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### Domestic Constitutional Violence

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## DOMESTIC CONSTITUTIONAL VIOLENCE

F. E. Guerra-Pujol\*

### I. INTRODUCTION

We often associate violence with extra-legal behavior<sup>1</sup> or with the dark side of law enforcement.<sup>2</sup> But violence has also played a pivotal role in our nation's history and in the development of constitutional law. Simply put, our government has often resorted to acts of "constitutional violence"<sup>3</sup> to effectuate major constitutional change. Consider the stain of slavery. From a practical perspective, it was not the formal enactment of the Thirteenth Amendment that eradicated this peculiar institution. Rather, it was the blood spilled in such costly battles as Bull Run, Chickamauga, and Gettysburg that settled the festering constitutional question of slavery once and for all.<sup>4</sup> The same logic applies to school desegregation and the Little Rock Crisis of 1957. From a practical perspective, it was not the Supreme Court's landmark decision in *Cooper v. Aaron*<sup>5</sup> that diffused the crisis or that ended school desegregation. Rather, it was President Dwight D. Eisenhower's reluctant decision to send paratroopers of the 101<sup>st</sup> "Screaming Eagles" Airborne Division into Arkansas in 1957, a full year before the Supreme

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\* This article is part of an ongoing project of mine in which I explore the complicated role of violence in law, a project that formally began in 2011 with a letter-essay I addressed to my dear friend, colleague, and kindred spirit Carlitos del Valle. See F. E. Guerra-Pujol, *Life, Love, and Law: An Epistolary Exchange*, 80 REVISTA DE DERECHO DE LA UNIVERSIDAD DE PUERTO RICO 995 (2011). I continue to await Carlitos's reply. It was my colleagues Daniel Nina and Sonia M. Serrano who initially kindled my interest in this question at a colloquium in Mayaguez, Puerto Rico in 2005.

1. See, e.g., F. E. Guerra-Pujol, *Buy or Bite?*, in *ECONOMICS OF THE UNDEAD* (Glen Whitman & James Dow eds., 2014).

2. See, e.g., Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601 (1986).

3. In this paper, I shall use the term "constitutional violence" (or "domestic constitutional violence") to refer to the use of military force to enforce existing constitutional rules within an existing legal system, as opposed to the use of reform or violence to create an entirely new constitutional order. For an example of the latter form of foundational violence (as opposed to reformatory violence) see David Bates, *Constitutional Violence*, 34 J. L. & SOC'Y 14 (2007).

4. See, e.g., JAMES OAKES, *FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865* (2013).

5. See *Cooper v. Aaron*, 358 U.S. 1 (1958).

Court's decision in *Cooper*, that desegregated the iconic Central High School and changed the course of United States civil rights history.<sup>6</sup>

Momentous constitutional questions are thus often decided not through ordinary legal channels but by force. But the use of force to effectuate constitutional change poses a constitutional puzzle. What is the relation between violence and the overall system of representative government created by the Constitution? After all, the federal courts and Congress do not have their own armies to enforce their decisions or laws, so as a matter of constitutional first principles, one could argue that a president is acting "within" the law when he uses military force to enforce a law or court order. But at the same time, the use of force is antithetical to the ideals of our republican constitution.<sup>7</sup> Eisenhower's fateful decision to resort to military force during the Little Rock Crisis thus poses a constitutional paradox.<sup>8</sup> Is there any viable solution to this paradox?

The remainder of this paper will be devoted to these questions and is organized as follows. First, after reframing the Little Rock Crisis as a paradigm example of constitutional violence, the paper revisits two obscure cases that unsuccessfully attempted to challenge the legality of Eisenhower's use of force during the Little Rock Crisis of 1957. Although neither case reached the Supreme Court of the United States, they pose important questions about the legality of force in disputes over the meaning of the Constitution. Next, the paper surveys the relevant constitutional provisions as well as the major pieces of domestic violence legislation enacted by Congress prior to the 1957 Little Rock Crisis. In brief, the Constitution not only anticipates the possibility of "domestic Violence,"<sup>9</sup> there is also a small corpus of federal law purporting to authorize and regulate the use of constitutional violence. Lastly, the paper concludes by suggesting a new global label for this delicate body of law: "the laws of constitutional necessity."

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6. A detailed chronology of the events leading up to the Little Rock Crisis and the deployment of federal troops in Arkansas appears in the Supreme Court's opinion in *Cooper*, 358 U.S. at 7–12. Additional primary source materials are available in *LITTLE ROCK USA: MATERIALS FOR ANALYSIS* (Wilson Record & Jane Cassels Record eds., 1960) [hereinafter *LITTLE ROCK USA*].

7. This tension recently re-rose to the surface in October of 2018 when President Donald J. Trump unilaterally deployed more than 5,000 active-duty military troops to patrol the United States-Mexico border. See Michael D. Shear & Thomas Gibbons-Neff, *Trump Sending 5,200 Troops to the Border in an Election-Season Response to Migrants*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/us/politics/border-security-troops-trump.html>.

8. Since this symposium issue is devoted to the case of *Cooper v. Aaron*, I will limit the scope of this article to the Little Rock Crisis of 1957.

9. See U.S. CONST. art. IV, § 4.

## II. THE LITTLE ROCK CRISIS: A PARADIGM CASE OF CONSTITUTIONAL VIOLENCE

With the hindsight of history,<sup>10</sup> the remainder of this paper will reframe the Little Rock Crisis of 1957 as a paradigm case of domestic constitutional violence.<sup>11</sup> On the one side, Governor Orval Faubus had called forth the Arkansas Guard to prevent the desegregation of Central High School.<sup>12</sup> On the other side, President Dwight D. Eisenhower decided to deploy paratroopers from the 101<sup>st</sup> Airborne Division to enforce federal court desegregation orders.<sup>13</sup> Although Governor Faubus and President Eisenhower were thus motivated by competing visions of the Constitution, their actions are nevertheless paradigmatic of constitutional violence. Simply put, both executive officials employed the sundry military forces at their disposal in order to preserve, protect, and defend their conflicting interpretations of the Constitution.

Most, if not all, scholars have, however, neglected the constitutional dimension of the use of force during the crisis.<sup>14</sup> Furthermore, inasmuch as Governor Faubus's decision to call out the militia was intended to prevent court-ordered desegregation, historians and legal scholars have framed the governor's action as a subversion of the Constitution.<sup>15</sup> Yet one could make a strong case that Governor Faubus was entitled to use all constitutional powers at his disposal to promote his understanding, however morally reprehensible, of the Constitution. After all, the United States Constitution creates a federal structure of government, not a unitary one, and the

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10. One of the advantages of the mere passage of time is that the present provides new opportunities to see the past in different ways, or in the timeless words of French historian Marc Bloch: "knowledge of the past is something progressive [that] is constantly transforming and perfecting itself." See MARC BLOCH, *THE HISTORIAN'S CRAFT* 58 (Peter Putnam trans., 1953).

11. This paper uses the term "paradigm" in the Kuhnian sense as an exemplary application of a general theory to specific facts. See Alexander Bird, *Thomas Kuhn*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2018), <https://plato.stanford.edu/archives/win2018/entries/thomas-kuhn/>. Here, the general theory of this paper is that the meaning of the Constitution has undergone change via the use of force.

12. Governor Faubus's official proclamation calling out the State Militia is reprinted in full in *LITTLE ROCK USA*, *supra* note 6.

13. Exec. Order No. 10730, 22 Fed. Reg. 7628 (Sept. 23, 1957).

14. See, e.g., David J. Garrow, *Foreshadowing the Future: 1957 and the United States Black Freedom Struggle*, 61 *ARK. L. REV.* 1, 16 (2009). See also Steven R. Goldzwig & George N. Dionosipolous, *Crisis at Little Rock: Eisenhower, History, and Mediated Political Realities*, in *EISENHOWER'S WAR OF WORDS: RHETORIC AND LEADERSHIP 195-97* (Martin J. Medhurst ed., 1994).

15. See, e.g., TONY FREYER, *THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION* 113-19 (1984).

administration of public schools has historically been a matter of local law.<sup>16</sup> But my deeper point is twofold: (1) Governor Faubus's pro-segregation interpretation of the Constitution, justified or not, was a form of domestic constitutional violence, but (2) so to was President Eisenhower's decision to send in paratroopers. That most people today might condemn Faubus and praise Eisenhower should not distract us from this main point: the fact that the desegregation of Central High School would not have occurred had Eisenhower not acted with such decisive military force in the fall of 1957.

### III. TWO LITTLE ROCK CASES

Alas, the school desegregation cases, beginning with *Brown v. Board of Education*,<sup>17</sup> do not directly address the problem of constitutional violence, like the possibility that physical force might be necessary to carry out court-ordered desegregation. By way of example, *Cooper v. Aaron*,<sup>18</sup> the most well-known court decision arising out of the Little Rock Crisis and the landmark case that is the subject of this symposium issue of the *UA Little Rock Law Review*, barely even mentions President Eisenhower's decision to send the "Screaming Eagles" of the 101<sup>st</sup> Airborne into Little Rock.<sup>19</sup> Instead, the Court appears to take the use of constitutional violence for granted. In fact, most, if not all, historians and legal scholars of the civil rights era have taken the legality of Eisenhower's extraordinary enforcement action and use of military force in Little Rock for granted.<sup>20</sup>

Nevertheless, there are two lesser-known Little Rock cases—one state, the other federal—that present the problem of constitutional violence front and center. In both of these obscure cases, *Duncan v. Kirby*<sup>21</sup> and *Jackson v. Kuhn*,<sup>22</sup> private citizens who opposed desegregation attempted to challenge

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16. At the time of the Little Rock Crisis in 1957, there was no federal department of education. In fact, the United States Department of Education was not created until 1979, when Congress enacted "The Department of Education Organization Act." See Pub. L. No. 96-88, 93 Stat. 668 (1979).

17. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

18. See *Cooper v. Aaron*, 358 U.S. 1 (1958).

19. Although the Court's *per curiam* opinion fills up more than twenty pages of the U.S. Reports and consists of more than thirty paragraphs, only three short sentences in the entire opinion make any mention of President Eisenhower's historic decision to employ military force during the Little Rock Crisis: "[T]he President of the United States dispatched federal troops to Central High School [on September 25, 1957] and admission of the Negro students to the school was thereby effected. Regular army troops continued at the high school until November 27, 1957. They were then replaced by federalized National Guardsmen who remained throughout the balance of the school year." *Cooper*, 358 U.S. at 12.

20. See, e.g., DAVID A. NICHOLS, *A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION* (2007).

21. *Duncan v. Kirby*, 228 Ark. 917, 311 S.W.2d 157 (1958).

22. *Jackson v. Kuhn*, 249 F.2d 209 (8th Cir. 1957) (*per curiam*).

President Eisenhower's legal authority to send federal troops into Little Rock. Neither case has received much attention from historians or legal scholars, since neither ever reached the Supreme Court of the United States. Nor did the courts decide the merits of the presidential power claims in these cases.

A. *Duncan v. Kirby*

*Duncan v. Kirby*<sup>23</sup> was a state case decided by the Supreme Court of Arkansas in March of 1958. The moving party in this case, one Vernon Duncan, a pro-segregation protestor, was arrested in front of Central High School on October 3, 1957 for "Disturbing the Peace" and for "Refusing to Obey a Lawful Order of an Officer of the U.S. Army."<sup>24</sup> The Little Rock Municipal Court acquitted Mr. Duncan of the "disturbing the peace" charge, but it convicted him of the "refusing to obey" charge.<sup>25</sup> To appeal this conviction, Mr. Duncan went before the Pulaski County Circuit Court, where he filed a motion to dismiss or reverse the conviction of the Municipal Court, arguing among other things that President Eisenhower had exceeded his legal authority to send U.S. troops into Little Rock.<sup>26</sup> The Circuit Court overruled his motion, and Mr. Duncan then took his case up to the Supreme Court of Arkansas, petitioning for a Writ of Prohibition to prevent the Circuit Court from punishing him on the refusing to obey charge.<sup>27</sup> A closely-divided Supreme Court of Arkansas ruled 4 to 3 in favor of the defendant, Mr. Duncan,<sup>28</sup> but the Court did not pass judgment on the legality of President Eisenhower's use of military force in Little Rock.<sup>29</sup> Instead, a majority of the Arkansas justices decided this case on more narrow grounds: that at the time of Duncan's arrest it was not a crime in Arkansas to refuse to obey a federal military order.<sup>30</sup>

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23. *Duncan*, 228 Ark. at 917, 311 S.W.2d at 157.

24. *Id.* at 917, 311 S.W.2d at 158. *See also id.* at 923, 311 S.W.2d at 161 (Justice McFaddin's dissenting opinion, which contains a more detailed description of the procedural posture of the case).

25. *Id.* at 917, 923, 311 S.W.2d at 158, 161.

26. *Id.* at 920–22, 311 S.W.2d at 160.

27. *Id.* at 917, 311 S.W.2d at 158 ("The issue is whether a writ of prohibition shall be granted.").

28. *Duncan*, 228 Ark. at 920–25, 311 S.W.2d at 160–62. (The dissenting justices would have denied Mr. Duncan's petition out of hand.)

29. *Id.* at 922, 311 S.W.2d at 160 ("We do not reach the point of whether the President acted beyond the scope of his authority in ordering troops into Arkansas to enforce a court decree.").

30. *Id.* ("It simply is not against the law in Arkansas to fail to obey an order of an officer of the United States Army. . . .").

As a further aside, although *Duncan v. Kirby* avoids the constitutional violence issue, this obscure case is still worth mentioning, for it symbolizes the overall deferential and lenient treatment that pro-segregation protestors received during the Little Rock Crisis. According to one historian, by the end of October of 1957, “some fifty-six persons had been arrested on various State law charges connected with disorders at the school, but the local police court had deferred the cases.”<sup>31</sup> Of these 56 pro-segregation protestors, only seven received a fine, and six of the seven had their fines suspended.<sup>32</sup> Moreover, not a single federal prosecution was brought against any of the protestors.<sup>33</sup> In any event, *Duncan v. Kirby* was not the only case to challenge the legality of President Eisenhower’s use of force in Little Rock.

### B. *Jackson v. Kuhn*

Like the *Duncan* case discussed above, the case of *Jackson v. Kuhn*<sup>34</sup> presented a direct challenge to the legality of President Dwight D. Eisenhower’s fateful decision to send the “Screaming Eagles” of the 101<sup>st</sup> Airborne Division into Little Rock. But unlike *Duncan*, which was a state court case, *Jackson v. Kuhn* was commenced in federal court. The plaintiff in this case was Mrs. Margaret Jackson, who was a vocal member of the newly-created (and short-lived) Mothers’ League of Central High School.<sup>35</sup> The attorney for Mrs. Jackson was Kenneth Coffelt,<sup>36</sup> who brought this case in the United States District Court for the Eastern District of Arkansas on October 2, 1957, naming as defendants Colonel William Kuhn, the Commanding Officer of the 101<sup>st</sup> Airborne Division in Little Rock, and Major General Edwin A. Walker, commanding officer of the Arkansas Military District of the United States Army. The district court judge

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31. PAUL J. SCHEIPS, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1945–1992, 62–63 (2005).

32. *Id.*

33. See OSRO COBB, PATHWAYS TO A GREATER FUTURE 249–50, 256 (Carol Griffiee ed., 1990). Osro Cobb was the U.S. Attorney for the Eastern District of Arkansas, which includes Little Rock, from 1954 to 1962. The second half of his self-published memoir, “Pathways to a Greater Future,” recounts the Little Rock Crisis from his unique vantage point as the U.S. Attorney in Little Rock.

34. *Jackson v. Kuhn*, 249 F.2d 209 (8th Cir. 1957) (per curiam).

35. See Graeme Cope, ‘A Thorn in the Side’? *The Mothers’ League of Central High School and the Little Rock Desegregation Crisis of 1957*, 57 ARK. HIST. Q. 160, 163 (1998). For additional information about Mrs. Jackson’s role in the Little Rock crisis, see ELIZABETH JACOWAY, TURN AWAY THY SON: LITTLE ROCK, THE CRISIS THAT SHOCKED THE NATION 169–70, 198–99 (2007).

36. Mr. Coffelt would run for Governor of Arkansas in 1962, but he garnered only 2% of the popular vote in the primary. See ORVAL EUGENE FAUBUS, DOWN FROM THE HILLS 318 (1980).

presiding over the case was Ronald N. Davies, who had recently replaced another federal judge, John E. Miller.<sup>37</sup>

Mrs. Jackson's federal complaint, which is dated October 2, 1957, petitioned the court for a declaratory judgment.<sup>38</sup> Specifically, the complaint petitioned the court to declare unconstitutional Sections 332, 333, and 334 of Title 10 of the United States Code,<sup>39</sup> the statutes that President Eisenhower himself invoked in his executive order when he authorized the use of military force in Little Rock.<sup>40</sup> After Judge Davies dismissed the complaint, Mrs. Jackson promptly appealed the district court's dismissal to the United States Court of Appeals for the Eighth Circuit on October 30, 1957.<sup>41</sup> The Eighth Circuit Court, however, affirmed the district court's dismissal, holding that it lacked jurisdiction to decide the case.<sup>42</sup> But what if the court of appeals or the district court had decided to decide this case on the merits? Simply put, did President Eisenhower have the legal authority to send United States Army paratroopers to Arkansas to enforce a federal court order and restore the peace at Little Rock's Central High School? If so, what is the source of this constitutional violence power, and what are the outer limits to this dangerous power?

#### IV. SOURCES OF DOMESTIC CONSTITUTIONAL VIOLENCE LAW

In a televised address to the nation on September 24, 1957, President Dwight D. Eisenhower justified his historic decision to use force on practical grounds: "Mob rule cannot be allowed to override the decisions of our courts."<sup>43</sup> In addition, the Eisenhower Administration invoked two separate sources of presidential power when it sent troops to Arkansas: the

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37. For information on Judge Miller's sudden and unexpected removal from the federal district court and from the Cooper v. Aaron litigation, see JACOWAY, *supra* note 35, at 84–100. See also COBB, *supra* note 33, at 180.

38. See Jackson, 249 F.2d at 210.

39. *Id.* These three provisions of the United States Code (10 U.S.C. §§ 332–334) are now codified at 10 U.S.C. §§ 252–254 (LEXIS through Pub. L. No. 115-385).

40. Exec. Order No. 10730, 22 Fed. Reg. 7628 (Sept. 23, 1957).

41. See Jackson, 249 F.2d at 210.

42. See generally Jackson v. Kuhn, 254 F.2d 555 (8th Cir. 1958). At that time, a federal question case, i.e. a case brought under 28 U.S.C. § 1331, had to meet an amount-in-controversy requirement of \$3,000.00. See generally Note, *Jurisdictional Amount in Civil Rights Cases*, 9 U. CHI. L. REV. 302, 303 (1942). As an aside, Jackson v. Kuhn was decided on the very same day as yet another Little Rock case, Thomason v. Cooper, 254 F.2d 808 (8th Cir. 1957), and the opinions in both cases were written by the same federal judge, John B. Sanborn, Jr. See Thomas H. Boyd, *Biography: The Life and Career of the Honorable John B. Sanborn, Jr.*, 23 WM. MITCHELL L. REV. 203, 293 (1997).

43. President Dwight D. Eisenhower, Address to the Nation (Sept. 24, 1957), <https://www.c-span.org/video/?434366-1/president-eisenhower-speech-rock>. See also NICHOLS, *supra* note 20, at 321 n.25.



Constitution and three separate statutes enacted by Congress between 1795 and 1871.<sup>44</sup> But neither Eisenhower's proclamation nor his executive order specify the provisions of the Constitution that authorize acts of constitutional violence.

### A. Article II

The Constitution contains at least four textual sources of power that might authorize the use of constitutional violence: (1) the Vesting Clause in Article II of the Constitution,<sup>45</sup> (2) the Commander-in-Chief Clause,<sup>46</sup> (3) the Take Care Clause,<sup>47</sup> and (4) the Domestic Violence Clause in Article IV.<sup>48</sup> Although each of these clauses are broadly worded, none of them refer directly to the enforcement of court orders. Let's consider each of these sources of presidential power, beginning with the broad Vesting Clause in Article II, Section 3 of the Constitution.

#### 1. *The Vesting Clause*

The first sentence of Article II of the Constitution states that “[t]he executive Power shall be vested in a President of the United States of America.”<sup>49</sup> In addition, Article II of the Constitution requires the president to take an oath to “preserve, protect and defend the Constitution of the United States.”<sup>50</sup> One could thus argue that these two provisions, either individually or in combination, authorize the president to use force and engage in constitutional violence if necessary to protect and defend the United States and the provisions of the Constitution. There are two fundamental problems with this line of reasoning, however. One problem is textual. Nowhere does the Constitution define the meaning of “executive power.” The other major problem is structural. The Constitution is designed to limit—not expand—political power, so why should presidential power be

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44. Exec. Order No. 10730, 22 Fed. Reg. 7628 (Sept. 23, 1957). The preamble of the executive order refers to “the authority vested in [the president] by the Constitution and Statutes of the United States, including Chapter 15 of Title 10, particularly sections 332, 333 and 334 thereof. . . .” See *id.* The preamble of the executive order also cites a fourth statute, Section 301 of Title 3 of the United States Code, which authorizes the president to designate and empower the head of any department or agency in the executive branch “to perform . . . any function which is vested in the President by law. . . .” See 3 U.S.C. § 301 (LEXIS through Pub. L. 115-385).

45. U.S. CONST. art. II, § 1, cl. 1.

46. U.S. CONST. art. II, § 2, cl. 1.

47. U.S. CONST. art. II, § 3, cl. 4.

48. U.S. CONST. art. IV, § 4.

49. U.S. CONST. art. II, § 1, cl. 1.

50. U.S. CONST. art. II, § 1, cl. 8.

the exception to this rule? In short, is the use of force inconsistent with the letter and spirit of the Constitution? This is the problem of “constitutional violence.” What limits are there to this power?

## 2. *The Commander-in-Chief Clause*

Next, Article II, Section 2 of the Constitution creates a unified military command structure, declaring the president to be “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”<sup>51</sup> This broad delegation of military power, however, is limited in scope. Specifically, Article I, Section 8 of the Constitution confers on Congress the power to declare war<sup>52</sup>, and likewise, the Militia Clauses in Article I, Section 8 grant to Congress, not the president, the exclusive power to call state militias into service.<sup>53</sup>

Nevertheless, beginning with the first Militia Act of 1792,<sup>54</sup> Congress eventually delegated this calling forth power to the president via a series of statutes dealing with domestic rebellions, internal insurrections, and obstructions of federal law. Moreover, Congress subsequently expanded this unilateral “calling forth” power in 1807 to include the use of federal military forces.<sup>55</sup> The Little Rock Crisis involved a large-scale obstruction of lower federal court orders—namely, the previous federal district court orders by Judge John E. Miller and Judge Ronald Davies affirming the Blossom Plan and mandating the desegregation of Central High School.<sup>56</sup> As a result, one could argue that the events producing the Little Rock Crisis justified the use of constitutional violence and that President Eisenhower acted lawfully when he sent federal troops into Little Rock to enforce the court orders. But does the enforcement of a court order really fall under the president’s general executive powers or his military commander-in-chief powers?

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51. U.S. CONST. art. II, § 2, cl. 1.

52. U.S. CONST. art. II, § 8, cl. 11.

53. U.S. CONST. art. I, § 8.

54. Militia Act of 1792, ch. 28, 1 Stat. 264.

55. Naval Peace Establishment, ch. 40, 2 Stat. 443 (1807).

56. *See* Aaron v. Cooper, 143 F. Supp. 855, 866 (E.D. Ark. 1957) (affirming the initial desegregation plan of the Little Rock School District, known as “the Blossom Plan” after Mr. Virgil Blossom, the Superintendent of Schools). *See also* Aaron v. Cooper, 156 F. Supp. 220, 226 (E.D. Ark. 1957) (“The Governor does not . . . have lawful authority to use the National Guard to deprive the eligible colored students from exercising their right to attend Central High School, which right is guaranteed by the Federal Constitution, the School District plan of integration, and the Court’s orders entered in this cause.”).

### 3. *The Take Care Clause*

Article II, Section 3 of the Constitution obliges the president to “take Care that the Laws be faithfully executed.”<sup>57</sup> The president is thus charged with the enforcement of federal law, but this provision begs the question of which law was Eisenhower attempting to enforce when he sent troops into Little Rock in 1957? At the time of the Little Rock Crisis, Congress had not enacted any legislation requiring school desegregation.<sup>58</sup> In fact, Congress did not pass any legislation prohibiting racial segregation in the public schools until the mid-1960s, when it enacted the Civil Rights Act of 1964.<sup>59</sup>

Instead, Eisenhower’s executive order refers only to 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 public schools, particularly at Central High School, located in Little Rock School District, Little Rock, Arkansas.”<sup>60</sup> So, does a federal court order count as a “law”? Although the Supreme Court of the United States had unilaterally declared that racial segregation in public education violated the Fourteenth Amendment when it decided the landmark case of *Brown v. Board of Education*,<sup>61</sup> it’s unclear (at best) whether a court’s interpretation of the Constitution, even the Supreme Court’s, should count as a “law” of the United States. This gap is especially embarrassing in the context of a Fourteenth Amendment case like *Brown*, since Section 5 of the Fourteenth Amendment confers on Congress, not the courts, the power to enforce the substantive protections contained in the Fourteenth Amendment.<sup>62</sup>

#### A. Article IV

As we have seen thus far, Article II of the Constitution—the article delegating “executive Power” to the president—does not really address or anticipate the problem of constitutional violence; Article IV, however, does.<sup>63</sup> Specifically, Article IV, Section 4 of the Constitution states, “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature

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57. U.S. CONST. art. II, § 3, cl. 4.

58. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

59. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

60. Exec. Order No. 10730, § 2, 22 Fed. Reg. 7628 (Sept. 23, 1957).

61. *Brown*, 347 U.S. 483 (1954).

62. The text of Section 5 reads in full: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

63. U.S. CONST. art. IV is the only provision in the entire Constitution to use the word “violence.”

can-not be convened) against domestic Violence.”<sup>64</sup> Although, a case could be made that the Little Rock Crisis generated troubling levels of “domestic Violence,” the text of Article IV imposes two checks on a president’s power to use constitutional violence.<sup>65</sup> First, it limits the president’s use-of-force powers to two categories: “invasions” and “domestic Violence.”<sup>66</sup> Second, it prohibits the president from acting on his own initiative in the second category; instead, he must await a request from a state legislature or governor before acting.<sup>67</sup>

To sum up, Article IV anticipates the problem of “domestic Violence,” while Article II confers broad powers and duties on the president. In addition to these general constitutional provisions, the Congress has also enacted a series of laws delegating to the president the power to use violence to enforce the laws and Constitution of the United States—laws that can be traced back to George Washington’s first term as president.<sup>68</sup>

## B. Statutes

Aside from the general provisions found in Articles II and IV of the Constitution,<sup>69</sup> by 1957 Congress had enacted five specific laws authorizing the president to use military force within the United States: (1) the first Militia Act of 1792,<sup>70</sup> (2) the Militia Act of 1795,<sup>71</sup> (3) the Insurrection Act of 1807,<sup>72</sup> (4) the Suppression of Rebellion Act of 1861,<sup>73</sup> and (5) the Enforcement Act of 1871.<sup>74</sup> Combined, these laws pre-authorize the president to commit acts of domestic constitutional violence under certain conditions.

The content and historical development of this remarkable body of “domestic violence” law has already been commented on by other scholars.<sup>75</sup> This paper, by contrast, will present the evolution of this body of

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64. U.S. CONST. art. IV, § 4.

65. *Id.*

66. *Id.*

67. *Id.*

68. *See infra* Section IV.A.

69. *See supra* Section IV.A.2.

70. Militia of the United States, ch. 28, 1 Stat. 264 (1792).

71. Militia of the United States, ch. 36, 1 Stat. 424 (1795).

72. Naval Peace Establishment, ch. 40, 2 Stat. 443 (1807).

73. Suppression of Rebellion Act of 1861, ch. 25, § 1, 12 Stat. 281 (codified as amended at 10 U.S.C. § 252 (1956)).

74. Enforcement Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1979)).

75. If the reader is unfamiliar with this body of law, a good place to start is Professor Stephen Vladeck’s excellent 2004 law review article on emergency powers and the Militia Acts. *See* Stephen I. Vladeck, Note, *Emergency Powers and the Militia Acts*, 114 YALE L. J. 149 (2004). *See also* Dominic J. Campisi, *The Civil Disturbance Regulations: Threats Old*

law as a three-act play and show how some of our previous presidents, including Washington, Jefferson, and Lincoln, invoked these laws when acting to preserve, protect, and defend the laws and territorial integrity of the United States. The remainder of this paper will thus evaluate President Eisenhower's historic use of military force in Little Rock—and the legality of domestic constitutional violence generally—in light of these laws.

1. *Act I: The Militia Acts of 1792 and 1795*

When can a president use violence to preserve, protect, and defend the Constitution or the laws of the United States? As we saw above, Article I, Section 8 of the Constitution gives to the Congress—not to the president—the power “to raise and support armies” as well as the power “to provide for calling forth the militia.” Nevertheless, the Congress delegated its constitutional calling forth power to the president early in our nation's history, when Congress enacted the first Militia Act of 1792,<sup>76</sup> President George Washington would invoke this law when he called forth four state militias in response to the Whiskey Rebellion of 1794.<sup>77</sup>

In summary, the 1792 Act spells out three different procedures the president must follow to call forth a militia, depending on the type of domestic danger he is responding to:

- *Invasion.* When there is an invasion or an imminent threat of invasion, the president may act unilaterally to repel the invasion.
- *Insurrection.* When there is an internal insurrection within a state, the president's authority to use military force is subject to a state veto of sorts. Specifically, the president must first request authorization from the state legislature or from the governor of the state, if the legislature cannot be convened in time.
- *Execution of the laws of the union.* In order to use military force to enforce federal law, the president must first request a certification from an associate justice of the Supreme Court of the United States or from a federal district judge. Specifically, the associate justice or district judge must certify that the laws of the United States are being

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*and New*, 50 IND. L. J. 757 (1975). For an in-depth history of this body of law, see ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES, 1789–1878* (1988).

76. Militia Act of 1792, ch. 28, 1 Stat. 264, (repealed). Congress enacted a second Militia Act a few days later on May 8, 1792. See Militia Act of 1792, ch. 28, 1 Stat. 271.

77. See COAKLEY, *supra* note 75, at 28–42. Although the Whiskey Rebellion took place in isolated parts of Western Pennsylvania, President Washington called on the governors of Maryland, New Jersey, and Virginia, as well as Pennsylvania, to provide a combined total of 12,950 militiamen. *Id.* at 39.

obstructed “by combinations too powerful to be suppressed by the ordinary course of judicial proceedings.”<sup>78</sup>

In addition, the 1792 law contained two additional checks on a president’s use of domestic constitutional violence. First, it imposed a public proclamation requirement on the president.<sup>79</sup> That is, in any of these three situations—whether it be a foreign invasion, an internal insurrection, or an obstruction of federal law by powerful combinations—the president was required to issue a formal proclamation *before* using force, or in the words of the 1792 Act: “whenever it may be necessary, in the judgment of the President, to use the military force hereby directed to be called forth, the President shall forthwith, *and previous thereto*, by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time.”<sup>80</sup> Next, the 1792 law contained a two-year sunset provision.<sup>81</sup>

At the behest of President Washington,<sup>82</sup> Congress repealed and replaced the 1792 Act with a new domestic violence law in 1795.<sup>83</sup> The new law made three important changes to the old law.<sup>84</sup> First off, the new 1795 law removed the judicial certification requirement in situations involving obstructions of federal law.<sup>85</sup> Under the previous (1792) law, if the president wanted to call forth the militia to enforce a federal law, he first had to obtain from a federal district judge or an associate justice of the Supreme Court of the United States a certification that the laws of the United States are being obstructed “by combinations too powerful to be suppressed by the ordinary course of judicial proceedings.”<sup>86</sup> Under the new law, the president had the unilateral power to decide how serious or severe an obstruction was.<sup>87</sup>

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78. Militia Act of 1792, ch. 28, 1 Stat. 264, § 2. In addition, the law can be read as requiring the president to receive authorization from Congress. If Congress is not in session, then the president’s authorization to use force automatically expires “thirty days after the commencement of the ensuing session.” *Id.* at § 3.

79. *See id.*

80. *See id.* (emphasis added).

81. *See id.* at § 10.

82. *See* COAKLEY, *supra* note 75, at 67–68.

83. Militia Act of 1795, ch. 36, 1 Stat. 424.

84. *See, e.g.,* EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787–1948*, 161 (3d rev. ed. 1948), cited in Vladeck, *supra* note 75, at 162 n.51. Despite the differences between the 1792 and 1795 militia acts, the 1795 act retained the 30-day time limit on the president’s calling forth power when the Congress was in session.

85. *Compare* Militia Act of 1795, ch. 36, § 2, 1 Stat. 424, *with* Militia Act of 1792, ch. 28, 1 Stat. 264, § 2.

86. *See* Militia Act of 1792, ch. 28, § 2, 1 Stat. 264.

87. *See* Militia Act of 1795, ch 36, § 2, 1 Stat. 424.

Second, the new law also modified the public proclamation requirement.<sup>88</sup> Under the 1792 law, the president was required to issue a formal proclamation *before* he used force to respond to an emergency or other domestic danger.<sup>89</sup> The new law, by contrast, deleted the words “and previous thereto.”<sup>90</sup> Third and last, the new law removed the sunset clause.<sup>91</sup> Unlike the 1792 law, which was temporary, the new 1795 replacement law was designed to remain on the books permanently.<sup>92</sup>

## 2. *Act II: The Insurrection Act of 1807*

When former Vice President Aaron Burr was accused of orchestrating a shadowy conspiracy to create an independent republic in North America, President Thomas Jefferson took decisive military and legal actions to apprehend the conspirators and halt Burr’s scheme.<sup>93</sup> But Jefferson found himself in a constitutional and legal catch-22. On the one hand, only state militias could be used against domestic insurrections under the 1795 law.<sup>94</sup> On the other hand, Aaron Burr intended to create an independent republic in Texas.<sup>95</sup> At that time, Texas was a Spanish dominion, not a state of the United States, so there was no militia for Jefferson to call.<sup>96</sup> The solution

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88. Compare Militia Act of 1795, ch. 36 § 3, 1 Stat. 424, with Militia Act of 1792, ch. 28, § 3, 1 Stat. 264.

89. Militia Act of 1792, ch. 28, 1 Stat. 264, § 3 (emphasis added).

90. See Militia Act of 1795, ch 36, § 3, 1 Stat. 424.

91. Compare Militia Act of 1795, ch. 36, § 10, 1 Stat. 424, with Militia Act of 1792, § 10, 1 Stat. 264 .

92. In fact, as amended by the subsequent set of domestic constitutional violence laws identified in the remainder of this paper, see *infra* text accompanying notes 93–121, the Militia Act of 1795 is still on the books. See 10 U.S.C. § 252.

93. See COAKLEY, *supra* note 75, at 77–83. See also PETER CHARLES HOFFER, *THE TREASON TRIALS OF AARON BURR* (2008).

94. Indeed, Jefferson’s Secretary of State, James Madison, had advised Jefferson that only state militias could be used against a domestic insurrection under existing law. See COAKLEY, *supra* note 75, at 80.

95. According to Robert W. Coakley, historians are unclear about Burr’s true intentions. See *id.* at 77–88. Some claim that he intended to take parts of Texas and the Louisiana Purchase for himself, others, that he intended to conquer Mexico, and yet others, that he planned to conquer most of the North American continent. Yet, whichever scenario Burr intended, Jefferson would have still found himself in this constitutional catch-22.

96. Recall that the Militia Acts of 1792 and 1795 authorized the president to call forth only *state* or local militias and only in three specific situations: invasions, insurrections, and obstructions of federal law. This trio of triggering events for the use of domestic military force also appears in the first Militia Clause of Article I, Section 8 of the United States Constitution, which allocates to Congress the power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections [,] and repel Invasions.” See Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. CIN. L. REV. 919, 926 (1988).

was legislation authorizing the use of regular soldiers to respond to such domestic dangers.

Congress adopted this novel solution when it enacted the Insurrection Act of 1807.<sup>97</sup> This remarkable law consists of a single sentence and is worded as follows:

That in all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all the pre-requisites of the law in that respect.<sup>98</sup>

This law expands the president's authority to engage in domestic violence in two significant ways. First, the new law applied to "all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory."<sup>99</sup> In other words, the president is authorized to use military force to enforce state laws as well as federal laws. But even more importantly, the 1807 law not only authorized the president to "call forth" state or local militias in these two situations ("insurrection" and "obstruction to the laws"); for the first time the new law also authorized the president to activate federal troops.<sup>100</sup> Prior to 1807, the president had to rely on state or local militias to put down rebellions and repel invasions on United States soil. Now, beginning with the 1807 law, the president obtained legislative authority from Congress to use regular federal troops in addition to state and local militias to respond to domestic dangers.

In the scheme of things, Burr's conspiracy was a small blip on the constitutional radar. The greatest threat to the vitality of the Constitution and to the territorial integrity of the United States was yet to come.

### 3. *Act III: The Suppression of Rebellion Act of 1861 and Enforcement Act of 1871*

By the time a Rump Congress enacted The Suppression of Rebellion Act on July 29, 1861,<sup>101</sup> eleven States had already left the Union.<sup>102</sup> The

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97. Insurrection Act of 1807, ch. 39, 2 Stat. 443.

98. *Id.*

99. See *supra* text accompanying note 95. The relevant language of the Insurrection Act of 1807 refers to "the laws, either of the United States, or of any individual state or territory."

100. See Vladeck, *supra* note 75, at 164–65.

101. Suppression of Rebellion Act of 1861, ch. 25, § 1, 12 Stat. 281. In full, Section 1 of this law consists of a single sentence and is worded as follows (emphasis added):



1861 Act revised the existing 1795 and 1807 domestic violence laws by authorizing President Lincoln to use military force to respond to “rebellions.”<sup>103</sup> In addition, Section 1 of the 1861 Act amended and replaced Section 2 of the old 1795 Militia Act and increased the president’s military power in two ways.<sup>104</sup> First, the new rebellion law replaced the previous obstruction trigger with a much lower standard.<sup>105</sup> Under the old law,<sup>106</sup> an obstruction had to be “by combinations too powerful to be suppressed by the ordinary course of judicial proceedings”; under the new law, by contrast, the obstruction just had to make it “impracticable” to enforce federal laws.<sup>107</sup> Second, the 1861 law committed to the president’s sole discretion the initial

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That whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become *impracticable*, in the judgment of the President of the United States, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory laws of the United States, it shall be lawful for the President of the United States to call forth the militia of any or all the States of the Union, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed.

*Id.*

102. The first eleven seceding states (and the dates in which they voted to leave the Union) are South Carolina (Dec. 20, 1860), Mississippi (Jan. 9, 1861), Florida (Jan. 10, 1861), Alabama (Jan. 11, 1861), Georgia (Jan. 19, 1861), Louisiana (Jan. 26, 1861), Texas (Feb. 1, 1861), Virginia (Apr. 17, 1861), Arkansas (May 6, 1861), North Carolina (May 20, 1861), and Tennessee (June 8, 1861). See *The Confederate States of America*, INFOPLEASE, <https://www.infoplease.com/history-and-government/us-history/confederate-states-america> (last visited Feb. 1, 2019).

103. In addition to listing “unlawful obstructions, combinations, or assemblages of persons,” Section 1 of the July 1861 Act adds the words “or *rebellion against the authority of the Government of the United States*” to the list of potential triggering events for the use of military force (emphasis added). Compare Suppression of Rebellion Act of 1861, § 1, 12 Stat. 281, with Militia Act of 1795, § 2, 1 Stat. 424, and with Insurrection Act of 1807, 2 Stat. 443.

104. See Vladeck, *supra* note 75, at 166–67.

105. Compare Suppression of Rebellion Act of 1861, § 1, 12 Stat. 281, with Militia Act of 1795, § 2, 1 Stat. 424.

106. See Militia Act of 1795, § 2, 1 Stat. 424, which authorizes the use of military force inside the United States “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 course of judicial proceedings, or by the powers vested in the marshals by this act. . . .”

107. See Suppression of Rebellion Act of 1861, § 1, 12 Stat. 281, which authorizes the use of military force “whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, *it shall become impracticable . . . to enforce by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory*” (emphasis added).

determination of whether or not it was “impracticable” to execute the laws.<sup>108</sup>

Although President Lincoln did not base his legal authority to conduct the civil war on the 1861 Act,<sup>109</sup> this new law nevertheless represents a major expansion of the president’s power to commit acts of domestic constitutional violence, or in the words of one legal scholar, “to whatever extent the 1795 Act had removed or changed three important checks on the President’s authority under the 1792 Act, the 1861 Act heavily diluted the major checks that remained.”<sup>110</sup> Yet, it should come as no surprise that the Congress would vote to expand the president’s power to commit acts of constitutional violence during our nation’s most serious political and military crisis. In fact, the Congress would further expand the president’s panoply of constitutional violence powers when it enacted a series of “enforcement acts” in 1870 and 1871 in response to the rise of the Ku Klux Klan in the South.<sup>111</sup>

Of particular relevance to the legal history of domestic constitutional violence is the third Enforcement Act, which was enacted by the Congress on April 20, 1871.<sup>112</sup> What makes this particular law noteworthy is that it authorizes the president to use military force to enforce constitutional rights.<sup>113</sup> Previous constitutional violence laws enacted by the Congress were designed to give the president the military power to enforce federal laws<sup>114</sup> as well as the military power to protect the territorial integrity of the United States.<sup>115</sup> The third Enforcement Act, by contrast, authorizes the president to use military force against private individuals in order to enforce

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108. See *id.* The Suppression of Rebellion Act authorizes the use of military force “whenever . . . it shall become impracticable, *in the judgment of the President of the United States*, to enforce by the ordinary course of judicial proceedings, the laws of the United States. . . .” (emphasis added). *Id.*

109. See COAKLEY, *supra* note 75, at 227–30.

110. Vladeck, *supra* note 75, at 167 (footnotes omitted).

111. See COAKLEY, *supra* note 75, at 299–313. See also Michael Curtis Kent, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments and the State Action Syllogism, A Brief Historical Overview*, 11 J. CONST. LAW 1381, 1398–1400 (2009).

112. Enforcement Act of 1871, 17 Stat. 13. The first Enforcement Act was enacted on May 31, 1870, while the second Enforcement Act was enacted on February 28, 1871. The third Enforcement Act is also sometimes referred to as the Ku Klux Klan Act. See Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light in State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L. J. 331 (1966).

113. See Enforcement Act of 1871, ch. 22, § 3, 17 Stat. 13.

114. See, e.g., Militia Act of 1792, ch. 28, 1 Stat. 264, § 2 ; Militia Act of 1795, ch. 36, 1 Stat. 424 .

115. See, e.g., Insurrection Act of 1807, ch. 39, 2 Stat. 443; Suppression of Rebellion Act of 1861, ch. 25, § 1, 12 Stat. 281.

the constitutional rights recently granted to the former slaves under the newly enacted Fourteenth Amendment.<sup>116</sup>

Specifically, Section 3 of the 1871 Act authorizes the president to use military force to protect “the rights, privileges, or immunities” of “the people” when one of two conditions are met.<sup>117</sup> First, the president may commit acts of domestic constitutional violence to fight an insurrection or an unlawful combination or conspiracy in a state that obstructs or hinders the enforcement of state or federal law, when the “constituted authorities of such State” are unable or refuse to protect the constitutional and civil rights of the people.<sup>118</sup> In the alternative, the 1871 Act authorizes the president to use military force “whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States or the . . . due course of justice under the same.”<sup>119</sup> President Ulysses S. Grant invoked this legislation in the fall of 1871 when he ordered United States Army Major General Alfred H. Terry to eradicate the Klan and arrest its members in the northern counties of South Carolina,<sup>120</sup> and Section 3 of the 1871 Act is still in effect to this day.<sup>121</sup>

116. For an excellent overview of the politics and history of the 1871 enforcement legislation, see Jeffrey A. Jenkins & Justin Peck, *Congress and Civil Rights: The Demise of Reconstruction, 1871–1877*, 1–22 (Aug. 29, 2016) (unpublished manuscript) (on file with author at <https://cpb-us-e1.wpmucdn.com/sites.usc.edu/dist/2/77/files/2018/01/demise-v2q5de.pdf>).

117. The full text of Section 3 consists of a single sentence and is worded as follows:

That in all cases where insurrection, 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 such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or reuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, *or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States or the due course of justice under the same*, it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under the provisions of this and the preceding section shall be delivered to the marshal of the proper district, to be dealt with according to law.

Enforcement Act of 1871, ch. 22, § 3, 17 Stat. 13 (emphasis added).

118. *Id.*

119. *Id.*

120. *See, e.g.*, ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* 399–417 (1979).

121. Section 3 of the 1871 Act was codified at 10 U.S.C. § 333. Today, it is codified at 10 U.S.C. § 253.

The third Enforcement Act<sup>122</sup> thus represents the last major piece of domestic constitutional violence legislation enacted by Congress prior to the Little Rock Crisis of 1957. To sum up our review of the relevant legislation thus far, each time Congress has enacted legislation authorizing the president to use military force to deal with domestic dangers, the Congress has expanded the president's constitutional violence powers in one way or another. By 1957, on the eve of the Little Rock Crisis, this remarkable body of law—and the power of the president to deploy troops inside the United States—was codified in Sections 331 through 334 of Volume 10 of the United States Code (10 U.S.C. §§ 331–334) as follows<sup>123</sup>:

1. *Internal Insurrections*: 10 U.S.C. § 331 is based on the 1807 Insurrection Act,<sup>124</sup> authorizing the president to use military force to respond to internal insurrections within a state.
2. *Unlawful obstructions*: 10 U.S.C. § 332 is based on Section 1 of the 1861 Suppression of the Rebellion Act,<sup>125</sup> authorizing the president to use military force to deal with unlawful obstructions of federal law.
3. *Civil rights*: 10 U.S.C. § 333 is based on Section 3 of the third Enforcement Act,<sup>126</sup> authorizing the president to use military force to deal with private acts of violence in violation of federal law.
4. *Proclamation requirement*: 10 U.S.C. § 334 is based on the proclamation requirement contained in the 1795 Militia Act.<sup>127</sup>

Combined, this remarkable body of law remained entirely unchanged when President Dwight D. Eisenhower issued his Proclamation and Executive Order on the eve of his military intervention in Little Rock.<sup>128</sup> Both Eisenhower's formal proclamation and executive order refer to "Statutes of the United States, including Chapter 15 of Title 10, particularly sections 332, 333 and 334 thereof."<sup>129</sup> The invocation of Section 332 makes

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122. Enforcement Act of 1871, 17 Stat. 13 (codified at 10 U.S.C. §§ 251–55).

123. Today, the laws of domestic constitutional violence are codified at 10 U.S.C. §§ 251–255.

124. Insurrection Act of 1807, ch. 39, 2 Stat. 443 (codified as amended at 10 U.S.C. § 331 (2006)).

125. Suppression of Rebellion Act of 1861, ch. 25, § 1, 12 Stat. 281 (codified as amended at 10 U.S.C. § 332 (2006)).

126. Enforcement Act of 1871, ch. 22, § 3, 17 Stat. 13 (codified as amended at 10 U.S.C. § 333 (2006)).

127. Militia Act of 1795, ch. 36, 1 Stat. 424 (codified as amended at 10 U.S.C. § 334 (2006)).

128. Exec. Order No. 10730, 22 Fed. Reg. 7628 (Sept. 23, 1957)).

129. *Id.* Notice the mission of Section 331, which requires a request from a state legislature or governor before the president can use force.

perfect sense, since Governor Orval Faubus had used the Arkansas National Guard to impede the court-ordered desegregation of Central High School, and likewise, the reference to Section 333 also makes logical sense, since mob violence had occurred on the grounds of Central High after Governor Faubus had removed the Arkansas National Guard.<sup>130</sup> This rather simple and straightforward analysis, however, should not distract us from the larger significance of Eisenhower's fateful military action in the fall of 1957: the potentially crucial role of violence or the threat of violence in the field of constitutional law. In short, the meaning and vitality of the Constitution—or in the case of Little Rock, the meaning of the Fourteenth Amendment and of the principle of equal protection of laws—might depend less on the decisions of the Supreme Court of the United States and more on the president's willingness to use force.

#### V. CONCLUSION: THE LAWS OF CONSTITUTIONAL NECESSITY?

To sum up our survey of domestic constitutional violence thus far, the Constitution vests broad executive powers to the president, while the domestic violence statutes discussed above delegate to the president the unilateral authority to use military force inside the United States in specific situations. This body of law also raises paradoxical questions about the proper role of violence in a constitutional republic and the relation between the rule of law and the use of violence, deep and difficult questions that can be traced back to Walter Benjamin's classic essay on law and violence.<sup>131</sup> Instead of attempting to answer these hoary metaphysical questions, this paper concludes by posing a subsidiary and more mundane query: What should we call this corpus of law?

Scholars have affixed a wide variety of labels to this body of law. By way of example, these constitutional violence laws have often been referred to as the "insurrection acts,"<sup>132</sup> the "militia acts,"<sup>133</sup> "the civil disturbance

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130. *Cooper v. Aaron*, 358 U.S. 1, 7–12 (1958). A detailed chronology of the events leading up to the Little Rock Crisis and the deployment of federal troops in Arkansas appears in the Supreme Court's opinion. Additional primary source materials are available in *LITTLE ROCK USA*, *supra* note 6.

131. See Walter Benjamin, *Critique of Violence*, in *SELECTED WRITINGS: VOL. 1, 1913–1926* (Marcus Bullock & Michael W. Jennings eds., 2004). The locus classicus in this genre is Robert Cover, *Violence and the Word*, 95 *YALE L. J.* 1601 (1986). For a historical overview of the foundational role of violence during declared emergencies, see GIORGIO AGAMBEN, *STATE OF EXCEPTION* (Kevin Attell trans., U. of Chi. Press) (2005).

132. See, e.g., Thaddeus Hoffmeister, *An Insurrection Act for the Twenty-First Century*, 39 *STETSON L. REV.* 861 (2010).

133. See, e.g., Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 *TEMPLE L. REV.* 391, 414 (2007).

regulations,”<sup>134</sup> and “the law of public defense.”<sup>135</sup> Yet, all these various labels are problematic. On the one hand, references to such euphemisms as “civil disturbances” or “domestic disorders” are too broad, implying that the trigger or threshold for the use of military force is a low one, while on the other hand, references to “the militia acts” are too narrow, since the president is now authorized to use the regular armed forces in addition to state militias. Likewise, references to “the law of public defense” are also too narrow, since one of these laws, the 1871 Enforcement Act,<sup>136</sup> broadly authorizes the president to commit acts of constitutional violence in response to private acts of violence that deprive individuals of their constitutional rights. And lastly, references to “the insurrection act” are incomplete, since the president also has the power to respond to other types of domestic dangers as well, such as invasions and large-scale obstructions of justice. In the alternative, we could refer to this body of law as “the calling forth acts” based on the original language of the 1792 and 1795 militia acts, but the modern statutes no longer use this “calling forth” formulation.

Whichever label one prefers, one must concede that “terminological choices can never be neutral.”<sup>137</sup> Accordingly, this paper proposes the term “the laws of constitutional necessity.” One reason is that this label does not take sides on the question of the source of the president’s power to commit acts of domestic violence to preserve, protect, and defend the Constitution. That is, whether this delicate power is an inherent one under Article II of the Constitution or is a delegated one under Article I, how can a mere piece of paper or “parchment barrier” by itself prevent a president from using the full powers of his office to enforce his understanding of the Constitution?<sup>138</sup> The other reason the author prefers this formulation is that the word “necessity” implies that constitutional violence in whatever shape or form should always be used as a last resort and that any such use of force should be proportionate to the threat encountered.<sup>139</sup> In short, the president’s power to

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134. See, e.g., Campisi, *supra* note 75.

135. See, e.g., George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776–1861*, 18 AM. J. LEGAL HIST. 52, 66 (1974).

136. The Enforcement Act of 1871, ch. 22, § 3, 17 Stat. 13 (1871).

137. See AGAMBEN, *supra* note 131, at 4. For a specific example of framing effects in the development of constitutional law, see Donald Kochar, *The [Fakings] Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 FLA. ST. L. REV. 1021 (2018).

138. See, e.g., Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?*, 112 YALE L. J. 1011 (2003). The apt phrase “parchment barrier” originally appeared in THE FEDERALIST NO. 48 (James Madison).

139. In other words, I wish to invoke the longstanding common law tradition and understanding of the defense of necessity. See, e.g., George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L. J. 975 (1999).

use constitutional violence, though undeniable regardless of its source, cannot be an unlimited one in a self-governing republic like ours. Instead, the inevitable occurrence of a domestic danger—whether it be an invasion, insurrection, or large-scale obstruction of law—should determine the duration and extent of any violence or threat of violence to be used in response to the danger.<sup>140</sup>

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140. See Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004) (arguing that the principle of constitutional necessity may override specific constitutional limits).