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The incomplete Commander-in-Chief power, as seen in 1805

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Here's an interesting old statute, enacted by Congress in 1805: "An Act for the more effectual preservation of peace in the ports and harbors of the United States, and in the waters under their jurisdiction." Act of March 3, 1805, ch. 41, 2 Stat. 339. The first section deals with apprehending alleged violators of federal laws who are on foreign armed vessels in US ports. It permits a federal court to issue a warrant for a marshal to arrest the alleged wrongdoer. Then it continues:

"And if the said marshal shall deem the ordinary posse comitatus insufficient to insure the execution of the said warrant, he shall apply to the said judge or justice, who shall immediately issue his order, directed to any officer having command of militia, or any officer having command of regular troops, or of armed vessels of the United States, in the vicinity, requiring him to aid the said marshal with all the force under his command, or such part as may be necessary in executing the warrant aforesaid. And the said marshal conforming himself in all things to the instructions he shall receive from the President of the United States, or from any other person authorized by the President, shall first demand the surrender of the person charged with the offense; and if delivery be not made, or if the marshal be obstructed from making the demand, he shall use all the means in his power by force and arms, to arrest the offender, and all others who are with him, giving him aid and countenance in evading the arrest ...."

Section 2 of the statute gives a similar power to state governors, when seeking to enforce state warrants. It provides that "it shall be lawful for the governor or other supreme executive officer of the state in which the said offense shall have been committed, upon due proof thereof, and upon his being satisfied that the ordinary posse comitatus is insufficient to insure the execution of the said process, to issue his order to any officer having command of regular troops or armed vessels of the United States, in the vicinity, requiring him to aid the officer charged with the execution of the process, with all the force under his command, or such part thereof as may be necessary, in arresting the offender and all those giving aid and countenance in resisting the civil authority." Section 2, interestingly, doesn't include the instruction contained in section 1 for the forces so employed to conform themselves to the President's instructions.

These are really quite remarkable provisions. The President and only the President is the Commander-in-Chief, but these two sections require federal judges, and authorize state governors, to issue orders to federal troops. It is startling to see anyone authorized to issue orders to federal troops except the President and those below the President in the chain of command. It's even more startling to see federal judges authorized to do so, since we are accustomed today to think of judges as ill-suited even to review military decisions, much less to issue orders for the use of troops against foreign armed vessels. And perhaps it's most startling of all to see state governors empowered to issue orders embroiling federal troops with foreign armed vessels; if there is anything clear in the Constitution, it is that the federal government is the principal holder of authority to use force against foreign nations.

It is true that the marshal in section 1 must comply with instructions given by the President. Perhaps the troops ordered into action by state governors under section 2 must do the same, though that isn't explicit in that section. But this requirement seems to mean only that the President specifies how the federal forces will carry out the requirements imposed by judges or governors -- the power to impose the requirements remains with them, and thus *not* with the Preside

And yet -- the Eighth Congress, in 1805, apparently saw all this differently. They did not, to be sure, view this statute as routine (section 9 is a sunset clause, with a total duration of less than 4 years). But they did, we must assume, view it as constitutional. It is very difficult to square that view with an uncompromising assertion of the President's Commander-in-Chief power as exclusive and largely beyond Congress' regulation -- the assertion that underlay so much of the Bush Administration's approach to the difficult issues of war.