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Is Trump's Paramilitary Crackdown Legal? It's Certainly Wrong

By Noah Feldman

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If there really is a law enforcement problem in American cities, why hasn't President Donald Trump sent the FBI to fight crime in Portland, Oregon? Or the DEA to fight violence connected to drug trafficking in Chicago? Why is he sending in special, paramilitary units from the Department of Homeland Security whose job is to enforce immigration laws?

A closer look shows why Trump's use of these officers is so troubling. Federal law enforcement agencies like the FBI and DEA have well defined responsibilities and are institutionally committed to carrying them out, not exceeding them. FBI agents are trained to understand that their job is to investigate federal crimes. DEA agents are trained to know that their job is to investigate federal drug crimes. Agents in both institutions are accustomed to working closely with federal prosecutors.

The DHS units that Trump is deploying are something else again. According to the DHS, it has deployed officers from several paramilitary units in Portland, including the Border Patrol Tactical Unit, Border Patrol Search, Trauma and Rescue and Special Response teams. These units, from the DHS departments of Customs and Border Protection and Immigration and Customs Enforcement, have nothing to do with policing ordinary street crimes. Yet that is what they are doing in Portland.

The reason these units are part of CBP and ICE is that their job is to target non-citizens. There's no reason to think they have the relevant training, experience, institutional knowledge or expertise to deal with citizens, protests or street crime. Nor is there any reason to think that these units are accustomed to working closely with federal prosecutors who could be expected (in theory at least) to make sure that their activities complied with relevant federal law.

It's hard to avoid the conclusion that Trump sent in DHS agents, rather than FBI or DEA agents, because FBI and DEA agents would be much less likely to do what he wants them to. They wouldn't, for example, detain protestors without probable cause and jail them without charges, as a lawsuit filed by the Oregon

Moreover, the use of DHS officers is legally problematic, since they seem to be fulfilling a function far beyond the responsibility given to them by statute. DHS officials have tried to suggest that the Portland protestors are domestic terrorists and thus somehow fall within the DHS ambit. This is absurd on its face, to be sure. But even if protesting outside of federal facilities somehow counted as domestic terrorism, there is absolutely no reason to associate the Portland protests with non-citizen crime. And that's the kind of crime that the ICE agents are supposed to target.

Yes, under the Constitution, the president enjoys a certain amount of discretion in sending executive branch employees to protect federal property and enforce federal law. A federal court would probably not want to get too deeply involved in supervising the exact functions being carried out by executive branch officials engaged in law enforcement. But there is good reason to question the legality of the use of these units for responsibilities that clearly have nothing to do with their statutory purpose.

It is profoundly worrisome to see the Trump administration sending paramilitary units to perform actions of questionable legality. It's worse and scarier when he has purposely chosen not to send the ordinary federal law enforcement officers who are specifically trained to deal with these situations. We are still far from the practice of would-be dictators, who also routinely use "special" paramilitary police to serve their interests. But you can see why civil libertarian watchdog groups from the conservative Cato Institute to the left-wing ACLU are worried.

I don't want to be too alarmist. But it is important to keep a close eye on this latest Trump stunt, and to notice how he is using executive branch power in unprecedented ways.