



The President's Authority to Use the National Guard or the Armed Forces to Secure the Border

Jennifer K. Elsea
Legislative Attorney

April 19, 2018

President Trump's [recent announcement](#) and [memorandum](#) to the Attorney General and the Secretaries of Defense and Homeland Security regarding the possibility of deploying the military to help guard the U.S.-Mexican border against aliens entering the country unlawfully as well as to stop the flow of drug and gang activity raise questions regarding his statutory or constitutional authority to do so. The answer may depend on which troops are sent and the role they will play. This sidebar addresses the legal authorities for the President to use the National Guard or the armed forces to assist in securing the southwestern border.

Memorandum and Recent Precedent

Declaring the situation at the border to have reached a point of crisis characterized by lawlessness, the President in the memorandum directs the Secretary of Defense to request the use of National Guard troops to assist in securing the southern border to “[stop the flow of deadly drugs and other contraband, gang members and other criminals, and illegal aliens,](#)” pursuant to [Title 32 authority](#). (In “[Title 32 status,](#)” National Guard members remain under the control of the governors of their home states and are not considered to be performing federal service.) The memorandum also directs the Secretary of Defense and the Secretary of Homeland Security to confer with the Attorney General in the preparation of an action plan recommending the use of other available executive authorities to be invoked for border protection.

There is precedent for deploying National Guard units to the southwestern border to assist with immigration control. In 2006-2008, President George W. Bush called on the National Guard to participate in [Operation Jump Start, in which National Guard troops were called to duty](#) in order to provide assistance to the U.S. Customs and Border Protection (CBP) to secure the southwestern border. National

Congressional Research Service

7-5700

www.crs.gov

LSB10121

Guard members participating in this operation did not serve in a direct law enforcement role, but rather reinforced the U.S. Border Patrol, including by [performing missions involving engineering, aviation, entry identification teams and a wide range of technical, logistical and administrative support](#). President Barack Obama used National Guard troops in a similar role in 2010 during [Operation Phalanx](#), a [successor operation to Operation Jump Start](#).

The National Guard

[Section 502](#) of Title 32, U.S. Code, provides the authority for the Secretary of the Army and the Secretary of the Air Force to call National Guard units to active duty under Title 32 status for training purposes. However, it also permits individual members to be called to active duty to perform training “or other duty in addition to” the mandatory training described earlier in section 502. This is the [provision of law that was used](#) to provide federal pay and benefits to the National Guard personnel who [provided security at many of the nation’s airports after September 11](#) and who participated in Hurricanes [Katrina](#) and [Rita](#)-related disaster relief operations. Title 32 authority under section 502(f) was also used for [Operation Jump Start](#) and [Operation Phalanx](#), discussed above. Although National Guard members did not engage in direct law enforcement activities during these two border security operations, it is possible that states might consider giving them that authority in future operations.

As a matter of [statute](#), section 502(f) “other duty” may also include “[homeland defense activities](#).” Such activities are [defined](#) to mean activities:

undertaken for the military protection of the territory or domestic population of the United States, or of infrastructure or other assets of the United States determined by the Secretary of Defense as being critical to national security, from a threat or aggression against the United States.

If the action plan under the President’s memorandum is determined to involve homeland defense activities, [federal funding](#) for some aspects may be available upon a determination by the Secretary of Defense that the participation of National Guard units or members for a qualifying operation is necessary and appropriate. The governor of a state wishing to use its National Guard resources for homeland defense activities may also [request funding assistance](#).

There is also provision for National Guard troops to be called to duty for drug interdiction operations at the state level. Federal funding may be provided to a state for the implementation of a drug interdiction program in accordance with [32 U.S.C. §112](#). Under this section, the Secretary of Defense may grant funding to the governor of a state who submits a “drug interdiction and counterdrug activities plan” that satisfies certain statutory requirements. The Secretary of Defense is charged with examining the sufficiency of the drug interdiction plan and determining whether the distribution of funds for its implementation would be proper. It appears that a state plan might include border security and immigration-related functions that overlap with drug interdiction activities.

The Armed Forces

In the event the use of the regular armed forces is recommended to assist in securing the border, a number of legal considerations may arise. For example, the use of the military to enforce immigration or criminal laws at the border could run afoul of the [Posse Comitatus Act](#), unless an exception applies. The Posse Comitatus Act is a criminal prohibition that provides:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

Consequently, there must be a constitutional or statutory authority to use federal troops in a law enforcement capacity to stop aliens from entering the country unlawfully, or to apprehend gang members or seize contraband. (The Posse Comitatus Act does not apply to the National Guard unless it is activated for federal service.)

The [Constitution empowers](#) Congress to authorize the militia to be called forth to execute federal law. Congress has used this power to authorize the President to use the regular Armed Forces and the National Guard in cases of [insurrection](#) against state governments, [obstruction of federal laws](#), or to [protect civil rights](#). These authorities permit the use of federal armed forces to execute a law enforcement role notwithstanding the Posse Comitatus Act. It also seems [well settled](#) that the President has the constitutional authority as Commander in Chief to employ the armed forces to defend against an armed attack against the United States, its territories, or armed forces.

The armed forces do not appear to have a direct legislative mandate to protect or patrol the border or to engage in immigration enforcement. Chapter 15 of [Title 10, U.S. Code](#)—Military Support for Civilian Law Enforcement Agencies, however, provides general legislative authority for the armed forces to provide certain types of support to federal, state, and local law enforcement agencies, in particular in counterdrug and counterterrorism efforts. Such authorities might permit the military to provide indirect border security and immigration control assistance. These authorities permit the Department of Defense (DOD) to [share information](#) collected during the normal course of military operations; [loan equipment and facilities](#); provide [expert advice and training](#); and [maintain and operate equipment](#). For federal law enforcement agencies, military personnel may be made available to maintain and operate equipment in conjunction with counterterrorism operations or the enforcement of counterdrug laws, immigration laws, and customs requirements. Military personnel are permitted under this authority to maintain and operate equipment only for specific purposes, including aerial reconnaissance and the detection, monitoring, and communication of air and sea traffic, and of surface traffic outside the United States or within 25 miles of U.S. borders, if first detected outside the border.

Congress placed several stipulations on Chapter 15 assistance. For example, the recipient law enforcement agency must [reimburse](#) DOD for the support it provides unless the support “is provided in the normal course of military training or operations” or if it “results in a benefit ... substantially equivalent to that which would otherwise be obtained from military operations or training.” Also, DOD can only provide such assistance where it [does not adversely affect](#) “the [military preparedness](#) of the United States.” Moreover, Congress incorporated [posse comitatus restrictions](#) into Chapter 15 support activities, providing that the authorized assistance “does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.”

With respect to counterdrug operations and activities to counter other transnational crimes along the border, Congress in 1989 began to expand the military’s support role in a number of other ways. For example, Congress [directed DOD](#), to the maximum extent practicable, to conduct military training exercises in drug interdiction areas, and [made the DOD the lead federal agency](#) for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States. Congress later provided additional authorities for military support to law enforcement agencies specifically for counterdrug purposes in the National Defense Authorization Act for FY1991. [Section 1004](#) authorized DOD to extend support in several areas to any federal, state, and local (and sometimes foreign) law enforcement agency requesting counterdrug assistance, subject to restrictions against military direct participation in law enforcement. This section was extended a number of times but was [repealed](#) at the end of 2016, when it was [superseded](#) by similar authority now codified at [10 U.S.C. §284](#) to provide assistance in drug interdiction and activities to control transnational organized crime. The authorized assistance is limited to maintenance or upgrade of equipment; transportation of personnel; establishment and operation of operations or training bases; training of law enforcement personnel; detecting and monitoring traffic

within 25 miles of the border; road and fence construction; light installation along smuggling corridors; the establishment of command and control centers and computer networks; the provision of linguist and intelligence analysis services; and aerial and ground reconnaissance.

As noted, these Chapter 15 authorities restrict military personnel from participating directly in law enforcement activities, but military reconnaissance patrols on the border may be armed and permitted to fire in self-defense under applicable rules of engagement. [Controversy](#) arose in 1997 after a group of U.S. Marines conducting drug interdiction surveillance fired upon and killed an American teenage goatherd they believed posed a threat.