Office of the General Counsel
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

TO: All State Attorneys General

April 17, 2025

Dear All:

Several of your States have inquired of the Department of Homeland Security (DHS) whether your National Guard may perform immigration functions under Title 8 of the U.S. Code in States other than their home State. This memorandum outlines several circumstances under which your National Guard may do so.

I. Federal-State Status Under Title 32, U.S. Code

When National Guard is operating in Title 32 Status, or Federal-State Status, they may perform immigration functions in a foreign State under two circumstances. Each is addressed below.

A. Cooperation Under 8 U.S.C. §1357(g)(10)

States with the consent of a foreign State, such as pursuant to an interstate cooperation agreement, may operate in that State on terms set by the home State. *See, e.g.*, Emergency Management Assistance Compact, PL 104–321, October 19, 1996, 110 Stat 3877. Many States, for example, sent National Guard to the southern border to assist Texas during the Biden Administration's border crisis.

The ability to operate in the State, however, does not itself establish authority to perform functions under Title 8. Title 8, however, authorizes cooperation under 8 U.S.C. § 1357(g)(10).

Specifically, § 1357(g)(10) authorizes States to "communicate with the Attorney General regarding the immigration status of any individual" and to "otherwise cooperate with the Attorney General in the identification, apprehension, detention, or removal" of illegal aliens. This establishes broad authority for cooperation between States and the federal government in immigration enforcement, even absent a formal "287(g) Agreement" (see Subparagraph B). Such cooperation does not require additional federal authorization nor is it preempted by federal law.

Under 1357(g)(10), State Governors deploying their National Guard forces in a Title 32 status can coordinate directly with DHS and with other States to identify and detain illegal aliens, as such actions fall within the scope of cooperative support to federal immigration enforcement and not State action. The statute does not limit cooperation to immigration enforcement activities undertaken within a State's own borders. Nor does it prohibit joint enforcement operations by National Guard personnel from different States.

As such, when National Guard is lawfully operating in a foreign State in Title 32 Federal-State status, and when the federal government requests cooperation in performing Title 8 functions, the National Guard may perform those functions pursuant to 8 U.S.C. § 1357(g)(10), which does not require any written agreement with the federal government or other States.

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B. Performing Immigration Functions Under 8 U.S.C. § 1357(g)

Section 1357(g) authorizes a State or political subdivision to "enter into a written agreement"[1] with the federal government "pursuant to which an officer or employee of the State or subdivision . . . [may] perform a function of an immigration officer." 8 U.S.C. § 1357(g)(1). When performing these functions, the State or local employee is "subject to the direction and supervision of the" federal government, *id.* § 1357(g)(3), and "shall be considered to be acting under color of Federal authority," *id.* § 1357(g)(8).

What the above describes is a State or local employee becoming a federal agent under specified circumstances for specified functions. It follows that a member of the National Guard in Title 32 status acting pursuant to a written agreement under § 1357(g) may do so anywhere in the United States so long as it is pursuant to the "direction and supervision" of the federal government. This situation is analogous to a National Guard employee acting in Title 10 status, which is similarly not limited to the home State of the employee.

Nothing in § 1357(g) contradicts this. In fact, § 1357(g) suggests the opposite. It states that the phrase "detention of aliens"—an activity expressly authorized by § 1357(g)—includes "the transportation of . . . aliens *across State lines* to detention centers." 8 U.S.C. § 1357(g)(1) (emphasis added).

For these reasons, the National Guard may perform immigration functions outside their home State pursuant to an agreement under § 1357(g).

II. Fully Federal Status under Title 10

The National Guard may also perform Title 8 functions once activated under Title 10 provided the Secretary of Homeland Security deputizes them under 8 U.S.C. § 1103(a)(6).

Section 1103(a)(6) permits the Secretary to designate "any employee of the United States" as an immigration officer. When National Guard members are activated in a federal status under Title 10, they are employees of the United States. This is supported by a fair reading of the statute's plain language, its broad grant of authority to the Secretary for immigration enforcement, use of the term "employee" in other areas of federal law, and Article I of the Constitution, which provides that activated State militias are "employed in the service of the United States." U.S. Const. art I, § 8, cl. 16.

Additionally, enforcement of federal immigration law by the National Guard does not run afoul of the Posse Comitatus Act (PCA), 18 U.S.C. § 1385, or the restrictions of 10 U.S.C. § 375 for assistance of civilian law enforcement activities. By their own terms, both statutes provide clear exceptions for law enforcement activities authorized by Congress. Specifically, the PCA permits law enforcement activities "in cases and under circumstances expressly authorized by the Constitution or Act of Congress." A similar exception is provided in 10 U.S.C. § 375, which permits law enforcement activities "otherwise permitted by law." Given these express exceptions, the general prohibitions against military members engaging in law enforcement activities should

[1] This is commonly referred to as a "Section 287(g) Agreement."

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not be construed to conflict with 8 U.S.C. § 1103(a)(6), which authorizes the Secretary to deputize National Guard members operating under Title 10 as immigration officers.

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