

THE CALLING FORTH CLAUSE AND THE DOMESTIC COMMANDER IN CHIEF

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INTRODUCTION

At the heart of virtually every contemporary debate over the scope of domestic presidential power during times of crisis is the Constitution's Commander in Chief Clause,¹ which provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."² Although Justice Jackson famously suggested in *Youngstown* that "the Constitution did not contemplate that the title Commander-in-Chief of the Army and Navy will constitute also Commander-in-Chief of the country,"³ Jackson was equally clear in the same opinion that "[t]hese cryptic words . . . imply something more than an empty title."⁴ The question, of course, is just

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¹ See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief: Statutory Limitations, and the Conduct of War in an Age of Terrorism* (pts. 1-2), 121 HARV. L. REV. (forthcoming 2008); cf. Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480 (2006); Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61 (2007). For a thoughtful version of the argument that the Commander-in-Chief Clause authorizes most of the Bush Administration's more controversial initiatives as part of the war on terrorism and displaces Congress's power to interpose limits, see U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (Jan. 19, 2006), available at <http://f1.findlaw.com/news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf>. But see Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933 (2007) (reflecting contrary perspective on the so-called "Commander-in-Chief override" and summarizing the relevant issues); see also *infra* Part IV (discussing the potential interaction between the "override" and the Calling Forth Clause).

² U.S. CONST. art. II, § 2, cl. 1.

³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-44 (1952) (Jackson, J., concurring).

⁴ *Id.* at 641. But see THE FEDERALIST NO. 69, at 418 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy."); JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 5 (1993) ("Proponents of broad executive authority . . . often rely on the constitutional

what Jackson meant by “something more.”

In attempting to answer that query based upon competing interpretations of the Commander in Chief Clause, disputes concerning the scope of the government’s domestic crisis authority—particularly as of late—have tended to neglect the potential significance of *other* constitutional provisions in understanding the Constitution’s separation of emergency powers. Perhaps no provision has been more disregarded than the so-called “Calling Forth” Clause of Article I, which empowers Congress “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”⁵ Indeed, just a few pages after his discussion of the Commander in Chief Clause in *Youngstown*, Jackson himself underscored the significance of the Calling Forth Clause vis-à-vis the domestic scope of inherent presidential power:

Such a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution’s policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.⁶

Justice Jackson’s assertion notwithstanding, the Calling Forth Clause today remains remarkably understudied in constitutional scholarship. Except as it pertains to debates over the original understanding of the Second Amendment⁷ and the authority to deploy National Guard units overseas,⁸ Congress’s constitutional power to provide for the use of the military during domestic crises has been overlooked in almost every contemporary assessment of the President’s domestic constitutional power, to the point where scholars too numerous to count have accepted without qualification the argument that the President possesses at least some inherent power to use the

designation of the President as ‘Commander in Chief of the Army and Navy of the United States,’ but the record is entirely clear that all this was meant to convey was command of the armed forces once Congress had authorized a war . . .”).

⁵ U.S. CONST. art. I, § 8, cl. 15. The provision is sometimes referred to as the “First Militia Clause,” *see, e.g.*, Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1642 (2002), or, as the “Militia Clause” when referred to in connection with the Second Militia Clause. U.S. CONST. art. I, § 8, cl. 16; *see, e.g.*, The Selective Draft Law Cases, 245 U.S. 366, 382 (1918); Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 181 n.1 (1940). Nevertheless, to more thoroughly distinguish the two provisions from each other, I follow the less confusing “Calling Forth” Clause terminology throughout.

⁶ *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring).

⁷ *See, e.g.*, H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 72–78 (2002). *See generally* Parker v. Dist. of Columbia, 478 F.3d 370 (D.C. Cir. 2007) (discussing extensively the Second Amendment in the context of striking down a D.C. gun control ordinance), *cert. granted*, 76 U.S.L.W. 3083 (U.S. 2007).

⁸ *See, e.g.*, Patrick Todd Mullins, Note, *The Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War*, 57 GEO. WASH. L. REV. 328 (1988).

military in domestic emergencies.⁹

In other writings, I have sought to critique this view by exploring the significance of the various statutes that Congress has enacted pursuant to its authority under the Calling Forth Clause, most of which are today codified at 10 U.S.C. §§ 331–335.¹⁰ In this Article, my focus is more on the overlooked constitutional text itself, and what significance it may have for our modern understanding of the limitations placed upon domestic use of the military by the commander in chief.

In particular, I aim to explore two fundamental questions about the Calling Forth Clause: First, is the Clause limited on its face to only the “militias?” If so, does the Clause therefore not even apply to today’s National Guard, the members of which participate in a “dual enlistment” system whereby they are simultaneously members of their state guard and the “National Guard of the United States,” and are acting in the latter capacity whenever “federalized?”¹¹ Second, if the Calling Forth Clause does not today limit the domestic use of the military, are there any *other* constitutional limitations on the domestic use of the military? What about statutory limitations, such as the Posse Comitatus Act of 1878?¹² To what extent might such limitations unconstitutionally infringe upon the President’s constitutional authority as commander in chief?

I take these questions in turn, beginning in Part I with the “militia” question. To resolve whether the Clause limits Congress’s crisis power to use of the militias only, rather than in conjunction with the federal armed forces, Part I focuses on the debates over the Clause (1) at the 1787 Constitutional Convention; (2) as part of the broader post-Philadelphia ratification controversy; and (3) in the early congressional attempts to implement the constitutional text. As Part I suggests, Justice Jackson had it entirely correct in *Youngstown*; the Framers’ limitation of the provision to the “militia” was not meant to recognize a separate executive power to use the federal regulars, but was rather meant to

⁹ For one particularly telling example, see RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006) (failing to acknowledge the potentially immeasurable role that Congress was meant to play by the Framers in defining the scope of governmental crisis power).

¹⁰ 10 U.S.C.A. §§ 331–335 (2007); see Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149 (2004) [hereinafter Vladeck, *Emergency Power and the Militia Acts*]; see also Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 81 TEMPLE L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=963994> [hereinafter Vladeck, *The Field Theory*].

¹¹ For a summary of the evolution of the National Guard’s status, see *Perpich v. Dep’t of Def.*, 496 U.S. 334, 340–46 (1990).

¹² See 18 U.S.C. § 1385 (2000) (“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.”).

reaffirm the Constitution's investiture in *Congress* of the "domestic war power."¹³

Nevertheless, a pair of 1918 Supreme Court decisions—the *Selective Draft Law Cases*¹⁴ and *Cox v. Wood*¹⁵—concluded that the Calling Forth Clause does not in fact limit the circumstances in which the government may call out the federal regulars. A later decision, *Perpich v. Department of Defense*,¹⁶ held that members of the National Guard are, for constitutional purposes, federal regulars when called into the active service of the United States.

Thus, Part I concludes that, whereas the Calling Forth Clause is properly understood as part of Article I's broader structural check on the President's domestic emergency power, it has been overlooked today because it is virtually never implicated. On the logic—however flawed—of the *Selective Draft Law Cases* and *Perpich*, its substantive limits do not apply to federal regulars, and there is hardly any situation under the prevailing statutory regime where the federal government uses military personnel domestically who are not, at least at that moment, "regulars." Thus, the Calling Forth Clause *was* a vital structural check, but its contemporary importance is attenuated, at best.

That conclusion only lends urgency to the second question—whether there are other constitutional (or statutory) limitations constraining the domestic use of the military—to which I turn in Part II. Particularly after the Court's decision in *Perpich*,¹⁷ Part II suggests that there is no general constitutional restraint on the domestic use of the military in a law enforcement capacity—that the Constitution as written embraced, rather than rejected, the common law doctrine of *posse comitatus*—and that the only constitutional limitations on military law enforcement are those individual rights that military rule would inherently subvert, including most significantly the Suspension¹⁸ and Due Process Clauses.¹⁹

Thus, central to contemporary debates over domestic use of the military are *statutes* constraining such action, most notably the Posse Comitatus Act. The remainder of Part II therefore focuses on the Posse Comitatus Act, and the significance of its statutory exceptions, including, most notably, the Insurrection Act.²⁰ Although the Calling Forth Clause may, as a direct matter, largely be a dead letter today, Part

¹³ See *supra* text accompanying note 6.

¹⁴ 245 U.S. 366 (1918).

¹⁵ 247 U.S. 3 (1918).

¹⁶ 496 U.S. 334 (1990).

¹⁷ *Id.*

¹⁸ U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

¹⁹ *Id.* amend. V.

²⁰ 10 U.S.C. §§ 331–335 (2000).

II concludes by suggesting that the Clause resolves in Congress's favor any argument that such statutory limitations unconstitutionally infringe upon the President's constitutional authority as commander in chief.²¹

Finally, Part III turns to situating the Calling Forth Clause more broadly in our modern understanding of the "domestic commander in chief," and suggests that resolution of these textual mysteries will only further add weight to Justice Jackson's summary of the importance of the Clause in the constitutional structure, and the extent to which the Clause undermines the ever-more-visible arguments in favor of strong and unilateral domestic presidential powers. In short, there can simply be no question that the Constitution empowers the federal government, acting in concert, to act decisively—and expeditiously—during emergencies. The Constitution, after all, "is not a suicide pact."²² But it is not nearly as straight a line from acceptance of that point to acceptance of a sweeping and unchecked domestic commander in chief power. To the contrary, the reality that the Constitution expressly envisions a role for Congress to play in providing for governmental responses to even the most existential crises dramatically undermines arguments evoking a broad independent authority for the domestic Commander-in-Chief. To date, we may not have paid enough attention to Jackson's discussion of the Calling Forth Clause in his *Youngstown* concurrence, but we must no longer forget it going forward.

I. THE CALLING FORTH CLAUSE AND THE "MILITIA"

A quick glance at the text of the Calling Forth Clause immediately identifies one of the reasons why it may have receded from the forefront of constitutional scholarship: It only authorizes Congress "[t]o provide for calling forth *the militia*,"²³ the term for the antiquated and loosely organized predecessor to the National Guard that we today associate far more readily with extremist groups in the western United States. For a twenty-first-century reader of the Constitution, it is difficult to immediately grasp the significance of a clause that deals with a body of combatants formally unrecognized since 1903, by which time it had long-since faded, as a practical matter, into historical oblivion.²⁴

²¹ See, e.g., sources cited *supra* note 1.

²² See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

²³ U.S. CONST. art. I, § 8, cl. 15 (emphasis added).

²⁴ See *Perpich v. Dep't of Def.*, 496 U.S. 334, 340-46 (1990) (summarizing the evolution of the militia system); see also William L. Shaw, *The Interrelationship of the United States Army and the National Guard*, 31 MIL. L. REV. 39, 44 (1966) ("The term 'Militia' has had at least two different meanings. One refers to all citizens and resident aliens who may be called in an emergency. These comprise the unorganized militia The second meaning is the modern-day

Of course, Congress began to erode this distinction—between the militia and the federal regulars—as early as 1799,²⁵ and completely collapsed the two categories in 1807,²⁶ just fifteen years after it had first provided for the militia to be “called forth.”²⁷ As I have suggested previously, “[b]y extending the President’s calling-forth power to the federal armed forces, the Ninth Congress vitiated any arguments that the Constitution, through the First Militia Clause and other provisions, granted Congress limited authority over only state militias, to be invoked in highly specific situations.”²⁸

But whereas Congress has, for two centuries, legislated against the background understanding that the Constitution does not differentiate between use of the militia and use of federal regulars to respond to domestic crises, no one, including the Ninth Congress (which enacted the 1807 Act without any meaningful debate),²⁹ has ever seriously considered whether such an understanding is actually consistent with the Constitution. It is a discussion of that issue to which Part II is devoted.

To be clear, the relevant question is *why* the Calling Forth Clause only references the militia. There are two competing interpretations: Under the first, which I describe as the “militia supplementation” view, the Clause exists to supplement those military powers elsewhere delegated to Congress, including the powers to declare war and to raise armies. Thus, the Calling Forth Clause exists for a limited purpose: To specify those extreme situations in which Congress could provide for the federal government’s use of the militia *in addition to* the federal regulars. Under the second view, which might best be characterized as the “militia exclusivity” view, the Clause is the *only* constitutional authorization for the federal government’s domestic use of military force, and thereby renders the “militia” the exclusive body through which such force can be exercised.

A. *The Origins and Ratification of the Calling Forth Clause*

Scholars too numerous to count (or cite) have deftly surveyed the origins of the Calling Forth Clause, and it would be repetitive and redundant to recount their efforts in any significant detail.

sense most commonly considered in the United States. It refers to those . . . who are individually enrolled in regularly organized, uniformed, equipped and trained National Guard units.”)

²⁵ See Act of Mar. 2, 1799, ch. 31, § 7, 1 Stat. 725, 726 (repealed 1802).

²⁶ Act of Mar. 3, 1807, ch. 39, 2 Stat. 443.

²⁷ Act of May 2, 1792, ch. 28, 1 Stat. 264 (repealed 1795). For an overview of the statutory evolution, see Vladeck, *Emergency Power and the Militia Acts*, *supra* note 10, at 159-67.

²⁸ Vladeck, *Emergency Power and the Militia Acts*, *supra* note 10, at 166 n.68.

²⁹ See *id.* at 164 & n.64.

Traditional accounts³⁰ suggest that the Calling Forth Clause was the result of a carefully thought-out compromise, motivated by the Framers' attempt to balance the pervasive and potentially catastrophic threat posed by a standing army with the need for a strong and centralized mechanism for responding to internal crises. Indeed, the dramatic absence under the Articles of Confederation of such power to respond to crises had been resoundingly demonstrated by Shays' Rebellion the previous summer.³¹ As Professor Hirsch has observed,

[A]ll parties desired a militia to provide for the security of the nation, with reliance on a standing army, if at all, only as a last resort. Indeed, there was not a member of the federal convention who did not feel indignation at the idea of a standing army, believing it a likely route to domestic tyranny. Citizen soldiers were full members of the community whose part-time military service was an extension of their obligations to fellow citizens. By contrast, full-time professional soldiers would form a military community unto itself and would have no loyalties to or affinities for the citizenry. It was feared that a standing army would eventually want to exercise dominion over the civilian population or, at any rate, would willingly assist the federal government's tyrannical designs.³²

The debates at the 1787 Constitutional Convention in Philadelphia thus "rarely addressed the wisdom or precise significance of enumerating the three situations in which the federal government could call out the militia. It focused instead on whether the federal government should have *any* power to call out the militia."³³ Whatever may be said of the merits of the competing positions, there is no doubt that the Convention answered that question in the affirmative.

What is telling about these debates, however, is not the argument over the extent of state control as compared to federal control, or the equally important question of whether domestic use of the militia was limited to the three enumerated circumstances. Instead, what is

³⁰ I am relying the most heavily here on ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789-1878*, at 4-19 (1988); RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802*, at 73-88 (1975); FREDERICK T. WILSON, *FEDERAL AID IN DOMESTIC DISTURBANCES: 1787-1903*, S. DOC. NO. 57-209, at 13-31 (1903); and Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. CIN. L. REV. 919, 923-30 (1988).

Coakley's book is the first installment of a wonderful three-volume history by the U.S. Army's Center for Military History concerning the domestic use of federal troops, which also includes CLAYTON D. LAURIE & RONALD H. COLE, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877-1945* (1997); and PAUL J. SCHEIPS, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1945-1992* (2005).

³¹ See, e.g., COAKLEY, *supra* note 30, at 7 ("[T]he right of the federal government . . . to use military force in domestic disorders was not a subject of extended debate in the Constitutional Convention. With few exceptions the convention delegates accepted the premise that the new national government must possess a coercive power that the Confederation had lacked . . .").

³² Hirsch, *supra* note 30, at 924 (footnote omitted).

³³ *Id.* at 926.

undeniably significant about the Philadelphia (and ratification) debates is that the choice over which Federalists and Anti-Federalists haggled was between a federal domestic power to use the militia to respond to crises, or no federal power *whatsoever*. That is to say, there was no suggestion that the Constitution elsewhere empowered the federal government to use military force to respond to domestic crises.

Given the heated debates the Calling Forth Clause itself engendered, a provision giving the federal government such power would have proved a veritable powder-keg (if not a deal-breaker), and would have validated the most serious criticisms of the Anti-Federalists, including their claim that the Constitution, as written, openly sanctioned (if not encouraged) domestic tyranny and oppression of the states at the hands of an all-powerful central government. The debate at Philadelphia and in the state ratifying conventions in the ensuing years thus centered on the question whether the federal government was to have any such crisis authority in the first place. It was always assumed that if the answer was “yes,” such power would come exclusively through federal use of the state militias.

In retrospect, of course, this conclusion seems somewhat disturbing, for it is difficult to understand why the Constitution would not contemplate use of the federal military to repel invasions, at the very least.³⁴ But history has clouded our understanding of the scope and depth of the anti-standing army sentiment that pervaded the early debates. Whereas it would make absolutely no sense today to deny the federal government, on *federalism* grounds, the power to use federal troops to repel invaders anywhere in the country (and even outside the country), fears that such authority would provide a dangerous pretext for federal usurpation of the states were as prevalent and wide-spread in 1787 as they would be proven unfounded thereafter.

B. *Implementing the Calling Forth Clause: The Militia Problem*

Just five years after the Constitutional Convention, when Congress first implemented its authority under the Calling Forth Clause, its own deliberations—and the statute that resulted—reflected the same conclusion. At the urging of James Madison, Congress first provided for the calling forth of the militia in May 1792,³⁵ the same month in which they passed the Uniform Militia Act.³⁶ I have elsewhere described the 1792 Act, the experience under its procedures during the

³⁴ See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 160-62 (1997).

³⁵ Act of May 2, 1792, ch. 28, 1 Stat. 264 (repealed 1795).

³⁶ Act of May 8, 1792, ch. 33, 1 Stat. 271 (repealed 1903).

1794 Whiskey Rebellion, and the modifications made by Congress to the statutory regime in 1795.³⁷ For present purposes, it suffices to note that the early experience was militia-specific, reflecting the “militia exclusivity” view of the Calling Forth Clause that emerged as the original understanding.

Even as early as the Whiskey Rebellion, however, it was clear that there were serious problems with federalized use of the militia to respond to domestic crises. Thus, as early as the 1794 Neutrality Act,³⁸ Congress began to provide for situations where *both* the militia and federal regulars could be used. Congress broadened the circumstances wherein the regulars could be called out in 1799,³⁹ and by 1807, Congress completely removed any distinction between the two, at least with respect to two of the Calling Forth Clause’s three categories: executing the laws of the Union and suppressing insurrections. As the 1807 Act provided:

[I]n all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all the pre-requisites of the law in that respect.⁴⁰

Thus, as Coakley explains:

From 1807 on, presidents had a choice, and from a variety of circumstances they nearly always chose to use regulars. There was a variety of circumstances dictating this choice, but these can be summed up as reflecting a lack of reliability of militia to overcome local prejudices and act with unity under national authority. . . . The net result was that by the end of Reconstruction the whole idea of using militia as the principal federal force in handling domestic disorders had become *passee*.⁴¹

The resulting question is whether Congress’s power to provide for the domestic use of federal regulars—to enact the Neutrality Act, the 1799 Act, and the 1807 Act—comes from the Calling Forth Clause (and is therefore limited to the three enumerated circumstances), or, instead, derives from Congress’s other Article I powers. But no matter which constitutional provision provided the basis for its authority, the statutes Congress enacted consistently reflected the substantive limits provided by the Calling Forth Clause—they only authorized the domestic use of

³⁷ See Vladeck, *Emergency Power and the Militia Acts*, *supra* note 10, at 159-67.

³⁸ Neutrality Act of 1794, ch. 50, §§ 7-8, 1 Stat. 381, 384.

³⁹ Act of Mar. 2, 1799, ch. 31, § 7, 1 Stat. 725, 726 (repealed 1802).

⁴⁰ Act of Mar. 3, 1807, ch. 39, 2 Stat. 443.

⁴¹ COAKLEY, *supra* note 30, at 347.

the military to suppress insurrections, repel invasions, and otherwise provide for the execution of the laws of the Union.

C. *The Calling Forth Clause in the Supreme Court*

Although the 1807 Act has been upheld by the Supreme Court, at least implicitly, on several occasions,⁴² the closest the Court has ever come to directly answering the question as to its constitutional foundation was in the *Selective Draft Law Cases*⁴³ in 1918. At issue in the *Draft Law Cases* was a 1917 Act of Congress that, *inter alia*, instituted a selective draft requiring able-bodied men between the ages of twenty-one and thirty to register. The defendants, convicted of violating the statute by failing to register for the draft, argued that the draft was unconstitutional on a number of grounds, including the contention that the Calling Forth Clause limited the circumstances for which they could be drafted—that the Constitution prohibited extraterritorial compulsory military service.

Writing for a unanimous Court, Chief Justice White rejected that argument:

[B]ecause under the express regulations the power was given to call for specified purposes without exerting the army power, it cannot follow that the latter power when exerted was not complete to the extent of its exertion and dominant. Because the power of Congress to raise armies was not required to be exerted to its full limit but only as in the discretion of Congress it was deemed the public interest required, furnishes no ground for supposing that the complete power was lost by its partial exertion.⁴⁴

In other words, although the Calling Forth Clause *did* limit the circumstances in which the militias could be used, it did not thereby also limit those situations where civilians drafted into the regular federal army could be used. Instead, Congress's power to institute a draft derived from its power to raise armies,⁴⁵ and the Calling Forth Clause did not provide an independent substantive limit on when and where those armies could be employed.

Any question as to whether the Court meant what it said—i.e., that the Calling Forth Clause does not also limit those circumstances where the federal regulars may be deployed—was resolved shortly thereafter

⁴² Most significantly, the Court relied upon the 1807 Act in sustaining President Lincoln's imposition of a blockade at the outset of the Civil War. *See* the *Prize Cases*, 67 U.S. (2 Black) 635 (1863). *See generally* Vladeck, *Emergency Power and the Militia Acts*, *supra* note 10, at 177-80 (summarizing the centrality of the 1807 Act to the *Prize Cases*).

⁴³ 245 U.S. 366 (1918).

⁴⁴ *Id.* at 383-84.

⁴⁵ *See* U.S. CONST. art. I, § 8, cl. 12.

in *Cox v. Wood*,⁴⁶ another challenge to the 1917 draft statute. Again writing for a unanimous Court, Chief Justice White summarized the *Selective Draft Law Cases* as holding that “the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause.”⁴⁷

To be sure, neither *Cox* nor the *Selective Draft Law Cases* dealt with the question whether the Calling Forth Clause might place substantive limits upon the *domestic* use of the federal regulars, as both cases concerned the use of draftees overseas. Both cases rested, however, on the premise that the Clause simply did not apply to the regular military, a conclusion that would not seem to turn on *where* the military was deployed.

Relying on *Cox* and the *Selective Draft Law Cases*, the Court in *Perpich* held that the Calling Forth Clause similarly did not prohibit the overseas training, in peacetime, of national guardsmen.⁴⁸ The *Perpich* Court reached such a result based on its conclusion that, under the so-called “dual enlistment” system (pursuant to which guardsmen are required to enlist in both the state National Guard and the National Guard of the United States, which is a reserve component of the federal military),⁴⁹ the guardsmen were effectively (and for constitutional purposes) federal *regulars*, and not federalized “militia,” when so deployed.⁵⁰ As Justice Stevens concluded,

In a sense, [state guardsmen] now must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time. When the state militia hat is being worn, the “drilling and other exercises” referred to by the Illinois Supreme Court are performed pursuant to “the Authority of training the Militia according to the discipline prescribed by Congress,” but when that hat is replaced by the federal hat, the

⁴⁶ 247 U.S. 3 (1918).

⁴⁷ *Id.* at 6.

⁴⁸ See *Perpich v. Dep’t of Def.*, 496 U.S. 334 (1990).

⁴⁹ See *id.* at 346 (“[U]nder the ‘dual enlistment’ provisions of the statute that have been in effect since 1933, a member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the State Guard for the entire period of federal service.”); see also *id.* at 347 n.19.

⁵⁰ Justice Stevens explained:

The draft of the individual members of the National Guard into the Army during World War I virtually destroyed the Guard as an effective organization. The draft terminated the members’ status as militiamen, and the statute did not provide for a restoration of their prewar status as members of the Guard when they were mustered out of the Army. This problem was ultimately remedied by the 1933 amendments to the 1916 Act. Those amendments created the “two overlapping but distinct organizations” described by the District Court—the National Guard of the various States and the National Guard of the United States.

Id. at 345.

second Militia Clause is no longer applicable.

This conclusion is unaffected by the fact that prior to 1952[,] Guard members were traditionally not ordered into active service in peacetime or for duty abroad. That tradition is at least partially the product of political debate and political compromise, but even if the tradition were compelled by the text of the Constitution, its constitutional aspect is related only to service by State Guard personnel who retain their state affiliation during their periods of service. There now exists a wholly different situation, in which the state affiliation is suspended in favor of an entirely federal affiliation during the period of active duty.⁵¹

Perpich, therefore, suggests that, at least under the dual enlistment system, the Calling Forth Clause is effectively a non-starter. The constitutional text simply doesn't matter because there is virtually no situation today when the "militia," at least as the Supreme Court has interpreted the term, is actually being "called forth." The *Selective Draft Law Cases*, *Cox*, and *Perpich* establish that the National Guard is not the "militia" to which the Calling Forth Clause refers, and that its deployment is therefore not limited to the three situations outlined by the constitutional text—executing the laws of the Union, suppressing insurrections, and repelling invasions.

That Congress, through the Posse Comitatus Act, the Insurrection Act, and other relevant statutes, has seen fit to place substantive limits on the domestic use of the federal military *mirroring* the constitutional text is a separate matter, albeit one to which I return in Part III; those few circumstances where the Court has interpreted the Calling Forth Clause make fairly clear that such limitations are not compelled by the constitutional text itself. In short, the three times the issue has been before the Supreme Court, the Court has squarely rejected the militia exclusivity view of the Calling Forth Clause, without seriously considering the ramifications of such holdings.

II. LIMITS ON THE DOMESTIC USE OF THE MILITARY

A. *Constitutional Limits*

That is not to say, of course, that there are no *other* constitutional limitations on the domestic use of the military. There are obvious limits, such as the Third Amendment, which categorically prohibits quartering during peacetime (and requires congressional authorization for such conduct during wars),⁵² and the Suspension Clause, which guarantees

⁵¹ *Id.* at 348-49.

⁵² U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house,

individuals held domestically under federal authority (including federal military authority) access to the courts “except when in Cases of Rebellion or Invasion the public Safety may require it.”⁵³ Some have even argued that there are fundamental due process limits on the domestic use of the military,⁵⁴ although those limits are ill-defined and attenuated, at best.

At bottom:

traditional reservations about military involvement in the execution of civilian law can only clearly be said to rise to the level of constitutional imperative when they take a form which offends some more explicit constitutional prohibition or guarantee such as the right to jury trial, to grand jury indictment, or to freedom from unreasonable searches and seizures.⁵⁵

Short of the Calling Forth Clause, then, there do not appear to be any structural constitutional limitations on the domestic use of the military. Rather, the domestic use of the military would seem to only run afoul of the Constitution when the military deprives individuals of their constitutional rights.

B. *Statutory Limits: The Significance of the Posse Comitatus Act*

The most important structural limits today on the domestic use of the military are all to be found in Acts of Congress. Perhaps none is of more importance than the Posse Comitatus Act, which generally prohibits use of the federal military in a law-enforcement capacity except where specifically authorized by Congress.⁵⁶ Enacted in (ill-intentioned)⁵⁷ response to the pervasive use of the federal military to

without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

⁵³ *Id.* art. I, § 9, cl. 2. For more on the Suspension Clause as a limitation on military detention during emergencies, see Trevor Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007).

⁵⁴ See, e.g., David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1 (1971).

⁵⁵ CHARLES DOYLE, CONG. RES. SERV., CRS REPORT FOR CONGRESS: THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW, at CRS-14 (2000), available at <http://www.fas.org/sgp/crs/natsec/95-964.pdf>.

⁵⁶ See 18 U.S.C. § 1385 (2000) (“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.”). See generally THE POSSE COMITATUS ACT OF 1878: A DOCUMENTARY HISTORY (Stephen Young, ed., 2003).

⁵⁷ As one recent reexamination of the Act suggests,

This nineteenth century remnant from the Reconstruction period has been mischaracterized from its very beginnings, at times deliberately. One initial deception was to hide the Act’s racist origins by linking the Act with the principles surrounding the founding of the United States, without accounting for the passage of the Constitution or the Civil War. To compound matters, the Act’s most vocal nineteenth

maintain order in the South during Reconstruction, and widespread concerns that the military had influenced the 1876 Hayes-Tilden presidential election,⁵⁸ the Act categorically prohibits the domestic use of the Army and Air Force to execute the laws, unless authorized by a separate Act of Congress.

The Posse Comitatus Act has tended to be overemphasized by underinformed commentators, who presume it to be a categorical prohibition on domestic use of the military, and who therefore are convinced that it prohibits everything from military detentions of “enemy combatants” to the NSA wiretapping program.⁵⁹ But whereas the Posse Comitatus Act does nothing more than prohibit the extralegislativ domestic use of the military, it does nothing less.⁶⁰ Thus, the Posse Comitatus Act suggests that we may define the limits on the domestic use of the federal military by negative reference to those statutes *authorizing* such use. We may understand the permissible domestic use of the military entirely by reference to those statutes satisfying the Posse Comitatus Act.

As others have noted, there are numerous statutory exceptions to the Posse Comitatus Act.⁶¹ These range from the Insurrection Act,⁶²

century supporters incorporated by reference the controversial, yet somewhat contrived, arguments against a standing U.S. army from the revolutionary period. The Act’s supporters also hid their unsavory agenda behind patriotic phrases and ideas of the Anti-Federalists that the founders themselves had not put into practice. In short, the Act was carefully disguised in two levels of deliberate misinformation.

Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 MIL. L. REV. 86, 88-90 (2003) (footnotes omitted). For a sobering examination of the racial violence in the South in the years leading up to the Act, along with a discussion of the important role of the federal military in curbing that violence and protecting the rights of former slaves, see NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* (2006).

⁵⁸ To be clear, there is compelling evidence that the federal military was attempting to protect the franchise of Southern blacks, who were otherwise often intimidated into not voting. *See, e.g.*, LEMANN, *supra* note 57, at 170-80 (discussing the “Mississippi Plan,” and its application to the 1876 presidential election).

⁵⁹ For a current study of the overreliance—and misinterpretation—of the scope of the Posse Comitatus Act, see Joshua M. Samek, Note, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?*, 61 U. MIAMI L. REV. 441 (2007).

⁶⁰ In that regard, there is a strong analogy to be drawn between the Posse Comitatus Act and the Non-Detention Act, 18 U.S.C. § 4001(a) (2000), which prohibits extra-legislativ detention of U.S. citizens. As with the Posse Comitatus Act, the Non-Detention Act does not categorically prohibit extrajudicial detention; it just requires an authorizing statute. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 542-45 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Thus, in cases like the detention of U.S. citizen “enemy combatant” Jose Padilla, the argument that his military confinement violated the Posse Comitatus Act turned on the argument that it also violated the Non-Detention Act. If a statute authorized the detention for purposes of § 4001, it is hard to see why the same statute wouldn’t provide an exception satisfying the Posse Comitatus Act.

⁶¹ For a fairly comprehensive list of such obscure statutes, see DOYLE, *supra* note 55, at CRS-21 to CRS-22 n.48.

which is perhaps the most important and wide-ranging exception in allowing the domestic use of the military to respond to domestic crises, to statutes authorizing military assistance in disaster relief, such as the Stafford Act,⁶³ to statutes authorizing the FBI to request assistance from the military in investigating attempts to kidnap or kill members of Congress or high-ranking Executive Branch officials.⁶⁴ My aim here is not to exhaustively catalog or characterize these statutes, but merely to suggest that current law provides numerous different contexts for the domestic use of the military, animated by the background constraint of the Posse Comitatus Act.

III. THE DOMESTIC COMMANDER IN CHIEF

A. *The Enforceability of Statutory Limits*

These statutes are more important because of their constitutional significance when read together with the Posse Comitatus Act. Under Justice Jackson's canonical trifurcated taxonomy from *Youngstown*, these statutes place the President's power at its zenith when acting in pursuance of the delegated authority. As Jackson wrote, "In these circumstances, and in these only, may [the President] be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power."⁶⁵ Just as importantly, though, the Posse Comitatus Act arguably places the President's power at its "lowest ebb" when he acts in excess of these statutory "exceptions."⁶⁶

Of course, the common response, at least these days, would be that Congress could not constitutionally interfere with the President's

⁶² 10 U.S.C. §§ 331-35 (2000).

⁶³ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C.A. §§ 5121-5204 (2007); see also MITCHELL L. MOSS & CHARLES SHELHAMER, N.Y. UNIV. CTR. FOR CATASTROPHE PREPAREDNESS AND RESPONSE, THE STAFFORD ACT: PRIORITIES FOR REFORM (2007), http://www.nyu.edu/ccpr/pubs/Report_StaffordActReform_MitchellMoss_10.03.07.pdf.

⁶⁴ 18 U.S.C. § 351(g) (2000) ("Violations of this section shall be investigated by the Federal Bureau of Investigation. Assistance may be requested from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.")

⁶⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

⁶⁶ See *id.* at 637-38 (Jackson J, concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.")

constitutional authority as commander in chief, and that the Posse Comitatus Act therefore should not be read to prohibit unilateral presidential action so as to avoid the constitutional question. The Bush Administration has made similar arguments against the applicability of the Non-Detention Act, the exclusivity provisions of the Foreign Intelligence Surveillance Act (FISA),⁶⁷ and a host of other statutory provisions arguably “interfering” with the President’s constitutional authority as commander in chief.⁶⁸

But as much as the Calling Forth Clause may be a dead letter today substantively, perhaps it is here that it is still of modern significance. There can be no question that the Constitution *does* give Congress the power to substantively regulate domestic use of the military. All that the *Selective Draft Law Cases*, *Cox*, and *Perpich* establish is that the Calling Forth Clause is not the constitutional ceiling on domestic use of the military where federal regulars are concerned. Moreover, those same cases emphasize that it is *Congress’s* powers to raise armies and declare war that transcend the limits of the Calling Forth Clause. And so, unlike several other of the current disputes, there is simply no question that the Constitution provides “that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy” in the context of domestic use of the military.⁶⁹ Put differently, because of the Calling Forth Clause, the domestic use of the military is a singularly poor candidate for application of the commander in chief override. The Calling Forth Clause may not, as a practical matter, limit Congress anymore, but it unquestionably empowers Congress to limit the President.

B. *The Implications for the Domestic Commander in Chief*

The above analysis does not dramatically reorient contemporary thinking about the collective scope of the federal government’s power to respond to domestic crises. Very much to the contrary, it largely reinforces the conclusion that the federal government has a vast reservoir of military force to use in responding to domestic crises, and the breadth of some of the more significant contemporary authorization statutes, especially the Insurrection Act, suggests that whatever limits these statutes impose upon the domestic use of the military are ill-

⁶⁷ *E.g.*, 18 U.S.C. § 2511(2)(f) (2000) (“[P]rocedures in this chapter or chapter 121 . . . and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.”).

⁶⁸ See generally Vladeck, *supra* note 1 (summarizing the debate over the “Commander-in-Chief override”).

⁶⁹ *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring).

defined and in need of revisiting.

But re-situating the Calling Forth Clause in the current debate *does* effect two significant results vis-à-vis the separation of powers. First, the idea that results from the *Selective Draft Law Cases*, *Cox*, and *Perpich*—i.e., that the Calling Forth Clause does not limit the domestic use of the federal regulars—suggests that long-held conceptions about the constitutional limits on the domestic use of the military are badly out of step with reality. If Congress so intended, the above analysis suggests that it could radically increase the incidence of domestic use of the federal military, subject only to constitutional limits—presumably stemming from individual rights—in application.

Second, and running somewhat in the opposite direction, the Calling Forth Clause, although it is of little direct substantive significance today, is structurally important in reaffirming Congress's general power to regulate the domestic use of the military, and thereby calls into question—in stronger terms than most other contemporary arguments—claims that Congress cannot interfere with the President's constitutional prerogative. In more stark terms, the Calling Forth Clause provides powerful evidence that the “domestic commander in chief” has vanishingly little inherent power to use the military domestically, even during emergencies, and notwithstanding regulations purporting to claim the contrary.⁷⁰

CONCLUSION

Lest the above discussion give the impression that I agree with the Supreme Court's narrow interpretation of the Calling Forth Clause, particularly in *Perpich*, I most certainly do not. The Court's conclusion that the Clause in no way constrains the domestic use of the federal regulars runs deeply contrary to the prevailing understanding at the Founding, and the “militia exclusivity” view of the Calling Forth Clause.

But almost all of the constitutional law concerning the respective allocation of authority between the federal and state governments suffers from similar anachronisms. Because of the “dual enlistment” regime, virtually *every* individual in federal service, including a member of the National Guard when federalized, is, for constitutional purposes, a federal “regular.” Under the *Selective Draft Law Cases*, *Cox*, and *Perpich*, the Calling Forth Clause does not limit those situations in which such “regulars” may be deployed, either at home or, as was the

⁷⁰ See, e.g., 32 C.F.R. § 215.4(c)(1) (2007) (authorizing use of the military in “emergencies” and to protect federal property and functions based on “constitutional” exceptions to the Posse Comitatus Act).

issue in *Perpich*, abroad. Given the Framers' deep-seated fear of a standing army, there is a way in which this inversion of the "militia" and the "regular army" might at least help to explain the apparently inverted reading the Court has given to the Calling Forth Clause.⁷¹

As uncomfortable as the reality of the Court's jurisprudence may be, it further underscores the structural significance of the Posse Comitatus Act, a badly misunderstood and both over- and underappreciated statutory mandate. Indeed, and to its credit, Congress has long understood its obligation to set statutory limits on the domestic use of the military, notwithstanding the uncertainty surrounding the location of any constitutional floor. Ultimately, then, the central project of this Article is to suggest that the Posse Comitatus Act *is* an important player in contemporary debates over the scope of the commander in chief's domestic power, and that the Calling Forth Clause imbues it with atypical force with respect to Justice Jackson's *Youngstown* concurrence.⁷²

Congress may still have substantial work to do in order to define with more precision the limits of when the President may employ the military in response to domestic crises,⁷³ but the critical point is that such work is properly Congress's job, and has been all along.

⁷¹ Some have even suggested that the end-run effected by the "dual enlistment" system vis-à-vis the Calling Forth Clause may itself call the system's constitutionality into question. See, e.g., Adam M. Giuliano, *Emergency Federalism: Calling on the States in Perilous Times*, 40 U. MICH. J.L. REFORM 341, 391-95 (2007). The problem, of course, is that Congress's power to raise armies is plenary, and so its power to provide that members of state National Guard units are enlisted as reserve members of the federal military would only raise constitutional concerns if such enlistments were involuntary—which they are not.

⁷² Cf. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))).

⁷³ See generally Vladeck, *The Field Theory*, *supra* note 10.