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## Domestic Military Operations and the Coronavirus Pandemic

Mark P. Nevitt

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# Domestic Military Operations and the Coronavirus Pandemic

Mark Nevitt\*

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## INTRODUCTION

In response to the novel coronavirus crisis, we are witnessing one of the largest domestic military operations in American history. To date, more than 45,700 Army and Air Force National Guardsmen and women operating under state authorities have been activated. And thousands more federal military forces—to include 5,900 Navy, Air Force and Army Reservists—are supporting the coronavirus response via a variety of missions.<sup>1</sup> The military’s coronavirus crisis response is defined by diversity in service, personnel, and mission:

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1. I use the shorthand “federal military forces” to include *all* military forces operating under Title 10, U.S. Code, including federalized personnel of the National Guard. This highlights the distinction between federal forces and National Guard forces operating under State Active Duty (SAD) or Title 32, U.S. Code. This definitional shorthand is consistent with governing military regulations. *See* U.S. DEP’T

- **Service:** Military support has come from all branches of the armed forces—Army, Navy, Air Force, Marines, Space Force, and Coast Guard.<sup>2</sup> While not a branch of the armed forces, the PHS Commissioned Corps is also playing a critical support role as a unique “uniformed service of public health professionals.”<sup>3</sup>
- **Personnel:** Military personnel in support of the coronavirus response include members of the active duty military, Reserves, and National Guard. Each military unit, in turn, reports to either the state governor via State Active Duty (SAD) or Title 32 authorities, or to the President pursuant to Title 10 authorities.<sup>4</sup> Both the type of personnel and the chain of command—federal or state—determine the scope of the military unit’s legal authorities and its capacity to undertake certain missions.
- **Mission:** To date, the National Guard operating under state authorities has been the military’s face of the coronavirus response. The federal military forces have largely supported this effort via their longstanding “Defense Support to Civil Authorities” (DSCA) mission.<sup>5</sup> Earlier concerns that the military might overtake civilian functions and supplant civil authorities via martial law have yet to be realized. The Navy deployed hospital ships to both coasts, the Army Corps of Engineers built a functioning hospital from the ground up at the Javits Center, and the National Guard has been activated in all 50 states, 3 territories, and the District of Columbia.<sup>6</sup>

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OF DEF. DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES 16 (Mar. 18, 2018) [hereinafter CIVIL AUTHORITIES].

2. 10 U.S.C. §101(a)(4) (2018). (The Space Force was added in 2019. See National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116–92, §952(c) (2019). The Coast Guard is a “military service and branch of the armed forces of the United States at all times.” 14 U.S.C. §1 (2018). It is ordinarily part of the Department of Homeland Security. The Public Health Service (PHS) Commissioned Corps has played a central role in the coronavirus crisis as a quasi-military service. The Coast Guard possesses special authority to enforce quarantines and health laws in conjunction with direction of the Secretary of Health and Human Services. 42 U.S.C. §97 (2018). For an overview of the different military branches and their role in domestic operations, see Mark Nevitt, *Unintended Consequences: The Posse Comitatus Act in the Modern Era*, 37 CARDOZO L. REV. 119 (2015).

3. 42 U.S.C. §217 (2018). The PHS Commissioned Corps is now a division of the Department of Health and Human Services. The President has the authority “[i]n time of war, or of emergency involving the national defense proclaimed by the President” to declare it a military service. President Truman exercised this power in 1945. See also Masha Simonova & Nathaniel Sobel, *Federal Executive Emergency Authorities to Address COVID-19*, LAWFARE (Apr. 2, 2020), <https://perma.cc/UHE4-VGHK>.

4. See CIVIL AUTHORITIES, *supra* note 1.

5. See CIVIL AUTHORITIES, *supra* note 1. Technically, under DOD doctrine the DSCA mission includes both a law enforcement and a non-law enforcement function. As discussed in Part II, there are considerably more restrictions on using the military in a domestic law enforcement capacity. In previous iterations, this was called a military operation other than war (MOOTW).

6. See Dep’t of Def., *COVID-19 Response*, <https://perma.cc/K3SB-MGF4> (information current as of May 27, 2020) [hereinafter *COVID Response*].

National Guard units are playing a more active role in law enforcement matters, with some governors initially turning to their National Guards to enforce social distancing guidelines or stopping out-of-state visitors.

This trifecta of service, personnel, and mission determines the scope of the military's legal authorities. Each military unit's chain of command (federal or state?), branch of military service (Army? Coast Guard?), and mission (law enforcement or relief aid?) inform the scope of its duties.

As I explain below, the National Guard-focused approach provides maximum operational flexibility for governors and military commanders responding to the coronavirus crisis in a variety of missions. While these National Guard forces sometimes receive funding from the federal government, the funding source does not define their legal status and ability to actively support the law enforcement mission if called upon to do so—their chain of command does. In contrast, federal military forces operating under Title 10 authorities report to the Secretary of Defense and President as Commander in Chief.<sup>7</sup> This distinction in state vs. federal authority over the military has a historical basis in fears of a standing army that predate the Constitution. These concerns were hotly debated at the nation's founding and remain enshrined in the Constitution.<sup>8</sup>

Independent of the coronavirus response, President Trump has consistently displayed a willingness to insert himself into day-to-day military matters that have historically been handled via the uniformed military leadership or the independent military justice system. As of this writing, the President is considering calling in federal military forces to support law enforcement in response to protests from the tragic death of George Floyd at the hands of Minneapolis police officers.<sup>9</sup> Further, President Trump has deployed the military in other, nontraditional contexts—witness the military's deployment to the U.S.-Mexico border.<sup>10</sup> His statements and actions have raised concerns about the proper role of the military

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7. CIVIL AUTHORITIES, *supra* note 1, at C2. Military support to law enforcement is addressed in a different directive. U.S. DEP'T OF DEFENSE, INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (Feb. 27, 2013) [hereinafter LAW ENFORCEMENT]. Northern Command is a combatant command. Unlike the National Guard, which may be federalized, federal military forces are never under the control of state Governors. ("Federal military forces will always remain under the command and control of the President and Secretary of Defense."). *See id.* at 28.

8. While it is beyond the scope of this article to exhaustively address the consideration given to standing armies during the Constitutional Convention, this concern was debated at length. *See, e.g.*, Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 157-58 (2004). Compare U.S. CONST. art. I, §8, cl. 12-13 (Congress shall have the power to "raise and support Armies" and "provide and maintain a Navy"), with U.S. CONST. art. I, §8, cl. 15-16 (Congress shall have the power "to provide for calling forth the Militia" and "to provide for organizing, arming, and disciplining the Militia . . . reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.").

9. Mark Nevitt, *The President, the Military, and Minneapolis*, JUST SECURITY (May 29, 2020), <https://perma.cc/3YMB-8QCQ>.

10. *See* Mark Nevitt, *The Military, the Mexican Border and Posse Comitatus: Four Key Takeaways*, JUST SEC. (Apr. 4, 2018), <https://perma.cc/U87U-2Q8L>.

on American soil, about the politicization of the military, and about the overall health of civilian-military relations.<sup>11</sup> They have also increased the scrutiny of Trump's actions as he turns to the military to address the coronavirus crisis.

This article proceeds in three parts. Part I considers the emergency authorities invoked to address the coronavirus, including the Public Health Service Act (PHSA), National Emergencies Act (NEA), and Stafford Act. Part II deals with the laws, regulations, and policies governing the military's role as a *law enforcer*—including restrictions on the military's role to quell civilian disturbances. I also briefly discuss martial law, a rarely invoked but powerful authority held at the federal, state, and local levels. Part III deals with the scope of the military as *emergency aid and relief provider*.<sup>12</sup> Unlike the military's role in quelling domestic disturbances, there are far fewer restrictions when it provides relief following a natural disaster or health crisis.

## I. EMERGENCY LAW AND THE MILITARY'S CORONAVIRUS RESPONSE

In exercising emergency authorities in response to the coronavirus crisis, the President and the Secretary of Health and Human Services (HHS), Alex Azar, have declared: (1) a public health emergency under the PHSA;<sup>13</sup> (2) an emergency under the NEA;<sup>14</sup> and (3) both an emergency and a major disaster under the Stafford Act.<sup>15</sup> Each declaration activates legal authorities that inform the scope, size, and scale of the military's response. Independent of these emergency declarations, the President has invoked the Defense Production Act (DPA) to facilitate the manufacture of critical medical supplies.<sup>16</sup> In what follows, I highlight the scope of these three emergency and major disaster declarations, applying them to the military's coronavirus mission.

### A. Public Health Emergency: A Federal Quarantine?

On January 31, 2020, Secretary Azar declared a public health emergency under Section 319 of the PHSA. The PHSA contains a broad catch-all provision that unlocks the Secretary's power in times of public health emergency to:

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11. For the classic account of civilian control of the military and the history of civil-military relations, see SAMUEL HUNTINGTON, *THE SOLDIER AND THE STATE* (1956).

12. This is governed by both military instruction and joint guidance. See CIVIL AUTHORITIES, *supra* note 1; JOINT CHIEFS OF STAFF, JOINT PUB. NO. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) (July 31, 2013) [hereinafter JOINT DOCTRINE].

13. Public Health Service Act, Pub. L. No. 78-410, 58 Stat. 682 (1944) (codified as amended at 42 U.S.C. §§201-300mm-61 (2018)).

14. National Emergency Act of 1976, Pub. L. No. 94-412, 90 Stat. 1255 (codified at 50 U.S.C. §§1601-51 (2018)).

15. Robert T. Stafford Act, 42 U.S.C. §5191 (2018) (outlining the authorities when declaring an "emergency"); 42 U.S.C. §5170 (2018) (outlining the authorities when declaring a "major disaster").

16. 50 U.S.C. §4533 (2018) The DPA authorizes the President to "create, maintain, protect, expand, or restore domestic industrial base capabilities for the national defense." *Id.* See also James E. Baker, *Use the Defense Production Act to Flatten the Curve*, JUST SEC. (Mar. 20, 2020), <https://perma.cc/HC7V-WHL5>. Disagreement remains about how and when the DPA's provisions were actually implemented.

*take such action as* may be appropriate to respond to the public health emergency, including making grants, providing awards for expenses, and entering into contracts and conducting and supporting investigation into the cause, treatment, or prevention of a disease or disorder<sup>17</sup>

Despite its capacious language (“take such action”), the precise scope of this provision remains unclear. Indeed, this question has not been litigated since its passage in 1944. At a minimum, the public health emergency declaration permits flexibility in assigning personnel to the crisis, waives certain laws to respond more expeditiously to the pandemic, and generally cuts through red tape to get people and supplies to crisis points expeditiously.<sup>18</sup>

How does a public health emergency declaration affect the military’s mission? The answer remains murky. In 2008, a former senior HHS official stated that the public health emergency declaration “does allow use of some waivers of programs, but . . . it is nowhere near as sweeping as a declaration of martial law.”<sup>19</sup>

The scope of the PHSA’s critical federal quarantine and isolation authorities also remains unclear. These authorities could potentially expand the military’s mission, enabling its involvement in enforcing a quarantine.<sup>20</sup> Under 42 U.S.C. §264, the Surgeon General—who reports to Secretary Azar—may “make and enforce regulations . . . necessary to prevent the introduction, transmission or spread of communicable diseases . . . from one state or possession into *any other state or possession*.”<sup>21</sup> While this authority’s scope has not yet been tested, some scholars have suggested that any federal quarantine invocation rests on shaky constitutional grounds.<sup>22</sup> Any quarantine order would likely be enforced by the military, subject to the constitutional and statutory restrictions discussed in Part II. Authority under the PHSA for the use of troops also remains untested.<sup>23</sup> To date, the PHSA’s practical impact on the day-to-day military coronavirus response has been limited, as discussions about imposing a federal quarantine have largely abated.

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17. 42 U.S.C. §247d(a)(2) (2018) (emphasis added).

18. Alexandra Phelan, *Explainer: National Emergency Declarations and COVID-19*, JUST SEC. (Mar. 13, 2020), <https://perma.cc/6FHM-QDZR>.

19. Simonova & Sobel, *supra* note 3 (quoting former HHS Deputy Secretary Eric Hargan).

20. “Quarantine” is defined as the “[s]eparation of individuals who have been exposed to an infection but are not yet ill from other individuals who have not been exposed to the transmissible infection.” Homeland Security Council, *National Strategy for Pandemic Influenza Implementation Plan* 209 (May 2006). “Isolation” is defined as the “[s]eparation of infected individuals from individuals that are not infected.” *Id.* at 208. *See also* 42 U.S.C. §97 (2018) (highlighting quarantine authorities).

21. 42 U.S.C. §264 (2018) (emphasis added).

22. *See, e.g.*, Arjun K. Jaikumar, Note, *Red Flags in Federal Quarantine: The Questionable Constitutionality of Federal Quarantine after NFIB v. Sebelius*, 114 COLUM. L. REV. 677 (2014).

23. Professor Jamshidi and other scholars have opined that the PHSA does not give the President the authority to order interstate or intrastate quarantines of individuals *en masse*. Maryam Jamshidi, *The Federal Government Probably Can't Order Statewide Quarantines*, U. CHI. L. REV. ONLINE (Apr. 2020).

Independent of the PHSA, the Supreme Court has recognized the right to travel as a fundamental constitutional right.<sup>24</sup> Accordingly, any governmental measure that restricts the right to travel is subject to strict scrutiny review. Under strict scrutiny, the government would be required to demonstrate that any measures used to restrict travel—such as a quarantine—are narrowly tailored to meet a compelling interest (public health) via the least restrictive means available.<sup>25</sup> The Court has, however, stated that travel may be abridged in “areas ravaged by flood, fire, or pestilence . . . that would directly and materially interfere with the safety and welfare of the area or the Nation as a whole.”<sup>26</sup>

State governors already possess broad police powers to restrict travel *within* their respective states, authority that has been used throughout the crisis. Relatedly, states have taken the lead in promulgating rules and guidelines governing social distancing and intrastate travel. Governors possess a more limited authority to halt travel from outside their states—but this has not stopped some governors from trying. Governor Gina Raimondo, for example, ordered the Rhode Island National Guard to stop incoming New Yorkers from entering her state at the outset of the crisis. She later backed away after public criticism and disagreement from New York Governor Andrew Cuomo.<sup>27</sup> Regardless of what restrictions are ultimately put in place, National Guard forces commanded by governors may play an important role in enforcing public health quarantines or stay-at-home orders.

Thankfully, at the time of this writing it appears unlikely that the President will turn to the public health emergency declaration to try to override these state-based rules. In fact, the President and Attorney General William Barr have expressed greater concern that states are imposing stay-at-home orders that are too strict, harming the economy.<sup>28</sup> Any broadly imposed federal order on quarantines would run into core federalism concerns if it sought to commandeer the machinery of state or local governments.<sup>29</sup>

### *B. National Emergencies Act (NEA) Emergency Declaration*

On March 13, 2020, President Trump declared an emergency under the National Emergencies Act (NEA).<sup>30</sup> On March 27, 2020, he invoked the NEA

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24. See *Zemel v. Rusk*, 381 U.S. 1 (1965).

25. For a discussion of the constitutional right to travel, see Timothy Baldwin, *The Constitutional Right to Travel: Are Some Forms of Transportation More Equal Than Others?*, 1 NW. J. L. & SOC. POL'Y, 213 (2006).

26. *Zemel*, 381 U.S. at 15-16.

27. See, e.g., Frank Bruni, Opinion, *The Governor Who Dissed New Yorkers*, N.Y. TIMES (Apr. 3, 2020), <https://perma.cc/W9GQ-H2G3>.

28. See Lisa Lerer & Kenneth Vogel, *Trump Administration Signals Support for Allies' Fight Against Virus Orders*, N.Y. TIMES (Apr. 29, 2020), <https://perma.cc/5UAB-ZRCZ>.

29. See, e.g., *New York v. United States*, 505 U.S. 144 (1992); see also Bobby Chesney, *Can the Federal Government Override State Government Rules on Social Distancing to Promote the Economy?*, LAWFARE (Mar. 24, 2020), <https://perma.cc/66AG-VLPG>.

30. Proclamation No. 9994, *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19 Outbreak)*, 85 Fed. Reg. 15337 (Mar. 13, 2020).

again in authorizing Secretaries of each military department to order certain members of the military (Selected Reserve and Individual Ready Reserve) to active duty.<sup>31</sup> The NEA serves as the “key” to unlock the authorities behind numerous statutory “doors.” In declaring a national emergency, the President gains access to a menu of 136 statutory emergency authorities.<sup>32</sup> Despite the NEA’s far-sounding implications, however, its practical import to the military’s coronavirus response appears limited.

In his emergency declaration, the President specifically invoked section 1135 of the Social Security Act, which permits the HHS secretary to waive certain federal insurance requirements.<sup>33</sup> This should ease access to medical care for many patients affected by the coronavirus. But the NEA declaration has not dramatically affected the scope and scale of military operations.

### *C. Stafford Act Emergency and Major Disaster Declarations*

On the same day that the President declared an emergency under the NEA, he also declared a Stafford Act emergency. In doing so, he stated that the federal government has “primary responsibility” for the coronavirus response.<sup>34</sup> This Stafford Act emergency declaration authorizes FEMA to provide financial support to states and localities, tapping into the federal Disaster Relief Fund. Shortly after the emergency declaration, all 50 states, three territories, and the District of Columbia requested that the President also make a Stafford Act “major disaster” declaration. The President did so, marking the first time since the Stafford Act’s passage that a major disaster was declared in response to a public health emergency.<sup>35</sup> These major disaster declarations provide additional authorities to facilitate the provision of medicine, food, and emergency personnel to states. But as with the NEA declaration, the Stafford Act emergency and major disaster declarations do not legally change the military’s fundamental authorities.

In sum, our coronavirus response has resulted in three distinct emergencies (PHSA, NEA, and Stafford Act) and a total of 54 Stafford Act “major disasters” across all states, three territories, and the District of Columbia. To date, these declarations mostly tap into federal funding, cut through red tape, and facilitate

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31. Exec. Order No. 13912, National Emergency Authority to Order the Selected Reserve and Certain Members of the Individual Ready Reserve of the Armed Forces to Active Duty, 85 Fed. Reg. 18407 (Mar. 27, 2020).

32. One scholar, Elizabeth Goitein of NYU Law School, estimated that there are 136 independent statutory authorities that could be invoked pursuant to the NEA. BRENNAN CENTER FOR JUSTICE, *A Guide to Emergency Powers and Their Use* (Dec. 5, 2018), <https://perma.cc/3ERC-UVEF>.

33. See Proclamation No. 9994, *supra* note 30.

34. *Id.* Since that time, the President has increasingly sought to place the burden of responsibility for the coronavirus response on the states.

35. The definition of “major disaster” under the Stafford Act does not specifically list “pandemics.” It does, however, list natural catastrophes, fire, floods, or explosions that “cause[] damage of sufficient severity and magnitude to warrant major disaster assistance under this Act. . . .” This major disaster authority was not invoked or used in the West Nile, H1N1, or Ebola crisis. Mark Nevitt, *The Coronavirus, Emergency Powers and the Military: What You Need to Know*, JUST SEC. (Mar. 16, 2020), <https://perma.cc/BZ4B-PLHM>.



access to resources and personnel. A massive federal quarantine—which would test the limits of the public health emergency—no longer seems to be an option that the executive branch is pursuing.

## II. THE MILITARY AS LAW ENFORCER

The military is governed by numerous constitutional, statutory, and regulatory constraints. Its employment in the COVID-19 crisis to date is further colored by the longstanding American tradition of civilian control of the military and a strong resistance to an active role for the military in domestic affairs, particularly in law enforcement.<sup>36</sup>

While the coronavirus response has not yet sparked massive civil disturbances, protests at state capitols have increased as citizens look to reopen their economy. And frustrations related to coronavirus restrictions are interspersed with the civil unrest following the death of George Floyd. Some of these disturbances have prompted the deployment of National Guard troops, but so far no federal military forces have been used to control any of the current protests or domestic violence.

The President is, of course, the Commander in Chief of the armed forces.<sup>37</sup> While an examination of the precise scope of the President's Commander-in-Chief authorities is beyond the scope of this article, any presidential assertion of authority that seeks to override existing statutes by asserting a plenary Commander-in-Chief power would be subject to judicial review.<sup>38</sup>

Longstanding concerns about military control supplanting civilian authorities actually predate the nation's founding. For example, the Declaration of Independence listed, among its grievances against George III, that he “kept among us, in times of peace, Standing Armies, without the Consent of our legislatures,” and “affected to render the Military independent of and superior to the Civil power.”<sup>39</sup>

The Constitution authorizes Congress to “raise and support Armies,”<sup>40</sup> “provide and maintain a Navy,”<sup>41</sup> and “organiz[e], arm[], and disciplin[e], the Militia.”<sup>42</sup> Under Article II, the President is, as noted above, the “Commander in Chief of the Army and Navy of the United States and of the Militia of the several states, when called into the actual service of the United States.”<sup>43</sup> The Third

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36. See Mark Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905, 916-25 (2019).

37. See U.S. CONST. art. II, §2.

38. For a discussion of the Commander in Chief's authority at its “lowest ebb,” see generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008).

39. THE DECLARATION OF INDEPENDENCE ¶¶ 13-14 (U.S. 1776).

40. U.S. CONST. art. I, §8, cl. 12.

41. U.S. CONST. art. I, §8, cl. 13.

42. U.S. CONST. art. I, §8, cl. 16. Congress also has the authority to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel invasions.” U.S. CONST. art. I, §8, cl. 15.

43. U.S. CONST. art. II, cl. 2.

Amendment prohibits the quartering of soldiers in any house during time of peace.<sup>44</sup>

Outside of the Constitution's text, restrictions on the military's domestic use can be found in statutes, regulations, and longstanding norms governing civilian control of the military.<sup>45</sup> As a general rule, for example, federal military forces operating under Title 10 are prohibited from enforcing state, local, and federal laws, absent an express statutory authorization. The non-federalized National Guard may directly participate in law enforcement matters, whether acting under State Active Duty or Title 32.

In what follows, I analyze the relevant statutes and other laws that constrain and empower the military when used in a law enforcement capacity, including (1) the Posse Comitatus Act, (2) the Insurrection Act, (3) and the "law of martial law."

A. *The Posse Comitatus Act (1878) and Governing Regulations: Preventing a Federal Military Role in Law Enforcement*

The Reconstruction-era Posse Comitatus Act (PCA) prohibits the federal ("Title 10") Army and Air Force from actively "execut[ing] the laws" on U.S. soil. The PCA states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or 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.<sup>46</sup>

While the PCA's text makes no mention of the Navy or Marine Corps, the DoD applies the PCA's law enforcement restrictions to the Navy and Marine Corps via departmental instruction.<sup>47</sup> Courts, however, have held that PCA limitations do not apply to the Coast Guard, which is, after all, a law enforcement agency as well as an armed force, and PCA limitations do not apply to the National Guard in State Active Duty (SAD) status,<sup>48</sup> Title 32 status, or when

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44. U.S. CONST. amend. III.

45. There is a rich scholarly literature governing the military's role in civil society. *See, e.g.*, WILLIAM C. BANKS & STEPHEN DYCUS, *SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY* (2016); JAMES E. BAKER, *IN THE COMMON DEFENSE* (2007); HUNTINGTON, *supra* note 11.

46. 10 U.S.C. §1385 (2018) (emphasis added).

47. LAW ENFORCEMENT, *supra* note 7, at 24 (applying the PCA's legal prohibitions to the Navy and Marine Corps).

48. It is beyond the scope of this article to provide an in-depth analysis of the distinction between State Active Duty status and Title 32 status for the National Guard, as their underlying legal authorities when operating in a law enforcement capacity are nearly identical. For a discussion of State Active Duty status and Title 32 status when the National Guard is used in Defense Support to Civil Authorities *see* U.S. DEP'T OF DEF., INST. 3025.22 *THE USE OF THE NATIONAL GUARD FOR DEFENSE SUPPORT OF CIVIL AUTHORITIES* (July 26, 2013) (C1, May 15, 2017).

the President orders the National Guard to quell civil disturbances under the Insurrection Act.<sup>49</sup>

Passed in 1878, the PCA has a complex and somewhat ignoble history. Following the Civil War, President Ulysses S. Grant ordered federal troops to protect African Americans' voting rights in several Southern states.<sup>50</sup> These troops—many of whom were former black Union soldiers—were stationed in the South with the express mission of protecting the civil rights and liberties of recently freed slaves. The PCA was passed in the aftermath of the notorious 1876 election that saw Rutherford B. Hayes emerge as the victor over Samuel Tilden. Its passage coincided with the effective end of Reconstruction.<sup>51</sup> The resulting political compromise saw federal troops removed from the South, ushering in the disgraceful era of Jim Crow.

In examining current domestic military operations during the coronavirus and beyond, the PCA's prohibitions are always lurking in the background and must be taken into account. Further, the PCA must be read in concert with regulations prescribing DoD support to law enforcement. The PCA and governing DoD regulations generally prevent federal military forces from exercising a *direct* role in law enforcement, such as making arrests and searching or seizing people or property.<sup>52</sup>

Under the Military Purpose Doctrine, however, PCA violations do not occur when federal military forces are engaged in law enforcement actions that are performed primarily for a military purpose. This may include *incidental* assistance to civil authorities,<sup>53</sup> or to a military or foreign relations function.<sup>54</sup> Federal military forces are also authorized to participate in law enforcement functions to protect military personnel and equipment, or classified information, or to investigate suspected Uniform Code of Military Justice violations.<sup>55</sup>

Further, in “extraordinary emergency circumstances,” according to DoD doctrine, federal military forces may be used to subdue large-scale, unexpected civil disturbances where prior authorization by the President is impossible.<sup>56</sup>

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49. See U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5820.7C, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS (Jan. 26, 2006). See also LAW ENFORCEMENT, *supra* note 7, at 23. Unlike the Army or Air Force, neither the Navy nor the Marine Corps has a National Guard. Courts have refused to extend the PCA restrictions to the Coast Guard. See, e.g., *Jackson v. State*, 572 P.2d 87 (Alaska 1977).

50. See, e.g., Matthew C. Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 WASH. U. L.Q. 953, 954 (1997).

51. See RADLEY BALKO, *RISE OF THE WARRIOR COP 24-25* (2013). For a discussion of the history behind the PCA, see also Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 MIL. L. REV. 86 (2003).

52. LAW ENFORCEMENT, *supra* note 7, at 15. The DoD Instruction counts 14 statutory authorizations for the military to actively participate in law enforcement. See *id.* at 15-16.

53. JOINT DOCTRINE, *supra* note 12, at III-2 (emphasis added). “Military or foreign relations function” is an important catch-all phrase, but it remains not precisely defined by federal courts or military doctrine.

54. LAW ENFORCEMENT, *supra* note 7, at 16.

55. *Id.* at 16-17.

56. *Id.* at 17.

DoD regulations additionally cite 14 statutes that expressly authorize the armed forces to participate directly in law enforcement. One regulation describes “execution of quarantine and certain health laws” in accordance with 42 U.S.C. §97.<sup>57</sup> To be sure, the scope of the Military Purpose Doctrine and many of the Posse Comitatus Act carve-outs mentioned above are articulated in military regulations and are not necessarily reflected in any statute. But they nevertheless provide practical, operational guidance concerning how and when the military may be employed domestically.

The military also may provide *indirect* assistance in support of a broader law enforcement mission. This includes providing technical assistance, logistical support, and communications.<sup>58</sup>

The Posse Comitatus Act has played an important, albeit below-the-surface, role in the current coronavirus crisis. To date, the National Guard operating under state authority has been the public face of the domestic U.S. military coronavirus response. Guard personnel may conduct the full spectrum of military missions unhindered by potential PCA limitations. Thankfully, the social-distancing and isolation guidelines have so far reduced the need for the National Guard to play an active role in law enforcement matters.

### *B. Insurrection Act: A Critical Posse Comitatus Act Exception*

The Posse Comitatus Act’s restrictions do not apply “under circumstances expressly authorized by the Constitution or Act of Congress.” The Insurrection Act is the most important “Act of Congress” that provides a PCA exception. The Insurrection Act refers to a series of laws—dating from 1792—that address the circumstances under which federalized National Guard forces or active duty military may be called into service by the President.<sup>59</sup> If the President invokes Insurrection Act authorities, federal military forces may be used for a wide variety of missions domestically, to include law enforcement.

Of note, in the aftermath of Hurricane Katrina—during which New Orleans witnessed a massive breakdown in civil order—the Insurrection Act was amended to include cases of “natural disaster, epidemic or other serious public health emergency.”<sup>60</sup> But Congress repealed this provision in 2008. This may reflect Congress’s hesitancy to expand the President’s authority to use the military outside traditional roles to control riots and other civil disturbances.

While invocation of the Insurrection Act in response to the COVID-19 crisis has not been widely discussed, it has been proposed in reaction to protests

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57. *Id.* at 18.

58. JOINT DOCTRINE, *supra* note 12, at III-7.

59. 10 U.S.C. §§251-255 (2018). *See also* LAW ENFORCEMENT, *supra* note 7, at 17 (referring to the Insurrection Act as authority for DoD regulations).

60. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, §1076, 120 Stat. 2083, 2404 (2006).

following the killing of George Floyd.<sup>61</sup> It is therefore important to consider whether and how the President might use the Insurrection Act to overcome the PCA's restrictions.

First, a state legislature or governor could request assistance from the President under 10 U.S.C. §251 "to suppress [an] insurrection."<sup>62</sup>

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.<sup>63</sup>

If the President provides assistance in response to a state request, federal military forces could be deployed to the requesting state to perform a wide variety of missions, to include directly enforcing the laws.

Second, the Insurrection Act authorizes the President to deploy the military (federal or state) without a state request.

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against authority of United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.<sup>64</sup>

There must, however, first be a civil breakdown in which courts cannot enforce federal law. The precise scope of this authority remains untested, as it has been rarely invoked, and courts have historically been reluctant to weigh in on the scope of the Commander in Chief's authority.

Third, the President may use the armed forces when there is simply an interference with federal or state law. He may deploy the military in a state to suppress an insurrection, domestic violence, unlawful combination, or conspiracy if it:

- (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

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61. A controversial *New York Times* op-ed by Sen. Tom Cotton (R-OK) called for the invocation of the Insurrection Act in response to massive protests related to the killing of George Floyd. Tom Cotton, Opinion, *Send in the Troops*, N.Y. TIMES (Jun. 3, 2020), <https://perma.cc/QY8M-PYS9>.

62. 10 U.S.C. §251 (2018).

63. *Id.*

64. 10 U.S.C. §252 (2018). Today's "organized militia" consists of each state's National Guard and Naval Militia. 10 U.S.C. §246(b)(1) (2018).

- (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.<sup>65</sup>

The precise scope of 10 U.S.C. §253 remains largely untested. The most generalized provision, it does not require either a state request (as in §251) or a specific breakdown in judicial proceedings (as in §252).

Prior to the deployment of armed forces under any of these three Insurrection Act provisions, the President must first issue a proclamation to “immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.”<sup>66</sup> Only after the order to disperse is issued may the President direct the use of the armed forces—under his authority—to quell the disturbance.

The Insurrection Act was last invoked in 1992, when California Governor Pete Wilson requested federal military assistance to restore law and order during the Los Angeles riots.<sup>67</sup> Governor Wilson specifically noted that the California National Guard could not undertake this task without outside help. President George H.W. Bush, invoking the Insurrection Act generally, then issued an executive order that authorized the Secretary of Defense to federalize the National Guard and deploy active duty Army and Marine personnel from bases in California to the riot scene in Los Angeles.<sup>68</sup> Shortly after their arrival, the civil unrest was quelled.

Perhaps not surprisingly, using the military to enforce domestic laws raises broader concerns about the military’s role in civil society and whether the military is undermining civil liberties. The Insurrection Act has not been invoked in 28 years, despite numerous high-profile riots and unrest (Baltimore in the aftermath of Freddie Gray’s death, Hurricane Katrina, unrest in Ferguson, Missouri). Remarkably, it was used earlier in the Twentieth Century to uphold and protect the civil rights and liberties of minority groups. Both Republican (Eisenhower) and Democratic (Kennedy) presidents used Insurrection Act authorities to deploy federal military forces to Southern states to enforce civil rights and desegregation laws in Arkansas (1957), Alabama (1962), and Mississippi (1963). In each of these instances, federal military forces were deployed against the wishes of Southern state governors who refused to enforce federal laws.

Consider how the Insurrection Act might be invoked in the current coronavirus crisis. In Michigan, for example, armed civilian protestors took over the state capitol in May, with local law enforcement stepping aside to avoid confrontation and

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65. 10 U.S.C. §253 (2018).

66. 10 U.S.C. §254 (2018).

67. Proclamation No. 6427, 57 Fed. Reg. 19,359 (May 1, 1992). Complicating matters, the Los Angeles police were the very subject of the protestors’ anger following the acquittal of officers charged with assaulting Rodney King.

68. Exec. Order No. 12804, 57 Fed. Reg. 19361 (May 5, 1992).

potential loss of life.<sup>69</sup> If the unrest continues, Michigan Governor Gretchen Whitmer might deploy her own National Guard forces in an effort to restore order. Or she could request federal assistance, as California's Governor Pete Wilson did in 1992. Because of the localized and ephemeral nature of these coronavirus-related "mini-insurrections," however, it appears unlikely that Insurrection Act authorities would be necessary to overcome any breakdown in law and order.<sup>70</sup>

If President Trump nevertheless sought to federalize the Michigan National Guard and call in nearby federal military units without a request from Governor Whitmer or the Michigan legislature, he would be obliged to assert that activities in that state "oppose[d] or obstruct[ed] the execution of laws of the United States or impede[d] the course of justice under those laws."<sup>71</sup> Or he would have to determine that those activities made it "impracticable to enforce the laws of the United States in [that] State by the ordinary course of judicial proceedings."<sup>72</sup> In the unlikely event that a court were willing to entertain a challenge to the President's action, it would face the difficult task of applying these very broad terms to the facts in a rapidly changing situation.<sup>73</sup>

Consider a second example: what if a neighboring state, witnessing the Michigan state capitol siege, sought federal military assistance in anticipation of a future civil breakdown? A plain reading of the Insurrection Act's text suggests that such an anticipatory invocation would be without legal support. Those provisions seem to indicate that an insurrection, disturbance, and breakdown of law must be in existence order prior to the Insurrection Act being invoked. But 10 U.S.C. §253 provides, *inter alia*, for the use of federal military forces to suppress an "unlawful combination, or conspiracy," perhaps in advance of any actual violence.

States may always seek federal civilian law enforcement assistance, such as from the U.S. Marshals Service or the FBI.<sup>74</sup> Under DoD Directives, a "tiered response" to civil disturbances within the states is available in the following order: (1) local and state police; (2) state's National Guard in either state active duty status or Title 32; (3) federal civilian law enforcement officials; and (4) U.S. military (to include federalized National Guard).<sup>75</sup>

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69. Veronia Stracqualursi, *Michigan Closes State Capitol as Protestors Gather Against Stay-at-Home Order*, CNN (May 14, 2020), <https://perma.cc/33D3-JKUW>.

70. To highlight the political calculus and controversy behind a decision to invoke the Insurrection Act, note that in the aftermath of Hurricane Katrina, in the midst of widespread violence and destruction, the Act was *not* invoked.

71. 10 U.S.C. §253(2) (2018).

72. 10 U.S.C. §252 (2018).

73. Beyond the legal standard, the President appeared to be on the side of the coronavirus protesters, exhorting state governors to "liberate" their states and open their economies.

74. LAW ENFORCEMENT, *supra* note 7, at 7. The U.S. Marshals Service, FBI, and other federal law enforcement agencies are not part of the armed forces, hence the Posse Comitatus Act restrictions are not applicable to them.

75. *Id.*

Independently of the Insurrection Act, several strong policy concerns argue for state National Guard forces to continue to serve a leading role in the coronavirus response. Admiral James Winnefeld (former vice chairman of the Joint Chiefs of Staff) and Gen. Craig McKinley (former chief of the National Guard Bureau) have forcefully argued against bringing state National Guards under a federal status.<sup>76</sup> For good reason: governors know their states better than anyone else, are in the best position to deliver aid, and have preexisting relationships with key players in their states. This was part of the calculus in keeping the Louisiana National Guard under state authority during Hurricane Katrina. Instead of federalizing the National Guard, the federal government should continue to fund the state National Guard response, utilizing Title 32 when necessary. In 2010, Winnefeld and McKinley helped untangle a command and control problem through the creation of a “dual-status commander” in each state that also helps in the military’s response.<sup>77</sup>

Another reason for continued reliance on non-federalized state forces to maintain order is that shifting the Title 10 military to law enforcement duties changes the rules governing the use of force. Such a change in rules also requires a change in operational mindset. As a general matter, federal military forces are trained to use force in armed conflict and operational military environments, where they operate under more permissive general or theater-specific Rules of Engagement (ROE).<sup>78</sup> State National Guards operate under different rules for the use of force promulgated by state chains-of-command. Law enforcement missions for the military require compliance with more restrained Rules for the Use of Force that take into account civilian law constraints on the employment of force.<sup>79</sup> Military units may not understand the differences in the two sets of rules. Any change in use of force guidance must take into account the individual training of the military unit, as well as its ability to make the shift from a ROE-mindset to a civilian use of force mindset. This can be challenging, even under the best conditions.

Apart from the Insurrection Act, at least 14 statutes authorize direct participation in law enforcement under particular specified circumstances, such as the unauthorized possession or use of nuclear materials.<sup>80</sup>

Finally, without regard to the Posse Comitatus Act, according to DoD regulations the military (federal or state) possesses the authority to respond to any request for assistance from states or localities under a continuing “immediate response authority.”<sup>81</sup> Military forces may thus be used when time does not permit approval from higher authority under “imminently serious conditions.”<sup>82</sup>

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76. Craig McKinley & James Winnefeld, *The Right Way to Activate the National Guard*, ATLANTIC (Mar. 21 2020), <https://perma.cc/KN7D-6KT6>.

77. 32 U.S.C. §325 (a)(2) (2018).

78. CHMN. JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT AND RULES FOR USE OF FORCE (2005).

79. See, e.g., *Tennessee v. Garner*, 471 U.S. 1 (1985); JOINT DOCTRINE, *supra* note 12, at App. B.

80. LAW ENFORCEMENT, *supra* note 7, at 15-16; 18 U.S.C. §831(e)-(f) (2018).

81. CIVIL AUTHORITIES, *supra* note 1, at 4

82. *Id.*



Similarly, DoD regulations give federal military authorities emergency authority to quell civil disturbances in “extraordinary emergency circumstances.”<sup>83</sup>

In sum, the military’s state-based National Guard response to the coronavirus crisis is both legally supportable and wise policy, while intervention with federal military forces would present a variety of important legal and policy questions.

### *C. Martial Law and Military Pandemic Response: A Legitimate Concern?*

Thankfully, initial concerns about a massive federal quarantine and the need for martial law have abated.<sup>84</sup> Martial law occurs when the military assumes control until civil authority can be restored.<sup>85</sup> Despite its importance, any direct reference to “martial law” is absent from the Constitution’s text, and only a few court rulings provide guidance on its legal contours and when it may be lawfully imposed. Martial law is closely aligned with the public law of necessity, defined as actions to “safeguard the state against insurrection, riot, disorder, or public calamity.”<sup>86</sup> What constitutes necessity remains a question of fact in each case.<sup>87</sup>

In response to the coronavirus crisis, President Trump has repeatedly used martial language, declaring himself a “wartime president,” arguing that the coronavirus response necessitates a war-like footing.<sup>88</sup> I briefly address three central legal issues associated with the imposition of martial law below: (1) martial law’s relationship to habeas corpus, (2) governing federal authority to impose martial law, and (3) governing state authority to impose martial law. It seems clear that state governors actually possess greater legal power than the President to impose martial law or martial law-style restrictions within their states.

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83. *Id.* at 5. *See also Id.* at 16 (Emergency authority” under DoD directive is described as follows:

A federal military commander’s authority, in extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, [may] engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances because (1) such activities are necessary to prevent significant loss of life or wanton destruction of property that are necessary to restore governmental function and public order or (2) duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions.).

84. *See, e.g.,* Joseph Nunn, *Can the President Declare Martial Law in Response to Coronavirus?*, THE HILL (Apr. 4, 2020), <https://perma.cc/HA4A-XG3C>.

85. BLACK’S LAW DICTIONARY 1063 (Bryan A. Garner ed., 9th ed. 2009).

86. FREDERICK B. WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 16 (1940).

87. *Id.* “Martial law is the public right of self-defense against a danger threatening the order or the existence of the state. Where the ordinary authorities—the police—are unable to resist, or subdue a disturbance, additional force, military in nature may be applied. The extent of military force used depends in each instance upon the extent of the disturbance.” *Id.* at 16-17.

88. For a summary and discussion of martial law, its legal implications, and its historical use, see Stephen Dycus & William C. Banks, *Martial Law Would Sweep the Country into a Great Legal Unknown*, ATLANTIC (Mar. 27, 2020), <https://perma.cc/VBM8-R62T>.

### 1. Martial Law and the Writ of Habeas Corpus

The imposition of martial law is closely tied to the writ of habeas corpus and when it may be suspended.<sup>89</sup> The Constitution's Suspension Clause recognizes the existence of the right of habeas corpus:

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.<sup>90</sup>

Federal case law addressing the relationship between martial law and habeas corpus mostly dates from the Civil War-era. At the outbreak of the Civil War in 1861, President Lincoln authorized General Winfield Scott—at the time the head of the Union military—to suspend habeas corpus on any “military line” between Philadelphia and Washington.<sup>91</sup> The military commander in Maryland suspended habeas corpus there in response to threatening Confederate activity. Immediately prior to the habeas suspension, Maryland legislators voted against seceding from the Union, but southern sentiment in the state remained strong. A Baltimore mob attacked Union troop transports moving through Maryland, raising tensions between the military, federal government, and the state.

John Merryman, a Baltimore farmer and militia member, was arrested by Army Brigadier General William H. Keim on charges of treason following the habeas suspension. While Merryman was held at Fort McHenry, Chief Justice Roger B. Taney, “riding circuit” in the Maryland federal court, ordered the commander to bring Merryman before the court and show cause for his arrest. The commander refused, citing the suspension of the writ of habeas corpus authorized by the President.<sup>92</sup> The issue before Chief Justice Taney was not *whether* the writ could be suspended, but rather *who* had the authority to suspend it—Congress or the President?<sup>93</sup>

In *Ex parte Merryman*, Taney found “no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power.”<sup>94</sup> After all, the Suspension Clause is found in Article I, not Article II. He referred to the Declaration of Independence in his opinion, noting that George III's efforts to “render the Military independent of

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89. While it is beyond the scope of this article to address all the legal and historical issues associated with habeas corpus, historian James McPherson has described the writ as “an ancient Anglo-American protection against arbitrary arrest and detention that required an arrested person to be brought before a court to decide the legality of his detention or imprisonment.” JAMES M. MCPHERSON, *TRIED BY WAR: ABRAHAM LINCOLN AS COMMANDER IN CHIEF* 27 (2008).

90. U.S. CONST. art. I, §9, cl. 2.

91. MCPHERSON, *supra* note 89, at 27-28.

92. For a discussion of the historical facts and legal issues in the suspension of habeas corpus in Maryland, *see id.* at 27-30.

93. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

94. *Id.* at 149.

and superior to the Civil power” was one of the justifications for dissolving the colonies’ political allegiance to the Crown.<sup>95</sup>

Later in the Civil War, President Lincoln declared martial law for “rebels and insurgents,” ordering their trial by court-martial or military commission, rather than by a civilian court, and suspending the writ of habeas corpus for all persons held in military custody.<sup>96</sup> President Lincoln’s suspension of the writ and military trial of a civilian was struck down by the Supreme Court in one case, however. In 1866, the Court decided *Ex parte Milligan*, ruling that the President was bound by congressional limits in denying access to the writ for a Southern sympathizer sentenced by a military commission to death for insurrection and violation of the laws of war.<sup>97</sup> Because those limits were not observed, the Court ruled that the military commission lacked jurisdiction to try Milligan and ordered his release. The Court also rejected the argument that a military trial was justified by the “laws and usages of war,” as war never existed in Indiana, where Milligan was arrested, and where citizens “upheld the authority of the government,” and the courts were “open and their process unobstructed.”<sup>98</sup>

## 2. Federal Authority to Impose Martial Law

*Milligan* also rejected the assertion that “martial law cover[ed] with its broad mantle the proceedings of this military commission.”<sup>99</sup> The Court then outlined in dicta most of what we now know about the circumstances that would justify a declaration of martial law. For martial law to be invoked, the Court stated, the civilian courts must actually be closed during a “foreign invasion or civil war . . . where war really prevails . . . [and] there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society.”<sup>100</sup> In other words, if martial law were justified, the courts would have to have been closed by foreign invasion or civil war, and the writ of habeas corpus would necessarily be unavailable. But martial law could not be used as an excuse to close the courts or to suspend the writ.

In only one instance has Congress sought to authorize the imposition of martial law.<sup>101</sup> Whether Congress could limit the authority of the President or military commanders to declare martial law is unclear. So is the precise scope of the President’s or a commander’s authority once martial law is appropriately declared.

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95. *Id.* at 152 n.3.

96. Proclamation No. 94, 13 Stat. 730 (Sept. 24, 1862) (ordering that “the writ of *habeas corpus* is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by the sentence of any court-martial or military commission.”). The Statutes at Large designate the document as Proclamation No. 1.

97. *Ex parte Milligan*, 71 U.S. 2 (1866).

98. *Id.* at 76.

99. *Id.*

100. *Id.* at 80.

101. Hawaii Organic Act, ch. 339, §67, 31 Stat. 141, 153 (1900).

Martial law was declared by the governor of Hawaii at the beginning of World War II pursuant to an express congressional authorization.<sup>102</sup> But in *Duncan v. Kahanamoku*, the Supreme Court ruled narrowly that the governing statute did not enable military trials of civilians.<sup>103</sup> We are ultimately left with only very limited legal guidance to indicate when the President or a military commander may invoke martial law, and no law at all to say what rules would apply once martial law was properly invoked.

### 3. State and Localized Authority to Impose Martial Law

Finally, under the Tenth Amendment, states possess broad police powers that could encompass martial law imposition within their respective states.<sup>104</sup> State and local martial law declarations were once quite common in the United States. By one estimate, states, cities, and counties imposed martial law 70 times in the United States between 1857 and 1945.<sup>105</sup> This occurred for a variety of reasons, including to quell civil unrest or to break strikes at the behest of business interests. Martial law was last declared by a state in 1966, when the California governor did so to suppress civil unrest in San Francisco following the shooting of a Black teenager by a white police officer.<sup>106</sup>

In sum, states have declared martial law more often than the federal government, although such declarations are disfavored in modern times. States have the military tools at their immediate disposal to impose martial law if the coronavirus crisis requires it, but so far none has done so. Instead, 50 states have activated their National Guards, who continue to operate under state authorities, unencumbered by the PCA's prohibition on enforcing the law.

#### *D. Judicial Review of Domestic Military Use*

Courts have struggled to determine when, where, and how the military may be used domestically. The PCA is a criminal statute, but there have been no convictions under it since its passage in 1878. Indeed, the PCA was largely forgotten by the courts until the mid-twentieth century.

The bulk of the case law since then has addressed two issues. First, a series of cases growing out the 1973 Wounded Knee uprising tested the limits of the ability of federal military forces to interact with civilians without violating the PCA prohibition. In decisions highly relevant to the current COVID-19 crisis, courts ruled that military personnel must not engage in activities that are “regulatory, proscriptive, or compulsory in nature,”<sup>107</sup> that involve “direct, active” use of the military in civil law enforcement,<sup>108</sup> or that “pervade[] the activities” of civil law

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102. *Id.*

103. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

104. U.S. CONST. amend. X.

105. *See Nunn, supra* note 84.

106. *See id.*

107. *United States v. Casper*, 541 F.2d 1275, 1278 (8th Cir. 1976) (per curiam).

108. *United States v. Red Feather*, 392 F. Supp. 916, 923 (D.S.D. 1975).

enforcement officers.<sup>109</sup> These criteria have since been incorporated into DoD doctrine for military support of civilian law enforcement.<sup>110</sup> One court held that intelligence collection or seizures by troops would be unreasonable under the Fourth Amendment if they violated these criteria, and thus the PCA.<sup>111</sup>

Second, innovative criminal defense attorneys have sought to exclude evidence collected by military personnel in violation of the PCA. Their efforts have been largely unsuccessful.<sup>112</sup>

Courts have not yet addressed the scope of the President's authority to use federal military forces in responding to a pandemic under the Public Health Safety Act, Stafford Act, or National Emergencies Act. But what if a President sought to go beyond these delegated statutory authorities by invoking a generalized Article II or inherent Commander-in-Chief power?<sup>113</sup> The cases raise a host of questions about the scope of such powers.

In April 2020, President Trump intimated that in order to protect the economy and various individual liberty interests, he was going to take steps to override state stay-at-home orders.<sup>114</sup> He did not say that he would use federal military forces to do so. But if he did, he would first have to confront a core constitutional problem. Under the Tenth Amendment, states retain police powers within their respective states. Such authority is "reserved to the States" under the Tenth Amendment.<sup>115</sup>

To be sure, a presidential order might assert as its basis the protection of interstate travel under the Commerce Clause. But Congress has already exercised its Commerce Clause authority to address public health emergencies via the PHSA and other laws, and its statutes contemplate federal augmentation, but not suppression, of state measures to control the spread of infectious diseases. And while Congress has not expressly prohibited federal suppression of such state measures, courts might nevertheless analyze any such separation of powers struggle through the lens of *Youngstown Sheet & Tube Co. v. Sawyer*, the seminal separation of powers case addressing the President's authority to seize steel mills at the height of the Korean War.<sup>116</sup> If the President sought to expand or override statutorily delegated authorities, he would have to "rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>117</sup>

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109. *United States v. Jaramillo*, 380 F. Supp. 1375, 1379 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

110. *See generally* LAW ENFORCEMENT, *supra* note 7.

111. *Bissonette v. Haig*, 776 F.2d 1384, *aff'd*, 800 F.2d 812 (8th Cir. 1986) (en banc), *aff'd*, 485 U.S. 264 (1988).

112. *See, e.g.*, *Hayes v. Hawes*, 921 F.2d 100, 104 (7th Cir. 1990).

113. The President possesses executive authority via the vesting clause and has additional authorities under the Take Care clause. U.S. CONST. art. II, §1, cl. 1 & §3. A full examination of the scope of these authorities is beyond the scope of this article.

114. Lisa Lerer & Kenneth Vogel, *Trump Administration Signals Support for Allies' Fight Against Virus Orders*, N.Y. Times (Apr. 29, 2020), <https://perma.cc/J32X-P8PB>.

115. U.S. CONST. amend. X.

116. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

117. *Id.* at 637 (Jackson, J., concurring).

Any effort by the President to use troops to override state stay-at-home orders would be even more problematic. In his famous concurring opinion in *Youngstown*, Justice Jackson made clear that he would “indulge the widest latitude of interpretation to sustain [the Commander in Chief’s] exclusive function to command the instruments of national force . . . [when] *turned against the outside world* for the security of our society.”<sup>118</sup> He would allow no such indulgence when those same powers were applied inward, however. Courts today might thus balk at the President’s use of federal military forces to overcome states’ efforts to protect their citizens during the COVID-19 pandemic.

### III. MILITARY AS RELIEF PROVIDER: SUPPORT TO CIVIL AUTHORITIES

Outside the law enforcement context, the U.S. armed forces provide emergency logistical and humanitarian services, and relief supplies. This domestic humanitarian assistance/disaster response (HADR) mission is inextricably linked to DoD doctrine called Defense Support to Civil Authorities (DSCA).<sup>119</sup> Under the National Defense Strategy, DSCA is a primary mission for the military.<sup>120</sup> Unlike the law enforcement mission—which is informed by the Constitution, statutes, and regulations—the contours of the DSCA mission are largely promulgated via military instructions, directives, and doctrine. DoD defines the mission broadly:

Support provided by US Federal military forces, Department of Defense civilians, Department of Defense contract personnel, Department of Defense component assets, and National Guard forces (when the Secretary of Defense, in coordination with the governors of the affected states, elects and requests to use those forces in Title 32, United States Code, status) in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events.<sup>121</sup>

So DSCA encompasses a large swath of activities and personnel (federal, state, uniformed, civilian, and contract). Perhaps not surprisingly, there are far fewer restrictions governing what the military may do in providing emergency and humanitarian relief than in supporting law enforcement. When the military is actively taking part in relief operations, the real and perceived threat to civil liberties is substantially reduced. The military is a resource and logistical support provider, playing a *support* role to civil authorities. In this capacity, the military poses less risk of taking over civilian functions.<sup>122</sup>

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118. *Id.* (emphasis added).

119. *See* CIVIL AUTHORITIES, *supra* note 1. To be sure, “Defense support to civil authorities” also includes law enforcement support, but the focus here is on the military’s ability to provide relief supplies.

120. *Id.*

121. JOINT CHIEFS OF STAFF, JOINT PUB. NO. 1-02, DO D DICTIONARY OF MILITARY AND ASSOCIATED TERMS 62 (2020).

122. JOINT DOCTRINE, *supra* note 12, at I-5.

The military's response to the coronavirus crisis—whether conducted by Title 10 or non-federalized National Guard forces—has so far centered on supporting state and local authorities by various means. The numbers bear this out. DoD has provided 57,500 DoD personnel, 1,100 medical personnel, twenty million N95 masks, eight million test swabs, and 2,000 ventilators.<sup>123</sup> The Corps of Engineers built a temporary hospital at the Javits Center in New York City, and the U.S. Navy hospital ships *Comfort* and *Mercy* sailed to New York and Los Angeles, respectively.

Health services is a core DSCA mission, with the goal “to restore essential health services in collaboration with the state and local health authorities.”<sup>124</sup> In contrast to the limited role played by federal military forces in this crisis, the National Guard, acting under the command of state governors, can and should play a major part. The military response overall should continue to be federally supported, state-managed, and locally executed.

#### CONCLUSION

The U.S. armed forces' primary mission is to fight and win the nation's wars. For the last century and a half, these have been fought abroad. The September 11 attacks on the Pentagon and World Trade Center dramatically changed the war-fighting framework to encompass both extraterritorial and domestic dimensions. Terrorists, non-state actors, and cyber threats do not respect neat geographic distinctions, and the military's mission can change rapidly in response to these and even newer new threats. The U.S. military thus maintains a critical role in both homeland defense and homeland security.<sup>125</sup>

The military's response, both state and federal, to the coronavirus pandemic thus far highlights the continuing durability of longstanding notions of civilian control of the military and the military's ability to provide aid. It has largely side-stepped concerns that domestic military operations pose a threat to civil liberties. The state-based National Guard has served as the military face of the response up to this point. While the military's response has not been perfect, criticism of it has centered more on bureaucratic struggles than on heavy-handed military enforcement. This bodes well for future military roles in domestic operations and responses to emergencies, whether pandemics, natural disasters, or climate change-exacerbated wildfires.

The military's coronavirus response has thus been measured. While earlier concerns about a military role in enforcing national quarantines or martial law

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123. See *COVID Response*, *supra* note 6.

124. JOINT DOCTRINE, *supra* note 12, at xii.

125. DoD defines “homeland defense” as “the protection of U.S. sovereignty, territory, domestic population, and critical defense infrastructure against external threats and aggression, or other threats directed by the President.” JOINT CHIEFS OF STAFF, JOINT PUB. NO. 3-27, HOMELAND DEFENSE vii (July 29, 2013).

have abated, unrest related to George Floyd's death has continued, keeping the issue of the military's role in domestic operations in the public consciousness. Longstanding constitutional norms and historical conceptions of civilian control of the military have so far prevailed. Nevertheless, the current crisis presents an opportunity to reexamine the laws, policies, and regulations governing domestic military operations, allowing—or forcing—us to consider afresh the armed forces' role in domestic affairs.



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