The President's Authority To Suppress Insurrections

By Edwin Vieira Jr., June 16th, 2020

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Recently, both the big "mainstream" media and hundreds of alternative sources on the Internet have overflowed with the opinions of commentators, pundits, bloggers, public officials at all levels of the federal system, retired military officers, sports stars, and assorted "celebrities", concerning the authority (or lack thereof) of the President of the United States to intervene in the rampage of riots, looting, arson, and even killings which have plagued American cities following the homicide of Mr. George Floyd. The major lesson one learns from this palaver is that the writers and speakers generating it possess little to no real knowledge of the subject-matter, and apparently have no inclination to acquire any. That is both amazing and frightening. For, besides being of the highest importance, the subject-matter is so clear cut that anyone who has obtained a secondary-school education of the quality generally available prior to (say) 1970 should be able to understand it with a minimum of mental strain. The following points are intended to clarify the matter for anyone whose thinking needs clarification—

FIRST. Article II, Section 1, Clause 7 of the Constitution of the United States mandates that "[b]efore he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation: — 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'" Everything which follows in this analysis comes within the purview of this "Oath".

SECOND. Article II, Section 1, Clause 1 of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." That is, *all* "executive Power", because the latter Clause recognizes no exceptions or exclusions.

THIRD. Article II, Section 2, Clause 1 of the Constitution provides that "[t]he 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 Constitution recognizes no one other than the President as the recipient of this status and authority.

FOURTH. Article II, Section 3 of the Constitution requires that the President "shall take Care that the Laws be faithfully executed". This is not only a duty, but also a power and a right (in the strict legal senses of those terms). Self-evidently, one manner of fulfilling this duty, and exercising this right and power, is for the President to take appropriate actions as "Commander in Chief" of the forces the Constitution places within his control.

FIFTH. Article I, Section 8, Clauses 15 and 16 of the Constitution delegate to Congress the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, [and] suppress Insurrections", whereupon "such Part of the[Militia]" as may be "call[ed] forth" is considered to "be employed in the Service of the United States".

SIXTH. Article I, Section 8, Clause 18 of the Constitution delegates to Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" not only its own "Power[ ]" "[t]o provide for calling forth the Militia", but also "all other Powers vested by th[e] Constitution in * * * any * * * Officer thereof", such as the "Power[ ]" of the President to "take Care that the Laws be faithfully executed".

SEVENTH. Section 1 of the Fourteenth Amendment to the Constitution provides (in pertinent part) that "[n]o 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." And Section 5 of that Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

EIGHTH. Pursuant to its powers recited above, Congress enacted the present Section 252 of Title 10 of the United States Code:

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

This is no novel contemporary piece of legislation, but derives from the Act of 29 July 1861, Chap. XXV, *An Act to provide for the Suppression of Rebellion and Resistance to the Laws of the United States, and to amend the Act entitled "An Act to provide for calling forth the Militia to execute the Law of the Union," &c., passed February twenty-eight, seventeen hundred and ninety-five, 12 Stat. 281*, and from the Act of 28 February 1795, Chap. XXXVI, *An Act to provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections, and repel invasions; and to repeal the Act now in force for those purposes*, § 2, 1 Stat. 424, 424.

Section 252, apparently, is what people who pontificate about the President's authority are calling "The Insurrection Act". If so, the contention of critics that President Trump cannot rely upon this statute is balderdash — inasmuch as Presidents before him have invoked it successfully, with no widespread (or, really, *any* significant) outcry against the legality of their actions. *See* Executive Order No. 10730, 24 September 1957, 22 *Federal Register 7628* (President Eisenhower); Executive Order No. 11053, 30 September 1962, 27 *Federal Register 9681* (President Kennedy); Executive Order No. 11111, 11 July 1963, 28 *Federal Register 5709* (President Kennedy); Executive Order No. 11118, 10 September 1963, 28 *Federal Register 9863* (President Kennedy).

NINTH. Although 10 U.S.C. § 252 could apply under some circumstances to some of the disorders which have occurred in various States in recent days, it is *not* the statute which President Trump — were he well advised — should invoke to deal with the generality of riots, looting, arson, and even killings which Americans in those places have suffered. The statute which better fits the situation is the present Section 253 of Title 10 of the United States Code:

> The President, by using the militia * * * shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it —
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> > (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
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> > (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.
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> 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.

This, too, is no novel contemporary piece of legislation, but derives from the Act of 20 April 1871, chap. XXII, *An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes,* § 3, 17 Stat. 13, 14. And its terms exactly describe the situation in those States in which civil unrest has broken out in recent days — namely, that "insurrection[s], domestic violence, unlawful combination[s], or conspirac[ies]" have terrorized the peaceful inhabitants, and "the constituted authorities of th[ose] State[s] are unable, fail, or refuse to protect th[e] right[s], privilege[s], immunit[ies], or to give the protection named in the Constitution and secured by law" for some "part[s] or class[es] of [those States'] people."

TENTH. Section 253 imposes no limits on the legal, let alone the commonplace, definitions of "insurrection, domestic violence, unlawful combination, or conspiracy" to which it applies. And the rioting, looting, arson, and killings which have taken place in various States surely fall within any acceptable definitions of those words.

ELEVENTH. Section 253 imposes no limit on what "militia" (or part thereof) the President may "us[e]", so long (obviously) as that "militia" is recognized as such (i) by the Constitution itself—namely, "the Militia of the several States" (Article II, Section 2, Clause 1); or (ii) by a law of Congress which refers to some "Part of the[Militia of the several States]" which "may be employed in the Service of the United States" (Article I, Section 8, Clause 16).

And pursuant to Article I, Section 8, Clauses 15, 16, and 18 of the Constitution, for "employ[ment] in the Service of the United States" in aid of "execut[ing] the Laws of the Union, [and] suppress[ing] Insurrections" (among other responsibilities), Congress has defined "[t]he militia of the United States" as follows:

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and, [with certain exceptions not relevant here], 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.
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> (b) The classes of the militia are—

> (1) the organized militia, which consists of the National Guard and the Naval Militia; and
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> (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

10 U.S.C. § 246.

TWELFTH. Section 253 imposes no limits on "the measures" that the President may "consider[ ] necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy" to which that statute is addressed. So his statutory authority must include "using the militia" (as defined in 10 U.S.C. § 246) "to execute [whatever] Laws of the Union" may apply to the situation (which authority and responsibility the Constitution explicitly assigns to the Militia in Article I, Section 8, Clause 15 of the Constitution), so as to fulfill his duty to "take Care that th[os]e Laws be faithfully executed" (under Article II, Section 3 of the Constitution).

THIRTEENTH. As Section 253 provides, should the President determine that "any insurrection, domestic violence, unlawful combination, or conspiracy * * * so hinders the execution of the laws of [a] State, and of the United States within th[at] 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", he may "consider" that "the State * * * ha[s] denied the equal protection of the laws secured by the Constitution." In that regard, Section 253 is *especially* "appropriate legislation" through which Congress has empowered the President to "enforce" in the first instance the requirement that no State shall "deny to any person within its jurisdiction the equal protection of the laws", perforce of Sections 1 and 5 of the Fourteenth Amendment to the Constitution. See the origin of 10 U.S.C. § 253 in Act of 20 April 1871, chap. XXII, *An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes,* § 3, 17 Stat. 13, 14.

For instance, the President could determine that, in those States in which riots, looting, arson, and homicide have taken place with no adequate response from public officials—or, even worse, with their tacit acquiescence or approval—"part[s] or class[es] of [those States'] people" have been deprived of the rights to "property" and even "life" "named in the Constitution", as well as the immunities "secured by law" from, for example, riots (18 U.S.C. § 2101), insurrections (18 U.S.C. § 2383), and sedition (18 U.S.C. § 2384).

To this, no disgruntled State or Local official (or anyone else, for that matter) can offer a legal objection, whether under the Tenth Amendment to the Constitution or otherwise. After all, Section 5 of the Fourteenth Amendment delegates to Congress a plenary supervisory power which it may wield in aid of Section 1 of that Amendment against the States perforce of Article VI, Clause 2 of the Constitution ("the Supremacy Clause"). Under the Supremacy Clause, Sections 1 and 5 of the Fourteenth Amendment, along with 10 U.S.C. § 253, are "the supreme Law of the Land" by which "the Judges in every State shall be bound * * * , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." And, as required by Article VI, Clause 3 of the Constitution, "the Members of the several State Legislatures, and all executive and judicial Officers * * * of the several States, shall be bound by Oath or Affirmation, to support th[e] Constitution" in the foregoing regard, not to disregard let alone to defy it.

FOURTEENTH. Inasmuch as Section 253 reaches *every* "insurrection, domestic violence, *unlawful combination, or conspiracy"* which comes within its terms, the President need not deal solely with the rioters, looters, arsonists, insurrectionists, and killers to be found at the scenes of their crimes, but may also search out organizers, agitators and propagandists, logisticians, intermediaries, financiers, and other accomplices of any sort who have escaped to or who have always performed their nefarious operations in distant places. And the President's authority in this regard embraces not only individuals, but also all ostensibly legitimate "foundations", "think tanks", and like institutions which fund, otherwise support, or encourage such criminal misbehavior.

FIFTEENTH. As appears on its face, Section 253 does *not* require the President to solicit or receive the approval of a State's Legislature, Governor, or other official before he (the President) executes that statute in that State. In this respect, Section 253 differs from 10 U.S.C. § 251. *See the origin of § 251 in the Act of 28 February 1795, Chap. XXXVI, An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to repeal the act in force for those purposes,* § 1, 1 Stat. 424, 424.

SIXTEENTH. Were the Constitution and 10 U.S.C. § 253 by themselves not enough to drive the point home, the Supreme Court has in principle already opined that *the President's determinations under that statute must be accepted as conclusive by everyone else, including the Judiciary.*

Pursuant to its constitutional power "[t]o provide for calling forth the Militia * * * to repel Invasions", in 1795 Congress enacted legislation which provided in pertinent part

> [t]hat whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state, or states, most convenient the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose, to such officer or officers of the militia, as he shall think proper.

Act of 28 February 1795, Chap. XXXVI, *An Act to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to repeal the act in force for those purposes,* § 1, 1 Stat. 424, 424.

Referring to the power so delegated by Congress to the President, the Supreme Court described it as

> not a power which can be executed without a corresponding responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, * * * by whom is the exigency to be judged of and decided? Is the president the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question * * * ? 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.
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> If we look at the language of the act of 1795, * * * [t]he power itself is confided to the executive of the Union, to him who is, by the constitution, "the commander in chief of

> the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot, therefore, be a correct inference, that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the president, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.

Martin v. Mott, 25 U.S. (12 Wheaton) 19, 29-32 (1827) (Story, J., for the Court).

This legal analysis applies directly, and with decisive effect, to 10 U.S.C. § 253—

(i) Congress enacted the Act of 1795 pursuant to its power in Article I, Section 8, Clause 15 "[to] provide for calling forth the Militia to * * * repel Invasions". That very same Clause also authorizes Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, [and] suppress Insurrections". Self-evidently, the principles *Martin v. Mott* invoked are equally applicable to all of the purposes for which the Militia may be called forth.

(ii) The Act of 1795 empowered the President "to call forth such number of the militia * * * as *he may judge necessary*", and "to issue his orders for that purpose, to such officer or officers of the militia, *as he shall think proper*". In like wise, 10 U.S.C. § 253 delegates to the President the broad authority "by using the militia * * * [to] take such measures as *he considers necessary*". Thus, the latter statute is entitled to the same construction *Martin v. Mott* applied to the former one — namely, that "the authority to decide whether the exigency has arisen, belongs exclusively to the president, and * * * his decision is conclusive upon all other persons"; and "that, under such circumstances, orders shall be given to carry the power into effect", and no "other person has a just right to disobey them." Indeed, as applied to 10 U.S.C. § 253, the principles of *Martin v. Mott* should extend far beyond the facts of that case. For there the President's power could be directed only at actual members of the Militia; whereas, under Section 253, "such measures as [the President] considers necessary" are not confined to members of the Militia alone, but instead may reach essentially anyone and everyone whose behavior is in any way implicated, for good or for bad, in the "insurrection[s], domestic violence, unlawful combination[s], or conspirac[ies]" those "measures" are designed "to suppress".

(iii) *Martin v. Mott* held that the Act of 1795 "d[id] not provide for any appeal from the judgment of the president, or for any right in subordinate officers to review his decision, and in effect defeat it" — whether through their own unaided efforts or by importuning the Judiciary to interject itself into the matter on their behalf (which the Supreme Court refused to do in that case). Neither does 10 U.S.C. § 253 "provide for any [such] appeal" or "right * * * to review" for a member of "the militia of the United States" called forth under the aegis of that statute. The modern-day Supreme Court has recognized that

the Judiciary may not interfere with the President's enforcement of discipline within the Militia. See *Gilligan v. Morgan,* 413 U.S. 1, 5-12 (1973). And other persons affected by the President's "measures" are no better off. For whereas under the Act of 1795 the President's power extended only to actual members of the Militia, under 10 U.S.C. § 253 "such measures as [the President] considers necessary" are not confined to members of the Militia alone, but instead may reach essentially anyone and everyone whose behavior is in any way involved in the perpetration of "insurrection[s], domestic violence, unlawful combination[s], or conspirac[ies]".

(iv) In reference to the Act of 1795, *Martin v. Mott* observed that "[w]henever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, * * * the statute constitutes him the sole and exclusive judge of the existence of those facts." No less than that Act, 10 U.S.C. § 253 delegates an equally "discretionary power" to the President to "take such measures as he considers necessary". That being so, the President's exercise of that power cannot be second-guessed by the Judiciary for any reason whatsoever. For "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170 (1803) (Marshall, C.J., for the Court).

(v) And *Martin v. Mott* is not alone in this regard. As the Supreme Court held in *Nishimura Ekiu v. United States*,

> the final determination of * * * facts may be entrusted by Congress to executive officers; and in such a case, * * * in which a statute gives a discretionary power to an officer, to be exercised by him upon his own judgment of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reëxamine or controvert the sufficiency of the evidence on which he acted.

142 U.S. 651, 660 (1892), *citing inter* alia *Martin v. Mott*, 25 U.S. (12 Wheaton) 19, 31 (1827), and followed in *Lem Moon Sing v. United States,* 158 U.S. 538, 544 (1895).

(v) Finally, no matter how deeply "the Deep State's" friends on the Bench despise President Trump and how desperately they desire to thwart him at every turn, unless and until the Supreme Court overrules *Martin v. Mott* the lower courts are required to adhere to its reasoning "no matter how misguided the judges of those courts may think it to be". *Hutto v. Davis,* 454 U.S. 370, 375 (1982). Within the Judiciary, only the Supreme Court can overrule its own precedents. E.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989); Agostini v. Felton, 521 U.S. 203, 237 (1997); *State Oil Company v. Khan,* 522 U.S. 3, 20 (1997).

IN SUM, those people who vociferously contend that the President has no authority to suppress the kinds of riots, looting, arson, and killings going on within the States these days know not whereof they speak. And if plain ignorance is not the explanation for their behavior, what is?

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For more than thirty years he has practiced law, with emphasis on constitutional issues. In the Supreme Court of the United States he successfully argued or briefed the cases leading to the landmark decisions Abood v. Detroit Board of Education, Chicago Teachers Union v. Hudson, and Communications Workers of America v. Beck, which established constitutional and statutory limitations on the uses to which labor unions, in both the private and the public sectors, may apply fees extracted from nonunion workers as a condition of their employment.

He has written numerous monographs and articles in scholarly journals, and lectured throughout the county. His most recent work on money and banking is the two-volume ***"Pieces of Eight: The Monetary Powers and Disabilities of the United States Constitution"*** (2002), the most comprehensive study in existence of American monetary law and history viewed from a constitutional perspective. *www.piecesofeight.us* He is also the co-author (under a nom de plume) of the political novel ***"CRA$HMAKER: A Federal Affaire"*** (2000), a not-so-fictional story of an engineered crash of the Federal Reserve System, and the political upheaval it causes. *www.crashmaker.com* His latest book is: ***"How To Dethrone the Imperial Judiciary***" ... and Constitutional "Homeland Security," Volume One, The Nation in Arms...

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