

# Principles for Insurrection Act Reform

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## THE PROJECT

At the invitation of the leadership of The American Law Institute, a group with a membership that spans a range of legal and political views came together to consider possible reforms for the Insurrection Act. Group members have varied backgrounds in constitutional law, national security law, and military law, and in senior positions of the U.S. Government. All share the belief that Congress should reform the Insurrection Act. After studying the Insurrection Act's flaws, members came to agreement on core principles that should guide this reform.

That the group came to a consensus on core principles does not mean that each member would apply those principles in the same way in shaping the details of reform legislation. But the group unanimously agrees that Congress should reform the Insurrection Act as soon as possible and proposes the following principles in an effort to contribute to a constitutionally sound bipartisan consensus in Congress.

## BACKGROUND

The Insurrection Act authorizes the president to deploy U.S. armed forces and the militia inside the United States to meet various threats to federal and state authority. See 10 U.S.C. §§ 251-55. These provisions can be traced to the 1790s and incorporate numerous intervening amendments.

Several provisions of the Constitution frame the Insurrection Act and any reform of the Act. They include:

- “The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States[;] . . . [and] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 14-16, 18.
- “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2.
- “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States[.]” U.S. CONST. art. II, § 2, cl. 1.
- “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the

Executive (when the Legislature cannot be convened) against domestic Violence.” U.S. CONST. art. IV, § 4.

- “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, §§ 1, 5.

There has been a need from the beginning of the nation for armed forces to be available in extreme cases to respond to serious domestic threats and harms to public safety and security. There has also long been a concern about the use of such forces in this context. U.S. military officials past and present have been wary of involvement by the federal armed forces in policing their own citizens. Others have cited dangers to citizens’ rights and state sovereignty.

The Posse Comitatus Act of 1878 provides an important limitation on the use of armed forces to execute the laws. That statute today 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.” 18 U.S.C. § 1385.

The Insurrection Act constitutes an express statutory authorization within the terms of the Posse Comitatus Act. Presidents have several dozen times invoked the Insurrection Act to address major outbreaks of violence and the imminent or actual collapse of federal or state law enforcement. Yet the need for presidents to invoke the Insurrection Act today must be considered in light of the size and capacity of modern law-enforcement agencies at the state and local level, as well as a large federal law-enforcement capacity available to the president, which in 2020 stood at almost 137,000 federal officials authorized to carry firearms, make arrests, or both.

The Insurrection Act in its current form provides broad authority without sufficient checks and balances. It is an old statute with vague triggers for the indefinite domestic use of military force. Some of these triggers are expressed in antiquated language. And the Insurrection Act contemplates no role for Congress in the use of the authorities under the Act even though the president receives those authorities from Congress. These flaws in the Insurrection Act have been clear for a long time and have prompted numerous proposals for reform.

## **PRINCIPLES TO GOVERN INSURRECTION ACT REFORM**

### **A. The “Triggers” for the President’s Invocation of Authority Under the Insurrection Act**

Two basic principles should guide reform of the Insurrection Act’s triggers of authority.

#### *Eliminate Antiquated Terms*

Under the Insurrection Act, a president’s authority to deploy U.S. troops turns on terms—including unlawful “combinations,” “obstructions,” and “assemblages”—that lack settled contemporary

meaning. The important purposes of the statute would be better served, the scope of presidential authority would be clearer, and appropriate congressional oversight would be materially enhanced, if reform of the law removed such terms.

### *Strengthen the Conditions for the Act's Use*

Where the president's deployment of U.S. troops is authorized as a response to the collapse of state or federal law enforcement, a reformed Insurrection Act should more clearly specify (i) the goal of ensuring enforcement and (ii) the requirement that the deployment be necessary to protect public safety and security. For example, the current authority to suppress "domestic violence" in 10 U.S.C. § 253 should be amended to make clear that the violence must be such that it overwhelms the capacity of federal, state, and local authorities to protect public safety and security.

These strengthened conditions on the use of the Insurrection Act are consistent with, but also clarify, the basis for well-recognized past invocations of the Act, such as those by Presidents Eisenhower and Kennedy to achieve compliance with federal-court desegregation orders.

### B. Time Limits, Reporting, and Consultation

Several statutes require the president and other executive branch officials to consult with and report to Congress on uses of force, covert operations, and other military or intelligence activities abroad. *See, e.g.*, 10 U.S.C. § 130f (sensitive military operations); 50 U.S.C. § 3093(b), (c) (covert actions); 50 U.S.C. § 3092(a) (intelligence activities other than covert action); 50 U.S.C. §§ 1542-43 (hostilities or imminent hostilities by the armed forces). Congress has also imposed a time constraint on certain presidential uses of the armed forces outside the United States, subject to subsequent congressional approval. 50 U.S.C. §§ 1544-45.

Although the Insurrection Act is grounded in Congress's power over the militia and war, the Act lacks any analogous reporting or consultation requirements. It also lacks time limits on the deployment of the armed forces or militia. From the perspective of democratic governance and constitutional principle, the use of armed forces and the militia in the domestic sphere can be as significant as the use of armed forces abroad. Congress in the exercise of its constitutional prerogatives should establish analogous reporting and consultation requirements, and time-limit constraints, on presidential deployments under the Insurrection Act.

A reformed Insurrection Act should:

- Require the president to consult, prior to the deployment of troops, with the governor of any state into which troops will be deployed.
- Require the president to make findings on the need to invoke the Insurrection Act, and to report these findings to Congress, along with a summary of consultations with state authorities, within 24 hours of deployment.
- Establish a time limit on the president's authority to deploy troops under the Insurrection Act. The time limit should not exceed 30 days absent renewed congressional authorization.

- Establish a fast-track procedure for Congress to vote on renewal of presidential authority under the Insurrection Act.

### C. Judicial Review

Insurrection Act reform should not include a provision for judicial review. Judicial review would likely be available to address discrete issues under extant law, and the Supreme Court has made clear the president's invocation of the Act will receive significant deference. The constitutionally guaranteed writ of habeas corpus remains available at all times.

#### GROUP MEMBERS

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#### BIOGRAPHIES\*

Bob Bauer is Professor of Practice and Distinguished Scholar in Residence at New York University School of Law. He served as White House Counsel (2009-2011), as Co-Chair of the Presidential Commission on Election Administration (2013-2014), and as Co-Chair of the Presidential Commission on the Supreme Court of the United States (2021).

James W. Crawford III, Vice Admiral, JAGC, U.S. Navy (Retired), was appointed by President Obama as the 43rd Judge Advocate General of the Navy (2015-2018). He served thirty-four years of active duty that included service as the principal military legal counsel to the Secretary of the Navy and Chief of Naval Operations and as the Department of Defense Representative for Ocean Policy Affairs (REPOPA). From 2020 to 2023, he was president of Felician University, a Franciscan Catholic university in New Jersey.

Mary DeRosa is a Professor from Practice at Georgetown University Law Center. She served as Deputy Counsel to the President and Legal Adviser to the National Security Council (2009-2011), as Chief Counsel for National Security for the Senate Judiciary Committee (2007-2009), as Legal Adviser and Deputy Legal Adviser to the National Security Council (1997-2000), and as Special Counsel to the General Counsel at the Department of Defense (1995-1997).

John Eisenberg is a national-security and white-collar attorney. In the Trump Administration, he served as the Legal Advisor to the National Security Council, Assistant to the President, and Deputy Counsel to the President. In the George W. Bush Administration, he served as a Deputy Assistant Attorney General in the Office of Legal Counsel and as an Associate Deputy Attorney General in the Department of Justice. He was a partner at Kirkland & Ellis from 2009 until 2017.

Courtney Simmons Elwood served as General Counsel of the U.S. Central Intelligence Agency (2017-2021), and as Associate Counsel to the President, Deputy Counsel to the Vice President, and Deputy Chief of Staff and Counselor to the Attorney General (2001-2007).

Jack Goldsmith is the Learned Hand Professor at Harvard Law School. He served as Assistant Attorney General, Office of Legal Counsel (2003-2004), and as Special Counsel to the General Counsel of the Department of Defense (2002-2003).

Jeh Charles Johnson is a partner in the law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP who previously served as Secretary of Homeland Security (2013-2017), General Counsel of the Department of Defense (2009-2012), General Counsel of the Department of the Air Force (1998-2001) and as an Assistant U.S. Attorney for the Southern District of New York (1989-1991).

Bruce MacDonald is a retired United States Navy vice admiral who served as the 40th Judge Advocate General of the United States Navy from July 2006 to August 2009. In March 2010, he was appointed to the Senior Executive Service by Secretary of Defense Robert Gates and served for three years as Convening Authority for the Office of Military Commissions.

Mark Martins is a retired Army brigadier general and a private practitioner of law in Washington, D.C. Before retirement from the military in 2021, he served in Kosovo (1999), Iraq (2003, 2004, 2006-2008), and Afghanistan (2009-2011), and as chief prosecutor for proceedings under the Military Commissions Act (2011-2021).

Michael B. Mukasey served as a U.S. District Judge for the Southern District of New York (1988-2006) and as the 81st Attorney General of the United States (2007-2009).

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