**Statement of the Brennan Center for Justice at New York University School of Law**

**Before the**

**United States Senate Judiciary Committee**

**Hearing on**

# How Mass Deportations Will Separate American Families, Harm Our Armed Forces, and Devastate Our Economy

**December 10, 2024**

## Introduction

The Brennan Center for Justice at New York University School of Law[1] respectfully submits this statement for inclusion in the record of the Senate Judiciary Committee's December 10, 2024 hearing titled "How Mass Deportations Will Separate American Families, Harm Our Armed Forces, and Devastate Our Economy." At the hearing, witnesses gave powerful testimony regarding the widespread negative effects that would flow from mass deportations. This statement provides a legal perspective, elucidating the statutory authorities that President-elect Donald Trump might invoke to involve military personnel in the detention and deportation of immigrants. It explains what these authorities permit, identifies relevant limitations on their use, and describes legislative reforms that would help prevent abuses.

By way of background, the Brennan Center is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. In December 2018, the Center completed a two-year intensive research project on the legal framework for national emergencies. We began our study of emergency powers by researching the history of the National Emergencies Act of 1976. We then catalogued all the statutory powers that become available to the president when a national emergency is declared, and for each such power, we determined when and under what circumstances it had been invoked. We published this compendium online[2] along with a list of national emergency declarations issued since the National Emergencies Act went into effect.[3] (We have updated these resources on an ongoing basis as new emergency powers are enacted and national emergency declarations are issued or terminated.)

Shortly thereafter, we embarked on a set of research projects to examine the authorities governing domestic deployment of the military in emergency situations. This work led to the publication in 2020 of a report on martial law—i.e., the displacement of civilian government by military authority—in which we concluded that current law would not authorize the imposition of martial law by the president.[4] In 2022, we followed up with a legislative proposal to reform the Insurrection Act,[5] a law that gives the president dangerously broad discretion to deploy

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[1] This statement is submitted on behalf of a Center affiliated with New York University School of Law but does not purport to represent the school's institutional views on this topic. More information about the Brennan Center's work can be found at http://www.brennancenter.org.

[2] *A Guide to Emergency Powers and Their Use*, Brennan Ctr. for Just. (last updated June 11, 2024), https://www.brennancenter.org/analysis/emergency-powers.

[3] *Declared National Emergencies Under the National Emergencies Act*, Brennan Ctr. for Just. (last updated Dec. 2, 2024), https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act.

[4] Joseph Nunn, Martial Law in the United States: Its Meaning, Its History, and Why the President Can't Declare It (2020), https://www.brennancenter.org/our-work/research-reports/martial-law-united-states-its-meaning-its-history-and-why-president-cant.

[5] *The Insurrection Act: Its History, Its Flaws, and. proposal for Reform: Hearing Before the U.S. House Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol*, 117th Cong. (2022) (statement of Elizabeth Goitein and Joseph Nunn, Brennan Ctr. for Just.), https://www.brennancenter.org/our-work/research-reports/statement-january-6th-committee-reforming-insurrection-act.

federal troops to suppress civil unrest or to enforce the law when it is being obstructed. And this year, we published a report on the Posse Comitatus Act, the foundational law that limits military involvement in civilian law enforcement, examining its many exceptions and loopholes and proposing reforms to strengthen it. We also published a report on a related topic: the Alien Enemies Act, which does not itself authorize domestic deployment but is a wartime authority that confers vast detention and deportation powers on the president.

Based on this research and on events of the past few years, the Brennan Center has concluded that the laws governing emergency powers and domestic deployment of the military are in urgent need of reform. These authorities are highly susceptible to abuse, and they could be exploited to undermine our democracy and our liberties. At the same time, none of these authorities gives presidents carte blanche to do as they please whenever they claim that an emergency exists. This statement will identify relevant limits on the use of emergency and domestic deployment authorities to engage in mass deportations.

## I. National Emergencies Act

President-elect Trump has indicated that he will declare a national emergency to assist in mass deportations.[6] As discussed herein, a declaration of national emergency gives presidents potent powers in a wide range of areas. When it comes to immigration enforcement, however, the small number of authorities that Trump could conceivably invoke largely amplify resources rather than providing additional substantive powers. The potential for these authorities to be used in service of mass deportations is nonetheless concerning, as is a 1983 Supreme Court ruling that left Congress with little practical ability to rein in abuses. Congress should pass existing bipartisan legislation to restore that ability.

### A. The Role and Source of Emergency Powers in the United States

Emergency powers have existed in countries around the world for hundreds of years. They are based on a simple premise: Because emergencies are, by definition, unforeseeable and unforeseen, existing laws might not be sufficient to respond to them, and amending the law to provide greater powers might take too long or do damage to principles held sacrosanct in ordinary times. Emergency powers thus give the government—usually, the head of state—a temporary boost in power until the crisis passes or there is time to change the law through normal legislative processes.[7]

Unlike the modern constitutions of most countries,[8] the U.S. Constitution includes no separate regime for emergencies. It does include a handful of specific crisis-response provisions,

[6] Charlie Savage and Michael Gold, *Trump Confirms Plans to Use the Military to Assist in Mass Deportations*, N.Y. TIMES (Nov. 18, 2024), https://www.nytimes.com/2024/11/18/us/politics/trump-military-mass-deportation.html.
[7] *See generally* John Ferejohn and Pasquale Pasquino, *The Law of the Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210 (2004); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989).
[8] A review of current constitutions reveals that at least 175 countries' constitutions have provisions for governing in emergencies. *See Topic and Keyword Search s.v. "emergency"*, CONSTITUTE, https://www.constituteproject.org/constitutions?lang=en&q=emergency&status=in_force&status=is_draft (last visited Dec. 19, 2024).

but these powers are given to Congress, not to the president. Most notably, Congress may suspend the writ of *habeas corpus* "when in Cases of Rebellion or Invasion the public Safety may require it,"[9] and Congress has the power "to provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions."[10]

Although Article II of the Constitution, which sets for the powers of the president, confers no explicit emergency powers, there are implied powers accompanying some of its express provisions. Most notably, the Commander-in-Chief power entails the authority to defend the United States against sudden attack, even without prior congressional authorization,[11] and to manage the conduct of war. The Supreme Court has also asserted (somewhat controversially) that the president is the "sole organ of the federal government in the field of international relations,"[12] although the scope of this exclusive power in the international-relations field remains unclear.

Broader claims that presidents have inherent constitutional powers to do whatever they consider necessary in an emergency have been soundly rejected by the Supreme Court. The government advanced a version of this theory to justify President Truman's seizure of U.S. steel mills during the Korean War. The Supreme Court invalidated the president's action, and Justice Jackson, in his famous concurrence, observed: "[T]he Constitution did not contemplate that the title Commander in Chief *of the Army and Navy* will constitute him also Commander in Chief of the country, its industries and its inhabitants."[13]

Accordingly, since the founding of the nation, Congress has been the primary source of the president's emergency powers. It has periodically legislated standby authorities that the president may activate when certain types of emergencies occur.[14] Critically, none of these powers allows the president to make law in his own right—i.e., to create an alternative set of rules that violate statutes or go beyond the authority they provide. Under the statutory emergency powers regime, the president is strictly limited to the powers that Congress has granted to him in advance.

### B. The National Emergencies Act: A Failed Attempt to Rein in Presidential Uses of Emergency Powers

Although statutory emergency powers have existed since the country's founding, the process by which presidents avail themselves of such powers has evolved over time. The current system for national emergencies—in which the president declares a national emergency, and the declaration unlocks statutory powers that would otherwise lie dormant—dates back to President Woodrow Wilson.[15] It developed organically, and for several decades there was no single law that

[9] U.S. Const. art. 1, § 9, cl. 2.
[10] U.S. Const. art. 1, § 8, cl. 15.
[11] *See* Louis Fisher, Presidential War Power 8–10 (2d ed. 2004).
[12] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).
[13] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643–44 (1952) (Jackson, J., concurring) (emphasis in original).
[14] *See* Harold C. Relyea, Cong. Rsch. Serv., Report No. 98-505, National Emergency Powers 5 (2007).
[15] *Id*. at 7.

governed the process. Presidents did not have to identify what powers they would invoke or keep Congress informed of their actions, and states of emergency could last indefinitely.

In the 1970s, several scandals involving executive branch overreach—including Watergate, the bombing of Cambodia, and domestic spying by the CIA—prompted Congress to take a hard look at executive power, and to enact several laws aimed at reasserting Congress's role as a co-equal branch of government and a check on executive authority.[16] It was in this context that a special Senate committee was formed to examine presidential use of emergency powers. The committee learned that four clearly outdated states of emergency were still in effect, providing access to literally hundreds of statutory emergency powers that allowed the president to "manage every aspect of the lives of all American citizens."[17]

The committee's work culminated in the introduction and passage of the National Emergencies Act of 1976, which went into effect two years later.[18] The clear purpose of the law, evident in every facet of the legislative history, was to place limits on presidential use of emergency powers.[19] It included three primary constraints. First, it provided that states of emergency would terminate after a year unless renewed by the president.[20] Second, it *allowed* Congress to terminate states of emergency at any time through a concurrent resolution—a so-called "legislative veto" that would take effect without the president's signature.[21] Third, it *required* Congress to meet every six months while an emergency declaration was in effect to "consider a vote" on whether to end the emergency.[22]

Unfortunately, the National Emergencies Act has not served as the strong check on executive action that Congress intended. Renewal of emergency declarations after one year, intended to be the exception, has become the default. Most of the emergencies declared since the National Emergencies Act was passed are still in effect. The average length of emergencies has been close to a decade, with more than 30 emergencies lasting even longer. The longest-running declaration of emergency was issued by President Jimmy Carter in 1979 in response to the Iranian hostage crisis and remains in place today.[23]

Congress, for its part, has not exercised its intended role as a check on presidential power. In 1983, the Supreme Court ruled that concurrent resolutions are unconstitutional.[24] Congress's solution was to substitute a joint resolution as the mechanism for terminating emergencies.[25] Like any other legislation, a joint resolution must be signed into law by the president. If the president

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[16] *See generally* Thomas E. Cronin, *A Resurgent Congress and the Imperial Presidency*, 95 POL. SCI. Q. 209 (1980).
[17] S. Comm. on Government Operations and the Spec. Comm. on National Emergencies and Delegated Emergency Powers, *The National Emergencies Act (Pub. L. 94-412) Source Book: Legislative History, Text, and Other Documents* 20 (1976) (hereinafter "Spec. Comm. on National Emergencies Source Book").
[18] National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976).
[19] Spec. Comm. on National Emergencies Source Book, 50.
[20] *Id.* § 202(d) (codified at 50 U.S.C. § 1622(d)).
[21] *Id.* § 202 (codified as amended at 50 U.S.C. § 1622).
[22] *Id.* § 202(b) (codified at 50 U.S.C. § 1622(b)).
[23] *See* BRENNAN CTR. FOR JUST., *Declared National Emergencies*, *supra* note 3.
[24] *See* INS v. Chadha, 462 U.S. 919, 954–55 (1983).
[25] *See* 50 U.S.C. § 1622(a)(1).

vetoes the resolution, Congress can override the veto only with a two-thirds vote by both houses. This change greatly diluted the role of Congress as envisioned in the original Act.

Moreover, until recently, Congress demonstrated little interest in exercising the powers it gave itself. The Act requires Congress to meet every six months while an emergency is in place to consider a vote on whether to end the emergency. States of emergency have been in place throughout the 46 years the law has been in effect, which means Congress should have met more than 90 times to review existing states of emergency. Before 2019, however, only one resolution to end a state of emergency had ever been introduced, and the emergency declaration at issue was revoked before Congress could vote on it.[26]

After President Trump declared a national emergency in February 2019 to secure funding for constructing a wall along the southern border, Congress twice voted to terminate the declaration.[27] President Trump vetoed the resolution both times,[28] however, and Congress was unable to muster the two-thirds majority necessary to override the veto.[29] In March of last year, Congress voted to terminate the national emergency declaration regarding the COVID-19 pandemic.[30] President Joe Biden, who had already pledged to end the declaration in May, signed the bill into law;[31] had he issued a veto, it is unlikely the House could have overridden it.[32]

National emergencies are thus easy to declare and hard to stop—and they grant access to a rich well of powers, most of which become available regardless of whether they are relevant to the emergency at hand. The Brennan Center has identified 150 authorities that may be invoked in a declared national emergency.[33] While some of these are measured and sensible, others seem like the stuff of authoritarian regimes. For example, merely by signing a declaration of national emergency, the president may take over or shut down radio stations;[34] if the president goes further and declares a "threat of war," he may take over or shut down facilities for wire communication—a provision that arguably could allow him to assert control over U.S.-based

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[26] *See* Tamara Keith, *If Trump Declares an Emergency to Build the Wall, Congress Can Block Him*, NPR (Feb. 11, 2019), https://www.npr.org/2019/02/11/693128901/if-trump-declares-an-emergency-to-build-the-wall-congress-can-block-him.

[27] H.J. Res. 46, 116th Cong. (Mar. 2019); S.J. Res. 54, 116th Cong. (Sep. 2019).

[28] President Trump, *Veto Message to the House of Representatives for H.J. Res. 46*, Trump White House Archive (March 15, 2019) https://trumpwhitehouse.archives.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/; President Trump, *S.J. Res. 54 Veto Message*, Trump White House Archive (Oct. 15, 2019), https://trumpwhitehouse.archives.gov/presidential-actions/s-j-res-54-veto-message/.

[29] H.J. Res. 46, 116th Cong. (override failed in House, Mar. 26, 2019); S.J. Res. 54, 116th Cong. (override failed in Senate, Oct. 17, 2019).

[30] H.J. Res. 7, 118th Cong. (2023).

[31] White House, "Bill Signed: H.J. Res. 7," April 10, 2023, https://www.whitehouse.gov/briefing-room/legislation/2023/04/10/bill-signed-h-j-res-7/.

[32] The vote in the House was 220-210, which falls well short of the two-thirds majority necessary to override a veto. *See* Ben Leonard, *House Votes to End Covid Public Health Emergency*, Politico (Jan. 31, 2023), https://www.politico.com/news/2023/01/31/house-end-covid-public-health-emergency-00080507.

[33] *See* Brennan Ctr. for Just., *A Guide to Emergency Powers and Their Use*, *supra* note 2.

[34] *See* 47 U.S.C. § 606(c).

Internet traffic.[35] Other powers would allow the president or members of the president's administration to freeze Americans' assets and bank accounts,[36] to exercise broad and unspecified powers over domestic transportation,[37] and to detail members of the U.S. armed forces to any country.[38]

### C. How Trump Might Try to Use a National Emergency Declaration to Assist in Mass Deportations, and the Limitations on Such Use

President-elect Trump has indicated that he will declare a national emergency as part of his mass deportation plans,[39] but he has not specified which emergency powers he intends to invoke. Although national emergency declarations unlock sweeping powers across a wide range of subject areas, none of them is designed to facilitate deportation or otherwise enhance immigration enforcement authority in the interior of the country. That said, two of the emergency powers previously deployed for border security purposes could, in theory, be used for immigration enforcement more broadly.

First, in 2021, President Biden declared a national emergency to address international drug trafficking.[40] In 2023, pursuant to that declaration, Biden invoked 10 U.S.C. § 12302, which allows him to call up members of the reserve components of the armed forces, including the National Guard, during a national emergency.[41] At the time, there were already 2,500 federalized National Guard forces assisting the Department of Homeland Security at the border, and they were soon joined by 1,500 active-duty armed forces.[42] (It is unclear how many reservists, if any, were mobilized under the emergency declaration.) Trump could conceivably invoke this same power to call up reservists to assist with deportation efforts.

There is a critical limitation, however, on any such deployment. Section 12302 is not an exception to the Posse Comitatus Act (discussed in Part II.A., below), as it does not expressly authorize federal armed forces to participate directly in core law enforcement activities. Accordingly, service members called up under this authority would not be able to apprehend or detain migrants; they would be limited to providing indirect support to the Department of Homeland Security. Moreover, the forms of support that they could offer would be limited, as discussed in Part II.B., below.

A second potentially relevant emergency power is 10 U.S.C. § 2808, a law that applies during a national emergency "that requires use of the armed forces."[43] It allows the secretary of

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[35] *See* 47 U.S.C. § 606(d); *see also* Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATLANTIC (Jan./Feb. 2019), https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/.
[36] *See* 50 U.S.C. §§ 1701 *et seq*.
[37] *See* 49 U.S.C. § 114(g).
[38] *See* 10 U.S.C. § 712(a)(3).
[39] Charlie Savage and Michael Gold, *Trump Confirms Plans to Use the Military*, *supra* note 6.
[40] Exec. Order No. 14059, 86 F.R. 71549 (2021).
[41] Exec. Order No. 14097, 88 F.R. 26471 (2023).
[42] Alex Horton and Nick Miroff, *Biden Orders 1,500 More Troops to Mexico Border Amid Migration Surge*, WASH. POST (May 2, 2023) https://www.washingtonpost.com/national-security/2023/05/02/biden-border-us-troops/.
[43] 10 U.S.C. § 2808.

defense to undertake military construction projects that are necessary to support such use of the armed forces, using unobligated funds appropriated for military construction projects that have been canceled or downgraded. President Trump declared a national emergency and invoked this provision in 2019 to secure funding for the border wall after Congress had refused to allocate the funds he requested. As observers have noted,[44] Trump might invoke this authority again, both to continue construction of the border wall and to construct or adapt military bases to serve as immigrant detention facilities.

Any such use, however, might well run afoul of the law. Although courts have been reluctant to probe whether a state of emergency exists, they can and do review whether actions taken pursuant to an emergency declaration are authorized by the specific powers invoked.[45] Several courts struck down President Trump's use of 10 U.S.C. § 2808 to build the border wall.[46] There were various reasons for their rulings, but a key finding was that construction of the border wall was not "necessary to support [the] use of the armed forces," as required by the statute—rather, the armed forces were being used to support the construction of the wall. Although the Supreme Court vacated these decisions after President Biden terminated the border wall emergency declaration, using the military to construct detention facilities would face similar legal challenges and would be impermissible under the logic of these rulings.

### D. What Congress Can Do: Reform of the National Emergencies Act

The potential for President-elect Trump to use emergency powers for mass deportations is not the only cause for concern when it comes to the National Emergencies Act. The powers available during a declared national emergency could be deployed to undermine democracy itself. As reported by various outlets in 2022, allies of President Trump advocated that he invoke a range of emergency powers to overturn the results of the 2020 presidential election. For instance, they urged him to declare a national emergency and invoke the International Emergency Economic Powers Act in order to seize voting machines.[47]

For reasons the Brennan Center has laid out, none of these suggestions would have provided a legal basis for overturning the election results.[48] Had President Trump nonetheless implemented these measures, they undoubtedly would have disrupted the transition of power even further, and created even greater chaos and (potentially) violence, than the insurrection of

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[44] Chris Mirasola, *How Can Trump Deploy the Military at the Southern Border?*, LAWFARE (Nov. 19, 2024) https://www.lawfaremedia.org/article/how-can-trump-deploy-the-military-at-the-southern-border.

[45] *See, e.g.,* Biden v. Nebraska, 143 S.Ct. 2355 (2023) (holding that the HEROES Act, an emergency power invoked by President Biden pursuant to the COVID-19 national emergency declaration, does not authorize forgiveness of student loan debt).

[46] *See* Sierra Club v. Trump, No. 19-cv-00892-HSG, 2019 WL 2715422 (N.D. Cal. 2019); California v. Trump, 407 F. Supp. 3d 869 (N.D. Cal. 2019); El Paso County v. Trump, 408 F.Supp. 3d 840 (W.D. Tx. 2019).

[47] *See* Betsy Woodruff Swan, *Read the Never-Issued Trump Order that Would Have Seized Voting Machines*, POLITICO (Jan. 21, 2022), https://www.politico.com/news/2022/01/21/read-the-never-issued-trump-order-that-would-have-seized-voting-machines-527572.

[48] *See* Joseph Nunn and Andrew Boyle, *There Are No Extraordinary Powers a President Can Use to Reverse an Election*, BRENNAN CTR. FOR JUST., March 3, 2021, https://www.brennancenter.org/our-work/analysis-opinion/there-are-no-extraordinary-powers-president-can-use-reverse-election.

January 6 on its own. Moreover, while there are no emergency powers that allow a president to change the outcome of an election, some of the authorities that become available in a declared national emergency could be used to undermine the fairness of the election itself—e.g., by creating conditions that make it harder for people to vote.[49]

It is incumbent on Congress to prevent these types of abuse. Following President Trump's border wall declaration, several lawmakers introduced bills to amend the National Emergencies Act. Most of them contained the same central reform: a presidentially declared national emergency would automatically terminate after 30 days (or a similarly short period) unless Congress voted to approve the declaration. Expedited procedures would enable Congress to move quickly; they would also allow any member to force a vote and would prohibit filibusters in the Senate. This would ensure that the emergency declaration would not expire through obstructionism or inertia, and that the outcome would reflect the will of a majority of Congress. If Congress approved the declaration, it could stay in place for up to a year; if the president wished to renew it, each yearly renewal would again require Congress's approval.

This approach, versions of which are used by many other countries,[50] is more consistent with the core purpose of emergency powers. It would give the president ready access to enhanced authorities when they are most needed—i.e., when the emergency is in progress and Congress has not had time to address it. Once Congress has had time to act, however—and history shows that Congress can act quite swiftly in the face of true emergencies[51]—it should be Congress's decision as to whether emergency authorities are a good fit for the crisis at hand. Critically, that would remove the perverse incentive that exists when the government actor who declares the emergency is the same one who receives additional powers.

There is remarkably broad bipartisan support for this approach. A bill featuring this reform, the ARTICLE ONE Act,[52] was reported out of the House Transportation and Infrastructure Committee (which has jurisdiction over the National Emergencies Act) by a unanimous voice vote in September of this year.[53] That same month, another bill featuring this reform (along with other reforms to emergency powers), the REPUBLIC Act,[54] was reported out of the Senate Homeland Security and Governmental Affairs Committee by a vote of 13–1.[55] These votes follow multiple committee hearings in recent years in which there was unanimity on both sides of the aisle about the need for reforms to bolster Congress's role as a check against

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[49] *See* Goitein, *The Alarming Scope of the President's Emergency Powers, supra* note 35, at 46–47.
[50] *See, e.g.*, Spanish Constitution, § 116, https://www.constituteproject.org/constitution/Spain_2011?lang=en; Constitution of the Fifth Republic (France) art. 36, https://www.constituteproject.org/constitution/France_2008?lang=en; Constitution of Greece art. 48, https://www.constituteproject.org/constitution/Greece_2008?lang=en.
[51] For instance, within weeks of the attacks of 9/11, Congress passed the USA PATRIOT Act, sweeping legislation that ran 342 pages and made changes to more than 15 different laws. Lisa Finnegan Abdolian and Harold Takooshian, *The USA PATRIOT Act: Civil Liberties, the Media, and Public Opinion*, 30 FORDHAM URB. L.J. 1429 (2003).
[52] ARTICLE ONE Act, H.R. 3988, 118th. Cong. (2023).
[53] Bob Bauer and Jack Goldsmith, *Emergency Powers Reform Advances*, LAWFARE (Oct. 1, 2024), https://www.lawfaremedia.org/article/emergency-powers-reform-advances.
[54] REPUBLIC Act, S. 4373, 118th Cong. (2024).
[55] Bauer and Goldsmith, *Emergency Powers Reform Advances, supra* note 53.

abuse of emergency powers.[56] Legislative reform of the National Emergencies Act has thus become a question of "when," rather than "if" or "how."

## II. Authorities for Domestic Deployment of the Military

In addition to 10 U.S.C. § 12302, discussed above, there are several legal authorities that permit domestic deployment of the military, including deployments to support or engage in civilian law enforcement. For each of these, there are important limitations on what they would permit if invoked in the context of mass deportations, as well as legal challenges that could be brought. But there is also a pressing need for Congress to reform some of these authorities to make it harder for a president to abuse them or exploit them for routine law enforcement.

### A. The Baseline: The Posse Comitatus Act

The use of federal troops as a domestic police force is in tension with both constitutional principles and long-standing American traditions, which were informed by the British government's heavy-handed use of the military to police the colonies in the years leading up to the American Revolution. But while the Constitution limits military involvement in civilian affairs in various ways, it does not entirely bar the federal armed forces from conducting law enforcement activities. A partial prohibition comes instead from a law passed by Congress in 1878: the Posse Comitatus Act.

The Posse Comitatus Act prohibits federal armed forces from acting "as a posse comitatus or otherwise execut[ing] the laws"—i.e., from participating in civilian law enforcement activities, whether criminal or civil—unless "expressly authorized" by Congress or the Constitution.[57] The Department of Justice has concluded that the Constitution gives the president the "inherent" power to unilaterally deploy the military for law enforcement purposes in some circumstances[58]—for instance, to protect federal personnel or property.[59] A straightforward reading of the Constitution, however, reveals no *express* authorization for such deployments. Accordingly, any military action that relies solely on these "inherent" powers should be deemed to violate the Posse Comitatus Act, and should be sustained only if it falls within the president's "conclusive and preclusive" sphere of authority (per Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*).[60]

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[56] *Restoring Congressional Oversight Over Emergency Powers: Exploring Options to Reform the National Emergencies Act*: *Hearings Before the Comm. on Homeland Sec. and Gov't Aff.,* 118th Cong. (2024); *Never Ending Emergencies – An Examination of the National Emergencies Act: Hearings Before the Subcomm. on Econ. Dev., Pub. Bldgs., and Emergency Mgmt. of the H. Comm. on Transp. and Infrastructure*, 118th Cong. (2023); *Examining Potential Reforms of Emergency Powers: Subcomm. on the Const., C.R., and C.L. of the H. Comm. on Judiciary*, 117th Cong. (2022).

[57] 18 U.S.C. § 1385.

[58] Law Relating to Civil Disturbances, Op. O.L.C. (1975), https://www.justice.gov/d9/pages/attachments/2022/09/02/la_19750106_law_relating_to_civil_disturbances_0.pdf.

[59] 32 C.F.R. § 215.4.

[60] *Youngstown Sheet & Tube Co.*, 343 U.S. at 637–38 (1952) (Jackson, J., concurring).

The Posse Comitatus Act is a critical protection for democracy and civil liberties. And yet, as set forth in a recent Brennan Center report, it is riddled with exceptions and loopholes that render it vulnerable to circumvention.[61] As relevant here:

- Courts have construed the Posse Comitatus Act to prohibit only direct participation in core law enforcement activities, such as arrests, searches, and seizures. A wide range of indirect support to law enforcement—including conducting reconnaissance, sharing intelligence, and providing/maintaining military equipment—is considered permissible under the Act.

- On its face, the Posse Comitatus Act applies only to federal armed forces. It does not bind the National Guard unless the Guard has been called into federal service. As discussed in Part II.C.2., below, the National Guard may perform federal missions under Title 32 without being federalized.

- There are many statutory exceptions to the Posse Comitatus Act—most importantly, the Insurrection Act, discussed in Part II.D., below.

As a result of these and other gaps in the law's coverage, the Posse Comitatus Act has long operated more as a norm than as a hard-and-fast rule. That poses serious risks in an era in which we can no longer rely on norms and tradition to constrain executive action. The Brennan Center's report includes a proposal for legislative reform of the Act that would limit exceptions, eliminate loopholes, and create effective enforcement mechanisms.[62]

### B. Title 10 Chapter 15 (Military Support for Civilian Law Enforcement Agencies) and Its Limitations

As noted, courts have held that the Posse Comitatus Act does not apply when federal forces provide indirect support to law enforcement without directly participating in core law enforcement activities. Drawing on the case law in this area, Congress has authorized a wide array of indirect support through Chapter 15 of Title 10.

Most notably, provisions in this Chapter allow the Department of Defense to make military equipment, bases, training, and expert advice available to civilian law enforcement agencies, whether federal, state, or local.[63] Military personnel may also operate equipment under specified circumstances.[64] The Department of Defense may provide additional forms of support, such as transportation of personnel and aerial and ground reconnaissance, for law enforcement agencies' counterdrug activities or activities to counter transnational organized crime.[65]

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[61] *See generally* JOSEPH NUNN, LIMITING THE MILITARY'S ROLE IN LAW ENFORCEMENT (2024), https://www.brennancenter.org/our-work/policy-solutions/limiting-militarys-role-law-enforcement.
[62] *Id.*
[63] 10 U.S.C. §§ 272–73.
[64] 10 U.S.C. § 274.
[65] 10 U.S.C. § 284.

These authorities have long been used to enable Department of Defense support of the Department of Homeland Security's activities at the southern border.[66] President-elect Trump could use them to expand support at the border, for instance by having troops build immigrant detention facilities. He could also direct the Department of Defense to support the Department of Homeland Security's enforcement activities in the interior of the country, most likely through the provision of military facilities and equipment and, in some circumstances, through assigning military personnel to operate that equipment.

There would be limitations on such uses, however. As with the powers available in a national emergency, the authorities contained in Chapter 15 do not create exceptions to the Posse Comitatus Act. Indeed, Chapter 15 includes an express statement that its provisions do not authorize military participation in arrests, seizures, or similar activities.[67]

Chapter 15 also prohibits the provision of support to civilian law enforcement agencies "if the provision of such support will adversely affect the military preparedness of the United States."[68] As Major General Randy Manner testified in this Committee's December 10, 2024 hearing, involving the military in immigration enforcement would do exactly that. In his words, "Additional training or deployments to support deportation operations in lieu of devoting the time, money, and effort needed to prepare for combat would absolutely harm operational readiness and reduce the military's ability to counter adversaries or respond to crises."[69]

In addition, Chapter 15 authorizes only certain types of military support to law enforcement. For instance, while the Department of Defense may provide equipment to law enforcement agencies, the use of military personnel to operate that equipment is limited to specific situations. To name one limitation that is particularly relevant to immigration enforcement, military personnel may operate equipment to address only *criminal* violations of immigration or counternarcotics laws.[70] Being present in the United States without documentation is not itself a crime.[71]

Notwithstanding these limitations, Chapter 15—reflecting the courts' broad reading of what constitutes "indirect" support—permits federal armed forces to be intricately involved in civilian law enforcement efforts in a way that presents many of the same dangers as "direct" participation. The Brennan Center's recent report on the Posse Comitatus Act thus recommends that Congress dispense with the amorphous distinction between direct and indirect participation in law enforcement activities, as well as eliminating or narrowing statutory exceptions that are outdated or overbroad.[72]

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[66] Military Support for Customs and Border Protection Along the Southern Border Under the Posse Comitatus Act, Op. O.L.C. (2021), https://www.justice.gov/olc/file/1357086/dl?inline.
[67] 10 U.S.C. § 275.
[68] 10 U.S.C. § 276.
[69] *How Mass Deportations Will Separate American Families, Harm Our Armed Forces, and Devastate Our Economy: Hearing Before S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Major General Randy Manner).
[70] 10 U.S.C. § 274(b)(1)(A).
[71] Laura Jarrett, *Are Undocumented Immigrants Committing a Crime? Not Necessarily*, CNN (Feb. 24, 2017), https://www.cnn.com/2017/02/24/politics/undocumented-immigrants-not-necessarily-criminal/index.html.
[72] Nunn, Limiting the Military's Role in Law Enforcement 13, *supra* note 61.

### C. Deployment of the National Guard Under Title 32

Another way in which the military has been used for border security is deployment of the National Guard in Title 32 status—specifically, under 32 U.S.C. § 502(f)(2)(A). As explained below, this authority permits the National Guard to perform federal missions, and to be paid with federal funds, even while serving under the command and control of state governors. Because the National Guard is not "federalized" in this status, the Posse Comitatus Act does not apply. This authority could conceivably be used to involve the National Guard in deportations, albeit with important constraints.

#### 1. National Guard Statuses

The National Guard is the modern incarnation of the state militias that predate and are also sanctioned by the Constitution.[73] A unique creation of both federal and state law, the Guard usually operates under state or territorial command and control. But because it can be called into federal service, it is principally governed by federal law and subject to comprehensive regulation by the Department of Defense through the National Guard Bureau. The federal government also provides the vast majority of the Guard's funding.

Members of the National Guard are subject to the Posse Comitatus Act only when they are called into federal service, or "federalized," by the president.[74] At all other times, members of each state and territory's Army and Air National Guard (excluding those of the District of Columbia[75]) serve under their governor's command and control. Thus, they are not "part of the Army… [or] the Air Force" for the purposes of the Posse Comitatus Act.[76]

While the question of whether the Guard has been called into federal service—and thus made subject to the Posse Comitatus Act—is binary, there are three different "duty statuses" in which members of the Guard may serve at any given moment. First, in "State Active Duty" status, National Guard troops carry out a state- or territory-defined mission at that jurisdiction's own expense, serving under the command and control of their state or territorial governor.[77] In these operations, governors are largely free to use their Guard forces as they see fit, free from the constraints of the Posse Comitatus Act.

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[73] Maryland v. United States, 381 U.S. 41, 46 (1965).

[74] Gilbert v. United States, 165 F.3d 470, 473 (6th Cir. 1999); United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997); United States v. Benish, 5 F.3d 20, 25-26 (3d Cir. 1993); United States v. Kyllo, 809 F. Supp. 787, 792-793 (D. Ore. 1992), *aff'd* 190 F.3d 1041 (9th Cir. 1999), *rev'd on other grounds* 533 U.S. 27 (2001); Wallace v. State, 933 P.2d 1157, 1160 (Alaska App. 1997). *But see* United States v. Banks, 383 F. Supp. 368, 376 (D.S.D. 1974); United States v. Jaramillo, 380 F. Supp. 1375, 1380-381 (D.Neb. 1974); United States v. McArthur, 419 F. Supp. 186, 193 n.3 (D.N.D. 1976).

[75] The District of Columbia National Guard is permanently under the command and control of the president. *See* NUNN, LIMITING THE MILITARY'S ROLE IN LAW ENFORCEMENT 7-8, *supra* note 61.

[76] *See* Perpich v. Department of Defense, 496 U.S. 334 (1990).

[77] *See* Steve Vladeck, *Why Were Out-of-State National Guard Units in Washington, D.C.? The Justice Department's Troubling Explanation*, LAWFARE (June 9, 2020), https://www.lawfareblog.com/why-were-out-state-national-guard-units-washington-dc-justice-departments-troubling-explanation; Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of In Federal Service*, 1994 ARMY L. 35 (1994).

Second, in "Title 32" (or "hybrid") status, National Guard troops remain, in principle, under the command and control of the state governor, but they are paid by the federal government and receive federal benefits.[78] Title 32 status is used to fulfill the Guard's federally mandated training requirements, as well as to authorize federal payment for certain state-initiated operations such as drug interdiction.[79] As explained below, however, Guard troops in Title 32 status may also be deployed for "operations or missions" requested by the president or Secretary of Defense.[80] Despite the fact that Guard members in this status may be performing fundamentally *federal* missions and are on the federal payroll, they are not subject to the Posse Comitatus Act, because they remain, at least in principle, under state command and control.[81]

Finally, when federalized, National Guard units operate in "Title 10" status.[82] In this status, National Guard personnel serve under the president's command and control, are paid with federal funds, receive federal benefits, and are used for federal missions up to and including deployment overseas. For all intents and purposes, they temporarily become part of the federal military. As a consequence, federalized National Guard personnel are bound by the Posse Comitatus Act unless a statutory exception applies.

### 2. 32 U.S.C. § 502(f)(2)(A) and Its Use for Border Security

The primary statute that authorizes National Guard operations in Title 32 status is 32 U.S.C. § 502. This provision was originally enacted—and Title 32 status was created—in the 1950s to allow Congress to foot the bill for the substantial training requirements it imposes on states' National Guards. Over time, the purposes for which Title 32 status may be used have expanded to include operational missions, including those undertaken at the president's direct request.

As befits a statute primarily concerned with National Guard training, the bulk of § 502 is devoted to "required drills and field exercises"—the particulars of how often and in what manner Guard units are required to train each year.[83] Subsection (f), however, is not so limited. Specifically, § 502(f)(1), which was added in 1964,[84] allows National Guard personnel to be ordered to perform "training or *other duty*" (emphasis added) beyond the training regime established by the preceding provisions of the statute.[85] Section 502(f)(2)(A), which was added in 2006,[86] further provides that this "training or other duty" may include "[s]upport of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense."

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[78] *See* 32 U.S.C. § 502. National Guard personnel operating in Title 32 status are to remain under state command and control per 32 U.S.C. § 101(19). *See* Vladeck, *Why Were Out-of-State National Guard Units in Washington, D.C.?*, *supra* note 77.
[79] *See* 32 U.S.C. § 112.
[80] 32 U.S.C. § 502(f).
[81] Goitein and Nunn, *Statement to the U.S. House Select Comm. to Investigate the Jan. 6th Attack*, *supra* note 5, at 30.
[82] 10 U.S.C. §§ 12401-12407. *See* Vladeck, *Why Were Out-of-State National Guard Units in Washington, D.C.?*, *supra* note 77.
[83] 32 U.S.C. § 502(a)-(e).
[84] Pub.L. 88-621, § 1(1), Oct. 3, 1964, 78 Stat. 999.
[85] 32 U.S.C. § 502(f)(1).
[86] Pub.L. 109-364, Div. A, Title V, § 525(c), Oct. 17, 2006, 120 Stat. 2195.

Under this authority, Presidents George W. Bush, Barack Obama, and Trump requested the deployment of thousands of National Guard troops to the southern border. (Trump also deployed active-duty armed forces; President Biden did the same, and he federalized the National Guard forces.)[87] Although National Guard forces in Title 32 status are not subject to the Posse Comitatus Act, they have not directly participated in core law enforcement activities during these deployments. Instead, they have provided support to the Department of Homeland Security in the form of surveillance, transportation, the provision of equipment, and the erection of barriers.

### 3. How Trump Might Try to Use 32 U.S.C. § 502(f)(2)(A) to Assist in Mass Deportations, and the Limitations on Such Use

President-elect Trump could seek to expand the use of National Guard forces at the border under 32 U.S.C. § 502(f)(2)(A) by involving them directly in the apprehension and detention of migrants. He also could request that governors use their National Guard forces either to provide support for, or to directly engage in, immigration enforcement activities in the interior of the country.

There would be several limitations on this power, however. First and foremost, the president or secretary of defense cannot directly order National Guard personnel to duty under § 502(f)(2)(A), and a governor is under no obligation to acquiesce to a request for troops.[88] In June of 2020, for instance, President Trump asked 15 state governors to send their National Guard troops to Washington, D.C., to join forces with the D.C. National Guard in suppressing protests against the police killing of George Floyd. Eleven governors agreed to this request; four declined.[89]

Moreover, § 502(f)(2)(A) would not authorize a governor to send his or her National Guard forces into another state without that state's consent. U.S. states are sovereign entities,[90] although their sovereignty is limited and made subordinate to the federal government under the Constitution. Like foreign sovereigns, their sovereignty is territorially defined.[91] As the Supreme Court explained on multiple occasions in the early republic, "the jurisdiction of a state is coextensive with its territory, coextensive with its legislative power."[92]

It is a function of the states' co-equal and territorially limited sovereignty that one state's courts cannot reach into another and exercise jurisdiction over individuals there, unless those individuals have sufficient "minimum contacts" with the forum state.[93] For the same reason, a

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[87] Joseph Nunn, *As Title 42 Comes to an End, So Should Military Operations at the US-Mexico Border*, JUST SECURITY (May 19, 2023) https://www.justsecurity.org/86625/as-title-42-comes-to-an-end-so-should-military-operations-at-the-us-mexico-border/.

[88] This reading is confirmed by 32 U.S.C. § 328, which makes clear that a governor is the party empowered to order National Guard troops to duty under § 502(f).

[89] Alan Suderman, *Some Governors Balk at Trump Request to Send Troops to DC*, YAHOO!NEWS (June 2, 2020), https://shorturl.at/uvslJ.

[90] Alden v. Maine, 527 U.S. 706 (1999).

[91] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[92] Rhode Island v. Massachusetts, 37 U.S. 657, 733 (1838).

[93] *World-Wide Volkswagen Corp.*, 444 U.S. at 561.

state may not, solely under its own authority, deploy its National Guard forces into another state without that state's permission. Simply put, U.S. states may not invade one another. And because National Guard forces are under state command and control when operating in Title 32 status, they are acting as state officials,[94] even if they are pursuing a federal mission. Accordingly, it would violate the Constitution for a governor to send his or her Guard forces into a nonconsenting state.

Even when a governor agrees to use his or her National Guard forces to perform a federal mission, there may be limits on those deployments. The Department of Justice takes the position that the words "other duty" can essentially mean *any* duty—that under § 502(f)(2)(A), National Guard troops provided by a willing governor may be used to perform any mission the president could request, including ones that involve National Guard participation in civilian law enforcement activities.[95] But there is a strong argument, based on the provision's legislative history and its placement in the U.S. Code, that the intent of § 502(f)(2)(A) was more narrow—i.e., to facilitate federal payment for homeland defense and other activities authorized under separate provisions of Title 32, as well as traditional Guard missions like natural disaster response.[96]

### 4. What Congress Can Do: Reform of 32 U.S.C. § 502(f)(2)(A)

Congress could head off potential abuses of 32 U.S.C. § 502(f)(2)(A), for immigration enforcement or other purposes, by making express some of its implied limits.

First, Congress should clarify that governors may not send their National Guard forces into other states without the receiving states' consent. An amendment to this effect, sponsored by Rep. Mikie Sherrill, was incorporated into the House versions of both the FY 2021 and FY 2022 National Defense Authorization Acts. The Biden administration objected to the provision on the ground that it would allow state officials (the governors of the receiving states) to veto the deployment of Guard forces to perform duties on federal lands or in federal facilities. But § 502(f)(2)(A) unambiguously gives *sending* states the right to refuse a requested mission, so it already provides the veto power denounced by the administration. More fundamentally, the

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[94] Gilbert v. United States, 165 F.3d 470 (6th Cir. 1999).

[95] Letter from William P. Barr, Attorney General, to Muriel Bowser, Mayor, Washington, DC, posted on TWITTER, Jun. 9, 2020, https://twitter.com/kerrikupecdoj/status/1270487263324049410 ("At the direction of the President, the Secretary of Defense… requested assistance from out-of-state National Guard personnel, pursuant to 32 U.S.C. § 502(f), which authorizes States to send forces to assist the '[s]upport of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense.'").

[96] *See* Joseph Nunn, *Section 502(f) Is Not a Blank Check*, LAWFARE (Oct. 17, 2024), https://www.lawfaremedia.org/article/section-502(f)-is-not-a-blank-check. In addition, as state officers, National Guard forces would need federal authorization to engage in immigration enforcement, as this responsibility is committed to federal agencies by law. Such authorization could potentially come in the form of deputation by the U.S. Marshals Service. *See* 28 C.F.R. § 0.112. Alternatively, states could enter into (or amend existing) "287(g)" federal-state agreements, which allow state officials to serve as immigration officers. *See* 8 U.S.C. § 1357(g).

administration's objection ignores the constitutional constraints on National Guard forces operating under state authority.[97]

Second, Congress should amend § 502(f)(2)(A) to make clear that it does not authorize National Guard forces to perform literally any mission or operation requested by the president or secretary of defense. When Guard forces perform federal missions under parameters set by the Department of Defense, many of the concerns that underlie the Posse Comitatus Act come into play, even if Guard forces remain—at least nominally—under state command and control. An open-ended authorization to perform *any* federal mission thus creates an enormous end-run around the Posse Comitatus Act and its principles. Congress can address this problem by more narrowly defining the missions or operations that fall within § 502(f)(2)(A), either listing or excluding specific categories. Alternatively, Congress could require that when the National Guard performs a federal mission under § 502(f)(2)(A), it is subject to the Posse Comitatus Act and thus restricted from direct participation in law enforcement unless expressly authorized by statute.

### D. The Insurrection Act

President-elect Trump has stated that he will invoke the Insurrection Act to facilitate military involvement in mass deportations.[98] There is no question that this dangerous law gives the president broad powers with few checks against abuse, and that it is in urgent need of reform. But its use for immigration enforcement would be both unprecedented and a clear abuse of the law.

#### 1. Strong Powers, Weak Safeguards

This Insurrection Act of 1807—in fact, an amalgamation of laws passed between 1792 and 1874[99]—authorizes the president to deploy federal armed forces and use them to quell civil unrest or enforce the law in a crisis. As such, it is the most significant and far-reaching exception to the Posse Comitatus Act. Federal troops activated under this law, including federalized National Guard forces, may be deployed into any state without triggering the sovereignty concerns raised by a nonconsensual interstate deployment under Title 32. Moreover, only one of the law's three provisions requires a request by the state; the other two provisions permit deployment over a state's objections.

The use of the military as a domestic police force represents a sharp departure from core constitutional values. The framers understood that military interference in civilian affairs threatens democracy and individual liberty, and they were careful to subordinate the military to civilian authorities. But they also recognized that a true crisis might necessitate military

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[97] Joseph Nunn and Elizabeth Goitein, *The Biden Administration's Senseless Opposition to Congress's Effort to Prevent Abusive National Guard Deployments*, JUST SECURITY (July 28, 2022), https://www.justsecurity.org/82531/biden-senseless-opposition-abusive-national-guard/.

[98] Charlie Savage, Maggie Haberman, and Jonathan Swan, *Sweeping Raids, Giant Camps and Mass Deportations: Inside Trump's 2025 Immigration Plans*, N.Y. TIMES (Nov. 11, 2023) https://www.nytimes.com/2023/11/11/us/politics/trump-2025-immigration-agenda.html.

[99] *See* Elizabeth Goitein and Joseph Nunn, *An Army Turned Inward: Reforming the Insurrection Act to Guard Against Abuse*, 13 J. NAT'L SEC. L. & POL'Y 355, 362 (2023).

intervention. They left it to Congress to strike a judicious balance between these competing considerations.[100]

The Insurrection Act fails utterly in this task. Its text is archaic, vague, and overbroad, granting the president sweeping powers to use troops for domestic law enforcement. For instance, one of its provisions permits deployment to suppress any "unlawful combination" or "conspiracy" that "opposes or obstructs the execution of the laws of the United States."[101] Taken literally, this would allow the president to deploy federal forces in response to two people conspiring to intimidate a witness in a federal trial. A more realistic (and worrisome) abuse scenario would involve the use of troops to suppress an unpermitted but peaceful protest against a controversial executive order.

The Insurrection Act allows the president to respond to the triggering event "by using the militia or the armed forces, or both, *or by any other means*" (emphasis added).[102] This alarming delegation of seemingly unlimited power explains why the Oath Keepers and similar groups believed that President Trump would draft them into service by invoking the Insurrection Act on January 6.[103] Congress has defined "militia" to include "all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard."[104] A substantial portion of white supremacist organizations' members would likely meet that definition, and at least in theory, the others could be mobilized under the "any other means" language.

Despite this extraordinary delegation of power, the Insurrection Act in its current form contains virtually no checks against abuse. Previous versions of the law required advance judicial sign-off and placed time limits on the use of troops to enforce the law absent congressional approval. But Congress removed those provisions, leaving no express role for the other branches of government.[105] The Supreme Court has held that the statute generally gives the president unreviewable discretion to decide whether deployment is warranted.[106]

Such a vast delegation of authority was dangerous at any time in our nation's history. In the modern era, it is also entirely unjustified. Most of the law's provisions were designed for the Civil War and the terrorist insurgency that followed in the former Confederacy. These threats were extinguished long ago, yet the powers crafted to address them have lingered, virtually unchanged, for 150 years. Furthermore, when the law was last amended, police departments were still in their infancy and federal law enforcement was all but nonexistent.[107] Many situations that might have required assistance from the military in the 18th and 19th centuries would be

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[100] *See* U.S. Const. art. I, § 8, cl. 15 (empowering Congress to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions").
[101] 10 U.S.C. § 253.
[102] *Id.*
[103] Alan Feuer, *Oath Keepers Leader Sought to Ask Trump to Unleash His Militia*, N.Y. Times (May 4, 2022), https://www.nytimes.com/2022/05/04/us/politics/oath-keepers-jan-6-riot.html.
[104] 10 U.S.C. § 246.
[105] *See* Goitein and Nunn, *An Army Turned Inward* at 363, 365, *supra* note 99.
[106] *See* Martin v. Mott, 25 U.S. 19, 30 (1827).
[107] *See* Goitein and Nunn, *An Army Turned Inward* at 372, *supra* note 99.

well within the capacity of today's law enforcement to handle. In short, nothing about the Insurrection Act is tailored to the needs of the United States in 2024.

That is not to say that military intervention in domestic crises is never appropriate. In the late 1950s and early 1960s, for instance, Presidents Dwight D. Eisenhower and John F. Kennedy both invoked the Insurrection Act to enforce federal court orders desegregating schools in the South. Other presidents, however, have used the law to break strikes and subdue labor movements.[108] And in the weeks leading up to January 6, President Trump's allies urged him to invoke the Insurrection Act as part of a strategy to overturn the election results.[109]

Indeed, it would have been frighteningly easy for President Trump to invoke the law on January 6 to shut down Congress, thus delaying or preventing certification of the vote on the pretext of keeping the peace. Although he ultimately did not pursue this course of action, he has threatened to use the Insurrection Act in a variety of inappropriate ways in his second term, including invoking it on "Day One" to quash any protests against his taking office;[110] deploying the military to cities like New York and Chicago, which he described as "crime dens";[111] and, as relevant here, using the military to detain and deport immigrants.

### 2. How Trump Might Try to Use the Insurrection Act to Assist in Mass Deportations, and the Limitations on Such Use

President-elect Trump has not specified what role federal armed forces would play in deportations if deployed under the Insurrection Act. At least in theory, however, they could engage directly in core law enforcement activities, such as apprehending immigrants, detaining them, and removing them from the United States, and they could do so in any state—with or without the consent of the state's governor.

Such a use of the law would be unprecedented. Although some past uses of the Insurrection Act have been questionable, it has never been deployed for a routine law enforcement purpose such as immigration enforcement. Indeed, it has been used to *protect* immigrants: in 1885, President Grover Cleveland invoked the law to suppress violent white mobs that were attempting to drive Chinese immigrants out of Tacoma and Seattle, Washington.[112] Furthermore, with the exception of the Civil War and its aftermath—a crisis unique in this country's history—the law has never been used for an operation approaching the scale of a nationwide mass deportation effort.

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[108] *See* Goitein and Nunn, *An Army Turned Inward* at 367, *supra* note 99.
[109] *See* Jacqueline Alemany, Josh Dawsey, and Tom Hamburger, *Talk of Martial Law, Insurrection Act Draws Notice of Jan. 6 Committee*, WASH. POST (April 27, 2022), https://www.washingtonpost.com/politics/2022/04/27/talk-martial-law-insurrection-act-draws-notice-jan-6-committee/.
[110] Isaac Arnsdorf, Josh Dawsey, and Devlin Barrett, *Trump and Allies Plot Revenge, Justice Department Control in a Second Term*, WASH. POST (Nov. 6, 2023), https://www.washingtonpost.com/politics/2023/11/05/trump-revenge-second-term/.
[111] Gary Fields, *Trump Hints at Expanded Role for the Military within the U.S. A Legacy Law Gives Him Few Guardrails*, ASSOCIATED PRESS (Nov. 27, 2023), https://apnews.com/article/trump-military-insurrection-act-2024-election-03858b6291e4721991b5a18c2dfb3c36.
[112] *See* Grover Cleveland, *Proclamation 274*, 24 Stat. 1027 (Nov. 7, 1885); Grover Cleveland, *Proclamation 275*, 24 Stat. 1028 (Feb. 9, 1886).

Invoking the Insurrection Act in this context might well cross a legal line. Although the Supreme Court held in *Martin v. Mott* (1827) that the Insurrection Act did not permit judicial review of a president's decision to deploy troops,[113] there are important caveats to this ruling. First, language in *Martin* and in later decisions—most notably, the 1932 case *Sterling v. Constantin*—suggests that there might be a "bad faith" exception to the general rule of non-reviewability, and that courts may step in if the president has exceeded a "permitted range of honest judgment."[114] Second, Congress has extensively amended the law since the *Martin* decision. Courts could conclude that the revised law, which includes much more detailed criteria for deployment, allows for judicial review in at least some circumstances beyond the "bad faith" scenario.

If courts determine that they may review whether deployment criteria are met, they should adopt long-standing interpretations of the Department of Justice's Office of Legal Counsel (OLC) that construe those criteria narrowly, in keeping with constitutional principles and tradition.[115] According to these interpretations, invocation of the Insurrection Act must be a "last resort," occurring only when a state requests assistance to put down an insurrection; when necessary to enforce a federal court order; or when "state and local law enforcement have completely broken down."[116] None of these conditions is present here.

Even if courts determine that they may not review the president's decision to deploy troops, they are clearly empowered to review whether the troops' actions pursuant to deployment are lawful. As the Court affirmed in *Sterling*: "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[117] The Insurrection Act does not (and could not) authorize the violation of constitutional rights; nor may troops violate other federal laws or exceed the scope of the authorization provided by the Insurrection Act. For instance, a 1975 Department of Justice memorandum suggested that prolonged military detention under the Insurrection Act would be unconstitutional,[118] and the same memorandum questioned whether the Insurrection Act authorizes federal troops to conduct arrests.[119]

### 3. What Congress Can Do: Reform of the Insurrection Act

Although courts should step in to curtail a manifest abuse of the Insurrection Act, there is no guarantee that they will do so. The fundamental problem with the law is that its text does not match the underlying intent, which was to provide for domestic deployment of the U.S. military only in acute crises—those on a level with an insurrection against federal or state governments.

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[113] *Martin*, 25 U.S. 19 (1827).
[114] 287 U.S. 378, 399.
[115] Laura A. Dickinson, *How the Insurrection Act (Properly Understood) Limits Domestic Deployments of the U.S. Military*, LAWFARE (Sept. 12, 2024) https://www.lawfaremedia.org/article/how-the-insurrection-act-(properly-understood)-limits-domestic-deployments-of-the-u.s.-military.
[116] Use of Marshals, Troops, and Other Federal Personnel for Law Enforcement in Mississippi, Op. O.L.C. (1964), https://irp.fas.org/agency/doj/olc/marshals.pdf.
[117] 287 U.S. at 401.
[118] Law Relating to Civil Disturbances, Op. O.L.C., *supra* note 58.
[119] *Id*.

To ensure that presidents cannot exploit the law for political gain or other improper purposes, Congress must enact comprehensive reform.

In September 2022, the Brennan Center submitted a statement to the House Select Committee to Investigate the January 6th Attack on the United States Capitol addressing the Insurrection Act. The statement included a legislative reform proposal, developed in consultation with numerous experts and several allied organizations, that would meaningfully guard against abuse of the powers conferred by the Act while preserving the ability to deploy troops in a true crisis.[120]

First, the proposal more specifically and narrowly defines both the criteria for deployment and what the president may do in response. For instance, while an insurrection against federal or state government would always warrant deployment, obstruction of federal law would trigger deployment authority only if it deprived a group or class of people of their constitutional rights—explicitly including the right to vote—or if it created an immediate threat to public safety that could not be handled by state or federal law enforcement. In responding to such crises, the president could deploy active-duty armed services or call the National Guard into federal service, but could not deputize private citizens to act as soldiers. Moreover, the proposal would clarify that the Insurrection Act does not authorize the suspension of habeas corpus—holding people without trial—or the complete displacement of civilian authority, also known as martial law.[121]

To ensure adherence to these limitations, the proposal includes mechanisms for congressional and judicial oversight. At the time of deployment, the president, secretary of defense, and attorney general would be required to submit a joint certification and report to Congress setting forth certain basic information. The authority provided by the law would expire automatically after seven days unless approved by Congress, using expedited procedures that would prohibit filibustering and allow any member to force a vote. Finally, courts would be authorized to review whether the criteria for deployment were met, employing a deferential "substantial evidence" standard of review to ensure that courts did not simply replace the president's judgment with their own.

In April of this year, a bipartisan working group of former top national security officials led by former White House counsel Bob Bauer (under President Obama) and former acting head of OLC Jack Goldsmith (under President Bush) issued a statement calling for reform of the Insurrection Act and setting forth principles to guide such reform.[122] The working group's principles overlap significantly with the Brennan Center's proposed reforms. Three months later, Senator Richard Blumenthal introduced the Insurrection Act of 2024, which closely tracks the Brennan Center's proposal.[123]

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[120] *See* Goitein and Nunn, *Statement to the U.S. House Select Comm. to Investigate the Jan. 6th Attack*, *supra* note 5. The proposal was subsequently published as a law review article. *See* Goitein and Nunn, *An Army Turned Inward*, *supra* note 99.

[121] *See* Tim Lau and Joseph Nunn, *Martial Law Explained*, Brennan Ctr. for Just. (Sept. 10, 2020), https://www.brennancenter.org/our-work/research-reports/martial-law-explained.

[122] Press Release, American Law Institute, Guidance for Insurrection Act Reform Issued by Bipartisan Group (Apr. 8, 2024), https://www.ali.org/news/articles/guidance-insurrection-act-reform-issued-bipartisan-group/.

[123] Insurrection Act of 2024, S. 4699, 118th Cong. (2024).

In the near future, of course, there are political barriers to enacting Insurrection Act reform. Unfortunately, it might take a massive abuse of this dangerous law to overcome those barriers. For now, though, members of Congress who support shoring up legal safeguards against presidential overreach should look for every opportunity to build bipartisan support for this critical reform effort.

## IV. The Alien Enemies Act

The Alien Enemies Act was enacted to give the president vast regulatory, detention, and deportation powers in times of declared war or an armed attack by a foreign nation or government. President-elect Trump, however, has said he will use this wartime authority for peacetime immigration enforcement.[124] This would be a clear abuse of the law. Moreover, even in wartime, applying this centuries-old law would conflict with later-enacted immigration protections and violate modern understandings of constitutional rights. Congress should thus repeal the Alien Enemies Act without delay.

### A. The Alien Enemies Act: A Sweeping Wartime Authority

The Alien Enemies Act of 1798 is the last remaining part of the notorious Alien and Sedition Acts. The president can invoke the law by proclaiming the existence of a "declared war" or a threatened or ongoing "invasion" or "predatory incursion" against U.S. territory perpetrated by a "foreign nation or government."[125] Upon invoking the Alien Enemies Act, the president is empowered to summarily detain, deport, and regulate the conduct of "all" noncitizens over the age of 14 who were born in or are citizens of the proclaimed foreign belligerent.[126] Although the law originally applied only to men, Congress amended it to cover women in 1918.[127]

The law does not distinguish between noncitizens who are loyal or disloyal, who have legal status or who are unlawfully present. Its text includes no exceptions for noncitizens who are long-term permanent residents, who have served in the U.S. military, or who came to the United States as refugees from the foreign belligerent. Historically, the law has been used to regulate and intern individuals from each of these categories, including German Jews who had fled persecution in the Third Reich.[128]

The law also includes no substantive or procedural restrictions on how the president can regulate the conduct of targeted noncitizens. Presidents have issued Alien Enemies Act

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[124] Steve Inskeep and Christopher Thomas, *Trump Promised the 'Largest Deportation' in U.S. History. Here's How He Might Start*, NPR (Nov. 15, 2024), https://whyy.org/articles/trump-deportation-immigrants-alien-act/.
[125] 50 U.S.C. § 21.
[126] The law applies to noncitizens who are the "natives, citizens, denizens, or subjects" of a proclaimed foreign belligerent. *Id*. Since World War I, courts have held that "nativity is determined by the place of [a noncitizen's] birth" and that birth heritage is immutable. Minotto v. Bradley, 252 F. 600, 602 (N.D. Il. 1918). Congress and the Department of Justice have discussed the Alien Enemies Act as applying to noncitizens based on their ancestry. *See, e.g.*, Wartime Violation of Italian American Civil Liberties Act, 114 Stat. 1947 (2000); U.S. Dept. of Justice, A Review of the Restrictions on Persons of Italian Ancestry During World War II (2001).
[127] An Act to Amend Section Four Thousand and Sixty-Seven of the Revised Statutes by Extending Its Scope to Include Women, 40 Stat. 531 (1918).
[128] *See generally* Harvey Strum, *Jewish Internees in the American South, 1942–1945*, 42 Am. Jewish Archives 27 (1990).

regulations to limit where noncitizens could live, where they could work, how they could travel, and what they could own, on penalty of detention.[129] At times, these regulations have appeared to conflict with established constitutional rights—as when President Roosevelt limited Japanese, German, and Italian noncitizens' access to certain books. Unlike many regulations under contemporary law,[130] these Alien Enemies Act regulations can be and have been promulgated by the president without any notice-and-comment process.

The civil liberties shortcomings of past Alien Enemies Act regulations have been exacerbated by the law's absence of procedural protections for individuals who are detained or deported for running afoul of them. The Alien Enemies Act does not entitle noncitizens to any hearing, appeal, or right to be represented by counsel. When, in World Wars I and II, Presidents Wilson and Roosevelt issued regulations that allowed them to intern any noncitizen they "deemed dangerous," neither those regulations nor the law itself established any standard or evidentiary threshold for determining whether targeted noncitizens were in fact dangerous. In its 1948 *Ludecke v. Watkins* opinion, a narrow majority of the Supreme Court upheld this vague regulation on the theory that, by targeting only a subset of noncitizens covered by the Alien Enemies Act—i.e., only those noncitizens "deemed dangerous," as opposed to the hundreds of thousands of noncitizens of Japanese, German, and Italian ancestry in the United States—the president had exercised its power "within narrower limits than Congress authorized" and was acting within the law's permissible scope.[131] The four *Ludecke* dissenters, meanwhile, warned that the regulation gave the president leeway to punish noncitizens for their beliefs and without due process.[132]

Presidents have invoked the Alien Enemies Act only three times: during the War of 1812, World War I, and World War II. It was last and most infamously used during World War II for the internment of 31,000 noncitizens of Japanese, German, and Italian ancestry.[133] (U.S. citizens of Japanese descent were incarcerated under a separate authority specific to World War II.[134]) Congress and the U.S. government have issued apologies for much of this shameful episode in our nation's history.[135]

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[129] *See, e.g.*, Woodrow Wilson, *Proclamation 1364*, 40 Stat. 1651 (Apr. 6, 1917); Franklin D. Roosevelt, *Proclamation 2525*, 6 F.R. 6321 (Dec. 7, 1941); Franklin D. Roosevelt, *Proclamation 2526*, 6 F.R. 6323 (Dec. 8, 1941); Franklin D. Roosevelt, *Proclamation 2527*, 6 F.R. 6324 (Dec. 8, 1941).
[130] *See* 5 U.S.C. § 553.
[131] 335 U.S. 160, 166 (1948).
[132] *See generally* 335 U.S. 160 at 173 (Black, J., dissenting); 335 U.S. at 184 (Douglas, J., dissenting).
[133] *World War II Enemy Alien Control Program Overview*, Nat'l Archives, https://www.archives.gov/research/immigration/enemy-aliens/ww2 (last visited Dec. 18, 2024).
[134] *See The Alien Enemies Act Paved the Way for Japanese American Incarceration. Let's Keep It In the Past.*, Denshō (Oct. 17, 2024) https://densho.org/catalyst/the-alien-enemies-act-paved-the-way-for-japanese-american-incarceration-lets-keep-it-in-the-past/.
[135] Civil Liberties Act of 1988, 102 Stat. 903 (1988) (providing apologies and reparations not only for Japanese incarceration under Executive Order 9066 but also to permanent residents of Japanese ancestry interned under the Alien Enemies Act); Mochizuki v. United States, 43 Fed. Cl. 97, 97(1999) (approving a settlement agreement to provide federal apologies and reparations to a class of Japanese Latin-Americans interned under the Alien Enemies Act); Wartime Violation of Italian American Civil Liberties Act, *supra* note 126 (apologizing for the "devastating" effects of Alien Enemies Act regulations on Italian-American communities and identifying the law's lack of procedural protections for internees of Italian ancestry as a civil liberties infringement).

### B. How Trump Might Try to Use the Alien Enemies Act to Assist in Mass Deportations, and the Limitations on Such Use

Since September 2023, Trump has promised to invoke the Alien Enemies Act as part of his mass deportation agenda.[136] According to aides, he intends to claim that migration from Mexico, El Salvador, and Venezuela constitutes an "invasion" or "predatory incursion" perpetrated by drug cartels and gangs that are acting as *de facto* governments or influencing formal governments' policy through bribes.[137]

There is no precedent for using the Alien Enemies Act in the absence of an armed conflict. When Presidents James Madison and Woodrow Wilson invoked the law in the War of 1812 and World War I, they did so on the basis of Congress's declaration of those wars.[138] And when President Franklin D. Roosevelt invoked the law on December 7, 1941, he did so in response to Japan's surprise attack on Pearl Harbor, for which he proclaimed an "invasion."[139]

Throughout the Alien Enemies Act's 226-year history, the law has been understood as a wartime authority only. The Fifth Congress discussed the Alien Enemies Act in terms of its compliance with the law of war and repeatedly referred to "invasion" in its literal sense, as an open or actual "hostility" aimed at the subjugation of a country.[140] In an essay discussing the Alien Enemies Act, James Madison wrote, "Invasion is an operation of war."[141] Later jurists and presidents maintained this understanding, with the Wilson administration acknowledging that the Alien Enemies Act's reach was limited to "those to whom the rules of war under the laws of nations applied."[142]

Nor is there precedent for using the Alien Enemies Act to address gang or cartel activity. Based on its requirement of a "foreign nation or government" adversary, the Alien Enemies Act has consistently been understood as an authority applicable in *interstate* armed conflict, not in conflicts with nonstate groups.

Trump might well argue that his decision to proclaim a migrant "invasion" is a sensitive national security determination committed to the president's discretion and not susceptible to judicial review. He could raise a similar argument about his decision to recognize gangs and

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[136] Vaughn Hillyard, Jake Traylor and Dan Gallo, *Trump Vows to Invoke a Wartime Law to Deport Suspected Foreign Gang Members and Drug Dealers*, NBC News (Sept. 20, 2023) https://www.nbcnews.com/politics/donald-trump/trump-alien-enemies-act-travel-ban-deport-drug-dealers-gang-members-rcna108121.

[137] Asawin Suebsaeng and Adam Rawnsley, *Trump's Bonkers Plan to Weaponize an Archaic Law for Mass Deportations*, Rolling Stone (Jan. 8, 2024) https://www.rollingstone.com/politics/politics-features/trump-archaic-law-mass-deportations-1234941671/.

[138] James Madison, *Proclamation* (Feb. 23, 1813), quoted in Lockington's Case, Brightly (N.P.) 269, 271 (Pa. 1813); Woodrow Wilson, *Proclamation 1364*, *supra* note 129.

[139] Franklin D. Roosevelt, *Proclamation 2525*, 6 F.R. 6321 (Dec. 7, 1941).

[140] *The Alien Laws*, *in* Great Debates in American History, Volume Seven: Civil Rights, Part One 22–23 (Marion Mills Miller, ed. 1918).

[141] James Madison, The Report of 1800 (1800), https://founders.archives.gov/documents/Madison/01-17-02-0202.

[142] *See, e.g.*, Supplemental Brief of the United States, 20 (1918), ex parte Gilroy, 257 F. 110 (S.D.N.Y. 1919); De Lacey v. United States, 249 F. 625, 626 (9th Cir. 1918) ("Alien enemies have no rights and no privileges . . . during time of war. . . . Power to enact [the Alien Enemies Act] . . . is recognized in international law.").

cartels as *de facto* governments or components, by way of bribery, of formal governments in Latin America. But the judiciary's "political question doctrine," under which courts often refuse to review congressional or presidential decisions on sensitive foreign policy and national security matters, has key backstops.

In its 1962 *Baker v. Carr* opinion, the Supreme Court suggested that the judiciary could override political decisions that reflect an "obvious mistake" or "obvious instance of a manifestly unauthorized exercise of power."[143] In addition, in *Sterling v. Constantin* (discussed in Part II.D., above), the Court alluded to a "permitted range of honest judgment" within which executives must operate pursuant to their constitutional obligation to "Take Care that the Laws be faithfully executed."[144] The courts could rely on these backstops to strike down an invocation of the Alien Enemies Act to address the actions of nonstate groups in peacetime.

Even if courts refuse to weigh in on these questions, the law would still be vulnerable to challenge on statutory and constitutional grounds. To start, the historical operation of the Alien Enemies Act stands at odds with requirements under contemporary immigration law, which may displace some or much of the wartime authority's summary deportation power. Most clearly, immigration law's withholding-of-removal provisions that implement the 1967 Refugee Protocol and Convention Against Torture may entitle noncitizens to a hearing if they express a fear of persecution or torture in their country of origin. These protections were read to limit the government's Title 42 power to expel noncitizens during the COVID-19 public health emergency.[145] This was so even though Title 42, like the Alien Enemies Act, was a longstanding authority and was not a part of conventional immigration law.

Furthermore, the 1948 *Ludecke* opinion that last upheld the Alien Enemies Act against a due process challenge predates the postwar civil rights revolution that remade the Fifth and Fourteenth Amendments. The law has never survived a modern due process challenge, and it has never been subjected to an equal protection challenge. Because the law permits indefinite civil detentions or internment, authorizes the detention or deportation of individuals based solely on their ancestry, and dispenses with basic procedural protections, it is arguably inconsistent with modern understandings of the Constitution's due process and equal protection guarantees. These arguments are detailed in a recent Brennan Center report.[146]

### C. What Congress Can Do: Repeal the Alien Enemies Act

The surest way to head off an abuse of the Alien Enemies Act, and to prevent a recurrence of civil liberties violations like those seen during World War II, would be for Congress to repeal the law. The Brennan Center has endorsed Senator Mazie Hirono's Neighbors Not Enemies Act, S. 1747, a clean repeal bill.

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[143] 369 U.S. 186, 214–16 (1962).
[144] 287 U.S. at 399–400.
[145] Huisha-Huisha v. Mayorkas, 27 F.4th 718, 731 (D.C. Cir. 2022).
[146] Katherine Yon Ebright, The Alien Enemies Act: Unjust, Unnecessary, and Unconstitutional 11–15 (2024), https://www.brennancenter.org/our-work/policy-solutions/alien-enemies-act.

Congress can repeal the Alien Enemies Act without any adverse effect on national security. Since the law was last used, Congress has codified and enacted criminal, immigration, and national security laws that protect against espionage, sabotage, and other malign activities in both peacetime and wartime. More specifically, chapters 37 and 105 of the criminal code cover all manner of espionage and sabotage, from sketching defense installations to tampering with defense materiel. Other parts of the criminal code now prohibit acting as an unregistered agent of a foreign government, trespassing on military property, and planning attacks on U.S. servicepeople.[147] In immigration law, there now exists an authority and process for deporting noncitizens on "security and related grounds," including for engaging in espionage, sabotage, or "any activity" to oppose the U.S. government by force.[148] And the president's ability to enforce these criminal and immigration laws is enhanced by postwar national security tools, including far-reaching surveillance capabilities and authorities.

Since World War II, no president has felt the need to invoke the Alien Enemies Act to protect the homeland or U.S. war efforts. The United States has prosecuted the Korean War, the Vietnam War, the Gulf Wars, and other conflicts without relying on the authority. Repealing the Alien Enemies Act would honor constitutional principles and prevent abuse while simultaneously ensuring public safety.

**Conclusion**

There are multiple legal authorities that President-elect Trump could exploit to involve the military in his plans for mass deportations. Many of these authorities, however, come with significant limitations. Moreover, even when a law—such as the Insurrection Act—appears to grant almost limitless discretion, it remains the case that the broadest discretion can still be abused. Nonetheless, it would behoove Congress to codify the various implied constraints on these powers, to amend the text where necessary to comport with the underlying intent, to ensure that both Congress and the courts can serve as checks against presidential overreach, and to repeal the Alien Enemies Act outright. Congressional action is the best hope for guarding against abuses of these authorities by the incoming administration or a future one.

[147] 18 U.S.C. §§ 951, 1381, 1389.
[148] 8 U.S.C. § 1227(a)(4).