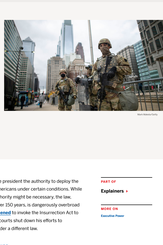
EXPLAINER

The Insurrection Act, Explained

The vague and rarely used law gives the president broad power to deploy the military domestically — but it's not a blank check.

Joseph Nunn

Elizabeth Goitein



Mario Tama/Getty

Updated November 12, 2025 | Published April 21, 2022

Government Power

SHARE

Enacted in 1792, the Insurrection Act grants the president the authority to deploy the U.S. military domestically and use it against Americans under certain conditions. While there are rare circumstances in which such authority might be necessary, the law, which has not been meaningfully updated in over 150 years, is dangerously overbroad and ripe for abuse. President Trump has threatened to invoke the Insurrection Act to deploy active-duty troops in American cities if courts shut down his efforts to federalize and deploy National Guard forces under a different law.

More on Domestic Deployment of the Military >>

What is the Insurrection Act?

The Insurrection Act authorizes the president to deploy military forces inside the United States to suppress rebellion or domestic violence or to enforce the law in certain situations. The statute implements Congress's authority under the Constitution to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." It is the primary exception to the Posse Comitatus Act, under which federal military forces are generally barred from participating in civilian law enforcement activities.

Although it is often referred to as the "Insurrection Act of 1807," the law is actually an amalgamation of different statutes enacted by Congress between 1792 and 1871. Today, these provisions occupy Sections 251 through 255 in Title 10 of the United States Code.

What does invoking the Insurrection Act allow the president and military to do?

Under normal circumstances, the Posse Comitatus Act forbids the U.S. military — including federal armed forces and National Guard members who have been called into federal service — from taking part in civilian law enforcement. This prohibition reflects an American tradition that views military interference in civilian government as being inherently dangerous to liberty.

Invoking the Insurrection Act temporarily suspends this rule and allows the president to deploy the military to assist civilian authorities with law enforcement. That might involve soldiers doing anything from enforcing a federal court order to suppressing an uprising against the government. Of course, not every domestic use of the military involves law enforcement activity. Other laws, such as the Stafford Act, allow the military to be used to respond to natural disasters, public health crises, and other similar events without waiving the restrictions of the Posse Comitatus Act.

In theory, the Insurrection Act should be used only in a crisis that is truly beyond the capacity of civilian authorities to manage. However, the Insurrection Act fails to adequately define or limit when it may be used and instead gives the president significant power to decide when and where to deploy U.S. military forces domestically.

When can the president invoke the Insurrection Act?

Troops can be deployed under three sections of the Insurrection Act. Each of these sections is designed for a different set of circumstances.

Section 251 allows the president to deploy troops if a state's legislature (or governor if the legislature is unavailable) requests federal aid to suppress an insurrection in that state. This provision is the oldest part of the law, and the one that has most often been invoked.

While Section 251 requires state consent, Sections 252 and 253 allow the president to deploy troops without a request from the affected state, even against the state's wishes. Section 252 permits deployment in order to "enforce the laws" of the United States or to "suppress rebellion" against the U.S. government whenever "unlawful obstructions, combinations, or assemblages, or rebellion" make it "impracticable" to enforce federal law in that state by the "ordinary course of judicial proceedings."

Section 253 has two parts. The first allows the president to use the military in a state to suppress "any insurrection, domestic violence, unlawful combination, or conspiracy" that "so hinders the execution of the laws" that any portion of the state is rendering a deprived of a constitutional right and state authorities are unable or unwilling to protect that right. Presidents Dwight D. Eisenhower and John F. Kennedy relied on this provision to deploy troops to desegregate schools in the South after the Supreme Court's landmark decision in *Brown v. Board of Education*.

The second part of Section 253 permits the president to deploy troops to suppress "any insurrection, domestic violence, unlawful combination, or conspiracy" in a state that "opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws."

What are the limitations on deployment under the Insurrection Act?

Although the Insurrection Act appears to confer wide-ranging authority, the Department of Justice has long taken the position that the law is "limited . . . by the Constitution and by tradition." In a 1964 memorandum, the deputy attorney General wrote that the law may be invoked in three circumstances: when a state requests help from the federal government, when department is needed to enforce a federal court order, or when "state and local law enforcement have completely broken down."

Moreover, even on its face, the Insurrection Act only permits the use of troops to enforce either federal laws or a narrow category of state laws (essentially, civil rights protections). Troops could not be used, for instance, to combat street crime, as that type of criminal activity is governed by state and local laws.

Most important, no statute can override the Constitution. Accordingly, troops deployed under the Insurrection Act may not violate individuals' constitutional rights. They may not, for example, search a person's home without a warrant. And while the Insurrection Act is an exception to the Posse Comitatus Act, it is not an exception to other federal laws that might apply to their conduct (for instance, the law criminalizing the presence of federal troops at polling places).

How has the Insurrection Act been used in the past?

The Insurrection Act has been invoked about 30 times throughout American history. Presidents George Washington and John Adams used it in response to early rebellions in the states against federal authority. President Abraham Lincoln invoked it at the start of the Civil War, and President Ulysses S. Grant used it to crush the first incarnation of the Ku Klux Klan in the 1870s. Several other presidents, including Andrew Jackson, Rutherford B. Hayes, and Grover Cleveland, have deployed troops under the Insurrection Act to intervene in labor disputes, almost always on the side of employers.

Most famously, Presidents Eisenhower, Kennedy, and Lyndon B. Johnson all invoked the Insurrection Act to enforce federal court orders requiring the desegregation of schools and other institutions in the South. In the latter half of the 20th century, Presidents Johnson and George H.W. Bush each invoked the law in response to massive civil-unrest that caused dozens of fatalities. These 20th-century incidents reflect a modern consensus that the Insurrection Act is best reserved for genuinely unpredictable crises. Indeed, in the past 130 years, it has been used exclusively in two circumstances: either when state and local law enforcement were overwhelmed and governors asked for federal military assistance or when state authorities were themselves actively obstructing federal civil rights laws or failing to protect constitutional rights.

When was the Insurrection Act last invoked?

The Insurrection Act was last invoked in 1992, when the governor of California requested military and then President George H.W. Bush in response to civil unrest in Los Angeles that followed the acquittal of four white police officers charged with beating Black motorist Rodney King. The violence in Los Angeles killed 63 people and resulted in one billion dollars' worth of property damage. At 33 years and counting, this is the longest period the United States has ever gone without an invocation of the Insurrection Act.

No president has invoked the Insurrection Act without a request from the state concerned since Johnson did so to provide protection for civil rights activists in Alabama marching from Selma to Montgomery in 1965.

Can courts review Insurrection Act deployments?

Nothing in the text of the Insurrection Act defines "insurrection," "rebellion," "domestic violence," or any of the other key terms used in setting forth the prerequisites for deployment. In the 1827 case Martin v. Mott the Court ruled that "the authority to decide whether [an exigency requiring the militia to be called out] has arisen belongs exclusively to the President, and . . . his decision is conclusive upon all other persons."

This broad language, however, must be understood in context. The case involved a soldier who refused an order to mobilize during the War of 1812. He then challenged the fine imposed on him, arguing that the Insurrection Act didn't authorize his mobilization. The Court found that individual soldiers couldn't decide for themselves whether the president had lawfully called them into service; the ability of judges to review Insurrection Act deployments simply wasn't before the court.

In any event, even if Mott stands for the general rule that courts can't review a president's decision to invoke the Insurrection Act, there are exceptions. In subsequent cases, the Supreme Court has suggested that courts may step in if the president acts in bad faith, exceeds "a permitted range of honest judgment," makes an obvious mistake, or acts in a way manifestly unauthorized by law.

Moreover, even in cases where the courts will not second-guess the decision to deploy troops, the Supreme Court clarified in Sterling v. Constantin (1932) that courts may still review the lawfulness of the military's actions once deployed. In other words, judges may hear lawsuits claiming that federal troops deployed under the Insurrection Act have violated constitutional rights or other federal laws.

Is invoking the Insurrection Act the same as declaring martial law?

The Insurrection Act does not authorize martial law. The term "martial law" has no established definition, but it is generally understood as a power that allows the military to take over the role of civilian government in an emergency. By contrast, the Insurrection Act generally permits the military to assist civilian authorities (whether that's state or federal), not take their place. Under current law, the president has no authority to declare martial law.

How does the Insurrection Act differ from the law Trump used to federalize and deploy National Guard soldiers in Los Angeles, Portland, and Chicago?

President Trump relied on an obscure law (10 USC § 12406) to federalize National Guard forces and deploy them in Los Angeles, Portland, and Chicago (the Portland and Chicago deployments are currently blocked by the courts). Section 12406 permits federalization of the National Guard when there is an invasion or rebellion (or a danger of invasion or rebellion) or when the president "is unable with the regular forces to execute the laws of the United States."

Because no previous president has used Section 12406 in this manner, courts are still in the process of determining its proper interpretation and scope. An aggressive reading of the law could turn it into something very similar to the Insurrection Act. But an Insurrection Act invocation is still a more powerful tool, and would represent a substantial escalation, in several respects.

Presidents can deploy active-duty troops, not just federalized National Guard forces, under the Insurrection Act. The bar for deployment under the Insurrection Act is in some ways lower, as there is no express requirement that the president be "unable" to execute the law without troops. There is arguably a higher level of deference required, although the Ninth Circuit federal appeals court has applied similar deference in reviewing Section 12406 deployments. And the Insurrection Act is widely understood to be an exception to the Posse Comitatus Act, while a federal judge in September held that Section 12406 is not such an exception (that decision has been stayed pending appeal).

How should the Insurrection Act be reformed?

The lack of clear standards within the Insurrection Act itself, combined with the Supreme Court's ruling in Martin v. Mott, has created a situation where the president has extremely broad discretion to deploy federal troops in cases of civil unrest. Unsurprisingly constrained authority to use the military domestically has always been dangerous. In the 21st century, it is also unnecessary and untenable. The United States has changed profoundly in the 232 years since the Insurrection Act was last amended, as have the capabilities of federal, state, and local law enforcement authorities and the expectations of the American people. The Insurrection Act — arguably the most potent of the president's emergency powers — should reflect those realities.

To address these concerns, Congress should amend the Insurrection Act to define more clearly and precisely what situations may trigger it. Congress also should establish mechanisms for review of the president's decision that will guard against abuse while still preserving the president's flexibility in a crisis. In the meantime, if the Insurrection Act comes before the courts, judges should determine, as the Department of Justice has in the past, that the law is limited by the Constitution and tradition.

PART OF
Explainers >

MORE ON
Executive Power

Related Resources

Guide to Invocations of the Insurrection Act

In 230 years, the Act has been invoked in response to 30 crises.

April 21, 2022
Research

EXPLAINER
Martial Law, Explained
June 5, 2025 | Tim Lau, Joseph Nunn

EXPLAINER | 5 min read
Martial Law in the United States: Its Meaning, Purpose, and Why the President Can't Declare It
August 20, 2020 | Joseph Nunn

EXPLAINER
Statement to the January 6th Committee on Reforming the Insurrection Act
September 27, 2022 | Elizabeth Goitein, Joseph Nunn

SEE ALL IN LIBRARY >

More from the Explainers collection

The Posse Comitatus Act, Explained

The law generally prevents the president from using the military as a domestic police force.

Joseph Nunn

September 29, 2025
Explainer

READ MORE



Habeas Corpus, Explained

The centuries-old tool is a bedrock principle of constitutional democracy that protects against unlawful detention.

Hernandez D. Stroud, J. Katherine Yim Wright, & Anna Arstein-Kerslake

June 18, 2025
Explainer

READ MORE



The 19th Amendment, Explained

It took more than a century of fighting by generations of activists to achieve suffrage for all American women.

Kendall Vieth-Hook

March 3, 2025
Explainer

READ MORE

STAY UP TO DATE

Informed citizens are democracy's best defense

First Name | Last Name

Email Address * | Zip Code *

SIGN ME UP

We respect your privacy.

© 2026 Brennan Center for Justice at NYU Law | Privacy Policy | Accessibility

An Army Turned Inward: Reforming the Insurrection Act to Guard Against Abuse

Elizabeth Goitein* and Joseph Nunn**

Introduction

On January 6, 2021, as supporters of Donald Trump prepared to storm the U.S. Capitol in an effort to prevent lawmakers from certifying the results of the 2020 presidential election, members of the Oath Keepers anxiously checked their phones for a message from Trump. What they were anticipating was no mere directive to wreak havoc. Spurred by the claims of their leader, Stewart Rhodes, they expected Trump to draft them into military service through an invocation of the Insurrection Act.[1]

This might seem like another wild conspiracy theory perpetrated by right-wing extremists with no understanding of the law. In fact, the Oath Keepers' conception of Trump's powers under the Insurrection Act was frighteningly close to the mark.

The Insurrection Act is among the most potent of the president's emergency powers. It is also among those most susceptible to abuse. The Act authorizes the president to deploy the U.S. armed forces and the militia — broadly defined to include a wide swathe of "able-bodied males" — to suppress insurrections, quell civil unrest or domestic violence, and enforce the law when it is being obstructed.[2] The criteria for deployment are set forth in vague and archaic terms that provide few meaningful constraints. Moreover, the determination of whether these criteria have been met is left entirely to the president; neither Congress nor the courts are given any role in the process. The Act provides no limits on what actions military forces may take once deployed.

---

* Senior Director, Liberty and National Security Program, Brennan Center for Justice at New York University School of Law.

** Counsel, Liberty and National Security Program, Brennan Center for Justice at New York University School of Law. The authors would like to thank the following individuals for generously sharing their time and extensive expertise: Scott R. Anderson, William C. Banks, Stephen Dycus, Eugene R. Fidell, Jack Goldsmith, Ryan Goodman, Thaddeus A. Hoffmeister, Mark Nevitt, Dakota Rudesill, and Stephen I. Vladeck. We also extend thanks to Protect Democracy, Human Rights First, the Project On Government Oversight, and the Niskanen Center, all of which endorsed our legislative reform proposal, and to our colleagues in those and other organizations who have been extraordinary partners in our efforts to reconceive and reform domestic deployment authorities: Cole Blum, Soren Dayton, Katherine Hawkins, Kodiak Hill-Davis, Emma Horseman, Christine Kwon, Kate Oh, Chris Purdy, Ariela Rosenberg, and Sarah Turberville. Finally, we are deeply grateful to Sahil Singhvi and Benjamin Waldman for their outstanding research assistance. © 2023, Elizabeth Goitein and Joseph Nunn.

1. Alan Feuer, *Oath Keepers Leader Sought to Ask Trump to Unleash His Militia*, N.Y. Times (May 4, 2022), https://perma.cc/PJ67-HZPJ.

2. 10 U.S.C. ch. 13., §§ 251–255.

In sum, although the Posse Comitatus Act is the most important restriction on the domestic activities of the United States military, its coverage is limited in practice. The Act prohibits (1) participation in civilian law enforcement activities (2) by members of the federal armed forces or federalized National Guard (3) in circumstances where none of the many statutory exceptions to the Act applies. It essentially operates as a clear statement rule—one that has been vitiated to a dangerous degree by the broad authority and nearly unlimited discretion granted to the president by the Insurrection Act.

II. THE INSURRECTION ACT: OVERVIEW AND HISTORY

The Insurrection Act, located at 10 U.S.C. ch. 13, §§ 251–255, is the most important exception to the Posse Comitatus Act's prohibition on federal military participation in civilian law enforcement. It is also the president's most powerful tool for deploying the U.S. military domestically. As discussed in detail below, it authorizes the president to deploy the armed forces and use them to suppress rebellions or enforce the law.[31]

The president must rely on such statutory authorization because the Constitution does not expressly grant the president any independent authority to use the armed forces at home.[32] Instead, the Calling Forth Clause in Article I, Section 8 empowers Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[33] As Justice Jackson explained in *Youngstown*, the Calling Forth Clause "underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy."[34] The Insurrection Act implements Congress's power under the Calling Forth Clause.

This section sets forth a summary of the Act in its current form, a description of the Act's origins and its evolution over time, and a brief history of how past presidents have used the Act.

A. The Current Insurrection Act

The three substantive provisions of the Insurrection Act authorize the president to use the military domestically in several different circumstances. The first, Section 251, is relatively straightforward.[35] It allows the president to call the states' militia into federal service and deploy them, and/or members of the federal

31. *See generally* Joseph Nunn, *The Insurrection Act Explained*, BRENNAN CTR. FOR JUSTICE (Apr. 21, 2022), https://perma.cc/S3S8-HSFZ.

32. The Supreme Court has, however, found that the president enjoys an implied constitutional power to use the military to repel sudden attacks. *Prize Cases*, 67 U.S. 635 (1862).

33. U.S. CONST. art I, § 8, cl. 15. The only other provision of the Constitution that potentially implicates domestic deployment is Article IV, Section IV, which, among other things, charges the federal government as a unified whole with protecting the individual states from invasion and, at the request of the relevant state government, from domestic violence. U.S. CONST. art IV, § 4.

34. *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring); *see also* Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091, 1092 (2008).

35. 10 U.S.C. § 251.

armed forces, into a state to suppress an insurrection against the state government. The president may use this authority only at the request of the affected state's legislature, or the governor if the legislature cannot be convened.

Under the Insurrection Act's second provision, Section 252, "[w]henever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings," the president may federalize any state's militia and deploy it, and/or federal armed forces, to suppress the rebellion or enforce the law.[36] Unlike deployments under Section 251, those occurring under Section 252 do not require a request by the state—or even the state's consent.

The third provision, Section 253, is arguably the most sweeping. It allows the president to use "the militia or the armed forces, or both," or "any other means," to take "such measures as he considers necessary" to suppress, within a state, "any insurrection, domestic violence, unlawful combination, or conspiracy" that either (1) "so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection"; or (2) "opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws."[37] As with Section 252, the president may invoke Section 253 without the consent of the affected state.

Section 254 provides that all invocations of the Insurrection Act, regardless of the section used, must be accompanied by a proclamation ordering the insurgents to disperse and retire peaceably to their abodes within a certain time.[38] Finally, Section 255 provides that Guam and the U.S. Virgin Islands are "States" for the purposes of the chapter.[39]

B. The Origins and Development of the Insurrection Act

Although often referred to as the "Insurrection Act of 1807," Chapter 13 of Title 10 is, in fact, an amalgamation of laws passed by Congress between 1792 and 1874.[40] The first of these, the Calling Forth Act of 1792 ("1792 Act"), closely tracked the language of the Calling Forth Clause. It authorized the president to call forth the militia to (1) repel invasions, (2) suppress insurrections in a state at the state's request, and (3) enforce the law when it was being opposed or obstructed by forces too powerful to be suppressed by civilian authorities.[41]

---

36. 10 U.S.C. § 252.
37. 10 U.S.C. § 253.
38. 10 U.S.C. § 254.
39. 10 U.S.C. § 255.
40. Vladeck, *Emergency Power*, *supra* note 11, at 156.
41. Calling Forth Act of 1792, ch. 28, 1 Stat. 264 (repealed 1795).

In order to invoke the 1792 Act under the third prong—that is, for the purpose of enforcing the law—the president had to obtain *ex ante* certification from a federal judge that doing so was necessary. Moreover, the president was limited to using the militia of the affected state unless that state was unwilling or unable to suppress the disturbance *and* Congress was out of session. Finally, a deployment under the third prong would terminate automatically thirty days after the start of Congress's next session, unless Congress acted to extend it. These restrictions did not apply to deployments under the first two prongs of the 1792 Act, an asymmetry that reflects the founding generation's particular wariness of military participation in civilian law enforcement. Under all three prongs of the 1792 Act, however, the president was required to issue a proclamation before deploying troops, ordering the lawbreakers to disperse. Reluctant to grant the president a permanent standing authority to use the military domestically, Congress scheduled the 1792 Act to expire after three years.

In 1794, President George Washington invoked the 1792 Act to suppress the Whiskey Rebellion, an uprising in western Pennsylvania sparked by a federal tax on liquor production.[42] By their actions during the crisis, Washington, the federal courts, and Congress all clearly evinced an understanding that the 1792 Act was the sole source of authority at play.[43] None of these stakeholders suggested that the president might have independent authority to suppress such a rebellion, and Washington scrupulously abided by the requirements imposed by the Act.[44] Thus, what a U.S. Army historian has called "[t]he great precedent for the use of federal military force in internal disturbances" was defined by congressional control.[45]

In 1795, informed by the experience of the Whiskey Rebellion, Congress enacted a permanent replacement for the 1792 Act. The Militia Act of 1795 ("1795 Act") left the first two prongs of the 1792 Act unchanged but removed most of the restrictions imposed by the third prong, including the judicial certification requirement and the limitation on using out-of-state militia forces when Congress was in session.[46] The 1795 Act also allowed the president to issue the proclamation to disperse simultaneously with the deployment of troops, rather than beforehand.[47] In this way, Congress partially dismantled a multi-stage, multi-actor process that culminated in the deployment of troops and instead authorized the president to act both quickly and unilaterally in a crisis.[48] Yet, although the 1795 Act greatly enhanced the president's power, it also served as a

42. ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789–1878, at 28 (1988).

43. Vladeck, *Emergency Power*, *supra* note 11, at 161.

44. *Id.*

45. COAKLEY, *supra* note 42, at 24.

46. Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed 1861).

47. *Compare* Militia Act of 1795, § 3, 1 Stat. 424, *with* Calling Forth Act of 1792, § 3, 1 Stat. 264.

48. Vladeck, *Emergency Power*, *supra* note 11, at 163.

reminder that the authority to deploy troops domestically was "unquestionably Congress's to delegate."[49]

The 1792 and 1795 Acts closely followed the language of the Calling Forth Clause itself, and accordingly limited the president to reliance on state militias. With the Insurrection Act of 1807 ("1807 Act"), Congress responded to domestic disturbances the country had experienced in the years since the Whiskey Rebellion, adding a single sentence that authorized the president to also use federal regulars when suppressing insurrections or enforcing the law.[50] In authorizing the use of federal troops, Congress had to rely on more than the Calling Forth Clause, which, by its express terms, only contemplates the use of the state militias. From the 1807 Act onward, Congress would overcome this limitation by calling on the totality of its war-power authorities under Article I, Section 8 when crafting domestic deployment legislation.[51] The Supreme Court upheld the 1795 and 1807 Acts—and impliedly sanctioned this innovation—in two mid-nineteenth century cases that form the foundation of the Court's domestic deployment jurisprudence, *Martin v. Mott* and *Luther v. Borden*.[52]

In 1861, Congress again amended the 1795 Act, this time to facilitate the federal government's ability to prosecute the Civil War.[53] The Suppression of the Rebellion Act of 1861 ("1861 Act") weakened the few guardrails that Congress had preserved when the 1795 Act replaced the original 1792 Act.[54] Specifically, the 1861 Act doubled the length of time that the president could use the militia to enforce the law from thirty to sixty days after the start of Congress's next session, expressly gave the president total discretion to decide whether it was "impracticable" for civilian authorities to enforce the law without military assistance, and added "rebellion against the authority of the Government of the United States" to the list of reasons for which the president could use the militia to enforce the law. With these changes, the portions of the Insurrection Act that are now codified at 10 U.S.C. §§ 252 and 254 were brought to what is very nearly their current form.[55]

Between 1865 and 1872, the Ku Klux Klan and other white supremacist organizations waged a brutal insurgency in the southern United States. In 1871, Congress passed the Ku Klux Klan Act ("1871 Act") in an attempt to give the president sufficient authority to suppress the Klan.[56] Among other things, the

49. Vladeck, *Emergency Power, supra* note 11, at 163.

50. Insurrection Act of 1807, ch. 39, 2 Stat. 443; *see* Vladeck, *Emergency Power*, *supra* note 11, at 164.

51. Vladeck, *Emergency Power*, *supra* note 11, at 165–166.

52. Martin v. Mott, 25 U.S. 19 (1827); Luther v. Borden, 48 U.S. 1 (1849).

53. Suppression of the Rebellion Act of 1861, ch. 25, 12 Stat. 281.

54. Vladeck, *Emergency Power*, *supra* note 11, at 168.

55. *Compare* Suppression of the Rebellion Act of 1861, ch. 25, §§ 1–2, 12 Stat. at 281–282, *with* 10 U.S.C. §§ 252, 254.

56. Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.); James Forman Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 920 (2004).

1871 Act added a new provision to the Insurrection Act authorizing the president to deploy the military to enforce the law whenever an insurrection, civil disturbance, or "unlawful combination" in a state so obstructed the laws that a group of people in the state were deprived of a constitutional right—such as the right to vote[57]—and the state government was unable or unwilling to protect that right.[58] This authority is now codified at 10 U.S.C. § 253 and has not been substantively amended since it was enacted.[59]

In 1874, the scattered provisions of the 1795, 1807, 1861, and 1871 Acts were codified as Sections 5297-5300 in Title LXIX of the Revised Statutes of the United States.[60] This codification process brought the last meaningful, substantive changes to what is today the Insurrection Act.[61] First, Congress removed the first prong of the 1795 Act—the authorization for the president to deploy troops to repel invasions.[62] The reasoning behind this move is unclear; it is possible that Congress saw the authorization as unnecessary in light of the Supreme Court's 1862 decision in the *Prize Cases,* finding that the president has inherent authority to repel sudden attacks.[63] The second prong of the 1795 Act, which allowed the president to deploy troops to suppress an insurrection in a state at the state's request, was preserved as what is now 10 U.S.C. § 251.[64] Second, the last remaining safeguard from the original 1792 Act—the time limit on the use of the military to enforce the law, which already had been extended by the 1861 Act from thirty to sixty days after the start of Congress's next session—was removed entirely from what is now 10 U.S.C. § 252.[65]

Subsequent modifications to the Insurrection Act have been predominantly superficial, consisting mostly of a series of recodifications.[66] However, during one such recodification, significant changes were made to the phrasing of the third section of the 1871 Act (discussed in Part III.A., below).[67] In addition, in 1968,

57. Congress specifically intended the Ku Klux Klan Act to be used to protect freedmen's right to vote. *See* CONG. GLOBE, 42d Cong., 1st Sess. 516–519 (1871) (statement of Rep. Shellabarger).

58. Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, § 3, 17 Stat. at 14 (codified as amended at 10 U.S.C. § 253).

59. *Compare* Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, § 3, 17 Stat. at 14, *with* 10 U.S.C. § 253.

60. Rev. Stat. 5297–5300 (1875). The remainder of Title LXIX, consisting of sections 5301–5322, was comprised of closely related statutes enacted during the Civil War. These are codified today at 50 U.S.C. §§ 205–226.

61. *Compare* Rev. Stat. 5297–5300 (1875), *with* 10 U.S.C. §§ 251–254 (2018).

62. *Compare* Militia Act of 1795, § 1, 1 Stat. 424, *with* Rev. Stat. 5297 (1875).

63. *Prize Cases*, 67 U.S. 635 (1862).

64. *Compare* Rev. Stat. 5297 (1875), *with* 10 U.S.C. § 251.

65. *Compare* Rev. Stat. 5298 (1875), *with* 10 U.S.C. § 252.

66. During the initial codification of the United States Code in 1925 and 1926, sections 5297–5300 of the Revised Statutes became 50 U.S.C. ch. 13, §§ 201–204. In 1956, when Title 10 and Title 32 were codified, these four sections—representing the remaining provisions of the 1795, 1807, 1861, and 1871 Acts—were moved to Chapter 13 of Title 10, becoming 10 U.S.C. §§ 331–334. Finally, the Insurrection Act was renumbered from 10 U.S.C. §§ 331–335 to 10 USC §§ 251–255 in 2016. *See* Pub. L. 114-328, div. A, title XII, § 1241(a)(2), 130 Stat. 2497 (Dec. 23, 2016).

67. *Compare* Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, § 3, 17 Stat. at 14, *and* 50 U.S.C. § 203 (1926), *with* 10 U.S.C. § 333 (1956).

Congress added 10 U.S.C. § 335 (now 10 U.S.C. § 255), which simply clarifies that Guam and the U.S. Virgin Islands are "States" for the purposes of the chapter. Finally, the Insurrection Act was heavily modified in 2006 following Hurricane Katrina, but these amendments were repealed in 2008, and the statutory language was restored to its prior state.[68]

C. Past Invocations of the Insurrection Act

The number of times the Insurrection Act has been used varies depending on how one chooses to count invocations.[69] Presidents have issued a total of forty Insurrection Act proclamations.[70] But these forty proclamations correspond to only thirty distinct crises because, on several occasions, the Act was invoked multiple times in response to a single event or set of closely related events.[71] For example, in 1968, President Lyndon B. Johnson invoked the Insurrection Act three times in response to the nationwide unrest that followed the assassination of Dr. Martin Luther King, Jr.—one invocation each for Washington, D.C., Chicago, and Baltimore, the three cities most affected.[72] Furthermore, not every invocation of the Insurrection Act has been accompanied by the deployment of troops. In some cases, the mere threat of military intervention has defused a crisis.[73] Finally, there are three incidents in American history that are often mistakenly regarded as uses of the Insurrection Act, despite the fact that the Act was not invoked.[74]

Presidents have used the Insurrection Act for a wide variety of purposes. In the early republic, Presidents George Washington and John Adams called forth the militia under the 1792 and 1795 Acts, respectively, to suppress two challenges to the new federal government's authority: the Whiskey Rebellion in 1794 and

---

68. Pub. L. 109-364, div. A, title X, § 1076(a)(1), 120 Stat. 2404 (Oct. 17, 2006); Pub. L. 110-181, div. A, title X, § 1068(a)(1), 122 Stat. 325 (Jan. 28, 2008).

69. For a comprehensive guide to every invocation of the Insurrection Act, *see* Joseph Nunn & Elizabeth Goitein, *Guide to Invocations of the Insurrection Act*, BRENNAN CTR. FOR JUST. (Apr. 25, 2022), https://perma.cc/TM8N-Q57R.

70. *Id.*

71. *Id.*

72. Proclamation No. 3840, 33 Fed. Reg. 5495 (Apr. 5, 1968); Proclamation No. 3841, 33 Fed. Reg. 5497 (Apr. 9, 1968); Proclamation No. 3842, 33 Fed. Reg. 5499 (Apr. 9, 1968). *See also* PAUL J. SCHEIPS, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1945–1992, 267–368 (2012).

73. *See, e.g.*, Proclamation No. 42 (Feb. 10, 1831) (border dispute in Arkansas); Lonnie J. White, *Disturbances on the Arkansas-Texas Border, 1827–1831*, 19 ARK. HIST. Q. 95, 108–09 (1960). In other cases, such as a few incidents in the former Confederacy during Reconstruction and in the western United States in the late nineteenth century, the Insurrection Act has been invoked to grant additional authority to military forces who were already present in the area in significant numbers. *See, e.g.*, Proclamation No. 218 (May 15, 1874) (Brooks-Baxter War); Proclamation No. 240 (Oct. 7, 1878) (Lincoln County War); *see also* COAKLEY, *supra* note 42, at 333; CLAYTON D. LAURIE & RONALD H. COLE, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1877–1945 68 (1954).

74. These incidents were Nat Turner's Rebellion, Andrew Jackson's action of January 28, 1834, and the Bonus Army Incident. *See* Nunn & Goitein, *supra* note 69; COAKLEY, *supra* note 42, at 92–94; WILLIAM C. BANKS & STEPHEN DYCUS, SOLDIERS ON THE HOME FRONT: THE DOMESTIC ROLE OF THE AMERICAN MILITARY 57 (2016); LAURIE & COLE, *supra* note 73, at 367–390.

Fries's Rebellion in 1799.[75] President Abraham Lincoln relied on the Act for much the same reason, albeit on a far larger scale, during the Civil War.[76] Unsurprisingly, Lincoln's invocation of the Act lasted longer than any other in history, remaining in force for more than five years—from his proclamation on April 15, 1861, until its termination by President Andrew Johnson on August 20, 1866.[77]

Open rebellion aimed at toppling the federal government or casting off its authority has been rare in U.S. history, and the Insurrection Act has more often been used in response to other sorts of crises or rebellions against state authority. In the early 1870s, for example, President Ulysses S. Grant used the new powers Congress had granted him through the 1871 Act to suppress the terrorist insurgency waged by the first incarnation of the Ku Klux Klan.[78] For the remainder of the decade, Grant repeatedly invoked the Act in an ultimately unsuccessful effort to prevent the violent white supremacist "Redeemer" movement from overthrowing Reconstruction governments in several former Confederate states.[79]

Over time, the range of purposes for which the Insurrection Act has been used has expanded. In the late nineteenth and early twentieth centuries, Presidents Rutherford B. Hayes, Grover Cleveland, Woodrow Wilson, and Warren G. Harding each deployed troops under the Act to intervene in labor disputes, including the Great Railroad Strike of 1877, the Pullman Strike, and the Colorado Coalfield War.[80] With the sole exception of President Wilson's even-handed intercession in Colorado, these presidents all intervened on the side of strike-breaking employers. Also during this era, President Cleveland twice used the Act to attempt to protect Chinese immigrants in Washington Territory from violent white mobs who sought to expel them from the cities of Tacoma and Seattle and force them to return to China.[81]

In the late 1950s and early 1960s, Presidents Dwight D. Eisenhower and John F. Kennedy both invoked the Insurrection Act to enforce federal court orders desegregating schools in the South.[82] President Lyndon B. Johnson similarly used the Act to provide protection for civil rights marchers in Alabama.[83] These presidents' decisive actions to protect African Americans' civil rights during the Little Rock crisis, the Ole Miss Riot, and the so-called Stand in the Schoolhouse Door in Alabama produced the most prominent and enduring images popularly

75. *See* COAKLEY, *supra* note 42, at 28–68, 69–77.

76. *Id*. at 227.

77. Proclamation No. 80 (Apr. 15, 1861); Proclamation No. 157 (Aug. 20, 1866).

78. *See* COAKLEY, *supra* note 42, at 312.

79. *See* LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION 118 (2009); *The Southern Question: The Vicksburg Trouble: Proclamation By the President Ordering the Rioters to Disperse*, N.Y. TIMES (Dec. 22, 1874), https://perma.cc/RQ9Z-BQPE; COAKLEY, *supra* note 42, at 326, 333, 338.

80. *See* LAURIE & COLE, *supra* note 73, at 33–41, 124–52, 203–18, 320–24.

81. *See id*. at 99–109.

82. *See* SCHEIPS, *supra* note 72, at 17–66, 101–28, 145–53, 159–61.

83. *See id*. at 162–164.

associated with the Act. Furthermore, their actions followed a tradition, one that can be traced to President Grant's suppression of the Ku Klux Klan in the 1870s and President Cleveland's protection of Chinese-American immigrants in the 1880s, of using the Act to protect marginalized communities when local authorities are unable or unwilling to do so.

However, the Insurrection Act has not been used for civil rights enforcement since 1965. Instead, it has been invoked exclusively to suppress riots and other civil disturbances.[84] More often than not, these deployments have taken place in cities with large African-American populations suffering from state violence and systemic racism. Indeed, the last time the Act was used was just such a situation. In 1992, President George H.W. Bush invoked the Act and deployed troops to Los Angeles to suppress unrest following the acquittal of several Los Angeles police officers for beating Black motorist Rodney King. The Insurrection Act has not been used in the thirty years since—the longest the United States has gone without an invocation of the Act since its inception in 1792.

III. THE PROBLEMS WITH THE INSURRECTION ACT

The Insurrection Act represents an extraordinary delegation of authority, granting the president one of the powers that the founders most feared: the ability to turn a standing army inward against the nation's own people. It is critical that any such authority speak clearly, extend no further than necessary, and include safeguards against abuse—including mechanisms by which the other branches of government may serve as checks. The Insurrection Act conforms to none of these principles. Moreover, it rests on 150-year-old assumptions about the need for military intervention that no longer hold in 2023. The events of 2020 and 2021, culminating in the January 6 attack on the U.S. Capitol, vividly illustrate the potential for this dangerous and outdated law to be abused in ways that could undermine our democracy.

A. The Insurrection Act is Dangerously Vague and Overbroad and Lacks Safeguards Against Abuse

When it comes to the substantive criteria for the deployment of federal forces, the text of the Insurrection Act is archaic, confusing, and vague. The circumstances that can trigger deployment authority under Section 252 include the existence of "unlawful obstructions, combinations, or assemblages" that "make it impracticable to enforce the laws of the United States in any State by the ordinary course

84. *See id.* at 188–204, 267–368, 440–41, and 441–49; *see also The Assassination of Dr. Martin Luther King Jr.*, MILLER CTR., U. VA., https://perma.cc/56X5-JYLH**;** Jean Marbella, *The fire both times: Baltimore riots after Martin Luther King's death 50 years ago left scars that remain*, BALT. SUN (Mar. 28, 2018), https://perma.cc/LA7K-MCCD**;** Mark Davis, *25 Years Later, Atlanta Prison Riots Live On in Captive's Memory*, ATLANTA J.-CONST. (Nov. 23, 2012), https://perma.cc/2MC2-W5R7; Dennis Hevesi, *Bush Dispatches Troops to Island In Storm's Wake*, N.Y. TIMES (Sept. 21, 1989), https://perma.cc/H839-4R8V.

of judicial proceedings."[85] Yet the statute fails to explain (1) what means of civilian law enforcement are included in, or excluded from, "the ordinary course of judicial proceedings," (2) what constitutes an "obstruction," "combination," or "assemblage"—terms that are not defined in the statute, (3) what factors would render one of these occurrences "unlawful," or (4) what level of interference or disruption would rise to the level of making it "impracticable" to enforce the laws.

The language of Section 253 is perhaps even more problematic. When this section was moved from Title 50 to Title 10 during a 1956 recodification, Congress broke the provision into two sub sections: (1) and (2).[86] In doing so, Congress changed the meaning of the provision. It is unclear whether Congress intended that outcome, or if it simply sought to make the elaborate nineteenth-century language more readable to a modern audience, because the legislative history is all but nonexistent. In any event, Section 253(2) now reads:

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it... (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.[87]

As with Section 252, it is unclear what is meant by the term "unlawful combination." It is similarly unclear what is encompassed in the term "conspiracy," and what would constitute "oppos[ition]" to "the execution of the laws" or "imped[ing] the course of justice under those laws." If, however, the term "conspiracy" is accorded its modern legal definition, and if an attempt to prevent the law from being enforced—even an unsuccessful one—would qualify as "oppos[ing] the execution of the laws," this provision would, in theory, allow the president to deploy the 82nd Airborne against two individuals plotting to intimidate a witness in a federal trial. Although this type of abuse seems unlikely, the same cannot be said for other ways in which these terms could be stretched. For instance, a president seeking to suppress dissent might consider an unpermitted protest against the implementation of a controversial executive order to be an "unlawful combination" that "opposes . . . the execution of the laws of the United States."

Compounding the vagueness and overbreadth of the statute's substantive criteria, the current version of the Act gives the president sole discretion, in most instances,[88] to determine whether those criteria have been met. The 1792 version of the Act required judicial approval before the president could deploy troops to

85. 10 U.S.C. § 252.

86. *Compare* Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, § 3, 17 Stat. 14, *and* 50 U.S.C. § 203 (1926), *with* 10 U.S.C. § 333 (1956) (now 10 U.S.C. § 253).

87. 10 U.S.C. § 253(2).

88. Only Section 251 leaves it to the state legislature (or governor, when the legislature cannot be convened) to decide whether an insurrection is underway.

enforce the law, but Congress removed this restriction in 1795. Section 252 now states that forces may be deployed "if the president considers" that the relevant conditions are satisfied. Section 253 is less explicit on this point, but nothing in that section suggests that the president must justify his determination, or be able to justify it, before any other body.

For all practical purposes, courts have been cut out of the process. Nearly two hundred years ago, interpreting the 1795 version of the Act, the Supreme Court ruled that "the authority to decide whether [an] exigency [that triggers the Act] has arisen belongs exclusively to the President, and . . . his decision is conclusive upon all other persons."[89] Thus, the Court concluded, judges cannot review whether a president's decision to invoke the Insurrection Act was justified by the circumstances.[90] More than a century later, the Court implied that there might be an exception to this rule for situations in which the president acted in bad faith.[91] The Court also clarified that courts may review the lawfulness of the military's actions subsequent to deployment[92]—for example, whether a soldier's search of houses in the vicinity of an uprising complied with the Fourth Amendment. Nonetheless, most judges would likely be extremely hesitant to rule that a president's use of the Act was unlawful.

Congress similarly has no role in the current statute. The 1792 version limited the president, when deploying the militia to enforce the law, to using the militia of the affected state unless Congress was out of session. Accordingly, in most cases, the decision of whether to expand deployment to include other states' militias was left to Congress. The 1792 law also required deployments for the purpose of law enforcement to end thirty days after the start of Congress's next session unless Congress voted to extend them. These provisions were removed from later versions of the law. Indeed, the Insurrection Act does not even require any reporting to Congress. The president need not share with lawmakers the reasons for deployment, nor any plans for how the armed forces will be used. The law thus does not appear to contemplate congressional oversight, let alone congressional approval.

Finally, the same vagueness and overbreadth that characterize the substantive criteria in the statute are also present in the authorities the statute provides. Sections 251 and 252, for instance, both allow the president to use "such of the armed forces, as he considers necessary" to respond to whatever crisis has led to invocation of the Act.[93] There is no requirement that the president exhaust non-military options or otherwise treat the deployment of federal forces as a last

89. Martin v. Mott, 25 U.S. 19, 30 (1827).

90. *Id.* at 31–32.

91. Sterling v. Constantin, 287 U.S. 378, 400 ("Such measures, conceived in good faith, in the face of the emergency, and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the executive in the exercise of his authority to maintain peace.").

92. *Id.* at 401 ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.").

93. 10 U.S.C. §§ 251, 252.

resort. Section 253 goes further still. It allows the president to use military forces or "*any other means*" to "take such measures as he considers necessary" to enforce the law.[94] The law quite literally places no limits on what actions the president can take under this provision.[95] Although any action the president takes must comply with the U.S. Constitution, and although courts should not construe this broad language to permit violations of other statutes, the perils of handing the president a blank check of this nature are evident. If nothing else, it could provide legal window dressing for measures that Congress almost certainly did not contemplate, such as the imposition of martial law or the suspension of *habeas corpus*.

In the wrong hands, limitless discretion to deploy the military as a domestic police force could be used as a tool of oppression. But even with benign motives, there are risks and costs to using the armed forces to conduct law enforcement. Military personnel are primarily trained and equipped to fight and destroy an enemy—an enemy that generally does not have constitutional rights. They are accustomed to prioritizing "force protection" measures and responding to potential threats with overwhelming force. Given this combat-oriented mindset, it is not only dangerous to ask military personnel to participate in civilian law enforcement outside of extreme circumstances, but also unfair to the servicemembers themselves. As one member of the Minnesota National Guard told a reporter when Trump was reportedly considering invoking the Insurrection Act in response to racial justice protests, "We're a combat unit not trained for riot control or safely handling civilians in this context."[96] Military deployment, in short, risks an escalation in violence—a phenomenon that has been tragically demonstrated on multiple occasions in U.S. history.[97] A lack of clear and enforceable criteria for deployment makes such an outcome more likely.

---

94. 10 U.S.C. § 253 (emphasis added).

95. The vast scope of this authority can be directly attributed to Section 253's origin as one of the lynchpins of the Ku Klux Klan Act (also known as the Third Enforcement Act). By 1871, the federal government had been struggling for years to combat the Klan and other white supremacist groups in the former Confederacy. The failure of the First and then the Second Enforcement Acts compelled Congress to grant ever greater authority to the president. What is now Section 253 was enacted as the final step in what had become a desperate effort to defeat a violent insurgency that was rampaging unchecked across a huge swath of the United States. *See* COAKLEY, *supra* note 42, at 24.

96. Ken Klippenstein, *Exclusive: The U.S. Military Is Monitoring Protests in 7 States*, NATION (May 30, 2020), https://perma.cc/93E5-MBYS.

97. To give one salient example, Marines responding to the 1992 Los Angeles riots pursuant to an Insurrection Act invocation accompanied Los Angeles police officers to a home where a domestic dispute had been reported. Preparing to enter the home, the officers were greeted with a blast of birdshot, and one of them shouted "Cover me" to the Marines—a request to stand guard and provide any needed backup. Instead, the Marines opened fire, riddling the home with bullets. *See* Jim Newton, *Did Bill Barr Learn the Wrong Lesson from the L.A. Riots?*, POLITICO (June 9, 2020, 4:30 AM), https://perma.cc/HWD4-TX5N.

B. The Law Rests on Outdated Assumptions About the Capabilities of Civilian Law Enforcement and the Need for Military Intervention

Much of the current Insurrection Act was designed for a country that was embroiled in civil war and the terrorist insurgency that followed. Sections 252 and 253 of the Act, in particular, are out of step with the needs of the contemporary United States, which faces dramatically different challenges than it did 150 years ago. Even if the challenges were the same, however—and it is difficult to predict what challenges may arise in the future—the resources available to meet them *without* military force have undergone seismic change.

The Insurrection Act predates the advent of professionalized police departments in the United States.[98] Before the Civil War, most cities and towns relied on a volunteer night watch model; as of 1860, only about fifteen cities had uniformed police forces,[99] and there were no state-wide police departments.[100] Even in cities that had police, personnel and resources were scant, and governors often called up the state militias as reinforcements when there was local unrest.[101] As for federal law enforcement, it primarily consisted of the U.S. Marshals. The Department of Justice was not created until 1870,[102] and the FBI was established in 1908.[103] Like city police departments, U.S. Marshals often had to call on the state militias for assistance, exercising their authority to deputize soldiers as marshals.[104] In short, given the limited availability and capacity of federal, state, and local law enforcement, reliance on state militias to conduct law enforcement was both necessary and relatively commonplace.

By contrast, the size and capacity of modern law enforcement agencies is difficult to overstate. As of 2019, there were 1,000,312 full-time state and local police officers in the United States,[105] with a combined budget of $123 billion.[106] The New York Police Department alone has 36,000 officers.[107] These state and local

98. *See generally* LAURENCE A. FRENCH, THE HISTORY OF POLICING AMERICA: FROM MILITIAS AND MILITARY TO THE LAW ENFORCEMENT OF TODAY (2018); Robert Reinders, *Militia and Public Order in Nineteenth-Century America*, 11 J. AM. STUD. 81 (1977); Julian Go, *The Imperial Origins of American Policing: Militarization and Imperial Feedback in the Early 20th Century*, 125 AM. J. SOC. 1193 (2020); Jonathan Obert, *A Fragmented Force: The Evolution of Federal Law Enforcement in the United States, 1870–1900*, 29 J. POL'Y HIST. 640 (2017); Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME (May 18, 2017, 9:45 AM), https://perma.cc/78JC-J2Q8; Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), https://perma.cc/YY5B-ZUXX.

99. ERIC H. MONKKONEN, POLICE IN URBAN AMERICA, 1860–1920, 162–8 (2004).

100. Reinders, *supra* note 98, at 88.

101. Reinders, *supra* note 98, at 88.

102. Obert, *supra* note 98, at 649.

103. *See* Memorandum of Charles J. Bonaparte, Att'y Gen. (July 26, 1908), reproduced in ROBERT S. MUELLER, JOHN J. MILLER & MICHAEL P. KORTAN, THE FBI: A CENTENNIAL HISTORY, 1908–2008, 3 (2008).

104. Obert, *supra* note 98, at 650.

105. *Police departments in the US: Explained*, USA FACTS (Aug. 13, 2020), https://perma.cc/EL78-YABL.

106. *Criminal Justice Expenditures: Police, Corrections, and Courts*, URBAN INST., https://perma.cc/8RUH-6BCF.

107. *About NYPD*, N.Y.C. POLICE DEP'T, https://perma.cc/T48V-U27D.

forces are complemented by more than 130,000 federal law enforcement officers.[108] To put this number in perspective, U.S. federal law enforcement officers outnumber active-duty members of the Canadian and Australian armed forces combined.[109] At the state, local, and federal levels, law enforcement agencies boast a level of technological sophistication and military-grade equipment that rivals that of the U.S. military itself—indeed, for better or for worse, much of law enforcement's technology and equipment comes directly from the military.[110] Today, the situations in which law enforcement personnel and resources are insufficient to handle domestic unrest are increasingly few and far between.

As the deployment of troops for law enforcement purposes becomes less necessary and less frequent, it also becomes less politically tenable. In the eighteenth and nineteenth centuries, Americans likely expected to see local militia members helping to preserve law and order in their communities. But the use of the military as a domestic police force today is fundamentally incompatible with modern sensibilities. Then-Secretary of Defense Mark Esper captured the prevailing attitude toward such deployments when he expressed his opposition to invoking the Insurrection Act in June 2020: "[T]he option to use active-duty forces in a law enforcement role should only be used as a matter of last resort and only in the most urgent and dire of situations."[111] The fact that no president has invoked the Insurrection Act since 1992—the longest period since the law's enactment—reflects not only the greater capacity of law enforcement agencies to handle civil unrest, but also the widespread public opposition an Insurrection Act invocation might well face today.

C. Events in 2020-2021 Showed How Easily the Insurrection Act Could Be Misused

Given the breadth of authority that the Insurrection Act grants the president and the absence of any meaningful safeguards, it is remarkable that the statute has not been abused more often. To be sure, as noted earlier, multiple presidents have exploited the authorities provided in the law to subdue labor movements.[112] But in general, presidents have shown considerable moderation in their use of this powerful tool. Events in 2020 and 2021, however, revealed how easily the

108. Connor Brooks, *Federal Law Enforcement Officers, 2016 - Statistical Tables,* U.S. DEP'T JUST. (Oct. 2019) at 1, https://perma.cc/77C8-FXLV.

109. INT'L INSTITUTE FOR STRATEGIC STUD., THE MILITARY BALANCE 242 (2021).

110. *Law Enforcement Support Office*, DEF. LOGISTICS AGENCY, https://perma.cc/R7WN-86KW; Niko Kommenda & Ashley Kirk, *Why are some U.S. police forces equipped like military units?*, GUARDIAN (June 5, 2020, 8:03 AM), https://perma.cc/V5SB-MSDS; Aaron C. Davenport, Jonathan W. Welburn, Andrew Lauland, Annelise Pietenpol, Marc Robbins, Erin Rebhan, Patricia Boren & K. Jack Riley, *An Evaluation of the Department of Defense's Excess Property Program*, RAND CORP., https://perma.cc/D3S8-8KM6; *see also* Allison McCartney, Paul Murray & Mira Rojanasakul, *After Pouring Billions Into Militarization of U.S. Cops, Congress Weighs Limits*, BLOOMBERG (July 1, 2020), https://perma.cc/UVJ9-JAL6.

111. Amanda Macias, *Defense Secretary Mark Esper opposes using Insurrection Act for George Floyd protest unrest, angering White House*, CNBC (June 3, 2020), https://perma.cc/NR68-P366.

112. *See* Laurie & Cole, *supra* note 80, at 33–41, 124–52, 203–18, 320–24.

Insurrection Act could be abused and reminded us that we cannot rely on tacit, nonbinding norms of presidential self-restraint to prevent such abuses.

In June of 2020, large protests against racial discrimination and police brutality occurred in multiple major cities around the country after the killing of George Floyd by Minneapolis police officers. Notwithstanding the fact that demonstrations were largely peaceful and no state had requested invocation of the Insurrection Act, Senator Tom Cotton (R-Ark.) called on the president to invoke the law and subject protestors to "an overwhelming show of force."[113] Reportedly, President Trump seriously considered doing so.[114]

Had Trump followed through, it would have been difficult for courts to stop him. How would a court assess whether the fraction of protesters who engaged in property crimes or violent acts constituted "unlawful assemblages," or whether their actions made it "impracticable to enforce the laws of the United States . . . by the ordinary course of judicial proceedings"? Even if a court could perform that exercise, the law wouldn't permit it: Section 252 expressly leaves this determination to the president's judgment.

Ultimately, it was an internal and informal executive branch check—not the courts, and not Congress—that prevented the deployment of active-duty armed forces. On June 3, Secretary of Defense Mark Esper publicly stated his opposition to invoking the Insurrection Act,[115] thus making it politically infeasible for the president to take that step. According to news reports, Esper's public stance against using the Act was one reason Trump fired him.[116]

Just three months later, as the November 2020 presidential election approached, Trump associate Roger Stone publicly called on the president to invoke the Insurrection Act should he lose the election. Indeed, Trump himself threatened to invoke the Act on election night should there be any "riots" in response to his potential victory.[117] After the election, when it became clear that Biden had won, numerous Trump allies—including Stone,[118] Mike Lindell,[119] and (reportedly) Sidney Powell[120]—continued to encourage him to invoke the

113. Tom Cotton, *Send in the Troops*, N.Y. TIMES (June 3, 2020), https://perma.cc/DR94-FJBN.

114. Michael S. Schmidt & Maggie Haberman, *Trump Aides Prepared Insurrection Act Order During Debate Over Protests*, N.Y. TIMES (June 25, 2021), https://perma.cc/8VJK-VQMU.

115. *See* Macias, *supra* note 111.

116. Tom Bowman, *Trump 'Terminates' Secretary Of Defense Mark Esper*, NPR (Nov. 9, 2020, 2:01 PM), https://perma.cc/X22H-H8SA.

117. Martin Pengelly, *Roger Stone to Donald Trump: Bring in Martial Law if You Lose Election*, GUARDIAN (Sept. 13, 2020, 11:22 AM), https://perma.cc/YTJ7-MWZV; Quint Forgey, *'We'll put them down very quickly': Trump threatens to quash election night riots*, POLITICO (Sept. 11, 2020, 10:30 AM), https://perma.cc/35GR-YST9.

118. Pengelly, *supra* note 117.

119. Maggie Haberman, *Photos of Trump ally who visited the White House capture notes about martial law*, N.Y. TIMES (Jan. 15, 2021), https://perma.cc/R9ZK-PH8Q.

120. Kyle Cheney & Josh Gerstein, *Trump Sought to Tap Sidney Powell as Special Counsel for Election Fraud*, POLITICO (Dec. 19, 2020), https://perma.cc/AHP4-LDGE.

Act as part of a scheme to overturn the election results and prevent or impede the transition.[121]

Calls for Trump to use the military to stay in power continued before, during, and after the January 6 attack on the United States Capitol.[122] In some cases, the vague language of the Insurrection Act facilitated misunderstandings and/or extreme interpretations about what an invocation of the Insurrection Act would authorize. For instance, some who advocated using the military to overturn the election results paired their requests for use of the Insurrection Act with calls for "martial law," or treated the two ideas as interchangeable.[123] The term "martial law" has no established definition in American law, but it generally refers to a power that allows the military to supplant civilian government in an emergency.[124] By contrast, the Insurrection Act should be understood to allow the military to *assist*, rather than replace, civilian authorities.[125]

Similarly, members of the "Oath Keepers" group seized on the expansive, archaic language of the Insurrection Act in an attempt to justify their actions on January 6, arguing that they believed President Trump would call them into federal service under the Act.[126] Outlandish as that may seem, the Oath Keepers could point to Section 253 and its authorization for the president to use "the militia or the armed forces, or both, or . . . any other means" to enforce the law.[127] The "militia of the United States" is defined under 10 U.S.C. § 246 to include "all able-bodied males" between the ages of 17 and 45 who are, or who intend to become, U.S. citizens, as well as all "female citizens of the United States who are members of the National Guard."[128] Those Oath Keepers who could not meet those criteria could cite Section 253's authorization for the president to employ "any other means." It seems clear that this limitless grant of power cannot be read literally—yet it is difficult to discern what the limiting principles might be, or how they could be enforced.[129]

---

121. Tina Nguyen, *MAGA Leaders Call for the Troops to Keep Trump in Office*, POLITICO (Dec. 18, 2020), https://perma.cc/KF58-4BML.

122. Luke Broadwater, *Fearing a Trump Repeat, Jan. 6 Panel Considers Changes to Insurrection Act*, N.Y. TIMES (Apr. 19, 2022), https://perma.cc/W56P-Q69Ll; Jacqueline Alemany, Josh Dawsey & Tom Hamburger, *Talk of Martial Law, Insurrection Act Draws Notice of Jan. 6 Committee*, WASH. POST (Apr. 27, 2022), https://perma.cc/V989-EJ4D.

123. *See* Nguyen, *supra* note 121; Pengelly, *supra* note 117; Broadwater, *supra* note 122; Alemany et al., *supra* note 122.

124. JOSEPH NUNN, BRENNAN CTR. FOR JUST., MARTIAL LAW IN THE UNITED STATES: ITS MEANING, ITS HISTORY, AND WHY THE PRESIDENT CAN'T DECLARE IT (2020), https://perma.cc/SF3L-P3LK.

125. *Id.*

126. Laura Italiano, *Oath Keepers Will Tell a Jury They Believed Donald Trump Would Turn Them into His Own Personal Militia on January 6*, BUS. INSIDER (Jun. 30, 2022), https://perma.cc/N8WS-6CG9; Devlin Barrett & Spencer S. Hsu, *How Trump's Flirtation with an Anti-Insurrection Law Inspired Jan. 6 Insurrection*, WASH. POST (Jan. 23, 2022), https://perma.cc/TC5P-XDN2.

127. 10 U.S.C. § 253.

128. 10 U.S.C. § 246(a).

129. To be clear, had Trump invoked the Insurrection Act for the purpose of directing an armed attack on the Capitol, rather than as a (pretextual) response to that attack, this would have exceeded even

These claims by Trump supporters underscore the dangers of the law's vagueness and overbreadth. At a minimum, the lack of clear boundaries can lead to confusion among the general public about what precisely the government can or cannot do during an emergency. In a future crisis, unscrupulous actors could take advantage of that confusion to accrue to the president the powers of an autocrat, all while claiming that their conduct is legal. In the ensuing chaos, facilitated by the law's lack of clarity, the extent of their usurpation might be difficult for the American public to see.

That said, even under the most conservative interpretation of the Insurrection Act, the president likely could have invoked it on January 6, with potentially disastrous consequences. By any honest account, the attack on the U.S. Capitol on January 6 was an insurrection, a rebellion against the authority of the United States, an instance of domestic violence, and an unlawful combination that served to obstruct the execution of federal law—specifically, the Electoral Count Act.[130] The criteria for invoking the Act were clearly satisfied. Had the president invoked it, though, it likely would have been for reasons other than suppressing the insurrection. He could have commanded federal troops to shut down the U.S. Capitol for a period of days or longer, thus preventing or delaying the vote count on the pretext of keeping the peace. Once again, courts would have been hard-pressed to rule that such a measure exceeded the terms of the Act.

This ploy would not have reversed the results of the 2020 election. A strong argument could be made that deployment in those circumstances would have violated the laws against interference with an election by members of the armed forces and other federal employees[131]—claims that are well within the courts' purview. Courts also could have broken new ground by ruling that the president's invocation of the Act was in bad faith. And even if Trump had successfully prevented Congress from certifying Biden's victory, Trump's own term would have ended at noon on January 20 by operation of the Twentieth Amendment to the Constitution.[132]

Nonetheless, invocation of the Insurrection Act could have thrown the transition into chaos and disarray, further weakening public confidence in the election and in our democratic system more broadly. Worse, deployment of U.S. armed forces to the U.S. Capitol, under the command and control of a president whose interests were aligned with the insurgents, could have fanned the flames of the violence that erupted that day rather than quelling it. In the following days, the use of troops to prevent certification of the vote would likely have prompted mass protests, creating the potential for further violent confrontations with federal troops.

It is unclear why President Trump did not invoke the Insurrection Act, or why he decided to wield the power of an angry mob rather than the emergency powers

---

the far-reaching discretion the Act provides. In such a case, the courts might well have felt emboldened to enjoin the invocation based on a finding of bad faith. *See supra* note 91 and accompanying text.

130. *See* 3 U.S.C. § 15.

131. *See* 52 U.S.C. § 10102; 18 U.S.C. § 592; 18 U.S.C. § 593; 18 U.S.C. § 595.

132. U.S. CONST. amend. XX, § 1.

National Guard or Political Weapon?

Legal historian and constitutional law scholar Professor Bernadette Meyler cautions that the Trump administration's deployment of the National Guard threatens the "presumption of regularity" that underpins the rule of law



When the National Guard shows up in American cities, it's usually after hurricanes, fires, or floods, not political fights. But recent federal deployments have changed the landscape and raised pressing questions about how far a president's domestic military powers can go. In this episode of *Stanford Legal*, host Pam Karlan talks with Professor Bernadette Meyler about the growing use of the National Guard for domestic law enforcement and what it reveals about shifting boundaries of presidential power.

This episode originally aired on October 30, 2025.



READ THE Q&A | VIEW ALL EPISODES

Transcript

Bernadette Meyler: *Thinking about this as a new norm is particularly disturbing in that it would lead to the possibility of having continuous deployment of the National Guard—and if the Insurrection Act is used, other military throughout the United States. And already there's been the prospect fixated of having the National Guard monitor elections in different locales, so I think that the presumption of regularity is really under threat.*

Pam Karlan: This is *Stanford Legal* where we look at the cases, questions, conflicts, and legal stories that affect us all every day. I'm Pam Karlan. Please subscribe or follow this feed on your favorite podcast app. That way you'll be alerted as we add new episodes as soon as they're available.

Today I am fortunate to be joined by my colleague Bernadette Meyler. Bernie is the Carl and Sheila Spaeth Professor of Law and she's also the Associate Dean for Research and Intellectual Life here at the university.

When we think of the National Guard, we think of them showing up when there are disasters. We think of them deploying to foreign countries. We know a lot of people in the National Guard who have become repeatedly over the last several decades. But one of the things we don't think about a lot, or at least we haven't in recent years, is the National Guard being called into federal service. And there's a provision of the U.S. Code, 10 U.S. Code 12406, that says that whenever the United States is invaded, or is in danger of invasion by a foreign nation, or there's a rebellion or danger of rebellion against the government of the United States, or the president can't with the regular forces of the United States with the regular forces, he can call into federal service members and units of the National Guard of any state. And one of the things we've been seeing recently in President Trump's deployment of the National Guard in cities that he's not even at all since maybe the civil rights era. And Bernie, you've been looking at this, and I'd love to just talk through with you what's happening now, both from a California and Illinois, and how we find ourselves here and what the law is.

So welcome to the show, Bernie.

Bernadette Meyler: Thanks so much. I'm really glad to be here discussing this with you.

Pam Karlan: The last time you were here, it was all about pardoning—*the pardoning power, which you have a wonderful book on called Theaters of Pardoning*, and talking about the extent to which Donald Trump could be pardoned, or the extent to which Donald Trump might pardon others. And now we're seeing some of the offshoots of the fact that we have a president and a similar operation in Los Angeles, and those were designed to do what? The initial operations, which are by ICE officials, I take it?

Bernadette Meyler: Absolutely. So the initial operations were designed to ramp up enforcement of immigration violations—enforcement against those who would be deported. So the administration, to have violations prosecuted, and to be illegally in the United States. But then that's also been subject to this as well. And I think a lot of the rhetoric surrounding these operations, the Midway Blitz and the other operations, has been about targeting Democratic cities that are presented to be harboring illegal immigrants and criminals. And so I think that it's been very clearly targeted at particular cities that seem to be democratically oriented for additional immigration enforcement.

Pam Karlan: Yes, so you've got these cities and a change in immigration enforcement in which … I remember them doing immigration raids, ICE raids and the like at meat packing plants, but now they seem to be doing more of it in the middle of cities. And these are cities where a large number of the citizens who live in these cities—people who are entirely entitled to be here—object to the raids. And so, for example, you have demonstrations, or you have reports that show up at Home Depot lots to blow whistles when they see ICE vans. And so there seems to be a change in how ICE is enforcing things. And then you have some reaction by people beyond the people who are the actual targets of these ICE raids. But you have police departments in these cities, I'm sure.

Bernadette Meyler: Absolutely. And you're referring to a number of different kinds of protests, or other actions, by locals in these cities who are objecting to the ICE enforcement actions. And one thing that's been noteworthy in the California context is that not only have local police departments said that they are absolutely sufficient to deal with any disturbances that might arise—as there was some violence in Los Angeles, but the police in Los Angeles said that they were handling it just fine. And then also Governor Newsom has said that the state is perfectly fine on its own without the deployment of the National Guard, but the deployment of the National Guard has been ordered over the governor's objection and than it would otherwise have been because of the substance, because in general, when the National Guard is deployed or federalized, it's with the consent of the governor of the particular state involved. And so, it was really quite suspicious and shocking that President Trump decided to deploy the National Guard without even alerting Governor Newsom when he did it in Los Angeles.

Pam Karlan: Yes, and so that raises something that I think probably a lot of our listeners don't realize, which is although it's called the National Guard, it's generally under the command of the governor of a particular state. The National Guard, and this goes back to your work as a legal historian, is the kind of successor to the militias that we had at the time of the framing, which were not designed to be a national standing army in some sense, but were designed to be under local control.

Bernadette Meyler: Absolutely. Yes. And so that was exactly the purpose of the militias, which became converted into the National Guard. So really they're local bodies. And another really striking episode that's been in the news is the use of the Texas National Guard, outside of the Texas, by deploying the Texas National Guard to Illinois, for example, and threatening the deployment of the Texas National Guard in other venues as well. So not only is there this controversion of the respect for state sovereignty that is implicated by not consulting with the governor or other political entity within a particular state where the guard is being deployed, there's also this first threat of basically the invasion of one state by another, and the use of the National Guard from … or the militia, the inherited militia of one state against another state.

Pam Karlan: Generally, and you just pointed to this: Generally, we wouldn't think that the Texas National Guard would go into Illinois unless the governor of Illinois asked them there. We've had some huge disasters in America, hurricane Katrina and the like, I believe National Guardsmen and telephone linemen and state police came in from other states to help the sheer magnitude of the threat. But here, if the president hadn't federalized the National Guard, we'd all understand that if Texas sends its National Guard to Illinois, that's an invasion.

Bernadette Meyler: Absolutely.

Pam Karlan: And so here we have the president federalizing the National Guard and presumably bringing in National Guardsmen from Texas because he's under some doubt as to whether National Guardsmen from Illinois will perform what he wants them to perform.

Bernadette Meyler: Absolutely. Yes.

Pam Karlan: So, the president can only do this—if I understand the statute correctly—there is an invasion or a rebellion or he's unable to enforce the law. And who decides whether there's an invasion, a rebellion, or an inability to enforce the law?

Bernadette Meyler: That's the main crux of the ongoing legal battles both in California and in Illinois, and which have reached the Supreme Court already. The main provision that the administration is falling back on here is this idea that the president is unable to execute the laws with his normal forces because of the threat of violence against ICE officials in these various locations.

So the Ninth Circuit in California, or a panel of the Ninth Circuit, rendered a pretty deferential decision towards the president, in saying that the president gets a lot of deference in determining whether the regular forces are able to execute the laws or not now. So, the Ninth Circuit said that the president's determination, as long as it reflects a colorable assessment of the facts in the law, within a range of honest judgment, is going to be allowed to stand.

Now, what does that mean exactly? What is a range of honest judgment? And then the Seventh Circuit also was fairly deferential, but not as deferential with respect to the meaning of the statute or what counts as a rebellion, what constitutes the inability to enforce the laws. So I think that so far the circuit courts have granted some deference, but not entire deference to the presidential determination of necessity, and there's been a lot of back and forth about whether that deference should be more in terms of the facts on the ground or more in terms of the legal standard at issue.

Pam Karlan: Yes, this is one of those things that for generations we've had something that's called the "presumption of regularity," which is when the government acts, it's acting honestly on the up and up. It's actually considering the things it's supposed to consider. It's not considering the things it's not supposed to consider. And one question I have for you is: how long are we going to have the presumption of regularity with this administration?

Bernadette Meyler: I think that's a great question. I would hope that we can retain it, but it is difficult, especially when decisions don't seem to be adequately explained or explained in ways that are consistent with the past. So even if the president were to articulate a very broad understanding here of the inability to execute the law with regular forces, that understanding wouldn't at all be consistent with past practice over the past several hundred years. Thinking about this as a new norm is particularly disturbing in that it would lead to the possibility of having continuous deployment of the National Guard—and if the Insurrection Act is used, other military throughout the United States. And already there's been the prospect fixated of having the National Guard monitor elections in different locales, so I think that the presumption of regularity is really under threat quite significantly at the moment.

Pam Karlan: Yes, the idea of having the National Guard monitoring elections, where does that come from?

Bernadette Meyler: One could imagine in certain circumstances … One time when the military was used under the Insurrection Act and that … in which the National Guard has been also used … was in terms of enforcing civil rights movements. So, when there were efforts to prevent Black children from going to school, and there was armed opposition on the part of states, then the military was called in to enforce civil rights against resisting states. That's one example. For example, a state had said that they were just going to ratify an election, perhaps there would be a role for the National Guard in that context.

But that gets back to this question of what the trigger is, right? If there's no evidence that there is any inability to enforce any federal law with respect to elections, then what would possibly justify the use of the National Guard in that context? Of course, the statute is to enforce the laws, but it's a lot of voters, so that would be perhaps the benefit for those who are trying to suppress electoral turnout. But there's no legitimate justification if there is no evidence of violation of the laws.

Pam Karlan: And there's been a statute that's been around for probably more than a century at this point, that essentially says that no officer of the Army or the Navy, and obviously they amended it to add in the Air Force, although they don't precisely say National Guard as well, is supposed to interfere in any way with elections because it's such an important part of American law and the background assumptions of American law, that the military is for fighting our country. It's not for fighting U.S. citizens on U.S. soil.

Bernadette Meyler: Absolutely. And I would just raise here also the importance of the Posse Comitatus Act, which is another prohibition on the use of the military for domestic law enforcement purposes, and that's been around since 1878. And that statute specifies that only if Congress very precisely permits the use of the military in a particular context for domestic law enforcement, can it be used. So that statute is in the background, both of the deployment of the National Guard and also of the possibility that Trump has floated a few times of invoking the Insurrection Act. And I think that…

Pam Karlan: Could you just stop there for a second to explicate Posse Comitatus Act and the Insurrection Act, which are … "Posse Comitatus" is not Latin for "insurrection," so maybe separate those two out for our listeners so that they have a sense of what's going on here.

Bernadette Meyler: Yes, the Posse Comitatus Act comes up in the late 19th century because there were a lot of discussions of the use of the military for domestic law enforcement in the aftermath of Reconstruction, and there was resistance against that to some extent. And so Congress passes this Posse Comitatus Act saying, look you can't use the military for purposes of domestic law enforcement unless we specifically authorize it. So that general prohibition is in the background here. And then we…

Pam Karlan: I just want to stop you there for a second. We don't, at this moment, have a congressional authorization for the use of the military for domestic law enforcement.

Bernadette Meyler: No. The only law that would permit that is the Insurrection Act, which is something that has been around in different forms since early on in U.S. history.

But I think it has to be understood in relation to the Posse Comitatus Act. What the Insurrection Act does allow is for the use of the militia and armed forces to enforce federal authority. So, part of it says that … it has to be a rebellion, or it says if it's impracticable to enforce the laws, then the president can call into federal service the militia and use it, as necessary, to enforce the laws or suppress the rebellion. Now, the reason why although the Insurrection Act is that it requires a presidential finding in order to do so. So if the president were to invoke the Insurrection Act and to deploy, there would be a requirement that he make a proclamation to everyone in the area to disperse if they were engaged in what was thought of as an insurrection. So there is the potential for using it.

Pam Karlan: And insurrection … I'm now thinking back to January 6th, and one of the interesting things there is that the charges that were brought against people there were not insurrection charges. And if that wasn't an insurrection, is anything that's going on today even remotely an insurrection?

Bernadette Meyler: I think even the administration doesn't think that's a very plausible argument because they've only made it as a kind of secondary argument when going to court to defend these various actions. So, I think that it would more be the "necessity to enforce the laws," right? That somehow law enforcement is not occurring properly and that's the "necessity" to use the military to enforce the laws. But I think that's where we get back to this question of who decides that, and the excessive deference that some courts have granted to the presidential determination of whether there's a problem with enforcing the laws.

I think that in light of the fact that there is this Posse Comitatus Act that prohibits, explicitly, the use of the military for domestic law enforcement, courts really should read the Insurrection Act narrowly in relation to that because courts have to decide when the Insurrection Act winds up being incompatible with provisions of the Posse Comitatus Act, or when the prohibition provided by the Insurrection Act is insufficient to override the Posse Comitatus Act. And I think that this goes back to an important Supreme Court decision, the Youngstown Steel case, and in that context president Truman had come over the steel mills, claiming a kind of emergency wartime authority, and what happened there was that the court said, no, we don't think that Congress has really authorized what you're doing. In fact, there are ways in which it has not authorized what you're doing and, in particular, the use of wartime powers domestically is a very different than the wartime powers abroad.

So we have to think more narrowly about the use of wartime powers when they're happening within the country.

Pam Karlan: Yes, it's interesting also that the president seems to be taking the metaphorical idea of "war on X" to be literally a war on something. We've talked about the "war on poverty," the "war on drugs" and the like. And what he's done so far, and this may be taking us a little far further afield, but it is to say, for example, that a gang has invaded the country and therefore we're entitled to engage in war powers. That there are drug smugglers on the high seas and we are entitled to blast them out of the water. He seems to be thinking the line between the things that are traditionally military exercises and the things that aren't. The discussion where he said he thought it'd be useful to train American troops by having them go into American cities.

Bernadette Meyler: Absolutely. Yes, I think it is definitely blurring that line. One precedent might be the war on terror, where again, we had a sense of non-state actors being involved to similarly to the gangs that Trump is signaling. And also in that context, there was the use of drone strikes or other things abroad maybe similarly to the use of the military in that context. But in the context of Venezuela, that's a different thing. And that's the terminology of the "war on X" then becomes a literal use of the military to actually effectuate that war. And that's unusual. That has not really happened before.

Pam Karlan: And then just to back out another step: One of the things that was really quite striking that Secretary of Defense Pete Hegseth has done is essentially to remove all of the high-level Judge Advocate General lawyers within the military. How is that related to this stuff that's going on?

Bernadette Meyler: Yes, I think that's really important also because it gets back to what you were saying about regularity and where the rule of law is being undermined within even the military. One thing that I found striking from the district court opinion in the context of the LA deployment of the National Guard, there was were a very long discussion about how the National Guard members were trained. And a lot of the earlier training had been reversed about what they were allowed to do or not, and what counted as law enforcement activities and therefore were prohibited, even under the deployment versus what wasn't. And so, I think, there's an undermining of prior norms.

I think that the removal of these judges is similarly undermining these earlier norms. And one thing that I've found often in reading cases from military tribunals or other judges, is that even though it's an executive branch activity, there's a sense of really wanting to maintain a very strict rule of law and a very strict use of military justice. And I think that undermining the personnel who are implementing that and making it more flexible is all undermining the same regularity.

Pam Karlan: Yes, it is



MINNEAPOLIS, UNITED STATES - JANUARY 25: Over 1,000 protesters march through downtown Minneapolis in protest of Immigration Enforcement's actions in the city of Minneapolis, United States, on January 25, 2025 (Photo by Arthur Maiorella/Anadolu via Getty Images)

Civitas Outlook

Topic
Politics

Published On
Jan 26, 2026

Contributors
John G. Malcolm

Will Minneapolis Trigger the Insurrection Act?

Contributors

John G. Malcolm

Summary

Trump might invoke the Insurrection Act, but why? What is it? What are the risks? And will it succeed?

Summary

Trump might invoke the Insurrection Act, but why? What is it? What are the risks? And will it succeed?

President Donald Trump appears poised to invoke the Insurrection Act to quell the rising violence in Minnesota, posting on social media his intention of doing so, "If the corrupt politicians of Minnesota don't obey the law and stop the professional agitators and insurrectionists from attacking the Patriots of I.C.E., who are only trying to do their job." Fifteen hundred active-duty soldiers from the Army's 11th Airborne Division are standing by waiting for a deployment order. On the other hand, Minneapolis Mayor Jacob Frey, who earlier said that Immigration and Customs Enforcement (ICE) agents should "get the f——out" of the city, is saying that Trump is trying to "bait" protesters through his immigration enforcement and threatened troop deployment efforts.

The tension has been building for quite some time, and not just in Minnesota. Violent acts against federal officers have almost become common. Federal immigration detention centers are being blockaded. Death threats against ICE officers are up over 8,000 percent since last year, and attacks are up over 1,000 percent. Protestors are ramming their cars into ICE vehicles and slashing their tires. A mob broke into an unmarked FBI car during the civil unrest in Minneapolis and stole guns and ammunition; a gang member has now been charged in connection with that theft. Drug cartels and gangs are tracking the movement of ICE agents and offering bounties ranging from $2,000 to $50,000 to individuals who doxx, kidnap, or kill ICE or Customs and Border Patrol (CBP) agents and high-ranking officials. Anarchists are encouraging people to use powerful laser pointers to try to blind the pilots of federal helicopters, and some have done so. Even greater violence could soon occur in Minnesota because it has already happened elsewhere. Remember: in 2025, an individual trying to assassinate ICE agents opened fire at a Dallas detention facility, killing two detainees and injuring a third, and late in November, a 29-year-old Afghan refugee shot two National Guardsmen: Sarah Beckstrom, who died, and Andrew Wolfe, who was in critical condition but is now (miraculously) recovering. The federal government is right to be worried about its officers and officials, along with their families, becoming victims of violent crime.

Federal district court judges in California, Illinois, and Oregon entered orders prohibiting the deployment of National Guardsmen to assist ICE and CBP agents, rejecting the invocation of the statutory authority (10 U.S.C. § 12406(3)) the government was relying upon and holding that those deployments exceeded Trump's constitutional authority and violated the Posse Comitatus Act (18 U.S.C. § 1385), a federal law enacted in 1878 that generally prohibits the use of the military as a domestic police force. The Trump administration filed an emergency appeal of the Illinois order to the U.S. Supreme Court, but the justices, by a 6-3 vote, allowed that order to stand while the litigation continues below.

Significantly, though, in a concurring opinion, Justice Brett Kavanaugh stated that "the Court's opinion does not address the President's authority under the Insurrection Act," nor does it "address or purport to disturb the President's long-asserted Article II authority to use the U.S. military (as distinct from the National Guard) to protect federal personnel and property and thereby ensure the execution of federal law," (the latter being a reference to a 1971 memo from the Justice Department's Office of Legal Counsel authored by future Chief Justice William Rehnquist, which concluded that the President has inherent authority to deploy troops to protect federal property and to prevent interference with federal employees). Kavanaugh noted, ironically, that, "One apparent ramification of the Court's opinion is that it could cause the President to use the U.S. military more than the National Guard to protect federal personnel and property in the United States."

What is the Insurrection Act? The Insurrection Act's historical roots can be found in the Militia Clauses (Art. I, §8, cl. 15 & 16) of the Constitution, other potential sources of authority would include the Commander-in-Chief Clause and the Take Care Clause. It was first enacted as part of the Calling Forth Act of 1792, but has since been amended and is currently codified at 10 U.S.C. §§ 251-255. The Act has been invoked 30 times by 10 presidents, first by George Washington in 1794 to put down the Whiskey Rebellion and last by George H.W. Bush in 1992 to suppress the Los Angeles riots following the beating of Rodney King. The Supreme Court has never overturned any of these invocations.

Two provisions of the Insurrection Act are potentially implicated here. They are as follows, with my added italicizations for emphasis.

Section 252 provides:

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

And Section 253 provides:

> *The President,* by using the militia or the armed forces, or both, or by any other means, shall take such measures as *he considers necessary* to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if in—
> (1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are *unable, fail, or refuse* to protect that right, privilege, or immunity, or to give that protection; or
> (2) *opposes or obstructs the execution* of the laws of the United States *or impedes the course of justice* under those laws.

Note that the language here is extremely broad, and purports to grant a tremendous amount of discretion to the President to use the armed forces "as he considers necessary" to crack down on domestic violence when he determines that the situation is such that it is "impractical" to enforce federal law in a state through "the ordinary course of judicial proceedings." Moreover, it empowers the President to deploy the military when the violence in a state is such that "the laws of that State, and of the United States within the State," cannot be adequately executed. Thus, were the President to invoke the Insurrection Act, troops would not be limited to protecting federal property or the safety of federal officers executing the nation's immigration laws. They would be empowered to enforce all federal laws, not just immigration laws, themselves, which some would, no doubt, find alarming.

Also relevant is that the Insurrection Act is an exception to the Posse Comitatus Act. The latter generally prohibits the use of the military for law enforcement purposes. Yet, it contains an express textual exception for statutes that authorize the President to use the military for law enforcement purposes, allowing the President to invoke the Insurrection Act when necessary.

Some have criticized the Insurrection Act because of its lack of clear standards and time limits, as well as the non-involvement by Congress, and have called for it to be reformed. Such reforms have been introduced in Congress, but never enacted.

In 1827 in *Martin v. Mott*, the Court, in a unanimous opinion by Justice Joseph Story, addressed the question of whether, when confronted with "sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union," the President would be "the sole and exclusive judge whether the exigency has arisen ...." The justices answered that question in the affirmative, stating that they were "all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons."

In 1849, in *Luther v. Borden*, the Court, in a 5-1 decision (with three justices not participating "on account of ill health when this case was argued") reiterated this view. The Court answered the question, "After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right?" The Court said the answer was "no," adding that if the judicial power were to extend that far, it would be "a guarantee of anarchy, and not of order." The Court acknowledged that some believe that repositing this much power in a President could "be dangerous to liberty, and may be abused." But, the Court concluded, "All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual." Suffice it to say that President Trump's critics would likely disagree with this assessment.

It is, of course, an open question whether the Supreme Court would be open to re-examining *Mott* and *Luther*, which are, after all, nearly two centuries old. The Court has been known to re-examine precedents that seemed to give the executive branch broad discretion, as evidenced by several rulings issued during the Bush administration's War on Terror, including *Hamdi v. Rumsfeld* (2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008).

There are other foundational constitutional questions lurking too. For example, Ninth Circuit Judge Jay Bybee—a George W. Bush appointee and former head of the Justice Department's Office of Legal Counsel—has raised the issue of whether the Domestic Violence Clause (Article IV, Section 4), which provides that the federal government shall protect the states "on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence," might prohibit a President from invoking the Insurrection Act in the absence of such a request from the state. Bybee also raises the possibility that a President's invocation of the Insurrection Act might be pretextual, as well as questioning whether special deference to a President, which is normally reserved for foreign affairs and national security, is warranted in this domestic context.

If the President invokes the Insurrection Act, the political and legal stakes will be high, especially with the midterm elections looming. Many believe that ICE agents have been overly aggressive in enforcing the law, leading to a sudden drop in support for those efforts, according to a slew of recent polls (see here, here, here, here, here, here, and here). The recent killings of two protestors by federal agents have only further inflamed what was already a charged atmosphere and volatile situation.

At this point, it is an open question whether the President will invoke the Insurrection Act. But if he does, how it will fare in the courts and whether it will minimize or exacerbate the violence currently occurring on the streets of several major cities is anybody's guess.

John G. Malcolm is the Vice President of the Edwin Meese III Institute for the Rule of Law at Advancing American Freedom.

Bookmark | Email | Print/PDF

More articles

Will the DSA Turn America Against Itself?
Politics • Aug 26, 2026

Can the Welfare State Be Reformed?
Politics • Aug 26, 2026

View all

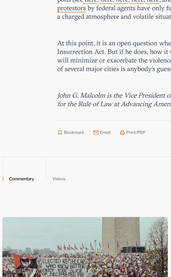
Join the newsletter

Receive new publications, news, and updates from the Civitas Institute.

Sign up

More on
Politics

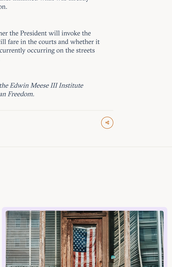
Commentary | Videos



Will the DSA Turn America Against Itself?

The DSA was meant to surprise.

Juliana Geran Pilon Politics • Aug 26, 2026



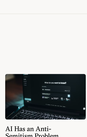
Can the Welfare State Be Reformed?

Chris Popes's "The American Way of Welfare" begins with a messy, expansive system that no one seems willing to reform, even when it serves poor people badly.

Veronique de Rugy Politics • Aug 26, 2026

AI Has an Anti-Semitism Problem

Politics • Aug 25, 2026



A Bigger Map, The Same Problems: Newsom's...

Politics • Aug 24, 2026