

## The Breakfast Club

### Constitutional Minute for 14 June 2025

## Insurrections, Posses, and Martial Law; Using the Military as Law Enforcement

Happy [Founding] Father's Day!

The new Constitution went into operation on 4 March 1789 with George Washington's former aide and hero of the Battle of Yorktown, Alexander Hamilton as Secretary of the Treasury. Hamilton's first priority was to set the new union's finances in order and for that he desperately needed funds to pay down the Revolutionary War debt.

In 1791, Hamilton proposed an excise tax on whiskey, which was being produced in abundance from corn grown in western Pennsylvania. Pennsylvania farmers and distillers alike refused to pay the tax, viewing it as an unfair burden on their livelihood, and set off what is commonly known today as the Whiskey Rebellion. In response Congress passed the Calling Forth Act of 1792, which allowed for federalization of state militias in the case of ... well, rebellion.

President Washington ordered the mobilization of 12,950 militia troops, and Hamilton asked Washington give him command. Washington relented. Upon the arrival of the force in Western Pennsylvania, the infant rebellion quickly evaporated.

On March 3, 1807, the first Insurrection Act replaced the Calling Forth Act and a year later President Jefferson invoked it in response to repeated violations of the new Embargo Act. Since then, there have been two modifications to the Insurrection Act. In early 1861, a new section was added allowing the federal government to use the militia and armed forces *against the will of the state government* in the case of "rebellion against the authority of the government of the United States;" President Abraham Lincoln promptly invoked the Act in April 1861 at the outset of the Civil War.

The Third Enforcement Act (aka [The Ku Klux Klan Act](#)) in April 1871, added a section aimed at protecting Black Americans from attacks by the Ku Klux Klan, just in time for President Grant's October invocation of the Act in response to a Klan insurgency across the South in October of that year. Grant would use the Act against the Klan again in 1873, three times in 1874 and once in 1876 to quell disturbances in the South. Grant's six invocations of the Insurrection Act set a record that stands today.

Since the Civil War period, the military, in the form of both federal troops and state national guards, has been used numerous times to enforce federal law, notably in 1957 to protect black students integrating southern schools and in the 1992 response to the Rodney King riots. In 2020, President Trump considered invoking the Act in response to the George Floyd riots but chose not to. One of the Executive Orders Trump signed on January 20, 2025, (Proclamation 10886) asked the Secretaries of Defense and Homeland Security to report on whether they thought use of the Insurrection Act would be justified in defending the southern border.

[Wikipedia](#) lists thirty times the Insurrection Act has been invoked in our history.

I take issue with the Insurrection Act; it is way too broadly worded. Too many events can be called an Insurrection and thus too many people could be called "insurrectionists." Here's what qualifies as "insurrection:"

- unlawful obstructions.
- combinations, or assemblages (whatever those are).
- rebellion against the authority of the United States. (what constitutes "rebellion?")
- domestic violence.
- unlawful combination or conspiracy.
- hindering the execution of the laws in a State, or of the United States.
- depriving people of a right, privilege, immunity, or protection named in the Constitution if the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity.
- Opposing or obstructing the execution of the laws of the United States.
- impeding the course of justice under those laws.

You see the problem? That's a lot of "insurrection." and much of it is so ambiguously worded as to be unintelligible -- and probably unenforceable.

I propose Congress tighten this law down, significantly. But Congress is never going to; our useless Congress benefits from the ambiguity. Congressmen can call someone an insurrectionist for committing "domestic violence, or "opposing the execution of the laws of the United States." Whopee! What is missing from the definition is the only action I think qualifies as "insurrection:" trying to overthrow the government of the United States. "Hindering the execution of the laws" might qualify, but on a significantly lower level. Call your Congressman if you agree with me.

The [Posse Comitatus Act](#) is 71 years younger than the Insurrection Act. Passed in 1878 after the end of Reconstruction, and after Southern Democrats regained a slim majority (52%) in the House of Representatives. With President Grant's frequent use of the

Insurrection Act, fresh in their minds, “Congress sought to ensure that the federal military would not be used to intervene in the establishment of Jim Crow in the former Confederacy.”<sup>i</sup>

The Posse Comitatus Act (18 U.S.Code Section 1385) contains just one sentence:

“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<sup>ii</sup> 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.”

In hindsight, it seems strange that Congress would pass the Posse Comitatus Act and yet leave the Insurrection Act in place; invocation of the Insurrection Act, which is easy for a President to declare, overrides the Posse Comitatus Act. Perhaps the feeling was that the mere passing of Jim Crow laws would not cause a President to declare an insurrection.

Returning to the Insurrection Act:

Section 252 ([10 U.S. Code Chapter 13](#)) states:

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

Section 253 consists of two parts. The first allows the president to use the military within a state to suppress “any insurrection, domestic violence, unlawful combination, or conspiracy” that “so hinders the execution of the laws” that any portion of the state’s inhabitants are deprived of a constitutional right and state authorities are unable or unwilling to protect that right. Presidents Eisenhower and Kennedy both invoked this section to deploy troops to desegregate schools in the South after the Supreme Court’s *Brown v. Board of Education* decision.

The second part allows the president to deploy troops to suppress “any insurrection, domestic violence, unlawful combination, or conspiracy” in a state that “opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.” This provision baffles the Left; they argue it could be interpreted to authorize the use of military force “against any two people conspiring to break federal law.”<sup>iii</sup>

It does not appear as of this writing that President Trump has yet invoked the Insurrection Act; but he may not need to: under [10 U.S. Code §12406](#) the president may order national guardsmen into service in the event of a “rebellion or danger of a rebellion against the authority of the government of the United States.” Significantly, without a companion invocation of the Insurrection Act, the Guardsmen could only be used to protect federal property and interests, and could not make arrests or carry out other law enforcement actions.

In other news, Governor Gavin Newsom’s request for a Temporary Restraining Order against the President for federalizing the California National Guard without his permission was rejected by Judge Richard Breyer, with whom it was filed; instead, a hearing was conducted on 12 June. Judge Breyer [ruled](#) that Trump’s calling up the California National Guard was illegal, that Trump did not issue his callup “through the Governor of California,” as required by law” (even though Hegseth’s directive to the California Attorney General was worded “through the Governor”). The judge cites the 1827 precedent of *Milton v Mott* but basically says the President’s discretion in deciding whether there is an emergency situation (or a “rebellion” against government authority) is still reviewable by the courts. Perhaps the judge’s most lamentable and ludicrous statements in the ruling is that: “it is not the federal government’s place in our constitutional system to take over a state’s police power whenever it is dissatisfied with how vigorously or quickly the state is enforcing its own laws.” In other words, the safety of ICE/CBP personnel in California is entirely up to California the federal government cannot call up the California National Guard to assist with the matter. The 9<sup>th</sup> Circuit temporarily stayed the judge’s command that Trump return the California Guard to the control of the Governor and scheduled a hearing for 17 June. I fully expect the 9<sup>th</sup> Circuit to reverse at least some of this terrible and biased “ruling.” More to come on this next week.

The last subject I’ll address in this already-too-long Constitutional Minute is:

### [Martial Law.](#)

On June 12, 1775, British General Thomas Gage enacted martial law in the Massachusetts Colony; any person helping the Americans would be considered a traitor and rebel. By doing so Gage established himself as the Chief Law Enforcement Officer (CLEO) of the region. The laws to be enforced, however, were not the laws of Massachusetts but rather the law as established by General Gage. This was not the first time American colonies had been under martial law, nor would it be the last.

The Virginia Colony had been under martial law from 1610 to 1619, the year the first elected representative body in the American colonies was established. The 1609 winter in Virginia had been particularly perilous, earning the moniker “the Starving Time.” A military

Governor, [Thomas West, baron De La Warr](#), was assigned to get the colony back on its feet. When De La Warr became unable to sail at the appointed date, [Sir Thomas Gates](#), was dispatched in his place as his Deputy and interim governor, leading a large re-supply fleet. Unfortunately, Gates' flagship was severely damaged in a storm enroute and barely limped into Bermuda. When Gates finally arrived in Virginia almost a year later, in May 1610, his aide William Strachey began compiling a list of the laws Gates thought prudent to bring order to the colony. The assemblage of laws, which would be periodically added to until 1612, became known as the "[Lawes Divine, Morall and Martiall](#), etc." Some examples of these laws:

- That no man blaspheme God's holy name upon pain of death...
- Twice a working day, every man and woman, upon the first tolling of the Bell, shall go to the Church to hear divine Service upon pain of losing his or her day's allowance for the first omission, for the second to be whipped, and for the third to be condemned to the Gallies for six Months.
- No man shall rifle or despoil, by force or violence, take away anything from any Indian coming to trade, or otherwise, upon pain of death.

The laws "martiall" applied only to those assigned to the protection of the colony. Today it would be called the "Uniform Code of Military Justice" (UCMJ). One example:

- Whosoever shall give offence to the Indians in that nature, which truly examined, shall found to have been cause of breach of their league, and friendship, which with so great travail, desire, and circumspection, we have or shall at any time obtain from them without commission so to do, from him that has authority for the same, shall be punished with death

Gates' initial efforts to get the colony on its feet were not successful. Within a few weeks, he decided that the few settlers remaining in the colony could not sustain themselves. He ordered the motley crew to pack up, board Gates' single ship and head back to England. As Gates' ship entered the Chesapeake Bay it was met by an arriving expedition, comprised of several ships, of the original governor of the colony, Lord De La Warr, who convinced the settlers to return to "Jamestowne."

In 1867, a series of Military Reconstruction Acts divided the former Confederate states into five military districts, each governed by a Union general. When the legislatures in southern states balked at ratifying the 14<sup>th</sup> Amendment, Congress announced they would remain under martial law until they ratified. On receiving this notification, ratification resumed.

Enough history, back to the subject at hand.

The study of the subject of martial law is hampered by the lack of an accepted definition; the imposition of rule by the military in place of rule by civil government seems to be the standard. Beyond that, the specifics of what martial law would look like to the citizen becomes a bit blurry.

“Martial law is justified when civilian authority has ceased to function, is completely absent, *or has become ineffective*.”<sup>iv</sup> One could argue that Mayor Karen Bass of Los Angeles has amply displayed her ineffectiveness and I’m sure Trump continues to watch the situation there carefully. But a declaration of martial law is complicated and not to be taken lightly. An organizational structure for command and control must be ready to implement. Personnel, logistics, and communications must all be in place and in numbers sufficient to actually quell disturbances. How many soldiers would be needed to control widespread unrest in the City of Los Angeles? Given the complexity, I think a declaration of martial law anytime soon is out of the question; Trump should let the people of California decide whether their present government is up to the task of governing and take appropriate action only if they decide otherwise.

Stay tuned.

For further reading:

- [The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law](#), Congressional Research Service Report R42659.8.
- [Defense Primer: Legal Authorities for the Use of Military Forces](#), Congressional Research Service Report IF10539.12.

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Previous Constitutional Minutes can be accessed [here](#).

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i The Posse Comitatus Act Explained, by Joseph Nunn, accessed 10 June 25 at: <https://www.brennancenter.org/our-work/research-reports/posse-comitatus-act-explained>.

ii A [different statute](#) extends the same restriction to the Navy and Marine Corps. A final one to the newly create Space Force.

iii The Posse Comitatus Act Explained.

iv Martial Law in Times of Civil Disorder, by E W Killam, *Law and Order* Volume: 37 Issue: 9 Dated: (September 1989) Pages: 44-47, accessed on 11 June 2025, at <https://www.ojp.gov/ncjrs/virtual-library/abstracts/martial-law-times-civil-disorder>.