Notes

# FEDERALIZING THE FIRST RESPONDERS TO ACTS OF TERRORISM VIA THE MILITIA CLAUSES

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## INTRODUCTION

Imagine over two thousand men, women, and children quietly watching a performance of the Nutcracker Suite at the Denver Performing Arts Studio. Afterward, the audience and performers leave to return to their daily routine. Two days later, the first signs of illness appear. Though it is initially dismissed by most as ordinary cough and fever, as more and more cases pour in, doctors run a broader series of tests. The results confirm a nightmare—the audience and cast have been infected with bubonic plague, released into the air system during the ballet performance. Airborne, the disease can pass from one person to another by a simple cough. Often fatal, it places thousands of lives in imminent danger. Indeed, with Denver International Airport nearby, millions of lives could be lost as travelers carry the plague throughout the United States and beyond[1]—unless, that is, immediate and effective measures are implemented to combat the awful aftermath of this act of bioterrorism.

But what precisely are those immediate and effective measures? This is a technical question, and one for which there are undoubtedly scores of possible answers. Perhaps a better question, then, is: who



1. This hypothetical is derived from one of the fictional scenarios actually tested as part of the TOPOFF ("Top Officials") exercises, which were a series of tests conducted to assess the nation's readiness to respond to the use of weapons of mass destruction on U.S. soil. For a full description of TOPOFF Denver, see Richard E. Hoffman & Jane E. Norton, *Lessons Learned from a Full-Scale Bioterrorism Exercise*, EMERGING INFECTIOUS DISEASES, Nov–Dec 2000, at 652, *available at* http://www.cdc.gov/ncidod/eid/vol6no6/pdf/hoffmann.pdf.

has the authority both to decide which measures should be chosen and how they should be executed? This Note addresses that important legal question by suggesting a constitutionally sound method for ensuring an immediate and effective response to terrorist attacks on American soil. The proposed method uses the Militia Clauses of the Constitution[2] to bring state and local emergency response personnel under federal authority.

Although federal agencies such as the Federal Emergency Management Agency (FEMA), acting under the authority and control of the president, are theoretically well-equipped to deal with these situations, the problem is one of *first* responders. If roads are to be closed, buildings evacuated, or infected victims quarantined to avoid the further spread of disease or more deaths, time is absolutely of the essence. Local doctors and law enforcement cannot simply sit and wait for federal assistance to arrive before taking action. Unfortunately, despite increased funding after 9/11 and years of preparation, state and local governments are not ready to respond to terrorist attacks, biological or otherwise.[3] An effective response requires federal involvement.[4] Unfortunately, recent federalism jurisprudence hinders the development of an effective response

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2. U.S. Const. art. I, § 8, cl. 15–16.

> Congress shall have the power . . .
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> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
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> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

3. *See* Senator Byron Dorgan, Democratic Policy Committee, Are We Prepared? The Bush Administration's Failure to Help Local Communities Prevent and Respond to Terrorism, *at* http://democrats.senate.gov/~dpc/pubs/108-1-088.html (last visited July 18, 2005) (listing the failures of the Bush administration in funding and preparing state and local first responders) (on file with the *Duke Law Journal*) TRUST FOR AMERICA'S HEALTH, READY OR NOT? PROTECTING THE PUBLIC'S HEALTH IN THE AGE OF BIOTERRORISM 6 (Dec. 2003), *at* http://healthyamericans.org/state/bioterror/ Bioterror.pdf (noting that after two years and nearly $2 billion of federal bioterrorism preparedness funding, "states are only modestly better prepared . . . than they were prior to 9/11") (on file with the *Duke Law Journal*).

4. *See* JAMES F. MCDONNELL, CONSTITUTIONAL ISSUES IN FEDERAL MANAGEMENT OF DOMESTIC TERRORISM INCIDENTS 36 (2004) ("A response to terrorism in the United States will require federal involvement due to the complexity of the threat and unique national capabilities.").

mechanism that would combine local manpower with federal expertise.[5]

This Note argues that the Constitution's oft-ignored Militia Clauses[6] nonetheless allow the federal government to direct the states and their first responders to prepare for and ultimately combat acts of terrorism on American soil. Part I explains why the Court's Tenth Amendment jurisprudence prohibits the federal government from coordinating the actions of first responders: such coordination would constitute impermissible "commandeering."[7] The Militia Clauses, however, expressly empower Congress to commandeer the states during specific times of need, and therefore should be considered an exception to the general prohibition on commandeering. Part II provides a brief history of the Militia Clauses and, more generally, the militia in the United States, explaining who comprises the militia and how Congress can organize it. Finally, Part III argues that the federal government may use the Militia Clauses to regulate first responders to acts of terrorism on United States soil. In so doing, the Militia Clauses could be revived as a fundamental component of the constitutional system for national security.

## I. THE HINDRANCE OF THE TENTH AMENDMENT TO COORDINATING FIRST RESPONDERS

The Supreme Court's Tenth Amendment[8] jurisprudence, construing the limits of the Commerce Clause,[9] works to prevent the

5. *See id.* ("The *Lopez* case highlights the limits of the Congress to mandate federal law enforcement involvement in public safety issues."); *infra* Part I (discussing Tenth Amendment limitations on federal entanglement with state police functions).

6. U.S. Const. art. I, § 8, cl. 15–16.

7. *See* Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

8. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

9. The Commerce Clause, U.S. CONST. art. I, § 8, cl. 8, is mentioned here because it is the workhorse of the federal government—no other provision has been construed to empower the federal government to regulate as broad a swath of activity as has the Commerce Clause. *See* Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995) (noting that the Commerce Clause has been used to do so much that one might "wonder why anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey, you-can-do-whatever-you-feel-like Clause'").

federal government from developing effective first-response measures to deal with the immediate aftermath of a terrorist attack. The Supreme Court interprets the Tenth Amendment as prohibiting Congress from "commandeering" state governments to serve federal Commerce Clause objectives.[10] Certain sovereign powers, including those ordinary police powers necessary to provide an effective first response, are retained solely by the states and therefore cannot be reached by the federal government.[11]

The first modern case to use the Tenth Amendment to invalidate the application of federal law to regulate the states was *National League of Cities v. Usery*,[12] in which the Court addressed whether the

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10. *See infra* notes 21–27 and accompanying text.

11. Even though the Tenth Amendment prohibits federal regulation of state executive officers, the Tenth Amendment is inapposite to regulation of private individuals. Although the regulation of private individuals raises no federalism concerns, at least not as a long as Congress is acting within its enumerated powers, the problem of first responders cannot be solved by merely regulating private individuals—those who make up the first responders—directly. The broadest power of the federal government is undoubtedly the commerce power. *See supra* note 9. However, in light of the Rehnquist Court's decisions in *Lopez v. United States*, 514 U.S. 540 (1995) (striking down the Gun-Free School Zones Act of 1990), and *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the Violence Against Women Act), the continued expandability of the commerce power to regulate whatever private conduct Congress wants is seriously in question. At a minimum, *Lopez* and *Morrison* seem to require that the activity being regulated by Congress be in some way "economic" in order to fall under the commerce power. *See Morrison*, 529 U.S. at 613 ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."). It is no longer enough that Congress simply finds that the activity "substantially affect[s]" interstate commerce—the very nature of the activity will be scrutinized by the Court. *Id.* Therein lies the problem of using the commerce power to create a completely federal first-response program: the response of police officers, fire fighters, doctors and others to such an attack would hardly qualify as economic activity. Accordingly, Congress cannot engage in such activity under the commerce power.

The spending power is similarly insufficient, but more as a practical matter than as a constitutional one. *See* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have the Power to provide for the common defence and the general welfare . . . ."). Problems with first responders, after all, remain despite attempts by the federal government to spend billions of dollars on state and local response programs. *See supra* note 3 and accompanying text. Moreover, money could only assist in the preparation of first responders, not their deployment; in an emergency, the federal government would still lack the coercive capacity to tell the state and local actors precisely what to do because that would constitute impermissible commandeering under *Printz*. 521 U.S. at 925.

12. 426 U.S. 833 (1976); *see also* Brent E. Simmons, *The Invincibility of Constitutional Error: The Rehnquist Court's States Rights Assault on Fourteenth Amendment Protections of Individual Rights*, 11 SETON HALL CONST. L.J. 259, 277 (2001) ("In *Usery*, the Court had held—for the first time in forty years—that the Tenth Amendment was an independent limit on Congress' Article I powers.").

states were obligated to follow the minimum wage provisions of the Fair Labor Standards Act (FLSA). Writing for the Court, then-Justice Rehnquist explained how FLSA violated the overarching principles of federalism and dual sovereignty implicit in the Constitution:

> Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' ability to function effectively in a federal system.[13]

Because the rationale for applying FLSA against the states had the potential to render them functionally ineffective by eliminating their ability to allocate resources freely, FLSA could not be applied to regulate the states.[14] The Tenth Amendment prevented the federal regulation of essential state functions under the Commerce Clause.[15] This new landscape for the Tenth Amendment, however, proved ephemeral.

Nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,[16] the Court expressly overruled *Usery*, holding that the FLSA should apply to the states[17] and obliterating *Usery*'s "essential state functions" test.[18] This turn of events resulted from a change in position by Justice Blackmun, who wrote for the majority in *Garcia* that the "essential state functions" test had proven itself unworkable.[19] Rather than hold merely that this was the improper test by which to judge federal regulation of the states, the Court held that alleged Tenth Amendment violations were essentially nonjusticiable political questions.[20]

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13. *Usery*, 426 U.S. at 852 (internal quotations omitted).

14. *Id*.

15. *See id.* at 845–46 ("The question we must resolve here, then, is whether these determinations are functions essential to separate and independent existence so that Congress may not abrogate the States' otherwise plenary authority to make them.") (internal quotations and citations omitted).

16. 469 U.S. 528 (1985).

17. *Id.* at 557.

18. This was also referred to as the "traditional government functions" test. *Id.* at 530.

19. *See id.* at 546–47 ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'").

20. *Id.* at 556 ("[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through

Despite the setback to a justiciable federalism in *Garcia*, the Tenth Amendment returned to prominence with the arrival of the contemporary Rehnquist Court.[21] Once resurrected, the Tenth Amendment again limited the power of the federal government, albeit this time more narrowly.[22] *New York v. United States*[23] involved a contest over the validity of a federal mandate that the states, through their legislatures, take particular measures to ensure the proper disposal of low-level radioactive waste.[24] Such a federal mandate was impermissible, not because Congress lacked power to regulate nuclear waste, but because it required the states to regulate the waste in Congress's stead.[25] If the federal government wished to regulate conduct, it had to do so directly, not by using the states as intermediaries:

> While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.[26]

Thus the anticommandeering principle was born: Congress may not commandeer the political machinery of the states into federal service.[27]

In 1997, the Court extended its *New York* holding to prevent federal commandeering of state executive machinery. That is to say,

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state participation in federal governmental action. The political process ensures that the laws that unduly burden the States will not be promulgated.").

21. *See* Tony Mauro, *Speculation Swirls About Rehnquist Retirement*, NEW YORK LAW. (Oct. 7, 2002) ("Once a lone dissenter on issues of federalism, Rehnquist now commands a majority—albeit a slim one—that has reined in Congress and restored some 'dignity' to the states.").

22. *See* New York v. United States, 505 U.S. 144, 160 (1992) ("This litigation presents no occasion to apply or revisit the holdings of [*Usery* or *Garcia*], as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties.").

23. 505 U.S. 144 (1992).

24. *Id.* at 149.

25. *See id.* at 160 ("Regulation of the resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause.").

26. *Id.* at 162.

27. In *New York*, the Court suggested that the anticommandeering principle was not a novel concept; although not used to strike down any legislation, it had been articulated by the Court years earlier. *See id.* at 162–63 (summarizing previous cases in which the Court noted that Congress' actions were appropriate because they did not involve "a federal command to the States to promulgate and enforce laws and regulations" (quoting FERC v. Mississippi, 456 U.S. 742, 761–62 (1982))).

the federal government could not affirmatively direct the conduct of state officers.[28] In *Printz v. United States*,[29] a pair of police officers challenged the Brady Bill, a federal law requiring state law enforcement officers to participate in a federal gun-control program.[30] The Court held that the Tenth Amendment prohibited the federal government from telling individuals within state executive branches what to do.[31] Summarizing the composite result of *New York* and *Printz*, Justice Scalia concluded for the Court:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty.[32]

At its most basic level, *Printz* says that state executive functions, like legislative functions, may not be commandeered by federal exercise of the commerce power.[33] This seems to speak precisely to the issue of federal coordination of first responders: the federal government may neither tell the states how to coordinate their first responders nor circumvent the states by coordinating them directly—at least not under the commerce power.

Although the Court has limited Congress's ability to regulate the states in Commerce Clause legislation, it has not done so in other areas. Most notably, in the context of the Civil War amendments, the Court has had no problem with Congress commandeering state functions such as voting.[34] The difference in treatment arises because

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28. Printz v. United States, 521 U.S. 898, 933 (1997).

29. 521 U.S. 898 (1997).

30. *Id.* at 904.

31. *See id.* at 922 ("The Federal Government's power would be augmented immeasurably and impermissibly if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.").

32. *Id.* at 935.

33. The Court dealt only with limitations on the commerce power. *See id.* at 937 (Thomas, J., concurring) (describing why he believed the legislation was not even valid under the Commerce Clause standing alone).

34. U.S. CONST. amends. XIII, XIV, XV; *see, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 666 (1966) (Harlan, J., dissenting) ("When recognized state violations of federal constitutional

these amendments, unlike the Commerce Clause, specifically empower Congress to regulate the states as states.[35] While the Commerce Clause simply authorizes regulation of commerce among the states, the Civil War amendments expressly deal with the states as sovereign entities.[36] For example, when a state violates the principles of due process, Congress may use its Fourteenth Amendment power to regulate how the state behaves.[37] The significance of this difference is that when a provision of the Constitution specifically defines the relationship between the federal government and the states in a given area of law, that provision supersedes the Tenth Amendment's anticommandeering principle.

## II. THE MILITIA CLAUSES

In none of the cases interpreting the scope of the Tenth Amendment has the Court discussed the Militia Clauses.[38] These clauses expressly grant Congress the power to regulate the states and their officers, so long as those officers are part of the militia. The Militia Clauses provide that:

> Congress shall have the power . . .

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standards have occurred, Congress is of course empowered by § 5 [of the Fourteenth Amendment] to take appropriate remedial measures to redress and prevent the wrongs."); South Carolina v. Katzenbach, 383 U.S. 301, 311 (1966) (upholding Congress's power under Section 2 of the Fifteenth Amendment to directly regulate and prohibit state voting laws that stood in the way of equal access to the polls, irrespective of race).

35. *E.g.*, U.S. CONST. amend. XIV, § 1 ("No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.") (emphasis added); *cf.* Nat'l League of Cities v. Usery, 426 U.S. 833, 842 (1976) ("[O]ur federal system of government imposes definite limits upon the authority of Congress to regulate the activities of the States as States by means of the commerce power.").

36. *See* United States v. Lara, 541 U.S. 193, 218 (2004) (Thomas, J., concurring) ("States retain sovereignty despite the fact that Congress can regulate States qua States in certain limited circumstances.").

37. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); *cf.* Tennessee v. Lane, 541 U.S. 509, 518 (2004) (noting that the Fourteenth Amendment, unlike the Commerce Clause, enables Congress to abrogate states' sovereign immunity).

38. U.S. CONST. art. I, § 8, cl. 15–16. Indeed, in none of the Tenth Amendment cases did the Court discuss whether the anticommandeering principle would apply at all as a limit on congressional powers other than the commerce power. The only times the clauses have been mentioned since the rise of a justiciable Tenth Amendment in *Usery* was in *Perpich v. Department of Defense*, 496 U.S. 334, 345 (1990), in which the Court decided the constitutionality of sending National Guard troops abroad for training exercises.

> [Clause 15:] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
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> [Clause 16:] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .[39]

Notice that Clause Sixteen "reserve[es] to the states" the "Appointment of Officers."[40] Thus, the militia is composed of state officers; yet Clause Fifteen allows Congress to call forth (i.e., commandeer) the militia not only for defense, but also to "execute the Laws of the Union."[41] Furthermore, the states themselves must carry out the training of the militia, but they can only do so "according to the discipline prescribed by Congress," not according to their own independent judgment.[42]

Were the Militia Clauses mere statutory provisions passed under the commerce power, the anticommandeering principle would clearly prohibit them.[43] But, as part of the explicit text of the Constitution—an affirmative grant of power to Congress—the Militia Clauses cannot be in any way limited by the Tenth Amendment, which by its own terms creates no limit on those powers expressly delegated to the United States.[44] Some notable scholars have even pointed out that the Militia Clauses could be interpreted to lend considerable support to *Printz*'s anticommandeering holding: by expressly providing for the use of state militias to assist the federal government in executing federal law, this precludes the possibility of such commandeering in any other context not expressly delineated in the Constitution.[45]

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39. U.S. CONST. art. I, § 8, cl. 15–16.

40. *Id.* cl. 16.

41. *Id.* cl. 15.

42. *Id.* cl. 16.

43. *See supra* notes 21–33 and accompanying text.

44. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

45. *See, e.g.*, John C. Harrison, *In the Beginning Are the States*, 22 HARV. J. L. & PUB. POL'Y 173, 176 (1998) ("[T]he fact that Congress has that specific power suggests that it is all the power Congress has."); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2197 n.79 (1997) ("One might invoke *expressio unius* to say that the Constitution explicitly addresses how the states would assist in executing the laws of the land, and provides for use of the militia, precluding other possibilities . . . .").

Insofar as the federal government is acting under the authority vested in it by the Militia Clauses, it may regulate the states and their officers. Therefore, if the individuals that make up first responders could be part of the militia, and if the goal of defeating terrorism falls under one or more of the exigencies listed under Clause Fifteen, then the federal government has a constitutional avenue to federalizing the problem of making first responders more effective.

However, to determine whether first responders can be regulated under the Militia Clauses, one must first ask, *what* precisely is the militia? A corollary question is, *who* decides which individuals should be part of the militia and when they may be called into action? Both of these questions are addressed in this Part by examining the relevant history of the militia and the Militia Clauses. Section A explains the purpose underlying the inclusion of the Militia Clauses in the Constitution and examines how these clauses were implemented during the early years of the republic. Section B traces the development of the militia into the present-day National Guard, which is essential for understanding how both the federal government and the states concurrently exercise much of the constitutional authority to regulate the militia. Section C discusses when the federal government may "call forth" the militia into federal service.

### *A. The Early Constitutional Militia*

Fears of federal tyranny through a standing army[46] were assuaged by the constitutional militia concept; the militia was to be jointly operated by the states and the federal government.[47] The Militia

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46. It is important to understand the distinction between an army and a militia in order to understand the impetus for granting limited federal control over the militia:

> A militia unit was "a randomly conscripted cross-section of the general militia (all citizens capable of bearing arms) . . . serving alongside their families, friends, neighborhoods, classmates and fellow parishioners." Army enlistees, "full-time soldiers who had sold themselves into virtual bondage to the government, were typically considered the dregs of society—men without land, homes, families, or principles."

David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 599–600 (2000) (quoting AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 53, 55 (1998)).

47. Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. CIN. L. REV. 919, 924 (1988). This was a significant advance over the situation under the Articles of Confederation, which prohibited any national standing army, instead requiring the Congress to ask the states to use their troops. ARTICLES OF CONFEDERATION art. IX, para. 5 (1777). The Articles of Confederation provide in relevant part that:

Clauses "expressly struck a particular balance between federal interests and state autonomy in the military context."[48] Several compromises were necessary to achieve that balance. First, a time-share plan of sorts was created for deciding when each sovereign could utilize the militia, with the federal government limited to use on an "as-needed" basis.[49] Under Clause Fifteen, Congress can call forth the militia under only three discrete circumstances: "to execute the Laws of the Union, suppress Insurrections and repel Invasions."[50] When not called into federal service, the militia would remain under the command of the states and their governors.[51]

A second important constitutional compromise is found in Clause Sixteen. The federal government can set standards for the militia to ensure that the militia will be able to respond effectively in the event of national emergency, but training and the appointment of officers is left to the states.[52] Two conflicting concerns drove this compromise:

> On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while on the other hand, there was a recognition of the danger of relying on inadequately

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> The United States in Congress assembled shall have authority . . . to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding; and thereupon, the Legislature of each State shall appoint the regimental officers, raise the men and cloth, arm and equip them in a soldier like manner, at the expence of the United States. . . .

*Id*.

48. Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1032 n.120 (1995).

49. *See* Perpich v. Dep't of Defense, 496 U.S. 334, 347 (1990) (noting the "traditional understanding" that the militia may only be called into federal service during emergency conditions).

50. U.S. CONST. art. I, § 8, cl. 15. The ability to use the militia "to execute the laws of the Union" initially seems very broad, and during the debates of the Framers, Charles Clay and Patrick Henry expressed precisely that concern. Hirsch, *supra* note 47, at 929–30. However, supporters of the compromise, such as George Nicholas, explained that the use of the militia would only be "necessary in case the civilian law enforcement mechanisms were inadequate." *Id.* at 930 n.72 (citing 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 392 (1901) (remarks of George Nicholas)).

51. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 12 (1820). The president, as commander in chief, may only command the militia "when called into . . . actual Service" by Congress under Clause Fifteen. U.S. CONST. art. II, § 2, cl. 2.

52. U.S. CONST. art. I, § 8, cl. 16.

> trained soldiers as the primary means of providing for the common defense.[53]

These compromises resulted in a militia that is coordinated day-to-day by the states; however, the states must at all times[54] ensure compliance with federal standards on organization, arms, and discipline.

Significantly, the Constitution imposes no express substantive limitations on the makeup or potential functions of the militia generally, dealing instead with the formalistic division of power between sovereigns.[55] Therefore, to discern the substance of what the militia is, one must look to its early history.

The historical militia was very different from the present conception of a military force. The militia stood apart from the regular army because it was theoretically comprised of "citizen-soldiers," rather than professional ones;[56] soldiering responsibilities were part time, leaving the citizens' day-to-day lives undisturbed during times of tranquility. Given this theoretically light amount of responsibility, the prevailing view was that *every citizen* was potentially part of the militia.[57] For instance, George Mason said, "Who are the Militia? They consist now of the whole people,[58] except

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53. *Perpich*, 496 U.S. at 340 (internal footnotes omitted) (discussing the history behind the constitutional militia as the basis for determining whether training the National Guard outside of the United States was a constitutionally permissible use of the militia by the federal government).

54. Congress's powers to provide for the organization, arming, and discipline of the militia existed regardless of whether the militia was actually called into federal service under Clause Fifteen.

55. U.S. CONST. art. I. § 8, cl. 16:

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .

56. Hirsch, *supra* note 47, at 921.

57. *See* David C. Williams, *The Militia Movement and the Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 897 (1996) "[T]he militia of the eighteenth century included every citizen . . . .").

58. Of course, at the time, "the whole people" likely meant adult white males, as they were the only full citizens. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 646–47 (1989) (discussing the Framers' ideas of who should comprise the militia and its intended purpose).

a few public officers."[59] This view essentially carried the day when Congress took to organizing the militia.

As between a militia comprised of soldiers and one comprised of citizens, Congress erred on the side of citizens: "[i]n place of a select contingent of young men, uniformly and periodically trained, Congress included every man, and imposed no requirements as to drills or musters."[60] The 1792 Uniform Militia Act enrolled into the militia every able-bodied white man between the ages of eighteen and forty-five.[61] Although the militia was large, "as measures of national defense, they were worthless . . . . It imposed a duty on everyone, with the result that this duty was discharged by no one."[62] Instead of providing for the militia with the federal budget, Congress required each man to arm and equip himself at his own expense.[63] Thus, although it was a topic of heated debate and mentioned in several constitutional provisions, the militia was incredibly disorganized and not particularly reliable. Amazingly, despite its obvious failings,[64] the 1792 Act remained the only permanent legislation under which the militia was organized for over a century.[65]

The constitutionality of the 1792 Act and the laws passed by the states to confirm with it, imposing the duty to serve in the militia on virtually all citizens, has been firmly established. In the first Supreme Court case to deal with the militia explicitly, *Houston v. Moore*,[66] the Court stated that the militia provisions "amount[ed] to a full execution of the powers conferred upon Congress by the Constitution."[67] In other words, because the incredibly broad 1792

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59. 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 425–26 (1901) (remarks of George Mason).

60. Fredrick B. Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 187 (1940).

61. Act of May 8, 1792, ch. 33, 1 Stat. 271. Congress gave the states the ability to craft their own exemptions. *Id*. The authority to craft exemptions to the congressional directive was statutory, not constitutional.

62. Wiener, *supra* note 60, at 187.

63. Act of May 8, 1792, ch. 33, 1 Stat. 271.

64. Even the sponsor of the legislation was opposed to it in the final form in which it was passed. Wiener, *supra* note 60, at 186–87. The original proposal, introduced twice before the 1792 Act, would have created a smaller force of young men with explicit training requirements. *Id*.

65. *Id.* at 187. Some variations upon it were passed, but none of them made any substantial changes to the provisions embodied in the 1792 Act. *Id*.

66. 18 U.S. (5 Wheat.) 1, 1 (1820).

67. *Id.* at 15.

Act was upheld, all citizens could be appropriately conscripted into the militia.[68]

*Houston* also clarified the bounds between state and federal control of the militia. Pennsylvania had initiated a court-martial against a disobedient militiaman despite the existence of a separate federal courts-martial provision.[69] The Court upheld Pennsylvania's court-martial because it dealt with disobedience to orders of the governor, whereas the federal courts-martial provision only punished disobedience to orders of the president.[70] By establishing the federal courts-martial provision, Congress did not create an exclusive venue for disciplining the militia.[71] The Court thereby affirmed that, as stated in Clause Sixteen, the states retained substantial power to organize, arm, and even discipline the militia.

The states, however, could not exercise their powers over the militia in a manner inconsistent with congressional mandates. In 1859, the governor of Massachusetts sought an advisory opinion from the state's highest court on whether Massachusetts could, contrary to the 1792 Act, include black men in its militia.[72] The Supreme Judicial Court of Massachusetts held that the "power to determine who shall compose the militia [was] exclusive" and was vested in Congress.[73] Therefore, when the federal government drew a picture of what it wanted the militia to look like, the states had to stay within the lines.

This historical analysis sheds light on the way that the constitutional division of authority over the militia between the states and the federal government has developed. At all times, during war or during peace, Congress has the exclusive power to say who among the citizenry can or must participate in the militia. The Constitution does not limit Congress's power, and the states cannot contradict federal requirements.

### *B. The Modern National Guard*

1. *Transforming the Militia into the National Guard.* As mentioned above, the basic provisions of the 1792 Uniform Militia

68. *See* Wiener, *supra* note 60, at 187 ("[The 1792 Act] imposed a duty on everyone . . . .").

69. *Houston*, 18 U.S. (5 Wheat.) at 2–3.

70. *Id.* at 57.

71. *Id*. at 28–29.

72. In re Opinion of the Justices, 80 Mass. (14 Gray) 614, 614 (1859).

73. *In re Opinion of the Justices*, 80 Mass. (14 Gray) at 618.

Act remained the sole guidance for the states for over a century. It was not until the Dick Act of 1903[74] that Congress gave the militia a much-needed overhaul. The Dick Act represented the first real assertion of federal power to fund and regulate the militia.[75] Fittingly, given the newly increased federal role, the militia was officially renamed the National Guard.[76] "This 'National Guard' represented the fruition of a process that had been underway from the beginning of the nation: the evolution of the militia from the whole citizenry into a select, organized military institution."[77] Section 3 of the Dick Act required that the National Guard be organized like the regular army within five years.[78] Perhaps the most significant change implemented by the Dick Act was its termination of compulsory militia service; participation in the new National Guard was voluntary.[79]

The transformation of the militia into the modern National Guard did not occur through the Dick Act alone, and it was hardly transformed overnight. Further significant change occurred via the Act of 1908,[80] which provided that when the National Guard was called into service, it would be available to serve "either within or without the territory of the United States."[81] This contradicted the common belief that Clause Fifteen only permitted use of the militia within the territory of the United States.[82]

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74. 32 Stat. 775, 775, ch. 196 (1903).

75. Hirsch, *supra* note 47, at 944–45.

76. *Id*. Even though the militia as a whole was not so named until 1903, it was only shortly after the Civil War that "select bodies of men . . . became known as National Guards," though they typically devoted their time to "drills, 'showy parades in harlequin uniforms,' and, with distressing regularity, to strike duty." Wiener, *supra* note 60, at 191 (quoting FEDERAL AID IN DOMESTIC DISTURBANCES, S. DOC. NO. 67-263, at 205 (1922)).

77. Hirsch, *supra* note 47, at 945.

78. Wiener, *supra* note 60, at 195 n.76. In addition to organizing itself like the army, the National Guard's training was to be provided by regular army officers. *Id*. However, due to the compromise of Clause Sixteen, training was left to the states. U.S. CONST. art. I. § 8, cl. 16. Accordingly, such training only took place upon application by a state's governor. Wiener, *supra* note 60, at 195–96.

79. Hirsch, *supra* note 47, at 945. Interestingly, the Dick Act and those that have followed it did not change the broad definition of militia, specifying that it "consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States." 10 U.S.C. § 311 (2000).

80. 35 Stat. 400, § 4; *see* Wiener, *supra* note 60, at 197 ("In that year, [the Dick Act] was amended and strengthened.").

81. Perpich v. Dep't of Defense, 496 U.S. 334, 343 (1990) (citing 35 Stat. 400, § 4).

82. *See infra* Part III.A.

Controversy over the potential use of the National Guard outside the territory of the United States came to a head in 1916, on the eve of America's entry into World War I.[83] Congress responded with the National Defense Act,[84] which provided for the Guard to be "federalized," completely transforming it from the earlier conception of a state militia.[85] The Guard "was made available for service abroad" and "was to receive federal pay for armory drills and administrative work as well as for field encampments."[86] Numerous other provisions gave the federal government substantial control over the National Guard, including over training and the appointment of officers, despite the Militia Clauses' express reservation of those powers to the states.[87] Significantly, the Guard began taking a dual oath—"to support the Nation as well as the State, to obey not only the governor but also the president."[88] A Note in the *Harvard Law Review* at the time of the National Defense Act took the position that by taking a federal oath, members of the National Guard expressly waived "their constitutional right to object to a draft for other than the constitutionally specified purposes . . . The net result [was] that the old sort of militia, known to the Constitution, [was] to be done away with."[89]

Then came World War I. Rather than attempting to call forth the National Guard under the Militia Clauses, Congress drafted the Guard into federal service.[90] Through this action the Guard became, for constitutional purposes, part of the regular army, and therefore there was no constitutional infirmity in sending the Guard to fight abroad. Unfortunately, the exigencies of war required the established Guard divisions, each hailing from its own state, to be broken up, thereby removing the inherent advantage in having troops that train together go into battle together.[91] Most distressingly, the draft inadvertently caused every member of the Guard that was drafted to

83. Wiener, *supra* note 60, at 199.

84. Act of June 3, 1916, ch. 134, 39 Stat. 166 (1916).

85. Wiener, *supra* note 60, at 200.

86. *Id*.

87. *Id.* at 201.

88. *Id*.

89. Note, 30 HARV. L. REV. 176, 178–79 (1916).

90. Wiener, *supra* note 60, at 203. The power to draft the National Guard into the regular army was upheld by the Supreme Court in the Selective Draft Law Cases, 245 U.S. 366, 366–67 (1918).

91. Weiner, *supra* note 60, at 203.

be discharged from the militia.[92] The end of the war left the states without a militia force to take care of domestic problems such as labor strikes.[93] Thus, the draft "virtually destroyed the Guard as an effective organization."[94]

In the years after World War I, the National Guard was again reconstituted and, thanks to the lessons learned during and after the war, further federalized. Among the first reforms was the arrangement of the Guard into national divisions, rather than on a statewide basis.[95] The unintended problem of permanent discharge from the militia upon draft into federal service was corrected by statute.[96] These reforms culminated in 1933, when the National Guard was officially reconstituted as a reserve component of the United States Army.[97] This obviated the need to "draft" the National Guard anytime Congress's Clause Fifteen powers were insufficient to call forth the militia.[98] Because Guard divisions could be called into service directly, rather than as individuals drafted separately, the problem of dismantled units was solved.

"Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States."[99] The Supreme Court has interpreted the current status of the Guard as one of "dual enlistment," meaning that the Guard is part of the army when called into federal service but is otherwise part of the militia.[100]

2. *Distinguishing the National Guard from the Militia.* Although both the army and the militia may be deployed to combat national emergencies, only the militia can be used to resolve domestic disputes within a state,[101] and only the army can be used for international

92. *Id.* at 203–04.

93. *Id.* at 205–06.

94. *See* Perpich v. Dep't of Defense, 496 U.S. 334, 345 (1990) (detailing the development of the National Guard).

95. Wiener, *supra* note 60, at 207.

96. *Id.* at 206.

97. *Id.* at 208.

98. *Id*.

99. *Perpich*, 496 U.S. at 346.

100. *Id.* at 345–46.

101. *See* Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez*, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 43 (1997) (noting that only upon application by the governor may federal troops assist in the state's handling of domestic violence). Aside from the possible constitutional prohibition on the unwelcome use of

disputes requiring action beyond the territory of the United States.[102] The dual enlistment of the National Guard thus gives it the breadth necessary to deal with emergencies at the local, national, and even international levels.

Although the National Guard may be used for any purpose, its creation did not dissolve the regular standing army; likewise, the existence of the Guard does not prevent the states from creating their own militias.[103] Interestingly, the broad enabling language of the 1792 Act did not change significantly with the creation of the Guard via the Dick Act, which defines the militia as:

> [C]onsist[ing] of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.[104]

Actually, the additional possibility of female members of the militia makes the present statute even broader than that created in 1792. The Dick Act, however, distinguished between the two types of militia: "(1) the organized militia, which consists of the National Guard . . . ; and (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard . . . ."[105] This statutory definition, which includes most adult men who have not volunteered for the National Guard, yields little, if any, help in understanding the nature of the unorganized militia.

Even today, virtually any individual could constitutionally be called into service of state or federal government as part of the militia; Congress need only act to organize what is currently defined

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federal troops to deal with ordinary intrastate violence, the Posse Comitatus Act of 1878 clearly prohibits any use of the Army for civilian law enforcement. 18 U.S.C. § 1385 (2000) (originally enacted as Posse Comitatus Act, ch. 263, § 15, 20 Stat. 152 (1878)) (prohibiting the use of "any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws").

102. *See, e.g.*, Wiener, *supra* note 60, at 190 ("When the Mexican War broke out, the militia was unavailable because of the constitutional limitations; service in Mexico was no part of repelling invasions or of suppressing insurrections.").

103. The legislation currently on the books both creates the National Guard and allows for the creation of unorganized militia; the latter provision has been used by a number of states to create emergency response teams. *See* 10 U.S.C. § 311(a) (2000); *infra* notes 108–11 and accompanying text.

104. 10 U.S.C. § 311(a) (2000).

105. *Id.* § 311(b).

as unorganized.[106] Even without congressional direction, the significance of the statutory "unorganized militia" goes beyond the occasional radical separatist's foray into what he believes to be the militia.[107] At least twenty-four states have utilized the congressional authorization for unorganized militia to create state guards.[108] These state guards essentially train themselves and typically serve without pay when they are not called into active duty by their governors, even paying for their own weapons and uniforms—not unlike the militia organized in 1792.[109] The state guards generally fill the role of community servants rather than soldiers, thanks in large part to the National Guard carrying the burden of most defensive activities.[110] Despite their noncombat role, the members of the state guards are acutely aware of their constitutional role as the traditional militia and are prepared to serve the president, if so called forth.[111]

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106. *See* William L. Shaw, *The Interrelationship of the United States Army and the National Guard*, 31 MIL. L. REV. 39, 44 (1966) ("The term 'Militia' has had at least two different meanings. One refers to all citizens and resident aliens who may be called in an emergency. These comprise the unorganized militia . . . .").

107. Until recently, the notion of unorganized militia did not receive much attention. The recent interest derives from the nongovernmental "Militia Movement" or the "New Militia." *See* Williams, *supra* note 57 (using the term "Militia Movement" in the article's title and throughout to refer to modern civilian groups that fancy themselves militia). These are armed paramilitary groups comprised of private citizens that fancy themselves constitutionally protected militia. *See* Anti-Defamation League: Militia History and Law FAQ, *at* http://www.militia-watchdog.org/faq1.asp (last visited July 19, 2005) (on file with the *Duke Law Journal*). These groups have given militias "a bad reputation in the news and entertainment media lately. They are usually portrayed as little better than outlaws—either home-grown terrorists, or paranoid gun-nuts ready to make war on the 'New World Order.'" *The Real Militia*, 23 ENGINEER UPDATE (1999), *available at* http://www.hq.usace.army.mil/cepa/pubs/aug99/story17.htm. The debate over the New Militia illustrates that the unorganized militia remains undefined by Congress.

108. *Id*. Express congressional approval of these organizations comes from 32 U.S.C. § 109, which states in part that "[i]n addition to its National Guard, if any, a State or Territory, Puerto Rico, the Virgin Islands, or the District of Columbia may, as provided by its laws, organize and maintain defense forces." 32 U.S.C. § 109(c) (2000).

109. *The Real Militia*, *supra* note 107.

110. About the Stage Guard Association of the United States, Who We Are, *at* http://www.sgaus.org/aboutSG.htm (last visited July 19, 2005) ("While in training status [state guards] also serve civil government and community organizations. This leads to rescue and relief roles for [state guards] and for all sorts of community service.") (on file with the *Duke Law Journal*).

111. *See id*. ("[B]y the U.S. Constitution, Militia is to defend against invasions and insurrection and to enforce the laws.").

### *C. Historical Limits on Calling Forth the Militia*

This Section addresses what precisely is encompassed by the power to "call forth" the militia under Clause Fifteen. One of the earliest and most famous instances in which the militia was called forth was the Whiskey Rebellion of 1794.[112] President Washington used the 1792 Act to assemble the militia of four states—Maryland, New Jersey, Pennsylvania, and Virginia—and personally led them in a successful campaign to reinstate order in the face of hundreds of recalcitrant Western Pennsylvanians.[113] Notably, Washington did not classify the actions of the Western Pennsylvania rebels as an "insurrection" to invoke the 1792 Act, but instead used the Act's provision allowing the militia to "execute the laws of the Union."[114] In classifying his order as an action to execute the laws of the Union, Washington triggered a set of procedural formalities not present in the insurrection classification.[115] Given the lingering fear of presidential control over a standing army, it is likely that Washington deliberately chose the classification that carried with it the greatest number of checks and balances to reassure the people that the president could be trusted as commander in chief.[116] Whatever the reason for the decision to observe procedural formalities, it seems relatively evident that the Whiskey Rebellion could have been just as easily classified as an "insurrection."[117] Significantly, President Washington's decision to follow rigid procedural rules did not create a lasting precedent followed by subsequent presidents, perhaps because the fear of tyranny by the executive quickly dissipated.

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112. Wiener, *supra* note 60, at 187–88.

113. FREDERICK T. WILSON, FEDERAL AID IN DOMESTIC DISTURBANCES: 1787–1903, S. DOC. NO. 57-209, at 33–42 (2d Sess. 1903). This was the "only campaign in American history ever led by the President in person." Wiener, *supra* note 60, at 187–88.

114. Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 161 n.46 (2004).

115. *See id.* at 160–61 (detailing how Washington first "sought and received certification from Supreme Court Justice James Wilson," then "issued a proclamation commanding the insurgents to disperse," and finally "assembled militiamen from four states . . . who eventually quelled the threat").

116. *See* ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789–1878, at 67–68 ("By his actions in the Whiskey Rebellion, Washington had apparently dissipated the fears expressed in 1792 that these powers could not with safety be entrusted to the President of the United States." (internal quotation omitted)).

117. *See* Wiener, *supra* note 60, at 187 (referring to this incident, which is typically called the "Whiskey Rebellion," as "the Whiskey Insurrection").

The War of 1812 marked the first occasion that required a significant mobilization of the militia, and several interesting events resulted.[118] Although the sudden appearance of British troops on American soil would, for most people, clearly constitute an "invasion," "the Governor of Massachusetts refused to honor the president's call for militia, and was sustained in his refusal by the Supreme Judicial Court of the Commonwealth."[119] In that opinion, the court stated its belief that the governor had the responsibility to decide whether to comply with a federal order calling forth the militia based upon his determination of whether the situation fell into one of the three exigencies listed in Clause Fifteen and its corollary enabling acts.[120]

Fifteen years later, in *Martin v. Mott*,[121] the United States Supreme Court had the opportunity to weigh in on the issue of who decides when one of the three exigencies of Clause Fifteen is present.[122] Justice Story wrote:

> We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself . . . [which] is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard [sic] the public interests.[123]

Today, 180 years later, *Martin* remains the only Supreme Court decision on the president's authority to call forth the militia under Clause Fifteen and the enabling statutes.[124] Thus, the president has the

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118. *Id.* at 188 ("[W]e raised over 527,000 men in all . . . .").

119. *Id*.

120. Opinion of the Justices, 8 Mass. (7 Tyng) 548 (1812).

121. 25 U.S. (12 Wheat.) 19 (1827).

122. *Id.* at 28.

123. *Id.* at 30.

124. Relatively recently, the Court was once again poised to address the limits of the constitutional power to call forth the militia in *Perpich v. Department of Defense*. 496 U.S. 334 (1990). The case involved a governor's refusal to send the state's national guard abroad for training exercises under the theory that the authority to train remained with the states so long as

*exclusive* power to decide whether a situation rises to the level of insurrection or invasion.[125]

Out of the War of 1812 came a different but nonetheless important lesson, one involving the territorial limitations on deployment of the militia. The New York Militia was ordered to cross the Niagara River into Canada to engage the British.[126] The militia refused to cross the river, being "unanimously of opinion that 'to repel Invasions' meant just that, and that it did not involve battling the British in Canada."[127] This set a long-standing precedent for militias to refuse to leave the territory of the United States. Over three decades later, during the Mexican-American War, the militia was deemed "unavailable because of the constitutional limitations."[128] Even though it did not come from either the text of the Constitution or the decision of any court, this understanding that the Militia Clauses only permit the militia to operate within the territory of the United States was de facto constitutional law.[129]

In sum, as far as deciding when an exigency exists sufficient to bring the militia within federal control under Clause Fifteen, the decisionmaking authority rests solely with the president and is not

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the militia had not been called into federal service. *Id.* at 336–38. Accordingly, a central issue could have been whether the National Guard was constitutionally called forth into federal service. However, the Court merely acknowledged the potential limitations on calling forth the militia for training exercises abroad given the longstanding history of militia use solely for defense purposes. The Court avoided that issue by recognizing the dual status of the Guard, and noting that, when called into federal service, the Guard is part of the army and not subject to the limitations of Clause Fifteen. *See id.* at 347:

> The Governor's attack on the Montgomery Amendment relies in part on the traditional understanding that "the Militia" can only be called forth for three limited purposes that do not encompass either foreign service or nonemergency conditions, and in part on the express language in the second Militia Clause reserving to the States "the Authority of training the Militia." The Governor does not, however, challenge the authority of Congress to create a dual enlistment program.

125. "Note that Congress cannot itself call forth the militias but may only 'provide for calling forth the Militia.' Someone else (i.e., the president) must call forth the militia." Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 586 n.173 (1994) (citation omitted). The president's ability to call forth the militia is dependent upon Congress providing some statutory basis for having a militia in the first place. *Id.* at 585–86.

126. Wiener, *supra* note 60, at 189.

127. *Id*.

128. *Id.* at 190.

129. *See* Hirsch, *supra* note 47, at 932 ("[T]he Constitution made the militia a defensive force only . . . ."); *see also Perpich*, 496 U.S. at 342 ("Moreover, the legislative history of [the Dick] Act indicates that Congress contemplated that the services of the organized militia would 'be rendered only upon the soil of the United States or of its Territories.'" (citation omitted)).

subject to judicial review. Furthermore, the Posse Comitatus Act, normally a limit on the domestic use of military personnel, does not apply to militias.[130] The power to use the militia once called forth, however, is limited by the historical understanding that the militia cannot be used outside of the territory of the United States.

## III. MODERNIZING THE MILITIA TO RESPOND TO TERRORIST ATTACKS

This Part argues that, consistent with the Constitution and historical practice, the Militia Clauses can be used to deal effectively with today's most important national security threat: terrorism. First, it addresses whether Clause Fifteen can be appropriately construed to permit the president to call forth the militia to combat terrorism.[131] Second, it considers whether the militia, traditionally a fighting force, may legitimately include first responders and engage in humanitarian aid.[132] Finally, this Note examines the practical issues that would arise if Congress adopted this proposed mechanism for federalizing the first response to acts of terrorism.[133]

### *A. The Authority to Call Forth the Militia to Combat Terrorism*

In considering whether the Militia Clauses can provide a way to federalize the first response to acts of terrorism, the first step is to

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130. The current language of the Act succinctly 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 comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385 (2000). A posse comitatus is "[a] group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations." BLACK'S LAW DICTIONARY 1200 (8th ed. 2004). The Act notably does not preclude the *militia* from acting as a posse comitatus or otherwise executing the laws. The same cannot be said when the National Guard acts under federal control. Because of the dual enlistment system, whenever members of the National Guard are called into federal service, they are instantly placed on the federal payroll and act as members of the regular army, temporarily relinquishing their status as members of the state militia. *Perpich*, 496 U.S. at 347. Therefore, insofar as the militia may be called forth to execute the laws of the union, the National Guard is generally excluded. 18 U.S.C. § 831(e) (2000) (providing the only congressional exception to the Posse Comitatus Act, dealing with the event of an emergency involving nuclear materials). The traditional militia therefore remains free to do whatever it is called forth to do, without regard for the traditional limitations upon military actors under federal control.

131. *See infra* Part III.A.

132. *See infra* Part III.B.

133. *See infra* Part III.C.

determine whether the Militia Clauses permit the "calling forth" of the militia in the event of terrorism; that is, whether combating particular acts of terrorism may be classified as executing the laws of the union, suppressing insurrection, or repelling invasions.[134] As noted in Part II.C, the president has "exclusive" authority to decide whether one of the exigencies has arisen, and "his decision is conclusive upon all other persons."[135] Therefore, although this Section argues that terrorism is a valid exigency under Clause Fifteen, it is merely an exercise in rhetoric because the president's decision is not subject to review.[136]

Despite that qualification, combating terrorism *should* be viewed as either insurrection or invasion.[137] An invasion is simply "the act of invading, especially the entrance of an armed force into a territory to conquer."[138] Insurrection is "the act or an instance of revolting esp[ecially] violently against civil or political authority or against an established government."[139] These two concepts have one common theme: an attack on the established government and an attempt to

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134. *See* U.S. CONST. art. I, § 8, cl. 15 (stating the power of Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions").

135. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827). This decision still stands as good law for calling forth the militia despite subsequent developments on the question of when the president and state executives may declare a state of martial law. *See* Ex parte Milligan, 71 U.S. (4 Wall.) 2, 124–28 (1866) (holding that the president's discretion to implement martial law during time of war is not unfettered and may be subject to judicial review). Because calling forth the militia is primarily a military decision, it remains within the president's direction as commander in chief. The imposition of martial law, on the other hand, directly affects the lives of citizens by removing their access to the ordinary channels of due process. Sterling v. Constantin, 287 U.S. 378, 404 (1932) ("If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the federal court . . . and not to attempt to override it . . . ."); *see also* Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2650 (2004) ("[T]he threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.").

136. *Martin*, 25 U.S. at 30.

137. The third exigency, "to execute the laws," is most likely inapposite to this situation because of the nature of response to terrorist activity, which primarily involves emergency response rather than law enforcement. Even insofar as first responders may be called upon to execute the laws, this exigency likely would not provide for federal intervention because the militia may only be called forth to execute the laws if the laws could not be executed "in the ordinary course of judicial proceedings or by [a federal] marshal." Wiener, *supra* note 60 at 187.

138. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2000). An alternative definition is a "large-scale onset of something injurious or harmful, such as a disease," but that is too broad to be useful here. *Id.*

139. MERRIAM-WEBSTER'S DICTIONARY OF LAW (1996).

change the way of life for the people in the attacked society. Similarly, terrorism is an attack on the citizenry in an attempt to undermine the established government while interrupting daily life. The Federal Bureau of Investigation (FBI) defines terrorism as "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."[140] Rather than using regiments of soldiers, however, terrorism uses acts of violence to strike terror in the collective psyche of a people, thereby altering the people's way of life and the government's policies.[141] Because an act of terrorism seeks to accomplish the same ends as invasion or insurrection through similar (violent) means, terrorism should be viewed as a form of insurrection or invasion.[142]

The disjunctive is used here—"invasion *or* insurrection"—because a terrorist attack may be one or the other depending on the source: insurrection comes from within; invasion from without. Terrorism, however, can come from anywhere. If insurrection constitutes revolting against established government, then certainly domestically-based acts like those of Timothy McVeigh in Oklahoma City would qualify—committing an act of violence and "hoping to spark an insurrection."[143]

Whether the terrorist acts of noncitizens constitute insurrection, even though the violence originates from within the United States, is less clear. However, because the United States is a relatively open country with millions of immigrants, it must be the case that those immigrants, whether legal or illegal, are subject to the general authority of the government. For any individual living in the United States, terrorist or otherwise, the United States is that individual's government, irrespective of whether that person's presence in the

140. General Functions, 28 C.F.R. § 0.85(l) (2004).

141. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 138 ("The unlawful use or threatened use of force or violence by a person or an organized group against people or property with the intention of intimidating or coercing societies or governments, often for ideological or political reasons.").

142. The Supreme Court, though not directly weighing in on the issue of whether an act of terrorism is the same as an act of invasion or insurrection, recently mentioned both insurrection and terrorism in tandem throughout its 2004 opinion in *Hamdi v. Rumsfeld*. 124 S. Ct. 2633, 2664 (2004) (Scalia, J., dissenting) (mentioning that statutes criminalizing warmaking and adherence to the enemy are akin to statutes criminalizing insurrection or rebellion).

143. Martin A. Lee, *Oy McVeigh*, S.F. BAY GUARDIAN (June 11, 2001), *available at* http://www.sfbg.com/reality/27.html (describing the atrocity committed by Timothy McVeigh on April 19, 1995, when he blew up the Alfred P. Murrah Federal Building in Oklahoma City).

country is merely an attempt to infiltrate the target. Accordingly, when such an individual tries to use violence to change the policies of the government and alter the way of life of fellow inhabitants, that individual is engaging in an act of revolt against the government. On the other hand, a terrorist attack by a nonresident of the United States constitutes an invasion. Al-Qaida, for example, is a foreign-based terrorist organization[144] with a goal of destroying the United States and supplanting it with an Islamist Caliphate: a goal of conquest.[145] Therefore, when Al-Qaida uses terrorism within the borders of the United States, this is fundamentally an act of invasion. The goal is the same as traditional invasion; the only difference is that, given the current supremacy of the United States' military forces, terrorism is more likely to achieve the goal of conquest than outright invasion by conventional means.

The president should be able to exercise his authority to call forth the militia to combat terrorism within the United States. Terrorism may be an invasion when the threat comes from outside the territory of the United States, and it may be an insurrection if the threat comes from within. Section B considers the means available to combat both threats through the militia.

### *B. The Appropriate Use of First Responders in the Militia*

The constitutional reach of the Militia Clauses is extensive: Congress may enroll the entire citizenry in the militia if it so desires.[146] By incorporating first responders into the militia, they can receive the federal guidance necessary to effectively respond to a terrorist attack.[147] However, their response will not involve any sort of traditional combat. This Section simply argues that the Constitution does not prohibit enlisting the militia to carry out first-responder activities for three reasons: (1) the militia were not historically limited to engaging in combat, (2) the nature of the other branches of the military has changed, and (3) the "fight" against terrorism cannot be

144. COUNTERTERRORISM OFFICE, U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2003, 131–32 (2004), *available at* http://www.state.gov/documents/organization/31912.pdf.

145. Al-Qaida Terrorist Group Profile, *at* http://library.nps.navy.mil/home/tgp/qaida.htm (last visited May 7, 2005) ("[The] [c]urrent goal is to establish a pan-Islamic Caliphate throughout the world . . . .") (on file with the *Duke Law Journal*).

146. *See supra* notes 53–68 and accompanying text.

147. *See supra* note 4.

won through combat, but instead requires immediate and effective humanitarian response. Together, these reasons support a flexible conception of the Militia Clauses as enabling Congress to conscript the average United States citizen to take whatever action is necessary to preserve the nation.

First, although evidence regarding the noncombat activities of the earliest constitutional militia is not extensive, state militias have served in both combat and noncombat capacities. During the early post-Colonial period, the militia was the primary means by which a state governor could exert force to maintain order.[148] Even in the country's largest cities, nothing resembling a professional police force appeared until nearly fifty years after independence.[149] Because the early militia often served police functions, even a purely originalist perspective would allow the militia to perform police functions today. Additionally, the unorganized militia that comprises state guards today is entirely a noncombat force, dedicated primarily to emergency response.[150]

Second, the other branches of the United States military have always had noncombat roles, but, importantly, as these branches' tactical capabilities have grown, so too have their noncombat activities.[151] For example, the army has had a medical department since 1775.[152] Though not engaged in combat, battlefield doctors that care for injured soldiers are full members of the military, not merely civilians accompanying the military. Today, the responsibilities of military doctors go well beyond simply caring for injured soldiers and include humanitarian missions around the world.[153] Additionally, the

148. 5 J. ELLIOT, *supra* note 59, at 445 (remarks of Roger Sherman).

149. *See* Levinson, *supra* note 58, at 646 ("[T]he development of a professional police force (even within large American cities) was still at least a half century away at the end of the colonial period.").

150. *See supra* Part II.B.2.

151. The army even engaged in standard law enforcement activities in the South during Reconstruction. Vladeck, *supra* note 114, at 168. However, it was anger over the army's role in law enforcement that led to the passage of the Posse Comitatus Act. *Id.*

152. Mary C. Gillet, *The Army Medical Department, 1775–1818*, *available at* http://history.amedd.army.mil/booksdocs/rev/gillett1/.

153. *E.g.*, Kathleen T. Rhem, *Military Doctors Discuss Humanitarian Assistance,* ARMED FORCES NETWORK, *at* http://www.armedforces.net/Detailed/2275.html (Sep. 14, 2004) (on file with the *Duke Law Journal*).

noncombat role of the military extends beyond medicine into fields functionally similar to those occupied by first responders.[154]

Third, the current threat of terrorism is one against which a historical militia could not adequately defend. The quintessential militia member, in the historical context, is the citizen-soldier—the farmer who, when called, puts down the hoe and takes up the musket.[155] The nature of warfare has changed dramatically since the eighteenth century, resulting in an abandonment of the concept of a citizen-soldier in favor of professional troops.[156] Thus, if the citizen-solder concept were to be revitalized in the twenty-first century at all, its character would have to change dramatically as well.

The Constitution is clear that Congress would be acting within its Militia Clause authority if it required all citizens to purchase weapons, attend regular training sessions, and even kill or be killed if called into duty by the president.[157] Such measures, though, are unlikely to be effective because of the clandestine nature of terrorists, who cannot be fought in the same way as conventional soldiers. A historical militia would not have been useful against surprise attacks in Oklahoma City and New York, nor would it be effective against the types of attacks anticipated by terrorism experts. As the enemy changes, so too must the response. Today, the citizen-soldier is not the farmer who drops the hoe for the musket, but instead the virologist who leaves the lab to investigate a terrorist attack involving a suspected biological agent.

The more damage done by a terrorist attack, the more effective the terrorists, and the closer they get to accomplishing their goal of changing governmental policy or, ultimately, destroying a society's way of life. Once the attack has been carried out by a terrorist cell, the only force that can be effective is a humanitarian one. Unlike traditional war, in which the success of battles is measured by the numbers of personnel and equipment lost, the success or failure of a terrorist operation is often all or nothing: typically, the terrorist act

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154. *See, e.g.*, 249th Engineer Battalion, United States Army Prime Power, *available at* http://249en.belvoir.army.mil/capabs/en249.htm (describing the battalion's mission as to "[d]eploy to generate and distribute prime electrical power in support of warfighting, stability and support operations, and disaster relief operations").

155. *See supra* notes 56–73 and accompanying text.

156. In 1901, President Theodore Roosevelt declared that "[o]ur militia law is obsolete and worthless," and, not surprisingly, the Dick Act followed on the heels of this comment. Wiener, *supra* note 60 at 194–95.

157. *See supra* note 2 (quoting the Militia Clauses of Article I).

either succeeds (for example, the plane crashes) or fails (the plane does not crash). Numerous federal agencies, such as the Central Intelligence Agency and the FBI, are currently working around the clock to prevent further terrorist strikes.[158] Their efforts might yield little or no reduction in the damage toll, however, if they fail to discover and reach the particular terrorist cell.[159] There is typically no long-fought battle; the entire attack lasts but a moment.

Once a terrorist attack has begun, the best way to "win" is through damage control: the emergency response by first responders is the best, and perhaps the only, way to combat terrorism. Using a first-responder militia would reduce the damage caused by a terrorist attack. By contrast, the traditional conception of the musket-bearing militia (even equipped with modern arms) would have little, if any, power to reduce the harm. Accordingly, when deciding who to call forth to combat terrorism, the president would not only be justified in calling first responders, he would be gravely mistaken not to do so.

### *C. Turning Theory into Practice*

Establishing a legal basis for federalizing first responders and actually implementing such a program are different matters. The practical steps that need to be taken before first responders can be treated as part of the militia include congressional action providing for the organization of first responders and development of a plan for federal deployment of first responders.

Under its Clause Sixteen power to organize the militia, Congress can precisely designate that specific types of personnel, such as doctors and engineers, be part of each state's militia, so that the militia is ready to respond to a variety of possible terrorist attacks. Congress has never used its full Clause Sixteen power to precisely specify who is in the militia, but this lack of precedent should not stop Congress from defining the militia in a way that includes first

158. Statement of John S. Pistole, executive assistant director, counterterrorism/counterintelligence, FBI, Before the National Commission on Terrorist Attacks upon the United States (April 14, 2004), *at* http://www.fbi.gov/congress/congress04/pistole041404.htm (last visited May 7, 2005) (noting the FBI's work "around the clock" and in conjunction with numerous intelligence partners to prevent terrorism) (on file with the *Duke Law Journal*).

159. This is an oversimplification of sorts, designed around the notion that each terrorist act is a self-contained event, such as one bomb, or one virus.

responders. Such a step would depart from Congress's historical, broad enabling acts—but those acts have been criticized.[160]

Although Clause Sixteen reserves the actual training and appointment of officers for the states, Congress may dictate the discipline for such training. Using experts in FEMA and the Center for Disease Control (CDC), Congress could develop a specific regimen for the states to implement. Congress could also provide a mechanism for the states to use such federal experts voluntarily to train first responders, perhaps providing monetary incentives to encourage states to do so. Additionally, by taking an active role in the appointment of officers, Congress would approach full federalization of first responders under the Militia Clauses. States would retain the right to appoint individual officers, but Congress could designate specific officer positions and dictate qualifications for each office.[161]

Once a militia is organized, Clause Fifteen gives Congress, and by extension the president, the power to call it forth under any one of the three listed exigencies.[162] If a terrorist attack occurred, the president should call forth the first responder militia. As commander in chief, the president could effectively coordinate first responders from all parts of the nation to efficiently respond to an act of terrorism. This course of action creates the nation's best chance of averting disaster in a terrorist attack through uniform training and federal coordination. Construing the militia in this way would turn a form of historical military service into *public* service—a concept far more palatable to the typical firefighter, police officer, or doctor who might be called forth to serve the national interests in the event of a terrorist attack.

## CONCLUSION

Because of the Court's interpretation of the Tenth Amendment, the federal government cannot directly prepare or coordinate the

160. Wiener, *supra* note 60, at 187 (noting that "[t]he basic fallacy of the 1792 Act was that it was unselective" and explaining how the broad definition of the militia in the 1792 Act failed to create an effective force such that history quickly made its provisions "obsolete").

161. U.S. CONST. art. I, § 8, cl. 16.

162. *See* U.S. CONST. art. I, § 8, cl. 15 (giving Congress the power to "provide for" the calling forth of the militia); U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ."); *see also supra* note 125 (explaining how the Constitution gives the president the authority to make the decision on when to call forth the militia).

activities of first responders under its commerce power. This Note argues that the federal government can exercise significant control over first responders by enrolling them as members of the militia. Congress has the broad and exclusive power to incorporate citizens into the militia. Although first responders would be in noncombat roles, history illustrates that army and militia alike may undertake noncombat goals and pursue them zealously, especially when the noncombat activities contribute to national security, as in the case of a terrorist attack. Once the first responders are members of the militia, Congress has the power to organize, equip, and discipline them into a well-trained team capable of providing immediate and effective responses to such attacks. The president would have the exclusive authority to call forth the first-responder militia, needing only to first determine whether the attack constituted an insurrection or invasion.

In the fight against terrorism, the battle is won at two stages: prevention and damage control. Once a terrorist strikes, the only way to fight back is by saving as many lives as possible. This means having well-equipped first responders on the scene immediately and ensuring that they respond effectively and in coordination with other efforts that may be taking place around the country. The federal government can help achieve this goal, while remaining faithful to the Constitution, by incorporating first responders into the militia. Only through the heroism of first responders can the United States return quickly to its feet after a powerful blow and stand ready to fight.