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The President's Legal Authority to Commit Troops Domestically Under the Insurrection Act

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I. The June 1 Claim

On June 1, 2020, President Donald Trump suggested that he could deploy U.S. troops to American cities over the objection of state and city leaders, without a court order, and unrelated to the purpose of protecting civil rights. “If a city or state refuses to take the actions that are necessary to defend the life and property of their residents,” he said, “then I will deploy United States military and quickly solve the problem for them.” The *New York Times* reported that Trump had planned to use his June 1 address to announce that he would invoke the Insurrection Act to “override governors and send active-duty troops to states where there [we]re protests,” but was persuaded against this approach by senior officials.¹ Meanwhile, Trump’s Press Secretary specifically mentioned invoking the Insurrection Act as a policy the President could pursue in the future to suppress nationwide protests. The President retweeted a series of messages from Senator Tom Cotton² suggesting that he use the Insurrection Act to deploy troops to America’s cities to suppress future protest marches.

The day after Trump’s June 1 speech, Secretary of Defense Mark Esper stated that he “do[es] not support invoking the Insurrection Act.”³ He explained that “the 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 situations” and that “we are not in one of those situations now.” So despite his expansive claims, the President never actually deployed troops domestically, or actually invoked the Insurrection Act. Still, a number of legal experts responded to Trump’s proposed action by conceding that either Trump possesses the legal authority under the Insurrection Act to use the troops in the manner he has proposed; or that while Trump’s true

¹ Thomas Gibbons-Neff et al., *Former Commanders Fault Trump’s Use of Troops Against Protesters*, N.Y. TIMES (June 2, 2020).

² Tom Cotton, @SenTomCotton, TWITTER (June 1, 2020, 8:57 PM), (Trump retweeted on June 5).

³ Zachary Cohen et al., *Pentagon Chief on Shaky Ground with White House After Breaking with Trump Over Protest Response*, CNN (June 3, 2020).

legal authority to deploy the troops is somewhat unclear, the courts would be likely to uphold his decision.⁴

We disagree. For the reasons below, there is no “widespread public disorder” exception that authorizes broad presidential use of federal troops in American city streets. President Trump does not possess legal authority to deploy military forces against domestic protestors in civilian streets (1) over the objections of state-governments; (2) unrelated to enforcing a court order; (3) outside the context of protecting civil rights.

II. Insurrection Act Analysis

A. Background

At the outset, it should be noted that the Insurrection Act was not enacted in a vacuum. The Constitution and statutory *Posse Comitatus* restrictions impose a general constitutional presumption against the Executive’s use of military force in American city streets. The *Posse Comitatus* Act of 1878 (presently codified at 18 U.S.C. § 1385 (2018)) explicitly restricts the use of the military for domestic law enforcement purposes. The *Posse Comitatus* Act embodies a core constitutional norm separating military from civilian space, barring the use of foreign troops in domestic settings, and forbidding insertion of uniformed military forces to police American civilian streets except in extraordinary circumstances. Trump’s proposed use of the troops would generally be barred under this law, unless there is a statutory exception.⁵ The most applicable statutory exception to *Posse Comitatus*—and the one that President Trump suggested he would use in his June 1 Claim—is the Insurrection Act.

B. Text and Structure

The Insurrection Act (presently codified at 10 U.S.C. §§ 251-54 (2018)) is a set of laws through which Congress has outlined specific conditions authorizing the President to deploy military forces to address domestic civil unrest. The four sections of the Insurrection Act outline the following conditions as exceptions to *Posse Comitatus*:

- Request by local official: Section 251 enables the president to deploy troops to cities when they are *requested* by a state’s legislature or its governor.
- Insurrection: Section 252, properly understood, enables the President to deploy troops to America’s cities to quell insurrections *against the federal government*, especially when such insurrections impair the functioning of the federal judiciary.
- Infringement of federally protected civil rights: Section 253, properly understood, enables the President to deploy troops to America’s cities in specific instances relating to the infringement of federally protected civil rights: most notably, when an insurrection is

⁴ See, e.g., John Yoo & Robert Delahunty, *Domestic Military Use Is Lawful But Not Yet Prudent*, NEWSWEEK (June 3, 2020).

⁵ 18 U.S.C. § 1385 (2018) (Use of the military “expressly authorized by the Constitution or Act of Congress” is not subject to *Posse Comitatus* Restrictions.”)

such that either (1) a state government is facilitating—whether due to intentional action or inability—the denial of equal protection of the laws to a class of its citizens; or (2) federal courts are unable to effectively adjudicate equal protection claims.

- *Notice and order*: Section 254 specifies that the president must announce his intent to use the troops and order the “insurgents” to peacefully disperse before deploying troops.

The lack of a state-government request plainly bars Section 251’s application to Trump’s proposed deployment. But the inapplicability of Sections 252 and 253 merit further attention. To determine the true scope of presidential authority under the Insurrection Act, one must look beyond the Act’s text to the intended purpose of each section and the history of executive practice concerning these provisions.

Although the current language of the Insurrection Act is broad and vague, much of its ambiguity can be traced to a massive 1956 recodification of America’s military laws.⁶ Importantly, this recodification was not intended to modify the Insurrection Act’s meaning. This recodification occurred as a result of a joint effort between Congress and the Department of Defense to recodify all laws pertaining to defense and the National Guard. The House and Senate reports accompanying these alterations make clear that the intention was to alter the meaning of the laws as little as possible, and that substantive alterations would be “*explained in the applicable revision notes.*”⁷

A close review of these revision notes show that the laws were not meant to be substantively expanded. Because Congress did not intend to expand the Insurrection Act, a court should not read the 1956 recodification to do so—the understood scope and purpose of the Act remained the same as it was prior to this modification. Following the Supreme Court’s directive, a Court should reject textualist arguments that suggest Congress has covertly, or inadvertently, delegated broad expansive authorities to the Executive branch.⁸

C. Legislative History

1. Section 251

Section 251 authorizes the President to deploy troops to a state “upon the request of [the state’s] legislature or of its governor if the legislature cannot be convened.” This Section can be

⁶ Act of August 10, 1956, ch. 1041, 70A Stat. 15.

⁷See Revision of Title 10, U.S. Code Entitled “Armed Forces” and Title 32, U.S. Code Entitled “National Guard,” Report of the Committee on the Judiciary of the House of Representatives, 84th Cong. 2d Sess. Rep. No. 970, at 8 (June 28, 1955); Revision of Title 10, U.S. Code Entitled “Armed Forces” and Title 32, U.S. Code Entitled “National Guard,” Report of the Senate Committee on the Judiciary, 84 Cong. 2d Sess. Rep. No. 2484, at 19 (July 9, 1956) (emphasis added).

⁸ See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (“The textual commitment must be a clear one”; “Congress, we have held, 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.”).

traced to 1792, when the law passed Congress with little debate.⁹ Since then, presidents have used Section 251 to come to the assistance of state governments, for example, when President Johnson deployed troops to Detroit at Michigan Governor George Romney’s request in 1967, and—in the most recent invocation of the Insurrection Act—when President George H.W. Bush sent troops to Los Angeles at the request of California Governor Pete Wilson during the 1992 Rodney King Riots. These instances of federal force were lawful under Section 251 because, as the statutory provision requires, the presidents were not acting proactively, but rather, responding to state-government *requests* for military assistance.

2. Section 252

Section 252 originated in 1861 when Congress passed “An Act to Suppress the Rebellion Against and the Resistance to the Laws of the United States.” As the law’s original name suggests, it was passed to give President Lincoln authority to use the military against the Confederacy in the South.¹⁰ Section 252, properly understood, only authorizes the President to deploy federal troops when direct resistance to the federal government, consistent with an actual revolt or insurrection, makes it “impracticable to enforce the laws of the United States . . . by ordinary judicial proceedings.” During the congressional debates of 1861, Congressman Bingham emphasized that the law was designed to address insurrections consistent with the Constitution’s being “assailed by rebels and traitors,” and repeatedly stressed that the law required the *impracticability* of law enforcement through “ordinary judicial proceedings.”¹¹ Therefore, Section 252 remains unavailable until there is a rebellion against the federal government such that federal laws cannot be enforced through the courts.

If, under a president’s judgment, it is “impracticable” to execute federal laws “by the ordinary course of judicial proceedings,” the president’s judgment must be that it is practically impossible for the federal judiciary to function. So when Congressman Vallandigham suggested that the new law might authorize the President to deploy the troops for purposes that are beyond mere “aid of the execution of the laws of the land by civil process,” Congressman Bingham responded: “The operative words in the act on 1795 are quoted in the bill in this form: ‘ . . . by the ordinary course of judicial proceedings.’” (emphasis in original).¹² President Trump’s proposed use of the military to “dominate city streets” on June 1, 2020 clearly fails these requirements, because the ongoing protests were neither against the authority of the federal government; nor of such a nature as to render the functioning of the judiciary “impracticable.”

⁹ Steven Vladeck, Note, *Emergency Powers and the Militia Acts*, 114 YALE L. J. 149, 170 (2004).

¹⁰ *Act of July 29, 1861*, 12 Stat. 281 (providing for the suppression of rebellion against and resistance to the laws of the United States).

¹¹ CONG. GLOBE, 37th Cong., 1st Sess. 146 (1861).

¹² *Id.*

3. Section 253

Section 253 originated in 1871 when Congress passed “An Act to Enforce the Provisions of the Fourteenth Amendment to the United States, and for Other Purposes.”¹³ The law was passed to enable President Grant to enforce the Fourteenth Amendment in the South, and has been codified and re-codified several times before arriving at its current wording. Still, tracing the Act through these various rewrites shows that the most significant modifications were intended to be stylistic, and do not alter the intended meaning of the Act.

The legislative history of Section 253 highlights that the law’s intended purpose was to protect the civil rights of Americans by ensuring that the equal protection guarantees of the Fourteenth Amendment would be enforced. Section 253 authorizes presidents to deploy military forces domestically under the narrow circumstances where an insurrection must have either (1) caused a state to deny citizens their equal protection rights, or (2) rendered federal courts in the state unable to adjudicate equal protection claims. Describing the law during congressional hearings in 1871, Congressman Hawley carefully focused on the protection of civil rights—“such as . . . the right to vote or the right to hold office”—before explaining that the law only authorized presidential action “under such circumstances as that the rights of citizens are taken away from them . . . as the failure of the state authority to execute the law . . . or from any such case by which the citizens of the United States are deprived of those rights . . .”¹⁴ At the same time, Senator Edmunds carefully clarified that the law was “to be enforced by the courts . . . and in no other way, until forcible resistance shall be offered to the quiet and ordinary course of justice.”¹⁵

This limited understanding of Section 253 is consistent with prior executive uses of federal troops domestically. For example, when President Eisenhower sent troops to desegregate Little Rock’s schools in 1957, he enforced a court order that the Governor of Arkansas had forcibly opposed. Likewise, when President Kennedy sent troops to desegregate the University of Mississippi in 1962, he acted within the properly understood bounds of Section 253. President Trump’s proposed use of the military fails these requirements, as the protests neither caused a state to deny equal protection of laws to its citizens, nor generated forcible resistance that impaired the functioning of the federal courts

4. Congress’s 2008 Repeal of the 2006 Expansion to the Insurrection Act

In 2008, Congress repealed a 2006 expansion to the scope of the Insurrection Act that had been covertly included in the 2006 Defense Authorization Act. The 2006 expansion was

¹³ Third Enforcement Act, ch. 22, Pub. L. No. 42-22, 17 Stat. 13 (1871).

¹⁴ Hawley, CONG. GLOBE 42d Cong., 1st Sess. 383 (1871).

¹⁵ Edwards, CONG. GLOBE 42d Cong., 1st Sess. 698 (1871).

described by Senator Feingold¹⁶ as a “middle-of-the-night fast move,” and as “ill-conceived, unnecessary, and dumb” by Senator Bond.¹⁷ Senator Leahy, the chief proponent for the 2008 repeal, criticized the 2006 law as a “troubling expansion of the President’s powers” and specifically emphasized that the 2006 act appeared to make “restoring public order” an “entirely new purpose for the Insurrection Act.”¹⁸

Congress’ 2008 action highlights the limited scope of the Insurrection Act. President Trump’s proposed use of the troops was entirely aimed at restoring public order, the exact purpose that the 2008 Amendment had established as outside the Insurrection Act’s scope. By now essentially claiming a novel “restoring public order” exception to the *Posse Comitatus* Act, the President would seek to write into that law a new statutory exception that would grossly expand the scope of the Insurrection Act in the face of recent congressional intent.

D. Executive Practice

By retweeting Senator Tom Cotton,¹⁹ President Trump seemed to suggest that past executive practice has established an expansive precedent for Trump’s proposed intervention for the vague purpose of “restoring public order.” Meanwhile, John Yoo and Robert Delahunty advanced a similarly overbroad theory of executive power in a *Newsweek* op-ed.²⁰ In fact, there is no historical precedent that supports invoking the Insurrection Act to execute President Trump’s proposal—all of the “examples” cited by Cotton, Trump, Yoo, and Delahunty fell within the proper, narrow legal bounds established in previous Sections.²¹

This point is best illustrated by two historical occasions where the Kennedy Administration carefully considered invoking the Insurrection Act to deploy the troops to America’s streets, yet concluded that it *lacked* legal authority to do so. By declining to use the Insurrection Act, the Kennedy Administration established that presidential authority to deploy troops through the Insurrection Act is not boundless and that even a high degree of public violence or disorder, standing alone, does not constitute sufficient grounds for invoking the Insurrection Act. Because there is no “widespread public disorder” exception in the *Posse Comitatus* Act, the specific conditions outlined in Sections 251-253 must be satisfied.

The first such occasion was President Kennedy’s decision *not* to deploy troops to Birmingham, Alabama in May 1963. In Birmingham, following tremendous violence against

¹⁶ *The Insurrection Act Rider: Hearing Before the Sen. Comm. on the Judiciary* 110th Cong. 10 (2007) ([Statement of Senator Russ Feingold](#)). In the interest of disclosure, Senator Feingold is now the President of the American Constitution Society, publisher of this Issue Brief.

¹⁷ *Id.* (Statement of Senator Christopher Bond).

¹⁸ [Press Release](#), Sen. Patrick Leahy, Leahy Statement on Legislation to Repeal Changes to the Insurrection Act (Feb. 7, 2007).

¹⁹ Tom Cotton, [@SenTomCotton](#), TWITTER (June 1, 2020, 8:57 PM), (Trump retweeted on June 5).

²⁰ Yoo & Delahunty, *supra* note 3.

²¹ See *supra* Sections III.A through III.D.

civil rights protesters, Kennedy initially argued that he lacked authority to use troops under the Insurrection Act due to “an absence” of “violations of the Federal Civil Rights” or “any other Federal Jurisdiction.”²² He distinguished the scenario from previous Insurrection Act invocations on grounds that the prior uses of force involved a “legal suit.”²³ After violence further escalated, Kennedy invoked the Insurrection Act to relocate troops, with Attorney General Robert Kennedy reportedly emphasizing that “Alabama state police were tending to inflame rather than to pacify the situation.”²⁴ But in the end, President Kennedy never deployed the troops. He characterized his actions as “preliminary steps” so that “units of the [National] Guard will be promptly available should their services be required,” and expressed his hope that “outside intervention” would be “unnecessary.”²⁵

The second relevant historical precedent occurred one year later. The Kennedy Administration argued that it lacked authority under the Insurrection Act to deploy troops to Neshoba, Mississippi following the murder of civil rights workers in 1964. Initially, Attorney General Robert Kennedy reportedly explained that “federal preventative police action could not be taken because of the division of powers between the state and national governments.”²⁶ But after a group of law professors demanded further explanation, Deputy Attorney General Nicholas Katzenbach explained:

As a matter of law as well as policy and tradition, those sections [of the Insurrection Act] contemplate a situation where there has been such a complete breakdown of law and order that civilian law enforcement measures are overwhelmed and use of the armed forces is required. *Normally such a situation arises only when the State itself supports or encourages those engaging or threatening to engage in violence.*²⁷

Similarly, President George W. Bush declined to deploy troops to New Orleans in the aftermath of Hurricane Katrina—due in part to the fact that Louisiana’s Governor refused to request the assistance of federally-controlled forces²⁸—on the ground that, without such a request, the Bush Administration would have lacked the necessary authority under Section 251.

²² Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 1966 DUKE L.J. 416, 417 n.11 (1966) (quoting Statement of President Kennedy, N.Y. TIMES, May 9, 1963, p. 16, cols. 1-2).

²³ *Id.*

²⁴ *Id.*

²⁵ Statement by President Kennedy, Office of the White House Press Secretary (May 12, 1963).

²⁶ Comment, *supra* note 21 at 418 (quoting N.Y. TIMES, June 25, 1964, p. 1, col. 5).

²⁷ Letter from Deputy Att’y Gen. Katzenbach to Rep. John V. Lindsay (July 30, 1964), 110 CONG. REC. 18661-62 (1964)(emphasis added).

²⁸ See Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES (Sept. 9, 2005).

E. Judicial Precedent

An overbroad reading of the Insurrection Act would not only be inconsistent with the text, structure, legislative history, executive practice and intended purpose of the Insurrection Act, it would also raise serious constitutional questions. In particular, President Trump’s proposed expansive reading of the Insurrection Act would likely violate basic principles of separation of powers and federalism

An overly deferential interpretation of the Insurrection Act would likely lead to challenges that the law violates constitutional separation of powers.²⁹ The Framers’ concern with separation of powers is particularly clear in the military context. A broadly deferential interpretation of the Insurrection Act would violate the Framers’ vision by enabling a rogue president both to call forth and control military forces to maintain domestic rule—a massive, dangerous “concentration” of executive power.

A broad, unrestrained interpretation of the Insurrection Act would also raise serious federalism concerns. If a court were to interpret the Insurrection Act as granting a president such broad, unchecked authority to use the military for local law enforcement over the objection of state officials, it would fundamentally disrupt the Constitution’s federalist system. As the Supreme Court recently explained, “the people, by adopting the Constitution, ‘split the atom of sovereignty’” between the federal government and the states.³⁰ Additionally, the states retain their police powers as one of the most fundamental sovereign functions retained by the states under the Tenth Amendment.³¹ Under the canon of constitutional avoidance, which the Supreme Court has accepted as “settled policy,” courts should avoid interpreting statutes in ways that raise difficult questions of constitutional law, and especially avoid interpretations that would render a statute unconstitutional.³²

Finally, commentators should not quote overbroad readings of dicta from nineteenth-century case law to support the baseless claim that the president has broad, unreviewable authority under the Insurrection Act to deploy the troops domestically. On inspection, none of the most often-cited cases involved Sections 252 or 253; to the contrary, each can be easily distinguished from Trump’s proposed actions:

²⁹ See, e.g., *Bowsher v. Synar*, 478 U. S. 714, 730 (1986) (“The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.”); THE FEDERALIST NO. 51, (James Madison) (discussing the division of powers in the government: “ambition [would] be made to counteract ambition” in order to avoid the “gradual concentration of several powers in a single department.”).

³⁰ See *Gamble v. United States*, 587 U. S. slip op. (2019).

³¹ See, e.g., *United States v. Lopez*, 514 U.S. 549, 564 (1995).

³² See, e.g., *Gomez v. United States*, 490 U.S. 858, 864 (1989).

- *Martin v. Mott*³³ pertained to a foreign invasion (the War of 1812), not a domestic insurrection. The Court did not discuss insurrections (or “combinations and conspiracies”) and instead repeatedly emphasized “foreign invasions.”
- *Luther v. Borden*³⁴ involved the degree of executive discretion to intervene with military force *once a state has requested this assistance*; so all other discussion of the Insurrection Act was dicta (“It is true that, in this case, the militia were not called out by the President.”).
- *The Prize Cases*³⁵ limited their analysis to the President’s ability to respond with force “if a war be made by invasion” and focused on the President’s commander-in-chief power to “accord to [those in ‘armed hostile resistance’] the character of *belligerents*,” not his statutory authority under the Insurrection Act.
- *In Re Debs*³⁶ did not involve President Cleveland invoking the Insurrection Act; the Court did not treat it as an Insurrection Act case;³⁷ and the President was enforcing an injunction ordered by a federal court, not acting on his own against a general claim of “widespread public disorder.”

III. Conclusion

Finally, it is worth noting that Senator Blumenthal has introduced a comprehensive reform bill in the Senate to reduce the ability of presidents inappropriately to deploy troops to America’s cities, and Representatives Omar, Jayapal, Pocan, and Escobar have introduced a “companion measure” in the House.³⁸ In addition, the Center for American Progress has put forward four straightforward proposals to reform the Insurrection Act, specifically recommending (1) “Requir[ing] congressional notification and authorization”; (2) “Impos[ing] executive branch checks, including certification by the attorney general and/or the secretary of defense that conditions necessitate its use”; (3) “Add[ing] a judicial branch check and expedited review”; and (4) “Explicitly prohibit[ing] invocation against peaceful assembly.”³⁹

While new clarifying legislation would be desirable, the foregoing analysis should make clear that the existing terms of the Insurrection Act do not provide legal cover for President Trump’s June 1 Claim. The Insurrection Act does not authorize any American president to deploy federal troops into America’s cities in the name of “restoring public order.” Rather than

³³ *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31-32 (1827).

³⁴ *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

³⁵ *Prize Cases*, 67 U.S. (2 Black) 635, 679 (1863).

³⁶ *In re Debs*, 158 U.S. 564, 582 (1895).

³⁷ See Vladeck, *supra* note 8 at 163. explaining that the Court appeared “unclear as to the source of Cleveland’s authority.”).

³⁸ *Press Release*, Sen. Richard Blumenthal, *Blumenthal Introduces Legislation to Limit Unchecked Presidential Authority under the Insurrection Act* (June 4, 2020); *Press Release*, Rep. Ilhan Omar, *Reps. Omar, Jayapal, Pocan, Escobar, Introduce Bill to Restrict the President’s Ability to Use Military Forces Domestically* (June 8, 2020).

³⁹ Kelly Magsamen, *4 Ways Congress Can Amend the Insurrection Act*, CTR. FOR AM. PROGRESS (June 12, 2020).

conceding to him such nonexistent legal authority, “We the People” should reaffirm that under current law, the President does not possess legal authority to deploy military forces against domestic protestors in civilian streets when such actions are taken:

- (1) over the objections of state governments;
- (2) unrelated to enforcing a court order;
- (3) outside the context of protecting civil rights, particularly when doing so would violate constitutional norms against military interference in civilian affairs, separation of powers, federalism, and Bill of Rights protections for free speech, assembly, right to petition, and right to vote.

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