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The New York Times interviews Joshua Kastenberg on Election Day and Deployment of the National Guard

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National Guard Readies for Election Day Deployment

Communities are bracing for protests and potential violence.

By Dave Phillips

The New York Times

November 2, 2020

This year has brought a barrage of emergencies across the country that have required the National Guard — the coronavirus pandemic, hurricanes, wildfires and a wave of street [protests](#). Now those troops are preparing in case they are needed once again, this time for potential violent unrest in the wake of the election.

Communities are bracing for protest regardless of the election's outcome. If demonstrations turn violent and overwhelm the local police, governors will almost certainly call out their states' National Guard.

Under federal law, it is the Guard, not active-duty military, that can enforce order on domestic soil. It has already happened dozens of times this year in cities across the country.

States are already on alert for violence. On Monday, Gov. Charlie Baker of Massachusetts ordered 1,000 members of the National Guard to be on standby in case of turmoil following Tuesday's election.

And in Oregon, Gov. Kate Brown declared a state of emergency for the Portland area, citing concern for potential violence surrounding the election. Under the plans, the Oregon State Police and the Multnomah County Sheriff will take over management of public safety in the city, and Governor Brown said she has directed the National Guard to have members trained in crowd control to be on standby.

"We know that there are some people who might use peaceful election night protests to promote violence and property destruction," Ms. Brown said Monday. "That behavior is not acceptable."

Hundreds of National Guard troops already have been called up in non-law-enforcement roles, to assist states where the ranks of poll workers have been depleted by the coronavirus pandemic. Those troops are doing cybersecurity and routine election tasks like opening mail-in ballots. As of last week 10 states had activated the National Guard to help with election tasks and 14 more are expected to activate troops this week.

New Jersey and Wisconsin have both called up hundreds of citizen soldiers and airmen to work the elections. In both states, the troops helping out are wearing civilian clothes so that voters will not be alarmed by seeing camouflage uniforms at the polls.

“It creates a sense of normalcy,” said Major Joe Trovato, a spokesman for the Wisconsin National Guard. “We’re not trying to alarm anyone; we are just trying to support the election.”

But in a year that is anything but normal, with the [electorate](#) sharply polarized, the president warning supporters [of a stolen election](#), and [gun sales through the roof](#), states are bracing for violence that may overwhelm local law enforcement and bring uniformed military troops into the streets.

Legal experts say the election may complicate the response because the president has [broad discretion to sidestep legal restrictions](#) by declaring an insurrection, which would allow him not only to take control of state National Guard troops, but also to deploy the Army or Marines.

If the president decides unrest rises to the level of insurrection, there is little Congress or the courts can do to stop him, legal experts say.

“The law is so broadly written that the president gets to decide what’s an insurrection, and there is not much local authorities or anyone else can do to stop it,” said Rachel VanLandingham, a retired Air Force lieutenant colonel who now teaches national security law at Southwestern Law School in Los Angeles.

President Trump has not indicated he will deploy troops after the election. If he did, legal scholars and historians said it would be highly unusual. But just a few months ago, the president signaled he was willing to use the Insurrection Act to send in federal troops amid widespread protests over abusive policing. “If a city or state refuses to take the actions necessary to defend the life and property of their residents, then I will deploy the United States military and quickly solve the problem for them,” he said in June.

But at the same time Mr. Trump threatened to deploy active-duty troops, Defense Secretary Mark T. Esper and Gen. Mark A. Milley, the chairman of the Joint Chiefs of Staff, argued against such a move to control the wave of protests in American cities, including Washington, at least at that time. Mr. Esper said [at a Pentagon news conference](#) that deploying active-duty forces in a domestic law enforcement role “should only be used as a matter of last resort and only in the most urgent and dire of situations.”

A federal law known as the [Posse Comitatus Act](#) prohibits federal troops from engaging in domestic law enforcement, leaving that role instead to state National Guard forces.

“The founding fathers were wary of having an army interfere in the new republic, so they placed the authority for law enforcement with the states,” Ms. VanLandingham

said. Governors long relied on state militias when local authorities were overwhelmed. Those militias in 1903 were organized as the National Guard but still remain under the control of governors unless they are federalized for a national emergency.

Governors have mobilized Guard forces frequently in recent months to respond to protests over violent policing, as well as hurricanes and wildfires. In June, during the height of the protests, about 86,000 Guard troops were deployed in domestic missions.

Some governors have put troops on standby this week for the election, including Gov. Greg Abbott of Texas, who The San Antonio Express-News reported had [dispatched 1,000 Guard troops to major cities](#) in anticipation of violence.

While federal law bars using federal troops, that restriction can be lifted by the president under [the Insurrection Act](#), which allows the president to send in armed forces if he decides local authorities are not enforcing the laws of the United States. This has happened amid labor strikes and conflicts with Native Americans and to enforce school desegregation. The last time the act was used was in 1992, when riots in Los Angeles broke out after four white police officers were acquitted in the beating of Rodney King, a Black motorist.

The Insurrection Act could complicate the response to civil unrest, Ms. VanLandingham said, because mayors and governors have no say in what is classified as insurrection, so troops could be sent in even if local authorities do not think they are needed.

Federal troops have not been used to guard against election violence since the years after the Civil War when the Army was stationed across the South to [put down the Ku Klux Klan](#) and protect Black voters, said Joshua Kastenberg, a retired Air Force lieutenant colonel and military judge who teaches military law at the University of New Mexico School of Law.

“Presidents have historically been very reluctant to call out the Army. They’ve used the authority briefly and responsibly,” he said. But, he cautioned, there are almost no checks on the president’s power to send in troops. Challenges in the courts are so slow that they are often decided long after an executive order is carried out, he said, and Congress has no standing to challenge what the White House deems an insurrection.

“A president could issue a ridiculous insurrection proclamation or violate the Posse Comitatus Act, and the people would have very little recourse,” he said.

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