LEGAL MEMORANDUM:
THE FEDERAL GOVERNMENT'S LIMITED ROLE IN ELECTION LAW ENFORCEMENT

From: Voter Protection Program
To: Interested Parties
Re: **The Federal Government's Limited Role in Election Law Enforcement**
Date: 10/21/20

State governments have the primary responsibility to administer elections and enforce election law. Traditionally, the federal role has been limited to two areas: (1) Enforcing the protections of the Voting Rights Act to ensure that every eligible citizen has the right to vote, and (2) after an election is concluded, prosecuting federal election crimes.

But recent comments and actions by federal government officials have raised concerns about the possibility of unprecedented federal involvement – and potentially interference – with the conduct of elections and enforcement of election laws at the state and local level.

This memorandum analyzes applicable law and concludes that multiple federal laws prohibit the deployment of troops or other armed federal agents to polling places before or on Election Day. The memorandum also examines the Insurrection Act, which does not allow the federal government to interfere in the election's aftermath by deploying federal troops under the guise of enforcing public order laws.

I. The Federal Government Cannot Send Armed Agents to Polling Places

Multiple overlapping federal laws and constitutional rules bar the government from deploying, or even threatening to deploy, armed agents to the polls.[1]

A. **Federal Law Prohibits Armed Agents at the Polls**. Several statutes prohibit federal agents from interfering in an election. Those include:

1. **52 U.S.C. § 10102** ("Interference with freedom of elections") provides that "[n]o officer of the Army, Navy, or Air Force of the United States shall…in any manner interfere with the freedom of any election in any State, or with the exercise of the free right of Suffrage in any State."

2. **18 U.S.C. § 592** ("Troops at polls") makes it a crime for any "officer in the Army or Navy, or *other person in the civil, military, or naval service of the*

[1] The Department of Justice has routinely sent personnel to monitor the polls for compliance with the Voting Rights Act. *See, e.g.*, Dep't of Justice Office of Public Affairs, *Press Release: Justice Department to Monitor Polls in 28 States on Election Day* (Nov. 7, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-monitor-polls-28-states-election-day.

United States" to "order[], keep[], or ha[ve] under his authority or control *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 . . . ." (emphasis added).

3. **18 U.S.C. § 593** ("Interference by armed forces") makes it a crime for any "officer or member of the Armed Forces of the United States" to "prevent by force, threat, intimidation, advice or otherwise any qualified voter of any State from fully exercising the right of suffrage at any general or special election" or "interfere[] in any manner with an election officer's discharge of his duties . . . ."

B. **Federal Law Prohibits Voter Intimidation**. At least two federal civil statutes prohibit voter intimidation. These laws may also be implicated by sending or threatening to send armed agents to the polls:

1. **§ 11(b) of the Voting Rights Act ("VRA")** provides that "[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to threaten, intimidate, or coerce any person for urging or aiding any person to vote or attempt to vote . . . ." 52 U.S.C. §10307 (b). This provision has no intent requirement, and extends to threats and attempts.

   Cases applying § 11(b) fall on a spectrum depending on the severity of the "intimidation." On one end of the spectrum, law enforcement violated § 11(b) when baselessly arrested and prosecuted activists attempting to register Black voters. *See United States v. McLeod*, 385 F.2d 734, 738 (5th Cir. 1967). On the other end of the spectrum, conduct that "misinformed, defrauded, tricked, or deceived" voters has been held not to rise to the "acts of compulsion" that are "required to prove intimidation, threats, or coercion." *Willingham v. County of Albany*, 593 F. Supp. 2d 446 (N.D.N.Y. 2006).

2. **52 U.S.C. § 10101**, a provision of the Civil Rights Act of 1957, was a precursor to § 11(b) of the Voting Rights Act. It provides: "No 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 . . . ." (emphasis added). This provision is perhaps less useful than § 11(b) because it contains an intent requirement.

C. **Federal Law Prohibits Conspiracies to Violate Civil Rights.** Third, several federal statutes prohibit conspiracies to deprive persons of certain civil rights.

1. **42 U.S.C. § 1985**, a provision of the Ku Klux Klan Act, provides a cause of action where "[t]wo or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and

immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . ." 42 U.S.C. § 1985. The statute also prohibits conspiracies to "prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President . . . ."

2. **18 U.S.C. § 241** makes it a crime for "two or more persons to conspire to injure, oppress, threaten, or intimidate any person in any State . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . ." For instance, in *United States v. Tobin*, 2005 WL 3199672, at *1 (D.N.H. Nov. 30, 2005), a senior political party official was charged with violating Section 241 "in connection with a scheme to jam telephone lines for ride-to-the-polls services offered by the opposing political party and the local fire department during the 2002 general elections."

D. Constitutional Violations

In addition to violating the statutes above, any threat to send armed agents—or actually sending armed agents—to the polls may violate the U.S. Constitution by "impose[ing] an unconstitutional burden on the right to vote." Such a claim would be subject to review under the *Anderson-Burdick* framework. *Democratic Nat'l Comm. v. Bostelmann*, 447 F. Supp. 3d 757, 765 (W.D. Wisc. Mar. 20, 2020).

Sends armed agents to polling places that serve large numbers of minority voters may also violate the equal protection guarantee of the Fifth Amendment as well as the Fifteenth Amendment. Similarly, sending armed agents to polling places with younger voters—such as near college campuses—may violate the Twenty-Sixth Amendment. Finally, state attorneys general could argue that sending armed agents to the polls violates the Tenth Amendment because it "deprive[s] the States of their constitutional right to regulate state elections . . . ." *Washington v. Trump*, - - - F. Supp. 3d - - -, 2020 WL 5568557, at *2 (E.D.Wash. Sep. 17, 2020); *Colorado v. DeJoy*, - - - F. Supp. 3d - - -, 2020 WL 5500028, at *1 n.3 (D. Colo. Sept. 12, 2020).

II. Federal Law Prohibits Deploying Troops in the Aftermath of the Election Under the Guise of Enforcing Civilian Law

A. The Insurrection Act's Carefully-Limited Exception to the General Rule Against Using the Federal Military for Domestic Law Enforcement

18 USC § 1385, known as the Posse Comitatus Act ("PCA"), prohibits the use of the military to enforce civilian law except where expressly authorized by statute.[2] The Insurrection Act – the

[2]"Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both."

"Act" – provides carefully limited exception to the PCA's general rule. Initially passed in 1807, the Act as amended authorizes the president to mobilize the armed forces domestically only when:

1. A state asks for the intervention to quell an "insurrection." 10 U.S.C. § 251;

2. "[U]nlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States… by the ordinary course of judicial proceedings." 10 U.S.C. § 252;

3. An "insurrection, domestic violence, unlawful combination, or conspiracy" deprives residents of a constitutional right and the state is unwilling or unable to help. 10 U.S.C. § 253(1); or

4. An "insurrection, domestic violence, unlawful combination, or conspiracy" obstructs the execution of federal law. 10 U.S.C. § 253(2).

The president must order insurgents to disperse peacefully, and afford them an opportunity to comply, before deploying troops under the Act. 10 U.S.C. § 254.[3]

B. The Insurrection Act Does Not Allow a President to Deploy Troops to Enforce Public Order in the Face of Governors' Objections

As a rule, laws preserving public order are state laws which the state alone is empowered to enforce.[4] And enforcing state law is not a permissible use of the Act, whose plain language only permits a president to deploy the military over a state's objection where civil rights are at risk; to enforce a federal court order; or to secure compliance with federal law.

Historical practice confirms that the Act does not authorize the federal government to enforce state laws without state permission. The Act has been invoked in two sets of circumstances. First: To calm civil disturbances at the request of governors, including in Los Angeles in 1992.[5] Second: To compel a recalcitrant state to comply with federal law, as in Little Rock in 1957.[6] In that second set of circumstances, the federal government has invoked the Act only when the

[3] Thus, before deploying the military to Los Angeles at the request of California's governor, President George H.W. Bush issued Proclamation 6428 (May 1, 1992), commanding "all persons engaged in such acts of violence and disorder to cease and desist therefrom and to disperse and retire peaceably forthwith."

[4] *See, e.g., United States v. Morrison*, 529 U.S. 598, 615 (2000) (noting that suppressing crime is at the core of states' reserved police powers).

[5] For a comprehensive review of instances in which the Act was invoked, *see* Congressional Research Service, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* (Nov. 6, 2018).

[6] *See* Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957).

state has actively subverted and violated federal law – as in 1963, when Alabama's governor publicly promised to obstruct a federal court order desegregating the University of Alabama.[7]

The legislative record also suggests that Congress intended the Act to be read and applied narrowly. In 2007, Congress passed legislation allowing the president to invoke the Act, even over a governor's objection, in the event of "natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition."[8] This broadening was opposed by all 50 governors, who criticized the Act for infringing on their sovereign prerogatives.[9] The amendment was repealed a year later, restoring a status quo of state civilian law enforcement in which invocation of the Act against a governor's wishes is a rare and strictly limited exception.[10]

[7] *See* Proclamation 3542, 28 Fed. Reg. 5705 (June 12, 1963).

[8] *See* Thaddeus Hoffmeister, *An Insurrection Act for the Twenty-First Century*, 39 Stetson L. Rev. 861, 900 (2010).

[9] *See* Sen. Jud. Comm., *The "Insurrection Act Rider" and State Control of the National Guard*, 110th Cong. 1076 (April 24, 2007) (testimony of Governor Michael F. Easley) (describing unanimous gubernatorial opposition).

[10] Sen. Jud. Comm., *The "Insurrection Act Rider" and State Control of the National Guard*, 110th Cong. 1076 (April 24, 2007) (statement of Senator Kit Bond) ("Under the old law, the President could invoke the Insurrection Act during violent and extraordinary situations that deprive a citizen of his or her rights. But the provision we are examining here today instead makes it easier for the President to invoke the Insurrection Act and, in turn, to declare martial law… And why on Earth would anyone want to do this?").