Deployment of the National Guard as Law Enforcement
July 2020

What is the National Guard?

The National Guard is a state military force that derives its powers from the U.S. Constitution's Second Amendment, which grants states the right to a "well regulated Militia." What we refer to as the "National Guard" is actually 54 separate state and territorial National Guards, one for each state and U.S. territory. As both a state and federal asset, the National Guard receives funding from both the federal government and the state in which it operates. National Guard members swear an oath of office to both their state government and the federal government. Each state National Guard has an Adjutant General appointed by the state’s governor who oversees the National Guard and acts as a liaison between the state and the National Guard Bureau headquarters in Washington, D.C, a joint Army-Air Force command that is part of the Department of Defense. Most National Guard members are not full-time members of the military. Until they are called to active duty, they perform full-time civilian jobs and train periodically.

What are the authorities and limits for National Guard deployment?

National Guard units may be called into three different types of active duty: (1) State Active Duty, (2) Title 32, or hybrid state-federal, status, and (3) Title 10, or federalized, status.

**State Active Duty** is when the state governor calls the National Guard members into duty to perform state missions, including law enforcement functions and emergency response services, under state command. When activated under state authority, National Guard deployments are funded entirely by the state government, they are confined geographically to the home state or a neighboring state pursuant to a state-to-state agreement, and any discipline is governed by the state military code. Because this status is governed entirely by state law, National Guard members are excluded from the Posse Comitatus Act, a federal law that prohibits the use of the military for domestic law enforcement purposes except as expressly authorized by Congress. Thus they may provide both direct and indirect support for civilian law enforcement as authorized by the governor. Recent examples of State Active Duty deployments include the Minnesota National Guard’s deployment to augment law enforcement at the protests against police brutality in May and June 2020 and the Wisconsin National Guard’s deployment to serve as poll workers for the state’s April 2020 primary election due to the COVID-19 pandemic.

**Title 32 status** is a hybrid state and federal deployment where the National Guard units are called into duty to support federal operations or missions at the request of the president or Secretary of Defense with the consent and at the command of the governor. The authority of the president or Secretary of Defense to activate the National Guard is typically derived from 32 U.S.
Code § 502(f). While § 502 generally covers training, subsection (f) provides that the National Guard may, under regulations prescribed by the Secretary of the Army or Secretary of the Air Force, "be ordered to perform training or other duty," which includes “[s]upport of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense.” When activated under Title 32 of the U.S. Code, National Guard deployments are usually funded by the federal government and confined to the home state or a neighboring state pursuant to a state-to-state agreement, and any discipline is governed by the state military code. Activations are often in response to a natural disaster. Some states have used Title 32 deployment to receive federal funding for state law enforcement activities, against the core intention of Title 32. Because the National Guard members remain under state command, they are not subject to the Posse Comitatus Act. National Guard units were recently deployed under Title 32 to the U.S.-Mexico border to assist the U.S. Border Patrol and, according to Attorney General William Barr, to Washington, D.C., during the protests over the police killing of George Floyd. Statements by Defense Secretary Mark Esper suggested that he believed that National Guard units were acting under federal command, which would have been a violation of Title 32.

**Title 10 status** is when the president federalizes the National Guard, without requiring a governor’s consent, by calling units into duty pursuant to Title 10 to assist the Army and Air Force in Department of Defense missions anywhere in the world. These deployments are under the command of the president as Commander in Chief of the Armed Forces and are funded by the federal government. National Guard members on Title 10 active duty are subject to the Posse Comitatus Act. Accordingly, to call them into duty for domestic law enforcement purposes, the president must invoke his statutory authority under the Insurrection Act, 10 U.S. Code §§ 251-255. The Insurrection Act is the authority pursuant to which President Eisenhower sent federal troops to desegregate schools in Little Rock, Arkansas in 1957, and pursuant to which federal troops were used to violently quash the Pullman railway strike in 1894.

**Can the president deploy out-of-state National Guard to act as law enforcement at protests?**

In June 2020, the president called for governors of various states to send their National Guards to Washington, D.C., to serve as law enforcement at the protests against police brutality. These out-of-state deployments raised at least two questions of legality. First, the out-of-state National Guard appeared to be acting, at least in part, under the command of the president or Secretary of Defense, rather than under their governor’s command. If so, their deployment would have violated the Posse Comitatus Act. Second, the Mayor of D.C. did not consent to their deployment. The Trump administration took the position that Title 32 allows the president to deploy out-of-state National Guard to D.C. without consent. That reading of Title 32 opens the door to the president’s authority to send willing state National Guards to other states without those states’ consent, a result that Congress could not have intended.