be sanctioned or prohibited by way of self-determination or, as then termed, ‘popular sovereignty’.

Kansas, then, became a battleground. A pro-slavery faction included armed “Border Ruffians” from the adjacent slaveholding state of Missouri who flooded to the neighboring territory, voting illegally and engaging in vigilante violence to ensure that the terri-

¹⁶⁴ Address to the Nation on the Civil Disturbances in Los Angeles, California, (May 1, 1992), in 1 PUB. PAPERS 685 (1992), <https://www.gpo.gov/fdsys/pkg/PPP-1992-book1/pdf/PPP-1992-book1-doc-pg685.pdf> [<https://perma.cc/MN4W-Q2PA>] (“What we saw last night and the night before in Los Angeles is not about civil rights. It’s not about the great cause of equality that all Americans must uphold. It’s not a message of protest. It’s been the brutality of a mob, pure and simple. And let me assure you: I will use whatever force is necessary to restore order. What is going on in L.A. must and will stop. As your President I guarantee you that this violence will end.”). A video version of the speech is also available online. *Bush on Los Angeles Riots*, HIST., <http://www.history.com/speeches/bush-on-los-angeles-riots#bush-on-los-angeles-riots> [<https://perma.cc/34DR-HK9E>].

¹⁶⁵ Franklin Pierce, Proclamation No. 66, Law and Order in the Territory of Kansas (Feb. 11, 1856), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=67740> [<https://perma.cc/ML99-ACZC>].

tory would not become a haven for escaped slaves. Their antagonists were abolitionists, including both humanitarian associations and armed guerrilla groups, the most notorious among them led by John Brown.¹⁶⁶ Violence and hotly contested elections ensued, with the political arm of each faction establishing a separate legislature and constitution for the territory.¹⁶⁷

As to Bleeding Kansas, federal military intervention was initially proposed in November 1855 by Kansas territorial governor Wilson Shannon, a pro-slavery sympathizer. In his capacity as commander-in-chief of the state militia, Shannon had called forth a *posse comitatus* of armed men from bordering Missouri to help suppress an insurrection of abolitionist groups assembling within the free state settlement of Lawrence; thereafter, the territorial governor had become overwhelmed by the ensuing unrest and requested that President Pierce dispatch federal troops to help restore order.¹⁶⁸

The president had been hesitant to heed this call, wary of the public appearance of targeting citizens with the force of the federal military. Moreover, anticipating the 1856 presidential election, President Pierce had been politically invested in the “success” of popular sovereignty in the territory. In light of such concerns, the president authorized federal troops in the territory to serve under the control of Governor Shannon, and in strict adherence to the text of the presidential proclamation and relevant territorial law. In effect, then, federal law enforcement was implemented at the behest and pleasure of the pro-slavery territorial governor.¹⁶⁹

¹⁶⁶ See *Pottawatomie Massacre*, PBS: AM. EXPERIENCE, <http://www.pbs.org/wgbh/amex/brown/peoplevents/pande07.html> [<https://perma.cc/AV9A-TAQS>]; see also *People and Events: Bleeding Kansas, 1853-1861*, *supra* note 158.

¹⁶⁷ “In fact what has been done is of revolutionary character. It is avowedly so in motive and in aim as respects the local law of the Territory. It will become treasonable insurrection if it reach the length of organized resistance by force to the fundamental or any other Federal law and to the authority of the General Government. In such an event the path of duty for the Executive is plain. The Constitution requiring him to take care that the laws of the United States be faithfully executed, if they be opposed in the Territory of Kansas he may, and should, place at the disposal of the marshal any public force of the United States which happens to be within the jurisdiction, to be used as a portion of the *posse comitatus*; and if that do not suffice to maintain order, then he may call forth the militia of one or more States for that object, or employ for the same object any part of the land or naval force of the United States.” Franklin Pierce, Special Message (Jan. 24, 1856), in *AM. PRESIDENCY PROJECT* (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/?pid=67636> [<https://perma.cc/6MR2-EVX3>].

¹⁶⁸ MICHAEL L. TATE, *THE FRONTIER ARMY IN THE SETTLEMENT OF THE WEST* 83-84 (1999).

¹⁶⁹ Franklin Pierce, Proclamation No. 66, Law and Order in the Territory of Kansas

Accordingly, among the more notorious displays of federal military intervention was the use of federal troops on July 4, 1856 to “disperse” the Topeka convention of a free-state legislative faction, which had been convened to contest and counteract the official pro-slavery territorial government.¹⁷⁰ This deployment sparked controversy, with Northern abolitionist sympathizers criticizing the use of federal military force to uphold a pro-slavery government, and Southern pro-slavery supporters wary of the potential for federal troops to be increasingly used to suppress the incursions of border ruffians and other similarly-aligned factions. Moreover, in the end, President Pierce’s perceived bungling of the situation in the Kansas territory – in part, occasioned by his hesitancy and lack of leadership in failing to assert executive control over the federal military response therein – contributed to his losing the Democratic presidential primary.¹⁷¹

b. *Anti-Chinese Expulsion*

President Grover Cleveland issued two presidential proclamations in response to the organized expulsion of Chinese laborers from Washington State in the mid-1880s. Amid an economic downturn that hit the Northwest Pacific region, Chinese residents—who had largely migrated to help build the region’s transcontinental railroad—became scapegoats for anxious white laborers who blamed them for driving down wages and, thereby, posing unfair competition for available work. A wave of propaganda campaigns by members and sympathizers of the Knights of Labor, a labor union, recommended expulsion of Chinese laborers, a tactic which gained significant public support.

The first proclamation, issued on November 7, 1885, concerned the move by groups spurred by the Knights of Labor to threaten and intimidate Chinese residents into leaving Tacoma, Washington.¹⁷² On November 3 of that year—a few weeks after three Chinese laborers were murdered and masked men torched

(Feb. 11, 1856), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=67740> [<https://perma.cc/MLE9-ACZC>].

¹⁷⁰ *The Missouri-Kansas Conflict 1854-1865: Topeka Legislature Dispersed*, CIV. WAR ON WESTERN BORDER, <http://www.civilwaronthewesternborder.org/timeline/topeka-legislature-dispersed> [<https://perma.cc/T9RM-3PQT>].

¹⁷¹ Gerhard Peters & John T. Woolley, *Election of 1856*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1856> [<https://perma.cc/7QX8-RMPP>].

¹⁷² Grover Cleveland, Proclamation No. 274, Law and Order in the Territory of Washington (Nov. 7, 1885), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T.

quarters where 37 Chinese workers resided—some 200 Chinese persons were ordered to pack, escorted by Knights of Labor supporters to a Northern Pacific railway, and forced to board a train to Portland, Oregon.¹⁷³ President Cleveland’s proclamation, which was made at the request of the territorial governor of Washington, stated “that by reason of unlawful obstructions and combinations and the assemblage of evil-disposed persons” it had “become impracticable to enforce” the law.¹⁷⁴ However, such “evil-disposed people,” having completed their mission, wondered what federal troops would do when they reached Tacoma: “‘What insurrection?’” asked perpetrators as they returned peaceably to their homes. . . . ‘How will they manage to put down a people who are not in rebellion?’ ‘Let them come,’ said the calm-minded. ‘We shall be glad to see them. It will give the boys a change.’”¹⁷⁵

The president’s second proclamation, which was also made at the request of Washington’s territorial governor, similarly cited “evil-disposed persons” whose unlawful obstructions and combinations made it impracticable to enforce the law. Issued on February 9, 1886, the proclamation responded to a riot that erupted in Seattle after local members and sympathizers of the Knights of Labor attempted to expel Chinese laborers using the “Tacoma Method.”¹⁷⁶ On February 7, such perpetrators had marauded through Seattle’s Chinese neighborhood and threatened residents to depart on a steamship leaving that afternoon. However, after plans were made to postpone the expulsion for the following day, the intended departure was further disrupted by violent clashes between Knight-supporters and white parties who sought to put a

Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=71275> [<https://perma.cc/BSD4-YAY8>].

¹⁷³ See GWEN WHITING, WASH. STATE HISTORY MUSEUM, THE CHINESE EXPULSION ACT OF 1882, http://www.washingtonhistory.org/files/library/chineseexclusion_001.pdf [<https://perma.cc/5YL3-Z2W8>]; see also David W. Chen, *Picturing the Remnants of Anti-Chinese Violence*, N.Y. TIMES: LENS (Aug. 13, 2012), <https://lens.blogs.nytimes.com/2012/08/13/remnants-of-anti-chinese-violence> [<https://perma.cc/FPJ2-JTXQ>].

¹⁷⁴ Grover Cleveland, Proclamation No. 274, Law and Order in the Territory of Washington (Nov. 7, 1885), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=71275> [<https://perma.cc/BSD4-YAY8>].

¹⁷⁵ Carlos A. Schwantes, *Protest in a Promised Land: Unemployment, Disinheritance, and the Origin of Labor Militancy in the Pacific Northwest, 1885-1886*, 13 WESTERN HIST. Q., 373, 383 (1982) (noting that a grand jury issued indictments pursuant to the Ku Klux Klan Act of 1871, which resulted in no convictions).

¹⁷⁶ Grover Cleveland, Proclamation No. 275, Intent to Use Force Against Unlawful Assemblages in the Territory of Washington (Feb. 9, 1886), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=71415> [<https://perma.cc/J2G8-FKMY>].

stop to the scheme. The ship ultimately departed with nearly 200 Chinese persons on board, but thereafter the opposing parties clashed when Knight-supporters tried to escort the remaining Chinese laborers off the dock to await the next ship, leaving five wounded and one person dead.¹⁷⁷

c. *Hurricane Hugo*

On September 20, 1989, President George H.W. Bush issued a proclamation regarding domestic violence and disorder in the U.S. Virgin Island of St. Croix that was “endangering life and property and obstructing execution of the laws.”¹⁷⁸ President Bush’s proclamation came after reports of looting and violence in St. Croix after Hurricane Hugo hit landfall three days earlier on September 17. The damage wrought by the hurricane severely impaired communications systems, making it difficult for Washington-based officials to confirm conditions on the island. Accordingly, much of the information relied upon was communicated by ham radio operators. Among circulated reports were incidents of racial violence enacted by Black residents against white residents and tourists, which were later determined to be exaggerated.¹⁷⁹ While the precise nature of civil disorder in the aftermath of the hurricane remained unclear, it was undisputed that widespread looting had occurred,¹⁸⁰ with local police, National Guard troops,¹⁸¹ and even prominent citizens

¹⁷⁷ Schwantes, *supra* note 175, at 382.

¹⁷⁸ Proclamation No. 6023, 54 Fed. Reg. 39,153 (Sept. 20, 1989), *reprinted in* 103 Stat. 3093 (1989).

¹⁷⁹ Jeffrey Schmalz, *3 Weeks After Storm, St. Croix Still Needs Troops*, N.Y. TIMES (Oct. 9, 1989), <http://www.nytimes.com/1989/10/09/us/3-weeks-after-storm-st-croix-still-needs-troops.html> [<https://perma.cc/4GAY-TGJA>] (“Federal officials say they believe reports that some blacks, who make up 70 percent of the island’s population, had shouted, ‘Whitey, go home!’ But they said that there was no indication that such encounters involved more than shouting, and the complaints were not being pursued.”).

¹⁸⁰ James Gerstenzang & Ronald J. Ostrow, *Washington Officials Paint Grim Picture of Chaos that Led to Approval of Troops*, L.A. TIMES (Sept. 21, 1989), http://articles.latimes.com/1989-09-21/news/mn-910_1_virgin-islands [<https://perma.cc/Y4TV-VEQL>] (“While Hurricane Hugo’s destruction of communications links left details of the disorders unclear, one Interior Department official reported that every store on St. Croix appeared to have been looted.”).

¹⁸¹ Branigin, *supra* note 158 (“Most troubling for many people, however, was the apparent insouciance of the police and National Guard, some of whose members were looters, witnesses said. ‘I watched people looting while Gen. Moorehead was standing right out there directing traffic’ a couple of blocks away, one U.S. law-enforcement official said angrily. At one point, the official said, ‘a guy with a National Guard uniform told me to go into a store and ‘take what you need.’ Why? Because the National Guard was looting, too.’”).

having reportedly participated.¹⁸²

News articles written at the time of the domestic disturbance cited reports of hundreds of inmates who broke out of a hurricane-damaged prison, “looters by the thousands” and “[f]leeing tourists [telling] of chaos, long and heavy automatic weapons fire, robbers with machetes and prisoners—including murderers—on the loose.”¹⁸³ Other sources quoted at the time reported that the looting was not solely opportunistic, but also need-oriented, engaged in by residents who were running out of food and other necessary provisions.¹⁸⁴ The ensuing unrest, in any event, occurred against a backdrop of racial tensions and socio-economic disparities between the island’s resident population and seasonal tourists.

The presidential proclamation was silent on whether it had been made at the request of the territorial governor of the U.S. Virgin Islands, and news reports provide conflicting accounts. While spokespersons for President Bush stated that the proclamation was made at the request of Virgin Islands territorial governor Alexander Farrelly, Farrelly responded that he had not made any such request.¹⁸⁵ In any event, on September 21, approximately 1,100 federal troops were deployed to the island to aid the Virgin Islands National Guard and other local law enforcement.

As for indicated perceptions of legitimacy, some territorial officials criticized the federal deployment, which they argued diverted necessary resources from relief missions to security

¹⁸² *Id.* (“The breakdown in order after the hurricane also has prompted much soul-searching about the behavior of Crucians, as people of St. Croix are known, since the looters included not only poor residents of public housing projects but also prominent citizens. The U.S. attorney’s office has charged 15 such persons with offenses ranging from grand larceny to possession of stolen goods. They include a former St. Croix senator and gubernatorial candidate who was police commander in Frederiksted at the time of his arrest, the vice president of a bank, a Christiansted civic leader and a restaurant owner.”).

¹⁸³ Bob Sexter & Richard E. Meyer, *St. Croix Chaos Subsides as U.S. Troops Arrive*, L.A. TIMES (Sept. 22, 1989), http://articles.latimes.com/1989-09-22/news/mn-673_1_st-croix [<https://perma.cc/E6Q9-9RFM>].

¹⁸⁴ *Id.* (“Some islanders have admitted that they joined in the looting because they were afraid that if they didn’t they would have nothing to eat.”).

¹⁸⁵ Gerstenzang & Ostrow, *supra* note 180 (“Farrelly said Wednesday night that he had not asked for the troops Bush authorized.”); Marita Hernandez & Richard E. Meyer, *U.S. Orders in Troops to Quell Island Violence: St. Croix Looting and Lawlessness in Wake of Hurricane Damage Spurs Authorization by Bush*, L.A. TIMES (Sept. 21, 1989), http://articles.latimes.com/1989-09-21/news/mn-890_1_virgin-islands [<https://perma.cc/AS7G-VCE9>] (“Presidential spokesman Marlin Fitzwater said Bush authorized deployment after receiving a request for help from Virgin Islands Gov. Alexander Farrelly. In Christiansted, the governor said he had not asked for federal help to restore order. But Holland Redfield, a Virgin Islands territorial senator and legislative liaison to the White House, said he asked for assistance from Washington.”).

operations. Territorial Governor Farrelly, for one, downplayed the level of disorder on the ground.¹⁸⁶ Further, non-voting House of Representatives member Ron de Lugo criticized the media reportage of the disruption on the island, “denounc[ing] the television networks, Time Magazine, The New York Times, The Wall Street Journal, The Miami Herald, The Chicago Tribune and other news organization [sic], accusing them of concentrating on the looting and exaggerating the extent of civil disorder.”¹⁸⁷

C. *Right Intention*

When contemplating the legitimacy of humanitarian intervention abroad, moral philosophers and critics of foreign policy, in particular, have considered whether—independent of the underlying circumstance deemed a “just cause”—such intervention was made with the “right intention.” In other words, such scholars have considered whether the “just cause” was merely a pretext for armed intervention, which, accordingly, was not undertaken solely for humanitarian purposes.¹⁸⁸

Indeed, in the international context, it is understood that states do not always engage in humanitarian intervention for purely humanitarian purposes. Humanitarian intervention, for instance, can be partly motivated by the pursuit of national interests that do not encompass the intent to save lives and protect human rights.¹⁸⁹ Given the understanding that humanitarian intervention is often prompted by such mixed motives, evaluations of right intention have tended to adopt an empirical approach that considers when such intervention has, and has not, been undertaken in light of underlying circumstances that would seem to constitute a just cause. Such evaluations, then, have adopted an inductive analysis to consider when humanitarian intervention appears to have been prompted by non-humanitarian national interests, on the one

¹⁸⁶ Dennis Hevesi, *Bush Dispatches Troops to Island in Storm's Wake*, N.Y. TIMES (Sept. 21, 1989), <http://www.nytimes.com/1989/09/21/us/bush-dispatches-troops-to-island-in-storm-s-wake.html> [<https://perma.cc/PA28-NFX5>] (“Governor Farrelly of the Virgin Islands, speaking from his office in Charlotte Amalie on St. Thomas, about 30 miles north of St. Croix, acknowledged, ‘There is some looting, no doubt about that. ‘But,’ he added, ‘there is no near state of anarchy. And I should know. I’m in the streets every day and I’m the Governor of this territory.’”).

¹⁸⁷ Schmalz, *supra* note 179.

¹⁸⁸ See, e.g., Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, FOREIGN AFFAIRS, Nov./Dec. 2002, at 100, 104, 109 (describing the relationship between right intention and national interest in modern humanitarian intervention).

¹⁸⁹ ANDREAS KRIEG, *MOTIVATIONS FOR HUMANITARIAN INTERVENTION: THEORETICAL AND EMPIRICAL CONSIDERATIONS* 37-58 (2013) (ebook).

hand, or, on the other hand, has not been undertaken due to the lack of both national self-interest and political will.

It could be posited that considerations of right intention at play in the international context are not suitable for the domestic context. At home, one would imagine, the federal government's response in protecting its own citizens in a crisis scenario would not only be politically uncontroversial, but would also be fairly uniform in tactical application, in line with the singular and incontrovertible motive of protecting any and all citizens in a given emergency. However, just as an empirical analysis of humanitarian intervention (e.g., in Bosnia, Kosovo, and Somalia) and its absence (e.g., in Rwanda) supports an inductive evaluation of the international community's political priorities, relative indifference, and blind spots, a similar analysis of the nature of federal intervention at home, as discussed in more detail below, not only reveals a curious trend, but also suggests a disparity as to which crises warrant certain kinds of responses.

This section considers the 'right intention' of domestic federal military intervention through a similar inductive analysis—here, with a select consideration of the application of the Stafford Act to govern the federal response to incidents that, on their face, could constitute instances of domestic violence or other obstruction of federal law or the enjoyment of constitutional rights that would warrant the invocation of the Insurrection Act. Such an analysis, albeit cursory and speculative, is nonetheless useful in light of the stated legislative purposes of the Stafford Act and the Insurrection Act, respectively, which frame the *nature* of federal military intervention.

Again, while the Insurrection Act authorizes the deployment of federal troops with law enforcement powers, the Stafford Act does not—a key distinction that is evident in the text of each statute and, further, is translated in the rules of engagement established under the authority of one or both acts. As for the legislative text itself, while the Insurrection Act authorizes the deployment of federal troops to “suppress insurrection” and otherwise quell “domestic violence,”¹⁹⁰ such troops may be deployed under the Stafford Act in accordance with the ultimate purposes to “save lives” and “alleviate . . . suffering.”¹⁹¹ While such text does not necessarily dictate specific behaviors of every federal military responder on the ground, the legislative authorization does *frame* the overall mission,

¹⁹⁰ 10 U.S.C. § 333 (2008).

¹⁹¹ 42 U.S.C. § 5121(b) (2007).

casting intervention as the use of military force to restore law and order, on the one hand, or to provide emergency relief in order to save lives, on the other.

The following subsection briefly considers select incidents of arguably insurrectionary character that were solely deemed either natural or man-made disasters under the Stafford Act. This subsection, moreover, is not intended to provide evidence *per se* of selective federal law enforcement, but to raise for discussion the potential for such selective enforcement and the implications in light of the fraught history of race and sovereignty of the several states.

1. Selective Enforcement

Instances of domestic violence in the United States that were not proclaimed insurrections are numerous; this article does not consider them all. Rather, this inquiry of right intention, similar to that offered by commentators on and critics of humanitarian intervention abroad, is episodic and speculative, intended to raise issues for further discussion rather than to make definitive conclusions. Accordingly, while the Stafford Act, passed in 1988, has applied to incidents that arose over a far shorter span of time than the Insurrection Act of 1807, it is nonetheless, for the purposes of this article, a useful benchmark for considering the potential for selective federal law enforcement.

Though the Stafford Act has been generally applied to authorize federal response to natural disasters—such as hurricanes, floods, and flash fires—there are only *three* instances since the legislation was enacted in which it was applied to respond to civil disturbances, specifically, three acts of domestic terrorism: the Oklahoma City Bombing, the 1993 attack on the World Trade Center, and the events of September 11, 2001.

On April 19, 1995, a car bomb detonated and destroyed the Alfred P. Murrah Federal Building in Oklahoma City, killing 169 people, including nineteen children, and injuring 500.¹⁹² On the same day, President Bill Clinton made a unilateral declaration of “emergency” under the Stafford Act.¹⁹³ The next day, on April 20,

¹⁹² *April 19, 1995 — Timothy McVeigh Bombs Oklahoma City Building*, N.Y. TIMES: THE LEARNING NETWORK (Apr. 19, 2002, 4:02 AM), <https://learning.blogs.nytimes.com/2012/04/19/april-19-1995-timothy-mcveigh-bombs-oklahoma-city-building> [https://perma.cc/E2EN-CSSL].

¹⁹³ William J. Clinton, Remarks on the Bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma (Apr. 19, 1995), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/>

1995, the Department of the Army transmitted an executive order for military support to civil authorities in Oklahoma City, citing the Stafford Act as legal authority. As for the World Trade Center Attacks, President Bill Clinton declared a “major disaster” after a car bomb was detonated on February 26, 1993 in the garage of the World Trade Center, killing six people and injuring about 1,000 others.¹⁹⁴ In response to the events of September 11, 2001, President George W. Bush declared a “major disaster.”¹⁹⁵ There was no proclamation of insurrection in relation to these attacks; rather, on that date, President Bush further declared a national emergency under the National Emergencies Act,¹⁹⁶ pursuant to which he called upon state governors to activate National Guard troops to patrol airports, train stations, and other transportation depots under Title 32, thereby federally compensating such troops for any law enforcement activities they engaged in under state command. Accordingly, patrolling National Guard troops, though a regular presence in the months following the attacks, were not engaged in *federal* law enforcement.

The above incidents are noteworthy comparators in that they involved acts of grave domestic violence that—while they elicited a robust security response—were not deemed “insurrections” under the Insurrection Act and, thereby, were not subject to federal law enforcement pursuant to the legislation. However, as will be illus-

index.php?pid=51239 [https://perma.cc/549R-XAB3]. Prior to President Clinton’s declaration, the Department of Defense had already provided assistance to state and local authorities pursuant to its “immediate action authority” to respond to emergencies in order to “save lives, [to] prevent human suffering, or [to] mitigate great property damage” when time does not permit for necessary prior approvals. See Jim Winthrop, *The Oklahoma City Bombing: Immediate Response Authority and Other Military Assistance to Civil Authority (MACA)*, ARMY LAW., July 1997, at 1, 4. Such assistance included the dispatch of explosive ordnance personnel, two bomb detection dog teams, and a 66-person rescue team. Thereafter, the primary efforts of the Department of Defense included providing airlift assets for FEMA’s search and rescue teams. *Id.* at 1, 1 n.5.

¹⁹⁴ William J. Clinton, The President’s Radio Address (Feb. 27, 1993), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=46253> [https://perma.cc/QV2L-WQ45]; see also Press Release, President Declares Disasters in Nebraska and New York (Apr. 2, 1993), <https://clinton6.nara.gov/1993/04/1993-04-02-president-declares-disasters-in-nebraska-and-new-york.html> [https://perma.cc/37RK-BLVY] (“President Clinton today declared major disasters exist in both the state of New York following the Feb. 26 bombing of the World Trade Center and in Nebraska as a result of severe March flooding and ice jams.”).

¹⁹⁵ *Bush Declares Major Disaster in New York*, USA TODAY (Sept. 11, 2001, 10:22 PM), <http://usatoday30.usatoday.com/news/nation/2001/09/11/nyc-disaster.htm> [https://perma.cc/KM9C-WVVD].

¹⁹⁶ Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

trated with the case of Hurricane Andrew, the disparity is not merely semantic, but can translate into differences in the permissible use of force by federal troops on the ground. Hurricane Andrew struck Florida in August 1992, especially devastating south Dade County, a suburban part of the Miami metropolitan area where the population was about 50% Hispanic residents, 30% non-Hispanic white residents, and 19% Black residents.¹⁹⁷

President George H.W. Bush made a proclamation of “major disaster” pursuant to the Stafford Act on August 24, 1992, the same day the hurricane hit landfall in South Florida with winds at an estimated 168 miles per hour.¹⁹⁸ There were numerous reports of looting in the days after the hurricane hit. Though official statistics on the extent of the looting remain uncertain, news stories from that time highlighted an atmosphere pervaded by fear and perceived lawlessness—with reports that signs painted on homes and other buildings read “You loot, we shoot” or “Looters will lose body parts,” and at least one man presumed to be a looter having been shot dead by a South Florida resident.¹⁹⁹ At the height of the crisis, then-governor of Florida, Lawton Chiles, dispatched approximately 5000 of the state’s National Guard troops to secure areas reportedly besieged by looting, including to guard the Cutler Ridge Mall.²⁰⁰ In response to the governor’s request for additional active-duty troops to Florida without, notably, making a proclamation of insurrection in order to confer law enforcement powers to such troops, federal troops dispatched to the area pursuant to the Stafford Act were armed with weaponry that *lacked ammunition*. As reported in *The Miami Herald*, members of the 82nd Airborne Division—who were armed with M-16 rifles but had not been is-

¹⁹⁷ RESEARCH & PLANNING SECTION, MIAMI DEP’T OF PLANNING & ZONING, DEMOGRAPHIC PROFILE MIAMI-DADE COUNTY, FLORIDA 1960-2000 10 (2003).

¹⁹⁸ George H.W. Bush, Remarks on Disaster Assistance for Florida Following Hurricane Andrew (Aug. 24, 1992), in AM. PRESIDENCY PROJECT (Gerhard Peters & John T. Woolley eds., 2017), <http://www.presidency.ucsb.edu/ws/index.php?pid=21360> [<https://perma.cc/HY3Q-RHDV>]. For a discussion of the wind speeds, see Mark Silva et al., *Destruction at Dawn: What Hurricane Andrew Did to South Florida 24 Years Ago*, MIAMI HERALD (Aug. 24, 2015, 9:09 AM), <http://www.miamiherald.com/news/weather/hurricane/article32006499.html> [<https://perma.cc/RUS4-XYJU>].

¹⁹⁹ See, e.g., Gary Nelson, *Hurricane Andrew Remembered: 20 Years Later*, CBS MIAMI (Aug. 24, 2012, 7:19 PM), <http://miami.cbslocal.com/2012/08/24/hurricane-andrew-remembered-20-years-later/> [<https://perma.cc/B4QD-4SYV>]; Silva et al., *supra* note 198; Deborah Sontag, *After the Storm; The Days of a Scavenger Amid the Rubble*, N.Y. TIMES (Sept. 1, 1992), <http://www.nytimes.com/1992/09/01/us/after-the-storm-the-days-of-a-scavenger-amid-the-rubble.html> [<https://perma.cc/24DT-RWL4>];

²⁰⁰ Ardy Friedberg & Kevin Davis, *Looting Heavy Despite Police Presence*, SUN SENTINEL (Aug. 26, 1992), http://articles.sun-sentinel.com/1992-08-26/news/9201170778_1_looters-florida-national-guard-troopers [<https://perma.cc/5TLA-WDUC>].

sued ammunition—were confronted by an armed gang in South Dade County; though the confrontation was diffused, a captain of the division recalling the incident noted that “[o]ne of these times, somebody’s going to call our bluff, and someone’ll get shot”²⁰¹

Again, that the aforementioned incidents were not proclaimed insurrections is not evidence *per se* of selective federal law enforcement. However, in light of “insurrections” and would-be “insurrections” that are similarly situated—namely Hurricane Hugo and Hurricane Katrina—and acts of domestic terrorism that pose arguably graver security risks, these incidents raise for serious discussion the potential for selective federal law enforcement and at least illustrate the fraught tension between race and the sovereignty of the several states.

II. PARADOXES OF SOVEREIGNTY AND CITIZENSHIP

Part I of this article applied the conceptual framework developed to guide humanitarian intervention abroad to domestic federal military intervention authorized under the Insurrection Act—or, as termed herein, humanitarian intervention *at home*. As discussed in detail above, executive decision-making regarding domestic federal military intervention raises similar questions of legal authority, just cause, and right intention, and, moreover, illuminates the fraught relationship between race and federalism. Again, the ostensibly clear legal authority for the executive to deploy federal troops with law enforcement powers is, in practice, vague—rendering “insurrection” tautological. So, as a *just cause* is, in effect, what the executive proclaims one to be, an overview of past incidents deemed “insurrections” helps define the otherwise slippery term, revealing that such crises have tended to either involve the violation of civil rights or so-called ‘race riots’. Furthermore, the application of this conceptual framework subjects the purported humanitarian intention behind such federal military intervention to a deductive inquiry, in that, when considering arguably similarly situated incidents that were not all deemed “insurrections,” the specter of selective enforcement is raised. In other words, the empirical association between “insurrection” and race—in particular, the civil rights of, or civil disturbances involving, Black citizens—might, as with Hurricane Katrina, reframe a mission to provide emergency relief (*i.e.*, humanitarian aid) as one to restore law and order (*i.e.*, humanitarian intervention).

²⁰¹ Peter Slevin, *The Army vs. The Gangs*, MIAMI HERALD, Sept. 6, 1992, at 1A.

Part II of this article further develops this implicit analogy between humanitarian intervention abroad and federal military intervention at home to speculate on two paradoxes that emerge from this conceptual exercise—one of sovereignty and another of citizenship. The definition of a paradox, of course, is a statement that is seemingly contradictory or opposed to common sense and, yet, is perhaps true. As for the sovereignty of the several states, while it would appear that federal military intervention during a crisis should be uncontroversial given the clear legal authority to intervene, the political fallout of doing such renders state sovereignty far less penetrable than would be expected—akin, perhaps, to that of the sovereignty of a foreign state. As to citizenship, while the federal government’s responsibility to protect all citizens within U.S. borders is unequivocal and expected to be fulfilled uniformly, an overview of the nature of federal military intervention in response to a given domestic crisis illustrates an ongoing contest over the incorporation of Black citizens into the nation-state, the legacy of which might result in disparate regimes of federal intervention where Black citizens are concerned, with the primary intention to restore law and order trumping that to save lives.

A. *Sovereignty of the Several States*

The paradox of sovereignty, illustrated in Part I, is that—where usurping police powers are concerned—the potential political fallout of violating the sovereignty of the several states appears to pose as much as, or perhaps more of, a constraint on federal military intervention at home as it does on humanitarian intervention abroad. This statement, seemingly absurd yet well-founded, may explain, in the case of Hurricane Katrina, the slow provision of federal assistance. This statement, moreover, poses an answer to Soledad O’Brien’s question as to why, apparently, such federal assistance was swiftly provided to tsunami victims in Indonesia relative to Louisiana.²⁰²

Such hesitancy, as discussed above, appears to arise when military intervention is framed under the Insurrection Act—which authorizes federal troops to engage in law enforcement—rather than solely in accordance with the Stafford Act—where, in line with Posse Comitatus restrictions, any federal troops deployed thereunder are *not* authorized to engage in law enforcement activity. The nature of this hesitancy, as explored above is two-fold: arising, on

²⁰² See note 10 and accompanying text *supra*.

the one hand, out of a longstanding and perhaps race-neutral aversion (expressed in *The Federalist Papers* and otherwise) to the exercise of federal military power within the several states, and, on the other hand, out of a fraught, racial history whereby, in practice, federal law enforcement was repeatedly authorized to either enforce civil rights of Black citizens or suppress so-called ‘race riots’.

As for the apparently race-neutral source of this hesitancy, an overview of past invocations of the Insurrection Act reveals a will on the part of the state governor of a given state to appear to his or her constituency to possess control over the police powers of the state. Moreover, given such politically motivated will, this overview also reveals a reluctance on the part of the executive to usurp such police powers from the state governor without having been requested to do so. Such hesitancy, in short, appears to arise, in part, out of classic federalist concerns. As raised in *The Federalist Papers*, even the establishment of federal troops sparked fears over their use to overpower state governments and forcibly restrain individual liberty. For instance, during Radical Reconstruction, the aforementioned “spectacle of soldiers ‘marching’” into a New Orleans assembly chamber and “‘expelling members at the point of bayonet’” aroused sufficient aversion among then-Republican congressmen to set in motion the withdrawal of federal troops from former Confederate states.²⁰³ State governors who resisted the court-ordered desegregation of public schools employed fiery rhetoric representing the use of federal troops to enforce civil rights as an unjust encroachment of federal power. The deployment of such troops was referred to as “military occupation” in Arkansas, as a move to “invade Alabama” and, according to the governor of Mississippi, an employment of “naked and arbitrary power” denying a “right of self-determination in the conduct of the affairs of our sovereign state.”²⁰⁴

Further, the executive aversion to violating the sovereignty of Alabama led President Johnson to reframe ultimate federal military intervention as a response to a ‘local invitation’ by Governor Wallace rather than a unilateral proclamation of insurrection. Specifically, after Governor Wallace declined to deploy the National Guard to enforce the rights of protestors subjected to violence by state troopers, President Johnson reframed his later proclamation as having been made on account of an ‘unwillingness’ of the state

²⁰³ FONER, *supra* note 100, at 554.

²⁰⁴ DAVID NIVEN, *THE POLITICS OF INJUSTICE: THE KENNEDYS, THE FREEDOM RIDES, AND THE CONSEQUENCES OF A MORAL COMPROMISE* 151 (2003).

to intervene that was tantamount to a request.²⁰⁵ Even where federal military intervention was at the request of a given state governor—as in the case of ‘race riots’—in some instances, the executive was at least rhetorically tentative in heeding this request. In the case of Bleeding Kansas, President Pierce was hesitant to heed the call of territorial governor Shannon to dispatch federal troops to restore law and order, wary of the public appearance of targeting citizens with federal military force.²⁰⁶ As for the Detroit riots of 1967, after state governor George Romney requested a proclamation of insurrection, President Johnson, for one, was reluctant to domestically deploy federal troops and, further, made clear in the proclamation’s written text that “the law enforcement resources available to the City and State, including the National Guard” were unable to restore law and order, indicating that federal military intervention as a ‘last resort’.²⁰⁷

B. *Disparate Responses to U.S. Citizens*

The paradox of citizenship illustrated in this article is three-fold. For one, following from the paradox of sovereignty, an overview of the past proclamations of “insurrection” and their attendant controversy reveals that—where federal military intervention has been contemplated—it could, counter-intuitively, be more efficient for the federal government to respond to crises abroad than to crises at home. As discussed in detail above, U.S. presidents have generally shown reluctance at employing the exceptional power to domestically deploy federal troops. Moreover, even where such deployment has been at the request of the relevant state governor, U.S. presidents have generally been prudent to inform the public that this exceptional authority was not exercised unilaterally, and, in some cases, reassure the public that such intervention was not made to enforce ‘civil rights’.

Second, the uncovered pattern of past “insurrections”—namely, civil rights ‘crises’ and so-called ‘race riots’—evidences the ongoing contest over the incorporation of Black persons into the body politic, and of such persons as, paradoxically, citizens consistently struggling to be afforded and enjoy the full benefit of citizenship.²⁰⁸ Indeed, a review of the invocation of the Insurrection Act

²⁰⁵ See *supra* note 140 and accompanying text.

²⁰⁶ See Part I.B.2.a. *supra*.

²⁰⁷ Proclamation No. 3795, 32 Fed. Reg. 10,905 (July 26, 1967).

²⁰⁸ DANIEL SIGWARD, FACING HISTORY AND OURSELVES, THE RECONSTRUCTION ERA AND THE FRAGILITY OF DEMOCRACY 114 (2015), <https://www.facinghistory.org/sites/>

reveals a marked trend as to what past presidents have deemed just causes—that is, on the one hand, the enforcement of civil rights of Black and other non-white persons in a given state (e.g., in Washington state to halt anti-Chinese expulsion campaigns; in Southern states during the Reconstruction Era; in Alabama, Arkansas, and Mississippi to desegregate public schools, as well as to enforce the rights of protesters marching from Selma to Montgomery), and, on the other hand, the suppression of ‘race riots’ that erupted in states unable to restore law and order (e.g., in “Bleeding Kansas” prior to the Civil War; the Detroit riots of 1943 and 1967; the unrest in cities across the United States after Martin Luther King, Jr. was assassinated; and the Los Angeles riots).

In light of this history, the epigraph that begins this article makes sense, rendering domestic federal military intervention particularly fraught where Black citizens are concerned. Again, regarding Hurricane Katrina, President Bush hesitated as to whether federal troops should have been deployed with the primary mission to suppress an insurrection or to save lives. The events of Hurricane Katrina, then, were indeterminate, representing at the same time humanitarian crisis and ‘race riot’, an illegibility that held an executive decision in abeyance for five crucial days. Just as mostly-Black evacuees in New Orleans were, at once, resident and “refugee,” stranded in a “third world country”²⁰⁹ at home, they were also, at the same time, victims and perpetrators—impotent insurgents, internally-displaced insurrectionists, relief-seeking rioters.

Third—given the disparate invocation of the Insurrection Act, on the one hand, and application of the Stafford Act, on the other, to respond to similarly situated internal crises—this legacy may result in a disparate response to crisis where Black citizens are concerned, with the primary intention to restore law and order trumping that to save lives. The key distinction between the Insurrection Act and the Stafford Act—the presence or absence of law-enforcement authority of federal troops—is implicit in the stated *purpose* of each statute and indicative of the respective nature of federal military intervention thereunder. Whereas federal troops are deployed under the Insurrection Act to suppress “insurrections,” “rebellions” and “unlawful obstructions,” federal assistance (military and otherwise), is provided under the Stafford Act simply

default/files/publications/The_Reconstruction_Era_and_The_Fragility_of_Democracy_0.pdf [https://perma.cc/5PGQ-RNYH].

²⁰⁹ Carr, *supra* note 5; Treaster & Sontag, *supra* note 6.

in order to “save lives” and “alleviate suffering.”²¹⁰ In other words, while the Insurrection Act authorizes the use of military force to achieve humanitarian objectives, both the end and the means of the Stafford Act are humanitarian in nature. Again, while the Insurrection Act presumes federal military intervention of a *combative* nature, the Stafford Act presumes federal intervention that, whether military or non-military, is, by contrast, *non-combative*. This distinction is important because the *intention* of federal disaster response can reframe a mission from one to search-and-rescue to shoot-to-kill.

In light of the above concern, a survey of incidents that have been deemed “insurrections” begs questions about certain incidents that have not. For instance, the bombings of a federal building in Oklahoma City and the World Trade Center in 1992, as well as the events of September 11, 2001—each domestic acts of terrorism—were not proclaimed “insurrections.” Rather, these attacks were solely interpreted as “man-made” disasters within the meaning of the Stafford Act, and, thus, any federal military dispatched thereunder lacked law-enforcement authority.²¹¹ Further, the Stafford Act was solely applied to coordinate the federal response to Hurricane Andrew in South Florida, where news media reported rampant looting in South Dade County—an area in which approximately 70% of the residents were white or Hispanic according to corresponding data.²¹² By contrast, the Insurrection Act was invoked to deploy federal troops to St. Croix amid the devastation of Hurricane Hugo in response to media reports of looters menacing tourist enclaves.²¹³ St. Croix is among the U.S. Virgin Islands, an unincorporated territory of the United States where approximately 85% of the residents were Black according to corresponding census data. To the extent that an “insurrection” is in the eye of the beholder, such incidents raise for serious discussion the apparent racial implications of federal military enforcement.

CONCLUSION

“Legal interpretive acts signal and occasion the imposition of violence upon others[,]” wrote Robert M. Cover in *Violence and the Word*.²¹⁴ Interpretations of the law, Cover further stated, results in

²¹⁰ See *supra* notes 190-91 and accompanying text.

²¹¹ See *supra* notes 192-96 and accompanying text.

²¹² See *supra* notes 197-201 and accompanying text.

²¹³ See *supra* notes 178-87 and accompanying text.

²¹⁴ Robert M. Cover, *Violence and the Word*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 203, 203 (Martha Minow et al. eds., 1993).

the sanctioned loss of freedom, property, one's children and even one's life. "When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence."²¹⁵ As discussed in this article, an "insurrection" is a state-authorized utterance that results in the deployment of federal troops to "restore law and order"—a mission that both implies and surely is expected to result in violence. This particular imposition of violence has been controversial, as it represents a threatening exercise of federal power that was formally constrained in this country's founding documents. The hesitancy to proclaim an insurrection discussed in this article, in light of humanitarian intervention abroad, illustrates a paradox of sovereignty: the enigmatic situation where the sovereignty of the several states appears to be given more respect relative to the sovereignty of foreign states. Furthermore, despite this hesitancy to proclaim an insurrection, the proclamation has been made time and again in order to either enforce civil rights or suppress race riots, suggesting a paradox of citizenship — *i.e.*, illustrating the ongoing contest over the incorporation of Black citizens into the American body politic, as "citizens" who are not afforded the full enjoyment of citizenship.

While Hurricane Katrina was a point of entry into this discussion—bringing to the fore, among other things, the question of selective enforcement (*i.e.*, racial profiling) in the executive decision to view hurricane victims as persons with lives to be saved or insurgents disrupting law and order, more recent events further raise the question of disparate responses to internal disturbances. Juxtaposing the responses to Black protesters in Ferguson, Missouri and Baltimore, Maryland, on the one hand, and the armed occupation of the Oregon wildlife refuge by white militants, on the other hand, shows the stark contrast in the use of force or, as Cover put it, "the imposition of violence" on "insurrectionary" actors of racial difference.

Finally, in this new paradigm under a Trump presidency, Cover's words are even more resonant. To the extent a president is uninhibited by traditional and historical constraints on the exercise of the Insurrection Act, the heart and mind of the particular interpreter—*i.e.*, the one who is proclaiming the "insurrection"—becomes less of a speculative side point and more of a legal priority. Given that President Trump has promised to be the "law and order" president who will, for example, "send in the Feds!" to Chi-

²¹⁵ *Id.*

cago and into “inner cities” in order to address gun violence,²¹⁶ the racial implications of the Insurrection Act may become yet more stark.

²¹⁶ See, e.g., Nikita Vladimirov, *Trump: 'I Will Send in the Feds' if Chicago Doesn't Fix Violence*, HILL (Jan. 24, 2017, 9:52 PM), <http://thehill.com/blogs/blog-briefing-room/news/315994-trump-i-will-send-in-the-feds-if-chicago-doesnt-fix-carnage> [<https://perma.cc/9RRH-FC94>] (describing Donald Trump's campaign as promising “to bring ‘law and order’ to the country's inner cities”); Donald Trump (@realDonaldTrump), TWITTER (Jan. 24, 2017, 6:25 PM), <https://twitter.com/realDonaldTrump/status/824080766288228352> [<https://perma.cc/78NX-AAKV>] (“If Chicago doesn't fix the horrible ‘carnage’ going on, 228 shootings in 2017 with 42 killings (up 24% from 2016), I will send in the Feds!”).