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*United States Marine Corps  
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Marine Corps University  
2076 South Street  
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Invoking the Insurrection Act: The Right Thing to Do?

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MASTER OF MILITARY STUDIES

**AUTHOR:**

Bayani Smith

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MMS Mentor Team and Oral Defense Committee Member:

Approved: Jul Goldenziel  
Date: 4/15/21

MMS Mentor Team and Oral Defense Committee Member:

BRADFORD A WINGMAN  
Approved: [Signature]  
Date: 4/15/21

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## **Executive Summary**

**Title:** Invoking the Insurrection Act: The Right Thing to Do?

**Author:** Bayani Smith, Department of Homeland Security

**Thesis:** Deploying active duty military forces under the authority of the Insurrection Act to quell today's acts of domestic civil unrest is unnecessary and inappropriate.

**Discussion:** In the United States, much of 2020 was marred by civil unrest in the form of protests, peaceful and otherwise. Much of the population was moved to demonstrate against police brutality, systemic racism, and racial injustice. Most of the demonstrations were largely peaceful affairs. However, some devolved into lawlessness, rioting, looting, arson, and violence. In some areas of the country, violence was a daily occurrence. The president suggested he would send in the military to end the unrest if governors and mayors did not sufficiently address the situation. While the president has the authority to do so, the ensuing debate centered around whether or not it is appropriate to use military force to quell incidents of domestic civil unrest.

**Conclusion:** Although the president has the authority to deploy military force domestically to perform law enforcement functions and quell incidents of civil unrest, the American people have no appetite for being policed by federal military force. Civilian law enforcement agencies have the proper training and equipment to handle the unrest, sufficient federal civilian law enforcement manpower exists to augment local and state efforts if necessary, and states may make use of the National Guard when necessary, negating the need for federal active duty military intervention.

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THE OPINIONS AND CONCLUSIONS EXPRESSED HEREIN ARE THOSE OF THE INDIVIDUAL STUDENT AUTHOR AND DO NOT NECESSARILY REPRESENT THE VIEWS OF EITHER THE MARINE CORPS COMMAND AND STAFF COLLEGE OR ANY OTHER GOVERNMENTAL AGENCY. REFERENCES TO THIS STUDY SHOULD INCLUDE THE FOREGOING STATEMENT.

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## **Preface**

I wrote this paper with a profound respect for the protectors of our great nation: the men and women of our armed services and of law enforcement. I believe in law and order, our constitutional rights, and healthy civilian-military relations. All of these ideals recently converged when the Insurrection Act was proposed as a mechanism to deal with the civil unrest our nation witnessed in response to video that appears to show a black man being killed by a white police officer. In some places, peaceful protests were being overshadowed by widespread violence. I wanted to research and discover, for myself, the appropriate way for our government to respond and restore order while maintaining healthy civilian-military relations and continuing to provide a safe environment for peaceful expression.

I would like to thank my mentor, Dr. Jill Goldenziel, for her guidance and high levels of patience, and Dr. Bradford Wineman for his thoughts, feedback, and for being a second set of eyes. I am also grateful for my faculty advisors, Lieutenant Colonel Patrick Manson and Dr. Craig Hayden who have created an atmosphere conducive to learning and critical thought. Furthermore, I am thankful to my classmates and the entire staff of Marine Corps University Command and Staff College for making an interagency student feel at home. Finally, I am most thankful to my wife, Tara, who has displayed superhuman levels of patience and support as I burned the midnight oil.

## **Invoking the Insurrection Act: The Right Thing to Do?**

### **Introduction**

In 2020, the United States bore witness to several large popular demonstrations across the country. What had been perceived as instances of racial injustice and brutality at the hands of the police culminated in May of 2020, when a video emerged of a white Minnesota police officer restraining George Floyd, a black man, by placing his knee on the suspect's neck for several minutes while Floyd complained that he could not breathe. Floyd consequently died of asphyxiation.<sup>1</sup> Demonstrations, both planned and spontaneous, erupted worldwide. Demonstrators sought accountability, police reform, and justice. Although most of the demonstrations in the United States were generally peaceful affairs, in several instances demonstrations devolved into lawlessness, rioting, and looting.<sup>2</sup>

On June 1, President Trump implored governors to deploy the National Guard and further urged both mayors and governors to establish an overwhelming law enforcement presence to quell the violence. President Trump invoked the specter of the Insurrection Act when he told reporters, "if a city or a state refuses to take the actions that are necessary to defend the life and property of their residents, then I will deploy the United States military and quickly solve the problem for them."<sup>3</sup> According to reports, U.S. Northern Command raised the alert status of

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<sup>1</sup> Helier Cheung, "George Floyd Death: Why US Protests Are so Powerful This Time," BBC News (June 8, 2020), <https://www.bbc.com/news/world-us-canada-52969905>.

<sup>2</sup> Sara Cline, "Police: More than 500 Arrests since May at Portland Protests," AP News (August 21, 2020), <https://apnews.com/article/b9edb15e4b0fddeabe1aae672b54b186>. Joshua McNichols, "CHAZ Community Chews on What to Do Next," KUOW (NPR, June 12, 2020), <https://www.kuow.org/stories/chaz-community-chews-on-what-to-do-next>.

<sup>3</sup> Donald J. Trump, "Statement by the President," The White House (United States Government, June 1, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-by-the-president-39/>.

several active duty military units so that they may be ready to assist with response to the civil unrest on short notice if needed.<sup>4</sup>

Senator Tom Cotton of Arkansas, a United States Army Veteran, argues that President Trump should have invoked the Insurrection Act in response to the civil unrest, saying many American cities at the time had devolved into anarchy, recalling the widespread violence of the 1960s.<sup>5</sup> In an opinion piece he penned for the *New York Times*, Senator Cotton went on to say:

These rioters, if not subdued, not only will destroy the livelihoods of law-abiding citizens but will also take more innocent lives. Many poor communities that still bear scars from past upheavals will be set back still further.

One thing above all else will restore order to our streets: an overwhelming show of force to disperse, detain and ultimately deter lawbreakers. But local law enforcement in some cities desperately needs backup, while delusional politicians in other cities refuse to do what's necessary to uphold the rule of law.<sup>6</sup>

Senator Cotton insisted that invoking the Insurrection Act and deploying active duty troops to the states to restore order is not only appropriate, but also required under the Constitution:

This venerable law, nearly as old as our republic itself, doesn't amount to "martial law" or the end of democracy, as some excitable critics, ignorant of both the law and our history, have comically suggested. In fact, the federal government has a constitutional duty to the states to "protect each of them from domestic violence." Throughout our history, presidents have exercised this authority on dozens of occasions to protect law-abiding citizens from disorder. Nor does it violate the Posse Comitatus Act, which constrains the military's role in law enforcement but expressly excepts statutes such as the Insurrection Act.<sup>7</sup>

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<sup>4</sup> Leo Shane, "Senator: Deploy Active-Duty Military to Deal with Violent Protesters," *Military Times* (June 1, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/06/01/senator-deploy-active-duty-military-to-deal-with-violent-protesters/>.

<sup>5</sup> Tom Cotton, "Tom Cotton: Send In the Troops," *New York Times* (June 3, 2020), <https://www.nytimes.com/2020/06/03/opinion/tom-cotton-protests-military.html>.

<sup>6</sup> Cotton.

<sup>7</sup> Cotton.



Senator Cotton's viewpoint is that in most cases the police have the capacity to address civil disorder, but in rare cases such as the unrest surrounding the Floyd protests, the Insurrection Act and active duty military force is appropriate.<sup>8</sup>

The possibility that the president may invoke the Insurrection Act sparked debate concerning whether or not it is appropriate for the president to use military force to quell civil unrest.<sup>9</sup> According to some experts and pundits, the president has the authority to do so.<sup>10</sup> However, deploying active duty military forces under the authority of the Act to quell today's acts of domestic civil unrest is unnecessary and inappropriate. The American public is generally against using active duty military force for domestic law enforcement. Civilian federal law enforcement officers should be used to bolster state and local efforts instead. With advances in training and technology, civilian law enforcement agencies are well equipped and more than capable of handling civil disturbances of the type recently seen, without the assistance of federal military force.

## **Background**

### **The Insurrection Act**

The federal military has a history of performing domestic law enforcement duties in the United States. On the western frontier of the early United States, settlers often relied on military fort

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<sup>8</sup> Cotton.

<sup>9</sup> "Civil disorder" is defined by 18 U.S.C. § 232 as "any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual." In this paper, the term may be used interchangeably with "civil unrest."

<sup>10</sup> Ed Kilgore, "Tom Cotton Is Wrong About the Insurrection Act," *Intelligencer* (*New York Magazine*, June 4, 2020), <https://nymag.com/intelligencer/2020/06/tom-cotton-is-wrong-about-the-insurrection-act.html>; Megan Scully, "Trump Floats Invoking 1807 Insurrection Act to 'Dominate' Protests," *Roll Call* (*Roll Call*, June 2, 2020), <https://www.rollcall.com/2020/06/01/trump-floats-invoking-1807-insurrection-act-to-dominate-protests/>.

commanders for security and law enforcement, as civilian law enforcement was limited the further west one ventured.<sup>11</sup> Army outposts were the only source of law and order in many places.<sup>12</sup> The result was a military that provided security and civilian law enforcement services in the far-flung reaches, often with mixed effectiveness or low oversight and accountability.<sup>13</sup> From the early days of the nation through the era of Civil War Reconstruction, federal troops were also commonly posted at polling stations around the country to ensure that only those legally eligible to cast a vote entered the polls.<sup>14</sup> After the Civil War, federal troops patrolled polling stations to ensure that the newly expanded electorate was permitted to vote, and to enforce provisions of law that restricted former Confederate officers from voting or holding office above the state level.<sup>15</sup> United States soldiers and militia members were also, on several occasions, deputized into posses by Deputy U.S. Marshals to assist in law enforcement matters or to quell civil unrest.<sup>16</sup>

The Constitution of the United States conveys upon Congress the authority “to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”<sup>17</sup> Shortly after Congress convened under the new Constitution, it began delegating its authority to call forth the militia to the president through the Calling Forth Act and subsequent

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<sup>11</sup> Bonnie Baker, "The Origins of the Posse Comitatus," *Air and Space Power Chronicles* (1999), 2, <https://www.airuniversity.af.edu/Portals/10/ASPJ/journals/Chronicles/baker1.pdf>

<sup>12</sup> Baker, 2.

<sup>13</sup> Baker, 2.

<sup>14</sup> Robert T. Hess, "The Posse Comitatus Act: An Outdated Law for the Threats of the 21st Century," ExLibris (Marine Corps University, 2003), 7, [https://usmc.primo.exlibrisgroup.com/view/delivery/01USMCU\\_INST/1247058910005241](https://usmc.primo.exlibrisgroup.com/view/delivery/01USMCU_INST/1247058910005241).

<sup>15</sup> Hess, 7.

<sup>16</sup> U.S. Library of Congress, Congressional Research Service, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, by Charles Doyle and Jennifer Elsea. R42659, (2018), 5-6. <https://crsreports.congress.gov/product/pdf/R/R42659>

<sup>17</sup> U.S. Const. art. I, § 8, states in part, “The Congress shall have Power... To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions....”

Militia Acts.<sup>18</sup> In 1806, President Thomas Jefferson lobbied Congress for authority to deploy the military in response to an alleged conspiracy by former Vice President Aaron Burr to raise a private army and establish his own territory in either Mexico or the Louisiana Purchase.<sup>19</sup> Congress obliged in 1807 when they passed the Insurrection Act codifying the delegation of Congress's constitutional power to call forth the military, to both execute the laws of the union and to suppress insurrections, to the President of the United States.<sup>20</sup>

The Insurrection Act, as it currently stands, empowers the president to call the National Guard or the active duty military into service to address an insurrection against a state when requested by that state's legislature or governor, to address an insurrection in any state that makes it impracticable to enforce the law, or to suppress an insurrection, domestic violence, unlawful combination, or conspiracy in any state that results in the deprivation of constitutional rights when the state is unable, fails, or refuses to protect those rights.<sup>21</sup> Although the Constitution of the United States specifically allows for the use of military forces to perform law enforcement functions, and despite a history of the military doing just that, the reason why the military is not seen regularly patrolling the streets of the United States is the Posse Comitatus Act of 1878.

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<sup>18</sup> Congressional Research Service, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, 7-9.

<sup>19</sup> Dave Roos, "Thomas Jefferson Signed the Insurrection Act in 1807 to Foil a Plot by Aaron Burr," History.com (A&E Television Networks, June 3, 2020), <https://www.history.com/news/insurrection-act-thomas-jefferson-aaron-burr>.

<sup>20</sup> Insurrection Act of 1807, ch. 39, 2 Stat. 443 states that:

...in all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual state or territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary, having first observed all the pre-requisites of the law in that respect.

<sup>21</sup> Insurrection Act, 10 U.S.C. §§ 251-255; The terms "unlawful combination" and "conspiracy" have not been well defined for the purposes of the Insurrection Act.

## The Posse Comitatus Act

As illustrated, it was not uncommon for federal troops to be ordered into a domestic law enforcement role, nor was it uncommon for federal law enforcement officers to compel military personnel to aid in enforcing the law. Congress put an end to the *carte blanche* practice, when on June 18, 1878 it enacted the Posse Comitatus Act. After the end of the Reconstruction Era, federal troops continued to enforce the law by patrolling the polling stations, particularly in former Confederate states, despite the states being readmitted to the Union and all other political restrictions having been lifted. While their presence was intended to preserve the integrity of the election process and ensure African Americans could exercise their right to vote, the military's presence may have benefited pro-Union Republican candidates over their pro-Confederacy Democratic rivals and potentially swayed the outcome of the Hayes-Tilden presidential election.<sup>22</sup>

In response, a Democrat-controlled Congress enacted the Posse Comitatus Act after overcoming the objections of President Rutherford B. Hayes, making it illegal to use federal troops to enforce and execute the laws unless expressly authorized by the Constitution or an act of Congress.<sup>23</sup> The immediate effect of the law's passage was to prevent federal troops from policing the polling stations. However, over time it came to be (mis)understood that the law prevents federal troops from performing civilian law enforcement functions within the boundaries of the United States. Yet, as it currently reads, the Act includes exceptions to this prohibition:

*Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a*

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<sup>22</sup> Congressional Research Service, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, 21.

<sup>23</sup> Rutherford B Hayes, "Veto Message," The American Presidency Project, April 29, 1879, <https://www.presidency.ucsb.edu/documents/veto-message-362>.

posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>24</sup>

It should be noted that although the Posse Comitatus Act only specifies the Army and the Air Force in the prohibition, Department of Defense regulations have since extended the prohibition to include the Navy and Marine Corps.<sup>25</sup>

As policing the polls and enforcing election laws with the use of military personnel were not duties expressly authorized to the executive branch by the Constitution nor an act of Congress, that activity ceased. Absent any statutory exceptions, the process of civilian law enforcement officers, such as Deputy Marshals, compelling the military to act as law enforcement officers under the concept of Posse Comitatus also came to a halt as a result of this law. It seems, however, that by including an exception in the text of the Posse Comitatus Act, Congress had no intention of completely outlawing the president's ability to use the military forces of the United States to perform domestic law enforcement roles, but it had sought to limit the extent to which the military could be used to do so. To date, no one has been criminally prosecuted for a violation of the Posse Comitatus Act.<sup>26</sup>

### **The Military's Role Under the Insurrection Act**

The Department of Defense (DoD) acknowledges that domestic law and order and the protection of life and property are the primary responsibility of the states and local governments.<sup>27</sup> When

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<sup>24</sup> Posse Comitatus Act, 18 U.S.C. § 1385. Emphasis added to underscore the statutory exception to the prohibition.

<sup>25</sup> Department of Defense Instruction 3025.21 (2019). <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302521p.pdf?ver=2019-02-08-082258-453>.

<sup>26</sup> Congressional Research Service, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, 69.

<sup>27</sup> U.S. Department of Defense, *Defense Support of Civilian Law Enforcement Agencies*, Instruction 3025.21, February 27, 2013, 25. <https://www.hsdl.org/?view&did=732255>.

active duty military assets and personnel are employed under the Insurrection Act to address a domestic civil disturbance and to restore order, it is only done to assist local authorities, and only for the length of time necessary.<sup>28</sup> According to Department of Defense documents, “the employment of Federal military force to control civil disturbances, shall only occur... as directed by the President... to provide for the restoration of law and order....”<sup>29</sup> Federal forces are further instructed that they “shall not take charge of any function of civil government unless absolutely necessary under conditions of extreme emergency,” and that “[a]ny commander who is directed, or undertakes, to control such functions shall strictly limit DoD actions to emergency needs and shall facilitate the reestablishment of civil responsibility at the earliest time possible.”<sup>30</sup>

## Precedents

Presidents have invoked the Insurrection Act less than two dozen times since its inception.<sup>31</sup> Several of the most recent instances were in regard to the United States government enforcing civil rights and the Fourteenth Amendment’s guarantee of equal protection, oftentimes in the face of absolute refusal by a state to comply with rulings and orders of the United States Supreme Court.<sup>32</sup> In 1957, President Eisenhower ordered a battle group of the 101<sup>st</sup> Airborne Division into Little Rock and federalized the Arkansas National Guard to enforce a court order allowing nine black students to attend a previously all-white high school.<sup>33</sup> President Kennedy

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<sup>28</sup> U.S. Department of Defense, *Defense Support of Civilian Law Enforcement Agencies*, 25.

<sup>29</sup> U.S. Department of Defense, *Defense Support of Civilian Law Enforcement Agencies*, 25.

<sup>30</sup> U.S. Department of Defense, *Defense Support of Civilian Law Enforcement Agencies*, 25,26.

<sup>31</sup> U.S. Library of Congress, Congressional Research Service, *Defense Primer: Legal Authorities for the Use of Military Forces*, by Jennifer Elsea. IF10539, (2020).  
<https://crsreports.congress.gov/product/pdf/IF/IF10539>

<sup>32</sup> Congressional Research Service, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, 42.

<sup>33</sup> Congressional Research Service, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, 5.

invoked the Act in 1962 when state forces, under the direction of the governor of Mississippi, prevented a black student from registering at Ole Miss. Kennedy federalized the Mississippi National Guard and ordered active duty Army troops to take action so that federal marshals could safely ensure James Meredith's registration.<sup>34</sup> In 1963, President Kennedy twice used the authority to overcome state resistance to desegregation in Alabama, and President Johnson in 1965 invoked the authority to protect civil rights marchers as they marched from Selma, Alabama to Montgomery.<sup>35</sup>

Although former presidents have invoked the Insurrection Act several times to enforce equal rights and the Constitution's guarantee of equal protection, it has also been used to quell domestic civil disorder. It was last invoked in 1992 by President George H.W. Bush after Governor Wilson of California requested federal assistance in quelling riots in Los Angeles sparked by the acquittal of four police officers accused of excessive force in the beating of Rodney King.<sup>36</sup> After invoking the Insurrection Act, active duty troops, including 2,500 soldiers from Fort Ord and 1,500 Marines from Camp Pendleton, were dispatched to assist in restoring order.<sup>37</sup>

Invoking the Insurrection Act has rarely proven popular. Due to potential political fallout from forcing active duty troops into a state to maintain public order and to quell unrest, a function that is primarily a responsibility of the state under the Tenth Amendment, and with an American public that harbors a centuries old suspicion of being policed by a standing army,

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<sup>34</sup> Congressional Research Service, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, 42.

<sup>35</sup> Congressional Research Service, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, 42.

<sup>36</sup> Congressional Research Service, *Defense Primer: Legal Authorities for the Use of Military Forces*, 2.

<sup>37</sup> Paul Taylor and Carlos Sanchez, "Bush Orders Troops into Los Angeles," *Washington Post* (May 2, 1992), <https://www.washingtonpost.com/archive/politics/1992/05/02/bush-orders-troops-into-los-angeles/4c4711a6-f18c-41ed-b796-6a8a50d6120d/>.

presidents have traditionally required a state to officially request assistance before invoking the Insurrection Act. Steve Vladeck, an expert in national security law and constitutional law and a Professor of Law at the University of Texas School of Law explains that the unpopularity of such a call is why President George W. Bush refused to invoke the Act in the aftermath of Hurricane Katrina without an explicit request from the state to do so.<sup>38</sup> Then-Major Thaddeus Hoffmeister, Assistant Professor of Law at the University of Dayton and a former Judge Advocate General, also notes that members of the Bush administration questioned the political wisdom of invoking the Insurrection Act if Governor Kathleen Blanco continued refusing to request or accept federal assistance.<sup>39</sup> Despite the widespread disorder, crime, and looting that occurred after Katrina made landfall in 2005, Governor Blanco reportedly refused to accept federal military intervention to quell unrest in her state, preferring to use organic resources and the state-controlled National Guard.<sup>40</sup> Ultimately, federal troops were deployed pursuant to statutory authority pertaining to disaster relief. Therefore, they could not assist civilian authorities in law enforcement and restoring order.<sup>41</sup>

Likewise, no states have requested active duty military assistance in regard to the civil unrest connected to the death of George Floyd. Scott Anderson, a fellow in Governance Studies at the Brookings Institution and a Senior Fellow in the National Security Law Program at Columbia Law School, and Michel Paradis, a senior attorney in the U.S. Department of Defense,

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<sup>38</sup> Vladeck, “Under the Insurrection Act.”

<sup>39</sup> Thaddeus Hoffmeister, “An Insurrection Act for the Twenty-First Century,” *Stetson Law Review* 39 (2009): 866, <https://www.stetson.edu/law/lawreview/media/document/an-insurrection-act-for-the-twenty-first-century.pdf>.

<sup>40</sup> William M. Arkin, “We Didn’t Need the Insurrection Act after Hurricane Katrina and We Don’t Need It Now,” *Newsweek*, June 4, 2020, <https://www.newsweek.com/we-didnt-need-insurrection-act-after-hurricane-katrina-dont-need-it-now-1508798>.

<sup>41</sup> Jonah A. Hein, “‘Passé’ Comitatus?: An Overview of the Limitations on the Employment of United States Military Forces to Enforce Domestic Law,” Naval Postgraduate School, 2019, 23-24. [https://calhoun.nps.edu/bitstream/handle/10945/63168/Hein\\_Jonah.pdf](https://calhoun.nps.edu/bitstream/handle/10945/63168/Hein_Jonah.pdf).



Military Commissions Defense Organization and lecturer at Columbia Law School point out that invoking the Insurrection Act has historically been reserved for extreme exigencies, but that the civil unrest seen in 2020 is a poor fit for what the Act was designed to address.<sup>42</sup>

### **Should the Insurrection Act be Invoked Today?**

#### **Legal Consideration**

According to the requirements of the Act, for the president to invoke its authority and employ active duty federal troops or federalize the National Guard and use those personnel to quell civil unrest, at least one of three conditions must be met. The first is under Section 251 of the Act, which states that,

[w]henever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, 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.<sup>43</sup>

As the governors and state legislatures have not requested federal assistance, the president cannot invoke the Insurrection Act under this section.

Section 252 of the Act denotes another condition under which the authority may be invoked, stating:

[w]henever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.<sup>44</sup>

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<sup>42</sup> Scott R. Anderson and Michel Paradis, “Can Trump Use the Insurrection Act to Deploy Troops to American Streets?,” Lawfare, June 8, 2020, <https://www.lawfareblog.com/can-trump-use-insurrection-act-deploy-troops-american-streets>.

<sup>43</sup> Insurrection Act, 10 U.S.C. § 251.

<sup>44</sup> Insurrection Act, 10 U.S.C. § 252.

It may be argued that this section is not applicable to the incidents of civil disorder that are the topic of this thesis. It does not appear to have become impracticable to enforce the laws of the United States through ordinary means and judicial processes. Those who are breaking the law are still amenable to arrest and prosecution, and Congressional Research Service reports that federal law, even in the midst of the disorder, is still being enforced.<sup>45</sup> The report indicates that the U.S. Department of Justice has made multiple arrests and filed several complaints for violations of the Anti-Riot Act, civil disorder statutes, the Gun Control Act, the National Firearms Act, and arson and explosives statutes, all in relation to the civil unrest, and all while the disorder continues.<sup>46</sup> However, impracticability may be up for interpretation, as it may be argued that it is impracticable to enforce the laws due to the sheer number of law violators, and that the difficulties associated with identifying each of the perpetrators make it unlikely that all perpetrators will be brought to justice. According to this section of the Insurrection Act, interpretation is solely up to the determination of the president.

The final condition under which the Act may be invoked by the president lies within Section 253 of the Act, which states,

[t]he 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—

- (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

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<sup>45</sup> U.S. Library of Congress, Congressional Research Service, *Federal Criminal Laws Applicable to Rioting, Property Destruction, and Related Conduct*, by Peter G. Berris and Michael A. Foster. LSB10493, (2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10493>.

<sup>46</sup> Congressional Research Service, *Federal Criminal Laws Applicable to Rioting, Property Destruction, and Related Conduct*.

- (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.<sup>47</sup>

It is not entirely clear that any part or class of people are being deprived of a constitutional right, privilege, immunity, or protection due to the obstruction or hindrance of state or federal law.

Although the second clause looks to be permissively broad and may be a possible avenue of authority for invoking the Act in response to the civil disorder, invoking the Act under this clause may appear to some as an end run around the intent of the law. First, showing that the execution of the laws is obstructed or opposed, or that justice under the law is impeded, may be difficult as the Congressional Research Service demonstrated that the laws are being enforced by normal judicial means.<sup>48</sup> Second, according to Stephen Haas, then-Director of National Paralegal College, Section 253 is typically used to protect Civil Rights Activists and to protect people from infringement of their rights by the state governments.<sup>49</sup> That is not what is happening here.

### **Is the Insurrection Act Appropriate in Today's Climate?**

Although the president may have the authority, forcing active duty military personnel upon a state that has not asked for assistance, and to have those personnel perform the states' law enforcement responsibilities of restoring order when the state is already doing so, may not be well received by the American public and their representatives in state government. Steve Vladeck asserts that any use of the Insurrection Act could raise serious constitutional questions,

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<sup>47</sup> Insurrection Act, 10 U.S.C. § 253.

<sup>48</sup> Congressional Research Service, *Federal Criminal Laws Applicable to Rioting, Property Destruction, and Related Conduct*.

<sup>49</sup> Stephen Haas, "The Insurrection Act and Use of the US Military on US Soil," LawShelf Educational Media, accessed March 16, 2021, <https://lawshelf.com:8443/blog/post/the-insurrection-act-and-use-of-the-us-military-on-us-soil>.

especially if a president claims a need to restore order in a state that has not even requested assistance to begin with.<sup>50</sup> In fact, not long after President Trump raised the possibility of invoking the Act, New York Attorney General Leticia James threatened to take the president to court in such an event.<sup>51</sup> Hawa Allan, Careers-In-Law Teaching Fellow and Fellow at the Center for the Study of Law and Culture, points out that invoking the Act is fraught with controversy, whether it is invoked unilaterally or at the request of the states.<sup>52</sup> Mark Nevitt, a former Commander and attorney in the United States Navy and an Associate Professor of Law at Syracuse University, cautions that using the military to enforce domestic law raises concerns about the military's proper role in civil society and whether or not it erodes civil liberties.<sup>53</sup> Despite the controversy, to date no president has been legally challenged for their invocation of the Act.

It is neither appropriate nor necessary for the president to unilaterally employ active duty military troops to confront domestic civil disorder. State governments have the primary responsibility of maintaining law and order within their boundaries. With advances in training and technology, civilian law enforcement agencies are more than capable of handling civil disturbances of the type recently seen without the assistance of federal military force. Should states need assistance, the president can muster civilian federal law enforcement officers to

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<sup>50</sup> Steve Vladeck, "Analysis | Under the Insurrection Act of 1807, Here's What a U.S. President Can and Cannot Do," *The Washington Post* (June 19, 2020), <https://www.washingtonpost.com/politics/2020/06/19/under-insurrection-act-1807-heres-what-us-president-can-cannot-do/>.

<sup>51</sup> Lia Eustachewich, "NY AG Letitia James Threatens to Sue Trump over Military Deployment," *New York Post* (June 2, 2020), <https://nypost.com/2020/06/02/ny-ag-letitia-james-threatens-to-sue-trump-over-military-deployment/>.

<sup>52</sup> Hawa K. Allan, "Paradoxes of Sovereignty and Citizenship: Humanitarian Intervention at Home," *CUNY Law Review*, 2017, <https://academicworks.cuny.edu/clr/vol20/iss2/5/>.

<sup>53</sup> Mark Nevitt, "Domestic Military Operations and the Coronavirus Pandemic," *Journal of National Security Law & Policy*, 2020, 119, [https://jnsllp.com/wp-content/uploads/2020/12/Domestic-Military-Operations-and-the-Coronavirus-Pandemic\\_2.pdf](https://jnsllp.com/wp-content/uploads/2020/12/Domestic-Military-Operations-and-the-Coronavirus-Pandemic_2.pdf).

bolster state and local efforts without invoking the Insurrection Act to employ active duty troops. However, barring the most extreme of circumstances, if military capabilities are absolutely required, the state and its National Guard, not the president and active duty armed forces, should provide those capabilities.

Today's local, state, and federal law enforcement agencies are better trained and better equipped to handle incidents of civil unrest than they have ever been. In addition to their regular acquisition process, these civilian law enforcement agencies are able to acquire specialized equipment that they might not otherwise be able to afford from the Department of Defense's Excess Property Program. According to a RAND report, this program allows the agencies to augment their resources and helps them to address equipment requirements for dealing with extraordinary and also less-routine activities "such as mass casualty response, natural and manmade disaster assistance, and large security events or civil disobedience incidents."<sup>54</sup> The military also provides these agencies with the expert advice and training necessary to operate any equipment received from the Department of Defense. State, local, federal, and tribal law enforcement agencies continue to receive specialized military training for special reaction teams, tactical police operations, and marksman/observer courses.<sup>55</sup> In essence and in most cases, the capabilities contemplated by invoking the Insurrection Act are likely already in the possession of today's civilian law enforcement agencies. One difference, however, is that civilian law enforcement agencies are experts in the craft of enforcing civilian law and providing security services to American communities. Conversely, soldiers are not, as they train to engage enemy

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<sup>54</sup> Aaron Davenport et. al, "An Evaluation of the Department of Defense's Excess Property Program: Law Enforcement Agency Equipment Acquisition Policies, Findings, and Options," RAND Corporation, 2018.

<sup>55</sup> *Operational Law Handbook, 2020* (Charlottesville, VA: United States Army, 2020), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/operational-law-handbook\\_2020.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2020.pdf); Deputy Secretary of Defense Memorandum, "DoD Training Support to U.S. Civilian Law Enforcement Agencies" (1996). *Operational Law Handbook, 2020*, Ch. 12 Appendix.

combatants, as opposed to citizens with rights to due process and the protections afforded to them by the Constitution.<sup>56</sup> Another key difference is that civilian law enforcement officers are keenly aware of their potential liability under a Section 1983 or *Bivens* lawsuit which could result in steep monetary damages if they were to violate a person's constitutional rights.<sup>57</sup>

In 2016, approximately 132,000 full-time civilian federal law enforcement officers were in the United States and its territories, with over 121,000 of those federal law enforcement officers working for executive branch agencies.<sup>58</sup> As employees of the executive branch, the president may direct the deployment of these law enforcement officers nationwide without the need to invoke any special authorities. In doing so, the federal government can assist the states in maintaining law and order, likely with less political fallout than if the president were to order active duty military forces onto the streets of America to start employing force against members of the community. Despite the issues underpinning the nationwide protests as of late, according to recent nationwide surveys the American public generally still trusts the civilian police agencies.<sup>59</sup> A Quinnipiac University poll and a poll conducted by Monmouth University both found that the majority of respondents approved of how police were doing their jobs at 77% and 71%, respectively.<sup>60</sup> A *New York Times* poll further found that 72% of respondents had a favorable impression of the police, while a CBS News poll found that 76% of respondents stated

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<sup>56</sup> Isaac Tekie, "Bringing the Troops Home to a Disaster: Law, Order, and Humanitarian Relief," *Ohio State Law Journal* (2006), 3, <https://kb.osu.edu/handle/1811/71058>.

<sup>57</sup> 42 U.S.C. § 1983; *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

<sup>58</sup> U.S. Department of Justice, "Federal Law Enforcement Officers, 2016 – Statistical Tables," Office of Justice Programs, Bureau of Justice Statistics, October 2019, Table 1, NCJ 251922, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6708>.

<sup>59</sup> As reported by aggregator Polling Report, Inc. Retrieved on December 31, 2020 from <https://www.pollingreport.com/crime.htm>.

<sup>60</sup> As reported by aggregator Polling Report, Inc. Retrieved on December 31, 2020. According to a Monmouth University poll conducted May 29-June 1, 2020, 71% of respondents were somewhat or very satisfied with the job their local police department does. A Quinnipiac University Poll conducted June 11-15, 2020 indicates 77% of respondents approve of the way the police in their community are doing their job.

the police made them feel mostly safe.<sup>61</sup> Federal law enforcement officers can augment these police forces by offering additional manpower, equipment, training, or expertise.

Although deploying civilian federal law enforcement officers is likely more politically tolerable than deploying active duty military, it is not without its risks. As federal law enforcement officers deployed around the country to address the civil unrest, a buildup of federal officers in Portland, Oregon was viewed as heavy handed and counterproductive by the state governor and local mayor. Governor Kate Brown of Oregon and Mayor Ted Wheeler of Portland both came out against the uninvited assistance of hundreds of federal agents, saying that it was an abuse of power and an attack on democracy.<sup>62</sup> In cases where civilian federal law enforcement officers are used to augment state and local efforts, it is prudent for the federal government to coordinate with local authorities to avoid friction and to ensure unity of effort.

Should civil unrest overwhelm the capabilities of local, state, and federal law enforcement, and if the state is considering the use of military capabilities as a last resort, then the state should opt to utilize the National Guard under state control before requesting presidential intervention under the Insurrection Act and employing active duty military force. The states' National Guard units are not subject to the same Posse Comitatus restrictions as are active duty federal forces, and as the states' militias they are better positioned to support state efforts. In a CNN nationwide poll conducted between June 2 and June 5, 2020, it was found that while 84% of respondents felt that peaceful protests in response to incidents of African Americans being harmed or killed by the police were justified, 69% of respondents indicated that

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<sup>61</sup> As reported by aggregator Polling Report, Inc. Retrieved on December 31, 2020. A CBS News Poll conducted May 29-June 2, 2020 indicated that 76% of respondents felt that police in their community made them feel mostly safe. From June 17-22, 2020, a *New York Times*/Siena College Poll found that 72% of respondents have a somewhat or very favorable impression of the police.

<sup>62</sup> Sergio Olmos, Mike Baker, and Zolan Kanno-Youngs, "Federal Agents Unleash Militarized Crackdown on Portland," *New York Times* (July 17, 2020), <https://www.nytimes.com/2020/07/17/us/portland-protests.html>.

*violent* protests were not justified.<sup>63</sup> Despite the negative feelings toward violent protests, the survey group overwhelmingly indicated, by 60%, that it would be inappropriate for the president to deploy the military in response to protests in the United States.<sup>64</sup> In a separate poll conducted by The Morning Consult around the same time, it was found that 71% of survey respondents supported cities “[c]alling in the national guard to supplement city police forces,” and 58% of respondents supported cities “[c]alling in the U.S. military to supplement city police forces.”<sup>65</sup> So although respondents found it was inappropriate for the president to deploy military force, they supported city officials bringing in military assistance if needed, with the National Guard favored over the federal military by a wide margin. This indicates that the general public has an aversion to federal, or presidential, control of military assets that may be employed in such a situation. Without the public’s clear support, it would be inappropriate and politically misguided for the president to invoke the Insurrection Act to address the disturbances with active duty federal troops.

## Conclusion

The states are well positioned to maintain law and order without unwanted interference from federal military forces and the invocation of the Insurrection Act. Law enforcement

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<sup>63</sup> As reported by aggregator Polling Report, Inc. Retrieved on December 31, 2020 from <https://www.pollingreport.com/crime.htm>. Referring to CNN poll conducted from June 2-5, 2020.

<sup>64</sup> According to a CNN poll conducted by SSRS from June 2-5, 2020, respondents were asked, “Do you think it would be appropriate or not appropriate for the president to deploy the U.S. military in response to protests in the United States?” 36% responded “appropriate,” 60% responded “inappropriate,” and 4% responded “unsure.” <http://cdn.cnn.com/cnn/2020/images/06/08/rel6a.-race.and.2020.pdf>.

<sup>65</sup> Nicholas Reimann, “58% Of Voters Support Using Military To Help Police Control Protests, Poll Finds,” *Forbes* (June 2, 2020), <https://www.forbes.com/sites/nicholasreimann/2020/06/02/58-of-voters-support-using-military-to-help-police-control-protests-poll-finds/>; Morning Consult. *National Tracking Poll #2005131*, 2020, 190-199, [https://assets.morningconsult.com/wpuploads/2020/06/01181629/2005131\\_crosstabs\\_POLICE\\_RVs\\_FIN\\_AL\\_LM-1.pdf](https://assets.morningconsult.com/wpuploads/2020/06/01181629/2005131_crosstabs_POLICE_RVs_FIN_AL_LM-1.pdf).



agencies at all levels have improved training and equipment, and the expertise to perform riot control and confront civil unrest. If a situation requiring military capabilities develops, states should and do first turn to their state National Guard. More often than not, the states are able to restore order without assistance from federal active duty troops. This is not lost on the American public, as they have indicated that they trust their local police departments and that those agencies were doing a good job during the civil unrest. They further indicated that if military capabilities were required, they would prefer the state's National Guard over federal military force.

The president does, however, have the ability to move federal civilian law enforcement personnel to assist local and state agencies without invoking any special authorities. With well over 100,000 executive branch law enforcement officers at the president's disposal, there are plenty of civilian law enforcement officers that the president could use to assist state and local efforts. Although this is a more palatable option than invoking the Insurrection Act and deploying active duty troops into the states, this should be done in coordination with state and local governments as this can also be seen as controversial and politically unwise. Generally, federal agencies are responsible for enforcing federal law, not the suppression of citywide disturbances. However, local and state agencies regularly collaborate with federal agencies to mutual benefit, but to maintain order in the community is the purview of local and state governments.

The Insurrection Act gives the President of the United States an incredible amount of authority to confront domestic civil disorder with active duty military force. While the president has the authority, it is not necessarily the right thing to do. Historically, presidents have only invoked the Act unilaterally when the state in question was in open and intentional defiance of

federal law or court order, as was the case when some states used their military and police forces to defy orders to desegregate. Otherwise, presidents have invoked the Act to assist in quelling civil unrest and restoring order within a state only after receiving a specific request for assistance from the state in question. In reference to the widespread protests and civil disorder of 2020, no states had made such a request. To invoke the Act absent a request from the state would not only be unpopular, inappropriate, and unnecessary, it would also be an affront to the idea of federalism and an intrusion on the state's Tenth Amendment inherent right to maintain law and order and enforce state law within their jurisdiction. Perhaps this explains why it has been almost thirty years since the Insurrection Act was last invoked.

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