



Fact Sheet: Reforming the Insurrection Act

The Problem

Congress is the first branch of government — the one in which the drafters of the Constitution placed significant power. Over time, however, Congress has ceded some of its most critical powers to the executive branch. One of the most worrisome ways Congress has abrogated its constitutional role is by giving the president nearly unfettered discretion to deploy the military for domestic law enforcement.

The drafters of the Constitution included numerous safeguards to prevent the president from possessing limitless power to deploy the armed forces.¹ Congress also adopted the Posse Comitatus Act, prohibiting use of the military to execute domestic law, “except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.”²

One glaring exception to the Posse Comitatus Act is the Insurrection Act, a combination of laws dating back to the 1790s that provide overly broad power to a president to use the military as domestic law enforcement in emergencies.³

Today, there are few domestic disturbances that cannot be handled by law enforcement. In addition to hundreds of thousands of state and local police officers, over 90 federal law enforcement agencies employ over 136,000 officers. Virtually none of these agencies existed when Congress adopted the laws that constitute the Insurrection Act.⁴

Moreover, while authorizing the use of military force is a central power of Congress, the Insurrection Act puts no checks on a president’s decision to use domestic deployment. It cuts out one of the most important safeguards on abuses of power, the Congress. While presidents have invoked the Insurrection Act to quell bona fide emergencies and to protect civil rights, the law itself uses vague, sweeping language that is ripe for abuse by an unscrupulous leader.⁵

¹ U.S. Constitution art. I, § 8.

² 18 U.S.C. § 1385 (2024), <https://www.law.cornell.edu/uscode/text/18/1385>; Note that the Posse Comitatus Act was not designed to protect civil rights; it was passed in 1878 as a measure to prevent the federal government from enforcing federal and election law in the Reconstruction South. See Mark P. Nevitt, “Unintended Consequences: The Posse Comitatus Act in the Modern Era,” *Cardozo Law Review*, 36 (2014), 134, <https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1124&context=faculty-articles>.

³ 10 U.S.C. §§ 251-255 (2024), <https://www.law.cornell.edu/uscode/text/10/subtitle-A/part-I/chapter-13>.

⁴ There are nearly 18,000 state and local police agencies across the United States, which employ over 787,000 sworn officers. See Andrea M. Gardner and Kevin M. Scott, Bureau of Justice Statistics, *Census of State and Local Law Enforcement Agencies, 2018 – Statistical Tables*, NCJ 302187 (October 2022), 4, <https://bjs.ojp.gov/library/publications/census-state-and-local-law-enforcement-agencies-2018-statistical-tables>; Connor Brooks, Bureau of Justice Statistics, *Federal Law Enforcement Officers, 2020 – Statistical Tables*, NCJ 304752 (Rev. September 29, 2023), 1, <https://bjs.ojp.gov/document/fleo20st.pdf>.

⁵ Elizabeth Goitein and Joseph Nunn, Brennan Center for Justice, *Guide to Invocations of the Insurrection Act*, (April 25, 2022), <https://www.brennancenter.org/our-work/research-reports/guide-invocations-insurrection-act>.

As Justice Robert Jackson wrote in his dissent in *Korematsu v. United States*, the idea that a president can act without checks on their power simply by claiming an “urgent need” is dangerous; it “lies about like a loaded weapon,” ready to be used to control the domestic population and violently suppress dissent without any checks from the Congress or courts.⁶

This outdated and dangerous law must be addressed, not only to protect those who might be subject to its abuses, but also to recalibrate the balance of power between the Congress and the president. Congress gave the presidency this dangerous power. It is incumbent on Congress to now rein it back in.

The Solution

Congress must reform the Insurrection Act in a manner that would allow a president to respond to a genuine crisis but would also place meaningful guardrails on a president’s ability to invoke the Act. These reforms draw on the work of the Brennan Center for Justice and the American Law Institute:⁷

- Remove antiquated terms from the law, which create confusion about the scope of the law (i.e. unlawful “combinations,” “obstructions,” and “assemblages”).⁸
- Clarify conditions under which the Act may be invoked (i.e. “triggering circumstances”), especially by defining what constitutes an insurrection, rebellion, domestic violence, or obstruction of the law, and specifying that a state legislature or governor must request an invocation of the Act before federal troops may be deployed to that jurisdiction, with limited exception.
- Clarify that the Insurrection Act does not permit the suspension of habeas corpus or imposition of “martial law.”
- Require the president to consult with Congress before invoking the Act.
- Require the president to make specific findings on the need for invocation of the Act and report them to Congress, no less than 24 hours after invocation, including why federal troops are needed, the consultations made with state authorities, that other measures to address the crisis have been exhausted, and a description of the size and scope of the mission.
- Impose clear time limits on domestic deployment of the military, including automatic expiration of the authority under the Act unless additional time is expressly approved by Congress.
- Require judicial review of whether the criteria under the Act have been met.

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⁶ *Korematsu v. United States*, 323 U.S. 214, 246 (1944), (Jackson, J., dissenting).

⁷ Elizabeth Goitein and Joseph Nunn, Brennan Center for Justice, *How to Fix the Insurrection Act*, (September 20, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/how-fix-insurrection-act>; American Law Institute, *Principles for Insurrection Act Reform*, (April 8, 2024), <https://www.aei.org/wp-content/uploads/2024/04/Principles-for-Insurrection-Act-Reform.pdf?x85095>.

⁸ 10 U.S.C. §§ 252, 253 (2024), <https://www.law.cornell.edu/uscode/text/10/subtitle-A/part-I/chapter-13>.