

United States Senate  
WASHINGTON, DC 20510

June 3, 2020

The Honorable Mark T. Esper  
Secretary of Defense  
1400 Defense Blvd  
Washington, D.C. 20301

General Mark A. Milley  
Chairman of the Joint Chiefs of Staff  
1400 Defense Blvd  
Washington, D.C. 20301

Dear Secretary Esper and General Milley:

We write to express our grave concern regarding President Trump's recent announcement that he intends to invoke the *Insurrection Act* to mobilize active duty military personnel or federalize National Guard personnel to deploy within the United States in response to nationwide protests following the killing of George Floyd in Minneapolis, Minnesota.

Under the *Posse Comitatus Act*, the U.S. Armed Forces are prohibited from performing law enforcement duties in the United States outside of Constitutional authorization or an act of Congress. Under exigent circumstances, the *Insurrection Act of 1807* allows the President to deploy military personnel within U.S. borders in the event of an insurrection, rebellion, or extreme civil unrest. The *Insurrection Act*, last used in 1992, is an exception to the *Posse Comitatus Act* that is understood to only be invoked under extreme conditions. We believe the President's interpretation of the *Insurrection Act* contravenes its purpose and spirit significantly departs from previous applications throughout our nation's history. While the first part of the Act (10 U.S.C. §251) allows states to request support from the federal government, other provisions of the Act (10 U.S.C. §252, §253, and §254) allow the President to activate federal troops independent of a state's request – under specific and limited conditions which are not currently met.

The Act has historically been invoked under these narrower provisions in order to protect equal access to civil rights, as was the case when federal forces protected the desegregation of public schools in Arkansas in 1957 and in Mississippi and Alabama in 1962 and 1963, respectively. Invoking the Act to restrict Americans' right to freedom of assembly, speech, and protest under current circumstances would be a significant departure from important historical uses of the law.

President Trump's behavior over the last three years has repeatedly politicized our Armed Forces and portrayed their mission not as one to protect and defend the Constitution, but rather to protect and defend his political interests. We are deeply concerned by your description of the United States, and those exercising their right to protest, as a "battlespace." America is not a

“battlespace” and protestors should never be “dominated” by the government or the military. Those peacefully protesting are not “thugs” or “terrorists” but are individuals exercising their fundamental Constitutional rights. The military should never be weaponized by the President to limit these expressions for liberty and justice. We believe it is antithetical to what those in uniform have sworn to protect and defend, and a serious threat to our democratic system.

Furthermore, General Milley, we are deeply concerned that your appointment to lead the Armed Forces’ response to ongoing protests will further militarize the government’s response. The scope of your leadership role remains unclear and concerning. The appointment of the Chairman of the Joint Chiefs of Staff to manage the response to nationwide domestic protests represents a highly disturbing delegation of authority and injects confusion within the chain of command.

In short, we oppose in the strongest terms the use of the U.S. military to impede the First Amendment rights of Americans. In cases where there is a need for additional security, state and local law enforcement, with support from the state National Guard, who live with and within the communities they serve, under the control of each state, are fully capable of responding.

Given the urgency of this situation and the potential for abuse of the *Insurrection Act*, we ask that you brief our staff to address the following questions concerning the possible invocation of the Act and use of other military personnel domestically not later than 3:00 pm Friday, June 5, 2020.

- 1) Will the Department of Defense (DoD) use Title 10 forces without the invocation of the *Insurrection Act*?
- 2) What is the mission and rules of engagement of any Title 10 servicemember, specifically, Military Police, who have already deployed in response to protests, and how are they coordinating with state and local law enforcement entities? Are they authorized to carry out arrests and other law enforcement activities? Are they authorized to use lethal force? What is their chain of command? What is their relationship to law enforcement entities?
- 3) Have any state legislatures requested deployment of the federal troops to “suppress an insurrection” pursuant to 10 U.S.C. §251, or for any other purpose in relation to the protests?
- 4) Will DoD deploy federal troops to a state where the state either has not requested military support or expressly states they do not want federal support? In this situation, to whom would these forces report?
- 5) In accordance with 10 U.S.C. §252, do current conditions “make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings” as required by statute? If so, where and why?
- 6) In accordance with 10 U.S.C. §253, do current conditions hinder “the execution of the laws of [a] State and of the United States . . . that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and

secured by law”? If so, please explain why and provide examples. Further, have any state authorities “[been] unable, fail[ed], or refuse[d] to protect th[ose] right[s], privilege[s], or immunit[ies], or to give that protection?” Alternatively, where do current conditions “oppose[] or obstruct[] the execution of the laws of the United States or impede[] the course of justice under those laws,” as opposed to state law?

- 7) Pursuant to 10 U.S.C. §254, will DoD only deploy federal troops following a presidential proclamation ordering people to “disperse and retire peaceably to their abodes within a limited time” before invoking the *Insurrection Act*, as required by law?
- 8) Are there any circumstances in which DoD envisions deploying combat troops (i.e. not Military Police)?
- 9) Although we do not believe invoking the *Insurrection Act* is warranted and believe the deployment of federal forces would be a grave mistake, we remain concerned about the assigned mission and scope in such an event. What are the rules for the use of force for any Title 10 unit that is activated to deploy to respond to protests under the *Insurrection Act*?
  - a) Will the servicemembers receive training concerning protests, riots, implicit bias, contextual sensitivity, and/or restraint?
  - b) Will the servicemembers be authorized to use lethal force?
  - c) Will they be armed with weapons? Will those weapons carry live rounds? What non-lethal riot control tools will be issued?
  - d) What is their designated mission?
  - e) Will they be authorized to make arrests, and if so, under what circumstances?
  - f) What is their chain of command?
  - g) What is their relationship to state and local law enforcement entities?
  - h) What will their relationship be to National Guard personnel on State Active Duty orders?
  - i) If military personnel are credibly alleged to have used excessive force or engaged in other abuses, will they be subject to civilian law, depending on their chain of command, or the Uniformed Code of Military Justice?
- 10) If National Guard personnel are federalized for this mission, will this take resources away from ongoing COVID-19 pandemic response activities?

This is a critical moment for our nation. How our institutions respond will determine whether the coming weeks and months lead to healing and unity, or continued derision, discord and injustice. We urge you to refrain from using the United States military to diminish or suppress the peaceful, free expression of Americans who are exercising their civil liberties in a call to hold government institutions to a higher standard in the fight for racial justice. We believe strongly in a healthy civil-military relationship. The inappropriate use of U.S. federal military personnel in this context could result in irrevocable damage to our nation.

We appreciate your response within the week.

Sincerely,

/s/ Michael F. Bennet

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Michael F. Bennet  
United States Senator

/s/ Richard Blumenthal

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Richard Blumenthal  
United States Senator

/s/ Sherrod Brown

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Sherrod Brown  
United States Senator

/s/ Bernard Sanders

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Bernard Sanders  
United States Senator

/s/ Edward J. Markey

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Edward J. Markey  
United States Senator

/s/ Amy Klobuchar

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Amy Klobuchar  
United States Senator

/s/ Ron Wyden

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Ron Wyden  
United States Senator

/s/ Tammy Baldwin

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Tammy Baldwin  
United States Senator

/s/ Robert P. Casey, Jr.

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Robert P. Casey, Jr.  
United States Senator

/s/ Chris Van Hollen

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Chris Van Hollen  
United States Senator

/s/ Christopher S. Murphy

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Christopher S. Murphy  
United States Senator

/s/ Tina Smith

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Tina Smith  
United States Senator

/s/ Elizabeth Warren

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Elizabeth Warren  
United States Senator

/s/ Kirsten Gillibrand

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Kirsten Gillibrand  
United States Senator

/s/ Thomas R. Carper

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Thomas R. Carper  
United States Senator

/s/ Jeffrey A. Merkley

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Jeffrey A. Merkley  
United States Senator

/s/ Kamala D. Harris

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Kamala D. Harris  
United States Senator

/s/ Mazie K. Hirono

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Mazie K. Hirono  
United States Senator

/s/ Debbie Stabenow

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Debbie Stabenow  
United States Senator

/s/ Patty Murray

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Patty Murray  
United States Senator

/s/ Patrick Leahy

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Patrick Leahy  
United States Senator