Congressional Research Service

Securing America's Borders: The Role of the Military

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June 16, 2010

Congressional Research Service
7-5700
www.crs.gov
R41286

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

The Secretary of the Department of Homeland Security (DHS) is charged with preventing the entry of terrorists, securing the borders, and carrying out immigration enforcement functions. U.S. Customs and Border Protection (CBP), a component of DHS, has primary responsibility for securing the borders of the United States, preventing terrorists and their weapons from entering the United States, and enforcing hundreds of U.S. trade and immigration laws. Within CBP, the U.S. Border Patrol's mission is to detect and prevent the illegal entry of aliens across the nearly 7,000 miles of Mexican and Canadian international borders and 2,000 miles of coastal borders surrounding Florida and Puerto Rico.

Although the military does not have primary responsibility to secure the borders, the Armed Forces generally provide *support* to law enforcement and immigration authorities along the southern border. Reported escalations in criminal activity and illegal immigration, however, have prompted some lawmakers to reevaluate the extent and type of military support that occurs in the border region. On May 25, 2010, President Obama announced that up to 1,200 National Guard troops would be sent to the border to support the Border Patrol. Addressing domestic laws and activities with the military, however, might run afoul of the Posse Comitatus Act (PCA), which prohibits use of the Armed Forces to perform the tasks of civilian law enforcement unless explicitly authorized. There are alternative legal authorities for deploying the National Guard, and the precise scope of permitted activities and funds may vary with the authority exercised.

In the 111th Congress, various types of legislation have been introduced, including S. 3332 and H.R. 4321, which, if enacted, would authorize the utilization of National Guard troops along the southern border. Additionally, H.Con.Res. 273 expresses the sense of Congress that the escalating violence along the southern border is a national threat and that National Guard troops should be deployed to the border.

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Background

The Secretary of the Department of Homeland Security (DHS) is charged with preventing the entry of terrorists, securing the borders, and carrying out immigration enforcement functions. U.S. Customs and Border Protection (CBP), a component of DHS, has primary responsibility for securing the borders of the United States, preventing terrorists and their weapons from entering the United States, and enforcing hundreds of U.S. trade and immigration laws. Within CBP, the U.S. Border Patrol's mission is to detect and prevent the illegal entry of aliens across the nearly 7,000 miles of Mexican and Canadian international borders and 2,000 miles of coastal borders surrounding Florida and Puerto Rico.[1]

The Department of Defense's (DOD's) role in the execution of this responsibility is to provide *support* to DHS and other federal, state, and local (and in some cases foreign) law enforcement agencies, when requested. Since the 1980s, DOD, including the National Guard, as authorized by Congress, has conducted a wide variety of counterdrug support missions along the borders of the United States. Although DOD does not have the "assigned responsibility to stop terrorists from coming across our borders,"[2] its support role in counterdrug and counterterrorism efforts appears to have increased the department's profile in border security.

In 2006, in response to requests for support enforcing federal immigration laws from the governors of Arizona, California, New Mexico, and Texas, President George W. Bush announced the deployment of up to 6,000 National Guard troops along the southern border to support the Border Patrol.[3] During 2006–2008, more than 30,000 individuals participated in the mission "Operation Jump Start."[4] The troops provided engineering, aviation, and entry identification teams, as well as technical, logistical, and administrative support.[5] The Guard units, serving pursuant to Title 32 of the U.S. Code (see later discussion), remained under the control of the respective governors, but were fully funded by the federal government and were not involved in direct law-enforcement activities.[6] Throughout Operation Jump Start, the federal government continued to recruit and train thousands of additional Border Patrol agents, thereby reducing the number of National Guard troops required to support the southern border.[7] Operation Jump Start officially concluded on July 15, 2008.[8]

Illegal drug activities and crime continue. After the murder of Arizona rancher Robert Krentz on March 27, 2010, the day after the Border Patrol seized 290 pounds of marijuana near his ranch,[9]

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[1] For a discussion on the history and role of the U.S. Border Patrol, *see* CRS Report RL32562, *Border Security: The Role of the U.S. Border Patrol*, by Chad C. Haddal.

[2] Department of Defense, Strategy for Homeland Defense and Civil Support, at 5 (June 2005), *available at* http://www.defense.gov/news/Jun2005/d20050630homeland.pdf.

[3] Michael D. Doubler, *Operation Jump Start: The National Guard on the Southwest Border, 2006-2008*, *available at* http://www.ng.mil/features/jumpstart/pdf/NGB_JumpStart.pdf.

[4] *Id.* at Foreword by Lieutenant General H. Steven Blum, Chief, National Guard Bureau.

[5] *Id.*

[6] *Operation Jump Start: The National Guard on the Southwest Border, 2006-2008*, at 19.

[7] National Guard Bureau After Action Report, *Operation Jump Start: Operational Lessons Learned*, NGB J7 Joint Doctrine, Training and Force Development, Joint Lessons Learned Branch, March 11, 2009, at 4.

[8] *Id.*

[9] Christian Anderson, "Guard Responds to Border Violence," *GX Magazine*, April 8, 2010, *available at* http://nationalguard.com/news/2010/apr/09/guard-responds-to-border-violence.

there have been calls for increased security along the border.[10] The governors and adjutants general of Arizona, California, New Mexico, and Texas requested that the Obama Administration create a new federal border mission along the lines of Operation Jump Start from 2006.[11] Following the murder of Krentz, Governor Bill Richardson of New Mexico ordered the National Guard to patrol the border in order to ensure the safety of New Mexico citizens.[12] And while Governor Jan Brewer of Arizona has requested federal troops to protect the border, she has not invoked her authority, as Governor Richardson did, citing Arizona's troubled finances as prohibiting such an act.[13] Additionally, Members of Congress have called for the deployment of National Guard troops along the southern border to "combat illegal immigration, drug and alien smuggling, and violent activity."[14]

On May 25, 2010, President Obama announced that up to 1,200 National Guard troops would be sent to the southern border to support the Border Patrol. According to John Brennan and General James Jones, the Assistant to the President for Homeland Security and the National Security Advisor, respectively, the National Guard troops will be utilized as a "bridge to longer-term enhancements in border protection and law enforcement personnel from the Departments of Homeland Security and Justice to target illicit networks' trafficking in people, drugs, illegal weapons, money, and the violence associated with these illegal activities."[15] The President "called immigration 'inherently the job of the federal government,' and said sending Guard members would be a basic step in securing the border before other reforms are implemented through legislation."[16] Further, President Obama stated that the National Guard troops would help with intelligence work, drug and human trafficking interdiction, and relieving border guards on security tasks so they can do more law enforcement.[17]

Military Assistance

The military does not appear to have a direct legislative mandate to protect or patrol the border or to engage in immigration enforcement. Indeed, direct military involvement in law enforcement activities without proper statutory authorization might run afoul of the Posse Comitatus Act.[18]

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[10] *Id.*

[11] *Id.*

[12] State of New Mexico, "Governor Bill Richardson Orders National Guard to Patrol the Mexican Border," press release, March 31, 2010, *available at* http://www.governor.state.nm.us/press/2010/march/033110_01.pdf.

[13] Randol C. Archibold, "Obama to Send Up to 1,200 Troops to Border ," *The New York Times*, May 25, 2010, *available at* http://www.nytimes.com/2010/05/26/us/26border.html.

[14] United States Senators McCain and Kyl, "McCain, Kyl Announce Border Security Plan, 10-Point Plan To Better Secure The U.S.-Mexico Border in Arizona," press release, April 19, 2010, *available at* http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=18459278-ac95-e53d-0c3a-427b2010565f&Region_id=&Issue_id=.

[15] Letter from Assistant to the President for Homeland Security and Counterterrorism and National Security Advisor on Southwest Border Security to Senator Levin, Chairman of Senate Armed Services Committee, *available at* http://www.whitehouse.gov/sites/default/files/Letter_to_Chairman_Levin.pdf.

[16] Lisa Daniel, "Obama: National Guard Can Aid Intelligence, Interdiction at Border," *GX News*, May 27, 2010, *available at* http://www.nationalguard.com/news/2010/may/27/obama-national-guard-can-aid-intelligence-interdiction-at-border.

[17] *Id.*

[18] For a comprehensive discussion of the Posse Comitatus Act, see CRS Report 95-964, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, by Charles Doyle.

The military does have, however, general legislative authority that allows it to provide *support* to federal, state, and local law enforcement agencies (LEAs) in counterdrug and counterterrorism efforts, and in combating certain border-related immigration and smuggling crimes.[19] Military personnel for these operations are drawn from the active and reserve forces of the military and from the National Guard.

Restrictions

The primary restriction on military participation in civilian law enforcement activities is the Posse Comitatus Act (PCA).[20] The PCA prohibits the use of the Army and Air Force to execute the domestic laws of the United States except where expressly authorized by the Constitution or Congress. The PCA has been further applied to the Navy and Marine Corps by legislative and administrative supplements. For example, 10 U.S.C. § 375 directs the Secretary of Defense to promulgate regulations forbidding the direct participation "by a member of the Army, Navy, Air Force, or Marines in a search, seizure, arrest, or other similar activity" during support activities to civilian law enforcement agencies. DOD issued Directive 5525.5, which outlines its policies and procedures for supporting federal, state, and local LEAs. DOD Directive 5525.5 prohibits the following forms of direct assistance: (1) interdiction of a vehicle, vessel, aircraft, or other similar activity; (2) a search or seizure; (3) an arrest, apprehension, stop and frisk, or similar activity; and (4) use of military personnel in the pursuit of individuals, or as undercover agents, informants, investigators, or interrogators. It is generally accepted that the PCA does not apply to the actions of the National Guard when not in federal service.[21] As a matter of policy, however, National Guard regulations stipulate that its personnel are *not*, except for exigent circumstances or as otherwise authorized, to directly participate in the arrest or search of suspects or the general public.[22]

Authorizations

The PCA does not apply "in cases and under circumstances expressly authorized by the Constitution." Congress is empowered, under the Constitution, to call forth the militia to execute the laws of the Union.[23] The Constitution, however, contains no provision expressly authorizing the President to use the military to execute the law. The question of whether the constitutional exception includes instances where the President is acting under implied or inherent constitutional powers is one the courts have yet to answer. DOD regulations, nonetheless, do assert two constitutionally based exceptions—sudden emergencies and protection of federal property.[24] The PCA also does not apply where Congress has expressly authorized use of the military to execute domestic law. Congress has done so in three ways: by giving a branch of the Armed Forces

[19] 10 U.S.C. § 374(b).

[20] 18 U.S.C. § 1385.

[21] *See Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999); *United States v. Hutchings*, 127 F.3d 1255, 1258 (10th Cir. 1997); *United States v. Benish*, 5 F.3d 20, 25-6 (3d Cir. 1993); *United States v. Kyllo*, 809 F. Supp 787, 792-93 (D.Ore. 1992); *Wallace v. State*, 933 P.2d 1157, 1160 (Alaska App. 1997); *see also* DOD Directive 5525.5.

[22] National Guard Regulation 500-2/Air National Guard Instruction 10-801, *National Guard Counterdrug Support*, August 29, 2008, *available at* http://www.ngbpdc.ngb.army.mil/pubs/10/500_2_10-801.pdf.

[23] U.S. Const. Art. I, § 8, cl. 15.

[24] 32 C.F.R. § 215.4.

civilian law enforcement authority (e.g., the Coast Guard[25]), by addressing certain circumstances with more narrowly crafted legislation,[26] and by establishing general rules for certain types of assistance.

The military indirectly supports border security and immigration control efforts under general legislation that authorizes the Armed Forces to support federal, state, and local LEAs. Since the early 1980s, Congress has periodically authorized an expanded role for the military in providing support to LEAs. Basic authority for most DOD assistance was originally passed in 1981 and is contained in Chapter 18 of Title 10 of the U.S. Code—Military Support for Civilian Law Enforcement Agencies. Under Chapter 18 of Title 10, Congress authorizes DOD to share information (§ 371); loan equipment and facilities (§ 372); provide expert advice and training (§ 373); and maintain and operate equipment (§ 374). For federal LEAs, DOD personnel may be made available, under § 374, to maintain and operate equipment in conjunction with *counterterrorism* operations (including the rendition of a suspected terrorist from a foreign country) or the enforcement of counterdrug laws, immigration laws, and customs requirements. For any civilian LEA, § 374 allows DOD personnel to maintain and operate equipment for a variety of 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 18 assistance (e.g., LEAs 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.")[27] Pursuant to § 376, DOD can only provide such assistance if it does not adversely affect "the military preparedness of the United States." Congress incorporated posse comitatus restrictions into Chapter 18 activities in § 375.

In 1989, Congress began to expand the military's support role. 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.[28] Congress later provided additional authorities for military support to LEAs specifically for counterdrug purposes in the National Defense Authorization Act for FY1991.[29] Section 1004 authorized DOD to extend support in several areas to any federal, state, and local (and sometimes foreign) LEA requesting counterdrug assistance. This section has been extended regularly and is now in force through the end of FY2011.[30]

[25] The legal basis for the Coast Guard is Title 14 of the United States Code, which states: "The Coast Guard as established January 28, 1915, shall be a military service and a branch of the armed forces of the United States at all times." Upon the declaration of war or when the President directs, the Coast Guard operates under the authority of the Department of the Navy. When not under the authority of the Department of the Navy, the United States Coast Guard is under the authority of the Department of Homeland Security.

[26] *See, e.g.*, 10 U.S.C. §§ 331-333 (to suppress insurrections).

[27] 10 U.S.C. § 377.

[28] National Defense Authorization Act for FY1990 and 1991, P.L. 101-189, Div. A, Tit. XII, § 1202(a)(1), codified at 10 U.S.C. § 124. A similar provision was first passed as part of the National Defense Authorization for FY1989 (P.L. 100-456), but was repealed by P.L. 101-189.

[29] P.L. 101-510, Div. A, Tit. X, § 1004, codified at 10 U.S.C. § 374 note.

[30] P.L. 109-364, Div. A, Tit. X, § 1021 (extending § 1004 through FY2011).

As amended, § 1004 authorizes the military to maintain, upgrade, and repair military equipment; transport federal, state, local, and foreign law enforcement personnel and equipment within or outside the United States; establish bases for operations or training; train law enforcement personnel in counterdrug activities; detect, monitor, and communicate movements of air, sea, and surface traffic outside the United States, and within 25 miles of the border if the detection occurred outside the United States; construct roads, fences, and lighting along the U.S. border; provide linguists and intelligence analysis services; conduct aerial and ground reconnaissance; and establish command, control, communication, and computer networks for improved integration of law enforcement, active military, and National Guard activities. Section 1004 incorporates the posse comitatus restrictions of Chapter 18.[31] Unlike Chapter 18, however, this law does allow support which could affect military readiness in the short term, provided the Secretary of Defense believes the support outweighs such short-term adverse effect.

The National Guard

The National Guard is a military force that is shared by the states and the federal government and often assists in counterdrug and counterterrorism efforts. The term "National Guard" generally refers to the Army National Guard and the Air National Guard.[32] As such, they are the "organized militia" of the states, Puerto Rico, Guam, the U.S. Virgin Islands, and the District of Columbia, which are organized, armed, and equipped wholly or partly at federal expense, and are federally recognized.[33] However, when in a federal status, the organizations are referred to as the Army National Guard of the United States and the Air National Guard of the United States and are the reserve components of the Army and Air Force.[34] While the District of Columbia National Guard is an exclusively federal organization and operates under federal control at all times, the other 53 National Guards operate as state or territorial organizations most of the time. Members of the National Guard may be called to active duty in an exclusively federal status (Title 10), in an exclusively state status, or under state control with federal pay and benefits (Title 32).

Under "Title 10 duty status," National Guard personnel operate under the control of the President, receive federal pay and benefits, and are subject to the PCA.[35] Typically, however, the National Guard operates under the control of state and territorial governors. In "state active duty," National Guard personnel operate under the control of their governor, are paid according to state law, can perform activities authorized by state law, and are *not* subject to the restrictions of the PCA.

Because border security is primarily a federal concern, some states have looked to the federal government for funding to support some of their National Guard activities. Under Title 32 of the U.S. Code, National Guard personnel generally serve a federal purpose and receive federal pay and benefits, but command and control remain with the governor. This type of service is commonly referred to as "Title 32 duty status," and examples are discussed below. The 6,000 National Guard troops deployed in support of Operation Jump Start were under the authority of

[31] *Id.* at § 1021(g).

[32] 32 U.S.C. § 101(3).

[33] *Id.* at § 101(4) and (6).

[34] *Id.* at § 101(5) and (7).

[35] 10 U.S.C. §§ 12301-12304. However, it appears that the National Guard could be deployed by the President under 10 U.S.C. §§ 331-333 and § 12406 to "execute the laws of the United States."

32 U.S.C. § 502(a), which allows the Secretary of the Army and Air Force to prescribe regulations for National Guard drill and training and § 502(f), described below.[36]

State Drug Plan

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 would be proper. While the emphasis is certainly on counterdrug efforts, a state plan might include some related border security and immigration-related functions that overlap with drug interdiction activities. By approving the state of Arizona's drug interdiction plan, the Secretary of Defense has enabled the Arizona National Guard to engage in some border security measures. For example, as part of its continuing requests for additional National Guard troops under the Joint Counter Narco-Terrorism Task Force (JCNTF), Arizona cites the negative impacts of illegal drug trade and illegal immigration on the southwestern border states as support for its request.[37]

Other Duty

Section 502(f) of Title 32 has been used to expand the operational scope of the National Guard beyond its specified duties. This provision provides that "a member of the National Guard may ... without his consent, but with the pay and allowances provided by law ... be ordered to perform training or *other duty*" in addition to those he or she is already prescribed to perform (emphasis added). 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.

Homeland Defense Activity

In 2004, Congress passed another law that could arguably provide federal funding for National Guard personnel conducting border security operations under Title 32.[38] In the event of a "homeland defense activity," Chapter 9 of Title 32 of the U.S. Code authorizes the Secretary of Defense to provide federal funding at his discretion to a state, under the authority of the governor of that state, for the use of its National Guard forces if their participation is "necessary and appropriate."[39] A "homeland defense activity" is statutorily defined as "an activity undertaken for the military protection of the territory or domestic population of the United States ... from a threat

[36] *Operation Jump Start: The National Guard on the Southwest Border, 2006-2008* at 19.

[37] Letter from Arizona Governor Jan Brewer to President Barack Obama regarding continued and additional National Guard programs, May 20, 2010 (supporting documentation attached to letter includes previous 2009 letter from Governor Brewer to Secretary of Defense Gates regarding additional troops for the CJNTF), *available at* http://azgovernor.gov/dms/upload/PR_052110_BorderAircraftProposalLtrtoPresObama.pdf.

[38] Defense Authorization Act for Fiscal Year 2005, P.L. 108-375, Div. A, Tit. V, Subtitle B, §§ 901-908.

[39] 32 U.S.C. § 905.

or aggression against the United States."[40] Although a deployment of National Guard troops for border security purposes could arguably be an activity "undertaken for the military protection" of a "domestic population," it is unclear whether the porous nature of the border or illegal entry of aliens is the type of "threat" or "aggression" that would be "necessary and appropriate" for National Guard troops.

Legislation in the 111th Congress

In the 111th Congress, various legislation has been introduced, including S. 3332 and H.R. 4321, which, if enacted, would authorize the utilization of National Guard troops along the southern border. S. 3332, entitled the Border Security Enforcement Act and introduced by Senators McCain and Kyl, would implement their "10-Point Plan To Better Secure The U.S.-Mexico Border In Arizona," including the deployment of 3,000 National Guard troops along the Arizona/Mexico border, as well as permanently add 3,000 Border Patrol agents to the border.[41] H.R. 4321, entitled the Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009, would prohibit the utilization of military forces, including the National Guard, from assisting in the enforcement of immigration laws.[42] However, an exception exists allowing the President, during a national emergency or for specific counterterrorism duties, to utilize the military forces, including the National Guard, to enforce immigration laws with various restrictions on allowed activities. Additionally, H.Con.Res. 273 expresses the sense of Congress that the escalating violence along the southern border is a national threat and that National Guard troops should be deployed, as has been requested by numerous governors and Members of Congress, to the southern border with clear rules of engagement and the right to defend themselves if attacked.[43]

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[40] DOD Directive 3160.01, Homeland Defense Activities Conducted by the National Guard (August 25, 2008), implementing Sections 901-908 of Title 32, does not provide additional guidance as to the question of whether border security operations could be considered homeland defense activities and thus eligible for DOD funding to the States.

[41] S. 3332, 111th Cong., 2nd Sess. (2010). *See also* United States Senators McCain and Kyl, "McCain, Kyl Announce Border Security Plan, 10-Point Plan To Better Secure The U.S.-Mexico Border in Arizona," press release, April 19, 2010, *available at* http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=18459278-ac95-e53d-0c3a-427b2010565f&Region_id=&Issue_id=.

[42] H.R. 4321, 111th Cong., 1st Sess., § 131 (2009).

[43] H.Con.Res. 273, 111th Cong., 2nd Sess., (2010).