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California Versus National Guard

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June 2025

In June 2021, I recorded a JES video [presentation](#) on my [publication](#) for the U.S. Army about the army's role in the post-Civil War Reconstruction era. It emphasized the role of the "Lost Cause" myth and its pervasive reach into contemporary life. The crux of the Lost Cause myth is that the valiant Confederate patriots fought well and bravely under highly capable commanders to preserve their way of life and only lost the war because they were out-numbered and out-resourced by the greedy industrial North. While the situation in Los Angeles is still unfolding, it feels like a good time to revisit a bit of that and share the role of domestic military branches in civilian affairs from that difficult time.

The post-Civil War Reconstruction period is the most all-encompassing case of post-conflict stabilization in U.S. history. President Abraham Lincoln had wisely begun planning for post-war stabilization in 1863, developing mechanisms for reconciliation and development projects to modernize the Southern economy. These initiatives, such as railroad lines and infrastructure expansion, were to blunt Southern dependence on cotton once slavery was abolished. John Wilkes Booth's bullet brought much of that thoughtful preparation to a sudden halt. Historians suggest that the Army had learned applicable lessons for the occupation of some Southern states while hostilities were ongoing in the recently acquired territories of California and New Mexico.^[1]

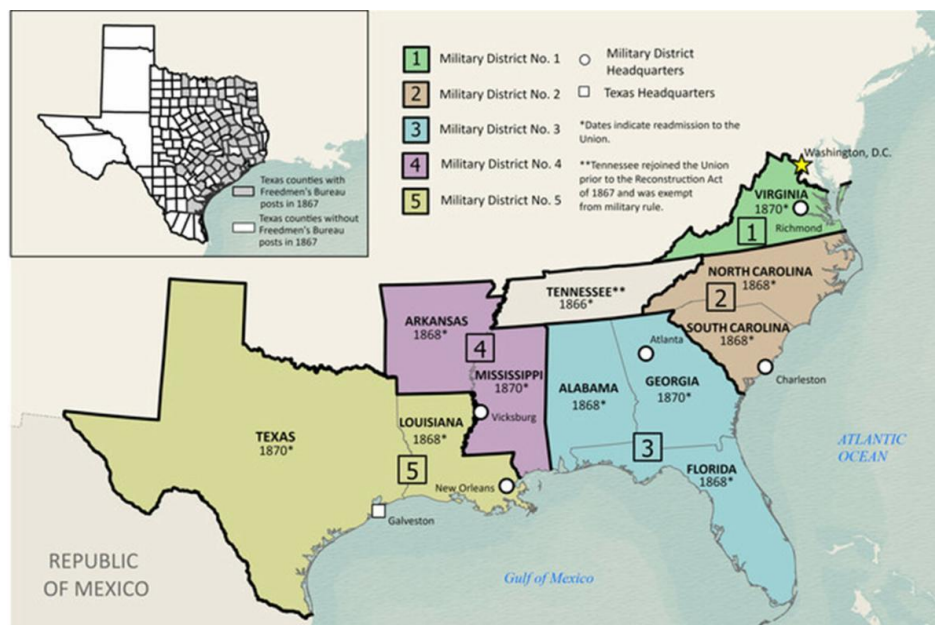
While the widespread violence brought on by the war ended at Appomattox in April 1865, leaders on both sides of the original conflict had very different ideas of what postwar "peace" should look like. Since there has never been a peace agreement officially ending the war, the wartime conditions were permissible

under law, and it can be argued that the war still has never ended, but the prevailing perspectives of the two sides are no longer limited by geography.

As President Lincoln prepared for the war's aftermath in 1863, he asked German legal scholar Francis (Franz) Lieber to attempt to codify the laws of war. This code of legal standards, called the "Lieber Code" included the justifications and process of imposing martial law promulgated as General Orders No. 100.[ii]

Lieber's premise was that the code would mandate the behavior of a "victorious army" toward an "invaded country," and it would create an approach to managing such a postwar occupation. To this end, many of its provisions, while at the time intended simply to not destabilize during the acute risk period, would not be appropriate for today, particularly for domestic use during peace time.

During Reconstruction, the commanders of the five Southern Districts noted on the map[iii] were endowed by Congress with immense powers as governors to manage law enforcement and justice administration, as well as the political process with mainly the Lieber Code as guide. Under President Andrew Johnson's Second Reconstruction, they were given only "20,000 soldiers to police an area roughly the size of Western Europe with a population of over 8 million." [iv] While calculations of optimal force and police-to-population ratios fluctuate, they typically average 20 (civilians) to 1 (military/police) in relatively stable areas. By 1867, this ratio was 400 to 1 and only increased through the rather unstable Reconstruction period.



Map of five military reconstruction districts of the southern United States, 1865-70

Confederate officers retained their weapons, and soldiers surrendered their rifles in some areas. They were permitted to retain their personal weapons to protect their families and property in other areas, but even this level of disarmament did not take place universally, ensuring there were plenty of arms available to enact campaigns of violence and intimidation against freedmen and sympathetic whites once the Union Army receded. While the number of troops available for occupation of the South constantly dwindled, there was never an effective or widespread disarmament process.

As the individual southern states worked through the political process of regaining home rule at varying velocities, in some places, unreconstructed southern politics took on the characteristics of a traditional insurgency. Stephen Budiansky recounted that from 1865 through 1877, “more than 3,000 freedmen and their white Republican allies were murdered in the campaign of terrorist violence ... (including) more than 60 state senators, judges, legislators, sheriffs, constables, mayors, county commissioners, and other officeholders whose only crime was to have been elected.”^[v]

The Posse Comitatus Act of 1878 was enacted after the Compromise of 1876, which effectively ended Reconstruction in defiance of the Army’s efforts to maintain public order in the face of an increasingly assertive white population. “Posse comitatus” is a Latin phrase meaning “the power of the county” and describes a group of citizens mobilized by the sheriff to maintain peace, conduct rescues, or apprehend criminals.^[vi]

The 1878 Act prohibited the Army from conducting law enforcement activities on U.S. soil except in case of federally declared martial law. This means the Army is prevented from policing activities including arrests, investigations, and search and seizure. Thus, the question of President Donald Trump deploying Marines to Los Angeles appears to be in violation of Posse Comitatus.

However, interpreting the Posse Comitatus Act became increasingly challenging into the 20th century as it was “suspended” during World War II by the Secretary of War essentially “clearing the way for repeated violations in the years ahead.” Throughout that century and into the next, violent eruptions over labor and race called for the military to augment law enforcement. Civil rights, antiwar demonstrations, and labor disputes, some of which reached the level of riots, led to the military assisting in maintaining civil order in numerous ways.^[vii]

Despite long southern memories of General Tecumseh Sherman’s alleged inhumane practices in war, he believed treatment of civilian populations should be clearly dichotomous in cases of war and not war. He said of Army activities from 1863 through 1865, “During war, the military is superior to civil authority, and where interests clash, the civil must give way.” This included activities in which commanders “directly emancipated slaves, seized food, exiled traitors,

shuttered newspapers, hanged outlaws, starved regions, and other efforts to ‘sap Confederates’ will or capacity to fight.’” Of the post-conflict period, however, Sherman said, “Where there is no conflict, every encouragement should be given to well-disposed and peaceful inhabitants.”^[viii]

It is always confusing to my students that National Guard units are deployed at the order of the governor of the state in which they are based. In that sense, the governor essentially serves as the commander-in-chief. While the National Guard is organized and controlled by individual states and territories, the federal government provides the majority of their funding through the Department of Defense budget. The funding covers personnel costs, equipment, training, and operations. All are under the command of the state governor, except for the Washington, D.C., National Guard, whose commander-in-chief is the president.

The National Guard is traditionally viewed as the successor organization to state militias mobilized to fight in the Revolutionary War. In that case, each state had its own militia, but they were all placed under the command of George Washington. In 1789, the U.S. Constitution Article I, Section 8, Clause 15, granted Congress the power to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." So, the argument holds that only Congress can order the National Guard for domestic deployment.

Another act passed on Feb. 28, 1795, stated:

Sec. 1. BE it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that 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 to 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.

And in case of an insurrection in any state, against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state, or of the executive, (when the legislature cannot be convened) to call forth such number of the militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection.

Sec. 2. And be it further enacted, that whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it

shall be lawful for the President of the United States, to call forth the militia of such state, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed; and the use of militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the then next session of Congress.^[ix]

This act was tested and deemed constitutional in 1825 by the Supreme Court case *Martin v Mott*.^[x] Thus, the question of whether it is ever lawful for the president to call out the National Guard seems to be settled. The outstanding question is whether the circumstances in Los Angeles justified his doing so.

The “Protecting the American People Against Invasion” Executive Order (14159) of Jan. 29, 2025^[xi] with its very title indicates that, in accordance with the 1795 Act, it is, “lawful for the President of the United States to call forth such number of the militia ... whenever the United States shall be invaded.”

Executive orders can be challenged and overturned by the Supreme Court or rendered null by a succeeding executive order, but until 14159 receives that treatment, inexpert reading suggests that Trump created the conditions under which it may be within his constitutional right to have taken the actions he did. The argument for the action is that the National Guard was protecting federal immigration officers while they carried out their orders under the same executive order and executed resulting policies.

Other questions remaining include whether a slow incursion of millions of people residing in the U.S., many for decades, constitutes an “invasion” or whether those protesting their apprehension met the definition of an “insurrection” or were they merely acting within the protection of the First Amendment’s rights to free speech and assembly. When interpreting laws, words really do matter.

References

- [i] Mark L. Bradley, “The Army and Reconstruction, 1865-1877,” part of the *U.S. Army Campaigns of the Civil War* series, *Center of Military History*, United States Army, 2015, accessed via U.S. Army Heritage and Education Center Library on June 23, 2025
- [ii] The entire Lieber Code text can be found under the Yale Law School Avalon Project, available [here](#), accessed on June 23, 2025
- [iii] Map from Texas General Land Office available [here](#), accessed on June 23, 2025
- [iv] Bradley, “The Army and Reconstruction, 1865-1877,” p. 8
- [v] Stephen Budiansky, *The Bloody Shirt: Terror After the Civil War*, 2009, Plume Penguin Publishing: New York, NY, pp. 7-8.
- [vi] Legal Encyclopedia, *Legal Information Institute*, Cornell University available [here](#), accessed on June 23, 2025
- [vii] Matt Matthews, “The Posse Comitatus Act and the U.S. Army: A Historical Perspective,” *Global War on Terrorism Occasional Paper No. 14*, Combat Studies Institute Press, Ft. Leavenworth, KS

[viii] Gregory P. Downs, *After Appomattox: Military Occupation and the Ends of War*, 2015, Harvard University Press: Cambridge, MA, pp. 22–23.

[ix] "Act of February 28, 1795," *Library of Congress*, available [here](#), accessed on June 23, 2025

[x] "Martin v. Mott," U.S. Supreme Court Decision, 1827, *Library of Congress*, available [here](#), accessed on June 23, 2025

[xi] "Protecting the American People Against Invasion," *Federal Register*, January 29, 2025 available [here](#), accessed on June 23, 2025

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