

## FAQ on Use of the Military for Immigration Enforcement

### Q: What is the Posse Comitatus Act?

It is a federal law prohibiting federal armed forces from participating in civilian law enforcement activities, either civil or criminal. This means that generally speaking, active-duty U.S. military personnel cannot be used for domestic law enforcement.

### Q: Are there exceptions to the Posse Comitatus Act?

Yes.

- ▶ **U.S. Code Title 10, Chapter 13—The Insurrection Act—is an exception to the Posse Comitatus Act.** It allows the president to deploy active-duty armed forces and to federalize the National Guard and deploy them to any state or territory to:
  - Suppress an insurrection in a state, if assistance is requested by the state legislature or the governor; or
  - Enforce federal laws or suppress a rebellion against U.S. authority if the president decides that “unlawful obstructions, combinations, or assemblages or rebellion” against the authority of the United States” make it “impracticable” to enforce federal law via the ordinary course of judicial proceedings; or
  - Suppress any “insurrection, domestic violence, unlawful combination, or conspiracy” that:
    - Interferes with the execution of state or federal law that deprives a class of people of constitutional rights and state authorities are unwilling or unable to enforce those rights, or
    - Opposes or obstructs the execution of, or impedes the course of justice under, federal law.
  - It has not previously been used for immigration enforcement.

### Q: What Other Laws or Powers May Play a Role?

- ▶ **U.S. Code Title 10, Chapter 15—Military Support for Civilian Law Enforcement Agencies**—authorizes federal military assistance to law enforcement agencies, but does not authorize the U.S. military to participate in “core” domestic law enforcement activities such as arrests, searches, or seizures. However, the Department of Defense can make military equipment or the use of military bases available to any federal, state, or local law enforcement officials for law enforcement purposes; can provide training; and can provide certain support for counterdrug or counter transnational crime activities. This support is already being used at the U.S. Border.

- ▶ **Declaration of National Emergency, which enhances the resources available to the military** by allowing the federal government to unlock enhanced authorities set forth in about 150 different statutes when the president declares a “national emergency.” The Trump administration abused powers unlocked by a declaration of national emergency to begin building a southern border wall before the Biden administration ended wall construction. The National Emergencies Act does not define what constitutes a “national emergency” but Trump’s declaration of a national emergency in relation to migration at the Southern border was out of line with historical precedent and some courts did determine that the Trump administration’s use of national emergency authority to build the wall was unlawful (although the Supreme Court vacated those decisions after Biden terminated the emergency declaration).

**Q: What about the National Guard?**

The National Guard can be deployed in three different statuses: state active-duty status, hybrid state-federal status, and federalized status.

- ▶ State Active Duty (“SAD”) Status – National Guard performs state missions with state funding and operates under the command and control of the state’s governor. When deployed in this status, the Guard is generally governed by state law.
- ▶ Hybrid Status – National Guard performs activities specified by Congress or the federal government and are paid with federal funds, but they are at least nominally under the command and control of the state governor. The state governor may refuse the federal government’s request, and a state may not send its National Guard into another state without that state’s consent, even to perform a federal mission. National Guard forces deployed under Title 32 are subject to state law, which may, for example, limit who can function as “peace officers” and perform core government functions.
- ▶ Federalized or Title 10 status. The President can “federalize” the National Guard and place them under full command and control of the secretary of defense. See the section above on the Insurrection Act for more information.

**Q: What is the Alien Enemies Act?**

The Alien Enemies Act allows the president to detain and/or deport any non-U.S. citizen, 14 years of age and above, who was born in an “enemy” nation, including those lawfully present, if:

- ▶ Congress has declared an act of war against the nation; or,
- ▶ The president proclaims an “invasion” or “predatory incursion” or threat of invasion or incursion by foreign nation or government.

Trump may try to unlawfully abuse the authorities under the Alien Enemies Act to justify his mass detention and deportation plan by arguing that Mexican drug cartels are “invading” the United States. While this argument would be absurd because the United States is not at war with Mexico or other Central and South American countries, and cartels are not “foreign governments,” there’s still good reason to be concerned because courts have historically deferred to the executive branch determinations on these matters, even when those determinations are dubious. As an example, the courts upheld the Truman administration’s reliance on the Alien Enemies Act for detentions and deportations years after the end of World War II, disclaiming their ability to second-guess the president’s judgment that the wartime authority still applied. These unchecked postwar detentions and deportations compounded the shame and injustice of how the Alien Enemies Act had been used during the war to intern 31,000 non-citizens of Japanese, German, and Italian descent.

NILC thanks the Brennan Center and Just Security for their deep expertise in these issues and for reviewing this FAQ. More information on the Alien Enemies Act can be found [here](#). More information on the deployment of the U.S. military for immigration enforcement can be found [here](#).