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PRESIDENTIAL USE OF TROOPS TO EXECUTE THE LAWS: A BRIEF HISTORY

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On September 23, 1957, President Dwight D. Eisenhower issued a Proclamation reciting that "certain persons in . . . Arkansas . . . have wilfully obstructed the enforcement of orders of the United States District Court for the Eastern District of Arkansas with respect to matters relating to enrollment and attendance" at Central High School in Little Rock. The President stated in the proclamation that "such wilful obstruction of justice . . . makes it impracticable to enforce such laws by the ordinary course of judicial proceedings" and he commanded "all persons engaged in such obstruction of justice to cease and desist therefrom, and to disperse forthwith."[1]

The following day the President issued an order directing the Secretary of Defense to take all appropriate steps to enforce any district court orders of the type covered by the Proclamation and authorized the Secretary of Defense to use the Arkansas National Guard or such parts of "the armed forces of the United States as he may deem necessary."[2] The Proclamation and the Executive Order recited as authority "the Constitution of the United States" and title 10, *United State Code,* sections 332, 333, and 334.[3] The purpose of this Article is to discuss

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[1] Proclamation No. 3204, 22 FED. REG. 7628 (1957).

[2] Exec. Order No. 10730, 22 FED. REG. 7628 (1957).

[3] "§ 332. 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 or Territory 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.

"§ 333. The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any 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 (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.

"§ 334. Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time." 1 STAT. 425 (1795), as amended, 10 U.S.C. §§ 332-34 (Supp. IV, 1957).

the legality of President Eisenhower's action in light of the above cited authorities.[4]

THE CONSTITUTIONAL PROVISIONS

The Constitution provides that "The Congress shall have Power To . . . . provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . . ."[5] It additionally provides that the President "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . ." and that "he . . . shall take Care that the Laws be faithfully executed . . . ."[6] The genesis of these provisions is an event that took place just prior to the Constitutional Convention of 1788, a farmers' revolt in Massachusetts under the leadership of Daniel Shays.

The New England states at the close of the Revolutionary War were in a depression. The fishing industry had been virtually destroyed. The shipping trade was in a languishing condition because of the wartime loss of many ships and because those remaining were prohibited by laws of England from pursuing their previous trade with the British colonies in the West Indies. The whaling industry which employed 150 vessels at the outbreak of the Revolutionary War was, at the opening of the peace, "reduced to the object of nineteen sails only."[7] Coinciding with the depressed economic conditions was an astronomical increase in debt, both public and private. The public debt of Massachusetts increased from approximately 100,000 pounds at the outbreak of the war to over 1,300,000 pounds by 1786. Private debts had accumulated in approximately the same ratio during the inflationary Revolutionary War period when the seldom paid soldier was forced to borrow for the support of his family. At the close of the Revolutionary War the state of Massachusetts levied high taxes to discharge the public debt; and the private creditor made demands upon the returned soldiers.[8] The

[4] Objections have been made to the legality of the President's action. These objections have taken four major forms. (1) The President is prohibited by the Constitution from sending troops into a state against the objections of the governor of that state (the situation presented in Arkansas); (2) Constitutional authority vested in the President to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 2, is limited to enactments of Congress and does not include decrees of a federal court; (3) The Posse Comitatus Act of 1878, 20 STAT. 152, 18 U.S.C. § 1385 (Supp. IV, 1957), makes it unlawful to employ any part of the Army for the purpose of executing the laws except as such employment may be expressly authorized by the Constitution or by act of Congress and there existed no express authorization to send the federal troops to Little Rock; and (4) the provision of the Civil Rights Act authorizing the President to employ the Armed Forces "to aid in the execution of judicial process" issued in Civil Rights cases, 17 STAT. 16 (1871), 42 U.S.C. § 1993 (1952), was expressly repealed in the 1957 Civil Rights Act Amendment, 71 STAT. 634, 42 U.S.C.A. § 1975a (Supp. 1957). These objections are discussed and supported in the 1957 September and November issues of *U.S. News & World Report.*

[5] U.S. CONST. art. I, § 8.

[6] U.S. CONST. art. II, §§ 2, 3.

[7] MINOT, HISTORY OF THE INSURRECTIONS IN MASSACHUSETTS 13 (1810).

[8] CURTIS, HISTORY OF THE CONSTITUTION OF THE UNITED STATES 266-69 (1854).

years 1785-1786 saw homesteads sold for the payment of debts, farm animals sold for the payment of lawyer's fees, and the farmer, his debts not yet satisfied, cast into debtors' prison.[9]

In 1786 some of the New England states passed legislation designed to aid the distressed debtor. Rhode Island issued half a million dollars in script for the payment of farm mortgages.[10] Vermont made farm produce, "at the value of their appraisal of men under oath," legal tender for purposes of paying farm mortgages. New Hampshire abolished imprisonment for debt.[11] The Massachusetts legislature, however, adjourned on the 8th of July, 1786, without enacting any legislation favoring the debtor. Remedial measures had passed the General Court, as the lower chamber was designated, but had failed in the Senate where qualifications of property ownership excluded all but the creditor class.[12]

The Massachusetts debtors were disappointed at the failure of the legislature to emulate the action taken in Rhode Island, Vermont, and New Hampshire. Conventions of delegates from townships were held in the western part of Massachusetts and petitions sent Governor Bowdoin requesting an emergency session of the legislature and the enactment of legislation to create "a bank of paper money . . . making it a tender in all payments, equal to silver and gold."[13] The conventions also requested Governor Bowdoin to halt the forthcoming sessions of the Court of Common Pleas, the court with jurisdiction over civil actions to collect tax and private debts, until the requested legislative session had opportunity to act on the grievances set forth in the petitions.[14]

The farmers decided to prevent the Court of Common Pleas from sitting until the Governor had opportunity to act on their petitions; so when the judges of the court arrived in Northampton on August 29th to begin the fall session, they were met with a line of bayonets barring their access to the court house, and presented with a petition requesting them to adjourn until "the resolves of the convention of this county can have an opportunity of having their grievances redressed by" the legislature. The court adjourned "without day"[15] and proceeded to Worcester County to hold its scheduled session on September 5th. Upon arrival the judges again found the court house filled with armed farmers who refused to let them in. The judges retired to a nearby tavern and opened court there; but access to all litigants was barred by the farmers, so the court adjourned to Athol, only to meet another band of armed

[9] TAYLOR, THE FARMERS' MOVEMENT 1620-1920, at 24 (1953).
[10] Note the provision in the Constitution authorizing the Congress to regulate the value of money. U.S. CONST. art. I, § 8.
[11] TAYLOR, *op. cit. supra* note 9, at 26-29.
[12] STARKEY, A LITTLE REBELLION 7-8 (1955).
[13] MINOT, *op. cit. supra* note 7, at 36-37.
[14] STARKEY, *op. cit. supra* note 12, at 8.
[15] *Id.* at 20-21.

farmers who presented a petition requesting the judges to hear no cases "except by consent of both parties."[16] The court then moved to Great Barrington where the armed farmers "not only prevented the sitting of the courts which were so obnoxious to them, but broke open the gaol, and liberated the prisoners. They also compelled three of the Judges of the Court of Common Pleas to sign an obligation that they would not act under their commissions until grievances were redressed."[17]

When Governor Bowdoin learned of these events, he called an emergency session of the legislature to meet on the 18th of October. Both chambers of the legislature shared an "abhorrence of the proceedings against the Judicial Courts"; but the lower chamber thought the best way to meet the situation was to eliminate the causes of the distress, while the upper chamber favored punitive action.[18] The legislature adjourned in the last days of November without enacting any conclusive legislation.

Throughout December county-wide conventions were held where petitions were addressed to Governor Bowdoin requesting a new legislative session; and the farmers continued to prevent the Court of Common Pleas from holding its scheduled sessions. Finally, in January, the Governor called forth the militia from the eastern counties and ordered the Commanding General "to protect the Judicial Court . . . if the justices of the said courts should request your aid; to assist the circuit magistrates in executing the laws . . ." and to put down the insurrection.[19] The militia, amounting to 4,400 rank and file, marched off and routed the insurrectionists. Daniel Shays and other leaders of the rebellion fled the state, and a general pardon was issued for all others with but two exceptions.[20] That spring Governor Bowdoin was swept out of office in an election which saw many of those who had actively participated in the rebellion elected to the legislature.[21] The rebellion was over. However, the repercussions of the rebellion played a vital role in the formation of our national government.

In the year preceding the rebellion all the states had been invited to send delegates to a convention where the Articles of Confederation could be examined in light of the changing times. Only five states agreed to send delegates, and George Washington refused to leave his retirement although requested by the Virginia legislature to lead its delegation to the proposed convention. Immediately after the Massachusetts rebellion, another invitation was sent to the states, and this time all except Rhode Island (whose legislature had sympathized with the side of the Massachusetts rebels) agreed to send delegates to what is now known as the

[16] *Id.* at 40.
[17] MINOT, *op. cit. supra* note 13, at 45.
[18] *Id.* at 52-53.
[19] *Id.* at 99.
[20] STARKEY, *op. cit. supra note* 14, at 216.
[21] *Id.* at 190.

Constitutional Convention. This time George Washington agreed to preside as chairman.[22] Additionally, and more appropriate for purposes of this Article, the Shays Rebellion in Massachusetts was referred to constantly throughout the drafting of the Constitution and throughout the debate on its ratification as demonstrating the need for congressional and presidential authority to call forth the armed forces to execute the laws.[23]

The procedure adopted by the Constitutional Convention that met in Philadelphia in 1787 was to consider the proposals submitted by the delegates and to send the approved proposals to a Committee on Style for rewriting. Several delegates proposed that Congress have power "to call forth the aid of the militia in order to execute the laws of the Union" and these proposals were approved and sent to the Committee on Style without dissent or debate. The proposal that the President be given power "to execute the national laws" was debated and adopted over protest. Mr. Madison of Virginia introduced an amendment providing that the words "not legislative nor judiciary in their nature" be added to the phrase giving the President authority "to execute the laws." This amendment was defeated by a vote of seven states to three.[24] Thus, the framers of the Constitution expressly rejected a proposal that the President's power to execute the law not be extended to the "judiciary laws."

The Constitution was completed on September 17, 1787, and presented to the states for ratification. During the ratification debate "the inordinate pride of State importance" prompted an argument against the proposed Constitution on the grounds that it would authorize the use of force "against delinquent members." Those favoring the Constitution admitted that the proposed national government would be granted this power, but said that without it, the United States would "afford the extraordinary spectacle of a Government destitute even of . . . power to enforce the execution of its own laws."[25] Additionally, those who opposed the Constitution sought "to cast an odium upon the power of calling forth the militia to execute the laws of the Union" by stating that the militia would be used as a matter of course, as "there is nowhere any provision in the proposed Constitution for calling out the posse comitatus to assist the magistrate in the execution of his duty." Those who supported the Constitution admitted that the militia could be called forth to assist the magistrate but argued that this power would not be exercised often as the congressional right "to pass all laws necessary and proper to execute its declared powers" included the right to re-

[22] CURTIS, *op. cit. supra* note 8, at 273-74, 401-02.
[23] STARKEY, *op. cit. supra* note 20, at 242.
[24] 5 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 141-42 (1845).
[25] THE FEDERALIST No. 21, at 133 (University ed. 1893) (Hamilton).

quire "the assistance of the citizens to the officers who have been entrusted with the execution of those laws."[26] Thus it appears that those who ratified the Constitution, as well as those who signed it, did so with full knowledge that the power to "execute the laws" authorized the federal government to call forth the militia to assist the magistrate in the execution of his duty against "delinquent" states.

CONGRESSIONAL USE OF ITS CONSTITUTIONAL POWER TO PROVIDE FOR CALLING FORTH THE MILITIA

In addition to the Constitution, President Eisenhower based his action on a statute initially requested by George Washington, amended at the request of Thomas Jefferson, again amended at the request of Abraham Lincoln, and most recently re-enacted without material alteration in 1956.

THE GEORGE WASHINGTON STATUTES OF 1792 AND 1795[27]

The Constitution[28] authorizes the Congress to "provide for calling forth the Militia to execute the Laws of the Union." Congress first exercised this authority in 1792 with a law authorizing the President to call forth the militia "whenever the laws of the United States shall be opposed, or the execution thereof obstructed."[29] This act of 1792 expired by its terms at the end of three years, and upon its expiration in 1795, Congress enacted a substantially identical permanent law.[30] The motivating factor behind these two George Washington statutes was the Whiskey Rebellion in the four western counties of Pennsylvania.

In March of 1791 Congress passed a law levying a tax on the dis-

[26] THE FEDERALIST No. 35, at 232-33 (University ed. 1893) (Hamilton). The *posse comitatus*, a term which is often used in this Article, is the entire population of a county above the age of fifteen which a sheriff may summon to his assistance in executing judicial decrees, keeping the peace, arresting felons, etc. BLACK, LAW DICTIONARY (4th ed. 1951).

[27] This term is used for the purpose of clarity in the subsequent discussion.

[28] U.S. CONST. art I, § 8.

[29] "§ 2. And be it further enacted, That whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary courts of judicial proceedings, or by the powers vested in the marshals by this act, the same being notified to the President of the United States, by an associate justice or the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed. And if the militia of a state, where such combinations may happen, shall refuse, or be insufficient to suppress the same, it shall be lawful for the President . . . to call forth and employ such numbers of the militia of any other state or states most convenient thereto, as may be necessary, and the use of militia, so to be called forth, may be continued, if necessary, until the expiration of thirty days after the commencement of the ensuing session." Act of May 2, 1792, c. 28, 1 STAT. 264.

[30] 1 STAT. 424 (1795), as amended, 10 U.S.C. §§ 332-34 (Supp. IV, 1957). Some changes were made, the effect of which was to give the President a freer hand. Thus, the requirement of the 1792 act requiring notice by the judiciary to the President was eliminated, and the President was given authority to call the militia of any state without having to call first the militia of the state involved.

tillation of grain into whiskey.[31] This tax, for all practical purposes, was a direct tax on the income of the western farmer who, for lack of a local market or adequate transport across the Allegheny mountains, was required to reduce his bulky grain to portable form and send the resulting whiskey across the mountains for sale. As no other group or class was saddled with an "income tax," the western farmer believed that this act violated at least the spirit of the constitutional provision that all taxes be uniform.[32] The western farmer also objected to existing provisions that violation of this law be tried in the nearest federal court (located in Philadelphia). This, it was believed, violated the spirit of the sixth amendment, which guaranteed trial by a jury of the district wherein the alleged crimes had been committed.[33] The Pennsylvania assembly had enacted laws taxing whiskey in 1694, 1728, 1744, and 1772, and each of them was repealed because of popular protest.[34] The farmer decided to oppose this newest taxing authority.

Opposition at first was peaceful. Throughout the summer months of 1791 conventions were called where the delegates drafted petitions to Congress asking for repeal of the law. Local associations of farmers were formed who pledged mutual non-compliance with the law until Congress had opportunity to act on their petitions. Placards were posted, signed by "Tom the Tinker," urging contempt and boycott of those who paid the tax. When it was perceived that mere negative modes of opposition might prove ineffectual, local groups, known as "Whiskey Boys," began to threaten those who were likely to comply. The next step was physical interference with those whose duty it was to collect the tax. On the 6th of September, 1791, a party of armed and disguised men waylaid one Robert Johnson, collector of revenue for the counties of Allegheny and Washington, "seized, tarred and feathered him, cut off his hair, and deprived him of his horse, obliging him to travel on foot a considerable distance in that mortifying and painful situation."[35]

Complaint was made to the United States court sitting in Philadelphia, and warrants issued for the arrest of three persons who were thought to have participated in the offense. Deputy Marshal Joseph Fox was chosen to execute them. He went to Pittsburgh (the center of the western counties), where he found so much popular sentiment against the tax laws that, fearing for his own safety, he employed a private messenger to serve the warrants. This person "was seized, whipped, tarred, and feathered; and after having his money, and horse

[31] Act of Mar. 3, 1791, c. 15, 1 STAT. 199, 203.
[32] U.S. CONST. art. I, § 8.
[33] 1796-1797: 6 ANNALS OF CONG. 2803 (1849) (report of the commissioners appointed to confer with the citizens in the western counties of Pennsylvania).
[34] TAYLOR, *op. cit. supra* note 9, at 46.
[35] 1796-1797: 6 ANNALS OF CONG. 2852 (1849) (report of Secretary-Treasurer Alexander Hamilton on opposition to the excise law).

taken from him, was blindfolded and tied in the woods, in which condition he remained for five hours."[36]

The Congress that next convened in the winter of 1791-1792 turned its attention to ways and means of enforcing the tax on whiskey. To reduce the opposition and make the law more palatable to the farmer, Congress reduced the amount of the tax[37] and remitted the penalties previously accrued.[38] To ensure that the amended tax would be collected, Congress increased the compensation and number of the tax officials,[39] regulated the serving of process issued by the United States courts,[40] and, more important for purposes of this Article, authorized the President to call forth the militia to aid in the execution of the laws.[41] Alexander Hamilton pointed out that at the time of the attack on the federal marshal in September of 1791 "the Legislature of the United States had not yet organized the means by which the Executive could come in aid of the Judiciary, when found incompetent in the execution of the laws."[42] None of these statutes had the desired effect.

In the summer of 1792 the tax officials went to the four western counties, but were unable to secure office space from which to carry on their business. An army captain named William Faulkner rented his house to a tax official, but shortly thereafter was encountered by a number of people "who reproached him with letting his house for an office of inspection, drew a knife upon him, threatened to scalp him, tar and feather him, and reduce his house and property to ashes, if he did not solemnly promise to prevent the further use of his house for an office. Captain Faulkner was induced to make the promise exacted; and, in consequence of the circumstances, wrote a letter to the inspector . . . countermanding the permission for using his house . . . ."[43]

Throughout the summer of 1792 another series of farmer's meetings was held, committees of correspondence appointed, petitions sent to Congress requesting the total repeal of the tax law, and all citizens urged to refrain from paying the tax or having social intercourse or dealings with those who did. Bands of "Whiskey Boys" visited those who were inclined to observe the law, smashed their stills, and burned their barns. Few, if any, farmers paid their taxes.

The Administration met this rebellion with both stick and carrot. President Washington issued a proclamation on September 15, 1792, warning "all persons whom it may concern to refrain and desist from

[36] *Id.* at 2853.
[37] Act of May 8, 1792, c. 32, 1 STAT. 267.
[38] Act of May 8, 1792, c. 35, 1 STAT. 275.
[39] Act of May 8, 1792, c. 34, 1 STAT. 274.
[40] Act of May 8, 1792, c. 36, 1 STAT. 275.
[41] Act of May 2, 1792, c. 28, 1 STAT. 264. See note 29 *supra.*
[42] 1796-1797: 6 ANNALS OF CONG. 2852, 2853 (1849).
[43] *Id.* at 2856.

all unlawful combinations and proceedings whatsoever . . . ."[44] The Administration also attempted to enforce compliance by prosecuting delinquents and by seizing the illegal whiskey on its way to the eastern markets where the people did not object to the law. To induce the farmers to pay their taxes, the Government entered into a purchasing program whereby all the whiskey used by the Army was to be purchased with immediate cash payment from the western Pennsylvania farmers who complied with the law.

All these measures were without avail. Inspectors and collectors of revenue were prevented by force from carrying out their tasks; and the "Whiskey Boys" who were indicted for interfering with the revenue officials were acquitted after neighbors provided alibis. The untaxed whiskey was diverted from its ordinary markets in eastern Pennsylvania and sent westward for sale in Kentucky and the Northwest Territory, whose inhabitants shared the western Pennsylvania farmers' aversion to the whiskey tax. The "Whiskey Boys" continued to threaten those who might otherwise have paid the tax.[45]

The Congress that met in 1792-1793 was unable to agree on any of the many proposals submitted on the Whiskey Tax and adjourned without taking any action on this problem.[46]

During the spring and summer of 1793 the western Pennsylvania farmers continued to obstruct the revenue laws, hoping thereby to cause their repeal. In April of 1793 a party of armed men in disguise attacked the house of the revenue collector in Fayette County. The judges of the county court thereupon issued warrants for the arrest of the rioters, but the sheriff refused to execute them and the judges were shortly thereafter voted out of office. In November of that year another attack was made on the home of the revenue collector, and he was forced at pistol point to surrender his office.[47]

The Congress that met in the winter of 1793-1794 again failed to take any definitive action, and upon its adjournment the Administration took matters into its own hands. Warrants for the arrest of those who had participated in the attack on the revenue collector were secured from

[44] 1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 124 (1896).

[45] "A breath in favour of the law, was sufficient to ruin any man. It was considered as a badge of toryism. A clergyman was not thought orthodox in the pulpit, unless against the law; a physician was not capable of administering medicine, unless his principles were right in this respect; a lawyer could have got no practice without at least concealing his sentiments, if for the law; a merchant, at a country store, could not get custom. On the contrary, to talk against the law was the way to office and emolument . . . . To go to the Assembly, you must make a noise against it; and in order to go to Congress, or to keep in it, you must contrive, by some means, to be thought staunch in this respect. It was the *shibboleth* of safety, and the ladder of ambition." TAYLOR, *op. cit. supra* note 9, at 49, quoting from 3 BRACKENRIDGE, INCIDENTS OF THE INSURRECTION 22 (1795).

[46] 1796-1797: 6 ANNALS OF CONG. 2852, 2858-59 (1849).

[47] *Id.* at 2859-60.

the United States court in Philadelphia and the marshal went personally to execute them. On July 15, 1794, he arrived in Allegheny County and joined forces with the inspector of revenue, one Colonel John Neville. Thereafter he was "beset on the road by a party of from thirty to forty armed men, who, after much previous irregularity of conduct, finally fired upon him, but, as it happened, without injury either to him or to the inspector."[48] The marshal made application to the "judges, generals of militia, and sheriffs of the county" for protection, but he was informed that "should the *posse comitatus* of the county be ordered out in support of the civil authority, very few could be gotten who were not of the party of the rioters."[49] The marshal then went to the home of Revenue Inspector John Neville, who took the precaution of calling a small detachment of regulars from the garrison of Fort Pitt to his aid. This precaution was justified, for on the night of July 17th, an armed band of approximately 500 men attacked the house of the inspector, and after some casualties on both sides, burned it to the ground. The marshal and inspector were captured, and released only after the marshal had agreed to serve no process on the west side of the Allegheny Mountains. Thereafter "the marshal and inspector returned to Philadelphia by a circuitous route, fearing personal injury from the farmers who beset all the usual routes to Philadelphia."[50]

Upon hearing of the marshal's misadventures, James Wilson, an Associate Justice of the Supreme Court of the United States, wrote the President that "in the counties of Washington and Allegheny, in Pennsylvania, laws of the United States are opposed, and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the powers vested in the marshal of that district."[51]

The receipt of this information caused President Washington much concern. "On the one hand . . . to yield to the treasonable fury of so small a portion of the United States, would be to violate the fundamental principle of our Constitution, which enjoins that the will of the majority shall prevail. On the other, to array citizen against citizen . . . were steps too delicate, too closely interwoven with many affecting considerations, to be lightly adopted."[52] He postponed the immediate summoning of the militia into the field, but called for a standby ready reserve of 15,000 men in the event that the Governor of Pennsylvania would not or could not cope with the situation.

The President then conferred with Governor Mifflin of Pennsylvania, who not only refused to call forth the Pennsylvania militia, but advised

[48] *Id.* at 2863.
[49] *Ibid.*
[50] *Id.* at 2865.
[51] *Id.* at 2796.
[52] 1796-1797: 6 ANNALS OF CONG. 2793 (1849) (message of President Washington to Congress).

the President not to send any militia into the western Pennsylvania counties.[53] The President advised Governor Mifflin that he had a constitutional obligation to "execute the laws," both those "laying duties upon spirits distilled within the United States" and those "which uphold the judiciary functions";[54] and on August 7, 1794, President Washington issued a proclamation warning all insurgents "to dispers and retire peaceably to their respective abodes" by the first day of September. In this proclamation he recited that David Lennox, marshal of the district of Pennsylvania, "had been fired upon while in the execution of his duty" and that he, President Washington, was determined "to cause the laws to be duly executed."[55] On the same day President Washington made requisition upon the Governors of Pennsylvania, Maryland, New Jersey, and Virginia for 15,000 men, to be immediately organized and prepared to move at a moment's warning.[56]

In the hope that the use of the militia might be averted, President Washington appointed three commissioners "to proceed to the scene of the insurrection, and to confer with any bodies of men or individuals with whom you shall think proper to confer, in order to quiet and extinguish it." These commissioners were authorized to tell the insurgents that the President was willing "to grant an amnesty and perpetual oblivion for everything which has passed" and to waive enforcement "concerning the duties of former years if they will fairly comply for the present year."[57]

The three United States commissioners met with three commissioners given like powers and duties by the Governor of Pennsylvania, and all proceeded to Pittsburgh to meet with the insurgents. The insurgents appointed a committee to meet with the commissioners, and after several days of discussion, it was agreed on both sides that prosecutions would be suspended and pardon granted if the majority of the people voted by referendum to henceforth pay their taxes. A referendum was conducted, and the people voted against compliance with the Whiskey Tax.[58]

Upon receipt of this information President Washington issued a proclamation "in obedience to that high and irresistible duty consigned to me by the Constitution 'to take care that the laws be faithfully executed'" in which he recited that he was sending the militia from

[53] 1796-1797: 6 ANNALS OF CONG. 2826-30 (1849) (letter of Aug. 5, 1794, from Governor Mifflin to President Washington).

[54] 1796-1797: 6 ANNALS OF CONG. 2848 (1849) (letter from President Washington to Governor Mifflin).

[55] 1 RICHARDSON, *op. cit. supra* note 44, at 159-60.

[56] S. Doc. No. 209, 57th Cong., 2d Sess. 37 (1903).

[57] 1796-1797: 6 ANNALS OF CONG. 2799-2800 (1849) (letter of Secretary of State Randolph to Commissioners James Ross, Jasper Yeates, and William Bradford).

[58] *Report of the Commissioners,* 1796-1797: 6 ANNALS OF CONG. 2803-12 (1849).

New Jersey, Pennsylvania, Maryland, and Virginia to "the scene of disaffection."[59]

Governor "Lighthorse" Harry Lee of Virginia, a Revolutionary War hero, was put in command of the militia and he was directed to accompany United States District Judge Richard Peters and United States Attorney William Rawle to the area of conflict and there "cause the laws to be executed . . . by judiciary process" by giving "countenance and support to the civil officers in the means of executing the laws."[60]

In the meantime meetings had been held in the rural districts and strong resolutions passed expressing willingness to "submit to the laws of the United States." On October 2nd a general meeting was held and two men delegated the task of meeting the President to assure him that order could be restored without the aid of military force. The President's reply was that the army was already on its way.[61]

When the militia arrived it was met with complete submission. A meeting was held on October 24th and resolutions adopted promising submission to authority and the payment of all excise taxes. Secretary of Treasury Alexander Hamilton caused the arrest of eighteen leaders who were sent to Philadelphia and marched through the streets with the word "Insurgent" on their hats, but a general pardon was issued to all but a few, and those who were tried and found guilty of treason were specially pardoned by Washington.[62]

President Washington devoted much of his 1794 annual message to Congress to the recent events in western Pennsylvania. He defended his conduct by pointing out that the "vengeance of armed men" prevented the marshal from delivering legal process; but pointed out that "there are not wanting real and substantial consolations for the misfortune," namely, the demonstration that his fellow-citizens "are now as ready to maintain the authority of the laws against licentious invasions as they were to defend their rights against usurpation." Then pointing out "the possibility of a similar contingency" he urged the Congress to enact laws reorganizing the militia and "providing, in the language of the Constitution, for calling them forth to execute the laws of the Union, suppress insurrection, and repel invasions."[63]

Ten days after the annual message of the President, the Congress enacted a temporary measure authorizing the President to cope with the situation then existing in western Pennsylvania.[64] The Congress then

[59] 1 RICHARDSON, *op. cit. supra* note 44, at 161-62.

[60] 1796-1797: 6 ANNALS OF CONG. 2866-67 (1849) (instructions from President Washington to Governor Lee). The defined objects of the "judiciary process" were "(1) to bring offenders to justice, and (2) to enforce penalties on delinquent distillers by suit."

[61] TAYLOR, *op. cit. supra* note 34, at 52-53.

[62] BASSETT, THE FEDERALIST SYSTEM 1789-1801, at 112 (1906).

[63] 1 RICHARDSON, *op. cit. supra* note 44, at 162-67.

[64] Act of November 29, 1794, c. 1, 1 STAT. 403.

engaged in a long debate which culminated in the act of February 28, 1795, entitled: "An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to repeal the Act now in force for those purposes."[65] This act was designed to provide "means by which the Executive could come in aid of the Judiciary,"[66] and authorized the President to call forth the militia to execute the laws of the United States whenever they "shall be opposed, or the execution thereof obstructed." This Act of 1795, passed at the request of President Washington to meet situations similar to those presented by the Whiskey Rebellion, has remained virtually intact to this date.

The Thomas Jefferson Amendment of 1807[67]

The first of several amendments to the 1795 George Washington Act was adopted in 1807 at the express request of President Thomas Jefferson for the purpose of giving the President more power to "execute the laws." In 1806 President Jefferson received information that Aaron Burr had raised a private army for the purpose of creating a new nation west of the Alleghenys, and he issued a proclamation calling forth the militia.[68] There were many who favored the cause of Burr,[69] the militia proved to be ineffective, and Burr remained at liberty until captured by a detachment of the regular Army. In his annual address to Congress that year President Jefferson requested authority to utilize the Army "against insurrection or enterprise on the public peace or authority."[70] Congress granted this request with the Act of March 3, 1807, which provided that "in all cases where . . . it is lawful for the President of the United States to call forth the militia for the purpose 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."[71]

The Abraham Lincoln Amendment of 1861

The George Washington Act of 1795 was again amended in 1861. At the time South Carolina seceded from the Union in 1860, the George Washington law as amended authorized the President to call forth the militia or the Army and Navy whenever the laws "shall be opposed, or the execution thereof obstructed." President James Buchanan, then

[65] 1 Stat. 424 (1795), 10 U.S.C. §§ 332-34 (Supp. IV, 1957).
[66] See text at note 42 *supra*.
[67] This terminology is used for purposes of clarity in the discussion.
[68] 1 Richardson, *op. cit. supra* note 44, at 404.
[69] A grand jury impaneled to indict Burr declared him innocent of any crime, condemned the President for calling out the militia, and denounced the arrest of Burr as unwarranted and unjustified. S. Doc. No. 209, 57th Cong., 2d Sess. 48 (1903).
[70] 1 Richardson, *op. cit. supra* note 44, at 407.
[71] 2 Stat. 443 (1807), 10 U.S.C. §§ 332-34 (Supp. IV, 1957).

in office, took the position that he was powerless to call forth the militia or the armed forces unless and until the laws were in fact opposed or the execution of the laws was in fact obstructed. As the federal judge, district attorney, and marshal in South Carolina had resigned, President Buchanan reasoned that there was no one in a position to execute the laws, that, therefore, there could be no obstruction or opposition to them, and that, consequently, he had no authority under the George Washington Act of 1795 to put down the South Carolina insurrection.[72]

When Congress next met it amended the George Washington 1795 Act so as to authorize the President to call forth the armed forces "to enforce the faithful execution of the laws" whenever, in the judgment of the President, *"it shall become impracticable"* to enforce them by the ordinary course of judicial proceedings. The announced purpose of this amendment was to override the construction put on the George Washington Act by President Buchanan, a construction which the senate sponsor of the bill said "was to the effect that if the rebels should cut the throats of the Federal judge and Federal marshal, in any State, the Executive could not act against their assassins, or enforce the laws within such State."[73] The senate sponsor of the amendment made it clear that no substantive changes of purpose were intended to be made in the George Washington 1795 Act, a purpose which "contemplates the employment of a military force solely in subordination to civil authority, and for the purpose of executing laws, aiding the judicial and executive officers."[74]

[72] In his annual message to Congress on December 3, 1860, President Buchanan referred to what he called a "revolution" in South Carolina and then said this: "What, in the mean time, is the responsibility and true position of the Executive? He is bound by solemn oath before God and the country 'to take care that the laws be faithfully executed,' and from this obligation he cannot be absolved by any human power. But what if the performance of this duty, in whole or in part, has been rendered impracticable by events over which he could have exercised no control? Such, at the present moment, is the case throughout the State of South Carolina, so far as the laws of the United States to secure the administration of justice by means of the Federal judiciary are concerned. All the Federal officers within its limits, through whose agency alone these laws can be carried into execution, have already resigned. We no longer have a district judge, a district attorney, or a marshal, in South Carolina. In fact, the whole machinery of the Federal Government, necessary for the distribution of remedial justice among the people, has been demolished; and it would be difficult, if not impossible, to replace it.

"The only acts of Congress on the statute book bearing upon this subject are those of the 28th February, 1795, and 3rd March, 1807. These authorize the President, after he shall have ascertained that the marshal, with his posse comitatus, is unable to execute civil or criminal process in any particular case, to call forth the militia and employ the Army and Navy to aid him in performing this service; having first, by proclamation, commanded the insurgents 'to dispers and retire peaceably to their respective abodes, within a limited time.' This duty cannot by possibility be performed in a State where no judicial authority exists to issue process; and where there is no marshal to execute it, and where, even if there were such an officer, the entire population would constitute one solid combination to resist him." CONG. GLOBE, 36th Cong., 2d Sess. app. 3 (1860).

[73] CONG. GLOBE, 37th Cong., 1st Sess. 145-56 (1861).

[74] *Ibid.*

THE GEORGE WASHINGTON ACT OF 1795 RE-ENACTED IN 1875 AND 1956

No changes have been made in the George Washington Act of 1795 since the Abraham Lincoln amendment in 1861.

In 1875 Congress re-examined all the existing laws of the United States and found contradictions, duplications, ambiguities, obscurities, and obsolete provisions. Due to this re-examination, some of the existing laws were discarded, and those of permanent value re-enacted. The re-enacted laws were put into what is known as the *Revised Statutes.* The George Washington Act as amended to that date was re-enacted and became title 69, *Revised Statutes,* sections 5297-5300.

In 1956 Congress again examined all the permanent laws, discarded some, re-enacted others, and placed the re-enacted laws into the *United States Code.* What had begun as the George Washington Act of 1795 was again re-examined by Congress, and again re-enacted as title 10, *United States Code,* sections 331-334.[75] Although some minor change in language was made, the object of the Congress was "adherence to the substance of existing laws."[76]

To summarize, the original George Washington Act of 1792 was enacted by Congress during the initial stages of the Whiskey Rebellion to enable the Executive to "come in aid of the Judiciary when found incompetent in the execution of the laws."[77] The power granted by this act was utilized by President Washington when he directed Governor Lee of Virginia to march 15,000 militia to the scene of insurrection and to "cause the laws to be executed by judiciary process."[78] This original George Washington Act was re-enacted by Congresses in 1795, in 1807, in 1861, in 1875, and again in 1956 in "adherence to the substance of existing law." Nor, as will be shown hereinafter, has Congress departed from the principle of the George Washington Act in any other statutes.

THE POSSE COMITATUS ACT OF 1878

On June 18, 1878, Congress passed what is known as the Posse Comitatus Act[79] making it illegal to employ the Army as a *posse comitatus* "for the purpose of executing the laws except . . . as such employment . . . may be expressly authorized by the Constitution or by act of Congress."[80] Certain editorial writers have voiced the opinion

[75] See note 3 *supra.*
[76] H.R. REP. No. 970, 84th Cong., 1st Sess. 8 (1955).
[77] See text at note 42 *supra.*
[78] 1796-1797: 6 ANNALS OF CONG. 2866 (1849) (orders to General Henry Lee).
[79] See note 26 *supra* for definition of the *posse comitatus.*
[80] 20 STAT. 152 (1878). The act presently provides that "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

that this act deprived President Eisenhower of lawful authority to send federal troops to Little Rock for the purpose of executing the orders of the federal court.[81] This contention merits discussion, but some background information is necessary for full understanding of the Posse Comitatus Act.

The original power given United States marshals to execute the laws of the United States was the same power given the sheriffs by the states wherein the marshals had jurisdiction,[82] *i.e.*, the power to call for the aid of all able bodied men over fifteen years of age. This power of the United States marshal was from time to time augmented by specific acts of Congress authorizing the marshal to call forth the armed forces to enforce specific provisions of specific laws.[83] For example, the Civil Rights Act of 1870 provides that the marshals "shall have authority to summon and call to their aid . . . such portion of the land or naval forces of the United States . . . as may be necessary . . . to insure a faithful observance of the fifteenth amendment to the Constitution of the United States."[84] This power of the United States marshal was also augmented in 1854 by an opinion of Attorney General Cushing that the power of the United States marshal to call out the *posse comitatus* "comprehends not only bystanders and other citizens generally, but any and all armed forces."[85] The United States marshals, acting pursuant to the opinion of Attorney General Cushing, called forth the armed forces so often that by 1877 "generals commanding military departments, north, south, and east, report the employment, hundreds of times, of hundreds of detachments of the standing Army in the suppression of strikes, in the execution of the local laws, in the collection of the revenues, the arrest of offenders, etc., at the requests of . . . United States marshals."[86] It is this use of the federal troops by the United States marshals that provides the background for the Posse Comitatus Act of 1878.

The Posse Comitatus Act was introduced as an amendment to the annual army appropriation bill. Mr. Knott, a co-sponsor of the amend-

comitatus or otherwise to excuse [execute] the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both. This section does not apply in Alaska." 18 U.S.C. § 1385 (Supp. IV, 1957).

[81] See, *e.g.*, U.S. News & World Report, Oct. 11, 1957, p. 144.

[82] "A United States marshal and his deputies, in executing the laws of the United States within a state, may exercise the same powers which a sheriff of such state may exercise in executing the laws thereof." 1 STAT. 264, 265 (1792), as amended, 28 U.S.C. § 549 (1952).

[83] The Embargo Act, c. 24, 2 STAT. 528 (1809), The Neutrality Act, c. 31, 5 STAT. 212 (1838), and the post civil war Civil Rights Acts, 15 STAT. 27 (1866), 16 STAT. 140 (1870), 17 STAT. 14 (1871), as amended, 71 STAT. 634, 42 U.S.C.A. § 1975a (Supp. 1957), are illustrative.

[84] 16 STAT. 142 (1870).

[85] 6 OPS. ATT'Y GEN. 466 (1854).

[86] 7 CONG. REC. 3851 (1878).

ment, referred to the United States marshals' frequent use of the Army as a part of the *posse comitatus,* and said, "This amendment is designed to put a stop to the practice, which has become fearfully common, of military officers of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws." Referring to what is described in this Article as the George Washington Act of 1795, Mr. Knott said that "the amendment proposed does not conflict with that."[87] Mr. Kimmel, the other co-sponsor of the amendment, urged that Congress remedy Attorney-General Cushing's "misconstruction of a statute" and, after referring to the numerous situations where the marshals had called upon the assistance of the Army, said this: "[T]he law of 1792, under which President Washington called out the militia to suppress the whiskey insurrection . . . prescribed the conditions on which the constitutional force, the militia, could be used . . . not one of which were complied with before these detachments of the standing Army were precipitated on the people" by the marshals.[88]

The bill, as it passed the House, made it unlawful to use the armed forces as a *posse comitatus* except as "expressly authorized by act of Congress."[89] When the bill reached the Senate, Mr. Beck, its sponsor in that chamber, referred to Attorney General Cushing's opinion "that the Army, organized or unorganized, could be used as a posse comitatus" and said that "the whole object of this section is to limit the use by the marshals of the Army to cases where by law they are authorized to call for them."[90] Some objections were made to the bill on the ground that it could deprive the President of power to "break down a forcible resistence to the law"[91] and the house bill was amended so as to make it unlawful to use the Army as a *posse comitatus* unless specially authorized by "the Constitution or by act of Congress." The words "by the Constitution" were inserted so that "the Executive would not be embarrassed by the prohibition" of the act.[92] As so amended the bill passed the Senate without a single dissent. One Republican Senator said the bill "contains nothing but the statement of truisms."[93] The bill was signed into law by President Rutherford B. Hayes.

President Hayes considered the Posse Comitatus Act as one aimed solely at the power of the U. S. marshals, for less than four months after signing it he relied upon the general authority given him by the George Washington Act of 1795 to call out the Army for the purpose of

[87] 7 *id.* at 3849.
[88] 7 *id.* at 3851-52.
[89] 7 *id.* at 3856.
[90] 7 *id.* at 4240-41.
[91] 7 *id.* at 4241.
[92] *Report of the House Conference Committee Explaining the Senate Amendment,* 7 *id.* at 4648.
[93] 7 *id.* at 4296.

enforcing judicial process in the territory of New Mexico.[94] Congress, by its silence, tacitly approved of the president's interpretation of the act.

The senate action unanimously approving the Posse Comitatus Act of 1878 contrasts sharply with the senate action defeating house approved amendments to three contemporaneous military appropriation bills expressly designed to curtail the president's power to call forth the militia under the terms of the George Washington Act of 1795.

In 1856 Democratic President Pierce called forth the Army to support the pro-slavery governor of Kansas during the insurrection lead by John Brown and other Republican "free holders."[95] When this came to the attention of the Republican dominated House, it promptly enacted a rider to the pending army appropriation bill prohibiting the use of the Army in Kansas. This prohibition on the president's use of the troops was defeated in the Senate.[96]

In 1879, the year following the Posse Comitatus Act, the House provided that no part of the money appropriated for the Army was to be used for its employment "at any place where a general or special election is being held." President Hayes vetoed this provision, and the Senate sustained the veto.[97]

The Army Appropriation Bill of 1887, as passed by the House, contained a provision that "no money appropriated by this act shall be applied to the pay of troops used in support of the claim of Francis T. Nicholls to be governor of the State of Louisiana."[98] This provision was defeated in the Senate, where Senator Blaine said in opposition: "I cannot believe that there is a lawyer on either side of this Chamber who will assert in his place that he believes that the Congress of the United States has the right to say to the President, who by the Constitution is the Commander-in-Chief of the Army and Navy, that in a particular exigency he shall not command the Army and in another exigency he shall command it in a certain way. If that does not constitute a clear invasion of the powers of the President, conferred upon him by the organic law of the land, then I cannot read it."[99]

[94] 7 RICHARDSON, *op. cit. supra* note 44, at 489. For further discussion of this, see text at note 126 *infra*.

[95] 5 *id.* at 390.

[96] 5 *id.* at 396.

[97] In his veto message President Hayes referred to the power given the President by the George Washington Act of 1795 and said: "It is now proposed to abrogate it on certain days and at certain places. In my judgment no fact has been produced which tends to show that it ought to be repealed or suspended for a single hour at any place in any of the States or Territories of the Union. All the teachings of experience in the course of our history are in favor of sustaining its efficiency unimpaired. On every occasion when the supremacy of the Constitution has been resisted and the perpetuity of our institutions imperiled the principle of this statute, enacted by the fathers, has enabled the Government of the Union to maintain its authority and to preserve the integrity of the nation." 7 *id.* at 532, 534.

[98] 5 CONG. REC. 2119 (1887).

[99] 5 *id.* at 2160.

The fact that not one Senator voted against the Posse Comitatus Act of 1878 indicates to a certainty that the Senate believed this house originated act differed from the house amendments to the annual army appropriation acts of 1856, 1879, and 1887 discussed above.

The genesis of the Posse Comitatus Act, the purpose of the act as announced by the house and senate sponsors, the contemporaneous interpretation of the President who signed the act into law, and the senate defeat of house passed amendments directly aimed at curtailing presidential power over the armed forces all lead to but one conclusion: that the act does not bar the President from using the power lodged in him by the Constitution and the George Washington Act of 1795.

THE CIVIL RIGHTS ACTS AMENDMENT OF 1957

The Civil Rights Acts Amendment of 1957 expressly repealed that portion of the existing act authorizing the President to employ the armed forces "to aid in the execution of judicial process issued under" the Civil Rights Act.[100] It has been argued that this congressional action manifested an intent to deprive the President of authority to use the armed forces to execute judicial decrees in cases arising under the Civil Rights Act.[101] This contention has surface plausibility, but an examination of the congressional debate demonstrates something entirely different: that Congress recognized and sustained the power of the President under the George Washington Act of 1795 to use the armed forces to enforce judicial decrees arising under the Civil Rights Acts and other acts of Congress and believed that the supplementary power given him in the Civil Rights Acts should be repealed so as to narrow the area of controversy on the then pending business.

From time to time Congress has thought it expedient to give the President power supplemental to and identical with the power given him by the George Washington Act of 1795. A notable illustration of this occurred in 1833. In 1832 South Carolina took the position that "protective tariffs" were not authorized by the Constitution, "nullified" the existing protective tariff provisions of the Customs Act, enacted a law making it illegal to enforce the payment of duties within the state, and raised a force of 12,000 volunteers. President Andrew Jackson was determined to exercise his constitutional duty to "take care that the laws be faithfully executed," and when Congress next met it amended the Customs Act so as to give the President authority to employ the armed forces "to enforce the due execution of this act."[102] This con-

[100] 71 STAT. 634, 42 U.S.C.A. § 1975a (Supp. 1957).

[101] See, *e.g.*, Schweppe, *Use Of Federal Troops In Little Rock Was Illegal*, U.S. News & World Report, Nov. 1, 1947, p. 123.

[102] An Act to Provide for the Collection of Duties on Imports, c. 57, 4 STAT. 632, 634 (1833).

gressional demonstration of presidential support caused South Carolina to rescind its "nullification," disband its militia, and repeal all laws interfering with the execution of the customs law.[103]

The post-civil war Civil Rights Acts are similar illustrations of congressional grants of authority to use the armed forces to enforce specific laws and judicial decrees where potential resistance can be eliminated by a show of force. The Civil Rights Act of 1866 authorized the President to use the armed forces "to prevent the violation and enforce the due execution of this act."[104] President Andrew Johnson unsuccessfully vetoed this act and in his veto message said that the additional authority given him to call forth the Army and Navy was unnecessary as "the general statutes regulating the land and naval forces of the United States, the militia, and the execution of the laws are believed to be adequate."[105]

The Civil Rights Act of 1870 authorized the President to employ the armed forces "to aid in the execution of judicial process issued under this act."[106] This provision was passed over senate objection that "it is wholly unnecessary. The Constitution makes it the duty of the President to take care that the laws are faithfully executed, and he is Commander in Chief of the Army and Navy. That is suggestive enough on that subject."[107]

The Civil Rights Act of 1871 was aimed at the Ku Klux Klan and it authorized the President to call forth the armed forces to execute the laws whenever "domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof and of the United States, as to deprive any portion or class of the people of each State of any of the rights . . . named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, for any cause, fail in or refuse protection of the people in such rights."[108] Once again

[103] S. Doc. No. 30, 22d Cong., 2d Sess. (1832); S. Doc. No. 209, 57th Cong., 2d Sess. 58 (1903).

[104] An Act to Protect All Persons in the United States in Their Civil Rights and To Furnish the Means of Their Vindication, 15 STAT. 27 (1866). The substantive provisions of this act provided in part that all citizens shall have the right to "inherit, purchase, lease, sell, hold, and convey real and personal property." This was designed to offset the so-called Black Codes enacted in southern states after the slaves had been freed. The Black Codes made it illegal for negroes to lease or own property, declared that negroes who lacked housing were vagrants, provided for the imprisonment of negro vagrants, and authorized the jailers to release negro vagrants to their former masters for the duration of the prison term. CONG. GLOBE, 39th Cong., 1st Sess. 1118, 1151, 1160 (1866).

[105] 6 RICHARDSON, *op. cit. supra* note 44, at 412.

[106] 16 STAT. 140, 143 (1870). The substantive provisions of this act were designed to protect the right of the negro to vote and authorized federal judges, upon proper application and proof, to order the registration of qualified negro voters who had been refused registration privileges.

[107] CONG. GLOBE, 41st Cong., 2d Sess. 3679 (1870).

[108] 17 STAT. 13, 14 (1871). The sponsor of the bill in the House explained the

objection was made that the above provision was unnecessary as there were not "wanting statutes to enable the President to enforce the laws of the United States. As early as 1792 Congress began to pass laws authorizing the President to use the military power in the performance of his duty, to take care that the laws be faithfully executed, and never since that day has he been without authority to call forth the militia 'whenever the laws of the United States shall be opposed, or the execution thereof obstructed.' "[109]

In 1875 the provisions in the Civil Rights Acts of 1861, 1870, and 1871 authorizing the President to use the armed forces were combined and recodified as section 1989 of the *Revised Statutes*. It is this section which was repealed by the Civil Rights Act of 1957. However, the senate debate makes it clear that the 1957 amendment was not intended to deprive the President of what Congress believed to be the identical authority given him by the George Washington Act of 1795.

As the Civil Rights Act of 1957 passed the House, it contained a provision authorizing the President to employ the military forces of the United States to enforce the substantive provisions of the act.[110] Senate opponents of the proposed civil rights amendments centered their attack, not on the substantive provisions of the proposed bill, but upon the provision authorizing the President to use troops to enforce judicial decrees. Whereupon Senators Knowland and Humphrey introduced an amendment eliminating this provision so that debate on the substantive portions of the bill should not be "clouded by, and in fact, distorted by, reference to the use of the Armed Forces."[111]

The senate debate conclusively indicates that the Senate did not intend to deprive the President of the power given him by the George Washington Act of 1795 when it passed the Knowland-Humphrey amendment.

Senator Clark of Pennsylvania announced that he was going to vote for the amendment because the Library of Congress had informed him that "independently of the proposed civil rights bill, the President already is vested with ample authority to deploy the Armed Forces to

necessity for it in these terms: "But a few days ago, over a hundred Alabama Ku Klux made a raid upon Meridian, Mississippi, and carried off their victims for execution. A meeting of the citizens was called to protest against these outrages. The Ku Klux became alarmed . . . . When the court convened they again assembled in force and commenced the work of death. Judge Bramlette, the presiding magistrate, was shot and the scene closed by driving the Republican mayor out of the city." CONG. GLOBE, 42d Cong., 1st Sess. 321 (1871).

[109] *Id.* at 72 (app.).

[110] "It shall be lawful for the President of the United States to employ such part of the land or naval forces of the United States to aid in the execution of judicial process issued under the provisions of sections 1981-1983 and 1985-1994 of this title." 103 CONG. REC. 11127 (daily ed. July 22, 1957).

[111] *Id.* at 11128 (statement of Senator Humphrey explaining purpose of the amendment).

meet concerted popular resistance designed either to obstruct enforcement of judicial process issued pursuant to constitutional and statutory provisions or to interfere with enforcement of statutory law by Federal officers."[112]

Senator Lausche of Ohio attacked those responsible for inserting this provision "notwithstanding the provisions of the Constitution which give the President the power to enforce judicial decrees when they are resisted by armed revolution or otherwise."[113]

Senator Javits said he would vote for the Knowland-Humphrey amendment as the opponents of the civil rights bill had seized upon "an issue out of no issue at all."[114]

Senator Carroll of Montana spoke in favor of the Knowland-Humphrey amendment as "the President has always had the power to use force to insure the functioning of United States laws. But because the Attorney General, through a mistake or stupidity or inadvertence, incorporated this provision in the bill, it has thrown a smokescreen over the entire debate."[115]

Senator Long of Louisiana, who opposed the civil rights bill generally, said he would vote for the Knowland-Humphrey amendment with the understanding that "the Senators who are proposing that this provision of the bill be stricken out are not doing so because they do not envision the use of Federal troops to support integration in the South. They are moving to have the provisions stricken out because, as they have explained, they believe that under the Constitution and other sections of the law the use of Federal troops, including the use of bayonets, to enforce such measures will still be available."[116]

The Senate approved the Knowland-Humphrey amendment by unanimous vote, which fact, when viewed in light of the background of the section eliminated from the Civil Rights Act, the announced purpose of the sponsors of the amendment, and the unanimous views of those who spoke on the amendment, leads to but one conclusion: that the Congress that met in 1957 believed that all apart from the express provision in the existing Civil Rights Act, the President had authority under the Constitution and the George Washington Act of 1795 to use federal troops to enforce the execution of judicial decrees issued in civil rights and other judicial cases. This 1957 congressional understanding coincides with that of all our Presidents since George Washington took his oath of office.

[112] *Id.* at 11130.
[113] *Ibid.*
[114] *Id.* at 11131.
[115] *Id.* at 11133.
[116] *Ibid.*

PRESIDENTIAL RESPONSE TO CONSTITUTIONAL OBLIGATION TO TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED—SOME ILLUSTRATIONS (1794-1894)

In 1794 President George Washington called forth the militia and over the objection of Governor Mifflin sent 15,000 armed troops to western Pennsylvania to ensure that the federal judge and marshal could carry on their judicial functions.[117] During the next one hundred years at least five additional Presidents called forth the armed forces to take care that the federal judiciary be protected and/or that the processes of the federal judiciary be enforced. These Presidents executed their constitutional obligation to take care that the laws be faithfully executed without regard to the objections of the governors of the states wherein the judicial process was obstructed.

In 1799 our second President, John Adams, employed the militia with the consent of Governor Mifflin to suppress a combination of persons who had "compelled William Nichols, marshal of the United States . . . to desist from the execution of certain legal process . . . and having compelled him to discharge and set at liberty certain persons whom he had arrested . . . ."[118] President Adams called forth the militia to suppress what is known as Fries Rebellion, a farmers' resistance in eastern Pennsylvania to a federal tax on private dwellings calculated by the number and size of windows. The insurrection began by deluging the "measurers" with scalding water from upper windows, which led to the arrest of those who had done the deluging, which in turn led to armed assaults on the marshal to free those arrested.[119]

In 1851 President Millard Fillmore employed the militia to suppress a combination of persons who made "a violent assault on the marshal . . . of the United States for the district of Massachusetts in the court-house . . . and did by force rescue from their custody a person arrested as a fugitive slave."[120] The Fugitive Slave Law made it the duty of the United States marshal to arrest and return all fugitives,[121] and President Fillmore sent armed troops to Boston on several occasions to assist the United States marshal in performing this function. In 1851 an escaped slave named Thomas Simms was seized by the marshal and marched in a hollow square of 300 troops from the court house to the docks and there put on board a vessel bound for Savannah. In 1854 a run-away slave named Anthony Burns was arrested by the United States marshal, and a mob of 50,000 would-be rescuers was repulsed by two batteries of the Fourth Artillery with casualties on both sides. The

[117] See text at note 53 and note 60 *supra*.
[118] 1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 287 (1896).
[119] TAYLOR, THE FARMERS' MOVEMENT 1620-1920, at 52-56 (1953).
[120] 4 RICHARDSON, *op. cit. supra* note 118, at 109.
[121] Act of September 18, 1850, c. 60, 9 STAT. 462.

following day Burns was escorted to the harbor by a detachment of marines and placed on board a United States revenue cutter which sailed for Virginia under the escort of several armed naval vessels.[122] President Fillmore sent the troops to Boston to assist the marshals in their duty under the Fugitive Slave Law even though the Massachusetts legislature had recently enacted a law nullifying the Fugitive Slave Act in that state[123] and in the face of widespread community resistance.

In 1857 Governor Brigham Young of Utah so defied the United States judges, federal marshal, and federal attorney that President James Buchanan sent "a military force for their protection" with instructions to obey any summons to aid the judges or the marshal "in the performance of his duties."[124] Governor Young was determined that the federal law not be executed in Utah, and called forth the Utah militia to resist the troops of the United States. United States forts were captured and gutted, supply trains destined for the United States troops were intercepted and burned, and the original detachment of United States troops was pinned down under seige throughout the winter of 1857-1858. Order was not restored until the arrival of United States reinforcements in the spring of 1858.[125]

In 1878 President Rutherford B. Hayes found it "impracticable to enforce by the ordinary course of judicial proceedings the laws of the United States within the Territory of New Mexico" and sent federal troops to assist the marshals serve and execute the federal court processes."[126] This was done at the request of the New Mexico Governor, who informed President Hayes that the United States attorney's office reported itself unable to "serve any legal document or carry out the law."[127] The Governor also told the President that, "The southeastern portion of the Territory is overrun by bands of armed men, numbering in all about 200, who almost daily commit the most atrocious crimes, such as murder, rape, arson and robbery. Some of these bands come from Texas and some from Old Mexico. One band when asked who they were and where they came from replied 'We are devils just come from hell,' and when ordered by the sheriff of the county to disband and return to their homes and ordinary avocations they replied, 'We have no homes; we are at our ordinary avocations.' "[128]

In 1894, just one hundred years after George Washington sent the militia to western Pennsylvania to assist the federal judiciary, President Grover Cleveland sent the federal troops into Chicago[129] to enforce an

[122] S. Doc. No. 209, 57th Cong., 2d Sess. 74-78 (1903).
[123] 5 RICHARDSON, *op. cit. supra* note 118, at 102-03.
[124] 5 *id.* at 455.
[125] S. Ex. Doc. No. 1, 35th Cong., 2d Sess. (1858).
[126] 7 RICHARDSON, *op. cit. supra* note 118, at 489.
[127] S. Doc. No. 209, 57th Cong., 2d Sess. 337 (1903).
[128] *Id.* at 207.
[129] 9 RICHARDSON, *op. cit. supra* note 118, at 499, 535.

injunction order issued by the federal judge requiring Eugene Debs and other officers and members of the American Railway Union to "refrain from . . . hindering . . . any of the business of any" designated railroads.[130] This injunction order had been obtained at the request of the Attorney General, who believed it to be proper "under the unquestioned power of a court of equity to deal with a public nuisance."[131] When Governor Altgeld learned of the arrival of federal troops in Chicago he wired the President that, "As Governor of the State of Illinois I protest against this, and ask the immediate withdrawal of Federal troops from active duty in this State."[132] President Cleveland curtly responded, "I have neither transcended my authority nor duty in the emergency that confronts us."[133] The troops remained to ensure obedience to the court order.

CONCLUSION

Whether or not one agrees with the wisdom of President Eisenhower's military action in Little Rock, one must agree that it is in keeping with the origin, spirit, and letter of his constitutional obligation to "take Care that the Laws be faithfully executed"; that it is consistent with the statutes enacted by Congress under its power to "provide for calling forth the Militia to execute the Laws of the Union"; and that it is in accordance with the precedent established by Presidents Washington, Adams, and others who served our nation during the first one hundred years of our constitutional history.

[130] *In re* Debs, 158 U.S. 564, 570 (1895).
[131] ATT'Y GEN. ANN. REP. 32 (1894).
[132] YELLEN, AMERICAN LABOR STRUGGLES 120 (1936).
[133] NEVINS, GROVER CLEVELAND, A STUDY IN COURAGE 626 (1933).