

# Exploring Constitutional Limits of Insurrection Powers

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## INTRODUCTION

Just over a year into his second term in office, President Donald Trump and his administration have threatened to invoke extensive national powers under antiquated provisions of the Insurrection Acts<sup>1</sup> to quell “rebellions”<sup>2</sup> and other purported threats to public health and safety.<sup>3</sup> The primary bases

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1. 10 U.S.C. §§ 251–54.

2. See Memorandum from Donald J. Trump, President, U.S., to Sec’y of Def. et al. (June 7, 2025) (on file with The White House).

3. See Alexandra Marquez & David Ingram, *Trump Backs Away from Sending Federal Troops to San Francisco After Pleas from Tech Leaders*, NBC NEWS (Oct. 23, 2025), <https://www.nbcnews.com/politics/donald-trump/trump-san-francisco-troops-rcna239409> [<https://perma.cc/Z278-NRJC>]; Donald J. Trump (@realDonaldTrump), TRUTH SOC. (Jan. 15, 2026), <https://truthsocial.com/@realDonaldTrump/posts/115899252938886431>. President Trump previously threatened to use insurrection powers during the latter part of his first term in office. See, e.g., Laura A. Dickinson, *Protecting the U.S. National Security State from a Rogue President*, 16 HARV. NAT’L SEC. J. 1, 11 (2025) (“Notably, toward the end of President Trump’s first term in 2020, his administration reportedly drew up plans to invoke the Act to quell protests against police violence.”). Ironically, one event for which invocation of such powers may have clearly been warranted is the storming of the U.S. Capitol on January 6, 2021. Thousands of persons took siege of the building and grounds, resulting in five deaths and dozens of prosecutions of offenders in the ensuing months. See Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES, <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html> (Oct. 13, 2022). President Trump was in the final weeks of his first term in office at that time. He was later investigated by the incoming President Biden administration for his role in the siege. Pete Williams et al., *Justice Department Investigating Trump’s Actions as Part of Jan. 6 Probe*, YAHOO! NEWS (July 27, 2022), <https://www.yahoo.com/news/justice-department-investigating-trump-actions-111954325.html> [<https://perma.cc/NN62-H8K9>].

under President Trump’s purview for such powers are repeated acts of civil unrest largely in response to immigration practices via federal Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Patrol (CBP) agents in Minneapolis beginning in early 2026 as well as other urban areas this past year.<sup>4</sup>

To date, President Trump has not actually unleashed armed forces of the U.S. military. Instead, he chose to act under separate statutory authorities<sup>5</sup> to mobilize state-based National Guard members in select locations (e.g., Charlotte, Chicago, Los Angeles, Memphis, New Orleans, Portland, and Washington, D.C.).<sup>6</sup> His efforts under this distinct statutory route, however, were circumvented in late December 2025 by a divided United States Supreme Court (SCOTUS) in its *per curiam* opinion in *Trump v. Illinois*.<sup>7</sup> Rejecting presidential claims of constitutional and statutory authority to mobilize the National Guard, the Court determined he failed to demonstrate that use of U.S. military troops could not have “executed the laws” as per Congress’s statutory requirement.<sup>8</sup>

SCOTUS’s invalidation of one exercise of executive emergency authority seemed to embolden President Trump’s willingness to consider other options. In a concurring opinion in *Trump v. Illinois*, Justice Kavanaugh intimated that the president could have simply invoked the Insurrection Acts in response to public protests.<sup>9</sup> Since the country’s founding, presidents have relied on rapid military deployments to stymie rebellions and other actions endangering

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4. See Charles Homans, *Watching America Unravel in Minneapolis*, N.Y. TIMES MAG, <https://www.nytimes.com/2026/01/25/magazine/minneapolis-trump-ice-protests-minnesota.html> (Jan. 27, 2026).

5. See 10 U.S.C. § 12406 (“Whenever . . . (2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or (3) the President is unable with the regular forces to execute the laws of the United States; the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to . . . suppress the rebellion, or execute those laws.”).

6. See Hanna Park et al., *What to Know About Trump’s Latest Federal Deployments in Memphis, Portland and Other US Cities*, CNN, <https://www.cnn.com/2025/10/02/us/trump-national-guard-portland-memphis-wwk-hnk> (Oct. 2, 2025) [<https://perma.cc/UBJ8-2GPF>]; Dana Goldstein & Hamed Aleaziz, *Trump Administration Plans to Send Border Patrol to Charlotte and New Orleans*, N.Y. TIMES (Nov. 11, 2025), <https://www.nytimes.com/2025/11/11/us/trump-border-patrol-charlotte-new-orleans.html>.

7. 146 S. Ct. 432, 433–34 (2025) (*per curiam*) (denying application for stay).

8. *Id.* at 434.

9. *Id.* at 435 n.2 (Kavanaugh, J., concurring) (“As I read it, the Court’s opinion does not address the President’s authority under the Insurrection Act. See 10 U. S. C. §§ 252, 253. . . . One apparent ramification of the Court’s opinion is that it could cause the President to use the U.S. military more than the National Guard to protect federal personnel and property in the United States.”).

national security and public safety within and across states.<sup>10</sup> Constitutional framers and congressional members foresaw risks of rebellions and other unruly actions, addressing them through statutory insurrection authorities vested largely with the president as the nation's highest executive authority.<sup>11</sup>

Whether presidents possess the powers to abate insurrections or rebellions is unquestionable. What distinguishes President Trump's willingness to invoke these authorities from his predecessors is that his own administration's aggressive actions through ICE and CBP agents are a primary source of civil unrest in Minneapolis and other cities hosting mass demonstrations.<sup>12</sup> Thus, the president sought to deploy the military to control public and private sector responses to the use of his own federal forces carrying out specious immigration control policies.<sup>13</sup>

As examined below, wielding insurrection powers under these domestic circumstances is largely unprecedented and unlawful based on two premier constitutional queries.<sup>14</sup> First, how much authority does President Trump (or any other president) have to utilize military powers on civil populations exerting their First Amendment rights to protest government actions? As examined in Part I, legislative and judicial approaches to presidential invocations of insurrection authorities have largely been viewed as hands

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10. For a historical summary of these authorities, see Michael R. Rouland & Christian E. Fearer, *Calling Forth the Military: A Brief History of the Insurrection Act*, 99 *JOINT FORCE Q.* 124, 125–32 (2020).

11. See Jeremy Campbell, *Amending Insurrection: Restoring the Balance of Power in the Insurrection Act*, 9 *TEX. A&M L. REV.* 239, 241–42 (2021). Post-Civil War failures or refusals to execute federal laws, including civil rights protections, across largely southern states in the mid- and late-1900s warranted similar, national responses sustained via amended insurrection emergency powers. *Id.* at 252–57; see also Jennifer Selin, *The Insurrection Act Is One of at Least 26 Legal Loopholes in the Law Banning the Use of the US Military Domestically*, *CONVERSATION* (Jan. 15, 2026), <https://theconversation.com/the-insurrection-act-is-one-of-at-least-26-legal-loopholes-in-the-law-banning-the-use-of-the-us-military-domestically-273649> [<https://perma.cc/LA2B-BH9G>].

12. See Jonah E. Bromwich, *ICE Agents Menaced Minnesota Protestors at Their Homes, Filings Say*, *N.Y. TIMES*, <https://www.nytimes.com/2026/02/13/us/minneapolis-ice-agents-protester-home-visits.html> (Feb. 14, 2026).

13. See Elizabeth Goitein, *Unpacking Trump's Order Authorizing Domestic Deployment of the Military*, *BRENNAN CTR. FOR JUST.* (June 10, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/unpacking-trumps-order-authorizing-domestic-deployment-military> [<https://perma.cc/NR5A-3VSJ>].

14. Note there are major distinctions between presidential powers to address foreign versus domestic threats to national security. See Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 *YALE L.J.* 149, 152–53 (2004) (discussing significant differences between insurrection authorities to address foreign threats). This commentary focuses solely on homegrown domestic threats to national or state security or public health and safety.

off.<sup>15</sup> The Constitution gave Congress the right to legislatively assign the president such powers. Congress did so. Consequently, SCOTUS and lower courts have consistently resisted constraining presidential decisions as to when to use insurrection powers.<sup>16</sup>

Even if Congress and SCOTUS defer extensively to presidential discretion in the invocation of insurrection powers, does the Constitution limit presidential authority to act under such emergencies? Explored in Part II, historic and modern judgments from the Court suggest there are, in fact, constitutional restraints to execution of military powers against civil populations. The Constitution is not cast aside during rebellions or other strife. If anything, its principles take primacy to protect Americans from sheer acts of presidential despotism that perhaps only SCOTUS can prevent.

### I. EXCLUSIVITY OF EXECUTIVE INSURRECTION AUTHORITIES

Pursuant to the Insurrection Acts (a series of statutory provisions passed over time and collectively referred to herein as the “Acts”),<sup>17</sup> President Trump as Commander in Chief has extensive power to mobilize U.S. military members to enforce federal law and hinder rebellions under broad statutory language:

Whenever 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>18</sup>

These broad emergency powers do not stop there. Under additional provisions, President Trump is authorized to suppress insurrections, acts of domestic violence, or conspiracies anywhere in the United States that “hinder[]” enforcement of federal or state laws so as to (1) deprive persons of their constitutional rights, privileges, or immunities or (2) oppose, obstruct, or impede justice.<sup>19</sup> Invocation and execution of these powers must be

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15. See Bob Bauer & Jack Goldsmith, *Here’s What Trump Could Unleash by Invoking the Insurrection Act*, N.Y. TIMES (Oct. 18, 2025), <https://www.nytimes.com/2025/10/18/opinion/trump-insurrection-act.html>.

16. See *id.*

17. 10 U.S.C. §§ 251–54.

18. *Id.* § 252.

19. *Id.* § 253.

accompanied by presidential orders to insurgents to “disperse and retire peaceably . . . within a limited time.”<sup>20</sup>

That Congress instilled these powers in the president is understandable. It was constitutionally allotted the task of “calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.”<sup>21</sup> As Professor Stephen I. Vladeck documents, from the earliest days of the Union, Congress crafted legislation to prevent the types of threats that can destroy states or the nation.<sup>22</sup> Initial statutory powers to quell insurrections assigned considerable discretion to presidents while reserving Congress’s ability to curb or withdraw them as needed.<sup>23</sup> Congressional limitations on presidential insurrection powers largely dissipated over time as the demand for rapid responses to exigencies emerged.<sup>24</sup> The president arguably needed unquestioned authorities to tamp down rebellions and stymie obstructions of justice, without being subjected to significant legislative oversight. Congress obliged, amending the Acts on multiple occasions to enhance presidential discretion to invoke, execute, and terminate these powers.<sup>25</sup>

#### A. *Scope of Insurrection Powers*

The modern breadth of presidential statutory authority under the Acts is palpable. Without advance congressional notice or judicial approval, “[w]hensoever” the president determines that “obstructions, combinations, or assemblages,” (limited only by their unlawfulness), or “rebellion[s],” (which are presumably always unlawful) render it “impracticable” to enforce U.S. laws in any part of the country through typical judicial processes, he can mobilize the “militia of any State” (e.g., National Guard) and “armed forces” (e.g., Army, Navy, Marines, Air Force) as “necessary” to enforce laws or tamp down rebellions.<sup>26</sup>

In essence, the president possesses unilateral authority via Congress to determine what constitutes an insurrection or other unlawful activities and then mobilize potentially hundreds of thousands of military or National

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20. *Id.* § 254.

21. U.S. CONST. art. I, § 8.

22. Vladeck, *supra* note 14, at 1553 & n.11.

23. *Id.* at 1553.

24. *See* Rouland & Fearer, *supra* note 10, at 126–29.

25. *Id.* For a discussion of potential unconstitutional facets of the structure of the Insurrection Acts, see William C. Banks, *Providing “Supplemental Security”—The Insurrection Act and the Military Role in Responding to Domestic Crises*, 3 J. NAT’L SEC. L. & POL’Y 39, 40–42 (2009) (arguing that the Acts assign too much authority to the President to the exclusion of states’ rights).

26. 10 U.S.C. § 252; Bauer & Goldsmith, *supra* note 15.

Guard members to suppress rebellions or administer laws through presumably any means he considers necessary. Neither Congress nor courts are expressly empowered to object to invocations of these powers, nor are they able to directly limit their duration. Societal legislative protections from prospective governmental abuses under the Posse Comitatus Act of 1878,<sup>27</sup> which prohibits military performance of domestic law enforcement, are expressly disavowed by the Insurrection Acts.<sup>28</sup> Military members mobilized via these Acts can, and have historically, enforced domestic laws.<sup>29</sup>

Consequently, insurrection powers are among the most hefty and subjective authorities possessed by any single person in the constitutional design of the nation (although they do not directly authorize presidential declarations of martial law).<sup>30</sup> Wielded responsibly over limited durations, their execution may curb profound threats to national security and preserve stability. Lacking definitive guardrails or affirmative limitations, however, unfettered implementation of these historic powers could significantly infringe individual rights and communal interests among affected persons whose welfare and lives stand in the balance.

### B. Presidential Discretion

Just how much discretion does a president have to invoke insurrection powers? It is considerable. The president is allotted broad and largely unilateral authority to summon and implement insurrection authorities.<sup>31</sup> Maximizing presidential discretion is a prominent component of a series of legislative acts passed by Congress, starting with the 1792 Calling Forth Act.<sup>32</sup> Initially, the president could call on the militia only after issuing a

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27. See 18 U.S.C. § 1385; see also John R. Brinkerhoff, *Understanding the Posse Comitatus Act and the Insurrection Act*, 3 ST. DEF. FORCE J. 3, 5 (2007).

28. See Vladeck, *supra* note 14, at 168.

29. See Rouland & Fearer, *supra* note 10, at 126–28.

30. See Tim Lau & Joseph Nunn, *Martial Law, Explained*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/martial-law-explained> (June 9, 2025) [<https://perma.cc/6Z7E-MA58>] (“In the United States, martial law usually refers to a power that, in an emergency, allows the military to take the place of the civilian government and exercise jurisdiction over civilians in a particular area.”). The authors argue that neither the Constitution nor Congress authorizes the president to declare martial law through the Insurrection Acts or other provisions. *Id.*

31. See Mireya Navarro, *The Insurrection Act: A Presidential Power that Threatens Democracy*, BRENNAN CTR. FOR JUST. (Feb. 15, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/insurrection-act-presidential-power-threatens-democracy> [<https://perma.cc/5ABT-5XUG>].

32. Vladeck, *supra* note 14, at 156, 159.

judicial notification that a crisis existed.<sup>33</sup> The 1795 Militia Act rescinded this judicial requirement, making the president the “sole arbiter” of when circumstances necessitated military intervention, allowing him to act “decisively, expeditiously, and . . . unilaterally.”<sup>34</sup> The Suppression of the Rebellion Act passed in 1861 at the commencement of the Civil War allowed President Abraham Lincoln to solely determine when it was “impracticable” to enforce laws through ordinary judicial proceedings, a one-time limitation on his power in earlier versions of the Acts.<sup>35</sup> After the War, the 1871 Militia Act granted presidents “unfettered statutory discretion” to deploy either state militias or the federal army to protect civil rights and enforce the newly-crafted Fourteenth Amendment without advance state approval.<sup>36</sup>

SCOTUS historically reinforced Congress’s allocation of broad discretion to the president to invoke the Insurrection Acts through a series of landmark decisions. In *Martin v. Mott*, the Court held that the authority to determine whether an emergency exists “belongs exclusively to the President.”<sup>37</sup> Such presidential decisions are “conclusive upon all other persons,”<sup>38</sup> in particular a New York state militia member who challenged his court martial for evading presidential orders.<sup>39</sup> To the degree the president is the “judge of the existence of the exigency,” the law provides no appeal from his judgment.<sup>40</sup> This same reasoning was affirmed twenty-two years later in *Luther v. Borden*.<sup>41</sup> The Court was petitioned to examine President John Tyler’s use of insurrection powers during the Dorr Rebellion in Rhode Island.<sup>42</sup> Its decision authorized the president to determine the source of insurrection sufficient to call forth militia to protect the state against domestic violence. As SCOTUS determined, the power to decide whether a crisis has arisen and by whom is clearly “given to the president.”<sup>43</sup>

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33. *See id.* at 162.

34. *Id.* at 162–63.

35. *Id.* at 166–67, 166 n.69.

36. *Id.* at 168; *see also* Rouland & Fearer, *supra* note 10, at 128.

37. 25 U.S. (12 Wheat.) 19, 30 (1827).

38. *Id.*

39. *Id.* at 20–22, 28.

40. *Id.* at 31.

41. 48 U.S. (7 How.) 1, 44–45 (1849).

42. *See id.* at 43–44.

43. *Id.* at 43; *see also* *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 76 (1857). In *Dynes*, a seaman charged with attempted desertion was committed to the penitentiary by a marshal under presidential direction. *Id.* at 77. After the seaman brought a false-imprisonment action against the marshal, the Court held the marshal incurred no liability as he acted within lawful jurisdiction under presidential insurrection authorities and factual determinations. *Id.* at 77, 83–84. The Court underscored that presidential determinations regarding whether the conditions necessary to invoke insurrection authority are satisfied are conclusive. *Id.* at 76.

The Supreme Court's deference to Congress's delegation of insurrection authorities to the president, coupled with significant discretion to wield them, proved prescient leading into the Civil War in the early 1860s. In a series of admiralty disputes filed shortly after the onset of the war collectively known as *The Prize Cases* in 1863, SCOTUS reviewed President Lincoln's authority to establish a naval blockade.<sup>44</sup> Consistent with its prior decisions, it affirmed that whether blockades and other measures were warranted to tamp down insurrections is a "question to be decided by [the president]."<sup>45</sup> Relying on Congress's empowerments and the Court's acquiescence, President Lincoln steered the nation through its greatest internal conflict.<sup>46</sup> The remainder of the century witnessed significant race-based and other uprisings during the Reconstruction era, resulting in even broader Congressional enactments to buttress presidential powers and discretion via the Acts to curb domestic violence and other injustices over the century ahead.<sup>47</sup>

## II. CONSTITUTIONAL BOUNDARIES OF INSURRECTION POWERS

Presidential authorities and discretion firmly embedded in the Insurrection Acts via Congress and endorsed by SCOTUS support the capacity of President Trump to unilaterally invoke these powers and execute them through U.S. military and National Guard members. Mobilizing thousands of military troops united under central command to put down insurrections or eliminate obstructions of justice has worked repeatedly over time to protect the nation, its states, and populations from clear threats to health and safety.<sup>48</sup> What about instances, however, where government actions themselves are a primary threat? Are powers entrusted with the president to terminate insurrections, curb threats to civil liberties, and re-establish law and order subject to constitutional protections to obviate rogue exercises of emergency powers?<sup>49</sup>

Stated alternatively, what stands in the way of a president who seeks to use insurrection powers in truly egregious manners? Political considerations are always at play. Any president may have to address significant national or

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44. See *The Prize Cases*, 67 U.S. (2 Black) 635, 640–41 (1863).

45. *Id.* at 670.

46. See Rouland & Fearer, *supra* note 10, at 127–28.

47. See *id.* at 128–30; see generally Eric Foner, *Reconstruction Revisited*, 10 REVS. AM. HIST. 82 (1982) (discussing the role of federal policy during the economic and societal shifts during the Reconstruction era).

48. See Rouland & Fearer, *supra* note 10, at 132–33.

49. See Dickinson, *supra* note 3, at 3 ("In the U.S. tradition, President Trump is arguably distinctive, however, because of the frequency and extent to which he has attempted to exercise such power and in explicitly stating that he is willing to go 'rogue.'").

regional objections to use of these powers. Presidents like Trump in his last constitutionally permitted term in office, however, may not be swayed so much by political forces.<sup>50</sup> Conversely, a president could face impeachment in response to unwarranted practices.<sup>51</sup> A unified Congress currently in lockstep with President Trump seems disinclined to take this step. Congress could simply amend the Insurrection Acts midstream<sup>52</sup> or defund military forced into action by the president.<sup>53</sup> Serious constitutional and political questions as to the soundness of these maneuvers would likely follow, as well as a presidential veto.<sup>54</sup> For these reasons, Congress may struggle to rein in a president it empowered to address national exigencies.<sup>55</sup>

#### A. Unlawful Acts

Two predominant legal protections remain. First, in each iteration of the Insurrection Acts, Congress clarified directly or by inference that presidential powers are only viable in response to unlawful acts.<sup>56</sup> Congress does not attempt to define terms like rebellions, insurrections, and domestic violence addressed in the Acts, but each is clearly illegal by nature. In every other instance in which insurrection powers may be wielded, including to address “obstructions” or “assemblages,” Congress clarifies that the underlying acts sustaining presidentially-authorized military responses must be unlawful.<sup>57</sup> Thus, for the president to legally respond via the Acts, the circumstances warranting intervention must be classifiable as outside the law. Illegalities may extend from threats to public health or safety as well as deprivations of rights, privileges, immunities, or protections “named in the Constitution,” or that obstruct or oppose the “execution of the laws” or impede “the course of justice.”<sup>58</sup>

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50. *Id.* at 12–13.

51. *See id.* at 4–5.

52. *See* Vladeck, *supra* note 14, at 153 (“[W]hat Congress giveth, Congress can surely taketh away.”).

53. *See* Dickinson, *supra* note 3, at 13–15 (documenting multiple calls for modern failed reforms to the Insurrection Acts).

54. *See id.* at 20.

55. *See also id.* at 15–19 (arguing that presidents may curb their own executions of insurrection powers through Executive Orders, Presidential Decision Directives, and internal memos through the Office of Legal Counsel). None of these options seem likely amid the Trump administration’s repeated references to the president’s power to invoke these authorities.

56. *See id.* at 5; Joseph Nunn & Elizabeth Goitein, *The Insurrection Act, Explained*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/insurrection-act-explained> (Nov. 12, 2025) [<https://perma.cc/2759-UDDL>].

57. 10 U.S.C. § 252.

58. *Id.* § 253.

Statutory framing of insurrection powers to address acts of illegality may hardly seem a barrier to presidential malfeasance during their execution when Congress fails to delineate exactly what types of uprisings or similar events sustain emergency responses. Yet, how could it? Unlawful acts threatening regional or national stability are multifarious. Any statutory attempt to classify precisely when the president can respond or not may contribute to confusion when rapid responses are needed most. What Congress relies on instead is a demarcation between presidential responses to unlawful acts, which are authorized, and lawful acts, which are not.

Applied to President Trump's contemporary threats to use insurrection powers, Congress's demarcation is salient. To the degree he seeks to invoke insurrection powers to put down protesters in Minnesota who peaceably assemble to voice their objections to ICE tactics, his powers are at their lowest ebb. Americans properly exercising their First Amendment rights are not breaking the law. On the other hand, persons rioting in the streets or wreaking havoc to protest lawful activities of federal agents may be cast as acting outside the law, and subject to emergency restraints.<sup>59</sup> While use of insurrection powers should be a "last resort,"<sup>60</sup> presidential discretion as to their invocation is still a dangerous option contributing to prospective abuses.

### B. Constitutional Protections

Even if the Acts are legitimately invoked, the president and military forces under his command are not empowered to address emergencies through any means necessary. SCOTUS has repeatedly clarified that constitutional protections and limitations on government actions remain in place even during exigencies, including invocations of insurrection powers.<sup>61</sup> Justice Joseph Story for the majority in *Martin* recognizes "there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, . . . is to be found in the constitution itself."<sup>62</sup> Likewise, in *Luther*, SCOTUS clarifies that if the president or his officers invade individual rights

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59. See *Trump v. Illinois*, 146 S. Ct. 432, 440–46 (2025) (Alito, J., dissenting) (proclaiming that the collective series of violent acts undertaken in response to ICE agents in Illinois constitute unlawful acts).

60. Dickinson, *supra* note 3, at 21 (quoting Memorandum from Antonin Scalia, Assistant Att'y Gen., Off. of Legal Couns., to the Deputy Att'y Gen., Law Relating to Civil Disturbances (Jan. 6, 1975)). The last known deployment of U.S. military via the Insurrection Acts was in 1992 to quell riots in Los Angeles following the racially-charged Rodney King trial in which several white police officers were found not guilty for assaulting a Black man. See Nunn & Goitein, *supra* note 56.

61. See Rouland & Fearer, *supra* note 10, at 130.

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

through the use of insurrection authorities for “purposes of oppression,” Congress can remedy it.<sup>63</sup>

While presidential invocations of insurrection powers may not be subject to considerable judicial review, execution of such powers inviolate of Americans’ constitutional rights and protections are. In *Sterling v. Constantin*, SCOTUS examined the role of the federal judiciary to address alleged abuses via Texas’s governor acting under state-based insurrection powers similar to federal powers.<sup>64</sup> When the historic equivalent of the Texas National Guard was called in by Texas Governor Ross S. Sterling to quell intrastate activities that were not remotely classifiable as rebellious,<sup>65</sup> SCOTUS intervened. Chief Justice Charles Evans Hughes confirmed that “allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”<sup>66</sup> Federalism-based arguments by Governor Sterling that his emergency orders were “supreme,” “unchallengeable,” and “unreviewable”<sup>67</sup> in federal court were rejected by SCOTUS:

If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases . . . Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution.<sup>68</sup>

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63. *Luther v. Borden*, 48 U.S. (7 How.) 1, 46 (1849) (“And if the power is exercised for the purposes of oppression, or any injury willfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable.”).

64. 287 U.S. 378, 389–92 (1932).

65. *Id.* at 392 (“The evidence shows no insurrection nor riot; in fact, existing at any time in the territory, no closure of the courts, no failure of civil authorities.”).

66. *Id.* at 401. The Court clarifies further:

When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the federal judicial power extends . . . and, so extending, the court has all the authority appropriate to its exercise.

*Id.* at 398.

67. *Id.* at 397.

68. *Id.* at 397–98.

Later, in cases like *Youngstown Sheet & Tube Co. v. Sawyer*<sup>69</sup> and *Baker v. Carr*,<sup>70</sup> SCOTUS clarified that courts retain responsibility for deciding whether presidents have exceeded allotted authorities. Historic recognition of the political question doctrine<sup>71</sup> does not shield clear instances of a “manifestly unauthorized exercise of power.”<sup>72</sup> Even where the president determines an exigency exists, a “[c]ourt is not at liberty to shut its eyes to an obvious mistake.”<sup>73</sup>

Two critical takeaways arise from the Court’s findings on the limits of presidential insurrection authorities: (1) improper executions of these powers are unquestionably reviewable by the judiciary. Even as statutory evolutions and judicial precedent allow considerable discretion to the president to invoke insurrection authorities, subsequent uses of these powers are subject to constraints; and (2) federal constitutional principles are “paramount,” as per *Sterling*, even during emergencies.<sup>74</sup> As to this latter finding, the Justices have opined as recently as this decade that constitutional norms are not put aside via the execution of federal emergency powers. Reviewing prospective constitutional infringements arising from social distancing powers during the throes of the COVID-19 pandemic, for example, the Court clarified how “constitutional norms remain intact even during crises.”<sup>75</sup>

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69. 343 U.S. 579, 589 (1952) (rejecting President Harry Truman’s authority to end a national strike among steelworkers through powers authorized directly by Congress or indirectly via presidential powers under Article II of the Constitution).

70. 369 U.S. 186, 226 (1962) (holding that challenges to Tennessee’s failure to reapportion its legislative districts are justiciable under the Equal Protection Clause even if presidential invocations of insurrection powers are not); *id.* at 221 (quoting *Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849)) (noting that once the president invokes the Insurrection Acts, courts are not positioned to question whether “his decision was right”).

71. In *Marbury v. Madison*, SCOTUS articulated the foundation of the political question doctrine, recognizing that certain disputes present issues constitutionally committed to the other branches of government and therefore are not within the scope of judicial review. 5 U.S. (1 Cranch) 137, 165–70 (1803).

72. *Baker*, 369 U.S. at 217.

73. *Id.* at 213–14 (clarifying what may constitute an “obvious mistake,” including extending emergencies beyond their factual reality related to rent controls).

74. *Sterling v. Constantin*, 287 U.S. 378, 398 (1932).

75. James G. Hodge, Jr. et al., *COVID’s Constitutional Conundrum: Assessing Individual Rights in Public Health Emergencies*, 88 TENN. L. REV. 837, 866 & n.178 (2021) (“[E]ven in a pandemic, the Constitution cannot be put away and forgotten.”); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 21 (2020) (Gorsuch, J., concurring) (“Government is not free to disregard the First Amendment in times of crisis.”); *id.* at 42 (Sotomayor, J., dissenting) (“Free religious exercise is one of our most treasured and jealously guarded constitutional rights. States may not discriminate against religious institutions, even when faced with a crisis as deadly as this one.”).

### III. CONCLUSION

Presidential invocation and use of insurrection powers to limit law-abiding actions of Americans protesting ICE agents' actions in Minneapolis or elsewhere are unlawful on multiple grounds. Exercises of insurrection powers are subject to considerable discretion, but not "rubber stamp" seals of judicial approval. Courts can review—and reject—alleged bases for such invocations. Judicial rejections of President Trump's insurrection authorities are constitutionally- and statutorily-warranted where the purported grounds for their uses are to quell otherwise lawful activities of Americans whose actions are not "rebellious" in nature.

Even if insurrection powers are lawfully invoked, deployed U.S. military cannot act against Americans in ways that exceed constitutional boundaries or infringe their rights. Federal agents cannot disband lawful assemblies of protesters under the First Amendment. They cannot conduct unwarranted searches under the Fourth Amendment. They cannot deny affected persons substantive or procedural due process under the Fifth and Fourteenth Amendments. They cannot dictate or control state agents to accomplish federal objectives arguably under the Tenth Amendment. And they cannot create the conditions for anarchy in attempts to establish a militant state in compliance with misguided presidential objectives under any part of the Constitution. What they can do under the Insurrection Acts is restore law and order in promotion of the public's health, safety, and liberty. *Nothing more.*