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# Border Security and Military Support: Legal Authorizations and Restrictions

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## Summary

The military generally provides *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 15, 2006, President Bush announced that up to 6,000 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, 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. This report will be updated as warranted.

## 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. The Department of Defense's (DOD) 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, the DOD (and National Guard), as authorized by Congress, has conducted a wide variety of counterdrug support missions along the borders of the United States. After the attacks of September 11, 2001, military support was expanded to include counterterrorism activities. Although the DOD does not have the "assigned responsibility to stop terrorists from coming across our borders,"[1] its support role in counterdrug and counterterrorism efforts appears to have increased the Department's profile in border security.

[1] Dep't. of Defense, Strategy for Homeland Defense and Civil Support, at 5 (June 2005) available at [http://www.fas.org/irp/agency/dod/homeland.pdf].

Some states, particularly those along the southern border that are experiencing reported escalations in crime and illegal immigration, are welcoming the increased military role and have taken steps to procure additional military resources. Governor Janet Napolitano of Arizona, for example, sent the DOD a request for federal funding to support the state's deployment of National Guard troops to the border after reportedly exhausting available state resources for combating illegal immigration and drug trafficking.[2] Others view the increased presence of military support along the borders as undiplomatic, potentially dangerous,[3] and a further strain on already overextended military resources.[4] Nonetheless, the concerns over aliens and smugglers exploiting the porous southern border continue to grow, and some now argue that the military should play a much larger and more direct role in border security.

On May 15, 2006, President Bush announced that up to 6,000 National Guard troops would be sent to the southern border to support the Border Patrol. According to the President, the Guard will assist the Border Patrol by operating surveillance systems, analyzing intelligence, installing fences and vehicle barriers, building roads, and providing training.[5] Guard units will not be involved in direct law-enforcement activities and will be under the control of the Governors. The Administration has indicated that the vast majority of the force at the border would be drawn from Guardsmen performing their regularly scheduled, two- or three-week annual training, pursuant to Title 32 of the U.S. Code (see later discussion).[6] Initial deployments of Guardsmen to the border began in June 2006 under the mission name, "Operation Jump Start." In Congress, the Comprehensive Immigration Reform Act of 2006 (S. 2611), as passed by the Senate, would allow the Governor of a state, with the approval of the Secretary of Defense, to order units of the National Guard of such state to perform specified activities (e.g., reconnaissance, construction) during annual training duty along the southern land border for border security purposes. Section 1026 of the House-passed Defense Authorization Act for FY2007 (H.R. 5122) would allow the Secretary of Defense, upon a request of the Secretary of DHS, to assign members of the armed forces to assist DHS in preventing the entry of terrorists, drug traffickers, and illegal aliens.[7]

## Military Assistance Along the Border

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

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[2] *See* [http://azgovernor.gov/dms/upload/NR_030706%20Rumsfeld_Chertoff%20Letter.pdf].

[3] In 1997, a Marine who was part of a four-man border observation team near Redford, Texas, shot and fatally wounded an 18-year old man after reportedly taking fire. *See Oversight Investigation of the Death of Esequiel Hernandez, Jr.*, A Report of Chairman Lamar Smith to the Subcommittee on Immigration and Claims of the Committee on the Judiciary, 105th Cong. 2d Sess. (Nov. 1998).

[4] Peter Baker, *Bush Set to Send Guard to Border*, THE WASHINGTON POST, May 15, 2006.

[5] Stephen Dinan, *Bush Calls for Guard on Border*, THE WASHINGTON TIMES, May 16, 2006.

[6] The White House, Press Briefing on the President's Immigration Reform Plan, May 16, 2006, available at [http://www.whitehouse.gov/news/releases/2006/05/20060516-2.html].

[7] H.R. 1986, H.R. 3938, H.R. 3333, and H.R. 4437 would propose similar measures.

in law enforcement activities without proper statutory authorization might run afoul of the Posse Comitatus Act.[8] The military does have, however, general legislative authority that allows it to provide *support* to federal, state, and local law enforcement agencies (LEA) in counterdrug and counterterrorism efforts, which might indirectly provide border security and immigration control assistance. 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).[9] 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. According to the Directive, the following forms of direct assistance are prohibited: (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.[10] 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, or become involved in the chain of custody for any evidence.[11]

**Authorizations.** The PCA does not apply "in cases and under circumstances expressly authorized by the Constitution." Under the Constitution, Congress is empowered to call forth the militia to execute the laws of the Union.[12] 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.[13] The PCA also does not apply where Congress has expressly authorized use of the military to execute the law. Congress has done so in three ways: by giving a branch of the armed

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

[9] 18 U.S.C. §1385.

[10] *See* CRS Report 95-964, at 42 (citing numerous cases); *see also* DOD Directive 5525.5.

[11] NGR 500-2/ANGI 10-801, *National Guard Counterdrug Support,* March 31, 2000.

[12] U.S. Const. Art. I, §8, cl. 15. In addition, the PCA does not apply to actions furthering a military purpose. *See* CRS Report 95-964, at 31 (describing the exception).

[13] 32 C.F.R. §215.4.

forces civilian law enforcement authority (e.g., the Coast Guard), by addressing certain circumstances with more narrowly crafted legislation,[14] 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."[15] 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 the DOD the lead federal agency for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States.[16] Congress later provided additional authorities for military support to LEAs specifically for counterdrug purposes in the National Defense Authorization Act for FY1991.[17] 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 FY2006.[18]

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 U.S.; establish bases for operations or training; train law

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

[15] 10 U.S.C. §377.

[16] 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.

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

[18] P.L. 107-107, Div. A, Tit. X, §1021 (extending §1004 through FY2006).

enforcement personnel in counterdrug activities; detect, monitor, and communicate movements of air, sea, and surface traffic outside the U.S., and within 25 miles of the border if the detection occurred outside the U.S.; construct roads, fences, and lighting along 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.[19] 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 counterrrorism efforts. After September 11, for example, President Bush deployed roughly 1,600 National Guard troops for six-months under Title 10 authority to support federal border officials and provide a heightened security presence.[20] 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.[21] 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, states, such as Arizona, 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 remains with the Governor. This type of service is commonly referred to as "Title 32 duty status," and examples are discussed below. According to the Administration, the deployment of the 6,000 Guardsmen derives its authority from 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.[22]

**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

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[19] *Id.* at §1021(g).

[20] Maj. Gen. Timothy J. Lowenberg, The Role of the National Guard in National Defense and Homeland Security, (Sept. 2005) available at [http://www.findarticles.com/p/articles/mi_qa3731/is_200509/ai_n15638615/print] [hereinafter Lowenberg, *The Role of the National Guard*].

[21] 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."

[22] Memorandum of Agreement between the States of Arizona, California, New Mexico, and Texas and the Department of Defense, *Operation Jump Start* (June 2, 2006).

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. Arizona's drug interdiction plan, for example, recognizes related border issues created by human smuggling and terrain vulnerabilities with respect to the illegal entry of aliens into the United States.[23] 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.

**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 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 Katrina and Rita-related disaster relief operations. States, such as Arizona, have argued that the "other duty" language should be liberally applied (like it was for Hurricane Katrina and Rita) to include activities associated with border security efforts.[24] Some question, however, whether domestic operations, in general, are a proper use of this Title 32 authority.[25]

**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.[26] 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 their National Guard forces if there is a "necessary and appropriate" "homeland defense activity."[27] 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 or aggression against the United States." 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. The State of Arizona requested federal funds for its National Guard under Chapter 9 for the performance of homeland defense-border security activities.

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[23] State of Arizona, Press Release, *Title 32: Statutory Funding Options* (Mar. 6, 2006) [http://azgovernor.gov/dms/upload/NR_030906_%20Border%20Veto%20Legal%20Support%20Letter.pdf].

[24] *Id.*

[25] Lowenberg, *The Role of the National Guard*.

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

[27] 32 U.S.C. §905.