

To Support and Defend: Resources and Recommendations for Military Leaders and Service Members Engaged on U.S. Soil

The United States Military and all who serve in the Total Force, whether Active Duty, National Guard or Reserve, occupy a sacred place in American democracy. Since the country's birth, the line of demarcation between the engagement of the armed forces and our political institutions and processes, including local, state, and federal elections, has been clear. Service members declare an oath not to any one political party or cause, but to ***support and defend the Constitution***. In recognition of the critical role that our military plays as an apolitical pillar of our democracy, this explainer was compiled by members of Truman National Security Project with civilian-military and legal expertise. It is intended to provide service members, and the decision makers who lead them, with the information and guidance they need to support and defend the Constitution this November and beyond.

Recommendations for State and Federal Leaders

1. Avoid militarizing responses to domestic unrest. Military units are often not specifically trained or equipped to manage demonstrations. Their involvement in domestic unrest should be avoided except in exceptional circumstances where necessary to protect human life. Any forces that are deployed domestically must be trained in de-escalation and public order management in accordance with international human rights law standards. In contrast to the tactics and equipment used to respond to protests this summer (for example, the [use](#) of military helicopters to intimidate protesters in Washington, DC), any domestically deployed forces must also utilize proper equipment and tactics for public order management.

2. Ensure clarity of mission areas. National Guard and any other military units should not assume tasks or missions for which they are not trained, prepared, or otherwise appropriately suited. National Guard and federal leaders should be clear with law enforcement authorities about what types of law enforcement missions their forces can and will support, and those they will not. All missions and any proposed changes should be approved at an appropriate level of command.¹

¹ Center for Civilians in Conflict, "The US National Guard and Public Order Management," June 2020, <https://civiliansinconflict.org/wp-content/uploads/2020/06/National-Guard-Brief-Single-Page.pdf>

3. Review standards for the use of force to comply with international human rights law, emphasize de-escalation, and prioritize protection of human life. All State and National Guard authorities, and any other federal forces that may be called to undertake public order management, should promptly review standards for the use of force to ensure that they uphold and facilitate adherence to international human rights standards, including physical integrity rights, the right to freedom of association, the right to peaceful assembly, the right to freedom of expression, and the right to due process. All guidance regarding the use of force should emphasize de-escalation and focus primarily on protecting human lives and civil liberties rather than property. Guidance should ensure the minimization of arrests, clarify legal arrest powers and the process for transferring temporarily detained persons to civil authorities, and expressly forbid violations such as detention and interrogation without due process.

4. Establish a duty to report misconduct. State and National Guard authorities and any other leaders of federal units deployed in a domestic law enforcement function should issue guidance establishing a duty for all deployed personnel to report incidents of misconduct and/or violations of applicable code of military justice and state or federal law, including misconduct by fellow military personnel as well as misconduct by the forces they support, such as state and local law enforcement.² State adjutants general and installation inspectors general should ensure a clear process to receive reports and a clear line to refer incidents of concern to local and state officials and law enforcement authorities.

5. Require the use of clear and visible insignia, badges, and equipment markers. The presence of unidentifiable federal officers and unmarked vehicles inconsistent with international standards. Visible badges and insignia, as well as clearly marked vehicles and personnel equipment, are essential to allow the public to identify public officers and demand due process rights and accountability for violations. State and National Guard authorities and all other federal agencies involved in public order management should issue clear guidance that personnel may not intentionally conceal visible insignia or badges, that they should utilize clearly marked vehicles and equipment, and that they should otherwise make their identities known to the public.³

² Center for Civilians in Conflict, “The US National Guard and Public Order Management,” June 2020, <https://civiliansinconflict.org/wp-content/uploads/2020/06/National-Guard-Brief-Single-Page.pdf>

³ Center for Civilians in Conflict, “The US National Guard and Public Order Management,” June 2020, <https://civiliansinconflict.org/wp-content/uploads/2020/06/National-Guard-Brief-Single-Page.pdf>

6. Proactively engage and communicate with civil society organizations and community leaders. State and federal leaders, including National Guard leaders, should proactively engage with civil society and communities before, during, and after activation to facilitate the reporting of complaints and concerns from the public; ensure that personnel have appropriate awareness, sensitivity, and specific training on engaging with vulnerable populations; establish plans for communicating actions to civilians in real time (e.g., communicating with crowds/protesters to promote de-escalation); and ensure channels for crisis communication.⁴

7. Establish and communicate a mechanism to receive and process complaints from the public. State and National Guard authorities and other leaders of federal units should disseminate public guidance for civilians to report misconduct or violations by units under their command.⁵ Such guidance should provide information about where and how to report. Authorities should also ensure a clear process for receiving complaints from civilian offices and agencies, investigating all reports of misconduct, and holding those responsible accountable.

Resources for Service Members

Understanding relevant legal authorities.

- **Posse Comitatus Act:** Restricts the federal government from employing the Army, Air Force, Navy, and Marine Corps for civilian law enforcement purposes.⁶
- **State Law:** State or territorial governors can mobilize National Guard units for active duty for any number of purposes, including disaster response, support of civilian law enforcement, or to respond to a request for support from another state. National Guard forces mobilized under state authority report to the governor and are subject to state law, including any state-specific code of military justice.

⁴ See: Lorelei Kelly and Dana P. Eyre, “A Civic Refresher with the National Guard: Discussion Guide on Community Safeguarding,” https://docs.google.com/document/d/1Hp6gnqdFpND6i_jyhYgQJvPw1gi-V1Gwae_ZC_obnwU/edit#heading=h.ak9l8pfpch9; Over Zero, “Election Violence Prevention Toolkit,” <https://www.usmayors.org/wp-content/uploads/2020/10/ElectionViolencePreventionToolkit16JBP.pdf>; Crime and Justice Institute, “A framework for public safety to prepare for the 2020 election,” <https://www.cj institute.org/publication/elections/>

⁵ Center for Civilians in Conflict, “The US National Guard and Public Order Management,” June 2020, <https://civiliansinconflict.org/wp-content/uploads/2020/06/National-Guard-Brief-Single-Page.pdf>

⁶ 10 U.S.C. § 275

- **Title 32 of the US Code:** Title 32 allows the federal government to pay for the mobilization of the National Guard while leaving the control and direction of the Guard to the discretion of the state or territorial governor. Guard forces authorized under Title 32 may provide direct support to law enforcement.
- **Title 10 and the Insurrection Act:** Under Title 10 of the US Code, the President may federalize National Guard units by ordering them to active duty and placing them under the control of the Secretary of Defense and the president. Title 10 also includes the Insurrection Act, a significant exception to Posse Comitatus that allows the President to deploy active duty military forces domestically to maintain or restore peace when certain civil unrest conditions are met. The National Guard is not permitted to directly assist or participate in civilian law enforcement activities under Title 10 unless activated under the Insurrection Act. All forces operating under Title 10 are subject to the UCMJ.

Understanding unlawful orders. All U.S. military service members have sworn an oath to support and defend the U.S. Constitution, including the freedoms of speech and assembly and the right to due process of the law. Service members deployed in domestic environments maintain the responsibility to protect these rights, including the right to peacefully protest. An order is considered unlawful if a person of “ordinary sense and understanding” would know it was illegal. For example, an order to use lethal force against a crowd, rather than against a specific target that has met the criteria designated in the Rules for the Use of Force, would be a manifestly unlawful order. It is important for service members to understand that the question of whether an order is “lawful” is a question of law; if a service member disobeys an order they think to be unlawful in the heat of the moment, they still may be subject to criminal penalty if a judge later decides that the order was lawful after careful consideration. At the same time, service members who execute unlawful orders will be held accountable under the appropriate jurisdiction. If confronted with an order they believe to be unlawful -- such as an order to open fire on protesters -- a service member can request clarification of the order, elevate the request to a more senior authority, seek legal review from Judge Advocate General officers, report the order to an Inspector General, and/or request the order in writing. In the moment, a service member should not carry out an order they believe to be manifestly unlawful. Some external expert groups, such as the [The Orders Project](#), are also available to advise military personnel who question the legality of orders during protests and election disputes.

Reporting misconduct and unlawful behavior. When called to respond to domestic unrest service members may witness or have knowledge of abusive and/or unlawful behavior by the forces they support or operate alongside. Prior to deployment, service members should seek information from their commanders and Judge Advocate General officers regarding the appropriate reporting procedures in the event that they witness or suspect misconduct by other military units and/or the forces they support, such as state and local law enforcement.

Speaking out: understanding your rights under the UCMJ and Hatch Act. Active Duty, Reservist, and National Guard political activities are governed by DoD Directive 1344.10,⁷ which describes expressly prohibited activities -- such as using a military position for political gain -- and permitted activities. First and foremost, every service member has a right to exercise their vote as a citizen and to encourage others to vote. Active Duty members can also express their personal opinions on political candidates and issues, make monetary contributions to a political campaign or organization, and attend political events as a spectator when not in uniform. Reservists can undertake a wider range of political activities while off duty, such as running for state office. Any service member interested in partisan political activities should refer to 1344.10 for more information. As many Reservist and National Guard service members may also be engaged in other federal employment, they should also ensure that their activities comply with the Hatch and Super-Hatch acts, along with related regulations.⁸

Elections and the military. As Chairman of the Joint Chiefs of Staff Gen. Mark Milley [recently emphasized](#), the U.S. military plays no role in determining or safeguarding the results of an election. Should an election be contested, it will be appropriately handled by the courts and U.S. Congress. However, while it is essential that the U.S. military maintain its 240-year tradition as an apolitical institution, every service member has the right to vote as a citizen, outlined in detail below.

Additional Resources

“National Guard and Federal Forces in the US: A Reference Guide,”
<https://drive.google.com/file/d/1InrA0E4JKJol303YTEg-lliJULlISzWn/view>

⁷ Department of Defense Directive 1344.10.

<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/134410p.pdf>

⁸ See: Department of Defense Standards of Conduct Office, “Political Activities.”

<https://dodsoco.osd.mil/DoD-Personnel/Ethics-Topics-for-DoD-Personnel/Political-Activities/>



Center for Civilians in Conflict, “The US National Guard and Public Order Management,” June 2020,

<https://civiliansinconflict.org/wp-content/uploads/2020/06/National-Guard-Brief-Single-Page.pdf>

Crime and Justice Institute, “A framework for public safety to prepare for the 2020 election,” <https://www.cjinstitute.org/publication/elections/>

Eugene R. Fidell, “Wrestling with Legal and Illegal Orders in the Military in the Months Ahead,” *Just Security*,

<https://www.justsecurity.org/72934/wrestling-with-legal-and-illegal-orders-in-the-military-in-the-months-ahead/>

Human Rights Watch, Center for Civilians in Conflict, Amnesty International USA, Physicians for Human Rights, and Human Rights First, “Letter to Governors,” October 20, 2020,

https://www.hrw.org/sites/default/files/media_2020/10/Letter%20to%20governors_FIN_AL_Oct20.pdf

Lorelei Kelly and Dana P. Eyre, “A Civic Refresher with the National Guard: Discussion Guide on Community Safeguarding,”

https://docs.google.com/document/d/1Hp6gnqdFpND6i_jyhYgQJvPw1gi-V1Gwae_ZC_obnwU/edit#heading=h.ak9l8pfpch9

Over Zero, “Election Violence Prevention Toolkit,”

<https://www.usmayors.org/wp-content/uploads/2020/10/ElectionViolencePreventionToolkit16JBP.pdf>