

Buttressing Institutional Integrity in an Election Year

Guardrails Limiting the Role of U.S. Federal Forces

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THE ISSUE

The United States has clear laws and norms that limit when federal forces—federal law enforcement, federalized National Guard, and active-duty military—can be sent into cities and towns in America, particularly in the context of elections. Yet, the deployment of such forces to cities this summer, combined with administration statements about deploying federal law enforcement to prevent voting fraud, has the potential to confuse the public about what is lawful and appropriate and raises concerns about potential abuse. This brief reviews laws, policies, practices, and norms regarding the domestic deployment of federal forces and makes recommendations to increase public trust, mitigate the risk of deployments that interfere with Americans' rights or their vote, and reinforce the peaceful transition of power.

The Center for Strategic and International Studies (CSIS) has conducted an independent and non-partisan project to examine the roles of federal forces around U.S. presidential elections, identify where these forces might be tested across a range of election and transition scenarios, and propose recommendations aimed at maximizing the prospect that any use of federal forces in these contexts is done in a way that is lawful, appropriate, and carried out in a way that reinforces public trust. For the purposes of this paper, “federal forces” means active-duty military, federalized National Guard, and federal law enforcement. With respect to civilian law enforcement, this brief focuses particularly on Department of Homeland Security (DHS) forces. To inform this work, the CSIS team conducted background research and a series of not-for-attribution interviews and convened expert roundtables with bipartisan stakeholders from the following backgrounds: current and former leaders from the Department of Defense (DOD) and DHS; renowned scholars specializing in defense, civil-military relations, homeland security, national security law, and election

law; current and former officials working at the state and federal levels; and former local law enforcement.

This brief outlines the primary findings of the CSIS team. The first sections of this brief introduce the studied federal forces, as well as non-federalized National Guard, and the legal and normative boundaries guiding domestic deployments. Subsequent sections address the implications of critical thresholds that could be tested during a presidential election and transition, specifically: gaps or ambiguities in current authorities; normative frameworks; command, control and organization challenges; organizational capacity; training and preparedness; and information, intelligence, and communications. The brief concludes with a set of both near- and long-term recommendations that policymakers should consider to reinforce the integrity and health of U.S. institutions.

RECENT CONCERNS

In response to the killing of George Floyd on May 25, 2020, Americans took to the streets to protest against

racial injustice. Notably, in Washington, D.C., President Trump deployed significant military and non-military forces in response to the protests. It is estimated that **roughly 7,600 individuals were deployed**—2,950 federal law enforcement personnel, 2,935 National Guard troops (out-of-state National Guard were not federalized and on orders from their respective governors), and an additional 1,704 active-duty military units stationed just outside the D.C. area. Shortly after, President Trump **deployed** over 100 DHS personnel from the Federal Protective Service (FPS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP) to Portland in support of Operation Diligent Valor. Both operations, as well as similar operations around the country, were met with intense criticism by members of Congress, civil society, and the American public.

In any event, the use of federal forces and National Guard in instances of civil unrest over the summer, fears of violence around the election, and suggestions that such forces may be deployed to prevent voter fraud, has raised questions about the laws, policies, practices, and norms surrounding the use of the military and federal law enforcement in election-related contexts. The United States has a strong framework of laws and norms intended to safeguard the election process from inappropriate federal interference. The proper application of these guardrails, however, rests upon the judgment and commitment of the nation's leaders. The guidelines for federal force deployments before, during, or immediately after an election, particularly for any deployment that directly or indirectly appears to interfere with the election process, merit urgent examination to ensure the priority is placed on protecting the constitutional rights of all Americans to peacefully assemble and vote.

OVERVIEW OF RELEVANT INSTITUTIONS COMPRISING “FEDERAL FORCES”

The **Tenth Amendment** of the U.S. Constitution states, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” This reflects two key aspects of our democracy: the federal government must have specific authority to act; and powers not specifically given to the federal government are reserved to the states, unless there is a specific prohibition, and to the people. This constitutional construct reinforces the norm that enforcing local laws is left to local law enforcement. Any federal law enforcement activity must be specifically authorized in

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law, and deployments to address general civil unrest are reserved for rare instances where local law enforcement and state authorities are unable to maintain order on their own and federal forces are needed in support. Use of active-duty military is even more rare, reflecting a strong principle against involving the military, trained to fight enemies overseas, inside the United States to police U.S. citizens.

Should a president deploy non-military, federal law enforcement assets, the operation will likely be comprised of Department of Justice (DOJ) and DHS units. For DOJ the relevant units likely would come from the **U.S. Marshals Service (USMS)**, particularly its Tactical Operation Division, but may also come from the Federal Bureau of Investigation (FBI), the Bureau for Alcohol, Tobacco, Firearms and Explosives (ATF), the Drug Enforcement Administration (DEA), and others. DOJ has **opined** that entities such as the DEA are authorized to engage in broad law enforcement activities, although earlier DOJ lawyers had reached a different conclusion looking at the same statutory language.

DHS also has several sub-entities that serve federal law enforcement and emergency relief functions. In the immediate aftermath of 9/11, DHS brought together a variety of pre-existing and newly created federal agencies and functions that, taken together, were intended to coordinate and provide enhanced security for the homeland. The following are all DHS entities that have some kind of federal law enforcement capacity: **FPS**, **CBP**, **Secret Service (USSS)**, and **ICE**—particularly ICE's **Homeland Security Investigations (HSI)** units. The **Coast Guard** and the **Transportation Security Administration (TSA)** also have some limited law enforcement authorities. Each of these entities has a specific mission and their authorities are prescribed in statute, as noted in the chart below.

With regard to the military, a president might choose to deploy either **active-duty** units or **National Guard** units that have been federalized (called up to active-duty under the authority of the president). Active-duty

Relevant DHS and DOJ Federal Forces included in this Study

FEDERAL FORCE TITLE, DHS OR DOJ	MISSION STATEMENT	RELEVANT LEGAL AUTHORITIES	CAPACITY
Federal Protective Service (FPS), DHS	To Prevent, protect, respond to and recover from terrorism, criminal acts, and other hazards threatening the U.S. Government's critical infrastructure, services, and the people who provide or receive them. ¹	40 U.S.C. § 1315: Law Enforcement Authority of Secretary of Homeland Security for Protection of Public Property	~ 1,000 employees that are law enforcement security officers, police officers, and criminal investigators ²
*Customs and Border Protection (CBP), DHS	To safeguard America's borders thereby protecting the public from dangerous people and materials while enhancing the Nation's global economic competitiveness by enabling legitimate trade and travel. ³	8 U.S.C. § 1357: Powers of Immigration Officers and Employees 19 U.S.C. § 1589a: Enforcement authority of customs officers <i>*CBP has numerous authorities codified under Title 8, 15, and 19, among others.⁴</i>	~ 24,500 CBP officers ~ 19,600 Border Patrol Agents ⁵
*Immigration and Customs Enforcement (ICE), DHS	To protect America from the cross-border crime and illegal immigration that threaten national security and public safety. ⁶	8 U.S.C. §1357: Powers of Immigration Officers and Employees <i>*ICE has numerous authorities codified under Title 8, 18, and 19 among others.</i>	~ 6,500 special agents in ICE Homeland Security Investigations (HSI) ⁷
U.S. Secret Service (USSS), DHS	To ensure the security of our President, our Vice President, their families, the White House, the Vice President's Residence, national and visiting world leaders, former Presidents, and events of national significance. ⁸	18 U.S.C. §3056: Powers, Authorities, and Duties of the United States Secret Service	~ 1,300 uniformed division officers ⁹
U.S. Marshals Service (USMS), DOJ	To enforce federal laws and provide support to virtually all elements of the federal justice system by providing for the security of federal court facilities and the safety of judges and other court personnel; apprehending criminals; exercising custody of federal prisoners and providing for their security and transportation to correctional facilities; executing federal court orders; seizing assets gained by illegal means and providing for the custody, management, and disposal of forfeited assets; assuring the safety of endangered government witnesses and their families; and collecting and disbursing funds. ¹⁰	28 U.S.C. §564: Powers as Sheriff 28 U.S.C. §566: Powers and Duties 28 C.F.R. §0.112: Special Deputation	~ 3,600 U.S. Marshals, Deputy Marshals, and Criminal Investigators ¹¹

*CBP and ICE both have very broad enforcement authorities within their mission areas. The listed provisions are examples.

Source: Authors own analysis and compilation.

service members are fulltime employees in the military and take their orders from the president, secretary of defense, and respective combatant commanders. The combatant commander for domestic deployments within the continental United States is usually U.S. Northern Command (NORTHCOM). Like DHS, NORTHCOM was created in response to 9/11, and its **mission statement** is as follows: “United States Northern Command Defends Our Homeland—Deters, detects, and defeats threats to the United States, conducts security cooperation activities with allies and partners, and supports civil authorities.”

The National Guard primarily takes their orders from their respective state governors under State Active Duty (SAD) orders or Title 32 orders. The president can federalize a state’s national guard under Title 10 orders for domestic use **only if there is a demonstrated need** meeting **statutory requirements** that mirror those of the Insurrection Act, and in recent decades has only done so at the direct request of, and in close-coordination with, a state’s governor. These authorities are described below.

LEGAL AND NORMATIVE BOUNDARIES

There are two broad categories of relevant legal authorities to consider: (1) laws directing *when* federal forces can be deployed, and (2) laws clarifying *which* forces can be deployed and *how* they will be used to address specific situations.

National Guard Status Distinctions

	State Active Duty	Title 32	Title 10, Active Duty <i>Under the Posse Comitatus Act</i>	Title 10, Active Duty <i>Under Insurrection Act exception to the Posse Comitatus Act</i>
Command & Control	Governor		President	
Where	Home State or United States	United States	United States and Global	United States and Global
Pay	State	Federal	Federal	
Discipline	State Military Code		Uniform Code of Military Justice	
Mission Types	State Domestic Operations	State Domestic Operations & Federal Missions**	Federal Missions	
		Federal Training	Federal Training	Federal Training
	Includes Policing		No Policing (Support Only)	Policing

*DC National Guard is distinct from other state National Guard units. Its unique characteristics are not captured in this chart.

** 32 U.S.C. §502(f) provides for federal training and might also be read to allow other federal direction while in Title 32 status. This will be described later in this brief.

The authors added to information presented on the Emergency Management Assistance Compact (EMAC) website: “The National Guard & EMAC,” EMAC, <https://www.emacweb.org/index.php/training-education/learn-about-emac-your-discipline/national-guard>.

WHEN FEDERAL FORCES CAN BE DOMESTICALLY DEPLOYED

In the context of an election, there are two primary considerations regarding the deployment of federal forces. The first concerns the prospect of federal forces being deployed at or near polling places or other places where the election is taking place, such as where ballots are collected or counted. Federal law is clear: it is a **crime** for a federal official to deploy forces or armed men to a place where an election is being held unless “necessary to repel armed enemies of the United States.”

The second context is the prospect for violence or civil unrest during or after an election. **The Posse Comitatus Act (18 U.S.C. §1385)** is a foundational check against the arbitrary deployment of the military inside the United States. It states that the executive branch cannot use the military to execute laws “except in cases and under circumstances expressly authorized by the Constitution or Act of Congress.” Initially the Posse Comitatus Act was **established** following the Compromise of 1877 to address Southern complaints about the presence of federal forces protecting Black voters and growing federal fatigue in implementing post-Civil War Reconstruction provisions. Since then, the Posse Comitatus Act has matured into a fundamental safeguard against civil rights violations.

This legal prohibition is accompanied by a strong norm across all the federal forces—either via explicit mention or established historical precedent—that, in responding

to civil unrest in communities, they work in *support* of or, as in the case of protecting federal property, at least in coordination with state and local law enforcement. Military units particularly, but also non-military units to some degree, are largely conditioned with a professional aversion against deploying domestically in situations where they may be asked to confront fellow citizens.

The judgment reflected in the relevant laws and norms is that governors and mayors call upon local law enforcement as their first default to address civil unrest or other violations of criminal law. If local law enforcement needs reinforcement, they call on neighboring jurisdictions for augmentation. The next level of support, should the governor deem it necessary, is the state's own National Guard. The governor can then ask other states for help from their respective National Guards. Federal forces may be requested to be included in a broader force package for planning, but the emphasis is placed on using local and state personnel first.

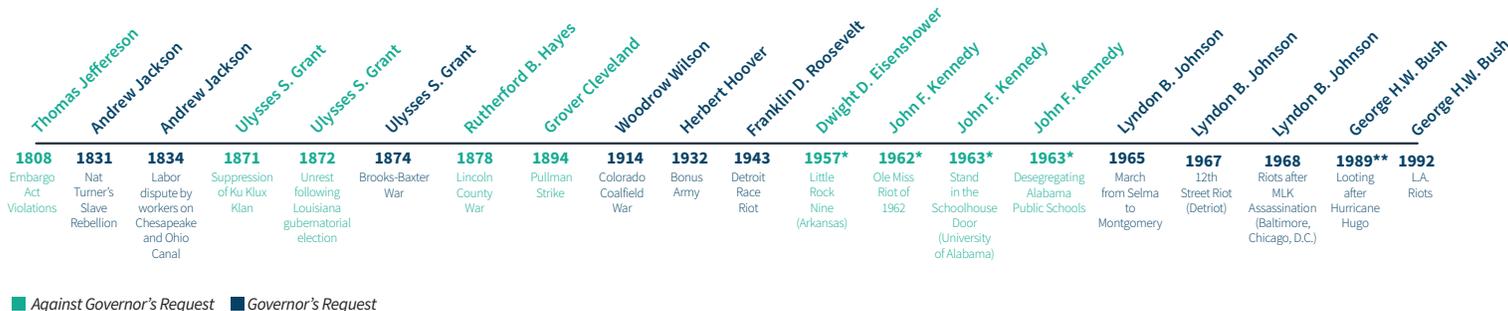
Additional laws underscore that federal reinforcements and National Guard should be deployed in response to requests by state and local authorities and only in support of narrow missions. The law is explicit about how a state can apply for “**Emergency Federal Law Enforcement Assistance**” (34 U.S.C. §§50101-50103). The **Stafford Act** (42 U.S.C. §5121 et seq.) also outlines statutory authorities for the federal government “to provide an orderly and continuing means of assistance” to state and local governments as they recover from a disaster. But assistance missions serve in a support capacity. So while the Stafford Act does authorize the use of the military in disaster relief operations, forces can **only be deployed** when the impacted state requests assistance. The act does not provide an exception to the Posse Comitatus prohibition on federal forces undertaking law enforcement duties.

Though DOJ and DHS forces are not restricted by the Posse Comitatus Act, norms and legal frameworks mirror similar logics of restraint and deference to local authorities. The Stafford Act outlines a process whereby the state governors can send emergency declaration requests to the president, and then the **Federal Emergency Management Agency (FEMA)**, which currently resides within DHS, coordinates the federal government’s disaster relief efforts in consultation with local authorities.

These relationships are explained in the **National Response Framework (NRF)**, a comprehensive guide that flexibly captures different federal roles and responsibilities during disasters and other emergencies. The NRF is further supported by **15 Emergency Support Functions**. The implicit understanding is that federal forces are only deployed when there is an identified need for assistance.

However, there are exceptions. Notably, the **Insurrection Act (10 U.S.C. §251-253)** provides that “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 as the [National Guard] of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.” The last time the Insurrection Act was invoked was in response to the 1992 Los Angeles riots and was done at the request of the California governor. But there have also been instances where presidents have invoked the act against governors’ wishes, as was done on a few occasions during the Civil Rights Era when federal forces were sent to enforce desegregation decrees in resisting states. Normative precedent, vice legality, has greatly contributed to the limited number of times the Insurrection Act has been invoked.

Invocation of the Insurrection Act



*These instances were during the Civil Rights Era. Presidents were sending in federal forces to enforce desegregation.

**There is some confusion about whether the governor made a formal request before federal forces were deployed. President Bush's administration claims they received a formal request. Governor of the Virgin Islands, Alexander Farrelly, at one point claimed the request was not made before troops were deployed.

The president may also claim to have special authorities to deploy federal troops to protect federal employees as they perform “assigned government functions.” This [opinion](#) dates back to 1971 and was written by then-assistant attorney general William Rehnquist to justify deployments during the Mayday Demonstrations. Attorney General Barr seems to use [similar justifications](#) for recent troop utilizations in the D.C. area, but again, it is worth considering that D.C., for many reasons, claims a unique status and should be acknowledged as such (see “[The Use of Federal Forces in Washington D.C.](#)” for more information).

There is no similar law that comprehensively addresses when non-military federal law enforcement can and cannot be deployed. Instead, each federal law enforcement entity must have specific authorization to justify its exercise of authority. For example, the Federal Protective Service (FPS) has the responsibility to protect federal buildings and the people who work in or visit them. This is a federal responsibility that was used to justify the deployment of DHS law enforcement, including CBP and ICE officers designated to FPS for this deployment, into Portland.

WHICH FEDERAL FORCES CAN BE DOMESTICALLY DEPLOYED, AND HOW THEY CAN BE USED ONCE DEPLOYED

National Guard: The National Guard could be mobilized under **State Active Duty (SAD), Title 32**, or **Title 10** orders. SAD status, which is the most common function for guard units, is when they are acting on a governor’s orders and are paid by the state. When guard units are utilized under Title 10 status that means they have been officially federalized by the president, take orders from the secretary of defense, and are paid by the federal government. [Title 10 of the U.S. Code §12406 \(National Guard in Federal Service\)](#) outlines that the president may “call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel [an] invasion, suppress [a] rebellion, or execute [federal] laws.” This language mirrors the Insurrection Act criteria for active-duty military.

Title 32 orders fall in between SAD and Title 10 orders—troops are under the command and control of the state’s governor but serve in support of a federal mission and may be reimbursed by the federal government. As a recent example, during the Covid-19 crisis, many states submitted “Major Disaster Declaration” requests to FEMA in keeping with the process outlined in the Stafford Act. Approved states were permitted to utilize [National Guard reinforcements under Title 32 orders](#), and their operations will be fully reimbursed by the federal government.

It is important to note that D.C.’s National Guard operates differently. Because D.C. is not a state, the commanding general takes orders directly from the president without having to be federalized. The authority to activate D.C. units has been delegated by the president and the secretary of defense to the secretary of the army. The D.C. National Guard can also be [formally called into federal service by the president or Congress](#), just like state units.

These distinctions are critical because Posse Comitatus restrictions only apply to the National Guard once they are federalized and serving in a Title 10 capacity.

Additionally, Guard units can be deployed to other states under SAD or Title 32 orders in support of [Emergency Management Assistance Compacts \(EMACs\)](#) between states’ governors. These agreements are a way for states to directly provide support to other states during times of distress or emergency. [States requesting assistance](#) reimburse the states providing assistance during a declared disaster, and depending on the type of disaster, the federal government could provide some of the monetary compensation.

DHS Law Enforcement: Distinctions in missions and authorities between different DHS law enforcement forces should limit a president’s ability to deploy what could be perceived as a national police force. Some forces operate with very explicit authorities that support narrow missions, while others have language, similar to the DEA language noted earlier, that could be interpreted more broadly. For example, FPS can only serve to protect federal facilities and the people that work in or visit them. On the other hand, CBP and its partner institution ICE have authorities intended to comprehensively support the larger missions of securing against cross-border and immigration-related threats (see DHS summary chart above). However, under the [Law Enforcement Authority of the Secretary of Homeland Security for Protection of Public Property \(40 U.S.C. §1315\)](#), the DHS Secretary is authorized to designate employees of DHS as FPS officers. DHS used this justification to send CBP and ICE officials to Portland—they were all technically authorized to work alongside FPS. This section further authorizes these designated forces to “carry out such other activities for the promotion of homeland security as the Secretary may prescribe,” but only “while they are engaged in the performance of official duties.

The U.S. Secret Service law enforcement mission includes counterfeiting and other financial fraud but is focused on protecting the White House and specified senior leaders. Like the other law enforcement entities, USSS Uniformed

Service is authorized to “make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony” but is also authorized to “perform such other functions and duties as are authorized by law.” Furthermore, the law provides that “Members of the United States Secret Service Uniformed Division shall possess privileges and powers similar to those of the members of the Metropolitan Police of the District of Columbia.” USSS is also the lead federal agency for National Special Security Events.

U.S. Marshals Service: USMS operates with relatively broad authorities ([28 U.S.C. §566](#)). They have the same authority to make arrests as other law enforcement entities. Marshals may also be designated by the USMS director to “exercise the same powers which a sheriff of the State may exercise in executing the laws thereof” ([28 U.S.C. §564](#)). These broad authorities are coupled with [28 C.F.R. §0.112](#), which authorizes the director of the USMS to deputize other DOJ officers *and* “selected federal, state, or local law enforcement officers” to serve as marshals should a need arise. Local law enforcement was deputized in Portland this summer at the request of local officials but a current lawsuit asserts that the U.S. government has unlawfully refused to release them back to local control long after the emergency ended.

POTENTIAL GAPS AND AMBIGUITIES IN THE LEGAL FRAMEWORK

While the legal framework is robust, some parts have exploitable gaps or potential ambiguities opening avenues for irregular deployments. This paper notes some of these potential weaknesses not to suggest that they could legitimately be used to deploy federal forces but to highlight areas that Congress may need to clarify or tighten, or that may benefit from policy or regulatory clarification.

One example is the statutory provision prohibiting the deployment of “any troops or armed men at any place where a general or special election is held” unless “such force be necessary to repel armed enemies of the United States” ([18 U.S.C. §592](#)). This clearly applies to polling places and would seem to include ballot boxes or ballot counting facilities, but that is not explicit. In addition, “armed enemies of the United States” is not defined. Could an administration claim that includes domestic terrorists, as determined by the president or attorney general? This interpretation is not consistent with legislative history

and any deployment would still have to be “necessary,” but these ambiguities could open the door for abuse.

Deployments would also seem to be barred by [18 U.S.C. §593](#), which further prohibits the military from interfering with voters or election officials, and [18 U.S.C. §594](#), which provides penalties for anyone who “intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce” voters. These clear prohibitions traditionally have informed a **strong policy** within DOJ against any investigations or prosecutions related to election fraud during the election. However, internal guidance has recently been changed to weaken this previously clear and strong policy. In light of this, the attorney general’s assertion that federal law enforcement may be deployed if there is a “specific investigative danger” causes concern. Any such deployment, for example, seizing uncounted ballots or disrupting the counting of ballots, would almost certainly wind up in the courts, but if a federal deployment is done in a way that deters voting or undermines confidence in the process, the damage may be done by the time a court ultimately rules.

Also of relevance, under Title 32, where National Guard units are mobilized under a state governor’s control, §502 lays out provisions for ‘required drills and field exercises.’ It also includes this language: “The National Guard may be ordered to “perform training or other duties” in “support of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense.” Though these units are still operating under a governor’s control, at least one prominent legal scholar **posits** the language is ambiguous and could provide a legal loophole for a president to direct National Guard law enforcement activities without officially federalizing them. Congress should consider reviewing this language to ensure this is not a loophole around the Posse Comitatus Act, and if it is, the language should be tightened.

Additional ambiguities can arise from emergency authorities, such as the Insurrection Act, where some flexibility is given to the president so that if there truly is an emergency, the executive branch can quickly mobilize, coordinate, and approve federal government resources to assist states.

When it comes to DHS forces, the president’s emergency authorities are even less clear. The Stafford Act, for instance, seems to limit military actions in disaster relief responses. It is less apparent that there are strict restrictions on the actions of non-military assets.

Moreover, while the NRF provides helpful guidance for how the federal government can support local partners in affected states, provisions such as **Emergency Support Function (ESF) #13** signal that there are openings for the executive branch to deploy federal law enforcement if some sort of emergency is declared. ESF #13 “provides federal public safety and security assistance to local, state, tribal, and Federal organizations overwhelmed by the results of an actual or anticipated natural/manmade disaster or an act of terrorism.” It is important to emphasize, however, that federal forces are envisioned as “support” entities. In fact, the annex describing ESF#13 reinforces the norm: “Local law enforcement responsibility and authority rests with local, state, tribal, territorial, and insular area law enforcement departments and agencies.” It further recommends that, if overwhelmed, additional resources should be obtained via mutual aid and assistance agreements. Only when those options are also exhausted should federal security be requested. As noted previously, federal forces need clear statutory authority for any activity. ESF 13 does not provide authority, it merely guides the use of existing authority.

Regarding the actual declaration of an emergency itself, the Stafford Act’s procedure for declaration does first emphasize that “all requests for a declaration by the President that an emergency exists shall be made by the Governor of an affected State.” However, the president can declare an emergency without such a request. The act provides that the “President may exercise any authority vested in him . . . with respect to an emergency when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which . . . the United States exercises exclusive or preeminent responsibility or authority.” Could this be asserted with regard to protecting election integrity or protecting against “domestic terrorists”?

In theory, inappropriate or unlawful deployments and the use of force could be checked by Congress or the Supreme Court. However, during a contentious election and presidential transition, it cannot be assumed that Congress will place a definitive check on presidential overreach, and there is precedent for the courts to decide that federal force deployment is a political question and therefore “nonjusticiable.” These mechanisms for checks and balances must be augmented by reinforced norms within the institutions of federal law enforcement and an informed and aware public empowered to hold

them accountable. The following potential normative breakpoints should be closely examined.

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TESTING ESTABLISHED NORMS

Norms guiding federal force deployments, particularly around deferring to local law enforcement and ensuring that law enforcement is apolitical, could be put under great strain during a presidential election and transition where partisan tensions and motivations are high, the desire to resolve crises immediately or at least show strength may be strong, and the incentives to collaborate with political opponents are weak, if not entirely absent.

The crisis in Portland perfectly illustrated this concern—deployment of DHS and DOJ forces was arguably not a last resort option, and the crisis unfolded in a way such that federal forces did not defer to, or fully coordinate with, local law enforcement. In addition, administration statements about “Blue” states added to the perceived politicization of the deployment.

President Trump sent federal forces against the wishes of the local authorities and the Oregon governor. The president’s administration emphasized that in this context **they did not need an explicit invitation from Portland authorities** because they were there to “enforce federal law”—or in this case, protect the federal courthouse pursuant to the FPS mission. Once there, deployed federal law enforcement forces took on a dominant role, as opposed to a supporting one. Without coordination among local, state, and federal authorities, the deployments appeared to heighten rather than reduce violence.

Tense standoffs can happen at any time, but the desire for a president to exude strength via federal forces, or for local authorities to resist perceived presidential overreach in any form, might be greater during an election cycle.

The highly politicized climate adds to the risk that public safety may be compromised through lack of coordination when federal forces are deployed to what should be a locally controlled event.

It is important to remember that this is not the first election in which election officials have had to plan for the possibility of violence. There are plans in place to work with local law enforcement in appropriate ways to prevent or respond to any violence. If these local forces need reinforcement, their first call is to local law enforcement from nearby jurisdictions, pursuant to mutual assistance agreements. The need for federal forces is remote.

Nevertheless, President Trump has indicated his strong desire to have forces at polling places to monitor the election and guard against fraud. Additionally, Attorney General Barr has **stated** that a law enforcement presence could be warranted if the federal government determines there is a “specific investigative danger.” He went on to cite the 1965 Voting Rights Act, noting that during the Civil Rights Era, poll monitors were deployed to ensure African Americans were not being harassed at polling places. The logic here is that law enforcement will be necessary to ensure a fair election. Yet it could have the opposite effect.

Polling places are run by local authorities, not the federal government. All states have **specific laws that provide for citizens to serve as poll watchers or challengers** and many processes in place to prevent voter fraud. Not only is there no apparent need for federal forces, many state laws prohibit a show of law enforcement at polling places because of the history of using such forces to intimidate voters. Moreover, as noted above, there is a clear federal prohibition on any armed federal law enforcement at polls.

Finally, while the examples above relate to how a president might directly deploy *federal* assets, it is important to consider how the president might use executive power as leverage to indirectly impact how a state might choose to utilize non-federalized National Guard units operating under Title 32 or SAD orders, or whether a state might request non-military federal law enforcement assistance. On September 21, Attorney General Barr put out a statement that New York City, Portland, and Seattle are **anarchist cities**—“jurisdictions that have permitted violence and destruction of property to persist and have refused to undertake reasonable measures to counteract criminal activities.” Pursuant to a **Presidential Memorandum** issued September 2, such a city could lose federal grant funds if it “unreasonably refuses to accept offers of law enforcement assistance from the Federal

Government.” The framework designed to work for deferment to local authorities is, in this case, potentially obstructed by coercive powers in the federal government.

COMMAND, CONTROL, AND ORGANIZATION

The command and control structure for federal forces presents a check against arbitrary federal force deployments. These organizational structures are built to reinforce adherence to top-down leadership direction but in domestic contexts normatively defer to the preferences and direction of local civilian authorities—as *support to civil authorities*. Active duty and federalized national guard have very clear command and control. However, these routine command, control, and organization considerations, injected with the partisanship of a presidential election and transition, could be circumvented.

Historically, and normatively, governors have the strongest say in how and why their National Guards are deployed. Any rules for the use of force are established by the governor and the adjutant general (TAG) in each state, and all operations are conducted in support of local civil authorities. The chain of command is clear and confined.

Normal EMAC arrangements involving the Guard are also direct transactions between states. Terms and reimbursement procedures are agreed upon ahead of time, and deployed troops serve under Title 32 or SAD orders, which means they still take their orders from their state governor.

But while a president cannot directly order these state-initiated operations, there are ways in which a president could use aforementioned executive power leverage to indirectly influence state deployments. First, a president might signal to states that a stronger law enforcement presence is needed to deal with civil unrest or another emergency. Some states might be more willing to respond to this “suggestion” with a heightened local law enforcement presence or call up their National Guard units under state authority, while other states might be more resistant. There will be heightened political scrutiny and more opportunities for mobilizations (or refusals to mobilize) to be politicized as states navigate these sorts of situations in a contentious election season.

A final relevant factor is the role of **Dual Status Commanders (DSC)**. DSCs are appointed, in agreements made by both the president and a state’s governor, when there is a mission that involves the use of state and federal units. These commanders take orders from the state and federal chains of command and are intended to streamline,

coordinate, and de-conflict processes and orders when state and federal military forces are involved. Any officer being considered for a DSC role receives training on the state and federal components they will need to manage. DSCs were **recently appointed in many states** to deal with the Covid-19 response. In civil unrest and related contexts surrounding an election season, DSCs may come under increased pressure to ensure mission and role clarity.

For non-military assets, some of the command and control issues stem from the deputation powers granted to the attorney general and the secretary of homeland security. Others stem from the fact that even though DHS routinely operates in a manner consistent with NRF guidance, the NRF does not have guidance or authority to de-conflict tensions during rapidly escalating civil unrest. Questions around which rules for the use of non-lethal or “less-than-lethal” force apply, whether local authorities can require any federal forces to meet certification and training requirements, and “who’s in charge” generally must be resolved.

Deputation processes and flexibilities in the laws around how a president can directly or indirectly deploy troops provide agility to the executive branch and have a force multiplier effect. But whether it is the rapid federalizing of the National Guard (moving units from Title 32 to Title 10 status) or the deputation of one federal force to another, rapid command and organization changes are not ideal—they could result in a situation where mistakes are more likely, authorities are confused, and tensions needlessly escalate, which is the opposite approach required when dealing with civil unrest or related emergencies.

CAPACITY CONCERNS

Capacity limitations could act as a check against the potential for widespread abuse of deployments. However, it could also lead to a reliance on or a fallback to augmenting with forces that are not appropriately trained to deal with a specific type of mission or not familiar with the communities to which they are being deployed.

While the president has direct command over DHS and DOJ forces, these departments do not have nearly as many available units to deal with crises as the military. Moreover, there are limits, derived from statutory authorities, on where and how DHS law enforcement officers are deployed around the country.

This is not to say that National Guard and active-duty units are an unlimited resource. Currently, military

forces are deployed overseas for a range of missions and domestically are **providing support to civil authorities** for Covid-19 response efforts across the country and wildfire containment in western U.S. states, enhancing security along the southwest border, and preparing for hurricane response efforts. Though authorities are confident that enough forces could be made available should a crisis emerge on or immediately after an election, that assessment largely depends on no other emergencies taking place that would pull forces into other missions at home or abroad. Over the summer, concerns rose among National Guard units over the ability to mobilize for an international crisis on top of the existing missions, according to interviews with DOD stakeholders. Given the range of demands on the National Guard, the National Command Authority has to determine where to accept risk.

Finally, deployments of federal forces, as we saw this summer, are likely to draw from multiple sources to fill capacity gaps and address evolving crises. For instance, when federal forces were deployed to deal with the Los Angeles riots, they comprised military and non-military assets to ensure there was a comprehensive presence to maintain order.

With regard to election-related civil unrest, extraordinary emergencies could arise and a variety of forces could be deployed to assist local law enforcement. However, it is important that deployed troops are only there to serve specific missions and are trained to deal with the task at hand, with an emphasis on de-escalating violence rather than “domination.”

For more information on 1992 Los Angeles riots, please see **[“Federal Force Deployment during L.A. Riots.”](#)**

TRAINING AND PREPAREDNESS

Beyond moral, legal, and normative objections to domestic deployments, most federal forces are not routinely trained to deal with civil unrest. Before 9/11, Operation Garden Plot (now CONPLAN 2502) served as DOD’s civil disturbance plan and informed the basis for the response to the 1992 Los Angeles riots. Of the forces in question, National Guard units are likely best positioned to respond to civil disturbances since they are trained for domestic deployment, have the closest relationships to local authorities and comprise citizens from the same communities.

Some DHS forces routinely cooperate with local law enforcement and should have some muscle-memory in how to best coordinate and partner with state and local

authorities during a crisis. DHS has ongoing programs that practice these, such as **FPS' Operation Shield**. But joint programs are not by themselves substitutes for the comprehensive mechanisms and specific training that is needed for broader missions.

Active-duty forces are seemingly the least well prepared to deal with domestic civil unrest, in large part because their primary mission is fighting enemies overseas and they traditionally have been, and should continue to be, a very last resort option for presidents.

Moreover, within non-military federal forces there is debate about how well each is trained to deal with these sorts of situations. For instance, CBP tactical units are highly trained but not for crowd control or civil unrest in cities. As noted by some experts interviewed, CBP and ICE are trained to routinely deal with illegal immigrants—individuals that are not immediately afforded the same constitutional rights as American citizens. Are these forces adequately prepared to switch from that mindset when dealing with domestic unrest?

Unfortunately, the prospect for of election-season civil unrest could signal a need for more forces specifically trained or designated to handle these situations. Reportedly, Alabama and Arizona National Guard units have been **designated as rapid response forces** tasked specifically with addressing civil unrest in the coming months under Title 32. It remains unclear how they might be mobilized across state lines, which would require either the agreement of the “receiving” governor or the president invoking the Insurrection Act and federalizing the forces under Title 10.

While preparedness is important, it must be done in a way that does not implicitly normalize domestic deployments in situations that state and local authorities have largely been able to handle on their own without outside assistance.

INFORMATION SHARING, INTELLIGENCE COLLECTION, AND COMMUNICATIONS

The National Guard, DHS, and DOJ forces have working relationships with state and local authorities. When deployed to support civil authorities, these forces routinely operate with high levels of coordination with different types of state and federal authorities. However, in a contentious election year the incentives to share information, particularly between federal and local forces, might be weaker and should be monitored closely as

contingencies arise that might lead to deployment of federal forces.

This leads to a related issue: the potential politicization of intelligence collection and dissemination. For decades, and after much reform, there has been a strong norm against the politicization of intelligence. In recent years, that norm has become strained. In the long term, leaders in the executive branch and in Congress will need to work to reinforce that norm, but in the interim, there is concern that intelligence collection offices within DHS, DOD, and DOJ could be asked to help generate a pretext for deployment. This further emphasizes the need for more effective, nonpartisan oversight mechanisms in place, in Congress and within the Executive Branch, to review any intelligence that is used as the basis for a deployment.

Finally, in contested election and transition scenarios, the potential for the reliance on and influence of informal and non-authoritative information sources may grow, as individuals within federal forces seek, perhaps outside normal channels, to understand the context in which they are operating. Rapid social media dissemination and the potential for foreign and domestic malign influence could, for example, shape perceptions of who is a civilian and should be protected, who is armed and dangerous, and, in the worst case, who is in control.

RECOMMENDATIONS

During a presidential election and transition, particular scrutiny is warranted of how a president might hand down pretextual or irregular deployment orders in ways that are not checked by existing frameworks or branches of government. There should also be contingency plans outlined so that should extraordinary emergencies arise, federal forces can be deployed in ways that protect citizens' rights to peacefully protest and the integrity of the election process.

The United States has a rich history of norms and authorities, which still largely guide lawful practice of federal force deployments. Policy and lawmakers must commit to reinforcing and formally institutionalizing these norms so that they cannot be ignored, misinterpreted, or weakened during extraordinary situations.

The following recommendations, though part of a larger body of recommendations and debates surrounding domestic deployments, are prioritized because of their relevance to election and transition scenarios.

NEAR-TERM RECOMMENDATIONS

Executive Branch

- **The administration should deploy federal forces only as a last resort and in support of local law enforcement, unless responding to a uniquely federal law enforcement mission.** Deployments should be rare and the prevailing assumption should be that local law enforcement is the primary supported element for dealing with civil unrest or local violence.
- **Leaders must strategically communicate “de-escalation” and “community protection.”** All federal forces need to operate with a de-escalation mindset, with a focus on community protection rather than domination. Training, exercises, doctrine, and equipment should reflect these principles. Focus should be on carefully and lawfully removing armed elements without endangering peaceful protesters. Federal forces must put civilian protection first.
- **Federal forces should be clearly identified.** Uniforms that clearly identify the specific agency and unique individual identifiers, such as assigned numbers, are important not only for helping law enforcement authorities quickly identify the various support elements but also for adding a layer of transparency and accountability that could help the overall goal of de-escalating the situation.
- **Federal forces should identify and uniformly implement mechanisms that are currently working between the military and non-military federal forces and law enforcement.** There are cooperative practices that are well understood for routine support to civil authorities’ missions, and successful practices and effective coordinating mechanisms should be identified in advance of election-related crises so that similar processes can be used to address potential unrest.
- **Leaders should reinforce norms around the role of federal forces.** Periodically, and though tested, DOD leadership has set the tone for the responsible use of federal forces that should be continually reinforced by senior leaders. In June, Secretary of Defense Mark Esper remarked that active-duty military forces should only be used as a last resort and only in the most urgent and dire of circumstances, which he does not believe the United States is experiencing currently. In August and again in October, Chairman of the Joint Chiefs of Staff General Mark Milley stated that the military will not play a role in November’s election

and will not help settle any disputes if the results are contested, stressing the principle of an apolitical military. Leaders at DHS should similarly reinforce the need to be apolitical and professional in exercising its authorities. This is not as deeply ingrained at DHS, but it is absolutely necessary for regaining the trust of the people the DHS was established to serve and protect.

- **Given the potential for civil unrest following the election, DOD and DHS should prepare a guide for new political leadership either from a second Trump administration or a Biden administration on the responsible use of federal forces.** The guide should include relevant authorities, norms, policy and process frameworks, and best practices for ensuring that any use of federal forces supports state and local authorities in de-escalating unrest and protecting Americans’ rights to peacefully assemble.

Congress

- **Congress should exercise its authority to see any intelligence used to justify federal deployments and require briefings and testimony by departmental authorities.** Oversight over the use of force domestically is vital to healthy civil-military relations and U.S. democratic institutions. To the degree possible, this information and all briefings and testimony should be made transparent to the U.S. public.

LONG-TERM RECOMMENDATIONS

Executive Branch

- **Federal forces and National Guard should train for civil unrest and related scenarios.** Given how rarely federal forces have been deployed to deal with civil unrest, most federal forces do not receive much, if any, training for the situations outlined in this report. There is some concern that in training for these missions, the president might be more inclined to deploy federal forces for certain missions. However, DOD and DHS federal forces train for a multitude of missions that are rare in occurrence. Given that the alternative is to send in unprepared troops, the National Guard Bureau and NORTHCOM should build upon **prior exercises** that emphasize defense support to civil authorities and develop training for civil unrest, and update former contingency plans, including even election-specific crises, with mechanisms for coordination with and support to state civil authorities and local law enforcement. Exercises should include scenarios that

account for contested information environments and foreign and domestic malign influence.

- **DoD and DHS should institutionalize more transparency for post-deployment reviews.** Post-deployment reviews are conducted internally, but it is essential that the public also knows the key takeaways from these assessments and is able to hold institutions accountable for implementing lessons learned. Having a more collaborative and transparent process will not only grow public confidence in future deployments but will also help all parties better anticipate and prepare.
- **DOD and DHS should map the differences among states' use-of-force guidelines, including for the protection of federal property.** National guard components have their own rules for the use of force, defined by the state governor and the state adjutant general. States' respective rules for the use of deadly force may differ when it comes to protecting property. A common framework would help inform decision points on where clarification and restraint in the use of force domestically is needed.

Congress

- **Congress should institutionalize more effective oversight mechanisms for domestic use of force.** Congress must formalize processes to exert proper oversight over domestic deployments, including requirements that information about threats of violence needs to be shared with Congress. Such a requirement exists under the 1973 War Powers Resolution for all uses of force overseas and U.S. Naval War College Associate Professor Dr. Lindsay Cohn has suggested that the same requirement should be applied at home. Ultimately, the goal is to normalize a process of consultation without implicitly normalizing domestic federal force deployments as routinely regulated options; they should remain notable exceptions.
- **Congress should create a commission to review DHS legal authorities.** Congress should consider a commission that makes practical recommendations for how and when presidents should be able to deploy DHS forces. There are a few immediate recommendations that a future commission might consider:
 1. Set forth clear guidelines for when the DHS secretary can deputize other agents into FPS, how those augmentees can be used, and how they will be trained;

2. Given the high risk of intimidation, consider prohibiting or significantly limiting the use of CBP and ICE as augmentees, at least for any activity related to elections;
 3. Clarify when DHS forces can be used beyond their traditional mission;
 4. Consider additional ways to strengthen norms within DHS and rebuild public trust in the department and its mission; and
 5. Do a comprehensive review of general law enforcement authorities, especially in light of DOJ's broad view of how to interpret its authorities.
- **Congress should review Title 32 authorities that enable presidential requests to be filled across state lines.** The review should examine thresholds and criteria for when these requests may be necessary and what checks are essential to approve them. §502(f) in particular should be revisited and potentially tightened for clarity.

State and Local Government

- **Local authorities and the federal government should adopt consistent guidelines and coordinating mechanisms across states to ensure mayors, governors, and federal authorities can clarify terms and forces under 'request for federal assistance' agreements.** If a governor is requesting assistance, state and federal authorities should work in tandem to decide up front what types of federal forces are allowed to go into a state.

Civil Society

- **Civil society organizations should elevate civics and civic education as a national imperative.** The deployment of DOD forces domestically in election or transition contexts could challenge the health of civil-military relations. Similarly, anger directed at deployed DHS assets will undoubtedly intensify mistrust in DHS and its mission generally, in part as a reflection of general frustration directed at federal law enforcement entities. But these are also symptoms of a much larger problem—the erosion of trust and confidence in democratic institutions—and these tensions will only be exacerbated during a divisive presidential election or transition period. Civic education can be a vehicle to help Americans better understand the basis for some of the fundamental norms discussed in this paper, their context in U.S. history, constitutional

tenets of federalism, and the role of federal forces in domestic contexts, as well as their own role in holding institutions accountable. This can also be reinforced through training of federal forces and professional military education to instill the weight of responsibility with regard to domestic deployments. ■

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