

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

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## 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.<sup>1</sup>

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.<sup>2</sup> 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.

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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.

Beyond these flaws, the law is also badly outdated. It was last amended in the 1870s, as the federal government struggled to contain a violent insurgency in the South spearheaded by the Ku Klux Klan. The civilian law enforcement resources available to counter this threat were negligible. The threats to law and order that exist today look nothing like those that marked the aftermath of the Civil War, and the capabilities of civilian law enforcement are orders of magnitude greater. Yet the law remains unchanged.

Even in a vacuum, the need to reform the Insurrection Act would be obvious. Unchecked executive discretion to use the military as a domestic police force is simply incompatible with liberal democracy. The events that took place between the 2020 presidential election and January 6, however, underscore the urgency of reform. From the time it became clear that Joe Biden had won the 2020 presidential election, close allies of Trump were seeking ostensibly “legal” ways that he could use emergency powers to overturn the election results. Several called on Trump to invoke the Insurrection Act and deploy federal troops for the purpose of impeding the transition.

Although the Insurrection Act would not have given Trump any power to overturn the election results, the danger of Trump invoking the Act was real, and it was particularly acute on January 6. The attack on the U.S. Capitol would have provided a ready excuse for triggering the Act and using the military to shut down Congress, thus preventing or delaying the certification of the vote — and potentially leading to more violence. It would have been up to the courts to reject this move, and courts have refused to question presidents’ judgment about the necessity of deploying troops in domestic emergencies.

In this article, we propose comprehensive reforms to the Insurrection Act. Our recommended changes would clarify and narrow the criteria for deployment, specify what actions are and are not authorized when the Act is invoked, and allow both Congress and the courts to serve as checks against abuse or overreach. At the same time — and recognizing that the attack of January 6 could presage future violence that might test the capacity of civilian law enforcement — we have sought to preserve sufficient flexibility to ensure that presidents can respond to urgent crises quickly and with the resources they need.

This article proceeds in four parts. The first discusses the Anglo-American tradition against military interference in civilian affairs and that tradition’s most significant expression in U.S. law today: the Posse Comitatus Act. Part II provides an overview of the Insurrection Act, the history of its development, and a summary of how past presidents have used it. Part III then addresses the problems with the Act — from the opacity of the language to the outdated assumptions upon which it rests — and explores why these problems make the Act especially dangerous now. Part IV lays out in detail our proposal for replacing the Insurrection Act with a law that better defines the boundaries of the president’s power and includes effective checks against abuse. Finally, the article includes a brief appendix summarizing our reform proposal.

## I. THE PRINCIPLE OF *POSSE COMITATUS*

Before delving into the Insurrection Act, it is important to understand the long-standing principles that govern the domestic deployment of federal troops in the United States. These principles first found expression in the laws of England, centuries before the founding of our nation. They are reflected in the design of our Constitution and ultimately embodied in the Posse Comitatus Act.

### A. *The Anglo-American Tradition Against Military Interference in Civilian Affairs*

There is a tradition in this country, “born in England and developed in the early years of our nation, that abhors military involvement in civilian affairs.”<sup>3</sup> It flows from a fear, shared by “[p]eople of many ages and countries,” of the subordination of civilian authority to military rule.<sup>4</sup> In the United States, “that fear has become part of our cultural and political institutions.”<sup>5</sup>

In Anglo-American law, efforts to constrain military intrusion into civilian government can be traced all the way to the Magna Carta, which declares that “no free man shall be . . . imprisoned . . . or in any other way destroyed . . . except by the legal judgment of his peers or by the law of the land.”<sup>6</sup> Four hundred years later, the Petition of Right added further protections, outlawing both the quartering of troops in private homes and the use of martial law commissions to punish civilians.<sup>7</sup> Both of these documents resulted from Britain’s direct experience with kings who used their armies to oppress and burden the civilian population.<sup>8</sup> The fact that the Magna Carta and the Petition of Right limited British monarchs’ power to use the military domestically was just as important as the specifics of the restrictions they imposed, because it established a precedent in Anglo-American law for *legislative* control over the domestic activities of the military—a precedent that was almost four hundred years old at the time the first U.S. colonies were founded.

A century and a half after the Petition of Right, the American Revolution was sparked in part by what the American colonists saw as the betrayal of these fundamental promises by the British government.<sup>9</sup> Thus, the Declaration of Independence charges King George III with:

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3. JENNIFER K. ELSEA, CONG. RSCH SERV., R42659, *THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW* 1 (2018).

4. *Duncan v. Kahanamoku*, 327 U.S. 304, 319 (1946).

5. *Id.*

6. ELSEA, *supra* note 3, at 2 (quoting Magna Carta, ch. 39 (1225) [ch.29 in the Charter of King John (1215)], reprinted in WILLIAM F. SWINDLER, *MAGNA CARTA: LEGEND AND LEGACY* 315–16 (1965)).

7. ELSEA, *supra* note 3, at 3 (citing Petition of Right, 3 Car. I, c.1, §§ 3, 4, 7, 10, reprinted in WILLIAM STUBBS, *SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST 515–17* (8th ed. 1895)).

8. ELSEA, *supra* note 3, at 2. See generally JOHN M. COLLINS, *MARTIAL LAW AND ENGLISH LAWS, c.1500–c.1700* (2016).

9. David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 24–25 (1971).

[Keeping] among us, in times of peace, Standing Armies without the Consent of our legislatures . . . affect[ing] to render the Military independent of and superior to the civil power . . . Quartering large bodies of armed troops among us [and] protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States.<sup>10</sup>

In 1787, with memories of the British military's transgressions still fresh in their minds, the delegates to the Constitutional Convention in Philadelphia sought to ensure that they would not be repeated under the new system of government.<sup>11</sup> As Justice Robert Jackson explained in the landmark case of *Youngstown Sheet & Tube Co. v. Sawyer*, the drafters of the Constitution "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation."<sup>12</sup> Indeed, their experiences had left them so suspicious of military power that the Convention's attendees vigorously debated whether even to allow for a national standing army.<sup>13</sup> They feared that such an army could easily be turned inward, becoming an instrument of tyranny that threatened both the rights of the states and individual liberty.<sup>14</sup> Yet the failure of the Articles of Confederation had also demonstrated the problems that come with a weak central government.<sup>15</sup>

In the end, the framers struck a balance. To guard against executive tyranny, the Constitution gives most of the powers related to regulating the military and its activities to Congress, not the president. Of particular relevance here, it allows Congress to authorize domestic deployment of the military for certain emergencies<sup>16</sup>—a concession to the inevitability of crises in any society, but one that preserves the primacy of legislative control. In addition, the Bill of Rights—and particularly the Third, Fourth, and Fifth Amendments—places limits on the military's domestic operations that not even Congress can override.<sup>17</sup> Aside from allowing congressionally-approved domestic deployment and permitting Congress to authorize

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10. THE DECLARATION OF INDEPENDENCE paras. 13–14, 16–17 (U.S. 1776).

11. See Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 156–158 (2004).

12. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

13. Vladeck, *Emergency Power*, *supra* note 11, at 156.

14. See *Reid v. Covert*, 354 U.S. 1, 23–24 (1957) ("The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. . . . The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders."); *Perpich v. U.S. Dep't of Def.*, 496 U.S. 334, 340 (1990) ("[T]here was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States . . ."). See generally Anthony Ghitto, *Defending Against the Military: The Posse Comitatus Act's Exclusionary Rule*, 11 HARV. NAT'L SEC. J. 359, 371–375 (2020).

15. Vladeck, *Emergency Power*, *supra* note 11, at 156–157.

16. U.S. CONST. art. I, § 8, cl. 15.

17. U.S. CONST. amends. III, IV, V.

suspension of the writ of *habeas corpus*, the Constitution makes “no [other] express provision for exercise of extraordinary authority because of a crisis.”<sup>18</sup>

### B. *The Posse Comitatus Act*

The Posse Comitatus Act adds to these protections, just as the Petition of Right built upon the Magna Carta. In doing so, it reaffirms the ancient Anglo-American legal tradition that the military must keep out of civilian affairs except in those circumstances where the legislature has expressly provided for its involvement.

The law was enacted in 1878, after the end of Reconstruction and the return of white supremacists to political power in both southern states and Congress. Its immediate object was to prevent the federal military from intervening in the establishment of Jim Crow in the former Confederacy. Despite its ignominious origins, however, the broader principle it enshrines—that the military should not intrude on the affairs of civilian government—is a core American value, as explained above.

The Act consists of a single sentence, now located at 18 U.S.C. § 1385, which provides:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>19</sup>

The Act covers most of the federal armed forces, as well as National Guard forces if they have been called into federal service, or “federalized,” by the president.<sup>20</sup> It does not apply to National Guard forces when they are operating under state command and control, nor does it apply to the Coast Guard, which has been given broad law enforcement authority by Congress.<sup>21</sup> Forces covered by the Act are barred from participating in civilian law enforcement activities unless an exception applies. The Act does not prevent covered military forces from performing non-law enforcement duties, such as carrying out domestic disaster relief operations under the Stafford Act.<sup>22</sup>

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18. *Youngstown*, 343 U.S. at 650 (Jackson, J., concurring).

19. 18 U.S.C. § 1385.

20. *Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999); *United States v. Hutchings*, 127 F.3d 1255, 1258 (10th Cir. 1997); *United States v. Benish*, 5 F.3d 20, 25–26 (3d Cir. 1993); *United States v. Kylo*, 809 F. Supp. 787, 792–93 (D. Or. 1992), *aff’d*, 190 F.3d 1041 (9th Cir. 1999), *rev’d on other grounds*, 533 U.S. 27 (2001); *Wallace v. State*, 933 P.2d 1157, 1160 (Alaska App. 1997). *See generally* ELSEA, *supra* note 3.

21. *See* 14 U.S.C. §§ 2, 89, 91; 19 U.S.C. §§ 1401(i), 1709(b). *See generally* Greg Shelton, *The United States Coast Guard’s Law Enforcement Authority Under 14 U.S.C. § 89: Smugglers’ Blues or Boaters’ Nightmare?*, 34 WM. & MARY L. REV. 933 (1993); Christopher A. Abel, *Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy, and Federal Law Enforcement at Sea*, 31 WM. & MARY L. REV. 445 (1990).

22. 42 U.S.C. ch. 68, §§ 5121–5208.

Although the text of the Posse Comitatus Act allows for federal military participation in law enforcement “in cases and under circumstances expressly authorized by the Constitution,”<sup>23</sup> no constitutional exceptions to the Act are generally recognized. To be sure, this is a subject of scholarly debate.<sup>24</sup> Yet the legislative history of the Act suggests that its drafters chose to include the language about express constitutional exceptions as part of a face-saving compromise, not because they believed any existed.<sup>25</sup> The Department of Defense and the Department of Justice’s Office of Legal Counsel have asserted authority to deploy federal troops for law enforcement purposes based on alleged inherent constitutional exceptions to the Act,<sup>26</sup> but these claims have never been endorsed by Congress or adjudicated by a court.<sup>27</sup> Fundamentally, the plain text of the Act allows only for “express” exceptions, and nothing in the Constitution expressly authorizes the president to use the military for law enforcement under *any* circumstances.

By contrast, Congress has created numerous *statutory* exceptions to the Posse Comitatus Act. These exceptions fall into three different categories. First, as noted above, Congress has given significant civilian law enforcement authority to the Coast Guard.<sup>28</sup> Second, it has enacted a set of broad authorizations for the military to share information and equipment with civilian law enforcement agencies, subject to restrictions on direct, active engagement in law enforcement.<sup>29</sup> Finally, it has enacted a number of more specific statutes that allow the armed forces to participate directly in law enforcement in certain circumstances. This last category includes the Insurrection Act and twenty-five other statutes.<sup>30</sup>

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23. 18 U.S.C. § 1385.

24. See ELSEA, *supra* note 3, at 28–30.

25. *Id.* at 28.

26. 32 C.F.R. § 215.4(b), (c)(1) (repealed 2018); U.S. DEP’T OF DEF., DIRECTIVE 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES 6 (Dec. 29, 2010, incorporating change Mar. 19, 2018), <https://perma.cc/RD6V-WHH2>; Memorandum from William H. Rehnquist, Ass’t Att’y Gen., Office of Legal Counsel, to Robert E. Jordan III, Gen. Counsel, Dep’t of the Army, Authority to Use Troops to Protect Federal Functions, Including Safeguarding of Foreign Embassies in the United States (May 11, 1970) (on file with author); Memorandum from William H. Rehnquist, Ass’t Att’y Gen., Office of Legal Counsel, to the Acting Gen. Counsel, Dep’t of the Army, Authority to Use Troops to Prevent Interference With Federal Employees by Mayday Demonstrations and Consequent Impairment of Government Functions (Apr. 29, 1971), <https://perma.cc/7BE6-XWDZ>.

27. Constitutional scholars have expressed skepticism over the executive branch’s claims that the Constitution accords the president broad inherent powers that Congress cannot check. See, e.g., H. JEFFERSON POWELL, *THE PRESIDENT AS COMMANDER IN CHIEF: AN ESSAY IN CONSTITUTIONAL VISION* 53–135 (2014); Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 *YALE L.J.* 2480 (2006); Neil Kinkopf, *Inherent Presidential Power and Constitutional Structure*, 37 *PRES. STUD. Q.* 37 (2007).

28. See *supra* note 21.

29. See 10 U.S.C. §§ 271–274, 282–284; 18 U.S.C. § 831; 42 U.S.C. § 98.

30. See 5 U.S.C. App. § 8(g); 10 U.S.C. §§ 251–255, 12406; 16 U.S.C. §§ 23, 78, 593, 1861(a); 18 U.S.C. §§ 112, 351, 1116, 1201, 1751, 3056 note, 3192; 22 U.S.C. §§ 408, 461–462; 25 U.S.C. § 180; 42 U.S.C. §§ 97, 1989, 5170b; 43 U.S.C. § 1065; 48 U.S.C. §§ 1418, 1422, 1591; 49 U.S.C. § 324; 50 U.S.C. § 220.

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.<sup>31</sup>

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.<sup>32</sup> 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.”<sup>33</sup> 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.”<sup>34</sup> 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.<sup>35</sup> It allows the president to call the states’ militia into federal service and deploy them, and/or members of the federal

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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]henver 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.<sup>36</sup> 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."<sup>37</sup> 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.<sup>38</sup> Finally, Section 255 provides that Guam and the U.S. Virgin Islands are "States" for the purposes of the chapter.<sup>39</sup>

### *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.<sup>40</sup> 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.<sup>41</sup>

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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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> The 1795 Act also allowed the president to issue the proclamation to disperse simultaneously with the deployment of troops, rather than beforehand.<sup>47</sup> 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.<sup>48</sup> Yet, although the 1795 Act greatly enhanced the president’s power, it also served as a

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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.”<sup>49</sup>

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.<sup>50</sup> 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.<sup>51</sup> 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*.<sup>52</sup>

In 1861, Congress again amended the 1795 Act, this time to facilitate the federal government’s ability to prosecute the Civil War.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup> Among other things, the

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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<sup>57</sup>—and the state government was unable or unwilling to protect that right.<sup>58</sup> This authority is now codified at 10 U.S.C. § 253 and has not been substantively amended since it was enacted.<sup>59</sup>

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.<sup>60</sup> This codification process brought the last meaningful, substantive changes to what is today the Insurrection Act.<sup>61</sup> First, Congress removed the first prong of the 1795 Act—the authorization for the president to deploy troops to repel invasions.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>

Subsequent modifications to the Insurrection Act have been predominantly superficial, consisting mostly of a series of recodifications.<sup>66</sup> 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).<sup>67</sup> In addition, in 1968,

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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.<sup>68</sup>

### *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.<sup>69</sup> Presidents have issued a total of forty Insurrection Act proclamations.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup>

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

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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.<sup>75</sup> President Abraham Lincoln relied on the Act for much the same reason, albeit on a far larger scale, during the Civil War.<sup>76</sup> 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.<sup>77</sup>

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.<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup> President Lyndon B. Johnson similarly used the Act to provide protection for civil rights marchers in Alabama.<sup>83</sup> 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

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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.<sup>84</sup> 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

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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.”<sup>85</sup> 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).<sup>86</sup> 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.<sup>87</sup>

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 82<sup>nd</sup> 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,<sup>88</sup> to determine whether those criteria have been met. The 1792 version of the Act required judicial approval before the president could deploy troops to

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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.”<sup>89</sup> Thus, the Court concluded, judges cannot review whether a president’s decision to invoke the Insurrection Act was justified by the circumstances.<sup>90</sup> 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.<sup>91</sup> The Court also clarified that courts may review the lawfulness of the military’s actions subsequent to deployment<sup>92</sup>—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.<sup>93</sup> There is no requirement that the president exhaust non-military options or otherwise treat the deployment of federal forces as a last

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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.<sup>94</sup> The law quite literally places no limits on what actions the president can take under this provision.<sup>95</sup> 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.”<sup>96</sup> Military deployment, in short, risks an escalation in violence—a phenomenon that has been tragically demonstrated on multiple occasions in U.S. history.<sup>97</sup> A lack of clear and enforceable criteria for deployment makes such an outcome more likely.

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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.<sup>98</sup> 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,<sup>99</sup> and there were no state-wide police departments.<sup>100</sup> 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.<sup>101</sup> As for federal law enforcement, it primarily consisted of the U.S. Marshals. The Department of Justice was not created until 1870,<sup>102</sup> and the FBI was established in 1908.<sup>103</sup> 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.<sup>104</sup> 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,<sup>105</sup> with a combined budget of \$123 billion.<sup>106</sup> The New York Police Department alone has 36,000 officers.<sup>107</sup> These state and local

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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.<sup>108</sup> To put this number in perspective, U.S. federal law enforcement officers outnumber active-duty members of the Canadian and Australian armed forces combined.<sup>109</sup> 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.<sup>110</sup> 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.”<sup>111</sup> 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.<sup>112</sup> 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

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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.”<sup>113</sup> Reportedly, President Trump seriously considered doing so.<sup>114</sup>

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,<sup>115</sup> 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.<sup>116</sup>

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.<sup>117</sup> After the election, when it became clear that Biden had won, numerous Trump allies—including Stone,<sup>118</sup> Mike Lindell,<sup>119</sup> and (reportedly) Sidney Powell<sup>120</sup>—continued to encourage him to invoke the

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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.<sup>121</sup>

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.<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup> By contrast, the Insurrection Act should be understood to allow the military to *assist*, rather than replace, civilian authorities.<sup>125</sup>

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.<sup>126</sup> 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.<sup>127</sup> 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.”<sup>128</sup> 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.<sup>129</sup>

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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-Q69LI>; 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.<sup>130</sup> 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<sup>131</sup>—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.<sup>132</sup>

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

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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.

at his disposal. One possible explanation lies in the fact top military leaders—in particular, Acting Secretary of Defense Christopher Miller and Chairman of the Joint Chief of Staff Mark Milley—were committed to preventing the use of military power to subvert the election results.<sup>133</sup> Perhaps their opposition, and that of other key members of the administration, was sufficient to head off that outcome. But we cannot rely on fortuitous personnel choices to prevent abuse of a statute that confers nearly unlimited discretion. The next president with autocratic ambitions will study what happened on January 6 and will be careful to appoint military leaders whose loyalty to the president is greater than their loyalty to the Constitution.

In short, the potential for abuse of the Insurrection Act has been made manifest. To borrow from Justice Robert Jackson’s dissent in *Korematsu v. United States*, the Act, like the poisonous principle underlying the *Korematsu* majority opinion, “lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”<sup>134</sup> It will continue to do so unless and until Congress acts to reform it.

#### IV. REFORM PROPOSAL

Addressing the problems with the Insurrection Act described above, and the attendant risks to our democracy, will require more than minor tweaks to the existing provisions. The haphazard way in which the current version of the law was pieced together from prior enactments creates both overlap and potential inconsistencies among its provisions. Its antiquated language leaves significant uncertainty over the circumstances in which it may be used. Most important, the broad discretion it confers on the president to use federal forces as a domestic police force, while dangerous at any point in our nation’s history, is both unwarranted and unacceptable in modern times. In short, the Insurrection Act requires a fundamental overhaul to bring it into the twenty-first century and better tailor it to the challenges our democracy currently faces.

In attempting such an overhaul, it is important to recognize that the authority to deploy military force domestically remains a critical one. Even though civilian law enforcement agencies will be able to handle most instances of civil unrest, there could be situations in which they are overwhelmed. One lesson of January 6 is that we are living in unprecedented and highly combustible times. One could imagine a January 6-style insurrection designed to depose a president who won reelection rather than to reinstate a president who lost. The Insurrection Act could be vital in that instance to maintaining the rule of law and defending democracy. We have also seen increasing instances of violence by white supremacists against people protesting racial injustice. Law enforcement agencies generally should be

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133. See Ryan Goodman & Justin Hendrix, *Crisis of Command: The Pentagon, The President, and January 6*, JUST SEC. (Dec. 21, 2021), <https://perma.cc/9TR8-YBRT>.

134. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (describing the danger of a judicial precedent that ratifies illegal military actions undertaken in response to an emergency).

able to handle such instances, but they have often failed to take needed action,<sup>135</sup> and there is the potential for more widespread and severe violence that could be beyond their capacity to address. The Insurrection Act must be available—and potent—in such cases.

With these factors in mind, we have developed a proposal for a reformed and updated version of the Insurrection Act to replace the existing law.<sup>136</sup> In arriving at our recommendations, we consulted extensively with a group of experts in the relevant areas of constitutional and military law.<sup>137</sup> We also collaborated with, and sought input from, a small coalition of organizations—both progressive and conservative—formed in 2020 with the goal of shoring up legal guardrails on the domestic deployment of the military.

The Appendix to this article includes an outline of our reform proposal, set forth in lay terms rather than legislative language for ease of comprehension. Below, we address each provision or set of provisions in that outline separately; the provision or set of provisions is presented in boldface, followed by an explanation of the reasoning behind it.

**Statement of Constitutional Authority. This Act represents an exercise of Congress’s authorities under Art. I, sec. 8, clauses 14, 15, 16, and 18; Art. IV, sec. 4; and Amend. XIV, Sec. 5.**

On occasion, Congress specifies within the text of a bill the constitutional authority under which it is acting. We think such language would be valuable here, both to reinforce that Congress has the authority to constrain presidential power when it comes to the domestic use of military force and to underscore federal authority to safeguard constitutional rights in instances where states are unable or unwilling to do so.

**Statement of Policy. It is the policy of the United States that domestic deployment of U.S. armed forces for the purposes set forth in this statute should be a last resort and should be ordered only if state authorities cannot or will not suppress the insurrection, rebellion, domestic violence, or**

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135. See MICHAEL GERMAN & SARA ROBINSON, BRENNAN CTR. FOR JUST., *WRONG PRIORITIES IN FIGHTING TERRORISM* 1 (2018).

136. Some of the reforms we propose, including requirements for certification, congressional approval, and judicial review, have been proposed by others who have studied the Insurrection Act and its flaws. See, e.g., Mark Nevitt, *Domestic Military Operations – Reforming the Insurrection Act*, JUST SEC. (Oct. 20, 2020), <https://perma.cc/W63U-6BNA>; Kelly Magsamen, *4 Ways Congress Can Amend the Insurrection Act*, CTR. FOR AMERICAN PROGRESS (June 12, 2020), <https://perma.cc/36SD-MDE8>.

137. These experts include Scott R. Anderson, Fellow, Brookings Institution; William C. Banks, Professor of Law Emeritus, Syracuse University College of Law; Stephen Dycus, Professor Emeritus, Vermont Law School; Eugene R. Fidell, Visiting Lecturer in Law, Yale Law School and Adjunct Professor of Law, NYU Law School; Thaddeus A. Hoffmeister, Professor of Law, University of Dayton School of Law; Mark Nevitt, Associate Professor of Law, Emory University School of Law; Dakota Rudesill, Associate Professor of Law, Moritz College of Law, The Ohio State University; and Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas at Austin School of Law (affiliations are listed for identification purposes only). The inclusion of their names here does not reflect any endorsement of this proposal.



**obstruction of law at issue, and federal law enforcement authorities are unable to do so.**

The Posse Comitatus Act reflects the principle that military involvement in civilian law enforcement should be a rare exception to the rule. However, on its face, the current Insurrection Act permits the deployment of federal troops even in situations that could be addressed by state authorities (including state and local law enforcement and, where necessary, the state National Guard)—or, failing that, by federal law enforcement. This statement of policy makes clear that deployment of federal troops should be a last resort. Although aspects of this policy are made concrete through the revised criteria for deployment (see “Triggering Circumstances,” below), we believe it is valuable to include a stand-alone statement that can guide the president, Congress, and the courts in their interpretation and application of the authorities provided by the law.

This statement of policy does not create a prohibition on deploying federal troops unless other alternatives had been exhausted, and we have not included such an exhaustion requirement in any of the substantive criteria. There may be cases in which it is evident that lesser options would be ineffective and delay would be dangerous. The president must be able to deploy federal forces quickly in such cases.

**Triggering Circumstances**

The Insurrection Act addresses three main sets of circumstances: insurrections or rebellions, obstruction of the law, and domestic violence. These track the authorities and obligations set forth in the Constitution: the “Calling Forth Clause” authorizes Congress to provide for calling forth the militia to “suppress Insurrections” and to “execute the Laws of the Union,”<sup>138</sup> while the “Guarantee Clause” requires the United States to protect the states, at their request, against “domestic Violence.”<sup>139</sup>

These three categories are conceptually distinct. “Insurrection” and “rebellion” describe uprisings against federal, state, or local governments; “domestic violence” describes violent unrest generally, which need not be targeted against a governmental body; and “obstruction of the law” need not involve either an effort to overthrow government or actual, current violence. The specific criteria for deployment in each instance should match the nature of the threat. However, the current Act scatters these categories across its three provisions, creating redundancies, potential inconsistencies, and ill-fitting criteria. Our revised version would treat each set of circumstances separately, streamlining the law and making it more tailored and coherent.

In addition, while the presence of circumstances triggering the Act’s authorities will necessarily be determined by the president in the first instance, our proposed legislation would not commit this determination to the president’s sole and unreviewable discretion. For instance, Section 252 in its current form may be

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138. U.S. CONST. art. I, § 8, cl. 15.

139. U.S. CONST. art. IV, § 4.

invoked “[w]henver the President considers that” certain circumstances exist; our proposal would eliminate this language.

**The authorities provided by this Act may be invoked in any of the following circumstances:**

- **Insurrection or rebellion against government authority in such numbers, and/or with such force or capacity, as to overwhelm civilian authorities. If the insurrection or rebellion is against a state or local government, the legislature of that state, or the governor if the legislature cannot be convened, must request an invocation of the Act.**

This is similar to the existing Section 251, which addresses insurrections against state governments, with three changes. First, it includes “rebellion against government authority,” which is currently addressed in Section 252. The concepts of “insurrection” and “rebellion” are closely related, and it makes sense to address them together. Second, it includes insurrection against the federal government—currently lumped in with various other triggering circumstances under Section 253—while making clear that state consent is not required to suppress an insurrection in such an instance. Third, it specifies that the insurrection or rebellion must be of such size or force as to overwhelm civilian authorities.

- **Domestic violence that is widespread or severe in one or more cities or states, if state authorities request assistance or if they are unable or otherwise fail to address the violence.**

Currently, Section 253 authorizes deployment to suppress domestic violence, with or without states’ consent, *if* it interferes with the execution of federal law or any right or protection guaranteed by the Constitution. Even if domestic violence does not interfere with federal law or constitutional rights, however, it may rise to a level that requires military intervention.

To justify deployment in response to domestic violence, two conditions should be met. Violence that does not undermine federal law would generally be a matter for the states to handle under the “police power” reserved to them by the Constitution.<sup>140</sup> Federal troops therefore should be deployed only at the states’ request or if local authorities cannot (or will not) address the violence. In addition, deployment should occur only if the violence is widespread or severe, to ensure that presidents cannot misuse federal troops to address isolated acts of

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140. U.S. CONST. amend. X; THE FEDERALIST NO. 45 (James Madison) (“The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”). See generally Collins Denny, Jr., *Growth and Development of the Police Power of the State*, 20 MICH. L. REV. 173 (1921); Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745 (2007).

violence at the fringes of otherwise peaceful protests, increases in overall violent crime rates, or other situations that do not truly rise to the level of “domestic violence” as conceived in the Constitution.

- **Obstruction of law, under one or more of the following circumstances:**
  - **Obstruction of federal or state law within a state that has the effect of depriving any part or class of its people 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.**
    - **This provision shall be construed to encompass the obstruction of any provision of Subtitle I of Title 52 of the U.S. Code regarding the protection of the right to vote. Any deployment in such circumstances shall be subject to 52 U.S.C. § 10102, 18 U.S.C. § 592, 18 U.S.C. § 593, and any other applicable statutory limitations designed to protect the right to vote.**
    - **In any situation covered by this clause, the State shall be considered to have denied the equal protection of the laws secured by the Constitution.**
  - **Obstruction of federal law by private actors—**
    - **in such numbers, or with such force or capacity, as to overwhelm state authorities; or**
    - **that state authorities fail to address, where such obstruction creates an immediate threat to public safety and the deployment of federal civilian authorities is insufficient to ensure enforcement of the law.**
  - **Obstruction of, or refusal to comply with a court order to enforce, federal law by the state or its agents, under circumstances in which the deployment of federal civilian authorities is insufficient to ensure enforcement of the law.**

Under the current Sections 252 and 253, obstruction of the law may trigger deployment of federal troops *if* the obstruction is occasioned by “insurrection,” “rebellion against the authority of the United States,” “domestic violence,” “unlawful obstructions, combinations, or assemblages,” or “conspirac[ies].” Our proposal would remove this requirement. As discussed above, we believe insurrections/rebellions and domestic violence are conceptually distinct categories that should be treated separately from obstruction of the law. As for “unlawful obstructions, combinations, or assemblages,” or “conspirac[ies],” we do not believe that they provide useful limiting principles. These terms are archaic and undefined, and they potentially expand the reach of the Insurrection Act to include minor legal infractions.

A better approach, we believe, is to focus on the *effect* of the obstruction—combined with the inability or unwillingness of civilian authorities to address the issue—in order to limit deployments to situations where the extreme step of deploying federal troops is justified. In our assessment:

- Obstruction of the law that deprives entire classes of persons of their constitutional rights justifies federal military intervention, without further evidence of harm, if state authorities cannot or will not protect those rights.
- Obstruction of other federal laws by private actors justifies military intervention if the obstruction creates an immediate threat to public safety, and if state authorities or federal law enforcement are unable (or, in the case of state authorities, unwilling) to enforce the law.
- Obstruction of federal law by state authorities, or a refusal on the part of state authorities to comply with court orders to enforce federal law, represent a form of state rebellion against the federal government. As such, they have serious constitutional implications that warrant military intervention in those situations where federal law enforcement is unable to enforce the law.

Focusing on the effects of obstruction led us to subdivide the current paragraph (2) of Section 253 into two categories, as we believe the harms of obstructing federal law are different when perpetrated by private versus state actors. We have proposed virtually no changes, however, to paragraph (1) of Section 253, which is the part of law that has been used at various points in U.S. history to enforce civil rights laws. The sole change we recommend is to make explicit the fact that the “right[s], privilege[s], immunity[ies], or protection[s] named in the Constitution and secured by law” include federal laws that protect the right to vote, and that federal troops may be deployed to enforce those laws. If deployed in those circumstances, troops would remain subject to laws that limit federal military presence at polling places—laws that themselves play an important role in protecting the right to vote.

#### **Actions authorized/not authorized**

Section 251 of the current Act authorizes the president to “call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.” Section 252 contains similar language: It allows the president to “call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary” under the circumstances.

The term “States” is defined to include Guam and the Virgin Islands, but it excludes the District of Columbia and Puerto Rico, even though their federalization and deployment under the Act could be an important tool, in some cases, for responding to unrest. Moreover, although the Insurrection Act itself does not

define “militia,” 10 U.S.C. § 246 defines the “militia of the United States” to include “all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.” This raises the specter that a future president might interpret the Insurrection Act to authorize the deputization of private militias.

Section 253 goes even further than Sections 251 and 252. It allows the president to “take *such measures as he considers necessary*” to address the circumstances described in that provision, whether “by using the militia or the armed forces, or both, or by *any other means*.” As discussed above, this is a boundless and highly dangerous delegation of authority—one that courts would be unlikely to uphold if interpreted literally.

In short, it is critical that the Insurrection Act specify what actions are permitted and what actions are prohibited, lest it become a vehicle for presidents to assert unlimited authority backed by military force.

- **Authorized: Deployment of U.S. armed forces, to include the National Guard and state defense forces of all the 50 states, the territories of Guam and the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the District of Columbia when called into federal service. While deployed under the Act, these forces must operate under the standing rules for use of force.**

This provision would specify that the “militia” to be called into federal service includes the states’ National Guard services (the modern incarnation of the state militias)—including those of Washington, D.C., and Puerto Rico, which are currently excluded—as well as state defense forces for the 22 states, along with Puerto Rico, that currently have them.<sup>141</sup> It would not provide any authority to deputize private militias—which, in any event, are illegal in most states<sup>142</sup>—to serve in the U.S. armed forces.

Under current law, state defense forces may not be called into federal service.<sup>143</sup> But Congress is free to legislate exceptions to that rule,<sup>144</sup> and it should do so here. If a governor were to deploy state defense forces for purposes of obstructing federal law or rebelling against the authority of the United States, the president must be able to federalize those forces and order them to stand down. By analogy, when President Eisenhower invoked the Insurrection Act to enforce desegregation in Little Rock, Arkansas, he federalized the Arkansas National

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141. See Joseph Nunn, *Reestablishing Florida's State Guard Won't Give DeSantis a Private Army*, JUST SEC. (Dec. 14, 2021), <https://perma.cc/3K89-PZW9>.

142. INST. FOR CONSTIT. ADVOC. AND PROT., GEORGETOWN LAW, PROHIBITING PRIVATE ARMIES AT PUBLIC RALLIES (3d ed. 2020), <https://perma.cc/CJW9-5V9X>.

143. 32 U.S.C. § 109(c).

144. Nunn, *Reestablishing Florida's State Guard*, *supra* note 141.

Guard—not only to support the active-duty armed forces he deployed, but also to ensure that the Guard did not carry out orders from Governor Orval Faubus to prevent desegregation.<sup>145</sup>

We have not sought to place any limits or conditions on the number of federal forces the president may deploy or the weaponry or technology they may bring to bear. This is a significant choice, as the modern U.S. military has capabilities and weaponry that Congress could never have imagined when it last amended the Act in 1874. Nonetheless, the core of the Insurrection Act is the president’s ability to deploy the military quickly and in a manner that is equal to the threat being posed. We have therefore left these tactical decisions to the president.

We have specified, however, that federal forces deployed under the Act must operate in accordance with the standing rules for the use of force (RUF) rather than the standard rules of engagement (ROE). As described by one expert:

As a general matter, ROE govern military operations in environments where host-nation law enforcement and civil authorities are nonexistent or otherwise resistant to U.S. military presence. Rules of engagement involve a more “combat-mindset.” It may even involve a declaration that certain forces are hostile, whether or not the individual poses an imminent threat of death or serious personal injury. Rules of engagement are employed largely outside the U.S. in uncertain environments – think of the ongoing military operation in Afghanistan.

In contrast, rules for the use of force (“RUF”) are based on a law enforcement and self-defense mission and mindset to include . . . border deployment. It takes into account domestic legal considerations: This includes the Posse Comitatus Act, the 4th Amendment and existing constitutional provisions. Rules for the use of force cannot authorize force in excess of constitutional reasonableness, nor can it declare certain forces hostile.<sup>146</sup>

Department of Defense policy requires federal forces deployed for civil disturbance operations to adhere to the RUF.<sup>147</sup> However, agencies’ policies may be changed, and use of the RUF rather than the ROE is critical to ensuring public safety in a domestic deployment of federal forces. We thus recommend codifying existing policy in the law.

- **Not authorized: Martial law. Military forces deployed under this Act must act in support of, and remain subordinate to, civilian authorities.**

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145. See SCHEIPS, *supra* note 72, at 47.

146. Mark Nevitt, *The Military, the Mexican Border and Posse Comitatus*, JUST SEC. (Nov. 6, 2018), <https://perma.cc/4ZZ5-QW6C>.

147. The current version of this policy, set forth in Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01 Series, is classified. For a previous version, see U.S. DEP’T OF DEF., CJCSI 3121.01 SERIES, STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES, <https://perma.cc/58QU-QEFX>.

Although there is no settled definition of the term “martial law,” it is commonly understood to refer to the *displacement* of civilian government by military rule. The very concept is in tension with the design of the Constitution, which carefully subordinates the military to civilian authority. Although state governors declared martial law with some frequency in earlier eras of the country’s history, federal declarations of martial law have been rare, with the last one occurring in Hawaii during World War II pursuant to a statute that was specific to the Territory of Hawaii and is no longer in place.<sup>148</sup>

In contrast to martial law, federal forces deployed under the Insurrection Act are acting to *support* civilian law enforcement authorities when those authorities require reinforcement. Even in situations where state or local authorities are unwilling to enforce federal or civil rights laws, federal armed forces deployed under the Insurrection Act are supporting federal law enforcement efforts. To ensure that the military remains subordinate to civilian authority, Department of Defense policies provide that military participation in “civil disturbance operations” must be overseen by the Attorney General.<sup>149</sup>

In 2020, the Brennan Center issued a study on martial law, which concluded that the current statutory framework for the domestic deployment of federal forces in the United States precludes a presidential declaration of martial law.<sup>150</sup> Nonetheless, there is sufficient ambiguity, both in relevant statutes and in the case law, to leave the door dangerously open—and the Insurrection Act itself does not explicitly address the question. Congress should close this door by specifying that federal forces deployed under the Insurrection Act must act in support of, and remain subordinate to, civilian authorities.

- **Not authorized: Suspension of *habeas corpus*.**

In suppressing violence or removing obstacles to enforcement of the law, military forces deployed under the Insurrection Act might need to arrest or temporarily detain individuals until they can be turned over to law enforcement authorities. Those individuals retain their constitutional rights, and courts must have the authority to review their detention as provided by the constitutional writ of *habeas corpus*.

Although the Constitution permits Congress to authorize suspensions of *habeas corpus*, the current version of the Insurrection Act provides no such authorization. Indeed, the Act of 1871 added language to the Insurrection Act that

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148. Joseph Nunn, *Guide to Declarations of Martial Law in the United States*, BRENNAN CTR. FOR JUST. (Aug. 20, 2020), <https://perma.cc/7BWU-KNKT>.

149. See U.S. DEP’T OF DEF., INST. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES 26 (Feb. 27, 2013, incorporating change Feb. 8, 2019), <https://perma.cc/4H6R-WU8J> (“Any employment of Federal military forces in support of law enforcement operations shall maintain the primacy of civilian authority and unless otherwise directed by the President, responsibility for the management of the Federal response to civil disturbances rests with the Attorney General.”).

150. See NUNN, *MARTIAL LAW*, *supra* note 124.

permitted suspension of *habeas corpus*, but that authority expired after one year and has not been reinstated.<sup>151</sup> Nonetheless, we think it would be wise for Congress to state explicitly that the Insurrection Act does not constitute an authorization to suspend *habeas corpus*, given widespread misunderstandings about what the law allows.

- **Not authorized: Lawless action. Military forces deployed under this Act must act in accordance with all applicable federal and, where not inconsistent with the U.S. Constitution or federal law, state law.**

The Insurrection Act, even as reconceived in this proposal, gives the president tremendous power by authorizing the deployment of federal forces in a range of circumstances. However, it does not empower the president to set aside the rule of law. The U.S. Constitution remains the supreme law of the land, and no statute can give the president license to violate its provisions. Moreover, in the course of restoring order, federal troops must scrupulously adhere to the laws and policies that govern their conduct, as well as any other laws that might apply in the circumstances. Members of the armed forces are constrained by law when they are fighting sworn enemies overseas; it is all the more important that they respect the boundaries of the law when operating domestically to preserve the peace among Americans.

- **Not authorized: Deployment of federal troops to suppress insurrection, rebellion, domestic violence, or obstruction of the law, except as expressly provided in an Act of Congress.**

The procedural and substantive limitations in the Insurrection Act are meaningless if presidents can sidestep them by relying on claims of inherent constitutional authority. As discussed above, by requiring “express” authorization to use federal forces for law enforcement purposes, the Posse Comitatus Act appears to preclude any reliance on “inherent” authority. Nonetheless, the Department of Defense claims that such an inherent authority exists and provides an exception to the Posse Comitatus Act.

In particular, Department of Defense policies purport to bestow “emergency authority” on federal military commanders to quell “large-scale, unexpected civil disturbances”—without presidential authorization, let alone an invocation of the Insurrection Act—where necessary to “prevent significant loss of life or wanton destruction of property,” or when civilian authorities “are unable or decline to provide adequate protection for Federal property or Federal governmental functions.”<sup>152</sup>

This claimed authority cannot be reconciled with the Insurrection Act, which represents Congress’s judgment about what criteria must be met in order for

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151. Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, § 4, 17 Stat. 14.

152. U.S. DEP’T OF DEF., DIR. 3025.18, *supra* note 26, at 6.



federal forces to respond to civil disturbances, however large-scale or unexpected. The law provides ample authority for deployment of federal forces in cases where civil disturbances could lead to significant loss of life or property destruction or could threaten federal operations. That authority, however, must be exercised in accordance with the requirements of the Act.

There can be no question that Congress has the authority to impose such requirements. Even if the president had inherent constitutional authority to suppress domestic unrest (a dubious claim that courts have never validated<sup>153</sup>), Congress would be able to restrict it as long as the president's authority was not "conclusive and preclusive"—i.e., as long as Congress itself had some authority in this area.<sup>154</sup> And Congress's constitutional power to act in this context is clear. The Constitution explicitly grants Congress the authority to provide for using the militia to suppress insurrections and to execute the law,<sup>155</sup> and it gives the federal government as a whole responsibility for quelling domestic violence.<sup>156</sup>

Congress should speak more clearly on this point. Specifically, Congress should state that the president may deploy federal forces to suppress insurrections, rebellions, or domestic violence, or to enforce the law, only pursuant to an Act of Congress.<sup>157</sup>

- **Not authorized: 32 U.S.C. § 502(f) may not be used for purposes of suppressing insurrection, rebellion, domestic violence, or obstruction of the law.**

On its face, this might not seem like a reform to the Insurrection Act. However, by closing a loophole in the Posse Comitatus Act, it ensures that the president cannot use military troops for the purposes envisioned by the Insurrection Act without actually invoking it.

In short, the Posse Comitatus Act applies to the National Guard only when called into federal service. When Guard forces are acting in so-called "Title 32" status—under the command and control of state governors, but paid with federal funds and serving purposes identified by Congress—the Act does not apply. The problem arises under 32 U.S.C. § 502(f), which authorizes Guard units to perform unspecified "operations or missions . . . at the request of the President or

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153. *See supra* note 27.

154. *Youngstown*, 343 U.S. at 638.

155. U.S. CONST. art. I, § 8, cl. 15.

156. U.S. CONST. art. IV, § 4.

157. The Insurrection Act is likely the Act that would apply in such cases. However, broader language is appropriate here, both because Congress could enact other applicable laws in the future and because a handful of other statutory exceptions to the Posse Comitatus Act could be read to allow military intervention in specific contexts that could theoretically involve domestic violence or obstruction of law. *See, e.g.*, 18 U.S.C. §§ 112, 1116, 1201 (Attorney General may request the assistance of federal or state agencies—including the Army, Navy and Air Force—to protect foreign dignitaries from assault, manslaughter and murder, or to enforce prohibition against kidnapping foreign officials and internationally protected persons).

Secretary of Defense.” Although this provision is included in a section that governs “required drills and field exercises,” Trump relied on it when he asked the governors of 15 states to send their National Guard forces into Washington, D.C., to suppress the protests that followed the police killing of George Floyd. (Eleven governors agreed to this request.<sup>158</sup>) The president did not have to follow the procedures in the Insurrection Act—or accept the political consequences of invoking it—because he had not actually called these Guard forces into federal service.

When the president seeks to have the military deployed for law enforcement purposes, it triggers the concerns that animate the Posse Comitatus Act, even if he acts through willing state intermediaries. Moreover, in light of section 502(f)’s statutory placement,<sup>159</sup> it is highly unlikely that Congress intended for this provision to encompass the suppression of civil unrest at the direction of the president. To protect the principles embodied in the Posse Comitatus Act and ensure adherence to the requirements of the Insurrection Act, Congress should specify that section 502(f) may not be used for purposes of suppressing insurrection, rebellion, domestic violence, or obstruction of the law. If the president wishes to make use of National Guard forces for any of those purposes, he may do so—by federalizing them and invoking the Insurrection Act.

### Procedure for invocation

- **The president must consult with Congress in every possible instance before invoking the Insurrection Act.**

Currently, the Insurrection Act includes no requirement that the president consult with Congress before deploying federal troops domestically to suppress civil unrest. This stands in stark contrast to the law governing the deployment of federal troops overseas to fight foreign enemies. In the latter scenario, the War Powers Resolution states that “[t]he President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”<sup>160</sup> Consultation with Congress is, if anything, even more important in the domestic context, and a similar requirement should be added to the Insurrection Act.

This requirement will not cause harmful delay. The direction to consult with Congress before deployment “in every possible instance” expressly contemplates

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158. See Elizabeth Goitein & Angelo Pis Dudot, *Three Fixes to Prevent Another Battle of Lafayette Square*, DEF. ONE (June 1, 2021), <https://perma.cc/52M9-ZYG6>.

159. The Supreme Court generally assumes that Congress will speak to major issues directly. *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (“Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”).

160. 50 U.S.C. § 1542.

that there will be situations in which advance consultation is not possible. It creates a strong presumption of advance consultation—not an absolute mandate. The president thus retains the flexibility to act quickly where circumstances require it.

- **Before deploying forces under the Act, the president must issue and widely disseminate a public proclamation/order to disperse that articulates which provision of the law is being invoked (i.e., which of the triggering circumstances is present).**

The Insurrection Act requires the president to issue a proclamation that orders “the insurgents” to disperse, but it does not require the proclamation to include any articulation of the reason for the contemplated deployment. Proclamations should include, at a minimum, a citation to the provision of the Act that forms the basis for the use of federal forces. Including such a citation would enhance the actual and perceived legitimacy of the military action.

In addition, the current version of the Insurrection Act allows the president to issue the proclamation simultaneously with the deployment itself. This subverts the purpose of issuing an order to disperse—i.e., to provide an opportunity for a change in behavior that would obviate the need for deployment. Mobilizing troops for deployment is not an instantaneous process, and a proclamation/order that merely cites the supporting statutory provision and orders dispersal can be issued swiftly. Requiring the president to issue the proclamation at the start of the mobilization process, rather than when troops arrive on the scene, should cause no delay. Even if that provides only a few minutes of notice, that could be sufficient in cases where the people engaged in the insurrection, violence, or obstruction are willing to disperse.

- **The president, Secretary of Defense, and Attorney General should submit a report and certification to Congress, contemporaneously with proclamation if at all practicable (and in all cases within four hours), setting forth:**
  - **the circumstances necessitating deployment;**
  - **a certification that the state has requested deployment, or that the state is unwilling or unable to address the circumstances necessitating deployment, where applicable;**
  - **a certification that options other than U.S. military deployment have been exhausted, or that those options would likely be insufficient and delay would likely cause irreparable harm; and**
  - **a description of the size, mission, scope, and expected duration of use of armed forces.**

When invoking the Insurrection Act, the president, jointly with the Secretary of Defense and Attorney General, should submit a report and certification to

Congress conveying certain basic information about the deployment. This report/certification would serve a key function in the congressional approval and judicial review provisions described below. But even leaving aside those provisions, Congress should have this basic information so that it may conduct its constitutionally-assigned oversight role.

Once again, the War Powers Resolution serves as a model. Under that law, within 48 hours of certain overseas deployments of military forces, the president must submit a report to Congress setting forth “(A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement.”<sup>161</sup> Congress has an equal, if not greater, need for such information when the president deploys troops within the United States. Given the heightened constitutional concerns and potential for harm to American civilians when the military acts domestically, the reporting should occur on a significantly shorter timeframe—contemporaneously with deployment if possible, but within four hours of deployment at most.

In the report, the president should be required to describe the circumstances necessitating the deployment, as well as the deployment’s size, mission, scope, and expected duration—information similar to that required by the War Powers Resolution. In addition, because the domestic use of the military for law enforcement should be a last resort, the president should be required to certify that options other than U.S. military deployment (e.g., use of federal law enforcement personnel) have been exhausted, or that those options would likely be insufficient and delay would likely cause irreparable harm. In those situations where the Insurrection Act includes a requirement that state authorities either request the deployment or prove unwilling or unable to address the circumstances at issue, the president should have to certify that this requirement has been met.

We propose that the Secretary of Defense and the Attorney General also serve as signatories to the report and certification. There is a tradition among military leadership of attempting to avoid politicization of the military;<sup>162</sup> the assent of the Secretary of Defense thus can provide some protection against both the appearance and reality of a politically-motivated deployment. The assent of the Attorney General, in turn, helps to ensure that military deployment is taking place in support of civilian authority and not intruding on the prerogatives and responsibilities of civilian law enforcement.

Some might argue, under the theory of the “unitary executive,” that the authority to order deployment cannot be made subject to the consent of cabinet officials.

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161. 50 U.S.C. § 1543. Presidents have honored this requirement in the breach through an unduly narrow interpretation of the circumstances triggering the requirement. *See* Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 194 (1980). There would be no such problem in the Insurrection Act context, as the triggering circumstance—the issuance of a proclamation under the Insurrection Act—is not subject to competing interpretations.

162. *See* Gen. Joseph Votel, *An Apolitical Military is Essential to Maintaining Balance Among American Institutions*, MILITARY TIMES (June 8, 2020), <https://perma.cc/7KUT-9A7Z>.

This argument is without merit, as domestic deployment of the military is not a “core” Article II function and the officials in question are removable by the president.<sup>163</sup> However, even if it were the case that the validity of an Insurrection Act invocation could not turn on the existence of a joint report/certification, we believe requiring such a submission would still serve an important purpose. At a minimum, it would have an important signaling function. If the president were to submit a report/certification without the signature of one or both of these officials, it would send a strong message to Congress—and to the public—that something is amiss, and that lawmakers should review the deployment with a particularly critical eye.

### **Checks and Balances: Congressional Approval and Judicial Review**

The authority to use the U.S. military as a domestic police force is an extraordinary delegation of power. It carries significant risks even when used appropriately. For one thing, as discussed above, it risks escalation and/or unnecessary violence. By mission and by training, federal troops are oriented toward vanquishing an enemy through combat; they are not well-equipped to conduct domestic law enforcement operations where the primary goal is to protect communities against violence.

The authority conferred by the Insurrection Act also carries clear potential for abuse. In the past, it has been used appropriately to enforce civil rights laws when states refused to do so—but it also has been used multiple times to help companies break strikes and disrupt labor movements. Additionally, the Act has been used to suppress so-called “race riots”—instances like the 1967 Detroit and 1992 Los Angeles riots that arguably did overwhelm local civilian authorities, but were sparked by racial injustices perpetrated by those same authorities and exacerbated (particularly in Detroit) by local officials’ use of excessive force in responding to the unrest. And the events of January 6 provide a frightening glimpse into how the Act could have been used—or could be used in the future—to undermine democracy.

Any power of this nature and magnitude requires robust checks and balances. In its current form, the Insurrection Act has none. If Congress disagrees with the president’s decision to deploy troops, its only option is to pass a law revoking the authority the Act provides in that instance. The president would almost certainly veto such a law, at which point Congress would need to muster a veto-proof supermajority to override the president’s veto. As for the courts, the Insurrection

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163. The Supreme Court has indicated that the touchstone of presidential control over the executive branch is removability. *See, e.g., Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2198, 2203 (2020); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–3 (2010). The Office of Legal Counsel (OLC), for its part, has argued that congressional certification regimes may not infringe upon a president’s “core constitutional power.” *See Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182 (1996); *Section 609 of the FY 1996 Omnibus Appropriations Act*, 20 Op. O.L.C. 189 (1996). Congress retains substantial leeway, however, to impose certification requirements in areas that “lie within congressional control and have been ceded to the executive only through progressive statutory delegations.” Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395, 452–5 (2019).

Act commits the decision to deploy entirely to the president's discretion, leaving no basis for judicial review of that decision. Although the Supreme Court has made clear that courts may review the lawfulness of the actions taken by the military *subsequent* to their deployment, the deployment itself is generally unreviewable.<sup>164</sup>

### Congressional Approval

- **Authority to deploy U.S. armed forces will expire after seven days unless Congress passes a joint resolution.**
  - **If Congress is adjourned or out of session, the timeline may be delayed up to 72 additional hours to allow for reconvening.**
- **The joint resolution is subject to expedited procedures that—**
  - **ensure that any member can force a vote;**
  - **prohibit filibustering in the Senate; and**
  - **dispense with procedural hurdles to allow action within the seven-day timeline.**
- **The joint resolution extends the authority to deploy troops for 14 days, which may be renewed for subsequent 14-day periods.**
- **The joint resolution will automatically expire if and when a court renders a final decision (after exhaustion of appeals) that the deployment of federal troops violates the Constitution, the Insurrection Act, or any other applicable law.**

As a political check against unwarranted or abusive domestic military deployments, Congress should provide that the authorities made available by the Insurrection Act expire after seven days (or a similarly short period of time) unless Congress passes a joint resolution of approval. The resolution would be subject to expedited procedures that would ensure timely action by Congress; these procedures also would prevent obstructionism by allowing any member to force a vote and by prohibiting filibusters in the Senate, thus ensuring that the outcome reflects the will of a majority of Congress.

There is a precedent for this approach. The War Powers Resolution includes an analogous provision, under which a president must terminate any use of the U.S. armed forces within 60 days (or 90 days in some cases) of engaging them in hostilities unless Congress has provided authorization using expedited procedures. A similar mechanism is contained in several bills currently pending before Congress to reform the National Emergencies Act.<sup>165</sup> Although they differ in their details, these bills all require presidential declarations of national emergency to

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164. As noted above, Supreme Court precedent suggests there might be an exception for deployments ordered in bad faith. *See Sterling*, 287 U.S. at 400.

165. *See, e.g.*, ARTICLE ONE Act, S. 241, 117th Cong. (2021); Congressional Power of the Purse Act, H.R. 5314, div. B, title V, 117th Cong. (2021); National Security Powers Act, S. 2391, 117th Cong. (2021); National Security Reforms and Accountability Act, H.R. 5410, 117th Cong. (2021).

expire after a short period (30 calendar days or 20 legislative days, depending on the bill) unless Congress approves them. The bills provide for expedited procedures that not only shorten the relevant timelines—as in the War Powers Resolution—but also remove potential procedural obstacles. The Protecting Our Democracy Act, which includes a version of this reform, passed the House in December 2021.<sup>166</sup>

We believe this approach provides a commonsense solution in situations where Congress intends to delegate extraordinary power to address extraordinary circumstances, but also wishes to preserve its own constitutional role as a meaningful check against abuse. In adopting this model, we have employed a shorter time frame than both the War Powers Resolution and the National Emergencies Act reform bills, given that the domestic use of military force to suppress civil unrest is an extreme measure that should be used as sparingly and briefly as possible.<sup>167</sup>

Congressional approval of a deployment under the Insurrection Act should not constitute a blank check for indefinite deployment. For the same reasons that Insurrection Act deployments present a risk of overreach in the first instance, there is a risk that presidents might keep troops in place for longer than necessary. Accordingly, joint resolutions to approve Insurrection Act deployments should expire after 14 days, with the option for Congress to vote to renew them. Although there would be no limit on the number of times Congress could renew a resolution, requiring a vote for each renewal would ensure that Congress does not simply permit extensions through inertia and would treat extended domestic military deployments with the seriousness they deserve.

Of course, it is possible that Congress would vote to approve deployments in cases where those deployments did not meet the criteria set forth in the Insurrection Act. In such cases, the authority provided by the joint resolution could be interpreted as supplanting (and expanding) the authority provided by the Insurrection Act, thus mooted any legal challenges that might have been brought in the courts. That would be a problematic outcome. While Congress always has the option to amend the Insurrection Act, amending it to lower the bar for deployment should not be a fast or easy process; it should be subject to the fullest possible debate and consideration. Here, though, we have provided for expedited procedures—both to ensure that improper deployments cannot continue for long periods of time, and to prevent obstructionism by lawmakers in a genuine emergency.

To address this dilemma, we propose that joint resolutions to approve Insurrection Act deployments include language stating that they will expire if and when there is a final court decision (i.e., a decision by the Supreme Court or a lower court decision if there is no appeal) holding or affirming that the

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166. H.R. 5314, 117th Cong. (2021).

167. The average length of Insurrection Act deployments over the past sixty years has been between eight and eleven days. *See* Nunn & Goitein, *supra* note 69. If the default termination date is set for after seven days, it becomes more likely that a president could start and finish an improper deployment before having to obtain congressional approval.

deployment violates the U.S. Constitution, the Insurrection Act, or any other applicable law. In this way, Congress will make clear that the intent of its resolution is not to permanently alter the law with respect to the deployment at issue, but rather to provide temporary authorization that is subject to both periodic reevaluation and judicial review. We believe this approach best threads the needle between making it too difficult or time-consuming for Congress to approve *lawful* deployments, on the one hand, and making it too easy to ratify *unlawful* ones, on the other.

### Judicial Review

- **Federal courts may review claims that the criteria for deployment set forth in the Insurrection Act were not met.**
- **Litigants have standing to bring such claims if—**
  - **they have a credible fear of injury from deployment; or**
  - **they are state or local authorities in an area where troops have been deployed without the consent of state or local government.**
- **Litigants may bring suit for declaratory or injunctive relief.**
- **Reviewing courts must uphold the president’s determination that the criteria for deployment were met if the determination is supported by substantial evidence.**
- **District courts must expedite their review, and appeals will go directly to the Supreme Court.**
- **This judicial review mechanism does not displace or preclude any available judicial review for other claims relating to deployments under the Act.**

The congressional approval requirement discussed above provides some check against presidential overreach. In cases where the president belongs to the same political party that controls Congress, however, there is a risk of the political branches joining forces to chip away at Americans’ legal rights. The judicial branch exists to uphold those rights and to say definitively what the law is. As the Supreme Court stated in reviewing the *habeas* petition of an American citizen detained as an enemy combatant after 9/11, “Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”<sup>168</sup>

In cases involving the Insurrection Act’s precursor laws, the Supreme Court held that courts could not review the president’s determination that an exigency existed that required the deployment of military troops. However, the Court recognized that this unreviewable discretion was vested in the president *by Congress*. As the Court stated in the landmark case of *Martin v. Mott*:

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168. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).



The [Insurrection Act] does not provide for any appeal from the judgment of the President or for any right in subordinate officers to review his decision and in effect defeat it. Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case we are all of opinion that such is the true construction of the act of 1795.<sup>169</sup>

Congress's power to grant discretion to the president necessarily encompasses the power to shape, limit, or withhold such discretion. Congress thus can—and should—place limits on the president's discretion under the Insurrection Act, as reflected in the substantive criteria for deployment outlined above. To ensure adherence to those limits, Congress should provide for an expedited but deferential form of judicial review to resolve claims that the statutory criteria for deployment have not been satisfied.

The law should make clear that potential litigants have standing to challenge the legal sufficiency of a deployment under the Act if they have a credible fear of injury as a result of that deployment. In other words, people who are directly threatened by an exercise of military force should not have to wait until force is used against them to bring suit. In addition, the law should acknowledge that state or local authorities have standing to sue if the president deploys federal troops in those states or localities without their consent.

Judicial review should take place on an expedited basis. Congress should instruct district court judges to advance these cases on their dockets and expedite their disposition to the greatest extent possible. Congress also should provide that appeals from the district court will go directly to the Supreme Court. Congress has made such provision in the past,<sup>170</sup> and currently there are several laws creating direct appeals to the Supreme Court from panels composed of three district court judges.<sup>171</sup>

The standard for reviewing the lawfulness of the deployment should be fairly deferential. Specifically, courts should uphold the president's determination that the statutory criteria for deployment were met if that determination is supported by substantial evidence. This is a lower standard than preponderance of the

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169. 25 U.S. 19, 31 (1827).

170. The Expediting Act of 1903 provides for direct appeals to the Supreme Court in all civil antitrust cases where the United States is a plaintiff, if the district court judge issues an order stating that direct appeal is of "general public importance in the administration of justice." 15 U.S.C. § 29(b). The Line Item Veto Act, Pub. L. 104-130, § 3(b) (1996) (codified at 2 U.S.C. § 692), included a provision for direct appeal to the Supreme Court after disposition by a D.C. District Court judge. (Because the Act was invalidated on other grounds, that provision is no longer operative. *See* *Clinton v. City of New York*, 524 U.S. 417 (1998).) A bill to reform the Insurrection Act that was introduced by Senator Richard Blumenthal in 2020, the CIVIL Act, similarly included expedited review by a district court followed by direct appeal to the Supreme Court. *See* S. 3902, 116th Cong. § 258(c) (2020).

171. *See, e.g.*, 28 U.S.C. § 2284 (three-judge panel for suits challenging the constitutionality of a congressional or statewide legislative redistricting); 28 U.S.C. § 1253 (direct appeals for decisions of three-judge panels).

evidence, and it does not authorize *de novo* review by the court. Rather, a conclusion is supported by substantial evidence if a reasonable person might accept the evidence as adequate to support the conclusion, even though other reasonable people might disagree.<sup>172</sup> Courts would not be substituting their own judgment for that of the president, but simply asking whether the president's determination met a threshold of reasonableness.

Congress should authorize courts to provide declaratory or injunctive relief. Congress also should specify that the judicial review mechanism created by the statute does not displace or preclude any available means of judicial review for other claims relating to deployments under the Act. Litigants would thus retain the ability to bring challenges to the lawfulness of actions taken subsequent to deployment.

#### CONCLUSION

Emergencies can and will happen in any society. Governments need to be able to respond to domestic crises quickly and decisively. The exercise of that authority, however, must be in accordance with terms that are clearly set forth in law and subject to robust checks against abuse. Without those guardrails, emergency power can be used to undermine democratic institutions and individual rights.

The Insurrection Act falls short in every respect. Its language is vague and archaic, creating confusion about what the law allows. It gives the president sole discretion to interpret those terms and to deploy the U.S. armed forces as a domestic police force. It envisions no oversight role for Congress or the courts. This situation not only is dangerous for our democracy, but also runs counter to the American tradition against military interference in the affairs of civilian government. Designed more than a century and a half ago for the needs of a dramatically different country, the Act is ripe for abuse—as evidenced when Trump's supporters urged him to invoke it to impede the transition of power after the 2020 presidential election.

Our reform proposal would give the president ample authority to use federal forces domestically in a true crisis, while establishing the safeguards necessary to guard against abuse of that power. We hope that members of Congress will see the merit in these reforms and enact them, or similar measures, into law. In the meantime, we hope that this proposal can help launch a discussion—among lawmakers, academics, and the general public—about the appropriate limits on domestic deployments of the military in a liberal democracy.

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172. *See, e.g.*, 4 C.F.R. § 28.61 (defining the “substantial evidence” standard in the context of administrative proceedings).

## APPENDIX: OUTLINE OF INSURRECTION ACT REFORM PROPOSAL

Statement of Constitutional Authority. This Act represents an exercise of Congress's authorities under Art. I, sec. 8, clauses 14, 15, 16, and 18; Art. IV, sec. 4; and Amend. XIV, Sec. 5.

Statement of Policy. It is the policy of the United States that domestic deployment of U.S. armed forces for the purposes set forth in this statute should be a last resort and should be ordered only if state authorities cannot or will not suppress the insurrection, rebellion, domestic violence, or obstruction of law at issue, and federal law enforcement authorities are unable to do so.

Triggering Circumstances. The authorities provided by this Act may be invoked in any of the following circumstances:

- Insurrection or rebellion against government authority in such numbers, and/or with such force or capacity, as to overwhelm civilian authorities. If the insurrection or rebellion is against a state or local government, the legislature of that state, or the governor if the legislature cannot be convened, must request an invocation of the Act.
- Domestic violence that is widespread or severe in one or more cities or states, if state authorities request assistance or if they are unable or otherwise fail to address the violence.
- Obstruction of law, under one or more of the following circumstances:
  - Obstruction of federal or state law within a state that has the effect of depriving any part or class of its people 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.
    - This provision shall be construed to encompass the obstruction of any provision of Subtitle I of Title 52 of the U.S. Code regarding the protection of the right to vote. Any deployment in such circumstances shall be subject to 52 U.S.C. § 10102, 18 U.S.C. § 592, 18 U.S.C. § 593, and any other applicable statutory limitations designed to protect the right to vote.
    - In any situation covered by this clause, the State shall be considered to have denied the equal protection of the laws secured by the Constitution.
  - Obstruction of federal law by private actors—
    - in such numbers, or with such force or capacity, as to overwhelm state authorities; or
    - that state authorities fail to address, where such obstruction creates an immediate threat to public

safety and the deployment of federal civilian authorities is insufficient to ensure enforcement of the law.

- Obstruction of, or refusal to comply with a court order to enforce, federal law by the state or its agents, under circumstances in which the deployment of federal civilian authorities is insufficient to ensure enforcement of the law.

#### Actions authorized/not authorized

- Authorized: Deployment of U.S. armed forces, to include the National Guard and state defense forces of all the 50 states, the territories of Guam and the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the District of Columbia when called into federal service. While deployed under the Act, these forces must operate under the standing rules for use of force.
- Not authorized: Martial law. Military forces deployed under this Act must act in support of, and remain subordinate to, civilian authorities.
- Not authorized: Suspension of *habeas corpus*.
- Not authorized: Lawless action. Military forces deployed under this Act must act in accordance with all applicable federal and, where not inconsistent with the U.S. Constitution or federal law, state law.
- Not authorized: Deployment of federal troops to suppress insurrection, rebellion, domestic violence, or obstruction of the law, except as expressly provided in an Act of Congress.
- Not authorized: 32 U.S.C. § 502(f) may not be used for purposes of suppressing insurrection, rebellion, domestic violence, or obstruction of the law.

#### Procedure for invocation

- The president must consult with Congress in every possible instance before invoking the Insurrection Act.
- Before deploying forces under the Act, the president must issue and widely disseminate a public proclamation/order to disperse that articulates which provision of the law is being invoked (i.e., which of the triggering circumstances is present).
- The president, Secretary of Defense, and Attorney General should submit a report and certification to Congress, contemporaneously with proclamation if at all practicable (and in all cases within four hours), setting forth:

- the circumstances necessitating deployment;
- a certification that the state has requested deployment, or that the state is unwilling or unable to address the circumstances necessitating deployment, where applicable;
- a certification that options other than U.S. military deployment have been exhausted, or that those options would likely be insufficient and delay would likely cause irreparable harm; and
- a description of the size, mission, scope, and expected duration of use of armed forces.

### Congressional Approval

- Authority to deploy U.S. armed forces will expire after seven days unless Congress passes a joint resolution.
  - If Congress is adjourned or out of session, the timeline may be delayed up to 72 additional hours to allow for reconvening.
- The joint resolution is subject to expedited procedures that—
  - ensure that any member can force a vote;
  - prohibit filibustering in the Senate; and
  - dispense with procedural hurdles to allow action within the seven-day timeline.
- The joint resolution extends the authority to deploy troops for 14 days, which may be renewed for subsequent 14-day periods.
- The joint resolution will automatically expire if and when a court renders a final decision (after exhaustion of appeals) that the deployment of federal troops violates the Constitution, the Insurrection Act, or any other applicable law.

### Judicial Review

- Federal courts may review claims that the criteria for deployment set forth in the Insurrection Act were not met.
- Litigants have standing to bring such claims if—
  - they have a credible fear of injury from deployment; or
  - they are state or local authorities in an area where troops have been deployed without the consent of state or local government.
- Litigants may bring suit for declaratory or injunctive relief.
- Reviewing courts must uphold the president's determination that the criteria for deployment were met if the determination is supported by substantial evidence.

- District courts must expedite their review, and appeals will go directly to the Supreme Court.
- This judicial review mechanism does not displace or preclude any available judicial review for other claims relating to deployments under the Act.