Trump's Order of Law

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Today, January 20, 2025, Donald Trump is going to be inaugurated a second time as the 47th President of the United States. His presidency is expected to undertake dramatic changes to America's policy on immigration as his hardcore rhetoric may transform into hardened policy. To fulfill his campaign promises, in particular his planned mass deportation policy, Trump has repeatedly stated his intention to invoke two archaic laws: the 1807 Insurrection Act and the Alien Enemies Act of 1798. This blog will provide an overview of the two acts, explain the requirements for the President-elect to utilize them, and detail potential ways to cabin their use.

The Law of Force

Adopted in 1807, the Insurrection Act was used under President Thomas Jefferson following an insurrection led by his former Vice-President Aaron Burr. At the time, the Constitution did not explicitly allow for the domestic deployment of the military against insurrections. Given this limitation, President Jefferson pushed Congress to pass the Act. Since then, it has been invoked 14 times, with the last time being in 1992 during the Rodney King riots under the George H. W. Bush administration.

The Insurrection Act legally enables the President to deploy federal forces to curtail and contain situations of domestic turmoil such as rebellion, civil unrest, or assisting civilians in law enforcement efforts. It thereby provides an exception to the Posse Comitatus Act which generally bars federal military forces from participating in civilian law enforcement activities. The Act accords broad authority to the President to define both what can be conceived as a situation of domestic turmoil and whether to deploy federal military force.

For example, it authorizes the President to deploy federal force in a state when its legislature or the governor (should the legislature not be convened) requests the aid of the federal government in suppressing an insurrection, with the latter not being defined by the text of the law. The President may even send in federal force against the wishes of the state should there be "unlawful obstructions, combinations, or assemblages, or rebellion" in enforcing US laws through the regular judiciary. What is more, the President may deploy the military if "any insurrection, domestic violence, unlawful combination, or conspiracy" [...] "hinders the execution of the laws;" deprives citizens of their constitutional rights; "opposes or obstructs the execution of the laws" or "impedes the course of justice under those laws."

The Scope of Executive Discretion

The President's discretion in determining the presence of an "insurrection", "rebellion" or "domestic violence" has been repeatedly upheld by the Supreme Court. In the case of Martin vs Mott (1872), the Court held that the President has the ultimate authority in determining the situations of domestic turmoil under the Act. Similarly, in Sterling v. Constantin (1932), the Supreme Court ruled that courts can only judicially review the executive's assessment (in the 1932 case, it was the Governor's) as to the presence of an insurrection, rebellion, or domestic violence once the federal force has already been deployed.

The 1932 ruling came against the backdrop of the great depression and the landslide victory of the Democrat Franklin D. Roosevelt. In addition to the presidency, the Democrats also had the majority in the House while the Republicans' majority in the Senate rested on merely two seats. At the time, the Supreme Court was led by Chief Justice Charles E. Hughes and his conservative bloc who frustrated many of FDR's New Deal policies. Current circumstances reflect a different equation of power, institutional balance, and

public behavior. Above all, there is a conservative-leaning Supreme Court that may be less likely to challenge presidential discretion, in addition to a clear institutional balance favoring the Republicans.

The discretion the Insurrection Act grants the President to define 'situations of domestic turmoil' is uniquely concerning, given Trump's history of using political violence to achieve political outcomes such as instigating the January 6th insurrection at Capitol Hill and the authoritarian discourses he used during his rallies, including calling his political rivals "vermin." Trump's fascination with the Insurrection Act goes as far back as George Floyd and Black Lives Matter protests where on both occasions he floated the idea to invoke the Act. He has also repeatedly suggested using the national guard and the military to address the 'migrant invasion', 'crime dens', and to go after the 'radical left.' Little stands in the way if Trump decided to go there, especially after facing no consequences over the Capitol attack and the recent Supreme Court ruling in Trump v. United States in which the Court decided that the President was immune from prosecution for "official acts".

The Law of Fright

Adopted in 1789, the Alien Enemies Act is a wartime authority that grants the President powers to deport and detain natives of an enemy nation. It has been invoked three times in the past. The last time it was invoked was by President Roosevelt immediately after Pearl Harbor to detain Japanese immigrants and later German and Italian immigrants. It continued to be applied under President Truman until 1951, even after the end of World War II.

The Alien Enemies Act is replete with ambiguous language and grants broad authorization to the President. The Act can be invoked either if there is a declaration of war between the US and a foreign nation, or, if any foreign nation "threatens", "perpetrates", or "attempts" any "invasion" or "predatory incursion" into US territory. While Congress has authority over the President when it comes to a declaration of war, the President does not need any congressional approval to determine the presence of a "threat" or "attempt" for an "invasion" or "predatory incursion". The interpretation of these terms thus lies with the President. Perhaps for this reason, Trump has characterized the US as an "occupied country" and promised to "rescue each city and town that has been invaded and conquered"; falsely accused migrants of "attacking villages"; and promised to seal the border and stop the "migrant invasion". This strategic use of language enables a conducive environment that normalizes the invocation of the Alien Enemies Act. In line with this, in his recent remarks, Trump made clear that he intends to declare a national emergency and deploy the military for his mass deportation plans.

The Unlikelihood of Institutional Checks

A key obstacle to the judiciary providing a meaningful check on the President's abuse of the Alien Enemies Act may be the political questions doctrine. There is a long-standing precedent that establishes judicial deference to executive judgment concerning what judges deem political questions. In Baker v. Carr (1962), Justice Brennan identified six instances that comprised a political question that included matters of "foreign affairs" and "executive war powers". However, in the same judgment, the Court also stated that they could come into the political fray if there is a "manifestly unauthorized exercise of power." This line of thought has not been relied upon since.

Moreover, in Ludecke v. Watkins (1948), the Supreme Court held that the President has expansive discretionary powers in the matters of national security during wartime which limits the scope of judicial review over the powers exercised under the Alien Enemies Act. The ruling also broadened the interpretative ambit of what counts as a "declaration of war" by stating that cessation of hostilities does not constitute an end to the war until political branches declare it to be such. This is why the Act's application continued till 1951 under Truman, well after the cessation of hostilities between the US and Germany, but not the official termination of war between both nations.

In this context, barring a congressional declaration of war, the Trump administration could invoke the Act by following the second line of authorization. Past

reporting has indicated that if challenged in court, his administration might attempt to legally argue that "cartels, gangs, and drug dealers in Latin America have, essentially, co-opted and corrupted their governments to such a degree that the criminals represent effective state actors." They would further seek to argue that members of cartels and gangs in the U.S. are therefore engaged in an invasion on behalf of foreign narco-state.

Aside from the courts, there is unlikely to be political resistance to Trump's potential invocation of the Act, given both the Republican institutional trifecta, and the fact that a great number of Americans in both red and blue states are enraged over migration. He is thus very likely to invoke the archaic Alien Enemies Act on day one to fulfill his central campaign commitment. Trump even came up with a catchy title "Operation Aurora" during his rally at Colorado's municipality to characterize the whole scheme.

Realizing MAGA's Vision through Law?

If invoked, these archaic Acts may prove useful for the realization of President Trump's authoritarian agenda and lead the U.S. one step closer to MAGA's vision of an ethno-nationalist America whose constitutive parts may become a hierarchical structure in citizenship; governance through largely unchecked executive power; and a strong institutional coherence between the Presidency, Congress, and the Supreme Court to preserve MAGA-led Republican political power.

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