

## Reference Sheet on the Insurrection Act and Related Authorities

### **The Constitution**

While Article II of the Constitution makes the President the “Commander in Chief of the Army and Navy[,]” Article I of the Constitution gives Congress the specific authority to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions[,]” as well as to “raise and support Armies” and “make Rules for the Government and Regulation of the land and naval forces[.]”

Article IV of the Constitution “guarantee[s] to every State . . . a Republican Form of Government” and obligates the federal government to “protect each of them against Invasion . . . and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”

### **The Insurrection Act**

Originally enacted in 1807, the Insurrection Act is the primary law defining when the president may deploy regular military and National Guard forces to suppress domestic unrest. Amended twice during and after the Civil War to address rebellions and allow for the enforcement of civil rights over state objections, it is now codified at 10 U.S.C. §§ 251-255 and provides three sets of authorizations:

- [§ 251] “Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.”
- [§ 252] “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.”
- [§ 253] “The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

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

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

Section 254, meanwhile, requires the President to issue a “proclamation” that “immediately order[s] the insurgent to disperse and retire peaceably to their abodes within a limited time” whenever he or she wishes to rely on these authorities. And § 255 defines “state” for the purposes of the above to include Guam and the Virgin Islands. That said, presidents have used the Insurrection Act in other non-state territories not expressly included by this section (see, e.g., Washington, D.C., in 1968).

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### **Posse Comitatus Act and Related Authorities**

Originally enacted in 1878 as a backlash against the military occupation of the southern states following the Civil War, the Posse Comitatus Act (as currently codified at 18 U.S.C. § 1385) makes it a crime for anyone to “willfully us[e] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws” “except in cases and under circumstances expressly authorized by the Constitution or Act of Congress[,]” including by the Insurrection Act. The Defense Department has traditionally extended these same restrictions to the Marine Corps and Navy by regulation, subject to certain exceptions.

No one has ever been criminally prosecuted under the Posse Comitatus Act, but it has provided a basis for contesting various forms of law enforcement action. Subsequent case law has reached conflicting conclusions as to whether it is intended to prohibit any military involvement in law enforcement, or only military participation in activities that risk hostile engagements with civilians. The executive branch has generally taken the latter view.

Congress has sought to clarify the permissible scope of activities by enacting provisions that authorize the military to provide law enforcement agencies with various types of assistance. These are largely codified at 10 U.S.C. §§ 271-284. Section 275, however, reinforces the restrictions associated with the narrower view of the Posse Comitatus Act by requiring the Secretary of Defense to “ensure that any activity” pursued under these authorities “does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.”

### **National Guard-related Authorities**

Since the 1930s, the National Guard system has supplanted the role originally played by state militias in the Constitution. Each state National Guard unit is dual hatted as both a state entity and part of the federal Army or Air Force. As a result, National Guard personnel can operate in one of three different statuses: state active duty, when they are acting pursuant to state law and authorities; “Title 32” status where they are pursuing missions authorized (and often funded) by the federal government under state command and control; and “Title 10” status, where they are put under federal command and control.

Federal law (codified at 10 U.S.C. § 12406) currently authorizes the President to call National Guard units into federal service in the event: (1) U.S. territory “is invaded or is in danger of invasion by a foreign nation[;]” (2) there is a “rebellion or danger of rebellion[;]” or (3) the President is unable with the regular forces to execute the laws of the United States[.]” Another provision, codified at 32 U.S.C. § 502(f), that allows National Guard personnel to be ordered to engage in “[s]upport of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense” under state authority command and control was recently cited by Attorney General Barr as authorizing the recent voluntary deployment of National Guard forces in Title 32 status to Washington, D.C.

### **Federal Law Enforcement Authorities**

While federal law enforcement agencies have extensive authority to enforce federal law, most common criminal offenses are only subject to state and local regulation. That said, many states’ laws allow federal law enforcement to aid in the enforcement of state and local law, subject to certain conditions.

Recently, the Department of Homeland Security has cited 40 U.S.C. § 1315, which authorizes DHS personnel to engage in the “protection of property owned or occupied by the Federal Government and persons on the property, including duty in areas outside the property to the extent necessary to protect the property and persons on the property[,]” as the legal basis for its activities in Portland, Oregon.