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USAWC MILITARY STUDIES PROGRAM PAPER

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THE NATIONAL GUARD DRUG INTERDICTION MISSION:
A CIRCUMVENTION OF POSSE COMITATUS?

An Individual Study Project
Intended for Publication

by

Lieutenant Colonel Ronald B. Flynn, AR

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Project Adviser

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U.S. Army War College
Carlisle Barracks, Pennsylvania 17013
2 April 1990

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ABSTRACT

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The concept of Posse Comitatus is well understood by all three branches of the government. As a statute, the Posse Comitatus Act of 1878 prohibits the use of U.S. military forces to enforce civil law without a Presidential Proclamation of National Emergency. Drug interdiction requirements in the U.S. have exceeded the capability of civil authorities at all levels, federal, state, and local. The Congress mandated that the Department of Defense take the lead in this area. This places the military in the difficult position of executing a mission that encroaches on the intent of Posse Comitatus. The National Guard, by virtue of its unique dual role as a federal force, and as a state militia, is exempt from some of the restrictions imposed upon the active military. As such, the Guard is being committed to training missions under Title 32 of the U.S. Code in direct support to civil authorities. The extended use of the Guard in a drug interdiction role appears to violate the intent of Posse Comitatus. Such an interpretation by the courts could obviate any success achieved by DOD in attempting to accomplish its mission.



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INTRODUCTION

It was a moonless night on the wind swept ridge line. Surprisingly cold for the month of June it was felt, by the three soldiers as they hunkered in their covered position. Out of a sense of duty, or perhaps out of boredom, one of the men put on his night vision goggles and peered out over the edge of ridge to scan the valley below. Nothing unusual, as usual. What a waste of time, he thought. As he glanced to his right flank he thought he detected some movement. Must be those damn coyotes again. He looked harder and saw two, three, perhaps six forms darting toward him and the discernible outline of weapons in their hands! "Holy Christ!" he muttered through clenched teeth as he raised his M-16 and offered a challenge, "Alto! Alto!" "Mata lo!" came the reply in a thick Colombian accent, followed by a suspended moment of intense madness that marks a fire fight at close range...the flashing muzzles of automatic weapons, the explosion of a grenade, and the silence...interrupted only by the sound of retreating foot steps, the smell of cordite in the air, and the unmistakable odor of burning flesh.

The evening news would report the death of three soldiers the night before, not in Columbia, or Peru, or some other country in South America, but on the U.S. border with Mexico. Killed in the line of duty while serving as part of a routine drug interdiction

mission providing surveillance of known access routes across the porous southern border of the United States. Killed while fighting in the unofficial "War on Drugs", on American soil, in support of civilian law enforcement, that is, in a domestic role enforcing civil law.

How could that be? In the face of Posse Comitatus, how could it happen that U.S. soldiers would be put in such a situation? The news report would continue to disclose the fact that the casualties were California National Guardsmen performing "federal training duty" in support of drug interdiction efforts being conducted by the U.S. Border Patrol, and various other federal agencies to include the U.S. Customs, and the Drug Enforcement Agency.

While wholly fictitious of course, this scenario has great potential considering the degree to which National Guardsmen across the country have become involved in supporting Federal and State law enforcement agencies in recent years. As early as 1983, California Army National Guard helicopters were supporting the state's Campaign Against Marijuana Planting, better known as the CAMP anti-drug program. Using the helicopters as aerial platforms for observation, deputy sheriffs overflew their counties looking for illegal marijuana plants. Typical of the success of this type of operation was a major discovery in July 1989, in Santa Barbara County that resulted in the eradication of 13,000 plants with a wholesale value around \$39 million.¹

Similar successes were achieved in other states as the

National Guard's role in drug interdiction has escalated. In 1983, four states were involved in missions, 25 states reported missions in 1987, and in 1988, 32 states reported various types of support to state and local law enforcement agencies. As of June 1989, 51 states and territories had submitted plans for approval by the National Guard Bureau to execute support missions during 1990. This represents a significant increase in the involvement of the National Guard in the War on Drugs.²

The Guard's support to civilian law enforcement during 1988 established some credible benchmarks. Nationwide, over 400 missions were executed entailing the use of helicopters as aerial platforms to locate marijuana fields, transportation support for law enforcement agencies, surveillance of drug trafficking routes and the employment of military equipment such as ground radar units and night vision goggles. Over 4,000 Guardsmen from 32 states were committed to support anti-drug missions. Their efforts contributed toward the seizure of over 727,000 marijuana plants and 2,200 pounds of cocaine which amounted to a street value of over \$1.3 billion. These results represent a sizeable contribution in the War on Drugs.³

Of particular significance during that same year was a concentration of National Guard efforts along the southwest border of the United States and the state of Florida. This represented the first multi-state, coordinated anti-drug operation and included Guard personnel and equipment from Texas, Arizona, and Florida.

This endeavor would become the prototype for border operations to follow in 1989.

National Guard support to drug interdiction and enforcement operations was constrained by state funding limitations and the lack of a method to provide federal funds for state support activities. For these reasons, the Department of Defense recommended to Congress, in early 1988, that provisions be enacted which would fund the National Guard's employment in support of drug interdiction operations while in state status. This concept was incorporated in the FY 1989 National Defense Authorization Act which provided a minimum of \$40 million during FY 1989 to increase National Guard support to local, state, and federal law enforcement agencies in support of drug interdiction and eradication operations.

To qualify for funding in 1989 each state, territory, possession and the District of Columbia was required to submit to the National Guard Bureau an operations plan which detailed its proposed military support initiatives for drug operations in support of federal, state and local law enforcement agencies.⁴

The Act required plans to focus on interdiction and eradication operations including the use of surveillance by flight crews, aerial photography and other imagery, radar surveillance, and long range reconnaissance patrols. Other efforts such as vehicle and container search, and loan or lease of equipment were also considered. Each state plan had to be approved by the

Secretary of Defense.

Drug support operations authorized for National Guard participation fall into two categories: interdiction or eradication. It is important to clarify the differences between the two. The former refers to support that involves detecting and monitoring the movement of illegal drugs, transporting confiscated goods and law enforcement personnel, and other National Guard Bureau and Department of Defense approved actions, to stop the flow of illegal drugs into the United States. The latter refers to support which involves identifying and maintaining surveillance of marijuana fields, transporting law enforcement personnel conducting anti-drug operations, and other approved actions which would eliminate the cultivation and distribution of marijuana in the United States.⁵

There were several very successful anti-drug support operations conducted throughout 1989 by the National Guard. Some of the more noteworthy were conducted in the states along the southwest border with Mexico, and in Florida with its accessible coasts.

"Border Ranger II" was conducted in California from the first week of May to the first week of June. It was a continuous 30-day surge operation intended to create an impact on routine drug flow into California. Segments of the mission included border surveillance of known crossing sites by Long Range Surveillance Detachment (LRSD) personnel concealed in well-positioned locations. Also conducted were surveillance missions against

suspected clandestine airfields in remote desert locations. Concurrent cargo container searches and truck searches at border crossings, while creating high visibility, did not uncover much in the way of illegal drugs. However, the border observation missions yielded about one thousand pounds of cocaine and 3,000 pounds of processed marijuana, plus a small amount of heroin. With an estimated street value of \$135 million, it can be safely stated that National Guard support made an impact on the drug operation during that short period of time.⁶

Based on an extensive plan to support 33 separate missions during 1989, Florida was able to garner \$3.4 million of the total authorization under the National Defense Authorization Act for the past year. Missions included the destruction of condemned dwellings being used as crack houses. Others included the employment of Special Forces teams to perform surveillance for extended periods of time in support of the Florida Department of Law Enforcement (FACE), cargo container searches in the port of Miami, and the use of mobile air traffic controllers to assist in tracking suspect low-flying aircraft. Some of the indirect and concurrent support included the tasking of Air Guard F-16 pilots to observe suspected drug activity in the air or sea, as well as the continued use of Army Guard aviation assets to spot marijuana fields.⁷

Two major operations, which support one another, were launched by Federal Agencies in Texas during 1989. The first, "Operation

Guardian", was conducted in support of the U.S. Customs Service checking cargo containers at border crossing sites and at the port of Houston. The intent of this mission was not so much to seize large shipments of illegal drugs, but rather to augment Customs agents' daily coverage thereby putting pressure on would-be smugglers to alter their methods of transport. Overall search productivity was increased from 6% to over 20%.

"Operation Unity" involved the use of Ranger and LRSB elements of the Texas Army National Guard to support the U.S. Border Patrol in the manning of surveillance sites along known drug trafficking routes. As was the case in California and Florida, Guardsmen, with surveillance missions, were armed with live ammunition and operated under strict rules of engagement.⁸

The National Guard Bureau has developed a basic set of rules of engagement to guide the actions of Guardsmen supporting drug enforcement operations. Prior to each drug enforcement mission, each Guardsman and the law enforcement members with whom they would serve are provided understandable instructions on: the Guardsman's mission, safety, use of force, when to load ammunition, self-defense, defense of other Guardsmen and law enforcement personnel, chain of evidence, arrest powers, and the chain of command. The objective is to insure that each Guardsman, the military chain of command, and the supported law enforcement agency has sufficient instructions to insure the safety of the civilian population, law officers and National Guard personnel, and to

facilitate mission accomplishment.9

New Mexico also deals with a porous border situation that affords multiple avenues of access for drug smugglers, both air and ground. Some of the approved missions for this state included visual border surveillance in support of the U.S. Border Patrol, helicopter transport of law enforcement officers to clandestine airfields to intercept and seize aircraft suspected of carrying illegal drugs, and the helicopter transport of police officers and DEA agents to raid methamphetamine labs in rural areas of the countryside. All of these support missions can be considered high risk and have a reasonable probability of direct confrontation with drug traffickers.

In fact, it can be said that each of the state plans profiled contain some missions that necessitated the arming of National Guard soldiers for self-protection. What then would be the legal status of Guardsmen in the execution of missions in support of law enforcement in the War on Drugs, particularly in situations which may result in confrontations with drug smugglers at gun point, with live ammunition? The National Guard Bureau offers some guidance in this area by delineating in a memorandum the three statuses a Guardsman may be activated under in an anti-drug support role. The first of these is State Active Duty which does not involve the federal government and places the participant in a state active duty status governed by appropriate state laws. The next is federal training duty under Title 32 U.S. Code, which allows a

Guardsmen to support civil authorities either during Annual Training (AT), Inactive Duty Training (IDT), usually referred to as a weekend drill, or a Unit Training Assembly (UTA). The last is a federal training duty status referred to as Title 32 U.S. Code, Additional Duty Under Section 502/Over and Above Normal Training Requirements.¹⁰ This is the status in which most Guardsmen are placed in order to perform missions in support of law enforcement in the War on Drugs. Since it allows National Guard soldiers to continue to drill with their units and thus maintain their military skills. Some states such as Pennsylvania prefer to have their Guardsmen serve in a special state duty status. Pennsylvania has amended its statutes governing the use of state military forces to reflect this.¹¹ Typical drug interdiction and eradication missions executed by the Pennsylvania National Guard during 1989 included aerial surveillance and search missions, cargo search operations at ports of entry, and aerial transportation of law enforcement officers and seized contraband.¹² However, under either variation of Title 32, duty is performed under the command and control of state officials and imposes no Posse Comitatus restrictions while still providing federal tort protection to individual Guardsmen.

What about Posse Comitatus? Mindful of the consequences of the earlier scenario, perhaps an explanation of the origins of the Act may be in order. Posse Comitatus means the power of the county, as it may be exercised by a sheriff, to call into service citizens to assist in the capture of criminals and the keeping of

the peace.

The Posse Comitatus Act of 1878 was enacted to prevent the use of federal military forces to enforce civil laws without the President declaring a state of emergency. In spirit it restates the intent of the Militia Act of 1792 which prohibited the use of the Regular Army to enforce laws. The framers of the Constitution, remembering the British occupation of the colonies from 1763 to 1775, realized the danger of large standing armies, and therefore, wanted a small regular army which would depend on a large militia during war time.

A more specific origin of the Posse Comitatus Act can be attributed to two flagrant applications of federal military force during the latter half of the 19th century. The first of these was the use of the Regular Army to enforce Reconstruction laws in the South following the Civil War. Carpetbag authorities, in an attempt to circumvent the restrictions of the Militia Act, encouraged local sheriffs to employ the convenience of Posse Comitatus to deputize Regular Army forces to do their bidding. This practice unnerved the Democratic Congress to the point that it enacted legislation resulting in the Act of 1878.¹³ A second theory of why the need arose to enact such legislation was the prevalent use of Regular Army forces to put down the nationwide railroad strikes of 1877.¹⁴ The militia failed to suppress a railroad strike in Martinsburg, West Virginia. That civil disturbance escalated into a nationwide strike which led to

increased violence as Regular Army forces were ordered out to battle the rioting railroad men.¹⁵ Ironically, the dismal performance of the state militia during these strikes may have been the root cause of their involvement in anti-drug operations today.

With the restrictions imposed on the Regular Army what forces could be used to adequately respond to widespread violence such as national railroad strikes? In a further bit of irony, and a fortuitous moment in history of the National Guard, some state militia forces had acquitted themselves quite favorably in dealing with various strikes. Pennsylvania and New York were two examples. A ground swell of lobbying efforts called for increased funding to equip and train state militias to meet the requirements for large scale police actions, a role the Regular forces could no longer fulfill except in cases of national emergency. State legislators were called upon to increase funds for the militia in order to equip and train units.¹⁶

The intent of the Posse Comitatus Act of 1878 is well understood throughout the executive and legislative branches of government though its origins may not be so well known. Its current popularity can be attributed to repetitious inferences in the media regarding the use of the military to support law enforcement in the War on Drugs. Interestingly, for such an apparently significant piece of legislation, it is a relatively simple law. Section 1385 of Title 18, Crimes and Criminal Procedure, U.S. Code, simply states that use of any part of the

Army or the Air Force as a Posse Comitatus shall result in a fine of not more than \$10,000 or imprisonment for not more than two years or both.¹⁷

There have been some very dramatic uses of the National Guard for domestic purposes during the last half of this century. Most, out of necessity, involved the employment of state militia in support of civil law enforcement. Some within the provisions of Posse Comitatus involved the employment of federalized National Guard troops under conditions of national emergency. They are representative of the various roles and authorities under which the Guard can be committed to duty. All are illustrative of the high profile and risks at stake when military force is applied to enforce civil law in a police role.

The first of these occurred on June 18, 1954, in the state of Alabama, when National Guardsmen were ordered under state active duty to patrol the streets of Phenix City. The night before that the newly elected state Attorney General was murdered in an ambush in a parking lot not far from his law office. Elected on a platform promise to clean up vice-infested Phenix City, he had literally prophesied his own death the day before when he told a citizen's rally, "I believe I have only one chance out of a hundred of being sworn in as Alabama's next Attorney General."¹⁸ Guardsmen were called to prevent any further attempts on the lives of leading citizens sworn to improve the situation in the seat of Russell County.

After a month of Guard presence in the streets, the Governor declared a state of martial rule. This called for the disarmament of Russell County and Phenix City law enforcement officers who were forced to turn in their badges and guns to Guardsmen. Only law enforcement activities were taken over by the Guardsmen. All other municipal and county administrative offices continued to function under their civil officials. Thus the National Guard within the role of support to civil authorities administered for almost a year the law enforcement of a city and county.¹⁹

The early 1960s saw large scale civil disorder in the South over the integration of Blacks and Whites within school systems. Since overshadowed by the massive civil disturbances of the late 1960s and early 1970s, dramatic confrontations involving the use of federalized National Guard forces on school campuses such as Oxford, Mississippi in late September 1962 are forgotten.

What was unique about the use of the National Guard to quell the riot on the Ol' Miss campus is the fact that they had been federalized prior to their mission execution, having been "called into the active military service of the U.S., effective at two minutes after midnight, September 30, EDT., for an indefinite period and until relieved by appropriate orders."²⁰ President Kennedy mobilized the entire Mississippi Army and Air National Guard to preclude their use by the Governor to deny the admittance of one Black student into Ol' Miss. The precedent for this had been set of course by President Eisenhower in 1957 when he federalized

the Arkansas National Guard to deny Governor Faubus the continued use of his state militia to prevent the admittance of Blacks to Little Rock High School. Interestingly that was a case where Guardsmen fought on both sides of a war in the same week.²¹ This action would be repeated again in 1963 by President Kennedy when he denied Governor Wallace the use of his Guard in Birmingham for the same reasons.²²

The mid to late 1960s saw a shift in racial violence and civil disturbances from school house rioting to direct confrontations between Blacks and local police, and often included National Guardsmen. The summer of 1965 saw one of the most violent incidents of this nature in the Watts area of Los Angeles, California. A riot continued for six days, during which 34 people were killed, over 1,000 were injured, and some 3,900 were arrested.²³

National Guard involvement in the Watts riot was extensive, and included elements of two divisions that approximated a corps-level operation on the streets of Los Angeles. Missions of the Guardsmen included riding shotgun on fire engines to defend against snipers that had already killed one fireman and wounded several others, sweep and clear operations at fixed bayonets against hard-core rioters, and the establishment of road blocks. That one of the units, the 40th Armored Division had been assembled for Annual Training was fortuitous. What was interesting from a legal standpoint was that Guardsmen from the 40th were paid from

the state treasury for their on-the-job training in a state active duty role while suppressing the riot, and for the balance of their summer training at Camp Roberts they were paid out of the U.S. Treasury for federal mission training.

The decade of the 1970s was ushered in with a new form of domestic violence. Not specifically racial, it covered the entire spectrum of civil disturbances with racial issues interspersed among anti-Vietnam sentiments, flanked by general civil disobedience. Nowhere was it more prevalent than on college campuses across the country. That it would involve the National Guard as a peace keeping force was inevitable. In fact, in little over a month, from April 15 to May 19, 1970, 30,000 Guardsmen were brought into emergency service under state active duty in 20 states and the District of Columbia to deal with civil disturbances.²⁴ This was very similar to the role the militia had incurred in suppressing the railroad strikes a century before.

The year of 1970 was characterized by violence on college campuses, but none so marked the history of our country as that which occurred on May 4 at Kent State, Ohio. On that fateful day, in just thirteen seconds of firing, four students were killed, thirteen wounded, and the reputation of the National Guard (in spite of Grand Jury findings that acquitted them in effect of wrongful deaths) would be maligned for years.³³ While not the finest hour for the National Guard, Kent State represents an example of the risk involved when military support to civilian

authority is applied to an emergency situation, particularly when it is necessitated by an under-resourced campus police department, and an overwhelmed small town law enforcement capability.

At first glance it is tempting not to question the legality of an extended use of military forces to support drug interdiction and eradication efforts of civil authorities, no matter how indirect it may be in the form of equipment usage, transport, or surveillance. Recent legislation however, such as that enacted under Public Law 100-456, The National Defense Authorization Act of 1989 while expanding the role the military may play in anti-drug support missions, also limits direct involvement. For instance, proposed changes to section 373 of Title 10 of the U.S. Code permit the Department of Defense to provide civilian law enforcement officials with expert advice in the areas of equipment operation and even assistance in strategic planning, but it may not extend to direct, active involvement in specific law enforcement operations.²⁶

This restriction on direct participation by military personnel is further emphasized in specific guidance expressed in section 375 of Title 10 which requires the Secretary of Defense to issue such regulations as may be necessary to insure military support to any civilian law enforcement officials, does not include or permit direct participation unless such activity is otherwise authorized by law.²⁷

Participation by the National Guard in the War on Drugs is detailed under section 1105 of the Defense Authorization Act which

calls for an enhanced drug interdiction and enforcement role for the Guard. The Secretary of Defense may provide funds to the Governor of a state to finance the cost of National Guard involvement in anti-drug operations while under the command and control of state authority. It is also mandated that participation by Guardsmen in such operations be service in addition to Annual Training required under section 502 of Title 32, U.S. Code.²⁸

The specific criteria for National Guard duty performance under Title 32 in support of anti-drug operations were outlined earlier. Posse Comitatus is not threatened if Guardsmen perform federal training duty under the command and control of the Governor of their state. Therein lies the rub. The modern National Guard, under the Total Army Policy, is not as discernible as it was in 1877 when it was unregulated, bone-fide militia. Today the Guard is indistinguishable from the Regular Army in terms of uniforms, doctrine, equipment, and training standards. Anti-drug missions executed by Guardsmen in a Title 32 status are missions executed by the Total Army as perceived by the general public, albeit under the command and control of the Governor. This hair splitting of "federal duty for training" is the circumvention of Posse Comitatus that has been engendered by recent legislation calling for increased involvement of the military in support to civilian law enforcement for anti-drug operations.

Legislators and executive branch decision makers must be mindful of recent judicial findings with regard to the use of

military personnel employed in a support role to civil law enforcement, even under the current allowance of Public Law 100-456. One of the more controversial decisions arose from a court case which emerged out of the Indian riots at Wounded Knee, South Dakota. In the case (U.S. vs. Jaramillo, 380 F. Supp. 1375 [D. Neb., 1976]), the court ruled that the presence of two Army colonels acting as advisor/observers exceeded the restrictions of Posse Comitatus.²⁹

Judging from the after action report prepared by one of the Army officers present, Colonel V.F. Warner, Chief of Staff of the 82d Airborne Division, this is understandable. Although designated primarily as an observer, his role soon escalated to something similar to that of a military assistance advisory group with an equal role in the decision making process at Wounded Knee.³⁰ Thus it was not the 15 M113 armored personnel carriers on loan to the FBI from the Nebraska National Guard or the scores of National Guard machine guns and M79 grenade launchers used by the federal agents that offended the court, but rather the mere presence of two Army colonels that exceeded their charter under Posse Comitatus. Therein lies the danger of increased involvement of the military, even the National Guard, in the prosecution of drug offenses - that somehow the seizure of evidence or capture of criminals will be contaminated by a simple infraction of the rules of employment. Eventually some court may question the concept of "federal duty for training". Recent events in world history, particularly in late

1989, illustrate the reason why civil law enforcement, military defense, and militia activity should be executed by clearly separate organizations focused on their respective areas of service to the citizenry.

In the U.S. effort to remove the Manuel Noriega from power and install the rightly elected government, Panama was left without a police force to maintain civil law amidst the ruins of urban warfare. This occurred because the Panamanian military also functioned as the civil law enforcement agency. The turmoil created also allowed the paramilitary Dignity Battalions to function somewhat like unregulated militia, adding more hostility to the shattered infrastructure of Panama.

The government of Romania was toppled by a grass roots revolution, precipitated by atrocities committed against the citizens. The Securitate, the Romanian secret police, had grown to proportions that rivaled the military. Open warfare was conducted between the Securitate and military forces. This resulted because the state police had acquired the excessive role of a quasi-military force charged with domestic control of the populous. Under the program of revived civil liberties for the Romanians, this agency could not be allowed to function in the role for which it was created by the late dictator. Out of false loyalty for the fallen tyrant perhaps, but more likely out of fear of reprisal and punishment for a multitude of violent transgressions against the people, the Securitate chose to resist

against the military. Not unlike the Gestapo of Hitler's Germany, this police force was an example of excess.

In the United States fortunately, there are clearly defined roles for the military, the militia (National Guard), and the layers of civilian law enforcement agencies which protect citizens from each other. If the legal status of the use of military forces in the execution of law enforcement missions is generally understood by statute and by precedent, which it appears to be, then why is there a constant knee-jerk reaction on the part of senior DOD officials to invoke Posse Comitatus in discussions about the use of the military in the War on Drugs?

In a recent press conference announcing the new DOD policy on drug enforcement and interdiction measures, Defense Secretary Richard B. Cheney, in response to questions about sealing off the southern border of the U.S., expressed a concern that care be exercised with regard to statutes governing Posse Comitatus.³¹ Similar concerns were voiced by his predecessor, Mr. Frank C. Carlucci, when in testimony before the Senate Armed Services Committee, he stated that he was firmly opposed to any relaxation of the Posse Comitatus restrictions on the use of the military to execute search and seizure, and arrest roles in the support of civilian authorities in drug interdiction.³²

It may well be that the real circumvention of the spirit and intent of Posse Comitatus is not the DOD use of National Guard forces on training missions to support civilian law enforcement

because of a quirk in their charter which allows them a level of commitment denied the Regular Army. Motives for the constant evocation of the Act and deference to the National Guard as the better force for the mission of drug interdiction may be even more subtle. The active military simply does not want the job.

For reasons very arguable, the DOD has been reluctant to become heavily involved in the mission. It detracts from training readiness as it relates to warfighting, and it places at risk the image of the U.S. military as a global force of international proportion, able to project power worldwide. Domestic use of this force for drug interdiction is beneath that capability. Search, seizure and arrest activities are distasteful and better left to civilian authorities.

A recent polling of a segment of the current Class of 1990 at the U.S. Army War College revealed some interesting opinions in this area. Considering that graduates will become the future leaders of the Army, their viewpoints of the use of the DOD in the War on Drugs are of interest. Of the students polled, only 24% felt that drug interdiction is not an appropriate mission for U.S. military forces, and 60% thought the public expects to see U.S. troops involved in the War on Drugs. However, and this could stem from the high proportion of Vietnam era veterans among the respondents, only 12% believe the national will is behind taking whatever measures are necessary to win the War on Drugs. Eighty-eight percent expressed feelings that without a dramatic

decrease in the tolerance toward drug use in the U.S., the military will have little effect in reducing the flow of drugs into and within the country. The feeling that the military and civilian leadership of DOD would rather not become involved in the War on Drugs was expressed by 60% of the War College students.³³

One has to wonder why the National Guard has become such a willing participant in anti-drug operations. If you subscribe to the rationale of LTG Stephen G. Olmstead, Deputy Assistant Secretary for Drug Policy and Enforcement, Department of Defense, as he responded to a question concerning the use of the Guard in drug interdiction, while participating as a member of a panel held by the Congressional Research Service, you might perceive the use of National Guard forces as merely discretionary on the part of a Governor to deal with the threat. LTG Olmstead expressed an opinion that, "the best way to utilize the Guard in a drug interdiction role was under Title 32 where a Governor who ascertains he has a problem on his borders calls out his state forces and sends them down there."³⁴ It might suffice if this type of mission was in response to an emergency, and the National Guard was committed on state active duty. But Title 32 calls for federal training duty, not emergency service. And borders are a national responsibility, not a local jurisdiction, at least international borders. It would be the rare case where a Governor would call upon his state militia to perform duty along his state border.

Why then has the National Guard voluntarily accepted this

mission? The current National Guard is well-regulated, well-led by its general officers, and better equipped than it has ever been in its 353-year history. As evidenced by the round-out relationships within CONUS combat divisions, and the Capstone program of wartime focus, the Guard is an integral part of the Total Force.

What has arisen in the need for a military response to the drug problem in the U.S. is a window of opportunity. What has not gone unrecognized by the National Guard is an excellent opportunity for state military forces to acquire operational equipment heretofore unimaginable under existing DOD funding. This is in no way to imply that such a venture has been merely self-serving. Modern, state-of-the-art equipment will enhance the warfighting capability of the Guard.

Since the Department of Defense has reminded decision makers of the limitations of the civil use of military force, the National Guard has taken advantage of the situation to improve its training readiness and upgrade its equipment. An example of this is a proposal from the State of California which requests the assignment of an attack helicopter battalion to its National Guard equipped with the latest AH-64 helicopters.³⁵ No subterfuge, the unit will be employed to fight the War on Drugs and will increase the warfighting readiness of National Guard combat units within the state. In the words of Lieutenant General Herbert R. Temple, Jr., Chief of the National Guard Bureau, "Before that legislation (FY 1989 National Defense Authorization Act) the Guard could assist

states in combating drugs only if it did not interfere with training for the Guard's wartime mission. Directly fighting the drug traffic is now an added Guard mission."³⁶

It would appear then that there has been a careful circumvention of the intent of Posse Comitatus as it relates to the use of military force to assist civilian authorities in drug interdiction. The Department of Defense, speaking for the active components of the military, has limited its involvement based on careful considerations of Posse Comitatus, deferring rather to the National Guard as the appropriate force of choice to fight the close battle in the War on Drugs. The Guard has willingly accepted the mission for obvious vested interests.

The Congress expects the military to become involved in the interdiction and eradication of drugs in this country, and it has tasked DOD to take the lead in this effort. Remote outposts and surveillance sites are being manned by military forces, National Guard soldiers, along the border with Mexico. It can only be hoped that evidence seized and information gathered by direct, even U.S. casualty producing confrontations with drug smugglers will withstand the court system and the acid test of Posse Comitatus.

ENDNOTES

1. SSG Phil Jordan, "Agencies Combine on Border Drugs," Grizzly Magazine, Fall 1989, p. 7.
2. LTG Herbert R. Temple Jr., The Nation's War on Drugs, p. 3. Cited with special permission of LTG Temple.
3. National Guard Bureau, Chief, National Guard Bureau Annual Review, Fiscal Year 1988, p. 19.
4. LTG Herbert R. Temple Jr., National Guard Bureau, Letter to the Adjutants General, SUBJECT: Support to Drug Enforcement Operations, 14 October 1988.
5. Temple Letter, p. 3.
6. Jordan, p. 7.
7. Capt Jean Marie Brawders, "Guard Expands Role in Drug War," National Guard, August 1989, p. 23.
8. National Guard Bureau, Report on the General Officer Drug Enforcement Operations in Progress Review, 16 August 1989, p. 2.
9. LTG Herbert R. Temple Jr., and LTC Walter L. Stewart, "The National Guard in the War on Drugs," Military Review, March 1990, p. 41.
10. Temple Letter, p. 2.
11. State of Pennsylvania, House of Representatives, Military and Veterans Affairs Committee, Bill Analysis of House Bill 1355, 4 May 1989, p. 1.
12. State of Pennsylvania, Department of Military Affairs, Statement in Support of House Bill 1355, 25 May 1989, p. 3.
13. MG Ansel M. Stroud Jr., "Yes to the War on Drugs, But Easy Does It," National Guard, July 1988, p. 2.
14. MG Bruce Jacobs, Presentation to the 107th Armored Cavalry Regiment Officers' Call, p. 3. Cited with special permission of MG Jacobs.
15. MG Bruce Jacobs, "The Road From Martinsburg," National Guard, June 1988, p. 54.
16. William H. Riker, Soldiers of the States, p. 51.

17. U.S. Laws, Statutes, Etc., United States Code, 1982, Vol. 7, Title 18, Sec. 1385, p. 304.
18. "Alabama Troops Rule Phenix City," Posting The Guard, The National Guardsman, 28 Sep 1954, p. 22.
19. "Alabama Guard Ends 214-Day City Rule," Posting the Guard, The National Guardsman, 1 Mar 1955, p. 21.
20. Paul J. Scheips, The Role of the Army in the Oxford, Mississippi Incident, p. 65.
21. Robin D.S. Higham, Bayonets in the Streets, p. 31.
22. Higham, p. 101.
23. Robert M. Fogelson, The Los Angeles Riots, p. 147.
24. "The Guard vs. Disorder," The National Guardsman, 1 June 1970, p. 2.
25. Joe Eszterhas, Thirteen Seconds; Confrontation at Kent State, p. 18.
26. "Defense Authorization Act (PL 100-456)," United States Code Congressional and Administrative News, Legislative History, 1988, Vol. 5, p. 2,579.
27. Ibid., p. 2,580.
28. "Defense Authorization Act (PL 100-456)," United States Code Congressional and Administrative News, Public Laws, 1988, Vol. 2, p. 2,047.
29. MAJ Aleksandra M. Rohde, "Pushing the Limits of Posse Comitatus," National Guard, August 1989, p. 32.
30. U.S. Department of the Army, After Action Report - Wounded Knee, 82d Airborne Division, 1973, p. 2.
31. Richard Cheney, "Defense Department Targets Illegal Drugs," ROA National Security Report, December 1989, p. 7.
32. U.S. Code Congressional and Administrative News, Legislative History, 1988, Vol. 5, p. 2,581.
33. LTC Ronald B. Flynn, "Use of the Military in the War on Drugs," Survey - U.S. Army War College, Class of 1990, December 1989, p. 3.

34. U.S. Congress, House, Committee on Armed Services, Report of the Defense Policy Panel on Narcotics Interdiction and the Use of the Military: Issues for Congress, 7 June 1988, p. 34.

35. State of California, Office of the Adjutant General, California National Guard Proposal to Support Drug Interdiction Operations, 1 March 1989, p. 1.

36. Bernard E. Trainor, "Role in Drug War for National Guard," New York Times, 8 January 1989, p. 18.