Trump vows to deploy the military, but can he?

Experts disagree, but culture, not law, may explain why it's rarely done

By Victoria McGrane
GLOBE STAFF

President Trump on Monday vowed to send the military into American cities if any city or state "refuses" to take the steps necessary to quell the violent protests erupting around the country.

The Insurrection Act of 1807 does give the president broad authority to deploy federal military forces to a state or to federalize a state's national guard to deal with a rebellion or other domestic unrest that is preventing the enforcement of federal law — even over the objection of the state's governor, legal scholars say.

But governors and Democratic attorneys general around the country were quick to declare that the law does not apply to the current unrest, which has involved peaceful protests as well as looting and violence. They say that local law enforcement has not been overwhelmed.

"The president can't unilaterally deploy the United States military into Massachusetts to stop peaceful protests," Massachusetts Attorney General Maura Healey said. "It's bad and a dangerous move; it also doesn't hold up legally."

The law Trump has threatened to use has conditions that must be met, "including a breakdown of federal law. That's not the case here in Massachusetts," she said, adding that state and local law enforcement officials "are fully capable of addressing safety concerns here."

In Boston, multiple protests sparked by the killing of George Floyd unfolded peacefully on Sunday but turned sharply violent that night, leading to a torched police cruiser, other damaged vehicles, and looted stores throughout Downtown Crossing and the Back Bay.

Some legal scholars say Trump has the authority to use the 213-year-old act to send troops into cities, even if he would be shattering longstanding cultural and political norms that have led other modern presidents to use the authority sparingly.

"For better or for worse — and I think a lot of people would say for worse — the Insurrection Act gives the power to make the relevant factual determination to the president," said Steve Vladeck, a national security and constitutional law professor at the University of Texas Austin. "And there's no obvious mechanism in the statute for anyone to challenge that determination."

The law provides two main paths for the president to send in troops to handle a domestic situation:

- He can do so at the request of a state legislature or the governor, as George H.W. Bush did in 1992 when Governor Pete Wilson of California asked for help dealing with riots in Los Angeles that followed the acquittal of police officers who were videotaped beating Rodney King.

- Or the president can decide to do it on his own, if he believes there is some form of domestic violence occurring that opposes or obstructs the execution of US law, said William C. Banks, a professor emeritus at Syracuse University College of Law who has written a book about the domestic role of the US military.

The law requires certain circumstances to be met for the president to involve military troops in domestic law enforcement. But whether those prerequisites have been met is "almost unilaterally at the discretion of the president," said Renee Landers, who teaches constitutional law at Suffolk University Law School.

"The reality is the law, such as it is, is very deferential to the president, in this context," Vladeck said. "And maybe what we're all learning is what some of us scholars have been trying to argue for a long time, which is there's way too much deference to the president in this space."

Congress amended the Insurrection Act in 2006 following Hurricane Katrina — then-president George W. Bush had considered using the statute during the disaster, but ultimately decided against it. Congress tried to make the statute much more specific about the circumstances under which the president could use the power, Vladeck said.

But laying it out "scared everybody," sparked a harsh pushback from governors, and the next Congress repealed the amendment, he said. They didn't take the opportunity to rein in the president's authority, though; rather, Congress just reverted back to its earlier, open-ended language.

Healey disagrees with those arguing that the law affords a president such broad authority.

"My view is that there's absolutely no case law to interpret it that way," Healey told the Globe. "This is uncharted territory. It just speaks to how beyond the norms the president's suggestion is, and..."
how outlandish."

She said other attorneys general around the country agree. Healey spoke with a number of them, all Democrats, on a call made Tuesday to discuss Trump's statement. Included were the AGs from New York, Michigan, Connecticut, and Virginia, among others, she said.

The Baker administration did not sound eager about Trump's potential plans, either.

"Governor Baker made clear his views regarding President Trump's inadequate response to these difficult times and believes Massachusetts residents all want to see progress on the hugely important issues of race and equality," Baker spokeswoman Lizzy Guyton said in a statement responding to an inquiry from the Globe about Baker's thoughts on Trump's military threat.

She added: "At this time, the Commonwealth does not plan to request additional public safety resources."

The governor called up the Massachusetts National Guard on March 10 to help with coronavirus response and it remains activated, under Baker's control. He also dispatched Guard members to Boston after Sunday's violence, according to news reports.

In 1957, President Dwight D. Eisenhower sent troops from the 101st Airborne Division to Little Rock, Ark., to ensure the desegregation of Central High School after the state's governor removed National Guard troops who were protecting the nine Black students from an angry white mob. In that case, a federal court had ordered the school desegregated.

President John F. Kennedy took similar action five years later to ensure that James Mer-edith, a Black student, could enroll at the University of Mississippi in Oxford, over the objection of the state's governor.

Cultural norms, rather than legal barricades, have prevented presidents from using the power more frequently, experts said. Put simply, Americans don't like to see their own military used against fellow Americans.

"The background presumption in our society has always been that we don't want the military involved in law enforcement," Banks said. It's a cultural view that sets the United States apart from most countries in the world and is rooted in the country's founding rebellion against England.

"What they were doing was using their military to ransack our houses, search our papers, throw us in jail, beat us up, all at the behest at King George."

Some scholars agree with Healey that the Insurrection Act cannot be used in the current situation — but they don't necessarily think that will stop Trump from using the law. Unlike in the school desegregation battles of the 1950s and 1960s, the states do not appear to be flouting federal law or federal court orders.

"I would say that's an unconstitutional use of the military because there is no real rebellion against the US," said Laurence Tribe, a constitutional law professor at Harvard Law School. Treating ordinary American citizens engaged in civil protest as insurrectionists "turns the law upside down," he said.

"The president has the authority to make sure laws are faithfully executed, even in the face of resistance or opposition by states," said Kent Greenfield, a constitutional law professor at Boston College. "But this is not that," he continued, saying that states are not refusing to enforce laws.

Rather, Trump "is essentially warming over domestically," because the states aren't enforcing the laws the way he wants them enforced.

This moment, Greenfield said, is a stark reminder of how many of our laws — including the Insurrection Act — are based on the notion the president is both competent and acting in good faith, and that the laws rely on some level of self-imposed restraint on the part of the commander in chief.

"This president doesn't have that," he said.

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STEVE VLADECK, a national security and constitutional law professor at the University of Texas Austin