No. 25A443

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Applicants,

v.

ILLINOIS, *et al.*,

Respondents.

ON APPLICATION FOR A STAY OF THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF 24 FORMER FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ELKAN ABRAMOWITZ
Counsel of Record
MORVILLO ABRAMOWITZ GRAND IASON & ANELLO P.C.
565 Fifth Avenue
New York, NY 10017
(212) 880-9500
eabramowitz@maglaw.com

Counsel for Amici Curiae

387371

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

OTHER AUTHORITIES

INTEREST OF AMICI

Amici are twenty-four former federal judges appointed by presidents of both major political parties. Collectively they served for decades on district courts and courts of appeal across the country. *See* Appendix I.[1] In their judicial capacities, amici confronted questions concerning the scope of constitutional powers and the separation of powers among the branches of government. They have a deep understanding of the ability of federal judges to discern and apply standards necessary to the resolution of constitutional questions.

Although amici no longer serve in an official judicial capacity, they retain a continuing and abiding interest in preserving the role of the judiciary in ensuring that the other branches of government do not exceed the powers conferred on them by the Constitution. They seek to ensure that the separation of powers is respected and that any delegation of congressional power to the president is subject to meaningful judicial review.

Amici's perspective is not shaped by any personal or institutional stake in the outcome of this litigation, but rather by their dedication to the rule of law, and their firm belief that the federal courts play an essential role in protecting the values that our founding fathers embedded in the Constitution.

---

[1] Pursuant to this Court's Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part. No entity or person, aside from amici curiae and their counsel on this brief, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case involves the constitutional and statutory authority of the President to send federal troops to help enforce federal immigration law in Chicago, over the objection of that City's mayor and the governor of the State of Illinois. Seeking to reverse the contrary decisions of a district court and a federal court of appeals, the Solicitor General claims that there is a "long historical tradition" (App. at 19) under which the president can call forth military forces to protect federal law enforcement in his unlimited discretion, free of judicial review.

The Nation's long history points exactly in the opposite direction. Our Founding Fathers, wary of the possibility that the country's chief executive might use the military to suppress dissent, gave Congress—not the president—the constitutional power "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." U.S. Const. art. I, § 8, cl. 15. Congress has authorized the president to deploy military force for domestic purposes, but only in very limited circumstances and only subject to judicial review. Both the limited nature of the president's authority to "call forth" the militia and the anticipated role of federal courts were made manifest in the Militia Act of 1792. That Act was passed by a Congress that included 19 of the 55 men who served in the constitutional convention. It provided:

> Sec. 2. *And be it further enacted,* That whenever the laws of the United States shall be opposed or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, the same being notified to the President of the United States, by an associate justice or

> the district judge, it shall be lawful for the President of the United States to call forth the militia of such state to suppress such combinations, and to cause the laws to be duly executed.

Calling Forth Act of 1792, ch. 28, 1 Stat. 264 (repealed 1795).

This very first Militia Act reflected an unwillingness to give the president the power to make domestic use of military force except in truly exigent circumstances, when "combinations too powerful to be suppressed" in the courts had stymied federal law enforcement. And, even then, the president's decision had to be authorized by a judge before the militia could be deployed in a state. These limitations grew out of the Framers' oft-stated concern that a "vain or selfish man," *see, e.g.*, Alexander Hamilton, Federalist No. 69, might become president and abuse his executive or military power.

Later revisions of the Militia Act, together with the Posse Comitatus Act and the Insurrection Act, also reflected Congress' decision never to give the president the wholesale authority to deploy federal forces for domestic purposes. The provisions of 10 U.S.C. § 12406—the statute on which President Trump relies for his actions in Chicago—do not authorize his actions. Under that statute, the president can call forth the National Guard only in the event of "invasion" or "rebellion," or where the president is "unable" to execute the laws of the United States "with the regular forces." The reference to the "regular forces" is unquestionably a reference to the country's standing armed forces, i.e., the Army and the Navy (among other troops). Those standing armed forces can themselves be deployed for domestic use only under the carefully limited terms of statutes such as the Insurrection Act. The circumstances that might make it lawful for the president to call up regular federal troops to patrol the streets of Chicago over the objection of the Mayor of the City and the Governor of the State of Illinois are not presented in this case.

ARGUMENT

I. History Teaches that the President's Authority To Call Up the Militia for Domestic Purposes Has Been Sharply Limited

In his application for relief in this Court, the Solicitor General argues that President Trump's calling up of the National Guard in Chicago was authorized by 10 U.S.C. § 12406. As the Solicitor General observes, that statute exists to "implement the Militia Clauses in the Constitution." (App. at 20.) In construing the reach of the statute, it is informative to consider the nature and purpose of its constitutional roots. Here, the history and purpose of the Militia Clauses in the Constitution counsel against the expansive view of presidential authority that the government asserts. In this regard, and as this Court has recognized in cases such as *District of Columbia v. Heller,* 554 U.S. 570 (2008), and *New York State Rifle & Pistol Ass'n v. Bruen,* 597 U.S. 1 (2022), the words used by the Founding Fathers in the Constitution must be construed by looking to historical context in which they were written.

That historical context explains the Framers' decision ***not*** to give the president unchecked authority to call up military forces to assist with domestic law enforcement. Indeed, the historical context reflects a deep concern about precisely the kind of presidential action at issue in this case. Our forefathers fought a revolution against a king who sent his troops against them to enforce his laws. The complaints against the king set forth in the Declaration of Independence included:

> he has erected a multitude of New Officers and sent hither swarms of officers to harass our people . . . . He has kept among us in times of peace standing armies without the consent of our legislatures. He has affected to render the military independent of and superior to the civil power.

Distrust for unchecked presidential power, especially with respect to the use of military force, led the Framers to give Congress—and not the president—the constitutional authority to "call forth the militia to execute the laws of the Union," along with the power to raise and support an army and a navy and the authority to declare war. U.S. Const. art. I, § 8. The new nation distrusted standing armies; in the immediate aftermath of the Revolutionary War the Continental Army was largely disbanded, and the Continental Navy was sold off or decommissioned. The new country's military force consisted largely of state militias. It was not until 1791 that Congress authorized a new regular army, and the U.S. Army became a permanent institution only in 1796.

This was the context in which Congress enacted the first Militia Act in 1792. In that Act, Congress authorized the president to send militia forces into a state only in the event of invasion or rebellions, or when the circumstances were too severe to be suppressed by the ordinary course of judicial proceedings. And, in the latter circumstance, the president could act only if "noticed" to do so by an associate justice of the Supreme Court or a district judge. Judicial notice served as a check on the president's exercise of military power.

In the face of this history, the government points to George Washington's actions in the Whiskey Rebellion as an illustration of the president's calling the militia into federal service to address the "open defiance" of federal authority. Indeed, the government's application argues that "[t]he Whiskey Rebellion is emblematic of the range of civil disorders that members of the militia and other federal military forces have long been called upon to address . . . ." (App. at 33) Amici agree that Washington's actions during the Whiskey Rebellion provide a useful example of the appropriate use of presidential authority, but the government's description of the circumstances is woefully incomplete.

Consider the following: The Whiskey Rebellion of 1794 began in Western Pennsylvania, where there was organized resistance to the federal excise tax on distilled spirits. Thousands of armed men had gathered in the summer of 1794 to form militias, drilling as a resistance force to prevent collection of the tax, and an armed crowd had burned down the home of John Neville, the regional inspector of revenue. The United States Marshall had fled the area. Alexander Hamilton (the Secretary of the Treasury) and Henry Knox (the Secretary of War) advised President Washington that the federal tax law could no longer be executed without military intervention. *See* Robert W. Coakley, *The Role of Federal Military Forces in Domestic Disorders, 1789-1878*, 28-65 (1988).

Before he summoned the troops, *President Washington obtained the consent of Pennsylvania's governor*, Thomas Mifflin. Mifflin had been wary of federal troops being used within a state without the state's consent. After receiving reports of armed resistance, Mifflin convened the Pennsylvania militia and resisted Washington's suggestion that the federal militia be called out. Indeed, he initially argued that the presence of a large federal army might inflame, not calm the region. But, as the violence escalated, he eventually conceded that local forces could not quell the rebellion. After meeting with Washington and Hamilton on August 5, 1794, and after learning that an associate justice of this Court had certified to the president that the federal law "cannot be executed by the ordinary course of judicial proceedings," Mifflin gave his consent to federal intervention and actively participated in organizing the Pennsylvania forces who acted under the president's command.

Washington called forth the militia only after receiving the governor's concurrence, and only after abiding by the legal preconditions set forth in the Militia Act of 1792, including the receipt of a certification from Associate Justice James Wilson that the circumstances warranted federal intervention.

In short, Washington acted only after federal law could no longer be enforced through judicial proceedings, after receiving the consent of the state's governor, and after his actions were approved by a Justice of the United States Supreme Court. Unlike George Washington, Donald Trump has called the National Guard to Chicago even though federal immigration law continues to be enforced in the courts there, and over the vehement objection of the state's governor, all the while claiming that his actions cannot be reviewed by this or any other court.

A year after the Whisky Rebellion, Congress enacted the Militia Act of 1795. This act, signed into law by President George Washington, did away with the requirement that a judge "notice" the presence of extraordinary circumstances before the president could call forth the militia. But it continued to place stringent limitations on the president's authority. It allowed him to act if there was an "invasion" from "any foreign nation or Indian tribe," or if there was an "insurrection in any State, against the government thereof," upon request of that state's legislature [or executive, if the legislature could not be convened]." Militia Act of 1795, ch. 36, 1 Stat. 424 (repealed in part 1861). With respect to military action in furtherance of federal law enforcement, the president was authorized to act only if the execution of federal law was obstructed "by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act . . . ." *Id.* § 2.[2] Even then, the law placed a strict time limit on the president's authority: he could act only until thirty days after the commencement of the next session of Congress, reflecting the understanding that it was Congress, and not the president, that had primary responsibility for calling forth the militia to enforce federal law.

Our historical tradition of ensuring that there are stringent and enforceable limitations on the president's ability to use military forces to enforce domestic law

---

[2] Federal marshals in 1795 were the principal federal law enforcement officers in each judicial district. They had the power to serve and execute court orders, to make arrests, to summon the "posse comitatus" (citizens who could help the marshal enforce the law or suppress resistance), and to keep order in court and carry out sentences. Their powers were civilian and judicial in nature; they enforced federal law through the courts. Accordingly, the president could call up the militia under this act only where judicial proceedings and federal law enforcement had broken down "by combinations too powerful to be suppressed" through the courts.

extends well beyond the aftermath of the Revolutionary War. Congressional concern about the misuse of military personnel led directly to the Posse Comitatus Act, 18 U.S.C. § 1385. That statute, enacted in 1878, restricts the use of the military for domestic law enforcement. Indeed, that statute makes it a felony for any person to "willfully use[] 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." *Id.*

Eventually the state militias transformed into today's National Guard. In the Militia Act of 1903 (known as the Dick Act), Congress transformed the old, loosely organized state militias into the National Guard. The statute authorized the president to "call forth" the Organized Militia, to be known as the National Guard, when he is "unable, *with the other forces at his command*, to execute the laws of the Union . . . ." (emphasis added) Dick Act, ch. 196, § 25, 32 Stat. 775, §4 (1903). The current iteration of this statute now appears as 10 U.S.C. § 12406 and is to the same effect. The current statute refers not to "the other forces at his [the President's] command, but to "the regular forces." *Id.* Amici believe it to be beyond dispute that the reference in Section 12406 to the president's inability to execute the laws of the United States "with the regular forces" means that he cannot use the National Guard except in circumstances so dire that he cannot enforce the law even with the aid of the United States Armed Forces.[3] And the president's ability to employ the regular military forces to enforce domestic law is sharply limited.

In 1807, Congress passed the original Insurrection Act, which gave the president the authority to employ the land and naval forces of the United States where it "is lawful for the President . . . to call forth the militia . . . , having first observed all the prerequisites of the law in that respect." Insurrection Act of 1807, ch. 39, 2 Stat. 443. Later versions of the Insurrection Act, enacted after the Civil War and Reconstruction, modified and modernized the language describing the president's authority. The current law, codified at 10 U.S.C. § 252, permits the president to employ the armed forces (or the militia of any state) where "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 . . . ." The precise reach of this language is not presently before this Court, as the president has not relied on the Insurrection Act as authority for his actions in Chicago.

This Court's cases have echoed the country's historical concern that the president's authority to use the military for domestic purposes be limited to situations in which there is an extreme danger to the existing order in one of the states. For example, in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 650 (1952)

[3] We respectfully refer the Court to the amicus brief filed by Professor Martin Lederman for a full discussion of the reasons why the reference to "the regular forces" in 10 U.S.C. § 12406 should be understood as a reference to military personnel serving in the United States Armed Forces.

(Jackson, J., concurring), Justice Jackson reviewed the history that led the drafters of the Constitution to limit the use of military force against civilians and concluded:

> They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretest for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis.

In *Ex parte Milligan,* 71 U.S. 2, 127 (1866), a Civil War case, this Court, based on its review of history concluded: "Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction." The Court in *Milligan* noted the Founders' reluctance to countenance the domestic use of the military in times other than those of true national emergency, and issued a warning that is as applicable today as it was back in 1866:

> This nation . . . has no right to expect that it will always have wise and humane rulers sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln, and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. . . . For this and other equally weighty reasons, they secured the inheritance they had fought to maintain by incorporating in a written constitution the safeguards which time had proved were essential to its preservation . . . .

Id. at 125.

Even after the attack on Pearl Harbor, the Supreme Court, in *Duncan v. Khanamoku,* 327 U.S. 304 (1946), was unwilling to extend military power to peaceful areas of Hawaii. The Court examined the historical use of the militia shortly after the Constitution was adopted and concluded:

> The executive and military officials who later found it necessary to utilize the armed forces to keep order in a young and turbulent nation did not lose sight of the philosophy embodied in the Petition of Right and the Declaration of Independence, that existing civilian government and especially the courts were not to be interfered with by the exercise of military power.

Id. at 320.

The principles and authorities cited above establish that this Nation's founders were determined to establish a government whereby military force would not be used against the people. They no doubt recognized that, when peaceful people assemble to protest perceived injustice, it is likely there will be disruptive acts undertaken by a small number of persons. But the Founders trusted the governments of the states to protect the safety of their people. They would never have agreed that a president could "call forth" the militia over the objection of state and local officials to deal with a relatively small number of disruptive incidents, all the while proclaiming himself immune from judicial review.

II. The President's Authority To Call Forth the Militia in Chicago Is a Question of Law for the Courts To Decide

The Solicitor General argues that courts are not competent to review a presidential determination calling forth the military to assist in federal law enforcement. This argument lacks merit and belies the historical record.

Certainly, there is nothing in the text of the governing statute, 10 U.S.C. § 12406, that places the president's decision out of the reach of federal courts. As we have seen, the very first militia act, the Militia Act of 1792, did not permit President George Washington to call forth the military without receiving the advance certification of an associate justice of this Court or a district judge. When Washington acted to put down the Whiskey Rebellion, he had received the advance written approval of Associate Justice James Wilson. It is plain, therefore, that those who governed the country in its earliest days did not perceive the president to have the power to make domestic use of the military in a manner entirely free from judicial oversight. Obviously, it was not that they distrusted George Washington. They recognized, as did this Court in *Milligan*, that "This nation . . . has no right to expect that it will always have wise and humane rulers," 71 U.S. at 125.

The requirement of advance judicial approval was deleted from the Militia Act of 1795. In an age when communication was time-consuming and difficult, the law was changed to avoid delay in emergency situations; the historical record reflects that Washington had stayed his hand while Justice Wilson reviewed the facts to determine that Pennsylvania's civil authorities had been overwhelmed. But the decision to do away with advance judicial approval did not mean that the president could ignore the requirements of the law, or that a court could not later determine the legality of his action. Many of the statutes that constrain the president's domestic use of the military permit him to act only when enforcement of the law through judicial proceedings has been rendered impossible. The notion that judges are somehow incapable of determining the efficacy of judicial proceedings is, in a word, nonsensical.

Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) and *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) are not to the contrary. In each case, there was no question that an emergency existed which entitled the executive to use emergency powers. In *Martin*, the War of 1812 was raging and in *Luther* no one questioned that there was an insurrection taking place in Rhode Island. In these circumstances, each of those cases stands for nothing more than the not surprising proposition that when a true emergency exists, the executive's decisions on how to carry out his responsibility is not a matter for judicial review. Neither case in any way addresses the issue of whether the executive's decision to take action met the constitutional or statutory bases authorizing him to act.

As this Court observed in *Baker v. Carr,* 369 U.S. 186, 211 (1962),

> [d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and it is a responsibility of this Court as ultimate interpreter of the Constitution.

Where Congress cedes some authority to the president by statute, the meaning of the statute, and the boundaries of its application, are matters for courts to decide, because it is for the courts "to say what the law is" *Marbury v. Madison,* 5 U.S. 137, 177 (1803). Even when the president has declared an "emergency," he cannot take unilateral action that is not authorized by the Constitution or by statute. The resulting questions of statutory and constitutional authority are for the judicial branch to decide, just as this Court did in *Youngstown Sheet & Tube Co.,* 343 U.S. 579. In this case, the president exceeded his constitutional and statutory authority, and it is squarely within the judicial province for the courts to say so.

CONCLUSION

The application for a stay should be denied.

Respectfully submitted,

/s/ Elkan Abramowitz
Elkan Abramowitz
Counsel of Record
Morvillo Abramowitz Grand
Iason & Anello P.C.
565 Fifth Avenue
New York, NY 10017
(212) 880-9500
eabramowitz@maglaw.com

Counsel for Amici Curiae

APPENDIX

TABLE OF CONTENTS

APPENDIX I

Amici and Courts on Which They Formerly Served

Mark W. Bennett, U.S. District Court for the Northern District of Iowa

John Winslow Bissell, U.S. District Court for the District of New Jersey

Robert J. Cindrich, U.S. District Court for the Western District of Pennsylvania

William F. Downes, U.S. District Court for the District of Wyoming

Jeremy D. Fogel, U.S. District Court for the Northern District of California

William Royal Furgeson, Jr., U.S. District Court for the Western District of Texas

Paul W. Grimm, U. S. District Court for the District of Maryland

Thelton E. Henderson, U.S. District Court for the Northern District of California

Robert Harlan Henry, U.S. Court of Appeals for the Tenth Circuit

David R. Herndon, U.S. District Court for the Southern District of Illinois

Richard J Holwell, U.S. District Court for the Southern District of New York

Barbara M. Lynn, U.S. District Court for the Northern District of Texas

John S. Martin Jr., U.S. District Court for the Southern District of New York

A. Howard Matz, U.S. District Court for the Central District of California

Paul R. Michel, U.S. Court of Appeals for the Federal Circuit

Kathleen O'Malley, U.S. District Court for the Northern District of Ohio & U. S. Court of Appeals for the Federal Circuit

Layn R. Phillips, U.S. District Court for Western District of Oklahoma

Philip M. Pro, U.S. District Court for the District of Nevada

Shira A. Scheindlin, U.S. District Court for the Southern District of New York

John D. Tinder, U.S. District Court for the Southern District of Indiana &
U.S. Court of Appeals for the Seventh Circuit.

Thomas I. Vanaskie, U.S. District Court for the Middle District of Pennsylvania &
U.S. Court of Appeals for the Third Circuit

T. John Ward, U.S. District Court for the Eastern District of Texas

Alexander Williams Jr., U.S. District Court for the District of Maryland

Diane P. Wood, U.S. Court of Appeals for the Seventh Circuit