

# Authorities Governing the Deployment of Troops during the Election and Post-Election Season

This memo responds to some of the most commonly asked questions regarding the laws and authorities for the possible use of federal or state military forces in the United States from early voting through the inauguration. Section I covers deployment under federal command; Section II covers deployment under state Gubernatorial control; and Section III is an overview of relevant election laws that apply to service member activities during election season.

## FEDERAL COMMAND: FEDERAL MILITARY & NATIONAL GUARD UNDER TITLE 10

**Command and Control:** The chain of command for federal forces follows the National Command Authority, which runs from the President to the Secretary of Defense to United States Northern Command (NORTHCOM) and/or other relevant United States Department of Defense combatant commands.

### Civilian Control

Our founders were concerned about the misuse of a standing military, particularly its use for law enforcement purposes. The Constitution therefore ensured that the military would operate under civilian control, and that the president would share power over any domestic military deployment with Congress. The [Militia Clauses](#) in Article I, § 8 of the Constitution make clear that deployment of federal forces “to execute the Laws of the Union, suppress Insurrections and repel Invasions” must be pre-authorized by Congress.

### Posse Comitatus Act

To avoid the unauthorized use of the military for law enforcement purposes, Congress further constrained military action with the [Posse Comitatus Act](#) of 1878. The Act is considered foundational to our armed forces and their mission of repelling foreign enemies, not policing fellow citizens. It prohibits the use of the Army or Air Force for domestic law enforcement, unless such use was expressly authorized by the Constitution or a Congressional statute. The Act was subsequently expanded to all federal armed forces.

The Posse Comitatus Act also applies to the National Guard when the Guard is federalized, i.e., when it is called up by the federal government for a federal mission under Title 10, removed from the control of the governors, and placed under the National Command Authority. Under Title 10 Status, the National Guard is considered part of the federal forces and is subject to those laws.

The Posse Comitatus Act is a criminal statute; a politician, commander, or service member who violates the Act can incur criminal penalties.

### Insurrection Act

The Posse Comitatus Act, however, permits a few exceptions. The primary such exception is the [Insurrection Act](#), which vests the president with broad discretion to deploy federal forces in cases of civil unrest, violence, or lawlessness. The Insurrection Act was enacted in 1807 to enable federal military action to suppress armed uprisings; it was amended during and immediately after the Civil War to quell possible ongoing insurrection and to

allow the enforcement of the equal protection clause of the 14<sup>th</sup> Amendment. Notably, all of its provisions were authored before the advent of professionalized police departments.

Section 251 allows the president to use troops when requested by the state to “suppress” an “insurrection” against state government. Section 252 allows the domestic deployment of the military for law enforcement purposes *without* the consent of the receiving governor “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.” Section 253 allows the president to deploy troops when “any insurrection, domestic violence, unlawful combination, or conspiracy,” prevents enforcement of state or federal laws in a manner that deprives residents of that state of their federal constitutional rights or impedes “the course of justice” under federal laws.

Many people remember this third use, when presidents invoked the Insurrection Act to enforce desegregation in the 1950s and 1960s. Section 251 was most recently used when California’s governor requested federal assistance with the LA riots in 1992. However, the Insurrection Act was also used during the late 19<sup>th</sup> and early 20<sup>th</sup> century “gilded age” to break strikes and interfere in labor conflicts.

Because of the Act’s potential for misuse, the military’s understanding of the Act, as expressed in Defense Secretary Mark Esper’s testimony, is that it “should only be used as a matter of last resort and only in the most urgent and dire of situations.”

The Insurrection Act grants broad presidential powers, but those powers are not limitless. The president must stay within the bounds of the authorities Congress has provided, as the Constitution makes clear that Congress, not the President, has the power to “provide for” the domestic use of the military. To exercise power in excess of the bounds of the Insurrection Act is therefore to violate the separation of powers. Moreover, Congress retains the power at all times to amend the Act and the powers it confers.

Insurrection Act deployments are judicially reviewable for abuse of power. In 1827, the Supreme Court held in *Martin v. Mott* that a president’s determination as to whether circumstances merit the deployment of troops (in that case, to defend against foreign attack) is “conclusive.” Yet the Supreme Court has made clear that the judiciary retains the right to determine whether the military’s actions and order *after* deployment are lawful.<sup>1</sup>

This is a critical distinction. The Insurrection Act cannot empower military troops to violate constitutional rights. Moreover, like all other statutes, it must yield if it comes into direct conflict with more specific, later-enacted federal laws—such as the federal voting rights laws mentioned below. Whether deployment of troops under the Insurrection Act violates the Constitution or other federal laws is a question for the courts to decide.

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<sup>1</sup> In *Sterling v. Constantin*, which involved a state governor’s declaration of martial law, the Supreme Court relied on *Martin v. Mott* in holding that the governor’s determination that military deployment was warranted was “conclusive.” The Court then added, “It does not follow . . . that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”

## STATE COMMAND: NATIONAL GUARD UNDER STATE COMMAND & TITLE 32

**Command and Control:** Article I of the Constitution explicitly reserves to states “the Authority of training the Militia.” Thus governors of each state and three U.S. territories command 53 of the country’s National Guard units. Since the District of Columbia has no governor, command for the Washington D.C. National Guard falls to the President, who delegates that authority to the Assistant Secretary of Defense for Homeland Defense and Global Affairs. Governors generally appoint an Adjutant General (TAG or AG) to serve as the highest military leader administering the force.

### State Active Duty

National Guard units almost always operate under state command and control; federalization under Title 10 is rare. National Guard personnel under State Active Duty pursue state missions, are paid with state funds, and are subject to state laws. They are not subject to the Posse Comitatus Act, and may undertake law enforcement activities within their state. The Guard prefers, however, to serve in support roles to local and state law enforcement, freeing up law enforcement officers to do their front line duties.

### Title 32

Under Title 32 status, National Guard units remain under state command and control, and therefore are not subject to Posse Comitatus. However, they may pursue federal missions assigned by the president or Secretary of Defense, and they receive payment with federal funds. This “hybrid” status was originally limited to certain counter-drug, homeland defense, and training activities, but the law was amended to authorize federally assigned “training or other duty.” Governors can refuse to allow their National Guards to be used for Title 32 missions.

In June 2020, seeking troops to send to Washington D.C. to quell protests in the wake of George Floyd’s death, Attorney General Barr made an unprecedented legal argument. He claimed that under Title 32, section 502(f), the President could assign National Guard units under hybrid status to perform any duty whatsoever, including law enforcement activities in response to civil disturbances. He then asked willing governors to send Guard units from their home state into the District, despite Mayor Muriel Bowser’s objections. According to Secretary Esper’s Congressional testimony, these troops, while under the command of their state governors as per Title 32 authority, reported to General Walker, commander of the D.C. National Guard. Yet General Walker’s chain of command runs through the Secretary of Defense to the President.

This represents an extremely unusual expansion of executive authority. If National Guard units report to a federal chain of command, they must be deployed under Title 10 status and therefore cannot be used for law enforcement, unless the Insurrection Act has been invoked. Federal funds cannot be used for missions outside of statutory authority, and there is no reason to construe a statute for field training as permitting deployment to police

civil disturbances.<sup>2</sup> Finally, absent federalization of the National Guard, it is unprecedented for one state's Guard units to be deployed to an out-of-state jurisdiction without that jurisdiction's consent.

## SERVICEMEMBER ACTIVITIES DURING ELECTION SEASON

Unless they are repelling armed enemies of the United States, federal officials who deploy armed troops to election polls are committing a crime. An array of federal and state laws specifically prohibit interference in an election and apply to military troops.

### Federal Laws

- [18 U.S.C. § 592](#) prohibits any federal troops (including National Guard under Title 10) or civil authorities from ordering any troops or armed men into a polling place for any reason other than “repell[ing] armed enemies of the United States” under criminal penalty for those officers or civil authorities;
- [18 U.S.C. § 593](#) prohibits members of the military (including National Guard under Title 10) from interfering in an election in a number of ways, including using threat or force to intimidate voters, or interfer[ing] in any manner with an election officer's discharge of his duties subject to imprisonment;
- [18 U.S.C. § 594](#) makes voter intimidation by anyone a federal crime subject to imprisonment;
- [42 U.S.C. § 1985\(3\) clauses 3 and 4](#) (originally the Ku Klux Klan Act) prohibits government and private actors from engaging in conspiracies to intimidate or injure voters;
- [Section 131\(b\) of the Civil Rights Act of 1957](#) and [Section 11\(b\) of the Voting Rights Act](#) prohibit voter intimidation by all public or private actors.

### State Laws

States have an array of additional laws to bar election interference that are also applicable. For instance, [Florida's Voter Protection Act](#) makes it illegal under criminal penalty for any person to “directly or indirectly use or threaten to use force, violence, or intimidation or any tactic of coercion or intimidation to induce or compel an individual to vote or refrain from voting,” as well as an array of other voting-related activities.

These and other laws from key states are detailed in the Stanford-MIT Healthy Elections Project documents: [Electoral Violence in 2020: Prevention and Potential Remedies](#) and [Defining Voter Intimidation: Six Battleground States](#).

In keeping with the Supremacy Clause of the U.S. Constitution, state laws must yield if in direct conflict with federal laws. Whether such a conflict existed, however, could be a complex question, as the federal laws

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<sup>2</sup> Title [32 U.S.C. § 502\(f\)](#) is a subheading under “Required Drills and Field Exercises” which explains that National Guard members may “be ordered to perform training or other duty,” which includes “[s]upport of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense.” John Denn, then a staff attorney at the U.S. Army Forces Command and one of a team working on these issues, explained to the Washington Post that the provision for performing federal “operations or missions” was added to the law in 2006 “to deal with counterterrorism,” and that “[n]obody writing this new provision likely viewed it as ever becoming some sort of work around for the Insurrection Act.” Such a reading would create broad new Presidential powers, open a large loophole in the Posse Comitatus Act, and create a sea change in how the National Guard operates. This goes against the Supreme Court's counsel that Congress “[does not, one might say, hide elephants in mouseholes.](#)”

themselves could conceivably come into conflict—e.g., if the president were to invoke the Insurrection Act to deploy troops at polling places in violation of federal law.

### **Other Legal Actions**

The events in June in Lafayette Square have already led to the filing of at least three lawsuits against the National Guard for violations of civil rights laws, the Posse Comitatus Act, and the [Federal Tort Claims Act](#) for personal injury due to low-flying helicopters. The National Guard has also been sued for records relating to the deployment.

### **About the National Task Force on Election Crises**

*The National Task Force on Election Crises is a diverse, cross-partisan group of more than 50 experts in election law, election administration, national security, cybersecurity, voting rights, civil rights, technology, media, public health, and emergency response. The mission of the nonpartisan National Task Force on Election Crises is to ensure a free and fair 2020 presidential election by recommending responses to a range of potential election crises. The Task Force does not advocate for any electoral outcome except an election that is free and fair. The recommendations of the Task Force are the result of thoughtful consideration and input from all members and therefore do not fully reflect any individual Task Force member's point of view—they are collective recommendations for action. More information about the Task Force, including its members, is available at <https://www.electiontaskforce.org/>.*