



LEGAL DEPARTMENT
NATIONAL SECURITY
PROJECT

National Office
125 Broad Street,
18th Floor
New York, NY 10004
Tel: (212) 549-2500
Fax: (212) 549-2644
aclu.org

OFFICERS AND DIRECTORS

Susan N. Herman
President

Anthony D. Romero
Executive Director

Richard Zacks
Treasurer

Mark T. Esper
Secretary of Defense
U.S. Department of Defense
1000 Defense Pentagon
Washington, D.C. 20301

March 18, 2020

Mark A. Morgan
Acting Commissioner
U.S. Customs and Border Protection
U.S. Department of Homeland Security
1300 Pennsylvania Ave. NW
Washington, D.C. 20229

Dear Secretary Esper and Acting Commissioner Morgan,

We write to express our concerns about the recent deployment of U.S. military personnel to ports of entry in El Paso, Texas, and San Diego, California. Our concerns arise from the expanding authority the Trump administration has granted to troops at the border, observations made by ACLU staff of military personnel acting in what appears to be a law enforcement capacity at ports of entry across Texas, and continued failure by the Departments of Defense and Homeland Security to clearly delineate the role of and limitations on the conduct of military personnel at the border. We ask that your respective agencies immediately clarify the parameters of military personnel's responsibility at ports of entry and make public all briefings, directives, memoranda and other documents regarding the scope of permissible activity by military personnel at ports of entry.

On March 6, 2020, U.S. Customs and Border Protection (CBP) officials announced that the Defense Department would deploy 160 active-duty service members to the border—80 to ports of entry in El Paso and 80 to ports of entry in San Diego.¹ The reported reason for this deployment was court rulings potentially blocking the so-called “Migrant

¹ Adolfo Flores, *The Trump Administration Is Sending 160 Troops To The Border*, BUZZFEED NEWS, March 6, 2020, <https://bit.ly/2W1RMME>; see also Priscilla Alvarez, *Trump administration to send approximately 160 troops to southern border as it awaits asylum policy ruling*, CNN, March 6, 2020, <https://cnn.it/2TRVqWt>.

Protection Protocols” or MPP, which forcibly return asylum-seekers to Mexico while they await immigration hearings in the United States, even though those rulings were stayed.² CBP has provided few details about the military deployment, only stating that personnel would include military police, engineers, and aviation support personnel and that they would “not be enforcing immigration laws.”³ The military personnel were reportedly to be in place at ports by March 7, 2020.

To date, this administration has deployed, through various operations and at various times, over approximately 16,000 Defense Department personnel to the border – some active-duty service members acting under Defense Department authority and others acting under state National Guard deployments.⁴ The administration has also issued various memos and directives expanding the authority of military personnel at the border to include activities that deeply concern the ACLU, such as, “a show or use of force (lethal force, where necessary), crowd control, temporary detention, and cursory search.”⁵ Retired

² At the time of this deployment, the injunction blocking the policy nationwide remained stayed nationwide while the government sought intervention by the Supreme Court. The 9th circuit’s stay order is available here: <https://bit.ly/38Gs1E9>. On March 11, 2020, the Supreme Court blocked the injunction, allowing MPP to proceed. The Supreme Court’s decision is available here: <https://bit.ly/39HvnrH>.

³ Flores, *supra* note 1.

⁴ The total number of troops deployed is calculated based on public reports detailed and cited herein. Neither the Defense Department nor CBP have provided a public accounting of the total number of troops deployed to the border. This estimate includes 4,000 National Guard troops in early 2018, 5,900 troops in Nov. 2018, 5,750 troops deployed by the Defense Department and 1,000 Texas National Guard troops in early 2019, and 160 troops in March 2020. See Todd South, *Border Patrol Union Head Calls National Guard Deployment ‘A Colossal Waste of Time,’* MILITARY TIMES, May 25, 2018, <https://bit.ly/3aNjErX>; Robert Burns, *Pentagon: Troops Deployed at US-Mexico Border to Cost About \$210 Million,* USA TODAY, Nov. 21, 2018, <https://bit.ly/2IBcMlf>; Gordon Adams, Lawrence B. Wilkerson & Isaiah Wilson III, *Trump’s Border Stunt Is a Profound Betrayal of Our Military,* N.Y. Times, Nov. 19, 2018, <https://nyti.ms/38y1w3K>; Joey Palacios, *U.S. Military Sends 200 Troops To Eagle Pass, Texas, To Reinforce Port Of Entry,* NPR, Feb. 6, 2019, <https://n.pr/3cRZyyH>; Matthew Schwartz, *Pentagon Deploying 3,750 Troops To Southern Border,* NPR, Feb. 4, 2019, <https://n.pr/337fliV>; Zach Montague, *Pentagon to Send 2,100 More Troops to the Southwestern Border,* N.Y. Times, July 17, 2019, <https://nyti.ms/2TDnnSX>; Cassandra Pollock, *Texas will deploy 1,000 National Guard troops to the border amid migrant surge,* T.X. TRIBUNE, June 21, 2019, <https://bit.ly/2Q1EviJ>; James Laporta & Chantal Da Silva, *Pentagon Searching For Troops And Aircraft To Fill ‘Shortfall’ Amid Mexico Tariff Talks, Documents Reveal,* NEWSWEEK, June 5, 2019, <https://bit.ly/2Q4qvVP>.

⁵ Tara Golshan, *What Trump’s “lethal force” authorization means at the border,* VOX, Nov. 27, 2018, <https://bit.ly/2TTaFhX>; Idrees Ali, *Pentagon to send more troops to Mexico border, some in contact with migrants,* REUTERS, April 26, 2019, <https://reut.rs/33712T0>; Courtney Kube & Carol E. Lee, *Active-duty U.S. troops are now just feet away from migrants in Texas,* NBC NEWS, July 25, 2019, <https://nbcnews.to/2TDjops>; James Laporta & Chantal Da Silva, *Exclusive: Documents Show U.S. Military Allowed To Shoot At Moving Vehicles At U.S.-Mexico Ports Of Entry,* NEWSWEEK, Oct. 22, 2019, <https://bit.ly/3aLBUBI>; Ken Klippenstein, *Military May Use Lethal Force on Civil Disturbances at Border,* TYT, Oct. 29, 2019, <https://bit.ly/3cS8cgD>.

Generals have called such deployments “wasteful” and “dangerous.”⁶ The Border Patrol union called a past deployment a “colossal waste of time.”⁷ No oversight body has, to our knowledge, examined the legality and appropriateness of these deployments.⁸

The longstanding separation between civilian and military government within the United States dates back to this country’s founding, and has been reiterated by Congress in landmark statutes, including especially the Posse Comitatus Act.⁹ A core component of that civilian-military separation is the general prohibition against the use of the military “to execute the law” unless expressly authorized by the Constitution or an act of Congress. The current deployment of military personnel under federal authority for law enforcement purposes raises profound concerns that it is inconsistent with the letter and spirit of the Posse Comitatus Act. More specifically, pursuant to that Act, the military is generally prohibited from providing direct support to a law enforcement agency such as CBP by, for example effectuating arrests and searches.¹⁰ The Defense Department’s own regulations place further limitations on the military’s ability to carry out traditional law enforcement roles.¹¹

Despite these restrictions, in late 2019, ACLU staff in Texas observed military personnel searching vehicles at primary inspection points at ports of entry in El Paso and documented one such search with video and photo at one port.¹² ACLU staff in El Paso also

⁶ Greg Jaffe and Dan Lamothe, *Former generals worry that Trump’s border mission uses troops as a political tool*, WASHINGTON POST, Nov. 2, 2018, <https://wapo.st/38AiHBG>.

⁷ Todd South, *Border Patrol Union Head Calls National Guard Deployment ‘A Colossal Waste of Time’*, MILITARY TIMES, May 25, 2018, <https://bit.ly/2VZSbz5>.

⁸ The Defense Department’s Acting Inspector General has announced an evaluation of deployments but has not issued findings at the time of this writing. The announcement is available here: <https://bit.ly/2IBZFQM>. The Acting Inspector General is copied to this letter, such that concerns raised here can be considered in his evaluation.

⁹ 18 U.S.C. § 1385.

¹⁰ See Mark Nevitt, *The Military, the Mexican Border and Posse Comitatus: Four Key Takeaways*, JUST SECURITY, Apr. 4, 2018, <https://bit.ly/39HfVMa>; see also, e.g., *United States v. Yunis*, 681 F. Supp. 891, 896 (D.D.C. 1988), *aff’d*, 924 F.2d 1086 (D.C. Cir. 1991).

¹¹ Other forms of “direct assistance” specifically prohibited include, “interdiction of a vehicle,” “security functions,” “crowd and traffic control,” and “operating, manning or staffing checkpoints.” DEP’T OF DEF., INSTRUCTION 3025.21: DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (Feb. 27, 2013), <https://bit.ly/39JHSml>.

¹² ACLU staff captured a video and image of military troops conducting searches at primary inspection points at the Bridge of the Americas port of entry in El Paso, which are available here: <https://bit.ly/2vXL8w7> (image); <https://youtu.be/F3sIsh4-xyz> (video). ACLU staff observed similar conduct at the Paso del Norte port in El Paso.

observed military personnel searching vehicles on international bridges prior to vehicles' arrival at primary CBP inspection points. These searches at and prior to primary inspection included opening vehicles' trunks and entering back seat areas. ACLU staff also observed military personnel checking pedestrian crossers' identifications at the mid-point of one international bridge in El Paso and documented that conduct by video and photo.¹³ ACLU staff in the Rio Grande Valley also observed troops conducting searches of vehicles in secondary inspection areas of ports of entry.

Given recent deployments to ports of entry in El Paso and San Diego, further clarity is urgently required to ensure members of the military do not fall afoul of restrictions on their conduct at the border. Public transparency is vital to ensure that military and civilian leaders who direct and cause improper service member deployments are held accountable to applicable law and agency directives. The need for this transparency is all the more imperative given the Defense Department's reported recent move to classify formerly unclassified orders and daily briefings related to military operations at the border.¹⁴

The continued deployment of military service members at the border and the undefined scope of their activities not only raises questions about their compliance with law, it also risks eroding the important and well-established distinction between domestic law enforcement and military activities. Blurring or crossing that line jeopardizes the cherished and fundamental principle that civilians remain subject to civilian law, with its attendant civil rights protections. The deployment of military personnel to the border in furtherance of the political agenda of any administration threatens to normalize military policing of the domestic civilian population, which is a matter of profound public concern.

¹³ ACLU staff captured a video and image of military troops checking documents at the mid-point of the Paso del Norte international bridge, which are available here: <https://bit.ly/2vPqv5r> (image); <https://youtu.be/epqyLiozYm4> (video).

¹⁴ James Laporta, *Exclusive: Military Documents About Us-Mexico Border Are Now Classified To Prevent Leaks, Limit Media Coverage*, NEWSWEEK, Dec. 17, 2019, <https://bit.ly/3cJ77aG>.

Thank you for your time and attention. We look forward to your timely response.

Sincerely,



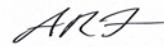
Hina Shamsi
Director
National Security Project



Scarlet Kim
Staff Attorney
National Security Project



Ronald Newman
National Political Director
National Political Advocacy
Department



Andrea Flores
Deputy Director of Policy
National Political Advocacy
Department



Astrid Dominguez
Director
Border Rights Center



Shaw Drake
Policy Counsel
Border Rights Center

CC:

Glenn A. Fine
Acting Inspector General
U.S. Department of Defense
4800 Mark Center Drive
Alexandria, VA, 22350

The Honorable Ron Johnson
Chairman, U.S. Senate Committee on
Homeland Security & Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C., 20510

The Honorable Lindsey Graham
Chairman, U.S. Senate Committee on the
Judiciary
224 Dirksen Senate Office Building
Washington, D.C., 20510

The Honorable James Inhofe
Chairman, U.S. Senate Committee on Armed
Services
Russell Senate Building, Room 228
Washington, D.C., 20510

The Honorable Carolyn Maloney
Chairwoman, House Oversight and Reform
Committee
2157 Rayburn House Office Building
Washington, D.C., 20515

The Honorable Adam Smith
Chairman, House Armed Services Committee
2216 Rayburn House Office Building
Washington, D.C., 20515

The Honorable Jerrold Nadler
Chairman, House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Gary Peters
Ranking Member, U.S. Senate Committee on
Homeland Security & Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C., 20510

The Honorable Dianne Feinstein
Ranking Member, U.S. Senate Committee on
the Judiciary
224 Dirksen Senate Office Building
Washington, D.C., 20510

The Honorable Jack Reed
Ranking Member, U.S. Senate Committee on
Armed Services
Russell Senate Building, Room 228
Washington, D.C., 20510

The Honorable Mark Meadows
Ranking Member, House Oversight and
Reform Committee
2157 Rayburn House Office Building
Washington, D.C., 20515

The Honorable Mac Thornberry
Ranking Member, House Armed Services
Committee
2216 Rayburn House Office Building
Washington, D.C., 20515

The Honorable Jim Jordan
Ranking Member, House Committee on the
Judiciary
2138 Rayburn House Office Building
Washington, D.C. 2051