

**Usurpation of Power:
FY2007 Defense Department Authorization Act and the
“Reform” of the Insurrection Act of 1807**

Messages are circulating on the Internet that raise an alarm over a provision of the FY2007 Defense Department Authorization Act (PL 109-364) that expands presidential discretion to declare martial law and to federalize the National Guard in case of insurrection.

The first to raise the subject was Senator Patrick Leahy (VT). On September 19th, 2006, and again on September 29th, 2006, he decried this expansion of presidential power previously restricted by the Insurrection Act of 1807 (10 U.S.C. 331) (as updated) and a similar weakening of the limits on presidential power in the *Posse Comitatus* Act of 1878 (18 U.S.C. 1385).

BACKGROUND

Many who have taken note of Senator Leahy’s remarks have also included in their analysis the generally unheralded Department of Homeland Security contract awarded to KBR, a Haliburton subsidiary. The five-year, \$385 million “Indefinite delivery/Indefinite quantity sole-source contract calls for construction on a contingency basis, under supervision of the U.S. Army Corps of Engineers, of “temporary detention and processing capabilities to augment existing Immigration and Custom Enforcement (ICE) Detention and Removable Operations” should there be an “emergency influx of immigrants into the U.S. or to support the rapid development of new programs.” This is not a new contract; Haliburton secured a similar contract covering 2000 with four one-year extensions that carried the contract to 2005. The “one-year” provisions are part of the current contract.

Before delving into the concerns raised by Senator Leahy and others, it might be helpful to start at the beginning – with what the U.S. Constitution says about militias, “insurrection” and with George Washington’s actions in response to the “Whiskey Rebellion of 1791” that formed the precedent in these matters.

The Constitution and the Role of Congress Regarding Insurrection

Albeit somewhat ancillary to the main threads to be followed, it remains important to the evolution of laws touching on insurrection to recall Article 1 Section 8 of the Constitution which enumerates the powers reserved for the legislature. As they do with any document of such fundamental import, constitutional scholars have poured over the order of words and the placement of every comma, semi-colon, and period in making the case for their interpretations of the meaning intended by the writers.

In regard to the public order, it seems noteworthy that the Framers saw fit not to insert commas – which could be taken to indicate a sequencing or hierarchy of congressional powers and duties in that part of this section reading “to pay the debts and provide for the common defense and general welfare of the United States;” – indicating that the common defense and the general welfare, which arguably includes domestic tranquility, are of equal importance.

Moreover, Article 1 Section 8 empowers Congress, not the president,

“To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasion” and

“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;”

Article 1, Section 9 states, “The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”

The Constitution and the Role of the Executive Regarding Insurrection

Article 2 Section 2 of the U.S. Constitution provides that “The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States:” – the latter ostensibly occasioned by a natural disaster or man-made event or threat to the “common defense and the general welfare” that either entails external attack (common defense) or exceeds the ability of local authorities to handle (general welfare).

IMPLEMENTING THE LAW: Washington and the Whiskey Rebellion of 1794

In 1791, in order to raise revenue to help pay the Revolutionary War debts the federal government assumed from the states, Congress imposed a tariff on the sale of “distilled spirits.” Although the tax was not a major burden for large distillers, for the smaller operators who were chiefly located along the frontier and who had other grievances against the federal government, the tax was the last straw. By 1794, Washington and Allegheny Counties in western Pennsylvania had evolved into centers of resistance to the federal government, with mobs destroying property and threatening the lives and well-being of revenue collectors, physically assaulting and kidnapping a federal marshal, and stealing mail from a post-rider.

Under the 1792 Militia Act, Congress had enumerated the three specific circumstances that would justify calling up a state militia for federal service: “calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.” The militia of the state or states concerned was to be called first, but should it refuse or be deemed

insufficient to deal with the insurrection, militias of adjacent states could be called up for a period of 30 days after reconvening of the Congress, a period thought sufficient for Congress to take action if necessary.

But before the militias could be called out, two conditions had to be met: a reasonable time for ending the insurrection had to be publicly proclaimed and to have expired, and evidence of “combinations too powerful to be suppressed by the ordinary course of judicial proceedings” or by federal marshals had to be presented to a federal associate or district judge. Having reviewed the material presented, the judge would in writing inform the president that a state of insurrection existed.

Using the authority given him by the Militia Act, in August 1794, President Washington issued a proclamation calling on those in rebellion to “disperse and retire peaceably to their respective abodes.” Upon receiving the required judicial notification, Washington called up nearly 13,000 militiamen, most from Virginia, and joined them in the field for part of their march westward.

Washington’s proclamation is noteworthy for its details on the rebellion: “misrepresentations of the laws,” acts committed that “amount to treason, being overt acts of levying war against the United States,” “intention to prevent by force of arms the execution of the said laws,” and “it is my judgment...that the very existence of government and the fundamental principles of social order are materially involved in the issue.”

Congress had intended that the 1792 Militia Act would have to be renewed every three years. But when renewal was considered in 1795, this requirement, along with the involvement of a federal judge, was dropped. Moreover, the bar against initially federalizing out-of-state militias was also rescinded. The revised Militia Act passed in 1795 permitted the president to act virtually unilaterally and quickly when Congress was not in session.

One other, albeit temporary, change to the law occurred in 1799 when Congress authorized the president to call out the federal regulars in circumstances in which he was empowered by the 1795 Militia Act to federalize state militias. This change was repealed in 1802.

The Burr Conspiracy and the First Insurrection Act

In 1806, Aaron Burr was accused of treasonous acts for planning to sail down the Mississippi River to attack Spanish New Orleans or to engineer the secession of the states of the southeast U.S. Burr was acquitted, and the incident largely forgotten except for what came to be known as the “Insurrection Act of 1807.” This Act, in effect a one-sentence amendment to the Militia Act, reinstated and made permanent the 1799 expansion of the use of federal troops in domestic disorders and insurrections. (By 1806, the regular army, which had been reduced after the Revolutionary war to 80 officers and men, numbered over 12,000.)

Why this change was made is unclear because this Act has no legislative history; it was passed with no debate, along with other bills, on the last day the Ninth Congress was in session in 1807. Whatever the reason, the Insurrection Act of 1807 amended the 1795 statute to permit, “where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection...it shall be lawful for him to employ for the same purposes, such part of the land or naval forces of the United States, as shall be judged necessary, having first observed all the prerequisites of the law in that respect.”

Other 19th Century Changes to the Law

With the Civil War looming, Congress in 1861 authorized the president to call up either the militias of the states or federal troops “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 impractical, 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.” This revision also extended the call-up period to 60 days into a new session of Congress and eliminated the requirement for a presidential proclamation. The significant changes were the addition of “rebellion” to the circumstances empowering federalizing militias and permitting the president to determine on his own that the laws could not be enforced. The addition of “rebellion” also linked use of militias and federal troops to the question of declaring martial law and suspending habeas corpus as “rebellion” is constitutionally specified as a trigger for such suspension.

A minor change to the Militia Act was made in 1871 to counter the depredations of the Ku Klux Klan in the post-Civil War South. With the withdrawal of federal troops from the South and the end of Reconstruction, Congress also passed the *Posse Comitatus* Act of 1878. This Act sought to limit the power of the president to “employ any part of the Army of the United States, as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress.” Note that the law applies only to federal troops. Non-federalized militias, because they are from the local community and, under normal “peacetime” conditions, come under and respond to the direction of their state’s governor, are exempt from this 1878 law.

At the turn of the century, then, distinctions existed as to the conditions that empowered the president to employ federal troops or federalized troops. Normally he waited until a state governor or legislature requested federal assistance. But *in extremis*, should the president determine that the state government was incapable of or refused to protect the rights of a significant part of its population, whether the rights were guaranteed by the constitution or by statute, he could use federal troops without waiting for a state request. And because the state militias at the time were so poorly organized, trained, and

equipped, presidents had to use federal troops when unrest or disasters struck – e.g., the Pullman strike when the movement of the U.S. post was endangered.)

Finally, in 1903, Secretary of War Elihu Root convinced Congress to pass a new Militia Act. This created the Organized Militia, which came to be called the National Guard. In ordinary times, control and employment of Guard personnel remained with state governors. The president retained authority to call the Guard into federal service in case of invasion or insurrection or to enforce the laws of the Union – and only for a maximum of nine months.

Nonetheless, between 1807 and 1925, federal troops were employed more than 100 times under the auspices of the Militia and Insurrection Acts to resolve civil disturbances that state authorities could not or would not control.

The Insurrection Act (10 U.S.C. 331) itself was expanded during these years to five sections.¹ These roughly empower the president:

- upon application by state authorities for help in suppressing an insurrection, to federalize sufficient militia troops or use federal troops “as he deems necessary”;
- upon determining that the laws of the U.S. cannot be enforced through normal judicial proceedings because of “unlawful combinations, or assemblages, or rebellion,” to federalize the militia or use federal troops in sufficient numbers to end the rebellion;
- to use the militia or federal troops if he determines that such use is the way to put down “any insurrection, domestic violence, unlawful combination, or conspiracy” that deprives any class or part of a state’s population of their right privileges, immunities, or protections under the Constitution or in statute and the state authorities cannot or will not act to ensure these rights or – or if a state even opposes or obstructs the execution of federal law or “impedes the course of justice”;

The fourth section requires the president, upon determining the need to use militia or federal troops, to “immediately order the insurgents to disperse” and return home peacefully. The fifth specifies that the act applies to Guam and the U.S. Virgin Islands.

The 2007 Defense Authorization Act

The Senate version of this bill (H.R.5122) went to conference with a section intended to strengthen the independence of the National Guard by raising its bureaucratic profile, requiring the Pentagon to provide more and better equipment, and emphasizing its role in responding to domestic disasters. When the Senate-House conference ended, the legislation not only had been stripped entirely of these proposals, in its place were revisions “making it easier to usurp the Governors’ control and making it more likely that the President will take control of the Guard and the active military operating in the states,” according to Senator Leahy. Why? Because, as noted before, the National Guard (militia) when operating under state control can be used to augment law enforcement,

thus removing the need for federal troops. But if a president invokes the Insurrection Act with its tie to “rebellion,” he can override state objections and authority and use federal forces or federalized forces (National Guard) for purposes of “enforcing the laws of the United States.”

Senator Leahy sees the changes as “payback” by the administration for the refusal of the Louisiana governor to cede control of post-Katrina recovery efforts to Washington. Indeed, the title of Section 1076² of the FY2007 Defense Authorization act suggests an expansion of presidential power – “Use of the Armed Forces in Major Public Emergencies.” Section 333 of the Insurrection Act now permits the president to use “the armed forces, including the National Guard in Federal service, to restore public order” in circumstances that now include “terrorist attack or incident, or other condition in any State or possession of the United States, the President determines” that state authorities cannot “maintain public order” because of “domestic violence.” The balance of the current Section 333 of the Insurrection Act is repeated in the 2007 legislation

Section 334 of the Insurrection Act deals with the presidential proclamation ordering those engaged in opposing the government or fomenting unrest to disperse. The 2007 law adds to “insurgents” the phrase “or those obstructing the enforcement of the laws.” The fact that the president determines to whom the proclamation applies gives him, *ipso facto*, the power to determine when the laws are being obstructed regardless of the views of state authorities.

Senator Leahy sees these changes as “automated triggers” that congressional allies of the administration rammed through the conference to further consolidate power in Bush’s unitary presidency. In point of fact, Congress has so yielded its power under the Militia clauses of the constitution that a president has nearly a free hand in case of a major man-made or natural disaster. And until one of these disasters actually occurs and the federal government usurps first line – that is, state-controlled assets – Congress is unlikely to try to claw back power to the states. One major impediment to congressional action is that the 2007 legislation also requires the Pentagon to provide relief supplies and emergency shelters needed “for the immediate preservation of life and property” once the president invokes the new powers. States will not reimburse the federal government for these supplies. The law also calls for coordination between the Department of Homeland Security and the Pentagon’s Northern Command which is responsible for Defense Department actions inside the United States.³

And at a deeper level, there is still the power to suspend *habeas corpus* upon presidential declaration.

CONCLUSION

Section 1076 of Public Law 109-364 does expand presidential power to declare when an emergency exceeds the power of a state government to handle and has tied ill-defined concepts such as “public order...or other condition” to rebellion, thus triggering potential presidential suspension of *habeas corpus*.

The question is: when and how far will the current or any future president decide to go in exercising the increased latitude conferred by this law?

Given the propensity for power to always tend toward the center, Congress needs to reverse this propensity. Its springboard is the Tenth Amendment – if it will but use it.

Notes:

¹ Current version of INSURRECTION ACT OF 1807 (10 U.S.C. 331-335) (before amendment by Section 1076 of the 2007 Military Authorization Act)

Sec 331. Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

Sec. 332 Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

Sec 333 The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

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

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

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

Sec 334 Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

Sec 335. For purposes of this chapter, the term “State” includes the unincorporated territories of Guam and the Virgin Islands.

² SEC. 1076. USE OF THE ARMED FORCES IN MAJOR PUBLIC EMERGENCIES.
(a) USE OF THE ARMED FORCES AUTHORIZED.—

(1) IN GENERAL.--Section 333 of title 10, United States Code, is amended to read as follows:

`` 333. Major public emergencies; interference with State and Federal law

``(a) USE OF ARMED FORCES IN MAJOR PUBLIC EMERGENCIES.--

(1) The President may employ the armed forces, including the National Guard in Federal service, to--

``(A) restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition in any State or possession of the United States, the President determines that--

``(i) domestic violence has occurred to such an extent that the constituted authorities of the State or possession are incapable of maintaining public order; and

``(ii) such violence results in a condition described in paragraph (2); or

``(B) suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy if such insurrection, violation, combination, or conspiracy results in a condition described in paragraph (2).

``(2) A condition described in this paragraph is a condition that--

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

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

``(3) In any situation covered by paragraph (1)(B), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

``(b) NOTICE TO CONGRESS.--The President shall notify Congress of the determination to exercise the authority in subsection (a)(1)(A) as soon as practicable after the determination and every 14 days thereafter during the duration of the exercise of that authority."

(2) PROCLAMATION TO DISPERSE.--Section 334 of such title is amended by inserting ``or those obstructing the enforcement of the laws" after ``insurgents".

(3) HEADING AMENDMENT.--The heading of chapter 15 of such title is amended to read as follows:

``CHAPTER 15--ENFORCEMENT OF THE LAWS TO RESTORE PUBLIC ORDER".

(4) CLERICAL AMENDMENTS.--(A) The tables of chapters at the beginning of subtitle A of title 10, United States Code, and at the beginning of part I of such subtitle, are each amended by striking the item relating to chapter 15 and inserting the following new item:

``15 Enforcement of the Laws to Restore Public Order 331".

(B) The table of sections at the beginning of chapter 15 of such title is amended by striking the item relating to sections 333 and inserting the following new item:

``333. Major public emergencies; interference with State and Federal law."

(b) PROVISION OF SUPPLIES, SERVICES, AND EQUIPMENT.--

(1) IN GENERAL.--Chapter 152 of such title is amended by adding at the end the following new section:

`` 2567. Supplies, services, and equipment: provision in major public emergencies

“(a) PROVISION AUTHORIZED.--In any situation in which the President determines to exercise the authority in section 333(a)(1)(A) of this title, the President may direct the Secretary of Defense to provide supplies, services, and equipment to persons affected by the situation.

“(b) COVERED SUPPLIES, SERVICES, AND EQUIPMENT.--The supplies, services, and equipment provided under this section may include food, water, utilities, bedding, transportation, tentage, search and rescue, medical care, minor repairs, the removal of debris, and other assistance necessary for the immediate preservation of life and property.

“(c) LIMITATIONS.--(1) Supplies, services, and equipment may be provided under this section--

“(A) only to the extent that the constituted authorities of the State or possession concerned are unable to provide such supplies, services, and equipment, as the case may be; and

“(B) only until such authorities, or other departments or agencies of the United States charged with the provision of such supplies, services, and equipment, are able to provide such supplies, services, and equipment.

“(2) The Secretary may provide supplies, services, and equipment under this section only to the extent that the Secretary determines that doing so will not interfere with military preparedness or ongoing military operations or functions.

“(d) INAPPLICABILITY OF CERTAIN AUTHORITIES.--The provision of supplies, services, or equipment under this section shall not be subject to the provisions of section 403(c) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170b(c)).”.

(2) CLERICAL AMENDMENT.--The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

“2567. Supplies, services, and equipment: provision in major public emergencies”.

(c) CONFORMING AMENDMENT.--Section 12304(c)(1) of such title is amended by striking “No unit” and all that follows through “subsection (b),” and inserting “Except to perform any of the functions authorized by chapter 15 or section 12406 of this title or by subsection (b), no unit or member of a reserve component may be ordered to active duty under this section”.

³ The House report on PL 109-364 Title X provides:

“Therefore, the committee directs the Assistant Secretary of Defense for Homeland Defense to review the findings applicable to the Department made in the Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina. The committee also directs the Assistant Secretary of Defense for Homeland Defense to submit to the Senate Committee on Armed Services and the House Committee on Armed Services by April 1, 2007, a report detailing how the Department intends to address the issues raised by the Select Committee report and the White House report. In particular, the report shall clarify U.S. Northern Command’s role in planning and executing support to the Department of Homeland Security and national guard units operating under title 32, United States Code, status during domestic contingencies.”