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POSSE COMITATUS: SOME THOUGHTS ON LOOSENING ITS RESTRICTIONS WITHIN THE DEPARTMENT OF DEFENSE

by

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A paper submitted to the faculty of the Naval War College in partial satisfaction of the Requirements of the Department of Joint Military Operations

The contents of this paper reflect my own personal views and are not necessarily endorsed by The Naval War College or the Department of the Navy

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15. Abstract: Posse Comitatus law and/or service policies have prohibited DOD forces from becoming involved in domestic/civil law enforcement since the late 1870s. Focus upon the "war on drugs" during the 1980s generated new laws that significantly changed DOD's role in this long-term battle. Current National Security Strategy (NSS) and National Drug Control Strategy (NDCS) indicate ongoing involvement by DOD forces in the strategy to decrease demand, reduce availability of drugs, and reduce the number of young people who experiment with drugs.

Posse Comitatus law does not apply outside of the United States, and the law only applies to the U.S. Army and U.S. Air Force; however, Department of Navy officials have crafted their service policy to mirror Posse Comitatus restraints. 10 USC 375 (1988) provided clarification and restricted all DOD forces from becoming directly involved in law enforcement (search, seizure and arrest).

It's time for another look at partially increasing DOD involvement in counterdrug operations (CD OPS). This paper presents a case for authorizing U.S. Navy combatants to board foreign vessels upon the high seas.

Appendix A includes a detailed summary of Posse Comitatus law and its changes over the past century.

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Introduction

Posse Comitatus is a Medieval Latin phrase meaning the legal force or power of the county. [1] Since 1878, the Posse Comitatus Act, using its popular title, has defined the limits for use of military force in civil law enforcement actions. It is worthwhile citing the law:

> "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both." [2]

U.S. Department of Defense (DOD) forces are restricted from taking an active role in most civilian law enforcement responsibilities due to Posse Comitatus restraints. Nevertheless, when United States national strategy began to focus on the "war on drugs" in the early 1980s, DOD forces were assigned increasingly significant responsibilities in counterdrug operations (CD OPS). Appendix A provides a summary of the evolution of laws and policies that impact DOD's role in CD OPS. For operational commanders, this mission growth was not difficult to manage in the resource-rich late 1980s; however, during the downsizing of the 1990s, every mission area felt the strains of reduced forces and declining budgets. Hence, operational commanders have been scrutinizing DOD's role in CD OPS, while looking for better ways to manage the readiness of their forces.

This scrutiny reached its zenith in the aftermath of an accidental shooting along the southwest border region in May 1997. The setting for this incident was a Joint Task Force Six (JTF-6) CD OPS detection and monitoring (D&M) mission along a suspected land drug corridor following along the Rio Grande River, adjacent to the U.S.-Mexico border. At this location, an active duty Marine corporal conducting D&M surveillance observed an 18-year-old U.S. citizen, Esquiel Hernandez, crossing through the area. Mr. Hernandez, who was tending the family goatherd, heard noises nearby and fired his 22-caliber rifle. The Marine, believing that his own life was at risk, returned fire inflicting a fatal gunshot wound to Mr.

Hernandez. Both men were performing their jobs, as they understood them. The civilian and military boards of investigation ruled the Marine corporal fired in self-defense.[3] What followed in July 1997 was an immediate suspension of DOD D&M surveillance missions within the territory of the U.S. as directed by the Secretary of Defense (SECDEF). JTF-6 immediately withdrew from a series of scheduled D&M missions.

I felt the effects of this suspension in my last assignment during summer 1997 when I had scheduled a U.S. Navy Reserve Mobile Inshore Undersea Warfare Unit (MIUWU) to conduct CD OPS D&M surveillance for two weeks along the international boundary waters of Lake Erie and Lake Ontario. This D&M mission was immediately canceled. DOD's reaction to the Hernandez shooting had a far-reaching impact then, and it continues today.

Thesis -- I believe SECDEF has made too many across-the-board restrictions for DOD involvement in CD OPS in the wake of the unfortunate Hernandez shooting. The National Security Strategy (NSS) and the National Drug Control Strategy (NDCS) both require extensive, ongoing involvement from DOD operational commanders. While Appendix A shows that Posse Comitatus restraints and 10 USC 375 prevent DOD forces from taking direct law enforcement actions, such as search, seizure and arrest, Congress inserted "escape clauses" to these laws that permit future change, if circumstances indicate change is in order. Additionally, CD mission operational commanders will need the unique, extensive capabilities of DOD resources and personnel to wage effective CD OPS in the future. In this paper, I propose a few minor adjustments to Posse Comitatus restraints in order to provide additional, full mission-capable DOD resources for certain CD OPS. Since Posse Comitatus and CD OPS are topics with such far-reaching talking points, the focus of this paper will be cocaine CD OPS in the transit and arrival zones within the U.S. Southern Command (USSOUTHCOM) area of responsibility (AOR). In the interest of brevity, any discussion of

host-nation support (HNS) within the USSOUTHCOM AOR and CD OPS in the USPACOM and USACOM AORs will be intentionally minimized.

National Security Strategy (NSS) and the National Military Strategy (NMS)

The latest NSS states that we have made significant progress in reducing drug abuse and drug trafficking in the United States over the past 20 years. Drug use has dropped 49 percent, and cocaine use has dropped 70 percent during the past two decades. Additionally, Americans now spend 37 percent less on drug purchases compared to ten years ago. [4] While this data is encouraging following a decade of serious drug interdiction, drug education efforts, and reduced demand, the overabundance of illegal controlled substances still provides a near stable source of supply, high levels of drug purity, and a fairly constant market price. Nevertheless, the NSS has set high marks for our determined and relentless efforts.

> "The aim of the U.S. National Drug Control Strategy is to cut drug availability in the United States by half over the next 10 years – and reduce the consequences of drug use and trafficking by 25 percent over the same period – through expanded prevention efforts, improved treatment programs, strengthened law enforcement and tougher interdiction." [5]

In addition to increased domestic drug awareness programs focused toward America's youth, and increased safety for all citizens by reducing drug-related crime and violence, the NSS directed that America's borders be shielded from the drug threat. It specifically calls for a halt in the flow of drugs at their source countries and in-transit. This requires operational commanders to employ their limited CD resources in the execution of CD strategy, while balancing the need for efficiency and effectiveness, in addition to fully engaging their federal, state, and local law enforcement partners to achieve success. The NSS also seeks to reduce the cultivation of drug-producing crops in source countries (Colombia, Peru and Bolivia) along the Andean Ridge in South America.

Under the authority of bilateral agreements managed by the Department of State, DOD forces, primarily working for USSOUTHCOM, have coordinated and successfully worked with Andean Ridge countries over the past decade to eradicate drug-producing crops. Drug crop cultivation continues to be a huge social and economic challenge for the Andean Ridge countries. "[A] 1986 study of Latin American cocaine trade estimates that for every 300 cocaine exporters there are 222,000 coca farmers, 74,000 paste processors, 7,400 paste transporters and 1,333 refiners, adding up to a total of 1.5 million drug employees." [6] The scope of this multifaceted issue does not permit its discussion in detail here. Nevertheless, DOD operational commanders will continue to have a significant responsibility in supporting host nations with their drug crop eradication efforts in the future.

The NMS places threats from drug cartels and drug trafficking, with their blurred linkages to terrorism, insurgency and international crime organizations, in the realm of transnational dangers. Failure to deal with each of these strategic concerns early in their evolution may require more substantial responses to significantly larger transnational problems for DOD operational commanders in the future. [7] The NMS clearly provides a place for DOD response within the CD OPS mission, a mission that may be best described as military operations other than war (MOOTW).

National Drug Control Strategy (NDCS)

The **Anti-Drug Abuse Act of 1988** set the goal of achieving a drug-free America. It also created the Office of National Drug Control Policy (ONDCP) to develop long-range drug control goals with measurable objectives, while managing the distribution of federal funds allocated for implementing national drug control measures. From its implementation, the NDCS involved a vast array of federal agencies in a three-pronged attack on drug abuse, as

follows. "Specifically, drug abuse is to be curbed by preventing youth from using illegal drugs, reducing the number of users, and decreasing drug availability." [8]

The 1999 NDCS has five goals and a variety of objectives for each goal. The NDCS goals and objectives are attached as Appendix B. While each of these five goals is important, DOD's role falls under objectives for goals four and five: "Shield America's air, land, and sea frontiers from the drug threat [and] Break foreign and domestic drug sources of supply." [9] Disruption of the drug flow through the transit zone and within the arrival zone is critical to achieving these goals. This is the realm for effective use of DOD resources.

Drug traffickers transport illegal drugs into this country via air, sea, and land routes. Their illegal goods are often smuggled among legitimate cargoes using international shippers with a history of Customs Law compliance, relying upon their huge volume of rarely inspected cargo to sneak illegal merchandise across the border. This daunting interdiction challenge requires timely CD intelligence and coordinated CD OPS at international, federal, state, and/or local levels in order to disrupt the flow of drugs, and force traffickers to use less effective smuggling techniques and routes, while increasing their risk of interdiction.

In a June 1998 article for United Nations Chronicle, General Barry R. McCaffrey made a pitch to his international readers that many nations tend to underestimate the threat posed to their national interests due to illegal drug use, cultivation, production, and trafficking. When traffickers find lack of resolve in a nation's antidrug policies, they are quick to try corruption and attempt to place those governments at risk. The huge profits enjoyed by large, organized drug trafficking organizations provide their leaders with near limitless ability to corrupt government officials, initiate insurgencies, and support guerrilla armies in order to guarantee themselves a more secure base of operations among weakened governments. [10]

Drugs are a transnational threat to the international community, and General McCaffrey proposed a variety of bilateral and multilateral agreements, and multinational drug eradication operations to reduce this threat. He cited recent crop eradication successes in Peru and Bolivia and their development of alternative agricultural products as examples of persistence and cooperation paying significant dividends in reduced coca production. Increased coca cultivation in Colombia offset this success to some degree, but these multinational efforts are making progress at overall reductions in coca supply.

Bulk drug transportation along traditional sea and air routes is becoming increasingly difficult for drug traffickers. "The relatively straightforward flow-charts of trafficking routes of a decade ago have been replaced by a complex web of nodes and lines linking virtually every country in the world to the main drug production and trafficking centers." [11] Over the past two decades, drug trafficking organizations have demonstrated their ability to adapt to increased CD OPS and changes in societal demands for their products. Europe is currently going through a phase of increased cocaine consumption, much like the United States did in the 1980s, and drug traffickers are finding creative methods to meet Europe's expanding demand. At home, drug trafficking organizations continue to meet United States cocaine demand, providing a product with greater purity and stable prices compared to ten years ago. Part of the explanation for stable cocaine prices within the United States is a steady decline in demand for cocaine, up to 70 percent less compared to 1979. [12] Yet, ONDCP indicates that illegal drugs kill 20,000 Americans every year and the total cost to society is almost $70 billion. [13] We have a long way to go before illegal drugs are no longer a problem in the United States. The current drug strategy places demand as the priority for our national antidrug focus. "People's desire for drugs is what sets the drug abuse cycle in motion. Drugs are supplied by traffickers only because a profit can be made. Thus demand fuels supply." [14]

Approximately 11 percent of the ONDCP budget is obligated for supply reduction, four percent goes toward international CD coordination measures, and 85 percent is obligated for drug prevention, treatment and law enforcement initiatives within the United States. Therefore, the vast majority of the $17.8 billion ONDCP budget is focused upon demand reduction within the United States. [15]

SECDEF Restraints upon DOD's Role in CD OPS

A Secretary of Defense Memorandum dated 6 October 1998 cautiously reiterated the requirement for DOD personnel to refrain from taking part in direct law enforcement activities (search, seizure and arrest), and it required that DOD support for DLEAs be "distinguishable and separate" from those activities initiated by the DLEAs. It also prohibited DOD personnel from accompanying DLEA officers on actual CD operations <u>or</u> participation in CD OPS when hostilities are imminent. [16] These additional CD OPS policy restraints potentially impact DOD support for Coast Guard LEDET boardings of vessels in the transit and arrival zones. Traditionally, surface combatant crewmembers have frequently served as backup for the 5-6 person LEDET while boarding a large vessel at sea or with a crew larger than the LEDET can safely control. This policy change may jeopardize safety augmentation for LEDETs and force operational commanders to reconsider future boarding targets of opportunity while LEDETs are embarked.

Some of the additional support services provided for the LEDETs by combatant crewmembers include: gas-free engineer to certify a compartment prior to entry by a boarding team, prize crew for security aboard a seized vessel, and communications specialist view of the communications capabilities of a boarded vessel. Currently, it's up to the combatant commander to decide the degree of LEDET support provided by his/her crewmembers and to ensure their awareness of the differences between Coast Guard use of

force procedures and application of standing rules of engagement (SROE) during a high seas boarding. [17]

The Operational Roles of USSOUTHCOM and JIATF-E

USSOUTHCOM defines its drug trafficking threat to include sea and airborne methods of delivery through the transit zone. Drug traffickers endeavor to corrupt government officials throughout the AOR in order to ease shipments of illegal drugs through ports of entry. Traffickers make alliances with insurgent groups and terrorist organizations in order to enjoy their security and freedom of movement to launch from clandestine airstrips and continue the process of converting coca into cocaine at remote drug processing facilities.

SOUTHCOM has a variety of host nation (HN) responsibilities, which include: (1) enhancing HN capabilities for maintaining sovereign control over their air, sea and land routes; (2) enhancing their ability to interdict and arrest drug traffickers; (3) strengthening HN democratic and human rights practices among their subjects; (4) strengthening HN military professionalism and enhancing their abilities to combat drug-related insurgencies and other threats. [18] SOUTHCOM manages these measures at the strategic level working for SECDEF with very close coordination through the U.S. Ambassadors for each HN. SOUTHCOM has the responsibility for ensuring operational and tactical commanders carefully comply with the restraints of Posse Comitatus law and the variety of statutes summarized in Appendix A.

Joint Interagency Task Force-East (JIATF-E) in Key West, FL is an operational commander with CD OPS D&M mission and C3I mission responsibilities in the SOUTHCOM AOR. On 1 April 1999, JIATF-South in Panama closed and was incorporated into the SOUTHCOM staff in Miami, FL. JIATF-S's D&M mission responsibilities were folded into the D&M mission at JIATF-E. The operational command relationships are shown

in Appendix C. JIATF-E also works very closely with Drug Enforcement Agency (DEA) officials, U.S. Customs Service (USCS) officials and U.S. Coast Guard (USCG) operational commanders in the southeast United States, Puerto Rico and the U.S. Virgin Islands to coordinate D&M missions, C3I and end game procedures. During 1998, France transferred her first Gendarmerie liaison officer to JIATF-E to enhance CD efforts in the French West Indies. This officer joined the Dutch and British liaison officers already in place for better coordination among their Caribbean territories and the United States. [19]

JIATF-E publishes a quarterly drug threat assessment for the region, hosts monthly meetings to develop effective CONOPS for the next month's activity, and publishes monthly CONOPS for ongoing D&M mission activities. "JIATF-E's CONOPS is built on defense in-depth to detect and monitor drug traffickers as close to the source country as possible, followed by continuous monitoring using a mixture of electronic and visual means as the target transits across JIATF-E's AOR, and finally handing off the target to LEAs." [20] JIATF-E uses a mix of DOD, Coast Guard and DLEA assets and sensors to cover the region's transit and arrival zones and respond to changes in the intelligence picture.

JIATF-E coordinates deployments for its assigned ships and aircraft patrolling the region. It uses current intelligence to produce a picture of expected trafficking routes and places patrol assets in optimal positions to detect, monitor, sort, and handoff suspect vessels and aircraft to DLEAs for end game interdiction. Once again, naval combatants are prohibited from end game search, seizure and arrest of suspect vessels, unless they have a USCG LEDET embarked to perform direct law enforcement activities. With a LEDET aboard, naval combatants may board suspect vessels once tactical control (TACON) has shifted to the Coast Guard District Commander with operational responsibilities for that area. Once the boarding is completed, TACON shifts back to JIATF-E. USCG cutters patrolling

for JIATF-E always have statutory authority to board certain vessels upon the high seas and play a significant role in all phases of drug interdiction.

Naval combatants on D&M patrol for JIATF-E should have USCG LEDETs embarked, according to 10 USCS 379. LEDET presence makes a naval combatant capable of carrying out D&M and apprehension/end game missions for the operational commanders. USCG LEDET presence aboard every combatant is not always possible since LEDET strength has not yet reached its authorized strength of 500 boarding personnel. More end game handoff coordination with DLEAs is necessary for naval combatants lacking LEDETs.

Air interdiction is initiated by ground/airborne radar surveillance. Once a target is detected, the difficult task of sorting a potential trafficker from legitimate air traffic is very difficult. Additionally, it is impossible to stop and search an aircraft in flight, and we do not shoot down suspect aircraft in the transit zone. Therefore, using timely intelligence, JIATF-E watch officers have learned to search for clues that an aircraft might be transiting to avoid detection; however, this often requires an up-close look. DOD, USCG and USCS assets are used to covertly intercept suspect aircraft throughout the transit zone, identify the aircraft whenever possible and determine whether tracking should continue or not. As a suspect aircraft approaches the continental United States, Puerto Rico or the U.S. Virgin Islands, air interdiction primacy becomes a shared responsibility for the USCS and USCG.

JIATF-E coordinates handoff of suspect aircraft with the Domestic Air Interdiction Coordination Center (DIACC), relieving JIATF-E of domestic law enforcement concerns and Posse Comitatus jeopardy. It then becomes DIACC's responsibility to complete end game interdiction using DLEA resources. If the suspect aircraft diverts to a foreign country, DIACC or JIATF-E will hand off suspect aircraft information to that nation's designated DLEA. The United States operates an Information Analysis Center (IAC) in Mexico City for

coordinating handoff with Mexican authorities. In The Commonwealth of the Bahamas, DEA operates Operation Bahamas, Turks and Caicos (OPBAT) to provide air interdiction capability at three sites under a HN agreement with the United States. These sites provide USCG or U.S. Army HH-60 helicopters for CD air interdiction throughout The Bahamas.

An Argument for Fewer Posse Comitatus Restraints

Posse Comitatus restraints have never been specifically applicable to the U.S. Navy and Marine Corps. Nevertheless the Department of Navy has adopted the principles of Posse Comitatus within the Department of Navy. Additionally, federal courts have ruled that Posse Comitatus restraints do not apply to U.S. Armed Forces outside of United States territory. Its original intent was to preclude DOD forces from intervention in domestic/civilian law enforcement matters. Yet, all of the DOD services have applied Posse Comitatus restraints with worldwide reach. Posse Comitatus has never been applied to the U.S. Coast Guard even during times of war when the USCG operated under the Department of Navy.

10 USC 375 became law in 1988, 110 years after the original Posse Comitatus law was signed, and delineates between direct and indirect participation of DOD forces in law enforcement matters. 10 USC 375 prohibits DOD involvement in direct law enforcement (search, seizure and arrest) activities, unless otherwise authorized by law. That means Congress may change the law to suit changing requirements at a future time. Nevertheless, 10 USC 375 is applicable law and DOD forces must avoid direct law enforcement activities.

Since Posse Comitatus does not apply outside of U.S. territory, and since Congress intended to keep the military out of domestic/civilian law enforcement matters, it appears that boarding of foreign vessels on the high seas, outside of U.S. Territorial Seas and U.S. Customs Waters does not conflict with long-standing Posse Comitatus intent. This may be an area to consider for opening up a role for select Department of Navy personnel as high seas

boarding officers. Navy warships already enjoy the Right of Approach and Visit under international law in order to approach a vessel to determine its nationality, although it is very rarely used. As long as that vessel is not a warship of another nation, it may be stopped, boarded, and its documents examined if there is "reasonable suspicion" that the vessel is engaged in piracy, slave trading, making unauthorized broadcasts, transiting as a stateless vessel, or refusing to show its flag. [21]

Many drug trafficking vessels operate as stateless vessels or they refuse to show their flag, especially in the Caribbean Sea transit zone. Traffickers will maintain a steady course or attempt to escape into another nation's territorial sea while operational commanders wait for authorization to search, on behalf of a HN, is obtained using the PD-27 process through the Department of State. The smuggler's hope is that the PD-27 process will take long enough to permit them to evade boarding. These two situations (a stateless vessel or a vessel refusing to show its flag), already covered under international law for warships, provide reasonable search criteria for naval combatant personnel to board suspect vessels.

I believe there is room for this small, incremental change to 10 USC 375 by Congress without alarming the American public, since the focus will be upon foreign vessels on the high seas, especially stateless vessels trafficking in drugs. SECDEF can then implement a revised, low-risk relaxation of Posse Comitatus restraints for naval combatants. This would be followed by Department of Navy revision of service policy for combatants toward Posse Comitatus restraints on the high seas, making a large difference in transit and arrival zone CD OPS for the operational commanders. In SOUTHCOM's AOR, if all seven naval combatants on patrol could detect, monitor, approach and then board foreign vessels on the high seas, their CD mission effectiveness would significantly increase. USCG LEDETs could still be

embarked aboard combatants to continue boarding U.S. vessels/citizens in the transit and arrival zones following current guidelines.

Counter-Arguments to DOD's Participation in CD OPS

Most arguments against DOD's ongoing role in CD OPS focus upon busy people with limited resources conducting operations that do not directly relate to their training/expertise. Some arguments against DOD retaining a role in CD OPS focus on the vast number of federal, state, and local law enforcement agencies already conducting CD OPS and a feeling that the American public does not want their military involved in civil matters. Some approach the argument from the position that demand reduction is where the United States should be spending its money. A brief summary of these arguments and my response to each follows.

Spend federal funds on demand reduction programs – CD OPS are very resource-intensive, and deployment of combatants and state-of-the-art surveillance aircraft for CD transit zone patrol duty is misdirecting the best use of these expensive, limited DOD assets. Spend more federal money on demand reduction programs within the United States. || In response to this argument, the trend during the decade of the 1990s has been in the direction of dedicating an increasing share of the federal budget toward demand reduction programs. The overall ONDCP budget for drug control initiatives steadily climbed during the past five years; $13.4 billion in FY 1996, $16.1 billion in FY 1998, and $17.8 billion has been requested for FY 2000. The prevention, treatment and domestic law enforcement pillars of the NDCS have also steadily risen during the same period, now comprising 85 percent of the total federal allocation distributed by ONDCP. That's a significant commitment to demand reduction.

DOD resources are strained -- The second argument takes the position that DOD resources were initially committed to the CD OPS mission during the late 1980s when they enjoyed an abundance of resources and personnel as the Cold War waned. Now that DOD has downsized, they can no longer afford to dedicate resources and personnel to CD OPS without negatively impacting their readiness. There simply aren't adequate surface combatants and patrol aircraft to conduct dedicated CD OPS for operational commanders tasked with CD OPS D&M missions. || I somewhat agree with the comments on negative impacts from downsizing. Nevertheless, we cannot simply halt support for CD OPS because it is difficult to schedule D&M missions. Operational commanders must manage their limited resources "across the board" in all mission areas. Striving for best use of limited resources is truly one of the operational commander's biggest challenges, and finding the most effective methods for use of resources will remain a long-term challenge. In his remarks during a recent visit to the Naval War College, General Wilhelm, USCINCSOUTH, stated that he could put 20 combatants to good use in the SOUTHCOM AOR conducting CD OPS D&M patrols. Yet, he only has an average of seven ships under his OPCON at any given time for this mission. The challenge is to make best use of these seven ships to provide an effective CD OPS D&M mission presence, conduct boardings when Coast Guard LEDET personnel are embarked, and interrupt drug trafficking within the AOR.

Don't mix warrior skills with civil law enforcement -- Another argument goes to the heart of the Posse Comitatus Act. A large number of DOD personnel have been trained as warriors and have learned to fight wars against an enemy using rules of engagement. We don't need these skills diluted by "softer" use of force constraints or having to select friends and foes among a civilian population while conducting CD OPS D&M missions. The unfortunate Hernandez shooting along the southwest border is an example of this in a worst-

case scenario. DOD forces are trained to respond using brute force and innocent civilians may be harmed if warriors are permitted to operate in the vicinity of civilian populations. ||

I believe that DOD involvement with MOOTW will be ever present during the next decade and beyond. DOD personnel must become increasingly capable of working in an environment where there is no clear distinction between friend and foe. Therefore, gaining experience in the CD OPS D&M mission and learning to work through situations requiring use of force considerations, self defense restraints and SROE will better prepare DOD personnel for future peace keeping and peace enforcement missions.

Commercial carriers now ship the vast majority of illegal drugs – The Drug Enforcement Agency (DEA) estimates a significant majority of illegal drugs brought into the United States are delivered via commercial air, sea and land transportation and mixed with legal cargoes. For example, airfreight shipments of cut flowers from Colombia to the United States may include several kilos of cocaine. Containerized cargo, shipped via legitimate international shipping firms, arriving in U.S. ports is rarely inspected. U.S. Customs inspectors have found cocaine secretly stowed among bulk coffee shipments from Colombia, among fruits and vegetables from South America, and cleverly disguised among metal and woodcarvings from South America. "In addition to concealing the shipments within maritime cargo, traffickers frequently attempted to circumvent inspection by altering shipping documents at intermediate transshipment points, and by counterfeit customs seals." [22] Our borders are so "open" that we cannot expect to halt the drugs entering under the cover of legitimate cargo or via illegal border crossings. We're in the realm of diminishing returns. ||

I agree that the interdiction challenge is immense! Nevertheless, our federal, state and local CD agencies, partnering with Western Hemisphere nations' law enforcement and military personnel, must work together to share drug trafficking intelligence and smuggling methods,

focusing combined CD OPS efforts upon increasing success in drug seizures at USCS sea, air and land ports of entry.

We already have enough federal, state and local CD agencies – There are more than 30 federal agencies with CD responsibilities. Hundreds of state and local agencies with parallel responsibilities add to the numerous "small kingdoms" in CD OPS, creating inefficiencies. Get them better organized under federal law enforcement leadership, probably the U.S. Attorney General, and efficiency will improve. [23] Once implemented, DOD can withdraw from the CD OPS mission, since federal, state and local CD unity of command will increase the efficiency and effectiveness of the CD OPS mission. || I agree that the CD OPS organization has many participants at every level creating inefficiencies in overall effort; however, the sophisticated D&M and C3I capabilities of DOD assets will always enable it to bring unique capabilities to the table in our overall CD efforts. The resource requirements for high-tech sensors and C3I capabilities to perform DOD's various war-fighting missions are also highly prized attributes in CD OPS.

There is no end state for the "war on drugs" – Our recent experience with MOOTW has shown that it is difficult to extract oneself from a military commitment when the end state has not been clearly defined. This is also true for the "war on drugs." With no strategy for a "ways, means and ends" synthesis, there is no proven blueprint to apply the correct level of military force to a CD challenge that appears to have no conclusion. [24] The NDCS describes the "war on drugs" as a long-term, continuous challenge. "Cancer is a more appropriate metaphor for the nation's drug problem. Dealing with cancer is a long-term proposition...The symptoms of the illness must be managed while the root cause is attacked." [25] There is no end state for DOD's role in CD OPS. || I agree. DOD's role in CD OPS is long-term, yet it must continue. We cannot retreat from the progress made over the past decade of DOD

involvement/successes in CD OPS. Operational commanders have carefully balanced demands for DOD involvement against the availability of resources and people to perform the mission. In 10 USC 376, Congress stipulated that DOD support for CD OPS shall not adversely impact military preparedness. During recent testimony before Congress, no DOD service chief indicated that CD OPS negatively impacted military readiness. To back away from CD OPS now will send a message to drug traffickers that United States resolve in the "war on drugs" has waned, and it will only be a matter of time before drug cartels buy their way into complete control of one or more Western Hemisphere governments. Using DOD forces in cooperation with the coordinated efforts of federal and international agencies in CD OPS is solid proof of United States determination to displace the controlling influences of drug cartels and other insurgent groups using drug trafficking to finance their pursuits.

Conclusions

CD OPS will remain an important mission for DOD in the years ahead because of NSS focus and NDCS dependence upon the superior capabilities of DOD sensors in the transit zone, C3I capabilities, and HN support provided by DOD forces within the Western Hemisphere. Any hint of backing away from these responsibilities will tell drug traffickers that American resolve to reduce illegal drug availability and consumption is waning.

Eliminating Posse Comitatus restraints for high seas boarding of suspected drug trafficking vessels in the transit zone by U.S. Navy combatants will have negligible impact upon the desire of the American people to prevent DOD forces from intervention in domestic matters. Posse Comitatus restraints are not intended for application away from U.S. territory, so Congress has an opportunity to make a very minor, incremental adjustment to the law, followed by changes in service policy, which will provide significant benefits to CD OPS commanders struggling to manage limited resources against a persistent foe.

Endnotes

[1] Laurence Urdang, Editor, The Random House Dictionary of the English Language (New York: Random House, 1968), 1035.

[2] Title 18 U.S. Code, section 1385 – Posse Comitatus Act (18 U.S.C. 1385).

[3] Scott Taylor, Analysis of the Military Role in America's Domestic Counterdrug Effort (Carlisle Barracks, PA: U.S. Army War College, 1998), 1.

[4] The White House, A National Security Strategy for a new Century – October 1998 (Washington, DC), 18.

[5] Ibid., 18.

[6] Alison Jamieson, "Global Drug Trafficking," in Terrorism and Drug Trafficking in the 1990s ed. Alison Jamieson (Dartmouth: Dartmouth Publishing Company, Ltd., 1994), 72.

[7] Joint Chiefs of Staff, National Military Strategy of the United States of America (Washington, DC: 1997), 9.

[8] Office of National Drug Control Policy, National Drug Control Strategy (Washington, DC: 1999), 3.

[9] Ibid., 41.

[10] Barry R. McCaffrey, "Illegal Drugs A Common Threat to the Global Community" for United Nations Chronicle June 9, 1998. http://www.whitehousedrupolicy.gov/news/commentary/unchron.html (25 April 1999), 5.

[11] Ibid., 3.

[12] Frank Loy and Barry McCaffrey, "On-the-Record Briefing on the Release of the Annual International Narcotics Control Strategy Report (INCSR)" February 26, 1999. http://www.state.gov/www/policy_remarks/1999/ (25 April 1999), 8.

[13] Barry R. McCaffrey, 5.

[14] Office of National Drug Control Policy, National Drug Control Strategy (Washington, DC: 1999), 4.

[15] Frank Loy and Barry McCaffrey, 4

[16] Ibid., 1.

[17] Summary of conversation with CDR Robert M Wilkins, USCG, legal advisor for JIATF-E on 26 April 1999.

[18] Joint Chiefs of Staff, Joint Counterdrug Operations (Joint Pub 3-07.4) (Washington, DC: 17 February 1998), VI-3.

[19] Department of State, International Narcotics Control Strategy Report, 1998, February 1999. http://www.state.gov/www/global/narcotics_law/1998_narc_report/ (25 April 1999), 8.

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[22] Drug Enforcement Agency, "The Supply of Illicit Drugs to the United States – 96" The NNICC Report 1996. http://www.usdoj/dea/pubs/intel/nnicc97.htm (25 April 1999), 11.

[23] Larry M. Keeton, Collegial Czar or Combatant Commander – Who Should Lead America's War on Drugs? (Carlisle Barracks, PA: U.S. Army War College, 1998), 15-17.

[24] John A. Tappan, Military Involvement in the War on Drugs, "Just Say No" (Carlisle Barracks, PA: U.S. Army War College, 1998), 19-20.

[25] Office of National Drug Control Policy, 7.

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Appendix A

An Historical View of Posse Comitatus Legislation

The U.S. Constitution includes language to prevent the military from serving in a domestic law enforcement role, except when directed in extreme cases to suppress rebellion. The American people have enjoyed over two hundred years of good civil-military relations, and they prefer to keep it that way. Posse Comitatus has helped to maintain that legal separation between civilian control and military influence. It has been the "law of the land" for War Department and Department of Defense forces since the Reconstruction Era following the U.S. Civil War. The Posse Comitatus Act (18 USC 1385) was intended to prevent active duty U.S. Army personnel from aiding federal law enforcement personnel in civil matters. The overall feeling of the American people in the post-Civil War era was that the U.S. Army had done enough damage during post-war militarization of the South, and it was time for some restraints or limitations upon their influence in civil matters. The Posse Comitatus law was extended to include the U.S. Air Force when it received its own service identity separate from the U.S. Army in 1949. The Secretary of Navy has extended the principles of Posse Comitatus restraint to the U.S. Navy and U.S. Marines as a matter of service policy. It is significant to note that the Posse Comitatus Act has never applied to U.S. Coast Guard law enforcement activities during its tenure in the Department of Treasury prior to 1967 or Department of Transportation since 1967.

Posse Comitatus received very little attention until the late 1960s when college campus riots were center-stage in the national media and the Executive Branch considered using active duty military personnel to restore order. Thankfully that did not occur. Instead, National Guard troops were used to quell campus disorder at the direction of the states' governors using their Title 32 U.S. Code authority.

Posse Comitatus was carefully scrutinized in 1973 following the Oglala-Lakota Sioux Indian revolt on Pine Ridge Indian Reservation in South Dakota. This confrontation was near the site of the historic Battle of Wounded Knee. Here, military forces and equipment (armored personnel carriers) were used to provide indirect support for federal law enforcement efforts to restore order on the reservation. "The primary issue was the legal interpretation of indirect versus direct participation of military forces in civil law enforcement." [1] A Department of Justice review of the use of military personnel and equipment in a supporting role on Pine Ridge Indian Reservation determined that DOD personnel did not violate Posse Comitatus restraints in this situation.

New Legislation brings DOD into Counterdrug Operations

During the 1980s, national dialogue and strategy focused upon drug abuse and trafficking problems within the United States. As a result, Congress demanded national action. What followed was a series of amendments to traditional Posse Comitatus restraints, relaxing some of the hundred year-old restrictions and placing DOD in a proactive CD OPS posture. During the 1980s and 1990s, DOD operational commanders became increasingly involved with support for drug law enforcement agencies (DLEAs) and several primary roles in CD OPS were added to DOD responsibilities. The following legislation summaries show how many CD OPS responsibilities were created for DOD operational commanders during the past 20 years.

Military Cooperation with Civilian Law Enforcement Officials Act of 1981 – This act permitted active and reserve forces within DOD to collaborate with DLEAs over CD OPS matters.

National Security Decision Directive 221 (NSDD-221) – President Reagan signed this NSDD in 1986 in order to focus national strategy on the international drug trafficking

problem facing the United States and its neighbors. NSDD-221 described drug trafficking as a tool for terrorists to fund their illegal and insurgent activities and called for a multinational effort to halt the illegal flow of drugs into the region. [2]

Anti-Drug Abuse Act – The first ADAA was signed into law in 1986, increasing the Executive Branch's authority to continue drug war efforts, especially in the CD OPS mission.

National Drug Policy Board (NDPB) – Executive Order 12590 established the NDPB in 1987 under the guidance and leadership of the U.S. Attorney General, and it took on the responsibilities for coordinating national CD efforts. [3] This was the precursor to Office of National Drug Control Policy.

The second **Anti-Drug Abuse Act** was signed into law during 1988. This version of the ADAA instituted the Office of National Drug Control Policy (ONDCP) under its own director and supplanted the NDPB. Requirements for the ONDCP included: (1) publishing a National Drug Control Strategy, with the first one promulgated during 1989; (2) building a comprehensive program for multinational CD operations; and (3) coordinating the actions of over 30 federal agencies, including DOD, with federal responsibilities in CD OPS, drug enforcement, and/or drug education. [4]

National Defense Authorization Act (NDAA) of FY 89 – This fiscal legislation gave DOD a lead agency role in CD OPS detection and monitoring (D&M) surveillance. Congress tasked DOD to integrate command, control, communications, & intelligence (C3I) capabilities into an effective C3I construct and provided funding for this mission. NDAA FY 89 was a turning point for DOD, moving it ever closer to the front lines of the CD mission.

National Defense Authorization Act of FY 91 – This fiscal legislation extended DOD's significant responsibilities in CD OPS through FY 99. The elements of NDAA FY 89 and NDAA FY 91 Public Law were codified in Title 10 U.S. Code sections 371-379

(10 USC 371-379), detailing military support for civilian law enforcement agencies. [5] Each section is summarized below.

(1) Section 371 – As directed by the Secretary of Defense, U.S. Armed Forces may provide civilian law enforcement officials with information/intelligence they have gathered during normal operations or training exercises that may be relevant to CD OPS or other civilian law enforcement matters. [6]

(2) Section 372 – As directed by the Secretary of Defense, U.S. Armed Forces may provide expertise, research facilities, equipment, and/or base facilities for law enforcement purposes and emergencies involving chemical or biological agents. [7]

(3) Section 373 – As directed by the Secretary of Defense, U.S. Armed Forces may provide expert advice and/or training for federal, state and local law enforcement officials for situations related to law enforcement matters, or chemical and biological agents.

(4) Section 374 – As directed by the Secretary of Defense, U.S. Armed Forces may:

(a) Provide personnel to operate equipment made available to federal, state, and local law enforcement officials for situations involving chemical and biological agents,

(b) Provide detection, monitoring, and communications information pertaining to movement of air and sea traffic outside the United States to federal law enforcement officials,

(c) Provide aerial reconnaissance services,

(d) Intercept vessels and aircraft outside the land area of the United States in order to communicate with and/or divert those resources to designated locations when directed by DLEAs, and

(e) Provide transportation for federal law enforcement officers, supporting them outside of the United States with bases of operation, subject to approval of the SECDEF and U.S. Attorney General.

(f) The management caveat remaining for SECDEF is that DOD personnel and equipment may be made available to DLEAs for the purposes above, provided their "support does not involve direct participation in civilian law enforcement operations unless such direct participation is otherwise authorized by law." [8]

(5) Section 375 – The Secretary of Defense shall prescribe regulations that prohibit members of the Army, Navy, Air Force and Marines from direct participation in search, seizure, arrest or similar activities, unless otherwise authorized by law. Here, Congress provided an "escape clause" for future legislative changes. [9]

(6) Section 376 – Support may not be provided to civilian law enforcement officials if it will adversely affect the military preparedness or readiness of the unit. [10]

(7) Section 377 – Support provided by DOD personnel and resources will be reimbursable, unless that support is beneficial to DOD for training or other purpose, or that support is provided in the normal course of military training or operations. [11]

10 USCS 379 (1998) – SECDEF and SECTRANS shall ensure that Coast Guard law enforcement detachments (LEDETs) are aboard every surface combatant at sea in drug interdiction areas beyond U.S. territorial seas. The Coast Guard LEDET boarding officers will provide search, seizure and arrest authority in accordance with 14 USC 89. The Coast Guard will provide no fewer than 500 active duty personnel per year to deploy according to this section of law. [12]

Endnotes

[1] Andrew J. Stanley, Military Counterdrug Patrols Along the Southwest Border: A Bridge too Far, (Carlisle Barracks, PA: Army War College), 24.

[2] John A. Tappan, Military Involvement in the War on Drugs, "Just Say No", (Carlisle Barracks, PA: Army War College), 6.

[3] Adele E. Hodges, The Role of the United States Military in Counterdrug Operations in the Year 2000, (Ft. Leavenworth, KS: Army Command and General Staff College), 22.

[4] Ibid., 23.

[5] General Military Law, United States Code, Title 10 – Armed Forces, secs 371-378 (1998).

[6] Ibid., sec 371.

[7] Ibid., sec 372.

[8] Ibid., sec 374.

[9] Ibid., sec 375.

[10] Ibid., sec 376.

[11] Ibid., sec 377.

[12] General Military Law, United States Code Supplemental, Title 10 – Armed Forces, sec 379 (1998).

Strategic Goals and Objectives of the

Goal 1: Educate and enable America's youth to reject illegal drugs as well as alcohol and tobacco.

Objective 1: Educate parents and other care givers, teachers, coaches, clergy, health professionals, and business and community leaders to help youth reject illegal drugs and underage alcohol and tobacco use.

Objective 2: Pursue a vigorous advertising and public communications program dealing with the dangers of illegal drugs, alcohol, and tobacco use by youth.

Objective 3: Promote zero tolerance policies for youth regarding the use of illegal drugs, alcohol, and tobacco within the family, school, workplace, and community.

Objective 4: Provide students in grades K- 12 with alcohol, tobacco, and drug prevention programs and policies that are research based.

Objective 5: Support parents and adult mentors in encouraging youth to engage in positive, healthy lifestyles and modeling behavior to be emulated by young people.

Objective 6: Encourage and assist the development of community coalitions and programs in preventing drug abuse and underage alcohol and tobacco use.

Objective 7: Create partnerships with the media, entertainment industry, and professional sports organizations to avoid the glamorization, condoning, or normalization of illegal drugs and the use of alcohol and tobacco by youth.

Objective 8: Develop and implement a set of research-based principles upon which prevention programming can be based.

Objective 9: Support and highlight research, including the development of scientific information, to inform drug, alcohol, and tobacco prevention programs targeting young Americans.

Goal 2: Increase the safety of America's citizens by substantially reducing drug-related crime and violence.

Objective 1: Strengthen law enforcement — including federal, state, and local drug task forces — to combat drug-related violence, disrupt criminal organizations, and arrest and prosecute the leaders of illegal drug syndicates

Objective 2: Improve the ability of High Intensity Drug Trafficking Areas (HIDTAs) to counter drug trafficking.

Objective 3: Help law enforcement to disrupt money laundering and seize and forfeit criminal assets.

Objective 4: Break the cycle of drug abuse and crime.

Objective 5: Support and highlight research, including the development of scientific information and data, to inform law enforcement, prosecution, incarceration, and treatment of offenders involved with illegal drugs.

Endnote

[1] Office of National Drug Control Policy, National Drug Control Strategy (Washington, DC: 1999), chap III.

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Goal 3: Reduce health and social costs to the public of illegal drug use.

Objective 1: Support and promote effective, efficient, and accessible drug treatment, ensuring the development of a system that is responsive to emerging trends in drug abuse.

Objective 2: Reduce drug-related health problems, with an emphasis on infectious diseases.

Objective 3: Promote national adoption of drug-free workplace programs that emphasize a comprehensive program that includes: drug testing, education, prevention, and intervention.

Objective 4: Support and promote the education, training, and credentialing of professionals who work with substance abusers.

Objective 5: Support research into the development of medications and related protocols to prevent or reduce drug dependence and abuse.

Objective 6: Support and highlight research and technology, including the acquisition and analysis of scientific data, to reduce the health and social costs of illegal drug use.

Objective 7: Support and disseminate scientific research and data on the consequences of legalizing drugs.

Goal 4: Shield America's air, land, and sea frontiers from the drug threat.

Objective 1: Conduct flexible operations to detect, disrupt, deter, and seize illegal drugs in transit to the United States and at U.S. borders.

Objective 2: Improve the coordination and effectiveness of U.S. drug law enforcement programs with particular emphasis on the Southwest Border, Puerto Rico, and the U.S. Virgin Islands.

Objective 3: Improve bilateral and regional cooperation with Mexico as well as other cocaine and heroin transit zone countries in order to reduce the flow of illegal drugs into the United States.

Objective 4: Support and highlight research and technology — including the development of scientific information and data — to detect, disrupt, deter, and seize illegal drugs in transit to the United States and at U.S. borders.

Goal 5: Break foreign and domestic drug sources of supply.

Objective 1: Produce a net reduction in the worldwide cultivation of coca, opium, and marijuana and in the production of other illegal drugs, especially methamphetamine.

Objective 2: Disrupt and dismantle major international drug trafficking organizations and arrest, prosecute, and incarcerate their leaders.

Objective 3: Support and complement source country drug control efforts and strengthen source country political will and drug control capabilities.

Objective 4: Develop and support bilateral, regional, and multilateral initiatives and mobilize international organizational efforts against all aspects of illegal drug production, trafficking, and abuse.

Objective 5: Promote international policies and laws that deter money laundering and facilitate anti-money laundering investigations as well as seizure and forfeiture of associated assets.

Objective 6: Support and highlight research and technology, including the development of scientific data, to reduce the worldwide supply of illegal drugs.

Appendix C [1]

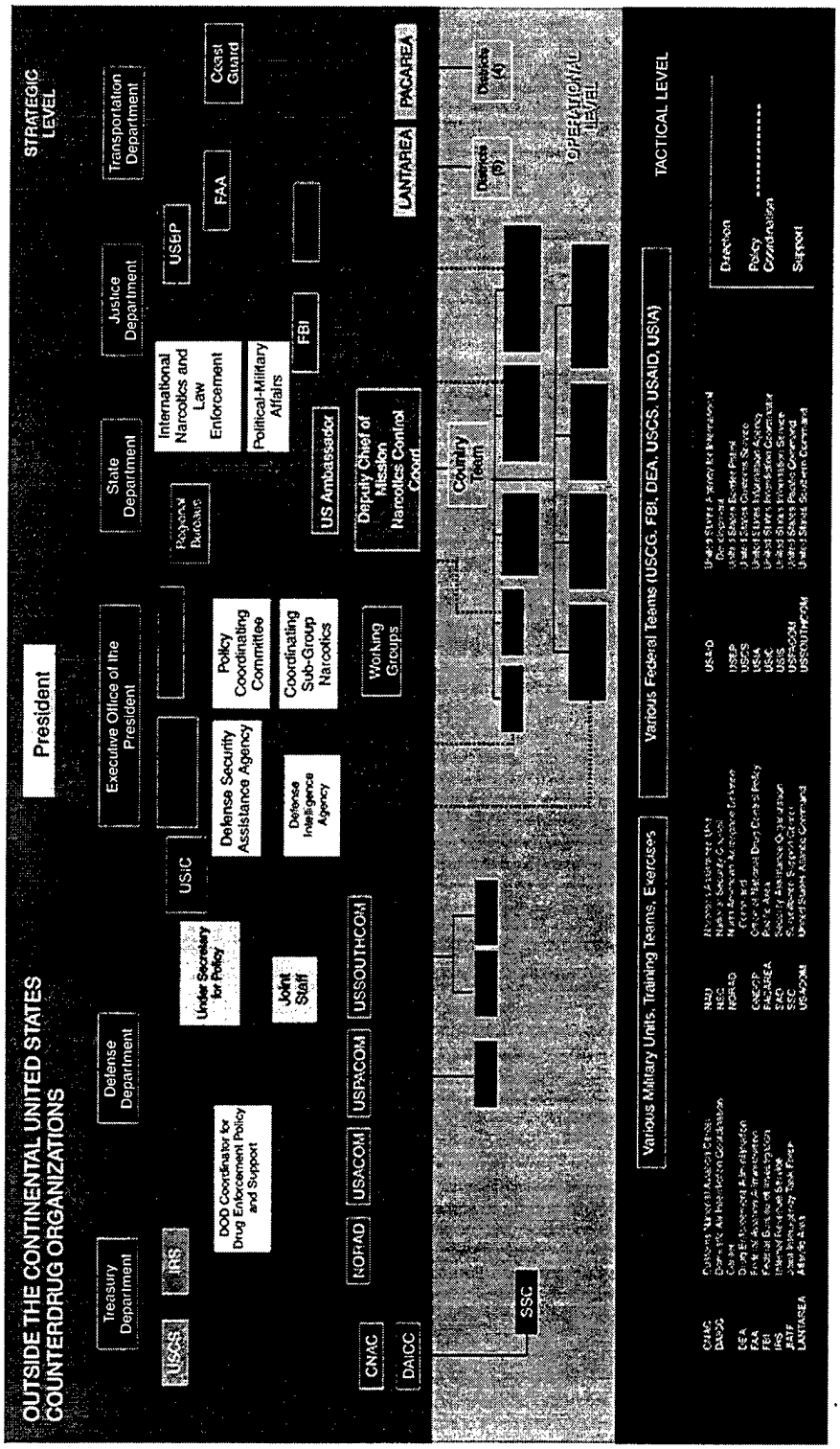

Figure III-24. Outside the Continental United States Counterdrug Organizations

Endnote

[1] Joint Chiefs of Staff, Joint Counterdrug Operations (Joint Pub 3-07.4) (Washington, DC: February 17, 1998), III-42.