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### Publication Date

2023

Peer reviewed|Thesis/dissertation

UNIVERSITY OF CALIFORNIA

Santa Barbara

Exigency and Entrepreneurship:

Presidents, Gradual Change, and the Modernizing of the American Presidency

A dissertation submitted in partial satisfaction of the  
requirements for the degree Doctor of Philosophy  
in Political Science

by

Samuel Alexander Fontaine

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June 2023

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Exigency and Entrepreneurship:  
Presidents, Gradual Change, and the Modernizing of the American Presidency

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by

Samuel Alexander Fontaine

## ACKNOWLEDGEMENTS

This dissertation would not have been possible without the innumerable contributions of others. First, I am indebted to John Woolley for his continuous mentorship throughout my time at Santa Barbara. John took me on as an advisee during my second year of graduate school, read and provided detailed comments on dozens of drafts of my prospectus and chapters of this dissertation. He provided encouragement the entire way and pushed me over the finish line. John did so despite retiring before I had even defended my prospectus. Our conversations about the historical development of the presidency and our shared interest in presidential documents were always enlightening.

Steve Weatherford was also a wonderful mentor throughout the process, providing warmth, wit, and insightful feedback. Whenever I felt doubt about the project, Steve would provide the affirmation I needed to carry on. As I looked through old notes while finalizing my dissertation, I realized just how many of Steve's ideas and suggestions became integral parts of this project. Bridget Coggins and Eric Smith did me a great service by joining my committee and lending their expertise to a project outside of their research interests. Both Bridget and Eric were incredibly supportive of my research, and I am grateful for all their assistance. Lorraine McDonnell, Clayton Nall, and Chris Parker all offered insightful comments about my research at different stages. Any remaining errors are, of course, my own.

I was also fortunate to befriend several brilliant colleagues at Santa Barbara. Chris Miljanic, Daniel Gomez, Eric Stein were constant sources of support throughout the PhD program. Daniel and Chris, in particular, taught me that good things come to those who wait.

Finally, I would not be here without the support of my family. I am forever indebted to my mother, Kerri, for providing constant support and a stern voice when needed. Thank you to my father, Jerry, for always wanting the best for me. To my brothers Ben and Alec, thank you for providing comic relief on a daily basis. Last, but not least, I am grateful for Audrey. Thank you for putting up with what may have seemed like a never-ending cycle of research, writing, and stress. I have good news, it's finally time for our next chapter.

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## ABSTRACT

Exigency and Entrepreneurship:

Presidents, Gradual Change, and the Modernizing of the American Presidency

by

Samuel Alexander Fontaine

The development of a “modern” presidency during the first three decades of the twentieth century shaped scholarly understandings of the presidency. Proponents of this view characterize the shift from a traditional to a modern presidency as abrupt and transformative, implying the non-comparability of presidents and the presidency across this dividing line. In this project, I argue that the modern presidency view overlooks the ability of individual presidents to alter their institutional environment. I develop a theory of institutional development that centers on presidential entrepreneurship. My theory claims that presidents can enhance their institutional authority by constructing their authority in novel ways and by deploying the institutional capacity of the executive branch in creative ways. To further develop my theory, I narrow my empirical focus to a single domain of governance in the nineteenth century – the maintenance of domestic order.

I use process tracing methods within a set of cases to refine and evaluate the validity of my theory. My analysis of the cases was based on a wide range of evidence including digitized archival collections, presidential documents digitized by the American Presidency

Project, congressional documents and historical newspapers digitized by *ProQuest*, and biographies and policy histories. I first analyzed a most-likely case for observing presidential entrepreneurship. The passage of the Ku Klux Klan Act of 1871 and the use of the military against the Klan in South Carolina in 1871 were both driven by presidential entrepreneurship, providing preliminary validation of my theory's explanatory value. I then analyzed two least-likely cases in which my theory would not expect presidential entrepreneurship to play a significant role. The Lincoln County War in the New Mexico territory from 1878-1880 and lawlessness in the Arizona territory from 1881-1882 were minor territorial disorders. Nevertheless, presidential entrepreneurship was present in the Lincoln County War, providing further corroboration of my theory's validity.

My project develops a new theory to explain the development of presidential authority that centers on the entrepreneurial actions of presidents. My theory is supported by the most-likely and least-likely cases analyzed in this project. While my research design does not directly test my theory against the modern presidency, it presents a plausible and supported alternative explanation. In doing so, my project will allow for future theory-building and theory-testing about the development of the American presidency.

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## Chapter 1, Reconsidering the Modern Presidency

Three years after the Supreme Court's ruling in *Brown v. Board*, President Dwight Eisenhower issued a proclamation entitled "Obstruction of Justice in the State of Arkansas."<sup>1</sup> The president's order referred to "unlawful assemblages, combinations, and conspiracies" that were obstructing the enforcement of judicial proceedings in the Eastern District of Arkansas. The proclamation also indicated that these obstructions to the execution of the law constituted a denial of the equal protection of the laws of the United States. Finally, the president ordered those obstructing the law to cease their activities and disperse, referencing authority "vested in me by the Constitution and statutes of the United States," making special reference to sections 332, 333, and 334 of Chapter 15 Title 10 of the United States code.<sup>2</sup>

The practical problem Eisenhower's proclamation sought to resolve was obstruction to the integration of Central High School in light of the Court's *Brown* decision. The day after the proclamation, Eisenhower issued Executive Order 10730 which federalized the Arkansas National Guard and authorized the deployment of military regulars to restore order and enforce the laws.<sup>3</sup> The administration's decision to federalize the state national guard troops, in effect, preempted their use by the Governor of Arkansas, Orville Faubus, to

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<sup>1</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); Dwight D. Eisenhower, Proclamation 3204—Obstruction of Justice in the State of Arkansas, September 23, 1957, The American Presidency Project, <https://www.presidency.ucsb.edu/node/308021>.

<sup>2</sup> Eisenhower, Proclamation 3204.

<sup>3</sup> Dwight D. Eisenhower, Executive Order 10730—Providing Assistance for the Removal of an Obstruction of Justice Within the State of Arkansas, September 24, 1957, The American Presidency Project <https://www.presidency.ucsb.edu/node/210621>.

prevent school integration.<sup>4</sup> Eisenhower's actions ensured the faithful execution of the court's ruling in *Brown* and did so against the active opposition of the state governor. Eisenhower's Democratic Party successors, John F. Kennedy and Lyndon B. Johnson, both deployed the military for similar purposes during their presidencies. From roughly 1957-1965 these presidents used the military to overcome obstruction to the execution of federal law five times as southern segregationists attempted to resist integration and the progress demanded by the Civil Rights movement.<sup>5</sup>

As authority for their actions, these presidents made general references to the statutes in their proclamations. These include explicit mention of sections of Chapter 15 of Title 10 of the U.S. code. These authorize as follows:

- Section 332: authorizes the president to use the militia and armed forces to enforce federal authority when the president deems that “unlawful obstructions, conspiracies, or assemblages, or rebellion against the authority of the United States, makes it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings.”<sup>6</sup>
- Section 333: authorizes presidents to use the militia and/or armed forces to suppress insurrection, domestic violence, or unlawful conspiracies if they deprive any part or class of citizens of equal protection of their constitutional rights, or obstructs the execution of U.S. laws, or impedes the course of justice under those laws.<sup>7</sup>

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<sup>4</sup> Paul J. Scheips, *The Role of Federal Military Forces in Domestic Disorders, 1945-1992*, Government Printing Office, 2005, 39, 49.

<sup>5</sup> In addition to Eisenhower's proclamation cited in footnote 1, see the following. John F. Kennedy, Proclamation 3497—Obstructions of Justice in the State of Mississippi, September 30, 1962, The American Presidency Project <https://www.presidency.ucsb.edu/node/269456>; John F. Kennedy, Proclamation 3542—Unlawful Obstructions of Justice and Combinations in the State of Alabama, June 11, 1963, The American Presidency Project <https://www.presidency.ucsb.edu/node/236674>; John F. Kennedy, Proclamation 3554—Obstructions of Justice in the State of Alabama, September 10, 1963, The American Presidency Project <https://www.presidency.ucsb.edu/node/270073>; Lyndon B. Johnson, Proclamation 3645—Providing Federal Assistance in the State of Alabama, March 20, 1965, The American Presidency Project <https://www.presidency.ucsb.edu/node/275817>.

<sup>6</sup> *Insurrection*, U.S. Code 15 (2010) § 332.

<sup>7</sup> *Insurrection*, U.S. Code 15 (2010) § 333.

- Section 334: requires that presidents issue a proclamation ordering insurgents to “disperse and retire peaceably to their abode within a time limit” any time they use the militia or military for these purposes.<sup>8</sup>

These sources of presidential authority pre-dated their use by Eisenhower, Kennedy and Johnson by around 150 years. In the first two decades after the ratification of the Constitution, Congress delegated to presidents the authority to use the military for these purposes in a series of laws. The "Calling Forth Acts" of 1792 and 1795 and the "Insurrection Act" of 1807 established these sections of the U.S. code, and they remain largely operational in present times.

The use of these statutory authorities was not unprecedented by any means when Eisenhower acted. From 1792 – 1956 presidents issued proclamations invoking the Insurrection Act at least 34 times. Among these was Grover Cleveland’s use of the military in Chicago during the Pullman Strike of 1894.<sup>9</sup> The parallels between Cleveland and Eisenhower illuminate elements of continuity in the actions of presidents separated by six decades. Cleveland’s intervention in Illinois was opposed by pro-labor Illinois Governor John Altgeld, who hoped to restore order relying on only the state national guard.<sup>10</sup> Cleveland’s decision to intervene with federal troops was a direct rejection of the expressed wishes of Altgeld and undermined his effort to restore order without undermining the strikers. The Eisenhower administration’s choice to federalize the Arkansas National Guard functioned to disarm Governor Faubus’s plan to use the state guard to prevent integration.

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<sup>8</sup> *Insurrection, U.S. Code* 15 (2010) § 334.

<sup>9</sup> Grover Cleveland, Proclamation 366—Law and Order in the State of Illinois, July 8, 1894, The American Presidency Project <https://www.presidency.ucsb.edu/node/206337>.

<sup>10</sup> Clayton David Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877-1945*, Vol. 30, no. 15. (Government Printing Office, 1997), 137.

The purposes of federal deployments were for completely different purposes, but both presidents believed there were grounds to assert federal supremacy over resistant state governments.

When the effects of the Pullman Strike spread to other states, Cleveland issued a following up proclamation the next day expanding the affected areas.<sup>11</sup> In both proclamations, Cleveland justified his decision to use the military based on the Interstate Commerce Clause of the Constitution in addition to the statutory authority. This assertion, which was subsequently supported by the Supreme Court's decision in *In Re Debs*, illustrates how presidents can justify expansive constructions of presidential (and federal) authority.<sup>12</sup> It parallels the incorporation of the Fourteenth Amendment's guarantee of equal protection under the law during the Civil Rights movement.

These two vignettes – Eisenhower and Cleveland – provide a puzzle for scholars attempting to understand the development of the American presidency. Do these seeming parallels between Cleveland's and Eisenhower's uses of institutional authority suggest continuity across vast periods of American history? The idea of a “modern” presidency – beginning with Theodore Roosevelt and culminating with Franklin Roosevelt – as a dividing line has shaped scholarly understandings of the presidency and its development. Are these parallels evidence that this dividing line is an insufficient account of institutional development? Or do they suggest a kind of continuity that does not undercut the story of the

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<sup>11</sup> Grover Cleveland, Proclamation 367—Law and Order in Parts of the States of North Dakota, Montana, Idaho, Washington, Wyoming, Colorado, and California and the Territories of Utah and New Mexico, July 9, 1894, The American Presidency Project <https://www.presidency.ucsb.edu/node/206339>.

<sup>12</sup> *In re Debs*, 158 U.S. 564 (1895); Richard Olney, Attorney General during Cleveland's presidency, was on retainer for several railroad organizations and advocated the use of the military under this justification, see Laurie and Cole, 133-140.

abrupt and dramatic transformation of the presidency during the New Deal? This project explores these questions and adds insights to our understanding of the American presidency, its development, and the processes through which institutional development occurs.

### **The Modern Presidency**

This is a study of modernization and institutional development. Its subject is the American presidency and, to a lesser extent, the executive branch. When presidency scholars began writing about the development of a “modern” presidency in the mid-twentieth century, they directed their attention towards several aspects of the institution. The presidency, they claimed, had lost its mooring to the Constitution and was instead reliant on extraconstitutional sources of authority. Presidents had made actions routine that were once considered extraordinary, driven by the increased expectations of the public for their leadership.<sup>13</sup> As expectations rose, scholars argued that the resources available to presidents increased in lockstep – increased authority to make policy through unilateral actions, visibility as a national political figure, centrality in agenda setting, and the acquisition of a presidential bureaucracy.<sup>14</sup> They conclude that the modern presidency is an institution facing heightened expectations, with dramatically expanded resources, filling the central role in the separation of power system. Eisenhower, Kennedy, and Lyndon Johnson’s responses to the Civil Rights movement seem to embody many of these characteristics. Each president used unilateral actions (i.e., proclamations and executive orders) to deploy the military to enforce federal law in the southern states. These presidents also served as visible national leaders during this tumultuous period. Their tense and short-lived partnership with the Civil Rights

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<sup>13</sup> Richard Neustadt, *Presidential Power: The Politics of Leadership* (Wiley and Sons, 1960), 6.

<sup>14</sup> Fred I. Greenstein (ed.), *Leadership in the Modern Presidency* (Harvard University Press, 1988), 347.



movement further illustrated a presidency that could be lead and be responsive to public opinion.<sup>15</sup> While modern presidents may not always succeed, they are typically conceptualized by presidency scholars as self-aggrandizing power seekers, who attempt to maximize their electoral and policy preferences.<sup>16</sup>

The modern presidency idea has also become embedded in the way we think about American political development. The scholars describing the modern presidency generally reflect a view of institutional development as being a process of punctuated moments. In this view, change occurs through critical junctures that occur rapidly and have transformative effects. These periods of change are often driven, in large part, by the leadership of exceptional presidents such as Theodore Roosevelt, Woodrow Wilson, and Franklin Roosevelt. In this view, there is little need to compare Dwight Eisenhower with Grover Cleveland because the presidency itself was so dramatically different during their administrations. There is perceived to be a lack of comparability across the dividing line.<sup>17</sup>

The modern presidency idea comes equipped with these empirical propositions, but it also arouses normative concerns about the sources of, and constraints on, executive power in a democratic political system. The normative puzzle lies in the effects of a modern

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<sup>15</sup> Sidney M. Milkis and Daniel J. Tichenor, *Rivalry and Reform: Presidents, Social Movements, and the Transformation of American Politics* (University of Chicago Press, 2019).

<sup>16</sup> Neustadt, *Presidential Power*; George C. Edwards III, *At the Margins: Presidential Leadership of Congress* (Yale University Press, 1989); Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Harvard University Press, 1997); Charles M. Cameron, *Veto Bargaining: Presidents and the Politics of Negative Power* (Cambridge University Press, 2000).

<sup>17</sup> John T. Woolley, "Drawing Lines or Defining Variables? Studying Big Changes in the American Presidency," Paper prepared for presentation at the Annual Meetings of the American Political Science Association (Washington D.C., 2005)  
[https://www.researchgate.net/publication/359931499\\_Drawing\\_Lines\\_or\\_Defining\\_Variables\\_Studying\\_Big\\_Changes\\_in\\_the\\_American\\_Presidency](https://www.researchgate.net/publication/359931499_Drawing_Lines_or_Defining_Variables_Studying_Big_Changes_in_the_American_Presidency).

presidency, reliant upon extraconstitutional sources of authority, on the broader political system. Stephen Knott sees the growing reliance of presidents on public support as leading the presidency on a decline into demagoguery.<sup>18</sup> This logic flips the modern presidency idea on its head. The progressive era intellectuals, including academic-turned-president Woodrow Wilson, advocated for a stronger executive sought to make the presidency a more representative office. While the idea of presidential representation has roots deeper than the modern presidency period, this idea was built into the institutions of the presidency during these same critical periods.<sup>19</sup> John Dearborn's analysis of the Budget and Accounting Act of 1921 and the Reorganization Act of 1939 suggests that the idea of presidential representation was entrenched in the presidency during these two major institutional developments.<sup>20</sup> Dearborn suggests that certain ideas – i.e., presidential representation and the unitary executive – were accepted during moments of institutional development. The acceptance of some ideas and rejection of others accompanies the reform of institutions and political processes. This aligns with the claim that presidents, by virtue of their national constituency, could enhance representation of universalistic or centrist preferences, in contrast to a parochial and inefficient Congress. Yet, at least some recent scholarship testing the idea of presidential representation finds that modern presidents have in fact behaved as

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<sup>18</sup> Stephen F. Knott, *The Lost Soul of the American Presidency: The Decline into Demagoguery and the Prospects for Renewal* (University of Kansas Press, 2019).

<sup>19</sup> Richard J. Ellis and Stephen Kirk, "Presidential Mandates in the Nineteenth Century: Conceptual Change and Institutional Development," *Studies in American Political Development* 9, no. 1 (1995): 117-186.

<sup>20</sup> John A. Dearborn, "The 'Proper Organs' for Presidential Representation: A Fresh Look at the Budget and Accounting Act of 1921," *Journal of Policy History* 31, no. 1 (2019): 1-41; John A. Dearborn, "The Historical Presidency: The Foundations of the Modern Presidency: Presidential Representation, the Unitary Executive Theory, and the Reorganization Act of 1939," *Presidential Studies Quarterly* 49, no. 1 (2019): 185-203.

divisive, partisan leaders, not as broad-visioned national leaders attempting to represent the nation writ large.<sup>21</sup>

Other critics of the modern presidency focus on the aggrandizement of institutional power by presidents. By the 1970s a prominent presidency scholar referred to the modern presidency with disapproval as “imperial,” suggesting that institutional growth had created a presidency that was out of control and prone to illegality and abuses of power.<sup>22</sup> These criticisms were renewed during the presidency of George W. Bush in reaction to his offensive wars in the Middle East.<sup>23</sup> They certainly remained relevant in the era of Donald Trump. The modern administrative state, another extraconstitutional development central to modern presidential authority, has also faced a direct assault since at least the 1980s. Presidents have sought, in popular appeals, to distance themselves from the executive branch they preside over, while simultaneously seeking greater control over the executive branch through their political allies and appointees.

### **Whig Ideology and the Presidency**

Prevailing conceptions of the nineteenth century presidency were largely extrapolated from Whig ideology. Whig ideas were expressed in a primordial form by the National Republicans and Anti-Masonic parties of the 1820s, and later in the Whig Party and, to a lesser extent, the post-Civil War Republican Party. The Whig party originated in opposition to the strong executive projected by Andrew Jackson. The Whigs differed from the

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<sup>21</sup> B. Dan Wood, *The Myth of Presidential Representation* (Cambridge University Press, 2009); Douglas L. Kriner and Andrew Reeves, *The Particularistic President: Executive Branch Politics and Political Inequality* (Cambridge University Press, 2015).

<sup>22</sup> Arthur M. Schlesinger, *The Imperial Presidency* (HMH, 2004).

<sup>23</sup> Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power After Watergate* (University of Michigan Press, 2008).

Jacksonians in their views about the proper role of the federal government. While Jacksonians favored a weak central government with a strong president, Northern (but not Southern) Whigs favored an activist central government driven by a strong legislature. Henry Monaghan has characterized the Whig view of the presidency as the “law enforcement” president. In this view, a president executes the enactments of Congress with only limited discretion and plays no independent, active role in the formulation of law.<sup>24</sup>

The presidency envisioned by the Jacksonians, and later the Progressives, differed substantially from that of the Whigs. While there are significant normative differences concerning what the presidency ought to be in the American political system, there is general acceptance of the empirical accuracy and explanatory value of the developmental narrative from a Whig to a modern presidency. My argument in this research is revisionist, building on several important prior dissenting contributions to our understanding of the development of the presidency.<sup>25</sup> The view I represent is skeptical about the explanatory value of the modern presidency, and it is also skeptical about the accuracy of Whig theory as an empirical matter, and dubious about the passive stereotypes assigned to presidents during the traditional period.

At base, my research addresses questions about institutional change and development that do not presume the accuracy of the bright-line separation implied by the dominant understandings of a modern versus traditional (i.e., Whig) presidency. It asks the following questions:

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<sup>24</sup> Henry P. Monaghan, "The Protective Power of the Presidency," *Columbia Law Review* 93, no. 1 (January 1993): 14.

<sup>25</sup> For example, David K. Nichols, *The Myth of the Modern Presidency* (Pennsylvania State University Press, 1994).

- How have gradual processes of change shaped the authority and institutional capacity of the American presidency?
- What types of gradual change occurred, i.e., what strategies, instruments, or means of implementing became available to presidents. Did presidents institutionalize these opportunities to expand executive power or their roles in governance?
- Finally, what forces drive institutional development? Is development driven by individual agency and the entrepreneurial efforts of institutional actors? Or is it driven by changes to the structural environment and events presidents face?

These questions revolve around two central themes in the study of institutional change and American political development (APD). One theme addresses the *processes of change* – whether they are abrupt or gradual (or both).<sup>26</sup> The other theme involves *the forces behind change* – are changes driven by agency or structure (or both).<sup>27</sup>

I seek, through this research, to increase the precision of scholarly conceptions of institutional change in the American presidency. I seek to move beyond sweeping periodization schemes to a more fine-grained view. I do not deny that the federal government is much larger and more complex today than in the late nineteenth century. Rather, I challenge the simplistic distinction between a traditional and modern presidency, in an effort to make the idea of gradual change central to our understanding of the developmental trajectory of the presidency. I argue it is a mistake to view context as determinative, and that individual agency can exploit institutional context to create gradual institutional change. My aim is to provide an account that incorporates the agency of

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<sup>26</sup> Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge University Press, 2004); Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton University Press, 2004); James Mahoney and Kathleen Thelen, eds., *Explaining Institutional Change: Ambiguity, Agency, and Power* (Cambridge University Press, 2009).

<sup>27</sup> See Stephen Skowronek and Matthew Glassman, eds., *Formative Acts: American Politics in the Making* (University of Pennsylvania Press, 2008).

presidents acting as entrepreneurs who confront broad structural factors that shape their leadership.

### **Foundations for New Approaches: Ideas, Capacity, and Restraint**

One of the most influential challenges to the modern presidency paradigm has been offered by Stephen Skowronek in his seminal book *The Politics Presidents Make*. Skowronek makes an explicit distinction between presidential authority (i.e. the ability to claim legitimate "warrants" for actions taken) and power (i.e. the presence of institutional resources necessary to act).<sup>28</sup> Skowronek proposes multiple patterns of institutional development based on these factors, by definition a revision of the modern presidency idea. Skowronek's emergent pattern does adopt the same periodization scheme when tracing the growth of presidential power. In the decades since Skowronek's book, historically oriented scholars of the presidency have expanded on his work in several ways.

This scholarship has studied the presidency in innovative ways. Scholars have explored:

- Control of the bureaucracy, across the modern-traditional divide.<sup>29</sup>
- The varied efforts of presidents to build and shape their party's organization.<sup>30</sup>
- How conflicts over ideas shape understandings of institutional legitimacy. And the role of ideas in shaping the institutional development of the modern presidency.<sup>31</sup>

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<sup>28</sup> Skowronek, *Politics Presidents Make*.

<sup>29</sup> Daniel Galvin and Colleen Shogan, "Presidential Politicization and Centralization Across the Modern-Traditional Divide," *Polity* 36, no. 3 (2004): 477-504

<sup>30</sup> Daniel J. Galvin, *Presidential Party Building* (Princeton University Press, 2009); Daniel J. Galvin, "Party Domination and Base Mobilization: Donald Trump and Republican Party Building in a Polarized Era," *The Forum*, vol. 18, no. 2, 2020: 135-168.

<sup>31</sup> Jeremy D. Bailey, "Opposition to the Theory of Presidential Representation: Federalists, Whigs, and Republicans," *Presidential Studies Quarterly* 44, no. 1 (2014): 50-71; Dearborn, "Foundations of Modern Presidency"; Dearborn, "Proper Organs"; Jeffrey S. Selinger, "Making Sense of Presidential Restraint: Foundational Arrangements and Executive Decision Making before the Civil War," *Presidential Studies Quarterly* 44, no. 1 (2014): 27-49.

- The dynamics of political time within specific policy domains like public finance policy; and the impact of broad structural constraints on presidential behavior.<sup>32</sup>

I seek to emulate the approaches of these scholars in three ways – by analyzing the development of presidential authority and capacity within a single policy domain, by focusing on the role of ideas (and contestation over ideas) in processes of institutional development, and by considering overarching structural constraints that shape presidential behavior (e.g., the need to maintain the union during times of fragmentation). My analysis focuses on a policy domain where the federal government has maintained some level of activity throughout the entirety of American history. By tracing the development of presidential authority from its origins, and alongside the contours of the nineteenth century state, we might find a great deal of continuity in the actions and understandings of presidents across the dividing line.

### **Outline of the Dissertation**

My belief is that there is much to learn about the twentieth and twenty-first century presidency from studying the processes of development the eighteenth and nineteenth century. To return to the vignettes that introduced this chapter, understanding Cleveland's use of the military in the Pullman Strike and its effects on the balance of institutional authority can help us to better understand the actions of subsequent presidents, including Dwight Eisenhower. My central argument is that when explaining the development of the presidency, one must consider factors such as these:

- The development of novel *constructions* of presidential (and federal) authority – shifting understandings of the meaning of the Constitution and ideas about the sources of presidential power and the scope of legitimate presidential action.

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<sup>32</sup> Patrick O'Brien, *Presidential Control over Administration: A New Historical Analysis of Public Finance Policymaking, 1929–2018* (University Press of Kansas, 2022).

- The changing *capacity* of presidents, and the central state, to translate ideas about authority into political outcomes.
- The shifting elements of *restraint* that shape and moderate presidents' pursuit of power.

Presidents are capable of altering these factors through entrepreneurial actions. To borrow Daniel Galvin's phrase, presidents can act as "agents of change" on their institutional surroundings.<sup>33</sup>

Chapter 2 continues this discussion by reviewing relevant literature. In chapter 2, I generate a theory of gradual institutional change driven by presidential entrepreneurship.<sup>34</sup> The framework established in chapter 2 is an attempt to trace these interrelated processes – changing constructions of the foundations of presidential authority, changing state capacity, and shifting structural constraints – to develop a theory of gradual institutional change driven by executive action. It is useful to see the theory guiding this research as complementary perspective to the rational choice approaches to institutions.<sup>35</sup> The rational choice view emphasizes exogenous shocks, critical junctures, and models of punctuated equilibrium. It adds nuance to the periodization scheme of the modern presidency, highlighting the operation of gradual and incremental change, as well as abrupt, transformative change.

In chapter 3, I discuss the research design and methodological approach. The methodology involves tracing, through in-depth case studies, of presidential authority, federal capacity, and shifting restraint within a single policy domain over a long historical

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<sup>33</sup> Daniel J. Galvin, "Presidents as Agents of Change," *Presidential Studies Quarterly* 44, no. 1 (2014): 95-119.

<sup>34</sup> Adam D. Sheingate, "Political Entrepreneurship, Institutional Change, and American Political Development," *Studies in American Political Development* 17, no. 2 (2003): 185-203.

<sup>35</sup> I provide a more detailed discussion of the rational choice literature on institutions in Chapter 2.



period. I also deployed a within-case design and process tracing methods to further refine the theory and provide preliminary tests of its validity. My research examined a policy domain relatively unexplored by political science, that of the federal government's role in maintaining domestic order. I discuss the selection of this area at length in Chapter 3. At that point, I note several reasons why this is a valuable area for generating insights about the development of presidential authority and institutional capacity.

Chapters 4 – 6 present the empirical work, applying the theory developed in Chapter 1 and 2 to the maintenance of domestic order. In chapter 4 I present a broad history of the domain of domestic order from the founding era. I review constitutional debates, the separation of powers in the initial constitutional framework, and the role of early presidents in the delegation of statutory sources of authority from Congress. This examination reaches the end of the nineteenth century. While I try to provide a thorough overview of relevant presidential actions, my examination focuses on a few critical periods in which novel constructions of presidential authority and innovative uses of institutional capacity expanded the president's ability to maintain domestic order.

The roughly 30-year period from the passage of the Fugitive Slave Act of 1850 to the Posse Comitatus Act of 1878 was marked by significant expansions of presidential authority and capacity, followed by extreme backlash. In the tumult of these decades, the foundations of presidential authority and capacity were transformed, in no small part because of the entrepreneurial efforts of presidents. Another period focused on in the analysis are the late Gilded Age presidencies of Grover Cleveland and Benjamin Harrison, both of whom furthered the evolution of presidential authority and laid the foundation for the changes that came in the Progressive Era. Before Theodore Roosevelt's articulation of the Stewardship

Theory in his autobiography and Woodrow Wilson's writing in *Constitutional Government in the United States*, Harrison and Cleveland promoted expansive constructions of presidential authority based on the president's constitutional authority as Commander in Chief and their constitutional duty to take care that the laws are faithfully executed. This chapter characterizes the terrain in which entrepreneurial presidents operated and highlights the accumulation of precedents and justifications for action over time.

Chapters 5 and 6 deploy process tracing methods to test for evidence of presidential entrepreneurialism in three cases. Chapter 5 discusses a most-likely case (a case in which we are most likely to find entrepreneurialism): the passage of the Ku Klux Klan Act in 1871 and its subsequent use in South Carolina. A case like this can provide some validation of my theory and its empirical expectations, but such validation would not be empirically surprising in any way.

Chapter 6 poses a harder test for the theory by examining two least-likely cases – the responses of Rutherford Hayes and Chester Arthur to domestic disorders in the western territories. These are both cases in which antecedent as well as contextual political conditions make it unlikely to observe clear evidence of presidential entrepreneurship. Thus evidence of entrepreneurship in either of these cases would provide stronger confirmation of the theory. The primary purpose of these chapters is theory-building. These cases allow me to identify more precisely what mechanisms of presidential entrepreneurship look like empirically and to evaluate whether the mechanisms provide the best explanation of the case.

Chapter 7 summarizes the main findings and conclusions of the research. It also considers implications of my research for scholars of the contemporary presidency.

Republicans in Congress and in state legislatures urged President Trump to invoke the Insurrection Act to use military force against Black Lives Matter protestors.<sup>36</sup> As this is written, the Republican-controlled House recently formed the Select Committee on the Weaponization of the Federal Government to investigate the Biden Administration, and in particular the practices of the Department of Justice.<sup>37</sup> Presidential authority to maintain domestic order through law enforcement remains a relevant and disputed aspect of presidential authority, making the work of this dissertation relevant to contemporary debates about institutional authority and the separation of powers.

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<sup>36</sup> Tom Cotton, “Tom Cotton: Send in the troops: The nation must restore order. The military stands ready.” *New York Times*, June 3, 2020, <https://www.nytimes.com/2020/06/03/opinion/tom-cotton-protests-military.html>; Katie Shepherd, “North Carolina GOP lawmaker urges Trump to suspend civil liberties to keep power: ‘Invoke the Insurrection Act,’” *Washington Post*, December 16, 2020, <https://www.washingtonpost.com/nation/2020/12/16/north-carolina-republican-trump-insurrection/>.

<sup>37</sup> Luke Broadwater and Catie Edmondson, “Divided House Approves G.O.P. Inquiry Into ‘Weaponization’ of Government: Republicans pushed through a measure to create a powerful new committee to scrutinize what they have charged is an effort by the government to target and silence conservatives.” *New York Times*, January 10, 2023, <https://www.nytimes.com/2023/01/10/us/politics/house-republican-committee-weaponization-government.html>

## Chapter 2, Exigency and Entrepreneurship

“Because the rules are never complete and definitive, there is also an indispensable role for the individual. Verbal formulas can never state the rules unambiguously.” – J. David Greenstone<sup>38</sup>

“I have not employed troops on slight occasions, nor in any case where it has not been necessary to the enforcement of the laws of the United States. In this I have been guided by the Constitution and the laws which have been enacted and the precedents which have been formed under it.” – Ulysses S. Grant<sup>39</sup>

### Introducing the Theoretical Framework

As the passages suggest, we cannot fully understand institutional politics without accounting for the creative acts of individual political actors. The ambiguity inherent in institutional structures and rules leaves space for individual acts of innovation and leadership, the effects of which often reshape institutional structures. Presidents must face uncertainty and complexity in their duties when responding to exigent circumstances. In their responses they draw creatively on various sources of authority and, in the process, construct new understandings and arguments of their role in the constitutional system.

This chapter develops a theory of presidential action and institutional change drawing on several strands of institutionalist literature – historical institutionalism, rational choice approaches, and American political development. The theory attempts to bring discordant views about the presidency and macro historical change into harmony. The analysis begins with a discussion of the function and effects of institutions derived from rational choice scholars. It then turns to scholarship in historical institutionalist studies of the presidency that emphasizes gradual change and the ability of political actors to effect endogenous

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<sup>38</sup> J. David Greenstone, "Political Culture and American Political Development: Liberty, Union, and the Liberal Bipolarity," *Studies in American Political Development* 1 (1986): 48.

<sup>39</sup> Ulysses S. Grant, Special Message, January 22, 1877, The American Presidency Project <https://www.presidency.ucsb.edu/node/203661>

institutional change through their actions. By comparing these two sets of scholarship, this chapter establishes a set of revisionist expectations about presidential motives and the role of presidents in modernizing the presidency as an institution – i.e., it shifts the theoretical framing of institutional change. Instead of emphasizing the dividing line of modern and traditional, it focuses on the processes by which the presidency was *modernized* by presidents. I apply the concept of *political entrepreneurship* to presidents and to high level bureaucrats to identify moments where their actions drove institutional change. In my analysis of entrepreneurship, I introduce three interrelated concepts that structure presidential opportunities and motives.

- Novel constructions of presidential authority, more specifically presidential understandings of the presidency’s role and authority in the constitutional system.
- Institutional capacity, the capacity, resources, and strategies available to presidents in the pursuit of their goals.
- Polity-Centered Restraints, which refer to the broad structural factors that delimit the possibilities of presidential action.

While these three factors ought to be considered variables, they are interdependent and may be both dependent and independent variables, highlighting the endogeneity inherent in institutional change. Presidential action may simultaneously be determined by existing structures – i.e., norm-driven behavior, institutional capacity, and polity-centered restraints – and, through their agency as political actors, effect changes to the structures they operate within – i.e., developing novel constructions of their authority, building institutional capacity, contributing to the erosion of restraints.

A brief example, Millard Fillmore’s enforcement of the Fugitive Slave Act of 1850, highlights the complex interactions that might occur. Fillmore justified his expansive enforcement of the fugitive slave laws through a broad, and fairly unprecedented,

interpretation of the Commander-in-Chief and Take Care Clause. Fillmore's ideas justified the inclusion of militiamen and military regulars in the posse used by U.S. Marshals enforcing the laws in northern states.<sup>40</sup> This idea was a strategic, entrepreneurial effort to overcome the limited institutional capacity of the marshals to enforce the laws in the face of northern resistance to its execution. It occurred during a period where the polity-centered restraints of the antebellum period were eroding. The regionally-based parties were becoming increasingly fragmented over the issue of slavery and its expansion into territories conquered in the Mexican American War. This fragmentation disrupted the traditional restraints on presidents against taking sectional sides. Fillmore's actions and construction of his authority went against the unionist restraints on presidential uses of force that existed for much of the antebellum period. He used federal coercion to explicitly promote the interests of southern slaveholders, at the expense of northern abolitionists and formerly enslaved people in the North.<sup>41</sup> Thus, Fillmore's ideas about presidential power were responses to limited institutional capacity and the broader restraints on presidential action in the 1850s. Yet, Fillmore's construction of presidential and federal authority was also formative for several reasons. This construction increased the capacity of the marshals, broke down the unionist restraint felt by antebellum presidents, and, as Joshua Miller argues, marked the white supremacist origins of the institutional law-and-order presidency.<sup>42</sup>

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<sup>40</sup> Millard Fillmore, Special Message, February 19, 1851, The American Presidency Project <https://www.presidency.ucsb.edu/node/201052>.

<sup>41</sup> On the concept of unionist restraint, see Jeffrey S. Selinger, "Making Sense of Presidential Restraint: Foundational Arrangements and Executive Decision Making Before the Civil War," *Presidential Studies Quarterly* 44, no. 1 (2014): 27-49.

<sup>42</sup> Joshua Miller, "The Historical Presidency: The Rendition of Fugitive Slaves and the Development of the Law-and-Order President, 1790-1860," *Presidential Studies Quarterly* 49, no. 3 (2019): 684-697.

While such an approach may be unsatisfying to readers seeking a clear, unidirectional relationship between cause and effect, this approach is necessary to account for the complexities and multidirectional causal relationships inherent in institutional change.<sup>43</sup> This theory attempts to build on other historical studies of the presidency, many of which are the efforts of recent scholarship. Like these works, this dissertation attempts to avoid the limited use of history in much of the field of presidency studies. This dissertation challenges the “standard routes between past and present as superhighways,” instead it seeks to explore roads that “twist and turn around less-noticed formations” of institutional and ideational development.<sup>44</sup> The theoretical framework articulated in this chapter structures the empirical analysis in subsequent chapters.

### **Institutions and Presidential Incentives**

Regardless of their approach, scholars generally agree that institutions structure the incentives and behavior of actors in several ways. Adam Sheingate notes that scholars often “conceptualize institutions in terms of their effects – how rules, norms, and cognitive shortcuts constrain actors’ behavior.”<sup>45</sup> The tendency among rational choice scholars is to examine how institutions structure incentives and shape the decisions of political actors. A consistent feature of this scholarship is the use of game theoretic models to deduce how

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<sup>43</sup> Karen Orren and Stephen Skowronek, "Institutions and Intercurrence: Theory Building in the Fullness of Time," *NOMOS: Am. Soc'y Pol. Legal Phil.* 38 (1996): 111-146. Orren and Skowronek characterize political change as being caused by “patterned disorder.” The disjunctures and friction between multiple institutions in a given political system drive change.

<sup>44</sup> Bruce Miroff and Stephen Skowronek, "Rethinking Presidential Studies through Historical Research: Introduction," *Presidential Studies Quarterly* (2014): 1-5.

<sup>45</sup> Adam D. Sheingate, "Political Entrepreneurship, Institutional Change, and American Political Development," *Studies in American Political Development* 17, no. 2 (2003): 186.

institutional structures influence the decisions of players (i.e., political actors). Charles Cameron's work summarizes this type of approach as it applies to presidential games,

“This way of thinking about power shifts attention from the attributes of presidents to the characteristics of the games they play. Among these many games are the Supreme Court nominations game, the veto game, the executive order game, the treaty ratification game, the legislative leadership game, the staffing game, the executive reorganization game, the opinion leadership game, and the impeachment game. *Understanding the presidency means understanding these games.*”<sup>46</sup>

According to Cameron, understanding the situations that actors are placed in by institutional rules and norms is the most useful way to understand presidential power.

These approaches to studying the presidency generated insightful institutional logics to explain the behavior of presidents and Congress, mostly in reference to the post-FDR presidents. Most prominent among the incentives identified by these scholars is power-seeking. Since Richard Neustadt, presidency scholars adopted the idea that president's first, and foremost, seek to claim and maintain power.<sup>47</sup> For instance, Terry Moe's highly influential work suggests that all presidents hold incentives to control the bureaucracy by centralizing decision-making in the White House and politicizing the bureaucratic agencies through strategic appointments.<sup>48</sup> Moe and Will Howell conclude in their work on presidential unilateralism that presidents seek power and that the first-mover advantage is a

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<sup>46</sup> Charles M. Cameron, “Bargaining and Presidential Power,” in Robert Y. Shapiro, Martha Joynt Kumar, and Lawrence R. Jacobs, eds., *Presidential Power: Forging the Presidency for the Twenty-First Century* (New York: Columbia University Press, 2000), 47.

<sup>47</sup> Richard Neustadt, *Presidential Power: The Politics of Leadership* (Wiley and Sons, 1960).

<sup>48</sup> Terry M. Moe, “The Politicized Presidency,” in *The New Direction in American Politics*, John E. Chubb and Paul E. Peterson, eds., (Brookings, 1985).



critical structural advantage of the presidency over Congress.<sup>49</sup> In their discussion of the “two presidencies” thesis, Canes-Wrone, Howell, and Lewis suggest that presidential supremacy in foreign policy is based on presidents’ first mover advantage, the executive branch’s control and dispersal of foreign policy information, and the electoral incentives of members of Congress and the president.<sup>50</sup> While not comprehensive, these examples highlight the impact of institutionalist approaches in presidency studies, especially in studies of modern presidents. In each of these examples, institutional rules and structures establish stable sources of presidential power.

The primacy of institutions in structuring the behavior of political actors also has implications for how scholars think about institutional change. For rational choice scholars, institutions often produce stability by structuring the interactions of political actors. Thus, institutional equilibrium, not change, is the prediction of many rational choice theories.<sup>51</sup> Institutional change is only likely to occur when an established equilibrium is significantly disrupted. Baumgartner and Jones characterize this type of change as “punctuated equilibrium” in which short periods of disruptive change create a new status quo which then

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<sup>49</sup> Terry M. Moe and William G. Howell, "Unilateral Action and Presidential Power: A Theory," *Presidential Studies Quarterly* 29, no. 4 (1999): 850-873; William G. Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (Princeton University Press, 2003).

<sup>50</sup> Brandice Canes-Wrone, William G. Howell, and David E. Lewis, "Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis," *The Journal of Politics* 70, no. 1 (2008): 1-16.

<sup>51</sup> Concerns about structure and agency are not unique to rational choice scholarship or political science. Scholars across the social sciences have adopted variants of structuralist arguments in their explanations of social systems, institutions, culture, and the human psyche. Further, several sociologists provide useful frameworks for understanding how agency and structure are influenced by and shape the other. Capturing the dynamic interplay between structure and agency heavily influenced the analytical approach discussed in this chapter. I am thankful to Chris Parker for making this important point to me. For an example, see William H. Sewell Jr, "A Theory of Structure: Duality, Agency, and Transformation," *American Journal of Sociology* 98, no. 1 (1992): 1-29.

produces a new equilibrium.<sup>52</sup> In this view, the study of institutions in different temporal or cross-national contexts is an exercise in comparative statics. John Kingdon's concept of "windows of opportunities" is similar, suggesting that when three streams of problem perceptions, policy ideas, and political momentum align that big changes can occur within a policy area.<sup>53</sup> This type of rapid, transformational change often is produced by exogenous shocks – i.e., disruptions that are external to political institutions such as economic or political crises. Kenneth Shepsle characterizes the rational choice view of institutional change as exogenous changes to the distribution of actor preferences that result in new institutional arrangements which then produce new equilibriums.<sup>54</sup>

This focus on exogenous shocks and transformative events is also quite common in American political development scholarship.<sup>55</sup> In this work, big changes often occur during "critical junctures," and might come in the form of realigning elections, international war, or reconstructive politics. Historically oriented scholars come to quite similar conclusions when discussing the effects of critical junctures – they enhance the importance of individual decisions and often produce feedback effects that limit the range of choices available to future actors.<sup>56</sup> Perhaps the most significant distinction between rational and historical

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<sup>52</sup> Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (University of Chicago Press, 2010).

<sup>53</sup> John W. Kingdon, *Agendas, Alternatives, and Public Policy* (Pearson, 1984).

<sup>54</sup> Kenneth A. Shepsle, "Studying Institutions: Some Lessons from the Rational Choice Approach," *Journal of Theoretical Politics* 1, no. 2 (1989): 131-147, especially 136-143.

<sup>55</sup> To be sure, there is significant overlap between the two fields. Many scholars who adopt rational choice perspectives on institutions develop theories based on historical institutions.

<sup>56</sup> Paul Pierson, "Increasing Returns, Path Dependency, and the Study of Politics," *Studies in American Political Development* 94, 2 (2000): 251-267.

institutionalism are in their focus. While rationalists typically focus on how exogenous shocks reorder coalitions and the preferences of actors' ex-post, historical institutionalists pay greater attention to how critical junctures may enhance the importance of individual agency and produce path dependent processes and feedback effects. While most scholarly attention in American politics focuses on how domestic shocks create these windows of opportunity, David Mayhew highlights that wars are unsurpassed in their ability to create windows of opportunity for domestic policy change.<sup>57</sup> Mayhew's focus on the domestic constitutive effects of international war is akin to "second-image reversed" approaches – where international events shape domestic politics – in the study of international relations.<sup>58</sup> Both historical and rational choice approaches to studying institutions perceive critical junctures and exogenous shocks as critical drivers of change.

It is worth reiterating here that the developmental narrative of the modern presidency embodies this type of abrupt, transformative change. In this narrative, the Great Depression, which began in 1929, was a massive exogenous shock that disrupted established institutional orders. The shock of the depression mixed with presidential leadership transformed the institutions and policy commitments of the national government. The result is that scholars often conceptualize the development of the presidency in terms of dividing lines.<sup>59</sup>

Traditional presidents exist on one side, modern presidents on the other. The modern

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<sup>57</sup> David R. Mayhew, "Wars and American Politics," *Perspectives on Politics* 3, no. 3 (2005): 473-493.

<sup>58</sup> Peter Gourevitch, "The Second Image Reversed: The International Sources of Domestic Politics," *International Organization* 32, no. 4 (1978): 881-912.

<sup>59</sup> John T. Woolley (2005), "Drawing Lines or Defining Variables? Studying Big Changes in the American Presidency," Paper prepared for presentation at the Annual Meetings of the American Political Science Association (Washington D.C., 2005), [https://www.researchgate.net/publication/359931499\\_Drawing\\_Lines\\_or\\_Defining\\_Variables\\_Studying\\_Big\\_Changes\\_in\\_the\\_American\\_Presidency](https://www.researchgate.net/publication/359931499_Drawing_Lines_or_Defining_Variables_Studying_Big_Changes_in_the_American_Presidency).

presidency is a theory of institutional change that privileges the effects of exogenous shocks and critical junctures over other explanations. Its influence in the field of presidency studies, namely in identifying the pursuit of power as the primary motive of presidents, creates a reductionist view of presidential action that omits other competing motives. As Benjamin Kleinerman puts it, presidency scholars “have failed to appreciate that presidents seek political authority—not just to wield power—but also to instantiate themselves in history as a certain kind of president only willing to do certain kinds of things.”<sup>60</sup>

### **Presidents and Bureaucrats as Strategic Entrepreneurs**

Adam Sheingate’s work on political entrepreneurship presents a framework for examining the endogenous sources of institutional change that presidents attempt to create, which he suggests is rooted in the constitutional ambiguity surrounding executive power. He suggests that political entrepreneurs: *shape* the terms of political debate through issue framing, problem definition, and agenda influence; act as sources of innovation by *investing* resources in the creation of new policies, agencies, or forms of collective action and cooperation; *consolidate* their innovations in lasting changes.<sup>61</sup> When successfully consolidated, these changes establish precedents and resources that future presidents may also use. This framework, which considers actions and their success, is useful for evaluating the opportunities, resources, and assets that presidents may use to engage in entrepreneurial acts, because “presidential action confronts a degree of uncertainty, engages a more diverse

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<sup>60</sup> Benjamin A. Kleinerman, "The Constitutional Ambitions of James Madison's Presidency," *Presidential Studies Quarterly* 44, no. 1 (2014): 6. This view is not necessarily incongruous with the approaches of scholars like Skowronek and Moe. These scholars seem to imply that presidents act strategically to develop a political project – i.e., specific means and ends – that they are responsible for.

<sup>61</sup> Sheingate, “Political Entrepreneurship,” 187-188.

range of governmental functions and political roles, and operates within less precisely defined boundaries of authority than actors do in Congress or the courts.”<sup>62</sup> The uncertainty and institutional complexity presidents face make the boundaries of their action relatively flexible, thus creating opportunities for entrepreneurship.

Sheingate’s framework also levies a critique against rational choice frameworks of the presidency. While Sheingate agrees that institutional rules structure the behavior of goal-oriented actors, he suggests that rational choice approaches often do not account for institutional complexity. No doubt this is in part a conscious choice by rational choice theorists to prioritize the development of parsimonious theories unencumbered by such complexity. Nevertheless, these assumptions do not allow for the incorporation of institutional complexity. Rational choice theories fail to consider all the players that participate in a given game (focusing instead on key actors), that several different games are underway at any given time, and that the actions taken in one game impact the actions and outcomes of several other games.<sup>63</sup> These complexities and ambiguities that are assumed away in many rationalist theories of institutions are, in fact, what makes entrepreneurship possible. Sheingate identifies three features of institutional complexity that entrepreneurs can exploit: the heterogeneity of institutional components which entrepreneurs can combine in creative ways, the connections of various institutional components which creates an uncertainty of outcomes when entrepreneurs engage in creative combinations, and the

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<sup>62</sup> Sheingate, 195.

<sup>63</sup> Adam Sheingate, “The Terrain of the Political Entrepreneur,” in *Formative Acts: American Politics in the Making*, Matthew Glassman and Stephen Skowronek, eds. (University of Pennsylvania Press, 2008): 14-15.

ambiguity of rules which generates creative possibilities by blurring the lines of authority and jurisdiction.<sup>64</sup>

To be sure, institutionalist scholarship on the presidency provides insights into the strategic actions of both traditional and modern presidents. For instance, Dan Galvin and Colleen Shogan highlight the use of appointments by nineteenth century presidents to maintain control of the bureaucracy.<sup>65</sup> The implication being that Moe's observation about the presidential impulses to centralize and politicize the bureaucracy apply to all presidents. Other institutional features such as the first mover advantage and control of information also can be fruitfully applied to presidents across eras. The purpose of focusing on how presidents shape institutions is not to dismiss these insights about how institutions shape presidential behavior. Rather, focusing on how presidents act as agents of change serves is complementary to these approaches because it explores how the entrepreneurial actions of presidents shape the institutional structures that they (and other actors) operate within.

Political entrepreneurship involves innovation in the face of ambiguity and complexity, providing a useful framework for explaining presidential action. While they may not formally invoke the language of entrepreneurship, a few historical scholars of the presidency have applied similar frameworks to understand the impact of presidents on institutional structure. Keith Whittington and Daniel Carpenter suggest that institutional development has often been driven by autonomous executive action and by conflicts

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<sup>64</sup> Sheingate,, "Terrain of the Political Entrepreneur," 13-15.

<sup>65</sup> Daniel Galvin and Colleen Shogan, "Presidential Politicization and Centralization Across the Modern-Traditional Divide," *Polity*, 36(3) (2004): 477-504.

between presidents and Congress.<sup>66</sup> For example, Peri Arnold finds that the Progressive era presidency was characterized by autonomous policy activism by presidents despite a dearth of political resources. To expand their capacity for independent policy leadership, these presidents had to justify their authority for innovation and strategically seek out resources to achieve their goals.<sup>67</sup> The process described by Arnold is quite similar to entrepreneurship – presidents innovated to expand the authority and institutional resources available to them. Daniel Galvin conceptualizes presidents as “agents of change,” but the argument is similar to those made by other historical-institutionalists: presidents’ efforts to bring existing structures into alignment with their own incentives often shape the long terms development of those institutions.<sup>68</sup> Galvin’s research demonstrates how presidents shape their party organizations, but the logic is applicable to other areas of presidential activity.<sup>69</sup> The commonality across this work is that presidents are capable of altering structures through innovation. In this framework, entrepreneurial innovation is one of three entrenched properties of the American political system that gives presidents a more central place than rationalist accounts do: presidents are party leaders (which means congressional parties are not independent of the president), presidents set the national agenda (i.e., they make politics in Skowronek’s terms), and they are able to engage in autonomous policy innovation.<sup>70</sup>

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<sup>66</sup> Keith E. Whittington and Daniel P. Carpenter, "Executive Power in American Institutional Development," *Perspectives on Politics* 1, no. 3 (2003): 495-513.

<sup>67</sup> Peri E. Arnold, "Effecting a Progressive Presidency: Roosevelt, Taft, and the Pursuit of Strategic Resources," *Studies in American Political Development* 17, no. 1 (2003): 63.

<sup>68</sup> Daniel J. Galvin, "Presidents as Agents of Change," *Presidential Studies Quarterly* 44, no. 1 (2014): 95-119.

<sup>69</sup> Daniel J. Galvin, *Presidential Party Building* (Princeton University Press, 2009).

<sup>70</sup> Whittington and Carpenter, "Executive Power," 496.

This research focuses its attention on these endogenous processes of change, but it also accounts for the way that exigent crises produce change. In that sense, the theory proposed here attempts to provide a more comprehensive, unified understanding of the development of the presidency than approaches that emphasize only one of these processes. With the exception of the Civil War, domestic disorders typically do not rise to the level of significance attributed to exogenous shocks, but these events create imperatives for the exercise of institutional authority. These factors are external to institutions and should be thought of as exogenous causes of institutional change. However, domestic disorder may also trigger endogenous sources of change by producing entrepreneurial responses that shift institutional authority in ways that are independent of the initial external stimulus that created the need for action.

The process of entrepreneurship is primarily one of endogenous institutional change, whereas the literature on critical junctures largely describes institutional change that results from exogenous factors. Further, Mahoney and Thelen draw attention to gradual and incremental processes of change, which may often be driven by the consolidated gains of entrepreneurial actions.<sup>71</sup> This differs from the focus on critical junctures which suggests that some exogenous shock occurs, dramatically restructures preferences and institutional structures, and creates a new, transformed equilibrium of politics.

### **Ideas and Constitutional Construction: Changing Understandings of Authority**

Ideas are the substance of politics and thus are essential in explanations of institutional change. However, as a concept, the use of ideas can amount to a slippery slope (i.e., what

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<sup>71</sup> James Mahoney and Kathleen Thelen, "A Theory of Gradual Institutional Change," in *Explaining Institutional Change: Ambiguity, Agency, and Power*, James Mahoney and Kathleen Thelen, eds., (2010).



counts as an influential idea?). For example, presidential ideas have been conceptualized broadly in several ways, some of which include:

- Presidential “vision,” defined as “a set of relatively specific goals for the country, including prescriptions for the president and the federal government in achieving those goals.”<sup>72</sup>
- Presidential programs or policy agendas, often measured by inclusion of policy issues and proposals during the president’s campaign and in their public rhetoric once in office.
- Presidential ideas about the proper constitutional role of the presidency.<sup>73</sup>

These distinct ways of conceptualizing ideas are all relevant, but for the purposes of this research presidential vision and constitutional constructions are most significant as they play a significant role in producing endogenous institutional change.

#### *Exploiting Ambiguity: Presidential Vision and Constitutional Constructions*

Let us first consider the concept of presidential vision. As Mark Zachary Taylor points out, vision incorporates the president’s theory of the presidency – i.e. their interpretation of the president’s duties, responsibilities, authorities, and capabilities, relative to other political actors and institutions. On economic policy, the subject of Taylor’s research, Gilded Age presidents varied in their vision and the activism (or inaction) that vision prescribed.<sup>74</sup> This presents a useful template for examining whether presidents envisioned themselves as the securer of federal laws and public order, and how these visions connected to their actions.

In addition to Taylor, several others focus on the importance of vision as a cause of presidential action. Fred Greenstein’s study of the modern presidents suggests that variations

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<sup>72</sup> Mark Zachary Taylor, “The Historical Presidency: The Gilded Age Presidents and the Economy,” *Presidential Studies Quarterly* 51, 4 (2021), 874 – 875.

<sup>73</sup> Kleinerman, “Constitutional Ambitions”.

<sup>74</sup> Kleinerman, 875.

in the vision of modern presidents influenced their effectiveness.<sup>75</sup> Stephen Weatherford's research on presidents' economic leadership also illuminates the importance of vision, even when controlling for political context and longer-term secular trends like polarization.<sup>76</sup> These presidency scholars blend this individual element of presidential leadership into broader institutional and contextual explanations of presidential power and success. Taken together, these works suggest we ought to consider presidential vision, as well as whether presidential constructions of their authority are accepted by other political actors.

Incorporation of ideas into accounts of historical change might also take place on a more specific basis. This is the case with John Dearborn's research on the institutional foundations of the modern presidency, in which he traces the incorporation (or rejection) of specific ideas about presidential authority such as presidential representation and the unitary executive.<sup>77</sup> Another related way we might incorporate ideas is by tracing their diffusion across networks of political actors. For instance, Alfred Thayer Mahan's advocacy for a strong navy was highly influential among the younger generation in the naval officer corps. Mahan's ideas also made their way into the Benjamin Harrison administration, mobilizing Secretary of the Navy Benjamin F. Tracy and Harrison as entrepreneurs in the pursuit of a

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<sup>75</sup> Fred I. Greenstein, *The Presidential Difference: Leadership Style from FDR to Barack Obama* (Princeton University Press, 2009).

<sup>76</sup> M. Stephen Weatherford, "Comparing presidents' economic policy leadership," *Perspectives on Politics*, 7, vol. 3 (2009): 537-560.

<sup>77</sup> John A. Dearborn, "The 'Proper Organs' for Presidential Representation: A Fresh Look at the Budget and Accounting Act of 1921," *Journal of Policy History* 31, no. 1 (2019): 1-41; John A. Dearborn, "The Historical Presidency: The Foundations of the Modern Presidency: Presidential Representation, the Unitary Executive Theory, and the Reorganization Act of 1939," *Presidential Studies Quarterly* 49, no. 1 (2019): 185-203.

modern navy.<sup>78</sup> This latter approach emulates that taken by John Kingdon in his influential research on windows of opportunities, in which the diffusion of ideas is one necessary element for policy change to occur.<sup>79</sup> These examples highlight value of incorporating ideas, but they also point to a need for further specification and precision in the use of ideas as a concept.

As Kleinerman emphasizes, ideas are significant because a president's conception of the proper role of the presidency informs their actions while in office. The focus of Kleinerman's study is James Madison, who he argues developed a restrained view of presidential authority during the early years of the new republic. However, this restrained view was not synonymous with weakness. Kleinerman suggests that Madison's principles "demand a presidency, unified, and thus responsible to the people, but restrained to its proper sphere of authority."<sup>80</sup> This distinction is critical because it reframes the terms of evaluating presidents – aggrandizement does not necessarily equal "greatness," nor does restraint equal weakness – and it suggests presidents like Madison would operate in areas of governance that were consistent with their conception of the *proper scope of executive action*.

The ambiguity of the Constitution, which is most pronounced in Article II, creates the uncertainty that is a necessary condition for entrepreneurship through strategic constructions of presidential authority. The presence of constitutional ambiguity clouds the boundaries of institutional authority and jurisdiction, presenting opportunities for presidents,

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<sup>78</sup> Homer E. Socolofsky and Allan B. Spencer, *The Presidency of Benjamin Harrison* (University of Kansas Press, 1987), 96-97.

<sup>79</sup> Kingdon, *Agendas, Alternatives, and Public Policy*.

<sup>80</sup> Kleinerman, "Constitutional Ambitions," 10.

and other institutional actors, to compete for control of them. This contestation often occurs through the employment of novel constructions of constitutional meaning, which Keith Whittington argues are “made by explicit advocates... those who advocate a given construction expect to benefit from it... to construe the Constitution so as to favor their own institutional position.”<sup>81</sup> Sheingate captures a similar idea in his writing on entrepreneurship, “ambiguity provides more than a constitutional space presidents occupy in a power grab with Congress or the Supreme Court; it also offers *a practical device presidents can use to justify novel extensions of authority.*”<sup>82</sup> In other words, presidents might attempt to construct their constitutional authority as practical and strategic element in pursuit of their goals. Thus, to fully understand the impact of presidential entrepreneurship, we must account for their efforts to generate new constructions of presidential authority which can be used as precedents by their successors. In this sense, constitutional constructions serve as an important vehicle of institutional change in the long term, even if the originator of a constitutional argument may fail to accomplish their immediate goals using it.

#### *Contestation and the Evolution of Authority*

To conclude this discussion of ideas, we must consider the processes by which ideas come to matter. Perhaps the most obvious, and immediately significant, way that ideas may influence politics is through their acceptance and use by other political actors.

Jeremy Bailey’s emphasizes that there are competing foundations of presidential authority in American politics. In the antebellum period, the Whigs argued that the source of

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<sup>81</sup> Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harvard University Press, 1999), 210-211.

<sup>82</sup> Sheingate, “Political Entrepreneurship,” 197 emphasis added.

presidential authority was constitutional, based on the rule of law. Jacksonian Democrats, on the other hand, adopted the view that the source of presidential authority could be the representation of a national constituency. While the Jacksonian conception won out, this example indicates that losing ideas often transform winning ideas into different forms. For example, Bailey notes the Whigs' emphasis on a constitutionally constrained presidency became entangled with developing notions of presidential authority that emphasized extra-constitutional sources.<sup>83</sup> Nicole Mellow and Jeffrey Tulis's analysis of Andrew Johnson's "politics of failure" directs us to similar conclusions. While Johnson lost the immediate battle over Reconstruction to Radical Republicans in Congress, he laid the foundation for southern resistance to federal power and the Civil Rights amendments. Johnson did so by providing a rhetorical defense of states' rights (which Mellow and Tulis note was based on logical constitutional arguments, i.e., constitutional constructions) that southerners could use, a replicable strategy of obstructing congressional action when possible, and by melding new cross-sectional party networks that formed the foundation of the white supremacist, post-Reconstruction Democratic party. Johnson's example highlights the potential importance of presidential ideas and entrepreneurial actions, even when they fail in their short-term goals.<sup>84</sup> In short, entrepreneurial innovation is often about the construction of new understandings of institutional authority to justify actions taken and establish

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<sup>83</sup> Jeremy D. Bailey, "Opposition to the Theory of Presidential Representation: Federalists, Whigs, and Republicans," *Presidential Studies Quarterly* 44, no. 1 (2014): 50-71.

<sup>84</sup> Nicole Mellow and Jeffrey K. Tulis, "Andrew Johnson and the Politics of Failure," in *Formative Acts: American Politics in the Making*, Matthew Glassman and Stephen Skowronek, eds. (University of Pennsylvania Press, 2008): 153-170.

precedents for the future. Further, novel ideas are central to entrepreneurial innovation because the ambiguity in rules allow for the strategic interpretations of rules.<sup>85</sup>

### **Capacity: Effecting Change Through a “Weak State”**

While ideas serve to inform the motives, logic, and rhetoric of presidential action, institutional capacity serves to delimit the possible avenues and strategies available to presidents in the execution of the law. In other words, whereas ideas inform presidential choice about what actions are appropriate and how those actions should be justified, capacity shapes the possibilities for action by presenting presidents with another type of choice. Institutional capacity gives presidents choices about the best methods for accomplishing their goals. Capacity may also serve as a significant constraint on presidential action. For example, presidents’ lack of staff in the nineteenth century may have limited their ability to go public. Likewise, the lack of modern communication and transportation technology made communication between political decision makers in D.C. and the territorial periphery more limited. As the bureaucratic and administrative apparatus expands, authority diffuses across them and becomes responsive to the goals of bureaucratic actors as well as the goals of the president.<sup>86</sup> In this section, I discuss the literature on the nineteenth century state and its bearing on the institutional capacity of the national government, in general, and, more specifically, the presidency.

The United States of the nineteenth century is often characterized as a “stateless” society, or at the very least having a weak central state. The common historical narrative is that the modern activist state has its origins in the Progressive era, but that it fully took

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<sup>85</sup> Sheingate, “Terrain of the Political Entrepreneur,” 19-20.

<sup>86</sup> Sheingate, “Terrain of the Political Entrepreneur,” 21.

shape during the New Deal. Other revisionist scholars have challenged this narrative and found the roots of the modern administrative state throughout the post-Civil War era. William James Hullhoffer leverages congressional debates to explore the emergence of what he terms as a second American state around the same time that the country was stricken with the Civil War.<sup>87</sup> A central theme in his interpretation is that the growth of the American state in this period occurred as a series of gradual developments, rather than by some transformational shift to the established political order.

This second state was the product of a tension between anti-bureaucratic tendencies in American political thought and the need to respond to exigent crises and novel problems that required substantial federal intervention into social and economic life.<sup>88</sup> In many respects the latter half of the nineteenth century was a period of immense upheaval in American life – the Civil War, Reconstruction, continual conflict with indigenous peoples as U.S. citizens and government spread West, the industrialization of the American economy and resultant economic hardships, and a political system characterized by fierce partisan competition over the control of government patronage and policy. The development of a national administrative apparatus during this era reflect decisions about what the governmental responses to these problems would be.

This account of the American state contrasts the prevailing interpretation of political historians who generally suggest that the American state is exceptionally weak. In this view,

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<sup>87</sup> William James Hullhoffer, *To Enlarge the Machinery of Government: Congressional Debates and the Growth of the American state, 1858 – 1891* (Baltimore, MD: John Hopkins University Press, 2007).

<sup>88</sup> Hullhoffer, *To Enlarge the Machinery*, 199 – 202; Robert C. Lieberman, "Ideas, Institutions, and Political Order: Explaining Political Change," *American Political Science Review* 96, no. 4 (2002): 697-712. Lieberman suggests that friction between political orders is often a critical driver of change and that the causal mechanism linking friction and political change are the reordering of individual incentives and opportunities.

even the development of the modern administrative state does little to counteract the apparent anti-statist tradition in American political culture and thought. The idea that American political culture was stateless originated with Alexis De Tocqueville's reflections on America from his visit in the 1830s. The sense of statelessness perceived by De Tocqueville was adapted by historians in the mid-twentieth century who similarly interpreted American political culture as being liberal, individualistic, associational, and generally opposed to state regulation or intervention into private life.<sup>89</sup>

Historians have also been highly critical of the "myth of the weak state."<sup>90</sup> In William Novak's critique of the "weak state" narrative, he suggests that the adoption of this narrative by mid-century historians was ideologically useful for differentiating the United States from the totalitarian states it had come into conflict with during World War II and the Cold War.<sup>91</sup> Despite its ideological usefulness, the notion of a weak state generally ignores the causes and processes of state development in the U.S.

Michael Mann's distinction of two forms of state power – despotic power and infrastructural power – allows us to reconceptualize the early U.S. state in a meaningful way.<sup>92</sup> While the U.S. state was developed around a system of checks and balances that

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<sup>89</sup> Some of the most influential of these historical interpretations include: Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (Houghton Mifflin Harcourt, 1955); Daniel J. Boorstin, *The Genius of American Politics* (Chicago, 1958); Arthur M. Schlesinger, "What Then Is the American, This New Man?" in *Paths to the Present*, Schlesinger, ed. (Boston, 1964), 3–23.

<sup>90</sup> William J. Novak, "The Myth of the "Weak" American State," *The American Historical Review*, 113(3) (2008): 752-776.

<sup>91</sup> Novak, "Myth of the "Weak,"" 755-756.

<sup>92</sup> Michael Mann, "The Autonomous Power of the State: Its Origins, Mechanisms, and Results," *European Journal of Sociology* 25, no. 2 (1984): 185-213.



limited despotic power (i.e., the unchecked ability of state officials to exert power arbitrarily), its infrastructural power (i.e., power generated through cooperation with the governed) was considerable from the outset. As a demonstration of this infrastructural power, Novak directs us to the role of the national state in the conquest of western territorial expansion, the creation of a vast system of infrastructure which promoted interstate commerce, the development of a strong military establishment, and the “expansion of governmental powers of police, regulation, and redistribution to the invention of new ways of policing citizens, aliens, races, morals, and gender relations in the production of national culture.”<sup>93</sup> In short, Novak illustrates the expansive scope and scale of state power present throughout all stages of the state’s development.

Even contemporaneous observers in the late nineteenth century found the idea of statelessness (cast at the time as *laissez faire*) as unsupported by the evidence. Albert Shaw observed the prevalence of *laissez faire* in the minds of Americans in his era but suggested that these perceptions overlooked an exorbitant amount of state intervention and regulation in American life.<sup>94</sup> In his review of administrative law in the Gilded Age, Jerry Mashaw draws on a rich body of historical and legal sources to give a compelling corroboration of Shaw’s perceptions. Mashaw’s shares a useful overview of the politics and administrative power of the state during this era:

“Just as today, conflicts between political parties, the drama of electoral politics, and the vagaries of congressional lawmaking dominated the headlines. But the day-to-day activities of government were in the charge of administrative departments and bureaus. Operating under broad delegations

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<sup>93</sup> Novak, “Myth of the “Weak,”” 763.

<sup>94</sup> Albert Shaw, *The American State and the American Man*, *The Contemporary Review*, 1866-1900, 51, ProQuest Congressional, (1887): 695-711

of authority, administrators developed a rich internal law of administration that guided massive administrative adjudicatory activity and substantial regulatory as well. Moreover, policy innovation at the legislative level depended heavily on the research and recommendations of existing administrative agencies. In short, if we look at legislative and administrative practice rather than at constitutional ideology or political rhetoric, we can see the emergence of a national administrative state and national administrative law before either had a name.”<sup>95</sup>

Both contemporary observers and administrative historians persuasively challenge the notion of statelessness in the United States.

Many of the seminal works in American political development give this period of state development considerable attention. Stephen Skowronek’s examination of the post-reconstruction development of national administrative capacity highlights how the emergence of intellectual elites in the late nineteenth century increased demands for a professionalized approach to policy and administration. Nevertheless, the development of this administrative capacity by these political entrepreneurs took the form of a “patchwork” layered over the established, and decentralized, institutional order of courts and parties.<sup>96</sup> Richard Bensei finds that the Civil War and Reconstruction were a critical step in the modernization of American society and government in their own right because they allowed the “modernizing” north to incorporate the “premodern” South into the national political and economic system.<sup>97</sup> These accounts both identify the late nineteenth century as a central

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<sup>95</sup> Jerry L. Mashaw (2010), “Federal Administration and Administrative Law in the Gilded Age,” *The Yale Law Journal* 119, 7 (2010): 1362.

<sup>96</sup> Stephen Skowronek (1982), *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge: Cambridge University Press, 1982).

<sup>97</sup> Richard Bensei, *Yankee Leviathan: The Origins of Central State Authority in Nineteenth-Century America, 1859 – 1877* (Cambridge University Press, 1990), 5.

period in the gradual, development of the modern administrative state.<sup>98</sup> They draw our attention to the conflictual, unintentional, and often non-linear, processes through which state development occurs.

*Presidents, the Cabinet, and Institutional Capacity*

Along with recent scholarship on the nineteenth century presidency, several prominent accounts of nineteenth century state building focus on an executive-bureaucratic expansion of the state. While presidents often do not take center stage in these accounts, the executive branch writ large or entrepreneurial bureaucrats more narrowly are portrayed in these works as central to policy innovation and the modernization of institutions. The development of professionalized bureaucracies, less dependent on the influence of parties, is a central feature in Skowronek's explanation of the modern administrative state.<sup>99</sup> Daniel Carpenter traces the development of bureaucratic autonomy in certain agencies during the same period, citing the entrepreneurial efforts of key bureaucrats to cultivate reputations for providing valuable expertise and services to political actors across multiple networks.<sup>100</sup> These

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<sup>98</sup> See also: Theda Skocpol, *Protecting Soldiers and Mothers* (Cambridge: The Belknap Press of Harvard University Press, 1992). Skocpol traces the development of the U.S. welfare state to the nineteenth century to the provision of social benefits to Civil War veterans and their families. Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth Century America* (Cambridge University Press, 2009). Balogh argues that since the founding era Americans held interest-based incentives to support an energetic government that actively promoted national economic and political development (65 – 66). These demands led to significant government action in foreign and economic policy – securing borders and trade, coordinating internal improvements among states with divergent interests, and the creation of national infrastructure and services like the Postal Service and Lighthouses.

<sup>99</sup> Skowronek, *Building a New American State*.

<sup>100</sup> Daniel P. Carpenter, "State Building through Reputation Building: Coalitions of Esteem and Program Innovation in the National Postal System, 1883–1913," *Studies in American Political Development* 14(2) (2001): 121–155; Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton, NJ: Princeton University Press, 2001); Daniel P. Carpenter, "The Political Foundations of Bureaucratic Autonomy: A Response to Kernell," *Studies in American Political Development* 15(1) (2002): 113–122; Daniel P. Carpenter, *Reputation and Power:*

executive-centered explanations of state development cut against institutional theories of the nineteenth century which often portray congressional parties as dominant actors. Only recently, and at the margins, have institutional scholars begun to revise their understanding of the nineteenth century presidency.

Even in the absence of the modern administrative state, traditional presidents used institutional resources in the pursuit of their goals. This support often came as the result of choosing high-level executive branch appointees, to pursue their policy and administrative goals more effectively. As Galvin and Shogan note, the president's incentives for controlling the bureaucracy were present even during the nineteenth century.<sup>101</sup> A central area of contention between presidents and Congress during this period was over the control of cabinet appointments. The cabinet served as a central intermediary between the executive branch bureaucracies and congressional committees, providing valuable expertise and information about policymaking to Congress. Several contemporaneous scholars corroborate the importance of the cabinet to legislative policymaking, and the Congressional Record also highlights the ways that the cabinet functioned as a partner in the legislative process.

In the late 1870s and early 1880s, the Senate dealt directly with issues stemming from policy complexity and informational concerns generated by the interdependent, yet separated, nature of the legislature and the executive. For example, on March 26, 1879, Senator George Pendleton introduced a bill that would allow the principal officer of each executive department to occupy seats on the floor of the House of Representatives and

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*Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton, NJ: Princeton University Press, 2010).

<sup>101</sup> Galvin and Shogan, "Politicization and Centralization."

Senate. The bill proposed that the heads of executive departments would be granted the privilege to engage in congressional debate, but also the responsibility to provide information to Congress about specific legislation.<sup>102</sup> The bill was laid on the table and referred to a special senatorial Committee on the Bill to Admit Cabinet Officers to Seats on the Floor of the Senate and House Select.

The committee's report, issued during the lame duck session of the 46<sup>th</sup> Congress in February 1881, recommended the bill for passage and emphasized that the practices recommended in the bill were *within the letter and spirit of the Constitution*.<sup>103</sup> While the bill was never brought to a floor vote, the report illuminates the precedents for and frequency with which executive branch officials had engaged in legislative policymaking with Congress throughout American history, and exhibited a willingness to accept this executive intrusion into congressional policymaking:

“The connection of the executive and the legislative departments of the government illustrates this position most strongly. Congress can pass no law without the assent of the President. The President can establish no office without the consent of Congress. Congress must provide him with the means of executing the great trusts confided to him. He must communicate to Congress the information and make the suggestions of legislation which his experience in administration teaches to be desirable. And so uniformly has Congress acted upon this interdependence of the executive and the legislative departments, that, as has been before said, Congress requires the chief officers of every executive department to report to it directly as to the performance of the duties and the execution of the powers confided to it. The result has been that the executive department comprising in this term the

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<sup>102</sup> U.S. Congress, Senate, A Bill to Provide that the Principal Officers of each of the Executive Departments may Occupy Seats on the Floor of the Senate and House of Representatives, S. 227, 46<sup>th</sup> Cong., 1<sup>st</sup> sess., March 26, 1879, *ProQuest Congressional*.

<sup>103</sup> U.S. Congress, Senate, Select Committee on the Bill to Admit Cabinet Officers to Seats on the Floor of the Senate and House, “To provide that principal officer of each of executive departments may occupy seat on floor of Senate and House of Representatives,” 46<sup>th</sup> Cong., 3<sup>rd</sup> sess., S.rp.837, serial 1948, *ProQuest Congressional*.

President and the chief officers, has exercised necessarily and properly, great influence on the legislation of Congress. The principles enacted into laws are comparatively few and simple. The machinery by which these few and simple principles can be carried into actual administration is complex, and can be perfected by experience only. The duties of administration necessarily compel the heads of departments to become familiar, not only with the best policy, but with the best methods of carrying policies into actual execution, and the consequence is that members of Congress much less familiar, do in fact seek, either individually or through committee, the counsel and advice of these officers, and are, to a very great extent, influenced by them. The influence is exerted by means of the annual reports, of private consultations, and of special reports made in answer to special resolutions of inquiry by either house, and the question really submitted to the consideration of Congress by this bill is, whether these means of communication will not be greatly improved by consultation between the members of Congress and these officers, face to face, on the floor of the houses.”<sup>104</sup>

This passage attests to the regularity and depth of involvement of the president and cabinet secretaries in legislative policymaking. Further, it provides multiple justifications for this involvement. Not only was there a constitutional responsibility for presidents and their subordinates to involve themselves in providing information and making recommendations to Congress, but the committee also explicitly recognized that because of policy complexity the executive branch was an essential partner in the making of good public policy. While the principles of legislation were relatively simple, the complexity of implementation required the input of executive branch officials about the most effective means of formulating and implementing policy. This suggests that especially in policymaking on issues that were complex or had high informational demands, much of the detail necessarily was based upon the experiences of the executive branch.

In Mary Louise Hinsdale’s analysis of the cabinet shortly after the turn of the twentieth century, she concluded that legislation was commonly influenced by the executive

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<sup>104</sup> U.S. Congress, S.rp.837, 5 – 6.

branch and that this influence was most pronounced in areas where greater technical information was required.<sup>105</sup> She further suggests that this influence was increasing with the slow expansion of a professionalized civil service in the late nineteenth century, “but it can be categorically asserted, that in all subjects where technical information is required, Congress grows more and more disposed to admit the influence of the Departments, as the Civil Service becomes more permanent and expert.”<sup>106</sup> Thus, the cabinet played a central role in congressional lawmaking and the degree of influence was conditioned by, among other things, the technical nature of the policy issues, the professionalization of the agency, and the entrepreneurship of the department heads.

Henry Jones Ford’s analysis of the American political system in 1900 promotes a similar, and perhaps more extreme, view to that espoused by Hinsdale. Ford’s perspective was that the presidency had developed into a powerful and dominant institution over the course of the nineteenth century. He describes the presidency as “the organ of the will of the nation.”<sup>107</sup> This view is based on the idea of presidential representation of the public that has its origins in the Jacksonian era, but unlike other interpretations of the Jacksonian era, Jones Ford views patronage as a tool to be used by presidents to substantively influence policy. Instead of viewing the distribution of patronage as the sole mechanism of presidential influence, this perspective suggests that the appointment of loyal and competent subordinates was a tool that expanded the ability of presidents to influence congressional

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<sup>105</sup> Mary Louise Hinsdale, *A History of the President's Cabinet* (Ann Arbor: G. Wahr, 1911), 311.

<sup>106</sup> Hinsdale, 312.

<sup>107</sup> Henry Jones Ford, *The Rise and Growth of American Politics, a Sketch of Constitutional Development* (New York: The Macmillan Company, 1900), 214 -220.

legislation. While Ford is extreme relative to other contemporary observers, his view provides some plausibility to the expectation of presidential influence in policymaking. Ford's view of the power of the presidency and weakness of Congress is captured by the following excerpt:

“It is impossible for a party to carry out even a purely legislative programme unless it embodies a policy accepted by the President and sustained by the influence of his office. The agency of the presidential office has been such a master force in shaping public policy that to give a detailed account of it would be equivalent to writing the political history of the United States.”<sup>108</sup>

Ford's assertions are backed by only limited evidence, generally through illustrative examples of presidential influence. Nevertheless, this perspective attests to the plausibility of more systematic presidential influence even if Ford's view of the presidency as “dominant” is an overstatement.<sup>109</sup> It supports the idea that presidential influence in this period was driven by appointments and the resources of the office, which includes the cabinet and bureaucratic control of information.

These contemporaneous views of cabinet and presidential influence in the congressional process, also align with the findings of modern political scientists about bureaucratic and congressional capacity. An illustrative, if simple and imperfect, measure of the information asymmetries between the presidency and Congress is to look at the number of executive branch appointees and the number of congressional staffers. The number of

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<sup>108</sup> Jones Ford, *Rise and Growth*, 278–280; A notable critique of Ford's view is George C. Edwards III, "Henry Jones Ford and the American Presidency," *PS: Political Science & Politics* 32, no. 2 (1999): 229-230. Edwards criticizes the rigor of Ford's analysis, by highlighting the limited evidence Ford presents to support his assertions of presidential power. Despite these shortcomings, there are insights in Ford's work. While the claim of presidential dominance is likely overstated, as Edwards points out, Ford's view speaks to the plausibility of presidential influence – if there were some examples of presidential influence over policymaking, then there might be others.

<sup>109</sup> See also, Mashaw, “Federal Administration,” 1362.



federal employees skyrocketed from around 50,000 in the 1870s to 500,000 in the 1920s. This represents both a challenge for presidents to effectively manage a growing and increasingly complex bureaucracy, but also suggests that presidents had an increasing degree of bureaucratic resources and expertise at their disposal. On the congressional side, the story is far different. During the early twentieth century, continuing through the mid-1940s, the number of congressional staffers remained stable at around 300. Bolton and Thrower use these empirical disparities to argue that the early twentieth century was a period of low congressional capacity.<sup>110</sup> It is reasonable to infer from this that the congresses of the late nineteenth century had similarly low capacity relative to the executive branch.

These differences in capacity have clear implications for the amount of specialized information and expertise that are available to decisionmakers in these institutions. Bolton and Thrower suggest that low congressional capacity meant that Congress was unable to write laws that contained specific and precise language that would effectively constrain presidents from issuing unilateral orders that affected the implementation of these statutes.<sup>111</sup> Huber and Shipan come to similar conclusions, arguing that when Congress has low capacity, that it will be difficult for legislators to write laws that are specific enough to effectively constrain the president.<sup>112</sup> The development of a complex administrative apparatus made policymaking necessarily more complex for legislators. Without the staff

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<sup>110</sup> Alexander Bolton and Sharece Thrower (2016), "Legislative Capacity and Executive Unilateralism," *American Journal of Political Science*, 60(3), 649-663. The size and growth of federal employees is discussed on 652. The size and growth of congressional staff is discussed on 652 – 653 and is illustrated in Figure 3 on 659.

<sup>111</sup> Bolton and Thrower, 653.

<sup>112</sup> John D. Huber and Charles R. Shipan, *Deliberate Discretion?: The Institutional Foundations of Bureaucratic Autonomy* (Cambridge University Press, 2002).

resources and accompanying reliable information about policy, the task of legislating in a way that could constrain the president is exceedingly difficult. The implications of these informational deficiencies in Congress carried over into congressional action, Jones Ford described congressional behavior as follows: “the mass of members record their votes for measures about which they know little or nothing, counting in return on a similar indulgence towards the measures in which they are interested.”<sup>113</sup>

This logic can be expanded to think about the capacity of Congress to formulate good public policy that aligned with the goals of the majority party, or the concerns of constituent groups. In some cases, a low capacity legislature might write vague laws that leave significant discretion for presidents to define the specifics surrounding implementation. Another response of a low capacity legislature might be to simply incorporate the views and preferences of executive branch officials with policy information. In the absence of congressional staff to research and formulate policy, congressional committees gathered policy information on their own, often through coordination with executive branch officials.

Several of the administrative expansions of this period enhanced executive oversight and power to secure order domestically and abroad – the Land and Indian Bureaus in the Department of Interior, the Secret Service within the Department of Justice and Treasury, and the Naval War College within the Department of the Navy. These expansions of the bureaucracy are central to this research. To what extent were these creations a product of the entrepreneurial actions of presidents? Regardless of their origins, for what purposes did presidents and their cabinet secretaries use these new bureaucracies?

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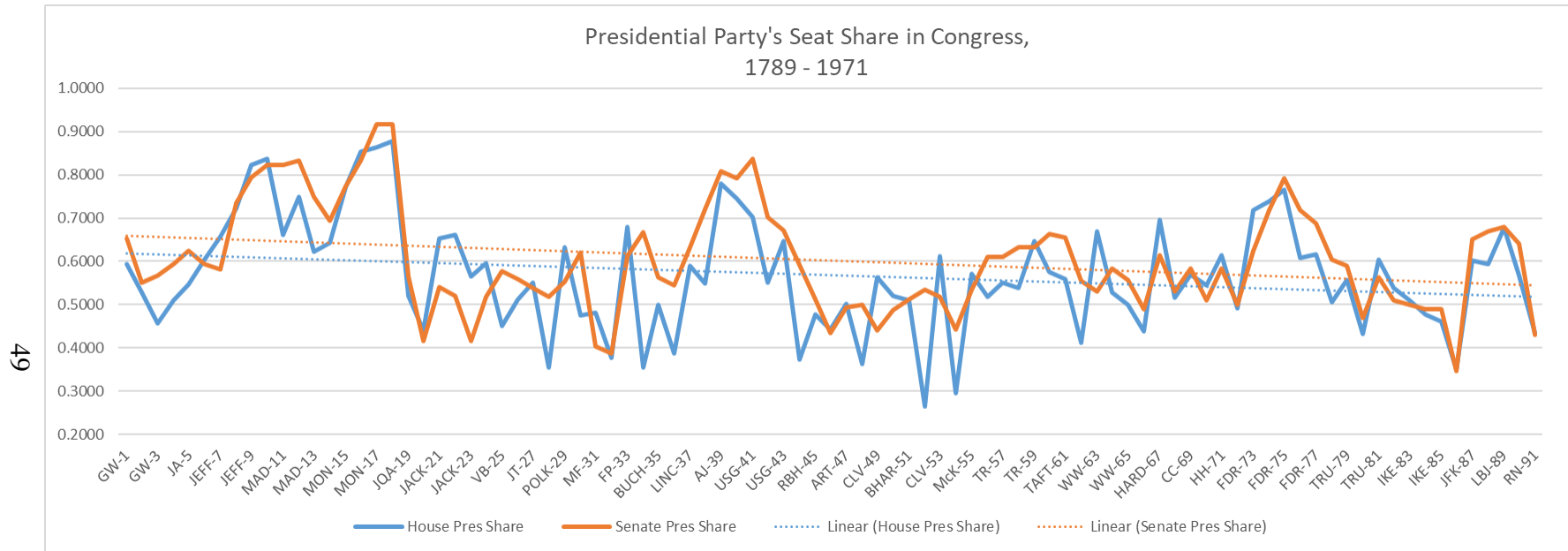
<sup>113</sup> Jones Ford, *Rise and Growth*, 230-233.

These questions about presidential control and administrative capacity bridge the divide between modern and traditional presidency scholars. While scholars like Terry Moe suggest that modern presidents hold shared incentives to reform the bureaucracy to enhance their control over administration policy, scholars of nineteenth century state building like Skowronek and Carpenter suggest that presidential control over administration was limited or sporadic.<sup>114</sup> Yet there are salient examples of nineteenth century presidents cultivating bureaucratic responsiveness and supporting bureaucratic actions. We need only think about Grant's appointment of an activist Attorney General, and their joint efforts to deploy the capacity of the marshals, army regulars, and Secret Service operatives in 1870 and 1871 to combat the Klan. More generally, we might think of the role of the military bureaucracy to secure frontiers and suppress domestic disorder, or the role of the navy in opening new markets for American goods and protecting shipping interests. The president's role as a securer of federal power and protector of American interests on the peripheries necessitated presidential management of bureaucratic resources, so tracing the development of this capacity is illuminating.

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<sup>114</sup> Moe, "The Politicized Presidency;" Skowronek, *Building a New American State*.

Figure 2.1. Presidential Party's Seat Share in Congress, 1789-1971



## **Restraint: Polity-based Constraints on Power-Seeking**

Just as shifting presidential understandings of the Constitution may lead them to entrepreneurial action, broader polity-based constraints may shift presidential motives away from self-interested, power-seeking. While these types of constraints typically refer to broader considerations than things like electoral margins, we might also account for how trends in control of national institutions might alter presidential motives. For example, figure 2.1 traces the seat share of the president's party in the House and Senate over time. Two periods stand out – the early republic period in which the president's party regularly held super-majorities in both chambers and the Civil War and early years of Reconstruction where the absence of southern states led to Republican dominance of national institutions. During these periods of significant single-party government, we might expect objections to federal interventions to be less constraining. In contrast, during the periods of close party competition over national institutions, presidents and their co-partisans might face greater challenges to their proposed constitutional constructions.

Jeffrey Selinger argues that presidential motives in the nineteenth century are more complex than the power-maximizing ascribed to modern presidents. He describes presidents in the nineteenth century as statesmen balancing self-aggrandizing aims with the perceived exigencies of government.<sup>115</sup> Among the most significant of these perceived exigencies was maintaining the union. George Washington is often assigned great historical significance precisely because he established several precedents that established the legitimacy of the tenuous, new federal government. Threats to the union did not subside after Washington's

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<sup>115</sup> Selinger, "Presidential Restraint," 27-28.

term. Selinger suggests that the antebellum period was characterized by several separatist initiatives and the threat of political violence between geographically concentrated domestic dissenters and the state.<sup>116</sup>

To some degree, the Civil War alleviated the threat of secession by establishing the supremacy of the federal government over the states. The Supreme Court's ruling in *Texas v. White* in 1869 established the illegality of secession and the principle of perpetual union.<sup>117</sup> Yet this precedent merely shifted the terms of contestation over state and federal authority. While secession was no longer a legitimate option, it seems reasonable to conceive of the remainder of the nineteenth century as a period in which the federal supremacy continued to be challenged by geographically-concentrated dissenters with significant representation in national institutions.

This discussion highlights the trade-offs presidents must make between their self-interested electoral or partisan motives and their broader motives to maintain order and the legitimacy of federal authority. In this view, as authority was increasingly concentrated in the federal government after the Civil War through increasing institutional capacity, presidents became incentivized to act as an agent of federal supremacy. While the end of Reconstruction dramatically enhanced the political costs of federal intervention in the South, the legitimacy of presidential authority intervention elsewhere was left intact. This contradiction highlights the complexity, and incoherence, of institutional change. Reconstruction generated new constitutional justifications and federal capacity for the maintenance of domestic order. Yet, the specific purpose – the protection of African

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<sup>116</sup> Selinger, 28-29.

<sup>117</sup> *Texas v. White*, 74 U.S. 700 (1868)

American civil and political rights – for which the justifications and capacity were created was abandoned. The consolidation of these new ideas and capacity into accepted precedents occurred outside of the South, further demonstrating the importance of understanding the impact of polity-centered restraints on entrepreneurship.

The consideration of polity-based constraints reintroduces structural considerations into the theory. While the theory is focused on entrepreneurial innovation and the construction of presidential authority, the concept of shifting restraint is useful for evaluating the possible motives of presidential action. Presidents are cross-pressured by electoral, policy, partisan, and national motives. They are incentivized to win reelection (for themselves and their co-partisans), to develop a coherent national program, to respond to their party organization, and to pursue their own vision of what is best for the nation. These various pressures can be evaluated in the context of specific cases to generate more thorough explanations of the case and to evaluate plausible alternative explanations.

### **Modernizing the Law-and-Order Presidency Through Entrepreneurship**

The theory of the presidency and institutional change developed in the previous sections is used to structure the empirical cases that follow. This section concludes the chapter by summarizing the theoretical expectations and empirical implications of the framework. First, it reviews the major concepts and contribution of the theory.

Presidents are uniquely positioned to engage in political entrepreneurship and to cause institutional change.<sup>118</sup> Existing accounts of the presidency and its development emphasize the transformation of the executive branch in rapid moments of change produced

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<sup>118</sup> Whittington and Carpenter, “Executive Power;” Sheingate, “Political Entrepreneurship;” Sheingate, “Terrain of the Entrepreneur.”

by unprecedented crises. These transformations reshape the institutional structures that presidents operate within, providing them with incentives, advantages, and constraints. These approaches have undoubtedly generated numerous insights about the presidency, but they do not tell the whole story. This theory's focus on entrepreneurship and the ability of presidents to act as agents of change reveals other processes of institutional change and logics of presidential behavior. It serves as a powerful complementary perspective to the "modern" presidency idea as an organizing concept. Structure not only serves to shape the action of political actors, but political actors themselves – through agency and entrepreneurship – are central to the generation and change of those structures.

The framework of entrepreneurship generates several expectations about how presidents will respond when threats to public order emerge. I introduce these expectations as a series of questions and plausible explanations, which also serve to structure the analysis of the cases. First, how do nineteenth century presidents respond to domestic disorder? The modern presidency and congressional dominance literatures would expect presidents to defer to Congress and the states, strictly implementing relevant statutes and taking no action to expand their authority or institutional resources. The theory of presidential entrepreneurship expects that presidents will respond to domestic disorder strategically by capitalizing on ambiguity in rules and institutional complexity. They will combine and deploy the heterogeneous components of institutional capacity strategically and will, at times, construct justifications for their actions that alter understandings of presidential authority.

If presidents do respond to domestic disorder with entrepreneurship, what are the observable empirical implications? There will be variation in how presidents construct their authority. Entrepreneurial presidents would be more likely to justify their actions by invoking



constitutional, or even extra-constitutional, arguments about their authority. Constrained presidents, as envisioned by the modern presidency concept, would almost exclusively justify their actions based on their statutory, not constitutional or inherent, authority. In terms of the strategic and creative use of institutional capacity, entrepreneurial presidents would make efforts to expand their institutional options by creating new organizational components or using existing components in novel ways (e.g., the use of the Secret Service to surveil the KKK during Reconstruction). Constrained presidents would simply rely on institutional components explicitly mentioned in statutes, making no effort to create new institutional components or use existing components in novel ways.

Finally, what are the effects of presidential entrepreneurship on the structure of institutions? When entrepreneurial innovation is successfully consolidated into institutions, presidents and the executive branch accumulate new institutional resources and strategies. More broadly, entrepreneurship leads to the accumulation of precedents that expand the legitimate scope of presidential action and creates templates that may be followed by future presidents. This differs markedly from accounts that emphasize the prevailing influence of structures on political actors. In this view, presidents act under structures, not upon them. The accumulation of precedents, signifying the lasting impact of entrepreneurial innovation on institutional structure, can be evaluated based on whether future presidents deploy similar strategies and justifications.

The maintenance of domestic order is a fitting domain of governance to explore these processes of entrepreneurship and president-driven institutional change. Whittington and Carpenter astutely observe that:

“The presidential authority to secure the peace is not readily confined to foreign lands, as demonstrated by cases from the Whiskey Rebellion to Reconstruction, to turn-of-the-century labor disputes, to Cold War domestic surveillance, to current homeland security. Exclusive presidential control over the foreign policy apparatus often makes effective congressional monitoring of executive actions impossible, and expansive constitutional authority of the president in these areas encourages legislative and judicial deference to apparent presidential prerogatives.”<sup>119</sup>

The intrinsic linkage of domestic order to the foreign policy apparatus – i.e., the military and related executive departments – positions presidents to engage in innovation, often without interference from Congress or the courts. Thus, many of the conditions for, and mechanisms of, entrepreneurial innovation ought to be present in this area of governance – ambiguity over authority and jurisdiction, heterogeneous institutional components (e.g., the military, state militias, local and federal law enforcement agencies), and independent bases of presidential authority. As the following chapters demonstrate, presidents regularly responded to domestic disorder by engaging in various types of entrepreneurial innovation – pressuring Congress to expand their statutory authority, justifying their actions by constructing novel understandings of constitutional authority, creatively combining institutional components to respond to disorder, and responding to disorders strategically based on the constraints of the political environment and their understanding of how the disorder related to their broader political project.

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<sup>119</sup> Whittington and Carpenter, “Executive Power,” 499.

## **Chapter 3, Research Design, Case Selection, and Methods**

### **Introduction**

The questions and theoretical expectations posed in the previous chapter, if supported by the evidence, would illuminate continuities between the traditional and modern presidencies.

The role of nineteenth century presidents in developing state capacity and asserting federal supremacy contribute to our understanding of the role of agency in the development of the presidency and American state. This research attempts to explore these theoretical expectations and to evaluate alternative explanations by employing a qualitative case study design – within case process-tracing is used to identify causal mechanisms. This design leverages official and private historical documents from a variety of institutional and personal perspectives, as well as existing compilations of historical data, as evidence.

In this chapter, I discuss each of these in greater detail. The contents proceed as follows. First, I restate the research objectives which are established at length in the previous chapter. I then discuss the benefits of historical analysis for studying the presidency, specify the methods and variables to be used, and discuss how I will describe the variance observed in each. Next, I describe and explain the logic of case selection, which also includes a description of the cases. The cases trace the development of presidential authority within a central domain of governance – the maintenance of domestic order. Finally, I outline the analytic questions and historical evidence that I will use to structure the analysis of the cases. In the discussion of the evidence, I provide a brief description and justification for each type of evidence, as well as a description of the search and collection processes. Together this discussion of the research design, methods, and historical evidence allows for a focused and structured analysis within and across cases. This chapter also presents a

transparent and thorough description of each of these components. In doing so, I attempt to persuasively demonstrate the rigor of the research, while also providing a guide by which other scholars can evaluate and replicate the analysis.

### **Research Objectives**

The central objective of this research is to reexamine the processes of entrepreneurial innovation and institutional development in the area of domestic law and order. The scope of this topic required me to explore the processes through which presidents responded to domestic crises and influenced congressional policymaking on these issues. It also required a focus on how these processes contributed to the accumulation of precedents for action and the development of the modern institutionalized presidency. Around the mid-twentieth century, scholarship on the presidency shifted its focus to the abrupt development of the modern presidency during the Progressive and New Deal eras, and its subsequent functions and influence in the management of the executive branch, use of unilateral power, and influence over domestic and foreign policy.

Subsequent scholars take it as a given that the presidency was fundamentally transformed during this period. The features of the modern presidency that contribute to executive influence are typically assumed to be absent or very limited before the modern presidency period. Explanations of presidential influence in this earlier period generally devolve to the view that presidential power was based on the distribution of political appointments and patronage.<sup>120</sup> My view is that this approach mistakenly confuses the advantages and institutions of the modern presidency with the possibility of presidential

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<sup>120</sup> Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Harvard University Press, 1997); see also, Jon C. Rogowski, "Presidential Influence in an Era of Congressional Dominance," *American Political Science Review* 110 (2) (2016): 325-341.

influence outside of patronage distribution. In doing so, the modern presidency concept largely ignores more gradual processes of institutional change that occurred before, and made possible, the emergence of the modern presidency.

Methods in the field of presidency studies have varied significantly over time, but two developments in the literature on the presidency are worth noting. Each of these improved the standards and empirical rigor of presidency studies, while also shifting the field towards quantitative approaches. The first of these developments was the recognition by a set of presidency scholars in the 1980s that the field's methodological quality was far behind that of most other fields in political science. George Edwards' critique of presidency research in the 1980s summarizes many of the field's early shortcomings, writing that:

“Research on the presidency too often fails to meet the standards of contemporary political science, including the careful definition and measurement of concepts, the rigorous specification and testing of propositions, the employment of appropriate quantitative methods, and the use of empirical theory to develop hypotheses and explain findings.”<sup>121</sup>

These criticisms go beyond methodology and highlight the ways that presidency studies were lagging in theory testing and development relative to other areas in political science. However, the prescription for scholars clearly includes an increased focus on quantitative methods.

Gary King wrote similarly about the methodological state of presidency studies a decade later. In a chapter prepared for a presidency conference where prominent scholars considered areas for growth in the field, King noted that the field of presidency studies was

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<sup>121</sup> George C. Edwards III, “Quantitative Analysis,” in *Studying the Presidency*, George Edwards and Stephen Wayne, eds. (Knoxville: University of Tennessee Press, 1983), 100.

descriptively rich, but theoretically underdeveloped.<sup>122</sup> This observation simultaneously served as a call for parsimonious theorizing and as a reminder that there is ample historical evidence available to scholars for the development and testing of these theories. King also discusses the “n=1” problem, suggesting that using presidents as the unit of analysis limits the generalizability of inferences to the case at hand. In other words, each president, and the configuration of the environment they face are so unique and idiosyncratic that it is not possible to develop general theories using this approach. King’s remedy to this problem is to expand the universe of cases by focusing on more numerous actions that occur within and across presidencies (e.g., decisions, legislative proposals, vetoes, executive orders). While King’s solution to the problem recommends expanding the size of the universe of cases, it does not necessitate that scholars must use quantitative approaches to study the presidency.

Around the same time, the emergence of American political development (APD) as an interdisciplinary scholarly community provided a strong push for studying historical processes of political change.<sup>123</sup> The focus of this field on accumulating in-depth knowledge of historical cases and the use of “thick” description to better understand causal processes align the substance of APD research naturally with qualitative methods. However, it also represents a shift in the types of topics and questions that we should ask when studying institutions and their development. Many innovative scholars have paired these qualitative

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<sup>122</sup> Gary King, “Methodology and the Presidency,” in *Researching the Presidency: Vital Questions, New Approaches*, George C. Edwards III, John H. Kessel, and Bert A. Rockman, eds. (Pittsburgh University Press, 1993), 396-397.

<sup>123</sup> The emergence of APD was simultaneous with the calls for increased rigor made by Edwards, King, and others.

methods with quantitative methods to strengthen their conclusions.<sup>124</sup> These scholars draw attention to the complexity and historical contingency of analyzing institutions. Thorough explanations of institutional interactions and policymaking are quite complex and may not be adequately captured in quantitative analyses that must simplify often complex variables and processes into discrete values. A promising area for qualitative research in political science is the analysis of policy-making processes, especially when these processes cut across institutional boundaries (e.g. between the executive and Congress).<sup>125</sup> Taken together, these two developments – the methodological rigor and theoretically-oriented approach to presidency studies advocated by King and Edwards, and the emergence of APD applying similar standards to historical questions about the institutions and policy regimes of the state – present scholars with a set of questions and standards of rigor to advance our understanding of the presidency. The imperative in designing historical research on the presidency then is to ensure the research is rigorous, theoretical, and clearly specified regardless of its methodological orientation.

Overall, this project attempts to improve the precision and theoretical richness with which we discuss the traditional presidency and its impacts on the modern presidency. It does so by framing traditional presidents as potential agents of change, capable of engaging in entrepreneurial acts that alter institutional and authority structures. This approach contributes to our understanding of American political history and development, as well as

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<sup>124</sup> For a strong example of a research using quantitative evidence to supplement a primarily qualitative analysis, see Daniel Carpenter, *The Forging of Bureaucratic Autonomy: Networks, Reputations and Policy Innovation in Executive Agencies, 1862-1928* (Princeton University Press, 2001).

<sup>125</sup> Michele Lamont and Patricia White, "Appendix D" in "Workshop on Interdisciplinary Standards for Systematic Qualitative Research," *National Science Foundation* (2005), [https://www.nsf.gov/sbe/ses/soc/ISSQR\\_workshop\\_rpt.pdf](https://www.nsf.gov/sbe/ses/soc/ISSQR_workshop_rpt.pdf).

to understanding the presidency's contemporary form and functions. By centering the analysis on relatively unexplored features of the traditional presidency – the importance of policy expertise and information in the face of exigent crises, the role of the cabinet in executive influence on policymaking, and the patterns of presidential action related to securing domestic order – this research illuminates underexplored aspects of the presidency's developmental trajectory which has significant implications for the form and function of the modern presidency. The research questions that orient this study are best answered through the use of qualitative analysis, historical evidence, and within-case methods.

### **Strengths of Historical and Temporal Analysis**

The assertion that presidents in the late nineteenth century were weak and ineffectual leaders is typically based upon episodic and anecdotal analysis of how presidents fared against Congress in various political and policy disputes. Notable, and commonly used, examples are the near impeachment of Andrew Johnson, and the struggles of Hayes, Arthur, Benjamin Harrison, and Cleveland to maintain presidential control over appointments and removals, which scholars argue precluded presidents from engaging in meaningful policy leadership.<sup>126</sup> It is further suggested that when presidents did attempt to influence congressional policy, their efforts were unsuccessful or unimportant. The focus on these anecdotes and highly visible disputes over institutional power overlook other less visible processes of executive branch influence on congressional policymaking and implementation.

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<sup>126</sup> See Leonard D. White, *The Republican Era, 1869-1901: A Study in Administrative History* (New York: Macmillan, 1958); Wilfred Binkley (1962) *President and Congress* (New York: Random House, 1962); James L. Sundquist, *The Decline and Resurgence of Congress* (Brookings Institution Press, 1981).



Skowronek's account of the slow emergence of the modern administrative state suggests this period is one in which bureaucratic capacity was expanding and breaking free of the constraints of party machines.<sup>127</sup> Altogether this presents a justification for reexamining the presidency in this period using temporal, historical analysis that account for gradual, less visible, but influential causes and processes that expanded presidential power and the capacity of the executive branch. This project's approach is somewhat unique because it analyzes the development of institutions and policy in tandem, as well as the interactions that drove both forward.

Studying politics over time allows us to better identify the dynamic interactions between presidents and the changing resources and contexts they interacted with. Changes to technology, organizational capacity, and dominant ideas often occur slowly, which suggests their importance will often be overlooked in synchronous analysis.<sup>128</sup> For instance, accounting for presidential control of bureaucratic information and resources requires us to consider how presidents interacted with the developing organizational capacity and expertise of executive branch departments and agencies. As Skowronek, and later Carpenter, demonstrate, the administrative state developed slowly throughout the late nineteenth century. This suggests that presidential control over this new organizational capacity would occur incrementally and lag behind the creation and increasing complexity of bureaucratic organizations.

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<sup>127</sup> Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877 – 1920* (Cambridge University Press, 1982).

<sup>128</sup> Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton University Press, 2004) 74 – 75.

This project seeks to identify and describe these slower, incremental forces of change in contrast to many accounts of institutional development that focus on more abrupt processes of change, such as punctuated equilibrium or critical junctures.<sup>129</sup> The preeminence of these types of explanations are problematic in presidency studies, as scholars have tended to accept these abrupt processes without fully grappling with the more gradual and incremental changes that occur in the interim. Studying incremental change is also useful because it allows us to identify how these changes paved the way for bigger, abrupt changes that occurred later.<sup>130</sup> In each case, I attempt to trace how rhetoric, actions, and decisions taken by presidents established precedents or opportunities that future presidents could exploit.

Paul Pierson identifies several common time-based considerations and dynamics that are useful for understanding institutional change. Consider the importance of path dependent processes, often used interchangeably with the concept of positive feedback, for the exercise of political authority. Path dependence suggests that early decisions or outcomes typically constrain future outcomes, meaning that the timing and sequencing of events can play an important role in determining the possibilities and contexts available to actors in subsequent periods.<sup>131</sup> These types of processes are essential for understanding the resilience of institutional orders or policy status quos, but they also suggest that the development of these

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<sup>129</sup> Pierson, *Politics in Time*, 134-135.

<sup>130</sup> I conceptualize gradual or incremental change as a foundation upon which more dramatic transformations can occur. In this view, gradual changes are worth tracing because they are necessary antecedent conditions for the changes typically focused on by scholars of the presidency.

<sup>131</sup> Paul Pierson, "Increasing Returns, Path Dependency, and the Study of Politics," *Studies in American Political Development* 94 (2) (2000): 251-267.

equilibria occurs slowly.<sup>132</sup> While especially influential decisions occur early in the process of change, thus constraining future choices, the crystallization of these changes takes time and continual action. Consider the impact of path dependent processes on presidential authority. When presidents offer or construct authority claims, whether they claim a constitutional or statutory justification, other institutional and societal actors are faced with a choice. Either they accept presidential action, thus setting a precedent and strengthening future presidents' claims to the same authority, or they attempt to constrain the president (which may or may not be successful). If the president's exercise of authority is not successfully challenged, then the deployment of similar strategies and justifications become more likely to be used by subsequent presidents.

These temporal processes of change are also helpful because they allow us to better consider the role and limitations of political entrepreneurship in producing outcomes.<sup>133</sup> The framework of entrepreneurship and its differences from congressional-centered perspectives highlights guides some of the analytic focuses of this research. For instance, entrepreneurial innovation might be observed in presidents, or their cabinet secretaries, advocating for expanding executive authority in congressional deliberations. Conversely, delegations to

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<sup>132</sup> On institutional orders, see Desmond King and Rogers Smith, "Racial Orders in American Political Development," *American Political Science Review* 99 (1) (2005), 75. King and Smith define institutional orders as "coalitions of state institutions and other political actors and organizations that seek to secure and exercise governing power in demographically, economically, and ideologically structured contexts that define the range of opportunities open to political actors."

<sup>133</sup> Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the US Congress* (Princeton University Press, 2001). Schickler finds that entrepreneurs in Congress were agents of institutional change during the early twentieth century. For other work on the significance of political entrepreneurship in creating political change, see Adam D. Sheingate, "Political Entrepreneurship, Institutional Change, and American Political Development," *Studies in American political development* 17 (2) (2003): 185-203. For an interesting discussion of when political leaders exert the most influence over outcomes, see Daniel L. Byman and Kenneth M. Pollack, "Let us Now Praise Great Men: Bringing the Statesman Back in," *International Security* 25 (4) (2001): 107-146.

presidents or secretaries might also reflect overconfidence from members of Congress about their ability to control the exercise this authority in the future. These types of observations allow us to evaluate whether and when presidential or cabinet-level entrepreneurship played an important role in the development of presidential authority in this policy area. This theory, if supported by evidence, would require us to reshape our understanding of presidential leadership in this period. Instead of casting presidents as bystanders, we would view them as “agents of change” – political entrepreneurs pursuing their goals and attempting to overcome structural and resource-based constraints.<sup>134</sup> While they may not always succeed in their efforts to reform their institutional surroundings, entrepreneurship clearly plays a role in policy contestation.

The examples and research discussed above highlight the advantages to using research methods that account for time-based dynamics. The relationships between variables of interest can change dramatically as background conditions change over time. As such, the use of multiple regression techniques is often inappropriate for research interested in describing and explaining changes to institutions and/or policy.<sup>135</sup> Altogether, this presents a strong justification for the use of process tracing methods and the incorporation of temporal processes in the analysis.

### **Theory-Building Case Study Design**

This research applies these temporal approaches to a set of qualitative cases that evaluate presidential leadership in issues related to domestic order in the nineteenth century. The case

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<sup>134</sup> Daniel Galvin, “Presidents as Agents of Change,” *Presidential Studies Quarterly* 44 (1) (2014): 95 – 119.

<sup>135</sup> Pierson, *Politics in Time*, 175. A weakness of many regression analyses is the assumption of parameter stability across time series data.

study design relies on within case process tracing in most and least-likely cases for the purposes of theory-building. In the following section I discuss each of these methods before turning to a discussion of the universe of cases, case selection, and a brief description of each set of cases.

### *Within Case Process Tracing*

First, I use process tracing methods within each case (within the domain of domestic order maintenance) to provide a thick description of each case and to identify the causal mechanisms at work in the policy area. Process tracing within cases is particularly useful for evaluating multiple competing explanations to determine which is most convincing and supported by the evidence. Process tracing at its core involves “attempts to identify the intervening causal process – the causal chain and causal mechanism – between an independent variable (or variables) and the outcome of the dependent variable.”<sup>136</sup> This method allows for the evaluation of my primary independent variable – the strategic, entrepreneurial actions of presidents to interpret or construct their authority in expansive ways and deploy institutional capacity creatively – and the path dependent effects of entrepreneurship in establishing *precedents* for subsequent presidents to rely on.

The causal process I propose is at least partially a process of internal institutional change - the exertion of presidential control over the actions of civil and military bureaucracies may subsequently affect presidential control over that agency, or other similar agencies, in the future. Another aspect relates to the way that institutional arrangements are created through interactions across institutions – between presidents and agencies, agencies

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<sup>136</sup> Alexander L. George and Andrew Bennett, “Process-Tracing and Historical Explanation,” in *Case Studies and Theory Development in the Social Sciences* (MIT University Press, 2005), Quote from 206.

and Congress, or presidents and Congress. Thus, the dependent variables, broadly construed, are changing institutional structures, especially norms or understandings about institutional authority and responsibility over the maintenance of domestic law and order. Victoria Farrar-Myers describes this variable as changing “coordinated scripts” of institutional authority and responsibility.<sup>137</sup> In the context of this research it is about the acceptance of presidential interventions as legitimate, as well as the construction of presidential authority proposed by the president.

This framework can be usefully applied to the traditional presidency to evaluate claims of presidential weakness and ineffectiveness against the theory developed in the previous chapter. The value of process tracing is in its attention to sequencing and causal mechanisms, as well as its finer level of detail and narrowing the empirical scope of the analysis from the claims initially posited in the theory of congressional dominance.<sup>138</sup> The modern-traditional divide in presidency studies explains presidential power in fairly broad terms – presidential power is characterized based on expansive historical eras, and the analysis itself typically focuses on a set of major events and institutional conflicts. The unit of analysis in these studies is often either presidents, or sometimes even more broadly just characterizations of historical eras. By focusing instead on a deep analysis of a policy area, with many related observations over a longer time frame, process tracing allows us to test whether these cases fit the modern-traditional divide’s predictions about the traditional presidency. As Charles Tilly notes, process tracing allows social scientists to generate and

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<sup>137</sup> Victoria Farrar-Myers, *Scripted for Change: The Institutionalization of the American Presidency* (Texas A&M University Press, 2007).

<sup>138</sup> Andrew Bennett, “Process Tracing and Causal Inference,” in *Rethinking Social Inquiry: Diverse Tools, Shared Standards*, eds. Henry E. Brady and David Collier (Rowman and Littlefield, 2010), 208.

test theoretical propositions using “relevant, verifiable causal stories resting in different chains of cause-effect relations whose efficacy can be demonstrated independently of those stories.”<sup>139</sup> Applying process tracing methods to the nineteenth century presidency allows us to reevaluate the theoretical propositions about this period through rigorous analysis of relevant cases.

While process tracing is typically used for purposes of causal inference, its focus on developing a comprehensive and rich understanding of the phenomena being studied is also extremely valuable. John Gerring argues persuasively that social scientists ought to resuscitate their interest in descriptive inference, sometimes as a complement to causal inference and sometimes for its own sake.<sup>140</sup> He suggests that the act of establishing detailed, empirical accounts of phenomena is often an invaluable precursor to identifying causal mechanisms. This aligns well with a variety of process tracing that Bennett and George call detailed narrative process tracing, which focuses on developing largely atheoretical, but descriptively rich accounts of historical cases and processes.<sup>141</sup> In this sense, the refined level of detail in process tracing is an extremely useful secondary benefit for developing descriptive accounts of historical cases that can also be used to evaluate various causal claims.

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<sup>139</sup> Charles Tilly, “Means and Ends of Comparison in Macrosociology,” *Comparative Social Research* 16 (1997): 43 – 53. Quote drawn from George and Bennett, 205.

<sup>140</sup> John Gerring, “Mere Description,” *British Journal of Political Science* 42 (4) (2012): 721 – 746.

<sup>141</sup> Bennett and George, *Case Studies and Theory Development*, 210. Bennett and George note that Arend Lijphart refers to this type of process tracing as an “atheoretical case study.” See Arend Lijphart, “Comparative Politics and the Comparative Method,” *American Political Science Review* 65 (3) (1971): 682 – 693.

This research applies a variety of process tracing that George and Bennett label “analytic explanation.” Analytic explanation involves the conversion of a historical narrative into an analytical causal explanation expressed in theoretical language and structured by hypotheses.<sup>142</sup> This type of process tracing requires a thorough historical accounting of a case, but also incorporates the researcher’s evaluation of the evidence in light of theoretical expectations and hypotheses.

Beach and Pederson distinguish the varieties of process tracing in a slightly different way, focusing on theory-centric versus case-centric process tracing.<sup>143</sup> My interpretation of this alternative framework is that analytic explanation process tracing is theory-centric engaging in both theory-testing and theory-building. This aligns with Stephen Van Evera’s assertion that process tracing case studies are strong both for inferring and testing theories.<sup>144</sup> When applied to this project, each case involves gathering a variety of historical evidence, including various institutional perspectives and individual accounts, covering all stages of the policy process. The evidence is then analyzed based on a shared set of structured questions that allow for an evaluation of theoretical propositions, while also serving to adjust and develop the theory further.

The result is a set of within-case analyses, each telling a unique causal story through a shared and replicable analytic structure.<sup>145</sup> The emphasis on identifying causal

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<sup>142</sup> Bennett and George, *Case Studies and Theory Development*, 211

<sup>143</sup> Derek Beach and Rasmus Brun Pederson, *Process-Tracing Methods: Foundations and Guidelines* (University of Michigan, 2016), chapter 2.

<sup>144</sup> Stephen Van Evera, *Guide to Political Science Methods for Students of Political Science* (Cornell University Press, 1997), 64 – 68.

<sup>145</sup> The replicability of the studies is founded upon transparency on the part of the researcher. I kept a research log of my notes and thoughts for each case as I analyzed various pieces of evidence. Summaries of



mechanisms is a key strength of a process tracing approach for this project.<sup>146</sup> This project is centrally interested in the way that presidents influenced issues related to domestic order through their control of the executive branch, but to adequately explain these processes of influence we need to understand the mechanisms by which presidents controlled and directed the executive branch – perhaps through appointing loyal and competent subordinates, or through the generation of relevant policy information.<sup>147</sup> I detail each of these mechanisms in greater detail in the following section. In that sense, the process tracing approach explores whether certain proposed mechanisms were present in the case, while also remaining open to the identification of other mechanisms that might also help explain the outcome.

Two common, related, concerns with the use of case studies and process tracing methods are the degrees of freedom of problem and the threat of infinite regress or equifinality. This issue emerges when the number of independent variables exceeds the number of observations, which commonly occurs in case study research. In process tracing,

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notes can be obtained upon request. Other researchers should be able to replicate the search terms used to generate evidence on databases, and to evaluate my interpretation of the evidence if they choose to do so.

<sup>146</sup> Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton University Press, 1994). King, Keohane, and Verba discuss the strength of process tracing methods for identifying causal mechanisms but make note that the identification of causal mechanisms should not be used interchangeably with causality or the adequate identification of a causal effect (see pp. 85 – 87).

<sup>147</sup> This discussion of appointments overlaps with patronage-based explanations of presidential influence in this period. I examine the gradual development of a precedent that presidents control their cabinet appointments. Where my approach differs is in focusing on the *entrepreneurial implications* of appointments. While patronage-based arguments suggest that presidential power was their ability to control who was appointed as executive branch officials, I suggest that their influence goes beyond the appointment stage. When presidents select loyal and ambitious subordinates, they promote entrepreneurial energy in the executive that can be used to strategically control policy information and to promote administration policies on the president's behalf in Congress.

researchers often analyze multiple independent variables and multiple steps in a causal chain, which can lead to infinite regress in which we are unable to precisely identify a single cause of an effect because of the innumerable combinations of variables and steps in the causal chain.<sup>148</sup> This potential indeterminacy is an important limitation on case study designs and process tracing methods. However, Bennett is more optimistic about the ability of process tracing to overcome these concerns. He suggests that in process tracing, not all data holds equal probative value and that the researcher's ability to focus on important pieces of evidence that discriminate among potential explanations avoids falling into infinite regress.<sup>149</sup> Further, process tracing differs from experiments in that its purpose is *not the identification of a causal effect* of a variable, but rather *the identification of causality* in the case.<sup>150</sup> There are several strategies for minimizing these issues, namely by engaging in tests of causation, considering a wide range of alternative explanations, and gathering diverse forms of data while accounting for the biases of each source.<sup>151</sup> Overall, this project incorporates time-based dynamics into its analysis of cases and uses process tracing methods to evaluate alternative explanations in each case, evaluating whether the theoretical propositions I lay out are supported.

### **Variables and Mechanisms**

The theory of institutional change proposed in the previous chapter emphasizes the influence of entrepreneurial innovation on institutional authority. This section discusses how I observe

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<sup>148</sup> King, Keohane, and Verba, *Designing Social Inquiry*, 86.

<sup>149</sup> Bennett, "Process Tracing and Causal Inference," 208 – 210.

<sup>150</sup> On this distinction, see George and Bennett, *Case Studies and Theory Development*, 138 – 140.

<sup>151</sup> Bennett, "Process Tracing and Causal inference," 210 – 211.

variation in aspects of presidential entrepreneurship – the presence of ambiguity and complexity in institutional rules and structures, constitutional constructions, and creative combinations of institutional capacity – and the potential mechanisms through which entrepreneurship might cause changes to institutional structures.

### *Measuring Ambiguity and Complexity*

Ambiguity about rules and institutional complexity enhances the possibilities for presidential entrepreneurship. As the federal government expands in agencies, employees, and responsibilities, the boundaries of authority become more complex and uncertain. Statutes may also be a source of ambiguity or complexity when they are unclear about the conditions in which statutory authority may be used or the means by which the goals of the statute may be accomplished.

The presence of ambiguity and complexity influence the likelihood that presidents will engage in entrepreneurial innovation – when ambiguity and complexity are more pronounced, presidents are more likely to engage in innovation that takes advantage of uncertainty. Because of the theoretical relationship between ambiguity and complexity, and entrepreneurship these conditions provide a useful method for selecting cases. For theory-building, cases in which uncertainty and complexity are high will likely be most-likely cases for observing the mechanisms of entrepreneurship. With that in mind, let us turn to the two mechanisms of presidential entrepreneurship – constitutional constructions and the creative use of institutional capacity.

### *Measuring Constitutional Constructions*

As discussed in chapter 2, constitutional constructions serve as justifications or logics for presidential actions that go beyond clearly delineated and agreed upon boundaries of

authority. Constructions then will be identifiable in the president's strategic framing of their own authority in their private and public communications with other executive branch officials and Congress. The key element of a constitutional construction is that the president must incorporate explicit constitutional sources of authority or invoke extra-constitutional sources of authority like prerogative powers. That is, constitutional constructions differ from other presidential justifications because they do not solely rely on statutory authority delegated by Congress.

There are several constitutional sources of authority that we might expect to be invoked frequently by presidents. First, the Take Care Clause may be invoked to construct broad presidential discretion to ensure the enforcement of federal law. Second, the Commander in Chief Clause may be invoked to defend the president's discretion when using the military for domestic purposes. Finally, under certain circumstances the Guarantee Clause of Article IV, which requires the federal government to protect the states from domestic violence and guarantee a republican form of government, may be invoked by presidents. While it is possible to identify likely constitutional sources where presidents can construct their authority broadly, the specifics of their creative constructions of authority will likely vary from case to case depending on the specific actions the president seeks to justify.

#### *Measuring Creative Uses of Institutional Capacity*

The possibility for creative use of institutional capacity is related to ambiguity and complexity. As heterogeneous institutional components (e.g., state militias, the army, federal law enforcement agencies) are created and jurisdictional boundaries blur, the president's opportunity to act strategically, and creatively, to use these various components to

accomplish their goals increases. Unlike constitutional constructions which are identifiable in presidential writing, creative use of institutional capacity points to the specific ways the executive branch responded to an instance of domestic disorder. While the details will vary from case to case, creative uses of institutional capacity will likely be characterized by some of the following indicators.

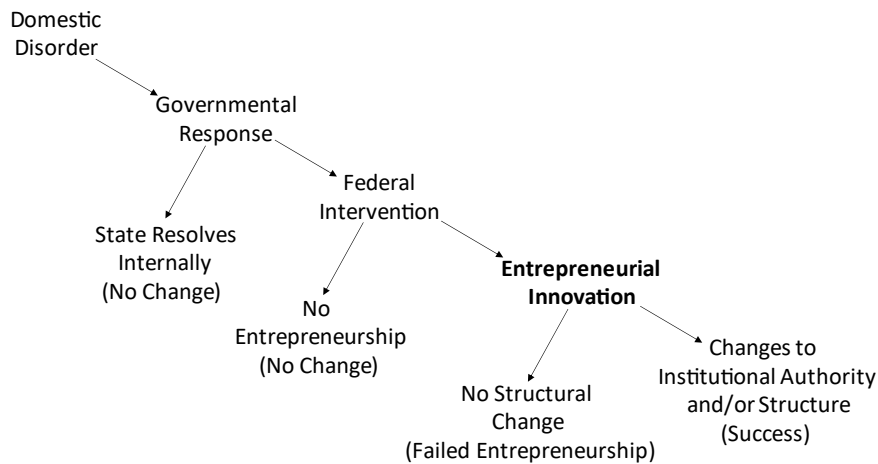
- First, an institutional component may be used for new functions that differ from prior practices.
- Second, several institutional components may be combined in novel ways to resolve a specific problem.
- Third, new institutional components may be created, or existing institutional components and operating procedures may be adapted, to respond to the domestic problem more effectively.

I expect that most presidential efforts at entrepreneurship will incorporate both creative uses of institutional capacity and constitutional constructions that justify and attempt to consolidate their actions into enduring structural changes. That is, constitutional constructions are often used by presidents to justify their creative uses of institutional capacity. It is certainly possible to observe only one of these two mechanisms, but not the other, in a given case. For instance, if standard uses of institutional capacity are deemed sufficient to respond to the disorder, then the entrepreneurial innovation may only consist of an expansive construction of constitutional authority, without any creative use of institutional capacity.

Figure 3.1 presents an arrow diagram of the entrepreneurship framework, illustrating the causal process proposed by my theory as well as the other possible outcomes of domestic disorders. This figure highlights that entrepreneurship is not automatically produced in response to domestic disorder; the theory is not overdetermined in that sense. Rather, the presence of domestic disorder and the possibility of federal intervention make

entrepreneurial efforts more likely to occur. Entrepreneurial innovations by presidents may cause structural changes to the distribution of institutional authority, but failure is possible even when presidents make these efforts. Thus, figure 3.1 presents a process framework in which successful entrepreneurship is one possible outcome.

Figure 3.1. Arrow Diagram of Entrepreneurship Framework: Causal Process and Outcomes



### The Universe of Cases and Logic of Case Selection

My empirical chapters use within-case process tracing methods and comparative case study methods to identify the processes and mechanisms of presidential authority to maintain domestic order during the nineteenth century. The objective of the case study design is primarily *theory-building* and, more specifically, the identification of new variables, hypotheses, causal paths, and causal mechanisms in the pre-modern presidency.<sup>152</sup> However, these cases serve dual purposes, to infer and develop my theory while also engaging in preliminary theory testing against the competing explanation of the modern

<sup>152</sup> George and Bennett, *Case Studies and Theory Development*, 75.

presidency/congressional dominance. The theory-building function of the cases is to develop a more precise conceptualization of the causal processes and effects of presidents' entrepreneurial innovations and strategic actions.

The theory building goals of this project make certain criteria for case selection appropriate. Specifically, selecting cases where we would expect extreme values on the independent variables or on conditional variables is appropriate because it ensures that the theory's predictions are unique and certain.<sup>153</sup> This allows for a clearer test of the theory's expectations and allows us to make claims more confidently about the validity of the theory. I use an iterative case study approach to achieve these goals, beginning with two most-likely cases, followed by two least-likely cases. Each type of case presents advantages for this research. Beach and Pederson discuss the purposes of selecting these types of cases in process tracing research, noting that an iterative research design can be a productive strategy in process tracing case studies.<sup>154</sup> Conducting most-likely cases first allowed me to establish the empirical validity of my theoretical claims and to provide evidence that the causal mechanisms I proposed were operational. These cases serve as a preliminary test of the theory, while also allowing favorable conditions under which the theory can be refined in light of new evidence. In contrast, the least-likely cases have strong confirmatory power, but the absence of the mechanisms in these cases does not disconfirm the theory because the case is one in which the mechanisms are least likely to be present.<sup>155</sup> Thus, using a most-

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<sup>153</sup> George and Bennett, 79-81 and 88.

<sup>154</sup> Beach and Pederson, *Process-Tracing Methods*, 153.

<sup>155</sup> Beach and Pederson, 153.

likely case to provide some confirmation that the mechanisms are present in some cases is a valuable step to take prior to conducting a least-likely case.

Most-likely cases are those in which we expect the theory's expectations to be supported based on relevant antecedent conditions and conditional variables. As such, most-likely cases are useful tools for establishing the validity of the theory and to allow for the refinement and further development of the initial expectations of the theory. This aligns with Van Evera's suggestion that case-selection should differ based on the stage of research – i.e., different criteria should be used when inferring theories versus testing theories.<sup>156</sup> Critiques of selecting cases based on extreme values of independent variables suggest that this strategy sets up weak tests of the theory because passage is highly likely. These critiques rest on an incorrect understanding of what constitutes a strong test. In cases where we expect an extreme value on the independent variable, we similarly expect extreme results on the outcome variable. Thus, the test is still fairly strong because the expectations on the outcome are higher than in cases where we do not expect extreme values on the independent variables.<sup>157</sup> By conducting most-likely cases first, I can then impose more difficult tests upon the theory in other cases where the favorable antecedents and conditions are not present and thus seeing presidential influence in the policy outcome would be less likely.

Two secondary considerations are also significant. First, process tracing requires a relatively high level of data richness. If there is no data, then the depth of analysis required in process tracing is not possible. As a result, I have selected cases where it appears that an

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<sup>156</sup> Van Evera, *Guide to Political Science Methods*, 78.

<sup>157</sup> Van Evera, 80.



adequate amount of data exists. Second, especially for theory testing, we need cases where competing theories make clearly divergent predictions. This can allow for a more confident test of which theory is supported by the available evidence.<sup>158</sup> Given that the modern presidency and congressional dominance theories are widely accepted by scholars, selecting cases where we can directly evaluate congressional behavior and preferences, in contrast to evidence of presidential influence, is essential. Further, to combat the modern presidency's claim that nineteenth century presidents did not engage in legislative leadership, I also selected cases in which new legislation altering institutional authority over domestic order. This should allow for an evaluation of entrepreneurial innovation against the expectations of periodization schemes such as the modern presidency in a more direct way than only examining cases focused on creative use of existing authority to respond to disorder.

A final consideration in the selection of cases is that cases should be substantively important to understanding the development of presidential authority and responsibility for maintaining domestic order. I also attempted to select and organize cases based on different aspects of the theory – entrepreneurial innovation's role in the expansion of presidential authority through statutes, constitutional constructions that expand presidential authority without formal congressional acceptance through statutes and varied presidential responses to changing policy-centered constraints.

A useful universe of cases meeting these criteria can be developed by collecting instances where domestic crises necessitated that:

- Presidents invoked the Insurrection Act or Enforcement Acts, both of which authorize presidents to deploy the military to maintain domestic order.
- Martial law was declared in an area(s) by either Congress, the President, or State Governors.

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<sup>158</sup> Van Evera, 79, 83-84, and 88.

- Or, that legislation was passed altering the statutory justifications for, and constraints on, federal intervention.

There is some overlap between these types of occurrences, for example anti-Chinese rioting in Washington state led Governor Watson Squire to declare martial law and Grover Cleveland also deployed federal troops under the Insurrection Act. The inclusion of declarations of martial law is particularly useful because it expands the universe of cases to include cases where presidents did not deploy troops despite the presence of a significant threat to domestic order (i.e., the universe of cases vary on the independent variable – presidential response or non-response – and dependent variable – changes to institutional structure). Presidents do not have formal legal authority to declare martial law, but their authority under the Insurrection Act framework may authorize them to use the military to assist civil authorities – i.e., the military does not replace the functioning of civil authorities as under martial law.<sup>159</sup> Thus, the inclusion of cases where martial law was invoked are also useful for identifying instances where domestic disorder occurred but were handled solely by state and local officials.

The Brennan Center for Justice has published collections of invocations of the Insurrection Act and declarations of martial law throughout U.S. history. I use their collections as a universe of potential cases. There are 33 invocations of the Insurrection Act in this collection, 22 from Washington – Hoover and 11 from FDR – present. My review of secondary histories on federal military intervention led to the identification of 11 additional cases of presidential invocations of the Insurrection Act bringing the total number of cases to 44. There are 68 declarations of martial law, 48 declarations spanning from 1814 – 1932

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<sup>159</sup> Joseph Nunn, “Martial Law in the United States: Its Meaning, Its History, and Why the President Can’t Declare it,” Brennan Center for Justice, August 20, 2020, <https://www.brennancenter.org/our-work/research-reports/martial-law-united-states-its-meaning-its-history-and-why-president-cant>.

and 20 from 1932 – 1963.<sup>160</sup> The Brennan Center collection and my own additions almost certainly do not reflect the entire universe of cases of domestic disorder that generated governmental responses. Nevertheless, these collections represent a reasonably comprehensive list of cases (n = 112) based on the availability of existing data. These cases, with my additions, are listed in Tables 3.1 and 3.2.<sup>161</sup>

Table 3.1. Presidential Invocations of the Insurrection Act Framework

<b>Date</b>	<b>President</b>	<b>Presidential Proclamation(s)</b>	<b>Short Event Descriptor</b>
1794-Sept-25	George Washington	<a href="#">Proclamation of Sept. 25, 1794</a>	The Whiskey Rebellion against federal tax on liquor production.
1799-Mar-12	John Adams	<a href="#">No. 9</a>	Fries' Rebellion against federal property tax.
1808-Apr-19	Thomas Jefferson	<a href="#">No. 15</a>	Widespread violations of Embargo Act of 1807.
1831-Feb-10	Andrew Jackson	<a href="#">No. 42</a>	U.S.-Mexico Dispute on Arkansas-Texas border
1831-Aug-24	Andrew Jackson	N/A	Nat Turner's Rebellion
1834-Jan-28	Andrew Jackson	N/A	Labor dispute between factions of Irish immigrant workers
1856-Feb-11	Franklin Pierce	<a href="#">No. 66</a>	Bleeding Kansas. Violence between pro and anti-slavery forces in territory
1856-Sep-9	Franklin Pierce	<a href="#">N/A</a>	Bleeding Kansas. Violence between pro and anti-slavery forces in territory
1857-July-14	James Buchanan	<a href="#">N/A</a>	Bleeding Kansas. Violence between pro and anti-slavery forces in territory
1857-Jul-18	James Buchanan	<a href="#">Proclamation of April 6, 1858</a>	Hostility towards federal government and officials in Utah territory
1858-Oct-17	James Buchanan	Proclamation issued, but never read.	Harper's Ferry. John Brown seizes hostages.
1861-Apr-15	Abraham Lincoln	<a href="#">No. 80</a>	Civil War
1864-Jul-05	Abraham Lincoln	<a href="#">No. 113</a>	Pro-Confederate insurgency in Kentucky
1871-Oct-17	Ulysses S. Grant	<a href="#">No. 197, 199, 200, 201, 204</a>	Crackdown on the KKK in South Carolina.
1873-May-22	Ulysses S. Grant	<a href="#">No. 213</a>	Colfax Massacre
1874-May-15	Ulysses S. Grant	<a href="#">No. 218</a>	The Brooks-Baxter War
1874-Sep-15	Ulysses S. Grant	<a href="#">No. 220</a>	White supremacist coup d'état against elected state government.
1874-Dec-21	Ulysses S. Grant	<a href="#">No. 223</a>	The Vicksburg Massacre

<sup>160</sup> The Brennan Center reports no declarations of martial law since 1963 and no invocations of the Insurrection Act since 1992.

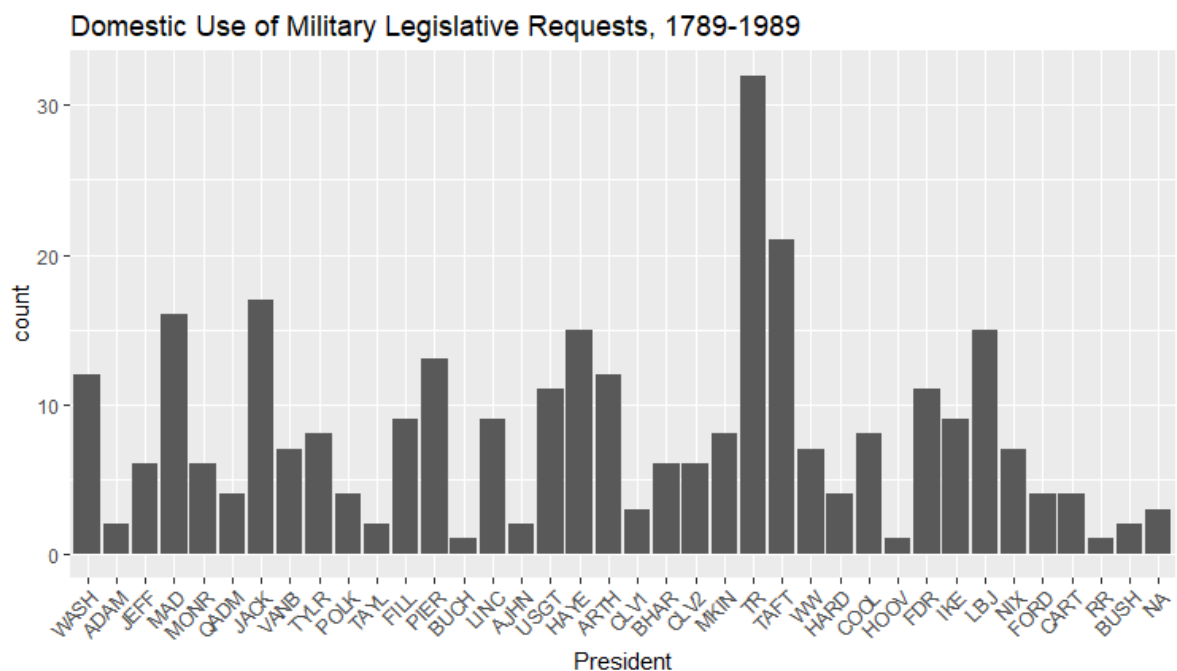
<sup>161</sup> For space purposes, table 3.2 is included as an appendix rather than in the text of this chapter.

1876-Oct-17	Ulysses S. Grant	<a href="#">No. 232</a>	Response to organization of white supremacist "rifle clubs" in lead up to 1876 Election.
1877-Jul-18	Rutherford B. Hayes	<a href="#">No. 236, 237, 238</a>	The Great Railroad Strike of 1877
1878-Oct-07	Rutherford B. Hayes	<a href="#">No. 240</a>	Lincoln County War
1882-May-03	Chester A. Arthur	<a href="#">No. 253</a>	Lawlessness and widespread criminality in Arizona Territory
1885-Sep-07	Grover Cleveland	<a href="#">N/A</a>	Rock Springs anti-Chinese riot
1885-Nov-07	Grover Cleveland	<a href="#">No. 274</a>	Tacoma Riot anti-Chinese riot
1886-Feb-9	Grover Cleveland	<a href="#">No. 275</a>	Seattle Riot of 1886 anti-Chinese riot.
1892-Jul-15	Benjamin Harrison	<a href="#">No. 334</a>	Coeur d'Alene miner strike
1892-Jul-30	Benjamin Harrison	<a href="#">No. 336</a>	Johnson County War. A ranch war between wealthy landowners and people accused of rustling cattle.
1894-Jul-08	Grover Cleveland	<a href="#">No. 366, 367</a>	Pullman Strike
1907-Dec-05	Theodore Roosevelt	<a href="#">N/A</a>	Disorder between Miners Union and management
1914-Apr-28	Woodrow Wilson	<a href="#">No. 1265</a>	Colorado Coalfield War coal miner strike.
1914-Nov-03	Woodrow Wilson	<a href="#">Dispersion of Unlawful Assemblages in Arkansas</a>	Unlawful Assemblages in Arkansas
1921-Aug-30	Warren G. Harding	<a href="#">No. 1606</a>	Battle of Blair Mountain coal miner strike.
1932-Jul-28	Herbert Hoover	<a href="#">N/A</a>	The Bonus Army Incident
1943-Jun-21	Franklin D. Roosevelt	<a href="#">No. 2588</a>	1943 Detroit Race Riot
1957-Sep-23	Dwight D. Eisenhower	<a href="#">No. 3204</a>	Protection of Black students during school integration.
1962-Sep-30	John F. Kennedy	<a href="#">No. 3497</a>	Protection of Black students during school integration.
1963-Jun-11	John F. Kennedy	<a href="#">No. 3542</a>	Protection of Black students during school integration
1963-Sep-10	John F. Kennedy	<a href="#">No. 3554</a>	Used to overrule Governor's use of state national guard to prevent school integration
1965-Mar-20	Lyndon B. Johnson	<a href="#">No. 3645</a>	Protection of Civil Rights Marchers
1967-Jul-24	Lyndon B. Johnson	<a href="#">No. 3795</a>	Riots in response to racial oppression
1968-Apr-05	Lyndon B. Johnson	<a href="#">No. 3840, 3841, 3842</a>	Riots after assassination of Martin Luther King Jr.
1987-Nov-24	Ronald Reagan	<a href="#">No. 5748</a>	Cuban Detainee Prison Riot
1989-Sep-20	George H.W. Bush	<a href="#">No. 6023</a>	Lawlessness in aftermath of Hurricane Hugo
1992-May-01	George H.W. Bush	<a href="#">No. 6427</a>	Riots after policy brutality against Rodney King

In addition to these collections of invocations of the Insurrection Act and Martial Law, I also used the Presidential Request Table of the Database of Congressional Historical Statistics (DCHS) to identify presidential legislative requests that dealt with domestic

disorder and the military. The full request table includes 12,500 presidential legislative requests to Congress from 1789-1989. I then created a dummy variable based on whether the description variable for each request included the following words or phrases: “army”, “militia”, “law enforcement”, “insurrection”, “rebellion,” “domestic violence”, “disorder.” This process identified 213 presidential requests, which are presented as a list in Table 3.3. and are also visualized in Figure 3.2.<sup>162</sup>

Figure 3.2. Domestic Use of Military Legislative Requests, 1789-1989.



While many of the requests do not deal directly with the president’s authority during domestic disturbances, this list provides a useful overview of presidents’ legislative involvement in domestic disorder, law enforcement, and military and militia policy. Cases

<sup>162</sup> I used the grepl function in r, which identifies the characters or strings specified in the search within the dataset. In my initial search, I also included the word “navy” which produced an additional 95 requests. I ultimately decided to exclude this term from the search because while the navy has been used at times to respond to domestic disorders, these events are quite irregular. The militia and the army are the main institutional components used in federal responses to domestic disorders. For space purposes, table 3.3 is only included as an appendix.

were selected based on the list of domestic disorders, but several of the legislative requests included in this search correspond to those cases. In the analysis of the case, I also an analysis of any legislation that preceded or followed the federal response to the disorder. This allows for the evaluation of presidential entrepreneurship in shaping congressional delegations of authority, as well as during implementation.

Table 3.4 creates a typology of disorders based on whether federal intervention occurred and whether there was a state request for assistance. While this two-by-two does not capture all the possible cases that might exist, it does provide a useful theoretical map for the different types of cases that exist within the universe of cases available.<sup>163</sup>

Table 3.4. Schema of Possible Responses to Domestic Disorders

	State Request for Intervention	No State Request for Intervention
Federal Intervention	Coordinated Intervention	Unilateral Intervention
No Federal Intervention	Discretionary Nonintervention (President’s Choice)	No Disorder OR State Militia Sufficient

One should also note that the variables discussed here relate to the immediate response or outcome to a disorder. Variation on these dimensions is useful for identifying cases where

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<sup>163</sup> For instance, one combination not specifically captured in this schema are presidential interventions that occur not only in the absence of a state request, but against the expressed will of state officials. A substantively significant case meeting these criteria is Cleveland’s intervention in the Pullman Strike in 1894 despite the protests of the Illinois Governor.

entrepreneurial responses are more (or less) likely but is distinct from the primary causal variable (presidential entrepreneurship) and outcome variables (structural changes to institutions and authority) proposed in my theory. Thus, selecting cases based on these factors avoids selecting cases directly on the dependent variable – whether presidential entrepreneurship caused structural changes to institutions or understandings of institutional authority.

The schema proposed in Table 3.4 and the variation it describes are informed by the statutory frameworks that govern the responses to domestic order. Under the Insurrection Act statutory framework, there are conditions in which presidents may deploy federal troops without state requests, but in many cases a request from the state legislature (or governor if the legislature cannot be convened) are required. Thus, presidential interventions can be construed as either coordinated with the affected state’s government or unilateral. The other dimension measures various reasons why presidents may not intervene when domestic disorders occur. The president may choose not to intervene in a disorder either because there was no state request (indicating that there was no disorder, or the disorder was minor enough to be handled solely by the state militia) or even if there was state request (which would indicate a president choosing not to exercise authority despite a clearly legitimate opportunity to do so).

Table 3.5 provides some examples of where cases fit within this framework. Most of the cases in which the Insurrection Act was invoked fall into the top left box of the table, though some also fall into the top right. The main distinguishing factor between these two types is the nature of the disorder. Namely that the “Guarantee Clause” and many conditions established in the statutory framework require requests from state officials before federal

intervention may legally occur. However, there are some conditions in which presidents may intervene without a state request. More prevalent in the top right of the table are more minor interventions (e.g., the dispatching of a Revenue Cutter ship to Cedar Keys, FL in 1890 to depose the town mayor after he threatened federal officials) and cases in which some essential federal function is impeded (e.g., the obstruction of interstate commerce).

Table 3.5. Examples Cases Based on Schema

	State Request for Intervention	No State Request for Intervention
Federal Intervention Occurred	Coeur D’Alene, ID Labor Strike (B. Harrison, Proclamation 334, 7/15/1892)	Little Rock, AR School Integration (Eisenhower, Proclamation 3204, 9/23/1957)
No Federal Intervention	Dorr Rebellion (No proclamation, 1841-1842)	Homestead Strike (B. Harrison, No Proclamation, July 1892)

The example in the top left box, Benjamin Harrison’s intervention in the Coeur D’Alene strike in Idaho occurred after a request from the state governor for assistance. The example of the Homestead Strike, in the bottom right box, occurred only a week earlier but there was no request for aid from the state government and the Harrison administration did not intervene.

In general, cases that fall on the bottom row (i.e., no federal intervention) are cases where martial law was established by a state or local authority (or not established at all). The example in the bottom left box is the Dorr Rebellion which occurred in Rhode Island in



1841-1842. Despite a request from the state legislature for federal intervention, President Tyler refused to intervene.

The cases analyzed in this research fall to the top row of the table (i.e., they are cases where federal intervention did occur). This approach is justified, I argue, because the primary goal of this research is theory-building – my interest is in identifying the processes and mechanisms through which presidential entrepreneurship alters institutional and authority structures. Selecting cases in which presidents did intervene in domestic disorders serves this purpose by increasing the likelihood of observing mechanisms and varying manifestations of entrepreneurial innovation.<sup>164</sup> In future research I intend to focus on cases where presidents chose not to intervene despite state requests, as these characteristics illuminate moments where presidents chose not to exercise authority despite a clear opportunity for power-seeking behavior. In the next section I provide an overview of the cases and the types of cases they represent.<sup>165</sup> With the universe of cases and case types outlined above, I now turn to a discussion of the cases selected for analysis. I selected three cases for within case process tracing – one case met the criteria of most-likely cases, and the other two cases meet the criteria of least-likely cases.

### **Most-Likely Case: Statutory Expansions and Creative Uses of Institutional Capacity**

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<sup>164</sup> Readers should note that the justification being offered here is, in essence, selecting cases with characteristics in which we are more likely to observe values of the primary independent variable and causal mechanisms that the theory expects should influence the dependent variable. This is distinct from selecting on the dependent variable. Just because presidents intervened in a domestic disorder and engaged in entrepreneurial leadership does not necessarily mean that they will always change institutional structures or norms about authority. The actual effects of entrepreneurship can be observed in each case by how other political actors, including successive presidents, respond to the innovation.

<sup>165</sup> A more detailed description of each case's characteristics on relevant contextual variables and plausible alternative explanations of the case are offered in each chapter.

The most-likely case was selected based on the schema discussed in the previous section and illustrated in table v. The case selected was the Enforcement Act (also known as the Ku Klux Klan Act) of 1871 and subsequent federal intervention in South Carolina. In this case the president's party was in control of Congress and there was a significant threat of disunion – Grant was faced with the challenge of reincorporating the southern states after the Civil War. Together these conditions created a situation in which presidential entrepreneurship would be highly likely in response to domestic disorders. The president in this case faced co-partisan controlled Congresses and governed during periods in which maintaining the union was a key focus of government. Thus, this case is one in which we should observe the mechanisms of entrepreneurial innovation. If the mechanisms were absent from this case, we would be unlikely to observe them in any case.

**Least-Likely Cases: Lawlessness in the Territories after the Posse Comitatus Act of 1878**

Just as the most-likely case explore the role of presidential entrepreneurship in a statutory expansion of presidential authority, the least-likely cases examine entrepreneurship immediately after Congress imposed constraints on executive authority to use the military domestically. The Posse Comitatus Act (PCA) of 1878 is typically interpreted as a congressional effort to narrow the conditions in which it was lawful for presidents to use the military domestically. Interpreting the PCA's impact on ambiguity and complexity is difficult. The PCA placed limits on the conditions when the military could be used as part of the posse comitatus, which could be interpreted as diminishing ambiguity by providing clearer rules about the boundaries of institutional authority. Yet, one might also argue that

the PCA was also a source of uncertainty because the language of the statute created loopholes in which presidents could still legally deploy the military domestically.

Yet, in the immediate aftermath of this legislation, presidents deployed the military for domestic purposes – Hayes in the New Mexico territory and Arthur in the Arizona territory. The characteristics of these interventions were similar, both taking place in territories rather than states. The identification of successful presidential entrepreneurship (i.e., entrepreneurship by the president altering the more constrained institutional structure imposed by the PCA in favor of the president) in these post-PCA interventions would provide strong support for the theory.

**Case Structure: Data and Analytical Questions**

In this section I turn to the historical evidence used to analyze each case and the analytic questions that provide a common structure to the analysis across cases. A summary of the evidence types and sources used is included in Table 3.6.

Table 3.6. Summary of Evidence Types and Sources.

<b>Evidence Types</b>	<b>Sources</b>
Presidential Documents and Correspondence	Collections of Presidential papers and documents digitized by Library of Congress and presidential libraries; The American Presidency Project; <i>ProQuest Congressional and Executive Branch Documents</i>
Congressional Documents, Hearings, and Legislative Record	<i>ProQuest Congressional</i>
Newspaper Coverage	<i>ProQuest Historical Newspapers</i>

<p>Policy Histories, Biographical and Autobiographical Accounts</p>	<p>Memoirs of cabinet members and members of Congress; Biographies of presidents, cabinet members, and members of Congress; histories of federal military interventions in domestic affairs.</p>
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I rely on a several types of evidence, that allows me to reconstruct a thorough account of each case from various institutional and personal perspectives. By deliberately seeking multiple perspectives, I control the bias that may be contained in one type of source by evaluating in comparison with others. Next, I discuss each of these types of evidence, the sources used to access them, and my identification strategy of relevant historical documents for each source. My intent is that these descriptions of the research process will serve as signposts for interested readers, providing transparency about my identification and use of historical evidence.

*Presidential and Executive Branch Documents*

Because my primary interest is in presidential entrepreneurship, the most central source of evidence to my theoretical claims are historical records created by presidential administrations. Many of the primary presidential documents were identified through my reading of the secondary literature and the Brennan Center’s list of Invocations of the Insurrection Act which list relevant proclamations. There are several types of presidential and executive branch documents and correspondence that I examined for each case. I used the American Presidency Project’s collection of official documents whenever possible. At times it was necessary to find certain documents through ProQuest Congressional because the documents were published in the congressional record, but seemingly not in Richardson’s *Compilation of Messages and Papers of the Presidents of the United States*,

which is the source for many of the American Presidency Project's documents from the eighteenth and nineteenth century. The following types of presidential documents are those most frequently relevant to this research:

- *Proclamations*: the statutory framework for the deployment of the militia or military requires a presidential "cease and desist" proclamation, and these proclamations are used to identify interventions. Proclamations were not always issued when the militia or military were deployed, but they provide a rich source for tracing the exercise of presidential power and the changing sources of authority invoked by presidents when doing so.
- *Annual Messages*: Several annual messages include reports to Congress on presidential deployments of the militia or military. Presidential requests for legislation on issues related to domestic order and military intervention can also be identified in the Annual Message.
- *Special Messages*: Presidents often send special messages to Congress in responses to congressional requests for information on executive branch action. These messages also often contain presidential requests for legislation. The official correspondence between the executive branch and Congress on issues related to domestic disorder often occurs through special messages and attached reports.

I also used the Library of Congress's digitized collections for each case to identify relevant correspondence and executive branch communications not included in online collections of presidential documents. The correspondence and executive branch documents contained in these collections are especially helpful because they allow me to establish the timing, sequence, and processes through which executive branch decision-making occurred. For each of these three collections, I used timebound searches to identify relevant documents.<sup>166</sup>

For some presidents there are also more extensive collections of papers published which, while overlapping some with the Richardson collection, also include additional

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<sup>166</sup> I searched all documents produced by the search term from around 2 months before the disorder or presidential intervention occurred to around 2 months after. In some cases, I conducted searches over a longer timespan when the details of the case indicated that there would be relevant documents in those periods. For example, the Coeur D'Alene Mine Strike emerged relatively quickly in late June 1892, so there is little reason to believe that there would be correspondence related to the disorder before April 1892. In contrast, the Ku Klux Klan Act of 1871 passed by the 42<sup>nd</sup> Congress was related to two other bills passed by the 41st Congress – the Enforcement Act of 1870 and the Enforcement Act of 1871 – because of this I expanded my search to include this period. I documented and saved copies of relevant documents.

material. Two examples are worth noting. First, John Y. Simon collected, published, and digitized *The Papers of Ulysses S. Grant* into 31 volumes which I relied on extensively for the Ku Klux Klan Act case. Second, Rutherford B. Hayes' diary and letters are collected by the Rutherford B. Hayes Presidential Library and digitized versions of the diary are available. These types of resources are not available in all cases, but they do provide an additional rich source of information about presidential and executive branch actions.

There are also several executive branch documents generated by the cabinet secretaries which I accessed through the ProQuest Congressional. Of particular interest are the Annual Reports of the Attorney General and Secretary of War. These documents are executive reports given to Congress each year detailing the expenses and actions taken by the relevant department (i.e., War or Justice). In addition to the annual report, the Official Opinions of the Attorneys General of the United States are published regularly and are rich source of evidence – these collections include the legal opinions of the Attorney General, often written in response to presidential requests. Thus, the generation of legal opinions providing cover are one potential avenue for presidents to engage in entrepreneurial innovation. Further, these opinions also give insights into executive branch understandings of presidential authority at various points in time.

#### *Congressional Documents and Supreme Court Rulings*

I used several types of congressional documents but relied most heavily on congressional debates as published in various congressional publications – The Annals of Congress (1789-1824), Register of Debates (1824-1837), Congressional Globe (1833-1873), and Congressional Record (1873-present) – all of which are searchable through *ProQuest Congressional*. These debates are useful for understanding the congressional side of

questions of presidential authority. These congressional sources often include debates about cases of domestic disorder, whether or not federal intervention occurred in response. Thus, they provide the congressional perspective – how members of Congress viewed the specific case in question, and how they understood broader questions of institutional authority. Like the presidential documents, I conducted keyword searches using the name of the city, county, and/or state, or common identifiers for each disorder and timebound the search results.

In addition to the congressional sources, there were several Supreme Court decisions relevant to the maintenance of domestic order. I identified the relevant cases through secondary literature and policy histories on the domestic use of the military. When using court opinions and decisions as evidence, I read the entirety of the court decisions to identify the logic and legal basis of the majority’s interpretation. While most of the historical research focused on presidential and congressional documents, rulings of the Court serve as a supplement to understanding changing institutional authority.

#### *Policy Histories and Elite Biographies and Autobiographies*

In addition to the historical sources used in this analysis, there are several useful policy histories, elite biographies, and autobiographies that provide useful contextual information about each case. First, there are several excellent histories of federal interventions and use of the military in domestic affairs some of which are worth noting individually given their importance to the analysis. In particular, these four histories were central to the analysis:

- Frederick T. Wilson, *Federal Aid in Domestic Disturbances: 1787-1903*, S. Doc. No. 57-209, 57<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 1903.
- Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878*, Center of Military History United States Army, 1988.
- Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877-1945*, Center of Military History, 1997.

- William C. Banks and Stephen Dycus, *Soldiers on the Home Front: The Domestic Role of the American Military*, Harvard University Press, 2016.

Wilson's volume was produced as a Senate Document in 1903, thus providing a useful first interpretation of federal interventions in domestic affairs. The two volumes by Coakley and Laurie and Cole are part of the same series commissioned by the Center of Military History; collectively these volumes cover the period from 1789-1945. Finally, Banks and Dycus's work covers more wide-ranging uses of the military. They discuss the use of the military to preserve public order in the wake of disturbances, but also detail other domestic uses of the military. Together these volumes provide extensive coverage of the cases discussed in this dissertation.

The use of biographical and autobiographical writings about political elites (i.e., presidents, cabinet members, members of Congress) was also indispensable. I read at least two biographies of each president who was in office during each case. For each president, I first used the *American Presidents Series* biographies edited by Arthur Schlesinger Jr. These biographies are brief compared to most others, but their similar structure, length, and shared editor make them useful for comparison across cases. In addition to this series, I used at least one, but often multiple, other biographies for each president. The use of multiple biographies for each president is an essential step in using this type of resource. It allows me to account for biases and the changing evaluations of biographers over time.<sup>167</sup> I also relied

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<sup>167</sup> A prominent example of these changing perspectives is Ulysses S. Grant who early biographers characterized as complicit in widespread administration corruption, inept as a leader, and an alcoholic. These accounts were heavily influenced by the Dunning School of Reconstruction which glorifies the "Lost Cause" of the South and, as a result, appraises Republicans as corrupt and tyrannical. More recent appraisals of Grant have been much more positive about his leadership and personal character. For a discussion of these issues, see George R. Goethals, "Imagining Ulysses S. Grant: Sifting through the shifting sands of conventional wisdom," *The Leadership Quarterly* 19, no. 4 (2008): 488-500.



on the biographies and autobiographies of several prominent members of Congress who were in office during the period of each case, as well as members of the president's cabinet.

#### *Newspaper Coverage*

I also used collections of historical newspapers as a supplement to the other types of evidence relied on in the study. Articles in historical newspapers were accessed through *ProQuest News and Newspapers* database. For each case, I used either the name of the city, county, and/or state in which the disorder was located, in some cases other identifiers were used (i.e., if there was another phrase used to describe the disorder, or for cases dealing with legislation the title of the legislation was used). For most cases searches were filtered to include the historical collections for the New York Times and the Washington Post.

#### *Transparency Notes About Research Process*

For the purpose of transparency and to allow for the replication of the qualitative analysis, this section briefly outlines the data identification and collection processes. There are three broad types of historical sources used in this study – digitized databases with embedded search functions, digitized archival collections, and biographical or second-hand accounts of historical events – each of these types requires a distinct strategy. I first identified and analyzed the basic facts of each case, relying on biographical accounts and policy histories. This allowed me to develop a knowledge of the case and to narrow my search strategy for documents in various digitized collections and archives. After developing an understanding of each case through the biographical accounts and policy histories, I then identified documents in the digitized databases (e.g., American Presidency Project, ProQuest Congressional) and archives (e.g., Presidential Collections digitized by the Library of Congress). The sheer volume of documents held in digitized collections required me to

conduct timebound searches and then manually go through the search results to identify relevant documents.

In process tracing methods, not every piece of evidence holds equal probative value. Some pieces of evidence may not provide much bearing on the causal mechanisms or processes of interest, while other pieces of evidence may provide strong confirmation or disconfirmation of the theory. As such, the case analyses focus on evidence that is most central to theory building and testing. However, I attempt to provide transparency about the research process by tracking all the evidence considered. Overall, this approach allows for the incorporation of a wide range of historical sources and perspectives, and the data collection and documentation should allow for replication and verification by interested readers.

## **Conclusion**

This chapter outlines this project's attention to temporal processes and details a qualitative, theory-building case study design that relies on process tracing methods. It also identifies the sources of historical evidence to be used and the strategies used to collect and analyze the data systematically. Finally, it provides a set of analytic questions that will be used to analyze each case, providing a shared structure for each case, and allowing for easier comparison across cases. The case selection strategy is not representative, but rather focuses on selecting cases based on theoretical expectations and the presence of certain configurations of relevant factors and variables. Sovereignty and foreign policy issues are likely areas of presidential activity based on their constitutional authority – a broad literature suggests that the president's foreign policy authority is broad and often unchallenged, the take care clause and the president's impulse to maintain domestic "law and order" further

suggests that presidents ought to be active in the management of domestic threats. Thus, while the cases both represent important areas for presidential action, there is significant variation across cases in terms of the opposition and constraints that presidents faced.

The centrality and linkages of domestic order and national sovereignty policy issues in this period of American political development are worth noting. Many of the major challenges facing the nineteenth century state – reincorporating the southern states, managing westward expansion, protecting expanding commercial interests abroad – fall in areas where there is potential for presidents to act boldly and seize new authority. As such, the cases presented here are centrally important to explaining the dynamics of state building and presidential leadership in this period, and their impact on processes of American institutional development. In the next chapter, I will present a brief overview of the history of federal intervention during domestic disorders. The purpose of this chapter is to provide context to the reader about the universe of cases and to highlight trends in governmental action and authority over the *longue durée*. It provides a baseline of institutional structures and norms in this domain of governance which serves to contextualize the significance of presidential entrepreneurship to changing institutional authority.

## Chapter 4. The Entrepreneurial Terrain: Ambiguity and Complexity in the Maintenance of Domestic Order, 1789 – 1896

“These cryptic words [the Commander in Chief Clause] have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title... It undoubtedly puts the Nation's armed forces under presidential command. Hence, this loose appellation is sometimes advanced as support for any presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with an army or navy... the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries, and its inhabitants.” – Justice Jackson<sup>168</sup>

“The President’s power to employ military force in the enforcement of the laws of the United States has undergone enlargement from the first, thanks in part to presidential initiative, in part to congressional legislation.” – Edward Corwin<sup>169</sup>

### Introduction

Chief Justice Jackson’s concurring opinion in the *Youngstown* case is most famous for developing a framework for evaluating the legitimacy of presidential actions. However, Jackson also presents a puzzle related to the nature and scope of presidential power and its development over time. The Truman administration’s defense of government seizure of the steel industry in *Youngstown* was predicated on three ambiguous constitutional sources of authority – the executive Vesting Clause, the Commander in Chief Clause, and the Take Care Clause. The court’s ruling in the case placed legal bounds on “unlimited” presidential emergency powers, but Jackson’s discussion of the ambiguity inherent in the executive power raises questions about the processes of institutional change that led to Truman’s executive overreach. As Jackson notes, the Constitution did not contemplate the Commander

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<sup>168</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson Concurring), 343.

<sup>169</sup> Edward Corwin, *The President: Office and Powers, 1787 – 1957* (New York University Press, 1957), 133.

in Chief Clause being applied to domestic politics. Yet, in the roughly 160 years between the ratification of the Constitution and *Youngstown*, presidents used the military to intervene in domestic politics with great regularity. They had done so with explicit congressional approval in the form of statutory delegations of authority, as well as by interpreting and constructing their authority in expansive ways.

Justice Jackson's opinion raises a question about process – if the Constitution did not contemplate a robust presidency in domestic affairs, then how did such a presidency come to exist? The empirical chapters take up this question by providing a detailed depiction of changes to the president's authority to maintain domestic order – which conceptually falls under the broader umbrella of domestic emergency powers. The findings add complexity to the periodization schemes central to presidency studies – namely the “modern presidency” as an organizing concept. Presidency scholars have long devoted attention, and criticism, to the expansion of presidential power in foreign affairs.<sup>170</sup> In the aftermath of Watergate, similar criticisms were levied at the Nixon administration's use of the executive branch to investigate and blackmail political opponents. The development of the Imperial Presidency, meant to be a pejorative label, is often considered to be a product of the modern, post-FDR period. Yet, pre-modern presidents regularly used the coercive capacity of the central state to maintain domestic order.

This chapter lays out the “entrepreneurial terrain” in which presidential entrepreneurs operated. It draws attention to the presence of heterogeneous institutional components, ambiguity in rules, and uncertainty in outcomes all of which make

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<sup>170</sup> Arthur M. Schlesinger, *The Imperial Presidency* (HMH, 2004); Aaron Wildavsky, "The Two Presidencies," *Trans-action* 4, no. December (1966): 7-14; Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate* (University of Michigan Press, 2008).

entrepreneurial innovation possible in the government's role in maintaining domestic order.<sup>171</sup> These features of the terrain are not constant and, as a result, entrepreneurship is not equally likely over time. However, as my discussion of the constitutional and statutory framework will illuminate, this domain of federal governance is persistently defined by some level of ambiguity, complexity, and uncertainty. This chapter provides context for readers by presenting a historical narrative structured by the theoretical framework developed in chapter 2. It serves as a useful backdrop against which the process tracing chapters are situated.

The chapter proceeds in five sections. First, I provide an introductory overview of the policy domain and various frameworks used for interpreting executive prerogative and emergency powers. Second, I provide an overview of the distribution of institutional authority established by the constitutional framework and the *Federalist Papers*. Third, I briefly explain the major components of the Insurrection Act statutory and judicial framework which simultaneously empowers and places procedural constraints on presidents' authority to use the military domestically. Fourth, I discuss the evolving institutional capacity (i.e., heterogeneity of components) available to the federal government when invoking the authority discussed in the previous sections. Finally, I assess the state of presidential authority at the end of the nineteenth century and provide some concluding thoughts. Taken together, this chapter should leave readers with an understanding of the contours and major changes to this policy domain throughout U.S. history. While the

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<sup>171</sup> Adam Sheingate, "The Terrain of the Political Entrepreneur," in *Formative Acts: American Politics in the Making*, Matthew Glassman and Stephen Skowronek, eds. (University of Pennsylvania Press, 2008): 14-15.

analysis is primarily organized in a chronological fashion, the sections ascribe to Sheingate's framework of entrepreneurial terrain.

### **Domestic Order, Prerogative, and Frameworks of Emergency Powers**

The broad historical overview provided by this chapter takes a similar approach to scholars like Edward Corwin by tracing institutional authority through the Constitution, subsequent statutes and court rulings, and the use of authority by presidents.<sup>172</sup> Steve Vladeck noted the dearth of scholarly attention paid to this topic since the works of Corwin and other early scholars, providing a valuable justification for this approach.<sup>173</sup> While Vladeck and other legal scholars have begun to reconsider the historical use of the military for domestic political purposes, political scientists have not yet done so.<sup>174</sup>

Domestic insurrections, rebellions, and lawlessness threaten the state's authority. However, these internal threats to domestic order typically do not pose the type of existential threat to the nation's existence that external threats do, but they raise questions about prerogative. John Locke defined prerogative as the "power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it."<sup>175</sup> Locke's conception of prerogative is based on the notion of emergency, requiring quick extra-constitutional action that goes beyond the explicit boundaries of the law, and the assumption that the actions must align with the public good. William Blackstone's writing in

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<sup>172</sup> Corwin, *President*. I rely on Corwin's brief section interpreting the use of the military to enforce laws (see pp. 130-139) in my analysis, while also noting the critiques of his interpretation.

<sup>173</sup> Stephen I. Vladeck, "Emergency Power and the Militia Acts," *Yale Law Journal* (2004): 155.

<sup>174</sup> Two significant exceptions are Daniel A. Kenney, *Seizing Domestic Tranquility: National Military Intervention in America, 1866-1940*, Brandeis University ProQuest Dissertations (2010); David Adams, "Internal Military Intervention in the United States," *Journal of Peace Research* 32, no. 2 (1995): 197-211.

<sup>175</sup> John Locke, *Two Treatises of Government*, Peter Laslett, ed. (Cambridge University Press 1960), 160.

the 1760s laid out an understanding of prerogative power that the framers of the Constitution were well aware of. Blackstone's framing of prerogative within a system of checks and balances emphasizes that the legitimacy of the king's prerogative could be judged by whether it harmed citizens (i.e., the king's prerogative was only limited when his actions were harmful to his subjects).<sup>176</sup> When it came to royal prerogative, the king's authority was only limited by the perceived effects of their actions.

Thomas Langston and Michael Lind make the important distinction that Lockean prerogative refers to several distinct types of prerogatives, not just a singular plenary power. According to Langston and Lind, there are at least two specific types of prerogatives developed in Locke:

- Prelegal prerogative involves the power of the executive to respond when unforeseen circumstances arise that are not covered by existing law. In essence, the executive responds in pursuit of the public good until the legislature can be convened.<sup>177</sup>
- Antilegal prerogative involves the ability of the executive, in certain cases, to set aside and act contrary to existing laws.<sup>178</sup>

The presence of these distinct types of prerogative highlight that prerogative is not a single unitary power.<sup>179</sup> Despite the prominence of prerogative as a concept during the revolutionary period, the Constitution does not explicitly specify that presidents have

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<sup>176</sup> William Blackstone, *Commentaries on the Laws of England: In Four Books; With an Analysis of the Work*, Vol. 1, (W.E. Dean, Printer and Publisher, 1847), 180.

<sup>177</sup> The reader should note the parallel between this type of prelegal prerogative and the language of the Guarantee Clause of the Constitution. The clause requires a request for federal assistance from the state legislature in cases of domestic violence unless the legislature cannot be convened, in which case a request from the governor is sufficient.

<sup>178</sup> The key example of antilegal prerogative in Locke's writing is the pardon power.

<sup>179</sup> Thomas S. Langston and Michael E. Lind, "John Locke & the Limits of Presidential Prerogative," *Polity* 24, no. 1 (1991): 49-68, see especially 56-58.



additional prerogative power during times of emergency.<sup>180</sup> Despite the ambiguity, and ambivalence, about prerogative in the U.S. Constitution, in practice presidential power has historically expanded during times of crisis. These historical experiences informed Clinton Rossiter's view that "constitutional dictatorship" was a necessary element of democratic government to preserve itself during emergencies.<sup>181</sup>

Jules Lobel traces changing ideas about executive emergency powers, noting the fundamental tension in constitutional orders "between the basic premise of government constrained by law and the perceived need for unfettered, discretionary power to confront dire emergencies and crises."<sup>182</sup> The tension represents a key trade-off between security and individual liberties that presidents and others must consider when responding to emergencies. In the language of entrepreneurship, it is a source of constitutional ambiguity which generates opportunities for the creative deployment of presidential resources. Lobel articulates three constitutional frameworks relevant for thinking about presidential emergency powers, which he labels the absolutist, relativist, and liberal schools.

A brief summary of these frameworks highlights their usefulness for thinking about entrepreneurial innovation. The absolutist view believes that there is no emergency power outside of those specifically included in the Constitution, thus even when the necessity for emergency powers exists the government has no power beyond the Constitution. Lobel notes

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<sup>180</sup> This is a source of significant debate, some "presidentialist" scholars suggest that expansive prerogative was built into the Constitution while many others argue that there is neither explicit nor implicit intent for prerogative in the meaning of the text. For a good summary of perspectives, see Langston and Lind, 51-52.

<sup>181</sup> Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Routledge, 2017).

<sup>182</sup> Jules Lobel, "Emergency Power and the Decline of Liberalism," *Yale LJ* 98 (1988): 1386.

that since such exigent circumstances do inevitably arise, that the absolutist view is often connected to a relativist view. The relativist framework argues that the Constitution is a flexible document that allows presidents to invoke emergency powers when crises arise. That is, the relativist view differs from the absolutist by claiming that the Constitution vests the Executive with the necessary authority to respond to crises. Lobel contrasts these frameworks with the liberal view of emergency powers, which he suggests draws a line between constitutional government and emergency government. This view creates a dichotomy between normal and emergency government, as well as constitutional and unconstitutional action. While presidents in the liberal view might find it necessary to respond to dire crises by exerting emergency powers beyond the scope of the Constitution, they must do so knowing their actions are unconstitutional and illegal.<sup>183</sup> The central caveat to this view of executive power then is that it emphasizes the judgment of the president, subject to post hoc punishment and sanction from other political actors and the public.

Lobel's distinction is useful here for two reasons. First, he presents an argument about when each of these sets of ideas were the dominant understanding of political actors. The process aligns closely with the timeframe of the emergence of a modern or imperial presidency – the relativist view, with its expansive interpretation of executive authority, came to prominence at the beginning of the twentieth century.<sup>184</sup> For Lobel, Theodore Roosevelt's stewardship theory is an example of a relativist logic of the president's constitutional powers. Just as presidency scholars suggest the modern presidency was

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<sup>183</sup> Lobel, 1386-1392.

<sup>184</sup> Lobel, 1398.

founded on the stewardship theory, Lobel argues that the relativist theory is primarily a twentieth century framework for interpreting the Constitution.<sup>185</sup> From this we can infer some expectations about presidential understandings of emergency powers. In the nineteenth century presidents would either adopt an absolutist understanding of the Constitution, preventing them from responding to exigent crises in ways that were not explicitly specified. Or, more likely, we would observe nineteenth century presidents adopting a liberal approach in which they took unconstitutional actions, letting their actions be judged by Congress after the fact.

Table 4.1. Constitutional Theories of Presidential Emergency Power from Lobel (1988).

Framework	Central Ideas of Framework	Expected Prevalence	Rhetorical Example
Absolutist	<ul style="list-style-type: none"> <li>- Government has no emergency power except those explicitly specified in Constitution.</li> <li>- Resolves liberty-security trade-off in favor of liberty.</li> <li>- In practice, adherents lean towards a liberal framework, since emergencies inevitably do arise that require a governmental response.</li> </ul>	Rare in 18 <sup>th</sup> and 19 <sup>th</sup> century, absent in 20 <sup>th</sup> .	Justice Davis: “No doctrine, involving more pernicious consequences, was ever invented by the writ of man than that any of it’s [the Constitution’s] provisions can be suspended during any of the great exigencies of government.” <sup>186</sup>
Relativist	<ul style="list-style-type: none"> <li>- Constitution is flexible and permit presidents to do whatever is necessary during times of crisis.</li> <li>- Balances liberty-security trade-off in favor of security.</li> </ul>	Common in 20 <sup>th</sup> , rare in 18 <sup>th</sup> and 19 <sup>th</sup> .	T. Roosevelt: “Occasionally great national crises arise which call for immediate and vigorous executive action, and in such cases it is the duty of the President to act upon the theory that he is the steward of the people.” <sup>187</sup>

<sup>185</sup> Lobel, 1399 fn 63. Though Lobel does note that the relativist framework was at least partially originated and legitimated by the Supreme Court’s ruling in *In Re Neagle* (1890).

<sup>186</sup> *Ex Parte Milligan*, 71 U.S. 2, 120 (1866).

<sup>187</sup> Theodore Roosevelt (1926), *An Autobiography*, Charles Scribner’s Sons, 464

<p>Liberal</p>	<ul style="list-style-type: none"> <li>- Distinguish between normal and emergency government</li> <li>- Executive may act unconstitutionally in true emergencies</li> <li>- Merit of executive action judged (and sanctioned) by legislature and public</li> <li>- Balances liberty-security trade-off by incorporating concept of responsibility.</li> </ul>	<p>Common in 18<sup>th</sup> and 19<sup>th</sup>, rare in 20<sup>th</sup>.</p>	<p>Jefferson: “on great occasions every good officer must be ready to risk himself in going beyond the strict line of law, when the public preservation requires it: his motives will be a justification as far as there is any discretion in his ultra-legal proceedings”<sup>188</sup></p>
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Table 4.1 summarizes the central arguments of each of these perspectives and notes the period(s) in which each perspective was prominent. Table 4.1 also provides an example of rhetoric that aligns with the perspectives. This highlights that it is possible to classify presidential rhetoric and actions based on the construction of emergency power that they embody. When presidents respond to domestic disorder, close adherence to statutory requirements and claims of authority derived specifically from the text of statutes align with an absolutist interpretation of presidential power. Liberal interpretations would manifest in similar, but distinct ways. In this case, presidents would still refer primarily to statutory authority. The notable difference would be that presidents might take actions beyond the scope of these authority sources, and if they did, they would take responsibility for these actions. In contrast, if presidents held a relativist view, they would cite vague constitutional sources of authority, inherent executive powers, and/or extra-constitutional sources of authority. This exercise in classification, illustrated in Table 4.1, makes it possible to trace the development of these varied frameworks over time as they manifest in presidential rhetoric and actions.

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<sup>188</sup> *Thomas Jefferson to William C. C. Claiborne, February 3. -02-03, 1807. Manuscript/Mixed Material.* <https://www.loc.gov/item/mtjbib016888/>.

Daniel Tichenor conceptual framework for analyzing the development of presidential emergency powers is a useful addition to Lobel's. Tichenor argues that this aspect of presidential authority emerged through what he calls shifting historical set points that "reflect the emergence of new resources, precedents, and expectations for stressed administrations."<sup>189</sup> Tichenor's study is focused on the development of presidential authority during critical junctures – Lincoln's response to the Civil War, FDR's response to World War II – highlighting how political processes can lead to shifting understandings of emergency powers. I add to this discussion by tracing the gradual shifting of these set points in response to domestic disorders.

Two presidential perspectives on the nature of executive power emerged based on different interpretations of the ambiguity present in the constitutional framework. The so-called Whig theory of presidential power interprets the Constitution as granting very little authority to presidents for the maintenance of domestic order. After all, Article I, section 8 explicitly enumerates many powers related to the maintenance and deployment of the militia and military with Congress. Presidential authority, on the other hand, is not specifically enumerated, and in the absence of that enumeration presidents have little authority to act. In this view, presidents are only justified in using the military domestically when Congress has previously exercised their power to "call forth the militia," or military, or when Congress explicitly delegate such authority to the president through statutes. Michael Korzi's reinterpretation of William Howard Taft's Whig theory of the presidency adds that Taft

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<sup>189</sup> Daniel J. Tichenor, "Historical Set Points and the Development of US Presidential Emergency Power." *Perspectives on Politics* 11, no. 3 (2013): 769-788, quote on 771. Tichenor is referring to emergency powers in a general sense and uses cases of war. I extend his logic to the development and exercise of emergency powers in the face of domestic disorders that, while less severe than war, present threats to existing orders.

believed presidents played an important role as party leaders, pushing the party's agenda and pursuing its goals.<sup>190</sup> Thus, presidents who ascribed to this whiggish view, might be said to exist in between the poles of direct popular leadership ascribed to by the stewardship theory (discussed below) and a stereotypical characterization of nineteenth century presidents as mere clerks.

A more expansive interpretation, often attributed to Theodore Roosevelt, is the stewardship theory. Roosevelt articulates this view throughout his autobiography, claiming "I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition."<sup>191</sup> The stewardship theory promotes the view that presidents may take actions not specifically delegated to them by Congress or explicitly granted in the Constitution. Instead, they are bound to take whatever actions they deem necessary so long as it is in the public's interest. Taken to its extreme, the stewardship theory seems to suggest that if the president and the "people" are unified, then the president is almost certainly going to be correct in the actions they pursue, regardless of its legality or constitutionality.<sup>192</sup>

The stewardship theory's derivation of presidential power from public support links it to the concept of presidential representation – the idea that presidents are the only elected officials who are representative of the entire nation. Despite its articulation during the

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<sup>190</sup> Michael J. Korzi, "Our Chief Magistrate and His Powers: A Reconsideration of William Howard Taft's 'Whig' Theory of Presidential Leadership," *Presidential Studies Quarterly* 33, no. 2 (2003): 305-324, especially 307-308.

<sup>191</sup> Theodore Roosevelt, *An Autobiography* (Charles Scribner's Sons, 1926) 347-348.

<sup>192</sup> Korzi, "Our Chief Magistrate," 314. Korzi comes to this conclusion based on his reading of Theodore Roosevelt's autobiography.

Progressive Era, the foundations of the stewardship theory's focus on representation can be traced to the nineteenth (and perhaps even the eighteenth) century. For example, Ellis and Kirk emphasize the emergence of the presidential mandate as a concept linking popular support to the endorsement of a policy program under Jackson.<sup>193</sup> The fact that presidential representation was used as a justification for governing by early presidents, undermines the idea that such popular conceptions of presidential power are inherently modern.

Proponents of the Stewardship theory also suggest that the Constitution establishes "inherent" presidential powers through the responsibility to take care the laws are faithfully executed and to serve as Commander in Chief.<sup>194</sup> In that sense, the theory incorporates elements of the unitary executive theory's emphasis on an expansive reading of the president's constitutional powers, a Lockean conceptions of extra-constitutional prerogative powers, and a democratic conception of presidential power being rooted in popular support.<sup>195</sup> Applied to the maintenance of domestic order, the stewardship theory believes that these dual authorities grant presidents significant discretion to enforce the law, perhaps even in the absence of significant disorder, and that presidents may use the military for that purpose if they deem it necessary. The checks on the exercise of presidential authority in this view are popular and congressional support, not the limitations of the president's constitutional or statutory authority.

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<sup>193</sup> Richard J. Ellis and Stephen Kirk, "Presidential Mandates in the Nineteenth Century: Conceptual change and Institutional Development," *Studies in American Political Development* 9, no. 1 (1995): 117-186.

<sup>194</sup> Corwin, *President*, 147-158.

<sup>195</sup> On the unitary executive theory, a common construction of the Constitution developed by contemporary conservatives like John C. Yoo, see Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (Yale University Press, 2008).

Presidency scholars, and political actors, have debated these conflicting ideas several times throughout American political history. The result has been the continual updating of our understandings of institutional authority and the legality of presidential actions. In tracing the evolution of authority in this issue area, we can observe a gradual delegation of statutory authority by Congress to the president. However, some contemporary legal scholars argue that the expansive view of presidential authority is the result of a misinterpretation of court doctrine by early scholars like Edward Corwin. I rely on this body of legal scholarship, as well as the rich secondary literature on the historical use of the military for domestic purposes, to trace how presidents and other actors understood institutional authority and its sources.<sup>196</sup> Together, these works provide significant evidence that this presidential authority was rooted in a statutory and judicial regime – which was the product of a nuanced interpretation of several court rulings, as well as evolving understandings of Congress and the presidents, rather than being based on “inherent” constitutional powers. However, despite these statutory foundations, ideas about this area of presidential authority evolved throughout the nineteenth century in a process of contestation and conflict between the various actors involved in domestic military interventions.

This discussion adds to these legal analyses by considering in greater detail the politics of domestic order – the way presidents understood and strategically framed their authority when invoking the statutory regime established by the Calling Forth Acts and Insurrection Act. In relation to these existing works, my analysis focuses more closely on

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<sup>196</sup> Several helpful histories of federal military interventions in domestic affairs exist including: Frederick T. Wilson, *Federal Aid in Domestic Disturbances: 1787-1903*, S. Doc. No. 57-209, 2<sup>nd</sup> Sess (1903); Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878* (Center of Military History United States Army, 1988); Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877-1945* (Center of Military History, 1997); William C. Banks and Stephen Dycus, *Soldiers on the Home Front: The Domestic Role of the American Military* (Harvard University Press, 2016).



the exercise of presidential power, its impacts on the development of the presidency as an institution, and the rationale and justifications provided by presidents. My approach aligns with theories that conceive of *presidents and cabinet-level bureaucrats – most commonly attorneys general, secretaries of war, and secretaries of the interior – as agents of change* based on their ability to exploit independent bases of executive authority and institutional conflict with Congress to effect political change and alter the institutional structure of the presidency.<sup>197</sup>

Finally, it is worth considering that the domestic use of the military is the result of the separation of powers system and its characteristic features – federalism, institutional politicking between presidents and Congress. Hence, domestic use of the military manifested in different ways to different types of domestic problems. The Insurrection Act statutory framework (which refers to several acts of Congress) requires formal invocations of the president’s authority through proclamations. Situations that fall under Article IV’s Guarantee Clause also require authorization from state officials before federal intervention. Yet presidents have also deployed troops domestically using other justifications (and without going through the formal steps required for a formal invocation of their authority).

Notably, the purposes of military intervention for domestic purposes evolved over time and the frequency of interventions increased in the late nineteenth century. David Adams’ notes that internal military interventions shifted from suppressing slave revolts and fighting indigenous peoples in the antebellum period to suppressing labor in the late

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<sup>197</sup> Keith E. Whittington and Daniel P. Carpenter, "Executive Power in American Institutional Development," *Perspectives on Politics* 1, no. 3 (2003): 495-513.

nineteenth century and Progressive Era.<sup>198</sup> Similarly, in their study of the history of the Insurrection Act, Rouland and Fearer note that presidents used these powers frequently during the Gilded Age to “protect property, aid in enforcing Federal laws, and protect victimized minorities from mob violence.”<sup>199</sup> The use of military force for these purposes continued during the Progressive Era as presidents used the authority to manage labor disputes and race riots. Just as understandings and ideas about emergency powers shift over time, so do the purposes of domestic military interventions. With that in mind, I turn to the development of presidential authority throughout the eighteenth and nineteenth centuries. The argument developed in this chapter is not that modern presidents were less concerned or able to respond to domestic disorder than their pre-modern counterparts. Rather, my argument is that the modern presidency’s maintenance of domestic order is the result of, and only possible because of, a process of gradual expansion of presidential authority that often occurred as a result of strategic entrepreneurial efforts of pre-modern presidents.

### **The Constitutional Framework: Shared Powers and Ambiguity in Article II**

The U.S. Constitution separates the state’s coercive powers between Congress and the presidency. Article I, Section 8 grants Congress a laundry list of enumerated powers related to national security including to “provide for the common Defence,” “To declare War,” “To raise and support Armies,” “To provide and maintain a Navy,” and “To provide for

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<sup>198</sup> Adams, “Internal Military Intervention,” 198-204. It is not clear whether Adams distinguishes between the use of militias by the southern states and federal interventions that used the state militias in the antebellum period. Further, the data Adams uses to describe interventions distinguishes between federal troops and the national guard but seems to imply that both are always under the direction of the federal government. Thus, Adams categorization may misconstrue purely state-level interventions as somehow being federal.

<sup>199</sup> Michael R. Rouland and Christian E. Fearer (2020), “Calling Forth the Military: A Brief History of the Insurrection Act,” *Joint Forces Quarterly* 99 (4), 128.

organizing, arming, and disciplining the Militia.”<sup>200</sup> In addition to these enumerated powers, the most directly relevant is the First Militia Clause which states that Congress has the power “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions.”<sup>201</sup> This clause articulates the conditions under which Congress may control and deploy the state militias. The enumerated powers of Congress related to domestic order are expansive; these powers not only deal with appropriating money for national defense, but also for calling the military and militia into service. The First Militia Clause in Article I, section 8 provides an enumerated authority to Congress in the area of domestic order.<sup>202</sup> However, it is worth noting that there is no analogous clause in Article I that enumerates a congressional power for calling forth the army for domestic purposes, this was largely driven by the framers’ fear of a large standing army.<sup>203</sup>

While Congress is enumerated much of the constitutional authority related to the use of and maintenance of the military, some of that power is dispersed to the president. Article II grants the president relevant, but ambiguous, powers as well in the Vesting, Commander in Chief, and Take Care clauses. Together these clauses provide presidents power over the military when in service, placement as head of the executive branch agencies, and a responsibility to execute laws passed by Congress.<sup>204</sup> In practice, presidents have justified

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<sup>200</sup> U.S. Constitution, art. I, sec. 8.

<sup>201</sup> U.S. Constitution, art. I, sec. 8.

<sup>202</sup> The First Militia Clause is the label used by Vladeck, “Emergency Powers.”

<sup>203</sup> Vladeck, “Emergency Powers,” 157-158; Robert W. Coakley, *The Role of Federal Military*, 14-15.

<sup>204</sup> U.S. Constitution, art. II. Vesting Clause in Section 1, Commander in Chief Clause in Section 2, Take Care Clause in Section 3.

the domestic use of the military based on these clauses, especially the Take Care and Commander in Chief clauses. Robert Coakley notes that when considered in tandem with Article VI’s establishment that the Constitution and federal were to be the “supreme Law of the Land,” these clauses gave implied powers to the president that would be worked out over time.<sup>205</sup>

In addition to the separation of powers between national institutions, the Constitution also establishes responsibilities for the federal government vis-à-vis the states. Article IV imposes requirements and constraints on federal intervention into the affairs of the states through the Guarantee clause. It notes that the United States – without specifying Congress or the president – shall guarantee a republican form of government to each state and protect them from invasion, and domestic violence.<sup>206</sup> Similarly, the federal government has a responsibility to maintain republican forms of government in the states, but in most cases doing so would require state officials to call for federal intervention.

Table 4.2. Ambiguity in the Constitution Related to Domestic Use of Military and Militia

<b>Constitutional Source</b>	<b>Clause</b>	<b>Description</b>
Art. I, Sec. 8	First Militia Clause	Enumerated powers to Congress related to regulation and calling out militia.
Art. II, Sec. 2	Commander in Chief Clause	Presidential control of militia and regular forces when called into service by Congress.
Art. II, Sec. 3	Take Care Clause	Presidential responsibility to ensure the enforcement of federal laws.
Art. IV, Sec. 4	Guarantee Clause	Federal responsibility to guarantee states’ republican forms of government and defend them from domestic violence.

<sup>205</sup> U.S. Constitution, art. VI, clause 2; Coakley, *The Role of Federal Military*, 14.

<sup>206</sup> U.S. Constitution, art. IV, sec. 4.

While the two clauses that speak most clearly to the domestic use of force are Congress's power under Article I, section 8 to "call forth the militia" and the Guarantee clause in Article IV, it is clear that presidents do share some constitutional authority over this key area of federal responsibility. Table 4.1 summarizes the shared power framework and ambiguity generated by the Constitution.

*The Articles of Confederation and Federalist Papers (nos. 9, 23, 28, 29 and 43)*

In the Federalist Papers, Alexander Hamilton and James Madison, writing under their collective pseudonym Publius, considered the usefulness of a strong national government for providing security from the dangerous effects of factions.<sup>207</sup> Each discussed the issue at some length, drawing similar conclusions about the importance of granting the national government authority to intervene when domestic disorder or insurrection existed. Daniel Walker Howe notes that Publius proposes three ways to limit factions in the Federalist papers, one being the suppression of factions through military force.<sup>208</sup> The arguments Publius presents in the Federalist essays – nos. 9, 23, 28, and 29 written by Hamilton and no. 43 written by Madison – are worthy of closer examination because they explicate this logic.<sup>209</sup>

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<sup>207</sup> I omit treatment of John Jay in this section as his essays on the coercive power of the state were directed towards external threats – i.e., foreign war.

<sup>208</sup> Daniel Walker Howe, *Making the American Self: Jonathan Edwards to Abraham Lincoln* (Oxford University Press, 1997), 96.

<sup>209</sup> Kenney, *Seizing Domestic Tranquility*, 4 see fn 10. Kenney suggests that roughly 15 percent of the Federalist Papers reference insurrection, domestic violence, or rebellion. His list includes the following essays nos. 6, 8-10, 16, 25, 26, 28, 29, 31, 43, 74, 85. Even this list may not be comprehensive, as my analysis discusses no. 23 which, in more general terms, discusses the necessity of granting the federal government power to respond to exigencies that threaten the nation (implying these could be either internal or foreign threats).

That the framers of the Constitution were concerned about collective security should come as no surprise given the specific failings of the Articles of Confederation. Most notable was the difficulty the central government had dealing with Shays' Rebellion in 1786 – 1787. The disorder began in western Massachusetts as Daniel Shays' and a large band of insurgents prevented the courts from functioning in the enforcement of debts and collection of taxes.<sup>210</sup>

This domestic disturbance is often cited as an impetus for the calling of the reform convention that led to the framing of a new Constitution.<sup>211</sup> Shays' rebellion revealed that the institutional design of the Articles of Confederation – namely, the voluntary requisition system through which states contributed to collective efforts – was unable to manage internal threats. The free-rider problems that emerged under the Articles were characteristic of voluntary systems, and it was this constitutional feature, rather than a lack of capacity, that produced an insufficient federal response to the crisis.<sup>212</sup> Alan Hirsch noted that the absence of federal enforcement mechanisms under the Articles of Confederation's made it impossible for the central government to force state cooperation when troops were needed.<sup>213</sup> Robert Coakley notes the difficulty the Confederation had raising militiamen or

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<sup>210</sup> Joseph Parker Warren, "The Confederation and the Shays Rebellion," *The American Historical Review* 11, no. 1 (1905): 42-67, especially 42.

<sup>211</sup> Coakley, *Role of Federal Military* v.

<sup>212</sup> Michael JG Cain and Keith L. Dougherty, "Suppressing Shays' Rebellion: Collective Action and Constitutional Design under the Articles of Confederation," *Journal of Theoretical Politics* 11, no. 2 (1999): 233-260.

<sup>213</sup> Alan Hirsch, "The Militia Clauses of the Constitution and the National Guard," *U. Cin. L. Rev.* 56 (1987): 919-923.

regulars, an endeavor which ultimately was funded by “private subscription from the wealthier men of the state whose interests were most directly involved.”<sup>214</sup> The reliance on militias funded largely by elites whose self-interest was threatened by the disorder laid bare the inadequacy of the Confederation and the need for a stronger executive (and militia system) to maintain domestic order. Joseph Parker Warren concluded the following in his history of Shays’ Rebellion:

“Crises like the Shays Rebellion might occur in other states than Massachusetts, and men might again look to the federal army as a possible bulwark against anarchy. But the history of the recent enlistments proved that with such questions the existing federal government had neither the power nor the capacity to deal.”<sup>215</sup>

By the conclusion of Shays’ Rebellion, the inability of the confederation government to deal with internal disorder was recognized to be a serious institutional shortcoming that needed to be remedied.

Even in the aftermath of Shays’ Rebellion, there remained widespread distrust and fear of standing armies among the American public. Richard Kohn’s history of the creation of the military establishment in the U.S. emphasizes these fears, tracing their roots to colonial experiences with British militaries in the 1770s as well as anti-military Whig thought in the aftermath of the Glorious Revolution.<sup>216</sup> The problems illuminated by Shays’ Rebellion came into conflict with this deep-seated mistrust of a standing army – put another way, there was a perceived trade-off between liberty and order. Creating a strong national

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<sup>214</sup> Coakley, *Role of Federal Military*, 5.

<sup>215</sup> Warren, “The Confederation,” 65.

<sup>216</sup> Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* (New York: Macmillan, 1975), 2-6.

government capable of maintaining order might increase the likelihood that the government would behave tyrannically. It was in this context that Hamilton and Madison made their arguments for the new Constitution.

Hamilton in Federalist no. 9 makes the argument that a “FIRM Union will be of the utmost moment to the peace and liberty of the states, as a barrier against domestic faction and insurrection.”<sup>217</sup> In other words, a strong national government would provide peace and liberty to the states against internal threats.<sup>218</sup> The implicit mechanisms to develop this protective capacity appears to be the pooling of resources by the states and the authority of the central government to engage in internal administration. Thus, if an insurrection emerged in a single state, the other states would retain the capacity needed by the federal government to quell the disorder. While Hamilton presents a compelling argument for the usefulness of the union for maintaining domestic order, he is silent on which institutions would be responsible.

In Federalist no. 23, Hamilton makes the case that the national government must be given wide discretion to ensure the common defense of the nation, both from foreign and

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<sup>217</sup> Alexander Hamilton, “Federalist No. 9: The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection,” *The Federalist Papers*, <https://guides.loc.gov/federalist-papers/text-1-10#s-lg-box-wrapper-25493272>.

<sup>218</sup> Hamilton, “Federalist No. 9.” Hamilton also explicitly links his argument to the writings of Montesquieu as a rhetorical tool. This linkage is employed by Hamilton to assuage concerns that creating a confederation would harm the interests of its constituent states. According to Hamilton, critics of the proposed Constitution cited Montesquieu’s observation that a small territory was necessary for republican government as evidence against forming a strong union. The reader is then reminded by Hamilton, and extensive direct quotations from Montesquieu’s “Spirit of Laws,” that this criticism is a misreading of Montesquieu. Hamilton, and Montesquieu, argue that a confederate republic in which the national government is supreme, but the state governments maintain important aspects of sovereignty, allows for the maintenance of local representation while also providing the protective benefits of a monarchy.



internal threats. This argument seems to support a broad interpretation of the government's emergency powers,

“IT IS IMPOSSIBLE TO FORESEE OR DEFINE THE EXTENT AND VARIETY OF NATIONAL EXIGENCIES, OR THE CORRESPONDENT EXTENT AND VARIETY OF THE MEANS WHICH MAY BE NECESSARY TO SATISFY THEM. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.”<sup>219</sup>

Hamilton emphasizes unpredictability as a justification for expanding the authority of the national government to handle crises. Like in Federalist no. 9, Hamilton does not explicitly advocate for presidential authority over congressional authority. Instead, Hamilton suggests that emergency authority should be vested in the same councils (i.e. Congress and the president) as the authority provided in the Constitution.

Hamilton also addressed the role of the federal government in cases of insurrection in Federalist no. 28 and 29 – no. 28's purpose is to rebuke anti-federalist criticisms of the legislature's powers to provide for common defense, while no. 29 focuses more narrowly on the militia. Hamilton notes the inevitability of domestic disorder to demonstrate the necessity of empowering the federal government to use force. He argues,

“THAT there may happen cases in which the national government may be necessitated to resort to force, cannot be denied. Our own experience has corroborated the lessons taught by the examples of other nations; that emergencies of this sort will sometimes arise in all societies, however constituted; that seditions and insurrections are, unhappily, maladies as

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<sup>219</sup> Alexander Hamilton, “Federalist No. 23: The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union,” *The Federalist Papers*, <https://guides.loc.gov/federalist-papers/text-21-30#s-lq-box-wrapper-25493336>

inseparable from the body politic as tumors and eruptions from the natural body.”<sup>220</sup>

Hamilton suggests that federal intervention would, at times, be necessary. He also saw the importance of flexibility in the type of force used. In cases where minor insurrections occurred within a state, Hamilton seemed confident that “the militia of the residue would be adequate to its suppression.”<sup>221</sup> The necessity of the federal government would be in cases where insurrections were more widespread, requiring resources beyond the capacity of the state(s) in which it was taking place. Hamilton argues that during more widespread insurrection, other states would need to resort to regular military forces beyond the militia. Thus, the federal government ought to have the right to do the same – i.e., use the regular army – when circumstances required it. Hamilton was careful to note that the resort to using the military should be in the hands of the “representatives of the people” as a preemptive response to anti-federalist who opposed the maintenance of a standing army.<sup>222</sup>

The purpose of Hamilton’s argument in no. 29 is threefold – to justify federal control of the militia during cases of insurrection, to argue for the legality of using the militias as a posse comitatus, and to highlight that such a system would not threaten liberty. In Federalist no. 29, Hamilton begins by highlighting the federated characteristics of the militia, as proposed in the Constitution. Hamilton argues that federal control of the militias during

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<sup>220</sup> Alexander Hamilton, “Federalist No. 28: The Same Subject Continued: The Idea of Restraining the Legislative Authority in Regard to the Common Defense Considered,” *The Federalist Papers*, <https://guides.loc.gov/federalist-papers/text-21-30#s-lg-box-wrapper-25493341>

<sup>221</sup> Hamilton, “Federalist No. 28.”

<sup>222</sup> Hamilton, “Federalist No. 28.”

times of “insurrection and invasion” are natural duties of the federal government.<sup>223</sup> His logic here is similar to the arguments developed in no. 28, but Hamilton is also careful to emphasize elements of state control over the militias as well. While it would serve the common defense to have militias organized and disciplined uniformly across the states, Hamilton notes that states would retain control over appointing officers and training the militia of their state.<sup>224</sup>

Hamilton also addresses the possibility that the militias could be used as a posse comitatus to aid in the execution of civil law. In disputing anti-federalist arguments on this issue, Hamilton notes:

“The same persons who tell us in one breath, that the powers of the federal government will be despotic and unlimited, inform us in the next, that it has not authority sufficient even to call out the POSSE COMITATUS. The latter, fortunately, is as much short of the truth as the former exceeds it. It would be as absurd to doubt, that a right to pass all laws NECESSARY AND PROPER to execute its declared powers, would include that of requiring the assistance of the citizens to the officers who may be intrusted with the execution of those laws... What reason could there be to infer, that force was intended to be the sole instrument of authority, merely because there is a power to make use of it when necessary?”<sup>225</sup>

Hamilton claims a federal authority to call out the posse comitatus and seems to imply a significant grant of discretion to executive officers to decide when it was necessary to do so. It’s worth noting that Hamilton invokes the language of the necessary and proper clause of Article I but seems to also apply it to the execution of federal laws. Overall, Hamilton

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<sup>223</sup> Alexander Hamilton, “Federalist No. 29: Concerning the Militia,” *The Federalist Papers*, <https://guides.loc.gov/federalist-papers/text-21-30#s-lg-box-wrapper-25493341>.

<sup>224</sup> Hamilton, “Federalist No. 29.”

<sup>225</sup> Hamilton, “Federalist No. 29.”

presents a constitutional logic that the federal government (and presidents) might invoke when exercising their authority to use the militia and military for domestic purposes.

Madison supplements Hamilton's views by providing a brief, but illuminating, discussion of the Guarantee Clause in Federalist no. 43. Madison's argument intends to assuage concerns that this clause will lead to abuses by the federal government against the states. However, Madison also explains the usefulness of the clause in the event of external (invasion) and internal (insurrection/rebellion) threats. For Madison, the Guarantee Clause amounts to a recognition by the members of the union that a republican form of government in each state was essential. Further, because of this shared interest, the members of the union shared a right to maintain republican forms of government in other states when those forms should be threatened by domestic violence or invasion. Madison frames this shared interest and right along these lines, arguing that "The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be SUBSTANTIALLY maintained."<sup>226</sup> Thus, it follows in Madison's view that the federal government should be responsible for enforcing this shared right of the states and arbitrating between them when conflict emerged.

To illustrate why the federal government is best positioned to enforce this guarantee, Madison attempts to explain how the Guarantee Clause will serve in practice as a potential protection for both minorities and majorities in the states. Madison explains how federal

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<sup>226</sup> James Madison, "Federalist No. 43: The Same Subject Continued: The Powers Conferred by the Constitution Further Considered," *The Federalist Papers*, <https://guides.loc.gov/federalist-papers/text-41-50#s-lg-box-wrapper-25493407> .

intervention would resolve impassioned conflicts within the states, “In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms, and tearing a State to pieces, than the representatives of confederate States, not heated by the local flame? To the impartiality of judges, they would unite the affection of friends.”<sup>227</sup> The ambiguity that might exist in some cases may make it impossible to tell which side in a conflict represents the majority interest or public good. The creation of an essentially private militia to respond to Shay’s Rebellion illustrated the pitfalls of local responses in the absence of federal authority.<sup>228</sup> This possibility, Madison concludes, makes the impartial arbitration of non-local troops essential for the resolution of domestic violence and insurrection.

The arguments made by Publius in Federalist nos. 9, 23, 28, 29 and 43 lay out the purpose and necessity of federal military intervention in domestic emergencies. They take the position that a strong union and empowered federal government were both important to the suppression of faction and protection of the states. Nevertheless, neither Hamilton nor Madison explicitly identifies which national institution would play the leading role. If interpreted in tandem with his essays on the presidency, one might argue that Hamilton intended for presidents to play the central role in these types of disputes.<sup>229</sup> However, a more cautious interpretation would be that Publius seems to leave this question unanswered (or

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<sup>227</sup> Madison, “Federalist No. 43.”

<sup>228</sup> Coakley, *Role of Federal Military*, 5.

<sup>229</sup> See especially, Alexander Hamilton, “Federalist No. 69: The Real Character of the Executive,” and “Federalist No. 70: The Executive Department Further Considered,” *The Federalist Papers*, <https://guides.loc.gov/federalist-papers/text-61-70#s-lg-box-wrapper-25493456>.

perhaps Publius takes it as settled that Congress holds the authority because of Article I, section 8), to be resolved in the operations of the new government.<sup>230</sup>

While the specifics were left to be worked out in practice, Publius lays out a detailed argument resolving the trade-off between liberty and order in favor of a strong national government capable of maintaining domestic order. These arguments provide insight into the political program pursued by the Federalists in their efforts to create a military establishment in the first decade of the new Constitution. The views of the Federalists were shaped by their military service in the Revolutionary period and their experiences under the Article of Confederation. Richard Kohn calls the Federalist proponents of a military establishment – which included the first two presidents – the “most dynamic element” in American politics in its first decade, noting that they played a crucial role in providing for the common defense and creating a “durable, lasting union.”<sup>231</sup> Neither the Constitution or *Federalist Papers* resolve the ambiguity surrounding the use of the military domestically, but Washington, Adams, and Jefferson were integral to the creation of a statutory framework that delegated authority to the president.

### **The Evolving Statutory and Judicial Framework of Authority**

This section provides a historical narrative of the evolving Insurrection Act statutory framework. Three notable pieces of the statutory framework – the Insurrection Act of 1807, the Enforcement Act of 1871, and the Posse Comitatus Act of 1878 – are only briefly discussed in this chapter because they will be discussed in much greater detail in the case

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<sup>230</sup> In the language of the entrepreneurial framework, the Constitution’s leading advocates acknowledge a fundamental ambiguity in the text regarding domestic order which will be worked out in the course of practical politics.

<sup>231</sup> Kohn, *Eagle and Sword*, 13.

study chapters. This section focuses much of its attention on the framework established in the first two decades of the new Constitution, but it also gives some treatment to the evolution of that framework during the remainder of the nineteenth century.

The origins of the statutory framework relied upon by presidents to maintain domestic order can be traced to two acts of Congress during the Federalist era – the Calling Forth Acts of 1792 and 1795. Congress delegated a substantial amount of its constitutional authority – almost the entirety of the First Militia Clause – to the president in these acts.<sup>232</sup> However, the initial delegation of authority was temporary and came with several requirements and constraints. It was only after Washington exercised this authority to quell the Whiskey Rebellion that Congress eased these procedural constraints and made the delegation permanent. Washington’s actions were a driver of the second Calling Forth Act in 1795. This early period illustrates how Washington’s careful use of temporary authority persuaded Congress of the necessity for permanently delegating presidents the authority to use the militia to maintain order.<sup>233</sup> Taken together Washington, Adams, and Jefferson responded in what could be construed as entrepreneurial, or at least strategic, ways when faced with domestic disorder.<sup>234</sup> Their strategic invocation of statutory authority and involvement in the legislative process set precedents and expanded authority for subsequent presidents.

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<sup>232</sup> Stephen I. Vladeck, "Emergency Power."

<sup>233</sup> For a recent discussion of how Washington and his cabinet set several important precedents for subsequent presidents, see Lindsay M. Chervinsky, "The Historical Presidency: George Washington and the First Presidential Cabinet," *Presidential Studies Quarterly* 48, no. 1 (2018): 139-152.

<sup>234</sup> Kohn, *Eagle and Sword*, 13. Kohn calls the Federalist proponents of a military establishment – which included the first two presidents – the “most dynamic element” in American politics in its first decade, noting that they played a crucial role in providing for the common defense and creating a “durable, lasting union.”

*The Whiskey Rebellion and the Calling Forth Acts of 1792 and 1795*

The first three sections of the Calling Forth Act of 1792 lay the statutory framework upon which all subsequent legislation would be built. The first section of the bill discusses foreign policy, granting presidents the authority to call forth the militia in case of foreign invasions or attacks from Native American tribes, and also delegates presidents the same authority to domestic insurrections. However, when used domestically the law required an application from the state legislature (or governor).<sup>235</sup> This language aligns with the requirements established in the Guarantee Clause – namely, that the state legislature (or governor when the legislature cannot be convened) must ask for federal assistance in cases of insurrection before the president can intervene.<sup>236</sup>

In contrast, the second section generated vigorous debate in the House about the distinction between cases of insurrection against the federal government and less severe resistance of federal laws.<sup>237</sup> The contention emerged over the provision that the military could be used to ensure the execution of federal laws in the states. Opponents of the bill raised concerns about the potential substitution of civil law enforcement for martial law, as well as the potential that such a power might be used by the president for isolated acts of

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<sup>235</sup> An Act to Provide for Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions, U.S. Statutes at Large 1 (1792): 264-265.

<sup>236</sup> Coakley, *Role of Federal Military*, 20. Despite the similarity, Coakley notes that the term insurrection was not “in consonance with the constitutional guarantee” against domestic violence guaranteed by Article IV. Instead, it seems that domestic violence referred to more minor disturbances or disorders that did not meet the criteria of insurrection against the state government.

<sup>237</sup> David E. Engdahl, "Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders," *Iowa Law Review* 57, no. 1 (October 1971): 45.



crime.<sup>238</sup> After this significant debate, Congress eventually decided to keep this section in the final version.

The bill also includes three explicit limitations on presidential authority. First, it required presidents to receive a judicial notification before calling forth the militia. This suggests, contrary to subsequent statutes and Supreme Court decisions, that the president may not unilaterally determine whether the conditions that require intervention exist.<sup>239</sup> Second, it includes an explicit expiration date on interventions by clarifying that when presidents use troops from other states to intervene in a state, that they may only do so without authorization for 30 days after Congress returns to session.<sup>240</sup> Finally, it established a requirement that presidents publish a proclamation requesting the insurgents to “disperse and retire peaceably to their respective abodes within a limited time” before intervening with the militia.<sup>241</sup> This requirement essentially sought to give belligerents a final chance to stop their activities, while also serving as an imminent threat should they fail to do so. These proclamations serve as “cease and desist” orders to lawbreakers in a given area.<sup>242</sup>

The first practical test of this congressional delegation, and a first example of strategic action by a president, came with the emergence of the Whiskey Rebellion in

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<sup>238</sup> Coakley, *Role of Federal Military*, 21 cites passages from the House debate of the bill in which this section was amended and several attempts to strike out section 2 entirely failed. He also notes on p. 19 that the original wording of the bill was not preserved in the record, which means the best guess about differences between the original and final versions should be derived from these debates.

<sup>239</sup> *Martin v. Mott*, 25 U.S. 19 (1827).

<sup>240</sup> The purpose of proclamations discussed in Wilson, *Federal Aid*, 32-33.

<sup>241</sup> Wilson, 32-33.

<sup>242</sup> Laurie and Cole, *Role of Federal Military*, 20.

western Pennsylvania during the summer of 1794. The rebellion largely broke out as a response to federal excise taxes that threatened whiskey distillers in the region. Frederick Wilson notes that since Congress's passage of the excise tax in 1791, that tax collectors had been resisted and assaulted by the locals.<sup>243</sup> However, it was not until 1794 that the level of lawlessness in the region escalated to the point where intervention was deemed necessary by the administration.

The Washington administration's initial reaction to the insurrection was to prepare to use force immediately. However, after meeting with Pennsylvania state officials, Washington showed greater restraint before exercising his authority. The meeting revealed potential barriers and negative reactions to intervention. First, Washington found that getting a judicial certification, as required by the 1792 law, might require the authentication of correspondence on the situation in western Pennsylvania. Second, Washington found that Pennsylvania state officials, including Governor Thomas Mifflin and the state attorney general, were unsupportive of federal intervention.<sup>244</sup> It was in light of these constraints, that Washington acted cautiously and deliberately. The administration first sent a federal peace commission to the affected area, and it was only when negotiations reported their lack of progress that the administration began its preparation for intervening with the militia.<sup>245</sup> Washington called forth the militia, mainly raising troops from Maryland, New Jersey, Pennsylvania, and Virginia who were eventually sent to western Pennsylvania in late 1794.

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<sup>243</sup> Wilson, *Federal Aid*, 34.

<sup>244</sup> Kohn, *Eagle and Sword*, 161-164.

<sup>245</sup> Kohn, 164-165.

The militia operation successfully restored order; in fact, by the time the militia marched to western Pennsylvania they met no resistance because most of the rebels had fled the area.<sup>246</sup>

Washington's successful wielding of this delegated authority contributed to Congress's decision to make the Calling Forth Act permanent and expanding the president's authority under it. After rigorously following the procedural requirements of the 1792 law, Washington requested for Congress to remedy the "striking defects" of the 1792 law by providing better "organizing, arming, and disciplining" of the militia so they could be more effectively called forth to deal with future domestic disorders.<sup>247</sup> Laurie and Cole explain the 1795 statutory delegation through a principal-agent framework. They conclude that Washington's military success, as well as his faithful use of authority and close following of the statutory requirements, in handling the Whiskey Rebellion led to the subsequent grant of authority.<sup>248</sup> Washington's careful actions, and ultimately effective intervention, seemed to assuage congressional concerns about delegating their First Militia Clause authority to presidents on a more permanent and complete basis. Thus, to understand the 1795 Calling Forth Act, one must understand Washington's strategic actions as well as the broader constraints that shaped those actions.

The 1795 law made two significant revisions to the 1792 law in-line with the spirit of Washington's requests. First, the provision requiring judicial notification of the president as

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<sup>246</sup> Coakley, *Role of Federal Military*, 43 – 65 provides a detailed history of the rebellion from the raising of militia quotas in the various states, Washington and Hamilton's oversight and involvement, the militia's march through poor conditions, and ultimately the arrest of remaining rebels.

<sup>247</sup> George Washington, Sixth Annual Address to Congress Online, The American Presidency Project <https://www.presidency.ucsb.edu/node/207788>

<sup>248</sup> Laurie and Cole, *Role of Federal Military*, 18.

pre-requirement for presidential action was dropped. This change delegated significant discretion to presidents, making them the sole judge of whether circumstances justified the use of his statutory powers.<sup>249</sup> Second, presidents were authorized to call forth the militia to suppress domestic violence, expanding the possible conditions that might justify presidential use of the militia.<sup>250</sup> These two acts established the statutory foundations on which future institutional conflict would play out.

To borrow Daniel Tichenor's metaphor, Washington's careful use of his domestic emergency powers created a "loaded weapon" that would lie dormant for future presidents to use when needed.<sup>251</sup> Bennett Milton Rich came to similar conclusions when discussing Washington's actions to end the Whiskey Rebellion. Rich thought that Washington's action set up "guideposts for later presidents faced with internal disturbances," including "His patience over a considerable period of law violation, his attempt at conciliation and peaceful settlement, his efforts to enlist the co-operation of state officials, and his especial concern for protection of the civil rights of the citizenry."<sup>252</sup> This gradual process of accumulation by presidents – of authority and precedents for exercising that authority – expanded the options available to future presidents.

*The Insurrection Act: Adams, Jefferson, and the Strategic Invocation of Statutes*

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<sup>249</sup> *Martin v. Mott*, 25 U.S. 19 (1827). The Supreme Court's ruling in this case provided judicial support for this interpretation: "The authority to decide whether the exigencies contemplated in the Constitution of the United States and the Act of Congress of 1795, ch. 101, in which the President has authority to call forth the militia, "to execute the laws of the union, suppress insurrections, and repel invasions" have arisen is exclusively vested in the President, and his decision is conclusive upon all other persons."

<sup>250</sup> Corwin, *President*, 131.

<sup>251</sup> Tichenor, "Historical Set Points," 772.

<sup>252</sup> Bennett Milton Rich, *The Presidents and Civil Disorders* (Brookings Institute, 1941), 20.

The legislative history of the Insurrection Act of 1807 shares similarities to the Calling Forth Acts. First, like the 1795 revision, the 1807 act was preceded by a temporary delegation of authority on March 2, 1799. During John Adams' presidency, Congress passed a law giving the president authority to augment the army (through the creation of a provisional, volunteer army) in response to looming international tension with France. The bill gave Adams authority to deploy newly raised army regulars for any of the purposes allowed for under the Calling Forth Acts.<sup>253</sup> When Fries' Rebellion broke out in early 1799, resulting in the obstruction of the local marshal's execution of the law, Adams' swiftly used this new authority.<sup>254</sup> Coakley concluded that Adams "stretched the president's legal prerogatives" by using army regulars to supplement the militia, despite only having the 1799 provisional army act as a statutory defense.<sup>255</sup> Adams' handling of Fries' Rebellion was innovative, illustrating how presidents may strategically interpret statutory authority for purposes beyond its original intent.

It was not until 1807, however, that this temporary delegation would be made permanent with the passage of the Insurrection Act. The Insurrection Act allowed presidents

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<sup>253</sup> An Act Giving Eventual Authority to the President of the United States to Augment the Army. U.S. Statutes at Large 1 (1799): 725.

<sup>254</sup> Wilson, *Federal Aid*, 43-44; Coakley, *Role of Federal Military*, 70-75; *Annals of Congress* 10, 1297-1298. Wilson, 43 notes the intrusive nature of the valuation of property under existing tax laws, during which inspectors would count the number of windows on a building, created widespread discontent and resistance to the law. Federal intervention was deemed necessary after the U.S. Marshal Nichols was obstructed in carrying out subpoenas for local citizens who resisted the law. Nichols had made around 17 arrests in the area and was holding several prisoners at a local tavern when a large group of armed locals forced Nichols to release his prisoners under threat of violence. Unlike Washington, the Adams administration acted quickly to mobilize the militia and faced little resistance from state officials. The results were quite similar to those of the Whiskey Rebellion. By the time federal forces reached the affected counties they faced no organized resistance and essentially served as a posse comitatus to round up the ringleaders and others who had been subpoenaed.

<sup>255</sup> Coakley, *Role of Federal Military*, 77.

to use the military (i.e., army and navy) for any purposes authorized under the Calling Forth Acts. The temporary authority granted to Adams was made permanent by the Insurrection Act in the waning years of Jefferson's presidency. The impetus for passage of the Insurrection Act was a conspiracy by Jefferson's ex-Vice President, Aaron Burr, the details of which remain somewhat unclear. Frederick Wilson concludes that even Burr was uncertain of his exact designs, claiming that "he himself could not have told" his ultimate objective.<sup>256</sup> Coakley notes that uncertainty remained among more recent historians, but that Burr's plan included some of the following potential elements – leading an expedition down the Mississippi River to seize New Orleans, using the leverage of controlling New Orleans to separate some western territory from the United States, and potentially seizing Spanish held territories.<sup>257</sup> For the purposes of this paper, Burr's conspiracy is important because it represented a significant challenge to the union and because of the response it elicited from the Jefferson administration.

Jefferson issued a formal proclamation on November 27, 1806, after meeting with his cabinet, which ordered those involved in a planned military expedition against the dominion of Spain to cease their activities.<sup>258</sup> The framing of the proclamation was an act of

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<sup>256</sup> Wilson, *Federal Aid*, 46. Thomas Jefferson noted the murky nature of the evidence in his report to Congress after the situation was resolved, suggesting that the information he received came "chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator." See Thomas Jefferson, Message to Congress on the Burr Conspiracy, The American Presidency Project <https://www.presidency.ucsb.edu/node/202052>

<sup>257</sup> Coakley, *Role of Federal Military*, 78. Coakley derives these conclusions from two biographies of Burr and his conspiracy, but notes that these biographies infer Burr's ultimate motives with little direct evidence.

<sup>258</sup> Thomas Jefferson, Proclamation 13—Warning Against Unauthorized Military Expedition Against the Dominions of Spain, The American Presidency Project <https://www.presidency.ucsb.edu/node/203136>; Jefferson also updated Congress on the issue in his annual message, see Thomas Jefferson, Sixth Annual Message, The American Presidency Project <https://www.presidency.ucsb.edu/node/202839>

strategic entrepreneurship, akin to Adams' strategic choice between sources of statutory authority. Coakley notes that Jefferson's proclamation frames the threat as being international in nature – an expedition against a foreign nation – rather than as being a domestic insurrection, despite the administration's belief that the plot also threatened domestic insurrection against the United States.<sup>259</sup> This framing was a strategic decision by the Jefferson administration to allow it to justify its response under the 1794 neutrality legislation, rather than the Calling Forth Act of 1795. While the Calling Forth Act would have only allowed Jefferson to use the militia, the neutrality legislation allowed the president to employ the militia and federal regulars as a “sort of grand *posse comitatus* to enforce that law.”<sup>260</sup> This type of statutory venue shopping casts Jefferson as an entrepreneur, exploiting ambiguity generated by institutional complexity to expand the enforcement capacity that would be available to him to resolve a threat to domestic order.

Jefferson's entrepreneurship was not confined to strategic invocation of statutes. The president was also integral in the passage, and content, of the Insurrection Act. Jefferson viewed the illegality of calling out army regulars to deal with domestic insurrections as a significant hindrance to the common defense of the union.<sup>261</sup> In a letter to John Dawson, a Republican ally and member of the House from Virginia, Jefferson sent a draft of legislation that would eventually become the Insurrection Act of 1807. Jefferson's draft legislation is noteworthy because of its similarity to the final legislation passed by Congress,

“A Bill authorizing the employment of the land and naval forces of the US in cases of insurrection. Be it enacted &. That in all cases of insurrection & of obstruction to

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<sup>259</sup> Coakley, *Role of Federal Military*, 80.

<sup>260</sup> Coakley, 80.

<sup>261</sup> The reader should note the significant difference between Jefferson's constitutional construction and Fillmore's cited in the previous section.

the laws of the US or of any individual state or territory, where it is lawful Presid't of the US to call forth militia to suppress such insurrection, or to cause the law to be duly executed, it shall also be lawful for him to employ for the same purposes such part of the land or naval forces of the US as shall be judged necessary, under the same restrictions and conditions as are by law provided and required for the employment of militia in the same case."<sup>262</sup>

This correspondence also casts some light on Jefferson's leadership of Congress and bridging of the separation of powers through hidden channels. Greenstein notes that Jefferson often drafted legislation to then be introduced by his allies in Congress.<sup>263</sup> As the letter indicates, Jefferson engaged in this type of legislative leadership to expand the president's authority to deal with insurrections. The president was also quite careful to cover up his tracks, writing on the outside of his letter to Dawson, "TH. Jefferson presents his compliments to Mr. Dawson, & his request that he will be so good as to copy the within and burn the original, as he is very unwilling to meddle personally with the details or the proceedings of the legislature."<sup>264</sup> The restraints of the early republican period, with its reverence for the separation of powers, made it necessary for Jefferson to lead behind the scenes. Yet, it is clear that one cannot explain the passage of the Insurrection Act without understanding Jefferson's entrepreneurship on its behalf.

The language of the Insurrection Act, which became law on March 3, 1807, is brief, straightforward, and most significantly is nearly identical to the draft legislation sent by Jefferson to Dawson. Table 4.3 compares Jefferson's draft legislation with the final version passed by Congress. The Insurrection Act expanded the institutional resources available to

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<sup>262</sup> Library of Congress, Manuscript Division, *Thomas Jefferson to John Dawson*. -12-19, 1806. Manuscript/Mixed Material. <https://www.loc.gov/item/mtjbib016689/>.

<sup>263</sup> Fred I. Greenstein, "Presidential Difference in the Early Republic: The Highly Disparate Leadership Styles of Washington, Adams, and Jefferson," *Presidential Studies Quarterly* 36, no. 3 (2006): 381.

<sup>264</sup> Library of Congress, *Jefferson to Dawson*.



presidents by allowing the president to call upon the army and navy to respond to insurrection or obstruction of the law in any case where the Calling Forth acts would make it lawful for the president to call up the militia for those purposes. This change marks a significant expansion of presidential capacity to maintain domestic order.

Table 4.3. Comparison of Jefferson’s Draft Legislation to Congressional Version of Insurrection Act of 1807.

Jefferson Draft Legislation	Final Version Passed by Congress
<p>“A Bill authorizing the employment of the land and naval forces of the US in cases of insurrection. Be it enacted &amp;. That in all cases of insurrection &amp; of obstruction to the laws of the US or of any individual state or territory, where it is lawful Presid’t of the US to call forth militia to suppress such insurrection, or to cause the law to be duly executed, it shall also be lawful for him to employ for the same purposes such part of the land or naval forces of the US as shall be judged necessary, under the same restrictions and conditions as are by law provided and required for the employment of militia in the same case.”<sup>265</sup></p>	<p>“That in all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all the pre-requisites of the law in that respect.”<sup>266</sup></p>

It also foreshadowed that the delegation and exercise of presidential authority to maintain domestic order would transcend partisanship. Despite the Republican criticisms of the Federalist administrations for their use of the military and creation of the military establishment, Jefferson behaved similarly when he occupied the White House. In doing so, he took a more overt role pursuing further statutory delegations of authority from Congress. Both Washington and Jefferson acted strategically to shape the distribution of institutional authority in ways that enhanced the president’s position. Their construction of the

<sup>265</sup> Library of Congress, *Jefferson to Dawson*.

<sup>266</sup> An Act Authorizing the Employment of the Land and Naval Forces of the United States, in Cases of Insurrections. U.S. Statutes at Large 2 (1807): 443.

Constitution was based on a Lockean view that dichotomized extra-legal emergency from non-emergency powers, and as a result they sought explicit statutory sources of authority to justify their responses to domestic threats.<sup>267</sup> This construction was consistent with public concerns about peacetime standing armies and executive tyranny. Nevertheless, their efforts consolidated the delegation of a broad swath of authority in the original constitutional framework from Congress to the executive.

### **The Fugitive Slave Act of 1850, the Cushing Doctrine, and the Federal Posse Comitatus**

The 1850s were one of the most intensely polarized decades in American history, ultimately ending in the Civil War. The president's authority to maintain domestic order evolved during this period in response to several challenges – resistance in northern states to the execution of the Fugitive Slave Act of 1850, bloody conflict between pro and anti-slavery forces in the Kansas territory, the emergence of vigilante groups in the California territory, and an expedition against Mormons in the Utah Territory. In particular, the Fugitive Slave Act of 1850 sparked a significant period in the institutionalization of the president's domestic law enforcement responsibilities. Joshua Miller argues that the efforts of Presidents Fillmore, Pierce, and Buchanan, as well as their attorneys general, to enforce the fugitive slave law marks the institutional beginning of the law-and-order presidency.<sup>268</sup> In the theoretical framework of this study, these presidents and attorneys general engaged in entrepreneurial innovation – constructing a new understanding of executive authority and creatively deploying the military as part of the posse comitatus. The result was a significant

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<sup>267</sup> Lobel, "Emergency Power."

<sup>268</sup> Joshua Miller, "The Historical Presidency: The Rendition of Fugitive Slaves and the Development of the Law-and-Order President, 1790–1860," *Presidential Studies Quarterly* 49, no. 3 (2019): 684-697.

enhancement of executive power and discretion codified in legal opinions generated within the executive branch, rather than in congressional statutes.

This section focuses primarily on Fillmore because he was the first of these presidents to interpret presidential authority in this way. Before turning to the details of Fillmore and the Cushing Doctrine, context about the status of federal power in the antebellum period is worth noting. Gautham Rao's history of the federal posse comitatus doctrine highlights the episodic nature of federal coercive power before the Fugitive Slave Act of 1850. In the antebellum period it was typically the state governments that would call citizens into compulsory service in the posse comitatus, primarily in the form of slave patrols.<sup>269</sup> While the Calling Forth and Insurrection Act frameworks empowered the federal government to deploy the military and state militias for the purpose of suppressing rebellions and insurrections, the federal government's regular law enforcement capacity was limited to the U.S. Marshals. In other words, the use of the military as part of the posse comitatus – temporarily in service of civil law enforcement – was not a legitimate federal function prior to 1850. Much of the controversy surrounding the federal posse under the Fugitive Slave Act of 1850 was that it placed the federal government, and as a result citizens, into the service of southern slaveholders.<sup>270</sup> This inextricable connection between slavery and federal coercion cannot be ignored.

Fillmore's sent a message to Congress in February 1851 in the aftermath of a group of black citizens freeing a fugitive slave from confinement in Boston.<sup>271</sup> After issuing a

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<sup>269</sup> Gautham Rao, "The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America," *Law and History Review* 26, no. 1 (2008): 1-56.

<sup>270</sup> Rao, "Federal Posse," 20.

<sup>271</sup> Coakley, *Role of Federal Military*, 130.

“cease and desist” proclamation to those resisting the fugitive slave laws, Fillmore followed up with a message to Congress in which he articulated a novel construction of presidential authority.<sup>272</sup> Fillmore’s construction claimed that presidential authority resided outside the statutory framework of the Calling Forth and Insurrection Acts:

“the Constitution declares that ‘the President shall take care that the laws be faithfully executed,’ and that ‘he 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,’ and that ‘Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.’ From which it appears that the Army and Navy are by the Constitution placed under the control of the Executive; and probably no legislation of Congress could add to or diminish the power thus given but by increasing or diminishing or abolishing altogether the Army and Navy. But not so with the militia. The President can not call the militia into service, even to execute the laws or repel invasions, but by the authority of acts of Congress passed for that purpose... the act of March 3, 1807, authorized the President to use the land and naval forces of the United States for the same purposes for which he might call forth the militia, and subject to the same proclamation. But *the power of the President under the Constitution, as Commander of the Army and Navy, is general, and his duty to see the laws faithfully executed is general and positive*; and the act of 1807 ought not to be construed as evincing any disposition in Congress to limit or restrain this constitutional authority.”<sup>273</sup>

Fillmore’s logic is nuanced, creating a distinction between the foundation of presidential authority when using the militia versus the army and navy. Fillmore proposes that presidents need not rely solely on their statutory authority when using the military to maintain domestic order.

This interpretation marks a significant moment of departure for presidents. Instead of relying solely on their statutory authority, Fillmore’s logic suggests that presidents also

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<sup>272</sup> Coakley, 130.

<sup>273</sup> Millard Fillmore, Special Message, February 19, 1851, The American Presidency Project <https://www.presidency.ucsb.edu/node/201052>, emphasis added.

could point to inherent authority derived from Article II of the Constitution. While the First Militia Clause of Article I, section 8 of the Constitution expressly granted Congress authority over the militia, Fillmore implies that the same was not true of the military because of the Commander in Chief Clause. The Senate's decision not to challenge Fillmore's message suggests that there was at least some tacit congressional acknowledgment of this view.<sup>274</sup> Coakley notes that the congressional debate was "acrimonious" but revolved more around "southern aggrievement at the failure to enforce the law" than the president's message.<sup>275</sup>

The bold construction of executive power articulated by Fillmore in 1851 was intended to convince Congress to eliminate the proclamation requirements of the Insurrection Act framework. According to Edward Corwin, Fillmore feared that the proclamation requirement would undermine the use of the military to aid the civil authorities in the enforcement of the fugitive slave laws by putting "unruly elements on notice."<sup>276</sup> In other words, the proclamation would aid people obstructing the fugitive slave laws by alerting them to federal interventions before they occurred. Fillmore's proposed reform presents an interesting rationale. Fillmore claimed the intent of the laws was that the proclamation requirement would only apply to cases of organized insurrection, not mere obstruction of federal laws. Fillmore expresses these views, arguing that,

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<sup>274</sup> Candidus Dougherty, "Necessity hath no law: Executive power and the Posse Comitatus Act," *Campbell L. Rev.* 31 (2008): 11. Dougherty notes that it was debated if presidents had inherent authority under the Constitution during Fillmore's presidency, and concludes it was decided that presidents did have this authority.

<sup>275</sup> Coakley, *Role of Federal Military*, 130.

<sup>276</sup> Corwin, *President*, 132.

“the proclamation seems to be in words directed only against insurgents, and to require them to disperse, thereby implying not only an insurrection, but an organized, or at least an embodied, force. Such a proclamation in aid of the civil authority would often defeat the whole object by giving such notice to persons intended to be arrested that they would be enabled to fly or secrete themselves.”<sup>277</sup>

Fillmore’s interpretation of the proclamation seems to imply that the requirements on presidential use of statutory authority may undermine their more general duty to effectively execute the laws. Fillmore’s tactics show deference to the existing law and Congress – he submitted legislation to Congress requesting a modification to the proclamation requirement but did not engage in extra-legal actions. Nevertheless, the purpose of his message is unambiguous – Fillmore wanted to remove the statutory restrictions placed on him, which he viewed as impeding the successful fulfillment of his higher, constitutional responsibilities.

In the absence of legislation eliminating the proclamation requirement, the Pierce administration accomplished the same ends pursued by Fillmore unilaterally. Pierce’s Attorney General Caleb Cushing wrote an opinion in 1854, which came to be known as the Cushing Doctrine, authorizing U.S. marshals to call forth the military as part of a *posse comitatus* when their execution of the laws was resisted. Cushing summarized his construction of executive authority, as follows:

“A Marshal of the United States, when opposed in the execution of his duty, by unlawful combinations, has authority to summon the entire able-bodied force of his precinct, as a *posse comitatus*. This authority comprehends, not only bystanders and other citizens generally, but any and all organized armed force, whether militia of the State, or officers, soldiers, sailors, and marines of the United States. If the object of resistance to the Marshal be to obstruct and defeat the execution of provisions of the Constitution or of acts of

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<sup>277</sup> Fillmore, Special Message, February 19, 1851.

Congress, the expenses of such *posse comitatus* are properly chargeable to the United States. Attempts, in any State of the Union, to prevent the extradition of fugitives from service, are covered by the principles of this opinion.<sup>278</sup>

This opinion had two significant effects on the president's authority. First, the opinion essentially created a loophole to the proclamation requirement by allowing marshals to ensure the faithful execution of the law by including anyone, including the military, in the *posse comitatus*. In that regard, the doctrine enhanced the power of the executive branch to fulfill the Take Care clause. Second, while the opinion generally removed congressional constraints on the executive branch, it also established a decentralized decision-making framework that diminished the decision-making power of presidents. While presidents could still exert control over their executive branch subordinates, it was possible under the Cushing doctrine for individual marshals to use the army to enforce the law without express authorization from the president. The Fillmore and Pierce administrations' pursuit of weakening the proclamation requirement further demonstrates a broad interpretation of presidential authority and a willingness to bypass Congress when it would not acquiesce to presidential preferences.

### **The Suppression of the Rebellion Act of 1861 and the Ku Klux Klan Act of 1871**

The final two statutory expansions to the Insurrection Act framework occurred during the Civil War and Reconstruction, both expanded the scope of presidential authority significantly. Compared to the other statutory expansions discussed in this chapter, these were responses to the most significant crises and internal threats to the union in the nineteenth century. The Civil War certainly meets the standard of emergency envisioned by

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<sup>278</sup> Caleb Cushing, "Extradition of Fugitives from Service," May 27, 1854, in *Posse Comitatus Act of 1878: A Documentary History*, Stephen Young, ed. (Buffalo, NY, William S. Hein & Co., Inc., 2003). This opinion of Attorney General Caleb Cushing embodies the principles known as the Cushing Doctrine.

scholars of executive prerogative, and Reconstruction stands out for the continuous and persistent federal presence in the southern states.

The Suppression of the Rebellion Act made shifted the authority delegated to the president in several ways. Perhaps most notably was a slight change in language from the Calling Forth Act of 1795. The section containing the most significant revision states:

“That, whenever, by reason of unlawful obstruction, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall be become impracticable, in the judgement 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 of the United States, it shall be lawful for the President of the United States to call forth the militia of any or all States of the Union, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States...”<sup>279</sup>

As Vladeck notes, the 1861 law made it legal to use the military when the president deems it “impracticable” to enforce the laws of the United States.<sup>280</sup> The language in the 1795 act only applies when execution of the laws is “obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings.”<sup>281</sup> The difference in language lowers the standards in which presidential intervention is justified, consistent with the court’s ruling in *Luther v. Borden*.<sup>282</sup> The president may use the military when he

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<sup>279</sup> An Act to Provide for the Suppression of the Rebellion Against 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 Laws of the Union. U.S. Statutes at Large 12 (1861): 281-282.

<sup>280</sup> Vladeck, “Emergency Power,” 166.

<sup>281</sup> An Act to Provide for Calling Forth the Militia to Execute the Laws of the Union, Suppress Insurrections, and Repel Invasions, U.S. Statutes at Large 1 (1792): 264-265.

<sup>282</sup> *Luther v. Borden*, 48 U.S. 1 (1849). In this case the majority decision of the Court established that when multiple parties claimed to be the legitimately elected state government, that the federal government’s role in resolving the dispute was a political question to be decided by the Congress and the President. The decision provided a post hoc legitimization of President Tyler’s decision not to intervene in the Dorr Rebellion in Rhode Island.



deems the execution of laws to be impracticable, which is distinct from the presence of combinations “too powerful” to be suppressed without federal intervention.

The final expansion to the Insurrection Act framework came with the passage of the Ku Klux Klan Act in 1871. This law was the third passed by Congress during 1870 and 1871 for the purpose of enforcing the Fourteenth and Fifteenth amendments. The immediate purpose of the legislation was to respond to widespread voter intimidation and violence being committed by the Ku Klux Klan and other white terrorist organizations against southern Black citizens. The broad construction of the legislation made two significant expansions to the president’s authority. First, it expands the scope of the existing framework to include the protection of constitutionally guaranteed rights from infringement. Second, section 4 states that when the president deemed that certain conditions of rebellion existed, the president could suspend the writ of habeas corpus. While the bill is too long to include in full, section 3 is provided below because it is most directly related to the Insurrection Act Framework:

“Sec. 3 That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such right, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such he cases, or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States or the due execution thereof, or impede or obstruct the due course of justice under the same, it shall be lawful for the President, and it shall be his duty to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence...”<sup>283</sup>

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<sup>283</sup> An Act to Enforce the Provision, of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, U.S. Statutes at Large 17 (1871): 13-15.

Notably, the Reconstruction-era regime of federal military intervention in the South was short-lived. Political support for military reconstruction eroded over time, ultimately resulting in Supreme Court decisions that rendered most of the Ku Klux Klan Act and Civil Rights Act of 1875 powerless.<sup>284</sup> Nevertheless, this period provides a most-likely case for observing the mechanisms of presidential entrepreneurship, even if any structural changes were partially undone.

### **Posse Comitatus Act as Constraint? Interpretations of Presidential Authority after Reconstruction**

In June 1878, largely in response to perceived abuses of federal military power during Reconstruction, Congress passed the Posse Comitatus Act (PCA) as part of the Army Appropriation bill that year. The PCA section is only a single sentence making it illegal for the army to be used as a posse comitatus by civilian law enforcement. The language of the bill significantly includes a clause making exceptions when such use is expressly authorized by the Constitution or statutes of the United States,

“From and after the passage of this act it shall not be lawful 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*; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person wilfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment.”<sup>285</sup>

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<sup>284</sup> *United States v. Cruikshank*, 92 U.S. 542 (1875); *Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>285</sup> An Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June Thirtieth, Eighteen Hundred and Seventy-Nine, and for Other Purposes. U.S. Statutes at Large 20 (1878): 152.

In his analysis of the presidents' domestic military authority under the PCA, Judge Adjutant General Guido Norman Lieber emphasized the implicit constitutional powers of the president. Lieber discusses the nature of executive power in these terms:

“The President’s constitutional duty to take care that the laws are faithfully executed must be carried out by means placed in his hands by or under the Constitution. If Congress does not prescribe means, he must use such means as the Constitution supplies him with. These means are not specifically set forth in the Constitution. They are *incidental to and implied in his general powers*.”<sup>286</sup>

This interpretation, which precedes the Supreme Court’s ruling in *Youngstown* by over 50 years, comes to similar, but more permissive, conclusions about executive power than that landmark case. When Congress does not provide the means necessary for the president to fulfill their responsibility under the Take Care Clause, presidents have an implied authority to use the means they deem appropriate (including the use of the military) to fulfill that constitutional responsibility. That is, if Congress has not explicitly made it illegal for the president to take an action than the president may do so if it allows them to fulfill their constitutional duty.

Lieber also raises a significant constitutional question about the PCA’s limitations that sheds light on the separation of powers framework. Lieber notes that the final clause of the PCA forbids the use of funds appropriated by the act to “pay the expenses incurred in the employment of any troops in violation of it.”<sup>287</sup> Thus, the PCA invokes Congress’s power to withhold appropriations as a strategy to shape the executive’s actions. While Lieber notes

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<sup>286</sup> Guido Norman Lieber, *The Use of the Army in Aid of the Civil Power*, No. 64. (US Government Printing Office, 1898), 55-56 emphasis added.

<sup>287</sup> Lieber, *Use of the Army*, 56.

that this clause was constitutional, he uses it to illustrate the limitations of congressional power over the executive.

Taken together, presidents, attorney generals, and Congress generally interpreted the PCA as largely inapplicable to the types of domestic military interventions allowed under the existing statutory framework. Along with these political and legal interpretations of the PCA, presidential actions demonstrate its limits as a constraint on presidential authority. Candidus Dougherty highlights the irrelevance of the PCA, concluding that the PCA did not affect domestic use of the military from 1877 – 1945.<sup>288</sup> It is worth emphasizing that Hayes, Arthur, Cleveland, and Benjamin Harrison all deployed troops to assist civil officers in the execution of law during the late 1870s, 1880s, and 1890s. This use of the military, while authorized under the Insurrection Act's language, seems to most closely resemble the restrictions intended by Congress in the PCA. In many of these cases – Hayes' deployment of troops to New Mexico, Arthur's to Arizona, Cleveland's deployment in response to mob violence in the Washington territory, Harrison's use of the Revenue Cutter service to depose a violent Florida Mayor – general criminality, not organized insurrection, were the focus of military interventions. Despite the PCA, the post-reconstruction presidents and their attorney generals exercised their authority to maintain domestic order. The least-likely cases from this period – the Lincoln County War and lawlessness in Arizona – explore whether presidents Hayes and Arthur engaged in entrepreneurial innovation to expand the institutional authority of the president.

### **Heterogeneity of Institutional Components: The Capacity to Maintain Order**

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<sup>288</sup> Dougherty, "Necessity Hath no Law," 14.

While much of this project’s focus is on the entrepreneurship of high-level executive officials, we can also trace institutional capacity through the creation, funding, and use of civil and military bureaucracies. The creation of new bureaucratic agencies signals increased institutional capacity, but also may create new opportunities for innovation by enhancing the assets and ideas available to presidents. There were several institutional components that shared responsibility over law enforcement and maintaining domestic order in the nineteenth century. Among these, were state militias that came under federal control when needed (e.g., state sanctioned and volunteer militia organizations), the military (e.g., the Army, Navy), executive-controlled law enforcement agencies (e.g. the Secret Service, the U.S. Marshals), and the executive departments responsible for these various organizations (e.g. the War Department, Department of Justice). While most of these institutional components had only limited capacity, they still presented options to be used in the maintenance of domestic order. To highlight the complexity of heterogeneous institutional components, table 4.4 summarizes the major law enforcement and defense agencies responsible for various elements of national defense and order.

The origins of the agencies in table 4.4 highlight the gradual enhancement of institutional capacity in this area of governance<sup>289</sup>. Within the framework of entrepreneurship, the presence of heterogeneous components generates institutional complexity that presidents can exploit by creatively combining and recombining elements of capacity in innovative ways. While the early twentieth century contains several “modernizing” moments – e.g., the creation of the Federal Bureau of Investigation and the modernization of the militia system through the Dick Act of 1903 – there were also several

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<sup>289</sup> That is not meant to suggest a unity of purpose or coordination across the various agencies.

significant enhancements of institutional capacity in earlier periods. In addition to the creation of these agencies, changes at the executive department level (not shown in table 4.4) also mark significant developments in institutional capacity. The creation of the Department of Justice in 1870 centralized the legal capacity of the executive branch. The modernization and professionalization of the War Department and Army throughout the late nineteenth century are also mentioned as enhancing the capacity of the state.<sup>290</sup>

Table 4.4. Institutional Components of National Defense and Federal Law Enforcement Establishment.<sup>291</sup>

Agency	Controlling Authority	Year Created	Notes on Origins
National Guard	Executive (DOD)	1775	Militia Act of 1903 creates modern National Guard
US Marshals	Executive (DOJ)	1789	Judiciary Act of 1789
US Capitol Police	Congress	1828	Act of Congress
DC Police	Executive	1861	Act of Congress
Secret Service	Executive (DHS)	1865	President upon recommendations of Commission
SCOTUS Marshal and Police	Supreme Court	1867	
FBI	Executive (DOJ/Dir. Of Nat'l Intelligence)	1908	Internal by AG, later by Congress
Coast Guard	Executive (DHS)	1915	Congressional funding at request of Hamilton in 1790 as Revenue Marine Service/ Revenue Cutter Service
Bureau of Prisons	Executive (DOJ)	1930	Pub. Law 71-218
CIA	Executive (Dir. Of Nat'l Intelligence)	1947	National Security Act of 1947 (earlier form by Truman directive in 1946)
ATF	Executive (DOJ)	1972	Congress

<sup>290</sup> Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge University Press, 1982).

<sup>291</sup> Katharina Buchholz, "Who Has the Power Over Federal Law Enforcement?" *Statista*, September 24, 2020, <https://www.statista.com/chart/23025/us-federal-law-enforcement-agencies-under-branches-of-federal-government/>. Additional information on specific agencies gathered through various agency websites.

DEA	Executive (DOJ)	1973	Nixon, Reorganization Plan 2
TSA	Executive (DHS)	2001	Aviation and Transportation Security Act
ICE	Executive (DHS)	2003	Homeland Security Act of 2002
CBP	Executive (DHS)	2003	Customs Service originated in 1789; Border Patrol in 1924

The capacity of each of the three major institutional components responsible for maintaining domestic order – the militias, the military, and federal law enforcement agencies – increased in fits and starts throughout the nineteenth century. In the early antebellum period, the militia system was largely made up of volunteers’ units lacking in training and organization. During the nineteenth century these militias included various types – compulsory (forced), state formed, and state sanctioned – which were largely insufficient in the War of 1812, but were effectively employed as state police powers in response to slave revolts and domestic rebellions.<sup>292</sup> A series of reforms to state laws in the 1840s and 1850s established training and organizational requirements, but also diminished the efficiency of militia units by incorporating them into state politics.<sup>293</sup> In the post-Reconstruction era, the state militias began to modernize with the creation of the National Guard Association as a lobbying organization.

By the first decade of the 1900s, the various state militia organizations were reorganized into the National Guard – a decision which increased the supervision and

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<sup>292</sup> Gian Gentile, Michael E. Linick, and Michael Shurkin, *The Evolution of US Military Policy from the Constitution to the Present* (Santa Monica: Rand Arroyo Center, 2017), 29-33.

<sup>293</sup> Frederick P. Todd, "Our National Guard: An Introduction to its History." *Military Affairs: Journal of the American Military Institute* (1941): 156-158.

coordination of the federal government over the various state organizations. Later in 1933 the National Guard was formally incorporated into the Army as reserve troops.<sup>294</sup> Thus, the history of the state militias is marked by persistent concerns about their efficiency, training, and professionalism which were addressed through periodic reforms and gradual change. The state militias are best conceived of as a supplement to army regulars. In times of war, this consisted of forming a line of defense behind which other forces could be formed.<sup>295</sup> In times of domestic disorder, the state militias presented a potential first response for state governments, with federal involvement being reserved for cases in which the state militias required coordination or were insufficient to restore order. Altogether, there was a substantial federal state in the nineteenth century, its capacity and complexity advanced gradually over time, and presidents' and cabinet members' control over this apparatus were a source of influence in the formulation and implementation of policy. In other words, the heterogeneity of institutional components and the ambiguity about jurisdiction across agencies and levels of government created opportunities for innovations in law enforcement by political entrepreneurs.

### **Assessing Presidential Authority at the Turn of the Twentieth Century**

The end of the nineteenth century was characterized by the tumults of increased labor conflict in an industrialized economy and the closing of much of the western frontier. It was in this context of significant upheaval that presidents and the courts fully articulated a theory of presidential authority more closely akin to the stewardship theory. The court's ruling in *In*

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<sup>294</sup> Todd, "Our National Guard," 162-163, 170.

<sup>295</sup> Todd, 154.



*Re Neagle* (1890) and *In Re Debs* (1895), as well as presidential interpretations of these rulings, illuminate the evolution of ideas about presidential power.

Benjamin Harrison, like his fellow Gilded Age presidents, is often cast aside by presidential historians. While important scholarly exceptions exist, the general wisdom about Harrison is that he was a forgettable, one-term president who embraced the Whig theory of a weak presidency and failed to win reelection. More recently, scholarship on Harrison has noted his substantial leadership of Congress and his significant legislative accomplishments.<sup>296</sup> Despite his failure to win a second term, Harrison was in many senses a modern president. Charles Calhoun comes to this conclusion when appraising Harrison's record. He argues that Harrison's term pointed the way of the future in the development of the presidency and that "a careful review of Harrison's performance demonstrates that McKinley and his successors owed much to the example set by Benjamin Harrison."<sup>297</sup> Calhoun's reassessment of Harrison persuasively casts his leadership as modern and influential – he was a skilled and active public speaker, he used the formal and informal power of his office to act as a legislative leader, and he carefully led the nation through several foreign crises.<sup>298</sup>

In addition to his leadership in foreign and domestic affairs, Harrison also made use of his authority to maintain domestic order. Harrison issued two "cease and desist" proclamations during his administration, both in 1892. The first was in response to a strike

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<sup>296</sup> Max J. Skidmore, "Benjamin Harrison," In *Maligned Presidents: The Late 19th Century* (Palgrave Macmillan, 2014), 92-107.

<sup>297</sup> Charles W. Calhoun, *Benjamin Harrison: The American Presidents Series: The 23rd President, 1889-1893*, Vol. 23 (Macmillan, 2005), 5-6.

<sup>298</sup> Calhoun, *Benjamin Harrison*, 5-6.

of mineworkers that had turned violent in Coeur d'Alene, Idaho. The second proclamation was issued in response to the Johnson County War, a ranch war between wealthy landowners and their hired guns and people accused of rustling cattle in Wyoming.

Harrison's post-presidential career, brief as it was, is also useful for understanding his view on government and the presidency. In 1896-1897 Harrison wrote a series of lectures for the *Ladies Home Journal* for the purpose of giving "a view of the machinery of our National Government in motion," which he later expanded into a book, published in 1897, called *This Country of Ours*.<sup>299</sup> While a full analysis of this Harrison's post-presidential writing is beyond the scope of this research, Harrison devotes an entire chapter (Chapter VII) to discussing his views on the enforcement of laws and the use of the army. I argue this chapter should be interpreted as representing Harrison's views on the president's authority and responsibility to maintain domestic order. Especially noteworthy is how Harrison's logic brings a whiggish view of the presidency into harmony with the use of the military domestically. In fact, Harrison's concludes that the president's constitutional authority to use the military domestically is expansive.

Harrison's writing on the enforcement of the laws generally aligns with the Whig theory of the presidency. He notes that "the thing to be executed is the law, not the will of the ruler" and that the Take Care clause and Presidential Oath "leave him no discretion, save as the means to be employed."<sup>300</sup> This vision of the presidency aligns with scholars who have argued that nineteenth century presidents were constrained.

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<sup>299</sup> Benjamin Harrison, *This Country of Ours* (Charles Scribner's Sons, 1897), v.

<sup>300</sup> Harrison, *This Country of Ours*, 98.

However, Harrison's discussion of the enforcement of laws to suppress disorder and insurrection presents a more expansive interpretation of presidential authority. Harrison is careful to note that the executive branch's role in these cases was to suppress and arrest those involved, and that the courts were solely responsible for punishing offenders.<sup>301</sup> He also cites two recent examples – the court's ruling in *In Re Neagle* and the Great Railroad Strike of 1877 – to argue that presidents, executive branch officials, and the national government hold significant authority to maintain domestic order. The question brought to the courts in *Neagle* was whether Deputy Marshal David Neagle was justified in killing David Terry while assigned to protect Stephen Field, an Associate Justice of the Supreme Court. In *Neagle* the Supreme Court ruled 6-2 (with Field not participating) in support of Neagle's actions. The broader importance of the ruling was the entrenchment of an expansive interpretation of the Take Care clause, which Harrison discusses by extensively citing the opinion of, and precedents cited by, Justice Miller in the case.

The court's ruling suggests a broad understanding of presidential authority. In essence, the court ruled that the president has the authority to do whatever is *necessary and proper* to take care that the laws are faithfully executed. In Harrison's citation of Miller's opinion, Miller provides an analogy of protecting the mails. Miller argues that if presidents or the postmaster general are advised that the mails of the United States may come under attack, that these officials undoubtedly have the authority to ensure the protection of the mails. Miller suggests that the form of this protection may be provided by a U.S. Marshal with the assistance of a posse comitatus, or by soldiers of the army.<sup>302</sup> The view of a

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<sup>301</sup> Harrison, 118.

<sup>302</sup> Harrison, *This Country of Ours*, 117.

Supreme Court justice in 1890, 12 years after the Posse Comitatus Act, was that presidents clearly had the authority to use the military or other bureaucratic agents to protect the functions and power of the government.

Perhaps more notable is that Harrison's interpretation of presidential authority seems to be based on the idea of constitutional, rather than statutory authority. In other words, presidents have some set of powers based on their obligations to take care that the laws are executed and to serve as Commander in Chief. Harrison's interpretation of the Commander in Chief clause's bearing on the president's authority to enforce laws is worth reading in full:

“The President cannot declare war. Congress must do that. But that the provision of the Constitution making him Commander-in-Chief was intended to confer upon the President the power to use military force in executing the laws, and in protecting the property of the United States and its officers in the discharge of their duties, there can be no doubt.”<sup>303</sup>

Harrison's interpretation suggests that the Commander in Chief clause grants presidents the power to use the military for the enforcement of domestic laws – he even suggests there can be no doubt about the president's power, a far cry from the ambiguity baked into the Constitution. While he does go on to note that Congress has imposed some limitations on the president's authority, and that the unpopularity of using the military for these purposes acts as a constraint, Harrison's view of executive power here seems remarkably similar to the stewardship theory associated with the modern presidency.<sup>304</sup> In fact, Harrison's logic, if taken to its extreme, seems to imply that statutory authorizations for presidential use of the military are unnecessary. The Constitution alone, through the Commander in Chief, Take

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<sup>303</sup> Harrison, 125.

<sup>304</sup> Harrison, *This Country of Ours*, 125.

Care, and Guarantee clauses, conveys sufficient authority for presidents to use the military domestically. This authority is constrained only by the threat of impeachment when used improperly and the popular distaste of using the military except in extreme cases. If Congress and the public are unwilling to sanction the president after the deployment of troops, then presidents can act without restraint. This invocation of popular support, or lack thereof, is reminiscent of the modern presidency argument that presidents can gain legitimacy for actions not sanctioned by congressional statutes or the Constitution so long as it is in the public's interest.

Altogether, Harrison's Whig view of the president's discretion to enforce the law is augmented by an expansive interpretation of presidential authority. Not only can presidents use the military to enforce laws, they also can send troops into a state without a request from the state legislature or governor when disorder threatens interstate commerce. By downplaying the statutory sources of presidential authority and interpreting the Commander in Chief and Commerce clauses expansively, Harrison argues for an unconstrained, powerful presidency.

Grover Cleveland's two non-consecutive terms in the White House were also marked by a persistent use of the military to maintain domestic law and order. Scholarly appraisals of Cleveland's leadership have recently emphasized his considerable influence on nationalizing the Democratic party organization, thus setting the organizational foundation for the modern rhetorical president.<sup>305</sup> Also, like Harrison, Cleveland also published post-

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<sup>305</sup> Daniel P. Klinghard, "Grover Cleveland, William McKinley, and the Emergence of the President as Party Leader," *Presidential Studies Quarterly* 35, no. 4 (2005): 736-760; Daniel J. Galvin, "The Transformation of Political Institutions: Investments in Institutional Resources and Gradual Change in the National Party Committees," *Studies in American Political Development* 26, no. 1 (2012): 50-70.

presidential writings about his presidency. Cleveland's book *Presidential Problems* consisted of four essays delivered as lectures at Princeton University or published in magazines.<sup>306</sup> Chapter 2 of Cleveland's book, titled "The Government in the Chicago Strike of 1894," is especially relevant both as an historical account of the Pullman Strike and for understanding Cleveland's views on the president's authority to use the military domestically.

In this essay, Cleveland provides a descriptive overview of the Pullman Strike, which began in Chicago in July of 1894. The Pullman Strike presents an interesting case for several reasons. First, there was no request for federal assistance from the Illinois governor (in fact, the governor questioned and challenged the use of the military in his correspondence with Cleveland).<sup>307</sup> Cleveland's response to the governor on July 6 captures his evaluation of his authority and the importance of firm action to restore order,

"While I am still persuaded that I have neither transcended my authority nor duty in the emergency that confronts us, it seems to me that in this hour of danger and public distress, discussion may well give way to active efforts on the part of all in authority to restore obedience to law and to protect life and property."<sup>308</sup>

Second, Cleveland ordered troops to Chicago on July 3, five days before issuing a formal proclamation. Cleveland and his Attorney General Richard Olney made this decision upon receiving a report that the strikers were obstructing rail traffic and a request for federal support from the district marshal, a U.S. court judge, special counsel, and the district

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<sup>306</sup> Grover Cleveland, *Presidential Problems* (New York: The Century Co., 1904).

<sup>307</sup> Cleveland, *Presidential Problems*, 110-113; Lieber, 83-86 is an appendix containing Governor Altgeld's protest against the use of troops in the Pullman Strike.

<sup>308</sup> Cleveland, *Presidential Problems*, 113.

attorney in Chicago.<sup>309</sup> Finally, the strike ultimately resulted in the arrest and trial of Eugene V. Debs which led to the Supreme Court’s ruling in *In Re Debs*. The court’s unanimous decision in Debs supported the president’s actions and provided yet another precedent for the supremacy of the federal government’s authority. Cleveland interpreted the Debs ruling as supporting “the inherent power of the Government to execute the power and functions belonging to it by means of physical force through its official agents, and on every foot of American soil.”<sup>310</sup> In other words, the court concluded, as it did in the Neagle case, that the executive branch had a right and duty to ensure the faithful execution of the laws.

**Conclusion: The Role of Presidential Entrepreneurship in the Expansion of Authority**

As this chapter makes clear, the president’s authority to use military force to maintain domestic order and rule of law expanded throughout the nineteenth century. Table 4.5 summarizes major changes to the statutory and judicial framework discussed in this chapter.

Table 4.5. The Evolving Statutory and Judicial Framework of Authority.

Law / Court Decision	Summary Impact on Presidential Authority
The Calling Forth Act of 1792	Temporary delegation of First Militia Clause power to President with restrictions.
The Calling Forth Act of 1795	Permanent delegation of First Militia Clause power to President with fewer restrictions.
The Insurrection Act of 1807	Expansion of presidential authority under Calling Forth Acts to also allow for use of the army and navy in situations in which president can deploy the militia.
<i>Martin v. Mott</i> (1827)	Court rules that the president alone must determine if the exigency exists requiring the use of his authority.
<i>Luther v. Borden</i> (1849)	Court rules that cases related to Guarantee Clause were political questions to be decided by Congress and the President.
The Suppression of the Rebellion Act of 1861	Expansion of presidential authority under Insurrection Act framework. Allowed president to deploy troops and militias when he deems it “impracticable” to enforce the laws.

<sup>309</sup> Cleveland, *Presidential Problems*, 100-101.

<sup>310</sup> Cleveland, *Presidential Problems*, 116.

The Ku Klux Klan Act of 1871	Expansion of conditions in which the president can call forth the militia or regulars to include the protection of rights under the 14 <sup>th</sup> Amendment.
<i>U.S. v. Cruikshank</i> (1876) and <i>Civil Rights Cases</i> (1883)	Taken together the court ruled that the 14 <sup>th</sup> Amendment did not apply to other individual rights or states, nor did it outlaw individual racial discrimination. Significantly curtails presidential authority to intervene based on civil rights restrictions.
Posse Comitatus Act (1878)	Congress restricts the use of the military as a posse comitatus, exempting express constitutional and statutory authorizations.
<i>In Re Neagle</i> (1890)	Court provides an expansive interpretation of presidential authority to fulfill their responsibility under the Take Care Clause.
<i>In Re Debs</i> (1895)	Court provides an expansive interpretation of the Commerce Clause (and to a lesser degree the Take Care Clause) to support federal actions to break labor strikes.

The narrative is perhaps best captured by the passage written by Edward Corwin at the outset of this chapter, which highlights that expanded presidential authority was in part the product of Congress (through statutory delegations of authority), in part the Courts (through judicial decisions upholding presidential authority), and in part the product of presidential initiative and strategic action (e.g., Fillmore’s invocation of constitutional authority, in addition to statutory authority, in the enforcement of the Fugitive Slave Act of 1850). By the turn of the twentieth century, presidents had accumulated more discretion and capacity to respond to domestic disorders. As Harrison’s and Cleveland’s rhetoric make clear, presidential interpretations of presidential authority were far more expansive than the views held by the framers of the Constitution and early presidents. My interpretation of this narrative is that the relativist framework of presidential emergency powers was consolidated and entrenched in the area of domestic order by the 1890s, providing some plausibility to the idea that the periodization scheme of the modern presidency overlooks significant gradual developments in the pre-modern period.



What remains unclear is whether, and to what degree, presidential entrepreneurship produced structural changes to institutional authority. This requires a deeper look at the cases selected and discussed in chapter 3. This chapter, in effect, provides a historical narrative of the development of presidential authority in this domain of governance. The within case process tracing that follows engages in a deeper theory-building exercise. The two most-likely cases – Jefferson’s management of the Burr Conspiracy and the subsequent passage of the Insurrection Act and Grant’s response to the Ku Klux Klan in the newly reinstated southern states – are cases in which we ought to observe the mechanisms and processes of presidential entrepreneurship at work. The least-likely cases – Hayes’ and Arthur’s responses to domestic disorders in the territories after the passage of the Posse Comitatus Act – are cases where we are less likely to observe presidential entrepreneurship. Together these cases are useful for building and refining the theory of presidential entrepreneurship while also considering plausible alternative explanations for each case.

## **Chapter 5, A Most-Likely Case of Presidential Entrepreneurship: The Ku Klux Klan Act of 1871 and Grant's Intervention in South Carolina**

"In pursuence of your directions. I have come to this place and have made careful inquiry here concerning the unlawful combinations which have been reported as existing in this part of South Carolina... You have twice, by proclamation, warned these conspirators to desist from their crimes, but they have not obeyed the admonition. They must now be taught that there is some force in the law which they have despised." – Attorney General Amos T. Akerman<sup>311</sup>

Amos Akerman's passage hints at the resilience of post-Civil War white supremacist terrorists to obstruct federal law and retake political power in the South. More significantly, it demonstrates Akerman's resolve to quell the violence and assert the power of the federal government. In this chapter, I examine the Ku Klux Klan Act of 1871 and the Grant administration's subsequent intervention in South Carolina. As discussed above in chapter 2, the characteristics of the case make this an instance in which we are highly likely to observe presidential entrepreneurship --it is a "a most-likely case." This chapter begins by providing an overview of the case's chronology, relevant actors, and features. It then evaluates whether mechanisms and processes of entrepreneurial innovation were present in the case. Finally, it evaluates alternative explanations of the case.

Evaluations of Ulysses S. Grant's performance as a president have shifted over time, but most do not emphasize or even discuss his presidential entrepreneurship. An exception is Joan Waugh who provides a powerful justification for studying Grant's leadership on the Enforcement Acts. Waugh writes that "no issue commanded Grant's attention as much as Reconstruction, and no issue affected his presidency, his reputation, and his legacy more

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<sup>311</sup> John Y. Simon, "The Papers of Ulysses S. Grant, Volume 22: June 1, 1871-January 31, 1872" (1995), *Volumes of The Papers of Ulysses S. Grant*, 22, 180. Henceforth abbreviated to Simon, PUSG vol. 22, page number.

profoundly. It was the reason he sought the office, and he was deeply involved in the implantation of policy...<sup>312</sup> Waugh's account comes close to offering an entrepreneurial explanation of the Ku Klux Klan Act of 1871 and federal intervention in South Carolina.

Traditionally, Grant's presidency has been more often characterized as a failure. This is certainly justified to some degree by the numerous scandals that occurred during his administration. The Grant administration and Congress were implicated and several officials were indicted in the Whiskey Ring, Credit Mobilier, and other scandals.<sup>313</sup> Scandals and corruption were emblematic of the post-war period, though it is worth noting that these scandals and the criticism they drew from Grant's opponents are overblown, and Grant was never implicated personally in any wrongdoing.<sup>314</sup> While Grant did not personally engage in any malfeasance, the numerous scandals are evidence of failures of leadership and management. William McFeely was highly critical of the president on this point. He argues that there is little evidence that Grant was involved in the Whiskey Ring. However, Grant knew his close friend and secretary Orville Babcock was guilty and Grant committed perjury to keep Babcock out of prison.<sup>315</sup> Regardless of Grant's direct involvement, the scandals of his administration have justifiably tarnished Grant's reputation. However, negative appraisals based on scandals do not directly speak to Grant's possible entrepreneurial

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<sup>312</sup> Joan Waugh, *U.S. Grant: American Hero, American Myth* (Chapel Hill: University of North Carolina Press, 2009), 138.

<sup>313</sup> Notably, Charles E. Merriam suggested that the scandals of the 1870s undermined public confidence in Congress, serving as an impetus for renewed faith in the executive. Charles E. Merriam, *American Political Ideas: Studies in the Development of American Political Thought, 1865 – 1917* (New York: Macmillan, 1923), 108-109.

<sup>314</sup> George R. Goethals, "Imagining Ulysses S. Grant: Sifting Through the Shifting Sands of Conventional Wisdom," *The Leadership Quarterly* 19 (2008): 497-498.

<sup>315</sup> William S. McFeely, *Grant: A Biography* (New York: Norton, 1981), 415.

leadership in the case at hand. The more relevant critiques of Grant in this case are those dealing directly with his handling of Reconstruction.

These negative views of Grant are partially based on scandals, as well as his perceived subordination to prominent Republicans in the Senate. These interpretations are consensual among many presidency scholars and early Grant biographers. It is, however, worth noting that these appraisals may be influenced by historiographical biases in the treatment of Reconstruction. Most prominent among these is the Dunning School of Reconstruction which promotes the narrative that the confederacy was a “lost cause.”

The Dunning School alleges that the federal government engaged in brutality against innocent white southerners in the aftermath of the war. It depicts Republican governments in the southern states as corrupt, illegitimate and incompetent. Finally, these historians were highly critical of the federal government’s expansion of civil rights to African Americans and the protection of those rights. In their view, African Americans were not educated or worthy of these rights.<sup>316</sup> The “lost cause” narrative maintains prominence today.

Interestingly, negative appraisals of Grant’s presidency were likely generated by these criticisms of his strong actions as president. Grant is a natural villain in the “lost cause” narrative precisely because of his significant efforts to maintain the rights of Black Americans in the south during Reconstruction.

Still, revisionist historians like Kenneth Stampp were not much kinder in their appraisals of Grant’s efforts. Stampp does praise the Enforcement Acts and Grant’s use of

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<sup>316</sup> Kenneth M. Stampp, *The Era of Reconstruction, 1865-1877: A Revisionist View of One of the Most Controversial Periods in American History* (New York: Random House, 1965), 4-15.

the military, noting that they effectively broke the Klan by 1872.<sup>317</sup> While this appraisal speaks to Grant's ability and effort to maintain African Americans' civil and political rights, the rest of Stamp's assessment is decidedly negative. Stamp cites Grant's election in 1868 as the "first sign of what might ultimately happen" with the federal government's abandonment of Reconstruction, going further to criticize Grant's lack of "moral dedication" to the radical Republicans' cause and his selection of "mediocrities and party hacks" to his cabinet.<sup>318</sup> Nevertheless, it is difficult to disentangle these appraisals because they are inevitably influenced by "lost cause" narratives that depict Grant as incompetent and morally inept. More recent appraisals of Grant have been more positive in their assessment of his presidency, especially regarding the Enforcement Acts.<sup>319</sup> With these appraisals of Grant in mind, I now turn to an overview of the case.

### **Case Overview**

Several features of the political context of Grant's first term created ideal conditions for presidential entrepreneurship related to domestic order. First, the Republican party held large majorities in both chambers of Congress in the 41<sup>st</sup> (1869-1871) and 42<sup>nd</sup> (1871-1873) Congresses. Second, the unified Republican control of government was significant because enforcement of the Reconstruction amendments was a key element of the party's political

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<sup>317</sup> Stamp, *Era of Reconstruction*, 200 -201.

<sup>318</sup> Stamp, *Era of Reconstruction*, 186-187.

<sup>319</sup> Goethals, *Imagining Ulysses*, 490 – 491, 496-497; Jean Edward Smith, *Grant* (New York: Simon & Schuster, 2001); Waugh, *U.S. Grant: American Hero, American Myth*; Ron Chernow, *Grant* (New York: Penguin Press, 2017). It is worth noting that these reappraisals of Grant were made possible by the publication of Grant's papers in 31 volumes by John Y. Simon from 1967 – 2005.

program.<sup>320</sup> Unified control meant the Republican party could enact policies of its choosing to accomplish these political goals.

The period was also marked by intense political contestation in the reconstructed South. This contestation occurred at the state and local levels, often spilling over into extra-legal violence, and led to regular requests from states and individuals for federal intervention (or inaction). At the center of many of these requests was the Ku Klux Klan. The Reconstruction-era Klan functioned as a para-military, terrorist wing of the southern Democratic party and reports of Klan atrocities in the form of intimidation, violence, and murder were ubiquitous across all the reconstructed southern states.<sup>321</sup> Responding to all these requests would require greater institutional capacity than was available at the time, creating a scenario where creative uses of institutional components were likely necessary to meet the exigencies of governing.

Another consequence of the numerous demands for intervention was the enhanced importance of executive branch decisions about how, when, and where intervention would be most effective, increasing the importance of individual agency. Finally, there was significant ambiguity about the boundaries of institutional authority under the existing statutory framework. For the Grant administration to respond adequately and legitimately to demands for federal aid, it would need an expansion of the president's statutory authority.

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<sup>320</sup> Republican Party Platforms, Republican Party Platform of 1868, The American Presidency Project <https://www.presidency.ucsb.edu/node/273300>.

<sup>321</sup> Miscellaneous examples are compiled in the following contemporaneous publication. Anonymous, *The Nation's Peril. Twelve Years' Experience in the South. Then and Now. The Ku Klux Klan a Complete Exposition of the Order: It's Purpose, Plans, Operations, Social and Political Significance. The Nation's Salvation*. New York, 1872; Ulysses S. Grant, Special Message, January 17, 1871, The American Presidency Project <https://www.presidency.ucsb.edu/node/204108>. Grant's message included a great deal of correspondence about conditions in the South which he forwarded to the Senate Select Committee to Investigate Alleged Outrages in the Southern States.

Thus, the ambiguity about institutional authority, numerous demands for federal intervention, and a favorable institutional context make this a case in which we are likely to observe successful presidential entrepreneurship.

*Relevant Actors and Chronology*

In Table 5.1, I provide a list of actors central to the events of the case. The actors fall into four general categories: high-level executive branch officials (i.e., president and cabinet members), military and civilian bureaucrats (e.g., Sherman, Townsend, Bristow, Whitley), congressional actors (e.g., Blaine, Morton), and state governors (e.g., Robert Scott and Holden).

Table 5.1 Relevant Actors Grant Policy Entrepreneurship Case.

Actor	Institutional Office	Notes
Ulysses S. Grant	President of the United States	
Amos T. Akerman	U.S. Attorney General (1870-1871)	Cabinet's main advocate of campaign against KKK.
George H. Williams	U.S. Attorney General (1871-1875)	Replaced Akerman after resignation.
William Worth Belknap	Secretary of War (1869-1876)	
Hamilton Fish	Secretary of State (1869-1877)	Cabinet's main opponent of campaign against KKK.
George S. Boutwell	Secretary of Treasury (1869-1873)	
William T. Sherman	Commanding General of the U.S. Army (1869-1883)	
Benjamin Bristow	U.S. Solicitor General, Department of Justice (1870-1872)	Main sub-cabinet advocate of campaign against KKK.
Hiram C. Whitley	Chief of U.S. Secret Service (1869-1875)	Responsible for covert intelligence gathering against the KKK.
Edward D. Townsend	Adjutant General of U.S. Army (1869-1880)	
James G. Blaine	Speaker of the U.S. House of Representatives (1869-1875), Maine	Key administration ally in the House.
Samuel Shellabarger	Member of U.S. House of Representatives (1871-1873), Ohio	Key administration ally in the House.
John Scott	U.S. Senate (1869-1875), Pennsylvania	Chair of congressional KKK Committee
John Pool	U.S. Senate (1868-1873), North Carolina	

Oliver P. Morton	U.S. Senate (1867-1877), Indiana	Key administration ally in the Senate.
Zachariah Chandler	U.S. Senate (1857-1875), Michigan	Key administration ally in the Senate.
Robert K. Scott	Governor of South Carolina (1868-1872)	
William Holden	Governor of North Carolina (1868-1871)	State-level campaign against the KKK influenced Grant administration strategy.

Notably absent from this list are opponents of the administration and its reconstruction policy. While congressional Democrats and the Democratic press were highly critical of the Grant administration and Republican actions in the South, their minority status limited their ability to block the passage of the KKK Act or federal intervention in South Carolina. I incorporate these contemporary critical views in my analysis to take note of their possible influence on public opinion and the resolve of the Republican party after 1871.

Table 5.2 presents a chronology of the case that provides the broader context for the passage of the KKK Act and subsequent intervention in South Carolina. This is not a comprehensive list of events relevant to the case, and it is important to point out that much of the most persuasive evidence is found in individual correspondence and orders from the president to military officials that were too numerous to include in the chronology. So, the chronology simply highlights the broader sequence of events relevant related to the case.

Table 5.2 Grant Entrepreneurship Case Chronology, 1868-1872<sup>322</sup>

<b>Date</b>	<b>Description of Event</b>
July 9, 1868	14th Amendment ratified.
November 1868	Grant wins presidential election.
February 3, 1870	15th Amendment ratified.
February 21, 1870	Bill that would become Enforcement Act of 1870 introduced by John Bingham in House.

<sup>322</sup> For a useful timeline of the Grant administration, see Ulysses S. Grant, Ulysses S. Grant Event Timeline, The American Presidency Project <https://www.presidency.ucsb.edu/node/356248>.



March 3, 1870	Grant takes office.
May 31, 1870	Grant signs Enforcement Act of 1870.
June 1870	Grant appoints Amos Akerman as Attorney General.
June 22, 1870	Grant signs act creating Department of Justice.
December 5, 1870	Grant's Second Annual Message to Congress draws attention to violence and obstruction of rights in the South.
December 16, 1870	Senate requests full report from Grant about outrages in South.
January 9, 1871	Bill that would become Enforcement Act of 1871 introduced by John Churchill in House.
February 28, 1871	Grant signs Enforcement Act of 1871.
March 3, 1871	Grant signs an appropriation bill funding detectives to investigate Klan.
March 10, 1871	Grant orders U.S. Army troops to South Carolina at request of Governor Robert Scott.
March 23, 1871	Grant goes to Capitol to confer with Republican Senators and request further legislation.
March 24, 1871	Grant issues Proclamation about Law and Order in South Carolina.
March 26, 1871	U.S. Army troops arrive in South Carolina.
March 28, 1871	Bill that would become Ku Klux Klan Act of 1871 introduced by Samuel Shellabarger in House.
April 10, 1871	Creation of Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States (KKK Committee).
April 20 1871	Grant signs Ku Klux Klan Act of 1871; first meeting of KKK Committee.
May 3, 1871	Grant issues Proclamation about Enforcement Acts.
Mid July 1871	KKK Committee dispatched subcommittee to South Carolina.
September 29, 1871	Secret Service Chief Whitley sends report on KKK to Akerman.
October 12, 1871	Grant issues "cease and desist" proclamation giving KKK in 9 counties of South Carolina until October 17 to disperse.
October 17, 1871	Grant issues proclamation suspending Habeas Corpus in 9 South Carolina counties.
October 19, 1871	U.S. Marshals and U.S. Army engage in mass arrests under direction of Akerman, in accordance with Grant's orders.
December 5, 1871	Grant's Third Annual Message to Congress presents facts about federal intervention and shifts to a more conciliatory southern policy.
December 13 1871	Akerman resigns at Grant's request. (not klan-related)
February 19 1872	Congressional KKK Committee issues their report.
August 15 1872	Grant issues pardons for 4 Klansmen of the 22 Whitley suggested.
November 5 1872	Grant wins reelection.

The Reconstruction period has received immensely detailed coverage by historians. It is not my purpose to retrace this ground. Rather, my purpose is to use the case to identify and evaluate mechanisms and processes identified by my theoretical framework. Consequently, my analysis focuses on those mechanisms and their adequacy in light of plausible alternative explanations. Similarly, because of my interest in the ability of entrepreneurial political actors to alter institutional authority, I focus primarily on the words and actions of formal governmental actors. This reflects the difference in process tracing method from many general works of history, and it is this analytic focus and structure that makes this work distinct. With that in mind, I now turn to a brief description of the case's major events.

*Setting the Stage: The Fifteenth Amendment and Enforcement Act of 1870*

The stage for these events is set by the passage of the Fifteenth Amendment by Congress and its subsequent ratification by the states. Yet, as Eric Foner argues, the Fifteenth Amendment was not a bellweather of further protections for African Americans. Foner notes that the Fifteenth Amendment was a political compromise that “opened the door to poll taxes, literacy tests, and property qualifications in the South.”<sup>323</sup> While the language of the Fifteenth Amendment did open up pathways for continuing racial inequality, it also provided new authority to the federal government. The efforts of the Grant administration and radical Republicans in Congress to provide statutory enforcement authority through the Reconstruction amendments demonstrates at least some political will to use it as a shield for African Americans. Despite its limitations, the protections afforded to African Americans by

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<sup>323</sup> Eric Foner, *Reconstruction* (Louisiana State University Press, 1988), 447.

the Fourteenth and Fifteenth Amendment would have been unthinkable only 5 years earlier and represented a triumph of Abolitionist groups and the Radical Republicans.<sup>324</sup> In short, the early years of Grant's administration were characterized by the consolidation of the achievements of Reconstruction, as well as the limitations of northern Republicans' will to intervene in the South.

Grant perceived the Fifteenth Amendment as one of the most significant, and important, changes in the nation's history. Grant advocated for the amendment in his inaugural address and later in a special message to Congress upon its ratification. Grant's inaugural identified several major goals of his administration – maintaining economic growth and prosperity, reforming the government's policy towards Native Americans, and passage of the Fifteenth Amendment.<sup>325</sup> The inclusion of the Fifteenth Amendment indicates that Grant held convictions about the importance of consolidating the gains of Reconstruction. Grant's points out that the Fifteenth Amendment was a valuable contribution to securing the goal of Black political rights in the South, but that it was imperative for the nation to solve this problem one way or another:

“The question of suffrage is one which is likely to agitate the public so long as a portion of the citizens of the nation are excluded from its privileges in any State. It seems to me very desirable that this question should be settled now, and I entertain the hope and express the desire that it may be by the ratification of the fifteenth article of Amendment to the Constitution.”<sup>326</sup>

While Grant could not have known that the Fifteenth Amendment would be inadequate on its own to secure the rights of African Americans in the South, his language foreshadows his

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<sup>324</sup> Foner, *Reconstruction*, 448.

<sup>325</sup> Waugh, *U.S. Grant*, 124.

<sup>326</sup> Ulysses S. Grant, Inaugural Address, The American Presidency Project <https://www.presidency.ucsb.edu/node/203651>.

commitment to secure the rights established by the Reconstruction amendments through effective implementation in the face of widespread violence from the Klan.

Further, on March 30, 1870, Grant sent a special message to Congress upon the ratification of the 15th Amendment by the states in which he again noted its “vast importance,” and called upon white Americans to “withhold no legal privilege of advancement to the new citizen.”<sup>327</sup> Grant was a persistent advocate of the ratification of the Fifteenth Amendment by the states, putting pressure on Nebraska and Nevada to ratify while also considering rushing through the readmission of several southern states so that the Amendment would take effect earlier.<sup>328</sup> Yet Grant’s hope that the amendment would resolve racial animosities were naïve. Such hopes would require the acceptance of southern whites who were not inclined to oblige the president, and without proper enforcement mechanisms in place the Reconstruction amendments would not be enforced in the southern states.

It became apparent immediately after the ratification of the Fifteenth Amendment that the Reconstruction amendments alone were not enough to curb racialized violence in the South. The violence and terror of the Klan continued unabated during and after the ratification process. The Enforcement Act of 1870 was passed by Congress in May 1870 with the explicit purpose of criminalizing the use of force or intimidation to undermine voting rights. The act outlined several classes of illegal actions that impeded voting rights and also provided authority to federal district attorneys and marshals to enforce breaches of these activities. It also included two grants of authority to Presidents. Section 9 suggests that

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<sup>327</sup> John Y. Simon, "The Papers of Ulysses S. Grant, Volume 20: November 1, 1869-October 31, 1870" (1995), *Volumes of The Papers of Ulysses S. Grant*, 20, 130-131.

<sup>328</sup> Brooks Simpson, *The Reconstruction Presidents* (University of Kansas Press, 1998), 143-144.

other officers who were specially empowered by the President would share the authority and responsibilities of marshals and district attorneys in the execution of the act. While a minor detail, this section allows presidents to shift executive branch personnel to work on administering the enforcement act, granting (or acknowledging) the president's control over the internal structure of executive branch administration. In addition, section 13 deemed it lawful for the president to use the U.S. military to "aid in the execution of judicial process" of the act.<sup>329</sup> After it became clear that the Fifteenth Amendment alone could not secure the voting rights and safety of Republicans in the South, the Grant administration became more active in a strategy that paired execution of existing laws and pressuring Congress to expand the president's statutory authority.

Grant appointed Amos Akerman as Attorney General in June 1870, less than a month before Congress's creation of the Department of Justice and less than a month after Grant signed the Enforcement Act of 1870. Akerman was a significant addition to Grant's cabinet. Ironically, the *New York Times* noted his appointment because it would grant the "reconstructed south to a representation in the Federal Cabinet."<sup>330</sup> Akerman would certainly provide representation to the interest of Republican governments in the South, but he was not sympathetic to southern Democrats or the Klan. Ron Chernow praises Akerman as a "brilliant choice" who was "honest and incorruptible," an ideal department head to pursue Grant's goal of securing Black civil rights.<sup>331</sup> Akerman's vigilant protection of African American rights under the Enforcement Acts was a far cry from representing the

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<sup>329</sup> Chernow, Grant, 703-704; An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes. U.S. Statutes at Large 16 (1870): 140-146.

<sup>330</sup> "The New Attorney General," June 17, 1870, *The New York Times*, ProQuest Historical Newspapers.

<sup>331</sup> Chernow, Grant, 700.

interests of the majority of southern whites, but it did reflect continuity from his time in post-war Georgia. Akerman played a prominent role in forming Georgia's new state constitution in 1868 and already displayed a "zealous dedication" to black rights by the time he got to Washington. He had done so by prosecuting violators of the Civil Rights Act of 1866 while he served as a federal district attorney for Georgia.<sup>332</sup> Lane notes that Grant appointed Akerman upon the request of Representative Benjamin Butler who was one of the fiercest congressional advocates of expanding federal authority to protect American citizens from Klan violence. Akerman sent instructions within a month of becoming Attorney General ordering U.S. Attorneys to prosecute every violation of the first enforcement act. Akerman and the Solicitor General, Benjamin Bristow, also directed the covert intelligence gathering operations of the Secret Service against the Klan during 1871.<sup>333</sup> This covert strategy paired with the Enforcement Act of 1870 laid the foundation for fighting the Klan. *Escalating the Administration's Policy: The Enforcement Act of 1871, the Ku Klux Klan Act of 1871, and Intervention in South Carolina*

While the Enforcement Act of 1870 gave the federal government greater power to protect voting rights in the South, Grant continued to press Congress on the situation in the South. In his second annual message in 1870, Grant opened by calling Congress's attention to "violence and intimidation" in southern states that had denied citizens of their rights.<sup>334</sup> While Grant did not make a specific request to Congress, his message continued to define

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<sup>332</sup> Chernow, *Grant*, 700 – 701.

<sup>333</sup> Charles Lane, *Freedom's Detective: The Secret Service, the Ku Klux Klan, and the Man who Masterminded America's First War on Terror* (Harlequin, 2019), 148-151.

<sup>334</sup> Ulysses S. Grant, Second Annual Message, The American Presidency Project <https://www.presidency.ucsb.edu/node/203728>.

infringements on voting rights in the South as a policy problem that required federal action. Grant revisited the issue in the conclusion of his message, writing that his administration's policies included a "thorough enforcement of every law" and "securing a pure, untrammelled ballot, without fear of molestation or proscription on account of his political faith, nativity or color."<sup>335</sup> Thus, Grant reaffirmed his dedication to faithful law enforcement, while also connecting that responsibility to the maintenance of civil rights in the South.

The result was two subsequent acts of Congress that bolstered the scope of federal oversight in the South and further empowered the president to intervene when necessary. In response to the presence of widespread irregularities in southern elections, Congress passed the Enforcement Act of 1871 in February 1871. This Act provided for federal supervision of southern elections, especially in large cities. While this was an important step towards securing the right to vote for African Americans, it would be relatively meaningless if the Klan's violence and terrorism was not stopped. And, in fact, the Klan had continued its violent activities and information about these acts flooded the administration from southern Republican governors and citizens.<sup>336</sup>

After the passage of the Second Enforcement Act in February 1871, the Grant administration pressed Congress for additional legislation that might empower them to break the Klan. The Grant administration also increased its activity in the South under the first two Enforcement Acts. In February 1871, Grant read aloud a report to his cabinet about the horrors of the Klan in South Carolina. Grant followed up by sending troops to South

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<sup>335</sup> Grant, Second Annual Message.

<sup>336</sup> Chernow, *Grant*, 704.

Carolina to maintain order and used Major Lewis Merrill to employ the military in arresting Klan members. As Grant and Akerman ramped up enforcement in South Carolina, Grant asked Speaker of the House James G. Blaine to keep Congress in session in the Spring for the sole purpose of passing further legislation to deal with the Klan.<sup>337</sup>

Grant followed up by visiting Congress in late March to confer with Republican legislators. The purpose of Grant's visit, it seems, was to informally request Republican leaders in Congress to pass additional legislation enhancing the president's authority to enforce the Fifteenth Amendment. During Grant's visit, he also drafted a special message to Congress formally requesting enforcement legislation. Grant's message to Congress expressed that a state of disorder and violence existed in some parts of the South, conveyed that he was unsure whether his existing authority under the Enforcement Acts was sufficient to respond to the demands of the situation, and recommended that Congress pass legislation to effectively secure life, liberty, and enforcement of the law.<sup>338</sup> While Grant did not go so far as to recommend specific provisions that should be included in legislation, the president's submission of a legislative request that asked Congress to expand his authority is significant. In addition to his formal request, Grant met informally with southern Republicans in the House and Senate to vet the message and to urge them to act. In response, the House established a special committee to consider Grant's message, which ultimately led to the introduction of legislation that would become law as the Ku Klux Klan

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<sup>337</sup> Chernow, *Grant*, 74-75; John Y. Simon, "The Papers of Ulysses S. Grant, Volume 21: November 1, 1870-May 31, 1871" (1995), *Volumes of The Papers of Ulysses S. Grant*, 21, 218-219. Henceforth abbreviated as Simon, PUSG vol. 21, page number.

<sup>338</sup> Simon, PUSG vol. 21, 246.



Act in April 1871.<sup>339</sup> This third and final act by Congress was the most impactful, providing Grant the authority to suspend the writ of habeas corpus when he deemed that unlawfulness and disorder existed in the southern states. Using this unprecedented authority, Grant and his administration would forcefully intervene against the Klan in South Carolina in late 1871.<sup>340</sup>

Upon the passage of the Enforcement Act of 1871 and the Ku Klux Klan Act of 1871, Grant issued a proclamation, drafted and read by Akerman to the cabinet, to call public attention to the law and to warn citizens of the consequences of violating the law.<sup>341</sup> While Grant expressed a reluctance to call into effect the extraordinary powers granted to him by the legislation, he made it known that he would not hesitate to use that authority when necessary:

“Fully sensible of the responsibility imposed upon the Executive by the act of Congress to which public attention is now called, and reluctant to call into exercise any of the extraordinary powers thereby conferred upon me except in cases of imperative necessity, I do, nevertheless, deem it my duty to make known that I will not hesitate to exhaust the powers thus vested in the Executive whenever and wherever it shall become necessary to do so for the purpose of securing to all citizens of the United States the peaceful enjoyment of the rights guaranteed to them by the Constitution and laws.”<sup>342</sup>

The proclamation’s language is forceful, demonstrating Grant’s willingness to use executive power to secure the rights of citizens. Grant also made several references to the ideal of law and order, expressing his “earnest wish that peace and cheerful obedience to the law” would

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<sup>339</sup> Simon, PUSG vol. 21, 246-247.

<sup>340</sup> An Act to Enforce the Provision, of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, U.S. Statutes at Large 17 (1871): 13-15.

<sup>341</sup> Simon, PUSG vol. 21, 337.

<sup>342</sup> Simon, PUSG vol. 21, 337.

prevail over the violence and disorder that had characterized southern politics.<sup>343</sup> While Grant's public warning to the Klan was a visible indicator of presidential involvement, the administration was also quick to act behind the scenes.

Grant's proclamation and focus on Klan activities was part of a strategy hatched by Akerman and the Solicitor General Benjamin Bristow. Together they developed the legal infrastructure necessary to successfully prosecute the Klan and identifying South Carolina as the area for intervention.<sup>344</sup> The presence of the military and undercover Secret Service operatives in South Carolina gave the administration the dual ability to gather intelligence about Klan activities and to suppress the Klan's activities when necessary. This plan came to fruition when Akerman convinced Grant to take up the issue late in 1871. Grant issued two proclamations on October 12 and 17, 1871 first warning the Klan to cease and desist and then suspending the writ of habeas corpus in nine counties in South Carolina in a second proclamation. This proclamation led to mass arrests and military rule in those areas of South Carolina, followed by indictments of over 50 Klan members.<sup>345</sup>

In his third annual message to Congress, Grant explained and justified his actions to Congress in a detailed manner. In Grant's explanation, he claimed that the report of the Join

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<sup>343</sup> Ulysses S. Grant, Proclamation 199—Enforcement of the Fourteenth Amendment to the United States Constitution, The American Presidency Project <https://www.presidency.ucsb.edu/node/204356>.

<sup>344</sup> Julie Novkov, "Making Citizens of Freedmen and Polygamists" in *Statebuilding from the Margins: Between Reconstruction and the New Deal*, Carol Nackenoff and Julie Novkov, eds. (University of Pennsylvania Press, 2014), 46-47. Novkov also notes that the focus on prosecuting violations of a narrow set of political rights held by African American men promoted a gendered conception of citizenship that left African American women and children vulnerable, with limited prospects for prosecution.

<sup>345</sup> Ulysses S. Grant, Proclamation 200—Law and Order in the State of South Carolina, The American Presidency Project <https://www.presidency.ucsb.edu/node/204364>; Ulysses S. Grant, Proclamation 201—Suspending the Writ of Habeas Corpus in Certain Counties of South Carolina, The American Presidency Project <https://www.presidency.ucsb.edu/node/204367>; Lane, *Freedom's Detective*, 183 – 185.

Select Committee investigating southern atrocities would support his decisions. Grant outlined the process of suspending habeas corpus in South Carolina. He first noted that his administration was made aware that “from time to time that combinations of these characters referred to in this law were powerful in many parts of the southern states,” and that after “Careful investigation” the administration determined that the Klan was active and particularly powerful in these counties of South Carolina.<sup>346</sup> After taking the unprecedented step of suspending habeas corpus outside of war, Grant quickly altered course and was more cautious about using his new authority in the future. Around the same time, Amos Akerman, the cabinet’s most vigorous advocate of intervention against the Klan resigned.

The reasoning behind Amos Akerman’s resignation, at Grant’s request, is still disputed but his prosecution of the Klan may have played a part. Akerman’s refusal to issue land grants to the Union Pacific railroad company meant that southern Democrats and Liberal Republicans were not his only political enemies.<sup>347</sup> Regardless of the reasons for his resignation, Akerman’s departure from the administration marked the beginning of the end of the administration’s vigorous execution of the Enforcement Acts.

By the time of Grant’s fourth annual message in December 1872 the President stepped back his rhetoric considerably. This was likely, in part, a reaction to the waning support of Grant’s own party, as well as his public castigation by southern Democrats. Grant expressed regret that a “necessity has ever existed” to require the execution of the Enforcement Acts by his administration, while also expressing hope that it would never

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<sup>346</sup> Ulysses S. Grant, Third Annual Message, The American Presidency Project <https://www.presidency.ucsb.edu/node/203731>.

<sup>347</sup> Novkov, “Making Citizens,” 47; Chernow, Grant, 710 – 711. Chernow suggests that Grant was under tremendous pressure from railroad companies and their political allies to force Akerman’s resignation.

again be necessary to execute it again.<sup>348</sup> The fierce opposition of Democrats and the waning support of his own party left Grant with few options, continue promoting aggressive enforcement against the Klan or retreat. The Liberal Republican split in the 1872 election limited Grant's ability to continue engaging in entrepreneurial innovation, as his party was no longer unified in its support for a vigorous enforcement of Reconstruction policies. In the face of growing political pressure, Grant chose retreat which severely limited the federal government's role as a guarantor of Black civil rights. This overview of the case is familiar ground for historians of Reconstruction, and the purposes of this chapter inevitably have led me to set aside important details of this era outside of government. The overview provides the context for my argument that presidential entrepreneurship was clear. With the chronology and context of the case in mind, I now present further evidence about mechanisms of entrepreneurial innovation.

### **Grant and Akerman as Entrepreneurs**

The previous section provides an overview of the political history of the case that would be familiar to many presidency scholars, with an analytic focus on federal actions. While some of the actions described in that section, such as Grant's involvement in the passage of the Ku Klux Klan Act of 1871, indicate entrepreneurial innovation, a more focused and fine-grained evaluation of the case is useful to make a really persuasive case for the presence (or absence) of entrepreneurship.

One clear takeaway from the history above is that Grant's Attorney General Amos Akerman was a leading advocate of battling the Klan. This underscores a conceptual issue

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<sup>348</sup> Ulysses S. Grant, Fourth Annual Message, The American Presidency Project <https://www.presidency.ucsb.edu/node/203736>; on the criticism of the Democratic Party, see Waugh, *U.S. Grant*, 141 and Chernow, *Grant*, 705.

about what qualifies as presidential entrepreneurship. While the president played a prominent role in administration policy and was the final decision-maker, it is likely that many of the creative acts of entrepreneurship were Akerman's. I consider such cabinet-level entrepreneurship, aligned with the president's objectives and with at least tacit presidential approval, to be equivalent to presidential entrepreneurship. We have seen that Grant did eventually dismiss Ackerman, so such an action was well within his power if he had wished to do so. Cabinet entrepreneurship is distinguished from bureaucratic entrepreneurship, by the proximity of the cabinet to presidential control. I introduced two mechanisms of presidential entrepreneurship in chapter two – creative combinations of institutional components and novel constructions of presidential authority. How do we see these play out in the Grant case?

#### *Combining Institutional Components and Capacity*

The initiation of federal action in South Carolina is an element of the case where we might observe entrepreneurial action on the part of the Grant administration. What processes led to the issuance of a “cease and desist” proclamation on October 12, 1871? What institutional components were mobilized in the federal response, and who developed and coordinated the response? The immediate process was initiated by Akerman after meeting with Grant in early October. A letter sent by Akerman to Solicitor General Bristow provides details about the events leading up to the proclamation. In the October 7 letter Bristow, Akerman mentioned his conversation with Grant, in which Akerman suggested the possibility of suspending habeas corpus in South Carolina. It was agreed that Akerman should write a draft proclamation and go to South Carolina to assess the situation firsthand.<sup>349</sup> The presence

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<sup>349</sup> Simon, PUSG vol. 22, 162-163.

of the Attorney General in the locale where federal intervention was being considered suggests a high degree of centralized control.

Grant and Akerman planned for the Attorney General to direct legal proceedings against the Klan from South Carolina for nearly a month before Akerman's letter to Bristow. We know this because on September 11, 1871, the Adjutant General of the Army, Edward Townsend, wrote a confidential letter to Brigadier General Alfred Terry about Akerman's visit. In the letter Townsend informed Terry that Akerman was contemplating a visit to the Carolinas "for the purpose of directing in person such legal proceedings as he may judge proper," going on to note that "The President desires you to give him every aid and facility in your power in prosecuting his plans..."<sup>350</sup> Townsend also sent letters to other commanding officers on the same day – Brigadier General Irvin McDowell and Major Charles H. Morgan – including copies of his letter to Brigadier General Terry and additional orders from Grant about how those officers could aid Akerman.<sup>351</sup> These earlier letters indicate that the administration's plan for Akerman's presence in the implementation of policy had been in place over a month in advance of the "cease and desist" proclamation. They also suggest that Grant was involved coordinating the Department of Justice under Akerman and the Army – to generate an effective response.

Grant's use of the military in South Carolina began seven months before his invocation of the Ku Klux Klan Act authority in October. Grant ordered four divisions of troops to South Carolina in response to the state government's request for federal

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<sup>350</sup> Simon, PUSG vol. 22, 180.

<sup>351</sup> Simon, PUSG vol. 22, 180.

assistance.<sup>352</sup> The deployment was consistent with the authority set forth in the Guarantee Clause and the Insurrection Act, but it remained unclear what, if any, role the military would play in law enforcement. Hamilton Fish wrote in his diary on February 24, 1871, that the cabinet discussed the possibility of sending troops to South Carolina and that Grant was determined that it be done.<sup>353</sup> As the entry makes clear, Grant was determined to act and guided his cabinet to his preferred decision.

Grant also engaged in entrepreneurship to ensure that the commanding officers of the military were executing their roles effectively. On May 13, 1871, Grant told Secretary of War Belknap to order the troops in South Carolina to make arrests when requested to do so by the U.S. Commissioner for South Carolina, and “in all cases to arrest and break up disguised night marauders.”<sup>354</sup> Grant’s orders were in response to a handwritten note from Akerman on the back of an unsigned memorandum about the refusal of commanding officers to make arrests under the Enforcement Acts without special authorization.<sup>355</sup> Thus, the purpose of Grant’s order was to ensure that the military officers executed the laws based on Grant’s vision.

The Army’s role in enforcing civil rights generated much criticism towards the administration’s actions. But equally significant from the perspective of the entrepreneurial framework is how non-military institutional components were used to enhance the effectiveness of the strategy. Attorney General Akerman’s direct coordination of affairs in

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<sup>352</sup> Simon, PUSG vol. 21, 263.

<sup>353</sup> Simon, PUSG vol. 21, 260.

<sup>354</sup> Simon, PUSG vol. 21, 355.

<sup>355</sup> Simon, PUSG vol. 21, 355.

South Carolina is an important element, but also of interest was Akerman's management of the newly created Department of Justice and the use of the Secret Service. Shortly after the passage of the Ku Klux Klan Act of 1871, Senator John Pool worked with Senator Scott and Akerman to persuade Grant to deploy covert detectives against the Klan. Joseph Hester, a deputy U.S. Marshall in North Carolina who had testified before the Ku Klux Committee days earlier, was sent to meet with Grant with a letter from Senator Scott. During the meeting, Grant hired Hester as a detective to investigate the Klan in North Carolina, initiating the Secret Service's role in the government's anti-Klan policies. Grant's endorsement highlights the creative combinations of institutional components that would make up the government's response,

“Respectfully referred to the Atty. Gn. who will please carry out the desires of the writer. The Military will be instructed to aid in any arrests called on to make either by the detective named in this Communication, the U.S. Marshal, or any of his deputies, the Dist. Atty. or U.S. Commissioner.”<sup>356</sup>

Grant's endorsement reflects the President's expectation of close coordination of institutional components in the implementation of policy – covert detectives and U.S. Marshals would investigate crimes and the military would assist in arrests as needed.

According to the authoritative history of the Secret Service, Hester's visit to D.C. to testify before the committee was in fact a cover for the meeting with Grant. Lane suggests that Akerman and his senate allies were unclear if Grant fully understood the possibilities inherent in the March 3 appropriation bill that appropriated funding for detectives in the South.<sup>357</sup> Thus, Hester was sent to “sound out the president indirectly” to determine if Grant

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<sup>356</sup> Simon, PUSG vol. 22, 11.

<sup>357</sup> An Act Making Appropriations for Sundry Civil Expenses of the Government, U.S. Statutes at Large 16 (1871): 495-515. The relevant section is included in the Treasury Department Appropriations under



would approve of undercover operations against the Klan.<sup>358</sup> Grant’s endorsement of hiring Hester as a detective to investigate the Klan in North Carolina marked the beginning of the use of new institutional capacity. The innovation in this case was the joint product of Attorney General Akerman and Senators Scott and Pool, again highlighting the coordinated nature of the federal response. This example provides evidence that entrepreneurship was occurring independent of the president’s initiative, at least in regard to the novel use of the Secret Service for covert intelligence gathering. The example clearly highlights the creative ways that the Grant administration, with the ongoing and consistent support of the President, used heterogeneous institutional components to promote law and order in the face of Klan violence.

Figure 5.1 Institutional Components Involved in Federal Intervention in South Carolina

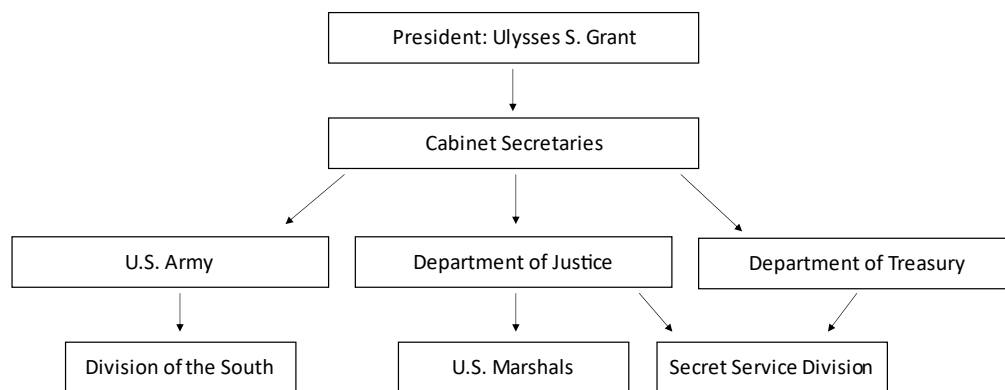


Figure 5.1 highlights the multi-faceted deployment of institutional components that characterized the Grant administration’s strategy. The Department of Justice (U.S. Marshals

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“Miscellaneous” appropriations. It reads: “For this Sum, or so much thereof as may be necessary, to be expended under the direction of the Attorney-General in the detection and prosecution of crimes against the United States, fifty thousand dollars.”

<sup>358</sup> Lane, *Freedom’s Detective*, 152-153.

and Attorneys), under the direction of Akerman and Grant, were central to the legal campaign, engaging in the execution of the Enforcement Acts by issuing arrest warrants and indictments against members of the Klan. The Secret Service engaged in covert intelligence gathering, even infiltrating local Klan organizations. This intelligence was used to enhance the effectiveness of the administration's efforts and secure evidence to be used in legal proceedings. Finally, for over seven months the Army supported the civil authorities in the affected parts of South Carolina, providing the coercive force needed to restore order.

### *Constructing Presidential Authority*

The processes that immediately preceded the administration's mass arrests in October 1871 indicate centralized coordination of a creative and multi-faceted institutional response. We can observe the origins of the administration's response almost a year earlier in November 1870. In this period, Grant was strategically balancing several institutional demands – the desire of Grant and Akerman to expand presidential authority through legislation, demands from the South Carolina governor and legislature for military aid under the Guarantee Clause, letters reporting on Klan violence from citizens in the southern states, and the efforts of the newly formed Senate committee investigating the Klan. These varied demands influenced how Grant constructed presidential authority.

The *New York Tribune* reported that an aide of South Carolina Governor Robert Scott met with Grant and Belknap on November 7, 1870, to discuss the violent conditions there.<sup>359</sup> This meeting, along with similar correspondence from other states, led Grant to begin his second annual message in December 1870 with a passage noting that “violence and intimidation” had been used in several southern states to deny the elective franchise to

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<sup>359</sup> Simon, PUSG vol. 21, 259.

voters.<sup>360</sup> Over the following months, Grant would request legislation from Congress to combat the Klan.

The construction of presidential authority embodied in the Ku Klux Klan Act of 1871 was novel because it was based on the Reconstruction amendments to the Constitution that implied a more activist role for the federal government in the protection of rights. Grant's construction of authority was entrepreneurial in the sense that he seemed committed to enforcing these amendments. However, it is also true that Grant's rhetoric and actions reveal a cautious approach. Grant made no broad Constitutional claims about executive authority based on the Take Care or Commander in Chief clauses, and even pointed to his uncertainty about the limits of his authority to justify his request for the Ku Klux Klan Act to Congress.

By contrast, Representative Samuel Shellabarger related the legislation to the president's Take Care Clause authority. Shellabarger framed the issue while pleading for passage of the Ku Klux Klan Act, arguing that:

“That the revenues of the Republic cannot be collected, because a mastering conspiracy forbids it, we are told by him whom the Constitution makes to swear that he will take care that the laws shall be executed; that the mails of this Government cannot be safely carried, because this incipient treason forbids it; that the States cannot defend the people, because this treason is so strong as to forbid it; that that race-their men and their women and their little ones-become, by act of God, the wards of the nation as well as its citizens, is perishing away under this new and immense murder; that the armies of the Republic are marching back to Sumter! And, then, you are told by the President that the sufficiency of the laws for the appalling emergency is not sure. Can you go off and not make it sure?”<sup>361</sup>

While I did not identify any arguments made by Grant that invoked the Take Care Clause, its presence in the speech of a key congressional ally is intriguing.

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<sup>360</sup> Grant, Second Annual Message.

<sup>361</sup> *Congressional Globe*, 42<sup>nd</sup> Congress, 1<sup>st</sup> Session, April 6, 1871, 519.

The uncertainty expressed by Grant might also be viewed as a strategic act to pressure Congress into expanding presidential authority. After all, Grant had deployed troops to South Carolina in March 1871 in a manner consistent with existing legislation. Grant's argument in his special message was that he was unclear what additional steps would be lawful.<sup>362</sup> Unlike the arguments made by Harrison and Cleveland later in the nineteenth century, Grant did not explicitly make any broad claims about his Article II powers— e.g., the Commander in Chief or Take Care Clauses. Yet the law and Grant's language do seem to suggest a reimagining of the Guarantee Clause so as to expand the federal government's ability to intervene in state affairs to protect the constitutional rights of citizens. Overall, I find less persuasive evidence that Grant constructed presidential authority in novel ways, though he certainly did actively pressure Congress to expand his statutory authority. There is less evidence of novel constitutional constructions in the case but given the creative combinations of institutional components that characterized the administration response, the case clearly supports the expected observation, that we see evidence of presidential entrepreneurship.

### **Evaluating Alternative Explanations**

In this section, I will review four potential explanations of the passage of the Ku Klux Klan Act of 1871 and federal intervention in South Carolina (see Table 5.3). The first explanation is the framework of presidential entrepreneurship, which was discussed at length in the previous sections. The preceding sections present several pieces of evidence indicating presidential entrepreneurship – Grant's exploitation of uncertainty about the boundaries of

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<sup>362</sup> Ulysses S. Grant, Special Message, March 23, 1871, The American Presidency Project <https://www.presidency.ucsb.edu/node/204259>.

presidential authority to justify the statutory expansion of authority embodied in the KKK Act, the centralized control and coordination of implementation by Akerman, the creative combination of institutional components in the administration’s response. While there is evidence that the mechanisms of entrepreneurship were present in this case, dismissing or showing the weakness of alternative explanations can provide a stronger test.

Table 5.3 Summary of Alternative Explanations of the KKK Act of 1871 and its Use in South Carolina

<b>Explanation</b>	<b>Implications for Passage of KKK Act of 1871</b>	<b>Implications for Use of Authority in South Carolina</b>
Presidential Entrepreneurship	President and cabinet play a central role in passage; influence legislators.	President and cabinet initiate and direct activity and maintain oversight of military and bureaucrats.
Congressional Dominance	Minimal presidential and cabinet involvement in passage.	Executive reliance on congressional investigations for information and direction.
Bureaucratic Entrepreneurship	Bureaucrats pressure Congress to pass legislation independent of president and cabinet.	Civil and military bureaucrats operating independent of presidential/cabinet directions.
State Demands	Similar to congressional dominance; legislation the result of state demands directly to Congress.	President and/or military simply respond to state-level demands for aid in a uniform fashion – i.e., no agency involved.

*Alternative 1. Congressional Dominance*

The theory of congressional dominance is prevalent in much scholarly writing about the nineteenth century presidency.<sup>363</sup> This view would claim that Congress, rather than the executive, initiated and played the leading role in the government’s response against the Klan. Eric Foner’s influential history of reconstruction takes this view, centering Congress in the passage of the Enforcement Acts.<sup>364</sup> Foner’s account does not even mention Grant’s

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<sup>363</sup> Wilfred E. Binkley, *President and Congress* (New York: Random House, 1962); James L. Sundquist, *The Decline and Resurgence of Congress* (Brookings, 1981).

<sup>364</sup> Foner, *Reconstruction*, 454-458. Foner does not explicitly say that Grant did not influence congressional policy, but his framing of events centers Congress. He does discuss the commitment of Akerman and Bristow to “vigorous enforcement” of the Enforcement Acts.

involvement in the passage of the Ku Klux Klan Act. Congress's role cannot be ignored, especially the Constitutional necessity of the passage of the enforcement acts and the politically useful investigation of conditions in the southern states. Nevertheless, the sequencing of events and details of the executive-legislative interactions ultimately do not support this interpretation. Individual members of Congress and the committees investigating the Klan contributed to the government's response to the Klan, but congressional involvement (and coordination with the executive branch) do not demonstrate congressional dominance. While Congress played an important role, presidential and cabinet-level entrepreneurship were the central force shaping the government's response.

There were several Republican senators and members who played a role in the government's actions. Senator John Scott of Pennsylvania was an essential ally of the administration's southern policy, and at several moments his actions did contribute to the administration's decisions. When the South Carolina legislature formally requested federal aid under the Guarantee Clause on February 8, 1871, Grant directed his assistant Orville Babcock to forward the resolution to Scott to be introduced in the Senate committee investigating the Klan.<sup>365</sup> Scott's role as the chair of the Senate committee made him a natural liaison connecting the administration and Congress.

Congress's efforts to investigate the Klan first through a Senate committee and then by the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States ("Ku Klux Committee") also deserve consideration. Perhaps congressional dominance of the executive is demonstrated by the information and intelligence gathered by these committees, which then forced the president's hand. While the

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<sup>365</sup> Simon, PUSG vol. 21, 259-260.

Ku Klux committee certainly aided the efforts of the executive branch, the timing and sequencing of events indicate that they more often were following, rather than leading, the Grant administration. Grant's second annual message preceded the Senate's resolution for information about the status of the Klan in North Carolina. The Select Committee of the Senate to Investigate Alleged Outrages in the Southern States was formed on January 19, 1871, days after Grant sent a report to the Senate about Klan outrages in North Carolina. The resolution creating the committee states that its formation was for the purpose of investigating the matters discussed in Grant's message.<sup>366</sup> The initial congressional investigation was, in fact, a response to information gathered and shared by the executive branch.

Subsequent investigative efforts by Congress also followed presidential actions. The formation of the Joint Select Committee on April 10, 1871, came weeks after Grant deployed troops to York and Chester counties in South Carolina, made his legislative request on March 23, and issued a proclamation about law and order in South Carolina.<sup>367</sup> Grant ordered additional troops to South Carolina in May 13, 1871, the Joint Select Committee sent a subcommittee of its members to take testimony in South Carolina during July 1871. The final report of the Joint Select Committee was not published until February 1872,

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<sup>366</sup> United States Congress, Senate, "Report on the Alleged Outrages in the Southern States by the Select Committee of the Senate, March 10, 1871, xxxiii.

<sup>367</sup> Simon, PUSG vol. 21, 263, Adjutant General Townsend to General Halleck informing the General of President Grant's desire for Halleck to send four companies of cavalry to the area; Ulysses S. Grant, Proclamation 197—Law and Order in the State of South Carolina, The American Presidency Project, <https://www.presidency.ucsb.edu/node/204348>.

months after the suspension of habeas corpus in South Carolina and Grant's subsequent decision to not invoke the authority in other locations.<sup>368</sup>

The work of the Ku Klux Committee was undoubtedly useful to the Grant administration, but the investigative functions of Congress lagged behind (and relied upon) significant executive actions and served to complement the executive branch's extensive intelligence gathering campaign undertaken by the Secret Service. Perhaps the moment where the committee's intelligence was most relevant was in Senator John Scott's letter to Grant on September 1, 1871, which included testimony given before the committee while it was in South Carolina. Scott also shared a list of six counties where local authorities could not contain Klan violence – Spartanburg, Union, Laurens, Newberry, Chester, and York – all of which were specified along with three others in Grant's subsequent "cease and desist" and suspension of habeas proclamations.<sup>369</sup> This example speaks more to the important role by an administration ally that Scott played as Chair of the congressional committee, rather than indicating congressional dominance over the executive.

The partisan acrimony surrounding the Ku Klux Klan Act of 1871 serves to remind that Congress, far from dominating the executive, was intensely divided and members of both parties were acutely aware that the law expanded presidential authority. Democratic members of Congress were highly critical of the new law and Grant's intervention in South Carolina. These members held political incentives to frame the effects of the law in hyperbolic terms that would generate public outrage. Nevertheless, their criticisms convey

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<sup>368</sup> *Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States*, February 19, 1872, 2.

<sup>369</sup> Simon, PUSG vol. 22, 163-165; Ulysses S. Grant, Proclamation 200—Law and Order in the State of South Carolina, The American Presidency Project <https://www.presidency.ucsb.edu/node/204364>.



the belief that the legislation was Grant's initiative and that it would enhance presidential authority to dangerous levels. James Beck of Kentucky lambasted efforts to pass legislation enforcing the Fourteenth amendment, suggesting it "is simply a bill to overthrow what remains of republican liberty and law in these once united coequal States, and to substitute in its stead a centralized, consolidated military despotism, with the President as dictator, law maker, and judge."<sup>370</sup> Other Democratic party members made similar claims, calling Grant as a dictator, and comparing him to infamous figures like Napoleon. Joseph Lewis of Kentucky also pointed to Grant's influence over the legislation, observing that "if this bill is passed at all it will be the result of executive dictation..."<sup>371</sup> Many more examples could be offered, but these accurately illustrate that Democrats attempted to frame the bill as one executive usurpation.

Even Republican members of Congress expressed concerns about the effects of the legislation, indicating that members realized that the bill would expand presidential authority. For instance, James Garfield wrote to Jacob Cox on the day of the president's legislative request to Congress complaining that Grant had not sent his request earlier and noting his trepidation about the interpretation of the Fourteenth Amendment by Grant and his allies. Garfield interpreted the bill in the following stark terms:

"Shellabarger and Bingham have bills ready, which rest on an interpretation of the 14<sup>th</sup> amendment, which I cannot yet see my way to adopt. They assume that the 14<sup>th</sup> amendment, empowers Congress to provide, by law, that the President may with out the invitation of the State legislature, or its Governor, send the Army into any state, and assume control of affairs, whenever, in his judgment, the State Laws, are not so administered, as to give that equal protection, to life and property, which the 14<sup>th</sup> article requires...They say that if the State neglect to enforce the laws of the State, which grant equal protection, such neglect will constitute a *denial* of equal

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<sup>370</sup> *Congressional Globe*, 42<sup>nd</sup> Congress, Session 1, 3/30/1871, 351.

<sup>371</sup> *Congressional Globe*, 42<sup>nd</sup> Congress, Session 1, 4/1/1871, 384-385.

protection, and will authorize the President to interfere. It seems to me, that this will virtually empower the President to abolish the State Governments.”<sup>372</sup>

Further, Shellabarger, despite being a chief proponent of the Ku Klux Klan bill in the House, expressed similar concerns about the bill's implications for the foundations of government.<sup>373</sup>

Speaker of the House James G. Blaine’s memoirs portray the president and his administration as the drivers of the government’s fight against the Klan, not Congress. Blaine suggested that the Grant administration’s efforts to protect voting rights in the South represented a monumental struggle between a President and forces in the southern states that sought to undermine voting rights. Blaine characterized the issue of voting rights as a presidential policy objective and suggested that Congress “did its utmost to strengthen the hands of the President in a contest with these desperate elements.”<sup>374</sup> While this unity of purpose between Congress and Grant was essential to producing the Ku Klux Klan Act, Blaine’s interpretation is not one of congressional dominance (or leadership) over the executive. After all, the Ku Klux Klan Act was an explicit effort by Congress to significantly expand the president’s statutory authority under the Insurrection Act framework. While Congress’s approval in the case was Constitutionally necessary, the driving force in policy innovation came from presidential and cabinet-level activism.

### *Alternative 2: Bureaucratic Entrepreneurship*

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<sup>372</sup> Simon, PUSG vol. 21, 247-248.

<sup>373</sup> *Congressional Globe*, 42<sup>nd</sup> Congress, 1<sup>st</sup> Session, Appendix, 67.

<sup>374</sup> James G. Blaine, *Twenty Years of Congress: From Lincoln to Garfield with a Review of the Events Which Led to the Political Revolution of 1860*, vol. II (Norwich: The Henry Bill Publishing Co, 1886), 468 – 470.

Several prominent accounts of state building in the late nineteenth century emphasize the entrepreneurship of mid-level bureaucrats.<sup>375</sup> The mobilization of multiple military and civil bureaucratic components in the government's response suggests that some degree of bureaucratic autonomy – and initiation – is plausible. To assess the degree to which these bureaucrats operated independent of the president and cabinet, I focus on a two critically important officials – Chief of the Secret Service Division, Hiram Whitley, and the Commanding General of the U.S. Army, William Tecumseh Sherman. A plausible alternative explanation of these events might be that the Army and Secret Service engaged in their campaigns at critical moments without direction from the Grant administration, and that the administration's apparent leadership was in fact a response to bureaucratic initiatives.

To begin with General Sherman's, it seems the opposite may be true. In a letter sent on March 18, 1871, Sherman expressed his disagreement with military reconstruction and stated his frustration at his lack of influence over the Army relative to President Grant and Secretary of War Belknap. Sherman wrote to Brigadier General Ord of the Department of California that "The Secretary of War seems jealous of any suggestions from me and I let him work out these problems in his own way."<sup>376</sup> Two things are clear from the letter, Sherman felt alienated from Belknap's management of military reconstruction and, as the rest of the letter details, was pessimistic about the prospects of reconstruction given violent conditions in the South. General Sherman's letter to his brother, Senator John Sherman, on July 8, 1871, expressed similar frustrations:

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<sup>375</sup> Daniel P. Carpenter, "State Building through Reputation Building: Coalitions of Esteem and Program Innovation in the National Postal System, 1883–1913," *Studies in American Political Development* 14(2) (2001): 121–155; Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* (Princeton, NJ: Princeton University Press, 2001).

<sup>376</sup> Simon, PUSG vol. 21, 351.

“I feel that the Republicans have done all that is possible to alienate me and the Army generally. My office has been by law stripped of all the influence & prestige it possessed under Grant, and even in matters of discipline & army control I am neglected, overlooked, or snubbed. I have called Genl Grants attention to the fact several times, but got no satisfactory redress.”<sup>377</sup>

These letters suggest that Sherman himself felt that the Army was under the control of the civilian leaders in the executive branch (Grant and Belknap). Further, the fact of top-down centralized coordination of the administration is supported by the numerous telegrams and letters sent from Grant, Belknap, and Akerman to various commanding officers in the South. While bureaucratic discretion is unavoidable in the implementation of policy, it seems clear from the evidence that the military bureaucracy was following orders rather than initiating or guiding decision-making.

Secret Service Chief Whitley was more aligned with the administration’s policy than General Sherman, and his division’s significant role in the government’s policy enhanced his influence. The Secret Service played a crucial role in the administration’s policy by providing covertly gathered, and thus more reliable, information about Klan activities in the South. Whitley sent his first report on the KKK’s activity to Attorney General Akerman on September 29, 1871. In this report, he detailed the widespread nature of the conspiracy and the necessity of covert detectives. A recent Whitley biography suggests that the report reached the administration as the leaders were discussing whether to follow up the deployment of troops to South Carolina in May 1871 with the suspension of habeas corpus under the Ku Klux Klan Act.<sup>378</sup> It seems plausible that the information contained in the

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<sup>377</sup> Simon, PUSG vol. 22, 31.

<sup>378</sup> Lane, *Freedom’s Detective*, 180-182. Lane cites the report, including parenthetical citations to the text, but I was unable to acquire a copy of the original document. A search of ProQuest’s executive branch documents database for “Secret Service Division” between 1870 and 1872 returned no results.

report was useful to the administration, but its timing casts doubt on whether it was a critical factor the decision to suspend habeas corpus in South Carolina. As noted above, the Adjutant General of the Army written to Brigadier General Alfred Terry on September 11, 1871, advising that Akerman was going to visit the Carolinas to evaluate the situation and oversee legal proceedings if necessary.<sup>379</sup> That is, the timing of these communications is inconsistent with the notion that Whitley's report from South Carolina precipitated the initiation of the administration's plan.

Surely it would be reasonable to conclude that the information provided by Whitley was useful to the Grant administration as it began to ramp up action against the Klan in South Carolina. However, the timing of the administration's actions also indicates that while the report may have supported the Administration plan, it did not initiate the administration's decision to escalate the use of force. The Secret Service and Whitley played an indispensable role in the Grant administration's efforts to break the Klan. Nevertheless, there is little evidence to suggest that Whitley played a significant role in the Grant administration's decision. Whitley is best viewed as an innovative and useful bureaucrat who played his role in the administration's broader entrepreneurial efforts to creatively combine institutional components in their response to Klan violence.

### *Alternative 3: State Demands*

A final alternative explanation is that the Grant administration simply reacted to the demands of the government of South Carolina. This explanation implies some degree of automaticity in the government's response – i.e., invocation of the KKK Act was merely a response to the state legislature (or governor) requesting federal military aid. If this were

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<sup>379</sup> Simon, PUSG vol. 22, 180.

true, the Grant administration could be said to have behaved entrepreneurially, but rather were responding to state demands.

Throughout the entire period of Reconstruction, numerous requests for federal aid were sent by states to President Grant. As the majority report of the Ku Klux committee and Grant administration records indicate, Klan violence affected most southern states. Further, various political disputes between state-level actors spilled over into requests to the president.<sup>380</sup> The demand for aid from states far outnumbered the capacity of the military and the political capital of the Republican party. Despite the visible and contentious presence of military in the southern states during Reconstruction, Foner notes that there were fewer than 6,000 troops garrisoned in the South in 1871.<sup>381</sup> In other words, there were simply not enough Army regulars in the South to respond to every state request. The editor of the Grant Papers, John Simon, corroborates this assessment, noting that “Calls for federal assistance came from elected officials and citizens throughout the South, taxing the limited number of troops available and forcing Grant to make hard decisions.”<sup>382</sup> In this context of widespread demands, the Grant administration acted strategically to determine when and where to use its new authority.

The decision of the President and Attorney General to concentrate their efforts in South Carolina requires further explanation. The administration’s logic was, in part, based

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<sup>380</sup> Simon, PUSG vol. 21, 35-37. This documents Grant’s endorsement that troops would not be used to obstruct the resolution of contested elections. This endorsement came about 10 days after Grant receipt of a letter from Charles Buckley reporting fraud and intimidation in Alabama’s elections. See Simon, PUSG vol. 21, 18-26.

<sup>381</sup> Foner, *Reconstruction*, 457. Note that Foner’s calculation excludes troops Texas because troops there were engaged in fighting Indian wars. The less than 6,000 troop estimate reflects the Army’s manpower for managing the affairs of the reconstructed southern states.

<sup>382</sup> Simon, PUSG vol. 21, xii.

on the strength of the Klan in the South Carolina Piedmont counties and the number of atrocities committed in that area in early 1871. According to Foner, the Klan became more “deeply entrenched” in the South Carolina Piedmont, “where medium-sized farms predominated and the races were about equal in number,” than any other place in the South.<sup>383</sup> The Grant administration also received an abundance of information about Klan outrages in South Carolina during early 1871. South Carolina’s Governor, Robert Scott communicated with Grant and military leaders about the Klan’s reign of violence and terror in January and February of 1871.<sup>384</sup> In addition to the correspondence between Governor Scott and the administration, Grant received letters from many citizens about Klan violence. For example, Warren Wilkes and Samuel Nuckles wrote to Grant on March 2, 1871, with details about the Klan’s killing of jailed Black prisoners in York County South Carolina.<sup>385</sup> The strength of the Klan in the Piedmont region of South Carolina, along with the persistent requests for aid from its citizens and state officials, help explain why the Grant administration focused its attention there.

What seems clear from the evidence is that the Grant administration did not respond automatically to all state demands for assistance. Each case was responded to differently – in some cases Grant deployed troops to affected areas for peacekeeping purposes, in other cases Grant was reticent to get involved in factional disputes about state political power. Further, this variation in the administration’s response reflected the small number of troops

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<sup>383</sup> Foner, *Reconstruction*, 431.

<sup>384</sup> Simon, PUSG vol. 21, 259-260, 263. See the following: Letter from Robert Scott to Brigadier General Alfred Terry, 1/17/1871; Scott telegram to Grant, 2/14/71; Scott telegram to Grant requesting troops to York and Chester counties, 3/9/1871.

<sup>385</sup> Simon, PUSG vol. 21, 260-265. This includes the letter from Wilkes and Nuckles, as well as correspondence from other citizens reporting violence and asking for aid.

garrisoned in the South which required Grant and the cabinet to make strategic decisions about where deployments would be most effective. In this view, the choice to crackdown on the Klan in the stronghold of South Carolina illustrates not a response to demands by the S.C. government, but a calculated, strategic use of the new authority that had the potential to deter and thus help to subdue the Klan elsewhere.

### **Constraints on Presidential Resolve**

The Ku Klux Klan Act of 1871 dramatically expanded the federal government, and president's, authority to enforce domestic law and order. It did so with the rights of African Americans in mind. Grant and Akerman's use of the authority granted to them in the Enforcement Acts remains a dramatic outlier. Nevertheless, Grant and Akerman's entrepreneurial innovation did not result in durable changes to institutional authority. So, what explains Grant, and the Republican party, retreating from this new conception of Presidential (and federal) authority several interrelated causes are relevant – the disenchantment of northern white voters with Reconstruction, the vocal and persistent criticism of southern Democrats in Congress, and the fracturing of Republican party resolve which ultimately resulted in the Liberal Republican defection in 1872. Foner captures this sentiment, noting that the Ku Klux Klan Act and Grant's use of force in South Carolina moved "Republicans to the outer limits of constitutional change," suggesting that this act's further empowerment of the president pushed the cause of Reconstruction and the Radicals as far as it could go politically.<sup>386</sup>

Grant's retreat from suspending habeas corpus in other southern states brings the limitations on presidential leadership into clearer focus. Brooks Simpson highlights how the

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<sup>386</sup> Foner, *Reconstruction*, 455 – 456.



continued use of federal interventions in the South became an issue of political survival for the Republican party. Grant was politically savvy enough to see that support for intervention declined among northern whites in 1871 and 1872, meaning that a continuation of his forceful policy to protect southern Republicans would erode the party's support among its northern base.<sup>387</sup>

The retreat from military intervention by Republicans in the federal government was certainly a victory for southern Democrats. The results for African Americans in the South were dire, as they were subjugated to an inferior status in southern society. While the Grant administration's reach in the South was always going to be limited, the use of the military undoubtedly left African Americans – at least for a short time – better-protected from violence and oppression. The longer-term effects on American politics are well-known, but worth reiterating. The new form of states' rights that emerged after the end of military reconstruction was a thinly veiled justification for denying due process and equal protection to Black Americans.<sup>388</sup>

The stakes of Reconstruction, and the enforcement of the Fifteenth Amendment, were high for African Americans. The lack of a true and resolute commitment to racial equality among white northerners enabled white southerners to undo in practice the rights and political voice granted to Black Americans during Reconstruction. Grant was pulled away from these goals by declining political support within his own party, thus

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<sup>387</sup> Simpson, *Reconstruction Presidents*, 135.

<sup>388</sup> William Allan Blair, "The Use of Military Force to Protect the Gains of Reconstruction," *Civil War History* 51, 4 (2005): 402.

demonstrating the limits of presidents to act on their own without the support of their co-partisans.

### **Conclusions: Evaluating the Entrepreneurial Framework**

The suspension of habeas corpus in South Carolina outside of war time is a dramatic moment in American history. Grant and Akerman were central players throughout the entire process – from problem definition in Grant’s second annual message to Congress’s passage of the Ku Klux Klan Act of 1871, and in the use of this new authority in October 1871. The creative use of institutional components in the response clearly aligns with the expectations of presidential entrepreneurship. The novel construction of presidential authority is somewhat present, but less clear. Further, when we explore alternative explanations like the theory of congressional dominance or bureaucratic entrepreneurship, the evidence simply does not undermine an explanation that concludes that the president was *the* agent of change. This most-likely case validates the theory, but it does not speak to the consequences of these mechanisms in other cases where the conditions are less favorable. For a less promising test of the theory of presidential entrepreneurship, I now turn to two least-likely cases – Hayes’ and Arthur’s invocation of the Insurrection Act framework in response to lawlessness in the New Mexico and Arizona territories. Observing similar mechanisms of presidential entrepreneurship in these cases would provide strong corroboration for the theory’s validity.

## Chapter 6, Least-Likely Cases of Presidential Entrepreneurship: Hayes and Arthur Intervene in the Territories

“From and after the passage of this act it shall not be lawful 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*; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person wilfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment.”<sup>389</sup> – The Posse Comitatus Act, June 18, 1878.

“No doubt the Government is a good deal crippled in its means of enforcing the laws by the proviso attached to the Army Appropriation Bill which prohibits the use of the army as a posse comitatus to aid United States officers in the execution of process... But in the last resort, I am confident that the laws give the Executive ample power to enforce obedience to United States process. The machinery is cumbersome and its exercise will tend to give undue importance to petty attempts to resist or evade the laws. But I must use such machinery as the laws give.”<sup>390</sup> – Rutherford B. Hayes, July 30, 1878.

The Posse Comitatus Act (PCA), passed by Congress in 1878, sought to constrain presidents in using the military for domestic law enforcement. The passage of the PCA was a direct response to federal military interventions in the southern states during reconstruction. One scholar has called the PCA a “relic of the nation’s failed experiment with Radical Reconstruction.”<sup>391</sup> The authority given to a president by the Ku Klux Klan Act of 1871 and used effectively by Grant’s military intervention in the South throughout the 1870s drew the

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<sup>389</sup> An Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June Thirtieth, Eighteen Hundred and Seventy-Nine, and for Other Purposes. U.S. Statutes at Large 20 (1878): 152.

<sup>390</sup> *The Diary and Letters of Rutherford B. Hayes, Nineteenth President of the United States*, Volume 3, Charles Richard Williams, ed. (Columbus, Ohio: Ohio State Archeological and Historical Society, 1922), 492-493. Henceforth approximated as Williams, *Diary and Letters of RBH* vol. 3, page number.

<sup>391</sup> Christopher A. Abel, "Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy, and Federal Law Enforcement at Sea," *Wm. & Mary L. Rev.* 31 (1989): 448.

ire of southern Democrats. As discussed in chapter 5, Grant's reliance on federal intervention provides strong evidence of how entrepreneurial innovation can generate shifts in institutional authority and accepted practices.

However, these shifts were challenged by Congress and the courts during the 1870s and 1880s. The PCA was made possible by the Democratic party's control of the House during the last two years of Grant's presidency and the first two years of Hayes' presidency.<sup>392</sup> Divided government continued through the end of Hayes' term and, with the exception of the 47<sup>th</sup> Congress during Arthur's first two years, the Democrats had continuous control of the House from 1875 – 1889. During this period the single-party government that characterized the Civil War and first decade of Reconstruction gave way to a more balanced environment of party competition.

My two "least-likely" cases involve response to lawlessness in the New Mexico (Hayes) and Arizona (Arthur) territories. They are situated in this context of national party competition and backlash against Grant's bold use of the military in southern affairs. Under these political constraints, I have hypothesized that we are less likely to observe presidential entrepreneurship at work. The PCA reduced ambiguity surrounding the president's authority to use the military domestically by clarifying when it would be lawful for presidents to do so. The PCA provided several exemptions to the constraints, leaving in place the statutory framework of the Insurrection Act. The PCA also in fact enhanced the president's authority by making it illegal for military commanders to deploy troops without presidential

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<sup>392</sup> Another legislative challenge to the accumulation of executive authority during Reconstruction can be seen in conflict between Hayes and Congress over riders in appropriation bills that would prevent federal supervision of southern elections. Hayes ultimately forced Democrats in Congress to backdown after several vetoes of various appropriation bills and a powerful defense of executive authority. See Ari Hoogenboom, *The Presidency of Rutherford B. Hayes* (University of Kansas Press, 1988), 74-77; Williams, *Diary and Letters of RBH* vol. 3, 527-555.

authorization.<sup>393</sup> The PCA was, more accurately, a repudiation of what was known as the Cushing Doctrine (discussed in chapter 4). Under this interpretation, military regulars could be deployed to aid civilian law enforcement officers when requested.<sup>394</sup> The PCA clarified that the military could only be deployed for civil law enforcement when expressly authorized by the Constitution or statutes. Thus, it became illegal for military commanders to directly offer military assistance to the U.S. Marshals as part of the posse comitatus without presidential authorization – a common practice from the 1850s - 1878. Despite these centralizing features, the PCA made Arthur unsure about the scope of his authority. In this context of diminished ambiguity, novel constructions of presidential authority would be riskier for presidents.

Further, in these cases, particular characteristics of the disorders must be noted. Arizona and New Mexico were located on the geographic periphery of federal control in the 1870s and 1880s. In fact, a prominent military historian noted the disparate geographical impact of the PCA,

“Oddly enough, the effect in the South, where the period of Reconstruction had really come to an end anyway with Hayes’ withdrawal of troops in 1877, was far less important than in the West where the Cushing Doctrine had enabled marshals and sheriffs to call on local commanders to assist them... Given the frontier conditions involved and the delays involved in getting presidential approval before troops could act in a local situation, this proved to be one of the less salutary effects of the Posse Comitatus Act.”<sup>395</sup>

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<sup>393</sup> Clayton D. Laurie and Ronald H. Cole, *The Role of Federal Military Forces in Domestic Disorders, 1877-1945*, Vol. 30, no. 15 (Government Printing Office, 1997), 58.

<sup>394</sup> Caleb Cushing, “Extradition of Fugitives from Service,” May 27, 1854, in *The Posse Comitatus Act of 1878: A Documentary History*, Stephen Young, ed. (Hein and Co., 2003) 466-474.

<sup>395</sup> Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878*. Vol. 30, no. 13. (Center of Military History, 1989), 345.

Adding to this impact was the fact that disorders in the western territories were less salient to national party politics than disorder in the reconstructed South. Further, territorial governments in the United States system were partially administered by the federal government, and thus some degree of military rule was normal in these areas. The disorders in the territories had a relatively limited link to presidential priorities in comparison to the issues of Black voting rights and widespread Klan violence. This substantive difference in issue priority makes it less-likely that we will observe Hayes or Arthur combining institutional components in creative ways to restore order. To summarize, the antecedent conditions of the cases make it unlikely I will observe either mechanism – novel constructions of presidential authority or creative uses of institutional capacity – of presidential entrepreneurship.

The structure of this chapter varies slightly from chapter 5 because it analyzes two cases, rather than one. First, I provide a brief historical overview of major events in the case known as the Lincoln County War, which took place in the New Mexico territory from roughly February 1878 – February 1880. I emphasize the response of the Hayes administration and the military. I then discuss probative evidence of the presence or absence of the theory's mechanisms and evaluate plausible alternative explanations of the case. I then do the same for Arthur's intervention in Arizona: provide a historical overview of the case, discuss evidence of mechanisms, and evaluate plausible alternative explanations. I note at the outset that the digitized papers of Hayes and Arthur are far less extensive and thoroughly annotated than Grant's. As a result, this chapter relies more heavily on histories

of each case and documents available through the American Presidency Project and ProQuest Congressional.<sup>396</sup>

Table 6.1 Chronology of Major Events in the Lincoln County War (1878-1880)

<b>Date</b>	<b>Description of Event</b>
February 18, 1878	Murder of John Tunstall by a deputized posse of citizens under command of Sheriff William Brady. Escalating feud between rival factions in Lincoln Co.
March 4, 1878	Samuel B. Axtell, Territorial Governor of New Mexico, requests that Hayes deploy military to keep peace; Hayes agrees, 9th Cavalry deployed to Lincoln Co.
April 1, 1878	"Regulators" associated with Tunstall and McSween murder Sheriff Brady.
April 5, 1878	Hatch replaces Lt. Col. Purington as commanding officer with Lt. Col. Nathaniel Dudley. Upon allegations of the former's partisanship in the conflict.
May 1878	Frank W. Angel, Special Investigator hired by the Department of Justice and Interior, arrives in Santa Fe, New Mexico to begin investigation.
June 18, 1878	Congress passes the Posse Comitatus Act (PCA)
July 7, 1878	Hatch receives news of PCA in General Order no. 49, orders Dudley to cease use of troops in aid of civil authority without authorization from Secretary of War or President.
July 19, 1878	Dudley deploys troops in "Five Days Battle," despite PCA.
August 11, 1878	Warner presents questions to Governor Axtell after uncovering evidence of his involvement in factional conflict.
August 20, 1878	Axtell requests military aid from Hayes to stop lawlessness produced by bands of marauders.
October 1, 1878	Secretary of War McCrary issued General Order no 71 allowing the emergency use of troops as posses under military control.
October 1, 1878	Hayes replaces Axtell with Lew Wallace as Governor of New Mexico territory.
October 7, 1878	Hayes issues "cease and desist" proclamation after request for aid from Wallace.
November 13, 1878	Territorial Governor Wallace issues proclamation encouraging maintenance of peace and offering a general pardon for misdemeanors and minor crimes.

<sup>396</sup> While the Library of Congress do have a digitized collection of Arthur's papers, Arthur ordered many of his papers to be destroyed upon his death. My search of Arthur's digitized papers October 1881 – June 1882 did not identify any relevant documents to the case. The bulk of the Hayes papers are housed at the Rutherford B. Hayes Presidential Center in Ohio, and the only relevant digitized documents are a five volume series of Hayes' diary and letters. Volumes 3 and 4 cover the presidential and post-presidential years of Hayes. They contain useful documents about Hayes' conception of presidential authority, including Hayes' reflections after the Great Railroad Strike of 1877, his interpretation of the PCA, and his battle with congressional Democrats over federal supervision of elections, but I did not identify any entries directly discussing the case. There are still several available records for each case including the Congressional Globe, Annual Reports of the Secretary of War, and Opinions of the Attorneys General.

December 14, 1878	Wallace requests military to aid in enforcing regular duties of civil authorities, beyond stopping bands of lawless marauders; the War Department denies request.
March 8, 1879	Dudley removed, Purington reinstated as acting commander of Fort Stanton.
March 15, 1879	Wallace organizes territorial militia called "Lincoln County Rifles" to maintain order.
February 28, 1880	Federal military intervention formally ends in Lincoln Co.

Table 6.2. Chronology of Major Events During Disorder in the Arizona Territory (1881-82)

<b>Date</b>	<b>Description of Event</b>
December 6, 1881	Arthur refers to lawlessness in Arizona in First Annual Message to Congress.
February 2, 1882	Arthur sends Special Message to Congress including letter and papers from Territorial Governor and Secretary of Interior.
March 8, 1882	Frederick A. Tritle becomes Governor of Arizona Territory.
March 31, 1882	Tritle writes to Arthur reporting on cowboy and Indian situation, requesting assistance.
April 15, 1882	Attorney General Brewster, at Arthur's request, issues opinion that PCA does not limit president's ability to deploy military.
April 26, 1882	Arthur sends Special Message to Congress requesting guidance; Arthur suggests invoking Rev. Stat. sec. 5298 (Insurrection Act) to deal with disorder.
April 28, 1882	House passes resolution requesting information from Secretary of War; Secretary of Interior reports Apache attack in Tombstone on same day.
May 1, 1882	Senate Judiciary Committee rules that no additional legislation was necessary, that Rev. Stat. secs. 5296 and 5298 could be used to justify military intervention; Tritle organizes "Tucson Volunteers" to pursue Apache raiders.
May 3, 1882	Arthur issues "cease and desist" proclamation in Arizona Territory.

### **Summary of Major Events in the Cases**

Table 6.1 provides a chronology of the major events of the Lincoln County War in the New Mexico territory. This conflict lasted from early 1878 through 1880. Table 6.2 provides a chronology of lawlessness in the Arizona territory which spiked in 1881 and 1882. As was the case with the chronology in chapter 5, the chronology presented here is not comprehensive. Rather, it attempts to summarize the major events in each case and



emphasizes governmental actions related to each disorder. Each of these disorders were unique.

The Lincoln County war was an ongoing dispute between rival factions competing for economic power. The disorder in Arizona was a general period of violence and criminality that included raids by cowboys and Apache warriors. Nevertheless, both cases involved disorders occurred in legally recognized territories on the geographic periphery of the United States. Because of this, the Department of the Interior, with its oversight of the territorial governments, played a central role in the resolution of both disorders. The territorial governors, nominated by the president with the advice and consent of the Senate, were a part of the Department of the Interior.<sup>397</sup> Neither territory had a strong, well-organized militia, and local authorities in the western territories had grown accustomed to military support as an aid to the civil authority before the advent of the PCA.<sup>398</sup> The Army played a key role because of its importance in the territories. The Army's primary functions after the end of Reconstruction were the maintenance of order on the frontier and fighting against Native American tribes.<sup>399</sup> As a result, both the Lincoln County War and the lawlessness in Arizona were instance where federal military intervention was needed because local civil authorities and militias were weak, and both were cases in which the PCA presented new challenges to prior standard operating procedures.

### **Hayes and the Lincoln County War**

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<sup>397</sup> Hoogenboom, *Presidency of Rutherford B. Hayes*, 121.

<sup>398</sup> Coakley, *Role of Federal Military*, 345.

<sup>399</sup> Hoogenboom, *Presidency of Rutherford B. Hayes*, 82.

The Lincoln County War emerged out of an economic dispute when the local economic monopoly controlled by Lawrence Murphy, John Dolan, and James Riley was challenged by John Chisum and John Tunstall. The feud between the two factions escalated when Tunstall was killed “by a deputized posse of Dolan employees, acting under authority of Lincoln County Sheriff William T. Brady” on February 18, 1878.<sup>400</sup> Some descriptions of the Lincoln County War place the starting date of the disorder even earlier, suggesting that a state of anarchy and violence existed in Lincoln County from October 1877 to the Fall of 1878.<sup>401</sup> For purposes of this analysis, all that is needed is basic background that highlights the major actors and factions involved in the feud.

Table 6.3 Relevant Actors in the Lincoln County War

Actor	Institutional Office	Notes
Rutherford B. Hayes	President of the United States	
Charles Devens	U.S. Attorney General (1877-1881)	
George W. McCrary	Secretary of War (1877-1879)	
William M. Evarts	Secretary of State (1877-1881)	
Carl Schurz	Secretary of Interior (1877-1881)	
William T. Sherman	Commanding General of the U.S. Army (1869-1883)	
Major General John Pope	Commander of Department of Missouri (1869-1883)	
Frank Warner Angel	Detective, Departments of Justice and Interior	Hired by administration to investigate the disorder.
Edward D. Townsend	Adjutant General of U.S. Army (1869-1880)	
Samuel B. Axtell	Governor, New Mexico Territory (1875-9/1878)	Appointed by Grant???
Lewis Wallace	Governor, New Mexico Territory (9/1878-1881)	Selected by Hayes to replace Axtell.
Colonel Edward Hatch	Commander of the District of New Mexico (1876-1881)	

<sup>400</sup> Laurie and Cole, *Role of Federal Military*, 59.

<sup>401</sup> Frederick T. Wilson, *Federal Aid in Domestic Disturbances. 1787-1903* (US Government Printing Office, 1903), 206.

Lt. Colonel George Purington	Commander of Fort Stanton	Replaced by Dudley after accusations he used troops to aid one faction over other.
Lt. Colonel Nathaniel Dudley		Faced similar accusations to Purington.

Table 6.3 lists the major governmental actors in the conflict. The actors fall into three general categories: high-level executive branch officials (i.e., president and cabinet members), military and civilian bureaucrats (e.g., Sherman, Pope, Angel), and territorial governors (e.g., Axtell and Wallace). Notably absent from this list are the numerous local actors participating in the Lincoln County War. While the lawlessness eventually expanded beyond the scope of the factional conflict, the local factions (and some territorial officials) were the central actors involved. The historical overview highlights several prominent instances of violence but necessarily summarizes the highly detailed accounts of the Lincoln County War compiled by various historians.<sup>402</sup>

After the killing of Tunstall by a deputized posse of Dolan employees in February 1878, violence between the two factions continued. At that moment, the PCA was not in effect (not until June of 1878). In March 1878 the territorial Governor Samuel Axtell requested aid from the local military commander at Fort Stanton. Secretary of War McCrary responded, with Hayes' permission, by ordering the military to aid civil territorial authorities in maintaining order and enforcing judicial processes.<sup>403</sup> However, these interventions did little to stop the violence. One reason for that was Lieutenant Colonel Purington, the

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<sup>402</sup> See William A. Keleher, *Violence in Lincoln County, 1869-1881* (University of New Mexico Press), 1957; Maurice Garden Fulton, *History of the Lincoln County War*, Robert N. Mullin, ed. (The University of Arizona Press, 1968); Robert M. Utley, *High Noon in Lincoln: Violence on the Western Frontier* (University of New Mexico Press), 1987.

<sup>403</sup> Wilson, *Federal Aid*, 206.

commanding officer of the deployed troops, operated in a partisan manner. Purington allegedly used the troops under his command to uphold the Dolan faction's power in Lincoln by assisting Sheriff Brady. To be precise, all the local civil authorities, including the Sheriff, local judge, and district attorney, from whom Purington was authorized to take orders, were aligned with the Dolan faction. Nevertheless, Purington made no effort to arrest the killers of Tunstall, which does indicate some degree of partisanship in his actions.<sup>404</sup>

On the opposing side was a group known as the "Regulators." The "Regulators" were a group of cowboys and outlaws affiliated with the McSween faction. Among the victims in this pre-PCA period were men implicated in the killing of Tunstall who were killed by the Regulators. The Regulators also ambushed and killed Sheriff William Brady and his deputy on April 1, 1878--two months after the killing of Tunstall.<sup>405</sup> George Peppin, who replaced Brady as Sheriff after his death, retaliated by arresting several of McSween's affiliates and conducted a warrantless search of McSween's property. Sheriff Peppin's efforts were aided by Purington and his troops who served as mediators, but also did not stop Peppin's illegal behaviors.<sup>406</sup> Complaints about Purington's actions in this conflict from McSween sympathizers led to his dismissal and replacement on April 4. Purington's replacement was Lieutenant Colonel Nathaniel Dudley, an officer of questionable skill and character.<sup>407</sup> Dudley "replicated" the strategy of his predecessor, supporting the Dolan faction.<sup>408</sup>

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<sup>404</sup> Laurie and Cole, *Role of Federal Military*, 62.

<sup>405</sup> Utley, *High Noon in Lincoln*, 57-61.

<sup>406</sup> Utley, *High Noon in Lincoln*, 62.

<sup>407</sup> Utley described Dudley in overwhelmingly negative terms as "a man whose genuine professional dedication consistently fell victim to a small intellect and a huge vanity... He got drunk often, and whiskey more or less influenced most of his actions. He compensated for his deficiencies with pomposity, bellicosity, petty despotism, and extraordinary aptitude for contention." Utley, *High Noon in Lincoln*, 66.

<sup>408</sup> Laurie and Cole, *Role of Federal Military*, 63; Fulton, *Lincoln County War*, 170.

The violence exploded on July 15, 1878 – after the PCA had become law – when McSween returned to Lincoln from a visit with John Chisum at South Spring Ranch. McSween and his force of 40 - 60 men took up positions in his home and other building around the town and engaged in a five-day shootout with a large group of anti-McSween men organized by Sheriff Peppin. The fighting ended after five days when the Sheriff's posse killed McSween and several of his followers and set McSween's house on fire.<sup>409</sup> The success of the Peppin forces was in part due to the intervention of federal troops under the command of Lieutenant Colonel Dudley. According to military histories written about the events, there are conflicting accounts of Dudley's role in the battle. Despite the PCA, which would have restricted the possibility of military activity, and an order from his commanding officer to cease aiding local civil authorities without authorization, Dudley deployed troops to Lincoln on July 19. Supporters of the Dolan faction claimed that Dudley's men were fired upon without provocation by McSween men. McSween sympathizers claimed that Dudley's troops were used to provide cover for the Dolan faction as they piled up combustible material to burn McSween and his men out of the buildings they were hiding in. This account essentially suggests the soldiers acted as human shields since neither side would shoot federal troops.<sup>410</sup>

In September 1878, Axtell was replaced by Lew Wallace as Governor of New Mexico. A biographer of Governor Wallace noted that Axtell's removal was driven by allegations of corruption based on his ties to a criminal organization known as "the Santa Fe Ring," and that Wallace's selection as his replacement was partially based on the problems

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<sup>409</sup> Keleher, *Violence in Lincoln*, 140-145; Laurie and Cole, *Role of Federal Military*, 64-65.

<sup>410</sup> Laurie and Cole, *Role of Federal Military*, 64-65.

in Lincoln County and partially based on patronage considerations.<sup>411</sup> Around the same time as this change in territorial administration, a new group of outlaws called the “Wrestlers” entered the area and engaged in a “reign of terror” across the county.<sup>412</sup> When Wallace arrived in New Mexico in early October, violence and disorder were rampant. Almost immediately, on October 5, Wallace telegraphed Secretary of the Interior Schurz requesting that the president declare a state of “insurrection” and suspend habeas corpus in Lincoln County.<sup>413</sup>

On October 1, 1878, Secretary of War McCrary issued General Order no. 71. This order amended General Order no. 49’s outlining of exceptions to the PCA to also include the following,

“but, in cases of sudden and unexpected invasion, insurrection, or riot, endangering the public property of the United States, or in cases of attempted or threatened robbery or interruption of the United States mails, or other equal emergency, officers of the Army may, if they think a necessity exists, take such action before the receipt of instructions from the seat of Government as the circumstances of the case and the law under which they are acting may justify. In every such case they will promptly report their action and the circumstances requiring it to the Adjutant General for the information of the President.”<sup>414</sup>

The additional passage grants Army officers the authority to act without presidential authorization in cases of emergencies that necessitate a quick response. There is a clear

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<sup>411</sup> Oakah L. Jones, “Lew Wallace: Hoosier Governor of Territorial New Mexico, 1878–81,” *New Mexico Historical Review* 60, no. 2 (1985): 132.

<sup>412</sup> Wilson, *Federal Aid*, 207-208.

<sup>413</sup> Jones, “Lew Wallace,” 134.

<sup>414</sup> Department of the Adjutant General, *General Orders No. 71*, October 1, 1878.

parallel between the logic of General Order no. 71 and the liberal framework of emergency power that was prevalent in the nineteenth century.<sup>415</sup>

This order, which expanded the ability of the Army to respond to violence in Lincoln County was followed up by a “cease and desist” proclamation from Hayes on October 7, 1878. And there was the telegram whenever it was. The proclamation authorized the military to ensure the faithful execution of the law and ordered those engaged in lawlessness to disperse by October 13.<sup>416</sup>

The implementation of the proclamation differed from previous disorders in the territories, namely the use of the military in “Bleeding Kansas” during the 1850s. Pierce’s law and order proclamation in 1856 allowed the territorial governor of Kansas to deploy the troops if he deemed there to be organized obstructions to the execution of the law; granting significant discretion to the territorial government.<sup>417</sup> Implementation of Hayes’ New Mexico proclamation allowed local commanding officers to respond to appropriate requests from the U.S. Marshal or territorial sheriff to aid in arresting people resisting the civil authorities. Further, Lieutenant Colonel Dudley was authorized to pursue murderers and cattle thieves without requests from local civil authorities. Dudley reported to his superiors that relative peace and order had been restored by mid-November.<sup>418</sup>

There were still sporadic acts of crime and violence in the following months, but the military histories of that period suggest this period was characterized primarily by conflict

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<sup>415</sup> Jules Lobel, "Emergency Power and the Decline of Liberalism," *Yale LJ* 98 (1988): 1386-1392.

<sup>416</sup> Rutherford B. Hayes, Proclamation 240—Law and Order in the Territory of New Mexico, October 7, 1878, The American Presidency Project, <https://www.presidency.ucsb.edu/node/203469>.

<sup>417</sup> Coakley, *Role of Federal Military*, 150-151.

<sup>418</sup> Laurie and Cole, *Role of Federal Military*, 69.

between Governor Wallace and Lieutenant Colonel Dudley over the appropriate role of the military<sup>419</sup>

The last major drama came after an attorney, Huston L. Chapman, was murdered on February 18, 1879. Chapman was the lawyer for Sue McSween whose husband had been killed during 1878. Chapman and Sue McSween were advocates of Dudley's removal for his partisan use of troops during the Five Days Battle in 1878. The efforts to remove Dudley escalated after Chapman's death, ultimately resulting in his removal in April 1879 and replacement by Purington (who Dudley had replaced a year earlier).<sup>420</sup> During this same period, Governor Wallace's disdain for Dudley and his dissatisfaction with the limited purposes that the federal troops could be used for led him to form a territorial militia to aid in keeping the peace in Lincoln County.<sup>421</sup> After Hayes' proclamation, much of the entrepreneurial action shifted from the president to the territorial governor.

Overall, the Lincoln County War was a complex factional conflict that spilled over into a broad state of rampant lawlessness and violence. The situation was made more complex by the fact that local commanders of US troops – Lieutenant Colonels Purington and Dudley – allegedly used troops in ways that benefited the Dolan faction.

The response of the Hayes' administration was proactive and robust. Hayes first ordered the local military to assist in maintaining order before the passage of the PCA. With the procedural restrictions of the PCA in place, Hayes replaced the territorial governor with a more responsive appointee in Lew Wallace and invoked his authority within the

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<sup>419</sup> Laurie and Cole, *Role of Federal Military*, 69.

<sup>420</sup> Laurie and Cole, 70-71.

<sup>421</sup> Jones, "Lew Wallace," 135-136



Insurrection Act framework. I turn now to consider in more detail evidence suggesting entrepreneurial actions by President Hayes.

### *Hayes' Entrepreneurial Response*

While the evidence is somewhat limited, there are a few items that support the presence of mechanisms of presidential entrepreneurship in this case. The Hayes administration's *construction* of executive authority in the immediate aftermath of the PCA is of central interest. The excerpt from Hayes' diary quoted at the outset of the chapter summarized his *construction* of executive authority under the PCA. To paraphrase, Hayes believed the new requirements were cumbersome and might lead to delays in federal response, but he also believed that the executive still held ample authority to enforce order when needed.<sup>422</sup> In practice, Hayes was not constrained by the PCA. Attorney General Devens issued an opinion on October 10, 1878, at Hayes' request about exemptions to the PCA. The opinion was issued after Hayes' "cease and desist" proclamation for the New Mexico territory, and the opinion was about the use of the military in response to obstructions to Internal Revenue Collectors in Arkansas.<sup>423</sup> The timing and subject of the opinion suggest that Hayes was already confident in his ability to deploy the military in the New Mexico territory.

Hayes also used the institutional components and formal powers of the executive branch in creative ways to control the government's response to the disorder. The most significant of these was hiring Frank W. Angel as a special investigator under the Departments of Justice and the Interior.<sup>424</sup> His position made Angel accountable to two key

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<sup>422</sup> *Diary and Letters of RBH*, July 30, 1878, Volume 3, 492-493.

<sup>423</sup> Charles Devens, "Employment of the Military as a Posse," October 10, 1878, in Young (ed.), *Posse Comitatus*, 162-164.

<sup>424</sup> Utley, *High Noon in Lincoln*, 75.

members of the president's cabinet – Attorney General Devens and Interior Secretary Schurz. Angel was directed by the cabinet to investigate the following issues, “1) land grant frauds in Colfax County, 2) alleged corruption among federal officials – particularly Governor Axtell and United States District Attorney Thomas B. Catron, 3) the death of John Tunstall, a British subject, and 4) the mounting violence in Lincoln County.”<sup>425</sup> The deployment of Angel was entrepreneurial because it allowed the Hayes administration to gather more reliable information than simply relying on local reports. Correspondence from the territorial governor, other federal officials, and local citizens all of whom were sympathetic to different sides in the factional dispute provided useful but often biased accounts of the situation.

For example, Hayes and Secretary Schurz received letters from a personal friend of Hayes named Montague Leveson who lived in the region. Leveson's letters claimed that all the federal officials in the territory, with the exception of the U.S. Marshal, were in league with the lawless element there. An early historian of the Lincoln County War noted that Leveson's request for federal investigation proved effective, and that “Washington began to show more interest than previously in the Lincoln County disturbances.”<sup>426</sup> It seems reasonable that the decision of Hayes and his cabinet's to hire Angel was influenced by Leveson's letter, and other correspondence the administration was receiving from the territory. Nevertheless, the deployment of a federal investigator, with no stake in the

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<sup>425</sup> Lee Scott Theisen and Frank Warner Angel, "Frank Warner Angel's Notes on New Mexico Territory 1878," *Arizona and the West* 18, no. 4 (1976): 334.

<sup>426</sup> Fulton, *Lincoln County War*, 170-171.

factional conflict, represents an innovative strategy for gathering reliable intelligence to inform the administration's strategy.

Angel's investigation in New Mexico occurred between May and August of 1878, during which time the PCA passed. During that time, Angel gathered hundreds of pages of testimony from locals in Lincoln, NM.<sup>427</sup> Angel's impact on the Hayes administration decision-making was significant, especially the decision to remove Axtell. After an initial interview with Governor Axtell, Angel wrote to Attorney General Devens on July 16 suggesting that Tunstall's death was not the result of corruption among federal officials. However, in early August Angel uncovered new evidence provided to him by attorney Frank Springer that implicated Axtell in corruption. It was in light of this new evidence that Angel presented Axtell with additional questions about his role in the events and returned to the east coast. Hayes' summoned Angel to Washington to give a verbal report of his findings, at which time he was informed that Axtell was to be removed and replaced by Lew Wallace.<sup>428</sup>

The use of a detective to gather intelligence for the administration was one innovative use of institutional capacity. Another was Hayes' use of the appointment power to enhance the responsiveness of the territorial governor. In Angel's final direct involvement, he provided Wallace with a notebook on September 12 that contained intelligence about various people and organizations in New Mexico.<sup>429</sup> Hayes provided Governor Wallace with directives to be pursued once he arrived in New Mexico, in a manner similar to the administration's orders to Angel at the outset of his investigation. A historian of the Lincoln

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<sup>427</sup> Thiesen and Angel, "Frank Warner Angel," 334-335.

<sup>428</sup> Thiesen and Angel, 335-337.

<sup>429</sup> Thiesen and Angel, 337.

County War suggested that Wallace's appointment "carried with it emphatic and plenary instructions from President Hayes himself to bring order and peace to the southern portions of the territory."<sup>430</sup> Wallace was told by Hayes and Secretary Schurz that lawlessness was the number one problem of the territory when he was appointed.<sup>431</sup> Wallace's quick actions to restore order imply that he intended to follow the directives given to him in Washington.

### *Evaluating Alternative Explanations*

The evidence of entrepreneurial actions in this least-likely case, provides strong support for the theory. Still, it is necessary to consider some alternative explanations for the federal response in the Lincoln County War. I focus briefly on two principal alternatives: (1) that Congress actually led the government's response, or (2) that local military leaders were the key actors.

I find little evidence of congressional dominance over the federal response. As I have noted, the PCA was an act of Congress intended to constrain the use of the military for civil law enforcement purposes, but it was a response to Reconstruction of the South, not to the use of the military in the territories. Hayes' entrepreneurship demonstrated that the PCA did not deter presidential action. In a search of the Congressional Globe from March 1878 to December 1878, the peak period of federal activity, I did not identify any congressional debates about, or other mentions of, the Lincoln County War.<sup>432</sup> All this strongly indicates

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<sup>430</sup> Fulton, *Lincoln County War*, 299.

<sup>431</sup> Jones, "Lew Wallace," 141.

<sup>432</sup> It is possible that debates did exist. My search terms were for "Hayes" and "New Mexico," which generated 49 documents. However, when I examined each document, none discussed the Lincoln County War or lawlessness in New Mexico.

that Congress was not heavily involved in the federal response to the Lincoln County War, and indeed was not even interested.

A more compelling alternative explanation might focus on the implementation of policy being driven by the discretion (and partisanship) of local military and civil officials. The factionalism of both Lieutenant Colonels Purington and Dudley lends some support to this claim. Further, Governor Axtell and U.S. Attorney Catron were both removed by Hayes' for their biased handling of affairs in favor of the Dolan faction. Even Lew Wallace, who was appointed by Hayes with direct orders from the president to restore order, eventually found himself in conflict with the local military. Eventually, Wallace would develop his own plans for restoring order that relied on removing Dudley from Command and developing greater local law enforcement capacity.<sup>433</sup> The complexity and factionalism that ran rampant in the Lincoln County War may provide a more useful explanation of the case. While Hayes' and his cabinet certainly played a significant role, the effectiveness of the government's policy was significantly hampered by local issues over which they had little control.

### **Arthur and Lawlessness in Arizona**

Like New Mexico, the southeastern corner of the Arizona territory was on the geographical periphery of the federal government's authority. In 1881 and 1882 the level of lawlessness and violence in the region increased significantly. President Chester Arthur characterized the violence as being caused by "armed bands of desperadoes" crossing back and forth between the U.S. and Mexico.<sup>434</sup> Henry Walker's history of the period noted several factors that made Arizona a haven for lawlessness including plentiful opportunities for criminal activity and

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<sup>433</sup> See Keleher, *Violence in Lincoln*, chapters 9 and 10.

<sup>434</sup> Chester A. Arthur, Special Message, April 26, 1882, The American Presidency Project <https://www.presidency.ucsb.edu/node/204294>.

the relative safety from the authorities in comparison to other nearby territories.<sup>435</sup> In this case, Arizona experienced general, and pervasive lawlessness, not an organized insurrection or opposition to a specific law.

Table 6.4. Major Actors in the Arizona Disorder.

Actor	Institutional Office	Notes
Chester A. Arthur	President of the United States	
Benjamin Brewster	U.S. Attorney General (1881-1885)	
Robert Todd Lincoln	Secretary of War (1881-1885)	
Frederick T. Frelinghuysen	Secretary of State (1881-1885)	
Samuel Kirkwood	Secretary of Interior (1881-4/1882)	
William Teller	Secretary of Interior (4/1882-1885)	
William T. Sherman	Commanding General of the U.S. Army (1869-1883)	
Brevet Major General Orlando Willcox	Commander of Department of Arizona (1878-1886)	
Edward D. Townsend	Adjutant General of U.S. Army (1869-1880)	
John J. Gosper	Acting Governor, Arizona Territory (10/1881-3/1882)	
Frederick A. Tritle	Governor, Arizona Territory (3/1882-1885)	

Table 6.4 Identifies the major governmental actors in the conflict. They fall into four general categories: high-level executive branch officials (i.e., president and cabinet members), military and civilian bureaucrats (e.g., Sherman, Willcox), members of Congress and territorial governors (e.g., Gosper, Tritle). There were essentially two distinct forces contributing to the state of lawlessness in the territory in 1881 and 1882. First were

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<sup>435</sup> Henry P. Walker, "Retire Peaceably to Your Homes: Arizona Faces Martial Law, 1882," *The Journal of Arizona History* (1969): 1-18. In terms of incentives and opportunities Walkers notes (among others) the high demand for beef from the U.S. Indian Affairs and Army outposts and the importance of horses for transportation, which made horse and cattle theft a lucrative business (see pp. 4-5). In terms of Arizona's relatively lax enforcement of laws, Walker mentions the rise of the Texas Rangers and development of "orderly communities" in California (see p. 2).

“cowboys,” described by a historian of the Arizona territory as “armed bands of desperadoes, cattle thieves, and high-way robbers.”<sup>436</sup> The second element were Apache raiders who were led into the territory by Geronimo in April 1882 to conduct raids against settlers.<sup>437</sup> In late 1881 through March 1882 the cowboys seemed to be the main source of the disorder, with the Apache raiders playing a more prominent role in the two months leading up to Arthur’s proclamation on May 3, 1882.

Because of the circumstances of the disorder – its occurrence in a territory (instead of a state) and in light of restrictions imposed on him by the PCA – Arthur thought that a deployment of the army would be solely for the purpose of augmenting local authorities in the enforcement of civil law. Arthur expressed concerns about this type of intervention in his first Annual Message in 1881, suggesting that he viewed the PCA as limiting the use of the military in the Arizona territory.

“With every disposition to meet the exigencies of the case, I am embarrassed by lack of authority to deal with them effectually. The punishment of crimes committed within Arizona should ordinarily, of course, be left to the Territorial authorities; but it is worthy consideration whether acts which necessarily tend to embroil the United States with neighboring governments should not be declared crimes against the United States... but in view of the speedy assembling of your body I have preferred to await such legislation as in your wisdom the occasion may seem to demand.”<sup>438</sup>

Arthur concluded that he did not have the requisite authority to send in the army to enforce civil law and made a request for new legislation to amend the PCA.<sup>439</sup> Thus, his first action

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<sup>436</sup> Jay J. Wagoner, *Arizona Territory 1863-1912: A Political History* (The University of Arizona Press, 1970), 191.

<sup>437</sup> Wilson, *Federal Aid*, 212-213; Laurie and Cole, *Role of Federal Military*, 75.

<sup>438</sup> Chester A. Arthur, First Annual Message, The American Presidency Project <https://www.presidency.ucsb.edu/node/203844>.

<sup>439</sup> Arthur was not alone in his interpretation of the new law. Prominent decision-makers in the U.S. Army (e.g., General Willcox of the Department of Arizona and General William T. Sherman) also concluded that the

was simply to inform Congress that a state of disorder existed and make a general request for additional legislation to bolster his authority.

Arthur's first annual message [of date] further indicates his careful, but narrow, readings of his authority under the Constitution and statutes. His uncertainty about his authority stemmed not only from the passage of the PCA, but also due to minor revisions to the statutes corresponding to the Calling Forth Act of 1795 and the Insurrection Act:

"I will add that in the event of a request from the Territorial government for protection by the United States against "domestic violence" this Government would be powerless to render assistance... The act of 1795, chapter 36, passed at a time when Territorial governments received little attention from Congress, enforced this duty of the United States only as to the State governments. *But the act of 1807, chapter 39, applied also to Territories. This law seems to have remained in force until the revision of the statutes [in date], when the provision for the Territories was dropped. I am not advised whether this alteration was intentional or accidental; but as it seems to me that the Territories should be offered the protection, which is accorded to the States by the Constitution, I suggest legislation to that end.*"<sup>440</sup>

This passage suggests Arthur interpreted his authority closely from the text of the statutes. He points to the prior legislation removing U.S. territories from the coverage of the Insurrection Act as a limitation on his authority. The president's acknowledgment that this consequence could have been unintentional, and that it was not a clear reflection of congressional intent, indicates a strict construction of presidential authority. That is, even if the original intent of the Insurrection Act was to apply to the territories, the (possibly accidental) removal of the territories from the current statutes limited his ability to act.

Arthur held this narrow interpretation of his own authority despite his belief that a potential deployment of troops would not be counter to the spirit of the PCA. In fact, Arthur

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PCA restricted them from deploying troops, despite their interest in doing so. Walker, "Retire Peaceably," 15 cites correspondence between military leaders that supports this interpretation.

<sup>440</sup> Arthur, First Annual Message, emphasis added.



makes an argument that the use of troops as a civil posse in the territories was essential given the sparseness of populations in these areas.

“It seems to me, too, that whatever views may prevail as to the policy of recent legislation by which the Army has ceased to be a part of the posse comitatus, an exception might well be made for permitting the military to assist the civil Territorial authorities in enforcing the laws of the United States. This use of the Army would not seem to be within the alleged evil against which that legislation was aimed. From sparseness of population and other circumstances it is often quite impracticable to summon a civil posse in places where officers of justice require assistance and where a military force is within easy reach.”<sup>441</sup>

Here we see an explicit acknowledgement that the PCA was not intended to apply to uses of the military covered by the Calling Forth and Insurrection Acts.<sup>442</sup> Further, Arthur recognized distinct problems the PCA posed in the western territories – the vastness of the territories, the sparseness of the population, and the limited capacity of civil authorities. Despite that understanding, he was still unwilling to act in the absence of congressional authorization.

When continued reports of lawlessness were sent to Washington, Arthur took further action to determine his authority. On February 2, Arthur shared a series of letters from the Acting Governor and U.S. Marshal in the Arizona territory with Congress. This correspondence gave information about the criminality and lawlessness occurring.<sup>443</sup> The Acting Governor also requested that Congress repeal the PCA so that the army could resolve the situation.<sup>444</sup> In the intervening months, General William Tecumseh Sherman, still

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<sup>441</sup> Arthur, First Annual Message.

<sup>442</sup> Chapter 4 provides a detailed discussion of each.

<sup>443</sup> H.exdoc.58, “Message of President on lawlessness in certain parts of Arizona,” February 2, 1882, 47<sup>th</sup> Cong., 1<sup>st</sup> sess.

<sup>444</sup> H.exdoc.58, 5.

Commanding General of the Army, visited the Arizona territory to assess the situation. Sherman came to similar conclusions as the president, suggesting that a state of lawlessness did exist in the region but that the PCA restricted the use of the military as a response.<sup>445</sup> Arthur then requested on April 14 that his Attorney General, Benjamin Brewster, provide an opinion about the limitations of his authority to respond. In that opinion, Brewster advised the President that no further legislation was needed.<sup>446</sup> Brewster's interpretation of the PCA was that it had no effect on the statutory framework set forth by the Calling Forth and Insurrection Acts. In Brewster's analysis of the PCA, he notes that it does not apply to uses of the military that are "expressly authorized" by the Constitution or Congress – i.e., the PCA does *nothing to alter* the president's authority derived from these sources.<sup>447</sup> This view aligns with that of the Hayes' administration in its response to the Lincoln County War. Despite being bolstered by the opinion of his Attorney General, Arthur seemingly remained uncertain. After the April 15 opinion, Arthur took no action to deploy the military. Instead, he made a second request to Congress on April 26, 1882, finally generating a congressional response in which the Senate Judiciary Committee reported that no additional legislation was needed because the president already had sufficient authority.<sup>448</sup>

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<sup>445</sup> Sherman to Brewster, April 11, 1882, U.S. House, *Lawlessness in Arizona*, 47<sup>th</sup> Cong., 1<sup>st</sup> Sess., 1882, House Exec. Doc. No. 188., 3.

<sup>446</sup> Benjamin Harrison Brewster, "Suppression of Lawlessness in Arizona," April 15, 1882, in Young, *Posse Comitatus*, 333-335.

<sup>447</sup> Brewster, "Suppression of Lawlessness," 335.

<sup>448</sup> Chester A. Arthur, Special Message, April 26, 1882; The Senate referred the president's request to the Senate Judiciary Committee. The House referred the message to the Military Affairs Committee. *Congressional Record* 13, 47<sup>th</sup> Cong., 1<sup>st</sup> sess., April 27, 1882: 3395 and 3355.

Some prominent military historians have called Arthur's May 3 1882 proclamation "superfluous," noting that by the time Arthur's order indicated the military would be deployed "American and Mexican soldiers had eliminated the Apache menace for the time being, peace returned to Cochise County and no further action was required to implement the proclamation."<sup>449</sup> Other historians have come to similar conclusions about Arthur's proclamation, suggesting that the "cowboy" problem gradually subsided after March 1882.<sup>450</sup> Arthur's slow and tentative response to the disorder rendered his eventual actions irrelevant to the resolution of the situation.

#### *Arthur's Deference to Congress*

In Hayes' management of the Lincoln County War, there is evidence of entrepreneurial mechanisms at work, but what about Arthur's response to lawlessness in Arizona? The historical records I have reviewed show that Arthur was overly deferential to Congress and that there is little evidence of presidential entrepreneurship in this case. That is, his behavior is much more consistent with a stereotyped view of a passive even subordinated president than that of Hayes and Grant.

Instead of leveraging the institutional resources of the executive branch, Arthur merely brought the issue to the attention of Congress over a span of five months. Arthur misinterpreted his own authority in each message, in essence asking Congress to delegate authority to the president that he already possessed. Arthur's misinterpretation of the PCA was a plausible, but narrow, reading of the law's impact on presidential authority--behavior contrary to my expectation. Rather than generating a novel construction that could be used

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<sup>449</sup> Laurie and Cole, *Role of Federal Military*, 76.

<sup>450</sup> Wagoner, *History of Arizona*, 200.

to assert presidential authority, or even just relying on the precedents set by his immediate predecessor, Arthur constructed his authority in a limited way.

Arthur's deference to Congress is even more puzzling when we consider that the Senate Judiciary Committee's report on the issue promoted a more expansive view of the president's legal authority under the Constitution and statutes. The Senate Judiciary Committee evaluated Arthur's most recent message requesting legislation and deemed that the PCA did not restrict the president's authority. Senator Edmunds, the Republican chair of the Committee, reported to the chamber that the committee determined that "there is no necessity in the case named for further legislation, and that the President of the United States has now ample power to put down the lawlessness in the Territory of Arizona."<sup>451</sup> Senator Garland, a southern Democrat, concurred with Senator Edmunds' report, referencing the opinion of Hayes' Attorney General Charles Devens to lend further support to the committee's interpretation of the PCA's inapplicability to the situation at hand. The Judiciary Committee's judgment was based on a nearly identical interpretation of the PCA, the Calling Forth and the Insurrection Acts, as the opinion given by Brewster to Arthur two weeks earlier. By the time of Arthur's last request for additional legislation in late April, he had already received the opinion of Attorney General Brewster affirming that no additional legislation was needed and citing the precedent of Hayes' administration.

There is also no evidence that Arthur creatively exploited the institutional components available to him in his response. Given Arthur's narrow construction of his authority, this is not surprising. Arthur issued a proclamation that would have authorized the Army to intervene if the disorder persisted past a certain date. There was no independent

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<sup>451</sup> *Congressional Record* 13, 47<sup>th</sup> Cong., 1<sup>st</sup> sess., May 1, 1882: 3457.

effort by Arthur to investigate the situation, no deployment of additional troops to military installations in the region, and no use of the appointment power to ensure the territorial government was responsive to the administration. While Arthur did appoint Frederick Tritle as a new territorial governor in early 1882, there is no indication that the appointment was a maneuver by Arthur to resolve the disorder.<sup>452</sup> The absence of creative uses of institutional components stands in stark contrast to the action of President Hayes and Secretary Schurz in sending Frank Warner as a special investigator in New Mexico. The use of Warner allowed Hayes to gather independent, and fairly reliable, information from the affected location, which informed his decision to replace Axtell as territorial governor and to issue the “cease and desist” proclamation in October 1878.

It is reasonable to say, given the evidence, that Arthur did not engage in entrepreneurial innovation in this case. His overly cautious and slow response meant that the president’s orders had little to do with the resolution of the disorder. Further, Arthur’s construction of presidential authority was narrow – both in his initial interpretation of the PCA, but also his unwillingness to act without explicit congressional assurances that his actions would be lawful. Arthur’s narrow construction of presidential authority is especially puzzling given the post-PCA precedents set by Hayes’ only two years earlier.

*Evaluating Alternative Explanations: Congressional Dominance and Local Response*

We can be brief, given the lack of evidence of presidential entrepreneurship in this case. I have already described Arthur’s deferral of initiative to Congress. The federal response to lawlessness in Arizona seems to be largely a product of congressional dominance over the

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<sup>452</sup> Wagoner, *History of Arizona*, 194. Wagoner explains the appointment as the result of Senator John P. Jones, an old friend of Tritle securing his appointment from the president.

executive. However, the federal response did little to restore order to the territory, so the efforts of Acting Governor Gosper and Governor Tritle are also worth examining. In early 1882 Tritle reported on the cowboy and Indian situation to Secretary of the Interior Teller, and in a separate letter requested an appropriation of \$150,000 dollars from Congress to organize a law enforcement body modeled after the Texas Rangers. In May 1882, Tritle organized the “Tucson Volunteers” as a territorial militia and sent them across the U.S.-Mexico border in pursuit of a band of Apache Indians that had murdered several citizens in the territory.<sup>453</sup> Much of Tritle’s correspondence and requests were sent by Arthur to Congress with Special Messages, but aside from that, Arthur took no action to aid or encourage the Governor’s efforts.<sup>454</sup> Thus, there is some evidence that the territorial governor was attempting to develop creative solutions to restore order to the territory. My research identified no evidence to suggest that Tritle's creative efforts were undertaken at Arthur’s direction. This leads me to conclude that the entrepreneurship of local officials is a better explanation of this case than presidential entrepreneurship.

## **Conclusion**

Among the conclusions I draw from the least-likely cases, perhaps the most significant is that only examining the context of a single disorder may obscure broader patterns of presidential entrepreneurship by ignoring how presidents responded to disorders throughout their terms. The processes of entrepreneurial innovation outlined in chapter 2 focus on gradual change – through the accumulation of experiences, strategies, and precedents – which may not be observable in response to a single disorder. My assumption was that such

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<sup>453</sup> Wagoner, *History of Arizona*, 195-196.

<sup>454</sup> See U.S. House, *Lawlessness in Arizona*.

processes would generate positive feedback effects across presidencies, i.e., presidential entrepreneurship at one time would demonstrate strategies and precedents for later presidents to use. While the historical overview provided in chapter 4 lends some support to that expectation, it may be more difficult to observe a president's entrepreneurial efforts without taking a broader analytic approach. More specifically, my choice to use domestic disorders, rather than presidents, as cases may obfuscate the identification of learning to do entrepreneurial innovation during a president's full tenure in office.

The Hayes presidency brings this conclusion into clear focus. There was some evidence of presidential entrepreneurship in the Hayes administration's response to the Lincoln County War, but the full impact of Hayes' presidency can only be observed by broadening the scope of our analysis. Several other events of Hayes' presidency are worth noting – his southern policy, the Great Railroad Strike of 1877, his battle with Congress over riders in appropriation bills, his crackdown on moonshiners in the South and on polygamists in the Utah territory.

After the disputed presidential election of 1876, Hayes' southern policy was primarily one of appeasement and "home rule." This reconciliatory shift away from federal intervention in the South generated support from many northern Republicans and Democrats. It also drew the criticism of Grant's Attorney General Amos Akerman, who criticized Hayes' policy as combatting "lawlessness by letting the lawless have their own way."<sup>455</sup> Nevertheless, Hayes' eventually faced off with Democrats in Congress by fighting back against their use of riders in appropriation bills that would prevent federal supervision

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<sup>455</sup> Cited in Hoogenboom, *Presidency of Rutherford B. Hayes*, 68.

at southern elections. This long saga eventually resolved in Hayes' favor.<sup>456</sup> As Congress backed down, there was at least some tacit acceptance of Hayes' defense of executive authority and federal supremacy over the states.

The Great Railroad Strike of 1877 is another example of Hayes' formally invoking his authority under the Insurrection Act. The strike originated in West Virginia in mid-July 1877 but quickly became national, spreading to several other major cities. Strike-related disorders and riots shifted to different geographic areas rapidly making an effective federal response difficult. A prominent Hayes biographer described the administration's success in overcoming this challenge by noting that the rapid ordering of troops by rail to various locations of disorder actually led to exaggerations about the number of troops available.<sup>457</sup> Ultimately, the multi-faceted response of federal troops, state militias, and local police was effective, and Hayes' cautious approach to deploying troops kept federal forces out of the violent confrontations that occurred between strikers and other forces. Hayes relied on the portions of the Insurrection Act based on the Guarantee Clause, despite some advisers recommending that Hayes suspend habeas corpus or intervene using the Interstate Commerce Clause as a justification.<sup>458</sup> This choice is intriguing because it highlights the choices and constitutional constructions available to presidents as early as 1877. It would be reasonable to suggest that the recommendation to suspend habeas corpus was influenced by

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<sup>456</sup> Hoogenboom, *Presidency of Rutherford B. Hayes*, 74-77; *Diary and Letters of RBH vol. 3*, 527-555.

<sup>457</sup> Hoogenboom, *Presidency of Rutherford B. Hayes*, 87.

<sup>458</sup> Ari Hoogenboom, *Rutherford B. Hayes: Warrior and President* (Rural America, 1995), 327-329; Michael A. Ross "Rutherford B. Hayes," in *The Presidents and the Constitution: A Living History*, Ken Gormley, ed. (New York University Press, 2016), 259. The Interstate Commerce Clause was later used as the basis of Grover Cleveland's deployment of the military over the protests of the Illinois Governor during the Pullman Strike in 1894.



the KKK Act and Grant's actions in South Carolina--thus indicating the importance of precedents and learning about strategies across presidencies.

Finally, Hayes also took bold, independent action to expand federal supremacy over the states in at least two other areas during his presidency. The first was his use of civilian posses and non-military federal officers to raid moonshining operations in the Appalachian Mountains. Hayes defended federal officers from being prosecuted by state and local officials when they clashed with moonshiners and his actions generated a Supreme Court ruling upholding federal supremacy and the government's ability to protect its agents from state prosecution.<sup>459</sup> Similarly, Hayes used his power to appoint a territorial governor in the Utah territory who pledged to prosecute Mormon political leaders for polygamy.<sup>460</sup> While each of these events during Hayes' presidency is unique, and not all involved widespread disorders, they all demonstrate a common effort on the part of the president to reaffirm federal supremacy over the states and to expand presidential power based on the constitutional powers of the president. When we consider Hayes' entrepreneurial innovation in the resolution of the Lincoln County War in tandem with these other events, we can see a pattern of innovative presidential action that provided precedents that strengthened the power of subsequent presidents – confirmed by the opinion of Arthur's Attorney General.

There is less to say about Arthur's handling of lawlessness in Arizona. Arthur's handling of the disorder does not seem to demonstrate any knowledge of precedent or willingness to engage in independent action, which is surprising given that his administration immediately followed Grant and Hayes. It seems plausible that Arthur's prior

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<sup>459</sup> Ross, "Rutherford B. Hayes," 260-261; *Tennessee v. Davis*, 100 U.S. 257 (1879).

<sup>460</sup> Ross, "Rutherford B. Hayes," 262.

political career as a loyal spoilsman may not have equipped him with the experience or motivation to focus on territorial politics. The Arthur administration's response was too slow and indecisive to resolve the disorder, and instead the military and territorial government essentially restored order without meaningful assistance from Washington. This least-likely case does not contain any meaningful evidence of entrepreneurial innovation. The lack of entrepreneurship in the Arthur case does highlight the contingent nature of presidential entrepreneurship. The lack of entrepreneurship from Arthur underscores the importance of presidential entrepreneurship in the Grant and Hayes cases. The end of Reconstruction and the passage of the PCA diminished the ambiguity surrounding presidents' domestic use of the military by clarifying when it was acceptable. This generated uncertainty among military and political leaders about the legality of their proposed actions. Nevertheless, the presence of presidential entrepreneurship in the Lincoln County War overcame uncertainty, while the absence of those mechanisms in Arthur's handling of the Arizona disorder led to a lackluster response. *Congress's reliance on, and deference to, the Hayes administration's narrow interpretation of the PCA further illuminates this point.* Even though Arthur did not engage in entrepreneurship to solve the disorder in Arizona, Congress's response demonstrated that the Hayes' administration's construction of presidential authority under the PCA was accepted by other institutional actors.

## Chapter 7, Conclusion

In chapter 1, I explored parallels between Dwight Eisenhower's use of the military to enforce school integration and Grover Cleveland's use of the military to break the Pullman Strike. I return to these cases, now in light of the intervening analysis and case studies. Do Eisenhower and Cleveland suggest continuity or change? Do they demonstrate the power of individual presidents to act as agents of change or are they evidence that institutional structure constrains agency? My main argument is that both presidents responded to exigent crises in innovative ways and, further, that their responses highlight a process of learning and precedent-setting in which the actions of particular presidents expand the strategies and justifications available to their successors. The historical analysis undertaken for this dissertation provides compelling evidence that the entrepreneurial framework adds value to dominant theories of the institutional development of the presidency.

I now return to the two most influential perspectives on the development of the presidency – the modern presidency and political time. Both these theories illustrate the value of my approach.<sup>461</sup> I begin with the modern presidency. James Sundquist argues that modern presidents became de facto legislative leaders and managers of the executive branch during and after the New Deal.<sup>462</sup> Fred Greenstein comes to similar conclusions noting that modern presidents possessed “increased unilateral policy-making capacity, centrality in national agenda setting, far greater visibility, and acquisition of a presidential

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<sup>461</sup> James L. Sundquist, *The Decline and Resurgence of Congress* (Brookings Institution Press, 1981); Fred I. Greenstein, ed., *Leadership in the Modern Presidency* (Harvard University Press, 1988); Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Harvard University Press, 1997).

<sup>462</sup> Sundquist, *Decline and Resurgence*, 36.

bureaucracy.”<sup>463</sup> These descriptions suggest a fundamental difference between the pre and post New Deal presidency. In this view Eisenhower faced fundamentally different expectations from the public and Congress than did Cleveland. Along with higher expectations, far greater institutional capacity was available to Eisenhower. There is undoubtedly truth to these descriptions. The executive branch during Eisenhower’s presidency *was* significantly larger and more complex than it was during Cleveland’s second term in the 1890s.

The political time view articulated by Skowronek focuses on two patterns – an "emergent pattern" of presidential *power* that aligns closely with the periodization scheme of the modern presidency, and a "recurrent pattern" of presidential *authority*. The recurrent pattern is Skowronek’s main contribution to understanding the development of the presidency. The recurrent pattern argument is that presidential authority varies based a president’s place in political time – more specifically, their affiliation or opposition to the dominant party regime and the resilience of that regime’s coalition and governing commitments.<sup>464</sup> This theory allows for a comparison of presidential leadership across periods. Cleveland and Eisenhower were both preemptive leaders – presidents opposed to the dominant party regime at a time when that regime’s commitments were still fairly resilient. Preemptive leaders often engage in political projects that blend opposition ideas with the commitments of the established regime (e.g., Bill Clinton’s framing of himself as a centrist “New Democrat” who would not directly challenge the policies of Reagan).<sup>465</sup> This

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<sup>463</sup> Greenstein, *Modern Presidency*, 347.

<sup>464</sup> Skowronek, *Politics Presidents Make*, 34 – 35.

<sup>465</sup> Skowronek, *Politics Presidents Make*, 36 – 49.

view can help explain why Cleveland and Eisenhower, both affiliated with parties in favor of a limited federal government, came to use federal force to pursue their objectives despite opposition from the state governments they intervened in.

Skowronek's theory of political time encourages us to compare presidents across periods and, as a consequence, helps to better understand the nature of presidential leadership and the processes through which institutions develop. Nonetheless, even Skowronek focuses on abrupt and transformative moments of institutional change, ignoring more gradual processes of institutional development. When party regimes fragment, opposition presidents are empowered to reconstruct politics. In the "politics of reconstruction," presidents craft new coalitions and redefine basic governing commitments. Skowronek's theory argues these abrupt shifts are the main drivers of change.<sup>466</sup>

### **Assessing the Entrepreneurial Framework**

My framework adds to these perspectives in several ways. First, it analyzes the dynamics of presidential leadership within a single policy domain, which presents the possibility of revealing processes and dynamics that are obscured when analyzing presidential leadership more generally.<sup>467</sup> My focus on a specific aspect of federal governance revealed previously unexplored processes of shifting institutional authority. Not only did Eisenhower and Cleveland face similar leadership challenges, but Cleveland's entrepreneurial response to the Pullman Strike (defending the integrity of legitimate Federal government functions and objectives) shaped the strategies available to subsequent presidents. Cleveland's rationale

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<sup>466</sup> Skowronek, *Politics Presidents Make*, 36 – 49.

<sup>467</sup> Patrick R. O'Brien, *Presidential Control Over Administration: A New Historical Analysis of Public Finance Policymaking, 1929-2018* (Kansas University Press, 2022).

was essentially the one articulated by Eisenhower. The development of institutional authority in the realm of domestic order is at least partially explained by a process of gradual accumulation of precedents and strategies first developed by entrepreneurial presidents. This can, to a significant degree, explain institutional change independent of more abrupt, transformative changes.

My approach provides scholars with new ways of thinking about the American presidency and institutional change. Chapter 2 provided a review of main theories of institutions. In that review, I identified plausible mechanisms that link entrepreneurial presidential action to durable shifts of institutional authority. In Chapter 3, I articulated a theory-building research design that incorporated a broad analysis of the politics of domestic order over time and a detailed inventory of most and least likely cases.

Chapter 4 described the “entrepreneurial terrain” of the politics of domestic order.<sup>468</sup> The analysis explored debates about the appropriate role of the federal government and military from the Articles of Confederation through 1896. That analysis revealed that the use of the military domestically was a point of enduring debate throughout the eighteenth and nineteenth centuries. This analysis examined several examples of presidents constructing their authority in novel ways and engaging in innovative uses of institutional capacity to respond to domestic disorders. Washington, Adams, and Jefferson all responded to domestic disorders with innovative leadership and, in doing so, expanded the institutional authority of future presidents. Jefferson stands out for his hidden-hand leadership of Congress in the

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<sup>468</sup> Adam Sheingate, “The Terrain of the Political Entrepreneur,” in *Formative Acts: American Politics in the Making*, Matthew Glassman and Stephen Skowronek, eds. (University of Pennsylvania Press, 2008).

drafting of the Insurrection Act of 1807.<sup>469</sup> Presidents and their attorneys general responded to the Fugitive Slave Act of 1850 by constructing presidential authority in novel ways during the 1850s. Fillmore's messages and legislative requests to Congress reconceptualize the authority of the president to maintain domestic order by basing his claims explicitly on the Commander in Chief and Take Care clauses. Pierce's Attorney General Caleb Cushing established a doctrine that the military could be deployed as part of the posse comitatus without explicit presidential authorization. This doctrine emerged without explicit congressional approval and shaped the use of the military in domestic politics through the Civil War and Reconstruction. The late nineteenth century presidents Benjamin Harrison and Grover Cleveland also constructed presidential authority in novel ways.

Chapters 5 and 6 expand on this overview chapter using process tracing methods to examine most and least likely cases for observing presidential entrepreneurship. The three cases were the Ku Klux Klan Act of 1871 and its use in South Carolina in October 1871 (most-likely), Hayes' intervention in the Lincoln County War in October 1878 (least-likely), and Arthur's intervention in Arizona in May 1882 (least-likely). All three contributed to the theory-building goals of this project. In the most-likely case, the Grant administration engaged in a creative combination of institutional components to crack down on the Klan in South Carolina. Some of these components were new (the Department of Justice), some were repurposed (the use of the Secret Service against the Klan when its traditional role had been as an anti-counterfeiting unit), and some had a history of use in domestic disorders (the

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<sup>469</sup> Fred I. Greenstein, "Presidential Difference in the Early Republic: The Highly Disparate Leadership Styles of Washington, Adams, and Jefferson," *Presidential Studies Quarterly* 36, no. 3 (2006): 373-390; Library of Congress, Manuscript Division, *Thomas Jefferson to John Dawson*. -12-19, 1806. Manuscript/Mixed Material. <https://www.loc.gov/item/mtjbib016689/>.

Army). The evidence that Grant articulated presidential authority in a unique way is less persuasive. Nevertheless, the KKK Act's clause allowing the suspension of habeas corpus by the president was an extreme expansion of presidential authority driven partially by Grant's liaison with Congress on the issue. Overall, presidential entrepreneurship provides a compelling explanation of the case that adds to existing accounts.

The idea of a most-likely case is that it is one in which we strongly expect to observe the theory's predicted presidential entrepreneurialism. The Grant case passes this test, providing support for the theory's validity and explanatory value.

The least-likely cases, on the other hand, are ones in which we would not expect to observe presidential entrepreneurialism. This expectation was largely confirmed in the case of Arthur and lawlessness in Arizona. Arthur appeared to be hesitant to respond on his own and deferential to Congress.

The case of the Lincoln County War, and Hayes' response, contradicted the expectations of a least-likely case. There was persuasive evidence of presidential entrepreneurship in this case, especially with respect to Hayes' response by creative deployment of institutional capacity. The Hayes administration's hiring of Frank Angel to investigate the situation and Hayes' replacement of the territorial governor, Samuel Axtell, in an effort to enhance the responsiveness of the territorial government were clear examples of presidential entrepreneurship. Neither of those actions were required by law or regulation. Observing presidential entrepreneurialism in even one of the two least-likely cases provides confirmation of the theory's validity.

All of the cases raised an important point that may be useful for refining the theory. Both Grant and Hayes were experienced combat Generals during the Civil War, while Arthur



served in a non-combat role as a Quartermaster General. It may be that these divergent experiences shaped the interest and ability of these presidents in managing military affairs. In other words, theories that propose individual agency as a significant explanatory factor allow for the individual-level characteristics that may influence individual choices. This point is reminiscent of Fred Greenstein's approach to studying presidents, which emphasizes that *individual differences* across presidents impact their leadership and success.<sup>470</sup> In future research focusing on presidential entrepreneurship, scholars might consider individual characteristics of presidents as antecedent conditions for selecting cases.

### **Limitations and Future Research**

The case studies in this dissertation established the validity and explanatory value of presidential entrepreneurship as a theoretical framework. However, it is important to note that the primary purpose of the research design was theory-building, not theory-testing. Based on the design it would be inappropriate to conclude that presidential entrepreneurship unquestionably provides a better explanation of institutional development than other theories such as the modern presidency or "punctuated equilibrium."<sup>471</sup> Certainly we can conclude that presidential entrepreneurship is a valid and important explanatory factor in the cases selected. Theory-building contributes to the state of knowledge in the field by providing plausible and supported alternatives to extant theories, which may then be tested in future studies.

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<sup>470</sup> Fred I. Greenstein, *The Presidential Difference: Leadership Style from FDR to Barack Obama* (Princeton University Press, 2009).

<sup>471</sup> Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (University of Chicago Press, 2010).

So, it is appropriate to conclude by pointing out some useful avenues for future research, theory-building, and theory-testing that build on this research. *First*, a useful test of the theory might be conducted through a comparative case study design. Finding cases that meet the criteria of a most-similar systems design is notoriously difficult (i.e., it is difficult to find real-world cases that are similar on all relevant variables except the outcome), but it might be possible to approximate such a comparison. For example, we might identify two domestic disorders – one that generated a presidential intervention and one that did not – that occurred during a single president’s term in office. This would allow us to control for the idiosyncratic differences of presidents, the partisan control of Congress, and other political and economic conditions. I show in this research that such comparisons are still limited because presidents at different times learn from the actions of their predecessors.

An example fitting these requirements might contrast Benjamin Harrison’s decision to intervene in a miner’s strike in Coeur D’Alene, Idaho in June of 1892 and his lack of intervention in the Homestead Strike in Pennsylvania in the same month. These cases illustrate the problems of actually meeting a strict standard of comparability for several reasons: the substantially greater capacity of the Pennsylvania militia; the different electoral importance of Pennsylvania and Idaho; and the lack of a request for aid from the Pennsylvania Governor. Nevertheless, cases that are roughly comparable and close in time might provide a test that illuminates the strengths and weaknesses of the theory.

*Second*, because my theory seeks to address the dynamics of institutional change over long time periods, it would be useful to continue tracing this domain of governance into the twentieth century. This would also provide leverage for evaluating the “dividing line” of

the modern presidency and shifting our focus to the definition of changing variables.<sup>472</sup> Continuity in presidential behavior before and after the advent of the modern presidency would force us to reconsider the explanatory value of this periodization scheme. While the evidence presented in this project suggests that pre-modern presidents were engaging in behavior that definitely looks “modern” (e.g., making policy through unilateral orders, controlling the executive branch, influence congressional lawmaking), a comparison across the dividing line would be corroborating evidence. Further exploration of presidential action on both sides of the dividing line would speak directly to scholars who question the usefulness and accuracy of the modern presidency.<sup>473</sup>

A final limitation that also serves as a pathway for future research is a practical one. Most of this research was conducted during the COVID-19 pandemic which significantly limited my ability to travel to relevant archives. Instead, the archival research I conducted was entirely based on digitized archival collections available through the Library of Congress and other presidential centers. Consequently, several archival collections were not accessible to me, including collections of various executive departments and cabinet officials. That expanded evidentiary base would be useful for expanding and validating this research. I hope that one of the next steps in this research will be to broaden the archival evidence used in the cases.

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<sup>472</sup> John T. Woolley Drawing Lines or Defining Variables? Studying Big Changes in the American Presidency.” Paper prepared for presentation at the Annual Meetings of the American Political Science Association (Washington D.C., 2005), [https://www.researchgate.net/publication/359931499\\_Drawing\\_Lines\\_or\\_Defining\\_Variables\\_Studying\\_Big\\_Changes\\_in\\_the\\_American\\_Presidency](https://www.researchgate.net/publication/359931499_Drawing_Lines_or_Defining_Variables_Studying_Big_Changes_in_the_American_Presidency).

<sup>473</sup> David K. Nichols, *The Myth of the Modern President* (Pennsylvania University Press, 1994); Victoria A. Farrar-Myers, *Scripted for Change: The Institutionalization of the American Presidency* (Texas A&M University Press, 2007); Anne C. Pluta, *Persuading the Public: The Evolution of Popular Presidential Communication from Washington to Trump* (University Press of Kansas, 2023).

## Presidents and Domestic Order in the Twenty-First Century

“Law and Order” has become a regular message of the Republican Party since at least Richard Nixon’s presidency.<sup>474</sup> Donald Trump made it a central message of his reelection campaign in 2020, framing Black Lives Matter protestors as a threat to public order. On September 17, 2020, Trump lambasted protestors in a speech, claiming that “Left-wing mobs have torn down statues of our founders, desecrated our memorials and carried out a campaign of violence and anarchy.”<sup>475</sup> Trump also deployed federal law enforcement officers to clear Black Lives Matter protestors in Lafayette Park, across from the White House so that Trump could have a photo-op at a local church. As I noted in the introduction, Republicans in Congress and state legislatures urged Trump to invoke the Insurrection Act against Black Lives Matter protestors during his presidency. Ironically, it was Trump’s supporters that created a threat to domestic order on January 6, 2021, when they engaged in an organized insurrection at the U.S. Capitol.<sup>476</sup>

Trump’s presidency has led to renewed interest among presidency scholars about the potential for democratic backsliding and the need to reform the institution. Terry Moe and William Howell have recently claimed that Republican presidents have behaved as “strong men presidents,” an analogy to authoritarians.<sup>477</sup> In this context, the history of presidential

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<sup>474</sup> Joshua Miller, “The Historical Presidency: The Rendition of Fugitive Slaves and the Development of the Law-and-Order President, 1790–1860,” *Presidential Studies Quarterly* 49, no. 3 (2019): 684–697.

<sup>475</sup> Nick Niedzwiadek, “Trump Goes After Black Lives Matter, ‘Toxic Propaganda’ in Schools,” September 17, 2020, *Politico*, <https://www.politico.com/news/2020/09/17/trump-black-lives-matter-1619-project-417162>.

<sup>476</sup> Tom Cotton, “Tom Cotton: Send in the troops: The nation must restore order. The military stands ready.” *New York Times*, June 3, 2020; Katie Shepherd, “North Carolina GOP lawmaker urges Trump to suspend civil liberties to keep power: ‘Invoke the Insurrection Act,’” *Washington Post*, December 16, 2020.

<sup>477</sup> William G. Howell and Terry M. Moe, “The Strongman Presidency and the Two Logics of Presidential Power,” *Presidential Studies Quarterly* (2023).

use of the military remains extremely relevant. Federal military interventions have served varied purposes. Some interventions have promoted equality and democratic values – such as the use of the military during Reconstruction or for school integration during the Civil Rights Movement. But more frequently the military has been deployed to preserve inequality – to suppress labor strikes and return escaped enslaved people. There is a duality in the order-maintaining presidency. The president’s authority to use the military domestically can reflect both its democratic and undemocratic characteristics. Public order and respect for the rule of law are significant elements of free societies, thus presidents serve as arbiters of justice. Yet, because challenges to the status quo are often disruptive, presidents have more often than not served as impediments to social movements.<sup>478</sup> While I have not engaged these normative questions directly, it is inescapable that domestic order was central to nineteenth century governance and the issue of racial equality.

Presidents are central players in the politics of domestic order and the exigencies of domestic crises have generated opportunities for presidential innovation. In this project, I have shown that the development of the presidency is intertwined with the use of federal coercion. In doing so I have demonstrated the ability of presidents to act as entrepreneurs and highlighted continuities in presidential leadership across the modern-traditional divide.

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<sup>478</sup> Sidney M. Milkis and Daniel J. Tichenor, *Rivalry and reform: Presidents, social movements, and the transformation of American politics*, University of Chicago Press, 2019.

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## Appendix

Table 3.2. Brennan Center for Justice Compilation of Declarations of Martial Law.

Covered area	Start Year	Duration	Precipitating event	Position of declaring authority
New Orleans, Louisiana	1814	3 months	Battle of New Orleans during the War of 1812	General (fed. military)
Rhode Island	1842	11 months	Dorr War	State legislature
Utah Territory	1857	9 months	Utah War	Territorial governor
Missouri	1861	4 years	Camp Jackson Affair and ongoing Confederate insurgency during the U.S. Civil War	General (fed. military)
United States	1862	4 years	U.S. Civil War	President
Kentucky	1864	1 year, 3 months	U.S. Civil War	President
New Orleans, Louisiana	1866	Unclear	New Orleans massacre of 1866	General (fed. military)
States of the former Confederacy, except Tennessee	1867	3 years, 4 months	Radical Reconstruction	Congress
Caswell and Alamance counties, North Carolina	1870	4 months	Kirk-Holden War	State governor
Chicago, Illinois	1871	13 days	Great Chicago Fire	Mayor
Scranton, Pennsylvania	1877	Unclear	Scranton general strike	State governor
Seattle, Washington Territory	1886	15 days	Anti-Chinese rioting	Territorial governor
Fort Bend County, Texas	1889	"Several days"	Jaybird-Woodpecker War	State governor
Shoshone County, Idaho	1892	4.5 months	Violent struggle between mine operators and miners in and around Coeur D'Alene, Idaho	State governor
Homestead, Pennsylvania	1892	Unclear	Homestead strike	State governor
Pana, Illinois	1898	4 days	Coal miner strike	State governor
Shoshone County, Idaho	1899	2 years	Violent struggle between mine operators and Western Federation of Miners in and around Coeur D'Alene, Idaho	State governor
Akron, Ohio	1900	5 days	Akron riot of 1900	State governor

Galveston, Texas	1900	8–9 days	Great Galveston hurricane	Mayor
Jacksonville, Florida	1901	14 days	Great Fire of 1901	State governor
Several Counties in Pennsylvania	1902	Unclear	Coal strike of 1902	State governor
Teller County, Colorado	1903	1 month, 28 days	Colorado labor wars	State governor
San Miguel County, Colorado	1904	2 months, 9 days	Colorado labor wars	State governor
San Miguel County, Colorado	1904	2 months, 23 days	Colorado labor wars	State governor
Las Animas County, Colorado	1904	2 months, 14 days	Colorado labor wars	State governor
Paint Creek and Cabin Creek, West Virginia	1912	1.5 months	Paint Creek–Cabin Creek Strike of 1912	State governor
Paint Creek and Cabin Creek, West Virginia	1912	2 months	Paint Creek–Cabin Creek Strike of 1912	State governor
Paint Creek and Cabin Creek, West Virginia	1913	4 months	Bull Moose Special attack on Holly Grove miners' settlement during Paint Creek–Cabin Creek Strike of 1912	State governor
Dayton, Ohio	1913	1 month	Great Dayton Flood	General (fed. military)
Indianapolis, Indiana	1913	3 days	Indianapolis streetcar strike of 1913	State governor
Butte, Montana	1914	See notes	Dynamiting of the Butte Miners' Union	State governor
Houston, Texas	1917	"Several days"	Houston riot of 1917	State governor
Longview, Texas	1919	Unclear	Longview race riot of 1919	State governor
Gary, Indiana	1919	Unclear	Steel strike of 1919	General (fed. military)
Fayette County, Kentucky	1920	14 days	Lynch mob attempting to storm Lexington courthouse	General (fed. military)
Galveston, Texas	1920	Unclear	Galveston Longshoremen's Strike	State governor
Mingo County, West Virginia	1920	2 months, 17 days	West Virginia coal wars	State governor
Mingo County, West Virginia	1921	15 months	West Virginia coal wars	State governor
Tulsa, Oklahoma	1921	4 days	Tulsa race riot	General (National Guard)

Nebraska City, Nebraska	1922	20 days	Packing plant strike	State governor
Oklahoma	1923	Unclear	Challenging Ku Klux Klan activity in Oklahoma and resisting KKK-led impeachment	State governor
Niles, Ohio	1924	10 days	Anti-Klan riot of 1924	State governor
Sherman, Texas	1930	14 days	Sherman riot of 1930	State governor
A section of Oklahoma's border with Texas	1931	13 days	Red River Bridge War	State governor
Oklahoma oil fields	1931	2 months	Nonviolent dispute between state government and oil producers over oil production limits	State governor
Several counties in Texas	1931	15 months, 26 days	Nonviolent dispute over oil production limits between state government and both oil producers and the federal courts	State governor
Oklahoma oil fields	1932	Unclear	Nonviolent dispute between state government and oil producers over oil production limits	State governor
Oklahoma oil fields	1932	Unclear	Nonviolent dispute between state government and oil producers over oil production limits	State governor
Oklahoma oil fields	1933	37 days	Nonviolent dispute between state government and oil producers over oil production limits	State governor
Oklahoma City, Oklahoma	1933	See notes	Attempt to force Oklahoma City to create "segregation zones"	State governor
In and around Highway Board of Georgia headquarters building	1933	39 Days	"Coup de highway department" by state governor	State governor
Minneapolis, Minnesota	1934	Unclear	Minneapolis general strike of 1934	State governor
Saylesville, Rhode Island	1934	Unclear	Textile workers strike of 1934	State governor
Georgia	1934	Unclear	Textile workers strike of 1934	State governor
Area around the Grand River Dam in Arizona	1934	Unclear	Federal government effort to prevent construction of Grand River Dam	State governor
LaGrange, Georgia	1935	Unclear	Follow up strike to 1934 textile workers strike	State governor

Omaha, Nebraska	1935	6 days	Omaha tram strike	State governor
Vigo County, Indiana	1935	6 months, 19 days	General Strike of 1935 (Terre Haute)	State governor
Around the state capitol building in Oklahoma City, Oklahoma	1936	Unclear	Dispute over drilling for oil on the grounds of the Oklahoma state capitol building	State governor
Area around Narragansett Park in Pawtucket, Rhode Island	1937	Unclear	Dispute over operation of race tracks	State governor
Newton, Iowa	1938	30 days	1938 Maytag Corporation labor dispute	State governor
Tulsa, Oklahoma	1938	4 months, 21 days	Strike at Mid-Continent Petroleum Corporation	State governor
In and around Highway Board of Georgia headquarters building	1939	See notes	Attempted "coup de highway department" by state governor	State governor
Area around the Grand River Dam in Oklahoma	1940	11 months	Effort to prevent completion and operation of Grand River Dam	State governor
Hawaii Territory	1941	2 years, 10 months, 17 days	Attack on Pearl Harbor during World War II	Multiple declarants
Beaumont, Texas	1943	5 days	Beaumont race riot of 1943	State governor
Freeborn County, Minnesota	1959	11 days	Meat-packing workers strike in Albert Lea, Minnesota	State governor
Cambridge, Maryland	1963	1 year, 1 month	Cambridge riot of 1963	State governor

Table 3.3. Presidential Legislative Requests Related to Domestic Order, Militia, and Military.

<b>Table 3.3. Presidential Legislative Requests Related to Domestic Order, Militia, and Military</b>		
<b>President</b>	<b>Date</b>	<b>Description</b>
WASH	8071789	ESTABLISH UNIFORM SYSTEM FOR U.S. MILITIA
WASH	9161789	PROVIDE TEMPORARY PROVISION FOR CALLING FORTH MILITIA
WASH	1081790	ESTABLISH UNIFORM SYSTEM FOR MILITIA
WASH	12081790	ESTABLISH MILITIA
WASH	10251791	ESTABLISH MILITIA
WASH	11061792	CONSIDER ADDITIONAL STIMULUS TO RECRUITING FOR THE MILITIA
WASH	12031793	CONSIDER A STUDY TO IMPROVE UNIFORM MILITIA ACT
WASH	12031793	INCREASE TROOPS WITH AID FROM MILITIAS OR THROUGH ADDITIONAL ENCOURAGEMENTS TO RECRUITS
WASH	11191794	IMPROVE LAWS FOR THE MILITIA
WASH	12081795	EXAMINE OPERATIONS OF MILITIA FOR IMPROVEMENTS
WASH	12071796	IMPROVE LAWS FOR THE MILITIA
ADAM	5161797	CONSIDER FORMING A PROVISIONAL ARMY
JEFF	12081801	PERFECT LAWS REGULATING THE MILITIA
JEFF	12031805	ENACT LEGISLATION TO CLASS THE MILITIA BY AGE
JEFF	10271807	ENACT LEGISLATION FORMING SEAMEN INTO SPECIAL MILITIA TO DEFEND HARBORS WHERE THEY HAPPEN TO BE
JEFF	2251808	RENEW ACT AUTHORIZING A DETACHMENT FROM THE MILITIA OF THE U.S.
JEFF	11081808	PRODUCE A UNIFORM MILITIA
MAD	5231809	DISCHARGE MILITIAS
MAD	11291809	BOLSTER MILITIA
MAD	1031810	RENEW ACT AUTHORIZING DETACHMENT OF 100000 MEN FROM MILITIA
MAD	1031810	CLASSIFY AND ORGANIZE MILITIA TO ENSURE PROMPT AID IN EMERGENCIES
MAD	11051811	PROVIDE DETACHMENTS FOR OTHER PORTIONS OF MILITIA
MAD	6301812	PROVIDE FOR APPOINTMENT OF ENGINEERS, AND FOR ADDITIONAL GENERAL OFFICERS AND DEPUTIES IN SPECIFIED DEPARTMENTS OF ARMY
MAD	11041812	INCREASE GENERAL OFFICERS OF THE ARMY
MAD	11041812	REVISE MILITIA LAWS
MAD	12071813	REVISE MILITIA LAWS TO SECURE SERVICES MORE EFFECTUALLY
MAD	9201814	FILL RANKS OF REGULAR ARMY AND ENLARGE PROVISION FOR SPECIAL CORPS FOR LONGER PERIODS OF SERVICE
MAD	9201814	CHANGE MILITIA SYSTEM
MAD	2181815	IMPROVE DISCIPLINE OF MILITIA



MAD	12051815	INCREASE APPROPRIATIONS FOR ARMY AND OTHER MILITARY PAY
MAD	12051815	WORK TOWARD EQUITABLE RESOLUTION OF CLAIMS BY STATE MILITIA FOR EXPENSES INCURRED
MAD	12051815	REORGANIZE MILITIA
MAD	12031816	REORGANIZE MILITIA
MONR	3041817	REGULATE ARMY; NAVY; AND MILITIA TO KEEP IN BEST PRACTICABLE FOOTING
MONR	12031822	RENEW ACT REGULATING THE STAFF OF THE ARMY
MONR	2231824	PROVIDE COMPENSATION TO MASSACHUSETTS FOR SERVICE OF STATE MILITIA IN LATE WAR
MONR	4121824	COMPENSATE VIRGINIA FOR INTEREST ON FUNDS BORROWED DURING WAR WITH BRITAIN FOR SERVICES RENDERED BY THE MILITIA
MONR	4121824	PROVIDE COMPENSATION TO ALL STATES FOR INTEREST ON FUNDS BORROWED FOR MILITIA OPERATIONS DURING WAR WITH BRITAIN
QADM	12061825	ESTABLISH MORE UNIFIED MILITIA
QADM	12041827	ESTABLISH MORE EFFECTIVE AND UNIFORM SYSTEM FOR GOVERNMENT OF MILITIA
JACK	12081829	EQUALIZE ARMY AND NAVY PAY
JACK	12041832	PROVIDE EFFICIENT ORGANIZATION OF MILITIA SYSTEM
JACK	12031833	ADOPT SUBJECTS SUGGESTED IN REPORT OF SECRETARY OF WAR REGARDING THE ARMY
JACK	12071835	PROVIDE FOR THE SUFFICIENT ORGANIZATION OF THE MILITIA
JACK	12071835	PASS LAW TO PROHIBIT UNDER SEVERE PENALTIES THE CIRCULATION IN THE SOUTHERN STATES THROUGH THE MAIL OF INCENDIARY PUBLICATIONS INTENDED TO INSTIGATE THE SLAVES TO INSURRECTION
JACK	12051836	INCREASE THE RANK AND FILE OF THE REGULAR ARMY
JACK	12051836	MAKE FURTHER PROVISION BY LAW FOR THE ORGANIZING, ARMING, AND DISCIPLINING OF THE MILITIA
VANB	12051837	PROVIDE FOR REORGANIZATION AND ENLARGEMENT OF THE STAFF OF THE ARMY AND OF THE ORDNANCE CORPS
VANB	12051837	CREATE NATIONAL FOUNDRY FOR CANNONS FOR ARMY AND NAVY
VANB	12051837	REQUIRE OFFICERS OF ARMY; NAVY; OR CIVIL DEPARTMENTS ENTRUSTED WITH THE RECEIPT OR PAYMENT OF PUBLIC MONEY TO GIVE NEW BONDS AT THE EXPIRATION OF THEIR TERMS OF SERVICE
VANB	1081838	PROVIDE FUNDS NECESSARY TO CALL OUT PORTIONS OF THE MILITIA IN RESPONSE TO AGGRESSION ON FRONTIER AND FOR COMPENSATION
VANB	12031838	PROVIDE FOR ORGANIZATION OF MILITIA ON MARITIME AND INLAND FRONTIERS

VANB	12021839	ADOPT SECRETARY OF WAR'S PLAN FOR ORGANIZATION OF MILITIA
TYLR	6011841	ORGANIZE AND DISCIPLINE THE MILITIA
TYLR	12041843	ORGANIZE THE MILITIA
POLK	3241846	INCREASE ARMY
POLK	12291846	INCREASE REGULAR ARMY
TAYL	12041849	SEND MORE ARMY TROOPS TO WESTERN POSTS
FILL	1141851	PASS BILLS ANSWERING ESTABLISHING RELATIVE RANKS BETWEEN ARMY AND NAVY
FILL	2191851	DROP REQUIREMENT FOR A PROCLAMATION TO USE MILITIA
FILL	2191851	MODIFY ACT ALLOWING ARMY; NAVY AND MILITIA TO BE USED IN SUPPRESSING INSURRECTIONS
FILL	12021851	INCREASE THE SIZE OF THE ARMY
FILL	12061852	ESTABLISH RELATIVE RANK BETWEEN ARMY AND NAVY OFFICERS
PIER	12051853	ENLARGE THE ARMY
PIER	12041854	INCREASE COMPENSATION OF OFFICERS IN THE ARMY
PIER	12041854	ENLARGE THE ARMY
PIER	12041854	REFORM LAWS REGULATING RANK AND COMMAND OF THE ARMY
PIER	12311855	REORGANIZE THE ARMY
PIER	12311855	LET DUTIES OF THE ARMY STAFF BE PERFORMED BY DETAILS FROM THE LINE
PIER	8211856	PASS ARMY APPROPRIATIONS BILL
PIER	12021856	REORGANIZE THE ARMY
BUCH	12081857	RAISE FOUR REGIMENTS TO SUPPRESS MORMON REBELLION
LINC	7041861	RATIFY PRESIDENT'S CALL FOR 75000 MILITIA
LINC	7041861	RATIFY PRESIDENTIAL CALL FOR LARGE INCREASE IN ARMY AND NAVY
LINC	12031861	ORGANIZE MILITIA ON A UNIFORM BASIS
LINC	12031861	COMPENSATE CHAPLAINS IN HOSPITALS AT SAME RATE AS CHAPLAINS IN THE ARMY
LINC	12081863	INSURE PAY BETWEEN NAVY AND ARMY IS EQUITABLE
AJHN	12091868	REPEAL UNCONSTITUTIONAL PROVISIONS OF THE 1867 ARMY BILL
USGT	12061869	REPEAL ACT PROHIBITING PROMOTIONS/APPOINTMENTS IN THE ARMY STAFF CORPS
USGT	3231871	ENACT LEGISLATION TO SECURE PRIVATE RIGHTS AND LAW ENFORCEMENT THROUGHOUT THE NATION
USGT	12041871	FIX THE NUMBER OF OFFICERS IN ARMY STAFF CORPS
USGT	12021872	CONSOLIDATE ARMY EXPENDITURE ACCOUNTS
USGT	12011873	REOPEN PROMOTIONS IN THE ARMY STAFF CORPS
USGT	4301187	ALLOW ARMY ENGINEER CORPS TO COMPLETE GEOGRAPHICAL SURVEYS AND MAPPING EXPEDITIONS OF THE U.S.

USGT	12071874	DISCHARGE ARMY OFFICERS FOR DRAWING TOO MUCH PAY
USGT	12071874	FIX STATUS/ALLOW PROMOTIONS IN ARMY STAFF CORPS
USGT	12051876	TRANSFER CLAIMS FOR SUPPLIES TAKEN BY THE ARMY DURING CIVIL WAR TO SOUTHERN CLAIMS COMMISSION
HAYE	10151877	MAKE APPROPRIATIONS NECESSARY TO SUSTAIN ARMY AT ITS PRESENT MAXIMUM SIZE OF 25000 MEN
HAYE	12031877	SUPPLY ARMY WITH MORE AND BETTER THINGS TO READ
HAYE	12031877	REVISE AND REPUBLISH ARMY REGULATIONS
HAYE	12031877	TRANSFER TO SOUTHERN CLAIMS COMMISSION CLAIMS FOR SUPPLIES TAKEN BY THE ARMY DURING CIVIL WAR
HAYE	12021878	REPEAL AND AMEND JUNE 1878 ACT FORBIDDING USE OF THE ARMY AS POSSE COMITATUS
HAYE	12021878	ORGANIZE CORPS OF MOUNTED INDIAN AUXILIARIES UNDER COMMAND OF THE ARMY TO SUPPRESS INDIAN DISTURBANCES
HAYE	3191879	PASS NEEDED APPROPRIATIONS FOR EXECUTIVE BRANCH; LEGISLATIVE AND JUDICIAL PURPOSES; AND THE ARMY
HAYE	12011879	AUTHORIZE FULL ARMY ENLISTMENT OF 25000 MEN
HAYE	12061880	MAINTAIN ARMY ENLISTMENT AT ITS FULL LEGAL STRENGTH OF 30000 MEN
HAYE	12061880	PROVIDE THAT THE DETAIL OF OFFICERS AS PROFESSORS OF TACTICS AND MILITARY SCIENCE BE MADE FROM THE RETIRED AND NOT THE ACTIVE LIST OF THE ARMY
HAYE	12061880	CONSOLIDATE BUREAU OF MILITARY JUSTICE AND CORPS OF JUDGE-ADVOCATES ON THE SAME BASIS WITH OTHER ARMY STAFF CORPS
HAYE	12061880	CONSTRUCT NEW BUILDING TO HOUSE COLLECTIONS OF ARMY MEDICAL MUSEUM AND LIBRARY
HAYE	12061880	AUTHORIZE APPOINTMENT OF A CAPTAIN-GENERAL OF THE ARMY
ARTH	12061881	INCREASE ARMY TO 30000 ENLISTED MEN
ARTH	12061881	PROVIDE LEGISLATION EXTENDING U.S. PROTECTION TO TERRITORIES AGAINST 'DOMESTIC VIOLENCE'
ARTH	12041882	PROVISION FOR ARMING AND EQUIPPING THE MILITIA
ARTH	12041882	AMEND LAW MAKING RETIREMENT OF OFFICERS OF THE ARMY COMPULSORY AT AGE 64
ARTH	12011884	PROVIDE FIREPROOF BUILDING FOR THE ARMY MEDICAL MUSEUM AND THE LIBRARY OF THE SURGEON-GENERAL'S OFFICE
ARTH	3031885	CONFIRM ULYSSES S. GRANT TO BE GENERAL ON THE RETIRED LIST OF THE ARMY
CLV1	12081885	LESSEN TERM OF FIRST ENLISTMENT IN THE ARMY
BHAR	12031889	INCREASE ARTILLERY FORCE OF THE ARMY
BHAR	3241892	PROVIDE FOR THE EXPENSES OF THE 26TH ANNUAL ENCAMPMENT OF THE GRAND ARMY OF THE REPUBLIC
BHAR	12061892	MODERNIZE THE ARMY

BHAR	12061892	DEVELOP NAVAL MILITIA
CLV2	12041893	REORGANIZE THE ARMY - - ADOPT BATTALION FORMATIONS FOR INFANTRY REGIMENTS
CLV2	12031894	ADOPT THE THREE- BATTALION FORMATION OF REGIMENTS TO IMPROVE THE ARMY
CLV2	12071896	MAKE NECESSARY PROVISIONS TO THE MILITIA
CLV2	12071896	ENABLE CONVICTS IN FORT LEAVENWORTH TO RESUME MANUFACTURE OF ARTICLES FOR ARMY USE
MKIN	12051898	PASS LEGISLATION FOR THE PERMANENT INCREASE OF THE ARMY
MKIN	12051898	GIVE DISCRETIONARY POWER TO THE PRESIDENT TO RECRUIT FOR THE ARMY FROM THE INHABITANTS OF CUBA AND PUERTO RICO
MKIN	12031900	PROVIDE A DETAIL OF OFFICERS FROM LINE OF THE ARMY WHEN VACANCIES OCCUR IN VARIOUS DEPARTMENTS LISTED
TR	12031901	CREATE NATIONAL NAVAL RESERVE - - FROM GRADUATES OF THE NAVAL MILITIA AND PRIVATE SAILORS AND COASTAL POPULATION NEAR LIGHT-HOUSES
TR	12031901	INSTITUTE GENERAL STAFF OF THE ARMY
TR	12031901	ADOPT SYSTEM TO ELIMINATE PROMOTION OF UNFIT OFFICERS IN SENIOR GRADES OF THE ARMY
TR	12031901	GIVE RETIRING ARMY VETERANS OF THE CIVIL WAR THE SAME PRIVILEGES AS NAVY RETIREES
TR	12031901	HAVE THE ARMY CONDUCT YEARLY FIELD EXERCISES
TR	12021902	CREATE ARMY GENERAL STAFF AND REORGANIZE SUPPLY DEPARTMENTS
TR	12021902	REORGANIZE THE MILITIA SYSTEM AND DEFINE THE ROLE OF THE NATIONAL GUARD
TR	12061904	MAKE ARMY SERVICE MORE ATTRACTIVE TO POTENTIAL OFFICERS
TR	12061904	USE SELECTION AND REJECTION SYSTEM FOR ARMY PROMOTIONS
TR	1091905	EXPAND ARMY MEDICAL CORPS
TR	12051905	AUTHORIZE EMBARKING AND DISEMBARKING EXERCISES FOR AT LEAST ONE ARMY BRIGADE OR DIVISION
TR	12051905	SHRINK THE NUMBER OF ARMY POSTS AND ESTABLISH BRIGADE AND DIVISION GARRISONS
TR	12051905	INTRODUCE A MERIT PROMOTION AND RETIREMENT SYSTEM IN THE ARMY AND NAVY
TR	12051905	EXPAND THE ARMY MEDICAL CORPS
TR	12051905	EQUALIZE THE RANK AND PAY OF ARMY AND NAVY MEDICAL OFFICERS
TR	12031906	INTRODUCE A MERIT PROMOTION AND RETIREMENT SYSTEM IN THE ARMY AND NAVY
TR	12031907	EXPAND THE NUMBER OF ARMY OFFICERS
TR	12031907	EXPAND AND REORGANIZE ARMY MEDICAL CORPS

TR	12031907	CREATE POSITION OF ARMY WARRANT OFFICER AND ENHANCE ITS ATTRACTIVENESS TO CAPABLE NONCOMMISSIONED OFFICERS
TR	12031907	INTRODUCE A MERIT SELECTION PROMOTION AND RETIREMENT SYSTEM IN THE ARMY
TR	12031907	INSTITUTE MORE RIGID TEST OF HORSEMANSHIP IN THE ARMY
TR	12031907	EQUALIZE AND INCREASE THE PAY OF OFFICERS AND ENLISTED MEN IN THE ARMY AND NAVY AND MARINES AND REVENUE-CUTTER SERVICE
TR	12031907	CREATE ARMY SERVICE CORPS
TR	12081908	MAKE ONE-THIRD OF PROMOTIONS IN THE ARMY THROUGH SELECTION BY THE PRESIDENT AND SECRETARY OF WAR FROM A LIST OF CANDIDATES PROPOSED BY A BOARD OF OFFICERS IN THE RELEVANT SERVICE
TAFT	3041909	PROVIDE FOR COST OF MAINTAINING A PROPER ARMY
TAFT	12071909	PASS ELIMINATION BILL TYING THE PROMOTION OF ARMY OFFICERS TO MERIT
TAFT	12071909	PROVIDE FOR RETIREMENT OF ARMY PERSONNEL BASED ON CERTAIN PROPORTION OF THEIR PAY AND LENGTH OF SERVICE
TAFT	6251910	REFER OLD PROJECTS TO BOARDS OF ARMY ENGINEERS FOR FURTHER CONSIDERATION AND RECOMMENDATION
TAFT	12061910	ESTABLISH COMMISSION TO DETERMINE COMPREHENSIVE POLICY FOR ORGANIZATION; MOBILIZATION AND ADMINISTRATION OF THE REGULAR ARMY; THE ORGANIZED MILITIA; AND VOLUNTEER FORCES IN EVENT OF WAR
TAFT	12061910	INCREASE NUMBER OF ARMY ENGINEERS BY SIXTY
TAFT	12211911	ESTABLISH ARMY SERVICE CORPS
TAFT	12211911	CONSOLIDATE THE ARMY STAFF CORPS
TAFT	12211911	ADOPT SYSTEM OF DETENTION LIKE THAT OF GREAT BRITAIN FOR ARMY AND NAVY ENLISTED MEN
TAFT	12061912	PASS NEW DISCIPLINARY SYSTEM FOR ARMY AND NAVY
WW	12071915	INCREASE THE SIZE OF THE STANDING ARMY
WW	12021919	ENACT CRIMINAL PENALTIES FOR SPEECH THAT INCITES CRIME AND INSURRECTION
HARD	4121921	CONTINUE ARMY AIR SERVICE AND UTILIZE IN COOPERATION WITH OTHER AGENCIES AND BRANCHES OF GOVERNMENT
HARD	4121921	ESTABLISH SYSTEM OF VOLUNTARY MILITARY TRAINING FOR MEN TO CONSTITUTE THE ARMY RESERVE
HARD	2281922	DISCONTINUE TRANSPORT SERVICES IN THE ARMY AND NAVY
COOL	12061923	PROVIDE ADDITIONAL PLANES FOR THE ARMY
COOL	12081925	PROVIDE FOR MORE SUITABLE HOUSING [FOR ARMY; NAVY; MARINE CORPS; NATIONAL GUARD; AND ORGANIZED RESERVES] TO BE PAID FOR OUT OF FUNDS DERIVED FROM THE SALE OF EXCESS LANDS

COOL	12081925	PROVIDE FOR TWO ADDITIONAL BRIGADIER GENERALS FOR THE ARMY AIR SERVICE
COOL	12081927	ENACT LEGISLATION PUTTING INTO EFFECT RECOMMENDATIONS REGARDING THE PLAN OF THE ARMY ENGINEERS FOR FLOOD CONTROL OF THE MISSISSIPPI RIVER IN ITS ALLUVIAL VALLEY
HOOV	2171932	AUTHORIZE SECRETARY OF WAR TO DELEGATE ARMY ENGINEERS TO THE SERVICE OF THE ADMINISTRATOR OF PUBLIC WORKS
FDR	3021934	RELINQUISH ARMY BASES IN PHILIPPINES
FDR	1281938	AUTHORIZE THE ARMY TO APPROVE ITS ANTI-AIRCRAFT CAPABILITIES
FDR	1281938	BOLSTER THE ARMY'S ENLISTED RESERVE
FDR	1121939	PURCHASE AIRCRAFT WITH \$300 MILLION OF ARMY'S APPROPRIATION
FDR	1121939	PURCHASE CRITICAL ITEMS WITH REMAINING \$150 MILLION OF ARMY'S APPROPRIATION
FDR	5161940	FILL THE ARMY'S ORDER FOR SUPPLIES WITHIN ONE YEAR
FDR	5161940	ALLOW ARMY AND NAVY AND MARINES TO MAKE CONTRACT OBLIGATIONS OF \$186 MILLION
FDR	7211941	REMOVE RESTRICTIONS ON SIZE OF ARMY
FDR	7211941	PROVIDE THAT EMPLOYERS KEEP JOBS OPEN FOR EMPLOYEES IN THE ARMY
IKE	3301954	BROADEN GUARANTEES AGAINST LOSSES ON NEW INVESTMENT A BROAD TO COVER LOSSES CAUSED BY WAR OR REVOLUTION OR IN SURRECTION
IKE	1131955	PERMIT THE STATES TO MAINTAIN IN PEACETIME ORGANIZED MILITIA FORCES TO REPLACE NATIONAL GUARD UNITS CALLED TO FEDERAL SERVICE
IKE	4091956	RAISE THE STATUTORY CEILING ON REGULAR ARMY AND AIR FORCE OFFICERS TO ABOUT HALF PLANNED OFFICER STRENGTH
IKE	4091956	EXTEND PERMANENTLY AUTHORITY FOR ARMY/AIR FORCE COMMISSIONED OFFICERS TO RETIRE IN CURRENT TEMPORARY GRADES
IKE	1191959	REPEAL AT AN EARLY DATE THE PROVISIONS IN THE FISCAL 1959 DEFENSE APPROPRIATION ACT SETTING MANDATORY MINIMUM STRENGTHS FOR RESERVE COMPONENTS FOR THE ARMY
IKE	1191960	REPEAL THE PROVISION SETTING A MANDATORY MINIMUM STRENGTH FOR THE ARMY NATIONAL GUARD
IKE	1191960	REDUCE THE ARMY NATIONAL GUARD AND ARMY RESERVE TO 360 THOUSAND AND 270 THOUSAND RESPECTIVELY
IKE	1141960	PERMIT THE TRANSFER TO NASA OF THE DEVELOPMENT OPERATIONS DIVISION OF THE ARMY BALLISTIC MISSILE AGENCY AND CERTAIN SUPPORTING PERSONNEL
JFK	7251961	INCREASE THE ARMY'S TOTAL AUTHORIZED STRENGTH FROM 875000 TO APPROXIMATELY 1 MILLION
JFK	3011961	RESTORE FORMER PRESIDENT EISENHOWER TO HIS MILITARY RANK OF GENERAL OF THE ARMY

LBJ	3081965	ENLARGE EFFORTS AGAINST ORGANIZED CRIME BY THE ATTORNEY GENERAL AND THE TREASURY SECRETARY AND OTHER HEADS OF FEDERAL LAW ENFORCEMENT AGENCIES
LBJ	3081965	ENACT LAW ENFORCEMENT ASSISTANCE ACT OF 1965 AUTHORIZING THE ATTORNEY GENERAL TO ASSIST STATE AND LOCAL AND PRIVATE GROUPS TO IMPROVE AND STRENGTHEN CRIME CONTROL PROGRAMS
LBJ	3081965	BOLSTER EXISTING TRAINING PROGRAMS FOR LOCAL LAW ENFORCEMENT PERSONNEL AND SUPPORT DEVELOPMENT OF NEW TRAINING METHODS
LBJ	3091966	AUTHORIZE A LOAN FORGIVENESS PROGRAM UNDER THE NATIONAL DEFENSE EDUCATION ACT FOR STUDENTS WISHING TO ENTER THE LAW ENFORCEMENT PROFESSION
LBJ	2061967	REQUIRE THAT THE STATE OR LOCAL GOVERNMENT'S PLAN DEAL WITH ALL LAW ENFORCEMENT AND CRIMINAL JUSTICE AGENCIES IN THE AREA UNLESS THE ATTORNEY GENERAL DETERMINES THIS IS IMPRACTICAL
LBJ	2061967	REQUIRE THAT THE STATE OR LOCAL GOVERNMENT'S PLAN SET FORTH PRIORITIES FOR IMPROVEMENT OF ALL ASPECTS OF LAW ENFORCEMENT AND CRIMINAL JUSTICE
LBJ	2061967	AUTHORIZE ATTORNEY GENERAL TO MAKE GRANTS OR CONTRACTS WITH PUBLIC AGENCIES OR UNIVERSITIES FOR UP TO 100% OF COST OF RESEARCH OR EDUCATION IN LAW ENFORCEMENT AND CRIMINAL JUSTICE
LBJ	2061967	PROVIDE FUNDS TO ENLARGE FEDERAL NARCOTICS LAW ENFORCEMENT TRAINING PROGRAMS IN ORDER TO REACH A GREATER NUMBER OF STATE AND LOCAL LAW ENFORCEMENT OFFICIALS
LBJ	2061967	ESTABLISH IN THE JUSTICE DEPARTMENT A NEW OFFICE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE ASSISTANCE
LBJ	2071968	ENACT THE SAFE STREETS AND CRIME CONTROL ACT PROVIDING FEDERAL AID TO STATE AND LOCAL GOVERNMENTS FOR PLANNING AND RESEARCH IN IMPROVED CRIME PREVENTION AND LAW ENFORCEMENT
LBJ	2071968	PROVIDE FEDERAL FUNDS TO COVER 50 PERCENT OF THE COST TO STATE AND LOCAL GOVERNMENTS OF CONSTRUCTING NEW LAW ENFORCEMENT AND CORRECTIONAL FACILITIES
LBJ	2071968	AUTHORIZE THE FEDERAL BUREAU OF INVESTIGATION TO EXPAND ITS TRAINING PROGRAMS FOR STATE AND LOCAL LAW ENFORCEMENT PERSONNEL
LBJ	2071968	PROVIDE MORE SUBSTANTIAL FINANCIAL ASSISTANCE TO STATE AND LOCAL LAW ENFORCEMENT AGENCIES TO DEVELOP THEIR OWN TRAINING PROGRAMS
LBJ	2071968	ESTABLISH A PROGRAM OF FELLOWSHIPS AND STUDENT LOANS AND TUITION AID FOR STATE AND LOCAL LAW ENFORCEMENT OFFICES

LBJ	2071968	CREATE A NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE TO DEVELOP A MAJOR FEDERAL RESEARCH PROGRAM FOR THE APPLICATION OF SCIENCE AND TECHNOLOGY TO LAW ENFORCEMENT
NIX	4231969	MAKE THE SYSTEMATIC CORRUPTION OF COMMUNITY POLITICAL LEADERSHIP AND LAW ENFORCEMENT OFFICIALS A FEDERAL CRIME
NIX	7141969	MODERNIZE LAW ENFORCEMENT CRITERIA AND PROCEDURES FOR DANGEROUS DRUGS
NIX	5201970	AUTHORIZE THE SECRETARY OF THE ARMY AFTER ONE YEAR TO SUSPEND DREDGING IF LOCAL INTERESTS ARE NOT MAKING REASONABLE PROGRESS IN ATTAINING DISPOSAL SITES
NIX	3021971	PROVIDE \$500 MILLION FOR SPECIAL REVENUE SHARING FOR LAW ENFORCEMENT
NIX	1281971	AUTHORIZE TEST PROGRAM OF SPECIAL PAY INCENTIVES DESIGNED TO ATTRACT MORE VOLUNTEERS INTO TRAINING FOR ARMY COMBAT SKILLS
NIX	1261971	PROHIBIT DISORDERLY CONDUCT TO DISRUPT GOVERNMENT BUSINESS OR ANY PHYSICAL VIOLENCE WITHIN GOVERNMENT FACILITY - - INCLUDING PHYSICAL OBSTRUCTION OR ABUSIVE OR THREATENING LANGUAGE
NIX	1301974	INCREASE FUNDING FOR THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION TO \$886 MILLION FROM \$826 MILLION
FORD	6191975	REAUTHORIZE THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION FOR FIVE YEARS -- THROUGH 1980
FORD	7011975	ENACT THREE RESCISSIONS TOTALLING \$123.7 MILLION AFFECTING FUNDS FOR TWO HIGHWAY PROGRAMS AND THE FEDERAL LAW ENFORCEMENT TRAINING CENTER
FORD	7221976	EXTEND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION FOR FIVE YEARS BUT PLACE IT UNDER THE DIRECTION OF THE ATTORNEY GENERAL
CART	3271978	REORGANIZE ACTION AND LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (LEAA) TO ENCOURAGE MAYORS AND LOCAL NEIGHBORHOOD GROUPS TO DEVELOP COMMUNITY CRISIS PREVENTION PROGRAMS
CART	7101978	PASS THE JUSTICE SYSTEM IMPROVEMENT ACT OF 1978 IN ORDER TO STREAMLINE AND REDIRECT THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (LEAA)
CART	1251979	REFORM THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (LEAA) TO ENABLE THE GOVERNMENT TO OBTAIN BETTER INFORMATION AND RESEARCH ABOUT CRIME PROBLEMS
CART	5201980	RESCIND \$12.4 MILLION FROM LAW ENFORCEMENT ASSISTANCE IN THE DEPARTMENT OF JUSTICE
RR	9151986	PASS THE 'DRUG INTERDICTION AND INTERNATIONAL COOPERATION ACT' TO FACILITATE U.S. LAW ENFORCEMENT PARTICIPATION IN DRUG ENFORCEMENT OPERATIONS ABROAD



BUSH	3111991	REFORM THE USE OF THE EXCLUSIONARY RULE BY PERMITTING THE USE OF EVIDENCE THAT HAS BEEN SEIZED BY FEDERAL AND STATE LAW ENFORCEMENT OFFICIALS ACTING IN GOOD FAITH
BUSH	9301992	AUTHORIZE A COMPREHENSIVE GRANT PROGRAM TO FIGHT DOMESTIC VIOLENCE AND ENFORCE CHILD SUPPORT OBLIGATIONS