

**Statement for the Record by  
Mark P. Nevitt  
Associate Professor of Law  
Emory University School of Law**

**U.S. Senate Committee on the Judiciary  
Hearing on “How Mass Deportations Will Separate American Families, Harm Our Armed  
Forces, and Devastate Our Economy”**

**December 10, 2024**

Chair Durbin, Ranking Member Graham, and Members of the Committee, thank you for the opportunity to submit written testimony in connection with the Committee’s December 10, 2024, hearing entitled, “How Mass Deportations Will Separate American Families, Harm Our Armed Forces, and Devastate Our Economy.” My views on the subject matter of the hearing are informed by my twenty years of experience in the U.S. Navy, both as a line Naval officer with operational experience implementing the law and as a JAG attorney advising on the law. They are also informed by my current role as a law professor teaching, researching, and publishing on the military’s use in domestic military operations.<sup>1</sup>

The potential use of the military to enforce nationwide federal immigration laws raises serious concerns. While existing law may well permit the President to take the extraordinary step of ordering the National Guard and active-duty military to do so, deploying the military to enforce federal immigration law threatens military readiness, undermines the hard-earned trust placed in the military by civil society, and creates enormous operational risks that endanger servicemembers and citizens alike.

**The President Possesses Broad Authorities to Deploy the Armed Forces Domestically, but Enforcing Immigration Laws is Far Outside Historical Norms and Boundaries**

The Posse Comitatus Act prohibits the use of active-duty military personnel to enforce the law domestically, unless such use is expressly authorized by another statute or the Constitution. The Posse Comitatus Act’s constraints are limited as a practical matter, because Congress has separately delegated broad authority to the President to deploy the military domestically to conduct a wide range of military missions—including law enforcement. While lawful, activating these legal authorities is not risk-free.

The President’s authority to deploy the armed forces domestically stems largely from the Insurrection Act, which authorizes the President to federalize state National Guard units or deploy federal military forces to enforce the law. In 230 years since the law’s passage, the Insurrection

---

<sup>1</sup> See, e.g., Mark Nevitt, Deploying Soldiers on American Soil: Operational Risks and Considerations, Lawfare, (Oct. 3, 2024) <https://www.lawfaremedia.org/article/deploying-soldiers-on-american-soil--operational-risks---considerations>; Mark Nevitt, *The President and Domestic Deployment of the Military: Answers to Five Key Questions*, Just Security (Jun. 2, 2020), <https://www.justsecurity.org/70482/the-president-the-military-and-minneapolis-what-you-need-to-know/>; Mark Nevitt, *Unintended Consequences: The Posse Comitatus Act in the Modern Era*, 36 CARDOZO L. REV. 119 (2014).

Act has been invoked in response to 30 crises. It has not been invoked since President George H.W. Bush relied on the statute during the 1992 Los Angeles riots. Significantly, the deployment of federal military forces into Los Angeles was at the request of the California governor.

Insurrection Act invocations have typically been limited in time and geographic location, with the military quick to arrive and quick to leave. In several cases, Presidents invoked the law in response to civil unrest, including the 1992 Los Angeles riots and riots in four cities following the 1968 assassination of Martin Luther King, Jr. In other cases, Presidents invoked the law to protect and uphold court orders protecting civil rights. For example, in Little Rock, Arkansas in 1957, President Eisenhower federalized the Arkansas National Guard and activated the 101st Airborne Division to desegregate Arkansas schools and protect students in the wake of *Brown v. Board of Education*. President Kennedy invoked the Insurrection Act in 1963 in response to Governor George Wallace's so-called "Stand in the Schoolhouse Door," federalizing the Alabama National Guard to protect African-American students enrolling at the University of Alabama. And President Johnson federalized the National Guard to protect Martin Luther King, Jr., and civil rights marchers as they traveled from Selma to Montgomery, Alabama.

Although the Insurrection Act provides the primary authority for domestic deployment of the military, the President could also seek to use novel authorities to authorize the military's involvement in immigration enforcement. This includes 32 U.S.C. § 502 (f), which was invoked by then-President Trump during the summer of 2020 to bring National Guard units from outside the District of Columbia into the nation's capital. The precise legal contours of this authority remain unclear and are ripe for tension and conflict, particularly if outside National Guard units are deployed to unwelcoming states and territories.

Regardless of the underlying legal authority, an order to deploy the Armed Forces throughout American cities to enforce immigration laws would be massively out of step with domestic military deployments in the modern era. These deployments have typically involved a specific crisis, a discrete location, and a limited timeframe—for instance, the Insurrection Act invocation in response to the 1992 Los Angeles riots. An open-ended, national Insurrection Act invocation to enforce immigration laws would go well beyond these historic norms and boundaries.

Ordering the military to enforce domestic immigration law would also implicate the military's strong allergic reaction to conducting domestic law enforcement even when requested to do so. Senior military leaders consistently pushed back during efforts to expand the military's role in counter-drug operations throughout the 1980s and 1990s, warning that this nontraditional mission distracted from the military's core functions. Testifying before Congress in 1988, Secretary of Defense Frank Carlucci warned that imposing a broader counterdrug mission on the Pentagon stressed military resources. He also expressed concerns about the military's institutional competence to handle a law enforcement mission set. Then-Chief of Naval Operations, Admiral Frank Kelso, highlighted the Navy's lack of institutional training to conduct law enforcement missions while noting that the Navy would face a readiness concern if a Sailor was asked to testify in federal court while deployed overseas. Those concerns surrounding training, readiness, and strained resources are as true then as they are today.

## Domestic Military Law Enforcement Operations Don't Align with Military Capabilities and Training

Irrespective of legal authorities, Title 10 federal military forces lack the requisite training and expertise to engage in law enforcement operations. Deploying the military to enforce federal immigration laws would require a sharp shift in mindset from overseas warfighter to domestic law enforcer. And military leaders need—indeed, require—clear orders from their civilian leaders before they take on any mission.

This shift also requires an entirely new set of instructions governing when to use force. More permissive Standing Rules of Engagement, or “SROE”—which I taught as a JAG—are integrated throughout military training.<sup>2</sup> As a general matter, Standing Rules of Engagement govern military operations in overseas environments where host-nation law enforcement and civil authorities are nonexistent or otherwise resistant to U.S. military presence. They require a more “combat mindset” and may even involve a declaration that certain forces are hostile, and whether or not a particular individual poses an imminent threat of death or serious personal injury.

Combat-focused Standing Rules of Engagement do not apply in domestic law enforcement operations. Instead, military forces would have to make the abrupt shift to the military’s more restrictive Standing Rules for the Use of Force, or “SRUF,” used for law enforcement operations.<sup>3</sup> Standing Rules for the Use of Force take into account cornerstone constitutional protections, such as the Fourth Amendment’s protection against unreasonable searches and seizures and the First Amendment’s protection of free speech and assembly. In my experience, military training focuses heavily on the Standing Rules of Engagement and much less so on the Standing Rules for the Use of Force, for the obvious reason that servicemembers conduct overseas combat operations much more often than domestic law enforcement missions. I have no doubt that servicemembers would do their best to adapt to the new Standing Rules for the Use of Force procedures, but making this shift on a dime adds an additional level of complexity and operational risk. Mistakes are bound to happen. Law enforcement missions are best left to law enforcement professionals who are staffed, trained, and equipped to conduct this mission—not the military.

Consider some of the dangerous breakdown in communication and terminology that took place in recent American history when the military was called upon to take on nontraditional missions. When responding to the 1992 Los Angeles riots, U.S. Marines, trained as warfighters in the more combat-oriented Standing Rules of Engagement, were accompanying a police officer to a domestic dispute in a neighborhood. The police officer instructed the Marines to “cover me” as he approached the door.<sup>4</sup> For law enforcement, “cover me” meant to point your weapons and be prepared to respond if necessary. The Marines interpreted “cover me” in accordance with their

---

<sup>2</sup> CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, *Standing Rule of Engagement/Standing Rules for the Use of Force for US Forces* (June 13, 2005), [https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Joint\\_Staff/20-F-1436\\_FINAL\\_RELEASE.pdf](https://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/Joint_Staff/20-F-1436_FINAL_RELEASE.pdf)

<sup>3</sup> *Id.*

<sup>4</sup> Christopher M. Schnaubelt, *Lessons in Command and Control from the Los Angeles Riots*, U.S. ARMY WAR COLLEGE QUARTERLY: PARAMETERS 88 (Summer 1997), <https://dml.armywarcollege.edu/wp-content/uploads/2023/01/Schnaubelt-Lessons-of-the-LA-Riots-Parameters-1997.pdf>

training and immediately laid down a base of heavy fire, ultimately firing over two hundred bullets into the house.<sup>5</sup> Thankfully no one was hurt, but this incident underscores how different training and terminology can risk lives, lead to confusion, and add to the fog of military operations.

In the 1990s, President Clinton ordered Marines to the U.S.-Mexico border to assist with counter-drug operations in an effort to combat the cross-border drug trade. In a tragic case, a young Marine killed an American high school student in Redford, Texas, Ezequiel Hernandez, who was shepherding goats along the border.<sup>6</sup> While the exact circumstances of the shooting have been disputed for years, in deliberations over the 1998 National Defense Authorization Act, then-Representative Becerra stated that “Had Border Patrol agents been patrolling the border on May 20 instead of military troops, Ezequiel would probably still be alive.”

Ezequiel’s tragic death led to the temporary halting of the military presence at the border. The tragic killing conducted at the hands of heavily camouflaged Marines also underscored the disconnect between the military training and doctrine that emphasizes combat in comparably more hostile environments and civilian law enforcement training that emphasizes protection of the local community.

In sum, if ordered to enforce domestic immigration laws, federal military forces must comply with the more restrictive rules for the use of force, which must be boiled down to tactics, techniques, and procedures. These tactics, techniques, and procedures must be communicated down the chain of command to the 19-year old Marine operating in an entirely new environment with a new set of rules and procedures governing when to use deadly force. This training disconnect may lead to excessive use of force or inappropriate responses in a domestic law enforcement environment.

### **Confusing Chains of Command Create Additional Operational Risk**

In addition to the challenges caused by a shift from permissive, operational Standing Rules of Engagement to the more restrictive law enforcement Standing Rules for the Use of Force, military personnel deployed to enforce domestic immigration laws may face confusing chains of command that create additional operational risk. Title 10 federal military personnel may well be operating alongside state Title 32 National Guard units that have not yet been brought under federal command and control. In that circumstance, state National Guard units would follow neither the Standing Rules of Engagement nor the Standing Rules for the Use of Force—they would follow state-specific rules. National Guard forces operating under Title 32 comply with state-specific rules addressing enforcement authority and use of force, and these rules vary in material respects by location. In some states (such as Arkansas) National Guard personnel have broad arrest authorities, while in other states (such as Iowa) the National Guard has only those powers enjoyed by the population at large. Each state and territory has different guidance on National Guard authorities on the use of force and when it is authorized. Different rules create additional potential for confusion when federal military forces operate alongside state National Guard forces, or when state National Guard forces operate alongside one another.

---

<sup>5</sup> *Id.*

<sup>6</sup> Samanta Schmidt, *How the Tragic Killing of an American Teenager Halted the Military Border Presence in 1997*, WASH. POST. (Apr. 6, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/04/06/how-the-tragic-killing-of-an-american-teenager-halted-the-military-border-presence-in-1997/>

Once again, the 1992 Los Angeles military response provides a cautionary tale. The California National Guard initially served in a state command under Governor Pete Wilson. Under state active-duty status, the California National Guard followed state rules for the use of force and worked alongside federal military troops who followed the military's rules for the use of force (not rules of engagement). When President Bush subsequently federalized the California National Guard, Guardsmen and women suddenly had to comply with the Standing Rules for the Use of Force—entirely different rules from those that had initially governed their mission. Confusion reigned, and the California National Guard did not even realize that it had been federalized for a full 24 hours.<sup>7</sup> A week later, the California National Guard reverted to state status (another change in rules) while federal military forces stayed in the area and gradually redeployed back to their respective bases.

### **Domestic Military Operations Undermine and Distract from the Military's Core Functions While Harming Recruiting and Retention**

The men and women honorably serving in the Armed Forces are our nation's most cherished national security asset. Today's military is a stressed force that suffers from retention and recruiting problems, a rising threat to national security that must be reversed. Last year, the military services missed their recruiting goals by more than 40,000 recruits.<sup>8</sup> But recruiting and retention may well suffer further blows if the public perceives the military to be used for political purposes—a point reinforced in a recent RAND report titled *What Americans Think About Veterans and Military Service*.<sup>9</sup> The RAND Report noted that public confidence in the military is declining due in part to heightened politicization of the military.<sup>10</sup> And deploying the military to aid in the enforcement of nationwide, mass deportations is an inherently controversial mission that would distract the military from its core mission of protecting the United States from foreign enemies and fighting and winning the nation's wars.

These concerns are especially acute with respect to the National Guard, which has dual domestic and overseas responsibilities by design and whose members have been stressed by a range of significant deployments in recent years. Our National Guard men and women just redeployed from supporting the COVID-19 nationwide relief and response effort, the largest domestic military deployment in recent history. In recent years, we have asked our National Guard personnel to patrol the border, drive school buses, teach in high schools, guard prisons, and take on a host of missions that address problems that are typically handled by civilian authorities. The military—particularly the state National Guard—is already a stressed force and we should tread carefully before asking them to take on additional missions.

---

<sup>7</sup> Christopher M. Schnaubelt, *Lessons in Command and Control from the Los Angeles Riots*, U.S. ARMY WAR COLLEGE QUARTERLY: PARAMETERS 88 (Summer 1997), <https://dml.armywarcollege.edu/wp-content/uploads/2023/01/Schnaubelt-Lessons-of-the-LA-Riots-Parameters-1997.pdf>

<sup>8</sup> David Vergun, *DoD Addresses Recruiting Shortfall Challenges*, DoD News (Dec. 13, 2023), <https://www.defense.gov/News/News-Stories/Article/article/3616786/dod-addresses-recruiting-shortfall-challenges/>

<sup>9</sup> Meredith Kleykam, Daniel Schwam, Gilad Wenig, *What Americans Think About Veterans and Military Service*, RAND Corp. (Dec. 14, 2023), [https://www.rand.org/pubs/research\\_reports/RRA1363-7.html](https://www.rand.org/pubs/research_reports/RRA1363-7.html)

<sup>10</sup> *Id.*

Indeed, the military does not have infinite time and resources to spend on nontraditional missions. General Daniel Hokanson, the outgoing chief of the National Guard Bureau recently made the same point: time spent on nontraditional missions—such as immigration enforcement—reduces the Guard’s ability to train for core functions (serving in combat overseas, responding to natural and manmade disasters).<sup>11</sup>

## Conclusion

A nationwide law enforcement mission that deploys the military domestically would mark an extraordinary shift in how the nation has used our most cherished national security asset. It would upset civil-military relations, threaten civil liberties, and endanger lives. Activating the National Guard or federal military forces for a nationwide immigration law enforcement mission would be inconsistent with the limited scope of past domestic deployments, and an ironic departure from instances where the Insurrection Act was invoked to protect civil rights. Finally, it would discount the military’s longstanding and well-founded skepticism of playing an outsized and continuous role in law enforcement operations.

---

<sup>11</sup> Major General Daryl Bohac (ret.) et al., *Overuse of National Guard Threatens to Undermine Preparedness*, Federal Times, (July 12, 2024), [https://www.rand.org/pubs/research\\_reports/RRA1363-7.html](https://www.rand.org/pubs/research_reports/RRA1363-7.html)