



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

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On May 2, 2023, the Biden Administration [announced](#) that Secretary of Defense Lloyd Austin approved a request from Secretary of Homeland Security Alejandro Mayorkas to send an additional 1,500 active-duty members of the Armed Forces to assist U.S. Customs and Border Protection (CBP) agents with a potential influx of migrants after [pandemic-era health restrictions ended in May 2023](#). (This figure does not include the thousands of Texas National Guard troops deployed to the border as part of Texas's [Operation Lone Star](#).) The federal deployment is to last up to 90 days and add to the 2,500 National Guard members already deployed to the border with Mexico. The Department of Defense (DOD) [said](#) the troops will provide “ground-based detection and monitoring, data entry, and warehouse support” and will not “directly participate in law enforcement activities.” This Sidebar addresses precedent for deploying troops to the border and the President's legal authorities to use the National Guard or the Armed Forces to assist in securing the southwestern border.

Precedent

There is precedent for deploying National Guard units to the southwestern border to assist with immigration control. President Trump deployed units there in April 2018 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 active-duty service as part of the regular Armed Forces. [Mobilization of National Guard](#) members under Title 10 differs from mobilization under Title 32 in a number of ways.) President Trump also [ordered](#) the Pentagon to deploy active-duty troops to the southwest border in October 2018. The Pentagon [reportedly](#) sent 5,800 soldiers to support the border mission.

From 2006 to 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 to assist CBP to secure the southwestern border. National 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](#)

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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.

Authority to Deploy 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. 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, 2001](#), and who participated in disaster relief operations in response to hurricanes [Katrina](#) and [Rita](#) in 2005. 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](#), *other duty* under [Section 502\(f\)](#) may also include “[homeland defense activities](#).” Such activities are statutorily [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.

[Federal funding](#) for some aspects of Title 32 missions 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 a provision for ordering National Guard troops 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 provision, 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 responsible for 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.

Authority to Deploy the Armed Forces

In the event regular Armed Forces are used 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 the following:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space 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 constitutional or statutory authority to use federal troops in a law enforcement capacity to stop aliens from entering the country unlawfully, 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 [protecting 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 and, in particular, to assist in counterdrug and counterterrorism efforts. Such authorities might permit the military to provide indirect border security and immigration control assistance. These authorities permit DOD to [share information](#) collected during the normal course of military operations, [loan equipment and facilities](#), provide [expert advice and training](#), and [maintain such 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 the movement 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.” DOD can also provide such assistance only 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, beginning in 1989, Congress expanded 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 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](#) of the law 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, constructing roads and fences, installing lights along smuggling corridors, establishing command and control centers and computer networks, providing linguist and intelligence analysis services, and conducting aerial and ground reconnaissance.

As noted, these Chapter 15 authorities restrict military personnel from participating directly in law enforcement activities, but military reconnaissance patrols along the border may be armed and permitted to fire in self-defense under applicable rules governing the use of force. [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.

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