

OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL

POLICY GUIDANCE PUBLICATION:

Anti-Federal Commandeering and Protection of the Second Amendment

I. INTRODUCTION

Of all the actions a law enforcement officer might take during duty, the ones with the most severe consequences concern constitutional rights. The safeguards of the United States Constitution and the Bill of Rights have become the cornerstone for the application of criminal justice in America. Consequently, these safeguards have placed limitations on the authority of law enforcement officers to enforce the laws of the nation, state, and municipalities by way of legislation in the West Virginia Code (the “Code”) and by way of the Courts. Specific to this policy, West Virginia state and local law enforcement agencies and departments should expect officers to observe constitutional safeguards of the Second Amendment scrupulously and knowledgeably. The same agencies and departments should further expect that officers understand the limits and prerogatives of their authority to act under West Virginia law. Respect for the civil liberties of citizens shall be a paramount concern for all law enforcement.

II. PURPOSE

The purpose of this policy is to highlight the requirements and limitations of West Virginia Code § 61-7B-1, *et al.*, relating to the “West Virginia Second Amendment Preservation Act and Anti-Federal Commandeering Act” enacted in the 2021 session of the West Virginia Legislature (referenced herein as “the Act”), to require that all law enforcement personnel resist any attempt or effort of federal commandeering, to reinforce processes and procedures that enable us to resist federal commandeering and protect citizens from the consequences of any attempt or effort at federal commandeering per the Act, and to clarify the circumstances that officers must consider when making related law enforcement decisions.

Enforcement of federal firearms law is a federal responsibility and agencies should assist or otherwise engage in such enforcement only in accordance with the Act.

To achieve these objectives, West Virginia state and local law enforcement agencies and departments should implement a combination of best practices including but not limited to hiring, in-service training, policy development, supervision, reporting and investigative processes, appropriate discipline, and community outreach/partnerships.

III. FEDERAL COMMANDEERING; LAW ENFORCEMENT

As a general rule, no West Virginia state or local agency or its personnel, operations, or assets may be commandeered under an executive action of the President of the United States or by Congressional action. *See* W. Va. Code § 61-7B-4. This means that the federal government (and its agencies and personnel) may not seize or exercise

control over state and local government personnel, operations, and assets in West Virginia. This is a broad prohibition, and it applies relative to any element of the federal government and of WV state and local government. Also, it is important to understand that this limit on federal commandeering arises from the U.S. Constitution.

More specific to this guidance, the Code is very clear that “**Federal commandeering of West Virginia law-enforcement for purposes of enforcement of federal firearms laws is prohibited.**” See W. Va. Code § 61-7B-4. The Code further states very particular prohibitions on action by state and local law enforcement relative to federal laws, rules, regulations, orders, and actions, but it also provides express permission for certain types of conduct that might otherwise appear prohibited. The best and most reliable path to resisting efforts of federal commandeering is understanding and complying with these prohibitions and permissions.

For these reasons, West Virginia state and local law enforcement agencies and departments should train all personnel—and provide updates as needed—regarding the provisions of Article 7B of Chapter 61 of the West Virginia Code. It is important that officers and other employees know the prohibitions on police activity as well as what is specifically permitted by Article 7B. Also, it is important to know West Virginia’s laws affecting possession of firearms, firearm accessories, and ammunition—in other words, what firearms, firearm accessories, and ammunition may be possessed legally under West Virginia law and who can possess those items under West Virginia law/who cannot possess those items. Officers and other personnel must be familiar with these aspects of West Virginia law to fully ascertain the limits of Article 7B’s prohibitions and permissions.

To be clear, the provisions of Article 7B have no impact on the enforceability of any federal laws, regulations, orders, or other similar actions or requirements. All federal laws and requirements remain fully in force, and any person that violates any existing or future law, regulation, order, or other similar actions or requirements may be prosecuted by federal authorities.

A. PROHIBITIONS ON POLICE ACTIVITIES¹

1. Federal Search Warrants²

- a. A West Virginia state or local law enforcement agency, department, or officer may **not** assist federal authorities in executing a federal search warrant when:
 - i. the **only** property sought to be seized by the terms of the warrant;
 - ii. is firearms, firearms accessories, or ammunition;
 - iii. which are lawful for a person to possess under West Virginia law; and
 - iv. the person whose premises are to be searched may lawfully possess such firearms, firearms accessories, or ammunition under West Virginia law.

¹ See W. Va. Code § 61-7B-5.

² W. Va. Code § 61-7B-5(a).

2. Federal Arrest Warrants³

- a. A West Virginia state or local law enforcement agency, department, or officer may **not** assist federal authorities in executing a federal arrest warrant when:
 - i. the federal arrest warrant charges **only** the crime of possession of firearms, firearms accessories, or ammunition;
 - ii. those particular firearms, firearms accessories, or ammunition is/are lawful for a person to possess under West Virginia law; and
 - iii. the person to be arrested may lawfully possess such firearms, firearms accessories, or ammunition under West Virginia law.

3. Red Flag Laws⁴

- a. A red flag law would lead to an order from a court or other body directing the temporary seizure of firearms from a citizen.
- b. A West Virginia state or local law enforcement agency, department, or officer may **not** enforce an order under a red flag law if the citizen to whom the order is directed may lawfully possess a firearm under West Virginia law.

[Note: For the purposes of the Act, an emergency protective order issued by a magistrate and a final order issued by a family court judge that directs the temporary seizure of firearms from the respondent by law enforcement is not a red flag law. This is because West Virginia law makes it unlawful for a respondent under such scenarios to possess a firearm.]

4. Traffic Stops and Noise Complaints⁵

- a. A West Virginia state or local law enforcement agency, department, or officer who is (1) engaged in a traffic stop or (2) responding to a noise complaint may **not**:
 - i. arrest or detain a person
 - ii. for violation of:
 - a. a federal firearms law created after January 1, 2021, that is inconsistent with West Virginia law, or
 - b. an executive order of the President of the United States relating to the enforcement of a federal firearms law that is inconsistent with West Virginia law.

B. PERMITTED POLICE ACTIVITIES⁶

The list of prohibitions above does not prevent West Virginia state and local law enforcement from certain other activities that might otherwise seem forbidden. These

³ W. Va. Code § 61-7B-5(b).

⁴ W. Va. Code § 61-7B-5(c).

⁵ W. Va. Code § 61-7B-5(d).

⁶ See W. Va. Code § 61-7B-5.

permitted activities are identified at § 61-7B-7. This section clarifies that, so long as an activity does not violate an agency's own policies and does not violate any local law or policy in the jurisdiction where the activity is going to occur, a West Virginia law enforcement agency is not prevented from the following activities:

1. Investigate, enforce, detain upon reasonable suspicion of, or arrest for any violation of law detected while performing law enforcement activities otherwise authorized by West Virginia law.
2. Respond to a request from federal law enforcement authorities for information about a specific person's criminal history, including previous criminal arrests, convictions, address, or similar criminal history information, or where otherwise permitted by state law about a specific person's criminal history.
3. Conduct enforcement or investigative activities or duties associated with a joint law-enforcement task force, including the sharing of confidential information with other law-enforcement agencies for purposes of task force investigations. **However**, such joint law enforcement task force-related activities are only permitted so long as the following conditions are met:
 - a. The **primary purpose** of the task force is something other than the enforcement of federal firearms laws that are inconsistent with West Virginia law; or
 - b. The investigative or enforcement activities are **primarily related** to a violation of state or federal law unrelated to federal firearms laws inconsistent with West Virginia law.

[Note: Task force commanders should evaluate the bylaws of the task force to see if the purpose of the task force is clearly stated. If not, strongly consider discussing an amendment to the task force bylaws to clearly set out the "primary purpose" of the task force.]

State and local law enforcement agencies and departments are advised to develop protocols for expedient communication with their respective legal counsel for situation-specific evaluation of federal commandeering. Training should provide sufficient grounding for non-legal personnel to identify federal commandeering efforts and respond accordingly. Nevertheless, given that some federal requests or demands for state or local law enforcement action may be urgent and present unavoidable uncertainty, the ability of officers and other personnel to speak directly with counsel is a critical need.

IV. TRAINING

- A. The West Virginia state and local law enforcement agencies and departments should ensure that, at a minimum, all members and employees are compliant with requirements outlined in these policies.

B. Accountability and Compliance

1. The process for making a complaint should be readily available to the public. Reasonable efforts should be made to accommodate language barriers.
2. All personnel of West Virginia state and local law enforcement agencies and departments should promptly report allegations, complaints, or knowledge of suspected violations of this policy to their supervisor and the agency's internal investigation function. West Virginia state and local law enforcement agencies and departments should consider when it would be appropriate to require employees to intervene at the time of any such violating incident.
3. Violations of the Act or any implementing policy adopted by West Virginia state and local law enforcement agencies and departments should result in appropriate disciplinary action as set forth in the relevant or applicable policy, rules and regulations. Supervisors should ensure that all personnel in their command are familiar and in compliance with the content of this policy. Supervisors should also be alert for and respond to indications of potential violations.

V. IMMUNITY⁷

- A. The Act provides that the head of any West Virginia state and local law enforcement agency or department and all of its officers and/or agents may not be required, at the direction of an agency of the federal government, to act in a law-enforcement capacity to enforce a federal statute, executive order, agency order, rule, or regulation determined by the Attorney General of the State of West Virginia to infringe upon rights protected and secured by the Second Amendment of the United States Constitution.
- B. The Act further provides that the head of any West Virginia state and local law enforcement agency or department and all of its officers and/or agents shall not be terminated or be decertified as a law-enforcement officer for refusing to enforce a federal statute, executive order, agency order, rule, or regulation determined by the Attorney General of the State of West Virginia to infringe upon the right to keep and bear arms protected and secured by the Second Amendment of the United States Constitution while the constitutionality of the statute, executive order, agency order, rule, or regulation is being challenged judicially pursuant to §61-7B-8 of the Code or thereafter, if the challenge is successful.

⁷ See W. Va. Code § 61-7B-10.

VI. CONFLICTS WITH STATE CODE

Nothing in this policy shall be construed to prohibit the criminal investigation and prosecution of those persons involved in criminal activity contrary to the criminal laws of West Virginia.