

# CRS Report for Congress

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## U.S. Military Participation in Southwest Border Drug Control: Questions and Answers

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### Summary

Among its counternarcotics activities in the United States, the U.S. military provides substantial assistance to federal, state, and local law enforcement agencies (LEAs) upon their request to control drug trafficking through the four southwest states that border Mexico. About two decades ago, Congress began to authorize expanded U.S. military support to other U.S. agencies in enforcing U.S. laws, particularly counterdrug laws. Over the last several years, however, Department of Defense (DOD) funding for counterdrug activities along the Southwest border has dropped from a high of \$186.7 million in FY1992 to \$105.6 million in FY1998. This military border presence is controversial. Some argue that the "militarization" of the border alienates and endangers residents, and contravenes the historical separation of military and law enforcement functions. Others judge it a necessary defense against the pervasive, powerful influence of drug traffickers, and argue that military assistance at the border should be expanded. The House version of the FY1999 DOD Authorization Bill (H.R. 3616, now in conference) would provide specific authority to permit troops to assist LEAs with immigration and customs functions, as well as drug control.

This report will be updated as needed. Also see CRS Report 97-989, *U.S. Border Patrol Operations*, by (name redacted), and CRS Report 97-974, *Reorganization Proposals for U.S. Border Management Agencies*, by (name redacted).

### Q. What Functions Does the U.S. Military Serve Along the Southwest Border?

A. As part of its national counterdrug effort, the U.S. military provides a wide range of services to law enforcement agencies (LEAs) which request its assistance in controlling the flow of illegal drugs over the Southwest border. The military provides federal LEAs, as well as state and local police forces in the four Southwest border states -- Arizona, California, New Mexico, and Texas--with services and training not otherwise available to them, or not available in a timely manner. The federal LEAs include the Treasury Department's U.S. Customs Service, and two agencies of the Department of Justice (DOJ):

the Drug Enforcement Agency (DEA), and the Border Patrol of the Immigration and Naturalization Service (INS). Although illegal narcotics control is just one function of every agency except the DEA, military assistance is provided only in support of drug control, and not for other purposes such as immigration control.

Among its services, the military conducts aerial reconnaissance to alert LEAs to illegal border crossings by suspected drug traffickers. It provides air and ground transportation for law enforcement personnel and equipment, and communications, intelligence, photography, video, and technology support. Military engineers provide engineering and construction services, including improving or constructing trails, roads, and obstacles.

Department of Defense (DOD) mobile training teams, either military or civilian, provide training on a variety of subjects to LEAs. This includes training in communication/radio procedures, interviewing and interrogation techniques, combat lifesaver training, intelligence analysis, marksmanship, canine training and first aid, counterdrug field tactics for police and counterdrug special reaction team training, drug awareness, foreign languages, and first aid.

A number of activities that involved an on-the-ground presence of armed troops have been suspended since a Marine on patrol fatally shot 18-year-old Esequiel Hernandez near Redford, Texas, in May 1997. These include the manning of listening and observation posts (LP/OPs), the placement and monitoring of unmanned ground sensors, and the conduct of ground reconnaissance operations.

#### **Q. Who Performs these Tasks?**

**A.** Military personnel for counterdrug operations are drawn from the active and reserve forces of the Army, Air Force, and Marines, and from the National Guard. Regular, reserve and national guard forces perform counterdrug missions as part of their training routines. Unit commanders volunteer their troops in order to provide training experience relevant to their assigned roles in a wartime situation. Guardsmen also perform these tasks as paid part and full-time volunteers working under their Governors' State Plan for the National Guard.

#### **Q. How Is Military Assistance Provided?**

**A.** Since 1989, Joint Task Force Six (JTF-6) has coordinated the military response to LEA assistance requests. JTF-6 is a 158-member unit headquartered at Fort Bliss, El Paso, Texas, operating under the command of an Army brigadier general. The JTF-6 staff works closely with Operation Alliance (OPALL), the coordinating body for LEAs involved in counterdrug control. OPALL reviews the requests for military counterdrug assistance submitted to it by individual federal, state and local agencies and forwards to JTF-6 those requests it approves. JTF-6 staff review the requests to verify that they are appropriate, and then locate volunteer units to provide the assistance. JTF-6 also directs the activities of those units during their performance of the counterdrug support mission. (In military terminology, it assumes tactical control of the unit.)

Aerial reconnaissance conducted through aerostat balloons is handled separately. The Air Force manages the aerostats under a contract with the U.S. Customs Service.

## **Q. What Restrictions Apply to Military Assistance to LEAs?**

**A.** U.S. military troops, operating under the Title 10 statutes governing the actions of the U.S. military, are not allowed to undertake tasks which would involve them directly in the arrest, search and seizure of persons or property. These are considered police powers, and beyond the scope of the military.

Statutory provisions have restricted the military from performing such functions since the adoption of the Posse Comitatus Act of 1878 (18 U.S.C. 1385). This Act stated that the army could not be used "to execute the laws" except as authorized by the Constitution or Congress. It has long been the legislative expression of a national aversion to using the military to enforce laws at home. (The Navy, Marines and National Guard were not covered by the Posse Comitatus Act, but they are restricted by other laws and policy which incorporate that doctrine. Because it was originally part of the Army, the Air Force is covered by the Act.) Although Congress has gradually modified the *posse comitatus* restrictions to specifically authorize indirect assistance to LEAs, it has retained the restrictions cited above that involve direct participation in law enforcement.<sup>1</sup>

*Posse comitatus* restrictions apply to those National Guardsmen participating in counterdrug activities as part of their annual training exercises, when they are considered federal troops operating under Title 10. They do not apply to National Guardsmen when they are operating in their capacity as the militia of the state under the statutes of Title 32 (32 U.S.C. 112). Thus, Guardsmen who are serving under their Governor's State Plan for the National Guard can participate in arrests, searches, and seizures.

## **Q. Under What Authorities Do Troops Perform These Functions?**

**A.** Since the early 1980s, Congress has periodically authorized an expanded role for the military in providing support to domestic drug enforcement efforts. Basic authority for most DOD assistance is contained in Chapter 18 of Title 10 of the United States Code (U.S.C.) Congress added Chapter 18, Military Support for Civilian Law Enforcement Agencies, in 1981 and subsequently modified it through amendments.

Under Chapter 18, Congress authorizes DOD to make available to LEAs equipment and base and research facilities. (Section 372) Chapter 18 authorizes DOD to provide LEAs with personnel to maintain equipment, and to train and advise law enforcement officials regarding equipment operation and maintenance. (Sections 373-374) Section 374 authorizes DOD personnel to assist in the enforcement of specified customs, immigration, and drug control laws by operating equipment for federal LEAs, in order (1) to detect, monitor and communicate the movement of air and sea traffic, and of surface traffic outside the United States or within 25 miles of U.S. borders if first detected outside the border, (2) to conduct aerial reconnaissance, (3) to intercept vessels or aircraft detected outside U.S. borders to direct them to a location designated by civilian authorities, (4) to facilitate communications

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<sup>1</sup>Existing case law and commentary indicate that 'execution of the law' in violation of the Posse Comitatus Act occurs (a) when the armed forces perform tasks which [are] assigned not to them but to an organ of civil government, or (b) when the armed forces perform tasks assigned to them solely for purposes of civilian government." CRS Report 95-964, *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, by (name redacted), p. 36.

for law enforcement programs regarding specified drug, immigration and customs laws, and (5) to transport civilian law enforcement personnel and to operate bases for them. Chapter 18 also permits the Secretary of Defense to provide information "collected during the normal course of military operations...relevant to a violation of any Federal or State law within the jurisdiction of such officials." (Section 371)

Congress put two stipulations on Chapter 18 assistance, however. First, LEAs must reimburse DOD for the support it provides except when the support "is provided in the normal course of military training or operations" or if it "results in a benefit...substantially equivalent to that which would otherwise be obtained from military operations or training." (Section 377) And, DOD can provide such assistance only if it does not adversely affect "the military preparedness of the United States." (Section 376) Also, Congress incorporated *posse comitatus* restrictions into Chapter 18. Section 375 prohibits members of the Army, Navy, Air Force or Marine Corps from "direct participation...in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law."<sup>2</sup>

In 1989, Congress expanded the military role in interdiction, intelligence and coordination of counternarcotics efforts. The National Defense Authorization Act for FY1989 (P.L. 100-456) as codified in Title 10 U.S.C. Section 124, conveys to DOD major interdiction and command, control, communications and intelligence (C<sup>3</sup>I) responsibilities. The legislation designates DOD to "serve as the single lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States." It also instructs the President to "direct that command, control, communications, and technical intelligence assets of the United States that are dedicated to the interdiction of illegal drugs be integrated by the Secretary of Defense into an effective communications network."

The National Defense Authorization Act (NDAA) for FY1991 (P.L. 101-510) provided additional authorities for military support to LEAs, **specifically for counterdrug purposes**. Section 1004 authorized DOD to extend support in several key areas to any federal, state, local (or foreign) law enforcement agency requesting counterdrug assistance. This section has been extended regularly and is now in force through the end of FY1999. As amended (in 1992), Section 1004 authorizes the military to:

- **maintain and repair** military equipment made available by DOD, **and upgrade** such equipment to make it compatible with other DOD equipment;
- **transport** federal, state, local and foreign law enforcement personnel and equipment within or outside the United States;
- **establish bases** for operations or training (including minor construction within and outside the United States), **construct roads and fences**, and **install lighting** on U.S. borders;
- **train** federal, state, local and foreign law enforcement personnel in counter-drug activities;
- **establish C<sup>3</sup>** (command, control, communications) **and computer networks** to better integrate law enforcement agencies, active military and National Guard activities;
- **conduct** aerial and ground **reconnaissance**;

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<sup>2</sup>Section 375 originally also prohibited military personnel from direct participation in an interdiction of a vessel or aircraft. This prohibition was removed in 1988.

- **detect, monitor and communicate movements** outside and within 25 miles inside U.S. borders of air and sea traffic, and also of surface traffic in cases where initial detection occurred outside the United States; and
- provide **linguists and intelligence analysis** services.

P.L. 101-510, as amended, incorporates Chapter 18 *posse comitatus* restrictions. Unlike Chapter 18, however, this law does allow support which would affect military readiness in the short-term, provided the Secretary Defense believes the support is of long-term importance.

**Q. How Much Funding Has Been Allocated to Southwest Border (SWB) Activities?**

A. Funding for U.S. military activities along the Southwest border since 1991 has ranged, as a proportion of the total DOD counterdrug budget, from 8.5% (in FY1991) to 16.9% (in FY1994), and, in current year dollars, from a low of \$88.2 million (in FY1991) to a high of \$186.7 million (in FY1992). At \$105.6 million for FY1998, planned funding for SWB activities comprises 13.1% of the DOD \$808.6 million drug control budget, the lowest percentage and absolute amount since 1991. Since 1994, the two largest items in the SWB drug control budget have been the funding of personnel at the border, i.e., the amounts to fund the presence of National Guardsmen at the Southwest border through National Guard State counterdrug plans (\$50.4 million in FY1997, and \$40.5 million planned for FY1998) and the operations of DOD personnel coordinated and funded through JTF-6 (\$32.9 million for FY1997 and \$30.7 million planned for FY1998). Funding for aerostats floated along the Southwest border to detect movement of persons and vehicles in the border area was not far behind (\$23.1 million for FY1997 and \$21.8 million planned for FY1998). Significantly less has been spent in recent years on other items, i.e., signal intelligence, information, and inspection systems.<sup>3</sup>

**Q. What Issues Are Raised by the U.S. Military Southwest Border Presence and What Action Has Congress Taken on These Issues?**

A. Debate about the role of the military along the Southwest border intensified with the May 20, 1997 death of 18-year old Esequiel Hernandez, shot by a Marine who was part of a four-man team observing an area near Redford, Texas. Although the Marines were absolved of any wrongdoing in criminal investigations concluded in February 1998,<sup>4</sup> this tragedy raised Congressional concerns about the use of the military for law enforcement assistance. For some Members, the killing dramatically illustrates the dangers of "militarizing" the border, and supports the argument that the U.S. military is not the appropriate organization to conduct border affairs. Other Members say that the state of lawlessness

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<sup>3</sup>The source for this paragraph is an Executive Office of the President briefing book: "An Overview of Federal Drug Control Program on the Southwest Border," August 1997. The briefing book cites the Department of Defense as the source of its data.

<sup>4</sup>Reportedly, in a 1998 agreement, the United States agreed to compensate Hernandez's family. Associated Press dispatch. U.S. To Pay \$1.9 Million to Family of Teen Slain by Marine. *The Washington Post*. August 12, 1998. p A16.

and danger along the border<sup>5</sup> demand a greater military presence to secure the border, deterring traffickers by a show of force that LEAs can't provide, and to otherwise supplement efforts of the Border Patrol and other U.S. agencies. Some believe, however, that the military could be better prepared to assist with border control functions.

A proponent of continued U.S. military involvement along the border, Representative James A. Traficant, Jr. offered an amendment to H.R. 3616, the House version of the National Defense Authorization Act (NDAA) for FY1999, approved 288-132, which would amend Chapter 18, Title 10 to provide specific authority to permit troops to assist with immigration, customs, and drug control functions. Engrossed as Section 1024 of H.R. 3616, the amendment allows the Secretary of Defense to assign, upon request, military personnel to assist the INS in preventing the entry of terrorists, drug traffickers, and illegal aliens, and the Customs Service in inspecting cargo, vehicles, and aircraft. It prohibits troops from conducting "a search, seizure, or other similar law enforcement activity" and from making an arrest. (However, according to Representative Traficant's floor remarks on the amendment, the troops would be allowed to "tackle" and "detain" drug traffickers. Congressional Record, May 21, 1998, p.H3700) Civilian law enforcement officers would accompany the troops, who would be required to complete training "regarding issues affecting law enforcement in the border areas..[where they] will perform duties."<sup>6</sup> Representative Silvester Reyes, who opposes the presence of U.S. troops patrolling the border, offered a substitute amendment. Defeated 179-243, the amendment would have permitted troops only to "conduct reconnaissance missions to assist" the INS and Customs.

DOD objects to Section 1024 on the grounds that it would unnecessarily expand Chapter 18 authorities, which it deems appropriate, and would detract from military readiness. DOD also fears that, despite the legislation's prohibitions on direct military participation in searches, seizures, arrests, and similar activities, Section 1024 would place U.S. troops in situations where they would be drawn into direct participation in civilian law enforcement activities.

In an effort intended to improve the military's ability to provide assistance, Representative Lamar Smith, Chairman of the Subcommittee on Immigration and Claims of the House Judiciary Committee initiated an investigation into the Hernandez case in order to clarify the circumstances surrounding Hernandez' death. Because investigators were unable to obtain information on the case, even after criminal investigations were concluded, in May 1998 the Judiciary Committee subpoenaed documents from DOD and the Department of Justice (DOJ). Investigators are concerned with several issues: whether the Marines received adequate training, in particular instruction in local conditions, to carry out their mission; whether the military and Border Patrol emergency response was adequate; whether the DOJ and DOD cooperated fully with subsequent criminal investigations; and whether DOJ personnel have been held accountable for their actions.

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<sup>5</sup> See: Counternarcotics Efforts in Mexico and Along the Southwest Border, Hearing Before the House Subcommittee on National Security, International Affairs, and Criminal Justice of the Committee on Government Reform and Oversight, February 25, 1997; and Losing Ground Against Drugs: The Erosion of America's Borders, Hearing before the Senate Committee on the Judiciary, July 31, 1996, S. Hrg. 104-877.

<sup>6</sup>The House approved similar Traficant language to the FY1998 NDAA; it was deleted in conference.

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