APPLYING COMBATANT STATUS UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT TO THE DOMESTIC MILITIA SYSTEM OF THE UNITED STATES

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I. Introduction

The militia is a historical hallmark of the United States' national defense system as well as a tool for domestic law enforcement.[1] At its crux is the principle of civic responsibility through the participation of the body politic.[2] Notwithstanding that, the nature of our system of national defense has largely transitioned from a force raised only in time of need and comprised of loosely regulated state militias to a standing professional fighting force. This resulted in a National Guard heavily regulated by a federal accreditation process.[3] Nevertheless, many of the legal mechanisms providing for citizen participation through militia service in

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[1] *See* United States v. Miller, 307 U.S. 174 (1939); Martin v. Mott, 25 U.S. 19 (1827); Luther v. Borden, 48 U.S. 1 (1849); see also Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L. J. 149, 170–175 (2004) (citing and discussing the significance of *Martin v. Mott and Luther v. Borden* with regard to martial law).

[2] *Miller*, 307 U.S. at 179–80.

[3] *See* JERRY COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920 (Mark Grimsley & Peter Maslowski eds., 1997); s*ee also Federalizing the National Guard: Preparedness, reserve forces and the National Defense Act of 1916*, NATIONAL GUARD BUREAU (June 2, 2016), http://www.nationalguard.mil/News/Article/789220/federalizing-the-national-guard-preparedness-reserve-forces-and-the-national-de/.

a time of crisis remain in full effect.[4] Although the State militia system has developed into what we now know as the National Guard, a dual state-federal entity with significant funding and oversight, other forms of legitimate governmental militias exist both at law and in practice.[5] These other forms chiefly include the State Defense Force (SDF), the Naval Militia, and the Unorganized Militia of the states as authorized under federal and state law.[6]

The *Law of Armed Conflict* (hereafter LOAC) provides that certain categories of persons constitute *privileged combatants*, carrying with them both immunities and responsibilities under international law.[7] Aside from service in regular armed forces, LOAC also provides various means through which militias and civilians may be recognized as falling within the purview of privileged combatant status, and thereby legally engage in hostilities under international law.[8] This aspect of international law would likely prove critical should the United States ever again find itself under threat of invasion as the U.S. has expansive domestic military laws. This article will analyze and apply substantive international LOAC to the primary domestic legal mechanisms for national defense regarding militia forces of the United States and its states and identify likely conflicts that may arise at the intersection of our domestic system and the overarching international LOAC. A key aspect of this analysis is the ability of the general population, acting either as individuals or as some ad hoc militia (under domestic law) independent of governmental oversight, to qualify for privileged combatant status under LOAC. Furthermore, the potential for domestic mechanisms to assimilate the general population, likely operating under the limited temporal authority of a *levée en masse*,[9] into a legitimate military force with continued long-term standing under LOAC is both strategically promising and academically fascinating.

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[4] *See, e.g.,*10 U.S.C.A. § 246 (West 2016) (unorganized militia for federal purposes); VA. CODE ANN. § 44-1 (West 2016) (unorganized militia for state purposes).

[5] *See, e.g.*, CONNECTICUT GOVERNOR'S HORSE AND FOOT GUARDS, https://ct.ng.mil/Community_Actions/Pages/Horse_Foot_Guards.aspx (last visited June 18, 2017); CONN. GEN. STAT. ANN. §§ 27-6a to -8 (West 2016) (statutory basis for the Connecticut Governor's Foot and Horse Guards).

[6] *See, e.g.*, *supra* note 4 (unorganized militia); *supra* note 5 (Connecticut Governor's Horse Guard); NEW YORK NAVAL MILITIA, http://dmna.ny.gov/nynm/ (last modified Aug. 19, 2015); VIRGINIA DEFENSE FORCE, www.vdf.virginia.gov (last visited June 17, 2017).

[7] Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 INT'L REV. RED CROSS 45, 45–46 (2003).

[8] *Id.* at 46 (discussing the doctrine of *levée en masse* whereby the citizenry may spontaneously rise up while under invasion without having to meet the traditional requirements for combatant status).

[9] *Id.*

II. Constitutional Basis for the Militia

The United States Constitution as well as the constitutions of the various states establish the validity of the United States' domestic system of militia-based common defense. The federal Constitution provides that "Congress shall have the power . . . to provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[10] As for the militia's utility for federal purposes, the Constitution likewise provides the federal government the right to call on "the militia to execute the laws of the Union, suppress insurrections, and repel invasions."[11] Furthermore, the Constitution explicitly stipulates that the "President shall be the Commander in Chief of the Army and Navy . . . and of the Militia of the several States, when called into the actual Service of the United States."[12]

The federal Constitution also contains two key Amendments of relevance to the militia. Firstly, the Second Amendment provides, "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."[13] Secondly, the Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[14] Accordingly, the United States Supreme Court, in its solitary twentieth century case interpreting the Second Amendment, held that there was no individual right to possess a sawed-off shotgun, holding in part:

> In the absence of any evidence tending to show that possession or use of a [sawed-off shotgun] . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an

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[10] U.S. CONST. art. I, § 8, cl. 16.
[11] U.S. CONST. art. I, § 8, cl. 15.
[12] U.S. CONST. art. II, § 2, cl. 1.
[13] U.S. CONST. amend. II.
[14] U.S. CONST. amend. X.

> instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[15]

While it remains a contentious point as to what extent the Second Amendment grants a private right to own weapons, there is now settled case law providing a minimal right to own and carry firearms, irrespective of any official state-sponsored militia nexus. The United States Supreme Court, in *District of Columbia v. Heller*, held that the Second Amendment provides a minimal individual right to own a firearm.[16] In so doing, the *Heller* Court mentioned in dicta that "the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty."[17] Furthermore, in *McDonald v. Chicago,* the Supreme Court ruled that the Second Amendment's individual right to keep and bear arms was likewise applicable to the states through the Fourteenth Amendment's Due Process Clause.[18]

The constitutions of many states likewise provide for the provision and maintenance of militia and generally make the Governor the Commander in Chief of the state's militia forces when not in active federal service.[19] The state constitutions also frequently contain provisions similar to the Second Amendment to the United States Constitution, providing some minimal guarantee of a right to keep and bear arms.[20] As with the contentious interpretative debate surrounding the federally conferred right to keep and bear arms, there are varying interpretations of the corresponding rights guaranteed in state constitutions.[21] Regardless of

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[15] *Miller*, 307 U.S. at 178 (citing Aymette v. State of Tennessee, 21 Tenn. 154, 158 (1840)).

[16] District of Columbia v. Heller, 554 U.S. 570, 595 (2008).

[17] *Id*. at 627.

[18] McDonald v. Chicago, 561 U.S. 742, 791 (2010).

[19] *E.g.*, CAL. CONST. art. V, § 7; FLA. CONST. art. X, § 2; *id.* art. 4, § 1; WYO. CONST. art. IV, § 4; *id.* art. XVII, § 5.

[20] *E.g.*, COLO. CONST. art. II, § 13; VA. CONST. art. I, § 13; WYO. CONST. art. I, § 24.

[21] *See, e.g.*, Benjamin v. Bailey, 234 Conn. 455, 465–66 (1995) (holding that the Connecticut Constitution, article I, section 15 guarantees a minimal right to own weapons for self-defense, but not an individual right to own an assault weapon); Salina v. Blaksley, 72 Kan. 230, 230 (1905) (holding that, as it was worded at that time, section 4 of the Kansas Constitution's Bill of Rights only applied to and protected weapons possession directly related to militia service); Carfield v. State, 649 P.2d 865, 871–72 (Wyo. 1982) (holding that Wyoming Constitution article I, section 24 confers only a limited right to bear arms, and that a prohibition on possession of firearms by convicted felons is constitutional); State v. McAdams, 714 P.2d 1236, 1236 (Wyo. 1986) (holding that Wyoming Constitution

the *collective* versus *individual* rights theories, the states appear unanimous in their establishment and acknowledgment of bona fide militia forces under their respective constitutions and laws.

III. Statutory Basis for the Militia

Article I, section 8, clause 16 of the United States Constitution explicitly grants Congress the power to organize, equip, and discipline the militias of the several states, while reserving command and control of those forces to the respective States. The sole exceptions allowing for federal control are the situations and purposes enumerated in clause 15 of the same article and section. Several years after the Constitution was ratified, Congress enacted two acts related to the militia. The Militia Acts of 1792 were two separate acts that implemented the authorities granted to the various branches of the federal government over the militia by the Constitution.

The first act, passed on May 2, 1792, expressly granted the President authority to call a state militia into federal service "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe"[22] or "whenever the laws of the United States shall be opposed or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act."[23] The second act, passed on May 8th of that same year, set minimal framework for the organization of a state's militia. Accordingly, the state militia was divided into "divisions, brigades, regiments, battalions, and companies, as the legislature of each State shall direct."[24] The act established mandatory militia service, requiring:

> [E]ach and every free able-bodied white male citizen of the respective States, resident therein, who is or shall be of age of eighteen years, and under the age of forty-five years . . . shall severally and respectively be enrolled in the militia, by the Captain or Commanding Officer of the

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article I, section 24 does confer a minimal individual right to bear arms but not in a concealed manner).

[22] Militia Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264, 264 (replaced 1795).

[23] *Id.* § 2.

[24] Militia Act of May 8, 1792, ch. 33, § 3, 1 Stat. 271, 272.

> company, within whose bounds such citizen shall reside . . . .[25]

As for equipment, the act further required:

> [E]very citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder . . . .[26]

The act also provided for a system of courts-martial to enforce the act's provisions.[27] With the notable exception of eliminating the racial distinction in 1862,[28] these provisions existed largely unaltered until 1903.

In 1903, Congress undertook a major overhaul of the United States' militia system. The "Dick Act," named in honor of its author, Representative Charles Dick of Ohio, established the modern day National Guard, both in name and in substance, while still maintaining the collective membership in the militia of the male citizenry at large.[29] The act established a federal accreditation system, known as "federal recognition," through which state militia units, thereafter dubbed the "National Guard," could receive federal pay, equipment, and funding if they met such federally prescribed standards.[30] The act also had the major effect of dividing the militia (at least for federal purposes) into two primary groups: the Organized Militia (comprised of the National Guard) and the Reserve Militia (comprised of all "able bodied male[s] . . . more than eighteen and less than forty-five [years old]").[31] The statute was amended several times throughout the early twentieth century. Four notable amendments occurred in the following years: in 1914 to

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[25] *Id.* § 1 at 271.
[26] *Id*.
[27] § 5, 1 Stat. at 264.
[28] Militia Act of 1862, ch. 201, § 1, 12 Stat. 597, 597.
[29] Efficiency in Militia (Dick) Act of 1903, ch. 196, 32 Stat. 775, 775–80.
[30] *Id.*
[31] *Id.* § 1 at 775.

encompass the addition of the Naval Militia;[32] in 1916 to rename the Reserve Militia the Unorganized Militia;[33] in 1947 to modify the minimum age to seventeen;[34] and in 1956 to include female members of the National Guard within the overall definition of militia.[35]

Despite the many benefits of the federal recognition process and the federal equipment and funding with which it brought on National Guard readiness, the fact remained that the National Guard was still a militia. This characterization subjects the Guardsmen to the restrictive conditions contained in the Constitution as to when they could be called into federal service and for what purposes.[36] When World War I began, there was contention as to the constitutionality of deploying National Guard units overseas, even in a federalized capacity, due to their characterization as a militia and the constraints contained in the Constitution.[37] The workaround was a draft *en masse* of National Guardsmen into the United States Army.[38] This changed their classification as a militia and enabled them to participate in WWI as members of the federal Army. In 1933, Congress resolved this problem by creating the National Guard of the United States, a reserve component of the federal Army. All federally recognized members and units of the National Guard of each state would simultaneously be a member of the National Guard of the United States and could be utilized as such by the federal government independent of their concurrent state militia membership.[39] This dual membership dichotomy of the National Guard remains the law to this day.[40]

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[32] Naval Militia Act of 1914, Pub. L. No. 63-57, ch. 21, 38 Stat. 283, 283–90.
[33] National Defense Act of 1916, Pub. L. No. 64-85, ch. 134, § 57, 39 Stat. 166, 197.
[34] Act of June 28, 1947, Pub. L. No. 80-128, ch. 162, § 7, 61 Stat. 191, 192.
[35] Act of July 30, 1956, Pub. L. No. 84-845, ch. 789, § 1, 70 Stat. 729, 729.
[36] *See supra* note 11.
[37] *See* Authority of President to Send Militia into a Foreign Country, 29 Op. Att'y Gen. 322, 323–324 (1912) ("It is certain that it is only upon one or more of these three occasions—when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done."); *see also The Army-Militia Plan*, N.Y. TIMES, Jan. 16, 1914, at 8.
[38] *Wilson to Draft Guard August 5*, N.Y. TIMES, July 10, 1917, at 1.
[39] Act of June 15, 1933, Pub. L. No. 73-64, ch. 87, § 5, 48 Stat. 153, 155.
[40] *See* 10 U.S.C.A. §§ 10105, 10111 (West 2016) (federally recognized members of the Army National Guard to also be members of Army National Guard of the United States and federally recognized members of the Air National Guard to also be members of the Air National Guard of the United States); *see also* Perpich v. Department of Defense, 496 U.S. 334, 347–48 (1990) (the Court discussed the concurrent membership of Minnesota National Guardsmen in the National Guard of the United States, holding that the President has the authority to use them in their concurrent Armed Forces reserve capacity without

The current federal statute also stipulates that the Organized Militia consists of the National Guard and the Naval Militia and that the Unorganized Militia consists of all persons otherwise meeting the definition of militia (by virtue of age, gender, and citizenship requirements) not otherwise a member of the Organized Militia.[41] There are certain categories of individuals exempted from militia service by a companion federal statute,[42] however the numbers and effect of such exempted classes would likely prove *de minimis* in the event of invasion and will not be discussed here. The current law pertaining to the National Guard is largely contained in Title 32 of the U.S. Code. This title provides the current statutory basis for membership, equipment, uniformity, regulation, federal recognition, and in what instances a state may utilize its Guardsmen in a federally funded status.[43] Likewise, law pertaining to the federal Armed Forces is contained in Title 10 of the U.S. Code.[44] Federal law defines the "Armed Forces" to include the "Army,"[45] and further defines the "Army" as including the Regular Army, the Army Reserve, the Army National Guard of the United States (ARNGUS), and the Army National Guard (ARNG) of the states while in federal service.[46] The Air Force, the Air National Guard of the United States (ANGUS), and the Air National Guard (ANG) of the states feature an identical relationship.[47] Current law provides two methods by which the states' National Guard may be called into active federal service. The National Guard of a state may still be called into federal service in its militia capacity (i.e. same as before the amendments in the 1933 act) for one of the purposes enumerated in the U.S. Const. article I, as now codified in the modern day descendant of the Insurrection Act.[48] Relatively speaking, this method of using the National Guard as a federalized militia has seldom been used in the past century. The exceptional cases largely occurred in

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the Governor's approval); Nyberg v. St. Mil. Dep't, 65 P.3d 1241, 1246 (Wyo. 2003) (citing N.J. Air Nat'l Guard v. Fed. Lab. Rel. Auth., 677 F.2d 276, 279 (3d Cir. 1982)) ("At the state level, the National Guard is a state agency, under state authority and control. At the same time, federal law provides for a large part of the activity, makeup, and function of the Guard.").

41 10 U.S.C.A. § 246 (West 2016); *see also* 32 U.S.C.A. § 101 (West 2016) (defining the National Guard as the "organized militia of the several States and Territories").

42 10 U.S.C.A. § 247 (West 2016).

43 32 U.S.C.A. §§ 101–908 (West 2016).

44 10 U.S.C.A. §§ 101–18506 (West 2016).

45 *Id.* § 101(a)(4).

46 *Id.* § 3062(c).

47 *Id.* § 8062(d).

48 *Id.* §§ 251–255.

the Southern States during the Civil Rights movement, ironically, to enforce federal law against their own defiant state governments.[49] The other method for federalization is to call units and members of the National Guard to active duty in their concurrent reservist capacity as a member of the National Guard of the United States.[50] With the recent exception of Dual Status Commanders, federal law operates to relieve National Guard members of their duty in the National Guard of their respective states, and thus their militia status, when called to active duty in the federal Armed Forces in their National Guard of the United States capacity.[51] Unless and until specifically ordered to federal active duty in a Title 10 status, Guardsmen are in a Title 32 (state militia) status by default.[52] When in either of the two federalized (Title 10) statuses, Guardsmen are subject to the federal Uniform Code of Military Justice (UCMJ).[53] In addition to Title 32 and Title 10 statuses, Guardsmen may be utilized in a purely state funded capacity, generally referred to as "State Active Duty" (SAD).[54] In Title 32 and SAD statuses, Guardsmen are subject to their respective state's military justice laws, the extent, jurisdiction, and operation of which is a question of substantive state law.[55] Furthermore, federal law extends the Federal Tort Claims Act's civil liability coverage to National Guardsmen acting in a Title 32 (i.e. federally funded militia) status despite the fact that they retain a state chain of command and generally remain

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[49] *See* Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957) (Arkansas National Guard federalized to desegregate schools in Little Rock); Exec. Order No. 11,053, 27 Fed. Reg. 9681 (Sept. 30, 1962) (Mississippi National Guard federalized for desegregation efforts); Exec. Order No. 11,111, 28 Fed. Reg. 5709 (June 11, 1963) (Alabama National Guard federalized for desegregation and other efforts); Exec. Order No. 11,118, 28 Fed. Reg. 9863 (Sept. 10, 1963) (Alabama National Guard again federalized for similar reasons).

[50] *See* 10 U.S.C.A. §§ 12301–12304, 12304b (West 2016).

[51] 32 U.S.C.A. § 325 (West 2016). The exception for Dual Status Commanders contained in this statute is questionable in that it purports to render the commander subject to the authority of two sovereigns at once.

[52] 10 U.S.C.A. § 10107 (West 2016); *see also* United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997) (citing *Perpich*, 496 U.S. at 343–44, 348) ("Guardsmen do not become part of the Army itself until such time as they may be ordered into active federal duty by an official acting under a grant of statutory authority from Congress. . . . When that triggering event occurs, a Guardsman becomes a part of the Army and loses his status as a state serviceman.").

[53] 10 U.S.C.A. § 802 (West 2016) (UCMJ personal jurisdiction over Guardsmen only when in federal service).

[54] Major Robert L. Martin, *Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia*, ARMY LAW, Dec. 2007, at 30, 34.

[55] *Id.* at 34–35.

state employees.[56] For arming purposes, a state is free to arm its Guardsmen with state owned or personally owned firearms while in a SAD status in addition to requesting to use federally owned firearms. However National Guard Bureau (NGB) regulations generally restrict the use of firearms in a Title 32 status to federally owned firearms.[57] Furthermore, even while in a Title 32 or SAD status, Guardsmen wear the uniform of their corresponding federal service.[58]

Federal law also allows a state to maintain two other forms of militia: the Naval Militia and a State Defense Force (SDF).[59] In a somewhat reverse fashion, the statutory framework for the Naval Militia aims to accomplish a result similar to the National Guard's dichotomy—a state militia force comprised of members who are concurrently federal reservists of the United States Armed Forces, that may use federal funding and equipment, adheres to minimal federally prescribed standards, and whose members are likewise relieved from militia duty when called into superseding federal service in any concurrent capacity as reservists.[60] Currently, it appears only a few states actively maintain a Naval Militia that meets all the requirements (namely the 95% reservist membership) for federal funding.[61] Additionally, several states have the statutory

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[56] 28 U.S.C.A. § 2671 (West 2016); *see also* United States v. State of Hawaii, 832 F.2d 1116, 1119 (9th Cir. 1987) (holding that the State of Hawaii was still liable in a contribution action to the United States for the negligence of its National Guardsman, regardless of FTCA coverage); Teurlings v. Larson, 320 P.3d 1224, 1228–29 (Idaho 2014) (holding that an Idaho National Guardsmen was a state employee under Idaho's law of *respondeat superior*, and that the U.S. Government's assumption of liability through the FTCA was coextensive with the respective state law civil immunity protections for state employees).

[57] *See* U.S. NAT'L GUARD BUREAU, REG. 500-5, NATIONAL GUARD DOMESTIC LAW ENFORCEMENT SUPPORT AND MISSION ASSURANCE OPERATIONS paras. 5-5, 5-6 (18 Aug. 2010) (only federal weapons may be used in a Title 32 status, and federal weapons may also be used in State Active Duty (SAD) status as long as the state refunds the federal government for any loss or expenditure of supplies).

[58] *See* 32 U.S.C.A. § 701 (West 2016) (Guardsmen to wear the same uniform as their corresponding federal branch).

[59] *See* 10 U.S.C.A. §§ 7851–54 (West 2016); 32 U.S.C. § 109 (West 2016).

[60] 10 U.S.C.A. §§ 7851, 7853 (West 2016) (requiring 95% membership to be federal Navy or Marine reservists and adhere to federal standards as a condition of federal funding and equipment and relief from militia duty when ordered to Active Duty as a federal reservist, respectively).

[61] *See, e.g.*, ALASKA NAVAL MILITIA, https://dmva.alaska.gov/ANM/AlaskaNavalMilitia (last visited June 18, 2017); NEW YORK NAVAL MILITIA, *supra* note 6; *see also* Deano L. McNeil, *Naval Militia: The Overlooked Homeland Security Option*, IN HOMELAND SECURITY (Apr. 25, 2016), http://inhomelandsecurity.com/naval-militia-overlooked-homeland-security/?utm_source=IHS&utm_medium=newsletter&utm_content=naval-militia-overlooked-homeland-security&utm_campaign=20160426IHS.

framework in place for a Naval Militia, the activation of which is contingent upon a triggering event or an executive order from the Governor.[62]

On the opposite end of the spectrum, the authorization under federal law of a state to maintain a Defense Force lacks any such features of prescribed federal standards, funding, or concurrent membership in the U.S. Armed Forces that characterizes both the National Guard and the Naval Militia.[63] Aside from clarifying that membership in a SDF does not excuse any current or future federal military obligations, federal law is silent on the structure, standards, funding, use, and membership of such a force.[64] There are presently only a handful of states that actively maintain an SDF, often applying alternate pseudo names to them at the state level.[65] To further complicate the dichotomy of the state National Guard and the SDFs, some states also maintain historical militia entities that have been in continuous existence since at least the American Revolution.[66] At one point, federal law specifically acknowledged such *historical* militias and stipulated that those militias may continue in existence, provided they are willing to fight alongside the National Guard if called upon.[67] There is no longer such an explicit provision in the U.S. Code, and in light of the provisions allowing for the maintenance of SDFs by the states, it is likely that such organizations would now be deemed to fall under the contemporary umbrella of an SDF, if they maintain any legitimacy at all.

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[62] *E.g.*, CONN. GEN. STAT. Ann. § 27-5 (West 2016); FLA. STAT. ANN. § 250.04 (West 2016); ME. REV. STAT. ANN. tit. 37-B, § 223 (West 2016).

[63] *See* 32 U.S.C.A. § 109 (West 2016) (authority of states to maintain a Defense Force).

[64] *Id.*

[65] *E.g.*, CAL. MIL. & VET. CODE § 550 (West 2016) ("California State Military Reserve"); IND. CODE ANN. § 10-16-8-1 (West 2016) ("Indiana Guard Reserve"); OHIO REV. CODE ANN. § 5923.01(A)(3) (West 2016) ("Ohio Military Reserve"); TENN. CODE. ANN. § 58-1-401 (West 2016) ("Tennessee State Guard").

[66] *E.g.*, CONNECTICUT GOVERNOR'S HORSE AND FOOT GUARDS, *supra* note 5; ANCIENT AND HONORABLE ARTILLERY COMPANY OF MASSACHUSETTS, http://www.ahac.us.com/history.htm (last visited June 18, 2017); VETERANS CORP OF ARTILLERY, STATE OF NEW YORK, http://www.vcasny.org (last visited June 18, 2017); *see also* CONN. GEN. STAT. ANN. §§ 27-7 to -8 (West 2016) (statutory basis for the Connecticut Foot and Horse Guards); MASS. GEN. LAWS ANN. ch. 33, § 132 (West 2016) (Ancient and Honorable Artillery Company rights preserved).

[67] National Defense Act of 1916, Pub. L. No. 64-85, § 63, 39 Stat. 166, 198 ("Any corps of Artillery, Cavalry, or Infantry existing in any of the States on the passage of the Act of May eighth, [1792], which by the laws, customs, or usages of said States has been in continuous existence since the passage of said Act . . . shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That said organizations may be a part of the National Guard and entitled to all the privileges of this Act . . . .").

As with the Naval Militia, there are several states that have a statutory scheme in place to create an SDF upon executive order or some other triggering event.[68] During the Second World War a *full mobilization* of the armed forces was in effect, with all National Guard forces ordered to federal service in their Armed Forces reserve capacity for the duration of the war, leading a substantial portion of the states to create and maintain active State Guards.[69] These State Guard forces, the equivalent of the modern day SDFs, generally served to provide internal defense and carry out the National Guard's normal peacetime mission.[70] One notable characteristic that both the Naval Militia and SDF generally have in common with the National Guard of their state is their shared jurisdiction under the military justice laws of the state.[71] This will play a key role in demonstrating their governmental relationship during subsequent LOAC analysis.

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[68] *E.g.*, CONN. GEN. STAT. ANN. § 27-9 (West 2016) ("Whenever the Connecticut National Guard is called into the federal service or whenever such a call, in the opinion of the governor, is deemed to be imminent, the governor shall forthwith raise, organize, maintain and govern, from the unorganized militia, a body of troops for military duty."); FLA. STAT. ANN. § 251.01 (West 2016) ("Whenever any part of the National Guard of this state is in active federal service, the Governor is hereby authorized to organize and maintain . . . such military forces as the Governor may deem necessary to assist the civil authorities in maintaining law and order. Such forces . . . shall be known as the Florida State Defense Force."); W. VA. CODE ANN. § 15-4-1 (West 2016) ("Whenever any part of the national guard of this State is in active federal service, the governor is hereby authorized to organize and maintain . . . such military forces as the governor may deem necessary to defend this State . . . . Such forces shall be additional to and distinct from the national guard and shall be known as the 'West Virginia state guard.'"); WYO. STAT. ANN. § 19-10-101(a) (West 2016) ("If the national guard of Wyoming is ordered into the service of the United States, the governor may organize and maintain within this state during that period . . . such military forces . . . as the governor deems necessary for the defense of the state. The forces shall be known as the Wyoming state guard.").

[69] Barry M. Stentiford, *Forgotten Militia: The Louisiana State Guard of World War II*, 45 LA. HIST.: J. LA. HIST. ASS'N 323, 326 (2004) (forty-four states and three territories formed State Guards during WWII); *see also* 10 U.S.C.A. §§ 12301(a), 12302(a) (West 2016) (authority for full mobilization of the armed forces reserve components during a time of war).

[70] *See generally* Stentiford, *supra* note 69 (discussing the various domestic uses and context of state guards during WWII).

[71] *E.g.*, N.Y. MIL. LAW §§ 2, 130.2 (McKinney 2016) (applying the N.Y. Code of Military Justice to the entire organized militia of the state, defined to include the N.Y. Guard, N.Y. National Guard, and N.Y. Naval Militia); VA. CODE ANN. § 44-54.10 (West 2016) (Virginia Defense Force subject to same judicial and non-judicial punishments as the Virginia National Guard); WYO. STAT. ANN. § 19-12-101 (West 2016) (state military justice code applies "to all persons in the military forces of the state").

The final militia component is referred to as the *Unorganized Militia* under federal law and generally under the laws of most states. This component of the militia generally functions as a categorical designation of a class of citizens, usually characterized by an age bracket, citizenship, and frequently gender,[72] from which the President or Governor may call forth members into active service under state and federal law. Federal law is silent as to the disposition of militia forces upon such a call into active federal service. To the contrary, it is a common feature of state law to stipulate that such members of the Unorganized Militia, as defined by state law, are to be folded in with the respective SDF of the state upon such a call to state active duty.[73] These systems create a mechanism from which the respective state Governors may effectively raise a fighting force independent of the National Guard and conscript citizens to serve in its ranks. When coupled with the applicability of state military justice laws to the SDF and activated militia at large, the net effect is that a legal duty to answer such a call is imposed on such members of the militia, and it is enforceable through threat of arrest and criminal liability. Practically speaking, whether the population at large is actually aware that such a legal duty exists is an entirely separate issue. Regardless, the fact remains that a legal process is in place to incorporate otherwise regular citizens into a legitimate military force under the authority of the several states and to impose military discipline therein.

IV. Sources of Combatant Status under International Law

There are two predominant sources of combatant status and classification which exist under international law. The first is the

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[72] For federal purposes, *see* 10 U.S.C.A. § 246 (West 2016) ("[males] 17 years of age and . . . under 45 years of age who are . . . citizens of the United States and of female citizens . . . who are members of the National Guard."). For state purposes, *see, e.g.*, N.D. CONST. art. XI, § 16 ("The reserve militia of this state consists of all able-bodied individuals eighteen years of age and older residing in the state"); GA. CODE ANN. § 38-2-3 (West 2016) ("the unorganized militia shall consist of all able-bodied male residents of the state between the ages of 17 and 45"); VA. CODE ANN. § 44-1 (West 2016) ("able-bodied . . . resident[s] in the Commonwealth . . . at least 16 years of age and . . . not more than 55 years of age."); WYO. STAT. ANN. § 19-8-102(a) (West 2016) ("residents of the state between the ages of seventeen (17) and seventy (70) years").

[73] *E.g.*, COLO. REV. STAT. ANN. § 28-4-103.5 (West 2016) (Establishing that the Unorganized Militia will directly be called into the SDF: "[e]very able-bodied male citizen . . . between the ages of eighteen and sixty-four years . . . are subject to military duty in the state defense force."); VA. CODE ANN. § 44-88 (West 2016) ("Whenever the Governor orders out the unorganized militia . . . it shall be incorporated into the Virginia Defense Force . . . .").

historically accepted and followed practice of nations with regard to warfare, known as *customary international law*. The second major source is the various treaties and conventions related to the Law of War, namely the Geneva Conventions and the two subsequent Additional Protocols. Customary international law is the portion of international law, or the law of nations, that exists by virtue of general and consistent state practice that is followed through a sense of obligation.[74] In order to constitute customary international law, the practice must be out of a sense of obligation and not a mere courtesy from which a nation feels privileged to deviate.[75] Furthermore, "[g]eneral principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate," thereby allowing commonality among things such as the military practices of nations to have precedential value even in the absence of rising to the level of customary international law.[76] The applicable restatement comment also provides:

> International agreements constitute practice[s] of states and as such can contribute to the growth of customary law . . . [and s]ome multilateral agreements may come to be law for non-parties that do not actively dissent . . . [specifically] where a multilateral agreement is designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states. A wide network of similar bilateral arrangements on a subject may constitute practice and also result in

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[74] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (AM. LAW INST. 1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

[75] *Id.* § 102 cmt. c.

> For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation . . . a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. *Id.*

[76] *Id.* § 102(4).

> customary law. If an international agreement is declaratory of, or contributes to, customary law, its termination by the parties does not of itself affect the continuing force of those rules as international law. However, the widespread repudiation of the obligations of an international agreement may be seen as state practice adverse to the continuing force of the obligations.[77]

It is in that key regard that the formation and development of international law is in many ways inverse to the Anglo-American common law system embraced by England and the United States. While in the United States, statutory law generally acts to supersede and supplant the judicially created *common law* when there is a conflict between the two, the prevalence of bilateral and multilateral treaties in the international law context can give rise to a rule or practice becoming a matter of customary law.

While the common practices of warfare developed over the centuries, the first major contemporary effort to reduce those practices to a singular work came in 1863 by Professor Francis Lieber.[78] The "Lieber Code," as it is commonly known, was officially promulgated by President Lincoln during the American Civil War as General Order No. 100.[79] Lieber's work was highly influential in the drafting of subsequent treaties and conventions dealing with the law of war.[80] Concurrently, a number of European powers congregated in Geneva, Switzerland in 1864 to develop and sign the first Geneva Convention, which primarily dealt with the treatment of the sick, dead, and wounded.[81] Following the Lieber Code and the 1864 Geneva Convention, an international conference of nations was held in Brussels in 1874 from which a multinational declaration on the law of war emerged which shared many of the principles declared in

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[77] *Id.* § 102 cmt. i (citing in part North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark & Netherlands), 1969 I.C.J. 1, at 28–29, 37–43 (Feb. 20)).

[78] U.S. WAR DEP'T, Gen. Order No. 100 (Apr. 24, 1863) ("Instructions for the Government of Armies of the United States in the Field").

[79] *Id.*

[80] Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, Proc. of the Annual Meeting, 95 AM. SOC'Y INT'L L. (PROC. ANN. MTG.) 112, 113 (2001).

[81] Convention for the Amelioration of the Condition of the Wounded of the Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 1 Bevans 7, T.S. No. 377.

the Lieber Code.[82] Building upon the Brussels Conference, two separate conventions were held in The Hague, in 1899[83] and 1907[84] respectively, from which additional progress was made in international standardization, regulation, and recognition of the law of war.

In the first half of the twentieth century, there were three additional Geneva conventions. The second came in 1906[85] and the third convention, largely dealing with the treatment of prisoners of war (POWs), came in 1929.[86] Finally, the fourth convention, itself containing four separate treaties, came in 1949 in the immediate aftermath of the Second World War, adding provisions to protect civilians in wartime as well as implementing a major revision of the previous three conventions.[87] In the latter half of the twentieth century and early years of the twenty-first century, there have been three additional protocols, with varying levels of

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[82] Project of an International Declaration Concerning the Laws and Customs of War, Brussels, Aug. 27, 1874, 65 B.F.S.P. 1005.

[83] *See, e.g.*, Hague Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, 1 Bevans 230; Hague Convention Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter *1899 Hague II*]; Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, July 29, 1899, 32 Stat. 1827, 1 Bevans 263.

[84] *See, e.g.*, Hague Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199, 1 Bevans 577; Hague Convention Concerning the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, 1 Bevans 619; Hague Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter *1907 Hague IV*]; Hague Convention Concerning the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654; Hague Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, 1 Bevans 681; Hague Convention for the Adaptation to Maritime War of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2371, 1 Bevans 694; Hague Convention Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 1 Bevans 723.

[85] Convention for the Amelioration of the Condition of the Wounded of the Armies in the Field, July, 6 1906, 35 Stat. 1885, 1 Bevans 516.

[86] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

[87] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter *G.C. I*]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter *G.C. II*]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *G.C. III*]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *G.C. IV*]; see also Jean S. Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 AM. J. INT'L L. 462, 462–75 (1951).

support and acceptance through signatory ratification. These collective Geneva Conventions of 1949 constitute the core of modern LOAC.[88] Additional Protocols I and II were put forth in 1977, dealing with the protection of victims of international armed conflict and non-international armed conflict, respectively.[89] Additional Protocol III, establishing the *Red Crystal* as a third protective emblem for medical personnel in addition to the *Red Crescent* and *Red Cross*, came in 2005.[90] The United States is currently a party to the Geneva Conventions and Additional Protocol III, while only a signatory to Additional Protocols I and II.[91] These treaties and works, from the Lieber Code, Brussels Declaration, and Hague Conventions, through the Geneva Conventions and Additional Protocols, form the substantive basis for privileged combatant status under current international law.

The developments noted above resulted in a test comprised of four general elements required for privileged combatant status of persons not otherwise members of their nation's armed forces: "(1) operating under a military command; (2) wearing a fixed distinctive sign (or uniform for regulars); (3) carrying arms openly; and most important, (4) conducting military operations consistently with the laws and customs of war."[92] With regard to entitlement to POW status, G.C. III likewise provides a nuanced definition of armed forces to include the regular "armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces."[93] The convention likewise covers "other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied,

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[88] *Id.*

[89] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *A.P. I*]; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter *A.P. II*].

[90] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), Dec. 8, 2005, TREATY DOC. NO. 109-10, 2404 U.N.T.S. 1 [hereinafter *A.P. III*].

[91] *Supra* notes 87, 89–90.

[92] W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Privileged Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts*, 42 L. Contemp. Probs., no. 2 (Changing Rules for Changing Forms of Warfare), Spring 1978, at 4, 5; *see also Practice Relating to Rule 4. Definition of Armed Forces*, INTERNATIONAL COMMITTEE OF THE RED CROSS (2017), https://ihl-databases.icrc.org/cust omary-ihl/eng/docs/v2_rul_rule4 (last visited June 16, 2017).

[93] G.C. III, art. 4, *supra* note 87.

provided that such militias or volunteer corps, including such organized resistance movements [meet the four conditions for lawful combatant status discussed above]."[94] The internal field manuals and regulations of militaries around the world reiterate this expansive definition of armed forces, and these general requirements that militias and volunteer corps must meet in order to have standing as a legitimate combatant during hostilities in an international armed conflict.[95] Based on such widespread and uniform adaptations of these four common elements of lawful combatant status, they can now be readily said to exist as a matter of customary international law.[96]

These sources of international LOAC also widely acknowledge an alternate, albeit temporary, means by which the population at large of a nation under invasion may collectively take up arms during the initial phase of that invasion. This principle, known as *levée en masse*, provides that the general population of a nation under invasion,[97] but not yet occupied, be allowed to spontaneously rise up against the invader, particularly when the situation precludes their ability to assimilate into the armed forces, militia, or volunteer corps. This principle grants those people status as privileged combatants and POWs (if captured).[98] This mechanism for gaining privileged combatant status is only temporary in nature, and upon the beginning of actual occupation by the invading army, individuals still wishing to engage in hostilities must assimilate into the armed forces (or otherwise meet the requirements of a militia or volunteer corps as discussed) to maintain lawful combatant status and subsequent POW status upon capture.[99]

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[94] *Id.*; *see also* G.C. III, arts. 2–3, *supra* note 87 (G.C. III provisions generally limited in applicability to international armed conflicts).

[95] Practice Relating to Rule 4, *supra* note 92 (containing excerpts from the military manuals of: Argentina, Australia, Belgium, Burkina Faso, Cameroon, Canada, Chad, Congo, Côte d'Ivoire, Croatia, France, Germany, Hungary, Indonesia, Israel, Italy, Kenya, Mali, Mexico, Netherlands, New Zealand, Nigeria, Peru, Philippines, Russia, Senegal, Sierra Leone, Spain, Sweden, Ukraine, United Kingdom, United States, and Yugoslavia).

[96] *See* 1899 Hague II, *supra* note 83; 1907 Hague IV, *supra* note 84; *see also Mallison, supra* note 92.

[97] The term "invasion" is used here in the context of an international armed conflict.

[98] *See* Dörmann, *supra* note 7, at 46; *see also Practice Relating to Rule 106. Conditions for Prisoner-of-War Status, Section B. Levée en masse, INTERNATIONAL COMMITTEE OF THE RED CROSS (2017), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_ch apter33_rule106_sectionb (last visited June 16, 2017).*

[99] *Id.*

V. Application of the Four-Part Combatant Status Test to the Militia

As discussed, the numerous works declaring the customary law of war, as well as the formal treaties relating thereto, have resulted in a test containing four universally accepted elements for privileged combatant status of irregular military forces: "(1) operating under a military command; (2) wearing a fixed distinctive sign (or uniform for regulars); (3) carrying arms openly; and most important, (4) conducting military operations consistently with the laws and customs of war."[100] The subsequent analysis will consist of the application of these four elements to the various forms of militias that exist, both presently and prospectively, under federal and state law. Additionally, the widely accepted principle of *levée en masse* is applicable to those forces as an alternative, albeit temporary, means of legitimate combatant status under LOAC. Aside from militia service and membership, there are additional mechanisms of domestic law that grant citizens the ability to act to enforce domestic criminal law and to use force in a private or public capacity for that purpose, such as the common law authorities of *citizens arrest*[101] and *posse comitatus*,[102] respectively. Such authority, while being highly attenuated from the battlefield context, may nevertheless play into the underlying domestic law basis or practical circumstances for an immediate armed response by citizens organized by local law enforcement during the initial phase of an invasion in an international armed conflict.

Determining the combatant status of National Guard forces mobilized into federal service in their capacity as a reserve component of the U.S. Armed Forces is so straight forward that it almost goes without

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[100] Mallison, *supra* note 92, at 5.

[101] *See* Phoenix v. State, 455 So. 2d 1024, 1025 (Fla. 1984) ("A private citizen [has] the common law right to arrest a person who commits a felony in his presence . . . ."); *see also Arrest*, BLACK'S LAW DICTIONARY (10th ed. 2014) (Citizen's arrest: "An arrest of a private person by another private person on grounds that (1) a public offense was committed in the arrester's presence, or (2) the arrester has reasonable cause to believe that the arrestee has committed a felony.").

[102] *See* State v. Parker, 199 S.W.2d 338, 339–40 (Mo. 1947) ("[T]he sheriff can summon to his aid in the performance of his duty the 'posse comitatus,' or the whole power of the county, and persons so called upon are bound to aid and assist him. . . . [A] member of a posse comitatus, while co-operating with the sheriff and acting under his orders, is clothed with the protection of the law as is the sheriff."); *see also Posse Comitatus*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A group of citizens who are called together to help the sheriff keep the peace or conduct rescue operations."); *Posse Comitatus*, BLACK'S LAW DICTIONARY (4th ed. 1951) ("The power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases; as to aid him in keeping the peace, in pursuing and arresting felons, etc.").

mentioning—they are fully integrated federal soldiers, subject to federal command authority, paid for with federal funding, armed with modern federal equipment and weapons, subject to the federal UCMJ, and in a federal uniform. In this status, Guardsmen are a fully integrated part of the U.S. Armed Forces, in the eyes of both domestic and international law. Similarly, Guardsmen called into federal service in their capacity as a militia under the Insurrection Act are likewise members of the federal Army or Air Force in that status, and bear all the same key characteristics as discussed above for LOAC purposes, with the sole difference—their status as a federalized *militia*—amounting to an immaterial matter of domestic semantics for international law purposes. A more in-depth analysis is required when assessing National Guard forces under state command in a Title 32 or SAD status.

From the outset, it is worth noting that the President would almost certainly federalize all National Guard forces upon an invasion to bring them under a unified federal command, rendering this discussion largely moot.[103] Regardless, in a Title 32 status Guardsmen are retained under their respective state Governor's command as well as the state's military justice laws, while simultaneously authorized the use of federal weapons, equipment, uniforms, and funding.[104] In a SAD status, Guardsmen bear almost identical resemblance to those in a Title 32 status with the possible exception of the sanctioned use of state owned and personally owned weapons in addition to their federal supply of weaponry and receiving pay as provided in state law.[105] This dichotomy, while being more nuanced than the Title 10 analysis, nevertheless is sufficient to establish privileged combatant status for Guardsmen under state command, with their domestic funding source being irrelevant for purposes of international law. Two points of contention are noteworthy: (1) the validity of a military force commanded by a sub-national Commander in Chief, and (2) the effectiveness of various state codes of military justice in ensuring compliance with LOAC. Because it is generally customary for nations to engage in warfare at the national level, a precarious situation would present itself should, as our system allows,[106] a separate sub-national

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[103] *See* 10 U.S.C.A. §§ 12301(a), 12302(a) (West 2016) (authority for full mobilization of the armed forces reserve components during a time of war).

[104] *See supra* notes 29, 57–58.

[105] *See id.*; Martin, *supra* note 54, at 34 ("When serving in a [SAD] status, National Guard personnel receive their pay and allowances from the state . . . ."); s*ee also, e.g.*, FLA. STAT. ANN. § 250.23 (West 2016) (pay for state active duty).

[106] *See supra* note 19 (state constitutions establishing that the Governor is the Commander in Chief of their state's militia).

sovereign remain in command of military forces in a conflict in which the United States is a party. This difference under domestic law would also likely prove immaterial in the eyes of international law. The respective Governors, acting with the general interest of the United States in the conflict, would constructively render their forces as "belong[ing] to a party to the conflict" as required in G.C. III, art. 4, and "responsible to that party" as required by A.P. I,[107] and instill the discipline necessary for adherence to LOAC within their forces, thus satisfying international law.

While the scenario presented proposes that the President has left Guardsmen under state command, the supremacy clause[108] of the Constitution would nevertheless likely provide the President the necessary domestic mechanism to ensure compliance by state commanders with federal military directives during such an incredibly exigent circumstance as an invasion. Such domestic authority would almost surely be sufficient to put to rest any doubt that the state forces belong to, and are acting on the behalf of, the United States for international law purposes. Further, the military justice laws of the states, while having a large degree in variance in form and substance, are also almost surely sufficient to enforce the command structure and ensure subordinates follow orders which comply with LOAC. Some states have adopted portions of the Model State Code of Military Justice,[109] a model code largely modeled after the federal UCMJ, drafted by the National Guard Bureau and offered to the state legislatures for consideration,[110] yet others have systems varying greatly from the federal model.[111] Regardless of the form under domestic law, the simple fact that Guardsmen under state control are subject to criminal liability in some form should prove sufficient to establish a military command relationship and internal mechanism for enforcing the law of war to satisfy the corresponding requirements for privileged combatant status.

The situation of the SDFs, with their sole full-time duty status being SAD (state funded and state commanded), is almost identical in the eyes

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[107] Although the United States is not a party to A.P. I, some of its provisions are considered customary international law and thus worth considering here.

[108] U.S. CONST. art. VI, cl. 2.

[109] NATIONAL GUARD BUREAU, MODEL STATE CODE OF MILITARY JUSTICE (2007), *available at* http://www.ngb.army.mil/jointstaff/ps/ja/conference/2007/MODEL_STATE_CODE_OF_MILITARY_JUSTICE.doc.

[110] *See* Martin, *supra* note 54, at 36.

[111] *Compare* W. VA. CODE ANN. §§ 15-1E-1 to -148 (West 2016) (model code with slight modifications) *with* UTAH CODE ANN. §§ 39-6-1 to -114 (West 2016) (unique state code).

of domestic law to that of National Guard forces in that same duty status. SDF personnel are subject to state command authority and state military justice laws, with the only caveat being their uniform. While federal law authorizes National Guard to wear the uniform of their corresponding federal branch, the uniforms worn by SDFs are at the discretion of the respective states and generally are a slight variation of the Army uniform with distinguishing insignia.[112] The distinctive alterations required to wear the modified Army uniform are minimal, merely requiring that the nametape over their left breast have the SDF's name in lieu of "U.S. ARMY," a distinctive red name tape on dress uniforms in place of the standard black one, and the use of the two-digit state abbreviation in lieu of "U.S." on insignia (such as officer's collar insignia) where they appear.[113] Insofar as international law is concerned, any SDF uniform with such minor alterations undoubtedly meets the *fixed distinctive insignia* requirement under LOAC, and these minute differences are immaterial.

A comparable analysis applies to the Naval Militia. In the rare case that a state maintains a Naval Militia, in lieu of or in addition to a maritime SDF unit, it is generally done for purposes of federal funding and therefore the 95% federal reservist membership requirement is a prerequisite.[114] As a result, it is accepted custom for Naval Militia members to wear the uniform of their corresponding federal branch (USN, USMC, or USCG) and to likewise make minor insignia alterations to their uniforms to distinguish themselves while in a state militia duty status.[115] It is also worth noting that, while the scenario here revolves around them acting as militia under state command, the fact that a Naval Militia is staffed by 95% or more federal reservists gives the President the practical option of calling them into federal service as either militia or as regular armed forces, even when already underway. With regard to the potential 5% non-federal

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[112] *See* U.S. NAT'L GUARD BUREAU, REG. 10-4, NATIONAL GUARD INTERACTION WITH STATE DEFENSE FORCES para. 2-2 (18 Aug. 2010) (SDFs are not authorized to wear the uniforms of any of the armed forces of the United States except Army uniforms as authorized and modified under Army Regulation 670-1).

[113] U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 21-8c (25 May 2017) [hereinafter AR 670-1].

[114] *See supra* notes 60–61.

[115] *See, e.g.*, N.Y. NAVAL MILITIA INSTR. 1020.1, NEW YORK NAVAL MILITIA UNIFORM REGULATIONS para. 1-1e (16 Aug. 2012) (New York Naval Militia (NYNM) options for distinguishing their uniforms, including an alternative nametape above their left breast, a distinctive badge, etc. The regulation also stipulates that current drilling reservists may continue to wear the nametape of their federal branch and only wear a badge or pin beneath it to distinguish themselves while in NYNM service.).

reservists mixed in, federal law allows the Secretary of the Navy (and thus by extension, the President) to appoint a member of the Naval Militia as a member of the Navy or Marine Corps reserve.[116] In the event that such an impromptu federalization occurred while Naval Militia forces were already underway, this would be a potential domestic mechanism to get the entire force into federal service in an Armed Forces status, thereby avoiding the domestic limitations of the Constitution and Insurrection Act that would arise by using them as federalized militia.[117]

The disposition of the population at large under LOAC will be a mixed issue of law and fact. Their status as combatants and to what extent they may engage in prolonged hostilities will depend on both the factual circumstances surrounding the hostilities as well as the operative state law involving the assimilation of the population at large into the various militia forces of the state. In the event of an invasion into United States territory, the doctrine of *levée en masse* under international law will provide the population at large the immediate ability to fight back against the invading force. In terms of domestic law and practice, such immediate resistance may come in the form of local law enforcement organizing citizens as some permutation of a *posse*,[118] or even a general proclamation by the President or Governor calling all citizens, or possibly only those falling within the purview of Unorganized Militia under the applicable law of the jurisdiction,[119] to fight back. Regardless of the domestic mechanism for organizing such an immediate resistance, the broad, yet temporary, privilege to engage in hostilities conferred by the doctrine of *levée en masse* is not dependent on domestic law for legitimacy.

At some point, should the invasion transition to an occupation, that privilege will dissipate and civilians wishing to continue engaging in hostilities will either need to assimilate into the armed forces of the United States or into a militia or volunteer corps meeting the required elements under LOAC, or cease hostilities altogether and adhere to a status as non-combatants. The ability of a civilian to assimilate into an acceptable military organization that satisfies the requisite elements of LOAC, be it

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[116] *See* 10 U.S.C.A. § 7852 (West 2016) ("In the discretion of the Secretary of the Navy, any member of the Naval Militia may be appointed or enlisted in the Navy Reserve or the Marine Corps Reserve in the grade for which he is qualified.").

[117] *See supra* notes 11, 48 (discussing the limited and enumerated purposes for which the militia may be called into federal service).

[118] *See supra* note 102 (discussing the common law authority of sheriffs to form a *posse comitatus*).

[119] *See supra* note 72 (definitions of "unorganized militia" under federal and state law).

the U.S. Armed Forces, or one of the various forms of legitimate state militia discussed, will be entirely domestic law dependent. While the establishment of a federal draft may be a highly likely result of entry into a prolonged war, thereby conscripting citizens directly into the United States Armed Forces,[120] present domestic law provides several mechanisms through which civilians could assimilate into government-controlled militias and thereby gain prolonged standing to engage in hostilities under LOAC. While the President has the ability to call forth the militia, to include the Unorganized Militia as defined under federal law, into active federal service, federal law is simultaneously silent as to the disposition of such Unorganized Militia forces upon such a call up. This readily leaves open the possibility of the President establishing a federal organization that satisfies the requisite elements of LOAC for those militia forces to be assimilated into by executive order. The laws of some states as to the disposition of the Unorganized Militia, as defined by state law, upon call to active state service may too fall silent, potentially leaving to the Governor's executive discretion how to utilize those forces.[121] On the contrary, other states have developed a statutory pipeline for the assimilation of the Unorganized Militia into the militia organizations of the state, namely the SDF.[122] For the reasons already discussed, the assimilation of the Unorganized Militia forces into a SDF would meet the requirements of LOAC for privileged combatant status, as would the creation of, and assimilation into, any impromptu state-controlled militia organization provided the organization is under formal state military command, particularly if subject to the state code of military justice, and wears some form of military uniform (albeit with distinct state-specific insignia).

The analysis of *historical* militias[123] that continue in existence under state law or as private entities, and were once formally recognized by federal law, poses a harder question. While such organizations are exceedingly rare, the ones that are still in existence show a great variance

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[120] *See, e.g.*, Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885, 885–97 (draft for World War II) (replaced 1948).

[121] *E.g.*, CONN. GEN. STAT. ANN. § 27-9 (West 2016) ("Whenever the Connecticut National Guard is called into the federal service or whenever such a call, in the opinion of the governor, is deemed to be imminent, the governor shall forthwith raise, organize, maintain and govern, from the unorganized militia, a body of troops for military duty.").

[122] *E.g.*, *supra* note 73 (state laws directing the assimilation of unorganized militia called forth to state duty into the SDF).

[123] *See supra* note 67 (discussing the former statutory preservation of historical militia's ancient privileges).

in governmental involvement and control. Some are now akin to a purely civilian historical society that performs a strictly ceremonial function,[124] while others are, by state statute, under the direct command of the state's military department, namely the Adjutant General with the Governor as their Commander in Chief.[125] In the former case, the members of the organization, while potentially in some fashion of uniform, would likely not have adequate governmental command to satisfy the first element in the LOAC analysis—that of military command. For this reason, such organizations, as with any veterans' society or group, would not hold any special standing or significance under LOAC aside from any independent affiliation the members may have with the U.S. Armed Forces[126] or the Unorganized Militia generally. It is however foreseeable that Governors, in their executive discretion, could elect to call forth members of such groups, that otherwise fall within the Unorganized Militia category under state law, as a continuous body and assimilate them at that point into the SDF of the state as an *ad hoc* unit. In the later case, where the historical militia unit is incorporated into the command and organizational structure of the state government's militia forces, such forces would meet the requirements of LOAC from the onset and would be nearly indistinguishable from an SDF unit.

Persons who are not within the scope of Unorganized Militia, as well as those that are within its scope but nevertheless remain unassimilated into any governmental militia or armed forces entity, likely fall outside the scope of lawful combatant status as it exists under LOAC. The temporary exception would be as allowed under the doctrine of *levée en masse.* Such a categorical denial of prolonged lawful combatant status under international law also logically applies to private organizations that profess to be some sort of "militia" due to a lack of a governmental military command. While they may self-identify as some sort of "militia," and may even meet the common dictionary definition in a very general sense, such organizations are not legitimate *militia* in the sense it is used as a legal term of art under federal and state law to refer to governmental military organizations of the states. Furthermore, it is likely that many of these independent paramilitary organizations exist in direct contravention of various state statutes barring the maintenance of *unauthorized troops*

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[124] *E.g.*, Veterans Corp of Artillery, State of New York, *supra* note 66.
[125] *E.g.*, Connecticut Governor's Horse and Foot Guards, *supra* note 5.
[126] *See, e.g.*, 10 U.S.C. §§ 10141, 10154, 12301 (West 2016) (containing the statutory basis for the retired reserve membership and call up).

within a state's borders.[127] They are also potentially in violation of various state statutes prohibiting the impersonation of state *officers* insofar as they claim formal rank and title in their state's militia without lawful authority.[128]

VI. Conclusion

The domestic militia system of the United States provides an effective legal mechanism to provide a substantial portion of the population privileged combatant status under international law. When coupled with the sweeping authority of *levée en masse* and the well established right to firearm ownership of the U.S. civilian population, the potential for armed resistance in the face of an invasion is likely unmatched by any nation on earth. The domestic militia structure and laws are capable of then assimilating a substantial portion of the population into a uniformed fighting force for prolonged lawful combatant status. While dating to well before the nation's founding, the United States' militia system of today nevertheless remains a relevant force multiplier for national defense.

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[127] *See* Ellen M. Bowden & Morris S. Dees, *An Ounce of Prevention: The Constitutionality of State Anti-Militia Laws*, 32 GONZ. L. REV. 523, 525 (1997) (as of 1997, twenty-four states had laws barring unauthorized militias); *see also, e.g.*, MASS. GEN. LAWS ANN. ch. 33, § 129 (West 2016) ("[N]o body of men shall maintain an armory or associate together as a company or organization for drill or parade with firearms . . . ."); WYO. STAT. ANN. § 19-8-104(a) (West 2016) ("No group or assembly of persons other than the regularly organized national guard or the troops of the United States shall associate themselves together as a military company or organization, or parade in public with arms without license of the governor.").

[128] *See, e.g.*, TEX. PENAL CODE ANN. § 37.11 (West 2016) (impersonation of a public servant).