

# United States Senate

WASHINGTON, DC 20510

November 26, 2024

The Honorable Joseph R. Biden, Jr.  
President of the United States  
The White House  
1600 Pennsylvania Avenue NW  
Washington, D.C. 20500

The Honorable Lloyd J. Austin III  
Secretary of Defense  
U.S. Department of Defense  
1000 Defense Pentagon  
Washington, D.C. 20301-1000

Dear President Biden and Secretary Austin:

We write to urge you to issue a policy directive that prohibits the mobilization of active duty military or federalizing National Guard personnel to be deployed against their fellow Americans unless specifically authorized.

The *Posse Comitatus Act* “outlaws the willful use of any part of the Armed Forces to execute the law unless expressly authorized by the Constitution or an act of Congress.”<sup>1</sup> As Department of Defense (DoD) guidance makes clear, this includes restrictions on “arrest,” “apprehension,” and “stop and frisk,” as well as “surveillance or pursuit of individuals, vehicles, items, transactions, or physical locations.”<sup>2</sup> An exception to *Posse Comitatus* is the *Insurrection Act*, which allows the President to deploy military personnel within U.S. borders under narrow circumstances of insurrection, rebellion, or extreme civil unrest.<sup>3</sup> But even when the *Insurrection Act* is invoked, commanders are required to “strictly limit DoD actions to emergency needs and shall facilitate the reestablishment of civil responsibility at the earliest time possible.”<sup>4</sup>

We urge you to issue a policy directive that makes clear that the narrow application of the *Insurrection Act* should be limited to instances when State or local authorities are so overwhelmed and that the chief executive of the State requests assistance or attacks against the U.S. government overwhelm State or local authorities. In instances when federal forces are necessary to protect or prevent violations of individuals’ civil liberties, federal forces should only be authorized when state, local, or federal civilian law enforcement personnel are unable, fail, or refuse to protect their rights. A policy directive should also clarify that any armed forces employed must operate under the Standing Rules for the Use of Force and cannot violate the writ of habeas corpus, federal law, or where applicable, federal or state law. Finally, we urge you to

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<sup>1</sup> Congressional Research Service, “Defense Primer: Legal Authorities for the Use of Military Forces,” December 14, 2022, p. 2, <https://crsreports.congress.gov/product/pdf/IF/IF10539>.

<sup>2</sup> Department of Defense, Department of Defense Instruction 3025.21, effective February 8, 2019, p. 19, <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302521p.pdf>.

<sup>3</sup> Congressional Research Service, “Defense Primer: Legal Authorities for the Use of Military Forces,” December 14, 2022, p. 2, <https://crsreports.congress.gov/product/pdf/IF/IF10539>.

<sup>4</sup> Department of Defense, Department of Defense Instruction 3025.21, effective February 8, 2019, p. 27, <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302521p.pdf>.

clarify that the President must consult with Congress to the maximum extent practicable before exercising this authority, as well as transmit to the Federal Register the legal authorities.

President-elect Trump's comments have indicated he could invoke the *Insurrection Act* "on his first day in office."<sup>5</sup> He has called his political opponents "the enemy from within"<sup>6</sup> and said they "should be very easily handled by — if necessary, by National Guard, or if really necessary, by the military."<sup>7</sup> When asked to clarify these remarks in late October, Vice President-elect J.D. Vance reiterated that President-elect Trump would use force against Americans.<sup>8</sup> Former officials of his previous administration say he also seeks to deploy the military as domestic law enforcement.<sup>9</sup>

We are deeply concerned that during his previous term in office, President-elect Trump repeatedly sought to use the military to impede the First Amendment rights of Americans.<sup>10</sup> As many of us wrote previously, "it is antithetical to what those in uniform have sworn to protect and defend, and a serious threat to our democratic system" to weaponize the military to advance the president's political interests.<sup>11</sup> During his last administration, in response to peaceful protests, then-President Trump came so close to deploying troops against protesters that "active-duty troops got as close to Washington as nearby Fort Belvoir, Va., and other installations on the outskirts of the city."<sup>12</sup> The concerns about use of force were so serious that, after federal forces from the U.S. Park Police and U.S. Secret Service cleared peaceful protesters on Lafayette Square, Secretary of Defense Mark Esper said he "didn't want active-duty forces available to the president." Esper sent them home without informing the White House because he "couldn't trust they wouldn't reverse [his] decision."<sup>13</sup>

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<sup>5</sup> Washington Post, "Trump and allies plot revenge, Justice Department control in a second term," Isaac Arnsdorf, Josh Dawsey, and Devlin Barrett, November 6, 2023, <https://www.washingtonpost.com/politics/2023/11/05/trump-revenge-second-term/>.

<sup>6</sup> Roll Call, "Interview: Maria Bartiromo of Fox Business Interviews Donald Trump - October 13, 2024," <https://rollcall.com/factbase/trump/transcript/donald-trump-interview-maria-bartiromo-fox-business-october-13-2024/>.

<sup>7</sup> *Id.*

<sup>8</sup> Washington Post, "Vance defends Trump on using U.S. military against Americans," Mariana Alfaro and Will Oremus, October 27, 2024, <https://www.washingtonpost.com/elections/2024/10/27/jd-vance-trump-authoritarian/>.

<sup>9</sup> Washington Post, "Trump alumni warn he could deploy troops against Americans," Isaac Arnsdorf, Josh Dawsey, and Dan Lamothe, October 24, 2024, <https://www.washingtonpost.com/elections/2024/10/24/trump-military-president-election/>.

<sup>10</sup> Associated Press, "Trump threatens military force against protesters nationwide," Darlene Superville, Tim Sullivan, and Aaron Morrison, June 2, 2020, <https://apnews.com/article/mo-state-wire-in-state-wire-mi-state-wire-election-2020-virus-outbreak-a2797b342b4fc509e43f404817a56aa9>.

<sup>11</sup> Letter from Senators Elizabeth Warren, Michael Bennet, Tammy Baldwin, Richard Blumenthal, Bob Casey, Sherrod Brown, et al. to Secretary of Defense Mark Esper and Chairman of the Joint Chiefs of Staff Mark Milley, June 3, 2020, p. 2, <https://www.warren.senate.gov/imo/media/doc/39A0499FA16A5B427CE82FD6B9260A86.20-06-03-letter-to-dod-re-insurrection-act.pdf>.

<sup>12</sup> Washington Post, "Trump alumni warn he could deploy troops against Americans," Isaac Arnsdorf, Josh Dawsey, and Dan Lamothe, October 24, 2024, <https://www.washingtonpost.com/elections/2024/10/24/trump-military-president-election/>.

<sup>13</sup> *Id.*

Your need to issue a policy directive is particularly urgent given questions raised by the U.S. Supreme Court’s *Trump v. United States* decision, which significantly expanded presidential immunity for official acts.<sup>14</sup> In a dissent, Justice Sonia Sotomayor warned that, “whether described as presumptive or absolute, under the [Supreme Court] majority’s rule, a President’s use of any official power for any purpose, even the most corrupt, is immune from prosecution.”<sup>15</sup> She goes on to write that the decision “effectively creates a law-free zone around the president, upsetting the status quo that has existed since the Founding... [If the President] orders the Navy’s Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune.”<sup>16</sup> While the president may be immune, legal scholars have said this decision should not have any impact on service members’ obligation to reject unlawful orders; “[i]f the underlying conduct the military member is expected to carry out violates the Constitution itself or a criminal statute (like the UCMJ)—even if it is an ‘official act’ of the president—the military member must disobey it and cannot be prosecuted for that disobedience.”<sup>17</sup> Others have pointed out that the military is “trained to follow orders... not to resist them.”<sup>18</sup>

Given the disagreement amongst scholars on the serious implications of the recent Supreme Court decision, it is reasonable to assume that service members, other DoD personnel, and the broader military community may not be aware of or fully understand their rights and responsibilities. If unaddressed, any ambiguity on the lawful use of military force, coupled with President-elect Trump’s demonstrated intent to utilize the military in such dangerous and unprecedented ways, may prove to be devastating.

Sincerely,



Elizabeth Warren  
United States Senator



Richard Blumenthal  
United States Senator

<sup>14</sup> *Trump v. United States*, 603 U.S. \_\_\_\_ (2024).

<sup>15</sup> *Trump v. United States*, 603 U.S. \_\_\_\_ (2024), p. 70, [https://www.supremecourt.gov/opinions/23pdf/23-939\\_e2pg.pdf](https://www.supremecourt.gov/opinions/23pdf/23-939_e2pg.pdf).

<sup>16</sup> *Id.*, p. 96.

<sup>17</sup> Lawfare, “Can the Military Disobey Orders in the SEAL Team 6 Hypothetical?” Dan Maurer, July 8, 2024, <https://www.lawfaremedia.org/article/can-the-military-disobey-orders-in-the-seal-team-6-hypothetical>.

<sup>18</sup> The Hill, “Supreme Court immunity ruling raises questions about military orders,” Brad Dress, July 8, 2024, <https://thehill.com/policy/defense/4757168-supreme-court-immunity-military-orders/>.