

USE OF THE NATIONAL GUARD ON THE U.S.-MEXICO BORDER TO QUELL BORDER SECURITY CONCERNS: INCREASE COORDINATION BETWEEN BORDER STATES AND FEDERAL GOVERNMENT BY EXPANDING 32 U.S.C. § 112 TO ENCOMPASS IMMIGRATION ISSUES

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INTRODUCTION

Immigration issues are something that everyone has heard about. Various news sources report on the status of the U.S.-Mexico border and presidential candidates debate about immigration reform and border security.¹ Border security is clearly a problem and over the years the United States has dealt with this problem in a variety of ways, including deploying the National Guard to the border to assist Border Patrol.² Indeed, this has happened on many occasions, but the two most recent were Operation Jump Start and Operation Phalanx.³ Both of these deployments happened because of presidential orders.⁴ In the last few years, the State of Texas has taken an active role in its border security.⁵ In July 2014, Governor Rick Perry deployed 1000 Texas National Guardsmen to the Texas-Mexico border, citing the failure of the federal government to step in and beef up border security in the state.⁶

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1. See generally Julián Aguilar, *Drawbacks Seen with Having National Guardsmen on Border*, TEX. TRIB. (Apr. 18, 2012), <http://www.texastribune.org/2012/04/18/national-guard-helps-border-patrol-has-drawbacks/> [perma.cc/6AUT-YSZY]; Jim Avila, *Will National Guard Help Stop Immigrant Influx in Texas?*, ABC NEWS (Jul. 21, 2014, 7:30 PM), <http://abcnews.go.com/blogs/politics/2014/07/will-national-guard-help-stop-immigrant-influx-in-texas/> [perma.cc/YFJ5-MYJ9]; Alex Seitz-Wald & Amanda Sakuma, *Clinton and Sanders Make Big Promises on Immigration at Debate*, NBC NEWS (Mar. 10, 2016, 7:50 AM), <http://www.nbcnews.com/politics/2016-election/clinton-sanders-make-big-promises-immigration-debate-n535621> [http://perma.cc/LM8D-FWDW].

2. David M. Church, *Looking Back on Operation Jump Start*, 53 JOINT FORCE Q. 104, 105 (2009), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a515585.pdf> [perma.cc/9A78-2S8C].

3. *Border Operations*, TEX. MIL., <https://tmd.texas.gov/border-operations> [perma.cc/ZK2T-5UUG] (last visited Mar. 11, 2016).

4. *Army National Guard Operation Phalanx*, U.S. ARMY (May 19, 2011), http://www.army.mil/article/56819/Army_National_Guard_Operation_Phalanx/ [perma.cc/9GBM-7RK6].

5. See generally *Border Operations*, *supra* note 3.

6. Leigh Ann Caldwell, *Perry Sending National Guard Troops to the Border*, CNN (Jul. 21,

This Article will first provide the history of the use of the National Guard on the U.S.-Mexico border, starting with Operation Jump Start, then Operation Phalanx, and lastly Operation Strong Safety. This discussion will also include the authority by which the President or governors acted under when deploying the National Guard. Next, this Article will raise two legal considerations surrounding the deployment of National Guard troops to the border by a state governor without coordination with the federal government: the over-militarization of the border and the far-reaching effects of no coordination with the federal government. This Article then briefly discusses the reason Governor Perry did not request federal support under 32 U.S.C. § 112, which addresses drug interdiction and counter-drug activities. Lastly, this Article ends with a proposal to modify § 112 to increase state and federal government coordination and to encompass changes in border security that are necessary at this time.

I. HISTORY

The federal government utilized the National Guard long before Operation Jump Start and Operation Phalanx, specifically “[t]he National Guard has provided support to CBP [U.S. Customs and Border Protection] through engineering and counter-drug missions for more than 20 years.”⁷ The CBP, which is a part of [the Department of Homeland Security], 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.⁸

This Article will focus on the joint partnerships of the CBP, Border Patrol, and the National Guard on the southwest border of the United States. To understand the need for cooperation between both federal and state organizations, it is important to understand the factual details of three specific missions on the U.S.-Mexico border that involved the CBP, Border Patrol, and various state National Guard units over the last ten years: Operation Jump Start, Operation Phalanx, and Operation Strong Safety.

2014, 5:13 PM), <http://www.cnn.com/2014/07/21/politics/perry-national-guard-border/index.html> [perma.cc/QV54-F7C2]; Rebecca Kaplan, *Gov. Rick Perry Deploying Up to 1,000 National Guard Troops to Border*, CBS NEWS (Jul. 21, 2014, 4:34 PM), <http://www.cbsnews.com/news/gov-rick-perry-deploying-up-to-1000-national-guard-troops-to-border/> [perma.cc/P3Q7-R86C].

7. *Operation Jump Start Fact Sheet*, NAT’L GUARD (July 28, 2008), http://www.nationalguard.mil/Portals/31/Features/Southwest%20Border%20Mission/pdf/OJS_Fact_Sheet%2028JUL08.pdf [perma.cc/M6ZY-WXCB].

8. R. CHUCK MASON, CONG. RESEARCH SERV., *SECURING AMERICAN’S BORDERS: THE ROLE OF THE MILITARY 1* (2013), available at <https://www.fas.org/sgp/crs/homesecc/R41286.pdf> [perma.cc/7U83-UJQS].

A. Operation Jump Start

In May 2006, President George W. Bush authorized a two-year mission called Operation Jump Start that directed the National Guard to support the CBP.⁹ Operation Jump Start was “a large-scale, short-term, national security effort to strengthen border security and assist CBP with non-law enforcement duties while they hire[d] and train[ed] additional border patrol agents.”¹⁰ This mission also assisted in the implementation of the Secure Border Initiative¹¹ and SBInet.¹² The National Guard assisted the CBP “by executing missions such as logistical and administrative support, operating detection systems, providing mobile communications, augmenting border-related intelligence analysis efforts, building and installing border security infrastructure, and providing aviation assets, transportation and training.”¹³ The National Guard did not perform any law enforcement duties as part of this mission.¹⁴ Because of the National Guard’s presence, “more than 350 Border Patrol agents [were] able to return to traditional frontline duties,” allowing Border Patrol agents to focus on border security instead of non-law enforcement duties.¹⁵

Initially, 6000 guardsmen reported to the southwest border of the United States, specifically California, Arizona, New Mexico, and Texas, as part of

9. *Operation Jump Start - CBP Border Patrol and the National Guard*, U.S. CUSTOMS & BORDER PROTECTION (Nov. 13, 2015, 9:08 AM), https://help.cbp.gov/app/answers/detail/a_id/1021/~/-operation-jump-start---cbp-border-patrol-and-the-national-guard [perma.cc/3CLZ-9UMY]; see also Church, *supra* note 2, at 104.

10. *Operation Jump Start Fact Sheet*, *supra* note 7.

11. FED. NEWS RADIO, SECURE BORDER INITIATIVE PROGRAM GUIDE 3 (2006), available at http://www.federalnewsradio.com/wp-content/uploads/pdfs/sbi_supplement.pdf [perma.cc/UK3U-RFSQ] (The Secure Border Initiative (SBI) “is a broad, multi-year initiative looking at all aspects of the problem across the board—deterrence, detection, apprehension, detention, and removal. SBI addresses the challenges we face with an integrated mix of increased staffing, a greater investment in detection technology and infrastructure, and enhanced coordination with our partners at the federal, state, local, and international levels.”).

12. *SBInet*, GLOBAL SECURITY, <http://www.globalsecurity.org/security/systems/sbinet.htm> [perma.cc/28K3-X8BX] (last visited Jan. 24, 2016) (“SBInet is the program component of the Secure Border Initiative (SBI) assigned to Customs and Border Protection (CBP) that is responsible for integrating personnel, infrastructure, technologies, and rapid response capability into a comprehensive border protection system. By combining existing investments and current security infrastructure with state-of-the-art technologies, best practices, and creative thinking, SBInet will provide the blueprint for integrating critical border security components in order to protect U.S. borders.”); see also *Operation Jump Start - CBP Border Patrol and the National Guard*, *supra* note 9.

13. *Operation Jump Start Fact Sheet*, *supra* note 7.

14. *Id.*

15. *Operation Jump Start - CBP Border Patrol and the National Guard*, *supra* note 9.

Operation Jump Start.¹⁶ A movement of this amount of guardsmen required extensive coordination between the CBP, the National Guard, and state governors and adjutant generals.¹⁷ To further complicate coordination, “[Operation Jump Start] was unique because it was the first time both the Army National Guard (ARNG) and Air National Guard (ANG) came together in significant numbers in the homeland to conduct a major operation of extended duration.”¹⁸ The number of guardsmen dwindled to approximately 3000 in the second year because “new Border Patrol agents were trained, new infrastructure was built, and advanced technologies were implemented in border security.”¹⁹ Interestingly enough, during the two-year mission more than 29,000 guardsmen “from all 54 states and territories supported Operation Jump Start.”²⁰ The National Guard assisted in over 176,000 alien apprehensions, 1116 vehicle seizures, and seizing roughly 321,000 pounds of marijuana and cocaine valued at almost \$900,000,000.²¹ The National Guard also assisted in improving approximately thirty-one miles of fencing, thirteen miles of road, eighty-six miles of vehicle border barriers, and 1153 miles of road repaired.²² The National Guard logged over 28,000 hours of flight time in support of aviation missions.²³

The National Guard greatly assisted the CBP in strengthening U.S. border security, but the day-to-day actions of the guardsmen encapsulated more than just border security. For example, on August 1, 2006, “National Guard members working in Del Rio Sector rescued a Central American woman who was drowning in the Rio Grande River.”²⁴ Two Texas National Guard members disregarded their own safety to jump into the water and save the drowning woman, “pulling her from the depths of the muddy Rio Grande River.”²⁵ Guardsmen also assisted the Yuma, Arizona sector in finding three individuals suffering from heat exhaustion on a trail along the Colorado River.²⁶ The guardsmen spotted two individuals on the trail that the CBP subsequently apprehended.²⁷ After apprehension, the two revealed three other people were still on the trail suffering from heat exhaustion.²⁸ An air search located the three other people; two of them were severely dehydrated.²⁹ Both were transported to a

16. *Id.*

17. *Id.*

18. Church, *supra* note 2, at 104.

19. *Operation Jump Start Fact Sheet*, *supra* note 7.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Operation Jump Start - CBP Border Patrol and the National Guard*, *supra* note 9.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

nearby hospital for treatment and eventually survived.³⁰ During Operation Jump Start, the National Guard assisted in nearly 101 illegal alien rescues.³¹

For this specific mission, President Bush ordered the National Guard troops via executive order in May 2006 to the southwest border of the United States to assist the CBP.³² The question remained, under what authority could he do this? It is important to remember that “[t]he National Guard is a military force that is shared by the states and the federal government and often assists in counterdrug and counterterrorism efforts.”³³ “The term ‘National Guard’ generally refers to both the Army National Guard and the Air National Guard.”³⁴ The National Guard is essentially the organized militia for each of the states, Puerto Rico, Guam, the U.S. Virgin Islands, and the District of Columbia.³⁵ Members of the National Guard may be called into exclusive federal service (Title 10 status), under state control with federal pay and benefits (Title 32 status), or exclusive state control (State Active Duty status).³⁶ Under Title 10 status, the National Guard operates under the exclusive control of the President, receives federal pay and benefits, and is subject to the Posse Comitatus Act.³⁷ More commonly, the National Guard operates in State Active Duty (SAD) status, where guardsmen are under the exclusive control of the governor, are paid pursuant to state law, and perform activities authorized by state law.³⁸

In regards to Operation Jump Start, the National Guard operated in Title 32 status, which means command and control remained with the respective state governors. But because the National Guard served a federal purpose—like border security—the guardsmen received federal pay and benefits.³⁹ President Bush acted under his authority pursuant to 32 U.S.C. § 502(a) and 502(f).⁴⁰ Section 502(a) states:

(a) Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary concerned, shall—

(1) assemble for drill and instruction, including indoor target practice, at least 48 times each year; and

(2) participate in training at encampments, maneuvers, outdoor

30. *Id.*

31. *Operation Jump Start Fact Sheet*, *supra* note 7.

32. MASON, *supra* note 8, at 5.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 6.

40. 32 U.S.C. § 502(a), (f) (2012); *see also* MASON, *supra* note 8, at 6.

target practice, or other exercises, at least 15 days each year.

However, no member of such unit who has served on active duty for one year or longer shall be required to participate in such training if the first day of such training period falls during the last one hundred and twenty days of his required membership in the National Guard.⁴¹

Section 502(f) states:

(f)(1) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—

(A) without his consent, but with the pay and allowances provided by law; or

(B) with his consent, either with or without pay and allowances; be ordered to perform training or other duty in addition to that prescribed under subsection (a).

(2) The training or duty ordered to be performed under paragraph (1) may include the following:

(A) Support of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense.

(B) Support of training operations and training missions assigned in whole or in part to the National Guard by the Secretary concerned, but only to the extent that such training missions and training operations—

(i) are performed in the United States or the Commonwealth of Puerto Rico or possessions of the United States; and

(ii) are only to instruct active duty military, foreign military (under the same authorities and restrictions applicable to active duty troops), Department of Defense contractor personnel, or Department of Defense civilian employees.⁴²

These provisions allow for the Secretary of the Army and Secretary of the Air Force to prescribe regulations for National Guard drills and training and for the President or Secretary of Defense to request support from the National Guard for

41. 32 U.S.C. § 502(a).

42. *Id.* § 502(f).

specified missions and operations.⁴³

Even though President Bush ordered the troops to the border pursuant to 32 U.S.C. § 502(f), “the Guard units . . . 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.”⁴⁴ Other examples of the National Guard being activated under Title 32 are “the National Guard personnel who provided security at many of the [U.S.] airports after September 11 and who participated in Hurricanes Katrina and Rita-related disaster relief operations.”⁴⁵

B. Operation Phalanx

Operation Jump Start officially ended on July 15, 2008.⁴⁶ However, it was not long after in July 2010 that President Barack Obama authorized up to 1200 National Guardsmen via executive order to report to the nearly 1933-mile southwest border of the United States, specifically California, Arizona, New Mexico, and Texas, to support the CBP again.⁴⁷ This mission was termed Operation Phalanx and was the successor operation to Operation Jump Start.⁴⁸ Operation Phalanx lasted from approximately June 2010 to September 30, 2011.⁴⁹ The mission under Operation Phalanx consisted of ground surveillance, mobile communications, transportation, logistics, training support, entry identification, criminal analysis, and command and control.⁵⁰ During this operation, the National Guard “assisted in the apprehension of [approximately] 17,887 undocumented aliens,” “the seizure of 56,342 pounds of marijuana,”⁵¹ and the confiscation of substantial amounts of “illicit currency.”⁵² Like Operation Jump Start, Operation Phalanx served as a force multiplier so the CBP could have the necessary time to train and equip newly hired Border Patrol agents.⁵³ In contrast to Operation Jump Start, Operation Phalanx did not utilize National Guard forces from across the United States.⁵⁴ Operation Phalanx consisted only

43. MASON, *supra* note 8, at 6.

44. *Id.* at 1.

45. *Id.* at 6.

46. *Id.* at 1.

47. *Army National Guard Operation Phalanx*, *supra* note 4.

48. *Id.*

49. *Border Security: Observations on Costs, Benefits, and Challenges of a Department of Defense Role in Helping to Secure the Southwest Land Border: Hearing on GAO-12-657T Before the Subcomm. on Border & Mar. Sec., H. Comm. on Homeland Sec.*, 112th Cong. (2012) [hereinafter *Hearing*] (statement of Brian J. Lepore, Director, Defense Capabilities and Management Issues), available at <http://gao.gov/assets/600/590173.pdf> [<http://perma.cc/ZDG7-ZY6M>].

50. *Id.* at 3; see also 32 U.S.C. § 502(a) (2012).

51. *Hearing*, *supra* note 49, at 6.

52. *Id.*

53. *Id.*

54. *Id.* at 3.

of local National Guard units.⁵⁵

Although the official end date for Operation Phalanx was September 30, 2011, President Obama revived Operation Phalanx in December 2011, but decreased the number of guardsmen from 1200 to only 300.⁵⁶ Also, the focus of the mission shifted from providing ground forces to assist the CBP to aerial patrols along the border with National Guard security and intelligence analysts assisting federal law enforcement.⁵⁷ Now termed Operation Phalanx II,⁵⁸ “[t]he National Guard’s mission is to conduct aerial detection and monitoring to disrupt Transnational Criminal Organizations (TCOs) and Drug Trafficking Organizations (DTOs) in support of the U.S. Department of Homeland Security (DHS).”⁵⁹ The National Guard provides “air-centric operations as augmentation to CBP as they increase capability with personnel and technology.”⁶⁰

This shift in focus and drawdown resulted from better staffing of the U.S. Border Patrol and the realization the National Guard could be better utilized through aerial support missions.⁶¹ “In fiscal year 2011, there were more than 21,400 U.S. Border Patrol agents on the nation’s borders, including about 18,500 on the Southwest border.”⁶² In addition to the increased staffing of the Border Patrol, because the National Guard troops are prohibited by federal regulation from making arrests on the border, the shift to aerial surveillance support made the National Guard more effective.⁶³ As recently as June 26, 2015, guardsmen from the Illinois Army National deployed for six months to the southwest border in support of Operation Phalanx II.⁶⁴ As long as the program continues to be funded as part of the annual National Defense Authorization Act (NDAA), Operation Phalanx will continue during upcoming years.

The authority used by President Obama for Operation Phalanx—32 U.S.C. § 502(f)—is the exact same as President Bush during Operation Jump Start.⁶⁵

55. *Id.*

56. Aguilar, *supra* note 1; *see also* Edwin Mora, *U.S. General: ‘More Troops’ Needed to Secure the Southwest Border*, CNS NEWS (Apr. 17, 2012, 6:25 PM), <http://cnsnews.com/news/article/us-general-more-troops-needed-secure-southwest-border> [<http://perma.cc/BTR4-CDLT>].

57. Angela King-Sweigart, *Pennsylvania Guard Soldiers Depart for Southwest Border Support Mission*, NAT’L GUARD (Jan. 7, 2015), <http://www.nationalguard.mil/News/ArticleView/tabid/5563/Article/577014/pennsylvania-guard-soldiers-depart-for-southwest-border-support-mission.aspx> [<https://perma.cc/6UGV-2LDB>].

58. James McDonnough, *Hometown Military News: June 26, 2015*, WJBC (Jun. 26, 2015), <http://www.wjbc.com/2015/06/26/hometown-military-news-june-26-2015/> [<http://perma.cc/JE8Q-FHHD>].

59. *Border Operations*, *supra* note 3.

60. *Id.*

61. *Hearing*, *supra* note 49, at 3.

62. Aguilar, *supra* note 1.

63. *Hearing*, *supra* note 49, at 2, 7.

64. McDonnough, *supra* note 58.

65. Julius A. Rigole, *The War Next Door: DoD’s Role in Combating Mexican TCOs* 18 (March 2013) (unpublished manuscript), *available at* <http://www.dtic.mil/cgi-bin/GetTRDoc?>

C. Operation Strong Safety

Since 2006, it is evident there has been some National Guard presence along the southwestern border pursuant to an authorization from the President. Interestingly in July 2014, Texas Governor Rick Perry, after repeated requests for federal government assistance,⁶⁶ ordered 1000 Texas National Guardsmen “to help secure the southern border where tens of thousands of unaccompanied minors from Central America ha[d] crossed into the United States th[at] year in a surge that [was] deemed a humanitarian crisis.”⁶⁷ In his requests to President Obama, Governor Perry pleaded with the President “to deploy federal troops to help quell the surge of immigrants crossing the border illegally,” and “urged the president to give the troops ‘arrest powers to support Border Patrol operations.’”⁶⁸ Governor Perry and other Texas officials believed “drug runners, human smugglers and other criminal elements [were] sneaking into the USA while the Border Patrol [was] distracted by the crisis, and the National Guard could help collar those criminals.”⁶⁹ Others, like Judge Ramon Garcia in Hidalgo County, where most of the immigrant youth were crossing, thought “[t]here [was] no public safety crisis [t]here. These [were] not drug dealers. These [were] not terrorists. These [were] human beings looking for something better than what they had.”⁷⁰ This particular operation is the main focus of this Article and demonstrates a gap between the federal government and Texas officials that must be bridged through legislation.

Governor Perry stated, “I will not stand idly by. The price of inaction is too high.”⁷¹ Governor Perry requested President Obama and Congress “hire an additional 3,000 border patrol agents for the Texas border, which would eventually replace the temporary guard forces.”⁷² Interestingly, White House spokesman Josh Earnest noted that “the White House ha[d] not yet received the formal communication required for Perry to deploy guard troops.”⁷³ The Rio Grande sector experienced the largest amount of immigrant children turning

AD=ADA590665 [https://perma.cc/D8AK-U3KW].

66. *Texas Governor Deploys National Guard to Border for ‘Referring and Deterring,’* ABC NEWS (Jul. 21, 2014, 5:59 PM), <http://abcnews.go.com/US/perry-orders-national-guard-point-immigrants-direction/story?id=24654484> [https://perma.cc/L6DC-K9RL] [hereinafter *Referring and Deterring*].

67. Caldwell, *supra* note 6.

68. Molly Hennessy-Fiske, *Texas Guard Troops Don’t Get Arrest Power at Border—Yet*, L.A. TIMES (Jul. 27, 2014, 9:00 AM), <http://www.latimes.com/nation/nationnow/la-na-texas-national-guard-20140726-story.html> [http://perma.cc/7TTSQ-VX2R].

69. Rick Jervis, *National Guard at Border Gets Mixed Reviews in Texas*, USA TODAY (Jul. 31, 2014, 3:56 PM), <http://www.usatoday.com/story/news/nation/2014/07/31/national-guard-border-immigrants/13394795/> [http://perma.cc/U9RD-P2FG].

70. *Id.*

71. Caldwell, *supra* note 6.

72. *Id.*

73. *Id.*

themselves into border patrol.⁷⁴ This sector “ha[d] 3,000 border patrol agents covering miles of land and 250 miles of water, which equates to 5.4 agents per mile.”⁷⁵ Ultimately, both the President and Governor Perry have the authority to deploy troops, but whoever actually deploys the troops will foot the bill for the deployment.⁷⁶ Perry’s deployment cost Texans approximately \$12 million per month.⁷⁷

The Obama administration, along with others, were skeptical of Governor Perry’s actions because of the potential political motivations behind it, considering “many of the minors [were] not trying to evade the border patrol but [were] turning themselves in after crossing the border.”⁷⁸ Governor Perry defended his actions, stating the guard [would] be “force multipliers,” helping CBP agents both on the ground and in the air to catch the 80% of people crossing the border who were not children to combat cartel and trafficking crime.⁷⁹ Governor Perry further argued, “[t]here can be no national security without border security, and Texans have paid too high a price for the federal government’s failure to secure our border.”⁸⁰ Lucy Nashed, a spokeswoman for Governor Perry, noted, “[a]s Border Patrol is being diverted from their law enforcement duties to give humanitarian aid to these kids, criminals are taking advantage of the opportunity to ramp up their illicit activities.”⁸¹

However, not all law enforcement agencies noticed an uptick in the amount of criminal activity.⁸²

Janice Ayala, the San Antonio-based special agent in charge of federal Homeland Security Investigations, said her agents ha[d]n’t noticed any spikes in crime resulting from the influx of immigrant youth.

There [were] more arrests of smugglers, but that’s because of an upsurge in federal agents at the border, bolstering the web of the Border Patrol checkpoints, public safety agents and sheriff’s deputies. We have a multilayered enforcement system on the border right now. I can’t say there’s been an increase in suspected people getting by.⁸³

Webb County Sheriff Martin Cuellar agreed with Ayala, as he had not noticed any criminal activity tied to the immigrant youth influx.⁸⁴

However, Texas Adjutant General John Nichols contended his troops would

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Referring and Deterring, supra* note 66.

81. Jervis, *supra* note 69.

82. *Id.*

83. *Id.*

84. *Id.*

only be “referring and deterring” immigrants and not detaining people,⁸⁵ as “[t]he mission of the guardsmen [was] not to stop the flow of undocumented children but to combat criminal elements trying to slip through in the confusion, said Nashed.”⁸⁶ Specifically, the Texas National Guard worked with the Texas Department of Public Safety (DPS), supporting operations along the Texas-New Mexico border.⁸⁷ The National Guard’s mission

[was] to directly support Texas DPS in combating pervasive criminal elements operating along the border and to prevent them from crossing over into the U.S. by enhancing security efforts through the visible presence on the ground and along the Rio Grande River, working alongside commissioned law enforcement officers to detect and prevent criminals from infiltrating through the international border, and helping to ensure the safety of the citizens of Texas.⁸⁸

Since Governor Perry, not the President, ordered their deployment, the Texas National Guard only assisted Texas DPS in enforcing state laws.⁸⁹ It did not have the authority to enforce federal law.⁹⁰

Governor Perry acted within his gubernatorial authority when he activated the Texas National Guard to respond to the crisis on the Texas-Mexico border.⁹¹ Generally, a governor of a state or territory is the Commander in Chief of the state National Guard unless the state National Guard is federalized.⁹² Guardsmen operating in SAD status perform duties pursuant to the applicable state constitution and statutes.⁹³ In this status, the National Guard is under the command and control of a state governor and adjutant general.⁹⁴ Generally, the governor of a state can order the National Guard under his or her control into SAD status to respond to emergencies like civil disturbances.⁹⁵ Here, Governor Perry was well within his rights as the governor to order the Texas National Guard into SAD status for deployment to the Texas-Mexico border. However, because the troops were in SAD status, Texas had to pay all costs associated with

85. *Referring and Deterring*, *supra* note 66.

86. Jervis, *supra* note 69.

87. *Border Operations*, *supra* note 3.

88. *Id.*

89. Jervis, *supra* note 69; *see also* Hennessy-Fiske, *supra* note 68.

90. Jervis, *supra* note 69; *see also* Hennessy-Fiske, *supra* note 68.

91. David Nakamura & Karen Tumulty, *Governor Perry to Send National Guard Troops to Mexican Border Amid Migrant Crisis*, WASH. POST (Jul. 21, 2014), https://www.washingtonpost.com/politics/perry-to-send-national-guard-troops-to-mexican-border-amid-migrant-crisis/2014/07/21/499feb5a-110c-11e4-98ee-daea85133bc9_story.html [perma.cc/4L55-3J96].

92. THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, DOMESTIC OPERATIONAL LAW: 2013 HANDBOOK FOR JUDGE ADVOCATES 57 (2013).

93. *Id.*

94. *Id.*

95. *Id.*

the deployment.⁹⁶

II. LEGAL CONSIDERATIONS

Border security and immigration are undoubtedly a federal government concern.⁹⁷ Veronica Escobar, an El Paso, Texas county judge, argued, “[i]t’s not something the federal government has asked [Governor Perry] to do . . . It is such a waste of taxpayer resources.”⁹⁸ Uncoordinated responses to border security issues present a host of concerns like over-militarization of the border and potentially negative far-reaching effects of such responses.⁹⁹ Operation Strong Safety presents a particularly interesting scenario because Governor Perry seemed to be very preoccupied with who would be paying for the deployment of the troops and even stated on numerous occasions he expected the federal government to reimburse the State of Texas for the money spent on the deployment; however, there is no evidence he requested funding under 32 U.S.C. § 112(a), which would provide an avenue of funding if the deployment was strictly for “drug interdiction and counterdrug activities.”¹⁰⁰ Below, this Article will analyze all of these legal considerations before proposing a solution to the ultimate issue of lack of coordination and funding.

A. Over-Militarization of the Border

Governor Bill Richardson of New Mexico commented, “I think border states have to be careful that they don’t over-militarize the border.”¹⁰¹ He believed Governor Perry’s “border operations have a military-style tone in their tactics and equipment, with football-themed names like Operation Linebacker and Operation Strong Safety.”¹⁰² Millions of Texas tax dollars were spent towards paying for a military contractor to develop Texas border-security strategy.¹⁰³ This is not the first time Governor Perry deployed guardsmen to the border.¹⁰⁴ He did so in 2007 during Operation Wrangler.¹⁰⁵

Militarization at the border does not help the immigration problem. It simply exacerbates it, which is why the federal government does not seek to militarize the border unless absolutely necessary. Militarizing the border also reinforces the idea in the American “public’s mind that the migrant crisis stems from

96. *Id.*

97. See, e.g., Manny Fernandez, *Texas Bolsters Border Patrol with Its Own*, N.Y. TIMES Aug. 7, 2014, at A1, available at http://www.nytimes.com/2014/08/07/us/texas-is-accused-of-overreaching-and-overspending-to-police-border.html?_r=1 [perma.cc/25WD-VKBB].

98. *Id.*

99. *Id.*

100. 32 U.S.C. § 112 (2012).

101. Fernandez, *supra* note 97.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

inadequate security at the border rather than from minors fleeing Central American's violence," as evidenced in Operation Strong Safety.¹⁰⁶ The situation at the border in 2014 was a humanitarian crisis.¹⁰⁷ Migrants sought refuge in the United States.¹⁰⁸ This is evidenced by the fact that many of the migrants willingly turned themselves in to Border Patrol.¹⁰⁹ Democratic Representative Luis Guterierrez of Illinois stated, "[s]o, they're fleeing men and women with guns in Central America, and we're going to receive them with men and women with guns here."¹¹⁰ What type of image is this creating for those seeking refuge in the United States? Certainly not an image of safety and acceptance, but instead one of fearfulness and disdain. The United States acts contrary to its foreign policy ideals and the nation's bedrock founding principles when it treats refugees like unwanted, wild animals.

One of the big concerns regarding the deployment of the Texas National Guard is the fact that "Texas operates independently from federal officials[,] . . . often spotting and responding to suspicious activity before the Border Patrol."¹¹¹ Shockingly, in 2012, a state officer attempted to shoot the tires of a pickup truck suspected of carrying drugs from a helicopter.¹¹² In the process, the officer killed two unarmed illegal immigrants hiding in the vehicle.¹¹³ Also, in 1997, "a Marine assigned to work with Border Patrol shot and killed a Latino high school student herding his family's goats."¹¹⁴ Tim Dunn, a sociology professor at Salisbury University, noted, "[t]he military, including the National Guard, have been reluctant to take a direct enforcement role [on the border, especially making arrests] . . . because they're not trained to handle that kind of situation."¹¹⁵ Oklahoma Republican Representative Tom Cole agreed, stating, "[f]rankly, they're not trained for this particular mission . . . I don't like the idea of militarizing the border, and I don't think that's what the National Guard is for."¹¹⁶

The over-militarization of the border presents an image to the international community that runs afoul of the image the United States seeks to portray. Particularly at the time of Operation Strong Safety, the United States was dealing with an influx of immigrants primarily from Central America.¹¹⁷ Often, these

106. James Oliphant & Rachel Roubein, *What Would the National Guard Actually Do at the Border?*, NAT'L J. (Jul. 24, 2014), <http://www.nationaljournal.com/s/72813/what-would-national-guard-actually-do-border> [perma.cc/ZH27-J59J].

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Fernandez, *supra* note 97.

112. *Id.*

113. *Id.*

114. Hennessy-Fiske, *supra* note 68.

115. *Id.*

116. Oliphant & Roubein, *supra* note 106.

117. Bradley Saacks, *Rick Perry Says 74 Percent Drop in Border Apprehensions Shows Texas Surge Worked*, POLITIFACT (July 26, 2015, 6:00 AM), <http://www.politifact.com/texas/>

immigrants came to the United States to seek refuge from over-militarization in their home countries. These immigrants fled from guns and persecution; they should not meet these same things at the U.S.-Mexico border.

B. Uncoordinated Efforts Mean Far-Reaching Effects

In addition to the fear of over-militarization of the border, it is important for the state and federal governments to coordinate on issues of national importance like border security and immigration. Uncoordinated deployments of troops do not assist in creating an effective strategy at the border.¹¹⁸ An effective border strategy must encompass all pieces of the puzzle and not just the concerns of one state. Particularly during Operation Strong Safety, because Governor Perry ordered the deployment without the cooperation of the President, there was no coordination between the CBP and the Texas National Guard.¹¹⁹ In fact, even Texas, “border sheriffs complained they were not consulted before Perry’s announcement, and expressed concern that Perry would send in troops unfamiliar with the area instead of granting the money spent on the guard - \$12 million a month—to their agencies for added staff and overtime.”¹²⁰ There does not appear to have been any coordination even within other relevant Texas state agencies in regards to this deployment of troops. This lack of coordination is unacceptable when dealing with an issue with potential international ramifications if something were to go wrong. Not to mention such extreme lack of coordination clearly depicts a weakness in the United States that its enemies could seek to take advantage of.

Furthermore, the lack of coordination with the federal government prevents guardsmen from moving into CBP jurisdiction.¹²¹ They “cannot physically detain or send any of the thousands of surging immigrants, many of them mothers and children, back across the border.”¹²² The National Guard also cannot use weapons to stop illegal immigration; the weapons may only be used for self-defense purposes.¹²³ The National Guard is extremely limited in what it can do on the border even with federal coordination. But without it, its authority becomes meniscal in dealing with immigration issues. CBP Commissioner Gil Kerlikowske in an interview with ABC News made clear the National Guard was not needed during this particular immigration crisis stating, “I don’t see the National Guard being particularly good help in this instance. Many of these people are not people that we’re having to apprehend or chase, these are people that are turning themselves in asking for some type of status here in the United

statements/2015/jul/26/rick-perry/rick-perry-says-74-percent-drop-border-apprehensio/
[<https://perma.cc/2997-VE2U>].

118. *Id.*

119. Avila, *supra* note 1.

120. Hennessy-Fiske, *supra* note 68.

121. Avila, *supra* note 1.

122. *Id.*

123. *Id.*

States.”¹²⁴ Jeh Johnson, Secretary of the Department of Homeland Security, indicated he would want to “understand better what the options are for the use of the Guard,” citing concerns about the National Guard’s limitations.¹²⁵

Jayson Ahern, former deputy and then-acting commissioner of the CBP from 2007 to 2009, argued, “[c]learly if they are properly deployed as part of a strategy, they can be very helpful. What’s not helpful is uncoordinated deployments that don’t have a good plan and that aren’t well thought-out.”¹²⁶ Ahern, referencing Operation Jump Start, continued, “[t]he key in that case, was that it was the federal government, through the Department of Homeland Security and the Pentagon, mobilizing the Guard, not individual states.”¹²⁷ Ahern stressed the importance of proper training, planning, and supervision of the National Guard troops directly by Border Patrol.¹²⁸ There are very strict limitations to what the National Guard can do, especially with other people involved.¹²⁹ For example, guardsmen cannot “step in[to] the shoes of federal officers to enforce immigration policy, they [cannot] conduct law-enforcement activities, and only in rare cases can they make arrests.”¹³⁰ In Ahern’s opinion, “if [the National Guard], solely, stopped and detained someone, [] that would be a stretch of their authority.”¹³¹ White House Press Secretary Josh Earnest agreed that a response to the immigration issue should be a coordinated effort, as “National Guard troops would be best deployed in coordination with a broader request for \$3.7 billion in emergency appropriations the administration ha[d] requested to deal with the crisis.”¹³² Earnest added Governor Perry had not provided “the kinds of communication that you’d ordinarily see from a governor when they want to make a deployment like this.”¹³³

The uncoordinated efforts of Texas officials resulted in the tumultuous birth of Operation Strong Safety. This mission included little coordination with other Texas state agencies at the onset and also no coordination with the federal government on an issue of particular interest to the federal government. This lack of coordination presents many problems not only within the United States, but also with the international image the United States seeks to portray to other countries. The lack of coordination also creates significant limitations on the Texas National Guard and what objectives it can actually achieve on the Texas-Mexico border. In a situation that garnered immense federal government attention and in which the federal government determined that National Guard support was not needed, Texas officials completely disregarded this assessment

124. *Id.*

125. *Id.*

126. Oliphant & Roubein, *supra* note 106.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Kaplan, *supra* note 6.

133. Nakamura & Tumulty, *supra* note 91.

and proceeded to send troops to the border unable to contribute meaningfully to the fight against illegal immigration and border security. Operation Strong Safety is a prime example of why the federal and state governments should work together in addressing border security issues.

C. Why Not Utilize 32 U.S.C. § 112(a)?

Interestingly enough, Governor Perry and Texas officials indicated that “the new deployment of troops has little to do with the influx of young Central American immigrants flooding the border and will instead mirror previous border missions focused on crime and smuggling.”¹³⁴ Travis Considine, a Perry spokesman, stated, “the Texas troops aren’t being sent to deal with the child-migrant crisis at all, but to help combat ‘crime and cartel activity that is resulting from our unsecured border.’”¹³⁵ Although other news sources reported vastly different reasons for Operation Strong Safety, if this truly was the case, then it seems the primary reason for the deployment would have been for drug interdiction and counterdrug activities. Then why didn’t Governor Perry seek support from the federal government under 32 U.S.C. § 112(a)?

Section 112(a) states, in relevant part, “The Secretary of Defense may provide funds to the Governor of a State who submits to the Secretary a State *drug interdiction and counter-drug activities* plan satisfying the requirements of subsection (c).”¹³⁶ There is no evidence Texas officials ever submitted an application under this provision for support. If the application was approved, the federal government would have funded the deployment and Governor Perry would have retained control of the National Guard. This solution would have addressed the funding issue, the need for Governor Perry to maintain command and control of his troops, and increased coordination between the federal government and Texas officials. But still, an application was not submitted. Why is that? Support was not sought under this provision because the purpose of the mission was not strictly “drug interdiction and counter drug activities.”¹³⁷ Texas officials were concerned with border security, particularly in regards to the illegal immigrants crossing the Texas-Mexico border, and not specifically the transportation of drugs across the border.¹³⁸ This makes this issue strictly immigration, which does not fall within the parameters of § 112(a).

III. PROPOSAL

In order to increase cooperation between the federal and state governments and quell many of the legal considerations presented above, § 112 should be amended to encompass immigration missions, not only drug interdiction and counterdrug activities. The specific language of § 112(a) mentioned previously

134. Fernandez, *supra* note 97.

135. Oliphant & Roubein, *supra* note 106.

136. 32 U.S.C. § 112 (2012) (emphasis added).

137. See, e.g., Caldwell, *supra* note 6; Hennessy-Fiske, *supra* note 68.

138. *Id.*

would need to be slightly revised to change the scope of requests under § 112(a). The amended statute could consist of the following language:

(a) Funding Assistance.—The Secretary of Defense may provide funds to the Governor of a State who submits to the Secretary a State *border security activities plan satisfying the requirements of subsection (c) that sufficiently addresses a problem related to drug interdiction, counter-drug activities, human trafficking, illegal immigration, or other similar immigration issues*. Such funds shall be used for the following

This amended language would expand the scope of § 112 so states could request funding from the federal government for more than just “drug interdiction and counter-drug activities.”¹³⁹ In addition, the likelihood of coordination between the federal and state governments would be significantly increased since states would have the opportunity to have the deployment paid for by the federal government. This was specifically a concern of Governor Perry during Operation Strong Safety.¹⁴⁰ This coordination is necessary to quell many of the concerns raised in Part II of this Article. In fact, this coordination is already contemplated by § 112 as written. Section 112(d)(1), in relevant part, states:

The plan as approved by the Secretary may provide for the use of personnel and equipment of the National Guard of that State to assist the *Immigration and Naturalization Service in the transportation of aliens who have violated a Federal or State law prohibiting or regulating the possession, use, or distribution of a controlled substance*.¹⁴¹

This language would simply need to be amended to broaden the scope of applicability from “federal or state law prohibiting or regulating the possession, use, or distribution of a controlled substance”¹⁴² to the applicable state or federal laws dealing with the issue proposed in the original application, whether that be drugs, human trafficking, illegal immigration, or other immigration issues. Once the issue is identified in the application, the relevant federal agencies would be notified and directed to coordinate with the applicable state National Guard.

Other sections of § 112 would need to be amended to reflect this change as well. One example would be the criteria by which such plans are approved. Section 112(c) states:

(c) Plan Requirements.—A State *drug interdiction and counter-drug activities plan shall—*

(1) specify how personnel of the National Guard of that State are to be used in *drug interdiction and counter-drug activities*;

(2) certify that those operations are to be conducted at a time when the

139. 32 U.S.C. § 112.

140. Fernandez, *supra* note 97.

141. 32 U.S.C. § 112(d)(1) (emphasis added).

142. *Id.*

personnel involved are not in Federal service;

(3) certify that participation by National Guard personnel in those operations is service in addition to training required under section 502 of this title;

(4) certify that any engineer-type activities (as defined by the Secretary of Defense) under the plan will be performed only by units and members of the National Guard;

(5) include a certification by the Attorney General of the State (or, in the case of a State with no position of Attorney General, a civilian official of the State equivalent to a State attorney general) that the use of the National Guard of the State for the activities proposed under the plan *is authorized by, and is consistent with, State law*; and

(6) certify that the Governor of the State or a civilian law enforcement official of the State designated by the Governor has determined that any activities included in the plan that are carried out in conjunction with Federal law enforcement agencies serve *a State law enforcement purpose*.¹⁴³

The italicized portions above would need to be broadened to encompass the other areas of applicability proposed by this Article. Specifically, § 112(c)(5)-(6) would need to be amended to delete the requirement that activities included in the plan be consistent with state law and serve a state law enforcement purpose. This is necessary, especially in regards to immigration, because these laws are not typically encompassed in the laws of a state. However, it could be argued the enforcement of immigration laws, particularly for border states like Arizona, California, New Mexico, and Texas, do serve a state law enforcement purpose and are consistent with state law because of the interest the state has in the enforcement of those laws is extremely high.

Lastly, § 112(h) would need to be amended to contain definitions for new areas of concern, like human trafficking, illegal immigration, and other immigration issues. What these definitions should look like is outside the scope of this Article due to the specificity to which such definitions might need to be articulated. However, the relevant federal agencies, such as the CBP and DHS, should work together to determine what these definitions should look like. It would be important to include examples of “other immigration issues” in the definitions to provide states with as much direction as possible when considering and drafting an application under this provision.

As drafted, § 112 does not provide an adequate avenue of support for state governments with border security issues, particularly those states that border Mexico. The proposed changes demonstrate an evolution in the law needed to increase coordination between border states and the federal government when it

143. *Id.* § 112(c) (emphasis added).

comes to addressing border security issues. Without these changes, missions like Operation Strong Safety will continue to happen and there will continue to be a tension between the various border states and the federal government. The proposed changes strike a fair balance between coordination amongst those affected, state government border security concerns, and the President's federal border security agenda. Without this necessary change, there will continue to be rogue operations like Operation Strong Safety when state governors feel like they have no other alternatives and are not receiving the necessary support from the federal government.

CONCLUSION

In summary, the presence of the National Guard on the border is not a recent phenomenon. It has been happening since 2006. The most successful of these missions have been those like Operation Jump Start and Operation Phalanx that are a direct result of an order from the President. The success of these missions can be linked to the coordination and planning from both state and federal governments. One of the most recent deployments of troops by Governor Perry, Operation Strong Safety, is a perfect example of why federal and state coordination is needed for border security missions. Specifically, coordination with the federal government increases the viability of the National Guard at the border and also allows the federal government to use the National Guard in such a way that is conducive with national border security policy.

State governors acting in direct contradiction of the federal government could result in over-militarization of the border and other far-reaching effects that stem from the lack of coordination between the relevant government agencies. Although it is unknown why Governor Perry did not formally request support under § 112, it is safe to assume Texas officials did not actually believe the § 112 application would pass muster because the mission would not have focused on a drug interdiction or counter-drug activities. Because of this and to avoid any such missions like Operation Strong Safety in the future, § 112 should be amended to include human trafficking, illegal immigration, and other immigration issues, so each state will have an avenue to request funding of such missions and the federal government will be able to coordinate with the relevant state governments on these issues. The rogue actions of individual border states like Texas could significantly damage the progress the United States has made in regards to border security and has the possibility of destroying international relations. Border security is national security and national security is a responsibility of the federal government. As a result, § 112 should be amended for the reasons stated above.