



THE ROLE OF THE NATIONAL GUARD IN ELECTIONS

Q. When and how can a state deploy its National Guard?

A. The National Guard is most frequently deployed when a state activates its own Guard. In this case, the Guard acts pursuant to “State Active Duty” authority; it is paid with state funds and remains fully under state control. Governors in more than 30 states activated the Guard under SAD authority over the summer in response to civil unrest following the killing of George Floyd. The upcoming election may well see governors invoking SAD authority for both peacekeeping and logistical election support.¹ In addition, under the Emergency Management Assistance Compact (EMAC), states may request Guard deployments from other states.² In advance of the election, the Guard has designated about 600 troops from Alabama and Arizona to be ready to deploy within 24 hours if requested by the governor of another state, under the EMAC.³

Q. What does “federalizing” the National Guard mean?

A. There are two ways the National Guard can be brought into a federal mission. Under various provisions of Title 32 of the U.S. Code (often called “Title 32 Authority”), the Guard may support certain federal missions and be paid for with federal funds but remains under the command of the state governor. This includes 32 U.S.C. § 502(f), which allows National Guard units to assist “operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense.” Alternatively, under Title 10 of the U.S. Code (often called “Title 10 Authority”), the President may, in certain circumstances defined by Congress, call up National Guard units and incorporate them into the chain of command for the standing military. This includes the Insurrection Act, 10 U.S.C. §§ 251-54, which allows the President to use the National Guard to put down insurrections and enforce federal law where certain conditions are met and he issues a required proclamation. The Insurrection Act was most recently invoked in response to the L.A. riots in 1992. Similarly, under 10 U.S.C. § 12406, the President may federalize National Guard forces to address invasions and rebellions or where necessary to execute federal laws.

Q. What laws constrain the National Guard’s behavior around elections?

A. Federal law prohibits, *inter alia*:

- Federal troops or any “armed men,” including non-military federal agents, from being sent to the polls (18 U.S.C. § 592);
- Federal troops interfering with elections in any way (18 U.S.C. § 593);
- Anyone from intimidating voters (18 U.S.C. § 594).

¹ For example, when Gov. Tony Evers activated the Wisconsin National Guard under SAD authority to help with elections held in April, May, and August of this year, members wore civilian clothing and performed the duties of civilian volunteer poll workers. Press Release, Wisconsin Nat’l Guard, *Wisconsin National Guard to support Aug. 11 election*, Aug. 6, 2020, available at <https://www.nationalguard.mil/News/Article/2302374/wisconsin-national-guard-to-support-aug-11-election/>.

² Cong. Research Serv., Congressional Primer on Responding to and Recovering from Major Disasters and Emergencies, June 3, 2020, at 4, available at <https://fas.org/sgp/crs/homesecc/R41981.pdf>.

³ Lolita C. Baldor, “National Guard taps units for rapid response to civil unrest,” Assoc. Press, Oct. 2, 2020, available at <https://apnews.com/article/election-2020-elections-racial-injustice-1bf55880ceae5f3d8fa1d731003ec88e>.

[Department of Defense guidance](#) prohibits DOD and National Guard members in Title 32 status from conducting “operations at polling places,” in line with the above federal legal limitations. DOD Directive 3025.18. Further, the Posse Comitatus Act (“PCA”) criminalizes using the military, including National Guard units operating under Title 10 Authority, to enforce civilian laws except when “expressly authorized by the Constitution or Act of Congress.” 18 U.S.C. § 1385. The PCA generally restricts National Guard in Title 10 status from performing law enforcement duties, except under the Insurrection Act and related authorities that expressly permit for the enforcement of federal law. Finally, there is a norm of not deploying federal forces absent a state or local request.⁴

Q. What can we learn from the summer 2020 domestic deployment of federal forces?

A. The deployment of federal forces after the police killing of George Floyd contravened long-held norms of federal restraint. That deployment is worth examining because it may suggest how the Administration could respond to civil unrest stemming from the election:

- *Portland, Oregon.* In early July, the federal government deployed law enforcement officers from several agencies to Portland for the stated purpose of protecting federal property, pursuant to 40 U.S.C. § 1315. The Departments of Defense, Homeland Security, and Justice all have “tactical teams” that can be deployed domestically.⁵
- *Washington, D.C.* In early June, in addition to federal law enforcement officers, thousands of National Guard troops from 11 states arrived in Washington, D.C. without the invitation of D.C. Mayor Muriel Bowser. Attorney General William Barr asserted that the deployment was authorized by 32 U.S.C. § 502(f). AG Barr might again cite § 502(f) to send a state’s National Guard into another state without local officials’ permission.⁶

In the summer of 2020, President Trump sought to invoke the Insurrection Act but senior defense and military leaders opposed it.⁷ President Trump may again seek to invoke the Act this fall, and may face similar opposition.⁸

Q. What does “martial law” really mean? Can the president unilaterally declare it?

A. There is no consensus definition of “martial law,” but the term generally refers to the displacement of civilian authorities by military authorities. Martial law has not been implemented by the federal government since World War II. While caselaw on point is limited, the President likely cannot unilaterally declare martial law.⁹

The Voter Protection Program (VPP) is a national nonpartisan initiative promoting election integrity and ensuring safe, fair, and secure elections. Learn more at <https://voterprotectionprogram.org>.

⁴ Melissa Dalton, Devi Nair, & Suzanne Spaulding, Center for Strategic and International Studies, *Reinforcing Institutional Integrity in an Election Year: The Role of U.S. Federal Forces*, Oct. 1, 2020, available at <https://www.csis.org/analysis/reinforcing-institutional-integrity-election-year-role-us-federal-forces>.

⁵ See, e.g., Government Accountability Office, *Federal Tactical Teams: Characteristics, Training, Deployments, and Inventory*, Sept. 2020, available at <https://www.gao.gov/assets/710/709297.pdf>.

⁶ For additional analysis of how § 502(f) was invoked over the summer, see Steve Vladeck, *Why Were Out-of-State National Guard Units in Washington, D.C.? The Justice Department’s Troubling Explanation*, Lawfare, June 9, 2020, available at <https://www.lawfareblog.com/why-were-out-of-state-national-guard-units-washington-dc-justice-departments-troubling-explanation>.

⁷ *Id.*

⁸ Christiana Silva, “Gen. Mark Milley Says The Military Plays ‘No Role’ In Elections,” NPR, Oct. 11, 2020, available at <https://www.npr.org/2020/10/11/922827554/gen-mark-milley-says-the-military-plays-no-role-in-elections>.

⁹ See Joseph Nunn, *Martial Law in the United States: Its Meaning, Its History, and Why the President Can’t Declare It*, The Brennan Center for Justice at New York University Law School, Aug. 20, 2020, available at <https://www.brennancenter.org/our-work/research-reports/martial-law-united-states-its-meaning-its-history-and-why-president-cant>.