

Authorities Governing the Deployment of Federal Law Enforcement during the Election and Post-Election Season

Cities, counties, and states routinely plan for problems that could occur during elections, including election-related violence, and this year is certainly no exception. Law enforcement may be needed to respond to any incidents, yet security deployments can also have a suppressive effect on voting—one reason for the many federal and state laws governing law enforcement behavior at polling sites.

Recent incidents have also heightened concerns about potential deployment of federal law enforcement. These incidents include the deployment of federal officers from the Department of Homeland Security, Department of Justice, and other federal departments and agencies to cities and states against the wishes of local and state government officials, as well as President Trump’s [memorandum](#) that an “anarchist” city that “unreasonably refuses to accept offers of law enforcement assistance from the Federal Government” could lose federal funding.

In general, however, the police power—including the power to police civil unrest—is reserved under the Constitution to the states, and the role of federal law enforcement is quite limited. The deployment of federal law enforcement in the election context would be inappropriate in most instances, could exceed statutory limits on federal jurisdiction, and could in some cases run afoul of voting-rights laws. This memo provides a high-level summary of the laws, regulations, and norms around the deployment of federal law enforcement with particular attention to the election season.

STATE LAW ENFORCEMENT AUTHORITY

According to the Tenth Amendment of the U.S. Constitution, any powers not specifically delegated to the federal government are specifically reserved to the states. This includes the police power—the power to protect public health, safety, and welfare. There is no general federal police power; if federal law enforcement wishes to act within a state, it generally must do so to enforce or investigate violations of federal law (including federal voting rights laws). Federal and state law enforcement agencies may choose to form joint task forces (e.g. counter-drug task forces), and indeed, states may even deputize federal officers with state law enforcement powers. However, the federal government generally acts only within the boundaries of specific grants of jurisdiction when deployed within a state, particularly when acting without the request of the Governor.

The strong norm to date has been a tiered approach to addressing civil unrest. Mayors use local law enforcement as the first response. If local police are overwhelmed, they first call for reinforcements from other local governments or from state law enforcement bodies. If more help is needed, a Governor can activate the state’s National Guard, which can enforce state law when acting in a state-activated capacity, and which has personnel trained for civil disturbance missions who are drawn from the communities they protect. If emergency conditions require additional help, governors may then ask other governors for the assistance of their National Guard through the Emergency Management Assistance Compact (EMAC). Generally, only if all of these self-help

mechanisms fail do states request federal reinforcement, and states are often loath to do so because of federalism concerns.

When states deem that they have a “law enforcement emergency” and that federal law enforcement is necessary, the state can request that help from the US Attorney General under the Emergency Federal Law Enforcement Assistance Act (EFLEAA), [34 U.S.C. §§ 50101-50112](#). This Act provides a pathway for assistance that is legal and trackable; the Act also permits the Attorney General to reach beyond DOJ and employ law enforcement officers from other federal departments and agencies, including DHS.

Other emergency authorities, with few exceptions (most notably the Insurrection Act), do not disturb this general framework. During a Stafford Act disaster or emergency, for instance, federal law enforcement may investigate federal crimes (e.g., the Murrah Federal Building bombing in Oklahoma City in 1995, or the 9/11 attacks); federal law enforcement can deploy pursuant to EFLEAA to support local and state law enforcement (e.g., during Hurricane Katrina); or federal law enforcement can deploy under Emergency Support Function 13, “Public Safety and Security,” under the rubric of the Federal Response Plan, in support of state and local officials. None of these pathways operates to expand federal law enforcement jurisdiction. The Federal Response Plan Emergency Support Function-13 Annex notes that “Local law enforcement responsibility and authority rests with local, state, tribal, territorial, and insular area law enforcement departments and agencies,” and recommends that if states are overwhelmed, they should seek additional resources from other states via mutual aid and assistance agreements; only when those options are exhausted should federal aid be requested.

UNREQUESTED FEDERAL LAW ENFORCEMENT DEPLOYMENTS

As described above, federal law enforcement agencies are agencies of limited jurisdiction.¹ Within DHS, US Customs and Border Protection exercises law enforcement authorities primarily under Titles 8, 19, and 21 of the US Code, relating to immigration, customs enforcement, and drug trafficking. Immigration and Customs Enforcement exercises similar authorities, while its Title 21 authorities overlap with the DOJ’s Drug Enforcement Agency. US Secret Service and Coast Guard law enforcement authorities, similarly, are narrowly drawn and aimed at particular, unique areas of DHS’s mission.

The law enforcement agency within DHS with the mission and authorities that come closest to domestic protection activities is the **Federal Protective Service (FPS)**. Transferred to DHS from the General Services Administration, FPS’s mission is to protect federal buildings and other property. Its authorizing statute, codified at **40 U.S.C. §1315** and broadened after the FPS transfer to DHS, authorizes deployment of federal law enforcement officers, not limited to FPS officers, “for duty in connection with the protection of property owned or occupied by the Federal Government and persons on the property, including duty in areas outside the property to the extent necessary to protect the property and persons on the property.” The DHS Secretary may also designate other DHS employees as FPS officers.

¹ The U.S. Park Police is somewhat unusual; in addition to having jurisdiction over National Parks administered by the National Park Service, it shares jurisdiction with the D.C. Metropolitan Police, a reflection of D.C.’s unique constitutional status.

Within the Department of Justice, many law enforcement agencies, like the FBI and Bureau of Prisons, have the authority to investigate and enforce provisions of Title 18. The most pertinent agency to the issues discussed here is the **U.S. Marshals Service**. Formalized within DOJ to protect the federal judiciary and charged with the arrest of federal fugitives, federal asset seizure, federal prisoner transportation, federal witness protection, and the authority to enforce orders of the courts, its history stretches back to the broad authorities of the U.S. Marshal for each Territory of the U.S. prior to their entry into the Union. As such, the USMS has the same authority to make arrests when enforcing the laws under its jurisdiction as any other federal law enforcement entity pursuant to **28 U.S.C. §566**, and under **28 U.S.C. §564**, Marshals, in enforcing federal laws within USMS jurisdiction, may “exercise the same powers which a sheriff of the State may exercise in executing the laws thereof.” While these laws give Marshals the power to conduct arrests within states, they also mean that Marshals are bound by the laws a state has enacted to regulate its sheriffs.

The Director of the Marshals Service can also act under Federal Regulation **28 C.F.R. §0.112** to deputize other DOJ officers and “selected federal, state, or local law enforcement officers.” USMS deputization is often used in Stafford Act or EFLEAA deployments, however, other law enforcement officers may only be deputized to perform the same functions as deputy U.S. marshals. Deputization must be conducted on a one-by-one basis. In July 2020, DHS officers were deputized by the Director of the Marshals Service for their mission in Portland.²

ELECTION LAWS AND LAWS PERTAINING TO PROTEST ACTIVITIES

During the period of early voting, election day, and the counting of ballots, as well as any post-election civil unrest, federal law enforcement agents and the officials who deploy them must be mindful of an array of additional federal and state laws that ensure a free and fair election as well as constitutional rights.

Federal officers are largely banned from entering polling places, and state law often requires them to maintain significant distance from the polls. They are also prohibited from interfering in any manner with an election. DHS leadership in particular needs to be extremely careful both in carrying out its specific missions and in deploying its special response teams at the request of DOJ, using these laws as both guardrails and guides.

Federal Laws and Statutes on Elections

- [18 U.S.C. § 595](#) prohibits federal agents from using their official authority to interfere with or affect an election.

² Had deputization not been used, the CBP and ICE special response teams that deployed to Portland would have been restricted to those agencies’ statutory authority, which they generally can exercise within 100 miles from US land and sea borders, within airports with international flights, or within the interior of the US when enforcing US immigration or counter-drug laws. While warrant requirements under the Fourth Amendment are different in the border environment, those differences are applicable only insofar as CBP is acting within its mission and authorities to exclude harmful people and goods from the US.

- [18 U.S.C. § 592](#) prohibits civil authorities from ordering 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. § 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.
- [52 U.S.C. 10101\(b\) of the Voting Rights Act](#) states that “[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose” in a federal election.

State Laws and Statutes on Elections

States have a wide range of additional laws to avoid voter intimidation and bar election interference that are also applicable.

For instance, Pennsylvania law prohibits police from coming within 100 feet of the polling place unless called by election officials to maintain order. They are expressly forbidden from using or practicing “any intimidation...nor, in any manner, unduly influence or overawe any elector or prevent him from voting or restrain his freedom of choice.” Under threat of two years’ imprisonment, state law criminalizes anyone from “directly or indirectly practic[ing] intimidation or coercion through the use of force, violence, restraint, or inaction or threatened inaction of injury, damage, harm, or loss, in order to induce or compel a person to vote or refrain from voting for a particular candidate or on a particular political issue.”

Law enforcement officers are barred from entering polling sites in Florida, Arizona, Wisconsin, Michigan, Texas, and other states, unless they are voting themselves or have been invited by election officials to enforce the law or maintain order. North Carolina officials may only invite law enforcement in the case of “urgent need” and police activity is limited to the “extent necessary to address that need.”

In keeping with the Supremacy Clause of the U.S. Constitution, state laws barring the uninvited presence of law enforcement at the polls might have to yield in cases where deployment of unarmed federal law enforcement was necessary to enforce federal law (and was not a pretext for intimidation); that would ultimately be a fact-dependent inquiry for the courts. (The presence of armed federal law enforcement at polling places is prohibited by federal law, as noted above.)

These and other key state level laws 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](#).

Constitutional Rights

The Constitution is our country's ultimate law and prevails regardless of other statutory authorities.

The First Amendment protects the rights of peaceful assembly, free speech, and protest. Law enforcement agents who are attempting to keep order at a protest must ensure security while not impeding these rights or deterring anyone from protesting because of the threat of arrest or injury, both of which are grounds for claims that constitutional rights have been violated.

The Fourth Amendment's prohibition on unreasonable searches and seizures has been interpreted by courts to apply to dispersing crowds with excessive force and making warrantless arrests. The use of weaponry or tactics to dominate a space or the types of arrests DHS agents made in Portland can provide grounds for Fourth Amendment claims.

CONCLUSION

The norm of state control over law enforcement action within the state is based in the constitutional principle of state sovereignty, long standing legal precedent concerning the police power, and sound principles of closest familiarity with applicable local laws and practices. It is also practical: DEA, ATF, and BOP are law enforcement bodies, but they lack expertise in addressing civil unrest, which is a core state police function. This lack of experience would be particularly problematic in the context of election-related unrest, which would constitute a particularly difficult and sensitive policing mission. In sum, interference by federal law enforcement officers in areas typically left to state and local law enforcement is fraught with difficulty and potential pitfalls, both legal and practical, for all involved.

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/>.